NORTH CAROLINA REPORTS

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SUPREME COURT OF NORTH CAROLINA

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OF
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[1]Deceased 6 August 1972. Succeeded by William Z. Wood, Winston-Salem, 1 December 1972.

[2]Retired and appointed Emergency Judge 1 December 1972. Succeeded by Julius A. Rousseau, Jr., North Wilkesboro, 8 December 1972.

[3]Succeeded by Dennis J. Winner, Asheville, 1 December 1972.

[4]Deceased 5 March 1972.

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WILLIAM LAWRENCE YAEGER	Chapel Hill
CHARLES HOLT YOUNG, JR.	Raleigh

THE FOLLOWING NAMED APPLICANTS WERE ADMITTED BY COMITY WITHOUT WRITTEN EXAMINATION:

RAYMOND WALKER DEW, JR.	Raleigh
JOSEPH RICHARD MOTELEWSKI	Camp Lejeune
WARD WILLIAM WUESTE, JR.	Durham
WILLIAM THEODORE JOBE, JR.	Asheville
GUY FLETCHER DRIVER, JR.	Winston-Salem
HORACE LLOYD WISE	Point Harbor
WILLIAM FAY O'CONNELL	Raleigh
WILLIAM JOHN GUENTHER	Franklin
WILLIAM FRANCIS DOWLING, JR.	Raleigh
HENRY CONRAD LAUERMAN	Winston-Salem
HUGH SCOTT HESTER	Reidsville
RALPH GUBLER JORGENSEN	Tabor City
WILLIAM GORDON HAEMMEL	Waynesville
WILLIAM LAURENS WALKER, III	Chapel Hill
DONALD ARTHUR DONADIO	Winston-Salem

Given over my hand and the Seal of the Board of Law Examiners, this 3rd day of October, 1972.

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 1972

STATE OF NORTH CAROLINA v. JESSE HARVEY, JR.

No. 51

(Filed 12 April 1972)

1. **Indictment and Warrant § 6— arrest warrant — probable cause**

The Fourth Amendment requirement that no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the persons or things to be seized, applies to arrest warrants as well as to search warrants.

2. **Indictment and Warrant § 6— arrest warrant — probable cause**

The judicial officer issuing an arrest warrant must be supplied with sufficient information to support an independent judgment that there is probable cause for issuing the warrant.

3. **Indictment and Warrant § 6— arrest warrant — probable cause**

The same probable cause standards under the Fourth and Fourteenth Amendments apply to both federal and state warrants. G.S. 15-27.

4. **Indictment and Warrant § 6— probable cause — reliable informant**

Information received from a reliable informant is sufficient to support a conclusion that probable cause for arrest exists.

5. **Indictment and Warrant § 6— probable cause — S.B.I. agent's testimony — information from another S.B.I. agent**

S.B.I. agent's affidavit and testimony before a magistrate that another S.B.I. agent had purchased heroin from defendant furnished sufficient evidence to support the magistrate's determination that probable cause existed for defendant's arrest.

6. **Arrest and Bail § 5— erroneous identification of defendant — arrest under warrant**

Although defendant had been erroneously identified as the person who sold heroin to an S.B.I. agent, defendant's arrest under a warrant

charging the sale of heroin to the S.B.I. agent was lawful where the warrant was issued by a magistrate, in compliance with his duty, upon a complaint which furnished him probable cause to believe that the crime charged had been committed by defendant.

7. **Arrest and Bail § 5— arrest under warrant — forcible entry — demand for and denial of entry**

There was sufficient compliance with the requirement that entrance be demanded and denied before a police officer can forcibly enter a dwelling for the purpose of making an arrest, where defendant had observed the officer's uniform and was aware of his official status, the officer had seen defendant looking out a door and knew that defendant had observed him, and the officer twice called out defendant's name and received no reply before he opened the door to defendant's residence.

8. **Constitutional Law § 21; Criminal Law § 84; Searches and Seizures § 1— seizure without a warrant — articles in plain view**

The constitutional guaranty against unreasonable searches and seizures does not apply where a search is not necessary, and where the contraband matter is fully disclosed and open to the eye and hand.

9. **Criminal Law § 84; Searches and Seizures § 1— lawful entry into home — seizure without warrant — articles in plain view — absence of exploratory search**

Where a police officer lawfully entered defendant's home to serve a valid arrest warrant, the officer did not need a search warrant to seize marijuana seeds lying in plain view on the top of a freezer some three or four feet from the officer or to seize marijuana which the officer saw inside a plastic jar that he picked up to use as a container for the seized marijuana seeds, no warrant being necessary for the seizure of articles in plain view, and the marijuana in the plastic jar not being discovered by a general exploratory search or an unreasonable search.

10. **Narcotics § 4— possession defined**

One has possession of narcotics within the meaning of the law when he has both the power and intent to control its disposition or use.

11. **Narcotics § 4— possession — premises controlled by accused**

The fact that narcotics are found on premises under the control of the accused raises an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession.

12. **Narcotics § 4— possession — defendant's proximity to narcotics**

The State may overcome a motion to dismiss or motion for judgment as of nonsuit in a prosecution for possession of narcotics by presenting evidence which places the accused within such close juxtaposition to the narcotics as to justify the jury in concluding that they were in his possession.

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13. Narcotics § 4— possession — marijuana in defendant's home

The State's evidence was sufficient to support a reasonable inference that marijuana was in defendant's possession where it placed defendant within three or four feet of marijuana lying on top of a freezer and marijuana in a plastic jar in defendant's home, and no one else was in the room where the marijuana was found.

14. Criminal Law § 115— necessity for submitting lesser offense

The court is not required to submit to the jury the question of defendant's guilt of a lesser degree of the crime charged in the indictment when the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged.

15. Narcotics § 4.5— felonious possession of marijuana — failure to submit misdemeanor

In a prosecution for the felony of possession of more than one gram of marijuana, the trial court did not err in failing to submit the misdemeanor of possession of less than one gram of marijuana, where all the evidence relating to the quantity of marijuana shows that defendant possessed more than one gram of marijuana.

16. Statutes § 5— legislative intent

In seeking to discover and give effect to the legislative intent, an act must be considered as a whole, and none of its provisions shall be deemed useless or redundant if they can reasonably be considered as adding something to the act which is in harmony with its purpose.

17. Narcotics § 5; Criminal Law § 138— possession of marijuana — punishment statute changed pending defendant's appeal

A defendant whose appeal from conviction of possession of more than one gram of marijuana was pending on 1 January 1972, the effective date of the act reducing that crime from a felony to a misdemeanor and reducing the maximum punishment for a first offense of possession of any quantity of marijuana to six months, is not entitled to the benefit of the more lenient punishment provisions of the new act, since the new act contains savings clauses providing that prosecutions for violations of law occurring prior to its effective date shall not be affected and that its provisions shall be applicable to violations of law which occur following 1 January 1972.

APPEAL by defendant pursuant to G.S. 7A-30(1) from decision of the North Carolina Court of Appeals, 13 N.C. App. 433, finding no error in the trial before *Rouse, J.*, at 24 May 1971, Session of BEAUFORT Superior Court.

Defendant was charged in a bill of indictment with unlawful possession of marijuana in excess of one gram. When the case came on for trial, defendant entered a plea of not guilty and, after the jury was duly empaneled, he moved to suppress

the marijuana from evidence. The court, on voir dire, heard evidence from both the State and defendant.

On voir dire, S.B.I. Agent Thomas W. Caddy testified that on 15 March 1971 he went before Magistrate W. T. Stowe for the purpose of obtaining an arrest warrant for Jesse Harvey, Jr. Agent Caddy testified under oath before the magistrate that on or about 23 January 1971 Special Agent E. H. Cross, Jr., of the State Bureau of Investigation, had purchased 16 bindles of heroin from Jesse Harvey, Jr. He stated that he told the magistrate he had received the information concerning the sale of heroin through Agent Cross. Based on the sworn testimony of Agent Caddy, the magistrate issued a warrant for the arrest of Jesse Harvey, charging him with unlawful sale of the narcotic drug, heroin.

At the time the warrant was obtained, Agent Cross was out of the county.

Deputy Sheriff Randy Respass testified that he went to the home of Jesse Harvey on 16 March 1971 for the purpose of serving the arrest warrant. He observed Jesse Harvey looking out the door of the utility room. Deputy Respass approached that door and twice called defendant's name. When he received no reply he opened the utility door about twelve inches and again called defendant's name. At this time defendant answered, "yes," and Respass observed him standing behind the door approximately three or four feet from a chest-type deep freezer located in the utility room. Deputy Respass opened the door wider and defendant came towards him. While standing in the doorway, he read the warrant to Harvey. At that time Deputy Sheriff Respass could see the top of the deep freezer, and he observed seed which he recognized as marijuana seed lying on top of the deep freezer. After handcuffing Harvey, Respass went into the utility room and gathered up the marijuana seed with his hands. He then picked up a plastic jar located adjacent to the deep freezer and poured the seed into the plastic jar. When he was in the act of pouring the seed into the jar, he observed more marijuana seed and some vegetable matter in the jar.

W. H. Thompson, with the State Bureau of Investigation, testified that on 23 January 1971 he was with Agent Cross when he made a purchase of sixteen bindles of heroin. He stated

that he saw the entire transaction, and the person who sold the heroin to Agent Cross was not defendant Jesse Harvey, Jr.

Defendant testified that Deputy Sheriff Respass came to his residence around 10 or 10:30 o'clock on the evening of 16 March, 1971, and at that time he (Harvey) was in the storage room of the house. He heard an automobile door slam and saw Deputy Sheriff Respass (wearing his uniform) approaching the porch. Defendant further testified that when the deputy called his name, he immediately left the storage room and closed the door behind him. He was arrested and handcuffed at that time. He stated there were no marijuana seeds loose on the freezer chest and that they were all in the jar; and that Deputy Sheriff Respass did not go into the storage room until after defendant had been arrested and handcuffed.

At the close of the evidence Judge Rouse entered an order in which he found facts, which were substantially supported by the testimony of the two S.B.I. agents, and entered an order concluding and adjudging:

> I. That the affidavit and information furnished by the officer to the magistrate was sufficient as a basis for the issuance of a valid warrant.
>
> II. That the entry into the home of the defendant under the circumstances of this case was with a reasonable belief that the defendant was present and had failed to respond after having been called and was, therefore, not illegal.
>
> III. That the contraband which is the subject of this action was in plain view and was, therefore, not discovered through an illegal search.
>
> IV. That if it should be construed that the contraband was discovered by search, then the Court concludes that it was a lawful search, incident to a lawful arrest.
>
> It is, therefore, ORDERED AND ADJUDGED that the Motion to Suppress be and the same is hereby DENIED.

The jury returned to the courtroom and Deputy Sheriff Respass testified to substantially the same facts as on voir dire.

The State then offered the testimony of Phil Williamson, found by the court to be an expert in forensic chemistry, who

testified that he had analyzed the contents of State's Exhibit No. 4 and had found that it consisted of two grams of marijuana seed and .2 of one gram of marijuana leaf fragments and flowering top parts. The State elicited other testimony showing that State's Exhibit No. 4 was the seed and vegetable matter taken from Jesse Harvey's home on 16 March 1971.

The record discloses that the State took a nol pros on the original charge of illegal sale of heroin.

Defendant offered no evidence before the jury.

The jury returned a verdict of guilty of the offense of possession of marijuana of more than one gram. Defendant appealed from judgment imposing a sentence of imprisonment of not less than one nor more than three years.

Attorney General Morgan, Chief Deputy Attorney General McGalliard, Associate Attorney Ann Reed, and Associate Attorney Poole for the State.

Paul & Keenan, by James E. Keenan, for defendant.

BRANCH, Justice.

Defendant contends that the trial judge erred in denying his motion to suppress the evidence seized from defendant's premises. Defendant first argues that there was no probable cause shown to the magistrate for issuance of the warrant.

[1-3] The Fourth Amendment requirement that no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the persons or things to be seized, applies to arrest warrants as well as to search warrants. The judicial officer issuing such warrant must be supplied with sufficient information to support an independent judgment that there is probable cause for issuing the arrest warrant. *Giordenello v. United States,* 357 U.S. 480, 2 L. ed 2d 1503, 78 S.Ct. 1245. The same probable cause standards under the Fourth and Fourteenth Amendments apply to both federal and state warrants. G.S. 15-27; *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755; *Ker v. California,* 374 U.S. 23, 10 L. ed 2d 726, 83 S.Ct. 1623; *Mapp v. Ohio,* 367 U.S. 643, 6 L. ed 2d 1081, 81 S.Ct. 1684.

This Court dealt with determination of probable cause relating to issuance of search warrants in the case of *State v. Vestal, supra,* and there stated:

> "In *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L. ed 2d 723, the Supreme Court of the United States dealt with questions concerning the Fourth Amendment requirements for obtaining a valid state search warrant. It said:
>
> > '[W]hen a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing court will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant." * * * and will sustain the judicial determination so long as "there was substantial basis for [the magistrate] to conclude that [the articles searched for] were probably present." * * *
> >
> > 'Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones v. United States,* 362 U.S. 257, 4 L. ed 2d 697, 80 S.Ct. 725, 78 A.L.R. 2d 233, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the [articles to be searched for] were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, * * * was "credible" or his information "reliable." ' "

[4] More specifically considering arrest warrants, the courts hold that information received from a reliable informant is sufficient to support a conclusion that probable cause for *arrest* exists. *Draper v. United States,* 358 U.S. 307, 3 L. ed 2d 327, 79 S.Ct. 329; *Ker v. California, supra; McCray v. Illinois,* 386 U.S. 300, 18 L. ed 2d 62, 87 S.Ct. 1056.

In support of his contention, defendant relies heavily upon the case of *Whiteley v. Warden of Wyoming Penitentiary,* 401 U.S. 560, 28 L. ed 2d 306, 91 S.Ct. 1031. There, the officer's complaint upon which the warrant for arrest was issued stated:

> " 'I, C. W. Ogburn, do solemnly swear that on or about the 23 day of November, A. D. 1964, in the County of Carbon and State of Wyoming, the said Harold Whiteley and Jack Daley, defendants did then and there unlawfully break and enter a locked and sealed building [describing the location and ownership of the building].' "

The Court there, in holding that the judicial officer was not supplied with sufficient information to support an independent judgment that probable cause existed, in part said:

> " . . . [T]he sole support for the arrest warrant issued at Sheriff Ogburn's request was the complaint reproduced above. That complaint consists of nothing more than the complainant's conclusion that the individuals named therein perpetrated the offense described in the complaint. The actual basis for Sheriff Ogburn's conclusion was an informer's tip, but the fact, as well as every other operative fact, is omitted from the complaint. Under the cases just cited, that document alone could not support the independent judgment of a disinterested magistrate."

The complaint for arrest upon which the warrant was issued in the case before us for decision avers: " . . . that at and in the County named above and on or about the 23 day of January, 1971, the defendant named above did unlawfully, wilfully and feloniously sell to S.B.I. Agent, E. H. Cross, Jr., a narcotic drug in violation of the Uniform Narcotic Drug Act. The drug in question consisted of sixteen (16) bindles of heroin."

The present case, unlike *Whiteley,* shows ample basis for issuance of the arrest warrant upon information from a credible source.

This Court has held that a police officer making the affidavit for issuance of a warrant may do so in reliance upon information reported to him by other officers in the performance of their duties. *State v. Vestal, supra; State v. Banks,* 250 N.C. 728, 110 S.E. 2d 322.

[5] Here, S.B.I. Agent Caddy relied upon information received through S.B.I. Agent Cross while in the performance of his duties. The evidence that Agent Cross purchased heroin from the accused furnished sufficient evidence that probable cause

for defendant's arrest existed. The very relation shown to exist between S.B.I. Agent Cross and the affiant (S.B.I. Agent Caddy) was sufficient evidence of circumstances upon which the affiant could conclude that the information furnished to the magistrate was credible and reliable.

[6] We must consider the fact that the warrant executed by Deputy Sheriff Respass was mistakenly issued for defendant.

5 Am. Jur. 2d, Arrest, § 4, p. 699, states:

> When a warrant, valid in form and issued by a court of competent jurisdiction, is placed in the hands of an officer for execution, it is his duty to carry out its demands without delay, and he incurs no liability for its proper execution, however disastrous may be the effect on the person against whom it is issued. If it is regular on its face, he is bound to serve it, and failure to do so would be disobedience of a lawful court order, punishable as contempt.

In the case of *Hill v. California,* 401 U.S. 797, 28 L. ed 2d 484, 91 S.Ct. 1106, the police had probable cause to believe that Hill had been implicated in a robbery and that the fruits of the crime were located in his apartment. They proceeded to his apartment, and when they arrived they found the door open and a man answering his description in the apartment. They thereupon arrested the occupant of the apartment despite his protestations that he was not Hill. They then proceeded to search the apartment. Sustaining the arrest as valid and holding the search legal as incident to the arrest, the Court stated:

> " . . . '[w]hen the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest.' . . . The upshot was that the officers in good faith believed Miller was Hill and arrested him. They were quite wrong as it turned out, and subjective good-faith belief would not in itself justify either the arrest or the subsequent search. But sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time."

We recognize that the facts in *Hill* differ from those in this case, in that in *Hill* the person arrested was not the accused against whom the evidence was offered. However, we think that the controlling principles of sufficient probability and reasonableness are applicable and controlling in both cases.

Here, the officer, as he was required to do, executed the warrant, valid on its face. The warrant was issued by a magistrate, in compliance with his duty, upon a complaint which furnished him probable cause to believe that the crime charged had been committed by defendant. The arrest was a valid arrest.

Defendant further supports his motion to suppress with the argument that Deputy Sheriff Respass illegally entered his home to make the arrest.

G.S. 15-44 provides:

> If a felony or other infamous crime has been committed or a dangerous wound has been given and there is reasonable ground to believe that the guilty person is concealed in a house, it shall be lawful for any sheriff, coroner, constable, or police officer, admittance having been demanded and denied, to break open the door and enter the house and arrest the person against whom there shall be such ground of belief.

[7] Defendant argues that the officer's failure to knock, disclose his identity, his authority, and his mission brings the facts of this case within the holdings of *State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897, and *State v. Covington,* 273 N.C. 690, 161 S.E. 2d 140.

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

> "Ordinarily, a police officer, absent invitation or permission, may not enter a private home to make an arrest or otherwise seize a person unless he first gives notice of his authority and purpose and makes a demand for and is refused entry."

The Court considered the same question in *State v. Covington, supra.* There police officers, without a search warrant, forcibly entered a motel room and arrested the defendant. The officers had grounds reasonably to believe that he had committed a felony, but had not first demanded and been denied

admittance. The Court, holding the entry to be unlawful and articles seized as a result of the unlawful entry to be inadmissible in evidence, stated:

> " . . . Under G.S. 15-44 admittance, in the absence of hostile action from inside the dwelling prior to such demand, must be 'demanded and denied' before a forcible entry is lawful where, as here, there is neither a search warrant nor a warrant for the arrest of an occupant or supposed occupant. Indeed, *State v. Mooring,* 115 N.C. 709, 20 S.E. 182, seems to support the view that this requirement would apply even though the officers have a search warrant or warrant of arrest. See 15 N.C.L.R. 101, 125. Compliance with this requirement serves to identify the official status of those seeking admittance. The requirement is for the protection of the officers as well as for the protection of the occupant and the recognition of his constitutional rights."

It is of interest to note that in his voir dire testimony defendant Harvey stated that the officer made no entry into the house prior to the arrest.

[7] The State's evidence showed that Deputy Sheriff Respass "twice called out" in lieu of knocking, before opening the door. Defendant had observed his uniform and was aware of his official status. The officer knew that defendant had observed him and was therefore justified in proceeding to open the door. Under the circumstances of this case there was sufficient compliance with the rationale of *Sparrow* and *Covington,* to the effect that entrance must be demanded and denied before a police officer can proceed to forcibly enter a dwelling for the purpose of making an arrest.

We hold that Deputy Sheriff Respass legally entered defendant's premises.

Defendant further contends that the marijuana was obtained by an illegal search and seizure.

[8] The constitutional guaranty against unreasonable searches and seizures does not apply where a search is not necessary, and where the contraband subject matter is fully disclosed and open to the eye and the hand. *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28; *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376; *State v. Giles,* 254 N.C. 499, 119 S.E. 2d 394.

Deputy Sheriff Respass testified:

> "I read the warrant to Mr. Jesse Harvey and told him what it was for and when he came out of the doorway I saw marijuana seed on the deep freeze. . . . They were three or four feet away from me."

[9] Obviously, the seizure of the marijuana seed comes squarely within the "plain view" doctrine set out in *State v. Virgil, supra.* Nor do we think there was a general exploratory search or unreasonable search when the officer saw marijuana inside a plastic jar which he had picked up to use as a container for the seized marijuana seed. Officer Respass was legally on the premises, and no search was required to discover the contraband material. There was sufficient evidence to support the trial judge's findings, and the findings in turn support his conclusions of law and ruling.

We hold that the court properly overruled the motion to suppress.

Defendant assigns as error the trial court's denial of his motion to dismiss. He argues that the State failed to offer substantial evidence that he was in possession of the marijuana.

> "As used in G.S. 15-173, there is no difference in legal significance between a motion 'to dismiss the action' and a motion 'for judgment as in case of nonsuit.' The question presented by defendant's motion to dismiss was whether the evidence was sufficient to warrant its submission to the jury and to support a verdict *of guilty of the criminal offense charged in the indictment.*" *State v. Cooper,* 275 N.C. 283, 167 S.E. 2d 266.

[10-12] An accused's possession of narcotics may be actual or constructive. He has possession of the contraband material within the meaning of the law when he has both the power and intent to control its disposition or use. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. Also, the State may overcome a motion to dismiss or motion for judgment as of nonsuit by presenting evidence which places the accused "within such close juxtaposition to the narcotic drugs as to

justify the jury in concluding that the same was in his possession." *State v. Allen,* 279 N.C. 406, 183 S.E. 2d 680; *State v. Fuqua,* 234 N.C. 168, 66 S.E. 2d 667; *Hunt v. State,* 158 Tex. Crim. 618, 258 S.W. 2d 320; *People v. Galloway,* 28 Ill. 2d 355, 192 N.E. 2d 370.

[13] In this case the State's evidence placed defendant within three or four feet of the marijuana within his home. No one else was in the room. This evidence supports a reasonable inference that the marijuana was in defendant's possession.

The trial judge correctly overruled defendant's motion to dismiss.

Defendant contends that the court erred in failing to instruct the jury that it could return a verdict of misdemeanor possession of marijuana.

Under the law as it existed at the time of defendant's trial he would have been guilty of a misdemeanor had he possessed only one gram, or less, of marijuana. G.S. 90-88; G.S. 90-111.

In the case of *State v. Riera,* 276 N.C. 361, 172 S.E. 2d 535, it is stated:

> "It is also well recognized in North Carolina that when a defendant is indicted for a criminal offense he may be convicted of the offense charged or of a lesser included offense when the greater offense in the bill contains all the essential elements of the lesser offense, all of which could be proved by proof of the allegations of fact contained in the indictment. . . . Further, when such lesser included offense is supported by some evidence, a 'defendant is entitled to have the different views arising on the evidence presented to the jury upon proper instructions, and an error in this respect is not cured by a verdict finding the defendant guilty of a higher degree of the same crime . . . . ' When there is evidence to support the milder verdict, the Court must charge upon it even when there is no specific prayer for the instruction."

[14] Equally well recognized is the rule that the court is not required to submit to the jury the question of defendant's guilt of a lesser degree of the crime charged in the indictment when the State's evidence is positive as to each and every element of

the crime charged and there is no conflicting evidence relating to any element of the charged crime. *State v. Flippin,* 280 N.C. 682, 186 S.E. 2d 917; *State v. Smith,* 268 N.C. 167, 150 S.E. 2d 194; *State v. Jones,* 249 N.C. 134, 105 S.E. 2d 513; *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545.

[15] All the evidence in this case relating to quantity of marijuana shows that defendant possessed more than one gram of the contraband material. Defendant tried unsuccessfully by cross-examination to elicit evidence showing a lesser amount. Thus, there was no error in the failure of the trial judge to submit and charge on the lesser offense of misdemeanor possession of marijuana.

Finally, we consider defendant's contention that he is entitled to be resentenced under the more lenient penalties for possession of marijuana prescribed by the North Carolina Controlled Substances Act effective 1 January 1972.

The 1971 General Assembly enacted the North Carolina Controlled Substances Act. We quote pertinent portions of the Act.

"§90-94. Schedule VI controlled substances.

The following controlled substances are included in this Schedule:

1. Marihuana.

. . . .

"§90-95. Violations, penalties.—(a) Except as authorized by this Article, it shall be unlawful for any person:

(1) to manufacture, distribute or dispense or possess with intent to distribute a controlled substance listed in any schedule of this Article;

. . . .

(3) to possess a controlled substance included in any schedule of this Article;

(b) Any person who violates G.S. 90-95(a)(1) or G.S. 90-95(a)(2) shall be guilty of a felony and shall be sentenced to a term of imprisonment of not more than five

years or fined not more than five thousand dollars ($5,000), or both in the discretion of the court. . . .

. . . .

(e) Any person who violates G.S. 90-95(a)(3) with respect to controlled substances included in Schedules V and VI of this Article shall, for the first offense, be guilty of a misdemeanor and be sentenced to a term of imprisonment of not more than six months or fined not more than five hundred dollars ($500.00). . . .

(f) Possession by any person of controlled substances included in any Schedule of this Article in violation of G.S. 90-95(a)(3) shall be presumed to be possession of such substances for purpose of violating G.S. 90-95(a)(1) in the following cases:

. . . .

(3) possession of more than 5 grams of marijuana as controlled within Schedule VI of this Article from which the resin has not been extracted, or possession of more than one gram of the extracted resin thereof and every salt, compound, derivative, mixture or preparation of such resin, or possession of more than one one-hundredth gram of tetrahydrocannabinols.

. . . .

"§ 90-113.7 Pending proceedings.—(a) Prosecution for any violation of law occurring prior to January 1, 1972 shall not be affected by these repealers, or amendments, or abated by reason thereof.

(b) Civil seizures or forfeitures and injunctive proceedings commenced prior to January 1, 1972 shall not be affected by these repealers, or amendments, or abated by reason thereof.

(c) All administrative proceedings pending on January 1, 1972 shall be continued and brought to final determination in accord with laws and regulations in effect prior to January 1, 1972. Such drugs placed under control prior to January 1, 1972 which are not included within Schedules I through VI of this Article shall automatically be controlled and listed in the appropriate schedule.

(d) The provisions of this Article shall be applicable to violations of law, seizures and forfeiture, injunctive proceed-

ings, administrative proceedings, and investigations which occur following January 1, 1972."

The possession of marijuana by an unlicensed person remains a crime under the Controlled Substances Act. However, the provisions of this Act reduce the mere possession of marijuana in any amount to a misdemeanor, punishable, on first offense, by imprisonment of not more than six months or a fine of not more than $500. Under this act possession of more than five grams of marijuana creates a presumption that the possession is for the purpose of distribution in violation of G.S. 90-95(a)(1).

There is a line of cases in North Carolina which hold that when there is an express and unqualified repeal of a statute after a crime has been committed—but before final judgment (even after conviction)—no punishment can be imposed under the provisions of the repealed statute. A judgment is not final as long as the case is pending. *State v. McCluney,* 280 N.C. 404, 185 S.E. 2d 870; *State v. Bryant,* 280 N.C. 407, 185 S.E. 2d 854; *State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765; *State v. Pardon,* 272 N.C. 72, 157 S.E. 2d 698; *State v. Williams,* 97 N.C. 455, 2 S.E. 55.

We note that none of the statutes considered in the above cited cases had a savings clause directed to violations committed prior to the repeal, or to prosecutions pending at the time of the repeal.

Thus, the pendency of this case on appeal poses the question of whether the defendant is subject to the felony punishment pursuant to the act under which he was convicted and sentenced, or whether he is subject to lesser punishment under the Controlled Substances Act.

The case of *State v. Perkins,* 141 N.C. 797, 53 S.E. 735, considered the effect of a statutory change in punishment before final judgment in a criminal trial. There, defendant appealed from convictions of possession of liquor for sale without a license and unlawful sale of liquor, pursuant to Ch. 434 of the Laws of 1903. The offenses were allegedly committed in 1904, and in 1905, prior to defendant's trial, the General Assembly increased the penalty for the two offenses. On appeal, defendant contended that the legislative change in penalty repealed the 1903 act and barred the prosecution against him.

The Court, in holding that there was no repeal of the 1903 act by the enactment of the later statute, set forth the above stated rule followed in *McCluney, Bryant, Spencer, Pardon* and *Williams,* and further said:

> " . . . The rule is so familiar and well grounded in reason that we need not stop to discuss it further, except to say that it necessarily relates to an unqualified and express repeal, in the view we take of it, as to its effect upon pending prosecutions for offenses committed under the prior statute before the repeal, or upon prosecutions for such offenses afterwards instituted. As thus considered, it has no application to the facts of this case, for the act of 1905 does not expressly and unqualifiedly repeal the act of 1903, but repeals only to the extent that it conflicts with it. If the Legislature had intended to repeal the act of 1903 absolutely it was easy to have expressed that intention in words of unmistakable meaning; but it preferred not to do so, but to repeal it only so far as it is repugnant to the provisions of the later statute. The act of 1905 is by its very language prospective in its operation. It refers to sales made after 1 June, 1905, when it became effective, and could not under our Constitution apply to antecedent acts, so as to make them criminal or punishable if not so at the time they were committed. . . . Repeals by implication are not favored, and they should not be extended so as to include cases not within the intention of the Legislature. . . .
>
> . . . .
>
> ". . . It can make no difference how the intention of the Legislature, that an act should have prospective operation, is expressed; whether it is done by unequivocal terms in the act, or by a proviso, or is to be gathered from its general scope and tenor, so that it appears with sufficient clearness that such is the intention. . . ."

In *Perkins* this Court quoted with approval from Pegram's case, 1 Leigh (Va.) 569 (28 Va. 569) as follows:

> "Although the principle is correct that *leges posteriores priores contrarias abrogant,* yet they only abrogate them from the time that the latter law is passed or goes into effect. The principle on which this rule prevails is that

> the latter statute being incompatible with the former, they cannot exist together, and the latest expression of the will of the Legislature is the law. But there is no incompatibility in the statutes now under consideration. A punishment affixed to an offense prior to the first of May, 1828, is not incompatible with a different punishment, either lighter or more severe, affixed to the same offense subsequent to that date. They may well stand together. The punishment prescribed by Laws 1827-'28 being different from that prescribed by Laws 1822-'23, is certainly an implied repeal of it, as to new offenses, from the time it goes into effect; but, by the very terms of the law, the new punishment is only applied to the offenses happening *after* 1 May, 1828, leaving the old punishment to be applied to the offenses happing before that day."

In *State v. Putney,* 61 N.C. 543, the defendant was convicted of larceny of a mule. After the time of the alleged larceny, but before trial, the Legislature increased the punishment for violation of the statute. The defendant made a motion in arrest of judgment on the ground that passage of the statute increasing the penalty repealed the statute under which he was convicted. The Court entered an order allowing the motion, and the State appealed. The Court, finding error in the entry of the order, stated:

> ". . . But the act of 1866-1867 has no application to the case before us, because it does not repeal the old law, but is only prospective in its character and is to be read thus: If any person shall *hereafter* steal a mule, etc., he shall suffer death. All larcenies committed before that act are to be tried and punished without reference thereto."

State v. Williams, 192 La. 713, 189 So. 112, reflects the rule recognized in many states. There defendant was charged with the statutory felony of injuring a person by operating an automobile while intoxicated. Defendant was arrested and released on bond, and before his trial the statute under which he was indicted was repealed. The repealing act contained a proviso which stated: "This act shall in no way affect pending prosecutions in the courts of this state." The Court held that defendant could be prosecuted under the old law even though indictment had not been returned against him until after the effective date of the repealing act. The Court, in so hold-

ing, defined the word "prosecution" as follows: "A prosecution consists of the series of proceedings had in the bringing of an accused person to justice, from the time when the formal accusation is made, by the filing of an affidavit or a bill of indictment or information in the criminal court, until the proceedings are terminated." Accord: *State v. Bowles,* 70 Kan. 821, 79 P. 728; *State v. District Court,* 19 N.D. 819, 124 N.W. 417; *Sigsbee v. State,* 43 Fla. 524, 30 So. 816; *State v. Shushan,* 206 La. 415, 19 So. 2d 185.

Although we do not consider the above quoted definition of "prosecution" as determinative of the question here considered, we do think it is a correct definition and is consistent with the legislative intent expressed in the Controlled Substances Act.

In 50 Am. Jur., Statutes, § 572 at p. 571, we find the following:

> § 572. Effect of Saving Clause in Repealing Statute.—Frequently, statutes repealing statutes relating to crimes contain saving clauses as to crimes committed prior to the repeal. Where the repealing statute contains a saving clause as to crimes committed prior to the repeal, or as to pending prosecutions, the offender may be tried and punished under the old law. In such case, the crime is punishable under the old statute although no prosecution is pending at the time the new statute goes into effect.

This Court has consistently re-affirmed the cardinal rule of statutory interpretation as stated in *State v. Spencer, supra:*

> "In construing the language of a statute we are guided by the primary rule that the intent of the legislature controls. 'In the interpretation of statutes, the legislative will is the all important or controlling factor. Indeed, it is frequently stated in effect that the intention of the legislature constitutes the law. The legislative intent has been designated the vital part, heart, soul, and essence of the law, and the guiding star in the interpretation thereof.' 50 Am. Jur., Statutes § 223. . . ."

[16] In seeking to discover and give effect to the legislative intent, an act must be considered as a whole, and none of its provisions shall be deemed useless or redundant if they can rea-

sonably be considered as adding something to the act which is in harmony with its purpose. *In re Watson,* 273 N.C. 629, 161 S.E. 2d 1; *Jones v. Board of Education,* 185 N.C. 303, 117 S.E. 37. The same criminal offenses exist under the Controlled Substances Act as existed under the former Articles 5 and 5A of Chapter 90 of the General Statutes. The provisions for punishment under the new act are different from those contained in the former act. Thus, if the saving clauses contained in G.S. 90-113.7 do not save the punishment provisions of the former act, they are useless and redundant.

[17] The North Carolina Controlled Substances Act does not contain an express repealing clause. On the contrary, the statute expressly provides that prosecutions for violation of law occurring prior to its effective date shall not be affected. The statute further provides that its provisions *"shall* be applicable to violations of law, . . . *which occur following January 1, 1972."* (Emphasis ours.) It is perfectly apparent that the general assembly intended that the provisions of the Controlled Substances Act be prospective and effective as of 1 January 1972. Thus, the pre-existing law as to prosecution and punishment as set forth in Articles 5 and 5A, Chapter 90 of the General Statutes as written prior to 1 January 1972, remains in full force and effect as to offenses committed prior to 1 January 1972.

We have carefully examined this entire record and find no prejudicial error. The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. JULIUS CORNELL, LARRY LITTLE AND GRADY FULLER

No. 9

(Filed 12 April 1972)

1. Evidence § 31— best evidence rule

Under the best evidence rule, a writing is the best evidence of its contents, and the writing itself must ordinarily be produced unless its nonproduction is excused; however, this rule applies only where the contents or terms of the writing are in question.

2. Evidence § 31— best evidence rule — personal observations

The best evidence rule did not prohibit a courtroom clerk from testifying as to his personal observations regarding the racial composition of jury venires during a specific period of time simply because the clerk had made a record of his observations.

3. Criminal Law § 162— *objection to evidence* — specified ground — appellate review

When an objection to evidence is made on a specific ground, the competency of the evidence will be determined on appeal solely on the basis of the grounds specified.

4. Criminal Law § 175— findings of fact — conclusions of law — appellate review

While the trial court's findings of fact will not be disturbed on appeal if there is competent evidence to support them, the trial court's conclusions of law are subject to review, and where rulings are made under a misapprehension of the law, the order of the trial judge may be vacated and the case remanded for further proceedings, modified or reversed, as the rights of the parties and the applicable law may require.

5. Constitutional Law § 29; Grand Jury § 3; Jury § 7— systematic exclusion of Negroes

If the conviction of a Negro is based on an indictment of a grand jury or the verdict of a petit jury from which Negroes were excluded by reason of their race, the conviction cannot stand.

6. Constitutional Law § 29; Jury § 7— racial discrimination in jury — burden of proof

If a motion to quash alleges racial discrimination in the composition of the jury, the burden is upon defendant to establish it; but once a *prima facie* case of racial discrimination is established, the burden of going forward with rebuttal evidence is upon the State.

7. Constitutional Law § 29; Grand Jury § 3; Jury § 7— racial composition of jury

A defendant is not entitled to demand a proportionate number of his race on the jury which tries him or on the venire from which petit jurors are drawn.

8. Constitutional Law § 29; Grand Jury § 3; Jury § 7— racial composition of jury — officials' denial of discrimination

The mere denial by officials charged with the duty of listing and summoning jurors that there was no intentional, arbitrary or systematic discrimination on the ground of race is not sufficient to overcome a *prima facie* case.

9. Constitutional Law § 29; Grand Jury § 3; Jury § 7— jury source — tax list

A jury list is not discriminatory or unlawful because it is drawn from the tax list of the county, and the jury commission is not limited to the sources specifically designated by the statute.

10. Constitutional Law § 29; Grand Jury § 3; Jury § 7— grand and petit juries — racial composition — systematic exclusion

A person has no right to be indicted or tried by a jury of his own race or even to have a representative of his race on the jury; he does have a right to be tried by a jury from which members of his own race have not been systematically and arbitrarily excluded.

11. Constitutional Law § 29; Jury § 7— systematic exclusion of Negroes — insufficiency of evidence

Defendants' evidence that the black adult population of the county amounted to 20% of the total county population and that during the biennium beginning January 1970 approximately 10% of the petit jurors appearing for service in the courtroom were Negro, *held* insufficient to make out a *prima facie* case of racial discrimination.

12. Constitutional Law § 29; Jury § 7— systematic exclusion of Negroes — prima facie case — absence of necessity for State to go forward

Even if defendants made out a *prima facie* case of racial discrimination on the theory of underrepresentation of Negroes on the juries, defendants' own evidence relieved the State of the burden of going forward with the evidence where defendants exhausted the State's sources of information and their evidence shows that any disparity in racial representation on juries of the county did not result from discrimination in the preparation and drawing of the jury list, the State not being required to repetitiously present evidence already elicited by defendants.

13. Constitutional Law § 29; Grand Jury § 3; Jury § 7— address on jury list card — black or white neighborhood — opportunity for discrimination

Testimony by jury commissioners that, in some instances, they could determine from the address shown on the raw jury list card that the person named thereon lived in a predominantly black or predominantly white neighborhood did not show an "opportunity for discrimination" sufficient to make out a *prima facie* case of racial discrimination.

14. Constitutional Law § 29; Grand Jury § 3; Jury § 7— jury list — absence of persons 18 to 21 years old

The absence from the jury list of the names of persons between the ages of 18 and 21 during the period from 21 July 1971, the effective date of the amendment of G.S. 9-3 lowering the age requirement for jurors from 21 years to 18 years, and 21 September 1971, the date of defendants' trial, is not unreasonable and does not constitute systematic exclusion of this age group from jury service.

15. Constitutional Law § 29; Grand Jury § 3; Jury § 7— selection and drawing of jurors — constitutionality of statutes

The North Carolina statutory plan for the selection and drawing of jurors is constitutional and provides a jury system completely free of discrimination to any cognizable group. G.S. Ch. 9, Art. I.

State v. Cornell

ON *certiorari* to the North Carolina Court of Appeals prior to determination of appeal, from *Long, J.*, at the 20 September 1971 Criminal Session of FORSYTH Superior Court.

Separate bills of indictment were returned by the Forsyth County Grand Jury charging defendants Cornell and Little with accessory after the fact of felonious larceny, and defendant Fuller with two counts of felonious assault with a firearm upon a law enforcement officer in violation of G.S. 14-34.2, and felonious larceny. Upon motions of defense counsel, the charges were consolidated for trial. On 3 May 1971 counsel for defendants filed motions to quash each of the indictments and to quash the petit jury venire on the grounds, *inter alia*, that the method of selecting the grand and petit jurors excluded blacks, women, daily wage earners, and younger persons in the community, and thereby denied defendants their constitutional right to be tried by a jury of their peers.

The cases came on for hearing before Judge Long on 22 September 1971, and at that time defendants amended their motions to include as a further ground for quashal the fact that the Forsyth County Jury selection process excluded persons under twenty-one years of age.

Defendants offered the testimony of Wayne C. Shugart, Guy L. Scott and S. C. Cable, who were members of the Forsyth County Jury Commission during the period October 1969 to the date of hearing. The testimony of these witnesses tended to show that during the months of October and November 1969, pursuant to statute, they had prepared a jury list to be used for the biennium beginning January 1, 1970. In order to compile the jury list the commissioners had instructed John Click, the data processing system manager for Forsyth County, to prepare a raw jury list by programming the computer to take every fourth name from the Forsyth County tax list and every twelfth name from the voter registration list. The computer was fed cards containing information concerning each taxpayer and each registered voter. The taxpayer card had no information as to race, but the voter registration card denominated the race of each individual because of certain federal requirements. The cards fed to the computer were not seen by the members of the Jury Commission. Each of the raw list cards obtained from the computer contained only the name and address of the in-

dividual. This list contained 7,963 names from the voter list, and 18,258 names from the tax list. This total list of 26,221 names was submitted to the Jury Commission, and the members of that commission deleted duplications in names, names of persons known to have left the county or to be deceased, and the names of persons known to be under twenty-one years of age. The deletion of names of persons known to be under twenty-one years of age resulted from the then existing statutory requirement that a juror be at least twenty-one years of age. The commissioners also deleted names of persons known to be physically or mentally incompetent to serve as jurors, the names of persons found on the "lunacy" docket, and the names of persons known to be convicted felons. The Jury Commission purged 5,842 names from the original list because of one or more of the above stated reasons.

A larger number of names was taken from the tax list because it was more accurate since it was reconstituted annually. Each member of the Jury Commission testified unequivocally that he did not consider race or economic status in preparing the list. However, each acknowledged that in some instances race or economic status could be determined by the individual's address. The commissioners had not changed the list so as to include persons between the ages of eighteen and twenty-one since the effective date of the statutory amendment allowing persons eighteen years of age or over to serve on juries.

The testimony of Eunice Ayers, Register of Deeds of Forsyth County, and A. E. Blackburn, Clerk of Superior Court of Forsyth County, tended to show that, pursuant to statute, the Jury Commission delivered to the Register of Deeds an alphabetized and numerically arranged jury list, together with the cards deleted by the Jury Commission. The Register of Deeds kept these jury cards under lock and key. The Clerk of Superior Court kept a round metal basket containing numbered discs in the same number as there were names on the jury list. The Clerk of Superior Court, at least thirty days prior to each session of court, drew from the metal basket discs equal to the number of jurors required for the sessions of district or superior court. The numbers from these discs were furnished to the Register of Deeds, and she matched the numbers drawn with the numbered and alphabetized jury list, and thereafter

furnished the Sheriff a list showing the names and addresses of the prospective jurors for summoning by the Sheriff. The Sheriff made return to the Clerk of Superior Court.

Nathan W. Lyndon testified that he served as Foreman of the Forsyth County Grand Jury from 4 January 1971 until 14 June 1971. During that period of time there were three members of the black race serving on the 18-member Grand Jury.

Michael R. Foltz, a deputy clerk of superior court of Forsyth County, testified that since 27 July 1967 he had been in position to observe the racial composition of the venire for petit jury service due to his employment as courtroom clerk. Of his own volition he kept records of the venires appearing between 31 May 1971 and 31 August 1971. He testified that he had kept written records concerning this information but had inadvertently left the records at home. He was allowed, over objection, to testify as to his recollection of the racial composition of the petit jury venires during that period. We quote a portion of this witness' testimony:

> Q. Do you recall whether your records reflect how many persons that appeared in this courtroom for petit jury duty since May 31 of this year?
>
> A. Yes, sir.
>
> Q. Approximately how many persons?
>
> A. Between May 31, 1971 and the last day of August 1971, three hundred twenty-four (324) people have appeared to serve as jurors.
>
> Q. And those three hundred, do your records reflect how many were black?
>
> MR. YEAGER: Objection. I object, your Honor, these aren't official records.
>
> COURT: Objection overruled.
>
> A. Thirty-two.

Objection overruled. State, in apt time excepted.

EXCEPTION NO. 1.

The witness further testified that he based the racial determination on skin coloration, and that his designations were actually in the categories of white and non-white. He stated that he had kept records during the current week of court, and that the venire for that week contained thirty-four persons, four of whom were non-white.

Defendants offered other testimony and documentary evidence which tended to show:

(1) On 1 January 1971, according to the U. S. Census figures, blacks comprised 22.3% of the total population of Forsyth County. The same census figures show that 19.8% of the persons over twenty-five years of age in Forsyth County were blacks, and that 20.9% of all persons over fifteen years of age in Forsyth County were black.

(2) In November 1969 Negroes comprised 20.4% of the qualified voters in Forsyth County.

There was no evidence as to percentage of Negroes appearing on the tax list, because the tax list contained no racial designation.

The State offered no evidence.

Judge Long thereupon entered the following order:

In regard to the motions of the defendants to quash the indictments in these cases and to quash the jury venire on the grounds that black persons and persons under twenty-one years of age were systematically excluded from the jury list from which a grand jury was selected and from which the petit jury is to be selected, the court makes the following findings of facts:

1. That in November, 1969, the Forsyth County Jury Commission prepared the current jury lists from which the Grand and Petit Juries involved in these cases were or would be drawn;

2. That the jury commissioners selected every fourth name on the Forsyth County tax list and every twelfth name of the Forsyth Voter registration list to obtain an unpurged list of prospective jurors;

3. That on January 1, 1970, when the current list was put into use, the percentage of Negroes in the Forsyth County population was approximately 22.3 percent according to the United States census figures. Although there is no evidence in the record as to the percentage of Negroes in the over-twenty-one age group at that time, census figures show that Negroes constituted 19.8 percent of all persons over twenty-five years of age and 20.9 percent of all persons then over fifteen years of age and who would now (two years later) be seventeen years of age or older;

4. That 20.4 percent of the qualified voters in November, 1969, were Negroes. There is no evidence as to the percentage of taxpayers who were Negroes;

(5. That since May 31, 1971, three hundred twenty-four jurors have reported pursuant to summons, for jury service in the criminal courts of this county. Of that number only 32 or 9.9 percent have been black and the only evidence on the point indicated that from the period of January, 1970 up to May 31, 1971, the percentage of black jurors has been approximately ten percent;)

EXCEPTION NO. 3.

(6. That the State has offered no evidence to explain the discrepancy between the approximately twenty percent Negro population in the community as a whole and the approximatetly ten percent Negro population of the jurors drawn for service;) EXCEPTION NO. 4.

(7. The court further finds as a fact that no persons under twenty-one years of age in November, 1969, were included in the jury list and no persons reaching said age since November, 1969, have been added to the jury list. That the General Assembly of North Carolina enacted a law on July 21, 1971, lowering the age of majority from twenty-one to eighteen years and lowering the age of qualification for jury service from twenty-one to eighteen years. That since that date no names of persons under twenty-one years of age have been added to the jury list. That under such circumstances there would be no possibility that any person under the age of twenty-two years eight months would serve on this jury involved with the trial of the

three defendants, two of whom fall at or under such age.) EXCEPTION No. 5.

(Upon such findings of fact, the court concludes that under the United States Supreme Court decisions of *Whitus vs. Georgia,* 385 U.S. 545, and *Sims vs. Georgia,* 389 U.S. 404, and *Jones vs. Georgia,* 389 U.S. 24, and under the applicable provisions of the United States Constitution, the defendants are entitled to allowance of their motions to quash their bills of indictment and to quash the petit jury venire.) EXCEPTION No. 6.

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

(1. The bills of indictment against these three defendants in these cases are hereby quashed;) EXCEPTION No. 7.

(2. That the jury commissioners for Forsyth County are hereby ordered to prepare a new jury list from which a venire of jurors may be drawn for grand and petit jury service. It is suggested that the jury commissioners give serious consideration to the possibility of using a broad-based name list such as the United States census records as an additional source of names of persons who might be summoned for jury service;) EXCEPTION No. 8.

(3. That the solicitor may proceed with new bills of indictment and with trial of the defendants after a new jury list has been prepared and a new grand jury has been sworn.) EXCEPTION No. 9.

This the 27th day of September, 1971.

JAMES M. LONG
Judge Presiding

EXCEPTION No. 10.

The State appealed.

Attorney General Morgan, Assistant Attorney General Safron, and Associate Attorney Speas for the State.

James E. Ferguson II (Chambers, Stein, Ferguson & Lanning) and James E. Keenan (Paul & Keenan) for defendants.

BRANCH, Justice.

The primary question presented by this appeal is whether the trial judge correctly quashed the bills of indictment and the petit jury venire on the grounds of systematic and arbitrary exclusion of qualified Negroes from the jury list.

[1, 2] The State first contends that the trial judge erred in basing critical findings of fact on the testimony of the witness Foltz as to his recollection concerning the contents of records which he had prepared. The State seeks to invoke the best evidence rule, which declares that a writing is the best evidence of its contents. It is ordinarily required that the writing itself be produced unless its nonproduction is excused. *In re Will of Knight,* 250 N.C. 634, 109 S.E. 2d 470; *Harris v. Singletary,* 193 N.C. 583, 137 S.E. 724. However, this rule applies only where the contents or terms of the document are in question. *State v. Ray,* 209 N.C. 772, 184 S.E. 836; *Overby v. Overby,* 272 N.C. 636, 158 S.E. 2d 799.

In *State v. Ray, supra,* this Court stated:

> "The appellant directs a number of exceptions to the court's permitting the State to introduce, over his objection, parol evidence to establish the contents of Norfolk Southern freight car No. 20635, when there was evidence to the effect that the records of the railroad company showed such contents, upon the theory that such records were the best evidence of the fact sought to be proved. While it is generally agreed that writings themselves furnish the best evidence of their contents, the 'best evidence rule' has no application here, since the fact sought to be proved was whether certain cigarettes had been put in a certain car, and had no relation whatsoever to the contents of any writing or record. No problem of primary and secondary evidence was presented. The making of a record did not prohibit a witness, who loaded the car and saw what went into it, from testifying as to its contents."

[3] We do not think that the witness Foltz was prohibited from testifying as to his recollection of what he had personally observed simply because he had made a record of his observations. Further, the State runs afoul of the technical rule which declares that when an objection to evidence is made on a specific ground, the competency of the evidence will be determined

on appeal solely on the basis of the grounds specified. Existence of another ground for the objection makes no difference unless the evidence was completely without purpose. *Pratt v. Bishop,* 257 N.C. 486, 126 S.E. 2d 597; Stansbury, N. C. Evidence, § 27 (2d ed., 1963) Here the Solicitor based his objection on the specific ground that the records in question were not official.

We therefore conclude that the evidence of witness Foltz was competent and admissible.

[4] It is well recognized that the trial court's findings of fact will not be disturbed if there is competent evidence to support them. However, the trial court's conclusions of law are subject to review, and where rulings are made under a misapprehension of the law, the orders or rulings of the trial judge may be vacated and the case remanded for further proceedings, modified or reversed, as the rights of the parties and the applicable law may require. *Harrelson v. Insurance Co.,* 272 N.C. 603, 158 S.E. 2d 812; *Horton v. Redevelopment Commission,* 264 N.C. 1, 140 S.E. 2d 728; *Insurance Co. v. Lambeth,* 250 N.C. 1, 180 S.E. 2d 36; *Morris v. Wilkins,* 241 N.C. 507, 85 S.E. 2d 892.

We first consider whether the trial judge acted under a misapprehension of the law when he concluded:

> "Upon such findings of fact, the court concludes that under the United States Supreme Court decisions of *Whitus vs. Georgia,* 385 U.S. 545, *Sims vs. Georgia,* 389 U.S. 404, and *Jones vs. Georgia,* 389 U.S. 24, and under the applicable provisions of the United States Constitution, the defendants are entitled to allowance of their motions to quash their bills of indictment and to quash the petit jury venire."

[5-7] In *State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765, this Court unanimously approved the following statement:

> "Both state and federal courts have long approved the following propositions:
>
> 1. If the conviction of a Negro is based on an indictment of a grand jury or the verdict of a petit jury from which Negroes were excluded by reason of their race, the conviction cannot stand. *State v. Ray,* 274 N.C. 556, 164 S.E. 2d 457; *State v. Wright,* 274 N.C. 380, 163 S.E. 2d

897; *State v. Brown,* 271 N.C. 250, 156 S.E. 2d 272; *State v. Lowry* and *State v. Mallory,* 263 N.C. 536, 139 S.E. 2d 870; *Whitus v. Georgia,* 385 U.S. 545, 17 L.ed. 2d 599, 87 S.Ct. 643; *Arnold v. North Carolina,* 376 U.S. 773, 12 L.ed. 2d 77, 84 S.Ct. 1032; *Eubanks v. Louisiana,* 356 U.S. 584, 2 L.ed. 2d 991, 78 S.Ct. 970; *Reece v. Georgia,* 350 U.S. 85, 100 L.ed. 77, 76 S.Ct. 167; *Shepherd v. Florida,* 341 U.S. 50, 95 L.ed. 740, 71 S.Ct. 549; *Cassell v. Texas,* 339 U.S. 282, 94 L.ed. 839, 70 S.Ct. 629.

2. If the motion to quash alleges racial discrimination in the composition of the jury, the burden is upon the defendant to establish it. *State v. Ray, supra; State v. Yoes,* 271 N.C. 616, 157 S.E. 2d 386; *State v. Brown, supra; Whitus v. Georgia, supra; Akins v. Texas,* 325 U.S. 398, 89 L.ed. 1692, 65 S.Ct. 1276; *Fay v. New York,* 332 U.S. 261, 91 L.ed. 2043, 67 S.Ct. 1613. But once he establishes a *prima facie* case of racial discrimination, the burden of going forward with rebuttal evidence is upon the State. *State v. Wilson,* 262 N.C. 419, 137 S.E. 2d 109; *State v. Ray, supra.*

3. A defendant is not entitled to demand a proportionate number of his race on the jury which tries him nor on the venire from which petit jurors are drawn. *Swain v. Alabama,* 380 U.S. 202, 13 L.ed. 2d 759, 85 S.Ct. 824; *State v. Wilson, supra; State v. Arnold,* 258 N.C. 563, 129 S.E. 2d 229 reversed on other grounds, 376 U.S. 773, 12 L.ed. 2d 77, 84 S.Ct. 1032."

The following propositions of law are equally well established:

[8] (1) The mere denial by officials charged with the duty of listing and summoning jurors that there was no intentional, arbitrary or systematic discrimination on the ground of race is not sufficient to overcome a prima facie case. *State v. Wilson,* 262 N.C. 419, 137 S.E. 2d 109; *Hernandez v. Texas,* 347 U.S. 475, 74 S.Ct. 667, 98 L.ed. 866; *Smith v. Texas,* 311 U.S. 128, 61 S.Ct. 164, 85 L.ed. 84; *Norris v. Alabama,* 294 U.S. 587, 55 S.Ct. 579, 79 L.ed. 1074.

[9] (2) A jury list is not discriminatory or unlawful because it is drawn from the tax list of the county. Nor is a jury commission limited to the sources specifically designated by the statute. *State v. Yoes* and *Hale v. State,* 271 N.C. 616, 157 S.E.

2d 386; *Brown v. Allen,* 344 U.S. 443, 73 S.Ct. 379, 97 L.ed. 469; *State v. Wilson, supra.*

[10] (3) A person has no right to be indicted or tried by a jury of his own race or even to have a representative of his race on the jury. He does have the constitutional right to be tried by a jury from which members of his own race have not been systematically and arbitrarily excluded. *State v. Yoes, supra; State v. Wilson, supra; Swain v. Alabama,* 380 U.S. 202, 85 S.Ct. 824, 13 L.ed. 2d 759; *Gibson v. Mississippi,* 162 U.S. 565, 16 S.Ct. 904, 40 L.ed. 1075.

The trial court and defendants rely upon the cases of *Whitus v. Georgia,* 385 U.S. 545, 87 S.Ct. 643, 17 L.ed. 2d 599; *Sims v. Georgia,* 389 U.S. 404, 88 S.Ct. 523, 19 L.ed. 2d 634; *Jones v. Georgia,* 389 U.S. 24, 88 S.Ct. 4, 19 L.ed. 2d 25, to support the order quashing the indictments and the jury venire. *Jones v. Georgia, supra,* and *Sims v. Georgia, supra,* were per curiam opinions factually similar to and decided on the authority of *Whitus v. Georgia, supra.*

In *Whitus v. Georgia, supra,* defendant attacked his murder conviction on the ground that the State systematically excluded members of his race from the grand jury which indicted him and the petit jury which convicted him. There, the jury commissioners made up the jury list from tax records which listed Negroes on yellow paper and whites on white paper. Later, the same commission reconstituted the jury box with names taken from a tax listing which denoted the names of Negro taxpayers by a "(c)" being placed opposite the name. The population of the county was 27.1% black, 42.6% of the potential (by age and sex) jurors were black. One of nineteen grand jurors was black, and seven of ninety petit jurors were black. The State offered no evidence tending to show or explain that the discrepancy was not the result of arbitrary, systematic exclusion of blacks. The United States Supreme Court, in reversing the judgments, *inter alia,* stated:

> "Under such a system the opportunity for discrimination was present and we cannot say on this record that it was not resorted to by the commissioners. Indeed, the disparity between the percentage of Negroes on the tax digest (27.1%) and that of the grand jury venire (9.1%) and the petit jury venire (7.8%) strongly points to this conclusion. Although the system of selection used here had been

specifically condemned by the Court of Appeals, the State offered no testimony as to why it was continued on retrial. The State offered no explanation for the disparity between the percentage of Negroes on the tax digest and those on the venires, although the digest must have included the names of large numbers of 'upright and intelligent' Negroes as the statutory qualification required. In any event the State failed to offer any testimony indicating that the 27.1% of Negroes on the tax digest were not fully qualified. The State, therefore, failed to meet the burden of rebutting the petitioners' prima facie case."

[11] In instant case defendants contend that their showing that the black adult population in Forsyth County amounted to approximately 20% of the population of that county, when coupled with the testimony of the witness Foltz to the effect that during the biennium beginning January 1970 approximately 10% of the petit jurors appearing for service in the courtroom in which he was employed were Negro, made out a prima facie case of racial discrimination.

The State, on the other hand, contends that such disparity, standing alone, is not sufficient to make out a prima facie case of racial discrimination.

The case of *Swain v. Alabama, supra,* strongly supports the State's argument. There the petitioner sought to quash the indictment and strike the trial jury venire on the ground of racial discrimination in the selection of all juries. He presented evidence showing that Negro males over twenty-one years of age constituted 26% of the age group in the county in which he was tried and that only 10% to 15% of the grand and petit juries drawn from the jury books since 1953 had been Negroes. There were four or five Negroes on the Grand Jury panel of approximately thirty-five persons which indicted defendant and there were eight Negroes on the petit jury venire, although none actually served in defendant's trial. The law of Alabama required the commissioners to place on the jury roll all male citizens over twenty-one years of age, reputed to be honest, intelligent men—esteemed for their integrity, good character and sound judgment. Each commissioner produced names of persons from various lists who in his judgment were qualified to serve as jurors. The United States Supreme Court held that the trial court properly denied defendant's motion

to quash. Mr. Justice White delivered the Court's majority opinion, and Mr. Justice Goldberg, with whom Chief Justice Warren and Mr. Justice Douglas joined, delivered a separate dissenting opinion. The majority opinion, in part, stated:

> " . . . We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much as 10%. See *Thomas v. Texas,* 212 U.S. 278, 283, 53 L.ed. 512, 514, 29 S.Ct. 393; *Akins v. Texas,* 325 U.S. 398, 89 L.ed. 1692, 65 S.Ct. 1276; *Cassell v. Texas,* 339 U.S. 282, 94 L.ed. 839, 70 S.Ct. 629. . . . There is no evidence that the commissioners applied different standards of qualifications to the Negro community than they did to the white community. Nor was there any meaningful attempt to demonstrate that the same proportion of Negroes qualified under the standards being administered by the commissioners. It is not clear from the record that the commissioners even knew how many Negroes were in their respective areas, or on the jury roll or on the venires drawn from the jury box. The overall percentage disparity has been small, and reflects no studied attempt to include or exclude a specified number of Negroes. . . . We do not think that the burden of proof was carried by petitioner in this case."

The basis for the dissenting opinion is that the showing of the disparity in racial representation of the jurors made out a prima facie case, and that since the State had greater access to the evidence which would negative its involvement in discriminatory jury selection, the State must assume the burden of going forward with evidence to show how the exclusion came about.

[11-13] *Swain v. Alabama, supra,* amply supports a holding under the facts of this case that the showing of underrepresentation of Negroes on the juries of Forsyth County was not sufficient to establish a prima facie case of racial discrimination. Even had a prima facie case been made out on the theory of underrepresentation of Negroes on the juries, defendants' own evidence relieved the State of the burden of going forward with the evidence. Defendants also argue that the system of jury selection in Forsyth County presented "opportunity for discrimination" merely because the jury commissioners ad-

mitted that, in some instances, they could determine from the address shown on the raw jury list card that the person there named lived in a predominantly white or a predominantly black neighborhood. We note in passing that a person who would qualify to serve on a jury commission would of necessity possess this knowledge of his county in order to impose the objective statutory criteria in preparing the jury list.

In attacking the jury selection system, defendants offered the testimony of all members of the Forsyth County Jury Commission, the Clerk of Superior Court of Forsyth County and the Register of Deeds of Forsyth County. By offering this testimony defendants exhausted the State's sources of information and affirmatively showed that the officials assiduously complied with the provisions of Article I, Chapter 9 of the General Statutes. We note that former Chapter 9 in 1949 contained substantially the same procedures as now. It was declared constitutional in the case of *Brown v. Allen, supra,* and was labeled "fair and nondiscriminatory" by this Court in *State v. Wilson, supra.* The rewrite of that chapter creating a jury commission to act in lieu of the county commissioners, designating the voter registration records as a source for preparing jury lists, and making other unsubstantial changes, preserves and enhances the fair and nondiscriminatory nature of its provisions. Chapter 9, Article I, of the General Statutes as it existed at the times herein complained of was obviously designed to require a minimum exercise of official discretion and to insure maximum protection against arbitrary abuse of such discretion.

Defendants' evidence further shows that there was no such "opportunity for discrimination" in the selection of the Forsyth County jury list as was found in *Whitus* and that the individual jury commissioners did not remove any name from the raw jury list solely on the basis of suspected race of the named person.

Thus, defendants' evidence fully demonstrates that any disparity in racial representation on the juries of Forsyth County did not result from discrimination in the preparation and drawing of the jury list. The rationale of the prima facie rule does not require the State to repetitiously present evidence already elicited by defendants. It was, therefore, not necessary for the State to "go forward" with further evidence.

We are cognizant of the decision in *Alexander v. Louisiana,* 40 U.S.L.W. 4365 (U.S. April 3, 1972) based upon *Avery v. Georgia, supra,* and *Whitus v. Georgia, supra. Alexander* is also distinguishable from instant case because of the differences in the Louisiana and North Carolina jury selection processes.

The trial judge erred in quashing the bills of indictment and the petit jury venire on the ground of arbitrary and systematic exclusion of qualified Negroes from the jury list.

[14] The only remaining ground for quashal of the bills of indictment and the petit jury venire which defendants bring forward and argue in their brief, and to which they have directed evidence, is the exclusion from the jury list of persons eighteen years old but not twenty-one years old.

At the time the jury list was prepared by the Forsyth County Jury Commission, G.S. 9-3 provided:

> Qualifications of prospective jurors.—All persons are qualified to serve as jurors and to be included on the jury list who are citizens of the State and residents of the county, who have not served as jurors during the preceding two years, *who are twenty-one years of age or over,* who are physically and mentally competent, who have not been convicted of a felony or pleaded nolo contendere to an indictment charging a felony, and who have not been adjudged non compos mentis. Persons not quilified under this section are subject to challenge for cause. (Emphasis ours.)

The 1971 General Assembly amended G.S. 9-3, *effective 21 July 1971,* so that the age requirement for voting was changed from twenty-one years or over to eighteen years or over. Therefore, we must determine whether there was intentional, arbitrary or systematic discrimination against this age group in the institution and management of the jury system. *State v. Wilson, supra.* At the time the jury list in question was prepared, the jury commissioners were precluded by the provisions of G.S. 9-3 from placing the names of any persons under twenty-one years of age on the jury list. G.S. 9-2 required that the jury commissioners "at least thirty days" prior to 1 January 1972 begin preparation of a new jury list for the ensuing biennium. Thus, if there be any discrimination against this age group, resulting in prejudice to these defendants, it must result

from a failure of the jury commission to place names representing such group on the jury list during the period from 21 July 1971 to 21 September 1971.

We know of no reasonable method by which the Forsyth County Jury Commission could have obtained a fair cross-section of the age group in question within a period of two months and one day. None of the names of this age group appeared on the voter registration records; very few of such names appeared on the tax lists; a large number of this group would have been in school, and many of them, being still dependent upon their parents, would not have established an independent address.

The North Carolina plan imposes a two-years lapse in preparation of new jury lists as opposed to the five-year plan adopted by some federal courts. *United States v. Kuhn,* 441 F. 2d 179 (5th Cir. 1971). We also note, parenthetically, that as of 4 February 1972 the United States Congress had not amended 28 U.S.C.A. § 1865 to require the federal district courts to include the names of persons under twenty-one years of age on their jury lists.

[15] The North Carolina statutory plan for the selection and drawing of jurors is constitutional and provides a jury system completely free of discrimination to any cognizable group.

The absence from the jury list of the names of persons between the ages of eighteen and twenty-one for the short period of time here complained of is not unreasonable, and does not constitute systematic and arbitrary exclusion of this age group from jury service.

The trial judge acted under a misapprehension of the law when he quashed the bills of indictment and ordered the jury commissioners of Forsyth County to prepare a new jury list for drawing of grand and petit jurors.

The order of 27 September 1971 entered by Judge Long in these cases is

Reversed.

STATE OF NORTH CAROLINA v. KENNETH JAMES WRIGHT

No. 16

(Filed 12 April 1972)

1. **Criminal Law § 76— confession — capital crime — right to counsel — determination of indigency**

In a prosecution for the capital crime of rape, the trial court erred in finding that defendant was not indigent and could employ counsel at the time he confessed and that he, therefore, could not invoke the provision of former G.S. 7A-457 that counsel could not be waived in a capital case, where the evidence before the court disclosed that when arrested defendant was an eighteen-year-old marine earning $149.00 per month, that he had $5.00 in cash, an automobile on which $56.00 per month was due, and two bonds costing $18.75 each which were in his mother's possession in Ohio, that his stepfather earned $9,000 per year and had a wife and eleven children other than defendant, and that any contribution the stepfather might make would have to be borrowed; consequently, the trial court erred in the admission of a confession made by defendant at a time when he was indigent and without counsel.

2. **Criminal Law § 169— erroneous admission of confession — prejudicial error**

The erroneous admission in a rape prosecution of an indigent defendant's confession made without benefit of counsel cannot be considered harmless and requires a new trial, notwithstanding there was other evidence sufficient to support a conviction.

Justice LAKE dissenting.

Justices HUSKINS and MOORE join in dissenting opinion.

APPEAL by defendant from *Rouse, J.*, September 7, 1971 Session of CRAVEN Superior Court.

In these criminal prosecutions, the defendant, Kenneth James Wright, was charged by bills of indictment with three felonies: (1) housebreaking, (2) crime against nature, and (3) rape. The three indictments grew out of a single episode which occurred in the trailer home of Mr. and Mrs. Parks at No. 1 Jones Street, Greenfield Heights Trailer Park, Havelock, North Carolina.

According to the State's evidence, Mrs. Parks, wife of a member of the Marine Corps, was at home alone on the morning of June 4, 1971. At approximately 9:30 a.m. the defendant, also a member of the Marine Corps, appeared at the trailer door and requested permission to use the telephone. When Mrs.

Parks told him she did not have a telephone, he drew a knife and forced entrance into the trailer as charged in Indictment No. 1. Before leaving he committed the acts charged by Indictments Nos. 2 and 3. During the struggle, to protect herself, Mrs. Parks struck the defendant with a pair of scissors, inflicting a shallow stab wound in the chest.

After the defendant left, Mrs. Parks reported to officers what had occurred. The officers broadcast an alert. Shortly thereafter, the defendant appeared at the Marine Corps Base for treatment of a fresh stab wound in the chest. The officers, having been alerted, took the defendant into custody for questioning about what had occurred in the trailer home. Present at the interrogation were Marine Corps and State officers who gave the defendant the required warnings after which he signed a waiver of his rights, including the right to counsel, and signed a written confession admitting his implication in the offenses reported by Mrs. Parks. Warrants were issued and a date fixed for the preliminary hearing. The court on a showing of indigency appointed Mr. Kennedy W. Ward attorney to represent the defendant.

Mrs. Parks, in company with her husband, attended the preliminary hearing. However, before she entered the courtroom, her husband lifted her up so she could see through the window into the courtroom where a number of persons were standing. She saw and recognized the defendant as her assailant. She had never seen him before he appeared at the trailer. Her view through the window was the first time she had seen him since. The defendant was ordered held without bond.

At the trial in superior court the defendant, through his court-appointed counsel, entered pleas of not guilty. The prosecuting witness, Mrs. Parks, testified, identifying the defenddant and described what he had done in the trailer. The State introduced an expert who testified that he had lifted finger and palm prints from articles in the Parks' residence. By comparing them with the defendant's known prints, the witness found points of similarity sufficient in number to enable him to express the opinion that the lifted prints had been made by the defendant.

When the State undertook to introduce in evidence the written confession, the defendant objected. The court conducted a

voir dire in the absence of the jury. Mr. Charles Lee Atkinson of the Naval Investigative Section, testified that he and Special Agent James M. Wilson of the State Bureau of Investigation, conducted the interrogation. He testified:

> "After advising him of his rights, I asked him did he have any objections in signing a military suspect's acknowledgement and waiver of rights form signifying the fact that he did, in fact, understand his rights. He indicated that he had no objections to it and voluntarily signed his name to the military suspect's acknowledgement and waiver of rights form at 12:50 hours on 4 June 1971. In regard to counsel, the statement says: 'I understand my rights as related to me and as set forth above. With that understanding, I have decided that I do not desire to consult with either a civilian or a military lawyer at this time and I do not desire to have such a lawyer present during this interview. I make this decision freely and voluntarily and it is made with no threats having been made or promises extended to me.' "

The defendant objected to the introduction of the confession on the ground it was obtained at a time when he, an indigent, was not represented by counsel. The State, however, contended the defendant was not an indigent at the time of the interrogation and was not entitled to have counsel appointed to attend the interrogation.

The voir dire examination, in the absence of the jury, disclosed the following: On June 7, 1971, before the preliminary hearing, the defendant signed an affidavit alleging his indigency and requesting appointment of counsel. His affidavit stated his monthly salary was $149.00; his only property was a 1970 Mustang automobile on which payments of $56.00 per month were due; he owed debts of $4,000.00; and he had only $5.00 in cash. The court found indigency and appointed Mr. Kennedy W. Ward as counsel.

However, when the State insisted the confession should be admitted, the trial judge called and examined the defendant. He testified he was eighteen years of age and had been in the Marine Corps for eleven months. His pay was $149.00 per month. He had authorized the Marine Corps to deduct $37.50 per month for savings bonds to be sent to his mother in Ohio. He had $5.00

when arrested. He testified he owned an automobile on which $56.00 per month was due. The value of his equity in it was not shown.

The defendant called his stepfather who testified that the defendant's mother had received two $25.00 bonds, each of which had cost $18.75. They were payable to the son and his mother. The defendant is one of twelve children. The stepfather works as manager of a garage in Ohio at a salary of $9,000.00 per year. The defendant's mother had worked as a maid at a hotel until six months ago when, "She quit to look after the kids." The stepfather testified that in order to help the defendant employ a lawyer, he would have to borrow the money and, "My family would have to do without."

At the conclusion of the voir dire, the court found the defendant's pay to be $149.00 per month and that in six months he could have accumulated bonds of a value of $225.00. There was no finding as to the defendant's indebtedness though he testified he had $5.00 and a 1970 Mustang on which payments of $56.00 were due each month.

The foregoing was the evidence with respect to the indigency of the defendant at the time of his interrogation. Based thereon, the court found as a fact the defendant was not indigent. "14. That the defendant had adequate resources with which to employ counsel at the in-custody interrogation stage of the proceeding in this case." The court concluded: "3. The defendant not being an indigent was not required to give a written waiver of counsel at the in-custody interrogation stage." The court ordered the confession admitted in evidence.

Having recited the evidence and the findings, we deem it fair to the trial judge to quote the explanation for his ruling which appears in the record of the case on appeal. "Court: I want to be frank; this question has not yet been to the Supreme Court. Now, Mr. Solicitor, I will leave it up to you. I want you to confer and think about it. If I'm wrong, then you are the man that's got to try the case a second time." The court then admitted the confession in evidence over defendant's objection. The jury returned verdicts of guilty in each of the three cases, recommending the punishment be imprisonment for life on the rape charge. From judgments imposed on the verdicts, the defendant appealed.

Robert Morgan, Attorney General, by James L. Blackburn and Russell G. Walker, Assistant Attorneys General, for the State.

Kennedy W. Ward for defendant appellant.

HIGGINS, Justice.

The three charges, rape, crime against nature, and felonious housebreaking, all grew out of a single episode. The three cases, on motion of the State, were consolidated and tried together. Before confessing, the defendant signed a waiver of rights and made the confession which was reduced to writing and signed by him. The court, after hearing and findings of fact, concluded that the confession was voluntarily and understandingly made after proper warning and permitted the State to introduce it in evidence. In the confession the references to the separate offenses are so interwoven as to make the confession one connected story. To relate the admissions exclusively to any one of the charges without involving the others would be impossible.

The result is that if the confession was inadmissible on the charge of rape, the State could not make it admissible by consolidation with the lesser charges. So the critical question is whether the confession is admissible on the charge of rape.

At the time the offenses were committed, the confession was obtained (both on June 4, 1971), and the trial held (September 10, 1971), Section 7A-457 of the North Carolina General Statutes was in full force and effect. Subsection (a) provided:

> "An indigent person who has been informed of his rights under this subchapter may, in writing, waive any right granted by this subchapter, 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 consequences of a waiver. In making such a finding, the court shall consider, among other things, such matters as the person's age, education, familiarity with the English language, mental condition, and the complexity of the crime charged. A waiver shall not be allowed in a capital case."

(Note: G.S. 7A-457 was rewritten by Chapter 1243, Session Laws of 1971, effective October 30, 1971.) Material at this stage, is the question whether the judge was correct in holding the defendant was not indigent at the time he made the

confession and therefore not in a position to invoke the provision of the statute that counsel could not be waived in a capital case. On this question the record discloses the defendant was found to be indigent and counsel was appointed and acted at the preliminary hearing. The same counsel was present and acting when the State sought to introduce the defendant's confession.

[1] The evidence before the trial judge disclosed that the defendant had $5.00 in cash; an automobile on which $56.00 per month was due; and two bonds payable to him and his mother, each of which cost $18.75 and were in his mother's possession in Ohio. On the original application for counsel, the defendant had disclosed his indebtedness of $4,000.00. The question of indebtedness was not raised on the voir dire before Judge Rouse. The stepfather had a salary of $9,000.00 per year with a wife and eleven other children. Any contribution which he might make toward the employment of counsel would have to be borrowed. "My family would have to do without."

On the showing before the trial judge, we hold the evidence was insufficient to support his finding the defendant was not indigent and was able to employ counsel at the time of his confession. When a person is charged with three felonies, one capital, the law says he is entitled to be represented by competent counsel. If he is unable to employ counsel, the court must appoint one to represent him. The representation goes further, much further, than a mere sitting in on the original interrogation. The representation is presumed to continue as long as counsel may be of service in the case. The finding the defendant is not indigent, reversing the original holding, is not supported by the evidence and the conclusion that the defendant was not indigent at the time of his interrogation was error.

The defendant's substantive rights are to be determined by the law in effect at the time the offenses were committed. At the time of the interrogation and confession, the defendant was indigent and was without counsel. Being charged with the capital felony of rape, he could not execute a valid waiver of counsel and, of course, the State could not place in evidence against him an invalid waiver. Otherwise, the provision, "A waiver shall not be allowed in a capital case," is meaningless.

[2] In passing on the question now involved, the Court is not unmindful of former decisions which hold that a certain type of

constitutional right may be waived and a conviction affirmed if the appellate court finds beyond a reasonable doubt that the denial of the right was harmless error. In *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384, this Court held the presence of counsel at a lineup was a constitutional right, but the in-court identification of Bass was of such independent origin that the absence of counsel at the lineup was harmless beyond a reasonable doubt. In *Bass,* and in other similar cases, all counsel could have done was to see that the lineup was properly "lined up."

The Constitution protects its citizens against forced self-incrimination. This eighteen-year-old Marine, being interrogated by his superiors in the Marine Corps, by the agents of the State Bureau of Investigation, and by the county officers, needed an attorney before making an admission which could lead to the loss of his life. The law of this State said counsel could not be waived.

This case is governed by the rule stated in *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123, rather than by the rule stated in *State v. Bass, supra.* In Blackmon, Justice Dan K. Moore for this Court said:

> "Where, as in the present case, a confession made by the defendant is erroneously admitted into evidence, no one can say what weight and credibility the jury gave the confession. Even though there is other evidence sufficient to support a conviction, we cannot say beyond a reasonable doubt that the error in admitting the confession did not materially affect the result of the trial to the prejudice of the defendant or that it was 'harmless error.' Error in the admission of this evidence requires a new trial."

See also *Chapman v. California,* 386 U.S. 18, 17 L.Ed. 2d 705; *State v. Accor and Moore,* 277 N.C. 65, 175 S.E. 2d 583; and *State v. Gaskins,* 252 N.C. 46, 112 S.E. 2d 745. In the latter case Justice Clifton L. Moore for the Court said: "In the case *sub judice* there was ample evidence to sustain a conviction other than that drawn in question on this appeal. But we have no way of determining what evidence influenced the jury. It may well be that the evidence in question was the deciding factor." The Court ordered a new trial.

For the reasons assigned and on the basis of authorities cited, this Court is required to hold, and now holds, the con-

fession made and signed by the defendant when he was without counsel was inadmissible in evidence against him. His Assignment of Error XVIII is sustained. The defendant is entitled to go before another jury. To that end it is ordered that on all charges there be a

New trial.

Justice LAKE dissenting.

In this case the majority takes a position not required by any decision of the Supreme Court of the United States or by any previous decision of this Court.

There is not the slightest suggestion that the defendant's confession was obtained by coercion, inducement, intimidation or persuasion. Nothing in the record indicates any involuntariness whatsoever. Nothing in the record indicates falsity or the slightest inaccuracy in the confession. There is no indication whatsoever that this eighteen year old Marine, apparently intelligent and not inexperienced, did not understand his right to have counsel present at the interrogation or that he was unaware that, if by reason of indigency he could not obtain counsel, the court would appoint counsel for him. He was expressly so advised, both by the military and by the civilian officers present, before he made the confession. In writing, clear and unmistakable, he stated he did not want counsel "present during this interview."

Subsequently, after he was formally charged and formal judicial proceedings were a certainty, he asserted for the first time that he wanted counsel and that, by reason of his indigency, he was unable to employ such counsel for the proceedings then imminent. Thereupon, counsel for those proceedings was appointed and he has been diligently and ably represented throughout those proceedings, including this appeal, by such counsel.

The trial court found, "The defendant had adequate resources with which to employ counsel at the in-custody interrogation stage of the proceeding in this case." This Court now says that finding is not supported by the evidence and was error.

The evidence is that this eighteen-year-old man had a regular job which paid him $149.00 per month over and above all expense for food, lodging, clothing, medical care and every other

necessary expense. There is no suggestion that he had any dependents. Obviously, the bulk, if not all, of his indebtedness represented the balance due on an automobile owned by him. This Court now says that he was an indigent because he did not have, in ready cash, enough funds to enable him to employ a lawyer, not just for the interrogation proceeding but for his trial, including appeal to the highest court available, and because his family could not help him do so without giving up some other things. If this be indigency, then to be self supporting is a condition rare in this the richest country in the world.

G.S. 7A-450(a) provides: "An indigent person is a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation in an action or proceeding enumerated in this subchapter." Subsection(c) provides: "The question of indigency may be determined or redetermined by the court at any stage of the action or proceeding at which an indigent is entitled to representation."

Indigency, at least in this sense, means financial inability to employ the legal assistance needed at the time. Surely, we may take judicial notice of the fact that a relatively small fee would be charged by competent counsel for appearance at a police investigation. This is all the defendant needed at that time. With full knowledge of his right to such counsel, and without the slightest suggestion of his inability to employ such counsel, he elected to represent himself. No one has suggested that he was coerced, intimidated or induced to reach that decision. When a suspected criminal, known to have the above mentioned employment and income, does not even suggest to the officers interrogating him that he is an indigent but expressly tells them he does not want counsel present, why must the officers inquire further into his financial condition?

Assuming this defendant was an indigent, within the meaning of G.S. 7A-457, for the purposes of the police interrogation, this statute does not declare that evidence obtained in disregard of it is not admissible. Neither *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694, nor *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081, nor any other decision of the Supreme Court of the United States which has come to my attention holds that state courts may not admit evidence obtained in violation of a state statute. The effect of those cases

is limited to the admissibility of evidence obtained in violation of the defendant's rights guaranteed by the Federal Constitution. No denial of any such constitutional right is involved in this case. Consequently, the admissibility of this defendant's voluntary confession must be determined by the law of this State.

We have held repeatedly that the common law of North Carolina does not forbid the admission of evidence unlawfully obtained but otherwise competent. *State v. Colson,* 274 N.C. 295, 305, 163 S.E. 2d 376, cert. den., 393 U.S. 1087, 89 S.Ct. 876, 21 L.Ed. 2d 780; *State v. Smith,* 251 N.C. 328, 111 S.E. 2d 188; *State v. Vanhoy,* 230 N.C. 162, 52 S.E. 2d 278; *State v. McGee,* 214 N.C. 184, 198 S.E. 616. See also: Stansbury, North Carolina Evidence, 2d Ed., § 121; Wigmore on Evidence, 3d Ed., §§ 2183-2184a; McCormick on Evidence, § 137; 29 AM. JUR. 2d, Evidence, § 408. In *State v. McGee, supra,* this Court refused to extend, to evidence obtained by a search without any warrant at all, a statute declaring incompetent evidence obtained by a search under an illegally issued warrant. Pursuant to the rule so established, we should not interpolate into G.S. 7A-457 a change in the rules so established in this State.

If, however, G.S. 7A-457 should be construed as a legislative declaration that a voluntary confession made under the circumstances of this case is not admissible, the statute should not be given that effect because the statute, itself, is an unconstitutional enactment. The State had no opportunity to raise this question since the lower court ruled in its favor on the question of the admissibility of the confession. In *State v. Bines,* 263 N.C. 48, 138 S.E. 2d 797, this Court said, "The constitutional right to counsel, of course, does not justify forcing counsel upon an accused who wants none." To the same effect are: *State v. Morgan,* 272 N.C. 97, 157 S.E. 2d 606, and *State v. McNeil,* 263 N.C. 260, 139 S.E. 2d 667, and in *State v. Williams,* 276 N.C. 703, 174 S.E. 2d 503, this Court affirmed a death sentence imposed upon a defendant tried without counsel, pursuant to his declaration that he did not want counsel. All of these cases involved a defendant who elected to proceed without counsel through the formal trial of the charge against him. If a defendant may not be denied the right to do that, surely he may not be denied the right to represent himself at a police interrogation prior to the filing of a formal charge against him. Having

elected to do so, voluntarily and with full knowledge of his rights, he should not now be given a new trial because he so elected and confessed to the offense charged.

Furthermore, G.S. 7A-450 et seq. is invalid in that it discriminates between indigent and non-indigent defendants. If this defendant, at the time of the police interrogation, had had in his pocket $10,000 in cash and had been free from debt the majority would apparently hold he had the right to represent himself at the police interrogation and the confession would be held properly admitted. Neither intelligence, education, nor skill in matters of police or courtroom procedure has any relation to the amount of money one has in his pocket or in a bank account. Neither the Legislature nor the courts of this State may make the right to represent one's self without counsel depend upon such a circumstance.

Justices HUSKINS and MOORE join in this dissenting opinion.

D. I. ROBERTS v. WILLIAM N. AND KATE B. REYNOLDS MEMORIAL PARK ALSO KNOWN AS TANGLEWOOD PARK, AND GRADY SHUMATE

No. 69

(Filed 12 April 1972)

1. **Bailment § 6— bailor of vehicle for hire — liability for injury to bailee**

It is the duty of a bailor for hire of a vehicle to see that the vehicle is in good condition, and while he is not an insurer, he is liable to the bailee or a third person for injuries proximately caused by a defect in the vhicle of which he has knowledge or which he could have discovered by reasonable care and inspection.

2. **Rules of Civil Procedure § 50— motion for directed verdict**

A motion for a directed verdict presents the question of whether, as a matter of law, the evidence offered by the plaintiff, when considered in the light most favorable to the plaintiff, is sufficient to be submitted to the jury.

3. **Rules of Civil Procedure § 50— directed verdict against party having burden of proof**

The court may direct a verdict against the party having the burden of proof when there is no evidence in his favor.

4. Pleadings § 36; Rules of Civil Procedure § 50— variance between pleadings and proof

Prior to the adoption of the new Rules of Civil Procedure, a plaintiff's recovery had to be based on allegations in his complaint, and nonsuit was proper when there was a material variance between allegations and proof.

5. Rules of Civil Procedure § 8— sufficiency of complaint

Under the "notice theory of pleading" of the new Rules of Civil Procedure, 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.

6. Rules of Civil Procedure § 84— complaint — specific acts of negligence

While federal Forms 9 and 10 do not require complaints for negligence to contain specific allegations of acts of negligence, such specific allegations are required by G.S. 1A-1, Rule 84, Forms 3 and 4.

7. Rules of Civil Procedure § 15— issues — amendment of pleadings

Under the new Rules of Civil Procedure, the trial must proceed within the issues raised by the pleadings unless the pleadings are amended.

8. Rules of Civil Procedure § 15— amendments to pleadings

Amendments to pleadings are made upon motion on leave of court, by express consent, and by implied consent.

9. Rules of Civil Procedure § 15— evidence outside the pleadings — failure to object — amendment of pleadings by implied consent

Under G.S. 1A-1, Rule 15(b), the pleadings are deemed amended to conform to evidence introduced outside the scope of the pleadings when the evidence is not objected to on the ground that it is not within the issues raised by the pleadings; even when the evidence is objected to on that ground, the court will freely allow amendments to present the merits of the case when the objecting party fails to satisfy the court that he would be prejudiced in the trial on its merits.

10. Rules of Civil Procedure § 15— pleadings — amendment by implied consent

Amendment by implied consent may change the legal theory of the cause of action so long as the opposing party has not been prejudiced in presenting his case; i.e., where he had a fair opportunity to defend his case.

11. Bailment § 6; Pleadings § 33; Rules of Civil Procedure § 15— evidence outside pleadings — failure to object — amendment by implied consent

In an action to recover for injuries sustained when a golf cart plaintiff had rented from defendants rolled backwards down a hill and overturned while being operated by plaintiff, wherein plaintiff alleged that defendants were negligent in failing to warn him of defective brakes on the golf cart, the pleadings were amended by

implied consent to conform to the evidence and broaden the issue of negligence so that the jury could consider whether defendants breached a duty to plaintiff by furnishing a golf cart which they knew had no brakes on it when going backwards, where defendants failed to object to plaintiff's testimony outside the pleadings that the individual defendant told him at the accident scene that defendants' golf carts had no brakes on them while going backwards.

12. Bailment § 3— bailor for hire of vehicle — warnings to bailee

It would be a breach of duty for a bailor for hire of vehicles to fail to warn that the bailed vehicles had "no brakes on them going backwards."

13. Principal and Agent § 8— knowledge of agent — knowledge of principal

A principal is charged with and bound by the knowledge of or notice to his agent received while the agent is acting as such within the scope of his authority and in reference to which his authority extends.

Justice SHARP concurring in result.

Chief Justice BOBBITT joins in concurring opinion.

APPEAL by plaintiff from decision of the Court of Appeals (12 N.C. App. 69) affirming the judgment of *Armstrong, J.*, at 18 November 1970 Session of FORSYTH Superior Court. This case was docketed and argued as No. 107 at the Fall Term 1971.

Plaintiff sued for damages for injuries sustained while operating a golf cart which had been rented from defendants.

Plaintiff alleged that defendant Grady Shumate, the resident golf professional, was the agent, servant and employee of the corporate defendant and that the defendants were negligent in that:

A. That the defendants failed to properly maintain and inspect the said golf carts rented to the plaintiff;

B. That although the defendants knew or should have known that the brakes on the said golf cart were defective, they negligently permitted the same to remain in operation and permitted the same to be rented to the plaintiff.

C. The defendants permitted the golf cart to be rented to and operated by the plaintiff without making proper inspections and proper maintenance of said brakes on said cart.

D. That the defendants left protruding rocks and objects within the fairway, knowing that the same would be used by the plaintiff and others using golf carts and knowing that the same was dangerous to the operation of said golf carts.

E. That the defendants failed and neglected to warn and instruct the plaintiff as to the proper use of said golf cart on steeped terrains and to the proper use of brakes on the golf cart.

F. That the defendants failed and neglected to warn the plaintiff of the defective brakes on said golf cart.

G. That the defendants failed and neglected to detect a defect in said golf cart when said defects could be readily detected had they made an inspection of the same.

Plaintiff's testimony, in substance, tends to show that on 3 May 1967, around 10:00 o'clock a.m., he and Mr. David Copen (Copen) arrived at the Tanglewood Park golf course to play golf. Copen rented a Pargo golf cart from defendants and plaintiff drove the cart. While driving the cart to the first green, he noticed that the brakes seemed to "fade." They did not respond in the same manner as the power brakes on his automobile. He considered returning the cart, but decided not to because he attributed the difference in response to the nature of the vehicle rather than a defect in the braking system. The physical layout of the first nine holes played by plaintiff and Copen did not require a significant use of the brakes. On that portion of the golf course plaintiff usually coasted up to the ball and let the cart stop itself. When the cart stopped he would lock the brakes by depressing the brake pedal. He noticed no defect or difficulty in the brakes while playing the first nine holes.

The 10th hole, which plaintiff and Copen partially played, was in a new section of the golf course. Their approach to the green traversed a steep hill. Copen's second shot landed just below the crest of the hill and plaintiff drove up the incline and stopped near the ball by easing up on the throttle. The cart immediately began to roll backwards down the hill. Plaintiff mashed the brake pedal as hard as he could, but the speed of the cart increased to approximately 25 or 30 miles per hour. The cart struck a rock which sheared the front wheel assembly

from the body of the cart. The cart overturned and threw both occupants onto the ground. It either ran over or fell on plaintiff, thereby causing him to suffer broken ribs and painful bruises. Plaintiff momentarily lost consciousness, and when he regained consciousness he noted that defendant Shumate and several other persons had arrived to offer aid. At that time Shumate made certain statements, which will be discussed later.

On cross-examination plaintiff testified that he had played the Tanglewood course approximately a dozen times prior to the date of the accident, and that he had operated a golf cart on an average of twelve times a year for the previous five years. Plaintiff did not remember seeing operating instructions printed on the dashboard of the cart.

David Copen's testimony substantially corroborated plaintiff's testimony. His direct testimony differed in that he described plaintiff's attempts to stop the backward motion of the golf cart as a "pumping on the brakes." He also stated that he saw no operating instructions on the dashboard of the cart. Neither plaintiff nor Copen denied that the instructions were printed on the dashboard of the cart.

Mr. Howard Hargett, a research and design engineer for the manufacturer of the Pargo Golf carts, testified as an expert witness for plaintiff. He described the braking system on a Pargo golf cart as being comprised of an external, lined band wrapped around a brake drum. The brake system is mechanically operated by a 3/16 inch aircraft cable connecting the band to the brake pedal. Pressure on the pedal wraps the band around the brake drum, causing the cart to stop. He stated that the brakes on these carts are just as effective whether the cart goes backwards or forward. He testified that there are two ways the brakes might fail. A snapping of the cable would result in a sudden failure of the brakes. This snapping would occur following excessive wear such as would result from four or five years' use. A reasonable inspection of the cable would reveal such wear. The other cause of brake failure would be wear on the linings of the brake bands. Such wear would result only from many hours of use, and a visual inspection would reveal such wear. An annual visual inspection of the brake bands for lining wear would be reasonable. He identified the cart used in the illustrative evidence as being a '67 or '68 model. He further

testified that each '67 or '68 Pargo golf cart left the factory with a decal stamped on the dashboard directly in front of the driver's seat. This decal set forth operating instructions for the cart.

Dr. Albert P. Glod testified as to plaintiff's injuries.

At the close of plaintiff's evidence the trial judge allowed defendants' motion for a directed verdict on the ground that plaintiff had failed to show facts on the issue of negligence which would support a verdict against defendants. The Court of Appeals affirmed this judgment, with Judge Hedrick dissenting. This case is before this Court pursuant to G.S. 7A-30(2).

Roberts, Frye & Booth, by Leslie G. Frye; Powell & Powell, by Harrell Powell, Jr., for paintiff appellant.

Deal, Hutchins and Minor, by John M. Minor and William K. Davis for defendant appellees.

BRANCH, Justice.

The sole question presented by this appeal is whether the trial judge erred in granting defendants' motion for a directed verdict.

[1] It is the duty of a bailor for hire to see that the vehicle bailed is in good condition. While he is not an insurer, he is liable for injury to the bailee or a third person for injuries proximately caused by a defect in the vehicle of which he had knowledge or which he could have discovered by reasonable care and inspection. *Hudson v. Drive It Yourself, Inc.*, 236 N.C. 503, 73 S.E. 2d 4.

[2, 3] A motion for a directed verdict presents the question of whether, as a matter of law, the evidence offered by plaintiff, when considered in the light most favorable to the plaintiff, is sufficient to be submitted to the jury. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396. The court may direct a verdict against the party having the burden of proof when there is no evidence in his favor. *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297.

We deem it unnecessary to discuss plaintiff's allegation that defendants left rocks or other objects dangerous to golf carts on the golf course, since he offered no direct evidence which

would support an inference that any objects of a dangerous nature were present on the golf course.

Plaintiff contends that his injury was caused by *defective* brakes on the golf cart and that defendants knew, or by the exercise of reasonable care should have known of the defect. In this connection plaintiff's evidence shows that the brakes on the golf cart could fail in two ways, viz: (1) sudden failure caused by the snapping of the brake cable, and (2) gradual failure of the brakes caused by wear on the linings of the brake bands.

Plaintiff's expert witness testified concerning sudden failure of the brakes as follows: "In order to sever this cable or cause this cable to break it is going to take a lot. There would be practically no way to break it, in normal driving around, suddenly, unless the cable, I'd say, is four to five years old and worn a lot, you can't break it, not with a foot." Plaintiff's evidence showed that the golf cart in which plaintiff was injured was not more than one year old.

As to the gradual failure of the brakes, plaintiff's evidence showed that a visual inspection would reveal the wear on the linings of the brake bands, and that an annual inspection would be reasonable.

Plaintiff's evidence failed to show that the cable snapped or that the linings on the brake bands were worn.

We quote the following excerpts from plaintiff's testimony:

> Q. What, if anything, did Mr. Shumate say to you?
>
> MR. MINOR: Objection.
>
> THE COURT: Well, I don't know what he is going to say. I guess at this point I will admit it as against Shumate and not the others. I don't know what he is going to say. Sustained as to, well, as to the corporate defendant, I reckon I will say.
>
> . . . .
>
> . . . Then the park manager came up—I assume that he was the park manager; I never did see the gentleman because of the way that I was lying—and Mr. Shumate told him—

MR. MINOR: Well, objection now, if the Court please.

THE COURT: Well—

MR. MINOR: He is talking about someone he doesn't know about.

THE COURT: Sustained again as to the corporate defendant, Tanglewood Park, Go ahead.

. . . Later Mr. Shumate came back to me and he says, "If you are familiar with these carts, you should know that they have no brakes on them going backwards." I was still lying on the ground at that time, sir.

MR. POWELL: I submit that statement is competent against the corporate defendant as well as Mr. Shumate.

THE COURT: Well, of course, he has got an exception to all this. I will let that in.

Plaintiff strongly contends that this statement was sufficient evidence of defendants' negligence to carry the case to the jury.

Plaintiff failed to allege that defendants rented the golf cart knowing that it had no brakes when going backward. We must therefore decide the effect of this variance in the allegations and proof.

[4] Prior to the adoption of the new Rules of Civil Procedure it was well recognized that a plaintiff's recovery had to be based on allegations in his complaint, and that when there was a material variance between allegations and proof, nonsuit was proper. *Conger v. Ins. Co.*, 266 N.C. 496, 146 S.E. 2d 462; *Andrews v. Bruton,* 242 N.C. 93, 86 S.E. 2d 786. No issues were submitted to the jury which were not raised by the pleadings and supported by competent evidence. *Bowling v. Bowling,* 252 N.C. 527, 114 S.E. 2d 228. A motion for nonsuit is no longer proper in a civil action. In an action tried by the court without a jury, a defendant may move for *a dismissal* on the ground that upon the facts and the law plaintiff has shown no right to relief. Ch. 1A-1, Rule 41(b). When a case is tried by a jury, as here, a defendant may move for a *directed verdict* to test the sufficiency of the evidence to go to the jury. Ch. 1A-1, Rule 50(a). See *Kelly v. Harvester Co., supra.*

[5] By enactment of G.S. 1A-1, the legislature adopted the "notice theory of pleading." Under "notice pleading" a statement of claim is adequate if it gives sufficient notice of the claim asserted "to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata,* and to show the type of case brought. *Sutton v. Duke,* 277 N.C. 94, 176 S.E. 2d 161.

[6] The North Carolina pleadings and forms differ from the federal pleadings and forms in that federal Forms 9 and 10, complaints for negligence, do not require specific allegations of acts of negligence. Under Rule 84 of G.S. 1A-1, Forms 3 and 4 do require such specific allegations. Sizemore, General Scope and Philosophy of the New Rules, 5 Wake Forest Intramural Law Review 1.

[7, 8] Under the new Rules the trial must proceed within the issues raised by the broad pleadings unless the pleadings are amended. The new Rules achieve their purpose of insuring a speedy trial on the merits of a case by providing for and encouraging liberal amendments to conform pleadings and evidence under Rule 15(a), by pretrial order under Rule 16, during and after reception of evidence under Rule 15(b), and after entry of judgment under Rules 15(b), 59 and 60. Such amendments are made upon motion and with leave of court, by express consent, and by implied consent.

In instant case, since plaintiff failed to amend by leave of court or pretrial order and there was no amendment by express consent, we need only consider whether the pleadings were amended by implied consent.

The doctrine of implied consent is based upon the provisions of Rule 15(b), which we quote:

> (b) Amendments to conform to the evidence.—When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within

the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Dean Dickson Phillips of the University of North Carolina Law School, in McIntosh, N. C. Practice and Procedure, Vol. 1, Supp. 1970, § 970.80, considered Rule 15(b) as it affects conforming amendments to pleadings after offer of evidence. He there, in part, stated:

> The most significant feature of Rule 15's approach to amendments to conform pleadings to proof already adduced is its abandonment, both in name and practice, of the highly technical code doctrine of "variance." Instead, Rule 15(b) approaches the problem from a completely functional standpoint. Two situations involving proof outside the scope of the pleadings are posited. In the first, no objection is made upon the introduction of evidence that it is outside the pleadings. In this situation, the Rule provides that "when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." *This is the doctrine of "litigation by consent." When this occurs, an actual conforming amendment may be made on motion either before or after judgment, but it is not essential—the pleadings are by the Rule deemed amended.* A party who fails to object to evidence is of course initially presumed to have given "implied consent" by silence. He can avoid the effect only by satisfying the court that under the circumstances, his consent to having certain issues considered by the trier of fact should not be implied from his failure to object to particular evidence." (Emphasis ours.)

In the case of *Securities and Exchange Commission v. Rapp*, (2d Cir., 1962), 304 F. 2d 786, the United States Court of Appeals considered their similar Rule 15(b) and, *inter alia*, stated:

> In the district court Judge Murphy gave judgment for defendants dismissing the complaint. The principal ground of decision appears to have been that the pleadings did not conform to the proof; he denied a motion, made at the close of argument, to amend the pleadings so to conform. This ruling was clearly in error. F. R. 15(b) provides that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." This is mandatory, not merely permissive. The rule then provides for free or delayed amendment, but states that "failure so to amend does not affect the result of the trial of these issues." *Indeed, formal amendment is needed only when evidence is objected to at trial as not within the scope of the pleadings.* . . . (Emphasis ours.)

Accord: *Tillman v. National City Bank of New York,* (2d Cir., 1941), 118 F. 2d 631; *Joyce v. L. P. Steuart, Inc.,* (D.C. Cir., 1955), 227 F. 2d 407; *Gallon v. Lloyd-Thomas Co.,* (8th Cir., 1959), 264 F. 2d 821. See also 3 Moore's Federal Practice, 2d Ed., § 15.13(2), and cases there cited.

[9] The thrust of this rule seems to destroy the former strict code doctrine of variance by allowing issues to be raised by liberal amendments to pleadings and, in some cases, by the evidence. Under 15(b) the rule of "litigation by consent" is applied when *no objection is made on the specific ground that the evidence offered is not within the issues raised by the pleadings.* In such case the statutory rule, in effect, amends the pleadings to conform to the evidence and allows any issue raised by the evidence to go to the jury. *Even when the evidence is objected to on the ground that it is not within the issues raised by the pleadings,* the court will freely allow amendments to present the merits of the case when the objecting party fails to satisfy the court that he would be prejudiced in the trial on its merits. The far-reaching effect of this statutory rule is emphasized by the burden placed on the objecting party to specify the grounds of objection and to satisfy the court that he will be prejudiced by the admission of the evidence or by litigation of the issues raised by the evidence. The objecting party must meet these requirements in order to avoid "litigation by consent" or allowance of motion to amend.

[10] Further, it is apparent that the effect of this rule is to allow amendment by implied consent to change the legal theory of the cause of action so long as the opposing party has not been prejudiced in presenting his case, i.e., where he had a fair opportunity to defend his case. In this connection, we feel compelled to note that the better practice dictates that even where pleadings are deemed amended under the theory of "litigation by consent," the party receiving the benefit of the rule should move for leave of court to amend, so that the pleadings will actually reflect the theory of recovery.

In instant case defendants' counsel did not object to Shumate's alleged statement on the ground that it was outside the pleadings. The record reveals that the legal effect of the evidence was argued by counsel for defendants without any mention of the broadened issue raised by the evidence or without any contention that defendants were unprepared to litigate the broadened issue because of unfair surprise. Defendants offered no evidence tending to satisfy the court that they would be unduly prejudiced by the admission of the alleged statement and the issue thereby raised.

[11] Thus the statement allegedly made by defendant Shumate, in effect amended the pleadings to conform to the evidence and broadened the issue of negligence so that the jury could consider whether defendants breached a duty owed to plaintiff by furnishing a golf cart which they knew had no brakes on it when going backwards.

Further, plaintiff's allegations that defendants failed to warn of defective brakes and that defendants failed to instruct as to the proper use of the cart on steep terrain and the proper use of the brakes on the golf cart, at least negated any inference of unfair surprise as to the evidence of complete absence of brakes when the cart was rolling backward.

[12] If it be a breach of duty for a bailor for hire to fail to warn of a known *defect* in the brakes of the bailed vehicle, it certainly follows that it would be a breach of duty for him to fail to warn that the bailed vehicle had "no brakes on them going backwards."

Plaintiff's complaint alleged:

4. That the plaintiff is informed and believes that the defendant, Tanglewood Park and the defendant, Grady

Shumate, who is pro, agent, servant and employee of Tanglewood Park, share in the rental income of the use of said golf carts. That the plaintiff is further informed that the said golf carts are owned and maintained by Tanglewood Park under the direct supervision of the defendant, Grady Shumate, its agent, servant and employee.

The answer of defendants to Paragraph 4 is as follows:

Denied, except it is admitted that defendant Park and defendant Shumate share in rental fees on golf carts; that said golf carts are owned and maintained by defendant Park and that the maintenance of said carts is under the supervision of defendant Shumate; and that on May 3, 1967, and for some time prior to that date, defendant Shumate was an employee of the defendant Park and was a professional golfer.

[13] The allegations in the complaint and the admissions in the answer established the relationship of principal and agent between defendant Shumate and the corporate defendant at the times plaintiff complained of. A principal is chargeable with and bound by the knowledge of or notice to his agent, received while the agent is acting as such within the scope of his authority and in reference to which his authority extends. *Norburn v. Mackie,* 262 N.C. 16, 136 S.E. 2d 279. Thus the corporate defendant was charged with and bound by its agent's knowledge that the golf cart had no brakes when rolling backward.

We conclude that the evidence offered by plaintiff, when considered in the light most favorable to the plaintiff, was sufficient to have a jury pass on it.

The decision of the Court of Appeals is

Reversed.

Justice SHARP concurring in result:

I am in accord with the majority's decision that plaintiff's evidence entitled him to go to the jury on the issue of defendants' negligence and that the trial judge erred in directing a verdict against him. Further, I do not disagree with the majority's interpretation of Rule 15(b). My thesis is that Rule 15(b) is

irrelevant to decision in this case. In my view, under Rule 8(a)(1) and Rule 84, Forms 3 and 4, plaintiff's allegations are sufficient to permit the introduction of testimony that the golf cart had no brake to check its backward movement. *Sutton v. Duke,* 277 N.C. 94, 176 S.E. 2d 161.

In addition to the allegations (quoted verbatim at the beginning of the majority opinion) that defendants furnished plaintiff a golf cart which they knew, or should have known, had *defective* brakes, the complaint contains the following: Plaintiff and his partner "traveled up a hill and approached the crest of a hill and allowed the said golf cart to roll to a stop . . . and his partner began to get his golf clubs when the cart began rolling backward with the plaintiff applying the brakes, all to no effect. That the cart continued to gain speed rolling backward and ran over a rock in the fairway and sheered off a front wheel, causing the cart to overturn. . . . "

Testimony, admitted without any objection, tended to show defendant Shumate told plaintiff that defendants' golf carts had "no brakes on them going backwards."

An allegation that the brakes were defective is surely broad enough to support evidence that they worked in one direction only. Brakes which do not stop both forward and backward motions are defective. Furthermore, plaintiff's additional allegation that when the cart began rolling backward he applied the brakes to no effect is clearly sufficient to support the evidence of Shumate's declaration. Thus, there is no variance between allegation and proof. In short, this is not a case in which it is necessary to resort to Rule 15(b) to insure the decision of a case on its merits. Patently, a complaint which is already sufficient has no need of amendment either by the express permission of the court or by operation of law.

It is also noted that defendants moved for a directed verdict "on the grounds that the evidence by its greater weight failed to prove any negligence and would leave this in the field of speculation and conjecture," and that the court allowed the motion on the ground that the *evidence* of negligence was insufficient to support a verdict against defendants on that issue. The trial court's ruling was not based upon a variance between allegation and proof.

Chief Justice BOBBITT joins in this concurring opinion.

STATE OF NORTH CAROLINA v. DONNIE L. FORD, ALIAS RONALD FORD

No. 50

(Filed 12 April 1972)

1. **Criminal Law § 161— absence of assignments of error — review of record proper**

Although the record contains no exception or assignment of error, defendant's appeal presents the question whether error appears on the face of the record proper.

2. **Criminal Law § 157— record proper**

Ordinarily, in criminal cases the record proper consists of (1) the organization of the court, (2) the information, warrant or indictment, (3) the arraignment and plea, (4) the verdict, and (5) the judgment.

3. **Criminal Law §§ 23, 25— plea of guilty — plea of nolo contendere — voluntariness — showing in record**

A plea of guilty or a plea of *nolo contendere* may not be considered valid unless it appears affirmatively that it was entered voluntarily and understandingly.

4. **Criminal Law § 25— plea of nolo contendere — voluntariness — consideration of evidence presented**

Whether technically a part of the record proper, evidence as to what occurred when defendant was arraigned and entered a plea of *nolo contendere* will be considered by the appellate court in determining if the plea was entered voluntarily and understandingly.

5. **Criminal Law § 25— plea of nolo contendere — insufficiency of court's inquiries**

Although defendant's counsel stated that he had explained to defendant the effect of a plea of *nolo contendere,* and defendant stated that he understood the plea of *nolo contendere* and that it was entered freely, voluntarily and understandingly, defendant's plea of *nolo contendere* to a charge of felonious escape should not have been accepted until the nature and consequences of the plea had been explained to defendant *in open court* and evidence to the effect that the plea was entered voluntarily and understandingly had been developed fully and a finding to that effect made by the court.

6. **Criminal Law § 25— plea of nolo contendere — deficiencies in court's inquiries — defendant's testimony**

Although inquiries addressed by the court to defendant and to his counsel fell short of approved practice with reference to the acceptance of pleas of guilty or of *nolo contendere,* deficiencies in the court's inquiries and in defendant's responses were cured by defendant's testimony on the occasion of his arraignment and plea which discloses affirmatively that he has no defense to the crime of

felonious escape for which he was indicted, and when the entire record is considered, it appears that defendant's plea of *nolo contendere* was entered voluntarily and understandingly.

APPEAL by defendant from the decision of the Court of Appeals reported in 13 N.C. App. 34, 185 S.E. 2d 328, which found "No error" in the "trial" before *Falls, J.*, at the August 9, 1971 Session of FORSYTH Superior Court.

Defendant was arraigned on a bill of indictment which charged that on January 9, 1971, while he was lawfully confined in the North Carolina Department of Correction in the custody of Captain T. D. Hill at Stokes Subsidiary #5546, under sentences imposed for breaking and entering and escape at the January 12, 1968 and February 7, 1969 Sessions of the Superior Court of Forsyth County, defendant did unlawfully, wilfully and feloniously escape while assigned to work at Forsyth Memorial Laundry Room, Winston-Salem, N. C.

Defendant, an indigent, through his court-appointed counsel, Curtiss Todd, Esq., tendered a plea of *nolo contendere*. In response to the court's inquiry, Mr. Todd stated that he had explained to defendant "the effect of a plea of nolo contendere." In response to inquiries which the court addressed directly to him, defendant stated in substance that he understood the meaning of a plea of *nolo contendere;* that nobody had promised him anything in exchange for this plea; and that he entered the plea freely, voluntarily and understandingly. Thereupon, the court heard the testimony of Correctional Officer Zeb Crews and the testimony of defendant.

The judgment signed by Judge Falls recites that defendant had "entered a plea of nolo contendere to the offense of FELONIOUS ESCAPE, being the second offense, and of the grade of felony. . . ." Upon this plea, the judgment imposed a prison sentence of two years, to commence upon expiration of the sentences defendant was then serving. Defendant appealed.

The record on appeal contains no exceptions or assignments of error. In the Court of Appeals, an opinion was written by each of the three members of the hearing panel. Reference is made to the opinion of Judge Hedrick, to the concurring opinion of Judge Graham, and to the dissenting opinion of Chief Judge Mallard.

Defendant appeals to the Supreme Court of right under G.S. 7A-30(2).

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

Curtiss Todd for defendant appellant.

BOBBITT, Chief Justice.

The question is whether the plea of *nolo contendere* and the judgment entered thereon should be vacated and the cause remanded to the superior court to permit defendant to replead to the bill of indictment. If not, the decision of the majority of the panel of the Court of Appeals must be affirmed.

In *State v. Woody,* 271 N.C. 544, 157 S.E. 2d 108 (1967), this Court affirmed judgments based on pleas of guilty entered in behalf of defendant by his counsel. On appeal, defendant assigned as error the acceptance of the pleas "without ascertaining whether or not the defendant personally wished to enter" them. An excerpt from the opinion of Chief Justice Parker is quoted below:

"[D]ue to the ever-increasing burden placed upon this Court to rule upon the countless petitions for review of the constitutionality of criminal convictions, it would be well, though not mandatory, for every trial judge in this State to interrogate, as most of our trial judges do, every defendant who enters a plea of guilty in order to be sure that he has freely, voluntarily and intelligently consented to and authorized the entry of such plea. However, we wish to make it clear that any failure on the part of the trial judge to follow this recommended procedure in cases of this nature would not be fatal to the conviction."

G.S. 7A-457(b), as amended by Chapter 1243, Session Laws of 1971, provides: *"If an indigent person waives counsel* as provided in subsection (a), and pleads guilty to any offense, the court shall inform him of the nature of the offense and the possible consequences of his plea, and as a condition of accepting the plea of guilty the court shall examine the person and shall ascertain that the plea was freely, understandably [*sic*] and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency." (Our italics.) In the present case, defendant was represented by

counsel who tendered the plea in open court in defendant's presence and in his behalf.

When a defendant *who is represented by counsel* tenders a plea of guilty or a plea of *nolo contendere,* the law as declared in *State v. Woody, supra,* has not been modified by any subsequent decision of this Court or by any North Carolina statute. However, our law has been affected by the decision of the Supreme Court of the United States in *Boykin v. Alabama,* 395 U.S. 238, 23 L.Ed. 2d 274, 89 S.Ct. 1709 (1969).

Since *Boykin* was decided, and based thereon, panels of the North Carolina Court of Appeals have held consistently that, notwithstanding a defendant who is represented by counsel enters a plea of guilty or a plea of *nolo contendere,* it must appear affirmatively in the record that he did so voluntarily and understandingly. *State v. Harris,* 10 N.C. App. 553, 180 S.E. 2d 29 (1971); *State v. Treadway,* 12 N.C. App. 167, 182 S.E. 2d 638 (1971); *State v. Atkins,* 12 N.C. App. 169, 182 S.E. 2d 595 (1971). In each of these cases the defendant's plea and the judgment entered thereon were vacated and the case was remanded to the superior court to permit the defendant to replead to the bill of indictment. In *Harris,* Judge Brock said: "The failure of the record in this case to affirmatively show that defendant was aware of the consequences of his pleas of guilty and to affirmatively show that his pleas were voluntarily and understandingly entered entitles the defendant to have his pleas of guilty vacated and entitles him to replead to the charges." *Supra* at 561, 180 S.E. 2d at 34.

In *Boykin v. State,* 207 So. 2d 412 (Ala. 1968), the defendant, represented by court-appointed counsel, entered a plea of guilty to each of five indictments for common-law robbery. It was provided by statute that "[a]ny person who is convicted of robbery shall be punished, at the discretion of the jury, by death, or by imprisonment in the penitentiary for not less than ten years." Alabama Code, Title 14, § 415 (1959). It was also provided by statute: "If he pleads guilty, . . . the court must cause the punishment to be determined by a jury. . . ." Alabama Code, Title 15, § 277 (1959). In Case No. 15520, the jury returned the following verdict: "We, the Jury, find the defendant guilty of Robbery, as charged in the indictment, on his plea of guilty, and further find that he shall suffer death by electrocution." On appeal, the judgment was affirmed by the

Supreme Court of Alabama. (Note: Although the appeal relates specifically to No. 15520 and to the jury's verdict therein, the dissenting opinion states that "[b]y agreement, all five cases were presented to the same jury.") Three of the seven Justices of the Supreme Court of Alabama dissented on the ground that "the record does not disclose that the defendant voluntarily and understandingly entered his pleas of guilty." The Supreme Court of the United States granted *certiorari.* 393 U.S. 820, 21 L.Ed. 2d 93, 89 S.Ct. 200 (1968).

The Supreme Court of the United States reversed. This excerpt from the opinion of Mr. Justice Douglas indicates the basis of decision: "Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. *Malloy v. Hogan,* 378 U.S. 1. Second, is the right to trial by jury. *Duncan v. Louisiana,* 391 U.S. 145. Third, is the right to confront one's accusers. *Pointer v. Texas,* 380 U.S. 400. We cannot presume a waiver of these three important federal rights from a silent record. What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." *Boykin v. Alabama,* 395 U.S. 238, 243-44, 23 L.Ed. 2d 274, 279-80, 89 S.Ct. 1709, 1712. Decision was based on the ground that " 'the record does not disclose that the defendant voluntarily and understandingly entered his pleas of guilty.' " *Id.* at 244, 23 L.Ed. 2d at 280, 89 S.Ct. at 1713 (quoting the dissent in *Boykin v. State, supra).*

A dissenting opinion by Mr. Justice Harlan, with whom Mr. Justice Black joined, stated that "[t]he Court thus in effect fastens upon the States, as a matter of federal constitutional law, the rigid prophylactic requirements of Rule 11 of the Federal Rules of Criminal Procedure." Although Rule 11 is not mentioned in Mr. Justice Douglas's opinion for the Court, there is substantial justification for Mr. Justice Harlan's statement. See, "Criminal Procedure—Requirements for Acceptance of Guilty Pleas," 48 N.C.L. Rev. 352 (1970).

Rule 11 of the Federal Rules of Criminal Procedure, 18 U.S.C. Appendix (1971), provides: "A defendant may plead

not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

In *Boykin,* Mr. Justice Douglas quotes with approval from *McCarthy v. United States,* 394 U.S. 459, 22 L.Ed. 2d 418, 89 S.Ct. 1166 (1969), a decision based solely on the Court's interpretation of Rule 11. In *McCarthy,* the Court held that, in a criminal prosecution in the United States District Court, the trial judge could not accept a plea of guilty unless, in addition to all other requirements, he determined that there was a factual basis for the plea.

Boykin involved death sentences. Nothing in the opinions of the Supreme Court of Alabama and of the Supreme Court of the United States indicates that the trial judge made *any* inquiry of the defendant or of his counsel with reference to whether the pleas of guilty were voluntarily and understandingly entered. Nothing in the opinions of the Court of Appeals in *Harris, Treadway* and *Atkins* indicates that the trial judge made *any* inquiry of the defendant or of his counsel with reference to whether the pleas of guilty were voluntarily and understandingly entered. The question before us is whether the present record discloses sufficiently that defendant's plea of *nolo contendere* was entered voluntarily and understandingly.

[1-4] Although the record contains no exception or assignment of error, defendant's appeal presents the question whether error appears on the face of the record proper. *State v. Roberts,* 279 N.C. 500, 183 S.E. 2d 647 (1971). "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." *State v. Tinsley,* 279 N.C. 482, 183 S.E. 2d 669 (1971). *Boykin* requires us to hold that a plea of guilty or a plea of *nolo contendere* may not be considered valid unless it

appears affirmatively that it was entered voluntarily and understandingly. Hence, a plea of guilty or of *nolo contendere,* unaccompanied by evidence that the plea was entered voluntarily and understandingly, and a judgment entered thereon, must be vacated as in *Harris, Treadway* and *Atkins.* If the plea is sustained, it must appear affirmatively that it was entered voluntarily and understandingly. Thus, whether technically a part of the record proper, evidence as to what occurred when defendant was arraigned and entered his plea must be considered if a judgment based upon the plea is to be sustained. This evidence appears in the agreed statement of case on appeal.

[5] It must be conceded that the inquiries addressed by the court to defendant's counsel and those addressed directly to defendant fall short of approved practice with reference to the acceptance of pleas of guilty or of *nolo contendere.* True, defendant's counsel stated that he had explained to defendant the effect of the plea of *nolo contendere;* and defendant stated that he understood the plea of *nolo contendere* and that it was entered freely, voluntarily and understandingly. Even so, the nature and consequences of the plea should have been explained to defendant *in open court.* Evidence to the effect that the plea was entered voluntarily and understandingly should have been developed fully and a finding to that effect made in order to safeguard a defendant's rights, to protect his counsel from charges of unauthorized action, and generally to protect the plea and judgment from collateral attack in State post-conviction and federal *habeas corpus* proceedings. See Annotation, "Validity of Guilty Pleas," 25 L.Ed. 2d 1025 (1971); also, "Standards Relating to Pleas of Guilty," American Bar Association Project on Minimum Standards for Criminal Justice (Approved Draft, 1968); also, Annotation, "Courts duty to advise or admonish accused as to consequences of plea of guilty, or determine that he is advised thereof." 97 A.L.R. 2d 549 (1964).

"A plea of nolo contendere . . . is tantamount to a plea of guilty for purposes of the particular criminal action in which it is tendered and accepted. The presiding judge acquires full power to pronounce judgment against the defendant for the crime charged in the indictment." *State v. Norman,* 276 N.C. 75, 79, 170 S.E. 2d 923, 926 (1969). The nature and consequences of the plea of *nolo contendere* are generally understood by those who have acquired experience as defendants in criminal

actions and as prisoners in our penal system. Defendant's counsel stated that he had explained to defendant the effect of a plea of *nolo contendere* and defendant stated that he understood "what a plea of nolo contendere is."

[6] In our view, the deficiency in the court's inquiries and in defendant's responses is cured by defendant's testimony on the occasion of his arraignment and plea. This testimony of defendant discloses affirmatively that he has no defense to the crime for which he was indicted.

The indictment is based on G.S. 148-45(a) which in part provides: "Any prisoner convicted of escaping or attempting to escape from the State prison system who at any time subsequent to such conviction escapes or attempts to escape therefrom shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than six months nor more than three years." Thus, upon a valid plea of *nolo contendere* to an indictment properly charging a second offense of escape, the statute provides that punishment shall be "by imprisonment for not less than six months nor more than three years."

The testimony of Officer Crews tends to show that defendant had been convicted for breaking and entering and that he had escaped once before. Defendant testified he had been convicted on January 12, 1968, for breaking and entering and sentenced to a prison term of "four to seven years." According to the testimony of Officer Crews and of defendant, defendant was an escapee from January 9, 1971, until officers "picked him up" in July, 1971.

Defendant testified that on January 9, 1971, he and four other prisoners were permitted to attend a movie and "to mingle" with other patrons; that he took a seat downstairs; that at 5:30, the time they were supposed to leave, he went back upstairs where "the volunteer" was supposed to be, but could not find either the volunteer or any of the prisoners; that he discovered that the car in which they had come to the movie was gone; that he "thought about calling in," but didn't do so "because one of the officers of the other units had already said if anybody messed up he was going to see that he would get whatever he could for him"; and that "[f]rom January 9th until the time they picked [him] up in July, [he] knew [he] had escaped but not in every sense of the word."

G.S. 148-45(b) provides in express terms that the conduct of the defendant, as related by him, constitutes an escape within the meaning of G.S. 148-45(a).

Neither defendant nor his counsel has ever contended that defendant did not understand the full significance of his plea of *nolo contendere* or that the plea was entered otherwise than voluntarily and understandingly. The present contention, namely, the asserted inadequacy of the record to show that the plea was entered voluntarily and understandingly, was made for the first time upon defendant's appeal to this Court from the Court of Appeals. The brief filed by defendant in the Court of Appeals referred to defendant's conduct as "in the nature of a breach of trust" rather than an escape, and made the contention that the alleged escape by defendant "was surrounded by many extenuating circumstances and that the sentence was more severe than the evidence warranted." It may be that defendant was under the erroneous impression that the two-year sentence he received was the maximum.

When the entire record is considered, we think it appears that defendant's plea of *nolo contendere* was entered voluntarily and understandingly. Hence, the *decision* of the Court of Appeals is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. RONALD LEE MILLER

No. 24

(Filed 12 April 1972)

1. **Burglary § 5— first degree burglary — sufficiency of evidence**

The State's evidence was sufficient to support a jury finding that defendant feloniously and burglariously broke into and entered an occupied home with intent to commit the felony of rape.

2. **Criminal Law § 66— pretrial photographic identification — in-court identification**

In a prosecution for first degree burglary, there was clear and convincing evidence to support the trial court's findings (1) that a pretrial photographic procedure at which the prosecuting witness identified defendant's photograph from a group of twelve photographs exhibited to her by a police officer at her place of employment was

not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification, and (2) that the prosecuting witness' identification testimony at the trial was based solely on her observations of the person in her room on the night of the crime; consequently, the trial court did not err in the admission of the prosecuting witness' in-court identification testimony and the police officer's testimony as to the photographic identification.

3. **Criminal Law § 86— cross-examination — prior convictions**

For the purpose of impeachment, a witness, including the defendant in a criminal case, is subject to cross-examination as to his convictions for crime.

4. **Criminal Law § 86— juvenile defendant — cross-examination — prior adjudications of guilt**

For purposes of impeachment, it is permissible to cross-examine a juvenile defendant with reference to his prior convictions or adjudications of guilt of prior conduct which, if committed by an adult, would have constituted a conviction of crime.

APPEAL by defendant under G.S. 7A-27(a) from *Kivett, J.*, August 23, 1971 Criminal Session of FORSYTH Superior Court.

Defendant was tried on a bill of indictment which charged that, on December 20, 1971, "about the hour of twelve in the night of the same day," defendant "unlawfully, feloniously and burglariously did break and enter the dwelling house of Geraldine Styles, to wit; located at 45-B Columbia Terrace, Winston-Salem, North Carolina, with the felonious intent to commit the crime of rape in the said dwelling house, upon the said Geraldine Styles, a female person, then and there actually occupying the said dwelling house at the said time. . . ."

The State offered the testimony of Geraldine Styles; Shirley Smith, Mrs. Styles's neighbor; Officer R. T. Masten; Officer W. R. Burke; and (in rebuttal) Wade Witherspoon. Defendant testified but offered no other evidence.

The only conflict in the evidence relates to the identity of the person who committed the crime charged in the indictment.

Uncontradicted evidence tends to show the facts narrated below.

Mrs. Geraldine Styles, age 26, lived in a one-story apartment at 45B Columbia Terrace, Winston-Salem, N.C. It consisted of four rooms, two bedrooms to the right as you enter the front door and a living room and kitchen to the left. Mrs.

Styles occupied the front bedroom. Her two children, ages 6 and 4, occupied the back bedroom.

On Sunday night, December 20, 1970, between nine-thirty and ten o'clock, Mrs. Styles locked the front and back doors of her apartment and went to bed. She closed and latched the kitchen window, which was near the back door. A hole in the glass right above the latch had been made on the preceding Friday when she had left her key in the house and couldn't get another key because the Columbia Terrace office was closed. This enabled her to unlatch and raise the window and open the door by reaching in from the outside.

When Mrs. Styles went to bed, Gary, her six-year-old son, was in the living room watching television. Mrs. Styles was very tired and went to sleep. Soon thereafter she was awakened by Gary who asked whether she wanted to keep the lights on, the only lights being the television light and a "revolving light" on the Christmas tree. As directed by Mrs. Styles, Gary turned off these lights. Mrs. Styles went back to sleep.

About 10:30 p.m., Mrs. Styles was awakened by the light from a flashlight. A young man, "real young," was standing "right off from the door in front of [her] night table." The intruder had a knife in one hand and looked at her but said nothing. She was "so stiff and so scared that [she] couldn't say anything." When she raised up, as if to get up, the intruder stepped forward and said, "Don't holler or I'll kill you." The knife in his hand, identified as State's Exhibit No. 2, "looked sort of like a dagger but it was a long one." The flashlight, identified as State's Exhibit No. 3, had "red plastic like" around both ends and "a metal part in between." When Mrs. Styles asked what he wanted, the intruder stated in vulgar phrase that he was going to have sexual intercourse with her. At that time Gary came up the hall. The intruder told Mrs. Styles to "tell him to go back to bed," and she did so.

After Gary went back to his bedroom, the intruder laid the flashlight on the table beside the bed with the light shining toward the bed. Mrs. Styles's clothing consisted of panties and a gown. The intruder went over to the bed, pulled the cover off of her and pulled off her panties. Getting on the bed with her, he tried "to place his parts in [her] parts." When she said, "There's my son coming up the hall again," the intruder got

out of bed and went to the door. He shined the flashlight "down the hall" and said, "He is not out there." He put the flashlight back on the little table near the door and came back to the bed, still holding the knife in his right hand. The intruder then got in bed, on top of her, and "placed his parts in [hers]." She "just laid there stiff." Upon her refusal to take off her gown, he got up, pulled off her gown and dropped it on the floor. Thereupon Mrs. Styles told him he didn't know "how to do it," and suggested that he pull his pants down, lie on the bed and let her get on top of him. Apparently assured of her cooperation, he complied with her suggestion. In arranging this maneuver, Mrs. Styles managed to get one foot on the floor and a grip on the bedcovers. She then leaped from the bed, jerked the bedcovers over his face, and ran, naked and screaming, out of the room, out the front door and into the apartment of Mrs. Smith.

Mrs. Shirley Smith lived in the adjoining apartment, at 45A Columbia Terrace. On the night of December 20, 1970, after 10:00 p.m., she heard Mrs. Styles screaming and calling upon Mrs. Smith to open her front door. When Mrs. Smith opened the door, Mrs. Styles, who was nude, ran into the Smith apartment screaming, "There's a man in the house." Mrs. Smith called the police.

On the night of December 20, 1970, Officer Masten, who was on duty with Officer Hogan, received a call from the police radio room to investigate a disturbance at 45A Columbia Terrace. They received the call a minute or so after eleven o'clock and arrived at 45A Columbia Terrace ten or fifteen minutes after eleven. There they saw Mrs. Geraldine Styles. She was "dressed in a gown" and "appeared excited, hysterical." After hearing her account of what had occurred, they went into the Styles apartment, 45B Columbia Terrace.

In Mrs. Styles's bedroom, the officers found a knife (State's Exhibit No. 2), a flashlight (State's Exhibit No. 3), and a key ring with two keys and a tag on it (State's Exhibit No. 4). The knife was "a black leather handle military K-bar knife with about a seven-inch blade." It was on the floor near Mrs. Styles's bed and "between her door and her bed." The key ring was on the floor near the knife. One of the keys was "a Sargent key." The tag had the name "Peggy" on it. The flashlight was a two-cell "Ash-Flash" brand flashlight with plastic

at both ends. The flashlight was on the night table beside Mrs. Styles's bed. The knife, flashlight and key ring and attachments were placed in "Property Control at the Police Department." The officers also found on the floor in Mrs. Styles's bedroom a gown and panties.

The kitchen (back) door was open and the window was "partially opened." There was a hole in a section of the window "right at the latch" large enough for the officer to put his hand through. He saw no loose glass on the floor in the vicinity of the window. Mrs. Styles had previously stated that she had closed the window when she went to bed and that the glass had been broken on a previous occasion. Masten also related statements made to him by Mrs. Styles with reference to locking up the apartment before going to bed, the actions and words and appearance of the intruder, and the circumstances under which she broke away from him and fled to her neighbor's apartment. These included a statement to the effect that she had not known defendant even by sight but "she felt she could recognize [him] if she saw him again."

Detective Sergeant Burke, in his investigation of the alleged burglary, got State's Exhibit No. 4, the "two keys and a tag with 'Peggy' on it," out of "Property Control." He found that the keys would not work the doors at Mrs. Styles's apartment. Later, in checking a board at the Columbia Terrace office which contained an extra key to each apartment in the project, he found a key to Apartment 47C which was similar to one of the keys on State's Exhibit No. 4. He went to 47C and found the key on State's Exhibit No. 4 "worked the door" at 47C. He then obtained information that defendant, his mother and his sister, Peggy Miller Williams, were living in 47C on December 20, 1970.

On two occasions Sgt. Burke asked Mrs. Styles to come to the police station "to look at pictures." On each of these occasions she viewed approximately "two hundred pictures" but did not make an identification. Later, on February 9, 1971, Sgt. Burke went to Western Electric with a group of twelve pictures and showed these pictures to Mrs. Styles.

The foregoing evidence was admitted without objection. The appeal presents no question relating to its competency.

Over objection, Mrs. Styles testified positively that defendant was the intruder in her home on the night of December 20,

1970. She testified she had observed him from time to time over a period of twenty to twenty-five minutes when the light shined on his face during her encounters with him. She then observed that he had "a stocking on his head," wore "some type of sweater," and was wearing tennis shoes. What she could see best was "the front of his face." His face and his lips were thin and he had small or medium ears. (Note: At the *voir dire* hearing, she testified that the intruder and she "were about the same size.")

Over objection Sgt. Burke testified that the pictures he showed Mrs. Styles on February 9, 1971, were twelve Polaroid snapshots of Negro males; that, exclusive of defendant who was then 14, their ages varied from 15 or 16 to 28; that he asked Mrs. Styles to look at the pictures to see if she could identify any of them; and that, after looking through the pictures, Mrs. Styles handed him a photograph and said, "That's the man right there."

Masten and Burke testified without objection as to statements made to them by Mrs. Styles in which she described the intruder in her home on December 20, 1970, with greater particularity. According to Officer Masten, Mrs. Styles described the intruder as a "male Negro, age early twenties, height approximately five feet six inches, slender build, smooth shaven, black stocking cap on hair, possibly a brown sweater, sneakers, ... " According to Sgt. Burke, Mrs. Styles described the intruder as "slim, young, did not shave, five six in height, and a hundred thirty-five to a hundred forty pounds, twenty-two to twenty-three years old, small face, wearing tennis shoes, wool sweater, had a stocking over the hair."

Defendant's testimony, summarized except when quoted, is narrated below.

On December 20, 1970, defendant lived with his mother, Mrs. Josephine McLean, and his brother and sister (seven-year-old twins), at 47C Columbia Terrace and had lived there about eighteen months. His grandmother, Mrs. Willie Mae Miller, lived in the Happy Hills section at 714 Liberia Street. His mother left on December 28th or December 29th and he went over to his grandmother's house. He did not actually know where he was on the night of December 20, 1970, but probably was at his home or at his grandmother's house.

The road from his house to the Happy Hills section ran in back of Mrs. Styles's apartment. Prior to December 20, 1970, he had seen her standing in her back door. He had never been in her apartment, had never spoken to her and knew nothing about her.

He did not own the knife or flashlight identified as State's exhibits and knew nothing about them. The keys in State's Exhibit No. 4 were his. One of them, the "Sargent key," fitted his grandmother's house; and the other fitted the apartment at Columbia Terrace where he had lived. He had lost these keys back in November, 1970, and had told his grandmother he had lost them. His grandmother had her lock changed. He bought another key to his apartment from the Columbia Terrace office. He had a sister whose name was Peggy.

Defendant's mother and grandmother were not present at the trial. Defendant testified he did not know where his mother was, that he believed his grandmother was at work but didn't know where.

Defendant testified he was arrested on February 18, 1971. The record shows that this prosecution was initiated by the issuance of a juvenile summons on March 31, 1971.

The cross-examination of defendant with reference to prior convictions for unrelated criminal offenses will be set forth in the opinion.

In rebuttal, Wade Witherspoon testified that, as maintenance supervisor for the Federal Housing Authority at Happy Hill Gardens, he was in charge of all maintenance work in the Happy Hills section; and that he had had no occasion to go to Mrs. Miller's home at 714 Liberia Street.

The jury found defendant guilty of burglary in the first degree as charged and recommended that his punishment be imprisonment for life. Thereupon, judgment of life imprisonment was pronounced.

Defendant excepted and appealed.

Attorney General Morgan and Assistant Attorneys General Melvin and Ray for the State.

Donald K. Tisdale for defendant appellant.

BOBBITT, Chief Justice.

[1] The assignments of error relating to the denial of defendant's motions for nonsuit have no merit. Uncontradicted evidence offered by the State tended to show that a young Negro male feloniously and burglariously broke into and entered the occupied home of Mrs. Styles during the night of December 20, 1970, with intent to commit the felony of rape. Too, Mrs. Styles's positive testimony, apart from corroborating circumstances, was amply sufficient to support a finding that defendant is the person who committed the crime.

[2] Defendant excepted to and assigns as error (1) the admission of Mrs. Styles's testimony in which she identified defendant as the person who committed the crime, and (2) the admission of Sgt. Burke's testimony as to what occurred on February 9, 1971, at Western Electric, when Mrs. Styles identified one of the twelve photographs then shown her as the photograph of the young Negro male who committed the crime.

Defendant's objection to Mrs. Styles's identification testimony is based on his contention that her testimony was tainted because of illegality in the photographic identification on February 9, 1971. He contends the photographic identification was illegal because the procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States,* 390 U.S. 377, 384, 19 L.Ed. 2d 1247, 1253, 88 S.Ct. 967, 971 (1968).

Before admitting the testimony, the court conducted two *voir dire* hearings, the first to consider the admissibility of Mrs. Styles's testimony and the second to consider the admissibility of Sgt. Burke's testimony. At these hearings, the only testimony, which was given in the absence of the jury, was that of Mrs. Styles and of Sgt. Burke, respectively. After each *voir dire* hearing, the court made findings of fact which are fully supported by uncontradicted evidence found by the court to be clear and convincing. In each instance, the court found that the identification procedure on February 9, 1971, was *not* "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." The court further found that Mrs. Styles's identification testimony before the jury was based solely on her observation of the person in her room on the night of December 20, 1970, completely independent of other factors.

Although defendant noted a general exception to the findings made by the court after each *voir dire* hearing, no exception or assignment of error is addressed to any specific factual finding or legal conclusion.

On February 9, 1971, defendant had not been arrested or charged with any criminal offense. The photographs were shown Mrs. Styles in the course of Sgt. Burke's investigation.

We conclude that defendant's objections to the testimony of Mrs. Styles and of Sgt. Burke were properly overruled and that assignments of error relating thereto have no merit.

Defendant excepted to and assigns as error the overruling of his objections to questions asked him on cross-examination as to whether he had been convicted of specific unrelated criminal offenses. In response, defendant testified he had been convicted of house breaking on August 27, 1967, and of mail fraud on an unspecified date.

[3] 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; *State v. Williams*, 279 N.C. 663, 669, 185 S.E. 2d 174, 178 (1971).

[4] Defendant contends the foregoing rule should not apply to the cross-examination of a defendant with reference to whether he had been found guilty of conduct committed by him while a juvenile which, if committed by an adult, would have constituted a conviction of crime. The question directly presented on this appeal is not whether an adult witness may be cross-examined with reference to convictions or adjudications of guilt of criminal conduct committed years before when he was a juvenile. Here the fifteen-year-old defendant was on trial for first degree burglary allegedly committed by him when he was fourteen. By electing to testify, defendant put in issue his credibility as a witness. The question is whether it was permissible to cross-examine a juvenile with reference to his prior convictions or adjudications of guilt of prior conduct which, if committed by an adult, would be accurately denominated criminal offenses.

As a basis for his contention that the general rule should not apply, defendant quotes Sections 24 and 29(6), Article 2,

Chapter 110 of the General Statutes, as these sections appear in Volume 3A (Replacement 1966). However, except for G.S. 110-25.1 and G.S. 110-39, Article 2 of Chapter 110 was rewritten by Section 1 of Chapter 911 of the Session Laws of 1969. The provisions formerly codified as Sections 24 and 29(6) no longer appear in Article 2 of Chapter 110. As set forth below, the system of "Juvenile Courts" formerly provided by Article 2 of Chapter 110 has been superseded.

Article 23, Chapter 7A, as now codified in Volume 1B (Replacement 1969) of the General Statutes of North Carolina, was rewritten by Section 2 of Chapter 911 of the Session Laws of 1969. Article 23 is captioned, "Jurisdiction and Procedure Applicable to Children." It vests exclusive, original jurisdiction over any case involving a child in the district court judge and provides in detail for procedures in the district court in cases involving children.

Defendant calls attention to this provision of G.S. 7A-277: "The purpose of this article is to provide procedures and resources for children under the age of sixteen years which are different in purpose and philosophy from the procedures applicable to criminal cases involving adults." Although not referred to by defendant, we take notice that G.S. 7A-287, which provides for maintaining "a complete record of all juvenile cases," contains this sentence: "An adjudication that a child is delinquent or undisciplined shall not . . . be considered as conviction of any criminal offense."

In *State v. Alexander,* 279 N.C. 527, 184 S.E. 2d 274 (1971), the defendant, then twenty-one, testified at his trial for armed robbery. When cross-examined with reference to a prior conviction, he answered: "When I was a juvenile, in 1965, I was convicted of store breaking and larceny." Justice Huskins, for the Court, said: "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." *State v. Alexander, supra* at 535, 184 S.E. 2d at 280. Justice Huskins also said: "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."* (Our italics.) *State v. Alexander, supra* at 535, 184 S.E. 2d at 280. Although not necessary to decision in the *Alexander* case, the italicized statement is apposite to the case under consideration.

In the present case, the State's evidence tends to show that defendant committed the crime of first degree burglary as charged and also the crime of rape. Assuming it would be technically accurate to refer to violations of the criminal law committed by a person under fourteen years of age as adjudications rather than as convictions, the gist of defendant's testimony was that on prior occasions he had been found guilty of conduct which, if committed by an adult, would be criminal. Whether labeled adjudication or conviction would seem to make no difference in respect of its effect, if any, upon defendant's credibility as a witness. Under the circumstances of this case, we perceive no error in the admission of the testimony of defendant relating to previous violations of the criminal law for consideration by the jury solely as bearing upon his credibility as a witness.

Decisions from other jurisdictions cited by defendant have been considered. They are based wholly or in substantial part on the statute law of the jurisdictions involved. Suffice to say, they do not control decision herein.

We note that the present decision is in accord with decisions of the North Carolina Court of Appeals. See *State v. Brown,* 1 N.C. App. 145, 160 S.E. 2d 508 (1968); *State v. Jeffries,* 3 N.C. App. 218, 164 S.E. 2d 398 (1968).

Defendant's other assignments of error are formal and require no discussion.

Defendant having failed to show prejudicial error, the verdict and judgment will not be disturbed.

No error.

STATE OF NORTH CAROLINA v. RONALD DOUGLAS JENERETT

No. 32

(Filed 12 April 1972)

1. Criminal Law § 106— nonsuit — necessity for corroboration of confession

A felony conviction may not be based upon or sustained by a naked extrajudicial confession of guilt uncorroborated by any other evidence.

2. Homicide § 21— murder during robbery — evidence aliunde confession — sufficiency

In this prosecution for first degree murder, there was ample evidence *aliunde* defendant's confession to sustain a finding by the jury that defendant shot and killed deceased while robbing him, notwithstanding defendant introduced evidence which tended to contradict the testimony for the State, where the State presented evidence tending to show that the owner of a grocery store was shot to death in his store, that while 100 to 150 feet from the store defendant asked another person who ran the store and if anyone was in the store with the owner, that at that time defendant had a .32 caliber pistol, that a witness saw defendant go into the store when the owner was in the store alone, heard a noise like a pistol shot, and saw defendant run out of the store, that the owner was found lying on the floor of the store and thereafter died as the result of a gunshot wound in the chest, that when an officer arrived at the scene, the cash register was empty except for nickels and pennies, that shortly after the shooting defendant was seen with considerable money in his possession, and that defendant later told a friend that he killed "the dude" and hid the money in the woods.

3. Homicide § 4— felony-murder rule — premeditation and deliberation

When a murder is committed in the perpetration or attempt to perpetrate any robbery, burglary or other felony, G.S. 14-17 declares it murder in the first degree; in those instances the law presumes premeditation and deliberation and the State is not put to further proof of either.

4. Criminal Law §§ 99, 170; Homicide § 15— homicide during robbery — ownership of stolen property — questions by court

In a prosecution for a homicide committed in the perpetration of a robbery, defendant was not prejudiced by the trial court's inquiry as to the ownership of the store where the crime occurred and the merchandise therein, proof of such ownership not being essential to establish the robbery.

5. Criminal Law § 34; Homicide § 15— confession — intent to commit other crimes — competency

In a prosecution for a homicide committed in the perpetration of a robbery, a portion of defendant's confession which related to his

intent to commit other robberies prior to the commission of the crime for which he is charged, *held* competent to show defendant's intent to commit a robbery, to establish the chain of circumstances leading up to the matter on trial, and to properly develop the evidence in the case at bar.

6. **Criminal Law § 169— objection — similar testimony admitted without objection**

The benefit of an objection is lost where the same evidence had twice been admitted without objection.

7. **Criminal Law § 51— caliber of bullet — expert testimony — absence of finding by court**

The trial court did not err in allowing a police officer to give an opinion as to the caliber of the bullet removed from the body of the deceased where there was ample evidence to support a finding that the officer was an expert in ballistics, notwithstanding the court did not specifically find that the officer was an expert, since it will be presumed from the admission of the testimony that the court found the officer to be an expert.

8. **Criminal Law § 166— abandonment of assignments of error**

Assignments of error not discussed in the brief are deemed abandoned. Supreme Court Rule 28.

BELATED appeal (permitted by our writ of *certiorari)* by defendant from *Lupton, J.,* at the 14 June 1971 Session of FORSYTH Superior Court.

Criminal prosecution upon a bill of indictment, proper in form, charging defendant with the first degree murder of Charles Bradley Samuel. The jury returned a verdict of guilty as charged with recommendation of life imprisonment. From judgment in accordance therewith, defendant appealed.

On 4 December 1971 at approximately 1:30 p.m., Charles Bradley Samuel, owner of a small grocery store on Jackson Street in Winston-Salem, North Carolina, was shot to death in his store.

The evidence for the State tends to show: On the morning of 4 December 1971, defendant left home with his brother Eli Jenerett. Defendant had a .32 caliber pistol in his possession. He went to the home of Julius Thompkins where he got a .25 automatic pistol. Defendant and Eli then went to Minor's Market to hold it up, but there was a customer in the store who knew Eli so they left. They then went to another store on 18th Street and Claremont Street. The lady who ran that store looked so pitiful they decided not to rob her.

Defendant then went to the home of Doretha Gandy, at which time defendant had two pistols in his possession. Shortly after 11 a.m. defendant and Carl Watson left the Gandy home to go get a beer. After buying the beer and eating lunch, they walked east on 24th Street to Jackson Street, about 100 to 150 feet from Samuel's store. There defendant saw Chalmers Gray Bohannon, Jr., and some other boys playing cards. This was about 1:15 p.m. Defendant asked if the Samuel store was open, who ran it, and if the owner was alone. While talking to these boys, defendant pulled out his .32 caliber pistol and threatened to shoot one of them. These boys left, and defendant watched the store until some men who were in there came out. He then entered.

About 1:30 that afternoon Preston Webb, who lived across the street from Samuel's store, saw a man whom he identified as the defendant hurriedly walk up the street and enter Samuel's store. At that time no one was in the store except defendant and Samuel. Three or four minutes later Webb heard a sound like a "little .22" being fired, and saw the defendant come out the front door. At the same time, Linda Attucks was about to enter the store. She collided with defendant who was leaving. Linda and defendant stood there for about a minute before defendant ran around the corner of the building. Linda then entered the store, saw the body of Samuel on the floor and screamed. Webb came across the street, saw Samuel's body, and told Linda to call the police and an ambulance, which she did. Samuel died shortly thereafter as a result of a .32 caliber bullet wound in the chest.

About 2 p.m. on the same day, Elizabeth Crosby saw the defendant in a downtown store. She asked defendant if he had heard that Samuel had been killed, and he joked with her about it. She saw that defendant's wallet contained a large sum of money. A few weeks later the defendant was talking with a friend, Johnny George Johnson, Jr., about the Samuel incident. Johnson asked defendant what he had done with the money, and defendant replied that he had killed "the dude" and hid the money, $1,000, in the woods.

On 28 January 1971 a warrant was issued charging defendant with the murder of Samuel. At the time of his arrest on 28 January 1971 defendant was orally advised of his rights. He refused to sign a rights waiver and asked for an attorney.

R. Lewis Ray, an attorney with the Forsyth County Legal Aid Society, was designated to represent defendant.

On 16 February 1971 defendant asked to talk with C. S. Pinkston and E. I. Weatherman, the arresting officers. Before talking to defendant, the officers called defendant's attorney who stated it would be all right for them to question the defendant, that he did not wish to be present, but asked them to call him before they talked to defendant. On 17 February 1971 defendant was brought into the detective office and was again advised of his rights by Officer Pinkston. Officer Weatherman called defendant's attorney, and the attorney again stated it would be all right for them to talk to defendant, and that he did not desire to be present but would talk to defendant on the telephone. Defendant then spoke briefly to his attorney on the telephone. The officers again fully advised defendant of his rights as required under *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), following which defendant signed this statement:

> "I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me by anyone. In fact, I have just talked by phone to my lawyer, Lewis Ray." Signed "Ronald Jenerett."

After signing this statement, defendant gave the officers a detailed account as to what occurred on the date in question, stating in summary that he went into the store after some other people had left and told Samuel he wanted some meat, which he knew Samuel did not have; that he and Samuel walked back toward the meat counter, and Samuel asked him what else he wanted; that he pulled his .32 pistol from his pocket and told him, "the money"; that he went to the cash register, opened it, and took all the money except the pennies and nickels; that he then told Samuel to give him his pocketbook; that Samuel did not have any money in his pocketbook but showed it to him, and Samuel did give him the money from his pocket. Samuel then grabbed him and wrestled with him, and he shot Samuel and ran from the store.

Officer Pinkston stated that in his opinion at the time defendant signed the waiver and made this statement defendant was not under the influence of any drugs, narcotics, or any alcoholic beverages.

Defendant offered evidence tending to show that the confession he gave was not a true confession; that when he made this statement he was under the influence of LSD, which he had concealed in his boots and had taken while in jail; that the only reason he made the confession was to get out on bond and to see a doctor about "bad trips"; and that he made up the story about the robbery-shooting of Samuel after reading the police report of the incident.

Linda Attucks testified that the person she ran into at the front door of Samuel's store was definitely not the defendant. Larry Watkins testified that about 1:30 p.m. on the day of the incident he was with the defendant buying marijuana from defendant for $25.

Defendant admitted that he was near the Samuel store on the date in question, but denied that he either entered the store on that date or robbed or shot the deceased.

Attorney General Robert Morgan, Associate Attorney William Lewis Sauls, and Deputy Attorney General James F. Bullock for the State.

R. Lewis Ray, of the Legal Aid Society of Forsyth County, for defendant appellant.

MOORE, Justice.

[1] Defendant first assigns as error the denial of defendant's motions for judgment of nonsuit made at the conclusion of the State's evidence and at the conclusion of all the evidence. Defendant contends that a mere confession is not sufficient to warrant a conviction, and that it is incumbent on the State to show independent of his confession that a robbery or attempted robbery was actually committed, and that Samuel was killed in the perpetration of such robbery or attempted robbery in order to convict him of first degree murder. Defendant relies on *Opper v. United States,* 348 U.S. 84, 99 L.Ed. 101, 75 S.Ct. 158 (1954), and *Smith v. United States,* 348 U.S. 147, 99 L.Ed. 192, 75 S.Ct. 194 (1954), which hold that a felony con-

viction may not be based upon or sustained by a naked extrajudicial confession of guilt uncorroborated by any other evidence. This has long been the law in North Carolina.

As stated by Justice Rodman in *State v. Whittemore,* 255 N.C. 583, 589, 122 S.E. 2d 396, 400-01 (1961), quoting from *State v. Cope,* 240 N.C. 244, 81 S.E. 2d 773 (1954):

> "'. . . (T)he overwhelming authority in this country is to the effect that a naked extrajudicial confession of guilt by one accused of crime, unaccompanied by any other evidence, is not sufficient to warrant or sustain a conviction. . . .'"

Justice Rodman, continuing, said:

> "Evidence to corroborate the confession need not be direct. It may be circumstantial. *State v. Thomas,* 241 N.C. 337, 85 S.E. 2d 300. . . . 'Full, direct, and positive evidence, however, of the *corpus delicti* is not indispensable. A confession will be sufficient if there be such extrinsic corroborative circumstances, as will, *when taken in connection with the confession,* establish the prisoner's guilt in the minds of the jury beyond a reasonable doubt.' [*Masse v. United States,* 210 F. 2d 418 (5th Cir. 1954), cert. denied 347 U.S. 962, 98 L.Ed. 1105, 74 S.Ct. 711 (1954)]."

[2] Therefore, the question to be decided in the present case is whether there is evidence of sufficient probative value, *aliunde* the confession, to establish the fact that the crime as charged has been committed by the defendant.

The evidence for the State tends to show the following facts: Defendant talked to Chalmers Gray Bohannon at the corner of 24th Street and Jackson Street, approximately 100 to 150 feet from Samuel's Grocery Store, and asked Bohannon who ran the store and if anyone was in the store with the owner. At that time defendant had a .32 caliber pistol. Defendant was seen by Preston Webb going into the grocery store at a time no one except Samuel was there; soon afterward, Webb heard a noise like a pistol shot and defendant ran out of the store. A lady met defendant as he came out, and when she went in she saw Samuel lying on the floor. She screamed and witness Webb ran to the store and also saw Samuel on the floor. Samuel was taken to the hospital and died as the result

of a gunshot wound in the chest. The testimony further shows that when the officer arrived at the scene, the cash register was empty except for nickels and pennies and that four crumpled checks were found near the door. Shortly after the shooting defendant was seen with considerable money in his possession, and later in a conversation with a friend of his, Johnny George Johnson, defendant stated that he killed "the dude" and hid the money in the woods.

In considering the motions for compulsory nonsuit in this case, we are not concerned with the weight of the testimony or with the truth or falsity, but only with the sufficiency to carry the case to the jury and to sustain the indictment. *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225 (1969). Considering the evidence in the light most favorable to the State, as we must, we conclude that there was ample evidence, *aliunde* the defendant's confession, to sustain a finding by the jury that defendant shot and killed Samuel while robbing him.

[3] When a murder is committed in the perpetration or attempt to perpetrate any robbery, burglary or other felony, G.S. 14-17 declares it murder in the first degree. In those instances the law presumes premeditation and deliberation, and the State is not put to further proof of either. *State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561 (1970).

Although defendant introduced evidence which tended to contradict the testimony for the State, the jurors chose to believe the evidence presented by the State. They alone are the triers of fact. *State v. Satterfield,* 207 N.C. 118, 176 S.E. 466 (1934). The State's evidence of the *corpus delicti,* in addition to defendant's confession of guilt, notwithstanding defendant's evidence in conflict, is sufficient to carry this case to the jury and to support the verdict of guilty as rendered by the jury. *State v. Stinson,* 263 N.C. 283, 139 S.E. 2d 558 (1965). The motions for judgment as of nonsuit were properly overruled.

[4] Defendant next contends that the court erred by asking Mrs. Samuel the following questions:

"Q. Just one minute. Who did you say owned the store? Or did you say? Were you asked that question?

"A. No, I wasn't asked that question.

"Q. Well, excuse me. Did your husband have a middle name or second name?

"A. Yes.

"Q. What was his full name?

"A. Charlie Bradley Samuel."

At this time the court asked the solicitor to approach the bench, and following a conference at the bench the solicitor asked the following questions:

"Q. Mrs. Samuel, who owned this store?

"A. It was in my husband's name, Charles. Charlie Bradley Samuel owned the store.

"Q. It was in his name?

"A. Yes.

"Q. Did he own the building?

"A. Yes.

"Q. And did he also own the merchandise in the building?

"A. Yes."

Defendant contends that the ownership of the property was a "crucial and germane element of the State's case," and that by inquiring as to the ownership the trial judge was attempting to "plug up the loopholes." Defendant is charged with a felony-murder, and proof of the ownership of the store or merchandise therein is not essential to the robbery charge. *State v. Rogers,* 273 N.C. 208, 159 S.E. 2d 525 (1968). Defendant does not point out how these questions prejudiced his case, and unless prejudicial effect on the result of the trial is shown, the error, if any, will be considered harmless. *State v. Holden,* 280 N.C. 426, 185 S.E. 2d 889 (1972); *State v. Perry,* 231 N.C. 467, 57 S.E. 2d 774 (1950); 2 Strong, N. C. Iudex 2d, Criminal Law § 99, p. 634. It must appear with ordinary certainty that the rights of the prisoner have in some way been prejudiced by the conduct of the court before such conduct can be treated as error. *State v. Holden, supra.* No such showing appears in this case. This assignment is without merit.

[5] Defendant next contends that the court erred in allowing a police officer to read into evidence that portion of the confession which related to defendant's intent to commit other crimes prior to the commission of the crime for which he is charged, defendant contending that the evidence of one offense is inadmissible to prove another and independent crime—wholly disconnected and in no way related to each other—citing *State v. Choate,* 228 N.C. 491, 46 S.E. 2d 476 (1948). As a general statement this is true, but as stated by Justice Lake in *State v. Atkinson,* 275 N.C. 288, 312-13, 167 S.E. 2d 241, 256 (1969):

> " . . . While it is well established that evidence of other crimes, having no bearing upon the crime for which the defendant is on trial, may not be introduced prior to his taking the stand as a witness in his own behalf, it is equally well settled that all facts, relevant to the proof of the defendant's having committed the offense with which he is charged, may be shown by evidence, otherwise competent, even though that evidence necessarily indicates the commission by him of another criminal offense. *State v. Christopher,* 258 N.C. 249, 128 S.E. 2d 667; *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364; *State v. Harris,* 223 N.C. 697, 28 S.E. 2d 232; Stansbury, North Carolina Evidence, 2d Ed., § 91. Thus, such evidence of other offenses is competent to show. . . the *quo animo,* intent, design, guilty knowledge, or scienter, or to make out the *res gestae,* or to exhibit a chain of circumstances in respect of the matter on trial, when such crimes are so connected with the offense charged as to throw light upon one or more of these questions. *State v. Christopher, supra; State v. Harris, supra;* Stansbury, North Carolina Evidence, 2d Ed., §§ 91 and 92."

This portion of defendant's statement was competent to show defendant's intent to commit a robbery and as a part of the chain of circumstances leading up to the matter on trial. It was also competent to properly develop the evidence in the case at bar. *State v. Sanders,* 276 N.C. 598, 174 S.E. 2d 487 (1970). This assignment is overruled.

[6] Defendant next contends that the court erred in allowing Officer Weatherman, over the objection of defendant, to give an opinion as to the caliber of the bullet taken from the body of the deceased. The bullet in question had been identified by

Dr. Ernest Austin as being the bullet removed from the body of the deceased and was introduced into evidence without objection. Officer Weatherman was first asked to identify the bullet. He replied: "It is a .32 missile from a .32 cartridge. This particular item was turned over to me by Dr. Austin." No objection was made at this time or shortly thereafter when he testified: "I have been a police officer for nearly thirty-one years. I have had training in firearms. We have had several days over the years of training. I have investigated other cases in which bullets were involved and used numbers of times. I believe I am familiar with the caliber of weapons. In my opinion this projectile in my hands is a .32 caliber bullet from a .32 cartridge." The third time Officer Weatherman was asked to give his opinion as to the caliber of the bullet, defendant did object, and the objection was overruled. Since the same evidence had twice been admitted without objection, the benefit of this objection is lost. *State v. Hairston,* 280 N.C. 220, 185 S.E. 2d 633 (1972); *State v. Minton,* 234 N.C. 716, 68 S.E. 2d 844 (1952).

[7] While the trial court did not expressly find the witness to be an expert in ballistics, the court did allow him to give his opinion as to the caliber of the bullet. By admitting the testimony as to the caliber of the bullet, the court presumably found him to be an expert. There was ample evidence to support such finding. *Teague v. Power Co.,* 258 N.C. 759, 129 S.E. 2d 507 (1963); *State v. DeMai,* 227 N.C. 657, 44 S.E. 2d 218 (1947). This assignment is overruled.

[8] The other assignments of error are not discussed in defendant's brief and are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783 (1961); *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1970). However, these assignments have been carefully considered and are found to be without merit.

Defendant having failed to show prejudicial error, the verdict and judgment will be upheld.

No error.

MAVIE M. MANGUM, TRUSTEE FOR MARY B. MATTHEWS v. DERRY THOMAS SURLES AND WIFE, MINNIE MARIE MATTHEWS SURLES

No. 7

(Filed 12 April 1972)

1. **Cancellation and Rescission of Instruments § 10; Fraud § 12— setting aside deed — fraud in the factum — sufficiency of evidence**

In an action to set aside a deed, plaintiff's evidence was sufficient to make out a *prima facie* case of fraud in the factum where (1) the 79-year-old plaintiff testified that defendants, after asking her "to ride around with them," took her to an attorney's office, that the male defendant asked plaintiff to sign a $500.00 note for him, that she signed because defendants had always been good to her, that no one told her she was signing a deed and, so far as she knows, she never did, (2) it was stipulated that defendants paid no monetary consideration for the deed, and (3) testimony of plaintiff's witnesses tended to show plaintiff's impaired mental and physical condition and that defendants "claimed they were looking after her."

2. **Fraud § 9; Cancellation and Rescission of Instruments § 8; Rules of Civil Procedure § 9— fraud, duress or mistake — pleadings**

G.S. 1A-1, Rule 9(b), codifies the requirement previously existing in our State practice that the facts relied upon to establish fraud, duress or mistake must be alleged.

3. **Rules of Civil Procedure § 15— evidence outside pleadings — failure to object — trial by implied consent — amendment of pleadings**

Where no objection is made to evidence on the ground that it is outside the issues raised by the pleadings, the issue raised by the evidence is nevertheless before the trial court for determination, and the pleadings are regarded as amended to conform to the proof even though the defaulting pleader made no formal motion to amend. G.S. 1A-1, Rule 15(b).

4. **Rules of Civil Procedure § 15; Pleadings § 32— amendments to conform to evidence**

Amendments to conform the pleadings to the proof should always be freely allowed unless some material prejudice is demonstrated.

5. **Cancellation and Rescission of Instruments § 8; Pleadings § 32; Rules of Civil Procedure § 15— evidence outside pleadings — failure to object — trial by implied consent — right to amend pleadings**

Where, in an action to set aside a deed, plaintiff introduced evidence not supported by the pleadings that defendants fraudulently induced her to sign the deed by representing the instrument to be a note, and defendants failed to object to such evidence on the ground that it is outside the issues raised by the pleadings, plaintiff is entitled as a matter of law to have the issue of fraud submitted to the jury and to amend her complaint to conform her pleadings to the evidence.

6. Rules of Civil Procedure § 15; Pleadings § 32— amendment of pleadings — decision on appeal — retrial

Where an issue not raised by the pleadings has been tried by express or implied consent, answered by the jury or the judge, and the judgment rendered on the verdict has been affirmed on appeal, the failure to amend the pleadings to conform to the evidence does not affect the results of the trial which has been had upon the merits; when, however, a retrial is ordered for failure to submit the issues raised by the evidence but not by the pleadings, failure of the court to allow an amendment in order to conform the pleadings to the proof, or when a dismissal is erroneously entered upon the ground of a fatal variance between allegation and proof, the pleadings should be amended to conform to the evidence during the interval between the decision on appeal and the retrial.

ON *certiorari* to review the decision of the Court of Appeals, reported in 12 N.C. App. 547, 183 S.E. 2d 839, which affirmed the judgment of *Hall, J.*, at the 29 March 1971 Session of HARNETT.

Action to set aside a deed on the grounds of lack of mental capacity, fraud, and undue influence.

The following facts were stipulated: Plaintiff, Mary B. Matthews, was 79 years old on 25 March 1969, when she executed a deed conveying to defendants the land described in the complaint, a 165-acre tract of land in Cumberland County. The deed, which reserved to plaintiff a life estate in the land, has been duly recorded. Defendants are step-grandchildren of plaintiff; they paid no monetary consideration for the deed. On 3 April 1970 plaintiff was declared incompetent by a jury verdict, and Mavie M. Mangum, her duly appointed trustee, prosecutes this action in her behalf.

The complaint was filed 4 May 1970. In addition to the facts stipulated above, it alleges that at the time plaintiff executed the deed in suit she was in a generally poor state of health, possessed of little memory and no will power; that her mental faculties had become greatly impaired by physical weakness; that she was wholly incapable of transacting any business or of making an intelligent and voluntary disposition of her property; that because defendants had previously advised plaintiff in many matters a confidential relation existed between them and her; that defendants were able to obtain plaintiff's signature to the deed because of her lack of mental capacity and their knowledge of it, and doing so constituted "a fraudulent act."

The answer is a general denial of all allegations as to which the facts were not stipulated.

The testimony of witnesses for plaintiff tended to show: On 25 March 1969 she lacked sufficient mental capacity to understand the nature and consequences of making a deed, to know what land she was conveying or to whom and how she was conveying it.

Plaintiff's own testimony, *to which there was no objection,* tended to show: She owns "some property in Cumberland County known as the Cain place," but defendants are trying to take it away from her. If she executed a deed to defendants on 25 March 1969 she doesn't remember it, for she did not do it. D. T. Surles is "no blood relationship" to her, and she had no intention of giving him any of her property because she "didn't have enough." Until October 1969, after a conversation with her tenant on the Cumberland County farm, plaintiff did not know that the property had been deeded away. The information upset her, and she did not understand it because she didn't want the property put in defendants' names. On 25 March 1969 defendants asked her to ride around with them, and they went to Sammy Stephenson's law office. There D. T. Surles asked her "to sign a note." Defendants were always good to her, but she didn't want anybody to say that she gave them her land. She was told she was signing a note in the amount of $500.00 for D. T. No one ever told her she was signing a deed. Stephenson was not her attorney; Robert Morgan was the only lawyer she had ever had, and she had not consulted him about this matter. (Mr. Morgan corroborated this testimony.) She had told defendants she would rent the property to them but never that she would give it to them.

Defendants did not testify; neither did Mr. Stephenson nor the notary public whose certificate of acknowledgment appears on the deed.

The testimony of the witnesses for defendants tended to show: D. T. Surles is the grandson of the second wife of plaintiff's deceased husband. Plaintiff was his third wife. On 25 March 1969 plaintiff was able to transact her own business. She knew what property she owned and understood the nature and effect of a deed. During the late summer of 1968 she told one neighbor she wanted D. T. to have the land, and in the

spring of 1969 she told another she had given it to defendants because they had been good to her and didn't have anything of their own. Sometime during 1969 she told a third neighbor that she wanted to keep her property, for she was depending upon it; that she liked her property and money. This neighbor testified that up until about six months before the trial defendants were frequently at plaintiff's home; "they claimed they were looking after her."

It was the consensus of all defendants' witnesses that approximately six or eight months prior to the trial plaintiff's general condition changed, and her mental faculties declined.

At the conclusion of the evidence defendants moved for a directed verdict on all issues raised by the pleadings. This motion was overruled. The plaintiff moved to be allowed to amend her complaint to conform to the evidence by adding the following allegation:

"That the defendants, at the time Mary B. Matthews signed the deed alleged in the complaint, did with intent to deceive, practice a fraud upon the said Mary B. Matthews by inducing her to sign said instrument while representing the instrument to be a note and knowing the said Mary B. Matthews did not know what she was signing." The motion to amend was denied and plaintiff excepted.

At the same time plaintiff tendered the following three issues: "(1) Did Mrs. Mary B. Matthews on March 25, 1969, have sufficient mental capacity to execute a deed? (2) Was the execution of the deed dated March 25, 1969, procured by undue influence on Mrs. Mary B. Matthews? (3) Was the execution of the deed dated March 25, 1969, procured by fraud on Mrs. Mary B. Matthews?"

Judge Hall declined to submit the second and third issues. He submitted the first, which the jury answered YES. From the judgment entered upon the verdict for defendants, plaintiff appealed to the Court of Appeals.

The Court of Appeals, in an opinion by Judge Hedrick in which Chief Judge Mallard and Judge Campbell concurred, found no error in the trial below. The rationale was that the motion to amend the pleadings was addressed to the discretion of the trial court, no abuse of which appeared, and that plaintiff

was not prejudiced by the denial of her motion to amend or the refusal to submit the tendered issues because "there is no evidence in this record tending to show that the defendants procured the execution of the deed by fraud or undue influence." We allowed certiorari.

Bryan, Jones, Johnson, Hunter & Greene for plaintiff appellant.

Samuel S. Stephenson and David K. Stewart for defendant appellees.

SHARP, Justice.

Plaintiff's assignments of error raise two questions for consideration: Did the trial judge err (1) in denying plaintiff's motion to amend her complaint to allege fraud in conformity with the evidence and (2) in refusing to submit the issue whether defendants had fraudulently obtained plaintiff's signature to the deed in suit.

[1] The threshold question is whether the Court of Appeals erred in holding that the record contained no evidence tending to show that defendants procured the execution of the deed by fraud. Obviously, if plaintiff produced no such evidence, the proposed amendment and issue were properly refused. However, we are at a loss to understand this ruling by the Court of Appeals or defendants' contention, stated in their brief, that plaintiff offered "not a scintilla of evidence" to show fraud on the part of the defendants. Plaintiff testified that defendants, after asking her "to ride around with them," took her to Mr. Stephenson's law office on 25 March 1969. There D. T. asked her to sign a $500.00 note for him. She signed because he and his wife had always been good to her; that no one ever told her she was signing a deed and, so far as she knows, she never did.

Plaintiff's testimony, the stipulation that defendants paid no monetary consideration for the deed, the evidence tending to show plaintiff's impaired mental and physical condition and that defendants "claimed they were looking after her," were more than sufficient to make out a prima facie case of fraud in the factum. *Mills v. Lynch,* 259 N.C. 359, 130 S.E. 2d 541 (1963); *Furst v. Merritt,* 190 N.C. 397, 130 S.E. 40 (1925). *See Wall v. Ruffin,* 261 N.C. 720, 136 S.E. 2d 116 (1964). If

her testimony was not true, its falsity was peculiarly within defendants' knowledge; yet neither they, nor any of the persons connected with the execution of the deed, took the stand to contradict plaintiff. *See Maxwell v. Distributing Co.*, 204 N.C. 309, 316, 168 S.E. 403, 406 (1933), and cases there cited.

The two questions raised by this appeal are so interrelated they must be treated as one.

[2] In addition to her lack of mental capacity, plaintiff alleged that the manner and circumstances by which defendants obtained her signature to the challenged deed "constituted a fraudulent act." She did not, as required by G.S. 1A-1, Rule 9(b), state "with particularity" the circumstances constituting the alleged fraud. Rule 9(b) codifies the requirement previously existing in our State practice that the facts relied upon to establish fraud, duress or mistake must be alleged.

Prior to 1 January 1970, the effective date of the Rules of Civil Procedure, absent *allegations* of fact which would constitute fraud if true, evidence of fraud—no matter how complete and convincing—could not be submitted to the jury. Proof without allegation was as ineffective as allegation without proof. *Products Corporation v. Chesnutt,* 252 N.C. 269, 113 S.E. 2d 587 (1960); *Calloway v. Wyatt,* 246 N.C. 129, 97 S.E. 2d 881 (1957); *Colt v. Kimball,* 190 N.C. 169, 129 S.E. 406 (1925); 1 McIntosh, N. C. Practice and Procedure § 990 (2d Ed. 1956). Under this rule, a case which had been tried upon its merits, and judgment entered upon the jury's verdict, could be dismissed in the Supreme Court upon a *demurrer ore tenus* to the complaint. *Howze v. McCall,* 249 N.C. 250, 106 S.E. 2d 236 (1958).

Under the former procedure, because of plaintiff's failure to allege fraud with particularity, Judge Hall's refusal to permit the amendment tendered at the close of the evidence and to submit the issue of fraud would have been unassailable. However, to eliminate the waste, delay, and the injustice which sometimes resulted from belated confrontations between insufficient allegations and plenary proof, Rule 15(b) was enacted. Its first two sentences control this case: "When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of

the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues."

Dean Dickson Phillips' comments on Rule 15(b), which are quoted in full in *Roberts v. Memorial Park, ante,* include the following pertinent statements: "A party who fails to object to evidence is of course initially presumed to have given 'implied consent' by silence. He can avoid the effect only by satisfying the court that under the circumstances, his consent to having certain issues considered by the trier of fact should not be implied from his failure to object to particular evidence. This may be a most difficult position to sustain. Counsel cannot in prudence under this rule fail to object to any evidence which seems even remotely to be opening up issues not raised by the pleadings." Phillips, 1970 Supplement to 1 McIntosh, N. C. Practice & Procedure § 970.80.

Rule 15(b), except for one minuscule, immaterial phrase, is a verbatim copy of Federal Rule 15(b); so federal decisions interpreting this rule are apposite. *Sutton v. Duke,* 277 N.C. 94, 176 S.E. 2d 161 (1971). Illustrative cases analogous to the one under consideration are discussed and cited below.

In *Slavitt v. Kauhi,* 384 F. 2d 530 (9th Cir. 1967), a suit against the owners of the Barefoot Bar and two of its employees, plaintiff alleged that Kapana, one of the employees, maliciously threw him down a flight of steps. The plaintiff's evidence showed that Kapana left him in a drunken condition at the top of a flight of stairs and that he was injured when he fell down the stairway. The trial judge refused the plaintiff permission to amend in order to conform pleadings to proof and declined to submit the issue of negligence. On appeal, the court held that Rule 15(b) required the judge to allow the requested amendment and to instruct the jury that it could predicate a verdict for the plaintiff upon the negligence of Kapana, if they found "such to have been the fact." *Accord, Bradford Audio Corporation v. Pious,* 392 F. 2d 67 (2d Cir. 1968) (official immunity not pleaded, but evidence of it considered); *United States Fidelity & Guaranty Co. v. United States,* 389 F. 2d 697 (10th Cir. 1968); *Mazer v. Lipshultz,* 360 F. 2d 275 (3d Cir. 1966) (although release given by plaintiff to an alleged

joint feasor not pled, evidence considered and case decided on merits); *Zappia v. Baltimore & Ohio Railroad Company,* 312 F. 2d 62 (6th Cir. 1963) (although contributory negligence not pleaded, under the evidence, issue properly tried by court); *Hasselbrink v. Speelman,* 246 F. 2d 34 (6th Cir. 1957) (sudden emergency not pleaded but evidence thereof required judge to submit issue to jury.)

In *Hester v. New Amsterdam Casualty Company,* 287 F. Supp. 957 (D.S.C. 1968), involving the issue of fraud, the court said: "Rule 15(b) also applies to fraud when the issue as to its existence is tried by the implied consent of the parties. It is proper for the court to treat the issue of fraud as if it had been raised in the pleadings." *Id.* at 972. *Accord, United States v. Cushman,* 136 F. 2d 815 (9th Cir. 1943).

In *J. C. Millett Co. v. Distillers Distributing Corp.,* 258 F. 2d 139 (9th Cir. 1958), after specific and uncontradicted evidence establishing a breach was introduced, the plaintiff moved to amend its complaint to conform to this proof. The trial judge's denial of the motion was reversed on appeal. The court emphasized that Rule 15(b) *requires* that leave to amend be freely granted unless the objecting party satisfies the court that the amendment will prejudice him *upon the merits. Accord, Cramer v. Hoffman,* 390 F. 2d 19 (2d Cir. 1968); *Lomartira v. American Automobile Insurance Co.,* 371 F. 2d 550 (2d Cir. 1967); *United States v. Stephen Brothers Line,* 384 F. 2d 118 (5th Cir. 1967); *Securities and Exchange Commission v. Rapp,* 304 F. 2d 786 (2d Cir. 1962); *Decker v. Korth,* 219 F. 2d 732 (10th Cir. 1955); *Watson v. Cannon Shoe Co.,* 165 F. 2d 311 (5th Cir. 1948); *Bradford Audio Corporation v. Pious, supra.*

[3, 4] The foregoing decisions establish that where no objection is made to evidence on the ground that it is outside the issues raised by the pleadings, the issue raised by the evidence is nevertheless before the trial court for determination. The pleadings are regarded as amended to conform to the proof even though the defaulting pleader made no formal motion to amend. Failure to make the amendment will not jeopardize a verdict or judgment based upon competent evidence. If an amendment to conform the pleadings to the proof should have been made in order to support the judgment, the Appellate Court will presume it to have been made. However, amendments should always be freely allowed unless some material prejudice

is demonstrated, for it is the essence of the Rules of Civil Procedure that decisions be had on the merits and not avoided on the basis of mere technicalities. See 3 Moore's Federal Practice § 15.13 (1968).

[5, 6] In this case plaintiff was entitled as a matter of law to have the issue of fraud submitted. It follows, therefore, that she was also entitled as a matter of law to amend her complaint to conform her pleadings to the evidence. Since there must be a new trial, orderly procedure, compliance with Rule 9(b), and good technique now require that the amendment *actually* be made. In the situation where an issue not raised by the pleadings has been tried by express or implied consent, answered by the jury or the judge, and the judgment rendered on the verdict has been *affirmed* on appeal, the failure to amend should not, and does not, affect the results of the trial which has been had upon the merits. The litigation is ended. When, however, a *retrial* is ordered for failure to submit the issues raised by the evidence but not by the pleadings, failure of the court to allow an amendment in order to conform the pleadings to the proof, or when a dismissal or directed verdict is erroneously entered upon the ground of a fatal variance between allegation and proof, as pointed out by Justice Branch in *Roberts v. Memorial Park, ante,* practical considerations intervene. The judge who presides at the retrial is entitled to know the theory and the state of the case confronting him without having to review the transcript of the case on appeal. Where the rules require specificity or affirmative pleading the pleadings should conform to the evidence, and there can be little justification for a failure to conform them during the interval between the decision on appeal and the retrial. The case is entitled to this protection.

The decision of the Court of Appeals is reversed. The cause will be remanded to the Superior Court for a trial de novo upon amended pleadings.

Reversed.

STATE OF NORTH CAROLINA v. FLOYD LINDSEY HUDSON

No. 15

(Filed 12 April 1972)

1. Kidnapping § 1— definition of the crime

Kidnapping is the unlawful taking and carrying away of a person by force and against his will; the distance the victim is carried is not material. G.S. 14-39; G.S. 4-1.

2. Kidnapping § 1— fraud — threats and intimidation

In the kidnapping of a person the law considers the use of fraud as synonymous with force, and threats and intimidation are equivalent to the actual use of force or violence.

3. Kidnapping § 1— fraud and intimidation — sufficiency of evidence

The State's evidence was sufficient to permit the jury to find that defendant was guilty of the crime of kidnapping by practicing both fraud and intimidation to overcome the will of the victim and secure control of her person, where it tended to show that defendant gained entry into the home of the retarded, 15-year-old victim by falsely telling her that he wished to use the telephone, that once inside his acts and words were calculated to frighten and intimidate, that defendant instructed the victim to turn out the porch light, not to scream and to accompany him to his car, that defendant led the victim out the door by the hand telling her he was taking her out for a five-minute drive, and that the victim went with defendant because she was afraid.

4. Criminal Law § 161— necessity for exceptions

Any error asserted on appeal must be supported by an exception duly taken and shown in the record; exceptions which appear for the first time in the purported assignments of error present no question for appellate review. Supreme Court Rules 19 and 21.

5. Criminal Law § 161— assignments of error — requisites

Each assignment of error must specifically state the alleged error so that the question sought to be presented is therein revealed.

6. Criminal Law § 163— assignment of error — failure to charge

An assignment based on the court's failure to charge should set out the defendant's contention as to what the court should have charged.

7. Criminal Law § 146— appellate rules — indigent appellants

Appellate rules of practice are applicable to indigent defendants and their court-appointed counsel as they are to all others.

8. Criminal Law § 146— constitutional question — failure to raise in trial court

Ordinarily, appellate courts will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court below.

9. Criminal Law § 146— appellate rules — mandatory

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

10. Criminal Law § 161— appeal as exception to judgment

The appeal itself is considered an exception to the judgment and presents for review any error appearing on the face of the record proper.

11. Criminal Law §§ 75, 169— erroneous admission of inculpatory statement — harmless error

Although the admission in this kidnapping prosecution of defendant's inculpatory statement to a police officer was erroneous because there was neither evidence nor findings to show that defendant waived his right to counsel, either in writing as provided by former G.S. 7A-457, or orally as provided by the *Miranda* decision, such error was harmless where (1) defendant's statement was not coerced or involuntary but was voluntarily made, (2) the statement would not be sufficient alone to convict defendant but is simply an admission of facts that, taken with others, tends to show guilt, and (3) defendant's guilt was shown beyond a reasonable doubt by competent, untainted, direct as well as circumstantial evidence.

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

The admission of evidence which is technically incompetent will be treated as harmless unless it is made to appear that defendant was prejudiced thereby and that a different result likely would have ensued had the evidence been excluded.

APPEAL by defendant from judgment of *Collier, J.*, 15 March 1971 Criminal Session, CABARRUS Superior Court.

The bill of indictment, proper in form, charges defendant with kidnapping Clemmie Hacker on the night of 25 September 1970.

The testimony of Clemmie Hacker, a retarded fifteen-year-old girl, tends to show that on the night of 25 September 1970 she was alone in the house she shared with her mother and sisters in Concord. The defendant appeared at the door at approximately 10 p.m. and asked to use the telephone. Clemmie admitted him, but instead of using the telephone he told her to turn out the porch light, not to scream, and to accompany him to his car. She went with him because she was afraid. He was holding her hand as they went from the house to the car. Defendant then drove to his house trailer where he removed all Clemmie's clothing, struck her in the nose and face breaking a bone and knocking out four teeth, and performed degrading acts

with her genitalia. Ultimately he drove her to a point on the bank of the Rocky River where he forced a drink bottle into her vagina, knocked her unconscious and left her naked lying in a field near the Rocky River Bridge.

The testimony of Clemmie Hacker was corroborated by George H. Smith, a police officer to whom she first related the incident. Officer Smith further testified that he informed defendant that the assault and kidnapping of a young white female person was under investigation. "I advised him fully of his constitutional rights. I advised him that he had a right to remain silent, that he did not have to answer any questions that we asked; that he had a right to have an attorney present while he was being questioned; if he could not afford one, one would be appointed for him. Further advised him that he had a right if he chose to talk to us to answer any questions he chose to answer, or any part of any question, or that he may remain silent on anything he wished to remain silent on. After we advised him of his rights he did choose to make a statement to us. We did not offer him any reward. Nor did we offer any influence. Nor did we threaten or employ any duress directly or indirectly to induce him to make a statement. He stated on this night he went to the home of Mrs. Hacker on Bell Avenue, knocked at the door and Clemmie Hacker came to the door and admitted him. He stated that his purpose there was to use the telephone, that he went into the house but did not use the phone, and then after a while he took the girl for a ride in his car, and stated that they went to his trailer-house out on College Circle, and while there he removed the clothing from this girl, but then he didn't remember exactly what took place while there; and they left and drove out to Rocky River Bridge where he left the child under the bridge."

Officer Smith further testified that defendant had the odor of alcohol about him when he was picked up around 3 a.m. on the night in question, but defendant was not under the influence of alcohol. The officer further stated that he found a pair of glasses in defendant's trailer home which Clemmie Hacker identified as belonging to her, and that he found a torn sanitary napkin belt with a part of the napkin attached in a chair in the living room of defendant's home. The officer stated that he went to the spot near Rocky River Bridge where Clemmie Hacker was found and there found a skirt which Miss

Hacker identified as belonging to her and a sweater which the defendant identified as belonging to him.

Deputy Sheriff C. D. Eggers testified that he spotted Clemmie Hacker at approximately 1:30 a.m. on the night of 25 September 1970 lying naked on the sand at the edge of the water beneath the Rocky River Bridge; that her left eye was swollen shut and she had cuts on the side of her face and was bleeding from the mouth; that he called an ambulance.

The trial court on its own motion excused the jury and conducted a voir dire with respect to defendant's inculpatory statement. Officer Smith testified on voir dire for the State. Defendant did not testify and offered no evidence either on voir dire or before the jury. Following the officer's testimony on voir dire the court found as a fact that prior to making any statement defendant was fully warned of his constitutional rights as required by *Miranda v. Arizona*, 384 U.S. 436; that defendant stated that he understood his rights and stated that he would talk to the officers; that his statement to the officers was freely and voluntarily and understandingly made without threats or any promise of reward. Upon such finding the jury was recalled and, without objection, the officer repeated his testimony before the jury substantially as above set out.

The jury convicted defendant of kidnapping as charged and defendant was sentenced to not less than twenty-five years nor more than life imprisonment. From the judgment pronounced defendant appealed to the Supreme Court assigning errors noted in the opinion.

Clarence E. Horton, Jr. (Davis, Koontz & Horton) Court Appointed Counsel for defendant appellant.

Robert Morgan, Attorney General; Robert G. Webb, Assistant Attorney General, for the State of North Carolina.

HUSKINS, Justice.

We first consider defendant's contention that the evidence is insufficient to carry the case to the jury on the charge of kidnapping.

[1, 2] G.S. 14-39 does not define kidnapping and therefore the common-law definition of that crime is the law of this State.

G.S. 4-1. The common-law definition of kidnapping is "the unlawful taking and carrying away of a person by force and against his will." *State v. Lowry,* 263 N.C. 536, 139 S.E. 2d 870 (1964). The distance the victim is carried is not material. Any carrying away is sufficient. *State v. Ingland,* 278 N.C. 42, 178 S.E. 2d 577 (1971). In the kidnapping of a person the law considers the use of fraud as synonymous with force, *State v. Gough,* 257 N.C. 348, 126 S.E. 2d 118 (1962), *State v. Murphy,* 280 N.C. 1, 184 S.E. 2d 845 (1971); and threats and intimidation are equivalent to the actual use of force or violence. *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216 (1966).

[3] Here, the State's evidence would permit the jury to find that defendant practiced both fraud and intimidation to overcome the will of his victim and secure control of her person. He gained entry to the home on the fraudulent representation that he wished to use the telephone. Once inside, his acts and words were calculated to frighten and intimidate. He instructed his retarded, helpless victim to turn out the porch light, not to scream, and to accompany him to his car. He led her out the door by the hand telling her he was taking her out for a five-minute drive. She testified she went with him because she was afraid. This suffices to show that the journey was undertaken without the victim's consent and against her will. The evidence presents a jury question. This assignment is overruled.

Defendant's remaining assignment of error is based on admission of Officer Smith's testimony in which the officer narrated defendant's inculpatory statements. Defendant contends his incriminating statement should not have been admitted because the record is silent as to defendant's waiver of his right to counsel and even the findings of fact on voir dire are insufficient to show waiver of counsel. The State says, however, that defendant did not object to the admission of this evidence and is attempting to take exception thereto for the first time on appeal.

[4-7] An examination of the record reveals that Officer Smith's testimony concerning the defendant's in-custody statement was received without objection or exception noted. This assignment is therefore ineffectual and presents no question for appellate review. Rules 19(3) and 21, Rules of Practice in the Supreme Court, 254 N.C. 783. "The Rules of Practice (19 and 21) of both this Court and the Court of Appeals require any error

asserted on appeal to be supported by an exception duly taken and shown in the record. Exceptions which appear for the first time in the purported assignments of error present no question for appellate review. *State v. Greene,* 278 N.C. 649, 180 S.E. 2d 789. *See State v. Merrick,* 172 N.C. 870, 90 S.E. 257. Furthermore, each assignment must specifically state the alleged error so that the question sought to be presented is therein revealed. *State v. Staten,* 271 N.C. 600, 157 S.E. 2d 225. An assignment based on the court's failure to charge should set out the defendant's contention as to what the court should have charged. *State v. Wilson,* 263 N.C. 533, 139 S.E. 2d 736. Appellate rules of practice are applicable to indigent defendants and their court-appointed counsel as they are to all others. *State v. Price,* 265 N.C. 703, 144 S.E. 2d 865." *State v. Jacobs,* 278 N.C. 693, 180 S.E. 2d 832 (1971).

[8] The question of defendant's constitutional right to counsel during in-custody interrogation was not raised in the court below. Ordinarily appellate courts will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court. *State v. Jones,* 242 N.C. 563, 89 S.E. 2d 129 (1955); *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376 (1968); *State v. Cumber,* 280 N.C. 127, 185 S.E. 2d 141 (1971). This is in accord with decisions of the Supreme Court of the United States. *Edelman v. California,* 344 U.S. 357, 97 L.Ed. 387, 73 S.Ct. 293 (1952).

[9] The rules of the Supreme Court are mandatory and will be enforced. *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1970).

[10] The appeal itself is considered an exception to the judgment and presents for review any error appearing on the face of the record proper. *State v. Ayscue,* 240 N.C. 196, 81 S.E. 2d 403 (1954); *State v. Elliott,* 269 N.C. 683, 153 S.E. 2d 330 (1967). 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 (1966); *State v. Jackson,* 279 N.C. 503, 183 S.E. 2d 550 (1971). An examination of the record proper reveals no error. *State v. Tinsley,* 279 N.C. 482, 183 S.E. 2d 669 (1971).

[11] Consideration of the assignment on its merits, however, leads to the same result. Admission of defendant's inculpatory statement to Officer Smith was erroneous because there is

neither evidence nor findings to show that defendant waived his right to counsel, either in writing as provided by G.S. 7A-457 on which *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971), is based, or orally as provided by *Miranda,* on which *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971), is based. Even so, the erroneous admission of the statement does not automatically require a new trial. Defendant's statement was not *coerced* as in *Payne v. Arkansas,* 356 U.S. 560, 2 L.Ed. 2d 975, 78 S.Ct. 844 (1958). The statement was not *involuntary,* induced by threat or promise or "by the slightest emotions of hope or fear" as in *State v. Roberts,* 12 N.C. 259 (1827). There is no suggestion that the police applied the stick or waved a carrot to produce the statement. It was voluntarily made. The court so found on voir dire, and all the evidence supports the finding.

The broad sweep of cases dealing with a defendant's inculpatory statements project two predominant concerns: (1) that the circumstances surrounding defendant's interrogation do not render his statement inherently unreliable because involuntary; and (2) that over-zealous officers be deterred from the use of unconstitutional and illegal practices in obtaining a statement from the accused. 3 Wigmore, Evidence § 821 ff. (Chadbourn rev. 1970). Neither of these concerns would be served by remanding this case since, measured by all traditional standards, defendant's statement was entirely voluntary and there is absolutely no evidence of overreaching on the part of the officers. Thus there is no factual basis for an *automatic* new trial.

[12] We have consistently held that the admission of evidence which is technically incompetent will be treated as harmless unless it is made to appear that defendant was prejudiced thereby and that a different result likely would have ensued had the evidence been excluded. *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969); *State v. Barrow,* 276 N.C. 381, 172 S.E. 2d 512 (1970); *State v. Barbour,* 278 N.C. 449, 180 S.E. 2d 115 (1971); *State v. Bailey,* 280 N.C. 264, 185 S.E. 2d 683 (1972). Moreover, every violation of a constitutional right is not prejudicial. "Some constitutional errors are deemed harmless in the setting of a particular case, not requiring the automatic reversal of a conviction, where the appellate court can declare a belief that it was harmless beyond a reasonable doubt. . . . Unless there is a reasonable possibility that the evidence

complained of might have contributed to the conviction, its admission is harmless. *Fahy v. Connecticut,* 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229 (1963)." *State v. Taylor,* 280 N.C. 273, 185 S.E. 2d 677 (1972). "Our judgment must be based on our own reading of the record and on what seems to us to have been the probable impact of the [defendant's statement] on the minds of an average jury." *Harrington v. California,* 395 U.S. 250, 23 L.Ed. 2d 284, 89 S.Ct. 1726 (1969).

Here, the statement made by this defendant placed him at the scene of the crime and in the company of the victim, but it did not prove his guilt. Taken alone, it would not have sufficed to convict defendant of the crime of kidnapping. It is simply an admission of facts that, taken with others, tends to show guilt. 22A C.J.S., Criminal Law § 730 and following; Wigmore, supra, § 821.

Just as in *Harrington, supra,* the case against Hudson "was not woven from circumstantial evidence." Defendant's guilt is shown beyond a reasonable doubt by competent, untainted, direct as well as circumstantial evidence, including: (1) the victim's testimony, (2) the officer's testimony in corroboration, (3) the victim's glasses which were found in defendant's trailer home, (4) a torn sanitary belt and napkin found in a chair in defendant's trailer home, and (5) the victim's skirt and defendant's sweater found at the spot near the Rocky River Bridge where Clemmie Hacker, naked and beaten, was first sighted by Deputy Sheriff Eggers. In light of such overwhelming evidence of guilt, there is no reason to believe that yet another trial would produce a different result. "It is so overwhelming that unless we say that no violation of [Miranda] can constitute harmless error, we must leave this . . . conviction undisturbed." *Harrington v. California, supra.* Admission of the statement was therefore harmless. *State v. Brinson,* 277 N.C. 286, 177 S.E. 2d 398 (1970); *State v. Smith,* 278 N.C. 476, 180 S.E. 2d 7 (1971); *State v. Fletcher and Arnold,* 279 N.C. 85, 181 S.E. 2d 405 (1971).

For the reasons stated the verdict and judgment will not be disturbed.

No error.

STATE OF NORTH CAROLINA ON RELATION OF THE BANKING COMMISSION, AND BRANCH BANKING AND TRUST COMPANY v. LEXINGTON STATE BANK

No. 75

(Filed 12 April 1972)

1. **Banks and Banking § 1— establishment of branch bank — requisite findings**

As a condition precedent to the establishment of a branch bank, the Commissioner of Banks must find that such branch will meet the needs of the community and that the probable volume of business will be sufficient to assure and maintain the solvency of such branch. G.S. 53-62.

2. **Banks and Banking § 1— applications for two branches — consolidation for hearing — separate findings and conclusions**

While two applications by a bank to establish two branches in the same city may be consolidated for hearing, each application must be treated as a separate application and be approved or denied on the basis of the evidence relating thereto, and separate findings and conclusions must be made as to each application.

3. **Banks and Banking § 1— establishment of branch bank — solvency requirements**

The solvency provisions of G.S. 53-62 for establishment of a branch bank are not met by the fact that the parent bank and all its branches together meet the solvency test, it being required that each new branch not endanger the solvency of the parent bank or the solvency of another bank in the field.

APPEAL by defendant from the decision of the Court of Appeals filed August 18, 1971, affirming judgment in favor of the plaintiff petitioner entered in the Superior Court of WAKE County by *Clark, J.*, at its September 14, 1970 Civil Session. A dissent was filed to the decision of the Court of Appeals. The respondent appealed as a matter of right under G.S. 7A-30(2). This case was docketed and argued at the Fall Term 1971 as No. 125.

Two applications were filed before the Commissioner of Banks (Commissioner) by Branch Banking and Trust Company (Branch) for authority to open two branches in Lexington. One was to be designated "Lexington Branch" and the other "Lexington Drive-In Branch." The Lexington State Bank (Lexington) filed a protest to each application.

The Commissioner of Banks (Commissioner) approved the applications. On review, the North Carolina Banking Commis-

sion (Commission) conducted an extensive investigation and heard evidence of interested parties. The two applications were consolidated and heard as a single proceeding. Throughout the hearing the petitioner's evidence dealt with the two applications as a single request for two branches. After the consolidation there was no attempt to relate the evidence, or the findings, specifically to either application. The two were treated as a single application.

On review by the Commission, facts were found and the Commissioner concluded: "4. All of the requirements for approval of the establishment of branches of The Branch Banking and Trust Company in Lexington, North Carolina, prescribed by applicable North Carolina law have been met." By order, the Commissioner of Banks approved the applications and, after hearing, the Banking Commission ratified, confirmed, and approved them.

The Lexington State Bank appealed the decision to the Wake County Superior Court. On review, Judge Clark found the facts and conclusions of the Commission were supported by the evidence and on September 25, 1970, entered an order ratifying, confirming, and approving the establishment "of two branches in Lexington." From the order, the respondent bank appealed.

On August 18, 1971, the Court of Appeals, Judge Brock dissenting, affirmed the order of the Superior Court. The respondent appealed.

Jordan, Morris and Hoke by John R. Jordan, Jr., and William R. Hoke; Walser, Brinkley, Walser & McGirt by Walter F. Brinkley for defendant appellant.

Carr and Gibbons by F. L. Carr, DeLapp, Ward & Hedrick by Hiram H. Ward for plaintiff appellee.

HIGGINS, Justice.

[1] As a condition precedent to the establishment of a branch, the Commissioner of Banks must find that such branch will meet the needs of the community and the probable volume of business will be sufficient to assure and maintain the solvency of such branch. G.S. 53-62 provides: "Such approval shall not be given until he (Commissioner) shall find (i) that the estab-

lishment of such branch or teller's window will meet the needs and promote the convenience of the community to be served by the bank, and (ii) that the probable volume of business and reasonable public demand in such community are sufficient to assure and maintain the solvency of said branch or teller's window and of the existing bank or banks in said community."

[2, 3] We conclude from the wording of the pertinent statute that each application for a branch must be treated as a separate application and be approved or denied on the basis of the evidence relating thereto taken before the Commissioner or the Commission. The requirement is not met in the absence of a separate finding. We do not mean to say that two applications for branches may not be consolidated and heard together. What we do say is that under the statute the evidence and finding must be sufficient to support each application independent of the other. No provision is made in the act for the approval of any branch that fails to meet the requirements. The purpose is obvious. A branch may not be established which would be a financial failure or would endanger the solvency of another bank already in the field. The petitioner argues that solvency provisions of our statute are met if the parent bank and all its branches together meet the solvency test. Branch cites *First Citizens Bank and Trust Company v. Camp,* 409 F. 2d 1086 in support of the total solvency test.

The decision of the Court of Appeals makes it clear that the decision applies only to the showing in the First Citizens case, calling attention to the absence of any North Carolina court decision construing G.S. 53-62. The solvency tests under the statute are twofold. Each new branch must not endanger the solvency of the parent bank and it must not endanger the solvency of another bank already in the field. We are governed by the provisions of the act as written. Fixing rules comes within the function of the General Assembly. Unless the rules violate some fundamental (constitutional) right, the Commissioner of Banks, the Banking Commission, and the courts are bound by them. The purpose to be accomplished by what appear to be rather stringent rules was to protect the solvency of banks. A bank failure is a major disaster to the community served by the bank.

Some of the members of the General Assembly which rewrote G.S. 53-62 were old enough to recall the day in 1933

when all banks were ordered closed because depositors were transferring funds from bank vaults to hiding places in their homes.

It is well known that a rumor of insolvency may start a run on a bank. To minimize the danger, was the motivation for G.S. 53-62. The purpose was to require that each separate branch contribute to the solvency of the system.

We conclude there must be an independent finding with respect to each branch. Manifestly two or more branches may not be lumped together and approved as a single unit. If two may be consolidated, then any number may be if the total meets the test. G.S. 53-62 requires that each branch meet the test.

For the reasons heretofore assigned, it is now ordered that the applications be remanded to the Banking Commission for separate findings and conclusions as to each individual application for a branch. To that end the decision of the Court of Appeals is reversed and the proceeding will be remanded to the Banking Commission for disposition in accordance with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. KENNIE HARRELL

No. 18

(Filed 12 April 1972)

1. Constitutional Law § 30— right to speedy trial — purpose

The threefold purpose of the constitutional guaranty of a speedy trial is to protect the accused against prolonged imprisonment, relieve him of the anxiety and public suspicion attendant upon an untried accusation of crime, and prevent him from being exposed to trial after the lapse of so great a time that the means of proving his innocence may have been lost.

2. Constitutional Law § 30— speedy trial

The word "speedy" cannot be defined in specific terms of days, months or years, so the question whether a defendant has been denied a speedy trial must be answered in light of the facts in a particular case.

3. Constitutional Law § 30— speedy trial — reasonableness of delay

Four factors should be considered in determining the reasonableness of a delay: the length of the delay, the reason for the delay, prejudice to the defendant, and waiver by the defendant.

4. Constitutional Law § 30— speedy trial — appeal from recorder's court — trial de novo in superior court — delay

Defendant was not denied his Sixth Amendment right to a speedy trial by the delay between his appeal from the recorder's court on 24 September 1968 and his trial *de novo* in the superior court in June 1971, where defendant was serving a sentence for an unrelated offense for nine months after his appeal, defendant thereafter failed to appear for trial on two occasions when the case was called, defendant has not shown that the delay in bringing him to trial was due to neglect or willfulness of the prosecution or even that it was for the convenience of the State, and defendant has not shown that the delay prejudiced his cause or created a reasonable possibility of prejudice to him.

5. Criminal Law § 138— trial de novo in superior court — increased punishment

Upon appeal from an inferior court for a trial *de novo* in the superior court, the superior court may impose punishment in excess of that imposed in the inferior court provided the punishment imposed does not exceed the statutory maximum. Amendments VI and XIV, U. S. Constitution; Article I, §§ 19 and 24, N. C. Constitution.

Chief Justice BOBBITT dissenting in part.

Justices HIGGINS and SHARP join in dissenting opinion.

DEFENDANT appeals from decision of the Court of Appeals upholding judgments of *Bowman, S.J.*, 21 June 1971 Criminal Session, CRAVEN Superior Court.

Defendant was charged in separate warrants with committing an assault with a deadly weapon upon Grace Harrell, his wife, Faye Mitchell, his wife's sister, and Mary Mercer, his mother-in-law.

The State's evidence tends to show that on 1 July 1968 the three prosecuting witnesses were sitting on Mary Mercer's porch when defendant drove up, jumped out of his car, held a shotgun on the trio and told them not to move or he would kill them. Faye Mitchell ran to the back of the house to call the police. Mary Mercer screamed for help. The defendant attempted to force Grace Harrell to get in his car and bring their children with her. He repeatedly told the women he would kill them if they moved and threatened to blow Mary Mercer's "god

damn head off." Defendant and his wife were separated at the time. When defendant heard that the officers were coming, "he hauled off and fired the gun," the shot striking the house within a few feet of Grace Harrell and her mother.

Defendant testified as a witness in his own behalf and stated that Faye Mitchell fired a pistol at him three or four times and that he reached for his shotgun but the boy, who was with him in his car, picked up the gun and shot at the porch and ran away. Defendant denied shooting at, pointing a gun at, or threatening the women.

On 24 September 1968 in the Craven County Recorder's Court defendant was convicted of an assault with a deadly weapon in each case and given six months in each case to run concurrently. He appealed to the Superior Court of Craven County where, on 21 June 1971, he was convicted by a jury of an assault with a deadly weapon in each case. The court thereupon sentenced him to eighteen to twenty-four months in each case to run consecutively. Defendant appealed to the Court of Appeals, and that tribunal found no error, 13 N.C. App. 243. Defendant thereupon appealed to the Supreme Court allegedly as of right contending that a substantial constitutional question is involved. The State moves to dismiss the appeal for lack of a substantial constitutional question.

John H. Harmon, attorney for defendant appellant.

Robert Morgan, Attorney General; Christine A. Witcover, Associate Attorney; James F. Bullock, Deputy Attorney General, for the State of North Carolina.

HUSKINS, Justice.

We have decided to consider the appeal on its merits. Hence the State's motion to dismiss the appeal is denied.

Defendant first contends that he was denied a speedy trial in the Superior Court of Craven County and that his motion to dismiss these actions on that ground should have been allowed.

The record is not clear with respect to events occurring between 24 September 1968 when defendant appealed from the recorder's court and June 1971 when he was tried *de novo* in the Superior Court of Craven County. In September 1968 de-

fendant was apparently serving a prison term for some unrelated offense. The colloquy among the judge, the solicitor and defendant's counsel seems to indicate that defendant completed that sentence on 25 June 1969, gave an appearance bond in these cases on 26 June 1969 and was released. On 10 September 1969 counsel was appointed in these cases to represent defendant. On 11 November 1969 defendant's present counsel was first appointed, but the record shows defendant subsequently attempted to fire him and "appoint" another attorney. Whether this occasioned any delay in defendant's trial is not clear. In any event, these cases were calendared for trial and called on 25 May 1970, and defendant failed to appear. Capias was issued and returned unserved when it was ascertained that defendant was in Florida. Whether he went to Florida shortly after posting his appearance bond on 26 June 1969 or at a later date is not shown by the record. Defendant was again called for trial on 8 March 1971 and again failed to answer, and another capias was issued for his arrest. Defendant was eventually apprehended on 12 May 1971, lodged in jail, and tried at the next term of Craven Superior Court. His present counsel was reappointed on 3 June 1971. The question of speedy trial was raised for the first time when these cases were called for trial at the June 1971 Term.

Principles governing the right to a speedy trial guaranteed by the Sixth Amendment and made applicable to the States by the Fourteenth Amendment are outlined with commendable clarity by Justice Sharp in *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274 (1969). The right to a speedy trial has been considered by this Court in other cases including *State v. Ball,* 277 N.C. 714, 178 S.E. 2d 377 (1971); *State v. Cavallaro,* 274 N.C. 480, 164 S.E. 2d 168 (1968); *State v. Hollars,* 266 N.C. 45, 145 S.E. 2d 309 (1965); *State v. Lowry,* 263 N.C. 536, 139 S.E. 2d 870 (1965); *State v. Patton,* 260 N.C. 359, 132 S.E. 2d 891 (1964); *State v. Webb,* 155 N.C. 426, 70 S.E. 1064 (1911).

Similarly, the Supreme Court of the United States has considered the constitutional guaranty of a speedy trial in various cases including *United States v. Marion,* 404 U.S. 307, 30 L.Ed. 2d 468, 92 S.Ct. 455 (1971); *Dickey v. Florida,* 398 U.S. 30, 26 L.Ed. 2d 26, 90 S.Ct. 1564 (1970); *Smith v. Hooey,* 393 U.S. 374, 21 L.Ed. 2d 607, 89 S.Ct. 575 (1969); *Klopfer v.*

North Carolina, 386 U.S. 213, 18 L.Ed. 2d 1, 87 S.Ct. 988 (1967); *United States v. Ewell,* 383 U.S. 116, 15 L.Ed. 2d 627, 86 S.Ct. 773 (1966); *Pollard v. United States,* 352 U.S. 354, 1 L.Ed. 2d 393, 77 S.Ct. 481 (1957); *Beavers v. Haubert,* 198 U.S. 77, 49 L.Ed. 950, 25 S.Ct. 573 (1905).

[1] The threefold purpose of the constitutional guaranty of a speedy trial is to protect the accused against prolonged imprisonment, relieve him of the anxiety and public suspicion attendant upon an untried accusation of crime, and prevent him from being exposed to trial after the lapse of so great a time that the means of proving his innocence may have been lost. 21 Am. Jur. 2d, Criminal Law § 242; *State v. Hollars, supra; United States v. Ewell, supra.*

[2, 3] The word *speedy* cannot be defined in specific terms of days, months or years, so the question whether a defendant has been denied a speedy trial must be answered in light of the facts in a particular case. Four factors should be considered in determining the reasonableness of a delay: the length of the delay, the reason for the delay, prejudice to the defendant, and waiver by the defendant. *State v. Ball, supra; State v. Hollars, supra; State v. Lowry, supra.*

It is the rule in a majority of jurisdictions that a defendant waives his right to a speedy trial unless he resists postponement, demands trial, or otherwise attempts to procure a speedier trial than the State accorded him. *State v. Hollars, supra;* Annot., Speedy Trial—Waiver or Loss of Right, 129 A.L.R. 572 (1940); Supp. Annot., 57 A.L.R. 2d 302 (1958). Here, defendant made no demand for a trial at any time during the delay he is now protesting. He not only failed to resist postponement but failed to appear for trial when called on at least two occasions. Hence under the majority rule defendant has waived his constitutional right to a speedy trial, but we do not rest decision here on that ground. A strong minority of jurisdictions rejects the "demand doctrine" and requires only a motion to dismiss, filed before trial. See 21 Am. Jur. 2d, Criminal Law § 254. Whether an accused loses his right to a speedy trial by silence or inaction remains to be resolved by the United States Supreme Court. In *State v. Ball, supra,* we quoted with approval from Mr. Justice Brennan's concurring opinion in *Dickey v. Florida, supra,* where he excludes waiver by the defendant as one of the basic factors to be considered

in judging the reasonableness of a particular delay. In any event, we prefer to rest decision here on other grounds.

[4] Defendant has not shown that the delay in bringing him to trial was "the studied choice of the prosecution," *State v. Johnson, supra,* or even that the delay was for the convenience of the State. Neither has defendant shown, or attempted to show, that the delay created a reasonable possibility of prejudice to him. Nor has he shown any actual prejudice to his cause. No witnesses have died or disappeared and no evidence has been lost. The memories of those he assaulted are not alleged to have been affected by the passage of time. His own memory of events has not dimmed. Hence it would appear that no actual prejudice to the conduct of the defense is alleged or proven. He seems to rely solely on the possibility of prejudice inherent in any extended delay—that memories are dimmed, witnesses become inaccessible and evidence lost. "[H]owever, these possibilities are not in themselves enough to demonstrate that [appellant] cannot receive a fair trial and to therefore justify . . . dismissal." *United States v. Marion, supra.* Furthermore, "[t]he burden in on an accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution. A defendant who has himself caused the delay, or acquiesced in it, will not be allowed to convert the guarantee, designed for his protection, into a vehicle in which to escape justice." *State v. Johnson, supra.*

In light of the foregoing principles we hold that the delay of which defendant complains did not violate his Sixth Amendment right to a speedy trial. Defendant's first assignment of error is overruled.

[5] Defendant next contends the imposition of greater sentences upon trial *de novo* in superior court violates his constitutional rights guaranteed by the Sixth and Fourteenth Amendments to the Federal Constitution and Article I, §§ 13 and 17 of the Constitution of North Carolina (now §§ 24 and 19 respectively of the State Constitution which became effective 1 July 1971). This constitutes his second and final assignment of error.

The question posed has already been the subject of conclusive judicial determination in North Carolina and has been determined adversely to defendant's position. *State v. Speights,*

280 N.C. 137, 185 S.E. 2d 152 (1971); *State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765 (1970); *State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897 (1970). It is pointless to thrash this straw again. The imposition of punishment by the superior court in excess of that imposed in the Recorder's Court of Craven County was not error. Upon appeal from an inferior court for a trial *de novo* in the superior court, the superior court may impose punishment in excess of that imposed in the inferior court provided the punishment imposed does not exceed the statutory maximum. *State v. Tolley,* 271 N.C. 459, 156 S.E. 2d 858 (1967); *State v. Morris,* 275 N.C. 50, 165 S.E. 2d 245 (1969). Decisions from other jurisdictions adopting this view include *Mann v. Commonwealth,* ____ Mass. ____, 271 N.E. 2d 331 (1971); *State v. Stanosheck,* 186 Neb. 17, 180 N.W. 2d 226 (1970); *Evans v. City of Richmond,* 210 Va. 403, 171 S.E. 2d 247 (1969); *People v. Olary,* 382 Mich. 559, 170 N.W. 2d 842 (1969); *Lemieux v. State,* Me., 240 A. 2d 206 (1968). Here, defendant was convicted of an aggravated assault in three separate cases, and the maximum punishment for each offense, when committed on 1 July 1968, was a fine and imprisonment not to exceed two years. G.S. 14-33(b), (c). If the punishment seems severe, the Board of Paroles may lawfully grant relief; but in law there is no error.

For the reasons stated the decision of the Court of Appeals upholding the judgments of the trial court is

Affirmed.

Chief Justice BOBBITT dissenting in part.

In my opinion there was only one assault—no battery—and therefore only one judgment was permissible.

Justices HIGGINS and SHARP join in this dissenting opinion.

STATE OF NORTH CAROLINA v. CRAVEN TURNER, JR.

No. 4

(Filed 12 April 1972)

Criminal Law § 75— in-custody statements — failure to demand counsel — absence of waiver

In this prosecution for first degree murder, the trial court erred in the admission of in-custody incriminating statements made by defendant without benefit of counsel where there was neither evidence nor finding that defendant specifically waived the right to counsel, the failure to demand counsel not constituting a waiver.

APPEAL by defendant from *Beal, S.J.*, May 31, 1971 Special Criminal Session, STANLY Superior Court.

The defendant was charged by indictment, proper in form, with the capital felony of murder in the first degree in the killing of James Alexander Howell. The offense is charged to have been committed in Stanly County on January 5, 1971. This is a companion case to *State v. Blackmon* tried at the March 29, 1971 Session, Stanly Superior Court. Blackmon and the defendant, Craven Turner, Jr., were separately indicted for murder in the attempt to perpetrate armed robbery.

The defendant Blackmon was convicted of murder in the first degree. The jury having failed to recommend life imprisonment, the court imposed the mandatory death sentence. This Court granted a new trial because of error committed by the trial court in permitting the State to introduce the defendant's in-custody confession made at a time when he was not represented by counsel, and had not affirmatively waived counsel. *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123.

The defendant and Blackmon were arrested and interrogated separately and then brought together by the officers where each implicated the other. The warnings required by the Supreme Court of the United States in *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602, had been given. In Turner's case as in Blackmon's, the court, after voir dire hearing, concluded that the admissions were knowingly and voluntarily made without any inducement or coercion and were admissible before the jury.

The theory of the State was that Blackmon and the defendant planned to rob the deceased, Mr. Howell; armed themselves

with a shotgun; and intercepted the intended victim as he was leaving home for work on the early morning of January 5, 1971. When first accosted, Mr. Howell gave evidence of his intention to resist the robbery. He was shot by one of the robbers. Both became frightened and left the scene in Turner's automobile after hiding their disguises which were later recovered.

The defendant Turner at his trial objected to the introduction in evidence of the in-custody admissions made to the officers. The trial court conducted a voir dire in which the officers testified that the warnings were given and Turner asked that Attorney Charles E. Brown be called. Attorney Brown was called and conferred with the defendant, but because of a conflict of interest Mr. Brown did not agree to represent the defendant. Other counsel for Turner was not obtained.

On the voir dire, the defendant testified that at the time of the interrogation he was frightened and did not remember the warnings. He did not deny that they were given. The defendant, however, did not testify at the trial before the jury and did not offer evidence.

The jury returned a verdict finding the defendant guilty of murder in the first degree with a recommendation the punishment be imprisonment for life in the State's prison. From the judgment in accordance with the verdict, the defendant appealed.

Robert Morgan, Attorney General, by Ralph Moody, Special Counsel to Attorney General, and William Lewis Sauls, Associate Attorney, for the State.

Davis, Koontz & Horton by James C. Davis and Clarence E. Horton, Jr. for defendant appellant.

HIGGINS, Justice.

After the appellant had filed the record of the case on appeal and his brief, the Attorney General filed the State's brief which contained the statement here quoted:

> "In view of the decision of this Court in STATE v. BLACKMON (280 N.C. 42), we do not discuss the LYNCH case (279 N.C. 1). While we do not confess error because the Court may see and observe some features that distinguish this case from the BLACKMON case, nevertheless,

> we are unable to distinguish between the two cases . . . . The critical ruling in the BLACKMON case is that the failure to ask for a lawyer does not constitute a waiver under the MIRANDA case."

The State, however, later requested, and was given permission to file a supplemental brief. In the supplemental brief the Attorney General called attention to the fact the defendant, after the original interrogations, requested that he have the opportunity to make changes in his story. He requested the further interview with the officers "to get it off his brain." He then made the incriminating statements which were admitted in evidence against him. He was still in custody charged with a capital felony. He had not withdrawn his request that he have counsel. He had at first asked for a lawyer and had Attorney Brown called, but Attorney Brown was unable to represent him. He did not waive his right to the presence and advice of an attorney, although he did not make a further demand for counsel. These facts do not constitute a voluntary waiver of counsel as this Court construes the requirement in *Miranda v. Arizona, supra.* On the voir dire and at the trial, however, the court found facts and concluded the admissions were knowingly and voluntarily made after adequate warnings and were admissible in evidence. However, there is neither evidence nor finding the defendant specifically waived the right to counsel.

At the time the offense here involved was committed (January 5, 1971) and at the time the incriminating admissions were made to the officers (February 19, 1971), the North Carolina statutory requirements as to counsel discussed in *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561, were in force. The General Assembly, however, by Chapter 1243, Session Laws of 1971, amended Section 7A-457 of the General Statutes, relaxing the requirement that a waiver of counsel must be in writing. As stated in Blackmon, however, we base decision in this case on the failure to meet the requirement fixed by the Supreme Court of the United States in *Miranda v. Arizona, supra.* Failure to demand counsel is not a waiver.

We conclude, therefore, the trial court erroneously overruled the defendant's objection to his in-custody admissions. The judgment is vacated, the verdict is set aside and it is ordered that there be a

New trial.

STATE OF NORTH CAROLINA v. JAMES MACKEL SPENCER

No. 27

(Filed 12 April 1972)

1. Constitutional Law § 30— speedy trial

The constitutional right to a speedy trial protects an accused from extended imprisonment before trial, from public suspicion generated by an untried accusation, and from loss of witnesses and other means of proving his innocence resulting from passage of time.

2. Constitutional Law § 30— speedy trial — circumstances of each case

Whether defendant has been denied the right to a speedy trial is a matter to be determined by the trial judge in the light of the circumstances of each case.

3. Constitutional Law § 30— speedy trial — burden of proof

The accused has the burden of showing that the delay was due to the State's wilfulness or neglect.

4. Constitutional Law § 30— speedy trial — unavoidable delay — delay requested by defendant

Unavoidable delays and delays caused or requested by defendant do not violate his right to a speedy trial.

5. Constitutional Law § 30— speedy trial — waiver

A defendant may waive his right to a speedy trial by failing to demand or to make some effort to obtain a speedier trial.

6. Constitutional Law § 30— speedy trial — ten months between arrest and trial

Defendant was not denied his constitutional right to a speedy trial by a delay of ten months between his arrest and trial on charges of possessing and growing marijuana where defendant, who was represented by counsel, failed to demand a speedy trial, failed to appear when the case was called for trial on one occasion, and acquiesced in a continuance on another occasion, and defendant failed to show that the delay resulted in any prolonged imprisonment, created public suspicion against him or deprived him of any means of proving his innocence; there is no merit in defendant's contention that he was prejudiced by the delay because of widespread publicity resulting from drug investigations in the county during the delay and the trial of three other drug cases at the same session at which he was tried.

7. Searches and Seizures § 3— affidavit for search warrant — sufficiency

An affidavit for a search warrant complied with G.S. 15-26(b) and met the constitutional standard of reasonableness and probable cause, where the affiant stated that he had received information from a reliable informant that defendant had marijuana in his residence and was growing marijuana approximately 75 yards from his residence, that the informant was credible because he had given information

in the past which led to arrests and convictions, that affiant confirmed the information as to growing marijuana by personal observation, and that affiant, by personal surveillance, observed large amounts of traffic to and from defendant's residence.

8. **Searches and Seizures § 3— search warrant — affidavit — information from prior warrantless search — lands not within curtilage**

There is no merit in defendant's contention that a search warrant was invalid on the ground that the affidavit for the warrant revealed that the affiant had illegally searched a cornfield in which marijuana was growing some 75 yards behind defendant's residence prior to issuance of the warrant, since the constitutional guaranties against unreasonable search and seizure do not apply to open fields or other lands not an immediate part of the dwelling site.

9. **Narcotics § 4— constructive possession**

Constructive possession of marijuana is that which exists without actual personal dominion over the material, but with an intent and capability to maintain control and dominion over it.

10. **Criminal Law § 106— motion for nonsuit or directed verdict — circumstantial evidence**

When a motion for nonsuit or motion for directed verdict questions the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances.

11. **Narcotics § 4— marijuana in out-building — possession**

The State's evidence was sufficient to support a reasonable inference that defendant exercised custody, control and dominion over 82.2 grams of marijuana found in a pig shed located approximately twenty yards directly behind defendant's residence, where it tended to show that defendant had been seen on numerous occasions in and around the out-buildings directly behind his house, and that marijuana seeds were found in defendant's bedroom. G.S. 90-88.

12. **Narcotics § 4— growing marijuana in cornfield**

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of feloniously growing marijuana where it tended to show that (1) marijuana seeds were found in defendant's bedroom, (2) 82.2 grams of marijuana were found in a pig pen located 20 yards directly behind defendant's residence, (3) an unintersected path began at the edge of the pig pen and extended a distance of about 55 yards to a cornfield where marijuana was found growing, and (4) the wire fencing at the beginning of the path was lower than the remainder of the path.

APPEAL by defendant from decision of the North Carolina Court of Appeals (13 N.C. App. 112), affirming *Rouse, J.*, at 1 May 1971 Session of BEAUFORT Superior Court.

Defendant was charged in separate bills of indictment with feloniously growing marijuana and with feloniously possessing marijuana in a quantity in excess of one gram.

The State offered evidence which tended to show that defendant lived in a combination residence and store in rural Beaufort County. Officers, armed with a search warrant, searched the residence-store and a pig pen located approximately twenty-five yards directly behind defendant's home. The officers found a jar containing marijuana seeds in defendant's bedroom, and found a box containing in excess of eighty-two (82) grams of marijuana leaves in a shed in the pig pen.

Beginning at the fence near the eastern corner of the same pig pen, a path some three or four feet wide ran approximately fifty to fifty-five yards to the edge of a cornfield. The wire fencing at the beginning of the path was lower than the remainder of the fence. The total distance by way of the path from defendant's residence to the cornfield was approximately seventy-five yards. No paths intersected or adjoined the path leading from the pig pen to the cornfield. The officers found approximately 115 marijuana plants growing in the corn rows.

Defendant offered no evidence. The jury returned verdicts of guilty as charged on both counts. The trial judge imposed concurrent sentences of two years on each count. Defendant appealed to the North Carolina Court of Appeals. The appeal is before this Court pursuant to G.S. 7A-30(1).

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

Wilkinson, Vosburgh & Thompson by John A. Wilkinson, for defendant.

BRANCH, Justice.

Upon the call of his case for trial, and before pleading, defendant through counsel moved to quash the bills of indictment on the ground that his constitutional right to a speedy trial had been violated.

We note at the outset that the motion should have been to dismiss rather than to quash; however, the trial judge apparently treated the motion as a motion to dismiss and we therefore choose to consider the question of speedy trial.

The trial judge considered the records of the case, statements of defense counsel and statements of the solicitor for the State, and, after making full findings of fact, concluded (1) that the length of delay was not unreasonable, (2) that the delay was for good cause and not because of neglect or wilfullness of the prosecution, (3) that the delay was not prejudicial to defendant in preparing and presenting his defense, and (4) that failure to try defendant at the January 1971 Session of Beaufort County Superior Court was acquiesced in by defendant's counsel. Upon these findings of fact and conclusions of law the court denied defendant's motions to quash the bills of indictment.

Defendant did not except to any findings of fact or conclusions of law upon which the denial of the motions to quash was based. In any event, the record discloses that there was ample evidence to support the findings of fact, and that these findings in turn supported the conclusions of law.

[1-5] The constitutional right to a speedy trial protects an accused from extended imprisonment before trial, from public suspicion generated by an untried accusation, and from loss of witnesses and other means of proving his innocence resulting from passage of time. Whether defendant has been denied the right to a speedy trial is a matter to be determined by the trial judge in light of the circumstances of each case. The accused has the burden of showing that the delay was due to the State's wilfulness or neglect. Unavoidable delays and delays caused or requested by defendant do not violate his right to a speedy trial. Further, a defendant may waive his right to a speedy trial by failing to demand or to make some effort to obtain a speedier trial. *State v. Ball,* 277 N.C. 714, 178 S.E. 2d 377; *State v. Hollars,* 266 N.C. 45, 145 S.E. 2d 309; *State v. Lowry* and *State v. Mallory,* 263 N.C. 536, 139 S.E. 2d 870. The constitutional right to a speedy trial prohibits arbitrary and oppressive delays by the prosecution. *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274. But this right is necessarily relative and is consistent with delays under certain circumstances. *Beavers v. Haubert,* 198 U.S. 77, 49 L.ed. 950, 25 S.Ct. 573.

[6] Approximately ten months elapsed between the time of defendant's arrest and the time of his trial. He complains that events taking place during the delay, rather than the actual

length of the delay, prejudiced him. He argues that widespread publicity resulting from drug investigations in Beaufort County during this delay, and the trial of three other drug cases in the same session at which he was tried, created the actual prejudice.

In this connection we take judicial notice that the drug problem had been known and widely publicized in every corner of the state long before defendant was arrested. In any event, we can only speculate as to the effect of the Beaufort County investigations and trials upon the minds of prospective jurors.

Defendant was represented by experienced and competent counsel and was in position to demand a speedy trial. He failed to do so. On the contrary, at one term of court his case was called and he failed to answer. At another term of court his counsel acquiesced in a continuance. Defendant fails to show that the delay of approximately ten months resulted in any prolonged imprisonment, created public suspicion against him, or deprived him of any means of proving his innocence. In fact, a careful examination of this record fails to reveal any evidence of purposeful and oppressive delay on the part of the State.

The trial judge correctly overruled defendant's motions to quash the indictments.

[7] Defendant next contends that the trial judge erred in denying his motion to suppress all the evidence resulting from the search of his premises. He argues that the affidavit for the search warrant fails to comply with G.S. 15-26(b) and with the constitutional requirement of probable cause guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution.

G.S. 15-26(b) provides: "An affidavit signed under oath or affirmation by the affiant or affiants and indicating the basis for the finding of probable cause must be a part of or attached to the warrant."

The portion of the affidavit pertinent to the question of probable cause recites:

> The facts which establish probable cause for the issuance of a search warrant are as follows:

Information received by affiant on 7-3-70 from a reliable informant, one which has given information in the past and lead to convictions and arrest, that James Spencer c/m who resides at R-2, Box 42, Pantego, N. C., as described above has marahauna plants growing approximately 75 yards from his residents and marahauna seeds within his residents. On 7-9-70 and 7-14-70 affiant found the marajauna plants growing in the location given by informant. On 7-13-70 information received from informant that subject James Spencer is to leave on 7-15-70 on trip with a quantity of marahauna which will be transported in his personal car, a 1964 Chrysler, N. C. Lic. LF602. Surveillance by affiant on 7-14-70 indicated large amount of traffic at residence.

THOMAS WILLIAM CADDY
Affiant.

Sworn to on July 15, 1970.

The principles of law applicable to this contention are stated in the case of *State v. Spillars,* 280 N.C. 341, 185 S.E. 2d 881 as follows:

A valid search warrant may be issued on the basis of an affidavit containing information which may not be competent as evidence. *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755. The affidavit may be based on hearsay information if the magistrate is informed of underlying circumstances upon which the informant bases his conclusion as to the whereabouts of the articles and the underlying circumstances upon which the officer concluded that the informant was credible. *Jones v. U. S.,* 362 U.S. 257, 4 L.Ed. 2d 697, 80 S.Ct. 725. Probable cause deals with probabilities which are factual and practical considerations of everyday life upon which reasonable and prudent men may act, *Brinegar v. U. S.,* 388 U.S. 160, 93 L.Ed. 1879, 69 S.Ct. 1302, and if the facts before the magistrate supply "reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender," it is sufficient basis for the issuance of the search warrant. *State v. Vestal, supra.* The magistrate's deter-

mination of probable cause should be paid great deference by the reviewing court. *Jones v. U. S., supra.*

Here, the affiant concluded that the informant was credible because he had given information in the past which led to arrests and convictions. The affiant confirmed the information as to growing marijuana by personal observation. Further, the affiant, by personal surveillance, observed large amounts of traffic to and from defendant's residence. These facts supplied reasonable cause to believe that search of the described premises would reveal the presence of marijuana.

[8] Defendant also contends that the search warrant is invalid on the theory that the affidavit shows on its face that affiant had engaged in illegal search and seizure because he illegally visited the field where the marijuana was growing prior to the issuance of the search warrant under attack.

Answer to this attack on the validity of the search warrant is found in *State v. Harrison,* 239 N.C. 659, 80 S.E. 2d 481:

> "It seems to be generally held that the constitutional guaranties of freedom from unreasonable search and seizure, applicable to one's home, refer to his dwelling and other buildings within the curtilage but do not apply to open fields, orchards, or other lands not an immediate part of the dwelling site. Machen, The Law of Search and Seizure, page 95 (citing *Hester v. United States,* 265 U.S. 57, 44 Sup. Ct. 445, 68 L.Ed. 898); Cornelius, Search and Seizure, Second Edition, page 49; 48 C.J.S., Intoxicating Liquors, section 394, page 630, *et seq.;* 30 Am. Jur., Intoxicating Liquors, section 528, page 529; Anno. 74 A.L.R. 1454, where numerous cases on this point are collected, among them being: *Simmons v. Commonwealth,* 210 Ky. 33, 275 S.W. 369; *S. v. Cobb,* 309 Mo. 89, 273 S.W. 736; *Penney v. State,* 35 Okla. Crim. Rep. 151, 249 P. 167; *Sheffield v. State,* 118 Tex. Crim. Rep. 329, 37 S.W. 2d 1038; *Field v. State,* 108 Tex. Crim. Rep. 112, 299 S.W. 258."

We hold that this affidavit complied with the provisions of G.S. 15-26 and clearly met the constitutional standard of reasonableness and probable cause requisite to issuance of a search warrant.

Defendant challenged the sufficiency of the evidence to carry both charges to the jury by moving for a directed verdict of not guilty.

In *State v. Glover,* 270 N.C. 319, 154 S.E. 2d 305, it is stated:

> "Defendant moved for a directed verdict of not guilty. This motion challenges the sufficiency of the evidence to go to the jury. *S. v. Wiley,* 242 N.C. 114, 86 S.E. 2d 913. '. . . (T)he objection that the evidence is not sufficient to carry the case to the jury . . . must be raised during the trial by a motion for a compulsory nonsuit under the statute now embodied in G.S. 15-173, or by a prayer for instruction to the jury.' *S. v. Gaston,* 236 N.C. 499, 73 S.E. 2d 311. . . . "

Prior to 1 January 1972, Article 5 of Chapter 90 of the General Statutes provided, in part:

§ 90-87. Definitions (of narcotic drugs).

(1) "Cannabis" includes the following substances under whatever means they may be designated:

a. The dried flowering or fruiting tops of the pistillate plant cannabis sativa L. from which the resin has not been extracted;

. . . .

d. Marihuana.

. . . .

§ 90-88. Manufacture, sale, etc., of narcotic drugs regulated.—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.

. . . .

§ 90-111.1. Growing of narcotic plant known as marijuana or opium poppy by unlicensed persons.—A person who without being licensed to do so under the federal narcotic laws, grows the narcotic plant known as marijuana or opium poppy or knowingly allows it to grow on his land without destroying

the same shall be guilty of a felony and shall be punished according to the provisions of this article.

. . . .

§ 90-111. Penalties for violation. (a) Any person violating any provision of this article or any person who conspires, aids, abets, or procures others to do such acts, shall upon conviction be punished, for the first offense, by a fine of not more than one thousand dollars ($1,000.00) or be imprisoned in the penitentiary for not more than five years, or both, in the discretion of the court: Provided, that any person unlawfully possessing . . . one gram or less of the drug marijuana defined in G.S. 90-87(1)d, shall, for the first offense, be guilty of a misdemeanor and punished by fine or imprisonment, or both, in the discretion of the court. . . .

We first examine the facts of this case concerning the charge of felonious possession of marijuana.

Defendant stipulated that the vegetable matter found within the pig shed was marijuana and that the vegetable matter weighed 82.2 grams. Thus, if the marijuana was in defendant's actual or constructive possession, the trial judge correctly denied defendant's motion directed to the charge of felonious possession.

[9] Constructive possession of contraband material is that which exists without actual personal dominion over the material, but with an intent and capability to maintain control and dominion over it. *State v. Allen,* 279 N.C. 406, 183 S.E. 2d 680; *Rodella v. United States,* 286 F. 2d 306 (9th Cir., 1960); *State v. Meyers,* 190 N.C. 239, 129 S.E. 600.

[10] One of the well recognized rules concerning sufficiency of evidence to withstand motion for nonsuit or motion for a directed verdict is that when the motion questions the sufficient of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431.

[11] In instant case the pig shed where the marijuana was found was located approximately twenty yards from and directly behind defendant's residence. Defendant had been seen on numerous occasions in and around the out-buildings directly

behind his house. Thus, when considered with the fact that marijuana seeds were found in defendant's bedroom, this evidence raises a reasonable inference that defendant exercised custody, control, and dominion over the pig shed and its contents. As stated by the Court in *Hunt v. State,* 158 Tex. Crim. 618, 258 S.W. 2d 320, defendant has been placed in "such close juxtaposition to the narcotic drug as to justify the jury in concluding that the same was in his possession."

[12] The trial judge also correctly allowed the jury to consider the charge on feloniously growing marijuana plants in violation of G.S. 90-111.1. Again, considering the facts above recited and these additional facts: (1) that a path about three or four feet wide began at the edge of the pig pen, where the 82.2 grams of marijuana were found; (2) that the wire fencing at the beginning of the path was lower than the remainder of the fence; (3) that the path extended a distance of about 55 yards to the cornfield where the marijuana was found growing; and (4) that the path leading from the pig pen to the growing marijuana was not adjoined by or intersected by other paths, a reasonable inference arises that defendant was feloniously growing marijuana.

The trial judge correctly overruled defendant's motion for a directed verdict.

The Controlled Substances Act, effective 1 January 1972, Article 5, Chapter 90 of the General Statutes, does not affect the prosecution in this case. *State v. Harvey, ante* p. 1.

The decision of the Court of Appeals finding no error is

Affirmed.

State v. Cox

STATE OF NORTH CAROLINA v. WALTER LEE COX

No. 70

(Filed 12 April 1972)

1. **Criminal Law § 161— appeal as exception to judgment**

The appeal itself constitutes an exception to the judgment and presents for review any error appearing on the face of the record proper, even in the absence of proper exception and assignment.

2. **Burglary and Unlawful Breakings § 1— burglary defined**

Burglary consists of a breaking and entering during the nighttime of a dwelling or sleeping apartment with intent to commit a felony therein; if the burglarized dwelling is occupied, it is burglary in the first degree, and if unoccupied, it is burglary in the second degree. G.S. 14-51.

3. **Burglary and Unlawful Breakings § 1— burglary — offense in nighttime**

To constitute burglary in either degree, the common law required the felonious breaking and entering to occur in the nighttime, and this common law requirement is still the law in this State. G.S. 4-1.

4. **Criminal Law § 146— Supreme Court — exercise of supervisory jurisdiction**

In this appeal from a conviction of second degree burglary, the Supreme Court, in the exercise of its supervisory jurisdiction, takes notice of the lack of proof of burglary, although such question was not raised by appellant. Art. IV, Sec. 12(1) of the N. C. Constitution.

5. **Burglary and Unlawful Breakings §§ 5, 7— verdict of second degree burglary — offense in daytime — felonious breaking and entering**

Defendant's conviction of second degree burglary cannot stand where all the State's evidence tends to show that the crime occurred in the daytime; since it is apparent that the jury found facts which establish defendant's guilt of breaking and entering a residence in the daytime with intent to commit the felony of robbery therein, but that the jury mislabeled its verdict, calling it burglary in the second degree, because the judge erroneously instructed it to do so, the verdict must be considered a verdict of felonious breaking and entering, a lesser degree of the crime of burglary, and the cause is remanded for pronouncement of judgment upon such verdict.

DEFENDANT appeals from *Braswell, J.*, 17 March 1971 Criminal Session, PERSON Superior Court. This case was docketed as No. 110 and argued at the Fall Term 1971.

Defendant was tried upon two bills of indictment. In Case No. 70 CR 4203 the bill charged defendant with the common law robbery of Sanders McWhorter on 17 November 1970 in Person County. In Case No. 70 CR 4204 the bill charged that

defendant burglariously broke and entered the occupied dwelling of one Sanders McWhorter on 17 November 1970, *in the night of the same day,* with force and arms, with the felonious intent to steal, take and carry away the goods and chattels of the said Sanders McWhorter located in said dwelling house against the peace and dignity of the State. Defendant pled not guilty to both charges.

Sanders McWhorter testified that he first saw defendant on 17 November 1970 "at approximately 1:30 in the afternoon when I returned to my house after going out for lunch. I was unlocking my back door and walked in and when I looked up he was standing directly in front of me. He had just stepped out behind the door of a broom closet that I had. I started to ask him what he was doing and before I could get it out of my mouth he hit me across the head and knocked me down and in the ensuing short scuffle after that he hit me the second time and knocked me back against the doorknob on the door and broke my shoulder." This witness further stated that defendant demanded money and threatened to kill him if he did not surrender it. Defendant thereupon took McWhorter's billfold containing between eight and ten dollars and fled. The victim sought hospital treatment and was an outpatient for about three weeks on account of his injuries. Mr. McWhorter further testified that the kitchen window, which had been previously closed and thumb-latched, had been raised, and flower pots against the window had been knocked down and broken.

On 20 November 1970 at approximately 11 a.m., defendant was exhibited to Sanders McWhorter in a lineup of eight black males basically dressed the same and about the same size and color. Defendant was represented by counsel, and his counsel personally brought two of the eight men who stood in the lineup. McWhorter testified he had no difficulty picking defendant out—"I picked him out on the first try and I only picked one." The court conducted a voir dire, determined the admissibility of the evidence identifying defendant, and it was admitted for consideration by the jury. There was other identification evidence, but its narration is not necessary to decision in this case.

Walter Lee Cox, as a witness in his own behalf, testified that he resided in Durham and worked at the University Grill;

that on 17 November 1970 he did not work on his regular job but assisted William Lloyd moving furniture. "We were helping the lady move. We did this all day on November 17, 1970." He said his friend stayed with this lady, and he did the work to pick up some extra money. The job was completed about three or four o'clock at which time he went with William Lloyd to Lloyd's home in Chapel Hill where they played records, got "a little drunk," and spent the night. He was unable to give Lloyd's address and said "I don't know where he is today." He swore he was not in Roxboro on 17 November 1970, did not know Mr. McWhorter, and had never seen him previous to the hearing in this case. He stated on cross-examination that he was nineteen years of age, had been convicted of robbery in Virginia and had served time in North Carolina for breaking and entering. While serving that sentence he said he escaped "from Person County."

On the burglary charge the court instructed the jury to return a verdict of guilty of burglary in the second degree or not guilty, as the jury may find. On the robbery charge the court instructed the jury to return a verdict of guilty of common law robbery or not guilty, as the jury may find. The jury found defendant guilty of burglary in the second degree and guilty of common law robbery. Defendant was sentenced to thirty years on the burglary conviction and ten years on the robbery conviction, to begin at the expiration of the burglary sentence. His appeal to the Court of Appeals was transferred to the Supreme Court for initial appellate review pursuant to our general order dated 31 July 1970.

Ramsey, Jackson & Hubbard by George W. Jackson, Attorney for defendant appellant.

Robert Morgan, Attorney General, and James B. Richmond, Assistant Attorney General, for the State of North Carolina.

HUSKINS, Justice.

[1] Defendant states in his brief that he has been unable to find reversible error in the trial below and simply presents the record in the hope that the Court will discover error *ex mero motu*. While we are not required to do so under our rules, we have nevertheless examined the entire record in view of the seriousness of the charges and the sentences imposed. The ap-

peal itself constitutes an exception to the judgment and presents for review any error appearing on the face of the record proper, even in the absence of proper exception and assignment. *State v. Elliott,* 269 N.C. 683, 153 S.E. 2d 330 (1967).

In the first case (No. 70 CR 4203) defendant was charged with and convicted of common law robbery. The bill of indictment is proper in form, and the judgment is supported by the verdict and is within the limits authorized by G.S. 14-2. No error appears of record with respect to defendant's conviction of common law robbery. Hence the judgment in the robbery case must be upheld.

In the second case (No. 70 CR 4204) defendant was charged with a capital felony in the bill of indictment and convicted of burglary in the second degree for which he received a prison sentence of thirty years. To insure the proper administration of justice, we have reviewed not only the record proper but the evidence and the charge of the court as well.

All the State's evidence tends to show that defendant entered the McWhorter dwelling during daylight hours. Mr. McWhorter himself testified that he first saw defendant "at approximately 1:30 in the afternoon when I returned to my house after going out for lunch." There is no evidence of entry during the hours of darkness. Rather, the State's evidence shows a breaking or entering in the daytime with intent to commit a felony in violation of G.S. 14-54, a lesser degree of the offense of burglary punishable by imprisonment not to exceed ten years under G.S. 14-2.

[2, 3] Burglary was a criminal offense at common law. "To warrant a conviction thereof it must be made to appear that there was a breaking and entering *during the nighttime* of a dwelling or sleeping apartment with intent to commit a felony therein." (Emphasis added.) *State v. Mumford,* 227 N.C. 132, 41 S.E. 2d 201 (1947). Since 1889, burglary has been divided into two degrees by G.S. 14-51. If the burglarized dwelling is occupied, it is burglary in the first degree; if unoccupied, it is burglary in the second degree. G.S. 14-51; *State v. Allen,* 186 N.C. 302, 119 S.E. 504 (1923); *State v. Morris,* 215 N.C. 552, 2 S.E. 2d 554 (1939). To constitute burglary in either degree, however, the common law required the felonious breaking and entering to occur *in the nighttime, State v. Whit,* 49

N.C. 349 (1857); and this common law requirement is still the law in North Carolina. G.S. 4-1. By virtue of the cited statute, all parts of the common law of England which were heretofore in force and which have not been abrogated or repealed by statute remain in full force within this State. *State v. Lackey,* 271 N.C. 171, 155 S.E. 2d 465 (1967); *State v. Ingland,* 278 N.C. 42, 178 S.E. 2d 577 (1971).

[4, 5] In light of these principles, the burglary charge was submitted to the jury under a misapprehension of the law, and defendant's conviction of burglary in the second degree cannot stand. To do justice in this case and to insure the proper administration of the criminal laws, we deem it appropriate to exercise our general supervisory jurisdiction conferred on the Supreme Court by Article IV, Section 12(1) of the Constitution of North Carolina, to take notice of the total lack of proof of burglary. *Compare State v. Brown,* 263 N.C. 786, 140 S.E. 2d 413 (1965).

The judge charged the jury in the burglary case as follows:

> "As to the charge of burglary in the second degree, I charge you that if you find from the evidence and beyond a reasonable doubt, the burden being on the State to so satisfy you that on the 17th day of November, 1970, that this defendant, Walter Lee Cox, did break and enter into the dwelling house here in Roxboro, owned and occupied by Sanders McWhorter, that at the time of the breaking and entering the building which is [sic] used as a dwelling house by Sanders McWhorter, that at the time of the breaking and entering no person was then physically inside of the dwelling house and that at the time of the breaking and entering it was the intent of the defendant to commit the felony of robbery therein, then upon your finding of these facts beyond a reasonable doubt, it would be your duty to return a verdict of guilty, as charged, of burglary in the second degree."

Since all the evidence shows the offense occurred at approximately 1:30 in the afternoon, it is perfectly apparent that the jury found the very facts enumerated in the judge's charge —facts which establish breaking and entering of the McWhorter residence in the daytime with intent to commit the felony of robbery therein. The jury mislabeled its verdict, calling it

burglary in the second degree, because the judge erroneously instructed it to do so. The verdict must therefore be considered a verdict of felonious breaking and entering, a lesser degree of the crime of burglary, and a violation of G.S. 14-54(a) punishable by imprisonment not to exceed ten years under G.S. 14-2. Hence, leaving the verdict undisturbed but recognizing it for what it is, the judgment is vacated in the burglary case (No. 70 CR 4204) and the cause is remanded to the Superior Court of Person County for the pronouncement of a judgment as upon a verdict of guilty of felonious breaking and entering. G.S. 14-54(a); G.S. 14-2; *State v. Jones,* 275 N.C. 432, 168 S.E. 2d 380 (1969); *State v. Foster,* 268 N.C. 480, 151 S.E. 2d 62 (1966). The Clerk of the Superior Court of Person County shall thereupon issue a revised commitment in Case No. 70 CR 4204, bearing the same date as the original commitment, to be substituted for the commitment heretofore issued. The effect will be, and it is so intended, that the defendant will receive credit upon the new commitment for all the time heretofore served for second degree burglary.

Inasmuch as the valid judgment of imprisonment for ten years pronounced in Case No. 70 CR 4203 was made to begin at the expiration of the thirty-year sentence imposed in Case No. 70 CR 4204, which is now vacated, Case No. 70 CR 4203 is remanded to the Superior Court of Person County to the end that the judgment may be modified so as to provide that the ten-year sentence shall commence at the expiration of the sentence which may be imposed in Case No. 70 CR 4204, or may run concurrently with it, as the court in its discretion may determine.

In the common law robbery case (70 CR 4203)—Remanded.

In the burglary case (70 CR 4204)—Remanded for Judgment.

ANNIE LONG v. METHODIST HOME FOR THE AGED, INC.

No. 57

(Filed 12 April 1972)

1. **Negligence § 52— private-duty nurse — invitee**

A nurse employed by the family of a nursing home patient was an invitee while in the nursing home.

2. **Negligence §§ 5.1, 53— duties to invitees**

While the operator of a nursing home does not insure the safety of his invitees, he must exercise ordinary care to keep his premises in such reasonably safe condition as not to expose them unnecessarily to danger, and must give warning of any hidden danger or unsafe condition of which he has knowledge, express or implied.

3. **Negligence §§ 5.1, 53— duties to invitees — warning — obvious condition**

Where a condition of the premises is obvious, there is generally no duty on the part of the owner to warn of such condition.

4. **Negligence §§ 5.1, 57— invitee — negligence by nursing home operator — insufficiency of evidence**

In an action to recover for personal injuries allegedly sustained by a private-duty nurse in a fall in defendant's nursing home, plaintiff's evidence was insufficient to be submitted to the jury on the issue of defendant's negligence where it tended to show that plaintiff overloaded a commode with toilet tissue and kept working the flushing lever, causing continuous and heavy overflow onto the floor of the patient's room, that an orderly employed by defendant removed the obstruction, that plaintiff mopped a portion of the floor, and that she slipped and fell when she stepped in water that had run from under a wardrobe.

ON *certiorari* to the Court of Appeals to review its decision (10 N.C. App. 534, 179 S.E. 2d 3) reversing the judgment for the plaintiff entered in the Superior Court of UNION County by *Brewer, J.*, at the August 17, 1970 Session. This case was docketed and argued at the Fall Term 1971 as No. 33.

The plaintiff, Annie Long, instituted this civil action in the superior court to recover damages on account of personal injury she alleges she sustained while engaged in the discharge of her duties as a nurse for Mamie Jones, a bedridden, mentally, and physically helpless patient in the Wesley Nursing Center, a wholly owned nursing unit of the defendant, Methodist Home for the Aged, Inc.

Although the plaintiff was employed by the family of the helpless patient, she was governed by the regulations of the

defendant. On the third day of the plaintiff's employment, her patient "messed up" the bed and floor around the bed. The plaintiff in her clean-up operations, made liberal use of toilet tissue which, after use, she deposited in the commode. When the plaintiff attempted to flush the commode, the amount of paper completely stopped the flow of water through the exit. As a result water overflowed the bathroom and the floor of the patient's room.

The plaintiff testified: "After I attempted to flush the toilet tissue down the commode, the water ran over the edge . . . onto the bathroom floor. I jiggled the lever some more to try to get the paper on down. When I did that, the water kept coming out. . . . (E)very time I would jiggle the lever some more the water would keep coming out, it never quit." The plaintiff called an orderly who unstopped the commode by the use of a hook made from a coat hanger. The plaintiff obtained a mop and by its use partially succeeded in removing the water from the floor of the rooms.

The plaintiff describing her accident testified: "While I was using the mop and wringing it out in the bathtub, it was necessary for me to walk through the water. . . . I had on nurses' oxfords . . . . The soles of my shoes were wet . . . . I started out of the bathroom, and when I did I stepped in that water that was running from under the wardrobe, and I fell. . . . At the time I fell I knew that I was walking on a wet floor. . . . I was aware that the floor was extremely slippery. . . . "

As a result of the fall the witness was injured. She offered both lay and medical testimony with respect thereto, including the expense for treatment.

At the close of the evidence the defendant moved for a directed verdict in its favor on the grounds, (1) the plaintiff had failed to offer evidence of defendant's negligence and (2) on the alternative ground the plaintiff's evidence disclosed her contributory negligence as a matter of law. The court denied the motions and submitted proper issues to the jury which answered them in plaintiff's favor. The court, after refusing to set the verdict aside, signed judgment awarding the plaintiff $8,000.00 in damages. The defendant filed many exceptions to the charge. On review, the Court of Appeals reversed the judgment holding

the evidence of negligence insufficient to sustain the verdict and judgment.

Griffin & Clark by Robert B. Clark for plaintiff appellant.

Carpenter, Golding, Crews & Meekins by James P. Crews for defendant appellee.

HIGGINS, Justice.

[1, 2] The evidence before the jury was sufficient to place the plaintiff at the time of her injury in the status of an invitee in the defendant's nursing home. While the proprietor or owner of premises does not insure the safety of his invitees, nevertheless he is under the duty of exercising ordinary care to keep his premises in such reasonably safe condition as not to expose them unnecessarily to danger. He is under the obligation to give warning of any hidden danger or unsafe condition of which he has knowledge, express or implied. Strong's Index 2d, Vol. 6, Negligence. § 53. Duties and Liability to Invitees. (Citing many cases.) *Gordon v. Sprott,* 231 N.C. 472, 57 S.E. 2d 785.

[3] While there is a duty on the part of the owner to warn invitees of hidden danger, "Where a condition of the premises is obvious . . . generally there is no duty on the part of the owner . . . to warn of that condition." *Shaw v. Ward Co.,* 260 N.C. 574, 133 S.E. 2d 217. See also *Wrenn v. Convalescent Home, Inc.,* 270 N.C. 447, 154 S.E. 2d 483; *Jones v. Pinehurst, Inc.,* 261 N.C. 575, 135 S.E. 2d 580; *Garner v. Greyhound Corporation,* 250 N.C. 151, 108 S.E. 2d 461; and *Harris v. Department Stores Co.,* 247 N.C. 195, 100 S.E. 2d 323.

[4] In this case the plaintiff not only knew of the slick and slippery condition of the floor, but she had actually caused that condition. There is neither allegation nor evidence the commode in the bathroom was defective or not in good working order. Actually the plaintiff overloaded it with toilet tissue and kept working the flushing lever causing a continuous and heavy overflow. When she called for help, an orderly appeared (though she claimed not promptly) and by the use of a hook made from a coat hanger he removed the obstruction. Although she knew the floor was wet and slippery, of which condition the owner had no knowledge, nevertheless she seeks to charge the defendant with liability. "And, ordinarily, it is only when

the dangerous condition or instrumentality is known to the occupant (owner), or in the exercise of due care should have been known to him, and not known to the person injured, that a recovery may be permitted." *Revis v. Orr,* 234 N.C. 158, 66 S.E. 2d 652.

A fair examination of the evidence convinces us that an inference of actionable negligence on the part of the defendant cannot be drawn from the evidence offered. The court should have entered judgment for the defendant. The decision of the Court of Appeals is correct and is

Affirmed.

EAC CREDIT CORPORATION v. FREDERICK M. WILSON AND HELEN A. WILSON

No. 92

(Filed 12 April 1972)

1. Guaranty— absolute or conditional

A guaranty contract is collateral to the primary obligation and may be absolute or conditional dependent upon its terms.

2. Guaranty— guaranty of payment

A guaranty of payment is an absolute promise by the guarantor to pay the debt at maturity if it is not paid by the principal; the obligation of the guarantor is separate and independent of the obligation of the principal debtor, and the creditor's cause of action against the guarantor ripens immediately upon failure of the principal debtor to pay the debt at maturity.

3. Guaranty— guaranty of collection

A guaranty of collection is a promise by the guarantor to pay the debt on condition that the creditor shall diligently prosecute the principal debtor without success.

4. Guaranty— guaranty of payment

The language of a guaranty contract constituted a guaranty of payment where the promise to pay when due was absolute and unconditional.

5. Attorney and Client § 9; Guaranty— guaranty contract— security agreements — attorneys' fees

A guaranty contract is not a "security agreement" within the language of G.S. 6-21.2(5), relating to liability for attorneys' fees

for the collection of a note, conditional sales contract or other evidence of indebtedness.

6. Attorney and Client § 9; Guaranty— promissory note — guaranty of payment — action on guaranty contract — creditor's attorney fees — liability of guarantors

Where a promissory note contains a provision requiring the debtor to pay reasonable attorneys' fees of the creditor in collection of the note, but a guaranty of payment of the note contains no such provision, the guarantors are not liable under G.S. 6-21.2 for attorneys' fees incurred by the creditor in an action on the guaranty contract.

APPEAL by plaintiff from decision of the Court of Appeals (12 N. C. App. 481) reversing judgment of *Thornburg, J.*, 29 March 1971 Civil Session, UNION Superior Court. Docketed as No. 165 and argued at the Fall Term 1971.

Plaintiff instituted this action to recover the sum of $44,320 pursuant to a guaranty agreement executed by defendants whereby defendants guaranteed the payment of a promissory note executed by Landmark Inns of Durham, Inc., payable to plaintiff.

On 4 March 1966 Landmark Inns of Durham, Inc., executed a promissory note payable to EAC Credit Corporation, plaintiff herein. That note provides, *inter alia,* that Landmark Inns of Durham, Inc., the maker, will pay "a reasonable sum as Attorney's fees, if placed with an Attorney for collection." (It is not necessary to refer to a modification of the note dated 13 February 1968 since the modification contains an identical provision regarding counsel fees.)

On 14 June 1966 Frederick M. Wilson and Helen A. Wilson, defendants herein, executed the guaranty agreement upon which this action is brought. That agreement reads as follows:

"FOR VALUE RECEIVED, I (we) do hereby guaranty to EAC Credit Corporation, (hereinafter called Company) its assignees and transferees, the payment when due of any and all notes, accounts receivable, conditional sales contracts, chattel mortgages, indebtedness and liability (hereinafter called commercial paper) at any time made or incurred by Landmark Inn of Durham, Inc., 2424 Erwin Road, Durham, North Carolina (hereinafter called said debtor), to said Company, or acquired by said company and any and all commercial paper at any time purchased or acquired from

said debtor, by said Company, and endorsed by said debtor to said Company, with or without recourse, whether said commercial paper so made or incurred, or so purchased and acquired, be retained by said company or transferred before or after maturity with or without recourse.

"Said company without notice to me (us), may elect which specific commercial paper this guaranty shall apply to and, from time to time, may change its election.

"The liability of the undersigned is direct and unconditional and this guaranty is given without regard to any security, or otherwise, and shall be effective as to any of said commercial paper as if no other guaranty or security had been given therefor. I (we) acknowledge that this guaranty is binding without the signature of any other person. I (we) waive notice of the acceptance of this guaranty, notice of the commercial paper to which the same shall apply, also presentment, demand, protest, and notice of protest on any and all such commercial paper. No renewal or extension of time of payment of any commercial paper, and no release or surrender or other security for such commercial paper, or delay in enforcement of payment of the principal obligation or any security thereto shall affect my (our) liability thereon, even though such renewal or extension or release or surrender may have been given subsequent to my (our) death. Said company may employ said debtor as collection agent for the purpose of presenting or demanding payment, collecting or protesting any or all of said commercial paper at any time purchased or acquired from said debtor by said company.

"This guaranty shall be a continuing one and shall remain in force until written notice from me (us) of its discontinuance shall be received by said company, and until all commercial paper and liability covered hereby, existing at the time of such notice, shall have been fully paid."

It will be noted that the foregoing guaranty agreement contains no provision for the payment of attorney fees.

The case was heard by Judge Thornburg without a jury, and he entered judgment awarding plaintiff $39,182.78 representing the sum due on the note, plus attorney's fees in the sum of $5,877.42 pursuant to G.S. 6-21.2(5). Defendants ap-

pealed to the Court of Appeals assigning as error only that portion of the judgment awarding plaintiff $5,877.42 as attorney's fees.

Being of the opinion that counsel fees were not recoverable under the facts of this case, the Court of Appeals reversed with Brock, J., dissenting, and plaintiff appealed to the Supreme Court as a matter of right under the provisions of G.S. 7A-30.

Thomas and Harrington, Attorneys for plaintiff appellant.

Powe, Porter & Alphin, P.A., by Willis P. Whichard and James G. Billings, Attorneys for defendant appellees.

HUSKINS, Justice.

Where a promissory note contains a provision requiring the debtor to pay reasonable attorneys' fees of the creditor in collection of the note, but a guaranty of payment of the note contains no such provision, are the guarantors liable under G.S. 6-21.2 for attorneys' fees incurred by the creditor in an action on the guaranty contract? This is the sole question presented on this appeal.

Plaintiff contends that it is entitled to recover attorneys' fees in this action upon the guaranty contract by virtue of G.S. 6-21.2 which provides in pertinent part as follows:

> "§ 6-21.2. *Attorneys' fees in notes, etc., in addition to interest.*—Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity, subject to the following provisions:
>
> * * * *
>
> "(2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the

'outstanding balance' owing on said note, contract or other evidence of indebtedness.

* * * *

"(5) The holder of an unsecured note or other writing(s) evidencing an unsecured debt, and/or the holder of a note and chattel mortgage or other security agreement and/or the holder of a conditional sale contract or any other such security agreement which evidences both a monetary obligation and a security interest in or a lease of specific goods, or his attorney at law, shall, after maturity of the obligation by default or otherwise, notify the maker, debtor, account debtor, endorser or party sought to be held on said obligation that the provisions relative to payment of attorneys' fees in addition to the 'outstanding balance' shall be enforced and that such maker, debtor, account debtor, endorser or party sought to be held on said obligation has five days from the mailing of such notice to pay the 'outstanding balance' without the attorneys' fees. If such party shall pay the 'outstanding balance' in full before the expiration of such time, then the obligation to pay the attorneys' fees shall be void, and no court shall enforce such provisions."

Plaintiff argues that G.S. 6-21.2 as quoted is sufficiently broad to include guarantors because the "evidence of indebtedness" is the note itself which provides for attorneys' fees and that the guaranty contract is simply a "security agreement" referred to in G.S. 6-21.2(5) which secures the payment of the note. Defendants, on the other hand, contend that the guaranty agreement is the only "evidence of indebtedness" within the meaning of the statute and is not a security agreement "which evidences both a monetary obligation and a security interest in . . . specific goods." Since such evidence of indebtedness contains no provision for attorneys' fees, defendants contend the statute does not authorize collection of such fees in this action on the guaranty agreement.

[1] A guaranty contract is collateral to the primary obligation between the debtor and the creditor, and it may be absolute or it may be conditional dependent upon its terms. "A guaranty of the payment of a debt is distinguished by the authorities from a guaranty of the collection thereof, the former being

absolute and the latter conditional." 38 Am. Jur. 2d, Guaranty § 22; *Garren v. Youngblood,* 207 N.C. 86, 176 S.E. 252 (1934).

[2, 3] A *guaranty of payment* is an absolute promise by the guarantor to pay the debt at maturity if it is not paid by the principal debtor. The obligation of the guarantor is separate and independent of the obligation of the principal debtor, and the creditor's cause of action against the guarantor ripens immediately upon failure of the principal debtor to pay the debt at maturity. *Milling Co. v. Wallace,* 242 N.C. 686, 89 S.E. 2d 413 (1955). On the other hand, a *guaranty of collection* is a promise by the guarantor to pay the debt on condition that the creditor "shall diligently prosecute the principal debtor without success." *Jenkins v. Wilkinson,* 107 N.C. 707, 12 S.E. 630 (1890); *Jones v. Ashford,* 79 N.C. 172 (1878).

[4, 5] Here, the language of the guaranty contract amounts to a *guaranty of payment* since the promise to pay when due is absolute and unconditional. Moreover, the guaranty instrument is not a "security agreement" analogous to a chattel mortgage or a conditional sales contract. Rather, it is a contract which *guarantees* payment of the note at maturity if not paid by the maker. There is no legal basis for plaintiff's argument that the guaranty contract is a security agreement within the language of G.S. 6-21.2(5). "*Security agreement* means an agreement which creates or provides for a security interest," G.S. 25-9-105(h); and "*security interest* means an interest in personal property or fixtures which secures payment or performance of an obligation. . . . " G.S. 25-1-201(37). As used in the Commercial Code, the general term *security agreement* is ordinarily understood to embrace chattel mortgages, conditional sales contracts, assignments of accounts receivable, trust receipts, etc. *Evans v. Everett,* 279 N.C. 352, 183 S.E. 2d 109 (1971). The term has a similar connotation here, and, for that reason, G.S. 6-21.2(5) is entirely irrelevant to the question posed by this appeal.

The rights of the plaintiff as against the guarantors, defendants herein, arise out of the guaranty contract and must be based on that contract. "Such an action is not a suit on the primary obligation which the guaranty contract secures, and the guarantor is not liable except under the terms of the guaranty contract." 38 Am. Jur. 2d, Guaranty § 115; *Milling Co. v. Wallace, supra* [242 N.C. 686, 89 S.E. 2d 413]. *Accord, Kushnick v. Building and Loan Assn.,* 153 Md. 638, 139 A. 446 (1927).

Where the guaranty contract is silent concerning attorneys' fees but the note provides for their payment, *and the action is brought against the maker and the guarantor jointly,* there is authority in other jurisdictions that plaintiff may recover attorneys' fees, the rationale being that such fees are a valid indebtedness of the maker which the guarantor agreed to pay. *See College National Bank v. Morrison,* 100 Cal. App. 403, 280 P. 218 (1929); *Franklin v. The Duncan,* 133 Tenn. 472, 182 S.W. 230 (1916); *Bank of California v. Union Packing Corp.,* 60 Wash. 456, 111 P. 573 (1910); *California Standard Finance Co. v. Bessolo and Gualano,* 118 Cal. App. 327, 5 P. 2d 480 (1931).

Other courts, in actions against the guarantor alone, have limited the liability of the guarantor of payment to payment of the primary debt, even though by the terms of the note the maker was obligated to pay the cost of collection including attorneys' fees. *See Continental Supply Co. v. Tucker-Rose Oil Co.,* 146 La. 671, 83 So. 892 (1920); *Krinsky v. Leventhal,* 323 Mass. 160, 80 N.E. 2d 477, 4 A.L.R. 2d 136 (1948); *Schauer v. Morgan,* 67 Mont. 455, 216 P. 347 (1923).

For a collection of cases involving suits against the maker and the guarantor jointly, suits against the guarantor after a fruitless suit against the maker, suits where the guarantor expressly agrees to repay the creditor for expenses of attempted collection from the maker, and other factual situations, see Annotation, Guaranty of payment at maturity as covering expenses of collection, 4 A.L.R. 2d 138; 38 Am. Jur. 2d, Guaranty § 75, and cases cited.

Decisions of this Court treat the obligation of a guarantor of payment separate and distinct from that of the maker. *Coleman v. Fuller,* 105 N.C. 328, 11 S.E. 175 (1890); *Cowan v. Roberts,* 134 N.C. 415, 46 S.E. 979 (1903); *Rouse v. Wooten,* 140 N.C. 557, 53 S.E. 430 (1905); *Trust Co. v. Clifton,* 203 N.C. 483, 166 S.E. 334 (1932). "Their contract of guaranty is their own separate contract jointly and severally to pay the debts of the male defendants when due, if not paid by the male defendants. . . : they are not in any sense parties to the [note]." *Milling Co. v. Wallace, supra* [242 N.C. 686, 89 S.E. 2d 413].

[6] Applying these principles to the facts before us, we hold that G.S. 6-21.2 does not authorize collection of attorneys' fees in this action. The guaranty contract sued upon does not so

provide. Guaranty of payment alone does not render the guarantors liable for attorneys' fees which the principal debtor, by the terms of the note, is bound to pay. Well-reasoned decisions from other jurisdictions supporting this view include *Walker v. McNeal,* 134 Okla. 111, 272 P. 443 (1928); *Midway National Bank v. Gustafson,* 282 Minn. 73, 165 N.W. 2d 218 (1968); *Estes v. Oilfield Salvage Co.* (Tex. Civ. App.), 284 S.W. 2d 201 (1955).

For the reasons stated the decision of the Court of Appeals reversing that part of the judgment of the trial court which awarded plaintiff attorneys' fees in the sum of $5,877.42 is

Affirmed.

ADAMS-MILLIS CORPORATION, RAY M. GRAVES, JR., AND PAUL A. BUTNER v. TOWN OF KERNERSVILLE, NORTH CAROLINA

No. 34

(Filed 12 April 1972)

1. Taxation § 25— ad valorem taxes — property within annexation area — appeal of annexation ordinance

Where an appeal from an annexation ordinance was pending in the Court of Appeals on the effective date of annexation specified in the ordinance, 15 May 1969, and the decision of the Court of Appeals was filed and certified in September 1969, property within the area being annexed was not subject to municipal ad valorem taxes for the fiscal year beginning 1 July 1969, since (1) newly annexed territory "is subject to municipal taxes levied for the fiscal year following the effective date of annexation," G.S. 160-453.5(f), and (2) under G.S. 160-453.6(i) the appeal postponed the effective date of the ordinance until "the date of the final judgment" of the appellate court.

2. Municipal Corporations § 2— appeal from annexation ordinance — Court of Appeals

An appeal from an order of the superior court affirming an annexation ordinance was properly taken to the Court of Appeals, notwithstanding by legislative oversight Sections (h) and (i) of G.S. 60-453.6 were not amended to include the Court of Appeals as one of the appellate courts, since G.S. 7A-27 gives initial appellate jurisdiction of such cause to the Court of Appeals, and the Court of Appeals, therefore, is deemed to be included in G.S. 160-453.6(h) and (i).

APPEAL by plaintiffs from *Kivett, J.*, 20 September 1971 Session "B" of Forsyth, certified for initial appellate review by the Supreme Court under G.S. 7A-31.

Plaintiffs instituted this action on 1 March 1971 pursuant to G.S. 105-267 and G.S. 105-406 (now G.S. 105-381 (1971)) to recover taxes paid defendant under protest.

Admissions in the pleadings, the record evidence, and affidavits establish the following facts: On 6 August 1968 the Board of Aldermen for the Town of Kernersville (the Town) adopted an ordinance extending the corporate limits to include, *inter alia*, the territory designated as Study Area No. Four. The effective date of the annexation was specified in the ordinance as 15 May 1969. Each of the plaintiffs owns real and personal property located in Area No. Four.

On 5 September 1968 plaintiff Adams-Millis Corporation (Adams-Millis), acting under G.S. 160-453.6, appealed the annexation of Area No. Four to the Superior Court. The appeal was heard by Seay, J., who affirmed the annexation ordinance without change on 6 February 1969. Adams-Millis appealed to the Court of Appeals and, on 14 May 1969, petitioned Judge Seay to stay the operation of the ordinance as to Area Four pending the appeal. On the same day Judge Seay denied the petition. On 17 September 1969 the Court of Appeals filed its decision affirming Judge Seay's judgment, *Adams-Millis Corp. v. Kernersville*, 6 N.C. App. 78, 169 S.E. 2d 496. The decision was certified to the Superior Court of Forsyth County on 29 September 1969. This Court denied certiorari on 2 December 1969, 275 N.C. 681.

While the Adams-Millis appeal from the annexation ordinance was pending before the Court of Appeals, the Town, purporting to act under G.S. 160-453.5(f), levied ad valorem taxes against plaintiffs' property in Area Four for the fiscal year beginning 1 July 1969 and ending 30 June 1970. Plaintiffs paid these taxes under protest and brought this action. Kivett, J., adjudged that plaintiffs were not entitled to a refund of the protested taxes and dismissed the action. Plaintiffs appealed to the Court of Appeals, and we allowed their petition for initial appellate review by this Court.

Womble, Carlyle, Sandridge & Rice for plaintiff appellants.

R. Kason Keiger for defendant appellee.

SHARP, Justice.

[1] Newly annexed territory is "subject to municipal taxes levied for the fiscal year following the effective date of annexation." G.S. 160-453.5(f). Therefore, plaintiffs' right to recover taxes paid under protest for the fiscal year beginning 1 July 1969 depends upon whether the annexation ordinance became effective before or after that date. The answer to this question is found in G.S. 160-453.6(i), which provides:

"If part or all of the area annexed under the terms of an annexation ordinance is the subject of an appeal to the superior or Supreme Court on the effective date of the ordinance, then the ordinance shall be deemed amended to make the effective date with respect to such area the date of the final judgment of the superior or Supreme Court, whichever is appropriate, or the date the municipal governing board completes action to make the ordinance conform to the court's instructions in the event of remand."

[2] Before considering this section it must be noted that at the time it was enacted as N. C. Sess. Laws, Ch. 1010, Section 6 (1959), the Supreme Court was the only court to which an appeal could be taken from the superior court. When the Court of Appeals was created as of 1 January 1967, the appellate division of the General Court of Justice became the Supreme Court and the Court of Appeals. G.S. 7A-5, G.S. 7A-16; *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376. By a clear legislative oversight Sections (h) and (i) of G.S. 160-453.6 were not amended to include the Court of Appeals as one of the appellate courts. However, N. C. Sess. Laws, Ch. 108, Section 1 (1967), codified as G.S. 7A-25 to -35, defines the respective appellate jurisdiction of the Supreme Court and the Court of Appeals. By G.S. 7A-27 initial appellate jurisdiction of this cause is given to the Court of Appeals subject, however, to the provisions of G.S. 7A-31. The Court of Appeals, therefore, is now deemed to be included in Sections (h) and (i) of G.S. 160-453.6. *Guilford County v. Estates Administration, Inc.,* 212 N.C. 653, 194 S.E. 295. This appeal was properly taken to the Court of Appeals, from which it was transferred to this Court upon our order entered under G.S. 7A-31.

Applying Section (i) to the facts of this case, it is quite obvious that the effective date of the annexation of Area Four

was subsequent to the fiscal year beginning 1 July 1969, and that plaintiffs' property was illegally assessed for taxes that year.

On 15 May 1969, the effective date specified in the ordinance, the annexation of Area Four was the subject of an appeal to the Court of Appeals. Therefore, the ordinance did not become effective until "the date of the final judgment" of that court. Its decision, filed 17 September 1969, was certified to the Superior Court on 29 September 1969. This Court denied certiorari on 2 December 1969. Therefore, the date on which the ordinance became effective could not have been earlier than 29 September 1969; so the fiscal year following the effective date of annexation did not begin until 1 July 1970.

Notwithstanding the unambiguous language of Section (i), defendant Town asserts that to construe it as written is to set at naught the provisions of Section (h) of the same statute, G.S. 160-453.6, which governs appeals in annexation proceedings. Section (h), after authorizing any party to a proceeding for the review of an annexation ordinance to appeal from the final judgment of the Superior Court, provides:

"The appealing party may apply to the superior court for a stay in its final determination, or a stay of the annexation ordinance, whichever shall be appropriate, pending the outcome of the appeal to the Supreme Court; provided, that the superior court may, with the agreement of the municipality, permit annexation to be effective with respect to any part of the area concerning which no appeal is being made and which can be incorporated into the city without regard to any part of the area concerning which an appeal is being made."

The Town contends that if the legislature had intended by Section (i) to stay an annexation ordinance until it had "been processed" through the Superior Court and the appellate division, there would have been no reason to authorize a stay of annexation "pending the outcome of the appeal" in Section (h). It argues: (1) When the Superior Court affirmed the ordinance without change on 6 February 1969, and thereafter refused to stay its operation pending the appeal, as it was authorized to do under Section (h), the annexation became effective on 15 May 1969, subject only to reversal in the appellate division; and (2) when the Court of Appeals, in a decision which the Supreme

Court declined to review, affirmed the judgment of the Superior Court it also affirmed the ordinance and 15 May 1969 as the effective date of the annexation of Area Four since that was the date specified therein.

The explicit language of Section (i), which fits this case exactly, renders the Town's contentions untenable. The first sentence of Section (h), which permits either party to a review proceeding to appeal, is applicable to any case. However, the proviso which concludes the second and last sentence is not applicable to this case. The first portion of the second sentence is utterly irreconcilable with Section (i) and, in this context, we cannot discern its meaning, if any. Without attempting to analyze Section (h) or to fathom its meaning, we hold that Section (i) controls decision here.

The Town's contentions that this action is a collateral attack on the ordinance and that plaintiffs are estopped to recover the taxes paid under protest are without merit and require no discussion.

For the reasons stated herein plaintiffs are entitled to recover the taxes for which this suit was instituted. The decision of the Superior Court is

Reversed.

STATE OF NORTH CAROLINA v. DEE D. ATKINSON

No. 52

(Filed 12 April 1972)

Criminal Law § 135— life sentence — compliance with Supreme Court order

Judgment of life imprisonment imposed by the superior court in compliance with an order of the N. C. Supreme Court is affirmed.

Justice LAKE dissenting.

APPEAL by defendant from *Clark, J.*, November 1971 Criminal Session, JOHNSTON Superior Court.

Robert A. Spence, Attorney for defendant appellant.

Robert Morgan, Attorney General, Andrew A. Vanore, Jr., Deputy Attorney General, for the State of North Carolina.

HUSKINS, Justice.

In *State v. Atkinson,* 279 N.C. 385, 183 S.E. 2d 105, filed 7 September 1971, for the reasons therein stated, this Court remanded the cause to the Superior Court of Johnston County for the pronouncement of a life sentence pursuant to the mandate of the Supreme Court of the United States. On 29 November 1971, in open court, after due notice and in the presence of defendant and his counsel, Judge Clark pronounced judgment that defendant be imprisoned in the State prison for and during the term of his natural life, said sentence to commence upon the termination of a life sentence imposed at the November Session 1971 of the Superior Court of Wayne County on the charge of murder. Defendant excepted and gave notice of appeal.

The questions defendant attempts to raise on the present appeal heretofore have been decided adversely to him, and we decline to explore them again. Judge Clark's judgment, having been entered in compliance with our decision of 7 September 1971, is

Affirmed.

Justice LAKE dissenting.

I dissent for the reasons previously stated in my dissenting opinions in *State v. Hill,* 279 N.C. 371, 378, 183 S.E. 2d 97, and in the present case when heretofore remanded by this Court for the entry of the judgment now affirmed. *State v. Atkinson,* 279 N.C. 385, 183 S.E. 2d 105.

STATE OF NORTH CAROLINA v. DEE D. ATKINSON

No. 49

(Filed 12 April 1972)

Criminal Law § 135— life sentence — compliance with Supreme Court order

Judgment of life imprisonment imposed by the superior court in compliance with an order of the N. C. Supreme Court is affirmed.

Justice LAKE dissenting.

APPEAL by defendant from *Tillery, J.,* November 1971 Criminal Session of WAYNE Superior Court.

Attorney General Robert Morgan and Deputy Attorney General Andrew A. Vanore, Jr., for the State.

Kornegay & Bruce by George R. Kornegay, Jr., for defendant appellant.

MOORE, Justice.

In *State v. Atkinson,* 279 N.C. 386, 183 S.E. 2d 106, filed September 7, 1971, for the reasons there stated by Chief Justice Bobbitt, this Court remanded the cause to the Superior Court of Wayne County for the pronouncement of judgment imposing a sentence of life imprisonment. On November 3, 1971, in open court, after due notice and in the presence of defendant and his counsel, Judge Tillery pronounced judgment that defendant be imprisoned for life in the State's prison. Defendant excepted and gave notice of appeal. The questions he attempts to raise by his assignments of error on the present appeal heretofore have been decided adversely to defendant in this cause.

Judge Tillery's judgment, having been entered in strict compliance with our order of September 7, 1971, is affirmed.

Affirmed.

Justice LAKE dissenting.

I dissent for the reasons previously stated in my dissenting opinions in *State v. Hill,* 279 N.C. 371, 378, 183 S.E. 2d 97, and in the present case when heretofore remanded by this Court for the entry of the judgment now affirmed. *State v. Atkinson,* 279 N.C. 386, 183 S.E. 2d 106.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

CORNATZER v. NICKS

No. 64 PC.

Case below: 14 N.C. App. 152.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 May 1972.

GARDNER v. BRADY

No. 52 PC.

Case below: 13 N.C. App. 647.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 April 1972.

LOFLIN v. LOFLIN

No. 44 PC.

Case below: 13 N.C. App. 574.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 April 1972.

REGAN v. PLAYER

No. 37 PC.

Case below: 13 N.C. App. 593.

Petition for writ of certiorari to North Carolina Court of Appeals denied 13 April 1972.

RIDDICK v. WHITAKER

No. 14 PC.

Case below: 13 N.C. App. 416.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 April 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

SMITH v. KILBURN

No. 25 PC.

Case below: 13 N.C. App. 449.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 April 1972.

STATE v. ANDREWS

No. 123.

Case below: 13 N.C. App. 718.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 25 April 1972.

STATE v. BENNETT

No. 41 PC.

Case below: 13 N.C. App. 251.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 May 1972.

STATE v. DAYE

No. 61 PC.

Case below: 14 N.C. App. 166.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 April 1972.

STATE v. GODWIN

No. 79 PC.

Case below: 13 N.C. App. 700.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 May 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. KELLY

No. 28 PC.

Case below: 13 N.C. App. 588.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 4 April 1972.

STATE v. KISTLER

No. 5 PC.

Case below: 13 N.C. App. 431.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 4 April 1972.

STATE v. KISTLER

No. 118.

Case below: 13 N.C. App. 431.

Motion of Attorney General to dismiss petition for writ of certiorari as improvidently granted allowed 25 April 1972.

STATE v. MARTIN

No. 49.

Case below: 13 N.C. App. 613.

Petition for writ of certiorari to North Carolina Court of Appeals denied 13 April 1972.

STATE v. MARTIN

No. 115.

Case below: 13 N.C. App. 613.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 25 April 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. MAYS

No. 77 PC.

Case below: 14 N.C. App. 90.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 May 1972.

STATE v. PARKS

No. 72 PC.

Case below: 14 N.C. App. 97.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 May 1972.

STATE v. SMITH

No. 48 PC.

Case below: 13 N.C. App. 583.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 April 1972.

STATE v. TURNER

No. 51 PC.

Case below: 13 N.C. App. 603.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 April 1972.

STATE v. WILLIAMS

No. 38 PC.

Case below: 13 N.C. App. 619.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 April 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

UTILITIES COMMISSION v. PETROLEUM CARRIERS

No. 53 PC.

Case below: 13 N.C. App. 554.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 April 1972.

WILSON v. CHEMICAL CO.

No. 46 PC.

Case below: 13 N.C. App. 610.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 4 April 1972.

WOODS v. ENTERPRISES, INC.

No. 45 PC.

Case below: 13 N.C. App. 650.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 April 1972.

JAHALA S. WRIGHT v. A. J. WRIGHT

No. 61

(Filed 10 May 1972)

1. **Evidence § 12; Divorce and Alimony § 16; Rules of Civil Procedure § 33— interrogatories — sexual intercourse between husband and wife — confidential communications**

In the wife's action for alimony and alimony *pendente lite*, the wife may not be compelled to answer interrogatories which seek to elicit her answers under oath as to acts of sexual intercourse between the husband and wife, since such an act is a "confidential communication" within the meaning of G.S. 8-56.

2. **Divorce and Alimony § 14; Evidence § 12— adultery — competency of spouse to testify**

Because of the provisions of G.S. 8-56 and G.S. 50-10, neither the husband nor the wife is a competent witness in any action *inter se* to give evidence for or against the other in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery, and may not be compelled to give such evidence.

3. **Divorce and Alimony § 14; Evidence § 12 —action in consequence of adultery — plea of adultery**

The husband's interposition of the plea of adultery in the wife's action for alimony and alimony *pendente lite* converted the action into an "action or proceeding in consequence of adultery" within the meaning of G.S. 8-56.

4. **Divorce and Alimony § 14; Evidence § 12; Rules of Civil Procedure § 33— interrogatories — adultery of husband or wife — actions inter se**

Rules of Civil Procedure 33 and 26(b) do not require the husband or wife in actions *inter se* to answer interrogatories relating to acts of adultery or conduct from which adultery might be implied during the subsistence of their marriage, the provisions of G.S. 8-56 and G.S. 50-10 being applicable to interrogatories as well as to testimony at trial.

5. **Evidence § 51; Parent and Child § 1— blood-grouping tests — paternity — civil and criminal actions**

In both criminal and civil actions in which the issue of paternity arises, the results of blood-grouping tests must be admitted in evidence when offered by a duly licensed practicing physician or other qualified person, regardless of any presumptions with respect to paternity, and such evidence is competent to rebut any presumptions of paternity. G.S. 8-50.1.

6. **Evidence § 51; Parent and Child § 1— paternity — right to blood-grouping test**

In plaintiff-wife's action for alimony, alimony *pendente lite* and child support, defendant-husband was entitled under G.S. 8-50.1 to an

order for a blood-grouping test where plaintiff alleged and defendant denied that he was the father of a child born to plaintiff during the subsistence of the marriage.

7. **Divorce and Alimony § 14; Evidence § 51; Parent and Child § 1— blood-grouping tests — issues of paternity and adultery**

In a case in which issues of paternity and adultery are raised, evidence of the results of blood-grouping tests excluding the husband as the father of a child born during the subsistence of the marriage is competent on both the issue of paternity and the issue of adultery.

ON appeal by defendant under G.S. 7A-30(2) from the decision of the Court of Appeals reported in 11 N.C. App. 190, 180 S.E. 2d 369, docketed and argued as No. 46 at Fall Term 1971.

Plaintiff-wife instituted this action on November 14, 1969. She alleged that she had separated herself from defendant-husband because he had offered such indignities to her person as to render her condition intolerable and her life burdensome. Answering, defendant denied the essential allegations on which plaintiff based her claim; and, in a further answer and defense, alleged facts with reference to plaintiff's conduct toward him which he contended constituted a bar to her action. These charges and counter charges are not germane to decision on this appeal.

Plaintiff prayed for custody of and support for Sidney Cullen Wright, alimony and possession of the family dwelling, and for subsistence and counsel fees *pendente lite.*

Plaintiff alleged that she and defendant were married on August 7, 1948; that three children were born of the marriage, Joseph Dewey Wright, age 20 (born July 13, 1949); Brenda Kathryn Wright, age 18 (born October 7, 1951); and *Sidney Cullen Wright,* age 2 *(born December 5, 1966).*

In Paragraph 4 of his *original* answer, which was filed January 27, 1970, defendant admitted the allegations of plaintiff set out in the preceding paragraph hereof; in Paragraph 11 he asserted that "defendant certainly admits that Sidney Cullen Wright is entitled to support from him, regardless of the court's decision relative to custody of the said child"; in Paragraph 18 of his further answer and defense he asserted that "defendant is a fit and proper person to have the custody of Sidney Cullen Wright, and the best interests of the said child

will be served by awarding his custody to the defendant"; and in Paragraph 1 of his prayer for relief he asked that "[t]he court award the custody of Sidney Cullen Wright to the defendant herein."

Defendant also filed on January 27, 1970, "Interrogatories to Plaintiff" in which he called for answers to sixty-five interrogatories. On January 29, 1970, plaintiff filed an "Objection to Interrogatories," in which she moved that "she not be required to answer" Nos. 20 through 33 and Nos. 36 through 51.

The thirty interrogatories to which plaintiff objected contained numerous sub-questions. Generally, defendant called upon plaintiff to answer under oath and in detail questions relating to the following: whether the child born on December 5, 1966, was conceived between February 25, 1966, and March 25, 1966; whether she had sexual intercourse with her husband during the period from January 1, 1966, to March 25, 1966, and the date of each act of intercourse during this period; whether she was absent from the family residence during the evening hours or overnight during the period from November 5, 1965, through March 25, 1966; whether she was acquainted and to what extent she had associated with each of three named men; and whether she had committed adultery at any time during her marriage to defendant and, if so, the date of each adulterous act and the name and address of each man with whom she had committed adultery.

On February 10, 1970, District Court Judge A. A. Webb, allowing defendant's motion therefor, ordered that plaintiff, Sidney Cullen Wright, and defendant, submit to a blood-grouping test as provided by G.S. 8-50.1. Judge Webb made no ruling at that time on plaintiff's objections to the enumerated interrogatories. The report of Dr. W. M. Summerville, clinical pathologist, which was filed February 24, 1970, sets forth that he performed the tests on February 18 and 20, 1970, and that "[a]ccording to [his] findings and the hereditary blood pattern, A. J. Wright is excluded as a parent of Sidney Cullen Wright."

On April 3, 1970, defendant moved for leave to amend his answer so as to delete admissions that he was the father of Sidney Cullen Wright and to plead adultery of plaintiff in bar of her right to recover in this action. Judge Webb's order granting defendant's motion for leave to amend and the amendment itself were filed on April 3, 1970.

In an order dated April 21, 1970, Judge Webb directed plaintiff "to answer each and every interrogatory . . . within ten (10) calendar days from the date of this order."

[Motions and orders with reference to placing the interrogatories in a sealed container and in the protective custody of the clerk are not set forth because not germane to any of the questions before us on appeal.]

In a motion filed May 18, 1970, plaintiff moved (1) that the court adjudge void its prior order for blood-grouping tests; (2) that the report of the blood-grouping tests be removed from the record; (3) that the court strike the amendment to the answer; (4) that defendant's motion of May 15, 1970, [referred to below] be denied; (5) that plaintiff's "Objection to Interrogatories" be sustained; (6) that the court set the case peremptorily for hearing on plaintiff's prayer for relief; and (7) for "such other and further relief to which plaintiff may be entitled."

In his motion of May 15, 1970, defendant moved that the court, because of plaintiff's failure to answer the interrogatories, treat as established thirteen specific factual matters set forth in the motion.

In a motion filed June 15, 1970, because of the intervening death of Dr. W. M. Summerville, defendant moved that the court order that plaintiff, the child and defendant submit themselves again for a blood-grouping test.

In an order dated June 9, 1970, filed June 16, 1970, Judge Webb directed plaintiff "to answer each and every interrogatory propounded, under oath, before June 19, 1970, and serve a copy on counsel for defendant before June 19, 1970," but denied "at this time" defendant's motion of May 15, 1970; and, with this exception, he denied each of the several prayers for relief set forth by plaintiff in her motion of May 18, 1970. Plaintiff excepted specifically to each adverse ruling.

In a supplementary order dated June 9, 1970, filed June 16, 1970, Judge Webb, allowing defendant's motion therefor, ordered that defendant, plaintiff and Sidney Cullen Wright appear at a designated time and place before a designated technician and then and there submit to a blood-grouping test. Plaintiff excepted.

Plaintiff's appeal to the Court of Appeals was from the two orders entered on June 9, 1970, and the denial of plaintiff's motions made on May 18, 1970.

In an opinion by Judge Morris, with which Judge Vaughn concurred and from which Judge Brock dissented, the Court of Appeals reversed the order of Judge Webb requiring plaintiff, the child and defendant to submit themselves again for a blood-grouping test. Because of the dissent, defendant appeals of right to the Supreme Court.

Clark, Huffman & Griffin, by Robert L. Huffman, for plaintiff appellee.

Thomas & Harrington, by L. E. Harrington, for defendant appellant.

BOBBITT, Chief Justice.

In her appeal from the District Court to the Court of Appeals, plaintiff asserted that Judge Webb erred (1) by ordering her to answer the interrogatories, and (2) by ordering that she, the child and defendant submit to a blood-grouping test. The Court of Appeals made no ruling in respect of the order requiring plaintiff to answer the interrogatories. It reversed the order for the blood-grouping test.

ORDER REQUIRING ANSWERS TO INTERROGATORIES

G.S. 50-16.6(a) provides: "Alimony or alimony pendente lite shall not be payable when adultery is pleaded in bar of demand for alimony or alimony pendente lite, made in an action or cross action, and the issue of adultery is found against the spouse seeking alimony, but this shall not be a bar to reasonable counsel fees."

Defendant pleaded adultery in bar of plaintiff's demand for alimony *pendente lite* and alimony. Whether the court should allow alimony *pendente lite* depends upon its answer to the issue raised by defendant's plea. Judge Webb deferred decision on this issue pending the availability of evidence resulting from compliance with his orders. By order dated June 9, 1970, Judge Webb allowed a fee of $1,200.00 to plaintiff's counsel for his services to that date. No order for the payment of alimony *pendente lite* has been entered.

The purpose of Interrogatories Nos. 20 through 33 and Nos. 36 through 51 is to elicit answers under oath which tend to show (1) that plaintiff had committed adultery, and (2) that defendant is not the father of the child born December 5, 1966. Evidence that defendant is not the father of her child would be evidence of plaintiff's adultery; but evidence of her adultery, except at a time when the child was or may have been conceived, would not be evidence that defendant is not the father of the child.

May one spouse, by filing interrogatories in the manner provided by Rule 33 of the Rules of Civil Procedure, G.S. 1A-1, compel disclosure by the other under oath of acts of adultery committed by him or by her during the subsistence of their marriage? Defendant contends that this question must be answered in the affirmative, basing his contention primarily on Rules 33 and 26(b) of the Rules of Civil Procedure, G.S. 1A-1. Plaintiff contends that this question must be answered in the negative, basing her contention primarily on G.S. 8-56 and G.S. 50-10.

Defendant points out that Rule 33 provides that interrogatories to parties "may relate to any matters which can be inquired into under Rule 26(b)," and that Rule 26(b) provides that "the deponent may be examined regarding any matter, not privileged, which is relevant to subject matter in the pending action . . . . " Obviously, answers to the interrogatories to which plaintiff objects are relevant to the issues raised by defendant's pleading. The question is whether, because of the statutory provisions quoted and discussed below, a spouse has the privilege not to answer interrogatories relating specifically to his or her adultery or to facts from which adultery might be implied.

G.S. 8-56 provides: "In any trial or inquiry in any suit, action or proceeding in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, *except as herein stated,* be competent and compellable to give evidence, as any other witness on behalf of any party to such suit, action or proceeding. *Nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other in any action or proceeding in consequence of adultery, or*

in any action or proceeding for divorce on account of adultery; or in any action or proceeding for or on account of criminal conversation, except that in actions of criminal conversation brought by the husband in which the character of the wife is assailed she shall be a competent witness to testify in refutation of such charges: Provided, however, that in all such actions and proceedings, the husband or wife shall be competent to prove, and may be required to prove, the fact of marriage. *No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage.*" (Our italics.)

G.S. 50-10 provides: "The material facts in every complaint asking for a divorce shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a jury, *and on such trial neither the husband nor wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either party be received as evidence to prove such fact.* Notwithstanding the above provisions, the right to have the facts determined by a jury shall be deemed to be waived in divorce actions based on a one-year separation as set forth in G.S. 50-5(4) or 50-6, where defendant has been personally served with summons, whether within or without the State, or where the defendant has accepted service of summons, whether within or without the State, or when service has been made upon the defendant by registered mail as provided in the Rules of Civil Procedure, unless such defendant, or the plaintiff, files a demand for a jury trial with the clerk of the court in which the action is pending, as provided in the Rules of Civil Procedure.

"In all divorce actions tried without a jury as provided in this section the presiding judge shall answer the issues and render judgment thereon." (Our italics.)

"At common law husband and wife were absolutely incompetent to testify in an action to which either was a party, ... " Stansbury, North Carolina Evidence, § 58 (2d ed. 1963). The first sentence of G.S. 8-56 removed this disqualification by providing, with explicit exceptions, that husband and wife are both competent and compellable to testify as any other witness on behalf of any party to the action.

In determining whether a husband or wife is *a competent witness* to prove the adultery of the other, the quoted statutes (including prior statutes from which they are derived) being *in pari materia,* have been construed together. Based largely upon the requirement of G.S. 50-10 that "no judgment shall be given in favor of the plaintiff in any such [divorce] complaint until such facts have been found by a jury," which was absolute prior to the 1963 amendment, this Court held that the primary purpose in restricting the husband's or wife's competency and in prohibiting "the admissions of either party" to prove the fact of his or her adultery, was to obviate the risk of and opportunity for collusive divorces. *Moss v. Moss,* 24 N.C. 55 (1841); *Hansley v. Hansley,* 32 N.C. 506 (1849); *Perkins v. Perkins,* 88 N.C. 41 (1883); *Hooper v. Hooper,* 165 N.C. 605, 81 S.E. 933 (1914); *Becker v. Becker,* 262 N.C. 685, 138 S.E. 2d 507 (1964); *Hicks v. Hicks,* 275 N.C. 370, 167 S.E. 2d 761 (1969). As pointed out by Justice Walker, "husbands and wives are incompetent to give evidence only where they testify 'for or against each other' in the class of cases specified" in the statute now codified as G.S. 8-56. *Powell v. Strickland,* 163 N.C. 393, 399, 79 S.E. 872, 874 (1913). Where the husband sued for divorce on the ground of adultery and offered as witnesses two men who testified they had engaged in adulterous acts with the wife, the wife was not prohibited from testifying in defense of herself. *Broom v. Broom,* 130 N.C. 562, 41 S.E. 673 (1902). Too, where the husband sued for divorce on the ground of adultery and the wife pleaded his condonation by engaging in sexual intercourse with her, the husband was permitted to testify in his own defense in contradiction of the wife's allegations and evidence as to condonation. *Biggs v. Biggs,* 253 N.C. 10, 116 S.E. 2d 178 (1960).

No attempt will be made here to reconcile our decisions involving *the competency* of a husband or wife to testify in a suit against a third party for criminal conversation with reference to alleged adulterous conduct of the defendant and the non-party spouse. Decisions which deal with this type of factual situation include the following: *Grant v. Mitchell,* 156 N.C. 15, 71 S.E. 1087 (1911); *McCall v. Galloway,* 162 N.C. 353, 78 S.E. 429 (1913); *Powell v. Strickland, supra; Knighten v. McClain,* 227 N.C. 682, 44 S.E. 2d 79 (1947).

[1] With specific reference to interrogatories which seek to elicit plaintiff's answers under oath as to acts of sexual inter-

course between plaintiff and defendant, it is sufficient to say: G.S. 8-56 provides that "[n]o husband or wife shall be *compellable* to disclose any confidential communication made by one to the other during their marriage." (Our italics.) "[A]n act of intercourse between husband and wife is a confidential communication." *Biggs v. Biggs, supra* at 16, 116 S.E. 2d at 183.

[2] Construing G.S. 8-56 and G.S. 50-10 together, we hold that neither the husband nor the wife is *a competent witness* in any action *inter se* to give evidence for or against the other in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery, *and may not be compelled* to give such evidence.

[3] This is an action between husband and wife. While in form an affirmative defense, we think interposition of the plea of adultery converted this into an "action or proceeding in consequence of adultery" within the meaning of G.S. 8-56. To hold otherwise would be to substitute form for substance.

[4] The District Court has not acted on plaintiff's application for alimony *pendente lite*. A finding of fact that plaintiff had committed adultery would defeat plaintiff's right thereto. The purpose of Interrogatories Nos. 20 through 33 and Nos. 36 through 51 is to compel answers which will or may tend to prove the adultery of plaintiff or disclose facts pertinent thereto. If plaintiff is required to give answers which will or may incriminate her in respect of adultery, plaintiff would be compelled "to give evidence for" defendant within the meaning of G.S. 8-56. We further hold that the provisions of G.S. 8-56 and G.S. 50-10 which render a husband or wife an incompetent witness apply to answers to interrogatories as well as to testimony at trial.

Plaintiff is not a competent witness to give evidence for defendant in this action. She is exempted from giving such evidence either at trial or before trial. The provision of Rule 26(b) that "[i]t is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence" refers only to testimony that will or might be inadmissible at trial. The statutes construed above relate to the disqualification of husband or wife as a *witness* with reference to specific matters, not to the admissibility or inadmissibility of the testimony of a qualified witness.

Prior to the Rules of Civil Procedure, G.S. 1A-1, the statutory procedure for the examination of an adverse party before trial was set forth in Article 46 of Chapter 1 of the General Statutes (Recompiled 1953). We find no decision based thereon or on the Rules of Civil Procedure which relate to a pretrial adverse examination of one spouse by the other or to interrogatories by one spouse to the other concerning matters such as those involved in the interrogatories under consideration.

We note that our Rules of Civil Procedure are modeled after the Federal Rules and in most instances are verbatim copies with the same enumerations. *Sutton v. Duke,* 277 N.C. 94, 176 S.E. 2d 161 (1970). Ordinarily, we look to federal decisions for guidance in the interpretation and application of our corresponding rule. However, since the federal courts do not try divorce actions, federal decisions are not germane in respect of the application of Rules 33 and 26(b) to the factual situation now under review.

In our view, the General Assembly, in enacting the Rules of Civil Procedure, did not contemplate that Rules 33 and 26(b) would enable the husband and the wife in actions between them to require the other to answer interrogatories relating to acts of adultery or conduct from which adultery might be implied during the subsistence of their marriage. We are quite sure the General Assembly did not intend in such manner to remove the cloak of privacy surrounding the confidential relationships of husband and wife.

For the reasons stated above, the order requiring plaintiff "to answer each and every interrogatory," to the extent it requires plaintiff to answer Interrogatories Nos. 20 through 33 and Nos. 36 through 51, should be reversed.

ORDER REQUIRING BLOOD-GROUPING TESTS

The validity of Judge Webb's order requiring plaintiff, the child and defendant to submit to blood-grouping tests depends largely upon the interpretation to be given the provisions of G.S. 8-50.1.

G.S. 8-50.1 provides: "Competency of evidence of blood tests.—In the trial of any criminal action or proceedings in any court in which the question of paternity arises, *regardless of any presumptions with respect to paternity,* the court before whom

the matter may be brought, upon motion of the defendant, shall direct and order that the defendant, the mother and the child shall submit to a blood grouping test; provided, that the court, in its discretion, may require the person requesting the blood grouping test to pay the cost thereof. The results of such blood grouping tests shall be admitted in evidence when offered by a duly licensed practicing physician or other qualified person. *Such evidence shall be competent to rebut any presumptions of paternity.*

"In the trial of any civil action, the court before whom the matter may be brought, upon motion of either party, shall direct and order that the defendant, the plaintiff, the mother and the child shall submit to a blood grouping test; provided, that the court, in its discretion, may require the person requesting the blood grouping test to pay the cost thereof. The results of such blood grouping tests shall be admitted in evidence when offered by a duly licensed practicing physician or other duly qualified person." (Our italics.)

With the exception of the italicized portions, G.S. 8-50.1 is a codification of Chapter 51 of the Session Laws of 1949, captioned "AN ACT TO AMEND CHAPTER 8 OF THE GENERAL STATUTES RELATIVE TO THE COMPETENCY OF CERTAIN EVIDENCE IN CIVIL AND CRIMINAL ACTIONS." The italicized portions were incorporated in G.S. 8-50.1 by Chapter 618 of the Session Laws of 1965, captioned "AN ACT TO AMEND AND CLARIFY G.S. 8-50.1 RELATING TO COMPETENCY OF EVIDENCE OF BLOOD TESTS."

Rule 35(a) of the Rules of Civil Procedure, G.S. 1A-1, provides: "In an action in which . . . the blood relationship of a party, . . . or a person in the custody or under the legal control of a party, is in controversy, a judge of the court in which the action is pending . . . may order the party to submit to a . . . blood examination by a physician, or to produce for such examination . . . the person in his custody or legal control. The order may be made only on motion for good cause shown. . . . "

[5] G.S. 8-50.1 requires blood-grouping tests only in actions "in which the question of paternity arises." Since the sole purpose of the blood-grouping tests is to procure scientific evidence relating to the paternity of the child, we think it clear that the clause "in which the question of paternity arises," although it appears only in the first paragraph of G.S. 8-50.1, is equally applicable

to both criminal and civil actions. We hold that the provisions of G.S. 8-50.1 were intended to apply alike in civil and criminal actions except in those particulars involving procedural differences. Such procedural differences include the following: (1) In criminal actions, the motion for the blood-grouping tests must be made by the defendant. In civil actions, the motion for the blood-grouping tests may be made by either party. (2) In criminal actions, the order directs the defendant, the mother and the child to submit to the blood-grouping tests. In civil actions, it is provided that the court "shall direct and order that the defendant, the plaintiff, the mother and the child shall submit to a blood-grouping test." The General Assembly, in providing for an order for *four* blood-grouping tests in civil actions, may have anticipated a husband's action for criminal conversation in which the blood-grouping tests might necessarily include the plaintiff and the defendant, his wife's alleged paramour. While the structure of G.S. 8-50.1 is not all that one might desire, we are of opinion and hold that in both criminal and civil actions in which the question of paternity arises, the results of such blood-grouping tests must be admitted in evidence when offered by a duly licensed practicing physician or other qualified person, "regardless of any presumptions with respect to paternity," and that "[s]uch evidence shall be competent to rebut any presumptions of paternity."

No civil action involving G.S. 8-50.1 has ever been considered by this Court. G.S. 8-50.1 has been considered only in criminal prosecutions under G.S. 49-2 for alleged wilful failure to support an illegitimate child. *State v. Davis,* 272 N.C. 102, 157 S.E. 2d 671 (1967); *State v. Fowler,* 277 N.C. 305, 177 S.E. 2d 385 (1970).

The Court of Appeals reversed the order requiring plaintiff, the child and defendant to submit to a blood-grouping test because it interpreted our decision in *Eubanks v. Eubanks,* 273 N.C. 189, 159 S.E. 2d 562 (1968), as a clear holding that "the results of a blood-grouping test cannot be used to establish non-paternity if there was access; . . . . "

"The law discussed in any opinion is set within the framework of the facts of that particular case . . . . " *Light Co. v. Moss,* 220 N.C. 200, 208, 17 S.E. 2d 10, 16 (1941). *Eubanks* did not involve a blood test. No question with reference thereto was raised or considered.

In *Eubanks,* the action was instituted March 21, 1966, by the plaintiff-husband for an absolute divorce on the ground of separation for one year. The defendant-wife answered and alleged a cross action for alimony without divorce and for custody and support of a child born to her on January 7, 1966. In his reply, the plaintiff denied the paternity of this child. The court found fundamental error in the irreconcilable answers to the third and fourth issues submitted to the jury. Answering the third issue, pursuant to a peremptory instruction, the jury found that the plaintiff and the defendant had lived "separate and apart from each other continuously for more than one year next preceding the institution of this action," as alleged in the complaint. Answering the fourth issue, the jury found that the plaintiff was the father of the child born to the defendant on January 7, 1966, as alleged in the defendant's cross action. The opinion states: "On this record, the law presumes that plaintiff is the father of Rhonda and that she was conceived on or about 3 April 1965, a time within the year next preceding the institution of the action." The Court further stated: "On this record, the third and fourth issues may not each be answered YES, and the court should have instructed the jury that if they answered the third issue YES, they would answer the fourth issue NO." The crucial issue was whether the plaintiff and the defendant had in fact lived separate and apart continuously during the year next preceding March 21, 1966.

The opinion in *Eubanks* contains this statement: "If there was access, there is a conclusive presumption that the child was lawfully begotten in wedlock." *Eubanks v. Eubanks, supra* at 197, 159 S.E. 2d at 568. Taken literally and out of context, the quoted statement would disallow evidence even of impotency or physical or racial differences to rebut the presumption. However, the topic sentence of the paragraph in which the above statement is found demonstrates the real rationale of the rule: "When a child is born in wedlock, the law presumes it to be legitimate, and this presumption can be rebutted only by facts and circumstances which show that the husband could not have been the father, *as that* he was impotent or could not have had access to his wife." (Our italics.) Impotency and nonaccess are set out therein as *examples* of types of evidence that would "show that the husband could not have been the father." Since the results of blood-grouping tests would be significant only if they tended to show that defendant herein could not have been

the father, we find nothing in *Eubanks* that would preclude their admission in evidence.

"A child born in wedlock is presumed to be legitimate, and the presumption can be rebutted only by proof that the husband could not have been the father, as by showing that he was impotent, or that he could not have had access to the mother during the period when conception must have occurred, or that the husband and wife were white and the child of mixed blood." Stansbury, North Carolina Evidence, § 246 (2d. ed. 1963).

Professor Stansbury refers to this presumption as "one of the strongest known to the law," and states, as indicated above, that it may be rebutted only by proof that the husband *could not have been* the father. Prior to the discovery and perfection of the blood-grouping test, the only kinds of evidence which showed to even an approximate certainty that a husband was not the father of his wife's child were evidence of impotency, racial or other distinctive physical differences, or nonaccess during the probable time of conception. Although we continue to recognize its primary importance in preserving the status of legitimacy of children born in wedlock, this presumption must give way before dependable evidence to the contrary. Blood-grouping tests which show that a man cannot be the father of a child are perhaps the most dependable evidence we have known. See Note, 50 N.C.L. Rev. 163 (1971).

[6] The issue of paternity arises herein from plaintiff's allegation that defendant is the father of Sydney Cullen Wright and defendant's denial thereof. Under G.S. 8-50.1, defendant was entitled to the order for the blood-grouping test.

The record discloses no facts sufficient to estop defendant from raising the issue of paternity. It may be that the putative father of a child conceived or born during wedlock should be estopped to raise the issue of paternity unless he does so within a fixed time. However, this is a matter for consideration by the General Assembly.

[7] Assuming the blood-grouping tests are made and offered in evidence by qualified persons, the results thereof, if they tend to exclude defendant as the father of the child, may be offered in evidence to rebut the common-law presumption of legitimacy. Ordinarily, such evidence is competent solely in relation to the issue of paternity. If the results of the blood-grouping tests ex-

clude defendant as the father of a child admittedly born during the subsistence of the marriage, may the evidence also be considered upon the separate issue of plaintiff's alleged adultery? While there is no authority for blood-grouping tests unless an issue of paternity is raised, in a case such as the present, in which the issue of paternity is raised, the results of the blood-grouping tests, if they exclude defendant as the father of a child admittedly born during the subsistence of the marriage, also would be evidence of adultery. In resolving this question, we must take the case as we find it.

When, as in the present case, issues of paternity and of adultery are raised, it would be unrealistic to hold that the evidence of the results of the blood-grouping tests is competent on the issue of paternity but not on the issue of adultery. Moreover, it would be virtually impossible for the District Court Judge, when passing upon the application for alimony and child support *pendente lite,* to consider the results of the blood-grouping tests as related to child support *pendente lite* but not as to alimony *pendente lite.*

For the reasons stated, the decision of the Court of Appeals, which reversed Judge Webb's order for the blood-grouping tests, is reversed.

The cause is remanded to the Court of Appeals with directions that it enter a judgment (1) reversing Judge Webb's order with reference to interrogatories, to the extent it requires plaintiff to answer Interrogatories Nos. 20 through 33 and Nos. 36 through 51, and (2) affirming the order of Judge Webb which requires the blood-grouping tests.

Reversed and remanded.

INVESTMENT PROPERTIES OF ASHEVILLE, INC. AND BAXTER H. TAYLOR v. MARTHA NORBURN MEAD ALLEN

No. 94

(Filed 10 May 1972)

1. **Rules of Civil Procedure § 50— motion for directed verdict — consideration of evidence**

On a motion for a directed verdict by the defendant, the court must consider 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.

2. **Principal and Agent § 4— agency — sufficiency of evidence**

Plaintiffs' evidence was sufficient to be submitted to the jury on the question of whether defendant's brother was the agent of defendant in terminating a lease of land owned by defendant and in promising to pay for the grading work performed on the land if the lease were terminated before a certain date, where it tended to show that (1) defendant knew her brother was negotiating to lease her property to the corporate plaintiff for the construction of a motel, (2) as a result of those negotiations defendant signed a lease because she trusted her brother to do what was best for her, (3) defendant was later advised that "this was not a good lease," (4) defendant's brother and the corporate plaintiff's vice president then entered into lengthy negotiations attempting to agree on a new lease, (5) during such negotiations the grading work continued, and defendant was kept advised by her brother concerning this grading and on occasions was taken by him to inspect this work, which substantially improved her land, (6) no new lease was agreed upon with corporate plaintiff and the lease signed by defendant was terminated, (7) defendant thereafter signed a lease of the land to another party which was negotiated by her brother, and (8) defendant recognized her brother as her agent at all times during such transactions and fully ratified his acts done in her behalf.

3. **Frauds, Statute of § 11— oral rescission of lease**

A lease required by the Statute of Frauds to be in writing may be rescinded orally by the mutual assent of both parties.

4. **Principal and Agent §§ 4, 6— proof of agency — ratification**

The jury could reasonably find that defendant's brother was acting for defendant when he promised to pay for grading work on defendant's land in the event a new lease of the land to plaintiff was not agreed upon, and that in any event defendant subsequently ratified her brother's promise to pay, where there was evidence tending to show that defendant's brother made such promise to prevent the removal of grading equipment from defendant's land and to assure that a motel would be constructed on the land, that defendant's land was substantially benefited by the work done, and that defendant was advised concerning the grading work and actually went on the property to inspect the work.

5. Frauds, Statute of § 11; Landlord and Tenant § 19— claim for rent and improvements — oral rescission of lease

The lessor has no claim for rental payments or the value of improvements promised under a lease if the lease was orally rescinded prior to the date the first rental payment was due.

6. Rules of Civil Procedure § 50— motion for judgment n.o.v. — consideration of evidence

When passing on a motion for judgment n.o.v., the court must view the evidence in the light most favorable to the non-movant.

7. Rules of Civil Procedure § 50— denial of directed verdict — judgment n.o.v.

Denial of a motion for a directed verdict is not a bar to a motion for judgment n.o.v.

8. Rules of Civil Procedure § 50— denial of judgment n.o.v.

The trial court correctly denied defendant's motion for judgment n.o.v. where the evidence viewed in the light most favorable to plaintiffs was sufficient to sustain the verdict.

9. Appeal and Error § 45— abandonment of exceptions

An exception not brought forward and discussed as an assignment of error is deemed abandoned. Supreme Court Rule 28.

10. Principal and Agent § 4— proof of agency — similar transactions

Evidence that defendant's brother negotiated a lease of defendant's land to another corporation after the lease to plaintiff was allegedly rescinded, and that defendant took no part in the negotiations but merely signed the lease when it was presented to her, *held* competent on the question of the agency of defendant's brother in various transactions concerning the lease with plaintiff.

11. Evidence § 33; Principal and Agent § 4— hearsay — purpose of testimony

Defendant's testimony on adverse examination that "They told me it was not a good lease" was not incompetent as hearsay, notwithstanding the identity of "they" was never revealed, where the testimony was not offered to prove or disprove the quality of the lease itself but was offered to show that defendant had been advised or put on notice that the lease might be deficient in some respects.

12. Principal and Agent § 4— proof of agency — negotiations with third party — responsiveness of witness' answer

Where defendant was asked by plaintiff on adverse examination whether her alleged agent was reporting to her regularly on the status of negotiations with a third party, defendant's answer, "He would come and tell me something about it and I trusted him to go ahead and do what he thought best, and I don't know how much went on," *held* responsive to the question and relevant on the issue of agency.

13. Appeal and Error § 31— assignment of error to the charge

An assignment of error to the charge on the ground that the court gave an erroneous instruction on a particular aspect should not only quote the portion of the charge to which the appellant objects but should also point out the alleged error.

14. Appeal and Error § 31— 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 appellant deems erroneous and no additional instructions which he deems to be required is broadside and ineffective to bring up any portion of the charge for review.

15. Contracts § 29; Interest § 1— contract action — interest on judgment — time of breach

In an action on a contract to recover the actual cost of grading and improvements performed on defendant's property, the trial court did not err in allowing plaintiffs to recover interest upon the verdict in their favor from the date plaintiffs forwarded to defendant a statement itemizing the work performed and the actual cost thereof, where the amount of damages, although not ascertainable from the contract itself, could easily be computed from the uncontradicted testimony of the individual plaintiff.

Justice SHARP dissenting.

Chief Justice BOBBITT and Justice LAKE join in the dissenting opinion.

APPEAL by defendant from the decision of the Court of Appeals reported in 13 N.C. App. 406, 185 S.E. 2d 711 (1972), which found no error in the trial before *Martin, J.*, at the 1 March 1971 Civil Session of BUNCOMBE Superior Court.

Plaintiffs brought this action to recover $19,456.88, the cost of grading, excavation and land preparation of certain real property belonging to defendant, Martha Norburn Mead Allen, in Buncombe County, North Carolina.

In May 1965 defendant was the owner of a tract of land known as the "Old Norburn Home Place," containing approximately 16 acres located at the intersection of U. S. Highway 19-23 and old Highway 10 in Buncombe County, North Carolina. In early 1965 Dr. Logan Robertson, Vice President of Investment Properties of Asheville, Inc., a real estate holding company, came to Dr. Charles S. Norburn, brother of defendant, and asked him to get his sister to lease this property to his Company for the purpose of constructing a motel thereon. Norburn discussed this with his sister, and on 10 May 1965 a written lease was executed between defendant Allen and

Investment Properties of Asheville, Inc. This lease provided in part that the lessee would pay to lessor monthly rental installments of $1,000 beginning when the lessee began to receive income from the property or on 1 June 1966, whichever was sooner. It further provided that in the event of re-entry by the lessor for default in rental installments, should the improvements then on the property amount to less than $60,000, the lessee would pay to the lessor the difference in cash. The lease also provided that the lessee "assume entire responsibility for property, to list it for taxes and pay the same when due, and also pay all assessments, . . . and shall have complete and unrestricted control in grading, reshaping and development of this property."

Robertson testified that after the execution of the lease he discovered that he would not be able to obtain financing for the construction of a motel based upon this lease, and requested that Norburn get his sister to agree to a new lease wherein she would subordinate her interest to the lien of the person or institution lending money for the construction of a motel on the property. Defendant refused to so subordinate her interest. Thereafter, various attempts were made to change the lease agreement of 10 May 1965 so that plaintiffs could finance the construction of a motel. No changes were made, and no other lease for this property was ever executed between plaintiffs and defendant.

Robertson further testified that in the month of July 1965 he and Norburn discussed the problem about the lease; that Norburn then stated that this lease was cancelled, and as a result Robertson returned to his office and made this notation on the lease: "Never registered 'cause we felt that both parties knew it was invalid. July 1965—CSN informed me that lease was cancelled." Norburn denied that he made such statement.

Baxter H. Taylor, one of the plaintiffs, was the President of Asheville Contracting Company and was a partner with Investment Properties of Asheville, Inc., in connection with the 10 May 1965 lease from defendant. Prior to May 1965 Asheville Contracting Company obtained a contract for the construction of a section of Highway I-40 which passed over railroad tracks and Highway U. S. 19-23 near defendant's property. It was necessary to build a fill for this overpass. Taylor testified that he had a conversation with Robertson with reference to Ashe-

ville Contracting Company's filling and leveling the Norburn property and putting in the drainage facilities necessary for the construction of a motel. Asheville Contracting Company agreed to do the work and began grading on 5 June 1965. The major grading work was completed within two weeks, although some seeding was done on the banks and some leveling done at a later date.

Before the work on the property was completed, Robertson told Norburn that if defendant Allen did not sign another lease so that financing could be obtained, he was afraid the grading machinery belonging to Asheville Contracting Company would be removed from the property and that the Holiday Inn would be built in Hendersonville rather than on the Allen land. Norburn assured Robertson that he thought he could persuade his sister to sign such lease, and stated that if she did not he would pay for the grading. Norburn then wrote and signed this statement:

"Asheville, N. C.
June 17, 1965

"To
"Dr. Logan Robertson:

"This is to certify that I will stand personally liable as stated below for the Conduit grading and necessary expenses (at actual cost) for the land preparation of the Acton property now owned by Martha Mead Allen, in case the lease is not continued after June 1, 1966.

"I promise to pay in cash for this or else deed to you the 734 acre tract in Ashe County which is and will be free and clear.

Charles S. Norburn"

On 29 September 1965 Robertson wrote defendant stating in part:

"I am sending you a new lease—which we think is a good one and our final offer for your property. . . . I want to say also that at first I had no idea that the grading would be delayed. Through necessity elsewhere the machines were withdrawn, but will now be returned. . . . You may rest assured that the place will be graded properly to

carry the large motel we plan to build upon it. Those who hold the Holiday Inn franchise say they simply cannot afford to build such an expensive complex if the lease is for a shorter time than fifty (50) years."

Neither the defendant nor Norburn answered this letter or ever insisted that the paper writing of 10 May 1965 was still in effect. No demand for payment of any rent was made on the plaintiffs by defendant Allen or by Norburn under the lease dated 10 May 1965, and none was paid. Defendant, through another brother Dr. Russell Norburn, contrary to the terms of said lease, listed the property for taxes on 17 February 1966.

On 12 December 1966 Robertson, in the presence of and at the request of Norburn, wrote on the lease of 10 May 1965 as follows:

"December 12, 1966

"Lease forfeited and returned this date. Settlement in accordance with the provisions of the lease and its associated papers is to follow.

Investment Properties of Asheville, Inc.
by Logan T. Robertson
Vice President"

On 13 October 1967 the land in question was leased by defendant to West Side Motel Company, Inc., and a Holiday Inn was built thereon.

Plaintiffs allege that at all times Norburn was acting as agent for his sister in negotiating and terminating the 10 May 1965 lease and in promising to pay for the grading. Plaintiffs further allege that after the land preparation was completed by Asheville Contracting Company, demands for payment were refused by defendant. Whereupon, plaintiffs paid Asheville Contracting Company by giving that Company a noninterest-bearing note payable on demand for $19,456.88, and defendant is now indebted to the plaintiffs in that amount.

Norburn testified that he received no compensation from Robertson or from his sister, defendant, and that he was not an agent for his sister; rather that he was acting as agent for his good friend Robertson when he approached his sister about the lease. Defendant Allen testified that Norburn was not her agent.

In a separate action (see *Investment Properties, Inc. v. Norburn,* 281 N.C. 191, 188 S.E. 2d 342 (1972)), plaintiffs sought to recover from Norburn $19,456.88 on his guaranty contract. By consent the two cases were consolidated for trial.

Upon issues submitted in this case, the jury found that Norburn was the agent of defendant in connection with the alleged termination of the lease, that the lease was terminated on or before 1 June 1966, that Norburn was the agent of defendant in contracting for the land preparation, that defendant through her agent Norburn agreed to pay the actual cost of the land preparation, and that plaintiffs should recover $19,456.88 from defendant.

From judgment entered on the verdict, defendant appealed to the Court of Appeals. That court, with Judge Vaughn dissenting, found no error. Defendant appeals to the Supreme Court as of right under G.S. 7A-30(2).

Williams, Morris & Golding by James F. Blue, III, for defendant appellant.

Bennett, Kelly & Long by Harold K. Bennett for plaintiff appellees.

MOORE, Justice.

Defendant Allen first contends the trial court erred in denying her motion for a directed verdict made at the close of all the evidence.

[1] On a motion for a directed verdict by the defendant, the court must consider 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. G.S. 1A-1, Rule 50(a), Rules of Civil Procedure; *Adler v. Insurance Co.,* 280 N.C. 146, 185 S.E. 2d 144 (1971); *Kelly v. Harvester Co.,* 278 N.C. 153, 179 S.E. 2d 396 (1971); 5A Moore's Federal Practice § 50.02[1] (2d Ed. 1969).

The motion presents substantially the same question for sufficiency as did a motion for an involuntary nonsuit under former G.S. 1-183. See Comment by Phillips in 1970 Pocket Part to McIntosh, North Carolina Practice and Procedure § 1488.15 (2d Ed. 1969). As to the rules which governed the motion for

an involuntary nonsuit under G.S. 1-183, see *Bowen v. Gardner*, 275 N.C. 363, 168 S.E. 2d 47 (1969).

In support of her motion for a directed verdict, defendant insists that there was no evidence of agency between defendant and Norburn, that the rescission of the written lease contract was not in writing and was improper because of the Statute of Frauds, and that there was no evidence that defendant Allen promised to pay for the grading work or that her alleged agent Norburn made such promise for her.

Taken in the light most favorable to plaintiffs, the evidence tends to show that defendant was quite sick during the spring and summer of 1965; that she was over 75 years of age, separated from her husband and in the process of obtaining a divorce; and that she was aware of the negotiations between Norburn and Robertson leading to the lease of 10 May 1965, which she signed and which she later learned was not a good lease. Defendant felt that the land in question was partly owned by her brothers although their names were not on anything, and that she and her brothers had obligations to each other. She also felt that "Norburn had business and good judgment," and although she did not know much about the negotiations between Norburn and Robertson, she signed the lease of 10 May 1965 because she trusted Norburn to do what he thought was best. On one or two occasions Norburn took her to view the grading on the property and talked to her about the status of the grading work, filling, and excavation. The lease which defendant finally signed with the West Side Motel Company, Inc., was also negotiated and approved by Norburn. This lease to West Side Motel Company, Inc., contained various provisions suggested by Norburn, one of which was, "Lessee acknowledges that certain grading, excavating, and laying pipes and building manholes have heretofore been done on the leased premises," with a further provision that should it ultimately be determined that defendant or Norburn was responsible for this grading, any such expense for which they might be liable would be paid by the West Side Motel Company, Inc.

In discussing the power of an agent to bind its principal, Justice Bobbitt (now Chief Justice) in *Research Corporation v. Hardware Co.*, 263 N.C. 718, 721, 140 S.E. 2d 416, 418-19 (1965), states:

"Our decisions adopt and quote the following statement from Tiffany on Agency, pp. 180-181, *viz:* 'The principal is liable upon a contract duly made by his agent with a third person—(1) When the agent acts within the scope of his actual authority; (2) When the contract, although unauthorized, has been ratified; (3) When the agent acts within the scope of his apparent authority, unless the third person has notice that the agent is exceeding his actual authority. "Apparent authority," as the term is used in the foregoing section, includes authority to do whatever is usual and necessary to carry into effect the principal power conferred upon the agent and to transact the business which he is employed to transact; and the principal cannot restrict his liability for acts of his agent within the scope of his apparent authority by limitations thereon of which the person dealing with the agent has not notice. The principal may be estopped to deny that a person is his agent, or that his agent has acted within the scope of his authority.' *Wynn v. Grant,* 166 N.C. 39, 47, 81 S.E. 949; *Brimmer v. Brimmer,* 174 N.C. 435, 439-440, 93 S.E. 984; *Jones v. Bank,* 214 N.C. 794, 797, 1 S.E. 2d 135."

[2] Here, the evidence favorable to the plaintiffs tends to show: (1) Defendant knew Norburn was negotiating with Robertson to lease her property to the corporate plaintiff for the construction of a Holiday Inn; (2) as a result of these negotiations, the lease of 10 May 1965 was signed by defendant because she trusted her brother to do what was best for her; (3) that the defendant was later advised that this "was not a good lease"; (4) that Norburn and Robertson then entered into lengthy negotiations attempting to agree upon a new lease; (5) that while these negotiations were in progress, the grading of the property proceeded and defendant was kept advised by Norburn concerning this grading, and on occasions she was taken by him to inspect this work, which had substantially improved her land; (6) that no new lease was agreed upon with Robertson; (7) that the lease of 10 May 1965 was terminated before 1 June 1966, and that Norburn, acting for defendant, negotiated a lease with West Side Motel Company, Inc., for defendant's property, which defendant signed, and (8) that defendant recognized Norburn as her agent at all times during these transactions and fully ratified his acts done in her behalf. This evidence was sufficient to be submitted to the jury and to over-

come defendant's motion for a directed verdict. *Kelly v. Harvester Co., supra; Equipment Co. v. Anders,* 265 N.C. 393, 144 S.E. 2d 252 (1965).

There was other evidence from which the jury could have found to the contrary, but the resolution of the factual issues was properly left to the jury. *Sneed v. Lions Club,* 273 N.C. 98, 159 S.E. 2d 770 (1968).

[3] In further support of her motion for a directed verdict, defendant contends that the alleged rescission of the lease of 10 May 1965 was not in writing and was improper because of the Statute of Frauds. This contention is without merit. A lease which is required by the Statute of Frauds to be in writing may be rescinded orally by the mutual assent of both parties. *Scott v. Jordan,* 235 N.C. 244, 69 S.E. 2d 557 (1952); *Bell v. Brown,* 227 N.C. 319, 42 S.E. 2d 92 (1947).

[4] Defendant also insists there was no evidence that defendant personally or through Norburn promised to pay for the grading work. The evidence discloses that Norburn agreed to pay for this work in the event a new lease was not agreed upon; that he did this to prevent the Asheville Contracting Company from removing its equipment, and also to assure that a Holiday Inn would be constructed on this property. Although no benefit accrued to Norburn, the defendant's property was substantially benefited by the work done. The evidence further discloses that defendant was advised concerning the grading and actually went on the property to inspect the work. From this evidence the jury could reasonably find that Norburn was acting for defendant when he promised to pay for this work, and that in any event defendant subsequently ratified his promise to pay. See *White v. Disher,* 232 N.C. 260, 59 S.E. 2d 798 (1950). This evidence was sufficient for submission to the jury and to overcome defendant's motion for a directed verdict. *Kelly v. Harvester Co., supra.*

[5] Defendant also assigns as error the failure of the trial court to direct a verdict for her on the counterclaim for rental payments due under the 10 May 1965 lease and for the difference between the value of the improvements promised and the value of improvements actually placed upon her property. This assignment is without merit. There was sufficient evidence from which the jury could find that there was no default under the

lease, but that the lease was orally rescinded prior to the date the first rental payments were due. If so rescinded, defendant had no claim for rent or improvements. *Scott v. Jordan, supra; Bixler v. Britton,* 192 N.C. 199, 134 S.E. 488 (1926). Consequently, the trial court correctly denied defendant's motion and submitted issues to the jury. *Adler v. Insurance Co., supra.*

Defendant next contends that the trial court erred in refusing defendant's motion for judgment notwithstanding the verdict, under Rule 50(b) of the New Rules of Civil Procedure. This rule provides in effect that "when a motion for directed verdict is denied, and the jury returns a verdict for the nonmovant, the movant may make a motion for judgment in his favor notwithstanding the verdict. The propriety of granting a motion for judgment notwithstanding the verdict is determined by the same considerations as that of a motion for a directed verdict and, as in the case of the latter motion, is cautiously and sparingly granted. It permits the judge to consider the sufficiency of the evidence after the jury has returned a verdict." Sizemore, *General Scope and Philosophy of the New Rules,* 5 Wake Forest Intramural Law Review 1, 41 (1969).

[6, 7] When passing on a motion for judgment n.o.v., the court must view the evidence in the light most favorable to the non-movant. *New Mexico Saving & Loan Ass'n v. U. S. Fidelity & Guaranty Co.,* 454 F. 2d 328 (10th Cir. 1972); *Hannigan v. Sears, Roebuck & Co.,* 410 F. 2d 285 (7th Cir. 1969); *Warner v. Billups Eastern Petroleum Co.,* 406 F. 2d 1058 (4th Cir. 1969). The standards are the same as those for granting a directed verdict. *Juhnke v. EIG Corp.,* 444 F. 2d 1323 (9th Cir. 1971). However, denial of a motion for a directed verdict is not a bar to a motion for judgment n.o.v. *Moore v. Capital Transit Co.,* 226 F. 2d 57 (D.C. Cir. 1955), cert. denied 350 U.S. 966, 100 L.Ed. 839, 76 S.Ct. 434 (1956). For a good explanation of the purpose of the rule, see *Montgomery Ward & Co. v. Duncan,* 311 U.S. 243, 85 L.Ed. 147, 61 S.Ct. 189 (1940); Comment to G.S. 1A-1, Rule 50, N. C. Rules of Civil Procedure.

[8] In the instant case, at the close of all the evidence defendant made a motion for a directed verdict, which was denied. After the jury returned its verdict, defendant then made a motion for judgment n.o.v. under Rule 50(b). The trial judge correctly denied this motion for the same reasons that he denied the

motion for a directed verdict—that is, the evidence viewed in the light most favorable to plaintiffs was sufficient to sustain the verdict.

[9] Defendant also made a motion for a new trial under Rule 59. This motion was denied by the court, and the defendant excepted to this ruling. However, this exception was not brought forward and discussed as an assignment of error and is therefore deemed abandoned. Rule 28 of the Rules of Practice in the Supreme Court, 254 N.C. 810 (1961); *Dinkins v. Booe,* 252 N.C. 731, 114 S.E. 2d 272 (1960).

[10] Defendant further contends that the trial judge erred in admitting testimony concerning a subsequent lease from defendant to West Side Motel Company, Inc. This lease involved the same tract of land and was signed by defendant on 13 October 1967. Both defendant and Norburn testified concerning this lease. Norburn testified that he dictated to West Side Motel Company, Inc., and its attorneys the provisions which he wished to be included in the lease, that defendant Allen had no part in negotiating the lease, and that she only signed it when it was presented to her. Defendant Allen testified that she had no contact with the representatives of West Side Motel Company, Inc., until she met them in the office of the attorney when she signed the lease. This testimony by defendant Allen and Norburn was competent on the question of the agency of Norburn, as it tended to show a course of business dealings between defendant and Norburn in similar transactions. *Colyer v. Hotel Co.,* 216 N.C. 228, 4 S.E. 2d 436 (1939). " . . . (P)roof that the principal permitted the agent to perform similar acts and transactions with other persons has always been accepted to establish the existence of an agency. . . . " 3 Am. Jur. 2d, Agency § 351. See also 3 Am. Jur. 2d, Agency § 352, which states: " . . . (E)vidence of an agent's authority to bind his principal is frequently found in the fact that the alleged principal acquiesced in, recognized, or adopted similar acts done on other occasions by the assumed agent." See *Realty Co. v. Rumbough,* 172 N.C. 741, 90 S.E. 931 (1916); *Gilbraith v. Lineberger,* 69 N.C. 145 (1873).

[11] Defendant next contends that the court erred in allowing the plaintiffs' attorney to read to the jury two portions of the adverse examination of defendant Allen. The first portion of defendant's statement related to the 10 May 1965 lease and was

as follows: "They told me it was not a good lease." Defendant contends that this was hearsay as the identity of "they" was never revealed. This argument is without merit. The purpose of the question was not to prove or disprove the quality of the lease itself, but was to show that defendant had been advised or put on notice that the lease might be deficient in some respects. *Wilson v. Indemnity Corp.*, 272 N.C. 183, 158 S.E. 2d 1 (1967); Stansbury, N. C. Evidence § 141, p. 346 (2d Ed. 1969).

[12] The second portion of the statement read to the jury consisted of the following question asked by plaintiffs' attorney and answered by defendant:

> "Q. Wasn't he [Norburn] reporting back to you regularly on the status of these negotiations [with West Side Motel Company, Inc.]?
>
> "A. He would come and tell me something about it and I trusted him to go ahead and do what he thought best, and I don't know how much went on, I just don't know."

Defendant contends the answer was not responsive to the question and should have been stricken. As stated in III Wigmore, Evidence § 785 (Chadbourne rev. 1970):

> "Where the witness, either in a deposition or on the stand, goes beyond the scope of the question, and makes an answer *not responsive*, there is nothing 'per se' wrong. If the answer contains irrelevant facts, they may be struck out, and the jury directed to ignore them. If it furnishes relevant facts, then they are none the less admissible merely because they were not specifically asked for."

The answer in this case was in fact responsive and relevant to the question of the existence of agency. See *State v. Little*, 278 N.C. 484, 180 S.E. 2d 17 (1971); *In re Will of Tatum*, 233 N.C. 723, 65 S.E. 2d 351 (1951).

[13] Defendant's assignments of error Nos. 323, 324, 325, 326, 327, 328, 329, and 330 relate to alleged errors in the charge. In each assignment the defendant merely says: "The court erred in instructing the jury, as set forth in EXCEPTION NO.[giving exception number]," and then quotes a portion of the charge. The assignments do not set out the defendant's contentions as to what the court should have charged or the particular matters

which defendant asserts were erroneous or omitted. An assignment of error to the charge on the ground that the court gave an erroneous instruction on a particular aspect should not only quote the portion of the charge to which the defendant objects but should also point out the alleged error. *State v. Boyd,* 278 N.C. 682, 180 S.E. 2d 794 (1971); *State v. Benton,* 276 N.C. 641, 174 S.E. 2d 793 (1970); *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1970); *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10 (1967); *State v. Wilson,* 263 N.C. 533, 139 S.E. 2d 736 (1965); *Pratt v. Bishop,* 257 N.C. 486, 126 S.E. 2d 597 (1962); 1 Strong, N. C. Index 2d, Appeal and Error § 31, p. 167; 3 Strong, N. C. Index 2d, Criminal Law § 163, p. 118.

[14] Assignment of error No. 331 based on exception No. 331, entered at the end of the charge, states:

> "The court erred in failing to state in a plain and concise manner the evidence given in the case to the extent necessary to explain the application of the law thereto and in failing to declare and explain the law arising on the evidence given in the case, as set forth in EXCEPTION No. 331 (R p 220), as required by Rule 51 of the Rules of Civil Procedure, in the following particulars:
>
> "(a) The court failed to explain the law relating to the meaning of agency and the agency relationship;
>
> "(b) The court failed to explain the law relating to the scope of an agent's authority to act for his principal and to sufficiently define authority and scope of authority of an agent within the context of this case;
>
> "(c) The court failed to fully and correctly explain apparent authority of an agent to act for his principal and to define the meaning of apparent authority within the context of this case;
>
> "(d) The court failed to fully and correctly explain the meaning of ratification by the principal and to define that term within the context of this case;
>
> "(e) The court failed to explain the law regarding the abandonment or termination of a written lease agreement;
>
> "(f) The court failed to explain the law relating to the requirements for an agent to make an agree-

ment for and on behalf of his principal, in order to bind the principal upon that agreement.

"ASSIGNMENT OF ERROR NO. 331."

This assignment of error is to the charge as a whole. It specifies no portion of the charge which defendant deemed erroneous and sets out no additional instructions which she deemed to be required. This is a broadside assignment and is ineffective to bring up any portion of the charge for review by this Court. *State v. Mason,* 279 N.C. 435, 183 S.E. 2d 661 (1971); *State v. Baldwin,* 276 N.C. 690, 174 S.E. 2d 526 (1970); *State v. Kirby, supra; State v. Wilson, supra.*

Even though the assignments of error to the charge do not comply with the rules stated above, we have examined the charge and find it free from error.

[15] Defendant finally contends that the court erred in allowing the plaintiffs to recover interest upon the verdict from 25 November 1966. The plaintiffs' action was on a contract to recover the actual cost for the grading and improvements performed by the Asheville Contracting Company on the defendant's property. The amount was not known at the time the agreement was entered into, but was ascertained upon the completion of the work. On 25 November 1966 plaintiffs forwarded a statement itemizing the work performed and the actual cost thereof. Defendant refused to pay.

In *General Metals v. Manufacturing Co.,* 259 N.C. 709, 713, 131 S.E. 2d 360, 363 (1963), with reference to interest on a judgment for breach of contract, it is stated:

> "The later cases following the enactment of G.S. 24-5 seem to have established this rule: When the amount of damages in a breach of contract action is ascertained from the contract itself, or from relevant evidence, or from both, interest should be allowed from the date of the breach. *Construction Co. v. Crain & Denbo,* 256 N.C. 110, 123 S.E. 2d 590; *Thomas v. Realty Co.,* 195 N.C. 591, 143 S.E. 2d 144; *Perry v. Norton,* 182 N.C. 585, 109 S.E. 641; *Bond v. Cotton Mills,* 166 N.C. 20, 81 S.E. 936."

See also *Vancouver Plywood Co. v. Godley Construction Co.,* 393 F. 2d 295, 299 (4th Cir. 1968).

Although in this case the amount of damages was not ascertained from the contract itself, the same could be easily computed from the uncontradicated testimony of the plaintiff Taylor. The court's action in allowing interest from 25 November 1966 finds support in the record and in the cases cited in *General Metals v. Manufacturing Co., supra.* This assignment is overruled.

The record in this case contains 334 assignments of error based on 334 exceptions. No effort was made to group the exceptions. *Williams v. Denning,* 260 N.C. 539, 133 S.E. 2d 150 (1963); *Daniel v. Lumber Co.,* 254 N.C. 504, 119 S.E. 2d 397 (1961). The assignments of error alone cover 93 pages of the record. Obviously, a separate discussion of each would prolong this opinion beyond reasonable bounds. *State v. Porth, supra; State v. Lea,* 203 N.C. 13, 164 S.E. 737 (1932). A statement made by Justice Higgins regarding the record in *Morgan v. Bell Bakeries, Inc.,* 246 N.C. 429, 98 S.E. 2d 464 (1957), is pertinent:

> " . . . The careful review of this record has been difficult and time consuming. More than 200 exceptions have been examined. The assignments of error alone cover 68 pages of the record. If there is grain of merit in this appeal it is covered up in the chaff."

Suffice it to say that each assignment has been carefully examined. The evidence was sharply conflicting in many respects. These conflicts have been resolved by the jury in favor of the plaintiffs in a trial free from prejudicial error.

The decision of the Court of Appeals is affirmed.

Affirmed.

Justice SHARP dissenting.

In my view, defendant's motion for a directed verdict should have been allowed, for (1) the evidence discloses that Norburn lacked authority to bind his sister, defendant Allen, to pay the cost of the grading in suit, and (2) in that matter plaintiffs did not deal with him as her agent. The undisputed evidence is that they relied upon Norburn's individual, specific promise "to pay in cash for this."

After plaintiffs found out that they could not secure a construction loan to build the motel they had planned to erect on the property they had leased from Mrs. Allen on 10 May 1965 until she subordinated her rights under the lease to those of the lender, they attempted to secure a substitute lease which would accomplish this. Dr. Logan Robertson came to Dr. Norburn's home "day after day, with one propositon after another, trying to get [him] to get Martha to give him another lease that would subordinate her property." At least twenty leases were prepared, but defendant never executed one. Plaintiffs rightly apprehended that a substitute lease might never be executed, and Dr. Robertson told Norburn that plaintiffs "would have to have some sort of a guarantee from him or from Martha to pay the cost of it [the continuation of the grading which had been started on defendant's property]." Whereupon, on 17 June 1965 Norburn executed the promise to pay which is set out in full in the majority opinion.

The record contains no evidence that defendant ever knew Norburn had executed a contract to "stand personally liable" for the actual cost of grading defendant's property "in case the lease is not continued after June 1, 1966." In it he did not purport to be acting as defendant's agent; the promise to pay was his individual act and bound him only. The instrument itself negates any promise to pay on defendant's part, and plaintiffs' requirement that either she *or* Norburn execute a written promise of payment demonstrates their knowledge of his lack of authority to bind his sister, the owner of the land on which the grading was being done.

Although Dr. Robertson testified that plaintiffs and Norburn had regarded the May 10th lease as canceled in the summer of 1965, there is no evidence that defendant herself so regarded it. It was not until 12 December 1966 that Dr. Robertson marked it "forfeited and returned." That lease had obligated plaintiffs to pay for all grading which was done on defendant's land. No person representing plaintiffs ever talked with defendant herself about rescinding the case and substituting therefor a new one. Plaintiffs, however, knew they had been unable to negotiate a new lease with her through Norburn and that they expended further sums on grading at their own risk. After obtaining Norburn's promise to pay in cash for the continued grading, or to deed Dr. Robertson 734 acres of land, in the

event the lease was "not continued," plaintiffs expended the sum of $19,456.88.

Defendant never executed a substitute lease to plaintiffs. For reasons satisfactory to herself she apparently desired no further dealings with them. Later, however, Norburn negotiated a lease with a tenant acceptable to her, West Side Motel Company. That company agreed to pay for the grading plaintiffs had done in the event either defendant or Norburn should be liable for it. West Side's agreement may or may not render academic the question of defendant's liability, but, be that as it may, I cannot agree that she has any liability whatever to plaintiffs. Conceding that the grading was necessary if a motel was to be constructed on defendant's property and that she has, or will, profit from the work, it was Dr. Norburn who agreed to pay for it. Further, it was his promise to pay upon which plaintiffs acted, and they have sued him upon it too. *See Investment Properties v. Norburn, post,* decided this day. The West Side Motel Company has also agreed to pay if either Norburn or defendant should be held liable for the grading. Defendant, however, never agreed to pay plaintiffs for the grading under any circumstances, and it is a fair inference from the evidence that she did not want it done. My vote is to reverse.

Chief Justice BOBBITT and Justice LAKE join in this dissenting opinion.

INVESTMENT PROPERTIES OF ASHEVILLE, INC. AND BAXTER H. TAYLOR v. CHARLES S. NORBURN

No. 54

(Filed 10 May 1972)

1. Guaranty— guaranty of payment

A guaranty of payment is an absolute promise by the guarantor to pay a debt at maturity if it is not paid by the principal debtor; this obligation is separate and independent of the obligation of the principal debtor, and the creditor's cause of action against the guarantor ripens immediately upon the failure of the principal debtor to pay the debt at maturity.

2. Guaranty— guaranty of payment

Language of a guaranty signed by defendant creating an unconditional promise to pay either in cash or by deeding 734 acres of land

for the actual cost of land preparation of property owned by defendant's sister in case a lease of the property to plaintiff corporation was not continued after a specified date constituted a guaranty of payment.

3. **Contracts § 4— consideration**

In order for a contract to be enforceable it must be supported by consideration.

4. **Contracts § 4— consideration — forbearance to exercise legal rights — benefit to third person**

Forbearance to exercise legal rights is sufficient consideration for a promise given to secure such forbearance even though the forbearance is for a third party rather than for the promisor.

5. **Contracts § 4; Guaranty— guaranty contract — consideration — benefit to principal debtor**

A consideration moving directly to the guarantor is not essential in a guaranty contract, but the promise is enforceable if a benefit to the principal debtor is shown or if detriment or inconvenience to the promisee is disclosed.

6. **Rules of Civil Procedure § 51; Trial § 33— application of law to evidence**

It is the duty of the court, without a request for special instructions, to explain the law and to apply it to the evidence on all substantial features of the case, and a failure to do so constitutes prejudicial error. G.S. 1A-1, Rule 51.

7. **Contracts § 28; Guaranty— sufficiency of consideration — instructions**

In this action to recover on defendant's guaranty of payment of the cost of grading and preparation of land owned by defendant's sister, the trial court erred (1) in giving the jury instructions subject to the construction that it was necessary for defendant to have received something of value himself in order to provide the legal consideration sufficient to support the contract of guaranty, and (2) in failing to instruct the jury that the contract of guaranty was supported by sufficient consideration if, by reason of the guaranty, defendant's sister received benefits from plaintiffs by their furnishing additional work on her property, or plaintiffs had additional work done on the property and thereby incurred added expense.

APPEAL by plaintiffs from the decision of the Court of Appeals reported in 13 N.C. App. 410, 185 S.E. 2d 710 (1972), which found no error in the trial before *Martin, J.*, at the 1 March 1971 Civil Session of BUNCOMBE Superior Court.

On 10 May 1965 Martha Norburn Mead Allen, sister of defendant, Dr. Charles S. Norburn, leased to plaintiff Investment Properties of Asheville, Inc., a tract of land owned by her in Buncombe County, North Carolina. The lease provided

that the lessee should have complete control in grading, reshaping, and developing the land, as well as full responsibility for listing and paying taxes, etc.

Plaintiffs' evidence tends to show that when plaintiffs attempted to obtain financing for the construction of a motel on this property, it was found that the lease was not in sufficient legal form to permit such financing. Negotiations were then carried on between Dr. Logan Robertson, Vice President of plaintiff Investment Properties of Asheville, Inc., and defendant Norburn, looking to the execution of a lease which would support financing on a long-term basis. In July of 1965 Robertson and defendant Norburn met and discussed the deficiencies in the 10 May 1965 lease, and according to the testimony of Robertson it was agreed that this lease be rescinded. Defendant Norburn denied that there was such an agreement.

Plaintiff Baxter H. Taylor was a partner or co-venturer with Investment Properties of Asheville, Inc., as to the leased property. Taylor was also the sole owner of Asheville Contracting Company, which was engaged in heavy dirt moving and construction projects, and at the time engaged in grading for a section of Highway I-40 near the Allen property. While negotiations with reference to another lease were being conducted, Asheville Contracting Company, at the request of Taylor and Investment Properties of Asheville, Inc., started grading the leased property for the construction of a motel. On 17 June 1965 Robertson stated to defendant Norburn that the grading on this property had reached such a point that the machinery might have to be removed if a satisfactory lease could not be obtained. To prevent this, defendant entered into a written agreement with plaintiffs as follows:

"Asheville, N. C.
June 17, 1965

"To
"Dr. Logan Robertson

"This is to certify that I will stand personally liable as stated below for the Conduit grading and necessary expenses (at actual cost) for the land preparation of the Acton property now owned by Martha Mead Allen, in case the lease is not continued after June 1, 1966.

"I promise to pay in cash for this or else deed to you the 734 acre tract in Ashe County which is and will be free and clear.

Charles S. Norburn"

Following the execution of this agreement, the Asheville Contracting Company continued to work on the Allen tract. Most of the grading on the property had been completed prior to 12 June 1965, but some additional leveling was done and the banks of the property were fertilized and seeded after that date.

Plaintiffs and Allen were never able to agree on a new lease although various lawyers were consulted, numerous leases considered, and negotiations continued for a long period following the conclusion of the grading work. On 13 October 1967 Allen finally leased the property to West Side Motel Company, Inc., which Company erected a Holiday Inn thereon.

Plaintiffs' evidence tends to show that the actual cost of grading the property was $19,456.88. Demand for payment was made by plaintiffs on Allen and on Norburn. Both refused to pay. Plaintiffs gave Asheville Contracting Company their note for that amount and instituted this action to recover this amount on the written contract of guaranty given by defendant Norburn. Plaintiffs at the same time instituted an action for the same amount against Allen (see *Investment Properties v. Allen,* 281 N.C. 174, 188 S.E. 2d 441 (1972)) alleging that defendant Norburn acted as Allen's agent in the various transactions concerning the lease with the plaintiffs, including the agreement to pay the actual cost of the grading and improvement of the leased property.

By consent the cases were consolidated for trial. On issues submitted and answered in favor of the plaintiffs, judgment was entered against Allen for $19,456.88, the cost of the grading. In the case against defendant Norburn, the jury found that the defendant did not receive a valuable consideration from plaintiffs for the execution and delivery of the written guaranty. From judgment on the verdict that plaintiffs recover nothing against defendant Norburn, plaintiffs appealed to the Court of Appeals. That court, with Judge Vaughn dissenting, found no error. Plaintiffs appealed to the Supreme Court as of right under G.S. 7A-30(2).

Bennett, Kelly & Long by Harold K. Bennett for plaintiff appellants.

Williams, Morris & Golding by James F. Blue, III, for defendant appellee.

MOORE, Justice.

Plaintiffs allege that defendant Norburn is liable for the actual cost of the grading and seeding done on Allen's property by reason of the guaranty agreement executed by Norburn. Defendant Norburn alleges that this guaranty agreement was not based on a legal consideration and contends that the jury correctly found that the defendant did not receive a valuable consideration from plaintiffs for the execution and delivery of this guaranty.

[1, 2] A guaranty of payment is an absolute promise by the guarantor to pay a debt at maturity if it is not paid by the principal debtor. This obligation is separate and independent of the obligation of the principal debtor, and the creditor's cause of action against the guarantor ripens immediately upon the failure of the principal debtor to pay the debt at maturity. *Milling Co. v. Wallace,* 242 N.C. 686, 89 S.E. 2d 413 (1955). The language in the guaranty signed by defendant Norburn created an unconditional promise to pay in cash for the actual cost of the land preparation of Allen's property in case the lease (of 10 May 1965) was not continued after 1 June 1966, or in lieu of cash to deed to Robertson 734 acres of land in Ashe County. This language was sufficient to constitute a guaranty of payment. *Credit Corp. v. Wilson,* 281 N.C. 140, 187 S.E. 2d 752 (1972).

The jury found that the lease in question was not continued after 1 June 1966, and, in accordance with a peremptory instruction, further found that the guaranty agreement was executed by defendant. The determinative issue then is: Did defendant Norburn receive valuable consideration from the plaintiffs for the execution and delivery of this guaranty agreement?

[3] It is well-settled law in this State that in order for a contract to be enforceable it must be supported by consideration. A mere promise, without more, is unenforceable. *Scott v. Foppe,* 247 N.C. 67, 100 S.E. 2d 238 (1957); *Jordan v. Maynard,* 231

N.C. 101, 56 S.E. 2d 26 (1949); *Stonestreet v. Oil Co.*, 226 N.C. 261, 37 S.E. 2d 676 (1946); 2 Strong, N. C. Index 2d, Contracts § 4. As a general rule, consideration consists of some benefit or advantage to the promisor or some loss or detriment to the promisee. However, as stated by Chief Justice Stacy in *Stonestreet v. Oil Co., supra:*

> " . . . It has been held that 'there is a consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit to the promisor or not.' 17 C.J.S. 426; *Spencer v. Bynum*, 169 N.C. 119, 85 S.E. 216; *Basketeria Stores v. Indemnity Co.*, 204 N.C. 537, 168 S.E. 822; *Grubb v. Motor Co.*, 209 N.C. 88, 182 S.E. 730, and cases cited."

[4, 5] It is not necessary that the promisor receive consideration or something of value himself in order to provide the legal consideration sufficient to support a contract. Forbearance to exercise legal rights is sufficient consideration for a promise given to secure such forbearance even though the forbearance is for a third person rather than that of the promisor. *Myers v. Allsbrook*, 229 N.C. 786, 51 S.E. 2d 629 (1949). In a guaranty contract, a consideration moving directly to the guarantor is not essential. The promise is enforceable if a benefit to the principal debtor is shown or if detriment or inconvenience to the promisee is disclosed. 38 Am. Jur. 2d, Guaranty § 43, p. 1046.

In *Cowan v. Roberts*, 134 N.C. 415, 46 S.E. 979 (1904), this Court held that a promise to pay for goods delivered to the principal was sufficient consideration to support the contract of guaranty. The guaranty in that case was as follows:

> "Knoxville, Tenn., 8 April, 1899
>
> "I hereby guarantee to Cowan, McClung & Co., any debts which Roberts Bros. now owe, or may owe in the future, to the extent of two thousand dollars. This obligation to remain in full force until the debt now due Cowan, McClung & Co. is fully discharged and this agreement annulled in writing.
>
> W. S. Roberts."

Although W. S. Roberts received nothing of value, the Court held the delivery of merchandise to Roberts Bros. by Cowan, McClung & Co., by reason of this guaranty, was sufficient consideration to hold the guarantor, W. S. Roberts, liable for the amount owed at the time of the guaranty, and for merchandise delivered to Roberts Bros. after the guaranty was executed.

In the case before us plaintiffs assign as error the failure of the trial court to instruct the jury that the contract of guaranty given by defendant Norburn was supported by sufficient legal consideration if a third party, Allen, received benefits from the plaintiffs by their furnishing additional services of benefit to her property, and that it was not necessary for the defendant Norburn to receive consideration or something of value himself in order to provide the legal consideration sufficient to support the contract of guaranty. This assignment is well taken.

[6] G.S. 1-180, as now incorporated in G.S. 1A-1, Rule 51, required the judge to explain and apply the law to the specific facts pertinent to the issue involved. A mere declaration of the law in general terms was not sufficient to meet the requirements of the statute. *Saunders v. Warren,* 267 N.C. 735, 149 S.E. 2d 19 (1966). It is the duty of the court, without a request for special instructions, to explain the law and to apply it to the evidence on all substantial features of the case. *Melton v. Crotts,* 257 N.C. 121, 125 S.E. 2d 396 (1962). A failure to do so constitutes prejudicial error for which the aggrieved party is entitled to a new trial. *Correll v. Gaskins,* 263 N.C. 212, 139 S.E. 2d 202 (1964).

[7] The court in the charge to the jury in this case correctly stated: "There must be a sufficient consideration in order to support a contract or legal agreement. Any benefit, right or interest accruing to the one who makes the promise or guaranty, or any forbearance, detriment or loss suffered or undertaken by one to whom the promise for guaranty is made is a sufficient consideration to support such guaranty or contract." Thereafter, the court charged the jury: "I charge you that if the plaintiffs have satisfied you by the greater weight of the evidence that the defendant Norburn received a valuable consideration for the execution and delivery of the guaranty it will be your duty to answer the issue 'Yes.' If the plaintiffs have failed to so satisfy you it would be your duty to answer the issue 'No.' " Under this charge the jury might well have understood that they

were required to find that defendant Norburn himself received a valuable consideration to support his guaranty. In view of the facts in this case, this was too restrictive.

The jury should also have been instructed that if, by reason of the guaranty signed by defendant Norburn, Allen received benefits from the plaintiffs by their furnishing additional work on her property, including fertilizing, seeding, and additional leveling, or if Asheville Contracting Company, at the request of plaintiffs, did additional work upon the Allen property and thereby incurred added expense by reason of this guaranty, either would be sufficient legal consideration to support such guaranty.

The failure to so charge the jury is error for which plaintiffs are entitled to a new trial. The other assignments of error are not considered since they may not recur at the next trial.

New trial.

STATE OF NORTH CAROLINA v. ELIZABETH CRADLE

No. 30

(Filed 10 May 1972)

1. **Constitutional Law § 32— right to counsel**

If an accused can afford counsel he has a constitutional right in all criminal cases to be represented by counsel selected and employed by him.

2. **Constitutional Law § 32; Criminal Law § 21— preliminary hearing — right to counsel**

A preliminary hearing is a critical stage of the State's criminal process at which an accused has a right under the Sixth and Fourteenth Amendments to assistance of counsel; furthermore, by statute in North Carolina, an indigent person has the right to the services of counsel at a preliminary hearing in any felony case. G.S. 7A-451(a)(1), (b)(4).

3. **Constitutional Law § 32— appointment of counsel — indigency**

The trial court erred in finding that defendant was not an indigent and in refusing to appoint counsel to represent her at her preliminary hearing on a felony charge where defendant's affidavit of indigency stated that she had no income, no money and no property except a 1958 Chevrolet which was paid for, and that she had three

children, an unemployed husband and owed $3,000, and nothing in the record refutes or contradicts the import of defendant's affidavit of indigency. G.S. 7A-450(a).

4. Criminal Law § 21— preliminary hearing — function

In North Carolina, a preliminary hearing is simply an inquiry into whether the accused should be discharged or whether there is probable cause to submit the State's evidence to the grand jury and seek a bill of indictment to the end that the accused may be placed upon trial.

5. Criminal Law § 21— preliminary hearing — probable cause

The district judge, when sitting as a committing magistrate as authorized by G.S. 7A-272(b), does not render a verdict but passes only on the narrow question of whether probable cause exists and, if so, the fixing of bail if the offense is bailable; and a discharge of the accused is not an acquittal and does not bar a later indictment.

6. Constitutional Law § 32; Criminal Law § 21— preliminary hearing — failure to appoint counsel — harmless error

The failure to appoint counsel to represent an indigent defendant at her preliminary hearing on charges of forgery and uttering a forged check was harmless error beyond a reasonable doubt where the testimony at the hearing was not transcribed and was never put before the trial court, the jury which convicted defendant never knew that a preliminary hearing had been conducted, the record does not show that defendant pled guilty or made any disclosures at the preliminary hearing which were used against her at the trial, and the record does not show the loss of any defenses or pleas or motions by failure to assert them at the preliminary hearing.

7. Criminal Law § 21— preliminary hearing — termination by court — probable cause

Counsel's ability at the preliminary hearing to "fashion a vital impeachment tool for use in cross-examination of the State's witnesses at trial" or to "discover the case the State has against his client" is greatly diminished by the authority of the court to terminate the preliminary hearing once probable cause is established.

8. Criminal Law § 91— motion for continuance — appellate review

A motion for continuance is ordinarily addressed to the discretion of the trial judge and his ruling thereon is not subject to review absent abuse of discretion; however, when the motion is based on a right guaranteed by the Federal and State Constitutions, the question presented is one of law and not of discretion, and the decision of the trial court is reviewable.

9. Constitutional Law § 31— right of confrontation

The right to the assistance of counsel and the right to face one's accusers and witnesses with other testimony are guaranteed by the Sixth Amendment to the U. S. Constitution, which is made applicable to the states by the Fourteenth Amendment, and by Article I, §§ 19 and 23 of the N. C. Constitution.

10. Constitutional Law § 32— right to counsel — time to prepare defense

The right to the assistance of counsel includes the right of counsel to confer with witnesses, to consult with the accused and to prepare his defense.

11. Constitutional Law § 31; Criminal Law § 91— denial of continuance — right to confrontation — right to effective assistance of counsel

Defendant's rights of confrontation and the effective assistance of counsel were not violated by the denial of a motion for continuance made on the ground that she needed to get information from her home in order to know what witnesses she wanted subpoenaed, where defendant was afforded the opportunity to go home during the noon hour to get anything she desired, defendant's counsel represented her in four other pending cases and they had conferred at length concerning them, defendant could have conferred with her counsel concerning this case for six days prior to the trial, counsel knew of his appointment and could have conferred with defendant for four days prior to the trial, both knew the case was calendared for trial, and neither defendant nor her counsel revealed to the court the name of any witness defendant allegedly had at her home which she desired to subpoena or what she expected to prove by any such witness.

12. Constitutional Law § 36; Forgery § 2— sentence for uttering — cruel and unusual punishment

A sentence of seven to ten years for uttering a forged check in the sum of $50 is not cruel and unusual punishment, since it is within the maximum authorized by statute. G.S. 14-119; G.S. 14-120.

13. Constitutional Law § 36; Criminal Law § 138— punishment — province of legislature

It is within the province of the General Assembly and not the judiciary to determine the extent of punishment which may be imposed on those convicted of crime.

DEFENDANT appeals from decision of the Court of Appeals, 13 N.C. App. 120, upholding judgment of *Copeland, S.J.*, 7 June 1971 Session, ORANGE Superior Court.

Defendant was charged in a two-count bill of indictment with forgery and uttering a forged check.

The State's evidence tends to show that on 15 January 1971 at approximately 2 p.m. defendant entered the place of business of Central Carolina Farmers, Inc., in Carrboro and requested Mrs. Irma Davis, who worked there, to cash a fifty-dollar check. Mrs. Davis asked who the maker was, and defendant replied: "That's the man I work for." The name appearing on the check as maker was Bennie Duty, and the name appearing on the check as payee was Lena Mae Hopkins. Defendant endorsed the

check in the presence of Mrs. Davis by writing the name "Lena Mae Hopkins" on the back of the check, and Mrs. Davis thereupon took the check and gave defendant fifty dollars in currency.

The check was deposited in due course and returned stamped "Account Closed." Mrs. Davis contacted the police and described the person who gave her the check as "a black female, with red hair, small build and freckles. On this particular date, January 15, 1971, she was wearing a dark blue dress. I was questioned by Officer Blackwood as to how many times I had seen Elizabeth Cradle prior to the date of January 15, 1971, to which I replied that I had seen her fifty, seventy-five or more times." Although she had seen Elizabeth Cradle many times, Mrs. Davis did not know her name. However, based on the information and the description, the officer swore out a warrant for Elizabeth Cradle.

Bennie R. Duty testified that he did not sign the check and did not authorize anyone else to sign his name to it. He identified the check in question as one of his personalized checks, with his name (Bennie R. Duty) and his address (115 Carr Street, Carrboro) printed on it. He said that for several months prior to 1 February 1971 he had been in prison serving a six-month term for driving under the influence of alcohol and had not been at his home address during the month of January 1971.

Earl Eversole testified that he lived at 115 Carr Street, Carrboro, North Carolina, in the same house where Bennie Duty lived; that Mr. Duty was absent during the month of January; that in December 1970, between Christmas and New Year's, defendant came to his house and cleaned up a room adjoining the room in which Mr. Duty lived; that after Mr. Duty returned home he complained about his checks being gone—"he calculated that he was missing about sixty checks." This witness stated that the room defendant cleaned opens out into the hall and doesn't open into Mr. Duty's room; that the house stays open rather than locked—"I do not lock the door."

The State rested its case and defendant moved for a directed verdict of not guilty as to both counts. As to the count charging forgery, the motion was allowed; as to the count charging uttering, the motion was denied.

Defendant, as a witness in her own behalf, testified that she is married to Irving Sylvester Cradle, is twenty-two years of age, and has three children. Neither she nor her husband has

ever been on welfare. For the last six months she has been staying home taking care of her children. "My mother's name is Lena Mae Rigsbee but she went under the name of Lena Mae Hopkins. She wasn't alive on January 15, 1971; she died about two years ago."

The defendant further testified that at two o'clock in the afternoon of January 15 she was at home "as far as I can remember." She denied she had ever seen the check in question and denied going into the Farmers Exchange on January 15. She admitted working for Mr. Eversole between Christmas and New Year's cleaning an upstairs room for him but denied having gone into Mr. Duty's room, "although I have known him for two or three years." She said she had never taken anything from any of the rooms at Mr. Eversole's. She said she did not know Mrs. Davis and had never given her a check of any kind.

Defendant's motion for directed verdict of not guilty on the uttering count in the bill of indictment was renewed at the close of all the evidence and denied. Following the arguments and the charge of the court, the jury convicted defendant of uttering a forged check, as charged, and defendant was sentenced to a term of not less than seven nor more than ten years. The Court of Appeals found no error, and defendant appealed to the Supreme Court, allegedly as of right, asserting involvement of substantial constitutional questions and assigning errors noted in the opinion.

Roy M. Cole; Loflin, Anderson & Loflin by Thomas F. Loflin, III, Attorneys for defendant appellant.

Robert Morgan, Attorney General; Charles M. Hensey, Assistant Attorney General, for the State of North Carolina.

HUSKINS, Justice.

Following her arrest defendant signed an affidavit of indigency on 22 March 1971. The affidavit stated that she was unemployed, had no income, no money, and no property except a 1958 model Chevrolet which was fully paid for. Her affidavit further stated that she had three children, an unemployed husband, and owed $3,000. She requested assignment of counsel. On 23 March 1971 District Judge Cates signed the following order denying counsel:

"The above named person, being a party to a proceeding or action listed in G.S. 7A-451(a), specifically, uttering forged check, and, having requested the assignment of counsel; now, therefore,

It appearing to the undersigned Judge from the affirmations made by the applicant and after due inquiry made, that the applicant is financially able to provide the necessary expenses of legal representation, it is, therefore,

ORDERED AND ADJUDGED that he is not an indigent, and his request is hereby denied."

Thereafter, a preliminary hearing was conducted before Judge Cates on 30 March 1971, probable cause found, and defendant was bound over to superior court for trial. Her appearance bond was fixed at $1,000 which she posted and remained at liberty until her trial in superior court. Insofar as the record discloses, she was not represented by counsel at the preliminary hearing. Defendant assigns as error the failure of Judge Cates to appoint counsel to represent her at the preliminary hearing.

[1] If an accused can afford counsel he has a constitutional right in all criminal cases to be represented by counsel selected and employed by him. *State v. Morris,* 275 N.C. 50, 165 S.E. 2d 245 (1969). If the accused is indigent and charged with a felony or other *serious* offense, what are his rights with respect to assigned counsel at a preliminary hearing?

[2] A preliminary hearing is a critical stage of the State's criminal process at which an accused has a constitutional right under the Sixth and Fourteenth Amendments to assistance of counsel. *Coleman v. Alabama,* 399 U.S. 1, 26 L.Ed. 2d 387, 90 S.Ct. 1999 (1970). *Compare, Gasque v. State,* 271 N.C. 323, 156 S.E. 2d 740 (1967); *State v. Cason,* 267 N.C. 316, 148 S.E. 2d 137 (1966). Furthermore, by statute in North Carolina, an indigent person has the right to the services of counsel at a preliminary hearing in any felony case. G.S. 7A-451(a)(1), (b)(4). An indigent person is defined as one "who is financially unable to secure legal representation and to provide all other necessary expenses of representation. . . ." G.S. 7A-450(a). The court makes the final determination of indigency, G.S. 7A-453(b), and this may be determined or redetermined by the

court at any stage of the proceeding at which the indigent is entitled to representation. G.S. 7A-450(c).

[3] Here, defendant was charged with a felony, and the only evidence of record bearing upon the question of indigency is her affidavit. That affidavit, if believed, certainly shows that she "was financially unable to secure legal representation and to provide all other necessary expenses." The order signed by Judge Cates in which he refused to assign counsel recites that "from the affirmations made by the applicant and after due inquiry made" it appears to the judge that the applicant is financially able to provide the necessary expenses of legal representation. The record does not reveal what inquiry the judge made and no facts are found. Nothing in the record refutes or contradicts the import of defendant's affidavit of indigency. On this record we hold that defendant was an indigent within the meaning of G.S. 7A-450(a) and was entitled to be represented by appointed counsel at the preliminary hearing conducted before Judge Cates on 30 March 1971. Failure to assign counsel was error. It is noteworthy that Judge Copeland, acting upon the same affidavit, "and after due inquiry made," found defendant indigent on 1 June 1971 and appointed Attorney Roy M. Cole to represent her at the trial in superior court and, following her conviction, upon appeal.

Whether defendant was prejudiced by the absence of counsel at the preliminary hearing must now be determined. "The test to be applied is whether the denial of counsel at the preliminary hearing was harmless error under *Chapman v. California,* 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824, 24 A.L.R. 3d 1065 (1967)." *Coleman v. Alabama, supra.*

[4, 5] In North Carolina, a preliminary hearing is simply an inquiry into whether the accused should be discharged or whether, on the other hand, there is probable cause to submit the State's evidence to the grand jury and seek a bill of indictment to the end that the accused may be placed upon trial. The district judge, when sitting as a committing magistrate as authorized by G.S. 7A-272(b), does not render a verdict; and a discharge of the accused is not an acquittal and does not bar a later indictment. *State v. Hargett,* 255 N.C. 412, 121 S.E. 2d 589 (1961). Thus a preliminary hearing is not a trial; and the district judge, in his capacity as committing magistrate, passes only on the narrow question of whether probable cause exists and, if so,

the fixing of bail if the offense is bailable. G.S. 15-94; G.S. 15-95; *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384 (1972).

[6] The record on appeal in this case is completely silent with respect to what occurred at the preliminary hearing. As defendant correctly states in her brief: "All that the record shows is that one was held and probable cause against the defendant found after the defendant submitted an affidavit of indigency and was denied counsel."

The record does not show that defendant pled guilty or made any disclosures at the preliminary hearing which were used against her at the trial, as in *White v. Maryland,* 373 U.S. 59, 10 L.Ed. 2d 193, 83 S.Ct. 1050 (1963).

The record does not show that the transcript of any testimony given at the preliminary hearing was used against defendant at her trial, thus denying her the right of confrontation, as in *Pointer v. Texas,* 380 U.S. 400, 13 L.Ed. 2d 923, 85 S.Ct. 1065 (1965).

The record does not show the loss of any defenses or pleas or motions by failure to assert them at the preliminary hearing. *See Hamilton v. Alabama,* 368 U.S. 52, 7 L.Ed. 2d 114, 82 S.Ct. 157 (1961).

The record does not show that the absence of counsel at the preliminary hearing in any way contaminated the proceedings at the trial in superior court. The testimony at the hearing was not transcribed and was never put before the trial court. The jury which convicted defendant never knew that a preliminary hearing had been conducted or that probable cause had been found and defendant bound over for trial. Surely defense counsel would have included in the statement of case on appeal each and every circumstance and event which was considered prejudicial to the defendant at her trial. The absence of all such circumstances is compelling proof of their nonexistence. The record contains nothing save the bare assertion of prejudice and the contention that defendant's conviction cannot stand because she was not represented by counsel at the preliminary hearing.

[7] In light of the record before us it would require reaching and stretching to conclude that the presence of counsel at the preliminary hearing would have enabled defendant to elicit

favorable testimony at her trial which was irretrievably lost due to absence of counsel at the preliminary hearing. That defense counsel might have done a better job at the trial had he been present at the preliminary hearing is sheer speculation. Moreover, the presiding judge may hear only one witness, find probable cause, and end the hearing. Thus counsel's ability at the preliminary hearing to "fashion a vital impeachment tool for use in cross-examination of the State's witnesses at trial," or to "discover the case the State has against his client," *Coleman v. Alabama, supra,* is greatly diminished by the authority of the court to terminate the preliminary hearing once probable cause is established. *See Adams v. Illinois,* 405 U.S. 278, 31 L.Ed. 2d 202, 92 S.Ct. 916 (decided March 6, 1972).

It was held in *Chapman v. California, supra* [386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824, 24 A.L.R. 3d 1065 (1967)] that some constitutional errors are deemed harmless in the setting of a particular case, not requiring the automatic reversal of a conviction, where the appellate court can declare a belief that it was harmless beyond a reasonable doubt. In fashioning a harmless error rule the Court said: "We prefer the approach of this Court in deciding what was harmless error in our recent case of *Fahy v. Connecticut,* 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229. There we said: 'The question is whether there is a reasonable possibility that the [error] complained of might have contributed to the conviction.' . . . We, therefore, do no more than adhere to the meaning of our Fahy Case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

Applying the *Chapman* test to the facts in this case, we see no reasonable possibility that the absence of counsel at the preliminary hearing could have contributed to defendant's conviction at her trial in superior court. In our view it was harmless error beyond a reasonable doubt and we so hold. *Harrington v. California,* 395 U.S. 250, 23 L.Ed. 2d 284, 89 S.Ct. 1726 (1969); *State v. Brinson,* 277 N.C. 286, 177 S.E. 2d 398 (1970); *State v. Fletcher and Arnold,* 279 N.C. 85, 181 S.E. 2d 405 (1971); *State v. Taylor,* 280 N.C. 273, 185 S.E. 2d 677 (1972). Defendant's first assignment of error is overruled.

Attorney Roy M. Cole was appointed to represent defendant in this case on 1 June 1971 and was informed of his appoint-

ment on 3 June 1971. When the case was called for trial on 7 June 1971, counsel moved for a continuance on the ground that he had not had time to prepare for trial and to subpoena witnesses. He had been previously appointed to represent defendant in four other cases and had conferred at great length with the defendant concerning them. In a conference with the solicitor on June 3 or 4 Mr. Cole indicated he was ready to go to trial in this case and was advised by the solicitor that not only this case but also other cases pending against the defendant were on the calendar and might be called during the week of June 7. When this case was called on June 7, defendant informed her counsel that she didn't know what witnesses she wanted subpoenaed until she went home. Mr. Cole then stated to the court that he was informed by his client that she needed to "get information that she has at her home regarding this case and to inform me what witnesses she desires to subpoena for this case; these being the reasons for the motion for continuance." The record discloses defendant was afforded an opportunity to go home during the noon hour to get anything she desired. The motion for continuance was denied, and this constitutes defendant's second assignment of error.

[8] A motion for continuance is ordinarily addressed to the discretion of the trial judge and his ruling thereon is not subject to review absent abuse of discretion. *State v. Stinson,* 267 N.C. 661, 148 S.E. 2d 593 (1966). However, when the motion is based on a right guaranteed by the Federal and State Constitutions, the question presented is one of law and not of discretion, and the decision of the court below is reviewable. *State v. Phillips,* 261 N.C. 263, 134 S.E. 2d 386 (1964).

[9, 10] The right to the assistance of counsel and the right to face one's accusers and witnesses with other testimony are guaranteed by the Sixth Amendment to the Federal Constitution which is made applicable to the States by the Fourteenth Amendment, and by Article I, Sections 19 and 23 of the Constitution of North Carolina. The right to the assistance of counsel includes the right of counsel to confer with witnesses, to consult with the accused and to prepare his defense. *Avery v. Alabama,* 308 U.S. 444, 84 L.Ed. 377, 60 S.Ct. 321 (1940); *Powell v. Alabama,* 287 U.S. 45, 77 L.Ed. 158, 53 S.Ct. 55 (1932); *State v. Farrell,* 223 N.C. 321, 26 S.E. 2d 322 (1943). Hence, the question presented by this assignment is whether

the refusal of the trial court to grant defendant's motion for a continuance impinged upon her constitutional right to confrontation and effective representation by counsel by denying her a reasonable time within which to prepare and present her defense. If so, she is entitled to a new trial. If not, denial of the continuance was a discretionary matter not subject to review except in case of manifest abuse.

[11] The record in this case does not support defendant's contention that she has been denied her constitutional rights of confrontation and assistance of counsel. She and her counsel were well acquainted. He represented her in four other pending cases and they had conferred at length concerning them. She could have conferred with him concerning this case, had she tried, for six days prior to the trial. Counsel knew of his appointment and could have conferred with defendant for four days prior to the trial. Both knew this case was calendared for trial during the week of June 7. Yet, insofar as the record shows, they did nothing. Moreover, neither defendant nor her counsel revealed to the court the name of a single witness defendant allegedly had at her home which she desired to subpoena. What she expected to prove by these witnesses must be surmised. If she went home to get the list of witnesses, the record fails to show it. The oral motion for continuance is not supported by affidavit or other proof. In fact, the record suggests only a natural reluctance to go to trial and affords little basis to conclude that absent witnesses, if they existed, would ever be available. We are left with the thought that defense counsel suffered more from lack of a defense than from lack of time. "Continuances should not be granted unless the reasons therefor are fully established. Hence, a motion for a continuance should be supported by an affidavit showing sufficient grounds. *State v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520 (1948)." *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972). The facts show no abuse of discretion and no violation of defendant's constitutional rights by the court's refusal to continue the case. Defendant's second assignment of error is overruled.

[12] Defendant's third and final assignment of error in this Court is grounded on the contention that a sentence of seven to ten years for uttering a forged check in the sum of fifty dollars is cruel and unusual punishment prohibited by both State and Federal Constitutions.

We have consistently held that a sentence of imprisonment which is within the maximum authorized by statute is not cruel or unusual in a constitutional sense, unless the punishment provisions of the statute itself are unconstitutional. *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345 (1969); *State v. Robinson,* 271 N.C. 448, 156 S.E. 2d 854 (1967); *State v. Greer,* 270 N.C. 143, 153 S.E. 2d 849 (1967); *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216 (1966).

One who forges or utters forged paper in this State is guilty of a felony and may be punished by imprisonment in the county jail or State's prison for not less than four months nor more than ten years. G.S. 14-119; G.S. 14-120. Thus the judgment pronounced in this case is within the maximum authorized by law and must be upheld.

[13] Defendant argues that the foregoing rule abdicates judicial functions to the legislative branch of government. No so. It is within the province of the General Assembly of North Carolina and not the judiciary to determine the extent of punishment which may be imposed on those convicted of crime. If the sentence pronounced here seems harsh, the executive branch of government acting through the Board of Paroles may lawfully commute it. Our function, however, is to pass upon errors of law; and in law there is no error.

Defendant's remaining assignments, five in number, relate to motions for nonsuit, mistrial, and to the court's charge. Defendant's supplemental brief filed in this Court does not discuss these assignments and does not refer to a discussion of them contained in defendant's brief filed in the Court of Appeals. Although they may be deemed abandoned under Rule 28, Rules of Practice in the Supreme Court *(State v. Strickland,* 254 N.C. 658, 119 S.E. 2d 781), we have carefully reviewed the assignments and find no merit in any of them. They are overruled without discussion.

For the reasons stated the decision of the Court of Appeals upholding the judgment of the trial court is

Affirmed.

In re Publishing Co.

IN THE MATTER OF THE APPEAL OF ASHEVILLE CITIZEN-TIMES PUBLISHING COMPANY FROM AN ACTION OF THE BUNCOMBE COUNTY BOARD OF TAX SUPERVISION, SITTING AS THE BOARD OF EQUALIZATION AND REVIEW, DENYING THE REQUEST FOR EXEMPTION FROM AD VALOREM TAXATION CERTAIN IMPORTED PROPERTY OWNED BY THE APPELLANT AND LOCATED IN BUNCOMBE COUNTY AS OF JANUARY 1, 1970.

No. 109

(Filed 10 May 1972)

1. Taxation § 9.5— taxes on exports or imports — U. S. Constitution

The purpose of Art. I, § 10[2.] of the U. S. Constitution, prohibiting a state tax on imports, is to prevent the coastal states, and other states through which imports must pass, from levying a tax on imports before they reach their destination, so as to impede the free flow of goods between the states, and so as to prevent encroachment by the state upon taxing powers reserved exclusively to the national government.

2. Taxation § 9.5— state taxes on imports — current operational needs

When goods are needed, imported and irrevocably committed to supply and are actually being used to supply the daily requirements of a manufacturer, they are being used for "current operational needs" so as to lose their character as imports and their immunity from state taxation.

3. Taxation § 9.5— state taxes on imports — use or storage

Neither the size of the supply of imported materials on hand nor the distance the materials are stored from the point of fabrication or consumption determines whether they are being used or merely stored, the treatment of the goods by the importing manufacturer being the critical test.

4. Taxation § 9.5— taxes on imports — current operational needs — time necessary for delivery

Contention that "current operational needs" of imported newsprint must be determined by mutiplying the number of days necessary for the imported goods to be shipped from the place of origin to destination by the average daily requirement of such goods by the importer-manufacturer is without merit.

5. Taxation §§ 9.5, 25— ad valorem taxes — imported newsprint — current operational needs

A four-to-six weeks supply of newsprint ordinarily kept on hand by a newspaper publishing company, and on hand on the taxing date, including imported newsprint, constituted the "current operational needs" of the publishing company and was subject to ad valorem taxation.

6. Taxation § 9.5— imported newsprint — ad valorem taxes — "original package" doctrine

The "original package" doctrine has no application in determining whether ad valorem taxes may be imposed on imported newsprint where the newsprint was being used on the taxing date for the purposes for which the taxpayer imported it.

APPEAL by plaintiff from *Martin, J. (Harry)* at the October 1971 Civil Session of BUNCOMBE Superior Court.

The Asheville Citizen-Times Publishing Company (taxpayer) requested the Board of Supervision of Buncombe County, sitting as the Buncombe County Board of Equalization and Review, to exempt it from ad valorem taxes on that portion of imported newsprint on hand as of 1 January 1970 which exceeded the average amount of newsprint used by it during a 6-day period. The taxpayer contended that such newsprint as was necessary to meet its "current operational needs" was taxable, and that "current operational needs" should be measured by the length of time it takes to get an additional supply of newsprint from its foreign supplier, in this case six days. However, the Buncombe County Board of Equalization and Review concluded that the four to six weeks supply ordinarily kept on hand by the taxpayer, and on hand on the taxing date, consisting of 293.1 tons of imported newsprint and 191.6 tons of domestic newsprint, constituted the "current operational needs" of the taxpayer. Pursuant to this conclusion, the Buncombe County Board of Equalization and Review, on 3 August 1970, denied the request for exemption. The taxpayer appealed to the North Carolina Board of Assessment, contending that the County was imposing a tax on imports in contravention of Art. I, § 10 [2.], of the United States Constitution, which, in part, provides: "No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, . . . "

The uncontradicted evidence disclosed by the affidavit testimony of Mr. John Q. Schell, General Manager of the taxpayer, answers by Mr. Schell to interrogatories submitted to him, and a copy of the contract between taxpayer and one foreign supplier for the purchase and sale of newsprint, shows that the newsprint is delivered to and placed in an underground storage warehouse located in a building adjacent to the building housing the printing facilities and general offices of taxpayer;

that the newsprint is moved from the underground warehouse to a storage room adjacent to the printing area as it is needed in order to maintain a four to six day supply in the storage room. The newsprint is wrapped in heavy kraft paper, which is removed just before the actual use of the newsprint on the presses. Pursuant to the written contract between taxpayer and one of its Canadian suppliers, the taxpayer places monthly orders for newsprint. This contract, in part, provides:

> "5(d) Unless the buyer shall furnish to International (supplier) by the 15th day of the month complete specifications expressed in tons of each width for the paper to be shipped the succeeding month, International may ship in accordance with specifications last received."

In connection with the purchase of newsprint, Schell, in his affidavit, *inter alia,* stated:

> " . . . [W]e can, as a practical matter, and occasionally do place special, changed or unanticipated orders with any of our manufacturing suppliers. On these occasions we can also get delivery in Asheville of the newsprint ordered within six days after the manufacturer's receipt of our order, barring unusual circumstances."

The State Board of Assessment found facts consistent with the evidence above stated, concluded that appellant's entire supply of newsprint on hand as of 1 January 1970 constituted its "current operational needs," and sustained the action of the Buncombe County Board of Tax Supervision, sitting as the Buncombe County Board of Equalization and Review. The taxpayer filed a petition for review in Buncombe County Superior Court, and on 26 August 1971 Judge Harry Martin heard arguments of counsel and considered the record proper and briefs of counsel. On 8 October 1971 Judge Martin entered a judgment in which he, *inter alia,* found and concluded:

FINDINGS OF FACT

> "4. Taxpayer contends any newsprint on hand exceeding a six (6) day supply (6 x 13.8 tons, or 88.8 tons) is not a part of "current operational needs" but rather newsprint purchased and held in the exercise of "sound and prudent business judgment."

"5. The Board concluded from the facts it found that a four to six weeks supply, some 489.972 tons, was required for taxpayer's "current operational needs" and held that this amount on hand January 1, 1970, the taxing date, was not exempt from taxation."

CONCLUSIONS OF LAW

"1. Taxpayer has failed to produce evidence that the newsprint on hand January 1, 1970, in excess of a six (6) days supply (88.8 tons) was purchased in the exercise of sound and prudent business judgment as distinguished from current operational needs. There is no evidence that any of the paper was purchased at a favorable price or was of a particular quality not customarily obtainable, or that it was purchased for a particular purpose as distinguished from regular business operations, or that purchases in certain quantities had economic advantages, or that there was any threat to the foreign supply by way of strikes or otherwise.

"2. There is sufficient competent evidence in the record to sustain the Board's findings of fact, and its conclusion of law, that a four to six weeks supply of newsprint paper (489.972 tons) did on January 1, 1970, (the taxing date) constitute the current operational needs of the appellant taxpayer.

"3. That the Board's Decision that the property subject to the appeal, 489.972 tons of newsprint paper owned by the appellant taxpayer January 1, 1970, and then located within Buncombe County, is not exempt from ad valorem taxes under Article 1, Section 10, Clause 2, of the United States Constitution."

Judge Martin, after finding facts and entering his conclusions of law, affirmed the decision of the State Board of Equalization and Review. The taxpayer appealed to the North Carolina Court of Appeals, and on 7 March 1972 we allowed the party's petition for writ of certiorari to the North Carolina Court of Appeals prior to determination.

McGuire, Baley & Wood, by Charles R. Worley, for Appellant Asheville Citizen-Times Publishing Company.

W. M. Styles for Board of Tax Supervision.

BRANCH, Justice.

The constitutional question here presented is when, and to what extent, Buncombe County may levy an ad valorem property tax upon newsprint imported by a taxpayer for use in its printing operation.

[1] Art. I, § 10 [2.] was inserted in the United States Constitution to prevent the coastal states, and other states through which imports must pass, from levying a tax on imports before they reach their destination, so as to impede the free flow of goods between the states, and so as to prevent encroachment by the state upon taxing powers reserved exclusively to the national government. *Brown v. Maryland,* 12 Wheat. 419, 6 L.ed. 678; *Youngstown Sheet and Tube Co. v. Bowers,* and *U. S. Plywood Corporation v. City of Algoma,* 358 U.S. 534, 3 L.ed. 2d 490, 79 S.Ct. 383.

In *Brown v. Maryland, supra,* Chief Justice John Marshall, writing for the Court, held that the national government had exclusive power to tax the act of importation, and that a state could not tax an imported good while it remained the property of the importer "in his warehouse, in the original form or package in which it was imported." However, the Chief Justice emphasized that there was a point of time when imported goods must lose their immunity and become taxable by the states. In this connection he said: "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; . . . "

Without defining just what constituted such act or conduct, the Chief Justice listed some of the acts which would cause loss of the import characteristic. Included in this list was the act of an importer in bringing goods into this country for "his own use" and here using them for the purposes for which they were imported.

The United States Supreme Court again discussed the effect of "use" by an importer in the case of *Hooven & Allison Co. v. Evatt,* 324 U.S. 652, 89 L. 2d 1252, 65 S.Ct. 870. There the court concluded that goods imported for "use" by the importer were subject to the same immunity as goods imported

for sale, and the goods imported for "use" did not lose their character as imports more readily than did goods imported for sale. When the imported goods are merely in storage in the warehouse of the importer, the goods retain their character as imports, and, consequently, their immunity from state taxation. The court, however, recognized that when a manufacturer begins to use the imported goods in the manufacturing process, the goods lose their character as imports and their immunity from state taxation.

It was not until the United States Supreme Court decided the companion, landmark cases of *Youngstown Sheet & Tube Co. v. Bowers, and U. S. Plywood Corporation v. City of Algoma, supra,* that the court delineated the actual use by an importing manufacturer which served to remove the import character from a good.

In *Youngstown,* the stipulated facts show that imported iron ore was transported to the manufacturing plant and stockpiled with similar imported ore adjacent to the smelters. These stockpiles, segregated as to quality and point of origin, contained enough ore to meet smelting needs at the manufacturer's plant for approximately three months. Ore was removed periodically from these stockpiles and taken directly to the open hearth and blast furnaces. The manufacturer kept a one-to-two days supply of ore available continuously at each furnace facility. As ore was removed from the large stockpiles, the stockpiles were replenished with imported ore. It was further stipulated that this ore had been imported for manufacturing and for the purpose of meeting estimated requirements at the plant; that the "importation journey definitely had ended; (and) that the ores were irrevocably committed to use in manufacturing at that plant and point of final destination; . . . "

The U. S. Plywood Corporation imported unfinished "green" lumber "in bulk" and veneers "in bundles" at its facilities. Upon delivery at its plant, the lumber was unloaded and carried to the company's storage yard, located "adjacent to its plant," where it was stacked so as to allow the air to circulate and dry the lumber. The lumber was then taken from the storage yard and placed in a kiln for drying, and the lumber was thereafter used in the manufacturing process. The veneers, imported from three countries, were received in bundles and kept in that form at the taxpayer's plant for use as needed in the day-to-day

operation of the plant. In the *Plywood* case the state court found as facts that the lumber and veneers had been imported for use in manufacturing at the Algoma plant; that upon arrival there the importation journey ended; that these materials were irrevocably committed to use in manufacturing at that plant; that these materials were "necessarily required to be kept on hand to meet (its) current operational needs"; and that these materials were actually being used at the plant to supply those needs. These findings were not attacked in the appeal to the United States Supreme Court.

In *Youngstown* the taxing authorities levied an ad valorem assessment against the full value of all the ore in the plant's stockpiles; in *Plywood* the authorities levied an assessment against only one-half the value of the imported materials located at the manufacturing plant. In affirming these levies, the United States Supreme Court held that the stipulated facts in *Youngstown* and the facts found by the court from sufficient evidence in *Plywood* showed that the manufacturers had "so acted upon the imported materials . . . for the purpose for which they were imported, that . . . they must be held to have then entered the manufacturing process."

The court held that the "original package" concept as applied to goods imported for the purpose of sale in the case of *Brown v. Maryland, supra,* did not exempt goods from taxation when such goods were imported for use in manufacturing and were in fact effectively subjected to such use before the original packaging was removed.

In discussing this holding, the court, in part, stated:

> "The materials here in question were imported to supply, and were essential to supply, the manufacturer's current operating needs. When, after all phases of their importation had ended, they were put to that use and indiscriminate portions of the whole were actually being used to supply daily operating needs, they stood in the same relation to the State as like piles of domestic materials at the same place that were kept for use and used in the same way. The one was then as fully subject to taxation as the other. In those circumstances, the tax was not on 'imports', nor was it a tax on the materials because they had been imported, but because at the time of the assessment they

were being used, in every practical sense, for the purposes for which they had been imported. They were therefore subject to taxation just like domestic property that was kept at the same place in the same way for the same use. We cannot impute to the Framers of the Constitution a purpose to make such a discrimination in favor of materials imported from other countries as would result if we approved the views pressed upon us by the manufacturers. Compare *May v. New Orleans,* 178 U.S., at page 509."

[2] The opinon in *Youngstown Sheet and Tube Co. v. Bowers, supra,* furnishes criteria for determining what imported goods are within the classification of "current operational needs" so as to lose their character as imports and their immunity from state taxation. The essence of these criteria may be stated as follows: When goods are needed, imported and irrevocably committed to supply and are actually being used to supply the daily requirements of a manufacturer, they are being used for "current operational needs."

[3] Neither the size of the supply on hand nor the distance the materials are stored from the point of fabrication or consumption, determines whether a good is being used or merely stored. *Hooven & Allison Co. v. Evatt, supra; Youngstown Sheet & Tube Co. v. Bowers, supra.* The treatment of the imported goods by the importing manufacturer is the critical test.

Thus, a supply of imported ore to meet its estimated requirements for a period of at least three months in the *Youngstown* case, and one-half of an unspecified supply of imported veneer in the *Plywood* case were held to be in use for the purposes for which they were imported, and, therefore, subject to taxation by the state. (We note that the one-half determination in the *Plywood* case was the decision of the local taxing authority and not of the United States Supreme Court. In reaching its decision the Supreme Court apparently did not consider the lapse between the time the manufacturer placed an order with the foreign supplier and the time the manufacturer received the goods.)

[4] Appellant argues that "current operational needs" should be determined by multiplying the number of days necessary for the imported goods to be shipped from the place of origin to destination by the average daily requirement of such goods by

the importer-manufacturer. In support of this contention appellant relies on *Hooven & Allison Co. v. Evatt, supra,* decided ten years prior to *Youngstown Sheet & Tube Co. v. Bowers, supra.* The later case specifically points out that *Hooven & Allison Co. v. Evatt* did not reach, but expressly reserved, the crucial question here presented. In that case it is stated:

> "[I]t is unnecessary to decide whether, for purposes of the constitutional immunity, the presence of some fibers in the factory was so essential to current manufacturing requirements that they could be said to have entered the process of manufacture and hence were already put to the use for which they were imported before they were removed from the original packages."

Appellant relies heavily on the line of authority represented by *City and County of Denver v. Denver Publishing Company,* 153 Colo. 539, 387 P. 2d 48. In that case the Board of Equalization of the City and County of Denver upheld the assessment of ad valorem taxes on all newsprint which taxpayer imported from Canada and held for storage in its warehouses and publishing plant. The facts show that taxpayer imported 99% of its newsprint and used three separate warehouse facilities to store its large newsprint demands. The Supreme Court of Colorado held that the crucial issue was the amount of newsprint required to meet "current operational needs." It adopted the trial court's holding that "current operational needs" is defined in terms of the 6-day period needed to fill an order for newsprint as multiplied by daily requirements. However, in so holding, the court stated:

> "There is no rigid and inflexible rule which can be laid down to determine the 'current operational needs' of a taxpayer. This is an area wherein the policy of the law dictates *ad hoc* determinations based on the facts presented in each particular case. The trial court in the instant case held that since it took six days for the taxpayer to replenish its supply of newsprint from Canada and since the taxpayer used 60 tons of newsprint per day, the amount necessary for 'current operational needs' was 360 tons and that this amount was taxable even though all the newsprint remained in its original package until actually being made ready for the presses. We approve the formula in the instant case and cannot conclude that as a matter of

> law the court made an erroneous determination of the 'current operational needs' of the taxpayer."

For other cases in this line of authority, see: *Knight Newspapers, Inc. v. City of Detroit,* 16 Mich. App. 438, 168 N.W. 2d 318; *Wheeling Steel Corp. v. Porterfield,* 14 Ohio St. 2d 85, 236 N.E. 2d 652; *Republic Steel Corp. v. Porterfield,* 14 Ohio St. 2d 101, 236 N.E. 2d 661; *Beall Pipe and Tank Corp. v. Tax Comm.,* 254 Or. 195, 458 P. 2d 420; *Lumber Co. v. Tax Comm.,* 255 Or. 13, 463 P. 2d 590; *Emhart Corp. v. Town of West Hartford,* 28 Conn. Supp. 134, 253 A. 2d 670.

Denver differs from *Youngstown, Plywood,* and instant case in that in *Denver* the taxpayer's use of three large, storage warehouses indicates storage rather than use. However, we think that the primary reason for the different results in these cases lies in the fact that the local fact-finding bodies found facts which compelled different conclusions. Obviously *Denver* and the other cases which reached like results recognized the desirability and practicality of retaining a broad discretion in the local fact-finding body. This is entirely consistent with the holdings in *Youngstown* and *Plywood.*

Our research discloses that none of the cases in the line of authority represented by *Denver* have been before the United States Supreme Court upon appeal; nor do we find that the United States Supreme Court has considered a petition for certiorari in any of these cases.

We find two recent decisions by the California Court of Appeals which reject the "time necessary for delivery" rule as adopted in *Denver,* and specifically apply the criteria as set forth in *Youngstown* and *Plywood. Virtue Bros. v. County of Los Angeles,* 239 Cal. App. 2d 220, 48 Cal. Rptr. 505, and *American Smelting & Refining Co. v. County of Contra Costa,* 271 Cal. App. 2d 437, 77 Cal. Rptr. 570. The United States Supreme Court denied taxpayer's petition for certiorari in *Virtue Bros. v. County of Los Angeles,* 385 U.S. 820, 17 L.ed 2d 58, 87 S.Ct. 45. In *American Smelting & Refining Co. v. County of Contra Costa,* the taxpayer appealed to the United States Supreme Court, and this appeal was dismissed for want of a substantial federal question. 396 U.S. 273, 24 L.ed. 2d 462, 90 S.Ct. 553. Taxpayer's moton for a rehearing was denied by that same court. 397 U.S. 958, 25 L.ed. 2d 144, 90 S.Ct. 940.

In instant case the imported newsprint had reached the end of its importation journey and had there been indiscriminately co-mingled with domestic newsprint. The uncontroverted statement of the taxpayer's general manager that, "inside our 14 O'Henry Avenue building and adjacent to our printing press area in that building, we have space for and maintain on hand the necessary quantity and sizes of newsprint for four to six days of our anticipated production needs from time to time," leads us to the inescapable conclusion that there was a continuous day-to-day use of the newsprint stored in the underground warehouse in connection with taxpayer's printing operation.

On 1 January 1970 (the taxable date) appellant had on hand approximately a four-to-six weeks supply of newsprint, of which 40.2612% was domestic newsprint. The domestic newsprint was unquestionably subject to the ad valorem tax assessed by the county, and it follows that the assessment on the entire supply as it affected the imported newsprint was nondiscriminatory.

The tax was not on imports. It was a nondiscriminatory tax on newsprint which had lost its character as an import because at the time of the assessment it was being used, in every practical sense, for the purpose for which it had been imported. The newsprint was, therefore, subject to taxation in the same manner as the domestic newsprint which was kept at the same place, in the same manner, and for the same use.

We have difficulty connecting the importation of the newsprint with the tax assessed on the newsprint. Certainly, assessment of the tax by the North Carolina authorities upon personal property which had been received and manufactured, and the finshed product distributed in this state, could not possibly contravene the intent of the framers of the Constitution that free flow of goods between the states be not impeded by state taxation. The newsprint, imported and domestic, stored in taxpayer's underground warehouse was as much a part of taxpayer's "manufacturing process" as was the four-to-six days' supply of newsprint stored adjacent to the printing press area.

We see no reason to construe the appropriate tax statutes and ordinances of this jurisdiction so as to require, as a matter of law rather than fact, that the term "current operational

needs" be given a more restricted meaning than that set forth in *Youngstown* and *Plywood.*

The evidence in this case supports the facts found by the State Board of Assessment, and these findings support the conclusion of law entered by the reviewing judge of the Superior Court, "that a four to six weeks supply of newsprint paper . . . did on 1 January 1970 (the taxing date) constitute the current operational needs of the appellant taxpayer." This conclusion and the resulting affirmance of the decision of the State Board of Equalization and Review by the Judge of Superior Court is entirely in accord with the principles of law set forth in the cases of *Youngstown* and *Plywood.*

[5] We conclude that the case of *Youngstown Sheet & Tube Co. v. Bowers, supra,* is controlling and that the four-to-six weeks supply of newsprint on hand on 1 January 1970 constituted taxpayer's current operational needs and was subject to the ad valorem taxes.

[6] The "original package" doctrine has no application under the facts of this case, since on 1 January 1970 the newsprint was being used for the purposes for which taxpayer imported it. *Hooven & Allison Co. v. Evatt, supra; Youngstown Sheet & Tube Co. v. Bowers, supra.*

The judgment of Judge Harry L. Martin, entered in the Buncombe County Superior Court on 8 October 1971, is

Affirmed.

STATE OF NORTH CAROLINA v. JAMES BRYAN WATSON

No. 35

(Filed 10 May 1972)

1. Constitutional Law § 30— speedy trial — delay between warrant and trial

Defendant was not denied his constitutional right to a speedy trial by the delay between the issuance of a warrant charging him with homicide on 19 July 1969 and his trial at the 19 April 1971 session of court, where defendant was committed to the State Hospital for 60 days upon motion of his counsel, defendant was granted continuances on two occasions, defendant was out on bail for most of the time between 12 December 1969 and the date of his trial but made no effort to obtain a speedier trial, and defendant has failed

to show that he was prejudiced by the delay or that the State wilfully or by its neglect caused arbitrary or oppressive delay.

2. **Jury § 5— competency of juror — discretion of court**

The question of the competency of jurors is a matter within the trial judge's discretion, and his rulings thereon are not subject to review on appeal unless accompanied by some imputed error of law. G.S. 9-14.

3. **Jury § 5— father-in-law of solicitor — competency as juror**

The trial court did not err in the denial of defendant's challenge for cause directed to the district solicitor's father-in-law as a juror, where the challenge was allowed only after the juror stated, upon being questioned by the court, that he would not convict on his relationship to the solicitor, and after it was ascertained that the district solicitor was not prosecuting defendant's case.

4. **Constitutional Law § 29; Criminal Law § 135; Jury § 7— jurors opposed to death penalty — challenge for cause**

The trial court properly allowed the State's challenges for cause to prospective jurors who stated, in effect, that under no circumstances could they vote for a verdict which would result in the imposition of the death penalty.

5. **Constitutional Law § 31; Criminal Law § 88— right of cross-examination**

The witnesses in criminal trials must be present and subject to cross-examination. Sixth and Fourteenth Amendments to the U. S. Constitution; Article I, § 23 of the N. C. Constitution.

6. **Constitutional Law § 31— right of confrontation**

The right of confrontation is an absolute right rather than a privilege and must be afforded an accused not only in form but in substance.

7. **Constitutional Law § 31; Criminal Law § 80; Death § 1; Homicide § 15— cause of death — competency of death certificate — right of confrontation — due process — harmless error**

In a homicide prosecution, defendant's right to confrontation and his right to fundamental fairness in a criminal trial guaranteed by due process were violated by the admission in evidence of the hearsay and conclusory statement in the victim's death certificate that "the immediate cause of death was hemorrhage and asphyxia due to or as a consequence of stab wounds of left neck"; however, the admission of such evidence was harmless error beyond a reasonable doubt in view of the other overwhelming evidence of defendant's guilt. Sixth Amendment to the U. S. Constitution; Article I, § 11 (Now Article I, § 23) of the N. C. Constitution; G.S. 130-66.

8. **Criminal Law § 169— erroneous admission of evidence — violation of constitutional right**

The improper admission of evidence which violates a right guaranteed by the U. S. Constitution does not constitute prejudicial error

unless there is a reasonable possibility that such evidence contributed to defendant's conviction.

ON *certiorari* to the North Carolina Court of Appeals to review its decision (13 N.C. App. 54) finding no error in the trial before *Cooper, J.*, at the 19 April 1971 Session of CUMBERLAND Superior Court.

The State's evidence, in substance, was as follows:

Shelton David Tew testified that on 19 July 1969 he and Billy Gene Horner were standing at the bar in Gib's Lounge in Fayetteville, North Carolina, drinking beer, when defendant, as he passed by, bumped into Horner. Tew, Jesse Robert Pittman and Horner passed defendant as they walked to a booth where they intended to play checkers. As they passed defendant, Horner said to him, "I will see you later." The trio sat in the booth where Horner and Pittman began to play checkers. After a few minutes, defendant approached the booth and said to Horner, "So you will see me later, will you?" Horner did not reply. Defendant slapped Horner twice, and Horner raised both hands and backed up. Defendant momentarily held a knife at Horner's throat and then thrust the knife into his neck just below the left ear. The knife was "maybe" four inches long and two inches wide. Defendant then walked to the end of the bar. Horner, beginning to bleed profusely from the neck, nose and mouth, stepped out of the booth, over to a pool table, and picked up a cue stick. He was so weak that he could only lean against the table. Tew took Horner out of the lounge and down the street for a distance of approximately 75 feet, where Horner collapsed on the sidewalk. He was at that time bleeding from the gash in his neck and from his nose and mouth. He was carried away by an ambulance a few minutes later.

Jesse Robert Pittman testified that on 19 July 1969, while he was playing checkers with Horner in Gib's Lounge, he saw defendant approaching with a knife in his hand. Pittman left the booth and walked over to the bar after defendant and Horner began to scuffle. When he next observed Horner, Horner was stepping out from the booth with blood gushing from his neck and mouth. He observed Horner stagger over to the pool table and fall. He next saw Horner lying across the hood of a car. He believed Horner was dead when he was carried away in an ambulance a few minutes later.

Douglas Davidson testified that he was a member of the Fayetteville police force on 19 July 1969, and that he and Officer Albert Tanzilo observed a person, later identified as Horner, lying on the street. He observed a trail of blood beginning at Gib's Lounge and leading to the place where Horner was lying. Horner was bleeding from his mouth, and when he tried to talk he could only make a gurgling sound. After calling an ambulance, Davidson went into Gib's Lounge in an attempt to locate witnesses. When he returned to the street he observed attendants putting Horner into an ambulance. Horner appeared to be dead at that time.

Officer Tanzilo testified to substantially the same facts as did Officer Davidson. He further testified that after the ambulance departed he and Officer Davidson proceeded about a block and a half to 204 Campbell Avenue, which was the home of defendant's parents. They there arrested defendant, who at that time had blood on his shirt, trousers and arms.

Detective Sergeant A. A. Banks testified, without objection, to certain statements made to him by defendant, including a volunteered statement by defendant that "If he (Horner) is dead, I killed him. He was a no good SOB, and he ought to be dead."

William Joyner, Director of the City-County ABC Bureau of Identification, testified, in part:

> " . . . I recognize the photograph marked S-6 and shown to me. It is a photograph taken by me at Cape Fear Valley Hospital morgue, of Mr. Horner. That picture was taken approximately a quarter to six or six o'clock. The picture shows the body of the deceased, and puncture wound on the left side of his face. . . .
>
> " . . . S-6 is a photograph of the deceased, showing a puncture wound on the left side of his neck."

Defendant, testifying in his own behalf, stated that on 19 July 1969 he had been drinking whiskey and beer. He had for some time had trouble with Billy Gene Horner, and Horner had threatened to kill him in June 1969. He stated that on 19 July 1969 he walked up to the booth in which Horner was sitting and asked, "Why is it you want to kill me or jump on me every time you see me?" Thereupon Horner mumbled some-

thing, and "come up with a motion as if to hit me, which he did, and I throwed up my hand to keep him from hitting me. . . . his left hand had a sharp object in it which cut me on the leg." He did not realize Horner had been cut until he saw him bleeding at the pool table. He did not intend to kill or hurt Horner in any way.

Defendant offered a number of witnesses who gave testimony as to the occurrence in Gib's Lounge on 19 July 1969. He also offered witnesses who testified that Horner had a reputation for being a violent person. Some of the witnesses testified on cross-examination that defendant had a reputation for being a man of violent character.

The jury returned a verdict of guilty of murder in the second degree. The trial judge imposed a sentence of imprisonment of not less than 25 nor more than 30 years. Defendant appealed, and the North Carolina Court of Appeals found no error in the trial. We allowed defendant's petition for certiorari on 14 January 1972.

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

Downing, David & Vallery, by Edward J. David, for defendant.

BRANCH, Justice.

[1] Defendant assigns as error the failure of the trial court to dismiss the prosecution on the ground that he had not been afforded a speedy trial.

The record in this case shows that the alleged crime was committed on 19 July 1969, and a warrant was issued on that day charging defendant with murder. On 30 July 1969 defendant was given a preliminary hearing and was bound over (without privilege of bond) to the Superior Court of Cumberland County for action by the grand jury. On 21 July 1969 defendant was found to be an indigent, and Mr. Edward J. David of the Cumberland County Bar was appointed as counsel for defendant. On 12 August 1969, upon motion of his counsel, defendant was committed to the State Hospital at Raleigh for a period of sixty days for observation and examination towards determining whether defendant had mental capacity to know

right from wrong and to understandingly enter a plea. On 22 September 1969 the grand jury of Cumberland County returned a true bill of indictment, charging defendant with murder. On 2 October defendant was transferred to Central Prison in Raleigh because of inadequate jail facilities in Cumberland County. Defendant filed a writ of habeas corpus on 1 November 1969, in which he alleged that he had been denied his right to a speedy trial, and alleged many other violations of his constitutional rights. On 18 November 1969 Judge Hamilton Hobgood signed a writ of habeas corpus *ad prosequendum* directing the Department of Correction to deliver defendant to the Sheriff of Cumberland County on 25 November 1969 to the end that he might be tried on 1 December 1969. On 12 December 1969 defendant was released on bond, and remained free on bond until the date of his trial except for one day in January 1970 and for approximately eleven days in August 1970, when he was in custody because his bondsman "went off his bond." On 15 December 1969 (after defendant had been released on bond) Judge Bickett denied defendant's petition for writ of habeas corpus. Defendant made no motion for a speedy trial after he was released on bond. Defendant's counsel moved for, and was granted, two continuances before the case was called for trial. Defendant's counsel again moved for a continuance after the trial court denied his motion for dismissal on the ground that he had been denied a speedy trial.

In the recent case of *State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779, this Court considered the question of speedy trial, and there stated:

> "The constitutional right to a speedy trial protects an accused from extended imprisonment before trial, from public suspicion generated by an untried accusation, and from loss of witnesses and other means of proving his innocence resulting from passage of time. Whether defendant has been denied the right of a speedy trial is a matter to be determined by the trial judge in light of the circumstances of each case. The accused has the burden of showing that the delay was due to the State's wilfullness or neglect. Unavoidable delays and delays caused or requested by defendant do not violate his right to a speedy trial. Further, a defendant may waive his right to a speedy

trial by failing to demand or to make some effort to obtain a speedier trial. *State v. Ball,* 277 N.C. 714, 178 S.E. 2d 377; *State v. Hollars,* 266 N.C. 45, 145 S.E. 2d 309; *State v. Lowry* and *State v. Mallory,* 263 N.C. 536, 139 S.E. 2d 870. The constitutional right to a speedy trial prohibits arbitrary and oppressive delays by the prosecution. *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274. But this right is necessarily relative and is consistent with delays under certain circumstances. *Beavers v. Haubert,* 198 U.S. 77, 49 L.ed. 950, 25 S.Ct. 573."

In instant case defendant's motion for a mental examination, in effect, was a motion for a continuance. Thereafter he was granted two continuances. During the period from 12 December 1969, when he was released on bond, to the date of his trial, defendant made no effort to obtain a speedier trial. He has failed to show that the delay in his trial resulted in prolonged imprisonment, created public suspicion against him, or deprived him of any means of proving his innocence. Nor does the record disclose that the State wilfully or by its neglect caused arbitrary or oppressive delay.

This assignment of error is overruled.

Defendant contends that the trial judge erred in not allowing his challenge for cause directed to the district solicitor's father-in-law as a juror.

[2] The question of the competency of jurors is a matter within the trial judge's discretion, and his rulings thereon are not subject to review on appeal unless accompanied by some imputed error of law. G.S. 9-14; *State v. Spencer,* 239 N.C. 604, 80 S.E. 2d 670; *State v. DeGraffenreid,* 224 N.C. 517, 31 S.E. 2d 523.

This Court discussed possible disqualifications of a juror because of his relationship with a State's *witness* in the case of *State v. Allred,* 275 N.C. 554, 169 S.E. 2d 833, and there stated:

"In this jurisdiction, a juror, who is related to the defendant by blood or marriage within the ninth degree of kinship, is properly rejected when challenged by the State *for cause* on that ground. . . .

* * * *

"We do not hold that a relationship within the ninth degree between a juror and a State's witness, standing

alone, is legal ground for challenge for cause. This is in accord with the weight of authority in other jurisdictions. Annotation, 'Relationship to prosecutor or witness for prosecution as disqualifying juror in criminal case.' 18 A.L.R. 375; 31 Am. Jur., Jury § 192; 50 C.J.S., Juries § 218(b)(1). Even so, where such relationship exists and is known and recognized by the juror, a defendant's challenge for cause should be rejected only if it should appear clearly that, under the circumstances of the particular case, the challenged juror would have no reason or disposition to favor his kinsman by giving added weight to his testimony or otherwise. . . . "

We are unable to find a North Carolina case which considers whether a juror is disqualified because he is related within the prohibited degree to *counsel* in the case. However, the majority rule in other jurisdictions is that a juror is not disqualified by the fact that he is related to counsel involved in the case. *Petcosky v. Bowman,* 197 Va. 240, 89 S.E. 2d 4; *State of Missouri v. Jones,* 64 Mo. 391; *Roberts v. Roberts,* 115 Ga. 259, 41 S.E. 616. The Georgia cases note an exception to this general rule and hold that the juror is disqualified where the prohibited relationship exists and counsel's fee is contingent upon success in the case. *Melson v. Dickson,* 63 Ga. 682, and *Roberts v. Roberts, supra.*

[3] We note that in instant case the trial judge carefully examined the juror and denied the challenge only after the juror stated that he would not convict on his relationship to the solicitor and after it was ascertained that the solicitor (juror's son-in-law) was not prosecuting in this case. These circumstances do not show imputed error of law or abuse of discretion on the part of the trial judge in making his ruling.

This assignment of error is not sustained.

[4] Defendant assigns as error the action of the trial judge in allowing the State's challenge for cause of certain jurors because of their beliefs as to capital punishment.

Each of the jurors successfully challenged stated, in effect, that under no circumstances could he vote for a verdict which would result in the imposition of the death penalty.

A trial judge should allow challenge for cause when a venireman is not willing to consider all possible penalties provided by state law and when the venireman is unalterably committed to vote against the death penalty, regardless of the evidence which might be presented at trial. *Witherspoon v. Illinois,* 391 U.S. 510, 20 L.ed. 2d 776, 88 S.Ct. 1770; *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671; *State v. Chance,* 279 N.C. 643, 185 S.E. 2d 227; *State v. Miller,* 276 N.C. 681, 174 S.E. 2d 481.

The Court correctly sustained the State's challenges for cause.

Defendant's most serious assignment of error relates to admission into evidence, over objection, a portion of a certified copy of the victim's death certificate. He contends that admission of this evidence violated his constitutional right of confrontation and cross-examination.

We note that the record does not contain a copy of the death certificate; however, the record does show that the Judge read portions of the death certificate to the jury, and in order to consider this assignment of error we must assume that the portions read to the jury are correctly indicated in that part of the charge which states:

> "The State further offered evidence in the form of an authenticated copy of a record of the Office of Vital Statistics of the State of North Carolina, State Board of Health, which in substance tends to show that Billy Gene Horner died in Cumberland County on July 19, 1969, and that the immediate cause of death was hemorrhage and asphyxia due to or as a consequence of stab wound of the left neck."

At the time of defendant's trial, Article I, § 11 of the North Carolina Constitution (now Article I, § 23) provided:

> "In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony, and to have counsel for defense, and not be compelled to give self-incriminating evidence, or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty."

[5, 6] The right of confrontation confirms the common-law rule that, in criminal trials, the witnesses must be present and subject to cross-examination. *State v. Bumper,* 275 N.C. 670, 170 S.E. 2d 457; *State v. Perry,* 210 N.C. 796, 188 S.E. 639; *State v. Hightower,* 187 N.C. 300, 121 S.E. 616; *State v. Thomas,* 64 N.C. 74. This same protection is granted by the Sixth Amendment to the United States Constitution and made applicable to the States by the Fourteenth Amendment. *State v. Moore,* 275 N.C. 198, 166 S.E. 2d 652; *Pointer v. Texas,* 380 U.S. 400, 13 L.ed. 2d 923, 85 S.Ct. 1065. The right of confrontation is an absolute right rather than a privilege, and it must be afforded an accused not only in form but in substance. *State v. Bumper, supra; State v. Hightower, supra; State v. Hackney,* 240 N.C. 230, 81 S.E. 2d 778.

This Court considered the admissibility of a death certificate in a *civil action* to recover damages for wrongful death in the case of *Branch v. Dempsey,* 265 N.C. 733, 145 S.E. 2d 395. There the appellant assigned as error the exclusion from evidence of a certified copy of the death certificate. This Court held that the death certificate was properly excluded because it contained hearsay statements concerning the manner in which the collision, which allegedly caused the fatal injuries, occurred. In so doing, the Court, in part, stated:

> "The purpose of the statute appears to be to permit the death certificate to be introduced as evidence of the fact of death, the time and place where it occurred, the identity of the deceased, the bodily injury or disease which was the cause of death, the disposition of the body and possibly other matters relating to the death. We think it was not the purpose of the Legislature to make the certificate competent evidence of whatever might be stated thereon. . . . "

We note that *Branch v. Dempsey, supra,* considered G.S. 130-73, which was superseded by the present G.S. 130-66. A notable difference in the statutes is that G.S. 130-73 stated "that any copy of the record of a birth or death certificate properly certified . . . shall be prima facie evidence *in all courts* and places of the facts therein stated." (Emphasis ours.) The comparable portion of the present G.S. 130-66 (applicable in this case) states:

> "(b) The State Registrar is authorized to prepare typewritten, photographic, or other reproductions of origi-

nal records and files in his office. Such reproductions, when certified by him, shall be considered for all purposes the same as the original and shall be prima facie evidence of the facts therein stated."

Our research fails to disclose a decision of this Court which considers whether the death certificate of a homicide victim is admissible into evidence to prove some element of the crime pursuant to a statute making it prima facie evidence of the facts stated therein. We note a split of authority in other jurisdictions on this question.

The Criminal Court of Appeals of Oklahoma, in the case of *Osborn v. State*, 86 Okla. Crim. 259, 194 P. 2d 176, without discussion approved the admission of a death certificate in the trial of a murder case pursuant to a statute which provided that a certified copy of a death certificate "shall be prima facie evidence in all courts and places of the facts therein stated."

In the case of *State v. Flory*, 198 Iowa 75, 199 N.W. 303, defendant was charged with the murder of his wife by administering poison. There the Supreme Court of Iowa held that the trial judge committed prejudicial error in excluding a certified copy of the death certificate of the victim when it was offered into evidence by defendant. In that state a statute provided that a properly certified death certificate was prima facie evidence of the facts therein stated in all courts and places.

The California Courts of Appeals have taken diverse views on this question. The California cases decided by these courts are reviewed and the better rule stated in the case of *People v. Holder*, 230 Cal. App. 2d 50, 40 Cal. Rptr. 655, where the Court stated:

"The authorities are in disagreement as to which elements of the death certificate are statements of 'fact' and which are not. The line between fact and opinion is often thin and indistinct. (Citations omitted.) Occurrence of death is doubtless a fact which is proved prima facie by the certificate. (Citations omitted.) The cause of death, however, may amount only to an opinion or conclusion, sometimes resulting from inferences drawn by a medical expert. . . . Other decisions assume without discussion that cause of death (no matter how dependent on medical con-

clusions) is a fact which may be established prima facie by certificate. (Citations omitted.) . . . .

"The point of the matter is not that conclusionary entries on death certificates are necessarily unreliable; rather, that Health and Safety Code section 10577 would permit their admission as hearsay. The coupling of hearsay and conclusionary elements in a single piece of evidence arouses the more fundamental problem of fairness to the defendant in a criminal case. The cause of death entry may emanate from a complex value judgment drawn by a medical expert. (See, for example, *Longuy v. La Societe Francaise,* 52 Cal. App. 370, 198 P. 1011.) When it rides into the fray mounted on a saddle of a public document, it is unaccompanied by the expert. The latter appears in court only in the form of the document. He himself is not available for cross-examination by the defense."

See also 30 Am. Jur. 2d, Evidence, § 1009, p. 143, and Annotation: Evidence—Official Death Certificate, 21 A.L.R. 3d 418.

[7] The clear mandate of Article I, § 11 (now Article I, § 23) of the North Carolina Constitution, and the Sixth Amendment to the United States Constitution guaranteeing the right of confrontation and cross-examination, and the fundamental fairness guaranteed to an accused in a criminal action by due process of law require that we hold that the trial judge erroneously admitted the hearsay and conclusory statement contained in the death certificate, "that the immediate cause of death was hemorrhage and asphyxia due to or as a consequence of stab wound of the left neck."

However, we must determine if the admission of this evidence as to cause of death was such prejudicial error as to require a new trial.

[8] The fact that the improper admission of this evidence violated a right guaranteed by the United States Constitution does not, per se, render the error prejudicial. *Chapman v. California,* 386 U.S. 18, 17 L.ed. 2d 705, 87 S.Ct. 824; reh. den. 386 U.S. 987, 18 L.ed. 2d 241, 87 S.Ct. 1283; *Harrington v. California,* 395 U.S. 250, 23 L.ed. 2d 284, 89 S.Ct. 1726. Unless there is a reasonable possibility that the improperly admitted evidence contributed to defendant's conviction, there is no prejudicial error. *Chapman v. California, supra.*

We deem it appropriate to here note the recent United States Supreme Court decision in the case of *Schneble v. Florida* (March 21, 1972; 40 U.S.L.W. 4299), 405 U.S. 427, 31 L.ed. 2d 340, 92 S.Ct. 1056. There the confession of a codefendant was admitted against the defendant and the confessor was not present for the purposes of confrontation and cross-examination by the defendant. This evidence corroborated other independent, objective evidence strongly pointing to defendant's guilt. The United States Supreme Court held that the admission into evidence of the confession of the codefendant was error, but that in view of the other overwhelming evidence of the defendant's guilt, such error was not reversible error.

The challenged evidence admitted in instant case relates to the same constitutional right, but is less persuasive than that complained of in *Schneble v. Florida, supra.*

We conclude that the evidence in this case clearly and overwhelmingly supports a reasonable inference that defendant intentionally used a deadly weapon and thereby inflicted a would which proximately caused Horner's death, and that the minds of an average jury would not have found the evidence less persuasive had the conclusory evidence contained in the certified copy of the death certificate been excluded. The admission of the evidence contained in the certified copy of the death certificate was at most harmless error beyond a reasonable doubt. *Schneble v. Florida, supra; Chapman v. California, supra.*

Finally, defendant argues that the trial judge erred in overruling his motions for judgment as of nonsuit.

In light of the preceding ruling, we do not deem it necessary to discuss this assignment of error at length. It is sufficient to say that upon application of the often-repeated and well-recognized rules as to the sufficiency of evidence to overrule a motion for nonsuit, we conclude that there was plenary evidence to repel defendant's motion. See 2 Strong's N. C. Index 2d, Criminal Law § 106, p. 654, and cases there cited.

We have carefully reviewed this entire record and find no prejudicial error.

The decision of the Court of Appeals is

Affirmed.

Robbins v. Nicholson

CLYDENE W. ROBBINS, WIDOW; CLYDENE W. ROBBINS, NEXT FRIEND OF SARAH EDITH ROBBINS, LARRY DEAN ROBBINS, CHARLES RANDY ROBBINS AND KATHY DARLENE ROBBINS, CHILDREN OF CHARLIE ROBBINS, DEC'D., EMPLOYEE, PLAINTIFF;

— AND —

VELMA HEWITT WEAVER, NEXT FRIEND OF DANNY LEWIS AND CYNTHIA LEIGH LEWIS, CHILDREN OF MRS. TERRI D. LEWIS, DEC'D., EMPLOYEE, PLAINTIFF;

v.

O. T. NICHOLSON, EMPLOYER; CASUALTY RECIPROCAL EXCHANGE, CARRIER; DEFENDANTS

No. 58

(Filed 10 May 1972)

1. Master and Servant § 55— workmen's compensation — compensable death

Under the Workmen's Compensation Act a compensable death is one which results to an employee from an injury by accident arising out of and in the course of his employment. G.S. 97-2(6).

2. Master and Servant § 59— workmen's compensation — assault

Although an assault is an intentional act, it may be an accident within the meaning of the Compensation Act when it is unexpected and without design on the part of the employee who suffers it.

3. Master and Servant § 56— workmen's compensation — "in the course of" — "arising out of"

As used in the Workmen's Compensation Act, the words "in the course of the employment" refer to the time, place and circumstances under which an accidental injury occurs, and the phrase "arising out of the employment" refers to the origin or cause of the accidental injury.

4. Master and Servant § 59— workmen's compensation — murder by employee's husband — in the course of employment

The deaths of two employees were the result of injury by accident arising in the course of their employment where they were unexpectedly shot and killed by the husband of one of the employees while performing their duties on the premises of their employer, where their employment required them to be, but the risk was not an incident of the employment.

5. Master and Servant § 56— workmen's compensation — injury arising out of employment

An injury arises out of the employment when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so that there is some causal relation between the injury and the performance of some service of the employment.

6. Master and Servant § 59— workmen's compensation — assault by third person

When the moving cause of an assault upon an employee by a third person is personal or the circumstances surrounding the assault furnish no basis for a reasonable inference that the nature of the employment created the risk of such an attack, the injury is not compensable even though the employee was engaged in the performance of his duties at the time.

7. Master and Servant § 59— workmen's compensation — murder of employees by jealous husband

The deaths of two employees of a grocery store who were unexpectedly shot and killed by the *femme* decedent's husband while they were performing their duties on the premises of their employer did not result from injuries arising out of their employment, where all the evidence showed that the *femme* decedent had left her husband because of his excessive drinking, and that the husband murdered his wife, her employer and her male co-worker because he believed (1) that the co-worker had replaced him in his wife's affection and (2) that if the employer discharged his wife, which the employer refused to do, she would have to return to him, the employer's refusal to discharge the *femme* decedent not having made the risk that her husband would assault her or one of her fellow employees a risk arising out of the employment, and the risk of murder by a jealous husband not being one which a rational mind would anticipate as an incident of the employment of both sexes in a business.

APPEAL by defendants from the decision of the Court of Appeals, reported in 10 N.C. App. 421, 179 S.E. 2d 183, affirming awards made to claimants by the North Carolina Industrial Commission. The case was docketed and argued as Case No. 35 at the Fall Term 1971. As to claimants Robbins, defendants appeal under G.S. 7A-30(2); as to claimants Lewis, defendants' petition for certiorari was allowed.

These two cases, which involve separate claims for deaths resulting from the same accident, are proceedings under the Workmen's Compensation Act. They were consolidated for hearing by the Industrial Commission. The decisive facts are not disputed.

In December 1967 Charlie Robbins (Robbins) and Terri Lewis (Terri) were employed by O. T. Nicholson (Nicholson), who operated a grocery and adjacent coal yard in Lexington. Robbins had worked for Nicholson about five years; Terri had been employed approximately two years and nine months. She was married to Daniel Lewis (Lewis), and the couple had two minor children, the claimants Danny Lewis (13) and Cynthia

Leigh Lewis (11). Lewis was a furniture worker. He had worked in various factories in Piedmont North Carolina.

Both before and after his marriage Lewis "drank on weekends, heavy." In consequence, domestic problems resulted. Terri twice left him—the first time, shortly after the marriage; the last time, on Thanksgiving 1967.

In July 1967 Lewis rented a beach cottage with the intention of taking the family on a vacation. However, three or four days before they were to leave, Terri said she wouldn't go; that she had to work. When Nicholson refused Lewis' request to let Terri off, Lewis said to him, "Looks like this job is breaking up my home." Terri remained on the job, and Lewis went to the beach with his children and mother-in-law.

In September 1967 Lewis decided that Terri was "acting funny." On November 1st he went to the grocery where he observed Terri and another employee, James Waller, putting up stock. He told Terri that he would kill Waller if he was going to work with her. On the same occasion he asked her if she wasn't "running around with Mr. Robbins." She assured him she wasn't running around with anyone, but he told her if he ever caught her with Robbins out of the store, or working with him in the store, he would kill them both.

Because of Lewis' conduct at the store and his continuous drinking, Terri left him on or about November 22nd. Shortly thereafter he went to the store and requested her to go home with him. She refused, and he said, "Well you won't live." He also told her that if she "took out a nonsupport warrant on him that she would not live to see Christmas." Later he went to the store and said to Nicholson, "I want you to let my wife go." When Nicholson replied, "Your wife needs to work," Lewis said, "If you don't let her go, you will never live to see Christmas." Lewis told a neighbor that he did not want his wife to work at Nicholson's store because, if she had no income, she would have to bring the children and come back home.

On 27 November 1967 Terri signed a warrant for Lewis, charging him with having failed to provide adequate support for his children. Thereafter he went to the store and told Terri that Robbins and Nicholson had caused her to take out the warrant, and he would kill them too. On 20 December 1967 Lewis was convicted of the charge contained in the warrant and ordered to

pay $15.00 on that day and $50.00 every two weeks thereafter for the support of his children.

About 3:30 on the afternoon of 25 December 1967 Lewis went to the home of his friend, Foyelle Cecil, and told him he intended to kill three people—his wife, "her lover," and a third person whom he did not name. Lewis had been drinking. Cecil advised him against executing such a plan and, after an hour and a half of discussion, Lewis agreed that perhaps "he had better forget about it" and left.

Nicholson's grocery was open for business on the afternoon of Christmas Day. About 5:30 p.m. Terri was at the cash register, and Robbins was at the end of the counter "sacking groceries" when Lewis entered with a rifle. He shot and killed both Robbins and Terri. Then he went into the stockroom where Nicholson and Miss Lillian Jones were working. After knocking Miss Jones out of the way, Lewis shot and killed Nicholson. He then went outside where he remained until the police came and arrested him.

Robbins was survived by his widow and four minor children, the claimants herein; Terri, by her two minor children.

The Industrial Commission found facts substantially as detailed above and included a specific finding that the "employment of Terri and Robbins at the Nicholson store was the chief origin of the matrimonial difficulties between Terri and Lewis." The parties stipulated that the deaths of Terri and Robbins were the result of injuries by accident. The Industrial Commission held as a matter of law that the fatal accident arose out of and in the course of their employment at Nicholson's grocery.

(We note that all the evidence tended to show that Terri was a woman of good character, and there was no evidence of any improper relationship between her and Robbins.)

The Commission held that the dependents of Terri and Robbins were entitled to compensation under G.S. 97-38, G.S. 97-39, and G.S. 97-41. Defendants appealed to the Court of Appeals. In an opinion by Judge Britt, Judge Hedrick concurring, the Court of Appeals affirmed both awards. In a separate opinion, Judge Campbell concurred as to the dependents of Terri and dissented as to the award to the dependents of Robbins.

T. H. Suddarth, Jr., and Jack E. Klass for claimants Robbins.

J. Lee Wilson and Ned A. Beeker for claimants Lewis.

Kennedy, Covington, Lobdell & Hickman by Edgar Love III, for defendants appellants.

SHARP, Justice.

[1] Under the Workmen's Compensation Act a compensable death is one which results to an employee from an injury by accident *arising out of* and *in the course of* his employment. G.S. 97-2(6) (1965); *Cole v. Guilford County,* 259 N.C. 724, 131 S.E. 2d 308 (1963). The two italicized phrases are not synonymous; they "involve two ideas and impose a double condition, both of which must be satisfied in order to bring a case within the Act." *Sweatt v. Board of Education,* 237 N.C. 653, 657, 75 S.E. 2d 738, 742 (1953).

This appeal presents only the question whether the deaths of Terri and Robbins resulted from injuries by accident *arising out of* their employment at Nicholson's grocery. The parties have stipulated that the deaths were accidents and, clearly, they occurred in the course of their employment.

[2-4] Although an assault is an intentional act, it may be an accident within the meaning of the Compensation Act when it is unexpected and without design on the part of the employee who suffers from it. *Withers v. Black,* 230 N.C. 428, 53 S.E. 2d 668 (1949). The words "in the course of the employment" as used in this Act, refer to the time, place and circumstances under which an accidental injury occurs; the phrase "arising out of the employment" refers to the origin or cause of the accidental injury. *Clark v. Burton Lines,* 272 N.C. 433, 158 S.E. 2d 569 (1967); *Taylor v. Twin City Club,* 260 N.C. 435, 132 S.E. 2d 865 (1963); *Withers v. Black, supra.* Terri and Robbins were unexpectedly shot and killed by Lewis during working hours while performing their duties as employees on the premises of their employer, where their employment required them to be. Thus, their deaths were the result of injury by accident arising during the course of their employment.

[5] An accident occurring during the course of an employment, however, does not *ipso facto* arise out of it. The term "arising out of the employment" is not susceptible of any all-inclusive

definition, but it is generally said that an injury arises out of the employment "when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so there is some causal relation between the injury and the performance of some service of the employment." *Perry v. Bakeries Co.*, 262 N.C. 272, 274, 136 S.E. 2d 643, 645 (1964). In other words, to be compensable, "[t]he injury must spring from the employment or have its origin therein." *Bolling v. Belk-White Co.*, 228 N.C. 749, 750, 46 S.E. 2d 838, 839 (1948). "The injury must come from a risk which might have been contemplated by a reasonable person as incidental to the service when he entered the employment. It may be said to be incidental to the employment when it is either an ordinary risk directly connected with the employment, or any extraordinary risk which is only indirectly connected with the service owing to the special nature of the employment." *Lockey v. Cohen, Goldman & Co.*, 213 N.C. 356, 359, 196 S.E. 342, 344-45 (1938).

In *Harden v. Furniture Co.*, 199 N.C. 733, 155 S.E. 728 (1930), one employee killed another, but the "motive which inspired the assault was unrelated to the employment of the deceased and was likely to assert itself at any time and in any place." *Id.* at 736, 155 S.E. at 730. In denying compensation this Court quoted with approval the following exposition by the Supreme Judicial Court of Massachusetts: " 'It (the injury) arises "out of" the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. . . . But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.' " *Id.* at 735, 155 S.E. at 729-30. *Accord, Guest v. Iron & Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596 (1954); *Bryan v. T. A. Loving Co.*, 222 N.C. 724, 24 S.E. 2d 751 (1943).

[6] *A fortiori*, when the moving cause of an assault upon an employee by a third person is personal, or the circumstances surrounding the assault furnish no basis for a reasonable inference that the nature of the employment created the risk of such an attack, the injury is not compensable. This is true even though the employee was engaged in the performance of his duties at the time, for even though the employment may have provided a convenient opportunity for the attack it was not the cause. *Ellis v. Rose Oil Company of Dixie*, 190 So. 2d 450 (Miss. (1960) ; 6 Schneider, Workmen's Compensation Text, § 1561(a) (1948) ; 99 C.J.S. *Workmen's Compensation* § 227 (1958) ; 58 Am. Jur. *Workmen's Compensation* § 265 (1948) ; Annots., 112 A.L.R. 1258; 40 A.L.R. 1122; 29 A.L.R. 437; 15 A.L.R. 588.

In *Duerock v. Accaregui*, 87 Idaho 24, 390 P. 2d 55 (1964), the claimant was the manager of a motel. Her employment made her subject to call at any time. She lived with her husband in an apartment connected with the motel. Her husband, who had become unable to hold a job because of his alcoholism, resented the fact that his wife was the primary breadwinner. He had repeatedly demanded that she quit her employment. One evening, while she was preparing their supper, he repeated this demand. She told him that until he found and kept a job she could not give up hers, and that she did not want to discuss the matter further. Thereupon, he shot her and himself. In consequence she was paralyzed, and he died. In sustaining the Board's denial of compensation, the Supreme Court of Idaho held that although claimant's injury resulted from an accident occurring in the course of her employment, it did not arise out of it; that her injuries were not the result of an industrial, but of a domestic hazard. "The risk existed before her employment. It was a personal risk she brought with her, a part of her domestic and private life. It was not a risk occasioned by, incident to, or a condition of, her employment." *Id.* at 37, 390 P. 2d at 63.

Among the authorities cited by the Idaho Court in support of the foregoing decision was *Harden v. Furniture Co., supra.*

In *State House Inn v. Industrial Com.*, 32 Ill. 2d 160, 204 N.E. 2d 17 (1965), the claimant was a married woman working the night shift as a switchboard operator at the Inn. About 3:00 a.m. she went with the night manager into the dining room for food. The claimant's husband suddenly appeared and "violently assaulted the pair, striking them both in a fit of jealous rage." On appeal, the Supreme Court held against the claimant,

saying: "[A]n injury does not arise out of the employment if it is caused by reason of something unrelated to the nature of the employment. An injury not fairly traceable to the employment as a contributing, proximate cause, and which comes from a hazard to which the employee would have been equally exposed apart from the employment, does not arise out of it. If Mrs. Strode's injury was caused by her husband's attack it could not be said to have arisen out of her employment." *Id.* at 163-64, 204 N.E. 2d at 19.

In the similar case of *Belden Hotel Co. v. Industrial Com.*, 44 Ill. 2d 253, 255 N.E. 2d 439 (1970), the husband of a hotel maid, in a fit of jealousy, killed one of her male co-workers. An award to his dependents was reversed because "[c]ompensation is proper only where it is shown that the injury arose out of some risk inherent in the conditions of employment." *Id.* at 255, 255 N.E. 2d at 440. *Accord, Wood v. Aetna Casualty & Surety Company,* 116 Ga. App. 284, 157 S.E. 2d 60 (1967).

[7] In this case all the evidence tends to show that Lewis murdered his wife, Terri; her employer, Nicholson; and her fellow worker, Robbins, because he believed (1) that Robbins had replaced him in his wife's affection and (2) that if Nicholson would discharge her, and she had no job, she would have to return to him. The three assaults were entirely unrelated to the nature of the victim's employment; they did not result from the work either Terri or Robbins was required to do. Indeed, it was not the fact that Terri was working at a grocery which created the risk of an assault by her husband, but the fact that she was gainfully employed at all. She would have been exposed to the same risk in any business or industry which paid wages and employed both sexes. Further, any male employee whose duties required him to work with her or beside her would have been equally endangered. As the Idaho Court said with reference to Mrs. Duerock, the risk which caused the deaths of Terri and Robbins existed before her employment. It was a personal risk she brought to the grocery from her domestic and private life. It was not occasioned by, incident to, or a condition of her employment.

Nicholson was under no duty to discharge Terri merely because her husband demanded he do so and, under the circumstances here disclosed, retaining her as an employee did not make the risk that Lewis would assault her or one of her fellow employees a risk arising out of the nature of the employment.

In our view, the evidence will not sustain the Commission's finding that "the employment of Terri and Robbins at the Nicholson store was the chief origin of the matrimonial difficulties between Terri and Lewis." The origin was his alcoholism, and it was the fact that she finally left him which motivated the assaults. However, even if it were conceded that her employment was a major source of friction between Terri and Lewis, that friction was not a risk arising *out of* the nature of her employment.

Notwithstanding the events at Nicholson's grocery on Christmas Day 1971, the risk of murder by a jealous spouse is not one which a rational mind would anticipate as an incident of the employment of both sexes in a business or industry. The possibility that an employee's spouse will become jealous of an associate—with or without cause—is a hazard "common to the neighborhood"; it is independent of the relation of master and servant.

The evidence in this case does not support the Commission's finding or conclusion that Lewis' assaults upon Terri and Robbins were accidents arising out of their employment.

The decision of the Court of Appeals is reversed with directions that these proceedings be remanded to the Industrial Commission for the entry of an award in accordance with this opinion.

Reversed and remanded.

IN THE MATTER OF: APPEAL OF McLEAN TRUCKING COMPANY, WINSTON-SALEM, NORTH CAROLINA, FROM AN ACTION OF THE FORSYTH COUNTY BOARD OF COMMISSIONERS PLACING THE TAXABLE SITUS OF CERTAIN OF THE APPELLANT'S OVER-THE-ROAD VEHICLES IN WINSTON TOWNSHIP (CITY OF WINSTON-SALEM), NORTH CAROLINA, AS OF JANUARY 1, 1969

No. 65

(Filed 10 May 1972)

1. Taxation § 24— vehicles owned by interstate motor carrier — tax situs

The tax situs of vehicles used by a trucking company in interstate commerce was the township in which the company has its principal office in the State, G.S. 105-302(a), not the township in which a lot owned by the company and designated by it as a storage place

for such vehicles was located, G.S. 105-302(d), where no such vehicles were actually stored upon such lot or elsewhere in the township in which the lot was located as of the first day of the tax year or for many months prior thereto for the reason that they were constantly on the move.

2. **Taxation § 25— Board of Equalization and Review — change of tax listing — time limitation**

A County Board of Equalization and Review had no authority to change a tax listing from one township to another after the time limitation set by G.S. 105-327(e) for completion of its duties had expired, such time limitation being mandatory.

3. **Taxation § 25— Board of Equalization and Review — Board of County Commissioners — change of tax records**

Although the County Board of Equalization and Review is identical in membership with the Board of County Commissioners, G.S. 105-327(a), its powers do not evolve upon the Board of County Commissioners after its authority has ceased by lapse of time, the authority of the Board of County Commissioners thereafter to make changes in the tax records being limited to that conferred by G.S. 105-330.

4. **Statutes § 5— statutory construction**

Nothing else appearing, the Legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning.

5. **Taxation § 25— improperly listed property — authority of County Commissioners to correct — discovered property**

The Board of County Commissioners had no authority to change a tax listing from one township to another as "discovered property" under G.S. 105-330, since "discovered property" means property which has not been listed for taxation; even if that term could be construed to include property improperly listed, the Board of County Commissioners had no authority to change the listing where the county and city were fully aware of the facts governing the tax situs of the property in question prior to the date on which the County Board of Equalization and Review ceased to function, since the authority of the Board of County Commissioners to change the listing extends no further than a change as to property "discovered" after the County Board of Equalization and Review has finished its work and ceased to function.

APPEAL by McLean Trucking Company and by respondents, Forsyth County and the City of Winston-Salem, from *Armstrong, J.*, at the 29 March 1971 Civil Session of FORSYTH, heard prior to determination by the Court of Appeals. This case was docketed and argued as No. 85 at the Fall Term 1971.

McLean Trucking Company (McLean) is incorporated in North Carolina and has its principal office in the City of

Winston-Salem. The city and Winston Township of Forsyth County are coterminous. McLean is a common carrier of property by motor vehicle. On 1 January 1969, it operated sixty-six terminals in twenty states, including one in Winston-Salem. Its vehicles operate on fixed and regular routes, but not upon regular timetables. In the four years preceding 1969, approximately 9.69% of its total interstate vehicle miles were in North Carolina.

McLean assigns to each of its terminals all vehicles used solely for the pick-up and delivery of freight within the local area served by such terminal. All such "local equipment" is recognized as having its tax situs at the terminal to which it is so assigned. Thus, such "local equipment" assigned to the Winston-Salem terminal is listed for taxation in Winston Township. It is taxed both by the county and by the city. This appeal does not involve the taxation of such "local equipment."

Other tractors and trailers owned by McLean, referred to as "interstate equipment," move between the various terminals in its system. They are not assigned to any specific terminal and remain at any terminal for brief periods only. These interstate tractors are divided into two groups. Those in Group I, with rare exceptions, never come into North Carolina. They were not listed for ad valorem taxes in North Carolina in 1969. Group II tractors move between the various McLean terminals and so travel in and out of all states served by McLean, including North Carolina. This appeal does not involve Group I tractors.

There are also two groups of trailers included in McLean's interstate equipment. Group A consists of a pool of trailers, of which each terminal in the total system is entitled to the use of a specific number, though not specific trailers, at any given time. The Group A trailers to which the Winston-Salem terminal is so entitled are regularly listed by McLean for ad valorem taxes in Winston Township and were so listed by McLean in 1969. The remaining Group A trailers (i.e., those so assigned to other terminals) were not listed by McLean for ad valorem taxes in Forsyth County. The remaining interstate trailers, Group B, are not pooled and are not assigned to any specific terminal, but serve the system at large, moving from terminal to terminal and from state to state as needed. This appeal does not involve Group A trailers.

In accordance with the practice followed by it since 1950, McLean listed in Broadbay Township, for 1969 ad valorem taxes, all of its Group II tractors, with a tax value of $2,050,450, and all of its Group B trailers with a tax value of $2,268,110. The total, $4,318,560, is the full taxable value of all such equipment, without any apportionment between North Carolina and the other states in which the respective vehicles operate. These are the only vehicles to which this appeal relates.

On 29 August 1969, taxes levied by Forsyth County, in accordance with such listing, were paid in full by McLean. For the year 1969, McLean also incurred and paid ad valorem property taxes on the same vehicles in some of the other states in which it operates.

Following the 1969 listing by McLean of these vehicles, and at some time prior to 22 April 1969, a question was raised as to whether such vehicles should have been listed for taxes in Broadbay Township or in Winston Township. If the proper place for listing was Winston Township, the vehicles would also be subject to city taxes, otherwise not. With respect to this question, on 22 April 1969, attorneys for the city and for the county wrote to the attorneys for McLean, requesting information as to the nature of the personal property so listed in Broadbay Township and as to whether a tract of land also listed by McLean in Broadbay Township was occupied by McLean as a "place for storage" and, if so, the extent to which storage actually took place thereon. McLean's attorneys replied promptly, advising:

> "The personal property listed there consists entirely of tractor and trailer equipment used by our client in its operations as an interstate motor common carrier of freight. * * * The amount of this type of equipment listed in Broadbay Township represents that portion of the line-haul fleet which is not permanently stationed at the Winston-Salem terminal or assigned outside of Forsyth County or domiciled outside of Forsyth County. It represents road equipment which is not used in connection with a single terminal but which moves to and from various terminals within the McLean system. * * *
>
> "The personal property listed in Broadbay Township is personal property which our client *elects* to list in its home county for taxes rather than at some other location throughout the McLean system.

"The tract of land above referred to was acquired by our client many years ago as a place for storage or parking area for the type of line-haul equipment referred to above when the same is not engaged in line-haul operations. This property is still occupied for that purpose and is at all times available for that purpose. * * * The lot is actually used very little for storage or parking for the reason that this type vehicle is constantly moving between terminals and between states and remains at one location for only brief periods of time. The lot, however, *has been* actually used for the parking of such vehicles and is retained and available for that purpose.

* * *

"I am sure that you are aware of the question which arises as to whether or not this property used exclusively in interstate commerce may be taxed at its full value rather than on an apportionment basis according to mileage or other reasonable factors. While our extensive research in this area leads us to believe that equipment used in interstate commerce cannot be taxed in one taxing jurisdiction at 100% of its value, *our client has not elected to press for such a determination.*" (Emphasis added.)

Following an intervening conference, on 8 September 1969, the attorneys for the city and for the county advised the Tax Supervisor, with a copy to McLean's attorney, that, in their opinions, the McLean vehicles here in question should be listed and taxed in Winston Township.

On 10 September 1969 (after the statutory date for the adjournment of the County Board of Equalization and Review and after the payment by McLean of the 1969 taxes levied by the county), the Tax Supervisor, pursuant to such advice, notified McLean of his intent to place the vehicle on the tax books of Winston Township, requesting McLean to agree that the appropriate valuation would be that previously used in the listing of these vehicles by McLean in Broadbay Township. This notice advised McLean that if it did not so agree on the matter of valuation, that question would be placed by the Tax Supervisor on the agenda for the meeting of the Board of County Commissioners on 22 September. McLean did not sign the requested consent to the proposed valuation in Winston Township.

On 17 Septebmer 1969, McLean, through its attorney, advised the Tax Supervisor of its contentions that (1) the vehicles were properly listed for taxation in Broadbay Township and (2) in any event, he had no authority to change the listing to Winston Township, the time within which he, the County Commissioners, or the County Board of Equalization and Review, might have made such change, if otherwise proper, having expired.

On 22 September 1969, the County Board of Commissioners met and fixed the value of the vehicles in question at $4,318,560, the identical valuation at which they had been so listed by McLean in Broadbay Township and upon which the county taxes previously paid by McLean had been levied. On 26 September 1969, the Tax Supervisor advised McLean that he was placing the vehicles on the tax books of Winston Township for 1969 taxes at the value so fixed.

On 30 September 1969, the Tax Supervisor billed McLean for 1969 city taxes based upon such listing of these vehicles, which tax bill McLean has not paid.

In 1962 and subsequently, including 1969, McLean requested the Tax Supervisor to develop and use a reasonable apportionment formula for the taxing of such interstate equipment owned by it. These requests were uniformly denied and none of them was pursued by McLean until the present controversy arose.

The origin of the listing of the vehicles in Broadbay Township is as follows: In 1950, McLean acquired a six acre tract of land in Broadbay Township with the intent of designating and using it as a "storage yard and parking area for its interstate equipment when such equipment was not in use." It thereupon inquired of the County Attorney as to whether in view of G.S. 105-302 Broadbay Township would be the taxable situs of the type of vehicle here in question. In that inquiry it stated:

> "At this time the company has acquired property in Forsyth County but outside of the city of Winston-Salem which we propose to use as a storage yard and parking space for equipment used in interstate commerce through all or most of the thirteen [as of 1950] states hereinabove pointed out. * * * The land in question will be the 'place

for storage' of the personal property in question which the company uses in its interstate commerce activities. There will, of course, be an 'office' there and/or 'shop'."

To this inquiry the County Attorney replied that, in his opinion, the tax situs of the property would be the township wherein such "storage yard" was located.

The 1950 opinion of the County Attorney was followed by McLean and the Tax Supervisor until the present controversy arose. Both this opinion and the tax practices followed in reliance thereon were known to the attorneys for the county and for the city at the time of their above mentioned correspondence with McLean in April, 1969. In their advice to the Tax Supervisor, dated 8 September 1969, the attorney for the county and for the city stated:

"Your office has likewise followed the 1950 opinion of the County Attorney in assessing the interstate equipment of companies owning such property and listing it for taxation at the 'place of storage' designated by the company.

"We are of the view that both your office and the companies named above have followed what was considered by all parties to be legally proper under the 1950 opinion. Likewise, we do not feel that the County Attorney who rendered the former opinion gave a wrong opinion, based upon the facts and interpretations of the law then before him.

"We do find, however, that since the date of the former opinion, the facts regarding this situation are slightly different, and the interpretations of the law have been clarified somewhat."

In 1950, the lot in Broadbay Township was enclosed by a metal fence and was used from time to time for the storage of interstate equipment not in use. It continued to be maintained by McLean as a designated place for storage of such equipment, but no equipment was stored thereon for at least twelve months preceding 20 November 1969 and "for some time prior" thereto such equipment was rarely stored or parked upon the lot for the reason that such equipment was constantly on the move. The equipment was not stored at any other location. As of 1 January 1969, and for some time prior thereto, McLean did not maintain either an office or a shop upon the lot

in Broadbay Township, of which circumstances neither the Tax Supervisor nor the County Attorney was advised in writing.

From the action of the Tax Supervisor, McLean appealed to the State Board of Assessment. Before that board it contended: (1) The property in question not being "discovered property," within the meaning of G.S. 105-331, the action of the Tax Supervisor in listing the property in Winston Township after the adjournment of the County Board of Equalization and Review was unlawful and invalid; (2) the proper 1969 tax situs of the property in question was Broadbay Township; and (3) it is a violation of the Commerce Clause of the Constitution of the United States for the County Board of Commissioners to assess the vehicles at 100% of their tax value rather than at a proportionate part thereof based upon the relationship which its use in North Carolina bears to its use in other states.

The foregoing facts were stipulated before the State Board of Assessment. In addition, McLean offered testimony that the vehicles in question were in North Carolina approximately 12% of the time.

On 12 May 1970, the State Board of Assessment rendered its decision affirming the action of the County Board of Commissioners. It concluded that the tax situs of the vehicles in question, as of 1 January 1969, was Winston Township, the listing was properly corrected to show the proper township, the city was a party to the consideration of the matter and had independent authority under G.S. 105-331(e) to make the correction and the use in the corrected listing of the same valuation at which McLean had listed the property in Broadbay Township was proper. McLean petitioned for judicial review by the superior court, excepting to each of these conclusions.

The superior court affirmed the conclusions of the State Board of Assessment, except that it set aside the board's conclusion as to the valuation. The court remanded the matter to the board with instruction to review the record, take such additional evidence as it shall determine to be necessary, determine whether or not the property is taxable on an apportionment basis and, if so, determine the proper apportionment of the total valuation taxable by the city. From that judgment McLean, the county and the city all appeal.

Hamrick, Doughton, and Newton, by Claude M. Hamrick and George E. Doughton, Jr., for McLean Trucking Company.

P. Eugene Price, Jr., for Forsyth County.

Womble, Carlyle, Sandridge & Rice, by William F. Womble and Roddey M. Ligon, Jr., for City of Winston-Salem.

LAKE, Justice.

All citations to sections of the General Statutes in this opinion relate, both as to section numbers and as to content, to the statutes in effect in 1969.

[1] G.S. 105-302(a) provides that, except as otherwise provided in that section, tangible personal property must be listed for taxes in the township wherein the owner has his residence, which, in the case of a corporation, is the township in which it has its principal office in the State. McLean contends that this does not apply to the property here in question because subsection (d) of this statute provides that tangible personal property "shall be listed in the township in which such property is situated, rather than in the township in which the owner resides, if the owner * * * hires or occupies a * * * place for storage * * * for use in connection with such property." This contention cannot be sustained for the reason that the tractors and trailers in question were not "situated" on the lot in Broadbay Township owned by McLean and designated by it as a place for storage of such property. *In re Freight Carriers,* 263 N.C. 345, 139 S.E. 2d 633. As of 1 January 1969, and for many months prior thereto, none of these vehicles was stored upon this lot or elsewhere in Broadbay Township, if, indeed, they ever were there. Consequently, Winston Township was the tax situs of these tractors and trailers as of 1 January 1969 and they should have been listed for 1969 taxes therein.

[2] The vehicles having been listed improperly in Broadbay Township, the County Board of Equalization and Review had the authority to correct the listing and cause the vehicles to be listed for 1969 taxes in Winston Township. G.S. 105-327(g)(1), (3). This it could do on its own motion or on sufficient cause shown by any person. Subsection (e) of G.S. 105-327 provides, however, that the County Board of Equalization and Review "shall hold its first meeting not earlier than the first Monday in April and not later than the first Monday in May following

the day on which the tax listing began, but it shall complete its duties on or before the third Monday following its first meeting," except that it may continue in session for a longer period when necessary or expedient to a proper execution of its responsibilities, "but in no event shall said board sit later than July 1," except for matters not pertinent to this appeal. The time limitation thus imposed upon the County Board of Equalization and Review by this statute is mandatory. *Spiers v. Davenport,* 263 N.C. 56, 138 S.E. 2d 762. Thus, at the time the Tax Supervisor undertook to change the listing of this property, the County Board of Equalization and Review was powerless to take such action.

G.S. 105-328 provides that when changes made by the County Board of Equalization and Review have been reflected upon the tax records, the members of the board, or a majority thereof, "shall sign a statement at the end of the scroll or tax book to the effect that the scroll is the fixed and permanent tax list and assessment roll for the current year, subject to the provisions of this subchapter."

[3] The County Board of Equalization and Review is identical in membership with the Board of County Commissioners. G.S. 105-327(a). Nevertheless, after its authority has ceased, by lapse of time, the powers of the County Board of Equalization and Review do not evolve upon the Board of County Commissioners. The authority of the Board of County Commissioners thereafter to make changes in the tax records is limited to that conferred by G.S. 105-330, the pertinent portion of which provides:

> "After the board of equalization has finished its work and the changes effected by it have been given effect on the tax records, the board of county commissioners may not authorize any changes to be made on said records except as follows:
>
> * * *
>
> "(5) To add any *discovered* property under the provisions of this subchapter. * * * " (Emphasis added.)

[4, 5] Thus, there was no authority in the Board of County Commissioners, and *a fortiorari,* none in the Tax Supervisor, to change the listing of McLean's vehicles from Broadbay Township to Winston Township unless these vehicles constituted "dis-

covered property." Nothing else appearing, the Legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning. *Yacht Company v. High, Commissioner of Revenue,* 265 N.C. 653, 144 S.E. 2d 821; *Seminary v. Wake County,* 251 N.C. 775, 112 S.E. 2d 528. The ordinary meaning of "discovered" is newly found, not previously known. G.S. 105-331(a) makes it clear that "discovered property," as used in the Machinery Act, G.S. Chapter 105, Subchapter II, means property which has not been listed for taxation. Even if this term could be construed to include property improperly listed (see, *Smith v. Dunn,* 160 N.C. 174, 76 S.E. 242), we think G.S. 105-330 makes it clear that the authority of the Board of County Commissioners to change the listing extends no further than a change as to property "discovered" after the County Board of Equalization and Review has finished its work and ceased to function. In the present instance, it is clear that the matter came to the attention of both the county and the city at some time prior to 22 April 1969. Nothing in the record indicates that the county and the city were not fully aware of the facts governing the tax situs of the property in question prior to the date on which the County Board of Equalization and Review ceased to function. Thus, the tractors and trailers listed by McLean in Broadbay Township cannot be deemed "discovered property," within the meaning of G.S. 105-330, as of the date of the attempted listing of these properties in Winston Township by the Tax Supervisor and such attempted listing was without legal effect.

The power conferred by G.S. 105-331(e) upon cities and towns is, by the terms of that statutory provision, no more extensive than the power conferred by that section and by G.S. 105-330 upon the Board of County Commissioners.

Having concluded that the attempted listing of the property in Winston Township for 1969 taxes was ineffectual, we do not reach, in this case, the question of whether McLean was entitled in 1969 to have the full tax value of these vehicles apportioned so as to subject only part of it to taxation in Forsyth County.

The judgment of the superior court affirming the decision of the State Board of Assessment is, therefore, reversed, and the matter is remanded to the Superior Court of Forsyth County for the entry by it of a judgment in accordance with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. HAYWOOD LINDALE PEELE

No. 110

(Filed 10 May 1972)

1. Constitutional Law § 31; Criminal Law § 80— access to evidence — witnesses favorable to defendant — statements by witnesses — production by solicitor

The trial court did not err in the denial of defendant's motion pursuant to G.S. 15-155.4 that the solicitor furnish defendant (1) the names and addresses of all witnesses known to the State who might offer testimony favorable to defendant, and (2) copies of written statements or transcripts of oral statements made by any witness, since the statute does not contemplate that the solicitor be required to furnish such information.

2. Criminal Law § 87— leading questions

The trial court did not err in allowing the solicitor to ask leading questions in this homicide and armed robbery prosecution.

3. Criminal Law §§ 162, 169— unresponsive testimony — test of relevancy

If an unresponsive answer produces irrelevant facts, it should be stricken and withdrawn from the jury; however, if an answer brings forth relevant facts, it is admissible even though not specifically asked for or beyond the scope of the question.

4. Criminal Law § 80— irrelevancy of letter

The trial court in an armed robbery and homicide prosecution properly excluded as irrelevant a letter written to defendant by an employment agency in New York forty-two days after the crimes which acknowledged defendant's application for a job without indicating any date on which the application was made, the letter having contained nothing from which any inference may be drawn as to defendant's whereabouts on the date of the crimes.

5. Homicide § 21— murder in perpetration of armed robbery — sufficiency of evidence

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of murder committed in the perpetration of an armed robbery where it tended to show that defendant and a companion entered a store, that a commotion in the store was heard, that defendant and his companion ran from the store carrying a cash register, that the store proprietor had been shot and killed with a .22 caliber pistol, that defendant and his companion took the cash register to another person's home and divided the money, and that defendant's companion had borrowed a .22 caliber pistol just before the robbery and returned it shortly thereafter.

6. Criminal Law § 26; Homicide § 31— murder in perpetration of robbery — separate punishment for robbery — double jeopardy

Where defendant's conviction of felony-murder was based upon a jury finding that the murder was committed in the perpetration

of an armed robbery, no separate punishment can be imposed for the armed robbery.

APPEAL by defendant from *Clark, J.*, January 17, 1972 Criminal Session, CUMBERLAND Superior Court.

These criminal prosecutions were based on grand jury indictments as follows. The bill in Case No. 71 CR 24751 is here quoted:

"THE JURORS FOR THE STATE UPON THEIR OATH Present, that Haywood L. Peele late of the County of Cumberland on or about the 12th of July, 1971, with force and arms at and in the county aforesaid did 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 pistol, whereby the life of William F. Icenogle was endangered and threatened, did then and there unlawfully, wilfully, forcibly, violently and feloniously take, steal and carry away Three Hundred Dollars ($300.00) in money, to wit: United States Currency of the value of Three Hundred Dollars ($300.00) from the presence, person and possession of William F. Icenogle, property of William F. Icenogle trading as Square Deal Package Store, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

/s JACK A. THOMPSON
Solicitor"

The bill in case No. 71 CR 24752 is likewise quoted:

"THE JURORS FOR THE STATE UPON THEIR OATH Present, That Haywood L. Peele late of the County of Cumberland on or about the 12th day of July, 1971, with force and arms, at and in the said county, feloniously and wilfully did kill and murder William F. Icenogle, which murder was committed in the perpetration of the crime of armed robbery, a felony, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

/s JACK A. THOMPSON
Solicitor"

The defendant was adjudged to be indigent and A. Maxwell Ruppe was appointed counsel to represent him.

After the indictments were duly returned but before arraignment, defense counsel filed a written request for discovery and moved before Judge Bailey for an order requiring the solicitor to make available to defense counsel " . . . (T)he following information pertaining to the charges against the defendant . . . : 1. Names and addresses of witnesses known to the State who might offer testimony favorable to the defendant. 2. Copy of all written statements made by any of the witnesses signed by the witnesses now in possession of a representative of the State. 3. Copy of any unsigned statements or verbal statements, including any transcribed recording of a witnesses statement given to a representative of the State which has been reduced to writing and now in possession of the representative of the State. 4. A copy of the transcript of testimony in the case of *State v. Anthony Calloway,* 71 Cr 23574 and 71 Cr 23575 . . . on the same charge now pending against Haywood Lindale Peele."

Judge Bailey found that Anthony Calloway was also indicted both for the robbery and the murder of William F. Icenogle. The evidence was taken by the reporter at the hearing after Calloway entered pleas of guilty both to murder in the second degree and to armed robbery. Judge Bailey concluded the transcript of the Calloway hearing would enable the defendant to prepare for the trial, as the same witnesses would be used by the State. Judge Bailey ordered the Calloway transcript made available to defense counsel at the State's expense.

When arraigned the defendant entered pleas of not guilty. Twelve regular jurors and one alternate were selected and empaneled.

The State introduced evidence of which the following is a summary. Mrs. Icenogle, wife of the victim, testified that she left her husband alone at the store about 9 o'clock on the night of July 12, 1971. The cash register contained $200.00 to $300.00 in cash and some checks. The State introduced it in evidence.

A State's witness stopped at a telephone booth near Mr. Icenogle's store a few minutes before 10 o'clock on the night of July 12th. He heard a commotion in the store, saw two men leave running, went inside, and found Mr. Icenogle on the floor

dying from gunshot wounds. Another eyewitness saw the two men running from the store carrying a cash register. Soon after they passed out of his view he heard an automobile door slam and heard the car drive away. The witness identified the defendant and Calloway as the men leaving the store with the cash register.

Catherine Winborn testified that she was well acquainted with Anthony Calloway, Haywood Lindale Peele, and Jake Gooding. Around 12 o'clock on the night of July 12th these three men came into her house through the back door carrying a cash register. They opened it in her house, took a quantity of money from it and left. A few days before, Anthony Calloway had borrowed her twenty-two calibre pistol. Shortly thereafter, he returned it. She had heard about the shooting and turned the pistol over to one of her friends who hid it under a trash can nearby. After the officers made inquiry, Catherine Winborn and Howard Jenkins informed the officers about hiding the pistol. A search disclosed it had been removed.

Jake Gooding, a witness for the State, testified that on the night of July 12th around 10 o'clock, or a little before, he drove his automobile to a place a short distance from the Icenogle store and that his two passengers, Anthony Calloway and Haywood Peele, left his automobile. He saw them go to the Icenogle store and in a few minutes return with the cash register. He went with them to Catherine Winborn's house where Calloway opened the safe and gave him $20.00. Calloway and Peele then divided the remainder of the money which was around $300.00. The officers took possession of the cash register. Mrs. Icenogle identified it as belonging to her husband and it was introduced in evidence.

After the shooting, the body of Mr. Icenogle was taken to the hospital. An autopsy was performed which disclosed that he had died from a twenty-two calibre pistol bullet which had pierced his heart.

At the close of the State's evidence the defendant's motion for a directed verdict of not guilty was overruled.

The defendant testified that he was well acquainted with Calloway and Gooding. He frequently saw them at the home of Mamie Gaines. They often met together and had social drinks.

He said that he left Fayetteville on the night of July 11th, went to New York and remained there until a relative wrote him about the robbery and death of Icenogle. He came back to Fayetteville and surrendered because he was not guilty. He called Anthony Calloway as a witness in his behalf. Calloway testified that he had already pled guilty to the robbery and second degree murder in the killing of Icenogle; that the defendant Peele was not with him at all and had nothing to do with the robbery or killing; that Gooding drove him to the place near the store and waited while he went to the store alone, shot Icenogle, and took the cash register to the home of Catherine Winborn. He admitted that he and Peele had occupied a cell together in jail before the trial.

The defendant called Officer Truitt who testified that he had a conversation with State's witness Catherine Winborn who told him that Calloway and Gooding brought the cash register to her house, opened it, and divided the money and that the defendant Peele was not with them.

The defendant sought to introduce in evidence a letter from an employment agency in New York addressed to him at his uncle's residence in Brooklyn. The letter, dated August 24, 1971, acknowledged the receipt of his application for a job. The court excluded the letter as irrelevant.

The jury returned a verdit finding the defendant guilty of murder in the first degree and recommended life imprisonment on the murder charge. The jury also returned a verdict of guilty on the robbery charge. From the judgment of life imprisonment on the murder charge and a sentence of not less than twenty-five nor more than thirty years on the robbery charge, the defendant appealed assigning errors.

Robert Morgan, Attorney General by Walter E. Ricks III, Associate Attorney, for the State.

A. Maxwell Ruppe and Paul G. Mallonee for defendant appellant.

HIGGINS, Justice.

[1] The bills of indictment charged armed robbery and murder committed in the perpetration of the robbery. The defendant's witness Calloway had already been tried and entered pleas of

guilty on the identical charges. The State's pre-sentence testimony on the charges against Calloway was transcribed and a copy was delivered to the defense counsel in response to the motion for discovery filed at the beginning of the hearing. The disclosure statute, Chapter 1064, Session Laws of 1967, now G.S. § 15-155.4, was enacted after this Court's decision in *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334. According to the statute, a pre-trial order may require the solicitor to produce for inspection and copy "specificaly identified exhibits" to be used in the trial and to permit defense counsel to examine "specific expert witnesses" who may be called. The statute does not contemplate anything resembling the demand made by defense counsel in this case. The purpose of the statute is to enable a defendant to guard against surprise documents and surprise expert witnesses. Nothing of that nature was shown to be available or its use contemplated in this case. The order to produce a copy of the pre-sentence hearing would appear to have given defense counsel sufficient information to enable him to guard against surprises. The Assignment of Error No. 1 is not sustained.

[2] By defendant's Assignments of Error Nos. 3 and 4, the defendant challenges the solicitor's leading questions. Examination discloses that questions, if on occasion somewhat leading, were intended to facilitate the hearing. The court was well within its prerogative in allowing them. *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384; *State v. Clanton,* 278 N.C. 502, 180 S.E. 2d 5; *State v. Pearson,* 258 N.C. 188, 128 S.E. 2d 251. The Assignments of Error Nos. 3 and 4 based on leading questions are not sustained.

[3] The Defendant's Assignment of Error No. 6 is addressed "To the court permitting Detective W. A. Newsome, a State's witness, on cross-examination to volunteer information that was not in response to any question." The questions related to the officer's conversations with a witness. It appears that these conversations had occurred on more than one occasion between the officer and Gooding. They concerned the identity of the two men whom he had taken to and from the Icenogle store and the home of Catherine Winborn. The witness in his reply to questions had gone somewhat beyond the answers to the last question. In a long trial it is not unusual for a witness to give testimony somewhat beyond the precise form of a question.

"Whether an answer is responsive to a question, is not the ultimate test on a motion to strike. If an unresponsive answer produces irrelevant facts, they may and should be stricken and withdrawn from the jury. However, if the answers bring forth relevant facts, they are nonetheless admissible because they are not specifically asked for or go beyond the scope of the question." *State v. Ferguson,* 280 N.C. 95, 185 S.E. 2d 119; *State v. Staten,* 271 N.C. 600, 157 S.E. 2d 225. Assignment of Error No. 6 is not sustained.

[4] Defense counsel in the brief and in the oral argument stressfully contends that the court committed prejudicial error by refusing to admit in evidence the letter dated August 24, 1971, addressed to the defendant at 50 Gates Avenue, Brooklyn, New York. The letter was written forty-two days after the robbery and related to defendant's application for a job without indicating any date on which the application was made. Hence it contained nothing from which any inference may be drawn as to the whereabouts of the defendant on July 12, 1971. The letter was properly excluded as irrelevant. We note the defendant's objection to the letter solely because of the stress and importance defense counsel seemed to attach to it.

[5] Defendant's 8th and final Assignment of Error challenges the sufficiency of the evidence to survive his motion to dismiss at the close of all the evidence. On this motion the State's evidence is deemed to be true. All inconsistencies and contradictions are to be resolved in favor of the State. The defendant's evidence in contradiction is not to be considered. The evidence when properly construed makes out a strong case for the prosecution showing a murder committed in the perpetration of a robbery.

Mrs. Icenogle left her husband alone in the store at 9 o'clock. The cash register was in place. She returned at 10 o'clock in response to a call from the officers. Mr. Icenogle was dead and the cash register missing. The defendant and Anthony Calloway are shown to have entered Icenogle's store just before 10 o'clock at night. A commotion in the store was heard. Calloway and the defendant were seen running from the store carrying a cash register. They appeared at the Winborn home, opened the cash register, divided the money, and left. Just before the robbery, Calloway had borrowed Catherine Winborn's twenty-two calibre pistol. Shortly after the occurrence

he returned it. Icenogle's death resulted from a twenty-two calibre bullet. The evidence indicates that Calloway probably did the shooting, but both he and the defendant entered the store together. They left together with the cash register and divided the contents. Both were equally guilty of the murder which one committed in the presence of the other. "Where two or more persons aid and abet each other in the commission of a crime, all being present, each is a principal and equally guilty regardless . . . of which is the actual perpetrator . . . . " Strong's N. C. Index, 2d, Vol. 2, Criminal Law, § 9. See also *State v. Aycoth,* 272 N.C. 48, 157 S.E. 2d 655; and *State v. Ham,* 238 N.C. 94, 76 S.E. 2d 346.

The evidence in its light most favorable to the State, establishes all essential elements of murder committed in the perpetration of armed robbery. *State v. Jones,* 280 N.C. 60, 184 S.E. 2d 862; *State v. Thompson,* 256 N.C. 593, 124 S.E. 2d 728; and *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431. In the trial, conviction and sentence on the charge of murder in the first degree we find no error.

[6] However, the face of the record proper requires this Court, of its own motion, to take notice of a fatal defect in the verdict and judgment in No. 71 CR 24751 charging armed robbery. Examination of the indictments, verdicts, and judgments disclose that the armed robbery charge was embraced in and made a part of the charge of murder in the first degree. Wharton's Criminal Law and Procedure, Vol. 1, Section 148, states the rule: "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, . . . " Many cases recognize and apply the same principle. Among them are *State v. Thompson,* 280 N.C. 202, 185 S.E. 2d 666; *State v. Hatcher,* 277 N.C. 380, 177 S.E. 2d 892; *State v. Parker,* 262 N.C. 679, 138 S.E. 2d 496; *State v. Birckhead,* 256 N.C. 494, 128 S.E. 2d 838; and *State v. Bell,* 205 N.C. 225, 171 S.E. 50.

From the foregoing it follows as a matter of course that the judgment must be arrested in the robbery case.

In No. 71 CR 24752—No error.

In No. 71 CR 24751—Judgment arrested.

STATE OF NORTH CAROLINA v. LIONEL ANDERSON

No. 13

(Filed 10 May 1972)

1. **Constitutional Law § 29; Criminal Law § 135; Jury § 7— jurors opposed to death penalty — excusal for cause**

The trial court in a first degree murder prosecution properly excused six jurors for cause when each stated on *voir dire* examination that he would not vote in favor of the death penalty under any circumstances no matter how aggravated the case and no matter what the facts may be.

2. **Criminal Law § 92— consolidation of murder cases for trial**

The trial court properly consolidated for trial indictments charging defendant with the first degree murders of his wife and mother-in-law.

3. **Criminal Law § 166— abandonment of assignments of error**

Assignment of error is deemed abandoned where appellant's brief sets out no reason or argument and cites no authority in support thereof. Supreme Court Rule 28.

4. **Criminal Law § 87; Witnesses § 1— list of State's witnesses — testimony by witness not listed**

In a first degree murder prosecution wherein the State furnished defense counsel a list of State's witnesses prior to selection of the jury, the trial court did not abuse its discretion in allowing the State to present a witness whose name was not on the list, where each juror stated upon interrogation by the court that he did not know the witness by sight or by name, and the court found that the name of the witness was not available to the State at the time the jury was selected and that defendant had suffered no prejudice by the fact that the name of the witness was not furnished prior to the jury selection.

5. **Criminal Law § 97— additional evidence after jury arguments**

The trial court did not abuse its discretion in allowing the State to recall two witnesses who had previously been examined and to elicit additional evidence from them after the State and defendant had rested and all arguments to the jury had been made, where defendant was given an opportunity to offer additional rebuttal evidence and the State's additional evidence was inconsequential.

6. **Constitutional Law § 29; Criminal Law § 135; Homicide § 31— first degree murder — death penalty — constitutionality — former G.S. 15-162.1**

Sentences of death could not constitutionally be imposed on defendant for crimes of first degree murder committed while the statute allowing a defendant to plead guilty to a capital crime and receive a life sentence, G.S. 15-162.1, was in effect, since during that time

the death penalty applied only to those defendants who asserted their constitutional right to plead not guilty; consequently, sentences of death imposed on defendant for first degree murder are vacated and the cases are remanded to the superior court for imposition of sentences of life imprisonment.

Justices HIGGINS and LAKE dissent.

DEFENDANT appeals from judgments of *Peele, J.*, September 1971 Session of MARTIN Superior Court.

Defendant was charged in separate bills of indictment with the first degree murder of Fannie Alice Whitfield, his mother-in-law, and the first degree murder of Joyce Janet Anderson, his wife, on 29 June 1971. Upon arraignment defendant entered pleas of not guilty. The cases were thereupon consolidated for trial, over defendant's objection, and a jury was selected and empaneled.

The State's evidence tends to show the facts narrated below.

Defendant Lionel Anderson and his wife Joyce Janet Anderson lived in Greenville, North Carolina. Joyce was the daughter of Willie Herbert Whitfield and Fannie Alice Whitfield who lived near Williamston on Highway No. 17 in Martin County. On 29 June 1971 defendant called his wife's father to come after her. Mr. Whitfield went to Greenville and took his daughter to his home near Williamston. That same afternoon defendant left Greenville taking his .20 gauge shotgun with him. He went to the Whitfield home, asked for his wife, and was told she was at the store. He left and drove toward the store where he saw his wife driving a car and thereupon turned around and followed her back to the Whitfield home. He parked his car in the backyard and talked to his wife for thirty or forty minutes. Defendant and his wife had been fussing since Tuesday morning, June 27, and defendant was trying to persuade her to return home. She told him she was going to Baltimore to live with the parents of a man who was the father of a baby born to her before her marriage to defendant. Defendant thereupon shot his wife Joyce Anderson with the .20 gauge shotgun. Mrs. Whitfield came to the back door, stepped out on the ground and defendant shot her in the stomach with his shotgun. He reloaded, stepped forward and shot her again and she fell to the ground near the back steps. Meanwhile, Joyce Anderson ran toward a neigh-

bor's house and the defendant followed her. Joyce stumbled and fell in the yard, and defendant stood over her with the shotgun and fired another shot into her body. Defendant then walked toward his car in the Whitfield yard and saw Mrs. Whitfield moving on the ground. He approached her and said, "You are the cause of all this," placed his gun against her neck and fired again. As defendant approached his car to drive away he was shot twice in the back by Melvin Whitley, a nineteen-year-old boy who was staying at the Whitfield home. Numerous shotgun pellets entered his body.

The coroner found both women dead when he arrived on the scene. He testified that Mrs. Whitfield had a large wound about the size of a quarter under her right breast and a large wound in her stomach below the navel about the size of a baseball, and a large wound behind her left ear. Joyce Anderson had a large wound near the top of her chest on the left side near the heart region and twenty-five to thirty small holes in her arm. When the coroner arrived the bodies were still lying in the yard where they had fallen.

Defendant drove at a high rate of speed to his mother's home in Greenville where he was arrested, taken to the hospital for treatment of his wounds which apparently were not serious, and lodged in jail. With his counsel present and after being fully warned of his constitutional rights, defendant made a statement to the officers in which he related his family difficulties and said he remembered shooting his wife only once and Mrs. Whitfield only once. Defendant identified the shotgun he used.

Defendant testified as a witness in his own behalf. His testimony shows that he was thirty-six years of age, had served as a special policeman in the City of Washington, D. C. for two years, and had never been in any trouble. On Monday preceding June 29 he had seen a man running from his home and this had caused serious arguments between him and his wife. On June 29 he called Mr. and Mrs. Whitfield to come to his home and they came. The Whitfields decided to take their daughter home. After they had gone defendant began drinking. He tried unsuccessfully to call his wife several times and finally decided to drive to Williamston to talk with her. The shotgun was already in the trunk of his car, but he took it out and laid it on the back seat when he left the house. When he knocked

on the door at the Whitfield residence he was advised that his wife had gone to the store. He went looking for her and followed her back to the Whitfield home. She took her two babies in the house and returned to the backyard where they talked. Defendant had consumed ten cans of beer and about half of a fifth of liquor. He begged his wife to go back home with him, and she told him she was going to Baltimore to stay with the mother of a boy who had fathered her baby before she married defendant. Defendant then testified that he remembered little of what happened thereafter; that he doesn't remember how many times he fired or who he shot on that occasion; that he didn't go to Williamston to hurt anyone.

In each case the jury convicted the defendant of murder in the first degree, and in each case the court pronounced a death sentence. Defendant appealed to the Supreme Court assigning errors discussed in the opinion.

Clarence W. Griffin, Attorney for defendant appellant.

Robert Morgan, Attorney General, and Ralph Moody, Special Counsel, for the State of North Carolina.

HUSKINS, Justice.

[1] Defendant assigns as error that six jurors were excused for cause when each stated on voir dire examination that he would not vote in favor of the death penalty under any circumstances no matter how aggravated the case and no matter what the facts may be. We said in *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671 (1971), that "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." This accords with the holding in *Witherspoon v. Illinois,* 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968). The six veniremen in question were properly excused because they were committed to vote against the death penalty before the trial commenced. This assignment is overruled.

[2] Defendant's second assignment is addressed to the consolidation of the two murder cases for trial. This assignment obviously has no merit. When a defendant is charged with crimes

of the same class and the offenses are not so separate in time or place and not so distinct in circumstances as to render a consolidation unjust and prejudicial, consolidation is authorized in the discretion of the court by G.S. 15-152. *State v. White,* 256 N.C. 244, 123 S.E. 2d 483 (1962); *State v. Johnson,* 280 N.C. 700, 187 S.E. 2d 98 (1972).

[3] Appellant's brief sets out no reason or argument and cites no authority in support of defendant's third assignment of error. The assignment is therefore deemed abandoned under Rule 28, Rules of Practice in the Supreme Court. *State v. Strickland,* 254 N.C. 658, 119 S.E. 2d 781 (1961).

[4] The State furnished defense counsel a list of State's witnesses prior to selection of the jury. However, the witness Alton Daniels was unknown to the solicitor and his name was not on the list. The solicitor learned during the trial that Alton Daniels was an eyewitness to the shooting. He informed the court of these facts and was allowed to examine Daniels as a witness for the State over defendant's objection. This constitutes defendant's fourth assignment of error.

The record reveals that before this witness was allowed to testify the court interrogated the jurors and each juror stated that he did not know Alton Daniels by sight or by name. The court found that the name of the witness was not available to the State at the time the jury was selected and that defendant had suffered no prejudice from the fact that the name of this witness was not furnished prior to selection of the jury. The court thereupon in its discretion permitted the witness to testify, and we perceive no error therein. It was a discretionary matter not reviewable on appeal absent abuse of discretion, and no abuse of discretion is shown.

Defendant's fifth assignment of error is based on denial of his motion for nonsuit at the close of the State's evidence. His sixth assignment of error is based on denial of his motion for a directed verdict of not guilty at the conclusion of all the evidence. These assignments are formal and are overruled without discussion.

[5] After the State and defendant had rested their case and after all arguments to the jury had been made, the court in its discretion allowed the State to recall two witnesses who had previously been examined and elicit from them additional evi-

dence. Defendant objected to this procedure, and this constitutes his seventh assignment of error.

It is discretionary with the trial court to permit the introduction of additional evidence after both parties have rested and arguments have been made to the jury, but the opposing party must be given an opportunity to offer additional evidence in rebuttal. *State v. Harding,* 263 N.C. 799, 140 S.E. 2d 244 (1965); *State v. Jackson,* 265 N.C. 558, 144 S.E. 2d 584 (1965). The record shows that defendant was given an opportunity to offer additional evidence in rebuttal but declined to do so. Furthermore, it is noted that the additional evidence in question was inconsequential and could not have prejudiced defendant. Defendant's seventh assignment of error is overruled.

The State again rested its case, and defendant again moved for a directed verdict of not guilty. Denial of his motion constitutes his eighth assignment of error. It has no merit and is overruled without discussion.

[6] Defendant's ninth and tenth assignments of error relate to the same legal question and will be treated jointly. By these assignments defendant challenges the constitutionality of the death sentences imposed upon him and contends that these cases against him should be remanded to the Superior Court of Martin County for imposition of a life sentence in each case. We think defendant's position is sound for the reasons set out below.

On 23 July 1971 the United States Supreme Court entered memorandum decisions in the following North Carolina cases reversing the death sentence imposed by the trial court and affirmed by this Court, to wit: *Atkinson v. North Carolina,* 403 U.S. 948, 29 L.Ed. 2d 859, 91 S.Ct. 2283; *Hill v. North Carolina,* 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2287; *Roseboro v. North Carolina,* 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2289; *Williams v. North Carolina,* 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2290; *Sanders v. North Carolina,* 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2290; and *Atkinson v. North Carolina,* 403 U.S. 948, 29 L.Ed. 2d 861, 91 S.Ct. 2292. As authority for its decision in each case, that Court 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).

Jackson and *Pope* stand for the proposition that every defendant has a constitutional right to plead not guilty and that the Federal Constitution does not permit the establishment of a death penalty applicable only to those defendants who assert their constitutional right to contest their guilt before a jury. At the time *Atkinson, supra,* and the other five North Carolina cases arose, the death penalty in North Carolina was expressed in G.S. 14-17 and G.S. 15-162.1.

G.S. 14-17 provides in pertinent part as follows: "A murder which shall be perpetrated . . . by any . . . 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."

G.S. 15-162.1 provides in pertinent part as follows: "(a) Any person, when charged in a bill of indictment with the felony of murder in the first degree, or burglary in the first degree, or arson, or rape, when represented by counsel, whether employed by the defendant or appointed by the court under G.S. 15-4 and G.S. 15-5, may, after arraignment, tender in writing, signed by such person and his counsel, a plea of guilty of such crime; and the State, with the approval of the court, may accept such plea. . . . (b) In the event such plea is accepted, the tender and acceptance thereof shall have the effect of a jury verdict of guilty of the crime charged with recommendation by the jury in open court that the punishment shall be imprisonment for life in the State's prison; and thereupon, the court shall pronounce judgment that the defendant be imprisoned for life in the State's prison."

The decisions in *Jackson* and *Pope* apparently condemned as unconstitutional the language of G.S. 15-162.1 because, with the language of that statute in effect, our death penalty applied only to those defendants who asserted their constitutional right to plead not guilty. To correct that infirmity, G.S. 15-162.1 was repealed by Chapter 117 of the 1969 Session Laws, effective 25 March 1969. Such repeal left in effect, applicable to all alike, the provisions of G.S. 14-17; and this Court has consistently upheld the constitutionality of that statute. *State v.*

Westbrook, 279 N.C. 18, 181 S.E. 2d 572 (1971); *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671 (1971). However, for some obscure reason, the General Assembly reenacted the provisions of G.S. 15-162.1 by Chapter 562 of the 1971 Session Laws, effective 15 June 1971. Then, apparently to correct the error, G.S. 15-162.1 was again repealed by enactment of Chapter 1225 of the 1971 Session Laws, effective 21 July 1971. It thus appears that from 15 June 1971 to 21 July 1971 the death penalty provisions of our statutes once again applied only to those defendants who asserted their right to plead not guilty. *United States v. Jackson, supra; Pope v. United States, supra; Atkinson v. North Carolina, supra.* Here, the murders were committed on 29 June 1971 while the provisions of G.S. 15-162.1 were in effect, and therefore the death sentences in these cases are unconstitutional and cannot be carried out. *Hill v. North Carolina, supra* [403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2287].

Applying the constitutional principles enunciated in *Jackson* and *Pope,* and following the procedure adopted by this Court in *State v. Hill,* 279 N.C. 371, 183 S.E. 2d 97 (1971), the judgments of the Superior Court of Martin County, insofar as they imposed the death penalty, are reversed. These cases are remanded to the Superior Court of Martin County with directions to proceed as follows:

1. The presiding judge of the Superior Court of Martin County will cause to be served on the defendant Lionel Anderson, and on his counsel 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 Lionel Anderson being present in person and being represented by his counsel, the presiding judge, based on the verdicts of guilty of murder in the first degree returned by the jury at the trial of these cases at the September 1971 Session, will pronounce judgments that the defendant Lionel Anderson be imprisoned for life in the State's prison, to be served concurrently or consecutively as the judge in his discretion may determine.

2. The presiding judge of the Superior Court of Martin County will issue a writ of habeas corpus to the official having custody of the defendant Lionel Anderson 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 judgment.

Justices HIGGINS and LAKE dissent.

THE CITY OF KINGS MOUNTAIN, A MUNICIPAL CORPORATION, PETITIONER v. BUFORD D. CLINE AND W. K. MAUNEY, JR., TRADING AS THE DOUBLE B. RANCH, A PARTNERSHIP, AND PATRICIA C. GOLD AND HUSBAND, HARRY G. GOLD, EDWIN H. CLINE AND WIFE, JEAN R. CLINE, C. R. GOLD AND WIFE, OCIE GOLD, JOSEPH C. WHISNANT, TRUSTEE, FIRST-CITIZENS BANK AND TRUST COMPANY OF KINGS MOUNTAIN, N. C., AND COUNTY OF CLEVELAND, DEFENDANTS

No. 88

(Filed 10 May 1972)

1. **Appeal and Error §§ 26, 28— broadside exception to findings and conclusions — questions presented**

Appellants' broadside exception to "each and every" finding of fact and conclusion of law and to the judgment does not bring up for review the sufficiency of the evidence to support any particular finding of fact, but presents only the questions (1) whether the facts found support the judgment and (2) whether error of law appears on the face of the record proper.

2. **Appeal and Error § 24— necessity for exceptions**

An assignment of error will not present a question unless it is based upon an exception set out in the case on appeal and numbered as required by Rule 21.

3. **Eminent Domain § 7— municipality's right to condemn— stipulation that municipality "will acquire title"**

Defendants are estopped to contest a municipality's right to condemn their property for a water reservoir project where it was stipulated that the municipality "will acquire title" to the lands upon posting the amount set forth in the petition and that defendants might withdraw the money from the clerk's office without prejudice to the right of either side to contest the amount of damages.

APPEAL by defendants from *Blount, J.*, February 1971 Session of Cleveland; 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); docketed and argued as Case No. 158 at the Fall Term 1971.

In this special proceeding, instituted 5 November 1969 under G.S. 160-204, G.S. 160-205, and G.S. 40-11 *et seq.*, the City of Kings Mountain (City) seeks to condemn 247.57 acres of land belonging to defendants. City alleged that the land described in the petition is a necessary part of a municipal reservoir in its Buffalo Creek water project; that defendants refused City's offer of $44,562.60 for the property; that although City has negotiated in good faith the parties have been unable to agree upon the value of the property.

Defendants denied that City has made a bona fide effort to purchase the land. They alleged, *inter alia*, that the size of the proposed reservoir far exceeds City's foreseeable needs; that although the maximum water level of the proposed lake will be 736 feet above sea level (shown on the project map as contour 736), City also seeks to condemn the perimeter between contour 736 and contour 744; that City requires only a floodage-easement over this area and has no right or need to acquire the fee simple title; that defendants are willing to grant City the necessary easement, but it seeks arbitrarily to take this portion of defendants' land. (The width of the area between contours 736 and 744, a vertical differentiation of 8 feet, is not disclosed.)

In an amended answer, filed 31 July 1970, defendants allege that City's appraisers valued their land on the erroneous assumption defendants' remaining property could be developed and sold as waterfront lots; that City has established a policy which prevents any recreational use of the proposed reservoir and is attempting to condemn land of the defendants lying above the normal water level of the lake without providing them any access from their remaining lands to the waters of the lake; that this policy will prevent defendants from developing and selling lake-front lots and, in consequence, the price at which City has attempted to buy defendants' land was not a good-faith offer; that defendants have never refused to sell City the land it desired; and that this condemnation proceeding should be dismissed because of City's failure to negotiate in good faith before instituting it.

As required by G.S. 40-16, on 11 August 1970, the Clerk of the Superior Court heard "the proofs and allegations of the parties."

Evidence for City tended to show: On 14 March 1967 City employed W. K. Dickson and Company (Dickson), an engineering firm specializing in water projects, to prepare plans and specifications for an adequate water supply system for the municipality. This plan is shown on the topographical map of the Buffalo Creek water project, introduced as petitioner's Exhibit 4. The lands required for the project were shown on the map as lying within a heavy green line at contour 744.

City's Board of Commissioners (Board) approved the plan on 11 July 1967 and instructed Dickson to proceed with the project. The Board found that the project would compel City to acquire all the lands within the green line.

Engineers R. D. Johnson and W. K. Dickson, upon whose advice City acted, testified that, in their opinion, the land shown within the green line on Exhibit 4 is the minimum acreage required for the lake site and for its adequate protection as a sanitary reservoir. The buffer zone between contour 736 and contour 744 is "really a minimum amount" to control flooding, erosion, mosquitos, and pollution.

In planning the project the engineers designed the lake for optimum benefits, including recreation. The State Board of Health gave tentative, preliminary approval to a plan "to have recreation on the lake." Thereafter, however, the Board adopted a resolution that there would be no recreation on the proposed lake.

City had defendants' property appraised and, after considerable discussion, the Board decided that defendants' land had a value of $44,562.60. Early in 1969 it instructed Coates Field Service to attempt to buy it for that amount. Defendants refused the offer.

Subsequent negotiations between the parties failed because City insisted on purchasing the fee in the area between contours 736 and 744, and defendants offered only an easement. On 28 August 1969, pursuant to a resolution adopted by the Board on 18 August 1969, City's attorney made defendants "a firm offer" of $44,562.60, and advised them that unless the offer was accepted within ten days it would be deemed refused. When defendants did not reply, on 18 September 1969 the Board ordered condemnation.

At the hearing the Clerk permitted defendants to offer their evidence before City presented its case. Defendants examined two of City's appraisers, the chief of the planning review section of the State Board of Health, James Stamey, and the five persons who, in addition to the mayor, composed City's Board of Commissioners on 18 August 1969.

The testimony of the appraisers is not pertinent to decision here. Stamey's testimony indicated that he, along with Mayor Moss, Dickson's president, W. K. Dickson, and Gardner Gidley, a private recreational consultant, attended a meeting on 2 February 1968 to discuss the Buffalo Creek water project. Gidley presented a plan which called for extensive recreational development in the watershed. The maps used in this conference did not indicate whether City proposed to acquire land above the 736 contour. Shortly thereafter, a letter from the Board of Health advised Moss that the proposed recreational development was tentatively approved. The letter proposed that City "will own a 10 foot horizontal (or 4 foot vertical) strip of land around the entire reservoir." However, the project's final plans, approved by the Board of Health on 5 November 1968, contemplated no recreational development at all.

Each commissioner testified, in substance, that he had voted to acquire the lands shown on the map on the basis of the engineers' recommendation; that in approving the project he voted for a lake to supply the town with water and for no other purpose; and that he had voted to prohibit its use as a recreational facility.

On 13 August 1970 the Clerk of the Superior Court rendered his judgment in which he found: (1) City, which has the power of eminent domain, had properly instituted this proceeding. (2) Defendants' land, described in the petition, is reasonably necessary for the construction of City's Buffalo Creek water project. (3) City, without success, negotiated in good faith for the purchase of defendants' property prior to the institution of condemnation proceedings. Thereupon he adjudged that three disinterested freeholders of Cleveland County be appointed to hear the evidence and contentions of the parties and determine just compensation for the property taken.

Defendants excepted "to each and every finding of fact" and "each and every conclusion of law" and appealed to the Superior Court.

At the time the appeal entries were made the parties stipulated:

"(1) . . . that both parties would waive the appointment of commissioners and appeal the entire controversy direct to the Superior Court and a jury trial on the question of damages;

"(2) The petitioner will acquire title to the lands upon the posting of the amount set forth in the petition and that the respondents may draw such money from the clerk's office without prejudice to either side, this being done in order to save interest running on the deposit; that in the event the final determination of value is a lower figure than the deposit, the petitioner may have a judgment against the respondents for the difference in such value, and in the event the final determination of damages is a greater amount than the deposit, then the respondents may have judgment against the petitioner for such greater amount, plus interest from the date of the taking to the day of such payment;

"(3) The respondents except to the award of damages under this stipulation and appeal to the Superior Court, demanding a jury trial on the question of damages."

At the same time the parties made the foregoing stipulations City paid defendants the sum of $44,562.60, the amount set forth in the petition.

In the Superior Court, Judge Blount heard the appeal upon a transcript of the hearing before the clerk. On 28 March 1971 he adjudged, *inter alia,* (1) that City, in good faith, had determined defendants' property was reasonably necessary for the successful operation and protection of its Buffalo Creek water project; (2) that it had negotiated in good faith with defendants for the purchase of said lands but was unable to reach any agreement with them; and (3) that all the land in suit was reasonably necessary for the operation and protection of City's water system. He thereupon decreed "that the City of Kings Mountain is entitled to acquire in fee the lands described in the petition for such sum of money to be determined and assessed by a jury."

Defendants excepted "to each and every finding of fact . . . to each and every conclusion of law and to the signing and entry of the foregoing judgment," and appealed.

Jack H. White and Verne E. Shive for the City of Kings Mountain.

Whisnant & Lackey for defendant appellants.

SHARP, Justice.

[1, 2] Appellants except to "each and every" finding of fact and conclusion of law and to the judgment. This broadside exception does not bring up for review the sufficiency of the evidence to support any particular finding of fact. It presents these questions only: (1) Do the facts found support the judgment, and (2) does error of law appear on the face of the record? *Logan v. Sprinkle,* 256 N.C. 41, 123 S.E. 2d 209 (1961); *Long v. Smitherman,* 251 N.C. 682, 111 S.E. 2d 834 (1959); *Cotton Mills v. Local 578,* 251 N.C. 413, 111 S.E. 2d 529 (1959); 1 N. C. Index 2d *Appeal and Error,* §§ 26, 28 (1967). An assignment of error will not present a question unless it is based upon an exception set out in the case on appeal and numbered as required by Rule 21. Exceptions which appear for the first time in the assignments of error will not be considered. *Barnette v. Woody,* 242 N.C. 424, 88 S.E. 2d 223 (1955); 1 N.C. Index 2d *Appeal and Error* § 24 (1967). Thus, the questions debated in the brief—whether City negotiated in good faith for the purchase of the land described in the complaint, and whether condemnation of the fee in the land lying between contours 736 and 744 was for a public purpose and necessary for the operation and protection of the Buffalo Creek water project—are not presented for decision.

[3] However, our examination of the record reveals that substantial competent evidence supports every finding of the clerk and the judge and that the findings support each judgment. Furthermore, all questions, except the question of just compensation, were rendered moot by the stipulation (quoted verbatim in the statement of facts) that City *will acquire title* to the lands upon posting the amount set forth in the petition and that defendants might withdraw the money from the clerk's office without prejudice to the right of "either side" to contest the amount of damages. This stipulation goes far beyond the right, which G.S. 40-19 gives a municipality upon the payment into court of the sum appraised by commissioners, to "enter, take possession of, and hold" lands notwithstanding the pendency of an appeal,

until final judgment has been rendered. *See Topping v. Board of Education,* 249 N.C. 291, 106 S.E. 2d 502 (1958). In the face of the stipulation that upon payment of the sum mentioned in the petition ($44,562.60) City would "acquire title," defendants are estopped to contest City's right to condemn.

By this stipulation the parties have, in effect, agreed that City's payment of $44,562.60 should be treated as if it were the amount of damages assessed by commissioners under G.S. 40-17 to -18 and thereafter paid into the office of the Clerk of the Superior Court under G.S. 40-19. From this "award of damages" defendants have appealed to the Superior Court as provided in G.S. 40-19, demanding a jury trial as provided by G.S. 40-20.

All preliminary questions of fact having been resolved, only the amount of damages which defendants have suffered in consequence of City's condemnation of the land described in the complaint remains to be determined. The case is remanded to the Superior Court for the trial of that issue.

The judgment of the court below is

Affirmed.

STATE OF NORTH CAROLINA v. DINO ROYAL COX
STATE OF NORTH CAROLINA v. WESLEY CONRAD WARD, ALIAS JAMES THOMAS
STATE OF NORTH CAROLINA v. JAMES GARY, ALIAS TIMOTHY JOHNSON

No. 68

(Filed 10 May 1972)

1. Criminal Law § 36.1; Indictment and Warrant § 17— date of kidnapping — variance — alibi — absence of prejudice

There is no merit in defendants' contention that they were prevented from developing any alibi they may have had by the fact that the indictment charged them with a kidnapping on 17 December 1970 and all the evidence tended to show that the crime occurred on 10 December 1970, where defense counsel assured the court before trial that he was fully aware that the State contended the crime was committed on 10 December 1970, and defendants were arrested during the early morning of 11 December 1970 and thereafter were in the custody of State or federal officers.

2. **Criminal Law § 111; Kidnapping § 1— kidnapping trial — charge on robbery and conspiracy**

The trial court in a kidnapping prosecution did not err in charging the jury on the crimes of robbery and conspiracy where the facts tending to prove defendants' participation in those two crimes constitute an integral part of the proof of the kidnapping for which they were indicted.

3. **Criminal Law § 68— reference to "he" and "they"**

Testimony by two bank employees, who could not identify defendants, with reference to what "he" or "they" did during a robbery of the bank and a kidnapping of one of the employees was competent when considered in connection with other State's evidence identifying defendants as the persons who committed the bank robbery and kidnapping.

4. **Criminal Law §§ 15, 91— continuance — change of venue — denial by court**

The trial court did not abuse its discretion in the denial of defendants' motions for a continuance and for a change of venue of their kidnapping trial.

5. **Criminal Law § 87— leading questions**

The trial court did not abuse its discretion in allowing the solicitor to ask leading questions of a State's witness in this kidnapping prosecution.

6. **Criminal Law § 66— identification testimony — absence of lineup — voir dire**

The trial court did not err in the denial of defendants' motion that a *voir dire* hearing be conducted to determine the admissibility of a police officer's identification testimony where there was no evidence that the officer had identified defendants in a pretrial lineup or confrontation.

7. **Criminal Law § 66— counsel at lineup — identification by officer at arrest scene**

The *Wade* and *Gilbert* decisions, relating to the right to counsel at a lineup, do not apply to a police officer's identification of defendants at the scene of their arrest by other officers as the persons who a few hours before had eluded pursuit and arrest by the identifying officer.

8. **Criminal Law § 34— evidence of guilt of another crime — same transaction rule**

Evidence that defendants had pleaded guilty in federal court to the armed robbery of a bank was properly admitted in the trial of defendants for kidnapping an employee of the bank, where the two crimes were parts of the same transaction and were so connected in point of time and circumstance that one cannot be fully shown without proving the other.

State v. Cox and State v. Ward and State v. Gary

9. Criminal Law §§ 75, 169— incriminating statements — written waiver of counsel — harmless error

The trial court in a kidnapping prosecution erred in the admission of in-custody incriminating statements made by one defendant where the State failed to produce and offer in evidence at the *voir dire* hearing a written waiver of counsel executed by that defendant in compliance with the statute then in effect and codified as G.S. 7A-457(a); however, such error was harmless beyond a reasonable doubt in the light of the mass of other evidence of defendants' guilt of the kidnapping, including evidence that defendants had pleaded guilty to a bank robbery which was part of the same transaction and that the same persons committed the bank robbery and kidnapping.

APPEAL by Dino Royal Cox, Wesley Conrad Ward, alias James Thomas, and James Gary, alias Timothy Johnson, under G.S. 7A-27(a), from *Johnston, J.*, April 13, 1971 Session of GUILFORD Superior Court, docketed and argued as No. 96 at Fall Term 1971.

Identical indictments were returned against the three appellants, each charging that the defendant named therein on December 17, 1970, "did unlawfully, wilfully, feloniously and forcibly kidnap Mrs. Paul Richardson, without lawful authority."

Upon determinations of indigency, the Public Defender for the Eighteenth Judicial District, Wallace C. Harrelson, Esq., was appointed as counsel for each defendant on January 26, 1971.

Prior to trial, the State moved to amend the indictments to charge commission of the crime on December 10, 1970, instead of December 17, 1970. The motion was denied. Defense counsel assured the court that he was fully advised that the State contended the crime charged was committed on December 10, 1970.

Defendants' pretrial motions for continuance and for change of venue were overruled.

Each defendant entered a plea of not guilty. On motion of the State, and without objection by defense counsel, the three indictments were consolidated for trial.

The State offered the testimony, respectively, of J. A. Ledbetter, High Point Police Officer; Mrs. Paul Richardson, employee of North Carolina National Bank; Gary Anderson, High Point Police Officer; Mrs. Ina Ray Gray, employee of North Carolina National Bank; J. G. Nixon, Greensboro Police Officer; and Frank Fairchild, FBI agent. Defendants offered no evidence.

The State's evidence, summarized except when quoted, is narrated below.

About 4:40 p.m. on December 10, 1970, three men entered the College Village branch of the North Carolina National Bank in High Point, where Mrs. Paul Richardson and Mrs. Ina Ray Gray worked as tellers. Everyone in the bank was ordered to get down on the floor. One of the men came behind the tellers' cages and, holding a gun at Mrs. Richardson's head, commanded her to empty into a pillowcase the money located at her window and Mrs. Gray's window. Mrs. Gray was made to get the key to the bank vault. Mrs. Richardson was dragged to the vault, all the while forced into a "stooped" position so that she could not look at the men, and made to fill the pillowcase with money from the vault. A gun was fired once. Mrs. Richardson was informed that "she was going to be a hostage." One of the men asked her if she had a car. She said, "Yes," and was made to get her keys from her teller's window. The four departed through the back door of the bank and got into Mrs. Richardson's Buick, with Mrs. Richardson at the driver's wheel.

On the lookout for "a '66 beige Buick," Officers J. A. Ledbetter and Gary Anderson sighted Mrs. Richardson's Buick stopped in a line of traffic headed north on Centennial Street because confronted by the red light at the intersection of Centennial and N. C. Highway #68. The police car pulled beside the Buick, Anderson driving and Ledbetter to his right. Ledbetter observed defendants Cox and Gary in the rear of the car and defendant Ward in the front seat on the right. Ledbetter and Anderson observed Cox sitting directly behind Mrs. Richardson with a pistol pointed to her head. The Buick turned out of the line of traffic, went through a service station yard, and headed east on #68. A quarter of a mile from the Centennial-#68 intersection, Cox crossed over from the back into the driver's seat, pushed Mrs. Richardson "over to the middle of the seat and down," and took control of the steering wheel, still holding his gun on Mrs. Richardson. Closely pursued by the police vehicle, which had its siren and emergency light on, the Buick attained speeds as high as 115 m.p.h. on the thickly-trafficked road. After four or five miles of this chase, Cox pulled to the side of the highway. The officers stopped about two car lengths behind.

Cox got out of the Buick on the driver's side, pulling Mrs. Richardson out with his left arm around her neck and his gun up to her head. The police officers got out of their vehicle and Cox began shooting at them, using Mrs. Richardson as a shield. Ledbetter and Anderson moved to the rear of their vehicle, and then Ledbetter crossed to the other side of the road. Cox came to the front of the police car, removed the keys, and shot through the windshield and over the roof. In the process of being dragged back and forth, Mrs. Richardson fell down on the ground. By this time the other two defendants had gotten out of the right-hand side of the Buick. Several more police cars were arriving on the scene. For the first time, Ledbetter and Anderson opened fire on the defendants. The defendants ran into the woods, continuing to shoot back at the police officers, and successfully eluded the officers who gave chase. A pillowcase "full of money" was found behind the driver's seat of the Buick, and more money was found in the woods nearby.

At 4:40 a.m. the next morning, December 11, 1970, when it was still dark, Officer J. G. Nixon was patroling in the vicinity of Meredith Drive in Greensboro. Three persons were beside the road and one attempted to flag him down. Nixon slammed on his brakes, turned his car around and went back. He then observed the defendants running beside a wooded area near Interstate 40. He got out, chased defendants a short distance, then went back to his patrol car to radio for help. Another car with Officers Austin and Stephenson arrived. The three officers went looking for the defendants. They followed Interstate 40, then turned into the woods and spread out. Nixon flashed on his flashlight and saw two of the defendants, lying face down. Nixon called to Austin and ordered the two to lie still. One of these defendants had a shotgun and came up on his knees. Austin hit him and grabbed the gun. Stephenson came over and grabbed the second defendant, and the two were handcuffed. Then the officers began looking for the third defendant, and he was found 20 feet north across a fence, lying face down. He got up and was handcuffed. A .22 pistol was found in the leaves, and more than $7,000.00 bound in bank straps of the North Carolina National Bank was recovered in a black skirt.

During the trial two *voir dire* hearings were held, one relating to the admissibility of certain testimony of Anderson and the other relating to the admissibility of certain testimony

of FBI Agent Frank Fairchild. Facts in connection with these hearings and the testimony of Fairchild will be stated in the opinion.

The jury found each defendant guilty of kidnapping; and, as to each, a judgment imposing a sentence of life imprisonment was pronounced.

Each defendant excepted and appealed.

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

Wallace C. Harrelson, Public Defender, and J. Dale Shepherd, Assistant Public Defender, for defendant appellants.

BOBBITT, Chief Justice.

In their brief, after stating quite accurately that they had brought forward "numerous assignments of error," defendants assert that "the most prejudicial to the defendants were those that are brought forward from the charge."

[1] Initially, defendants stress the fact that, although the indictments charged that Mrs. Richardson was kidnapped on December 17, 1970, all the evidence tends to show this occurred on December 10, 1970. As noted in our preliminary statement, defense counsel stated that he was fully aware that the State contended the crime was committed on December 10, 1970. He now contends that the trial of this case upon an indictment charging that the offense was committed on December 17, 1970, "played havoc with any alibi that the defendants might have had." This contention is without substance since defendants were arrested during the early morning of December 11, 1970, and thereafter were in the custody of State or federal officers. Time was not of the essence of the offense and no prejudice to defendants was caused by the clerical error.

[2] Defendants' brief further asserts that the trial judge's "clearest error" was in charging "on two distinct separately indictable crimes (robbery and conspiracy) which neither of the defendants has ever been charged with . . . . " Although defendants were not charged with conspiracy or with bank robbery, the facts tending to prove defendants' participation in these two crimes constitute an integral part of the proof of the

kidnapping for which they were indicted. The three crimes are so interwoven as to constitute one transaction or series of events. "It was not necessary, in order to submit to the jury the law as to criminal conspiracy, that the bill specifically charge conspiracy, if the evidence was sufficient to warrant this view. *S. v. Triplett,* 211 N.C. 105, 189 S.E. 123." *State v. Absher,* 230 N.C. 598, 54 S.E. 2d 922 (1949). There can be no doubt as to the sufficiency of the evidence to warrant findings that the men who robbed the bank were acting in furtherance of a common purpose, design and unlawful conspiracy, and that this unlawful conspiracy included the means for escape with the fruits of the robbery. The evidence was sufficient to support the conviction of each defendant of the crime of kidnapping on the legal principle that, in the accomplishment of the purpose and design of an unlawful conspiracy, each conspirator is responsible for the acts of his co-conspirators. Moreover, the judge correctly instructed the jury with reference to the principles of aiding and abetting in the commission of a felony. Apart from conspiracy, if the jury found that defendant Cox was guilty of the crime of kidnapping as principal, there was ample evidence to support the conviction of each of the others as an aider and abettor or principal in the second degree.

Defendants noted twenty exceptions to the charge. The excerpts to which they relate constitute a major portion of the charge. Although all have been considered, further discussion of these exceptions is unnecessary. The instructions are in substantial accord with our decisions. The assignments relating thereto are without merit.

[3] Mrs. Richardson and Mrs. Gray testified in detail as to what occurred at the bank when three men entered shortly after 4:30 p.m. on Thursday, December 10, 1970. The period covered by Mrs. Gray's testimony relates to what occurred until Mrs. Richardson was taken from the bank by the three robbers. Mrs. Richardson's testimony continues until she fell to the ground during the confrontation between the robbers and the pursuing officers. Both these witnesses testified they were unable to identify any of the defendants as being one of the three bank robbers.

Defendants excepted to and assigned as error all testimony of Mrs. Richardson and of Mrs. Gray referring to what "he" or "they" (that is, the unidentified robbers) did during the

robbery of the bank and the kidnapping of Mrs. Richardson. Both women testified that the three men who robbed the bank were the men who kidnapped Mrs. Richardson. Their testimony was competent when considered in connection with other State's evidence identifying defendants as the persons who robbed the bank and kidnapped Mrs. Richardson. These assignments are without merit.

[4] Defendants excepted to and assign as error the denial of their motions for a continuance and for a change of venue. These motions were addressed to the court's discretion. *State v. Baldwin,* 276 N.C. 690, 697, 174 S.E. 2d 526, 531 (1970); *State v. Ray,* 274 N.C. 556, 568, 164 S.E. 2d 457, 465 (1968). Defendants having failed to show abuse of discretion or prejudice, these assignments are overruled.

[5] Defendants excepted to and assign as error the overruling of their objections to certain questions on the ground the solicitor was leading the witness. "The allowance of leading questions is a matter entirely within the discretion of the trial judge, and his rulings will not be disturbed on appeal, at least in the absence of abuse of discretion." *State v. Painter,* 265 N.C. 277, 284, 144 S.E. 2d 6, 11 (1965). Defendants having failed to show abuse of discretion or prejudice, these assignments are overruled.

[6] Defendants excepted to and assign as error the denial of their motion that the court conduct a *voir dire* hearing to determine the admissibility of Officer Ledbetter's identification testimony. Absent evidence that Ledbetter had identified defendants in some pretrial lineup or confrontation, there was no basis for any contention that his in-court identification was in any way affected by such lineup or confrontation. Hence, this assignment is overruled.

Defendants excepted to and assign as error the admission of Officer Anderson's in-court testimony that the three male occupants of the Buick were Cox, Ward and Johnson [Gary]. Defense counsel obtained permission to cross-examine Anderson in the absence of the jury concerning his identification of defendants shortly after their arrest by Greensboro police officers. In the course of this cross-examination Anderson testified that early in the morning of December 11th, when traveling toward Greensboro, he received a call from the Greensboro police; and

that, in response to this call, he went to Meredith Drive and there found defendants Cox, Ward and Johnson [Gary], each in the back seat of a police car. He testified unequivocally that he based his in-court identification of defendants on his observation of them at the time of the gunfight, when he was approximately two car lengths from them. He further testified that "[he] knew them when [he] saw them" on Meredith Drive. Immediately following this statement, Anderson was asked, "Therefore, your testimony in court today, your identification is based partly on your observation of them in Greensboro in custody of the Greensboro police department?" Anderson answered: "Yes, sir." When considered in context, we attach no significance to this answer, except that Anderson was simply saying that the men whom he had pursued a few hours before were the identical men who were now seated in the police cars.

Defendants contend that Anderson's identification of defendants as the men whom he had pursued a few hours before was made under circumstances in the nature of a lineup or one-person confrontation; that defendants were not represented by counsel when Anderson identified them on Meredith Drive; and that the circumstances under which Anderson identified defendants were so suggestive as to render Anderson's identification of defendants on Meredith Drive "unconstitutionally prejudicial."

After hearing the cross-examination of Anderson by defendants' counsel in the absence of the jury, Judge Johnston concluded that this was not a lineup or one-person confrontation within the meaning of the decisons of the Supreme Court of the United States in *United States v. Wade,* 388 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926 (1967), and *Gilbert v. California,* 388 U.S. 263, 18 L.Ed. 2d 1178, 87 S.Ct. 1951 (1967). Thereupon he overruled defendants' objections to Anderson's in-court identification testimony. Defendants' assignments of error on this aspect of the case are addressed to the admission over objection of Anderson's in-court identification testimony and to the court's failure to find the facts as to the circumstances under which Anderson identified the defendants on Meredith Drive and as to whether his in-court identification testimony was tainted thereby.

[7] Defendants' assignments of error in this connection are without merit. Of course, the accuracy and credibility of Ander-

son's in-court identification testimony were proper subjects for cross-examination by defendants' counsel and for resolution by the jury. However, we are unwilling to extend the decisions bearing upon exclusion of in-court identification testimony because tainted by illegal pretrial identifications to the present factual situation. Here officers engaged in the pursuit of fleeing criminals whom they had had every opportunity to observe soon thereafter identified persons intercepted by different officers as the persons who a few hours before had eluded their pursuit and arrest. The *Wade* and *Gilbert* decisions simply do not apply to this type of identification.

We note that the testimony of Anderson, elicited on cross-examination *before the jury,* clearly indicates his independent identification of defendants. This testimony contains references to the position and actions of defendant Cox during the pursuit of the Buick and to the actions of Cox from the time the Buick stopped until the three men fled into the woods. It further refers to the actions of the two men other than Cox after the Buick stopped and the occupants got out of it.

Defendants' Assignments Nos. 14-17 relate to the testimony of FBI Agent Fairchild. He testified before the jury that, early in the morning of December 11, 1970, he went to Meredith Drive where the defendants were in the custody of the Greensboro police. He testified he then received from Officer Nixon the shotgun and [.22] pistol identified as State's Exhibits Nos. 3 and 4 and also money in excess of $7,000.00 which was enclosed by "bank straps of the North Carolina National Bank" and wrapped in a black cloth, "possibly a woman's skirt."

Then, in the absence of the jury, Fairchild was cross-examined as to the circumstances under which defendant Cox made a statement later admitted into evidence over defendants' objection. Fairchild's testimony on *voir dire* is summarized below.

Fairchild talked to Cox at the City-County Jail in High Point around 5:30 a.m. on the morning of December 11, 1970. He advised Cox of his constitutional rights as set forth in the *Miranda* decision. Cox stated that he understood his rights and signed "a rights waiver form." (Note: Fairchild testified "the rights waiver form" was not in the file he had with him but in a file at his office. The State did not produce the waiver form

nor did the defendants request that it be produced.) The conversation of Fairchild and Cox related primarily to the bank robbery.

[9] The court found as a fact that the confession made by Cox to Fairchild was made voluntarily and after he had been fully warned of his *Miranda* rights. Fairchild was then permitted to testify that during the course of their conversation defendant Cox stated, "in running through the woods after he left Mrs. Richardson's car that he lost his pistol in the woods, a 38 revolver." We find no evidence that a *.38 pistol* was used in the gun fight or that a *.38 pistol* was found in the woods. The implicating aspect of this testimony is that Cox was "running through the woods after he left Mrs. Richardson's car." Contrary to defendants' appraisal, we think the admission of this testimony constitutes their more serious assignment because of the State's failure to produce and offer in evidence at the *voir dire* hearing a written waiver by Cox in compliance with the statute then in effect and codified as G.S. 7A-457(a).

Later, Fairchild testified before the jury, over defendants' objections, that each defendant had pleaded guilty in federal court to the robbery of the College Village branch of the North Carolina National Bank on December 10, 1970, and that each was there represented by separate and independent counsel when his guilty plea was entered.

[8] Defendants base their objection to the admission of the evidence of their guilty pleas in federal court on the general rule that in a prosecution for a particular crime the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense. They cite *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954), which states the general rule and the established exceptions thereto. The first exception, for which numerous prior decisions are cited, is stated in these words: "1. Evidence disclosing the commission by the accused of a crime other than the one charged is admissible when the two crimes are parts of the same transaction, and by reason thereof are so connected in point of time or circumstance that one cannot be fully shown without proving the other." *Id.* at 174, 81 S.E. 2d at 366. The testimony under consideration fits this exception like a glove and illustrates its soundness.

Apart from the in-court identification testimony of the officers, Mrs. Richardson and Mrs. Gray testified unequivocally that the men who kidnapped Mrs. Richardson were the men who robbed the bank. Thus, their testimony, considered with defendants' judicial admissions, identifies the defendants as the kidnappers. Moreover, the impact of this testimony must be considered in the light of these evidential facts: Anderson testified that, after the three men fled, a pillowcase full of money was found on the floor of the back seat of the Buick directly behind the driver's seat, and later some money was found in the woods into which the three men had fled. Officer Nixon testified that, on the occasion when the three defendants were apprehended in the woods in the Greensboro area, he, along with other Greensboro officers and at least one FBI agent, found in excess of $7,000.00 in a lady's black skirt, sewed up at one end, which money had North Carolina National Bank wrappers on it.

[9] When the mass of evidence pointing to the guilt of the defendants is considered, we hold that errors, if any, in the admission of testimony, were harmless beyond a reasonable doubt. *Harrington v. California,* 395 U.S. 250, 23 L.Ed. 2d 284, 89 S.Ct. 1726 (1969); *Schneble v. Florida,* 405 U.S. 427, 31 L.Ed. 2d 340, 92 S.Ct. 1056 (1972); *State v. Doss,* 279 N.C. 413, 423-24, 183 S.E. 2d 671, 677 (1971); *State v. Jones,* 280 N.C. 322, 340, 185 S.E. 2d 858, 869 (1972). It appears beyond a reasonable doubt that these defendants would have been convicted of the crime charged if the evidence challenged as erroneous were not in the case. Fairchild's testimony as to Cox's statement concerning his flight from Mrs. Richardson's car was of negligible probative value when considered in the light of Cox's plea of guilty of the bank robbery.

The assignments of error not discussed specifically herein have been considered. They do not disclose prejudicial error or merit discussion.

Defendants having failed to show prejudicial error, the verdict and judgment of the court below will not be disturbed.

No error.

State v. Accor and State v. Moore

STATE OF NORTH CAROLINA v. RICHARD WILLIAM ACCOR

— AND —

STATE OF NORTH CAROLINA v. WILLARD MOORE

No. 17

(Filed 10 May 1972)

1. **Criminal Law § 66— illegal photographic identification — in-court identification — independent origin**

There was sufficient evidence to support the trial court's determination that in-court identifications of defendants as the perpetrators of a burglary arose out of the witness' observations of defendants during the crime and were independent of and not influenced by a preview of illegally obtained photographs.

2. **Criminal Law § 115— erroneous submission of lesser offenses — absence of prejudice**

In a prosecution for first degree burglary, error, if any, in the submission of lesser included offenses was favorable to defendants and was, therefore, nonprejudicial. G.S. 15-170.

3. **Criminal Law § 122— additional instructions urging verdict**

Trial court's additional charge to the jury after the dinner recess, "If you don't reach a verdict, of course, it will be necessary that the case be tried again and someone is ultimately going to have to decide the case in Gaston County and I hope it will be you," *held* without error where the court further charged that no juror should surrender any conscientious opinion in order to reach a verdict.

THE case is now before this Court on the defendants' appeal from the decision of the North Carolina Court of Appeals finding no error in their trial, convictions, and sentences in the Superior Court of GASTON County at the February 1, 1971 Session. The decision affirmed the convictions of felonious housebreaking. The defendants contend their appeal is authorized by G.S. 7A-30(1). The State contends that all constitutional questions have been decided adversely to the defendants' contentions, and the appeal should be dismissed.

Robert Morgan, Attorney General by Walter E. Ricks III, Associate Attorney, for the State.

Chambers, Stein, Ferguson & Lanning by James E. Ferguson, II, and Adam Stein for defendant appellants.

HIGGINS, Justice.

Resolution of the legal questions involved in the defendants' appeal and in the State's motion to dismiss require a review of what has already been decided in this case.

Defendants, Richard William Accor and Willard Moore, were charged by grand jury indictment with the crime of burglary in the first degree. They were convicted by the jury of burglary in the first degree with a recommendation punishment be imprisonment for life. From the judgment, in accordance with the verdict entered in the Superior Court of Gaston County on May 26, 1969, they appealed. The appeal was argued here on the merits. After argument, this Court found defects in the record which the Court ordered corrected. 276 N.C. 567, 173 S.E. 2d 775. After a correct record was certified to this Court and after careful consideration of the questions presented on the appeal, this Court found the trial court had committed error in the admission of evidence and ordered a new trial. 277 N.C. 65, 175 S.E. 2d 583.

At the new trial before Thornburg, S.J., at the February 1, 1971 Session, the defendants were again placed on trial on the original indictment, a copy of which appears at page 567, 276 N. C. Reports and again at page 68, 277 N.C. Reports.

At the trial before Judge Thornburg the State sought to offer the evidence of witnesses Witt Martin, James Martin, and Elizabeth Martin Carson identifying the defendants as the two colored males who broke into the residence of Mrs. Carson and, when discovered, assaulted both Witt Martin and James Martin. The defendants objected to the identifications on the ground they were tainted by a preview of an album in which illegally obtained pictures of the defendants appeared. The court conducted a thorough voir dire examination, heard evidence, found facts, and entered the following:

> "1. That the photographs displayed to the witnesses were illegally obtained and are inadmissible as evidence in the cause now on trial.
>
> "2. That the State may not offer the testimony of Elizabeth Martin Carson as to the identity of the parties involved in the trial of this action by reason of the fact that her testimony does not meet the standards for in-court

identity previously fashioned by the courts of this State or the Federal Court.

"3. That the witnesses, Witt Martin and James Martin, may offer and make in-court identification in this case, their identifications having been determined by the Court to be of independent origin and not tainted by the photographs referred to."

Mrs. Carson was called as a State's witness. She testified before the jury as to what occurred in her home on the night of March 4, 1969. At no time, however, was she permitted to testify as to the identity of the intruders into her home. The State's witnesses, Witt Martin and James Martin, were permitted to testify before the jury identifying Richard William Accor and Willard Moore as the men who forcibly entered the Carson home about 2:00 a.m. on the night of March 4, 1969, and after discovery assaulted them.

The defendants testified denying they were in the Carson home on the night of March 4, 1969. They admitted they were together on the day of March 3, 1969, and until late in the night when they separated and went to their respective homes. Moore testified he arrived at home about 1:56 a.m. Accor testified: "It was about between quarter to 2:00 or 2:00, somewhere around in that area when I got in the house . . . . " The two men lived near each other in Gastonia. Both testified that they had been engaged in heavy drinking throughout the day and until shortly before they separated.

After the arguments, the court charged the jury that under the evidence the jury could render one of four verdicts: (1) guilty of burglary in the first degree with the recommendation the punishment be imprisonment for life in the State's prison; (2) guilty of felonious housebreaking; (3) guilty of non-felonious housebreaking; or (4) not guilty. At the conclusion of the charge the court asked counsel, both for the State and for the defendants, if there was any request for further instruction. The solicitor replied, "No, sir." Defense counsel replied, "No, your Honor."

After the jury had deliberated for one hour and fifty minutes, the court sent them to dinner in charge of an officer. When they returned to the courtroom at 9 o'clock, the court gave this instruction:

"THE COURT: Members of the Jury, I wanted to be certain that you were all together before you continued your deliberations and also to give you these additional instructions, that it is not anticipated when twelve people retire to a jury room for the purpose of making up a verdict that they will be all of the same mind or opinion as to what verdict should be reached. That's the reason we have twelve jurors who are chosen so that they may sit, consider the opinions that each of the others has and do their best, after thinking on their own and considering the opinions of others, to reach a just verdict in the case. You have not been out long up to this point but I do hope that you and members of this jury will be able to reach a verdict as to each defendant. Coming as you do from all parts of Gaston County, certainly you represent a cross section of the County, and certainly you are as intelligent a jury as we would ever hope to have to hear the evidence in the case. If you don't reach a verdict, of course, it will be necessary that the case be tried again and someone ultimately is going to have to decide this case in Gaston County and I hope it will be you. I am not asking either of you at any time to surrender any conscientious opinion that he or she may have as to how the verdict should be reached as to each defendant, but I am asking you to do your very conscientious best to reach a verdict in this case as to each defendant. With those additional instructions, you may be excused to continue your deliberations."

Two hours later the jury returned into court and rendered this verdict: "Guilty of felonious breaking and entering." The court imposed on each defendant a prison sentence of eight to ten years "to have credit for jail time and prison time served from March 6, 1969." The defendants appealed to the North Carolina Court of Appeals. The decision finding no error in the trial is reported in 13 N.C. App. 10, 185 S.E. 2d 261.

Within the time permitted, the defendants filed notice of appeal to this Court alleging that in their trial their constitutional rights had been denied them in three particulars: (1) by permitting the State's witnesses Witt Martin and James Martin to identify the defendants as the two men who entered the Elizabeth Martin Carson home on the night of March 4, 1969; (2) by the trial court's instruction to the jury that it

should render one of four verdicts; and (3) the court's instruction after the jury had begun its deliberations.

Unless there is merit in one or more of the above particulars in which the defendants allege their rights were denied, the motion of the State to dismiss should be allowed, or the decision of the Court of Appeals affirmed.

When the court ascertained the State intended to offer evidence of Witt Martin, James Martin, and Elizabeth Martin Carson identifying the defendants as the men who broke into the Carson home on the night of March 4, 1969, and that the defendants intended to challenge on the ground the witnesses had been shown illegally obtained photographs of the defendants placed in an album with other photographs, thus tainting the identifications rendering them inadmissible in evidence, the court conducted an extensive voir dire. Witt Martin and James Martin each testified he had a full face view of the intruders under good light and that there was no doubt in his mind about the identity of the intruders into the home. While he saw the album, his identification was based exclusively on his face to face confrontation in the home.

Mrs. Carson testified that she saw the two intruders into the home and later saw their pictures in an album. The court sustained the defendants' objection to testimony of identification.

[1] The court made detailed findings of fact and concluded that Witt Martin and James Martin were qualified to give identifying evidence before the jury, specifically finding their identifications were independent of and not influenced by a preview of the illegally obtained photographs. Their identifications were based entirely on the face to face confrontations in the home. The court concluded that Mrs. Carson's evidence might have been influenced by the album and sustained the defendants' objection to her identifying testimony. The court permitted Witt Martin and James Martin to testify before the jury. The admission of their testimony is challenged by the defendants.

It is well established in North Carolina that findings of fact made by the trial judge and conclusions drawn therefrom on the voir dire examination are binding on the appellate courts if supported by evidence. *State v. Wright,* 274 N.C. 380, 163

S.E. 2d 897; *State v. Wilson,* 262 N.C. 419, 137 S.E. 2d 109; *State v. Austin,* 276 N.C. 391, 172 S.E. 2d 507.

" . . . (I)f the in-court identification had an independent origin it is competent. If it resulted from the illegal, out-of-court confrontation it is incompetent. . . . That question should be decided by the trial court on a voir dire examination . . . . " *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581. See also *Wong Sun v. U. S.,* 371 U.S. 471, 9 L.Ed. 2d 441; and *State v. Gatling,* 275 N.C. 625, 170 S.E. 2d 593; and *U. S. v. Wade,* 388 U.S. 218, 18 L.Ed. 2d 1149.

The defendants have not been denied their constitutional rights by the admission of testimony of Witt Martin and James Martin at the trial. The decision of the Court of Appeals so holding is sustained by the authorities and is correct.

[2] The defendants challenged the court's charge on the permissible verdicts which are included lesser offenses in an indictment charging first degree burglary. 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." *State v. Allen,* 279 N.C. 115, 181 S.E. 2d 453; *State v. Fikes,* 270 N.C. 780, 155 S.E. 2d 277; *State v. Perry,* 265 N.C. 517, 144 S.E. 2d 591; *State v. Chambers,* 218 N.C. 442, 11 S.E. 2d 280.

In the first trial the defendants were convicted of burglary in the first degree and given sentences of life imprisonment. In the trial now under review they were convicted of felonious housebreaking and given sentences of eight to ten years. They were on trial in the State court for a violation of State law. Error, if any, in the submission of lesser offenses was favorable to the defendants and hence was nonprejudicial. Constitutional rights were not infringed.

[3] Finally, the defendants contend the court's additional charge, heretofore quoted in full, violated their constitutional rights to a fair trial. A reading of that portion of the charge which is the subject of the objection, shows conclusively that the court was explaining to twelve laymen that it was their duty to act and they could only act as a body. *State v. Green,* 246 N.C. 717, 100 S.E. 2d 52; *State v. Barnes,* 243 N.C. 174, 90 S.E. 2d

321. Nothing unfair or prejudicial to the defendants' rights can be read into the additional charge. The jury's verdict under the evidence in the case was not unkind to the defendants. The court's failure to sequester the witnesses was discretional.

After careful review, we find the decision of the Court of Appeals is correct and in accordance with our decided cases. That decision is

Affirmed.

IN THE MATTER OF THE APPEAL OF STRONG TIRE SERVICE, INC., GREENSBORO, NORTH CAROLINA

No. 60

(Filed 10 May 1972)

1. **Taxation § 25— ad valorem taxes — unlisted property — listing by tax supervisor — assessment by county commissioners**

When county tax authorities discover that property subject to ad valorem taxes has not been listed, it is the duty of the tax supervisor to list such property in the name of the taxpayer; and, in such case, the county commissioners may assess the previously unlisted property for the preceding years, not exceeding five, during which it escaped taxation and for the current year, and may assess a penalty for the taxpayer's failure to list it in accordance with statutory requirements. G.S. 105-331.

2. **Taxation § 25— understatement of inventory — failure to list portion of inventory — assessment by county commissioners**

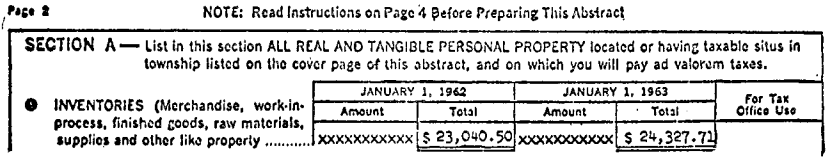
Where inventories were identified and listed only by value on ad valorem taxation forms, the taxpayer's gross understatement of the value of its inventories, as shown by the taxpayer's records, for each of the years 1963-1968 constituted a failure to list a portion of its inventories for those years; consequently, the board of county commissioners was authorized by G.S. 105-331 to assess taxes with penalties for each of those years on the difference between the amount reported on the tax forms as inventory and the value of inventory shown by the taxpayer's records.

APPEAL by Guilford County from *Exum, J.*, at January 7, 1971 Session of GUILFORD Superior Court, docketed and argued as No. 43 at Fall Term 1971.

Strong Tire Service, Inc., hereafter called taxpayer, listed tangible personal property for ad valorem taxation by Guilford

County for the years 1963, 1964, 1965, 1966, 1967 and 1968 on the "Business Property Abstract" forms.

The following is the pertinent part of the taxpayer's completed form for 1963.

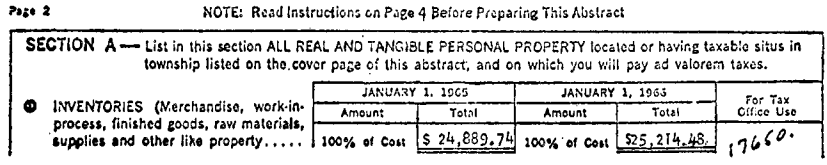


Page 2 NOTE: Read Instructions on Page 4 Before Preparing This Abstract

SECTION A — List in this section ALL REAL AND TANGIBLE PERSONAL PROPERTY located or having taxable situs in township listed on the cover page of this abstract, and on which you will pay ad valorem taxes.

	JANUARY 1, 1962		JANUARY 1, 1963		For Tax Office Use
	Amount	Total	Amount	Total	
● INVENTORIES (Merchandise, work-in-process, finished goods, raw materials, supplies and other like property	XXXXXXXXXX	$ 23,040.50	XXXXXXXXXX	$ 24,327.71	

The following is the pertinent part of the taxpayer's completed form for 1966.



Page 2 NOTE: Read Instructions on Page 4 Before Preparing This Abstract

SECTION A — List in this section ALL REAL AND TANGIBLE PERSONAL PROPERTY located or having taxable situs in township listed on the cover page of this abstract, and on which you will pay ad valorem taxes.

	JANUARY 1, 1965		JANUARY 1, 1966		For Tax Office Use
	Amount	Total	Amount	Total	
● INVENTORIES (Merchandise, work-in-process, finished goods, raw materials, supplies and other like property.....	100% of Cost	$ 24,889.74	100% of Cost	$25,214.48	17660

Except for the differences in the figures, the completed forms for 1964 and 1965 are the same as the completed 1963 form. Except for the differences in the figures, the completed forms for 1967 and 1968 are the same as the completed form for 1966. In the completed forms for 1966-68, these words and figures appear below the heading "Amount": "100% of Cost." A series of x's appears in the corresponding spaces in each of the completed returns for 1963-65.

An examination of the taxpayer's records in 1968 disclosed that its inventories on the first day of January of each of the years 1963-68 had a value greatly in excess of that reflected in the taxpayer's returns. Thereupon, the tax supervisor listed in the taxpayer's name inventories for each of the years 1963-68 in the amount of the difference between the amounts specified in the taxpayer's returns and the amounts of the taxpayer's inventories as shown by its records.

On October 7, 1968, the Guilford County Board of Commissioners approved a tax assessment with penalties and interest, based on authority for the assessment of unreported tangible personal property conferred by G.S. 105-331. The taxpayer appealed the County Board's decision to the State Board of Assessment.

The appeal came on for hearing before the State Board of Assessment, sitting as the State Board of Equalization and Review (State Board), on September 17, 1969. It was there stipulated that the taxpayer's actual inventories according to its records, the amounts reported to the county and the differences between these two figures for the years 1963-68 are as follows:

	1963	1964	1965
Inventories per records	53,033	56,032	70,463
Amounts reported	24,327	23,120	24,890
Differences	28,706	32,912	45,573

	1966	1967	1968
Inventories per records	79,511	95,785	101,560
Amounts reported	25,214	25,982	27,541
Differences	54,297	69,803	74,019

Each of the abstracts was signed by a named individual who describing himself as an officer or agent of the taxpayer, solemnly swore "that the above listing of real and tangible personal property [was] a full, true and complete list as abstract indicates." There was no evidence as to the method, if any, employed by the taxpayer to arrive at the reported inventory figures. The percentages of the taxpayer's actual inventories reported to the county was: 45.87% for 1963; 41.26% for 1964; 35.32% for 1965; 31.71% for 1966; 27.13% for 1967; and 27.12% for 1968.

The State Board, having found the facts stated above, concluded "that the abstracts filed by the appellant for the years under appeal were not complete listings of all property owned by the appellant as of the assessment dates. . . . that for each of the years under appeal, to wit: 1963, 1964, 1965, 1966, 1967 and 1968, the appellant failed to list that portion of its inventory represented by the difference between the amount shown by its records and the amount reported to Guilford County as inventory. . . . that the appellant filed the abstracts with full knowledge that they did not accurately reflect its inventories for the years under appeal." Thereupon, the State Board ordered "that the action of the Guilford County Board of Commissioners in assessing taxes and penalties on the inventories not listed

by the appellant for the years 1963 through 1968 is hereby sustained."

After hearing in the Superior Court, upon the taxpayer's petition for review of the decision of the State Board, Judge Exum entered judgment in favor of the taxpayer which concluded as follows:

"(1) The taxpayer in question did list its *'Inventories'* for the years 1963-1968;

"(2) That G.S. 105-331 entitled DISCOVERY AND ASSESSMENT OF PROPERTY NOT LISTED DURING THE REGULAR LISTING PERIOD does not apply in this instance; and

"(3) That although the facts found by the State Board of Assessment are supported by the evidence. the FINAL DECISION OF THE STATE BOARD OF ASSESSMENT including the CONCLUSION, DECISION AND ORDER OF THE STATE BOARD OF ASSESSMENT entered September 17, 1969, is in error as a matter of law, in that it is not supported by the facts found, is in excess of the statutory authority of the Board, is arbitrary and capricious and is prejudicial to substantial rights of the taxpayer.

"IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that the FINAL DECISION OF THE STATE BOARD OF ASSESSMENT be and the same is hereby reversed."

Guilford County excepted and appealed. The case was transferred from the Court of Appeals for initial appellate review by the Supreme Court under our general order of July 31, 1970, entered pursuant to G.S. 7A-31(b) (4).

W. B. Trevorrow and Ralph A. Walker for appellant Guilford County.

Frazier, Frazier & Mahler, by Harold C. Mahler and Spencer W. White, for appellee Strong Tire Service, Inc.

Attorney General Morgan and Deputy Attorney General Benoy for North Carolina State Board of Assessment, amicus curiae.

John T. Morrisey, Sr., for North Carolina Association of County Commissioners, amicus curiae.

BOBBITT, Chief Justice.

[1] When county tax authorities discover that property subject to ad valorem taxes has not been listed, it is the duty of the tax supervisor to list such property in the name of the taxpayer; and, in such case, the county commissioners may assess the previously unlisted property "for the preceding years during which it escaped taxation, not exceeding five, in addition to the current year," and may assess a penalty for the taxpayer's failure to list it in accordance with statutory requirements. G.S. 105-331.

[2] In reversing the State Board, Judge Exum held the provisions of G.S. 105-331 do not apply to the present factual situation. He accepted taxpayer's contention that, although the figures under "Total" did not reflect the true value of taxpayer's inventories as shown by its records, taxpayer's failure to state the true value thereof may not be considered a failure to list a portion of its inventories.

Spiers v. Davenport, 263 N.C. 56, 138 S.E. 2d 762 (1964), and *Wolfenden v. Commissioners,* 152 N.C. 83, 67 S.E. 319 (1910), cited and stressed by taxpayer, hold that the county commissioners have no authority to raise the appraised value of *specific listed property* after final adjournment of the county board of equalization and review and the assessment and payment of the taxes thereon. Specific parcels of real estate were involved in *Spiers.* Specific mortgage notes were involved in *Wolfenden.* The statutory provisions governing the procedure in such cases are discussed by Justice Rodman in *Spiers* and need not be repeated here. The question before us is whether taxpayer *listed all of its inventories* for the years 1963-68 or only a portion thereof.

Included in the record before us are pages 1, 2 and 3 of each of the abstracts for 1963-68. As indicated in our preliminary statement, there appears at the top of page 2 the following: "NOTE: Read Instructions on Page 4 Before Preparing This Abstract." However, page 4 (presumably the reverse side of page 3) is not before us.

G.S. 105-306 provides in part: "Each taxpayer or person whose duty it is to list property for taxation shall file with the proper list taker a tax list setting forth, as of the day on which property is assessed, the following information: . . . . (14) The

amount and value of merchandise, manufactured goods, or goods in the process of manufacture. This subdivision is intended to include all tangible personal property whatever held for the purpose of sale or exchange or held for use in the business of the taxpayer."

G.S. 105-294 provides in part: "All property, real and personal, shall as far as practicable be appraised or valued at its true value in money. The intent and purpose of this section is to have all property and subjects of taxation appraised at their true and actual value in money, in such manner as such property and subjects of taxation are usually sold, but not by forced sale thereof; and the words 'market value,' 'true value,' or 'cash value,' whenever used in this chapter, shall be held to mean for the amount of cash or receivables the property and subjects can be transmuted into when sold in such manner as such property and subjects are usually sold."

The abstract form permitted taxpayer to list its inventories in bulk. Since neither itemization nor identification was required, the extent or "Amount" of taxpayer's inventory was shown only by the figure entered under the word "Total." Thus, taxpayer was permitted to identify and list its inventories by value rather than by description. In the absence of special circumstances, it was contemplated that the reported value of the inventory would be its value as shown by taxpayer's records.

In the abstracts for 1966, 1967 and 1968, under the word "Amount," which precedes the word "Total," are the printed words "100% of Cost." Since page 4 (instructions to be read before preparing the abstract) was not included in the record, whether page 4 of the abstracts for 1963, 1964 and 1965 contained instructions pertinent to the listing of inventories cannot be answered from the record before us.

Taxpayer stipulated that the value of its inventories as shown by its own records as of January 1 of each of the years 1963-68 greatly exceeded the amounts shown as totals on its six abstracts. No attempt was made to justify the figures in its abstracts. In gist, taxpayer admits its inventories were greatly undervalued but asserts that the failure of the tax supervisor to challenge its figures before the final session of the Board of Equalization and Review clears it from obligation to pay additional taxes.

Notwithstanding the explicit provisions in the abstracts for 1966, 1967 and 1968 to the effect that the amount of inventories was to be "100% of Cost," each year during the period 1963-68 the percentage shown under "Total" of the true value of taxpayer's inventories as shown by its own records continued its downward course. Taxpayer's contention that in each of the years 1963-68 it listed its entire inventories for ad valorem taxation is unimpressive. When inventories are identified and listed only by value, gross understatement of value is evidence that *all* of taxpayer's inventories were not listed.

We think the evidence was sufficient to support the State Board's finding (erroneously set forth as a conclusion of law) that taxpayer "failed to list that portion of its inventory represented by the difference between the amount shown by its records and the amount reported to Guilford County as inventory," and that taxpayer "filed the abstracts with full knowledge that they did not accurately reflect its inventories" for the years 1963-68.

G.S. 105-331, -306 and -294, as codified in Volume 2D of the General Statutes (Replacement 1965), are applicable to the taxation periods involved in this case. They clearly require taxpayer to pay taxes on the full value of its inventories. We note that these statutory provisions were superseded by Chapter 806 of the Session Laws of 1971.

The judgment of the Superior Court is reversed; and the cause is remanded for the entry of a judgment affirming the decision of the State Board.

Reversed and remanded.

Stevenson v. City of Durham

ANNIE NEAL STEVENSON, SISTER, CURTIS DANIELS, BROTHER, ALFRED DANIELS, BROTHER, O'NEAL DANIELS, DECEASED EMPLOYEE v. CITY OF DURHAM, EMPLOYER, SELF-INSURER

No. 3

(Filed 10 May 1972)

1. **Statutes § 5— statutory construction — legislative intent**

The intent of the legislature controls the interpretation of a statute; in seeking to discover this intent, the courts should consider the language of the statute, the spirit of the act, and what the act seeks to accomplish.

2. **Master and Servant § 47— Workmen's Compensation Act — construction**

The Workmen's Compensation Act should be liberally construed so that the benefits under the Act will not be denied by narrow, technical or strict construction.

3. **Master and Servant § 79— workmen's compensation — death benefits — next of kin**

Brothers and sisters of a deceased employee who are eighteen years of age or older and married are "next of kin" as defined in G.S. 97-40 and are entitled to receive compensation for the death of an employee who left no wife, child, parents or dependents surviving him, the dependency, age and marital status restrictions contained in G.S. 97-2(12) not being applicable to the definition of "next of kin" contained in G.S. 97-40.

APPEAL from decision of the North Carolina Court of Appeals (12 N.C. 632) affirming opinion and award of the North Carolina Industrial Commission.

The facts stipulated by the parties to this action disclose that O'Neal Daniels was killed on 18 September 1969 as a result of an accident which arose out of and in the course of his employment with defendant City of Durham. Defendant was a self-insurer. Deceased left no wife, child, parents, or dependents of any kind surviving him. He was survived by two brothers and one sister, all of whom were married and over eighteen years of age at the time of his death.

The surviving sister and brothers filed a claim with the North Carolina Industrial Commission alleging that they were next of kin pursuant to G.S. 97-40 and were therefore entitled to compensation as his next of kin.

The North Carolina Industrial Commission held that claimants were not next of kin and therefore no compensation

was due or payable as a result of the employee's death, except the sum of $500 already paid to his administratrix to be applied on burial expenses.

Claimants appealed, and the Court of Appeals affirmed, with Chief Judge Mallard dissenting.

The case is before this Court on appeal pursuant to G.S. 7A-30(2).

Mason H. Anderson for plaintiff appellants.

C. V. Jones, S. F. Gantt by S. F. Gantt, for defendant appellee.

BRANCH, Justice.

The question presented by this appeal is whether "brothers" and "sisters" who are eighteen years of age, or older, and married are "next of kin" as defined in G.S. 97-40.

At the time of O'Neal Daniels' injury and death, G.S. 97-40, in part, provided:

> 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 or 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. . . .
>
> 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. (Emphasis ours.)

G.S. 97-38 classifies those persons eligible to receive, and determines the amount of, death benefits payable under the Workmen's Compensation Act to persons wholly or partially dependent upon the earnings of a deceased employee. If the deceased employee leaves neither whole nor partial dependents, as here, then G.S. 97-40 provides for the commutation and payment of compensation to the "next of kin" *as therein defined.*

The Court of Appeals, relying on the case of *Jones v. Sutton,* 8 N.C. App. 302, 174 S.E. 2d 128, affirmed the opinion and award of the Industrial Commission. The rationale of the majority decision of the Court of Appeals is that G.S. 97-40 and G.S. 97-2(12) are in *pari materia* and therefore should be construed with reference to each other. G.S. 97-2(12) provides:

> Child, Grandchild, Brother, Sister.—The term "child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent upon him. "Grandchild" means a child as above defined of a child as above defined. "Brother" and "sister" include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but does not include married brothers nor married sisters unless wholly dependent on the employee. "Child," "grandchild," "brother" and "sister" include only persons who at the time of the death of the deceased employee are under eighteen years of age.

After the Court of Appeals filed its decision in this case, this Court, in the case of *Smith v. Exterminators,* 279 N.C. 583, 184 S.E. 2d 296, in construing G.S. 97-38 and G.S. 97-40, stated:

> " . . . 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. . . .* " (Emphasis ours.)

G.S. 97-40 as rewritten by the 1965 General Assembly added "next of kin" as a category of persons entitled to death benefits under the Workmen's Compensation Act. The rewritten statute defined the term "next of kin" and specified the order of priority among "next of kin" who are neither wholly nor partially dependent upon the deceased employee and who take under the section.

[1, 2] The primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute. In seeking to discover this intent, the courts should consider the language of the statute, the spirit of the act, and what the act seeks to accomplish. *Galligan v. Chapel Hill,* 276 N.C. 172, 171 S.E. 2d 427; *State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765; *Freeland v. Orange County,* 273 N.C. 452, 160 S.E. 2d 282. Equally well recognized is the rule that the Workmen's Compensation Act should be liberally construed so that the benefits under the Act will not be denied by narrow, technical or strict interpretation. *Hollman v. City of Raleigh,* 273 N.C. 240, 159 S.E. 2d 874; *Cates v. Construction Co.,* 267 N.C. 560, 148 S.E. 2d 604; *Keller v. Wiring Co.,* 259 N.C. 222, 130 S.E. 2d 342. "In seeking to discover and give effect to the legislative intent, an act must be considered as a whole, and none of its provisions shall be deemed useless or redundant if they can reasonably be considered as adding something to the act which is in harmony with its purpose. *In re Watson,* 273 N.C. 629, 161 S.E. 2d 1; *Jones v. Board of Education,* 185 N.C. 303, 117 S.E. 37." *State v. Harvey,* ante 1, 187 S.E. 2d 706.

Imposition of the restrictions contained in G.S. 97-2(12) upon the definition of "next of kin" as defined in G.S. 97-40 would require that we ignore the unambiguous language contained in G.S. 97-40 that "next of kin" be as "herein defined." Further, a child, brother or sister who is partially or wholly dependent and under eighteen years of age would take death benefits under the provisions of G.S. 97-38. Thus, the imposition of the restrictions of dependency and age contained in G.S. 97-2(12) would result in a narrow and technical interpretation of the Workmen's Compensation Act.

[3] We conclude that the 1965 re-write of G.S. 97-40 shows a clear intent by the General Assembly to remove the requirements of dependency, age and marital status from the definition

of "next of kin" who are entitled to death benefits under Section 40 of the Workmen's Compensation Act. This conclusion draws strength from the fact that the 1972 General Assembly (after the decision in *Jones v. Sutton, supra)* further amended G.S. 97-40 so as to include adult children or adult brothers and adult sisters in the definition of "next of kin" contained in that section. By this amendment the General Assembly again evidenced its intent that the definition of "next of kin" as contained in G.S. 97-40 should not be narrowly and strictly limited by the provisions of G.S. 97-2(12). *Cates v. Construction Co., supra.*

We note with approval the reasoning and conclusions in the dissenting opinion filed in the Court of Appeals by Mallard, Chief Judge.

The doctrine of *pari materia* does not apply and the provisions of G.S. 97-40 should not be construed with the provisions of G.S. 97-2(12).

We hold that brothers and sisters who are eighteen years of age or older, and who are married, are "next of kin" as defined in G.S. 97-40.

The decision of the Court of Appeals is

Reversed.

STATE OF NORTH CAROLINA v. JACK ARNOLD McINTYRE

No. 107

(Filed 10 May 1972)

Narcotics § 5; Criminal Law § 138— possession of marijuana — punishment statute changed pending defendant's appeal

A defendant whose appeal from conviction of possession of more than one gram of marijuana was pending on 1 January 1972, the effective date of the act reducing that crime from a felony to a misdemeanor, is not entitled to the benefit of the more lenient punishment provisions of the new act, since the new act contains savings clauses providing that it would apply only to violations of law "following January 1, 1972" and that prosecutions for violations of law occurring prior to that date should not be affected by its provisions. G.S. 90-113.7.

State v. McIntyre

ON *certiorari*, upon petition by the State of North Carolina, to review the decision of the Court of Appeals reported in 13 N.C. App. 479, 186 S.E. 2d 207.

Defendant was tried at the May 1971 Session of ROBESON upon a bill of indictment charging that, in violation of G.S. 90-88, on 21 March 1971 he had in his "possession a certain quanity of the drug marihuana, to wit: 168 grams." He was convicted of the offense charged, a felony. Acting under G.S. 90-111, *Judge Canaday* imposed a prison sentence of 3-5 years.

The State's evidence tended to show: On the afternoon of 21 March 1971, Deputy Sheriff Hubert Stone, who had a search warrant for defendant's car and was looking for him, saw defendant driving a Toyota on Main Street in Pembroke. The officer followed the Toyota, which made several turns at intersecting streets. At a time when Stone was about 50 feet behind the Toyota, at the intersection of Pine Street and Fifth Street, defendant threw out a blue object. It landed on a lawn at the corner of Pine and Fifth. About 300 yards from that spot the officer stopped defendant and informed him he had a search warrant for his automobile. Defendant told him to go ahead and search, that he would find nothing but a pistol lying on the seat, and that was what the officer found.

Defendant was allowed to continue on his way, and Stone returned to the place where he had seen defendant throw the blue object from the Toyota. There he found a blue bank-deposit bag containing several small plastic pouches filled with vegetable matter. In the officer's opinion, the stuff was marihuana. Approximately ten minutes elapsed from the time Stone saw defendant throw out the blue bag until he picked it up on the lawn.

Immediately after finding the bag, Stone went in search of defendant. In about three minutes he found him stopped for a red light near the spot he had first seen him. Stone showed defendant the bag and told him he "would be back with a warrant" if a laboratory analysis confirmed his suspicion that the substance in the plastic was marihuana. The bag and its contents were sent to the laboratory of the State Bureau of Investigation at Raleigh for analysis and a search for fingerprints. The laboratory found that the bag contained 74.9 grams of marihuana, and that defendant's fingerprints were on the plastic bags containing the contraband. In consequence, defendant was charged with the possession of marihuana and arrested.

Defendant offered evidence of his good character and testified that, although the sequence of events occurred as Deputy Stone stated, he did not throw anything out of the car window and had no marihuana in his possession on 21 March 1971.

Defendant appealed his conviction and sentence to the Court of Appeals. In an opinion, filed 2 February 1972 and written by Chief Judge Mallard, Judges Hedrick and Graham concurring, the Court of Appeals found no error in the trial and affirmed defendant's conviction of the crime of possessing more than one gram of marihuana, G.S. 90-111 (Supp. 1969). Citing *State v. Pardon,* 272 N.C. 72, 157 S.E. 2d 698, as controlling its decision, the Court held that the North Carolina Controlled Substances Act, which became effective 1 January 1972 and reduced the mere possession of marihuana to a misdemeanor, governed the punishment in all pending prosecutions for its possession. Whereupon it reduced the 3-5-year sentence which Judge Canaday had imposed, to only six months. The State petitioned for certiorari under G.S. 7A-31(a) and (c)(3), and its petition was allowed.

Attorney General Robert Morgan; Associate Attorney Henry E. Poole for the State.

John C. B. Regan III for defendant appellee.

SHARP, Justice.

The one question presented is whether defendant's possession of marihuana on 21 March 1971 is punishable as a felony under G.S. 90-111 (Supp. 1969) or as a misdemeanor under G.S. 90-95(e) (Supp. 1971). The question was decisively answered by our decision in *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706: Defendant's crime is punishable as a felony.

In *Harvey,* as in this case, the defendant was indicted, tried and convicted under G.S. 90-88 (1965), which made illegal the possession of any quantity of marihuana. Also in effect at the time the offenses were committed was the proviso, which was incorporated into G.S. 90-111 by N. C. Sess. Laws, Ch. 970, § 3 (1969). This proviso made the possession of more than one gram of marihuana a felony, punishable by not more than five years in the penitentiary.

Both this case and the Harvey case were in the appellate division on 1 January 1972, the date on which the North

Carolina Controlled Substances Act, G.S. 90-86 to -113.9 (Supp. 1971), supplanted the Uniform Narcotic Drug Act, G.S. 90-87 to -111.2 (1965) *as amended* (Supp. 1969). The Controlled Substances Act specifically provided, however, that it would apply only to violations of law "following January 1, 1972," and that prosecutions for any violations of law occurring prior to that date should not be affected by its provisions. G.S. 90-113.7 (Supp. 1971).

We held in *Harvey* that the savings provision of the Controlled Substances Act (G.S. 90-113.7) made the decision in *State v. Pardon,* 272 N.C. 72, 157 S.E. 2d 698, inapplicable to any offense committed prior to 1 January 1972 and that, as to such offenses, the Narcotic Drug Act continued in full force and effect.

Upon the authority of *Harvey,* the decision of the Court of Appeals is reversed, and the cause is remanded to that court with directions that the judgment of the Superior Court be reinstated and affirmed.

Reversed.

JERRY W. GOBLE v. V. LEE BOUNDS, DIRECTOR OF THE NORTH CAROLINA DEPARTMENT OF CORRECTION

No. 111

(Filed 10 May 1972)

Convicts and Prisoners § 2— prison records — inspection by inmate

A prison inmate has no right to examine the contents of his prison file and to offer commentary on items which may adversely affect his opportunities for honor grade status, work release or parole.

APPEAL by plaintiff from order of *Long, J.,* July 11, 1971 Session, CASWELL Superior Court.

The plaintiff, Jerry W. Goble, prisoner in the Blanch Prison complex in Caswell County, North Carolina, instituted this proceeding against V. Lee Bounds, Director of the North Carolina Department of Correction, alleging in substance the following: The prisoner believes his personnel record in the Prison Department includes a letter from the solicitor of the Twelfth

Solicitorial District who prosecuted him in the superior court. The letter contains statements "which are derogatory of plaintiff and are highly damaging to his reputation" and "have adversely affected his opportunities for earning honor grade status, work release, or parole." Plaintiff believes the allegations contained in said letter must be false and the plaintiff desires the opportunity to know the contents of the said letter and to be able to explain, deny, and rebut all parts of said letter which he might find to be inaccurate. Plaintiff has made known to defendant his desire to read the letter. Plaintiff has been denied the opportunity to review the letter, consider its accuracy, and offer any commentary on the letter that he may desire.

The plaintiff's prayer for relief requests the following: "Preliminary injunction and permanent injunction be entered against defendant, enjoining him to permit plaintiff to inspect and comment upon the letter referred to herein contained in plaintiff's personal file, and generally to permit plaintiff to inspect and comment upon the contents of his personal file maintained by defendant."

In addition to his individual complaint, the prisoner alleges the defendant consistently refuses to other prisoners the right to inspect their individual files and he seeks to make this a class action and to obtain an order that all files be open to inspection.

The Attorney General, acting for the defendant, moved to dismiss the action upon these grounds: (1) The complaint fails to state a cause of action upon which relief may be granted; (2) the court lacks jurisdiction over the subject matter of the action; and (3) the prison rules under G.S. 148-11 and 148-13 provide that the granting of work release or parole is left to the State Department of Correction after conviction, and after the courts have passed final judgment.

The court adjudged the plaintiff is lawfully in the custody of the Commissioner of Correction pursuant to G.S. 148-4. All prisoners serving sentences shall be subject to all the rules and regulations legally adopted for the government thereof. Prison records of inmates are confidential and are not subject to inspection either by the public or by the inmate concerned. The court dismissed the prisoner's petition.

Smith, Paterson, Follin & Curtis by Norman B. Smith and Michael K. Curtis for plaintiff appellant.

Robert Morgan, Attorney General by Jacob L. Safron, Assistant Attorney General for defendant appellee.

HIGGINS, Justice.

Ordinarily when the court enters a final judgment in a criminal case, the execution of the sentence becomes the function of the executive branch of the State Government. The legislative branch makes the rules which govern the operation of the State's prisons. By G.S. 148-1 (Chapter 996, Session Laws of 1967) the Legislature created the State Department of Correction; and by G.S. 148-51.1 provided for the Board of Paroles. G.S. 148-59 requires the clerks of the superior and the clerks of all inferior courts to attach to the commitment of each prisoner sentenced a statement giving:

(1) The court in which the prisoner was tried;

* * * * * * * *

(4) The offense with which the prisoner was charged and the offense for which convicted;

* * * * * * * *

(6) The name and address of the presiding judge;

(7) The name and address of the prosecuting solicitor;

* * * * * * * *

(9) The name and address of the arresting officer; and

(10) All available information of the previous criminal record of the prisoner.

"The prison authorities receiving the prisoner for the beginning of the service of sentence shall detach from the commitment the statement furnishing such information and forward it to the Board of Paroles, together with any additional information in the possession of such prison authorities . . . and the information thus furnished shall constitute the foundation and file of the prisoner's case."

G.S. 148-64 provides that the officials and employees of the Department of Correction and the Board of Paroles shall cooperate and furnish each other such information and assist-

ance as will promote the purpose for which these agencies were established. "The Board of Paroles and its staff shall have free access to all prisoners."

The legislative enactments tie the three branches of State Government together in the business of dealing with crimes against the State. The Legislature makes the laws. The judicial branch interprets them and enters judgment. The executive branch takes over the custody of the prisoner and effects the judgment with such modifications favorable to the prisoner as the above designated agencies deem for the best interest of the State and the prisoner.

The prisoner's complaint in this case relates to the manner in which the executive branch is dealing with his qualifications for honor grade status, work release, and parole.

The granting of the above privileges is by way of mitigating the terms of the judgment which the court has entered. The legality and propriety of the trial and sentence have already been determined after the prisoner has been heard and his constitutional rights have been accorded him. The merits of the trial and the validity of the judgment may not again be raised before the Department of Correction and the Board of Paroles.

The authorities are required to keep a file on each person admitted to prison and to make a periodic review to ascertain whether the prisoner's conduct and attitude merit his release earlier than the time fixed by the court's sentence. The file must contain the name and address of the judge, of the investigating officer, and of the State's prosecutor. These sworn officials know more of the background of the case than the record discloses. The identity of these officers is a required part of the prisoner's file. Hence, the officers may be consulted on matters in addition to that which the record discloses. Their reports would be of more value, perhaps, if they were treated in confidence.

Whether to release a prisoner before the completion of his sentence is a question with many facets. It cannot be answered by rules of law. Those who have watched the prisoner during his confinement are better qualified than the courts to say if and when he merits parole. Another court proceeding would be a poor substitute for the method now employed.

In the instant case the prisoner says he has information that a letter is in his file from the public prosecutor which contains statements "derogatory . . . and highly damaging to his reputation." If the Court opens prison files for inspection, many prisoners will want to inspect and refute. In fact in this case the prisoner asks that his application be treated as a class action and the Court order all files to be opened for inspection.

Of course a prisoner takes with him into the prison certain rights which may not be denied him. *Lee v. Washington,* 390 U. S. 333, 19 L.Ed. 2d 1212. The legal right to the mitigation of his punishment is not one of them. It is contemplated as a part of his rehabilitation that he earn his right to honor grade status, work release, or parole. The decision is not in the nature of an adversary proceeding under rules of evidence. The Supreme Court of the United States in *Williams v. New York,* 337 U.S. 241, 69 S.Ct. 1079, states: "The practice of probation which relies heavily on non-judicial implementation has been accepted as a wise policy. Execution of the United States parole system rests on the discretion of an administrative board. . . . The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure."

In the case of *Menechino v. Oswald,* 430 Fed. 2d 403, the Court said: " . . . He (the prisoner) is entitled only to be released after full service of his sentence less good time earned during incarceration. The Board is given absolute and exclusive discretion to decide whether or not to initiate parole proceedings and, if so, whether parole should be granted to him. Appellant has been constitutionally deprived of his right to liberty for the period of his sentence. . . . (H)e does not qualify for procedural due process in seeking parole."

In the case of *Tarlton v. United States,* 430 Fed. 2d 1351 (5th Circuit) the Court passed on the question now before us.

> "By his first motion Tarlton sought to obtain access to his prison file to learn the source of a derogatory statement which was allegedly made concerning him. As the District Court held, PRISON RECORDS OF INMATES ARE CONFIDENTIAL AND ARE NOT SUBJECT TO INSPECTION BY THE PUBLIC NOR THE INMATE CONCERNED." (Emphasis added.)

Whether the prisoner in this case is entitled to honor grade status, work release, or parole involves policy decisions which should be decided by the Department of Correction and the Board of Paroles. These agencies are charged with the duty and are properly given means of discharging it not available to the courts.

The judgment entered in the superior court dismissing the action is

Affirmed.

STATE OF NORTH CAROLINA v. MARIE HILL

No. 98

(Filed 10 May 1972)

Criminal Law § 135— life sentence — compliance with Supreme Court order

Judgment of life imprisonment imposed by the superior court in compliance with an order of the N. C. Supreme Court is affirmed.

Justice LAKE dissenting.

APPEAL by defendant from *Cowper, J.*, November 8, 1971 Session of EDGECOMBE Superior Court.

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

Chambers, Stein, Ferguson & Lanning, by James E. Ferguson II, J. LeVonne Chambers and Jonathan Wallas for defendant appellant.

BOBBITT, Chief Justice.

In *State v. Hill*, 279 N.C. 371, 183 S.E. 2d 97, filed September 7, 1971, for the reasons there stated, this Court remanded the cause to the Superior Court of Edgecombe County for the pronouncement of judgment imposing a sentence of life imprisonment. On November 8, 1971, in open court, after due notice and in the presence of defendant and her counsel, Judge Cowper pronounced judgment that defendant be imprisoned for life in the State's prison. Defendant excepted and

gave notice of appeal. The questions she attempts to raise by her assignments of error on the present appeal heretofore have been decided adversely to defendant in this cause.

Judge Cowper's judgment, having been entered in strict compliance with our order of September 7, 1971, is affirmed.

Affirmed.

Justice LAKE dissenting.

For the reasons stated in my dissent when this matter was remanded to the superior court, *State v. Hill*, 279 N.C. 371, 378, 183 S.E. 2d 97, I dissent from the present majority opinion.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

CARTER v. TOWN OF CHAPEL HILL

No. 76 PC.

Case below: 14 N.C. App. 93.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 May 1972.

CROUCH v. CROUCH

No. 82 PC.

Case below: 14 N.C. App. 49.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 May 1972.

FREEMAN v. HAMILTON

No. 81 PC.

Case below: 14 N.C. App. 142.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 May 1972.

HUGGINS v. DeMENT

No. 6.

Case below: 13 N.C. App. 673.

Motion of Betty Lou Britt, Defendant Appellee, to dismiss appeal for lack of substantial constitutional question allowed 24 May 1972.

KENAN v. BOARD OF ADJUSTMENT

No. 75 PC.

Case below: 13 N.C. App. 688.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 May 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

McALISTER v. McALISTER

No. 78 PC.

Case below: 14 N.C. App. 159.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 May 1972.

ROSE & DAY, INC. v. CLEARY

No. 80 PC.

Case below: 14 N.C. App. 125.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 May 1972.

STATE v. CURRENCE

No. 88 PC.

Case below: 14 N.C. App. 263.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 May 1972.

STATE v. CURRENCE

No. 128.

Case below: 14 N.C. App. 263.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 24 May 1972.

STATE v. FRAZIER

No. 92 PC.

Case below: 14 N.C. App. 104.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 May 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. HOOVER

No. 68 PC.

Case below: 14 N.C. App. 154.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 May 1972.

STATE v. McLAMB

No. 74 PC.

Case below: 13 N.C. App. 705.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 May 1972.

STATE v. NEWKIRK

No. 83 PC.

Case below: 14 N.C. App. 53.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 May 1972.

STATE v. RAY

No. 87 PC.

Case below: 12 N.C. App. 646.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 May 1972.

STATE v. SALLIE

No. 90 PC.

Case below: 13 N.C. App. 499.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 May 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. STORY

No. 59 PC.

Case below: 14 N.C. App. 182.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 May 1972.

PETITIONS TO REHEAR

HARRISON ASSOCIATES v. STATE PORTS AUTHORITY

No. 127.

Reported: 280 N.C. 251.

Petition by Harrison Associates to rehear denied 20 April 1972.

WIGGINS v. BUNCH

No. 7.

Reported: 280 N.C. 106.

Petition by Wiggins to rehear denied 28 January 1972.

STATE v. FERGUSON

No. 155.

Reported: 280 N.C. 95.

Petition by Ferguson to rehear denied 31 January 1972.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION AND ROBERT MORGAN, ATTORNEY GENERAL v. GENERAL TELEPHONE COMPANY OF THE SOUTHEAST AND CITY OF DURHAM

No. 5

(Filed 16 June 1972)

1. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— rate base — value of franchise**

While the value of a telephone franchise enters into and affects the market price of the utility's stock, it does not enter into the computation of the utility's rate base. G.S. 62-133.

2. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— adequacy of service — rates**

The Utilities Commission, not the Supreme Court or the Court of Appeals, has been given the authority to determine the adequacy of a public utility's service and the rates to be charged therefor. G.S. 62-31; G.S. 62-32; G.S. 62-130; G.S. 62-131.

3. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— public utility rates — legislative function — constitutional limitations**

In fixing rates to be charged by a public utility, the Utilities Commission is exercising a function of the legislative branch of the government and may not exceed the limitations imposed upon the Legislature by the State and Federal Constitutions.

4. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— public utility rates — statutory requirements**

In fixing the rates to be charged by a public utility for its service, the Utilities Commission does not have the full power of the Legislature but must comply with the requirements of G.S. Chapter 62, more specifically, G.S. 62-133.

5. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— public utility rates — power of reviewing court**

The authority of an appellate court to reverse or modify the order of the Utilities Commission, or to remand the matter to the Commission for further proceedings, is limited to that specified in G.S. 62-94, which includes the authority to reverse or modify such order on the ground that it violates a constitutional provision.

6. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— public utility rates — presumption of reasonableness**

Upon appeal, the rates fixed by the Utilities Commission, pursuant to G.S. Chapter 62, are deemed *prima facie* just and reasonable, and all findings of fact supported by competent, material and substantial evidence are conclusive.

7. Telephone and Telegraph Companies § 1; Utilities Commission § 6— findings of fact — appellate review

A finding of fact or determination of what rates are reasonable by the Utilities Commission may not be reversed or modified by the reviewing court merely because the court would have reached a different finding or determination upon the evidence.

8. Telephone and Telegraph Companies § 1; Utilities Commission § 6— public utility — acquisition of property — board of directors

Except as otherwise provided, expressly or by reasonable implication in G.S. Chapter 62, a public utility is free to manage its property and business as it sees fit, and the Utilities Commission may not restrict or control the discretion of the utility's board of directors in the acquisition of property or in the price paid for it.

9. Telephone and Telegraph Companies § 1; Utilities Commission § 6— public utility rates — attraction of capital

To attract capital, a public utility need not charge, and is not entitled to charge, for its services rates which will make its stock or bonds attractive to investors who are willing to risk substantial loss of principal in return for the possibility of abnormally high earnings, since the utility, having a legal monoply in an essential service, offers its investors a minimal risk of loss of principal.

10. Telephone and Telegraph Companies § 1; Utilities Commission § 6— public utility rates — fair value

The Utilities Commission must "ascertain the fair value of the public utility's property used and useful in providing the service," and must then fix a fair rate of return on "fair value."

11. Telephone and Telegraph Companies § 1; Utilities Commission § 6— fair value

The "fair value" which G.S. 62-133 requires the Utilities Commission to ascertain is not the price for which the property could be sold as used or second-hand property, is not the sale or exchange value of the entire business as a going concern, and is not the same as the fair value to be awarded by a jury in a condemnation case.

12. Telephone and Telegraph Companies § 1; Utilities Commission § 6— fair value

G.S. 62-133 contemplates that, normally, the Utilities Commission will ascertain the "fair value" of a utility's properties at a point somewhere between the original cost, less depreciation, and the cost of replacement new, less depreciation.

13. Telephone and Telegraph Companies § 1; Utilities Commission § 6— fair value — original cost — replacement cost

In determining "fair value," the Utilities Commission has the duty to weigh evidence of original cost, less depreciation, and evidence of replacement cost, less depreciation, fairly in balanced scales and may not disregard either or brush aside either by giving it only minimal consideration.

14. Telephone and Telegraph Companies § 1; Utilities Commission § 6— fair value — appellate review

The reviewing court may not set aside the Utilities Commission's determination of fair value merely because the court would have given the respective elements thereof different weights and would, therefore, have arrived at a different fair value.

15. Telephone and Telegraph Companies § 1; Utilities Commission § 6— fair value — "other facts"— necessity for findings

"Other facts" which the Utilities Commission considers in determining the fair value of a utility's properties must be found and set forth in its order, so that the reviewing court may see what these elements are and determine the authority of the Commission to consider them as relevant to the present fair value.

16. Telephone and Telegraph Companies § 1; Utilities Commission § 6— rate base — excess of fair value over cost — addition to equity

G.S. 62-133 contemplates that the excess of fair value over the original cost, less depreciation, shall be included in the rate base of the utility; it should be treated by the Utilities Commission as if it were an addition to the equity component of the utility's capital structure.

17. Telephone and Telegraph Companies § 1; Utilities Commission § 6— fair rate of return

There is no fixed "fair rate of return" applicable to all utility companies or to a single utility company at all times.

18. Telephone and Telegraph Companies § 1; Utilities Commission § 6— fair rate of return — debt-equity ratio

A public utility's debt-equity ratio and its effect on the attraction of capital are circumstances to be weighed by the Utilities Commission in determining what is a fair rate of return on fair value.

19. Telephone and Telegraph Companies § 1; Utilities Commission § 6— prices paid for equipment and supplies — rate base

The Utilities Commission may not fix or control prices which a company that is not a public utility within the definition contained in G.S. 62-3(23)a charges its customers; the Commission may, however, in a proper case, refuse to allow a public utility to include in its rate base or in its operating expenses the full price actually paid to another company for equipment and supplies.

20. Telephone and Telegraph Companies § 1; Utilities Commission § 6— public utility rates — reasonable cost of property

In fixing rates to be charged by a public utility to its own customers, the Utilities Commission is directed by G.S. 62-133 to consider "the *reasonable* original cost of the utility's property used and useful in providing the service."

21. Telephone and Telegraph Companies § 1; Utilities Commission § 6— rate base — extravagance in purchases and construction

A public utility may not inflate its rate base by extravagance in purchasing equipment or in constructing its plant, it being im-

material whether such extravagance is due to careless improvidence or to wilful payment of exorbitant prices to an affiliate.

22. Telephone and Telegraph Companies § 1; Utilities Commission § 6— prices paid by utility — authority of board of directors

The management of the business of a public utility, including the fixing of the prices which it pays for construction and equipment of its plant and for its maintenance and operation, rests with its board of directors in the absence of a clear mismanagement or abuse of discretion.

23. Telephone and Telegraph Companies § 1; Utilities Commission § 6— public utility rates — disregard of corporate entity

The doctrine of the corporate entity may be disregarded where it is used to defeat the public interest and circumvent public policy in the regulation of utility rates.

24. Telephone and Telegraph Companies § 1; Utilities Commission § 6— purchases from affiliated company — reasonableness of prices

The fact that equipment or services are sold to a public utility by an affiliated corporation does not alter the ultimate question before the Utilities Commission of whether the prices paid by the utility are reasonable and, therefore, reflect the reasonable original cost of the properties.

25. Telephone and Telegraph Companies § 1; Utilities Commission § 6— purchase from affiliated company — reasonableness of price — burden of proof

A purchase from an affiliated company calls for a close scrutiny by the Utilities Commission of the price paid by the utility; when such transaction is called in question, the burden is on the utility to show that the price it paid was reasonable.

26. Telephone and Telegraph Companies § 1; Utilities Commission § 6— telephone rates — purchases from affiliated company — deduction for excess profits

The Utilities Commission erred in deducting $978,000 from a telephone company's "net investment in plant" (original cost less depreciation) by reason of profits earned by an affiliated company on its sales to the telephone company, where the evidence shows that the affiliated company had an independent existence before it was acquired by the present parent company, that it was a supplier of materials and equipment to the telephone company during its independent life, that it continues to supply unaffiliated companies, that its prices to the telephone company are no higher and are often lower than its prices to nonaffiliated customers, that the telephone company receives the benefit of volume discounts obtained by the affiliated company from its suppliers, which discounts would not be available to the telephone company if it dealt directly with the affiliated company's suppliers, and that the telephone company receives refunds by reason of savings on the affiliated company's income taxes resulting from the affiliation, and nothing in the record indicates that the affiliated company was acquired or has been used by the parent company as a device through which to siphon off and conceal profits of the telephone company.

27. Telephone and Telegraph Companies § 1; Utilities Commission § 6— rate increase — burden of proof

The burden of proof is upon the utility seeking a rate increase to show the proposed rates are just and reasonable. G.S. 62-75; G.S. 62-134(c).

28. Telephone and Telegraph Companies § 1; Utilities Commission § 6— overbuilding of utility plant — rate base

The question for determination in connection with an alleged overbuilding of the utility plant is whether the properties in question can be deemed "used and useful" in rendering the service as of the end of the test period; if not, they may not be properly included in the rate base. G.S. 62-133.

29. Telephone and Telegraph Companies § 1; Utilities Commission § 6— determination of plant requirements — latitude of directors

Substantial latitude must be allowed the directors of a public utility in making the determination as to what plant is presently required to meet the service demand of the immediate future, since construction to meet such demand is time consuming and piecemeal construction programs are wasteful and not in the best interest of either the ratepayers or the stockholders.

30. Telephone and Telegraph Companies § 1; Utilities Commission § 6— rate base — excess plant — interest of stockholders

The deletion of excess plant from the rate base is not precluded by a showing that present acquisition or construction is in the best interest of the stockholders, since the present ratepayers may not be required to pay excessive rates for service to provide a return on property which will not be needed in providing utility service within the reasonable future.

31. Telephone and Telegraph Companies § 1; Utilities Commission § 6— excess central office equipment — rate base

The fact that a telephone company's central office equipment is not presently used to its full capacity does not necessarily justify the exclusion of any portion of it from the rate base on the theory that such portion is not presently "used and useful" in rendering service; on the other hand, a telephone company with central office equipment sufficient to serve any reasonably anticipated increase in customers may not properly add to its rate base additional units of central office equipment merely because, in the long future, it hopes to have customers who will use it, especially where the supplier of such equipment is an affiliated corporation controlled by the same holding company which controls the telephone company.

32. Telephone and Telegraph Companies § 1; Utilities Commission § 6— plant requirements — determination by Utilities Commission

The Utilities Commission's determination of how much plant is presently required to meet the service obligations of a public utility in the immediate future, supported by competent evidence, may not properly be set aside by the reviewing court merely because a different conclusion could have been reached upon the evidence.

33. Telephone and Telegraph Companies § 1; Utilities Commission § 6— property "used and useful" — burden of proof

The question of whether specific property is presently "used and useful" in rendering service is one of fact to be determined by the Utilities Commission upon competent and substantial evidence, the burden of proof being on the utility to show that the property should be included in the rate base. G.S. 62-75; G.S. 62-134(c).

34. Telephone and Telegraph Companies § 1; Utilities Commission § 6— telephone rates — excess central office equipment

The evidence supported a finding by the Utilities Commission that a portion of the property of a telephone company consisted of central office equipment not to be used by it in rendering telephone service within the reasonable future, and the Commission properly excluded such excess property from the computation of the original cost, less depreciation, in arriving at the fair value of the telephone company's properties used and useful in rendering telephone service.

35. Telephone and Telegraph Companies § 1; Utilities Commission § 6— fair value

"Fair value" of a public utility's property is not synonymous with "replacement cost," is not an arithmetical average of original cost and replacement cost, less depreciation, and is not to be ascertained by the application of any mathematical formula; conversely, a finding of "fair value" by the Utilities Commission is not rendered immune to judicial review by the Commission's declaration that, in reaching such finding, it followed no formula.

36. Telephone and Telegraph Companies § 1; Utilities Commission § 6— ascertainment of fair value — factors — weight

It is for the Utilities Commission, not the reviewing court, to determine the weight to be given each of the factors set forth in G.S. 62-133(b) for consideration in the ascertainment of "fair value"— original cost, replacement cost and other relevant factors.

37. Telephone and Telegraph Companies § 1; Utilities Commission § 6— determination of fair value — appellate review

The Utilities Commission's finding of "fair value" may be set aside by the reviewing court if it clearly appears (1) that the Commission disregarded or gave minimal consideration to one of the factors enumerated in G.S. 62-133(b), (2) that the Commission made its determination thereof by giving weight to a factor as to which there is no substantial evidence in the record, or (3) that the Commission considered unspecified facts other than original cost and replacement cost depreciated.

38. Telephone and Telegraph Companies § 1; Utilities Commission § 6— fair value — factors — consideration by Utilities Commission

The mere recital by the Utilities Commission that it has considered all of the factors prescribed by G.S. 62-133 in arriving at its ascertainment of "fair value" does not preclude the court from setting aside the finding of "fair value" where the record discloses error of law.

39. Telephone and Telegraph Companies § 1; Utilities Commission § 6— replacement cost — variance from expert testimony — reasons

It would be proper and helpful for the Utilities Commission to state, at least in summary, its reasons for not acquiescing in the figures suggested for replacement cost, less depreciation, by the respective expert witnesses.

40. Telephone and Telegraph Companies § 1; Utilities Commission § 6— public utility rates — determination of replacement cost

The Utilities Commission may in some cases fix rates to be charged by a utility for its service without a determination of replacement cost less depreciation, since the utility, with the Commission's acquiescence, may offer evidence of original cost less depreciation as its only evidence of fair value.

41. Telephone and Telegraph Companies § 1; Utilities Commission § 6— original cost — replacement cost — necessity for findings

When the record before the Utilities Commission presents the questions of original cost, less depreciation, and replacement cost, less depreciation, these are material issues of fact upon each of which the Commission must make its finding; when it does so, those findings are conclusive if supported by substantial evidence in the record and not affected by error of law.

42. Telephone and Telegraph Companies § 1; Utilities Commission § 6— replacement cost — errors or omissions in expert testimony

It is the prerogative of the Utilities Commission to take into account, in making its finding of replacement cost, errors or omissions in the testimony of an expert witness purporting to show such replacement cost.

43. Telephone and Telegraph Companies § 1; Utilities Commission § 6— fair value — cost of reproducing plant

The Utilities Commission is not required to accept as a factor to be weighed, in determining fair value, the full amount stated by an expert witness to be the cost of reproducing the exact plant now in operation, brick for brick, pole for pole, and wire for wire.

44. Telephone and Telegraph Companies § 1; Utilities Commission § 6— public utility rates — poor service — deduction from original cost and reproduction cost

Consistently poor service, attributable to defective or inadequate or poorly designed equipment or construction, justifies a subtraction from both the original cost and the reproduction cost of the existing plant before weighing such factors in ascertaining the present "fair value" of the properties; the Utilities Commission must make a specific finding showing the effect it gave this factor if such a deduction is made.

45. Telephone and Telegraph Companies § 1; Utilities Commission § 6— depreciation — change by Utilities Commission

If a reasonably close relationship between the reserve for depreciation and the actual accumulated depreciation is not present, the

Utilities Commission may and should review and make appropriate changes in the annual charge to operating expenses on account of depreciation.

46. Telephone and Telegraph Companies § 1; Utilities Commission § 6— depreciation — presumption

In the absence of convincing evidence to the contrary, the Utilities Commission is entitled to proceed on the assumption that the annual charges to operating expenses to cover depreciation, which the utility has been making with the Commission's approval, have been based on plausible assumptions as to downward trends in asset values in the course of their service lives.

47. Telephone and Telegraph Companies § 1; Utilities Commission § 6— replacement cost — percentage of depreciation — deduction for plant inadequacy

In the absence of convincing evidence to the contrary, the Utilities Commission may discount the replacement cost new by the same percentage as that indicated by the total accumulated depreciation in arriving at the replacement cost factor, or, if there is evidence to support such a finding, may discount replacement cost new by a greater or a smaller amount on account of depreciation, including obsolescence; the Commission may, after proper findings, further subtract from both original cost and replacement cost new an appropriate allowance for the inadequacy of the plant, if any, due to faulty engineering, faulty maintenance or other circumstance.

48. Telephone and Telegraph Companies § 1; Utilities Commission § 6— failure to find replacement cost

The Utilities Commission committed an error of law in failing to make a specific finding of its determination of the replacement cost of the utility's properties.

49. Telephone and Telegraph Companies § 1; Utilities Commission § 6— rate base — plant under construction

The Utilities Commission properly refused to include in the rate base telephone plant under construction at the end of the test period, since that is not property "used and useful" within the meaning of G.S. 62-133.

50. Telephone and Telegraph Companies § 1; Utilities Commission § 6— objective of ratemaking

The ultimate objective of ratemaking is the fixing of rates for service which will enable the utility to (1) produce a fair profit for its stockholders, (2) maintain its facilities and service, and (3) compete in the market place for capital, and no more. G.S. 62-133(b)(4).

51. Telephone and Telegraph Companies § 1; Utilities Commission § 6— fair rate of return — experience in attracting capital

A utility's experienced success or difficulty in attracting capital on reasonable terms under the rates of which it complains is often more convincing than expert opinion testimony in determining a fair rate of return.

52. Telephone and Telegraph Companies § 1; Utilities Commission § 6— rate of return — determination

The weighing of the evidence and the drawing of the ultimate conclusion therefrom as to what return is necessary to enable a utility to attract capital is for the Utilities Commission, not the reviewing court.

53. Telephone and Telegraph Companies § 1; Utilities Commission § 6— rate of return — fixing prior to ascertainment of fair value

Without a finding by the Utilities Commission of the replacement cost of a public utility's properties "used and useful in providing the service," the Commission's finding of "fair value" was affected by an error of law and, consequently, its finding of a fair rate of return on such "fair value" was so affected and was premature.

54. Telephone and Telegraph Companies § 1; Utilities Commission § 6— fair rate of return — fair value — appellate review

The Utilities Commission must consider and weigh the testimony of expert witnesses on the question of the fair rate of return in the light of its own adjustment, for ratemaking purposes, of the utility's actual capital structure by its determination of the "fair value" of its properties; having done so, its determinations of the rate of return to be allowed, and the rates for service it deems sufficient to earn such rate of return, may not be modified or reversed by a reviewing court in the absence of a violation of a constitutional provision or of an error of law specified in G.S. 62-94(b).

55. Evidence § 48; Utilities Commission § 6— rate hearing — qualification of expert

The Utilities Commission did not err as a matter of law in allowing a witness experienced in public utility accounting and related financial matters to testify as to his opinion concerning the cost of capital and a fair rate of return.

56. Evidence § 48— qualification of expert

A witness qualified to testify as an expert in the field of his training and experience is not necessarily qualified to testify as an expert in other fields, even though somewhat related.

57. Evidence § 48— qualification of expert — discretion of trial court

The competency of a witness to testify as an expert is a question addressed primarily to the sound discretion of the trial court or commission, and its discretion is ordinarily not disturbed by a reviewing court.

58. Evidence § 48— qualification of expert — officer, employee or consultant

The fact that a witness is an officer or employee, or a consultant specially retained by a party to the litigation, does not disqualify him as an expert.

Chief Justice BOBBITT and Justices HIGGINS and SHARP concurring in part and dissenting in part.

SEPARATE appeals by all parties from the judgment of the Court of Appeals, reported in 12 N.C. App. 598, 184 S.E. 2d 526, reversing and remanding to the North Carolina Utilities Commission the order of the Commission allowing in part an application by General Telephone Company of the Southeast for an increase in its rates for telephone service.

General Telephone Company of the Southeast (General) is a wholly owned subsidiary of General Telephone & Electronics Company (GT&E). Automatic Electric Company (Automatic), a manufacturer of telephone equipment and supplies, is also a wholly owned subsidiary of GT&E. Automatic is the principal but not the only source of supply of such equipment and materials for General.

General renders telephone service to the public in this and other states. Its service area in North Carolina includes the City of Durham and the Towns of Creedmoor and Butner. Prior to the present proceeding, the North Carolina Utilities Commission (Commission) entered on 19 December 1968 an order granting rate increases to General, the rates then approved being, basically, those in effect when the present proceeding was instituted and being referred to herein as the present rates. In that order the Commission also directed that General make certain improvements in its service to its subscribers.

General instituted the present proceeding by filing with the Commission on 14 July 1970 its application for further increases in its rates for service, sufficient to increase its revenues from North Carolina intrastate telephone service by $2,472,554. Its application was based upon its alleged operating experience under the present rates during the twelve months ending 31 March 1970, the test period used throughout the present proceeding. The proceeding was designated a general rate case by the Commission. The City of Durham and the Attorney General intervened in opposition to the proposed rate increases, the city contending, among other things, that the service presently rendered by General is grossly inadequate.

The Commission conducted a hearing, which lasted approximately two weeks, and received thereat the testimony of many witnesses, expert and otherwise, together with a great mass of exhibits setting forth statistical data, prepared and

submitted by the various expert witnesses in support of their respective opinions.

Pursuant to the Rules of Practice before the Commission, the direct testimony of all expert and technical witnesses, both for the company and for the other parties, including the Commission's staff, and all exhibits in support of such testimony, were put in writing and filed with the Commission substantially in advance of the hearing. Copies thereof were made available to all parties, for study and preparation of cross-examination, prior to the commencement of the hearing and the actual giving of the testimony and introduction of the exhibits.

In addition to company officials and expert witnesses called by the company, the city and the Commission staff, the city called 51 witnesses, who testified concerning the quality of the service being rendered by General. Sixty other individuals, present for the purpose of testifying upon this subject, did not do so in the interest of time, the Commission being advised that their testimony would be substantially repetitious of that of the 51 witnesses actually called. The following is a catalog or summary of their testimony concerning the quality of General's service:

Telephones are frequently out of order. There are long delays in obtaining service after difficulties are reported, resulting in telephones being out of order for several days at a time. Supposedly private lines are not private, with the result that the subscriber to a private line frequently cannot use his telephone due to other conversations being carried on over the line. A subscriber seeking to get operator assistance frequently has to wait 15 minutes or more before the operator answers. Direct distance dialing results in reaching the wrong number more frequently than could be explained by inaccurate dialing. Calls are frequently cut off while the conversations are in progress. Innumerable incoming calls for the wrong number are received. Company employees in the lower echelons are discourteous and inefficient in receiving reports of service difficulties. There is little relation between the arrival of a repairman at the subscriber's home and the hour for which his arrival was promised by the central office, so that a complaining subscriber is kept at home waiting for him and then he comes when the subscriber is not at home, necessitating a new service call. Billing for long distance calls, not properly

chargeable to the subscriber's telephone, is frequent. On attempts to dial an outgoing call, the calling phone frequently disconnects before the other phone begins to ring. On incoming calls, the person placing the call frequently hears a ringing sound but the subscriber being called, though at home, hears no ring. Incoming long distance calls frequently do not get through to the subscriber's telephone. There is static on the line. Phones are frequently out of order in rainy weather. "It is inefficient to do business with the phone company by phone," because employees in the complaint department do not answer the telephone. "It is almost impossible to contact the telephone company."

The Commission made detailed findings of fact, including the following:

"(5) With the elimination of * * * plant under construction * * * the Applicant has invested in utility plant in service * * * as of the end of the test period * * * an original cost of $31,564,745. This figure reflects Applicant's net investment plus allowance for working capital, and is subject to further adjustments as hereinafter stated.

"(6) Applicant's investment in telephone plant is adjusted herein in the amount of $690,340, representing ½ of the amount testified to by the Commission Staff as relating to excess margin in central office equipment * * *. The Commission Staff's recommendation is reduced by 50% because a portion of the equipment considered to be excess margin during the test period will be utilized in the service improvement program of the Applicant in the immediate future.

"(7) Applicant's net investment in plant is further adjusted by $978,000 in regard to the excess profits which are reasonably attributed to its dealings with its major supplier Automatic Electric Company. This amount, however, is based on a 15% return to AE rather than the 12% return recommended by Witness Smith. These major adjustments, accompanied by standard related adjustments, yield an adjusted net investment in telephone plant for the Applicant's North Carolina intrastate operations of $30,107,171 for the test period.

* * *

"(9) The Commission finds that the fair value of the

Applicant's properties used and useful in rendering intrastate telephone service to its North Carolina subscribers, considering original cost less depreciation and considering replacement cost by trending original cost by current cost levels, is $31,913,601.

"(10) Applicant's net operating income for return at the end of the test period, and considering the adjustments hereinabove described, is $1,729,517, resulting in a rate of return on adjusted book value of 5.74%, which the Commission deems insufficient considering the Applicant's current operating conditions.

"(11) The rate of return deemed necessary on the fair value of Applicant's properties, with sound management, to produce a fair profit for its stockholders, considering economic conditions as they exist, and permitting Applicant to maintain its facilities and service and further permitting Applicant to improve its service in accordance with the terms of this Order, * * * is 7.53%, which said rate of return on fair value will afford Applicant an opportunity to realize additional annual gross revenues of $1,445,003. The Commission deems this amount of dollar return to the Applicant sufficient for it to compete in the market for capital funds on a reasonable basis to its customers and stockholders. This amount is a 16.04% increase over Applicant's present revenues and will afford the Applicant an opportunity to earn additional gross revenues in the above stated amount, being approximately 59.32% of the increases requested by the Applicant in this proceeding. The increases requested by the Applicant in excess of the above stated amount are deemed to be unjust and unreasonable by the Commission.

"(12) The additional revenues provided by the increases herein approved will produce a total net operating income of $2,469,106 and will result in a return on common equity to the Applicant of approximately 8.94%.

"(13) * * * Applicant's present engineering design techniques and standards are efficient and economical.

"(14) Applicant has made * * * improvements in service to its subscribers. * * * While there has been improvement in the quality of service, there remains a need

for additional improvements. The Commission finds that the overall quality of service afforded by the Applicant to its subscribers is on the low side of providing reasonably adequate service. The following specific service improvements are determined to be necessarily required to be completed on or before July 1, 1972 * * * ."

The Commission then stated in detail its conclusions, including the following:

"The Commission concludes that the rate of return on the fair value of Applicant's properties of 7.53% will afford the Applicant an opportunity to earn approximately $1,445,003 additional annual gross revenues being * * * 58.44%, requested by the Applicant.

"The total amount applied for by the Applicant is not supported by this record and would produce a return greater than that which could be deemed just and reasonable. The Commission concludes that additional gross revenues of $1,445,003 are necessary to provide a fair return to the Applicant on the fair value of its property.

" * * * The Commission concludes that [Automatic's] prices charged to the Applicant are unreasonable and excessive to the extent they produce a return higher than 15% on common equity [of Automatic]. The excess profits adjustment of $978,000 is made necessary because of the close relationship existing between [Automatic] and [General] which buys about 85% to 95% of its telephone equipment and supplies from [Automatic]. As a wholly-owned subsidiary of [GT&E], [Automatic] has been the leading supplier of telephone equipment to non-Bell companies. The dominant position of [Automatic] in the telephone equipment manufacturing market leaves only a few small low-volume non-affiliated manufacturers in the market with very little, if any, competitive forces available to them. Despite the Applicant's contention that competition does exist in this market, the Commission is of the opinion and concludes that the method utilized in this proceeding of adjusting for excess profits relating to the dealings between the Applicant and [Automatic] more nearly treats the operation of [Automatic] as another division or extension of the telephone operations of the Applicant. * * *

> [I]t is reasonable to deal with [Automatic] and the Applicant for rate making purposes as one company subject to regulation by this Commission.
>
> "The Commission Staff evidence indicates that the Applicant as of the end of the test period had excess plant margin in central office equipment amounting to approximately $1,380,680. * * * This Order reduces that figure by 50% in view of the Commission's opinion and conclusion that a portion of this equipment is being consumed and utilized in the service improvement program which is ongoing and imminent with respect to the Applicant's operations.
>
> * * *
>
> "While the quality of telephone service afforded by the Applicant * * * has improved since its last general rate proceeding, the Commission concludes that Applicant's overall level of service is on the low side of reasonably adequate service."

The Commission thereupon ordered that General be authorized to make effective on bills rendered after 1 June 1971 rates and charges contained in an appendix made part of the order, these being sufficient to produce the additional revenues above mentioned. It further ordered that General be required to comply with specified service improvement requirements not later than 1 July 1972.

Commissioners Wells and McDevitt dissented in separate opinions, it being their view that: The Commission should have subtracted from the rate base the full amount of the excess central office equipment shown in the testimony of Witness Clemmons of the Commission Staff; the deduction from the rate base, on account of excess profits made by Automatic upon its sales to General, should have been larger; and, consequently, a smaller increase in rates for service should have been granted. Commissioner Wells was further of the opinion that the probable future revenues from the present rates were understated by the majority due to the rapidly progressing program to put all subscribers on single party lines, which will increase the average revenue per telephone even without any increase in the present rates. Both Commissioners Wells and McDevitt were of the opinion that at least a sub-

stantial part of the increases allowed should be withheld pending improvements by General in its service.

The Commission entered its order 11 May 1971. General and the city appealed to the Court of Appeals which rendered its decision 17 November 1971, reversing the order of the Commission and remanding the proceeding to it for further consideration "either upon the present record or after such further hearing as the Commission shall deem proper." Salient points in the opinion of the Court of Appeals are these:

1. Only after the determination of the fair value of the utility's property, used and useful in providing service, can judgment be intelligently exercised in fixing the rate of return which the utility is entitled to earn thereon. (General assigns this ruling as error.)

2. The Commission had ample authority to inquire into the reasonableness of the prices paid by General to Automatic for equipment and supplies and, to the extent that such prices were unreasonable, to reduce, accordingly, the amount otherwise determined to be the original cost to General of its properties used and useful in rendering telephone service. There was no error in the deduction from original cost of the properties made by the Commission on this account. (General now assigns this ruling of the Court of Appeals as error.)

3. The Commission erred in further reducing the amount otherwise found by it to be the original cost of the properties by $690,340 on account of alleged excess margin in central office equipment. (This ruling of the Court of Appeals is now assigned as error by the Commission, the Attorney General and the city.)

4. There was no error in the Commission's exclusion of plant under construction at the end of the test period from the rate base. (General assigns this ruling of the Court of Appeals as error.)

5. The Commission made no finding of fact and stated no conclusion as to the replacement cost of the properties, simply noting the testimony of General's Witness McGrath stating his opinion as to the net trended book cost and an exhibit introduced by General showing such net trended book cost of the North Carolina intrastate portion of the properties to be

$40,781,543 as of the end of the test period. "It is apparent," said the Court of Appeals, "that the Commission arrived at its ultimate determination as to the fair value of General's property by first determining original cost and then increasing that figure by 6%. This, the Court of Appeals said, is not supported by the record and "the Commission's finding of fair value in this case was not supported by competent, material and substantial evidence in the record and was arrived at by a method which failed to comply with the directives contained in G.S. 62-133(b)(1)." (The Commission assigns this ruling of the Court of Appeals as error.)

6. The Commission's finding that the quality of service "is on the low side of providing reasonably adequate service" is ambiguous. If the Commission meant thereby that the quality of service fell short of the statutory requirement that it be adequate, efficient and reasonable, the Commission should make specific findings showing the effect of such inadequacy upon its decision as to the rates. The evidence of service deficiencies was such as to provide material facts which the Commission must consider in determining just and reasonable rates. Specific and unambiguous factual findings by the Commission are necessary to enable the reviewing court to determine whether the Commission has performed a duty imposed upon it by the statute in this respect. (The Commission assigns this ruling of the Court of Appeals as error.)

7. In view of the fact that the appropriate rate of return can be determined only after the fair value of the properties is correctly ascertained and, in view of the court's conclusion that the proceeding must be remanded to the Commission for further consideration and fixing of the fair value of the properties, the court did not pass upon the contention of General that the Commission committed error in fixing a fair rate of return at 7.53%.

8. Other exceptions by General and by the city to rulings of the Commission were found to be without merit.

The evidence before the Commission, concerning the respective questions presented by the several appeals to this Court, is summarized in the opinion.

Attorney General Morgan, Deputy Attorney General Benoy and Associate Attorney Payne for the Attorney General.

Edward B. Hipp and Maurice W. Horne for the Utilities Commission.

Claude V. Jones for the City of Durham.

Newsom, Graham, Strayhorn, Hedrick & Murray, by A. H. Graham, Jr.

Power, Jones & Schneider, by John Robert Jones and William R. White; and Ward Wueste, Jr., General Counsel and Secretary, for the General Telephone Company of the Southeast.

LAKE, Justice.

In the consideration of an appeal from an order of the Utilities Commission in a general rate case, such as this, it is necessary for the reviewing court to keep in mind certain fundamental facts and principles. Some of these are:

[1] 1. The State has granted to the utility company a legal monopoly upon a service vital to the economic well being and the domestic life of the people of a large territory. G.S. 62-110. This franchise is a property right of great value. Normally, when the grantee sells its business to another company, the monopolistic franchise commands a substantial price, over and above the exchange value of the physical properties transferred with it. Thus, the value of the franchise enters into and affects the market price of the utility's stock. It does not, however, enter into the computation of the utility's rate base. G.S. 62-133; *Galveston Electric Co. v. Galveston,* 258 U.S. 388, 396, 42 S.Ct. 351, 66 L.Ed. 678; 73 C.J.S., Public Utilities, § 21.

2. Because of this monopolistic feature of the utility's business, many of the basic principles of the Free Enterprise System, which govern the operations of and the charges by industrial and commercial corporations and those of the corner grocery store, have no application to the regulation of the service or charges of a utility company.

[2] 3. An uncontrolled legal monopoly in an essential service leads, normally and naturally, to poor service and exorbitant charges. See Adam Smith, The Wealth of Nations (3d Ed.), Book V. Chapter 1, pp. 143-144. To prevent such result, the

Legislature has conferred upon the Utilities Commission the power to police the operations of the utility company so as to require it to render service of good quality at charges which are reasonable. G.S. 62-31; G.S. 62-32; G.S. 62-130; and G.S. 62-131. These statutes confer upon the Commission, not upon this Court or the Court of Appeals, the authority to determine the adequacy of the utility's service and the rates to be charged therefor. *Utilities Commission v. Morgan, Attorney General,* 277 N.C. 255, 177 S.E. 2d 405; *Utilities Commission v. Telephone Co.,* 266 N.C. 450, 146 S.E. 2d 487; *Utilities Commission v. State* and *Utilities Commission v. Telegraph Co.,* 239 N.C. 333, 80 S.E. 2d 133.

[3, 4] 4. In fixing rates to be charged by a public utility, the Commission is exercising a function of the legislative branch of the government. It may not, therefore, exceed the limitations imposed upon the Legislature by the State and Federal Constitutions. The Commission, however, does not have the full power of the Legislature but only that portion conferred upon it in G.S. Chapter 62. In fixing the rates to be charged by a public utility for its service, the Commission must, therefore, comply with the requirements of that chapter, more specifically, G.S. 62-133. This is true, notwithstanding the fact that, in *Federal Power Commission v. Hope Natural Gas Co.,* 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333, the Supreme Court of the United States held the Federal Constitution no longer requires such a procedure.

[5-7] 5. Upon appeal, the authority of the reviewing court, whether the Court of Appeals or this Court, to reverse or modify the order of the Commission, or to remand the matter to the Commission for further proceedings, is limited to that specified in G.S. 62-94, which includes the authority to reverse or modify such order on the ground that it violates a constitutional provision. *Utilities Commission v. Morgan, Attorney General, supra.* Upon such appeal, the rates fixed by the Commission, pursuant to G.S. Chapter 62, are deemed prima facie just and reasonable. G.S. 62-94(e); G.S. 62-132. All findings of fact made by the Commission, which are supported by competent, material and substantial evidence, are conclusive. *Utilities Commission v. Coach Co.,* 269 N.C. 717, 153 S.E. 2d 461; *Utilities Commission v. Telegraph Co.,* 267 N.C. 257, 148 S.E. 2d 100; *Utilities Commission v. Coach Co.,* 261 N.C. 384, 134 S.E. 2d 689;

Utilities Commission v. Champion Papers, Inc., 259 N.C. 449, 130 S.E. 2d 890; *Utilities Commission v. Towing Corp.*, 251 N.C. 105, 110 S.E. 2d 886. Neither such finding of fact nor the Commission's determination of what rates are reasonable may be reversed or modified by a reviewing court merely because the court would have reached a different finding or determination upon the evidence. *Utilities Commission v. Morgan, Attorney General, supra; Utilities Commission v. Railway Co.*, 267 N.C. 317, 148 S.E. 2d 210; *Utilities Commission v. Railway Co.*, 254 N.C. 73, 118 S.E. 2d 21; *Utilities Commission v. Towing Corp., supra.*

[8] 6. Notwithstanding the authority of the Commission to regulate its services and rates, and other matters incidental thereto, the property of the utility is private property and the business is private business. Except as otherwise provided, expressly or by reasonable implication, in G.S. Chapter 62, the utility is free to manage its property and business as it sees fit and the Commission may not restrict, or control, the discretion of the board of directors in the acquisition of property, or in the price paid for it. *Utilities Commission v. Gas Co.*, 254 N.C. 536, 119 S.E. 2d 469.

[9] 7. As a practical matter, apart from constitutional right, the utility must be able to attract from volunteer investors additional capital, as required from time to time for the expansion or improvement of its service. *Utilities Commission v. Morgan, Attorney General, supra;* G.S. 62-133(b) (4) (5). Here, the principles of the Free Enterprise System do come into play, for the utility must win the favor of the free, volunteer investor in competition with all other investment options available to him. This the utility does by offering the investor an opportunity to earn on his investment at a rate which, considered together with the risk of loss of part or all of the principal of his investment, outweighs, in his opinion, the corresponding prospects and risks in those other types of investment. Obviously, the utility will have little appeal to many investors, strong appeal to others. Some investors paramount safety of principal, some the prospect of very large earnings. To attract capital, a utility does not need to charge, and it is not entitled to charge, for its service rates which will make its shares, or its bonds, attractive to investors who are willing to risk substantial loss of principal in return for the possibility of ab-

normally high earnings. The reason is the utility, having a legal monopoly in an essential service, offers its investors a minimal risk of loss of principal. *Bluefield Water Works & Improvement Co. v. Public Service Commission,* 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176; *Federal Power Commission v. Hope Natural Gas Co., supra.*

[10] 8. In order to assure the utility of earnings sufficient to attract capital and also in order to limit its charges for service to levels sufficient for that purpose, the Legislature has prescribed in G.S. 62-133 the steps which the Commission must take in fixing such charges. This statute requires the Commission to "ascertain the fair value of the public utility's property *used and useful* in providing the service." (Emphasis added.) In so doing, the Commission is required to *consider:* (1) "The *reasonable* original cost of the property" (emphasis added) less depreciation, (2) the replacement cost of the property, and (3) any other factors relevant to its fair value. The statute then requires the Commission to "fix such rate of return on the fair value of the property" as will enable the company, after payment of its "reasonable operating expenses," including taxes, maintenance of its properties and "reasonable actual depreciation," to attract, upon reasonable terms, such capital as it reasonably requires for the expansion and improvement of its service. Paragraph (d) of this statute further directs the Commission to "consider all other material facts of record that will enable it to determine what are reasonable and just rates."

[11] 9. The "fair value" which the statute requires the Commission to "ascertain" is not the price for which the property could be sold "as used or second-hand property." *Utilities Commission v. State* and *Utilities Commission v. Telegraph Co.,* 239 N.C. 333, 80 S.E. 2d 133. On the other hand, it is not the sale or exchange value of the entire business as a going concern, for that is determined by its prospective earnings. To undertake to regulate rates for service so as to maintain a value based on earnings leads into a vicious circle. "The property is not ordinarily the subject of barter and sale and, when rates themselves are in dispute, earnings produced by rates do not afford a standard for decision." Chief Justice Hughes, in *Los Angeles Gas Co. v. Railroad Commission,* 289 U.S. 287, 305, 53 S.Ct. 637, 644, 77 L.Ed. 1180. Accord: *Federal Power*

Commission v. Hope Natural Gas Co., supra, at p. 601; *Chambersburg Gas Co. v. Public Service Commission,* 116 Pa. Super. Ct. 196, 176 A 794, 797. See also, *General Telephone Co. of Upstate New York v. Lundy,* 17 N.Y. 2d 373, 218 N.E. 2d 274, 281. For the same reason, the "fair value" to be ascertained by the Commission is not the same as the fair value to be awarded by a jury in a condemnation case, for in the condemnation proceeding there is a forced sale of the property and the purpose is to award damages equal to the fair market or sale value at the time of the taking. *DeBruhl v. Highway Commission,* 247 N.C. 671, 676, 102 S.E. 2d 229.

[12-14] 10. The concept of "fair value," as used with reference to a public utility's rate base, is unique to rate making. To "ascertain" this "fair value" of the utility's property, the Commission is directed by the statute to *consider* the original cost of the properties, less depreciation, generally referred to as the "net investment," and also to *consider* the "replacement cost." Neither of these is the test of "fair value." "We are to remember that the cost of reproduction is a guide, but not a measure." Justice Cardozo, in *Dayton Power & Light Co. v. Public Utilities Commission,* 292 U.S. 290, 311, 54 S.Ct. 647, 78 L.Ed. 1267. "Ordinarily, the fair value of a utility's property is found to be less than the reconstruction cost of the property." Chief Justice Denny, in *Utilities Commission v. Telephone Co.,* 266 N.C. 450, 454, 146 S.E. 2d 487. Clearly, G.S. 62-133 contemplates that, normally, the Commission will "ascertain" the "fair value" of the properties at a point somewhere between the original cost, less depreciation, and the cost of replacement new, less depreciation. The Commission has the duty to weigh these evidences of "fair value" fairly in "balanced scales" and may not disregard either, or brush either aside by giving it "minimal consideration only." Justice Higgins, in *Utilities Commission v. Gas Co.,* 254 N.C. 536, 550, 119 S.E. 2d 469. Accord: *Utilities Commission v. Telephone Co.,* 263 N.C. 702, 140 S.E. 2d 319. The Legislature has, however, designated the Commission to do the weighing of these elements, and the reviewing court may not set aside the Commission's determination of "fair value" merely because the court would have given the respective elements different weights and would, therefore, have arrived at a different "fair value." *Utilities Commission v. Morgan, Attorney General, supra,* at p. 267; *Utilities Commission*

v. State and *Utilities Commission v. Telegraph Co., supra,* at pp. 344 and 349; *Utilities Commission v. Telephone Co.,* 266 N.C. 450, 457, 146 S.E. 2d 487.

[15] 11. "Other facts" which the Commission considers in determining the "fair value" of the utility's properties must be found and set forth in its order, so that the reviewing court may see what these elements are and determine the authority of the Commission to consider them as "relevant to the present fair value." The statute does not contemplate that the Commission may "roam at large in an unfenced field" in the selection of such "other facts." Justice Higgins, in *Utilities Commission v. Public Service Co.,* 257 N.C. 233, 125 S.E. 2d 457.

[16] 12. The excess of "fair value," so ascertained by the Commission, over and above the original cost, less depreciation, is an unrealized paper profit to the utility. It is not a proper entry on the utility's balance sheet and does not appear there. It is not an addition to surplus, which is either distributable to stockholders or reinvestable in the business. It is, therefore, utterly different from an actual, earned surplus retained and reinvested in the business by the company. Nevertheless, G.S. 62-133 clearly contemplates that this excess shall be included in the rate base of the utility, just as if it were a realized profit invested in additional property used and useful in rendering service to the public. Since the holders of the utility's bonds and other evidences of indebtedness derive no benefit from this paper profit, it should be treated by the Commission in a proceeding to fix rates as if it were an addition to the equity component of the utility's capital structure.

[17] 13. There is no fixed "fair rate of return" applicable to all utility companies, or to a single utility company at all times. *Federal Power Commission v. Hope Natural Gas Co., supra,* at p. 603; *Smith v. Illinois Bell Tel. Co.,* 282 U.S. 133, 160, 51 S.Ct. 65, 75 L.Ed. 255; *United Railways v. West,* 280 U.S. 234, 249, 50 S.Ct. 123, 74 L.Ed. 390; *Bluefield Water Works & Improvement Co. v. Public Service Commission, supra,* at p. 692; *City of Alton v. Illinois Commerce Commission,* 19 Ill. 2d 76, 165 N.E. 2d 513, 519. In the Smith case, Chief Justice Hughes said:

> "[A] rule as to rate of return cannot be laid down which would apply uniformly to all sorts of utilities; 'what

> may be a fair return for one may be inadequate for another, depending upon circumstances, locality and risk.' * * * It is evident that in the present case we are not dealing with an ordinary public utility company, but with one that is part of a large system organized for the purpose of maintaining the credit of the constituent companies and securing their efficient and economical management."

[18] 14. A major factor in the element of risk is the company's capital structure. A low ratio of debt capital to total capital means less risk, both to the bondholder and to the stockholder. The lower the risk, the lower is the return required to attract capital. On the other hand, a high debt ratio, coupled with a rate of return on "fair value" which is in excess of the rate of the fixed interest charges on the debt component, provides a leverage, which results in a rate of return on the equity component substantially higher than the rate of return on "fair value." These are circumstances to be weighed by the Commission in determining what is a fair rate of return on "fair value." As above noted, the excess of "fair value" over the actual total capital of the company (debt capital, plus capital stock, plus actual surplus) is to be added to the equity component of the capital structure for the purpose of fixing rates under G.S. 62-133. The choice of the appropriate debt-equity ratio is a management decision, but the board of directors may not thereby tie the hands of the Commission and compel it to approve rates for service higher than would be appropriate for a reasonably balanced capital structure.

We turn now to the more difficult task of applying these principles to the specific questions arising on the record before us.

Deductions From Rate Base Due To Purchases From Automatic Electric Company

Witnesses for General testified to the following effect:

Both General and Automatic are wholly owned subsidiaries of GT&E. Automatic was acquired by GT&E in 1955. As of 31 December 1969, GT&E's investment in Automatic was $328,909,188 and the consolidated book net worth of Automatic and its own subsidiaries was $235,991,550, on which Automatic earned 18.06%.

For many years prior to its acquisition by GT&E, Automatic was an independent manufacturer of telephone and electronic equipment and a major source thereof for telephone companies not affiliated with the Bell Telephone System, including all operating companies in the GT&E System. This business Automatic had secured on a competitive basis. Since such acquisition, the other affiliates of GT&E, including General, are not obligated by contract or otherwise to purchase equipment and supplies from Automatic. However, Automatic continues to be their principal, though not their sole supplier. Automatic continues to sell to telephone companies not affiliated with either the Bell System or the GT&E System. Most of its manufactured products are designed and engineered to the purchasing company's specifications.

Since the acquisition of Automatic by GT&E, its prices to GT&E affiliates, including General, are the same as or lower than its prices to telephone companies not affiliated with GT&E. On items sold but not manufactured by it, Automatic obtains from its own supplier discounts by virtue of the volume of its purchases. These discounts Automatic passes on to its operating affiliates, such as General, irrespective of the size of the purchases made from time to time by such affiliated operating companies. [This is one distinguishing feature of the present case from *Utilities Commission v. Morgan, Attorney General, supra,* concerning transactions between affiliates.] Generally, on items not designed to meet the specific customer's specification, Automatic's prices to General, and to other GT&E operating affiliates, are lower than the prices charged by competing independent suppliers; i.e., suppliers other than Western Electric Company, which is the principal supplier of the Bell System operating companies.

Since its acquisition by GT&E, Automatic has followed the same or similar pricing methods as prior to such affiliation. However, as a result of the affiliation, Automatic, under the Federal Internal Revenue Act, may disregard profits made by it on sales to affiliated companies, thus substantially reducing Automatic's income tax liability. This entire saving Automatic remits to GT&E, which, in turn, remits to its affiliated operating companies. In this way, General received in 1969 a total refund of $1,660,000 on account of its purchases from Automatic, totaling $17,802,000 (company-wide, not North Carolina alone). Also, since its affiliation with GT&E, Auto-

matic has introduced an inventory stocking plan which allows the affiliated operating companies, including General, to minimize their own inventories and use invoicing and other procedures which are beneficial to them.

Since its affiliation with GT&E in 1955, Automatic's sales to its nonaffiliated customers have increased from $37,000,000 to approximately $72,000,000, despite intervening acquisition by GT&E of a number of previously nonaffiliated customers of Automatic.

The Commission's Director of Accounting, who testified concerning the relation between Automatic and General, did not controvert any of the above summarized testimony given by witnesses for General. His testimony was to the effect that Automatic's sales to nonaffiliated domestic companies have declined in relation to Automatic's total sales. (This would be a natural consequence of the acquisition by GT&E of some of Automatic's previously unaffiliated customers.) He further testified that the dominant position of Automatic in the telephone equipment market, other than the Bell System, leaves only a few smaller manufacturers in the market with little, if any, competitive forces at their command. On the other hand, Automatic's existence depends upon the business it receives from GT&E affiliates and its entire operations are geared to the service of such affiliates.

For this reason, this witness recommended that the Commission permit General, for rate making purposes, to consider as the original cost of its purchases from Automatic, not the actual price paid to Automatic, but no more than a reasonable price, based on a fair return to Automatic upon its own net investment in properties required for the production of such commodities. He concluded that $1,417,000 should be subtracted from the original cost of General's properties, computed on the basis of prices actually paid by it, on the ground that this amount represented excess profits made by Automatic upon its sales to General for North Carolina intrastate service. Such excess he computed "on the concept of permitting the supplier affiliate the same rate of return on net book investment as that allowed by the Commission to the affiliate operating telephone company," which, in the opinion of the witness, should be 12% (i.e., on the equity component of General's capital structure). This concept would further require, in the opinion

of the witness, adjustments to the accumulated depreciation reserve and to operating expenses. In support of this concept, the witness cited the decision of the Court of Appeals of New York in *General Telephone Co. of Upstate New York v. Lundy, supra,* and orders of the New York, Pennsylvania and Wisconsin Commissions.

[19] The record does not indicate that Automatic carries on any operations in North Carolina. Furthermore, it is not a public utility within the definition contained in G.S. 62-3(23)a. It is not the parent of or a subsidiary of General, as those terms are defined in G.S. 55-2. Consequently, it is not brought within the definition of "public utility" by the provisions of G.S. 62-3(23)c. Neither the Commission nor the courts may add to the types of business defined by the Legislature as public utilities. *Utilities Commission v. Telegraph Co.,* 267 N.C. 257, 268, 148 S.E. 2d 100. Consequently, the Commission may not fix or control prices which Automatic charges its customers for its products. The Commission may, however, in a proper case, refuse to allow General to include in its rate base, or in its operating expenses, the full price General actually paid Automatic for equipment and supplies.

In its proper regulation of rates charged by General, the Commission is expressly authorized to inspect the books and records of affiliated corporations and to investigate contracts and practices between the operating utility company and its holding company. G.S. 62-37 and G.S. 62-51. G.S. 62-153, which authorizes the Commission, after hearing, to disapprove and declare void contracts between a public utility and certain types of affiliated corporations is not before us in the present case and nothing herein may be deemed to limit the powers granted to the Commission by that statute.

[20, 21] In fixing rates to be charged by a public utility to its own customers, the Commission is directed by G.S. 62-133 to consider "the *reasonable* original cost of the utility's property used and useful in providing the service." (Emphasis added.) Obviously, a utility may not inflate its rate base by extravagance in purchasing equipment or constructing its plant. In this connection, it is immaterial whether such extravagance be due to careless improvidence or to wilful payment of exorbitant prices to an affiliate. See: *State v. Morgan, Attorney General, supra,* at pp. 271-272; *Pacific Telephone & Telegraph*

Co. v. Public Utilities Commission, 34 Cal. 2d 822, 215 P. 2d 441. As Mr. Justice Brewer said, in *Chicago & Grand Trunk Railway v. Wellman,* 143 U.S. 339, 346, 36 L.Ed. 176, 180, "While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call 'operating expenses'."

[22] On the other hand, the management of the business of a public utility, including the fixing of the prices which it pays for the construction and equipment of its plant and for its maintenance and operation, rests with its board of directors in the absence of clear mismanagement or abuse of discretion. *Utilities Commission v. Gas Co.,* 254 N.C. 536, 548, 119 S.E. 2d 469; *United Fuel Gas Co. v. Railroad Commission,* 278 U.S. 300, 320, 49 S.Ct. 150, 73 L.Ed. 390; *Southwestern Bell Telephone Co. v. Public Service Commission,* 262 U.S. 276, 43 S.Ct. 544, 67 L.Ed. 981; *Chambersburg Gas Co. v. Public Service Commission,* 116 Pa. Super. Ct. 196, 176 A. 794, 806.

[23] As observed by Justice Traynor, later Chief Justice, in *Pacific Telephone & Telegraph Co. v. Public Utilities Commission, supra,* at p. 826, the advent of the holding company, which both controls and provides, either directly or indirectly through another subsidiary, services for a network of operating utilities, has been the source of new problems in public utility rate regulation. As the Supreme Court of California there observed, and as we stated in *Utilities Commission v. Morgan, Attorney General, supra,* at p. 272, the doctrine of the corporate entity may be disregarded where it is used to defeat the public interest and circumvent public policy in the regulation of utility rates.

[24, 25] However, the fact that equipment or services are sold to the utility by an affiliated corporation does not alter the ultimate question for the Commission. That question is whether the prices paid by the utility are reasonable and, therefore, reflect the "reasonable original cost" of the properties. The only effect of the affiliation between the utility and its supplier is that such relationship calls for a close scrutiny by the Commission of the price paid by the utility. *Dayton Power & Light Co. v. Public Utilities Commission of Ohio,* 292 U.S. 290, 295,

308, 54 S.Ct. 647, 78 L.Ed. 1267; *Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S. 151, 156, 54 S.Ct. 658, 78 L.Ed. 1182; *Western Distributing Co. v. Public Service Commission of Kansas*, 285 U.S. 119, 124, 52 S.Ct. 283, 76 L.Ed. 655; *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 152, 51 S.Ct. 65, 75 L.Ed. 255; *Pacific Telephone & Telegraph Co. v. Public Utilities Commission, supra; General Telephone Co. of Upstate New York v. Lundy, supra; Solar Electric Co. v. Public Utilities Commission,* 137 Pa. Super. Ct. 325, 9 A. 2d 447, 473. Where the purchase is made from an affiliated company, the bargaining is not at arm's length and when the transaction is called in question, the burden is upon the utility to show that the price it paid was reasonable. As was said in *Solar Electric Co. v. Public Utilities Commission, supra:*

> "Charges arising out of intercompany relationships between affiliated companies should be scrutinized with care [citations omitted] and if there is an absence of data and information from which the reasonableness and propriety of the services rendered and the reasonable cost of rendering such services by the servicing companies can be ascertained by the commission, allowance is properly refused. * * *
>
> "Moreover, the record in this case is an illustration of the fact that effective and satisfactory State regulation of utilities is made increasingly difficult by the progressive integration of utility services under holding company domination.
>
> "The desire of public utility management, evidenced by various methods, to secure the highest possible return to the ultimate owners is incompatible with the semi-public nature of the utility business, which the management directs. It therefore follows that the commission should scrutinize carefully charges by affiliates, as inflated charges to operating companies may be a means to improperly increase the allowable revenue and raise the cost to the consumers of utility service as well as an unwarranted source of profit to the ultimate holding company."

Similarly, the Court of Appeals of New York, in *General Telephone Co. of Upstate New York v. Lundy, supra,* observed:

"When such materials and services are obtained through contracts which are the result of arm's-length bargaining in the open market, the contract price is usually accepted as the proper cost. However, when a utility and its suppliers are both owned and controlled by the same holding company, the safeguards provided by arm's-length bargaining are absent, and ever present is the danger that the utility will be charged exorbitant prices which will, by inclusion in its operating costs, become the predicate for excessive rates."

In *United Fuel Gas Co. v. Railroad Commission, supra,* at p. 320, Mr. Justice Stone, later Chief Justice, said:

"We recognize that a public service commission, under the guise of establishing a fair rate, may not usurp the functions of the company's directors and in every case substitute its judgment for theirs as to the propriety of contracts entered into by the utility; and common ownership is not of itself sufficient grounds for disregarding such intercorporate agreements when it appears that, although an affiliated corporation may be receiving the larger share of the profits, the regulated company is still receiving substantial benefits from the contract and probably could not have secured better terms elsewhere."

[26] The uncontradicted evidence offered by Automatic before the Commission in the present case is to the effect that Automatic had an independent corporate existence long before it became a part of the GT&E System. It was not brought into being, and nothing in the record indicates that it was acquired by GT&E or has been used by it, as a device through which to siphon off and conceal profits of the affiliated utility. During its independent life it was a supplier of materials and equipment to General. It continues to supply unaffiliated telephone companies. Its prices to General are no higher and are often lower than its prices to such nonaffiliated customers. Though this circumstance is not controlling, it is relevant. General receives the benefit of volume discounts obtained by Automatic from its suppliers, which discounts would not be available to General if it dealt directly with Automatic's suppliers. In addition, General receives refunds by reason of savings on Automatic's income taxes due to Automatic's now being a member of the GT&E System. In view of benefits to General, resulting

from the affiliation, we cannot deem the fact that Automatic earns, on its own net investment in its properties, a return somewhat higher than that which might be deemed reasonable earnings by General, on the equity component of its own capital structure, sufficient basis for disallowance of part of the prices actually paid by General to Automatic in the computation of General's rate base. We are compelled to the conclusion that there is no substantial evidence in this record to support a finding that the prices charged by Automatic to General are so excessive as to indicate bad faith or mismanagement by the directors of General. The complete absence of any evidence tending to show an abuse of the doctrine of the corporate entity so as to conceal excessive rates for telephone service distinguishes this case from *Utilities Commission v. Morgan, Attorney General, supra.*

Consequently, we hold that the Court of Appeals erred in affirming the deduction by the Commission of $978,000 from General's "net investment in plant" (original cost less depreciation) by reason of profits earned by Automatic upon its sales to General. This finding by the Commission is not supported by the evidence.

Deduction From Rate Base On Account Of Excess Margin In Central Office Equipment

Witnesses for General testified to the following effect concerning additions to plant:

All telephone companies operating in North Carolina had a combined station growth of 96% from 1960 to 1970. General's station growth in that period was 91.7%.

At the time of the hearing, General anticipated that its construction of "outside plant," as contrasted with central office construction and equipment, would be a larger proportion of its total construction program in 1971 than had been the case in 1970. It is moving toward a complete one-party service; that is, it is moving toward the elimination of two-party and multi-party lines. [This will, of course, increase its average revenue per telephone without any increase in the present rates for service. It will also increase to some extent its investment in plant per telephone.]

The company contemplates gross additions to its telephone plant in North Carolina, including both interstate and intra-

state operations, of approximately $10,000,000 per year for the next five years. In the three year period ending 30 November 1970, General's investment in telephone plant in service in North Carolina increased from $30,143,000 to $50,809,000, an increase of 69%, and in the same period its primary or main telephones in service increased from 41,338 to 51,096, an increase of 24%.

The Chief Engineer of the Commission, Mr. Clemmons, testified:

General's investment in central office equipment increased 127.5% for the three years of 1967, 1968 and 1969. This increase was at such a rapid rate that main station growth has not been able to keep pace with the investment. He made a study to determine whether General's investment in plant included central office equipment not reasonably needed during the test period. As a result of this study he found that on 31 March 1970, the end of the test period, there were 16,202 lines, representing an investment of $1,457,000, and 7,236 terminals, representing an investment of $253,355 available but not in use.

Mr. Clemmons also made a study to determine the engineering interval for the last line and terminal additions at each central office. In his opinion, an engineering interval of two and one-half years for large central office additions and three years for small additions is reasonable. The term "engineering interval," so used by him, means the period beginning with the completed installation of the equipment and ending when it is completely in service, so that it no longer affords margin for further growth in business. Substantial line and terminal additions were made during the test period, or within the few months immediately preceding it. The long engineering intervals, for which these additions made during, or just prior to, the test period provided, resulted in the above mentioned lines and terminals being included in the plant during the test period in excess of those needed for a two and one-half year engineering interval. The company's program for conversion of its system to an all one-party service is scheduled to be completed by the end of 1973, with most of the conversion to be completed by the end of 1972. Consequently, this does not explain the excessive quantity of lines and terminals exceeding the two and one-half year engineering interval.

Mr. Clemmons' final conclusion was that "the quantity of lines and terminals installed just prior to and during the test period was exceptionally large for the reason that they were in some cases engineered for long periods of time and also the regrade program required more equipment than would normal growth." Exhibit 22, prepared and introduced in evidence by this witness, showed that at the end of the test period the company had 9,842 lines, representing an investment of $885,900, and 4,711 terminals, representing an investment of $164,830, installed but not actually in use, all of which exceeded the appropriate engineering interval of two and one-half years from the end of the test period. In the witness' opinion, this was excess plant margin at the end of the test period. A substantial portion of the lines and terminals, installed but not in use at the end of the test period, will be used for regrade and new growth at some time in the future.

Rule 1-21(b)(1) of the Rules of Practice Before the Utilities Commission, promulgated pursuant to G.S. 62-72, requires that the exhibits and direct testimony of expert witnesses to be offered by the Commission's staff in a general rate case be reduced to writing, filed with the Commission and made available to the utility company not less than twenty days prior to the commencement of the hearing. Thus, General had full notice of the evidence to be given by Mr. Clemmons. Nevertheless, General offered no evidence to rebut his expert opinion that two and one-half years is a reasonable engineering interval for the planning and installation of lines and terminals for future station growth, or to rebut his testimony that, as of the end of the test period, General had installed the above mentioned lines and terminals which were not in use at the end of the test period and which could not reasonably be anticipated to be put in use until more than two and one-half years after the end of the test period. These unused lines and terminals represent a total investment of $1,050,730, which is reflected in the net investment (original cost less depreciation) shown on General's books. The Commission, in reaching its finding of the original cost, less depreciation, eliminated $690,340 on this account. The Court of Appeals held this was error. The city contends the full amount of the excess, as shown in the testimony of Mr. Clemmons, should have been eliminated.

[27] The burden of proof is upon the utility seeking a rate increase to show the proposed rates are just and reasonable. G.S. 62-75; G.S. 62-134(c); *Utilities Commission v. Railway Co.*, 267 N.C. 317, 148 S.E. 2d 210.

[28] The question for determination in connection with an alleged overbuilding of the utility plant is whether the properties in question can be deemed "used and useful" in rendering the service, as of the end of the test period. If not, they may not properly be included in the rate base. G.S. 62-133; *Utilities Commission v. Morgan, Attorney General, supra,* at p. 268; *Utilities Commission v. Gas Co.*, 254 N.C. 536, 548, 119 S.E. 2d 469. As the Supreme Court of Oregon said, in *Pacific Telephone & Telegraph Co. v. Wallace,* 158 Ore. 210, 231, 75 P. 2d 942, 951:

> "We are well satisfied that the company cannot include within its valuations property which it neither used nor was useful to the public service. Property which was not reasonably necessary to the adequate furnishing of telephone service must be excluded from the rate base."

Similarly, in *St. Joseph Stockyards Co. v. United States,* 11 F. Supp. 322, 329 (W.D. Mo.), aff'd 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033, the Court said:

> "The matter of including or excluding land or property held for business expansion in the rate base is the matter of who—the ratepayers or the company—shall carry property which is not being used to produce the service paid for by the rate. Obviously, it may be proper and good business judgment may sometimes dictate provision for future expansion of the business. It is equally clear that, so far as the present ratepayers are concerned, there must be a limit to the extent to which they can be compelled to pay for providing possible future facilities for future business. While a broad power and discretion must be left undisturbed in company management, yet, even as to expenditures directly entering into the present service for which the now customer pays, this discretion is not beyond control. [Citations omitted.] It would seem that such control should be much more extensive where the expenditure has no part whatsoever in furnishing the service paid for. In fact, the general doctrine is that the rate base is made up of values used in furnishing the service."

Justice Holmes, speaking for the Court in *San Diego Land & Town Co. v. Jasper,* 189 U.S. 439, 446, 23 S.Ct. 571, 47 L.Ed. 892, said:

> "If a plant is built * * * for a larger area than it finds itself able to supply, or, apart from that, if it does not, as yet, have the customers contemplated, neither justice nor the Constitution requires that, say, two-thirds of the contemplated number should pay a full return."

At the time he so spoke, the Supreme Court of the United States followed the view that the Federal Constitution required regulatory commissions to comply with the rule of *Smyth v. Ames,* 169 U.S. 466, 18 S.Ct. 418, 42 L.Ed. 819, from which G.S. 62-133 is derived.

Justice Cardozo, speaking for the Court in *Columbus Gas & Fuel Co. v. Public Utilities Commission,* 292 U.S. 398, 407, 54 S.Ct. 763, 78 L.Ed. 1327, said:

> "[Certain gas leases purchased by the utility] ought not in fairness to be capitalized until present or imminent need for use as sources of supply shall have brought them into the base upon which profits must be earned. To capitalize them sooner is to build the rate structure of the business upon assets held in idleness to abide the uses of the future."

To the same effect are: *Cedar Rapids Gaslight Co. v. City of Cedar Rapids,* 144 Iowa 426, 120 N.W. 966, 969, and *Public Service Commission v. Montana-Dakota Utilities Co.* (N.D.), 100 N.W. 2d 140, 150.

[29, 30] On the other hand, a public utility is under a present duty to anticipate, within reason, demands to be made upon it for service in the near future. *Idaho Underground Water Users Association v. Idaho Power Co.,* 89 Idaho 147, 404 P. 2d 859; *Wisconsin Telephone Co. v. Public Service Commission,* 232 Wis. 274, 343, 287 N.W. 122. Substantial latitude must be allowed the directors of the utility in making the determination as to what plant is presently required to meet the service demand of the immediate future, since construction to meet such demand is time consuming and piecemeal construction programs are wasteful and not in the best interests of either the ratepayers of the stockholders. *Springfield v. Springfield*

Gas & Electric Co., 291 Ill. 209, 234, 125 N.E. 891, 901; *Latourneau v. Citizens' Utilities Co.*, 125 Vt. 38, 209 A. 2d 307; *Pacific Telephone & Telegraph Co. v. Department of Public Service*, 19 Wash. 2d 200, 142 P. 2d 498; *Wisconsin Telephone Co. v. Public Service Commission, supra;* 73 C.J.S., Public Utilities, § 18a. However, Commission action deleting excess plant from the rate base is not precluded by a showing that present acquisition or construction is in the best interests of the stockholders. The present ratepayers may not be required to pay excessive rates for service to provide a return on property which will not be needed in providing utility service within the reasonable future.

[31] The overbuilding of plant may occur in a variety of ways. For example, a spare tire is presently used and useful in the operation of an automobile, but twenty spare tires carried in the trunk would be beyond the limit of sound management. A power line may properly be built to carry voltage in excess of that required to serve customers presently in a growing area, since otherwise a line constructed today must be replaced within a short time. *Latourneau v. Citizens Utility Co., supra.* An office building or a storage warehouse may properly be built today, with capacity larger than presently needed, if greater need may reasonably be expected in the near future. A pipe line may be laid today in the mere hope that some day the area it reaches may be occupied by industries and in the belief that, in that event, the cost of laying such a line may be greater than now. See, *Pacific Telephone & Telegraph Co. v. Department of Public Service supra,* at p. 513. The inclusion of such a line in the utility's rate base places an unreasonable burden on today's ratepayers. Thus, the fact that a transmission line, a building or a telephone company's central office equipment is not presently used to its full capacity does not necessarily justify the exclusion of any portion of it from the rate base on the theory that such portion is not presently "used and useful" in rendering service. On the other hand, a telephone company, with central office equipment sufficient to serve any reasonably anticipated increase in customers, may not properly add to its rate base additional units of central office equipment merely because, in the long future, it hopes to have customers who will use it. This is especially true where the supplier of such equipment is an affiliated corporation, controlled by the same holding company which controls the telephone company.

[32] It must be borne in mind that, customarily, the utility selects the time for filing an application for an increase in its rates for service and thereby fixes the test period. Within limits, it has the opportunity to pad its rate base with excess additions to plant immediately before or during the test period. Such additions to plant will produce little or no revenues during the test period and so will artificially depress the rate of return for such period. If rates for service are now fixed so as to yield, from the customers served at the end of the test period, a fair return on the total plant, including such excess construction, then, in the future years, when the excess plant is actually rendering service and producing revenue, the return on the total plant may well be excessive. The self interest of the utility alone may well lead its management into such speculative construction of plant. While the Commission should allow the directors of the utility considerable latitude in the exercise of their business judgment, concerning how much plant is presently required to meet the service obligations of the utility in the immediate future, the courts must give the Commission some measure of discretion in the discharge of its duty to protect the ratepayers against a padded rate base. The Commission's determination, supported by substantial evidence, may not properly be set aside by the reviewing court merely because a different conclusion could have been reached upon the evidence. *Utilities Commission v. Morgan, Attorney General, supra,* at p. 267; *Utilities Commission v. Railway Co.*, 267 N.C. 317, 326, 148 S.E. 2d 210; *Utilities Commission v. Champion Papers, Inc.*, 259 N.C. 449, 130 S.E. 2d 890; *Utilities Commission v. Railway Co.*, 254 N.C. 73, 84, 118 S.E. 2d 21; *Utilities Commission v. Towing Corp.*, 251 N.C. 105, 109, 110 S.E. 2d 886.

[33] The question of whether specific property is presently "used and useful" in rendering service is one of fact to be determined by the Commission upon competent and substantial evidence. *Southern New England Telephone Co. v. Public Utilities Commission,* 29 Conn. Super. 253, 282 A. 2d 915, 919; *Latourneau v. Citizens Utilities Co., supra.* On this question, the burden of proof is upon the utility to show that the property should be included in its rate base, for it has the burden of showing that its proposed increase in rates is just and reasonable. G.S. 62-75; G.S. 62-134(c).

[34] There is unquestionably substantial, competent evidence in the record before us to support the finding of the Commission that a substantial portion of the property of General, asserted by it to be a proper part of its rate base, consisted of central office equipment not to be used by it in rendering telephone service within the reasonable future. General, having full advance knowledge that this evidence would be offered by the Commission Staff, did not introduce any evidence to refute it. Under these circumstances, it was error for the Court of Appeals to set aside the Commission's finding that such excess property should be excluded from the computation of the original cost, less depreciation, in arriving at the fair value of the properties of General used and useful in rendering telephone service.

The city's exception to the refusal of the Commission to subtract from the original cost, less depreciation, of the properties the full amount deemed by Mr. Clemmons to be excess plant margin cannot, however, be sustained. The finding of the Commission as to the extent of the excess is supported, though not compelled by the testimony of Mr. Clemmons, himself.

Fair Value Of The Properties

In its application, General alleged that the net book cost of its properties used in intrastate service in North Carolina as of the end of the test period, 31 March 1970, was $33,467,015, which, together with its cash working capital and materials and supplies on hand, gave it a total net investment, as of that date, in the amount of $34,531,781. This includes plant under construction at the end of the test period and the amount eliminated by the Commission as excess plant margin. It alleged that the net trended cost of its properties, including the above mentioned items, was such as to give it a rate base as of the end of the test period of $43,480,850. The testimony and exhibits prepared and introduced by General's controller, Mr. Redman, are to the effect that the original cost of its intrastate plant in service at the end of the test period was $39,030,988 against which General has, through annual charges with Commission approval, accumulated a depreciation reserve in the total amount of $6,635,641, giving it an end of period net investment in plant of $32,395,347 (original cost less depreciation). This figure also includes plant under construction and the amount

disallowed by the Commission as excess margin. [Thus, the accumulated depreciation reserve is approximately 17% of the original cost of the properties prior to any deductions for these items.]

General's Witness McGrath testified that the trended cost of the properties, including plant under construction and the entire plant margin, as of the end of the test period, was $52,930,678 and the net trended cost thereof was $49,409,698. [The difference, $3,520,980, is this witness' allowance for depreciation, this being only 6.65% of his estimated trended cost of the properties.] Apparently, Mr. McGrath's figures relate to General's entire plant in North Carolina, including the portion attributable to interstate service, which if true, would require a substantial further reduction therefrom. His estimate of 6.65% depreciation was the result of his inspection of the plant and the exhibit prepared and introduced by him showed, among the several property accounts [i.e., types of property], he observed only "pole lines" to have depreciated as much as the 17% reflected in General's accumulated depreciation reserve.

Mr. McGrath testified that his trended cost figure was intended by him to represent the "fair value" of General's properties. In this computation, he made no determination as to whether the plant in service was properly engineered. He testified, "I trended what was on the books of the company * * * I don't know what the book reserve [for depreciation] is. I haven't had it. * * * I am out there telling the condition, physical condition of the plant as of today. * * * *I am taking the original piece of equipment and replacing it, the same design, brick for brick,* and value has nothing to do with potential buyers and sellers and value on the market. It is my understanding that it is replacing, and the fair value is set up for me to replace it as an Engineer. I cannot go out and re-engineer a plant." (Emphasis added.) In response to the question, "Replacement is something that would render the same service using current technology which may produce a substantial different result than trending the existing plant to current cost?" Mr. McGrath replied: "I am not permitted to do that. That is not the value I am permitted to use. I would get a different value but I am not allowed to do it." [Thus, this witness' estimate of trended cost takes no account of obsolescence or of

faulty engineering, but is his opinion as to the trended original cost of the properties actually in use, less his own estimate of physical depreciation only, with no deduction for the defects in service described by the 51 subscriber witnesses and found by the Commission, many of which would appear to be attributable to the condition of the equipment.]

The Commission Staff offered the evidence of its Staff Engineer, Mr. Cash. He testified that General's density of 181 stations per square mile is the highest in the State and over four times that of the State average. From this circumstance he would normally expect General's investment in plant per telephone in service to be below the State average. However, General's investment in plant per station is $573.00, as compared with the State average of $526.00. He attributed General's greater investment per station, in large part, to General's crash program of construction in 1968 and 1969. In his opinion, this comparative investment per station is a fact which should be considered by the Commission in determining the fair value of General's properties.

The Commission Staff's Chief Engineer, Mr. Clemmons, testified that service problems still exist in several areas of General's operations in North Carolina. He found only 7.16% of the pay stations checked were in operational condition. He further found that the failure rate for calls, inter-office and intra-office combined, was 2.74% and that the number of "initial trouble reports per 100 stations" was 8.5, whereas the figure should be in the range of 6 per 100 stations. He testified: "I would compare Durham [i.e., General] to Southern Bell in Raleigh, and Raleigh's Southern Bell is reported for the month of December, 1970 total subscriber trouble reports of 4.22 per 100 stations. For General * * * for December, 1970, initial trouble reports were 7.3 per 100 stations, Charlotte for the month of December 3.43, Greensboro 5.06."

The Commission Staff Accountant, Mr. Peele, testified that General's investment in telephone plant in North Carolina increased $9,559,134 in the 16 months immediately prior to the test period used in this proceeding, and an additional $6,972,105 as added to its investment in plant during the test period. [This coincides with the period in which, according to Staff Engineer Cash, General was engaged in a crash program of construction, and coincides with the period in which Chief Engineer Clem-

mons found the company installed the central office equipment far in excess of a reasonable engineering interval.]

G.S. 62-133(b) requires the Commission to "ascertain," that is, to find "the fair value of the public utility's property used and useful in providing the service." In so doing, the statute requires the Commission to *consider* (1) "the reasonable original cost," less depreciation, (2) the "replacement cost," which may be determined by trending such reasonable depreciated cost to current cost levels or by any other reasonable method, and (3) any other relevant factor.

[35] Quite obviously, "replacement cost" and "fair value" are not synonymous. It is equally clear that "fair value" is not an arithmetical average of original cost and replacement cost, less depreciation, nor is it to be "ascertained" by the application of any mathematical formula. Conversely, a finding of "fair value" by the Commission is not rendered immune to judicial review by the Commission's declaration that, in reaching such finding, it followed no formula. The statute contemplates a "considering" or a weighing of the three factors by the Commission in the exercise of its own expert judgment. *Utilities Commission v. Telephone Co.*, 266 N.C. 450, 454, 146 S.E. 2d 487; *Utilities Commission v. Public Service Co.*, 257 N.C. 233, 237, 125 S.E. 2d 457; *Utilities Commission v. State* and *Utilities Commission v. Telegraph Co.*, 239 N.C. 333, 344, 349, 80 S.E. 2d 133; *Railroad Commission v. Pacific Gas & Electric Co.*, 302 U.S. 388, 398, 58 S.Ct. 334, 82 L.Ed. 319; *Dayton Power & Light Co. v. Public Utilities Commission*, 292 U.S. 290, 311, 54 S.Ct. 647, 78 L.Ed. 1267; *Los Angeles Gas Corp. v. Railroad Commission*, 289 U.S. 287, 53 S.Ct. 637, 644, 77 L.Ed. 1180; Minnesota Rate Cases, 230 U.S. 352, 434, 33 S.Ct. 729, 57 L.Ed. 1511; *New England Tel. & Tel. Co. v. Public Utilities Commission*, 148 Me. 374, 94 A. 2d 801; *State v. Hampton Water Works Co.*, 91 N.H. 278, 18 A. 2d 765; *New York Telephone Co. v. Public Service Commission*, 309 N.Y. 569, 132 N.E. 2d 847; *City of Pittsburgh v. Public Utility Commission*, 187 Pa. Super. Ct. 341, 144 A. 2d 648.

[36-38] The determination of the weight to be given each of the above factors in its ascertainment of "fair value" is for the Commission, not the reviewing court. But if it is clear from the record that the Commission reached its finding of "fair value" by disregarding or giving "minimal" consideration to

one of the above enumerated factors, its finding of the ultimate fact of "fair value" may be set aside by the court on the ground of error of law in such ascertainment. *Utilities Commission v. Telephone Co.*, 263 N.C. 702, 707, 140 S.E. 2d 319; *Utilities Commission v. Gas Co.*, 254 N.C. 536, 119 S.E. 2d 469. Similarly, the finding of "fair value" may be set aside by the reviewing court if it clearly appears that the Commission has made its determination thereof by giving weight to a factor as to which there is no substantial evidence in the record. *Utilities Commission v. Coach Co.*, 261 N.C. 384, 134 S.E. 2d 689. It is likewise where the order of the Commission shows that it reached its determination of "fair value" by considering unspecified facts other than original cost and replacement cost depreciated. *Utilities Commission v. Public Service Co.*, 257 N.C. 233, 125 S.E. 2d 457. The mere recital by the Commission that it has considered all of the factors prescribed by G.S. 62-133 in arriving at its ascertainment of "fair value" does not preclude the court from setting aside the finding of "fair value" where the record discloses any of the above mentioned errors of law. *Utilities Commission v. Public Service Co., supra.*

[39] It seems inescapable that the Commission cannot "consider" or "weigh" an element until it first determines what that element, itself, is. No doubt, the Commission, in the present case, formed an opinion satisfactory to itself, as to the amount of the "replacement cost," depreciated, of the properties included in its determination of the "reasonable original cost," since it said it had given consideration thereto. Unfortunately, though it set forth its finding of the "net investment" [i.e., the reasonable original cost, less depreciation], it failed to set forth its finding of the "replacement cost," depreciated. We do not construe this omission as an acceptance by the Commission of Mr. McGrath's conclusion, for, as we have indicated above, his conclusion was predicated, in substantial part, upon certain items the Commission excluded from "net investment," and upon an erroneous treatment of depreciation. While the consideration or weight to be given "replacement cost," depreciated, in ascertaining "fair value" rests in the sound discretion of the Commission, the reviewing court cannot satisfactorily determine whether the Commission considered or weighed this element at all, or merely gave it "minimal consideration," unless the Commission sets forth what it found this element to be. Though perhaps not indispensable to the validity of such find-

ing, it would be proper, and certainly helpful to the reviewing court and to the parties, for the Commission to state, at least in summary, its reasons for not acquiescing in the figures suggested for this element by the respective expert witnesses.

[40] Original cost, less depreciation, and replacement cost, less depreciation, are not ultimate facts but evidential facts only. The ultimate fact, in this segment of a rate case, is "fair value." However, G.S. 62-133 requires that these evidential facts be considered or weighed by the Commission in determining this ultimate fact. This is not to say that in no case may the Commission fix rates to be charged by a utility for its service without a determination of "replacement cost," less depreciation. The utility, with the Commission's acquiescence, may offer evidence of original cost less depreciation, as its only evidence of "fair value." Proof of "replacement cost" is exceedingly costly, and may be unduly burdensome, especially to a small utility company. However, where, as here, such evidence is introduced, the statute seems clearly to require that the Commission make, and set forth in its order, its findings as to both of these evidential facts, along with any "other facts" considered by it. G.S. 62-79 requires that all orders of the Commission shall include findings upon all "material issues of fact, law, or discretion presented in the record." *Utilities Commission v. Membership Corp.*, 260 N.C. 59, 64, 131 S.E. 2d 865; *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 152, 51 S.Ct. 65, 75 L.Ed. 255; *Northern States Power Co. v. Board of Railroad Commissioners*, 71 N.D. 1, 298 N.W. 423; *Commonwealth Telephone Co. v. Public Service Commission*, 252 Wis. 481, 32 N.W. 2d 247.

[41, 42] We hold, therefore, that, when the record before the Commission presents the questions of the original cost, less depreciation, and the replacement cost, less depreciation, these are "material issues of fact," upon each of which the Commission must make its finding. When it does so, those findings are conclusive, if supported by substantial evidence in the record and not affected by an error of law. Having made such findings, so supported, it is for the Commission, not the reviewing court, to determine, in its expert discretion and by the use of "balanced scales," the relative weights to be given these several factors in ascertaining the ultimate fact of "fair value." *Utilities Commission v. Gas Co.*, 254 N.C. 536, 550, 119 S.E. 2d 469. It is, of course, the prerogative of the Commission to determine

the credibility of evidence, even though it be uncontradicted. It is clearly the prerogative of the Commission to take into account, in making its finding of replacement cost, errors or omissions in the testimony of an expert witness purporting to show such replacement cost.

[43] It must be borne in mind that the ultimate fact to be found is the present "fair value" of the properties. Obviously, the present "fair value" of a plant, physically new, but composed of outmoded, obsolete equipment, poorly designed and engineered, cannot exceed what it would cost to build today a modern, well engineered and designed plant capable of producing the same quantity of service at lower operational costs. See the dissenting opinion of Justice Brandeis, concurred in by Justices Holmes and Stone, in *St. Louis & O'Fallon Railway Co. v. United States,* 279 U.S. 461, 488, 517, 49 S.Ct. 384, 73 L.Ed. 798, and the authorities there cited. Consequently, the Commission is not required to accept as a factor to be weighed, in determining "fair value," the full amount stated by an expert witness to be the cost of reproducing the exact plant now in operation, brick for brick, pole for pole, and wire for wire.

[44] It is obvious that consistently poor service, attributable to defective or inadequate or poorly designed equipment or construction, justifies a subtraction from both the original cost and the reproduction cost of the existing plant before weighing these factors in ascertaining the present "fair value" of the properties. *City of Alton v. Illinois Commerce Commission,* 19 Ill. 2d 76, 165 N.E. 2d 513, 518. The Commission must, however, make a specific finding showing the effect it gave this relevant factor, if it made such deduction on that account. *Utilities Commission v. Morgan, Attorney General, supra,* at pp. 268-269. As the Supreme Court of Appeals of Virginia said, in *Alexandria Water Co. v. City Council of Alexandria,* 163 Va. 512, 563, 177 S.E. 454: "The fact that a plant or a unit thereof is not well adapted to, or is inappropriate for, its present and/or reasonably to be anticipated future use tends materially to reduce its value below its reproduction new cost. One of the forms of inappropriateness is inappropriate engineering layout."

G.S. 62-133 recognizes the self-evident truth that the present "fair value" of a utility plant, which includes properties installed at varying times over a period of many years, is not

to be ascertained by simply weighing the original cost new and the replacement cost new. From each of these there must be subtracted an appropriate allowance for depreciation in order to reach the elements which are to be considered in arriving at the ultimate fact of present "fair value." In this era of automation and a well nigh constant flow of inventions and new techniques, the art of telephony is rapidly changing. Obsolescence often takes a heavier toll from the value of plant and equipment than does physical wear and tear.

Before there is any return whatever to the utility upon the "fair value" of its properties, it must recover its operating expenses, including an adequate allowance for the depreciation or consumption of its properties in the public service. *Utilities Commission v. Morgan, Attorney General, supra,* at p. 262. Rates for service are fixed by the Commission on the basis of including, as an operating expense, an annual charge for depreciation, which over the anticipated useful life of the property will, upon its retirement from service, be sufficient in amount to restore to the utility the full original cost of the property. G.S. 62-35; *Utilities Commission v. State* and *Utilities Commission v. Telegraph Co., supra,* at p. 346. The Commission is expressly authorized to prescribe "what are proper and adequate charges for depreciation of the several classes of property for each public utility," and to make such changes from time to time in these as it finds necessary. G.S. 62-35(c).

General's charges to operating expenses for depreciation, so approved by the Commission, are computed on the straight line basis, the most frequently used of several methods for computing annual depreciation charges. Substantially, this method involves (1) estimating the service life of the various properties included in the plant, (2) estimating the salvage value of such property at the end of its useful service life, (3) dividing the original cost of the property, less its salvage value, by the number of years of its anticipated service life, and (4) charging annually to operating costs, and setting aside in a reserve for depreciation, an amount equal to such quotient. The reserve so created is customarily reinvested in the business.

[45] If these estimates and computations are correct, at any given time during the service life of the property, the reserve will be in the same proportion to the original cost as the consumed portion of the property is to the total property new.

Obviously, as to any specific item of property, this exact relation of accumulated reserve to accumulated actual depreciation at any given time is unlikely, since properties do not wear out or become obsolete at a uniform rate. Nevertheless, when this method is applied to the innumerable items constituting a utility plant, these having been installed in service at varying times over a period of years, a reasonably close relationship between the reserve and the actual accumulated depreciation is probable. If such relationship is not present, then the Commission, in fairness both to the utility and to its ratepayers, may and should review, and make appropriate changes in, the annual charge to operating expenses on account of depreciation. In *State v. Hampton Water Works Co.,* 91 N.H. 278, 18 A. 2d 765, 774, the Supreme Court of New Hampshire, speaking through Chief Justice Allen, said: "It would seem that the company's actual depreciation reserve, found by the Commission to be adequate and proper, should be applied in proportion to reproduction costs." See also: *Tobacco River Power Co. v. Public Service Commission,* 109 Mont. 521, 98 P. 2d 886; *City of Philadelphia v. Pennsylvania Public Utility Commission,* 174 Pa. Super. Ct. 641, 102 A. 2d 428.

In *Lindheimer v. Illinois Bell Telephone Co.,* 292 U.S. 151, 167, 54 S.Ct. 658, 78 L.Ed. 1182, Chief Justice Hughes, speaking for the Court, said:

> "Broadly speaking, depreciation is the loss, not restored by current maintenance, which is due to all the factors causing the ultimate retirement of the property. These factors embrace wear and tear, decay, *inadequacy,* and *obsolescence.*" (Emphasis added.)

To the same effect are: *Utilities Commission v. State* and *Utilities Commission v. Telegraph Co.,* 239 N.C. 333, 346, 80 S.E. 2d 133; *City of Cincinnati v. Public Utilities Commission,* 151 Ohio St. 353, 86 N.E. 2d 10; *Solar Electric Co. v. Pennsylvania Public Utilities Commission,* 137 Pa. Super. Ct. 325, 9 A. 2d 447; *Chambersburg Gas Co. v. Public Service Commission,* 116 Pa. Super. Ct. 196, 176 A. 794, 797; *Wisconsin Telephone Co. v. Public Service Commission,* 232 Wis. 274, 337-338, 287 N.W. 122. An expert witness, who computes replacement cost by trending the original cost of the properties and subtracting from the figure, thus derived, an allowance for no element of depreciation, save the physical wear and tear observed by him,

has obviously left out the major factor of obsolescence. The Commission is not required by the statute to accept as the replacement cost factor, in its ascertainment of "fair value," such a witness' conclusion, even though there be no other witness on the subject of replacement cost.

A utility, nothing else appearing, occupies a poor position before the Commission when, in the same rate case, it says, through one witness, that it should be permitted to continue to charge, as an annual operating expense, the company's long established and applied depreciation rates, but says, through another witness, the reserve, thus accumulated, does not reflect the portion of its properties heretofore consumed through use and obsolescence.

[46] As the Wisconsin Court has said: "Manifestly, property does not diminish in value in accordance with a regular schedule. * * * Some new invention may require the retirement of a large amount of property, such as the substitution of the dial for the manual system. * * * It is also apparent that some depreciation factors are not observable from physical inspection." *Wisconsin Telephone Co. v. Public Service Commission,* 232 Wis. 274, 337-338, 287 N.W. 122. Professor Bonbright has said in his book, "Principles of Public Utility Rates," at p. 98: "As a matter of sound accounting and sound price fixing, the rates at which capital costs are gradually transformed into a series of charges to operating expense should be based on plausible assumptions as to downward trends in asset values in the course of their service lives." In the absence of convincing evidence to the contrary, the Commission is entitled to proceed on the assumption that the annual charges to operating expenses to cover depreciation, which the company has been making with the Commission's approval, have been so based. See also, *City of Weslaco v. General Telephone Co. of the Southwest* (Tex. Civ. App.), 359 S.W. 2d 260, 265, and *Re Reedsburg Telephone Co.,* 7 P.U.R. (N.S.) 389, 397, in which case the Wisconsin Public Service Commission said:

> "[Witness] Hartt's depreciation estimate is based on inspection of portions of the property. This method, as applied by Hartt, gives consideration to the physical causes of depreciation, but does not provide a complete allowance for the more or less invisible but extremely important causes of depreciation such an inadequacy and obsolescence.

> For the past seventeen years this utility has followed the 'straight-line' method of depreciation accounting. This method supposedly makes allowance for all factors both physical and functional which act to terminate the service lives of units of equipment. In our opinion, a utility which claims and has long used the 'straight-line' depreciation allowances in operating expenses for the ostensible purpose of replacing capital consumed in operation is estopped to have its property for purposes of valuation depreciated on some other and inconsistent basis. Either the company was wrong in claiming its depreciation expense or it is wrong now in claiming accrued depreciation on a different basis. It cannot be right in both respects."

[47] Where, as in the present case, the accumulated reserve indicates a total accumulated depreciation of 17%, in absence of convincing evidence to the contrary, the Commission may discount the replacement cost new by 17% in arriving at the replacement cost factor which it is to consider and weigh in determining the "fair value" of the properties. If there is evidence to support such a finding, the Commission may, instead, discount replacement cost new by a greater or a smaller amount on account of depreciation, including obsolescence. Here, as in other phases of a proceeding instituted by the utility to fix its rates for service, the burden of proof is upon the utility. G.S. 62-75.

The Commission may, after proper findings, further subtract from both original cost new and replacement cost new an appropriate allowance for the inadequacy of the plant, if any, indicated by the great volume of service complaints set forth in the evidence before the Commission.

[47, 48] We, therefore, hold that the Court of Appeals was correct in its conclusion that the Commission committed an error of law, in failing, in the present case, to make a specific finding of its determination of the replacement cost of General's properties. Upon remand the Commission may, in making such finding, take into account the appropriate allowance for depreciation, including obsolescence, and the appropriate allowance for inadequacy, if any, of the properties due to faulty engineering, faulty maintenance or other circumstance. The Commission should make appropriate findings as to these items. It may further subtract from original cost and from replace-

ment cost, so adjusted, the appropriate amount for excess plant margins hereinabove discussed.

Plant Under Construction At The End Of The Test Period

[49] The Court of Appeals was correct in finding no error in the Commission's refusal to include in the rate base telephone plant under construction at the end of the test period. This is not property "used and useful" within the meaning of G.S. 62-133. *State v. Morgan, Attorney General, supra,* at p. 273; same case on rehearing, 278 N.C. 235, 179 S.E. 2d 419.

Fair Rate Of Return

General's witness, Mr. Redman, testified that, as of the end of the test period, General did not have enough coverage of interest charges by earnings to permit the issuance of additional long term debt securities under the terms of its indenture. "This," he said, "is true for our entire operation, not just for North Carolina."

Mr. Redman's testimony and exhibits do not disclose directly how General's earning rate on its North Carolina intrastate business compares with that in each of the other states in which General operates. However, it does appear from Mr. Redman's Exhibits 13 and 14 that in the test period General's net operating income from North Carolina intrastate service was 28.8% of its company-wide net operating income, whereas it appears from his Exhibits 12 and 15 that General's net investment in telephone plant attributable to North Carolina intrastate service was only 18.8% of its company-wide net investment in telephone plant. These exhibits appear to indicate that such inadequacy as there may be in the coverage of interest charges by earnings stems, primarily, from General's operations in other states rather than from its North Carolina intrastate service. "North Carolina users of telephones are not to be required to furnish revenue to maintain applicant's financial condition which other states refuse to provide." Justice Barnhill, later Chief Justice, in *Utilities Commission v. State* and *Utilities Commission v. Telegraph Co., supra,* at p. 346.

Furthermore, Mr. Redman's testimony in this regard was predicated upon the inclusion in General's long term debt of an issue of $14,000,000 in new bonds on the day after the test period ended, the interest rate on that issue being 9.375%. That bond issue would, necessarily, depress temporarily the ratio of

earnings to interest charges. Clearly, the ratio maintained during the test period was sufficient to permit the sale of the bond issue of 1 April 1970.

According to Mr. Redman, General's current construction program requires the attraction of a substantial amount of capital, in addition to funds available through the accumulation of its reserve for depreciation. In his opinion, to secure long term debt capital for such construction, General must have earnings, after taxes, equal to two times its interest charges and it would have such earnings from North Carolina intrastate service, in relation to interest charges attributable to that service, if the requested rate increases were granted in full.

Mr. Meyer, Vice President of GT&E, was General's expert witness on what constitutes a fair rate of return, being permitted to testify as an expert in that field over objection by the city. The substance of his voluminous testimony and exhibits is as follows:

The optimum capital structure for General is: 45.09% mortgage bonds; 3.00% debentures; 0.02% other long term debt; 5.56% short term debt; 1.93% unamortized tax credit; 2.25% preferred stock; and 42.15% common equity (i.e., common stock plus accumulated surplus). A fair rate of return to General is a composite of the cost of the debt and preferred stock components of such capital structure, plus a reasonable return on the equity component. He computed the cost of the bonded debt component by considering the present embedded cost of outstanding bonds, prior to the issue of 1 April 1970, which is 5.76%, the cost of that issue, which is 9.63%, and his opinion as to the cost at which a proposed issue of $6,600,000 could be sold at the time of the hearing, 8%. From these factors, he derived a composite cost of the bonded debt component, 6.73%.

Proceeding with his computation of the composite cost of capital to General, Mr. Meyer used the present embedded cost of the debenture component, 4.85%, and of the other long term debt component, 6%. For the short term debt component, he used the cost of short term debt as of the time of his testimony, 6%, and for the preferred stock component, he used the actual dividend rate of 4.65%. To the "unamortized investment tax credit" component, Mr. Meyer assigned a cost rate of 3%, although this is capital which is available to General without

any actual interest cost whatsoever. This left for determination his estimate of the cost of the common equity component of the capital structure.

In Mr. Meyer's opinion, the basic test of a fair rate of return on the common equity component of a utility's capital structure is "the comparable earnings test." Since a public utility has no right to a profit such as is anticipated in a highly profitable, speculative venture, he restricted his study of earnings of other companies to "comparable utilities," both telephone and electric, also taking into account the coverage of interest charges by earnings required to give General an A rating on its bonds. His conclusion was that a reasonable return to General on the equity component of its capital structure was between 11.5% and 13.5%. Considering all components in combination, he concluded that "a fair range of rate of return * * * on the rate base" would be 8.5% to 9.5%.

In the opinion of Mr. Meyer, the common equity component of General's actual capital structure as of the end of the test period, 36.03%, was too low and would tend to increase the cost of the debt component of his optimum capital structure. In this observation, however, he did not take into account any increase in the equity component, for rate making purposes, by reason of the unrealized paper profit inherent in a finding of "fair value" in excess of book value (original cost less depreciation).

General's witnesses, Mr. Flannery and Mr. Duncan, both testifying for the primary purpose of showing the reasonableness of the profits earned by Automatic on its sales to General, demonstrated, rather convincingly, that the earnings of industrial corporations are little, if any, evidence of what rate a utility should be permitted to earn on the "fair value" of its properties.

Mr. Flannery testified that a manufacturing company has "a risk factor far greater than a public utility," and for this reason successful manufacturing companies ordinarily earn greater returns than do public utilities. His testimony as to the reasons for this may be summarized as follows: Manufacturers' sales tend to change dramatically from year to year, whereas public utilities have a reasonably stable growth in their rates of return. The cost of operation of a manufacturing company, as contrasted with a utility, is greatly increased by the much

more erratic fluctuations in revenues. The cost of labor and material to the manufacturing company is a much higher proportion of its revenue dollar than is the case with the utility.

Mr. Duncan's testimony upon this subject may be summarized as follows: It is difficult to draw any meaningful comparison of returns on investment between industrial companies without careful analysis of their comparability. This is especially true where the comparison is between a particular company and broad averages of rates of earnings shown by a number of companies in diverse industries. "Unlike most utility companies, return on investment on any one of the industrial companies included in the average can fluctuate widely, depending on many different factors. * * * Secondly, there is no uniform system of accounts such as is prescribed for utilities. * * * Return on book net worth is a relatively unimportant measure of the profitability of an industrial business because the balance sheet usually does not reflect any amount for some of the company's most productive assets." The profitability of a manufacturing enterprise is less dependent on tangible assets than on such intangibles as the competency of its management, the creativity of its research, its patents, processes and technical drawings, the reputation of its product, the skill of its labor force and other intangibles which do not appear on the balance sheet.

The city's witness, Dr. Olson, also used the cost of capital approach as the basis for his computation of a fair rate of return for General. Including the bond issue of 1 April 1970, he computed the weighted cost of outstanding mortgage bonds at 6.476%, as contrasted with Mr. Meyer's computation of 6.73%. Dr. Olson based his computation of a fair return on the equity component of General's capital structure upon a study of the ratios of earnings per share to market price per share of companies deemed by him comparable to General. His conclusion was that a return of 9.8% on its equity component would be sufficient to attract equity capital to General and so would be a fair return on its equity component. This contrasts with the range of 11.5% to 13.5% used by Mr. Meyer in his computation of the cost of equity capital to General. Like Mr. Meyer, Dr. Olson did not take into account in his computation any addition to General's equity component by reason of the unrealized paper profit inherent in a "fair value" rate base which is in excess of the original cost less depreciation.

Dr. Olson further testified: "The company [General] has included in its operating costs the higher taxes it would have paid without the investment tax credit, and this excess has been accumulated as an investment tax credit reserve. This reserve represents capital that has been accumulated by charging telephone subscribers more for Federal income taxes than the company actually has paid. The company pays no return on this capital and it should be deducted in arriving at the rate base upon which the company is entitled to earn a return." The North Carolina intrastate portion of this accumulated reserve is $690,030.

Plant and equipment acquired with past excess allowances in the rate structure for operating expenses is, nevertheless, property of the utility. It is properly included in the rate base. G.S. 62-133(b). The appropriateness of continuing to allow, as an operating expense, a computation of income tax liability in excess of taxes actually payable is a different matter. The consideration of time lags between collections of customers' bills and payment of taxes and other expenses in computing the utility's need for cash working capital is also a different matter.

[50] G.S. 62-133(b)(4) requires the Commission to fix a rate of return on the "fair value" of the properties which will enable the utility "by sound management": (1) To produce a fair profit for its stockholders, in view of current economic conditions, (2) maintain its facilities and service, and (3) compete in the market for capital. This, as is recognized by all parties before us, is the test of a fair rate of return declared in *Bluefield Water Works & Improvement Co. v. Public Service Commission, supra,* at p. 692. See also, *Federal Power Commission v. Hope Natural Gas Co., supra,* at p. 603. The fixing of rates for service which will enable the utility to do these things, and no more, is the ultimate objective of rate making. At best, the result of the complex rate making procedure is an approximation of this objective. *Utilities Commission v. State* and *Utilities Commission v. Telegraph Co., supra,* at p. 344.

The apparent precision with which experts, both for the utility and for the protestants, compute the fair rate of return is somewhat illusory. The habitual bickering and theorizing of such witnesses over the relative merits of methods of computing cost of equity capital, such as the earnings-to-price ratio

or the discounted-cash-flow, lends a false appearance of certainty to the ultimate decision which is for the Commission. No doubt, either of these, or any other method adopted by a competent expert, will aid the witness and the Commission in arriving at an approximation of the return, which will be sufficient to attract to the utility the capital it will require in the *immediate future.*

[51] It is for the Commission, not the reviewing court, to determine the credibility of and the weight to be given to all competent evidence, including conflicting expert opinion testimony upon this complex question and the respective methods used by the witnesses in their studies. As Chief Justice Hughes said, in *Lindheimer v. Illinois Bell Telephone Co., supra,* at pp. 163-164, the actual experience of a utility in the attraction of capital, under the rates of which it complains, is often more convincing than tabulations of experts and "[e]laborate calculations which are at war with realities are of no avail." See also, *Federal Power Commission v. Hope Natural Gas Co., supra,* at pp. 602-603. This is as true of the utility's experienced difficulty in attracting capital on reasonable terms as it is of the utility's success in doing so, which was the situation of which Chief Justice Hughes spoke in the Lindheimer case.

[52] The weighing of the evidence and the drawing of the ultimate conclusion therefrom as to what return is necessary to enable a utility to attract capital is for the Commission, not the reviewing court. It has been said many times that this is so because the Commission is a body of experts "composed of men of special knowledge, observation and experience" in the field of rate regulation. *Utilities Commission v. Champion Papers, Inc.,* 259 N.C. 449, 456, 130 S.E. 2d 890; *Utilities Commission v. State* and *Utilities Commission v. Telegraph Co., supra,* at p. 349. Without any intent to question the correctness of such statement as to the experience and abilities of the Commission or to claim expertness for the courts, this is not the reason for the rule. The rule applies to the newly appointed, inexperienced commissioner, sitting on his first general rate case, as truly as it does to the veteran and, should the veteran be transferred from a seat on the Commission to a seat on the reviewing court, he loses immediately the preferential status given by this rule to his views of the matter. The reason for that status is not expertness in fact, but the circumstance that the Commission is the delegatee of the power of the Legislature.

The courts can modify or reverse the action of the Commission, in the exercise of that delegated authority, only when an error of law specified in G.S. 62-94 (including a violation of constitutional provisions) has occurred.

[53] The Court of Appeals held it was such an error of law for the Commission to fix the allowable rate of return prior to its ascertainment of the "fair value" of General's properties used and useful in providing its telephone service. In this we find no error, in view of the rate making procedure required by G.S. 62-133(b). In so holding, we do not intimate, as the Court of Appeals did not, that the Commission's determination that 7.53% is a fair rate of return upon the "fair value" of General's properties is arbitrary or capricious, or that it is unsupported by competent, material and substantial evidence in the record, or that it is confiscatory or, per se, in excess of the statutory authority of the Commission. Nor are we to be understood as holding that the Commission's finding of "fair value" is affected by any of these errors of law. What the Court of Appeals held was that, *without a finding* by the Commission of the replacement cost of General's properties "used and useful in providing the service," the Commission's *finding* of "fair value" was affected by an error of law and, consequently, its finding of a fair rate of return on such "fair value" was so affected and was premature.

[54] Obviously, no witness, however expert, can form an opinion, prior to the hearing, as to the fair rate of return on the "fair value" of the utility's properties so used and useful, since there is, at that time, no way for the witness to know what the Commission will determine the "fair value" to be. Until that determination is made by the Commission, the existing capital structure of the utility, *for rate making purposes,* cannot be known. The capital structure of the company is a major factor in determining the risk of investing in its bonds or in its stock. Consequently, it is a major factor in determining its cost of capital, which cost determines the fair rate of return. See, *City of Alton v. Illinois Commerce Commission,* 19 Ill. 2d 76, 165 N.E. 2d 513, 519. To comply with the statute, the Commission must consider and weigh testimony of expert witnesses, on the question of the fair rate of return, in the light of its own adjustment, for rate making purposes, of the utility's actual capital structure by its determination of the "fair value" of its properties. Having done so, its determinations of the rate of return

to be allowed, and the rates for service it deems sufficient to earn such rate of return, may not be modified or reversed by a reviewing court in the absence of a violation of a provision of the State or Federal Constitution or of one or more of the other errors of law specified in G.S. 62-94(b).

Other Assignments Of Error

[55-58] The city's exception to the ruling of the Commission allowing Mr. Meyer to testify as to his opinion concerning the cost of capital and a fair rate of return cannot be sustained. *In Re Filing by Automobile Rate Office,* 278 N.C. 302, 320, 180 S.E. 2d 155. In view of our decision in that case, we cannot hold that, as a matter of law, the Commission erred in permitting such testimony by a witness experienced in public utility accounting and related financial matters. See also, Stansbury, North Carolina Evidence, 2d Ed, § 132. Of course, a witness qualified to testify as an expert in the field of his training and experience is not necessarily qualified to testify as an expert in other fields, even though somewhat related. *Hopkins v. Comer,* 240 N.C. 143, 81 S.E. 2d 369. However, the competency of a witness to testify as an expert is a question addressed primarily to the sound discretion of the trial court, or Commission, and its discretion is ordinarily not disturbed by a reviewing court. *LaVecchia v. Lank Bank,* 218 N.C. 35, 9 S.E. 2d 489. The fact that the witness is an officer or employee, or a consultant specially retained by a party to the litigation, does not disqualify him as an expert. The effect of this circumstance upon the weight to be given his opinion is for the trial body to determine.

We have considered each other assignment of error by each of the appellants and find therein nothing requiring discussion or further modification of the decision of the Court of Appeals.

The decision of the Court of Appeals, remanding this matter to the Utilities Commission for further proceedings by the Commission, either upon the record heretofore compiled at the hearing before it, or after such further hearing as it may deem advisable, is approved, except insofar as hereinabove modified. This matter is, therefore, remanded to the Court of Appeals, with direction that it enter its judgment remanding the matter to the Commission for further proceedings in accordance with this opinion.

Modified and affirmed.

Chief Justice BOBBITT, concurring in part, dissenting in part.

I concur in that portion of the Court's decision which holds that the Court of Appeals erred in affirming the deduction by the Commission of $978,000.00 from General's "net investment in plant" (original cost less depreciation) by reason of profits earned by Automatic upon its sales to General. With this exception, I vote to affirm the decision of the Court of Appeals for the reasons set forth in the opinion of Judge Parker. I deem it unnecessary to approve or disapprove the extended discussions in the Court's opinion relating to the determination of replacement cost, less depreciation, and other questions not directly presented by this appeal. These should be decided when drawn into focus by proper exceptions and full argument.

Justice HIGGINS, concurring in part, dissenting in part.

In my view the Court of Appeals committed error in confirming the Commission's deduction of $978,000 from the rate base on account of equipment purchased from a separate though affiliated corporate dealer. In my opinion, the evidence in the record neither justifies nor supports the deduction.

I vote to remand to the Utilities Commission for reconsideration and correction of this error. Otherwise I think the decision of the Court of Appeals is correct and should be affirmed.

Justice SHARP, concurring in part, dissenting in part.

I concur in the majority's decision that "the Court of Appeals erred in affirming the deduction by the Commission of $978,000 from General's 'net investment in plant' (orginal cost less depreciation) by reason of profits earned by Automatic upon its sales to General."

In all other respects I vote to affirm the decision of the Court of Appeals upon the grounds so succinctly stated by Judge Parker in the opinion of that Court. Thus, I dissent from the majority's decision that the Court of Appeals erred in setting aside the Commission's finding that General's investment in its North Carolina telephone plant should be reduced in the amount of $690,340 as "excess margin in central office equipment in re-

lation to the test period." In my judgment the Commission erred in making this deduction and this Court errs in affirming it.

In my view, the extended discussions and pronouncements in the majority opinion go far beyond the questions presented for decision on this appeal. The opinion is a dissertation upon the theory of rate making which clearly manifests the scholarship and indefatigability of the author. Yet, with all deference, I do not deem it the proper function of this Court, in any case, to attempt to encompass the law of future cases. Those will present facts and problems we cannot now anticipate, and the arguments which they engender may open avenues heretofore unexplored.

IN THE MATTER OF: APPEAL OF McLEAN TRUCKING COMPANY, WINSTON-SALEM, NORTH CAROLINA, FROM AN ACTION OF THE FORSYTH COUNTY BOARD OF EQUALIZATION AND REVIEW RELATING TO THE VALUATION AND SITUS OF CERTAIN OF APPELLANT'S TRACTORS AND TRAILERS FOR PURPOSES OF 1970 AD VALOREM TAXES

No. 66

(Filed 16 June 1972)

1. **Taxation § 25— ad valorem taxes — tractors and trailers — value**

G.S. 105-294 requires that tractors and trailers, like other property, be appraised for purposes of taxation at their "true value in money," i.e., their sale value.

2. **Taxation § 25— ad valorem taxes — appraisal**

The appraisal of property for taxation cannot be made to depend upon the number of units of similar properties owned by the taxpayer or upon the varying abilities of the several taxpayers to negotiate for favorable terms in buying or selling such units.

3. **Taxation § 25— ad valorem taxes — tractors and trailers — use of book value**

The State Board of Assessment erred in accepting a trucking company's book value of its tractors and trailers as the "true value in money" of such properties, since the book value is based upon what the company actually paid for the vehicles and, therefore, reflects the company's peculiar purchasing power due to the size of its fleet and the resulting volume of its purchases.

4. **Taxation § 25— ad valorem taxes — use of Truck Blue Book**

The use of the National Market Report's Truck Blue Book and its uniform application to all such vehicles listed by all taxpayers in the county cannot be deemed arbitrary *per se*, the burden being upon the complaining taxpayer to show that the application

of such standard to his vehicles results in their being appraised at a figure in excess of their market value.

5. **Evidence § 33; Taxation § 25— appraisal of trailers — hearsay**

There was no competent evidence before the State Board of Assessment supporting a county's appraisal of trailers owned by a trucking company, where the evidence for the county consisted of the testimony of two of the county's tax appraisers who stated that their appraisal was based upon information as to the price of new trailers obtained by them from an official of a trailer manufacturer and from a dealer in trailers, since the testimony of the appraisers was hearsay and does not fall within any exception to the hearsay rule. G.S. 143-318.

6. **Taxation § 24— personal property — tax situs — owner's domicile**

Nothing else appearing, tangible personal property may be taxed at its full value by the state of the owner's domicile even though it is frequently taken or sent out of state during the tax year.

7. **Taxation § 24— ad valorem taxation — allocation between counties**

The state of the owner's domicile may determine how the value of property subject to its taxing jurisdiction shall be allocated among its several counties.

8. **Taxation § 24— domestic corporation — personal property — tax situs**

The tangible personal property of a domestic corporation must be listed for taxation at its true value in money in the county and township wherein the principal office of the corporation is located. G.S. 105-302(a).

9. **Taxation § 24— personal property — apportionment between taxing units**

In the absence of legislative authority, the value of tangible personal property, subject to the taxing power of this State, may not be apportioned between a county and any other taxing unit in or out of North Carolina.

10. **Taxation § 24— tractors and trailers — apportionment of taxes**

For the tax year 1970, there was no statutory authority in this State for the allocation or apportionment of the value of a trucking company's vehicles as between the county wherein its principal office is located and other taxing units in or out of this State.

11. **Taxation § 24— tax situs — taxation by other states**

A tax improperly imposed by another state cannot deprive this State of taxing jurisdiction, nor does the election of another state not to tax that which is within its taxing power confer upon this State authority to tax that which it could not otherwise tax.

12. **Taxation § 24— domestic corporation — property located or used in another state**

A state may not tax a domestic corporation on account of tangible personal property which is permanently located in another state, or on account of property which is habitually located and used in the

business of the corporation in another state, even though such property may occasionally come into the state of the domicile.

13. Taxation § 24— trucking company vehicles — allocation of value between N. C. and other states

The State Board of Assessment erred in allocating the value of all of a trucking company's tractors between North Carolina and other states, since that figure included the value placed upon vehicles totally beyond the taxing jurisdiction of this State; it also erred in using as the allocation factor the ratio of miles traveled in North Carolina to the total miles traveled by all of the company's interstate vehicles, since the latter figure included the miles traveled by vehicles not taxable in North Carolina because they never, or only rarely, come into this State.

14. Taxation § 24— trucking company — interstate vehicles — tax situs

A trucking company was taxable for the year 1970 in the county wherein its principal office was located upon the full value of its tractors and trailers operated in interstate commerce in and out of this State, where no specific tractor or trailer had a fixed, regular route or schedule but moved from one terminal to another as the volume of business required, no tax situs for such vehicles having been established in any other state.

Chief Justice BOBBITT dissenting in part.

Justice SHARP concurs in dissenting opinion.

APPEALS by McLean Trucking Company, the County of FORSYTH and the City of WINSTON-SALEM from *Armstrong, J.*, at the 19 April 1971 "A" Session of FORSYTH, heard prior to determination by the Court of Appeals. This case was docketed and argued as Case No. 86 at the Fall Term 1971.

This is a companion to Case No. 65 of the same name, decided 10 May 1972, 281 N.C. 242, 188 S.E. 2d 452, that case involving the tax year 1969, whereas the present case involves the tax year 1970. Except for differences in the number of vehicles and in the valuations thereof, the facts in the two cases are the same with reference to the types of vehicles, their location and their use by the taxpayer (McLean) and will not be repeated here.

At the appropriate time, McLean listed 635 tractors and 1409 trailers for county taxes for 1970 in Broadbay Township, Forsyth County. In so doing McLean listed these vehicles at 9.62% of what McLean contended was their total tax valuation, this being an apportionment of such valuation on the basis of the ratio of the interstate miles traveled by McLean vehicles

in North Carolina to the total interstate miles traveled by all McLean vehicles in all states in 1969, including miles traveled by vehicles which never come into North Carolina and which, for that reason, are not among the vehicles so listed by McLean.

In due time the Tax Supervisor appraised the vehicles, changed the listing from Broadbay Township to Winston Township, assessed them at the full assessment ratio, 58% of the appraised value, and refused to apportion such assessed valuation on any basis whatever.

In due time McLean sought relief from the County Board of Equalization and Review, contending that: (1) The appraised valuation was excessive; (2) the correct valuation should be apportioned on the basis above mentioned; and (3) the tax situs of these vehicles was Broadbay Township. The County Board of Equalization and Review affirmed the determinations of the Tax Supervisor in all of these respects.

In due time McLean appealed to the State Board of Assessment, which conducted a hearing and received evidence. The State Board of Assessment made the following findings of fact:

Unnumbered Findings

McLean is a common carrier of property operating over fixed and regular routes in North Carolina and twenty-three other states. For the past several years, the North Carolina portion of McLean's interstate mileage has been approximately 10%. In 1969, the figure was 9.62%.

This appeal relates to 635 tractors having a book value of $5,161,199 and 1460 trailers having a book value of $4,359,513. The county has valued the tractors at $6,295,810 and the trailers at $5,327,931.

Numbered Findings

(1) Appellant's tractors were appraised by the county on the basis of "average retail value" as reflected in the "Used Truck Blue Book" published by National Market Reports, Inc.

(2) Used tractors will not usually sell for the said average retail value unless they have been reconditioned by the dealer at a cost of approximataely 20% to 25% of the said average retail value.

(3) The schedule used by the county to value appellant's trailers was developed from conversations with representatives of one or more trailer sales firms.

(4) The entire schedule is keyed to a selling price of $8,000 for a 1970 forty-five foot tandem trailer.

(5) Depreciation is computed on the basis of 20% of the selling price for the first year and 10% of the remaining balance for each subsequent year subject to a residual.

(6) The county made no inspection of appellant's vehicles.

(7) In 1970, appellant purchased 225 forty-five foot trailers at an average price of $6,104.81.

(8) Appellant's book value figures are based upon actual cost less depreciation as allowed by the ICC; i.e., 12½% per year to a residual of 15% for trailers and 16⅔% to a residual of 10% for tractors.

(9) The only vehicles known to have been stored in appellant's Broadbay Township "place of storage" during 1969 were some which had been sold by appellant but were awaiting pick up by the purchaser.

(10) Of appellant's 2,918 interstate trailers, 1,409 serve the system at large and 1,509 are assigned to the various terminals throughout the McLean system.

(11) Of the 1,509 assigned trailers, 203 are assigned to North Carolina terminals.

(12) None of the said 203 trailers, except the 51 assigned to the Winston-Salem terminal, have been listed for taxation in any county in North Carolina.

(13) The 9.62% mileage figure was computed on the basis of the interstate mileage driven by all of appellant's 1,166 interstate tractors.

(14) The vehicles involved in this appeal have been subjected to ad valorem taxation on an apportionment basis in numerous taxing jurisdictions in other states.

Upon these findings, the State Board of Assessment concluded: (1) The appraisal methods used by the county resulted in a valuation of the vehicles, tractors and trailers, in excess

of their fair market value and, in this instance, the book value is the best indication of the fair market value; (2) the taxable situs of the property is Winston Township; and (3) McLean is entitled to be taxed on these vehicles in a manner recognizing that they have acquired a partial situs outside North Carolina.

Upon these conclusions, the State Board of Assessment held that the fair market value of McLean's entire interstate fleet of 1,166 tractors was $8,884,945, the fair market value of its entire fleet of 1,409 unassigned trailers was $4,207,178, that 9.62% (the ratio of miles traveled in North Carolina by interstate vehicles, to total miles traveled by all interstate vehicles) was the proper proportion of these valuations attributable to Forsyth County, that the fair market value of 51 trailers assigned to the Winston-Salem terminal (100% attributable to Forsyth County) was $152,335, making a total valuation attributable to Forsyth County of $1,411,798.

The State Board of Assessment further held that trailers having a total fair market value of $453,975 were assigned to terminals in other counties of North Carolina and were attributable for tax purposes to those counties. It, therefore, ordered the taxing officials of Forsyth County and of the City of Winston-Salem to recompute 1970 taxes assessed upon McLean on account of such properties in accord with the above figures; i.e., applying the 58% assessment ratio to such apportioned value and then applying to that result the tax rate. It further ordered that McLean list in the appropriate other North Carolina counties for 1970 and other years not barred by statute the above mentioned trailers so assigned to those counties.

The county and the city petitioned the superior court to review the order of the State Board of Assessment and reverse it, reinstating the action taken by the county taxing authorities. McLean also petitioned the superior court to review the order of the State Board of Assessment and to modify it in the following respects: (1) To include a finding that the true market value of the interstate equipment is that to which McLean's expert witnesses testified; (2) to include a finding and determination that the tax situs of the property (apportioned) is Broadbay Township; and (3) with reference to trailers assigned to McLean's other terminals in North Carolina, to delete the reference in the board's order to any tax years other than 1970.

In the superior court McLean tendered a judgment, which would have affirmed the decision of the State Board of Assessment in all respects except (1) the determination and order concerning the tax situs and listing of trailers assigned to other terminals in North Carolina, and (2) the determination that the situs of the interstate tractors and trailers was in Winston Township. Thus, McLean abandoned in the superior court its exception to the valuation of its vehicles by the State Board of Assessment.

The county and the city tendered a judgment in conformity to their contentions in their petition for review.

The superior court entered judgment: (1) Affirming the decision of the State Board of Assessment that the proper tax situs of the interstate equipment is Winston Township; (2) affirming the State Board of Assessment's determination of the value of the vehicles; (3) reversing that portion of the final decision of the State Board of Assessment which ordered McLean to list in counties in North Carolina, other than Forsyth, trailers assigned to terminals located in such counties; and (4) remanding the matter to the State Board of Assessment for further consideration of that portion of its order relating to the apportionment of the value of interstate tractors and trailers for taxation.

The superior court directed the State Board of Assessment to "take such additional evidence, if any, as it shall determine necessary in order to make appropriate Findings of Fact and Conclusions of Law," and to determine the apportionment issue in accordance with principles of law laid down in *Billings Transfer Corporation v. Davidson,* 276 N.C. 19, 170 S.E. 2d 873, and other applicable law.

McLean appealed from the judgment of the superior court, contending: (1) The decision of the board on the matter of apportionment is supported by sufficient findings and conclusions, and (2) the interstate vehicles have a tax situs in Broadbay Township.

The county and city appealed from the judgment of the superior court, contending: (1) The court erred in affirming the findings and conclusions of the State Board of Assessment concerning the total valuation of McLean's interstate equipment; (2) the court erred in failing to adjudge that McLean

is not entitled to any apportionment of the valuation of its interstate vehicles; and (3) the court erred in overruling exceptions by the county and city to evidence introduced before the board by McLean.

There is no appeal from that portion of the judgment of the superior court reversing so much of the order of the State Board of Assessment as directs McLean to list for taxation in counties of North Carolina, other than Forsyth, trailers assigned by McLean to its terminals in those counties.

Hamrick, Doughton and Newton, by Claude M. Hamrick and George E. Doughton, Jr., for McLean Trucking Company.

P. Eugene Price, Jr., for Forsyth County.

Womble, Carlyle, Sandridge & Rice, by William F. Womble and Roddey M. Ligon, Jr., for City of Winston-Salem.

LAKE, Justice.

In Case No. 65, decided 10 May 1972, *In Re McLean Trucking Co.*, 281 N.C. 242, 188 S.E. 2d 452, we have held that the tax situs of the interstate vehicles here in question is Winston Township. We affirm that decision.

All references herein to Chapter 105 of the General Statutes, both as to section numbers and as to content, relate to statutes in effect in 1970, not to the 1971 revision of the Machinery Act.

G.S. 105-294 provides:

> "All property, real and personal, shall as far as practicable be appraised or valued at its true value in money. The intent and purpose of this section is to have all property and subjects of taxation appraised at their true and actual value in money, in such manner as such property and subjects of taxation are usually sold, but not by forced sale thereof; and the words 'market value,' 'true value,' or 'cash value,' whenever used in this chapter, shall be held to mean for (sic) the amount of cash or receivables in the property and subjects can be transmuted into when sold in such manner as such property and subjects are usually sold."

G.S. 105-327(g) provides, with reference to the powers and duties of the County Board of Equalization and Review:

> "(1) It shall be the duty of the board of equalization and review to equalize the valuation of all property in the county, to the end that such property shall be listed on the tax records at the valuation required by law; and said board shall correct the tax records for each township so that they will conform to the provisions of this subchapter.
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> "(3) The board * * * shall correct all errors in the names of persons, in the description of property, and in the assessment and valuation of any taxable property appearing on said lists; shall increase or reduce the assessed value of any property which in their opinion shall have been returned below or above the valuation required by law; and shall cause to be done whatever else shall be necessary to make said lists comply with the provisions of this subchapter. * * * "

G.S. 105-275, with reference to the duties and powers of the State Board of Assessment, provides:

> *"Duties of the Board.*—The State Board of Assessment shall exercise general and specific supervision over the valuation and taxation of property taxation (sic) throughout the State, including counties and municipalities. It is constituted * * * a State Board of Equalization and Review of valuation and taxation of property in this State. It shall be the duty of the Board:
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> * * *
>
> "(3) To hear and adjudicate appeals from the boards of county commissioners and county boards of equalization and review as to property liable for taxation that has not been assessed or of property that has been fraudulently or improperly assessed through error or otherwise, to investigate the same, and if error, inequality, or fraud is found to exist, to take such proceedings and to make such orders as to correct the same."

G.S. 143-318 provides, with reference to administrative proceedings before State agencies, such as the State Board of Assessment:

"(1) Incompetent, irrelevant, immaterial, unduly repetitious, and hearsay evidence shall be excluded. The rules of evidence as applied in the superior and district court divisions of the General Court of Justice shall be followed.

* * *

"(3) Notice may be taken of judicially cognizable facts. * * * The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence."

G.S. 143-315, with reference to judicial review of decisions of administrative agencies, such as the State Board of Assessment, provides:

"The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

"(1) In violation of constitutional provisions; or

"(2) In excess of the statutory authority or jurisdiction of the agency; or

"(3) Made upon unlawful procedure; or

"(4) Affected by other error of law; or

"(5) Unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or

"(6) Arbitrary or capricious.

"If the court reverses or modifies the decision of the agency, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or modification."

The first step to be taken in this matter is to determine "the true value in money" of the tractors and trailers listed by McLean—635 tractors, and 1,409 unassigned and 51 assigned trailers—as of 1 January 1970. G.S. 105-294. This is separate and apart from any question of an apportionment of such value.

The county tax appraisers valued the tractors in accordance with the Blue Book published by National Market Reports,

Inc. The Blue Book states one value for each tractor type and series, this being the publisher's opinion as to the average retail value of the tractors in each such series. Taking the list filed by McLean, the county appraiser assigned to each tractor shown thereon the appropriate average value. The county followed this procedure in valuing all tractors listed for taxation in 1970, irrespective of whether the owner listed one tractor or many.

McLean offered the testimony of Mr. Phil Deans, Used Truck Manager of White Trucks, a division of White Motor Corporation. Mr. Deans classified the 635 tractors according to manufacturer, age and model number. He assigned a per unit value to each such group, giving to eight groups, containing a total of 408 tractors, a valuation within a range, the variation within each such range being either $250 or $500. The remaining four groups, containing 227 tractors, he assigned specific values per unit. Thus, he too assigned to the tractors average values.

McLean also introduced evidence of the book value of these tractors, using the same classification used by Mr. Deans. The book values of the respective groups varied substantially from the values assigned by Mr. Deans. For example: Mr. Deans valued 90 GMC 1963 tractors at $2,350 per unit, whereas the book value was $1,578 per unit, but Mr. Deans valued 179 White 1966 tractors at $4,500 to $5,000 per unit, whereas the book value was $6,462 per unit. Mr. Deans valued 125 White 1969 tractors at $11,000 per unit, whereas the book value was $13,499 per unit.

Mr. Deans testified that it has been his experience that the values stated in the Blue Book published by the National Market Reports, Inc., are substantially higher than the actual market values of such vehicles, and that in order to obtain a price approximating the value stated in the Blue Book, it is necessary to spend 20% to 25% thereof in reconditioning the truck. McLean describes the condition of all its vehicles as "good."

The county, using the Blue Book value per unit, valued the 635 tractors at $6,295,810. McLean's book value is $5,161,199.

There is no Blue Book for trailers. The county appraiser testified that he conferred with the sales manager at the local

office of the Fruehauf Company and with a dealer in new and used trailers. From the information so obtained, he arrived at the opinion that a new 45-foot trailer had a value of $8,000 and a new 40-foot trailer had a value of $7,000. To these figures he applied depreciation at the rate of 20% for the first year and at the rate of 10% of the preceding year's value in each subsequent year. The depreciation rate so applied was based upon information given the appraiser by the above mentioned dealer. Upon this basis the county appaiser valued the 1,460 trailers, including 51 assigned to the Winston-Salem terminal, at $5,327,931. He used this method and these basic figures in appraising all trailers listed for taxation in Forsyth County in 1970, whether by McLean or by other taxpayers.

McLean offered evidence that in 1970 it purchased 225 new 45-foot tandem trailer units for an average cost of $6,104.81 per unit. These 1970 purchases were, of course, not included in the tax list in question. Upon cross-examination, it was developed that these purchases were in large blocks of not less than 60 units and McLean was given substantial price discounts due to volume. McLean further introduced in evidence its book value of its entire fleet of 2,918 trailers, the total being $8,714,122. The book value, of course, represents the price paid by McLean, less its computation of depreciation, and thus reflects similar volume discounts given McLean by its suppliers. McLean did not offer evidence of the book value of the 1,460 trailers involved in this proceeding. The State Board of Assessment simply assigned to these the proportionate part of the book value of the entire fleet.

McLean also offered the affidavit of Mr. Harrison, the local Factory Branch Manager of the Fruehauf Corporation, which was received without objection. Mr. Harrison stated that he is familiar with the various types of trailers included in the McLean fleet and, from time to time, has made appraisals for McLean. Classifying McLean's entire fleet of 2,918 trailers, only 1,460 of which are involved in this appeal, into 30 groups according to manufacturer, age, type and length, he gave his opinion as to the average unit value in each group. McLean also introduced the affidavit of Robert L. Millikin, Branch Manager for Trailmobile, Inc., to the same general effect, though varying slightly as to the respective unit values of the several groups of trailers. There is nothing to indicate that either of these witnesses ever saw or appraised any one

of the 1,460 trailers involved in this appeal and there is no evidence showing that the 1,409 unassigned trailers which move in and out of North Carolina and which are involved in this appeal, fall proportionately into each of the 30 groups or classifications into which these two witnesses divided McLean's entire fleet.

The County Board of Equalization and Review affirmed the tax appraiser's valuation of the 1,409 unassigned trailers at $5,141,569. The State Board of Assessment reduced this to $4,207,178, using McLean's book value as its measure.

[1-3] G.S. 105-294, quoted above, requires that tractors and trailers, like other property, be appraised for purposes of taxation at their "true value in money;" i.e., their sale value. A tractor or trailer which is part of a large fleet does not, for that reason, have a different sale value from that which it would have if it were the only tractor or trailer owned by the taxpayer. The appraisal of property for taxation cannot be made to depend upon the number of units of similar properties owned by the taxpayer or upon the varying abilities of the several taxpayers to negotiate for favorable terms in buying or selling such units. To hold otherwise would depart from the principle of equality of appraisal which is fundamental in the Machinery Act. In accepting McLean's book value of its tractors and trailers as the "true value in money" of these properties, the State Board of Assessment erred, since the book value is based upon what McLean actually paid for the vehicles and, therefore, reflects McLean's peculiar purchasing power due to the size of its fleet and the resulting volume of its purchases. See, Annot., 160 A.L.R. 684, 686.

The use of the Blue Book published by National Market Reports, Inc., in the valuation of trucks (tractors) for taxation has been approved by this Court. *In re Block Company,* 270 N.C. 765, 155 S.E. 2d 263. In that case he replied, at least in part, upon G.S. 105-428, which statute, by its terms, had no application to Forsyth County. It was repealed in 1971. We do not construe the omission of Forsyth from the list of counties to which G.S. 105-428 was made applicable as a prohibition against the use of the Blue Book for such purpose in Forsyth County. As we said in the Block Company case, at page 769:

> "The task of examining and appraising each of the thousands of trucks and cars in [Forsyth] County would

be almost impossible. To avoid this, the County is justified in using some recognized dependable and uniform method of valuing them. There is no 'the' Blue Book nor a 'the' Red Book, any more than there is a 'the' Almanac, but the authorities may use this type publication as a guide, and in the absence of merited complaint adopt figures given by the publication as valuations which would be subject to the assessment ratio. But we know that not all 1964 Buicks, for instance, are of the same value. One may have been driven 200,000 miles and be almost worn out while another had been carefully driven for only 6,000 or 8,000 miles. One may be wrecked and damaged almost to the extent of uselessness, in which event the taxpayer would be entitled to some consideration. And the owner *making such a showing* should not be taxed upon the arbitrary valuation placed in a publication giving no consideration to the condition of the article." (Emphasis added.)

[4] Obviously, the Blue Book figure is an estimate as to the value of the average vehicle in the designated class. Its reliability increases, however, when used as a guide to the value of the units in a large fleet of vehicles, such as that here in question. The use of such a publication and its uniform application to all such vehicles listed by all taxpayers in the county cannot be deemed arbitrary per se. As suggested in the appeal of the Block Company, *supra,* the burden is upon the complaining taxpayer to show that the application of such standard to his vehicles results in their being appraised at a figure in excess of their market value. G.S. 143-318 does not apply to county authorities. The Blue Book was introduced without objection at the State Board hearing. Furthermore, it is within an exception to the Hearsay Rule. See, Stansbury, N. C. Evidence, 2d Ed., § 165.

The State Board of Assessment found that used tractors will not sell for the Blue Book value unless they have been reconditioned at a cost of approximately 20% to 25% of that value. This is in accord with the testimony of Mr. Deans. However, 75% of the Blue Book value of these 635 tractors is $4,721,857, whereas Mr. Deans' estimate of the value of these vehicles, using the upper limits of his several value ranges, was only $3,314,250. The book value of these vehicles was $5,161,199, and the board concluded that the book value is the best indication of fair market value in this case. The State Board of

Assessment never actually found the fair market value of the 635 tractors. However, we interpret its statement concerning book value as a finding that such fair market value of the 635 tractors was $5,161,199. We hold that such finding is "unsupported by competent, material, and substantial evidence in view of the entire record as submitted."

For the reasons above mentioned, the book value of the trailers is not the measure of their fair market value. Also, McLean's evidence that in 1970 (after the listing in question) it purchasesd 225 new 45-foot trailer units for an average price of $6,104.81 is not indicative of the sale price of a new 45-foot tandem trailer. The record shows these purchases were made in large blocks from the same dealer, so that the price reflects a substantial volume discount. Thus, the evidence does not show the county's appraisal based upon its information as to the selling price, new, of such trailers resulted in an excessive valuation. The testimony of Witness Harrison that Fruehauf advertises a 40-foot trailer for $4,495 does not tend to refute the county's valuation for the reason that this witness stated the trailer so advertised is not of the same quality as those used by McLean.

[5] On the other hand, there was no competent evidence before the State Board of Assessment supporting the county's appraisal of these trailers. The evidence for the county and city consisted of the testimony of two of the county's tax appraisers. Both testified that their appraisal was based upon information as to the price of trailers, new, obtained by them from an official of the Fruehauf Corporation and from a dealer in trailers. Neither the official of Fruehauf Corporation nor the dealer was called as a witness. Neither witness for the county and city purported to have basis for an opinion of his own as to the market value of the trailers, new or used. Neither made an inspection of any of the vehicles in question.

This is not to say that there was an impropriety in their making their original appraisals on the basis of information so obtained. Such appraisals are not required to be based upon evidence competent in a judicial proceeding. However, in a proceeding before the State Board of Assessment upon an appeal from the action of the county taxing authorities, G.S. 143-318 governs the admissibility of evidence. It provides that the rules

of evidence as applied in the superior and district court divisions of the General Court of Justice shall be followed. While the testimony of these witnesses was competent to show the method they used in reaching their appraisal of trailers (those of McLean's and those of other taxpayers alike), it was not competent on the question of the correctness of those appraisals. It was hearsay and does not fall within any exception to the hearsay rule.

There was no competent evidence before the State Board of Assessment as to the "true value in money" of the McLean trailers, except the testimony of Messrs. Harrison and Millikin, witnesses for McLean, each of whom valued McLean's entire fleet of 2,918 trailers far below the book value thereof, which the board found to be the entire fleet's true value in money.

We hold, therefore, that the superior court erred in its Conclusion No. 1 that the findings of fact and conclusions of law made by the State Board of Assessment respecting the fair market or true value of the equipment in question are supported by competent and material evidence.

The State Board of Assessment actually made no finding as to the "true value in money" of the 635 tractors which travel in and out of North Carolina. It valued McLean's entire fleet of 1,166 tractors at the book value thereof, $8,884,945, and valued the 1,409 trailers, unassigned by McLean to any terminal, at their book value, $4,207,178. It then attributed 9.62% of each of these amounts to Forsyth County as the tax value of the portion of McLean's interstate vehicles attributable to Forsyth County.

[6-10] Nothing else appearing, tangible personal property may be taxed at its full value by the state of the owner's domicile even though it is frequently taken or sent out of such state during the tax year. *New York Central Railroad Co. v. Miller,* 202 U.S. 584, 26 S.Ct. 714, 50 L.Ed. 1155. The state of the domicile may determine how the taxable value of property, subject to its taxing jurisdiction, shall be allocated among its several counties. With exceptions not here material, this State has determined that the tangible personal property of a domestic corporation shall be listed for taxation at its true value in money in the county and township wherein the principal office of the corporation is located. G.S. 105-302(a); *In re McLean*

Trucking Co., supra. In the absence of legislative authority, the value of tangible personal property, subject to the taxing power of this State, may not be apportioned between such county and any other taxing unit in or out of North Carolina. *In re Freight Carriers,* 263 N.C. 345, 139 S.E. 2d 633. The Machinery Act of 1971 makes certain provisions for the allocation or apportionment of the valuation of properties of truck companies for tax purposes, but those provisions did not become effective until 1 January 1972 and, consequently, have no bearing upon this appeal. G.S. 105-395. For the tax year 1970, there was no statutory authority in this State for the allocation or apportionment of the value of McLean's vehicles as between Forsyth County and other taxing units in or out of this State.

[11] The failure of the Legislature to provide for constitutionally required apportionment of the tax valuation of property between this and other states cannot, of course, enlarge the taxing jurisdiction of this State or of its counties. Obviously, Forsyth County may not tax McLean upon property which is beyond the taxing jurisdiction of North Carolina. On the other hand, this State's jurisdiction to tax a domestic corporation upon property which is outside its borders during part or all of the tax year does not depend upon what other states do, in fact, with reference to imposing taxes upon the corporation on account of such property. A tax improperly imposed by another state cannot deprive this State of taxing jurisdiction, nor does the election of another state not to tax that which is within its taxing power confer upon North Carolina authority to tax that which it could not otherwise tax. *Central Railroad Company of Pennsylvania v. Pennsylvania,* 370 U.S. 607, 613, 82 S.Ct. 1297, 8 L.Ed. 2d 720, reh. den., 371 U.S. 856, 83 S.Ct. 15, 9 L.Ed. 2d 93; *Northwest Airlines v. Minnesota,* 322 U.S. 292, 64 S.Ct. 950, 88 L.Ed. 1283.

[12] It is now well settled that a state may not tax a domestic corporation on account of tangible personal property which is permanently located in another state. *Union Refrigerator Transit Co. v. Kentucky,* 199 U.S. 194, 26 S.Ct. 36, 50 L.Ed. 150. Likewise, the domiciliary state may not tax its domestic corporation on account of property which is habitually located and used in the business of the corporation in another state, even though such property may occasionally come into the state of the domicile. *Central Railroad Company of Pennsylvania v. Pennsylvania, supra.* On the basis of these principles, McLean

has not listed in Forsyth County its Group I tractors or its Class A trailers (for a description of these vehicles, see *In re McLean, supra)*. The county and city do not here contend that those vehicles should have been listed for taxation by them. Thus, they are not involved in this appeal and we are not presently required to determine the correctness of such conclusion as to those vehicles.

[13] The question of apportionment, assuming it to be applicable to any of the McLean vehicles, relates only to the vehicles which run in and out of North Carolina in the course of McLean's business; that is, its Class II tractors and its Class B trailers. Only the value of these vehicles would be subject to apportionment and, assuming that the ratio of miles traveled in North Carolina to total miles traveled is the appropriate allocation factor, the mileage to be used in computing that factor would be the mileage accumulated by these vehicles only. Thus, the State Board of Assessment erred in allocating the value of all of McLean's tractors between North Carolina and other states, since that figure included the value placed upon vehicles totally beyond the taxing jurisdiction of North Carolina. It also erred in using as the allocation factor the ratio of miles traveled in North Carolina to the total miles traveled by all of McLean's interstate vehicles, since the latter figure included the miles traveled by vehicles not taxable in North Carolina because they never, or only rarely, come into this State.

We conclude, however, that upon this record the question of apportionment of Class II tractors and Class B trailers (the vehicles which operate in interstate commerce in and out of North Carolina) does not arise at all. *Billings Transfer Co. v. Davidson, supra.* In the Billings Case, we said, at page 34, "The burden is on the taxpayer who contends that some portion of his tangible personal property is not within the taxing jurisdiction of his domiciliary state to prove that the same property has acquired a tax situs in another jurisdiction." We also said in the Billings Case, at page 34, "With respect to tangible movable property, a mere *general* showing of its continuous use in other states is insufficient to exclude the taxing power of the state of domicile," and, at page 33, "When a fleet of vehicles is operated into, through, and out of a nondomiciliary state, a 'tax situs' sufficient to satisfy constitutional requirements is acquired if (a) the vehicles are operated along fixed routes *and*

on regular schedules, or (b) the vehicles are habitually situated and employed within the nondomiciliary jurisdiction throughout the tax year." The record before us does not show that Class II tractors and Class B trailers are habitually situated and employed in any other state throughout the tax year. Nor does the record show that these vehicles are operated on regular schedules. McLean's Witness Wells testified:

> "The period of frequency and the time within which trailers might leave a designated terminal to another could vary depending on the volume of traffic. So when you speak of timetables, there are no timetables on an hour or minute basis. There are timetables on a daily basis.
>
> "I would say that with respect to schedules and the number of trailers at a particular terminal, it would depend on the demand and need that are dictated by the volume of business."

McLean's Witness Elkins testified:

> "A typical example of our operation—a truck, at least one or more trucks, would be dispatched to Boston, Massachusetts, [apparently from Winston-Salem] every day and when they arrive in Boston, Massachusetts, they do not remain there as permanent fixtures. They come back out to various other places. I am referring to interstate equipment. It is conceivable that after this equipment arrives in Boston, it might not return to Boston for some months."

[14] Thus, any specific tractor or trailer has no fixed, regular route or schedule. It moves from one terminal to another as the current volume of business requires. The total number of vehicles moving to or from any specific terminal varies from day to day as the volume of business fluctuates. This does not establish a tax situs for these vehicles in any other state in accordance with the rule of *Billings Transfer Company v. Davidson, supra.* Therefore, for the year 1970, McLean was taxable in Forsyth County upon the full value of the 635 Class II tractors and the 1,409 Class B trailers. The State Board of Assessment erred in allocating to Forsyth County only a portion of the value of these vehicles and the superior court erred in remanding the matter to the State Board of Assessment for further consideration with regard to the question of apportionment. The matter must, however, be remanded

to the State Board of Assessment for further consideration and determination of the value as of 1 January 1970 of the properties of McLean here in question after due notice to all parties to this proceeding and an opportunity to them to present such evidence upon the question of valuation as may be competent under G.S. 143-318.

The judgment of the superior court must, therefore, be modified and to that end this matter is remanded to that court for the entry of a judgment by it which shall:

1. Affirm the final decision of the State Board of Assessment insofar as it finds, concludes and orders that the proper tax situs of the vehicles in question for the year 1970 is Winston Township;

2. Vacate and set aside the decision of the State Board of Assessment insofar as it purports to determine and fix the value, for the purposes of taxation by Forsyth County for the year 1970, of the properties of McLean here in question;

3. Vacate and set aside the decision of the State Board of Assessment insofar as it orders McLean to list in counties of North Carolina, other than Forsyth County, the properties of McLean specified in the said decision of the State Board of Assessment; and

4. Remand this matter to the State Board of Assessment for the determination by it of the true value in money, as of 1 January 1970, of the 635 tractors, the 1,409 unassigned trailers and the 51 assigned trailers to which this proceeding relates, and the allocation by it to Forsyth County of the entire value of such properties, for the purpose of taxation for the year 1970, such determination to be made by the State Board of Assessment following a further hearing by it, of which hearing all parties to this proceeding shall be given due notice and at which hearing they may offer evidence competent under G.S. 143-318.

Error and remanded.

Chief Justice BOBBITT dissenting in part.

I dissent from that portion of the Court's decision which holds that the valuations placed on McLean's tractors and trailers by the State Board of Assessment were not supported by competent evidence.

The opinion states: "There was no competent evidence before the State Board of Assessment as to the 'true value in money' of the McLean trailers, except for testimony of Messrs. Harrison and Millikin, witnesses for McLean, each of whom valued McLean's entire fleet of 2,918 trailers far below the book value thereof, which the board found to be the entire fleet's true value in money."

Elsewhere, the opinion states: "[W]e interpret [the statement of the Board of Assessment] concerning book value as a finding that such fair market value of the 635 tractors was $5,161,199. We hold that such finding is 'unsupported by competent, material, and substantial evidence in view of the entire record as submitted.'" In the last sentence, the opinion was quoting G.S. 143-315(5), the general provision describing the various circumstances under which an administrative decision may be reversed.

These conclusions, standing alone, might indicate that the evidence of book value in this case was "incompetent" due to a failure in the manner of *presentation.* However, when considered in context, the term "incompetent" is used to mean *legally impermissible.* The reasoning of the opinion is this: McLean's "book value" reflected substantial quantity discounts that McLean was able to get from time to time in the purchase of its tractors and trailers. Such discounts do not bear on what each individual tractor or trailer might sell for on the market. "[T]he principle of equality of appraisal which is fundamental in the Machinery Act" would require that each tractor and trailer be valued from the standpoint of what each *item*—each tractor and trailer—might sell for on the market. Therefore, the opinion concludes, book value is an improper test and the State Board may not even consider it.

Seemingly, this position puts this Court in the position of making appraisals and usurps the discretion of the duly constituted appraisal boards. Nowhere does it appear that the State Board held that McLean's book value afforded the only proper evidence to be considered in determining the trucks' true value in money. After considering several types of evidence, the State Board came to the conclusion that the book value more nearly approximated true value under the circumstances of this case.

Of course, book value is not necessarily an accurate indicator of true market value. If McLean's discounts represented "bargains" which McLean would not have to pass on to another buyer, then book value, to the extent it recognized such "bargains," would not have been properly relied upon. However, there is no evidence to indicate that a competitor of McLean who makes volume purchases from the manufacturers of tractors and trailers would be unable to obtain similar volume discounts.

McLean is not in the business of selling used tractors and trailers. As of January 1, 1970, McLean had a large inventory of tractors and trailers *for use* in its business. It was the function of the State Board to determine the market value of this inventory in its entirety on that date. Obviously, the willing buyers of large numbers of tractors and trailers would be limited; and any prospective buyer could reasonably expect a volume discount in its purchase of used tractors and trailers at least equal to the volume discount it could obtain in the purchase of new tractors and trailers. It is for the State Board of Assessment to exercise its judgment as to valuations based on the realities of each case.

In *In re Block Co.*, 270 N.C. 765, 155 S.E. 2d 263 (1967), the Court approved the use of the Truck Blue Book in the assessment of the value of trucks (there, only six trucks). In *Block*, the Court found support for its approval for the use of the Truck Blue Book in Article 35A of Chapter 105 (Vol. 2D, Replacement 1965), entitled "Listing of Automobiles in Certain Counties," and specifically in G.S. 105-428. Article 35A, according to G.S. 105-429 thereof, did apply to Guilford County (involved in *Block)* but not to Forsyth County (involved here). Article 35A has been repealed.

Since G.S. 105-429 authorized the use of the Truck Blue Book in Guilford County, the Court did not consider whether the Truck Blue Book would otherwise have been competent under "[t]he rules of evidence as applied in the superior and district court divisions of the General Court of Justice . . . . " G.S. 143-318(1). I share the view that the State Board of Assessment *should* be permitted to consider the Truck Blue Book along with other sources of information which competent appraisers would deem appropriate. Whether there was evidence sufficient to establish that the particular Blue Book

here considered complies with "[t]he rules of evidence as applied in the superior and district court divisions of the General Court of Justice" is not presented on this appeal.

The valuation of McLean's tractors and trailers for the purpose of taxation was a matter for determination by the State Board of Assessment. We are not to determine whether it should have reached a different conclusion. In my opinion, it did not overstep its authority or the limits of its discretion in the valuations it placed upon McLean's tractors and trailers as of January 1, 1970.

Justice SHARP joins in this opinion.

STATE OF NORTH CAROLINA v. JOHN R. RATLIFF

No. 43

(Filed 16 June 1972)

1. **Criminal Law § 84— evidence unconstitutionally obtained — exclusion**

Evidence unconstitutionally obtained is excluded in both state and federal courts as an essential to due process.

2. **Criminal Law § 84— evidence unlawfully obtained — exclusion — statutes**

G.S. 15-27 and G.S. 15-27.1, in accord with constitutional requirements, render incompetent all evidence obtained (1) in the course of a search, (2) without a legal search warrant, (3) under conditions requiring a search warrant.

3. **Constitutional Law § 21; Searches and Seizures § 1— unreasonable search and seizure**

The Constitution does not prohibit all searches and seizures but only those which are unreasonable.

4. **Criminal Law § 84; Searches and Seizures § 1— search of automobile — probable cause**

The right to search an automobile without a warrant does not depend on the right to arrest but depends on the existence of probable cause to make the search.

5. **Criminal Law § 84; Searches and Seizures § 1— probable cause to search automobile — officer's choice**

If there is probable cause to search an automobile the officer may either seize and hold the vehicle before presenting the probable cause issue to a magistrate, or he may carry out an immediate search without a warrant.

6. **Criminal Law § 84; Searches and Seizures § 1— search of automobile — probable cause**

An officer had probable cause to believe that defendant's car contained contraband of some sort, and a search of the car without a warrant was lawful, where the officer observed defendant, apparently nude, in a parking lot of a business establishment at midnight, defendant tried to drive away when the officer stopped, and defendant was seen brushing something out of his lap onto the floorboard of the car and then appeared to kick something under the seat with his left leg and foot; consequently the fruits of the search, including a pistol found under the seat, were admissible in defendant's trial for homicide.

7. **Criminal Law § 75— indigent defendant — arrest for petty misdemeanor — statements relating to capital felony — right to counsel**

Former G.S. 7A-451 and the decision of *State v. Lynch*, 279 N.C. 1, did not render inadmissible in a first degree murder prosecution statements made by an indigent defendant to the arresting officer without benefit of counsel, where defendant had been arrested only for the petty misdemeanor of carrying a concealed weapon when the statements were made and the officer had no knowledge that a capital felony had been committed, since at all times pertinent to this case, an indigent charged with a petty misdemeanor was not entitled to the services of counsel at the State's expense.

8. **Criminal Law § 75— arrest for misdemeanor — statements relating to capital felony — in-custody interrogation**

Where defendant was arrested for carrying a concealed weapon, a pistol, and the arresting officer, upon discovering that three of the pistol's nine chambers were empty, asked defendant where he had been and what he had been shooting at, defendant's unexpected statement that he had shot a woman, defendant's further statement, in response to the officer's attempt to get more definite information, that the officer was a cop and it was for him to locate the victim, and defendant's volunteered statement that the woman might not be dead and the officer could be a hero, *held* not the result of "in-custody interrogation" within the purview of the *Escobedo* and *Miranda* decisions; consequently, the statements were properly admitted in defendant's trial for first degree murder although defendant was an indigent, was not represented by counsel and had not waived counsel when they were made.

Justice HIGGINS dissenting.

APPEAL by defendant from *Bailey, J.*, 6 December 1971 Criminal Session, CUMBERLAND Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging him with the murder of Marilyn Best on 24 June 1971. Being indigent, he was represented by the public defender.

The State's evidence tends to show that on the night of 24 June 1971 Deputy Sheriff Douglas Hartley was on patrol on Highway 401 south. At approximately 12:15 a.m. he saw defendant sitting in a gray 1964 Thunderbird in the parking lot of Johnson Furniture Store on Raeford Road. The dome light of the car was on and defendant was apparently nude. Officer Hartley pulled into the parking lot and stopped defendant when he started to pull out. The officer observed defendant "making a motion like he was knocking something out of his lap onto the floorboard of the car." The officer got out of his vehicle, approached defendant's car on the driver's side, and observed he was dressed only in Bermuda shorts. He was sitting under the wheel with a knife in his hand. "I asked him to lay the knife down and open the car door and when he did this he made a kicking motion with his left leg and foot as if he were kicking something under the seat." He laid the knife on the dashboard of the car, and when he got out the officer reached under the seat of the car and found a .22 caliber revolver. It was located directly under the driver's seat on the extreme left where the frame joins the floorboard of the car. The weapon (State's Exhibit 1) was a High Standard .22 caliber, nine-shot revolver, serial No. 2206367. Defendant stated his name upon request, and the officer informed him he was under arrest for carrying a concealed weapon. The officer then read defendant's constitutional rights to him from a prepared copy he kept in his patrol car, and defendant acknowledged that he understood his rights.

Officer Hartley then broke the weapon down and found that it contained six .22 long rifle shells and three empty chambers. The officer then asked defendant where he had been. Upon objection the court excused the jury and, after conducting a voir dire examination during which only Officer Hartley testified, found facts substantially as above narrated and further found that Officer Hartley "had reasonable grounds to believe that something had been concealed under the floor of the car and . . . that it was reasonable to believe that said article constituted the fruits or evidence of a crime." In addition, the court found "that the officer had reasonable grounds to believe that if said vehicle was not properly searched it would be moved and such evidence or fruits of crime as might be in it would be disposed of and would never again be available to the police." The court further found that at the time of the

arrest, and prior to making any statement, defendant had been given the *Miranda* warnings and had said he understood his rights; that defendant was not suspected of any crime which would involve a penalty of over six months; that he was not required to waive his rights to an attorney or other constitutional rights in writing; and that there was no showing that defendant was an indigent person at that time. Based on such findings the court concluded that Officer Hartley had probable cause to search defendant's automobile without a warrant and that defendant's answer in response to the officer's questions should be admitted into evidence.

The jury returned to the box and Officer Hartley continued his testimony as follows: "After I charged Mr. Ratliff with carrying a concealed weapon, I asked him where he had been and he said out off Fisher Road and I asked him what he shot out off Fisher Road and he said he had just shot a woman." The officer then asked him for the location off Fisher Road where a woman had been shot and, over objection, the officer was permitted to testify: "He told me then, at that point, that I was a cop, and for me to find out." Officer Hartley asked no more questions at that time and busied himself filling out a storage report to have defendant's automobile stored. Defendant volunteered an unsolicited statement that the officer "should try to find the woman, she may not be dead and then I could be a hero." This statement prompted Officer Hartley to try again, without success, to learn the woman's name and the location.

At this point Officer Hartley made an examination of defendant's car and testified, over objection, that he found a hatchet on the back floorboard of the car, a lady's necklace-type watch on the floorboard at the front on the right side and some wet one-dollar bills stuffed between the seat and console on the driver's side of the automobile. Defendant said the watch belonged to his wife, and Officer Hartley left it in the car on the right front floorboard where he found it.

Officer Hartley then took defendant to the Cumberland County Sheriff's Office. Around 9 a.m. that same morning, Officer Hartley returned to the Johnson Furniture Store parking lot where he found two spent .22 long rifle casings "in an area that would have been in front and to the left" of the point where defendant's car was parked when the officer first arrived on the scene.

The following morning while cleaning his patrol car, Officer Hartley examined the back seat area where defendant sat the previous night on the trip to the Sheriff's office and found, behind the back seat, an identification card similar to those issued to Army dependents with a picture of Marilyn Best on it and bearing the following inscription: "Issued on 8th June, 1970, expiration 27th May, 1973, issued to Marilyn Best, color of eyes, brown, color of hair, brown, five-nine, weighing 140. Date of birth, 26 October 1951. Grade, name, Private Samuel W. Best."

In response to a radio call during the day of June 24, Officer Hartley went to the trailer home of Marilyn Best with a man named Paul Cunningham, a neighbor of Mrs. Best. The trailer door was open. Inside, Marilyn Best lay half in and half out of an easy chair. Her hair was matted with blood, and she had a wound on the outside of the left thigh. She was dressed in panties and some type of dress or nightgown which was above her waist. There were two bullet holes in the wall behind the chair. Beside the kitchen sink lay an empty lady's pocketbook. The sink was full of water and the contents of the pocketbook, "papers and things," were floating in it.

Mrs. Best was having difficulty breathing. Her head was slumped over the left arm of the chair. She was moaning and apparently unconscious. Mrs. Best died in Duke Hospital five days later as a result of her wounds.

Paul Cunningham, neighbor and acquaintance of Marilyn Best and her husband, testified that he was the owner of the .22 caliber pistol taken from defendant's car by Officer Hartley and that he had loaned the pistol to Mrs. Best on the Saturday before she was shot. He said she wanted to borrow it for her protection and was apprehensive because a car had stopped two or three times in her driveway. This witness further stated that at approximately 5:33 a.m. on June 24 he was driving by the Best trailer and saw the lights on and the front door open; that he stopped to investigate, saw Mrs. Best moaning and apparently unconscious and called the officers.

Samuel Best, husband of the deceased, identified the lady's necklace-type watch found in defendant's car (State's Exhibit 2) as the property of his wife. He said it was given to her by her father and she had worn it many times. Mr. Best also

identified State's Exhibit 5 as the Army dependents identification card issued to his wife.

SBI Agent E. B. Pierce testified that in his opinion the two .22 caliber cartridge casings found on the parking lot where defendant was parked when apprehended (State's Exhibits 4A and 4B) had been fired in the .22 caliber revolver found in defendant's car (State's Exhibit 1).

Defendant offered no evidence. The jury convicted him of murder in the first degree and recommended life imprisonment. Judgment was pronounced accordingly and defendant appealed to the Supreme Court assigning errors noted in the opinion.

James Godwin Taylor, Assistant Public Defender, for the defendant appellant.

Robert Morgan, Attorney General, William F. O'Connell, Assistant Attorney General, for the State of North Carolina.

HUSKINS, Justice.

Defendant's first, second and third assignments of error are based on the contention that the warrantless search of his automobile was illegal. Hence, defendant argues, the fruits of the search were tainted and inadmissible as evidence against him.

[1, 2] Unreasonable searches and seizures are prohibited by the Fourth Amendment to the Constitution of the United States. Since the decision in *Mapp v. Ohio,* 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961), "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." Thus, evidence unconstitutionally obtained is excluded in both state and federal courts as an essential to due process—not as a rule of evidence but as a matter of constitutional law. *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376 (1968). Such was law in North Carolina long before the decision in *Mapp.* G.S. 15-27 and G.S. 15-27.1 provide, *inter alia,* that no facts discovered or evidence obtained in the course of any search without a legal search warrant, made under conditions requiring the issuance of a search warrant, shall be competent as evidence in the trial of any action. These statutes, in accord with constitutional requirements, render incompetent all evidence obtained (1) in the course of a

search, (2) without a legal search warrant, (3) under conditions requiring a search warrant. *State v. Coffey,* 255 N.C. 293, 121 S.E. 2d 736 (1961); *State v. Stevens,* 264 N.C. 737, 142 S.E. 2d 588 (1965).

[3] The Constitution does not prohibit all searches and seizures but only those which are unreasonable. *Carroll v. United States,* 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280, 39 A.L.R. 790 (1925); *Elkins v. United States,* 364 U.S. 206, 4 L.Ed. 2d 1669, 80 S.Ct. 1437 (1960). An unreasonable search has been defined as "an examination or inspection without authority of law of one's premises or person, with a view to the discovery of . . . some evidence of guilt, to be used in the prosecution of a criminal action." 47 Am. Jur., Searches and Seizures, § 52.

[4] In recognition of the mobility of automobiles, a search of an automobile without a warrant is constitutionally permissible *if there is probable cause to make the search. Carroll v. United States, supra; Brinegar v. United States,* 338 U.S. 160, 93 L.Ed. 1879, 69 S.Ct. 1302 (1949); *Chimel v. California,* 395 U.S. 752, 23 L.Ed. 2d 685, 89 S.Ct. 2034 (1969). The search of an automobile *on probable cause* proceeds on a theory entirely different from that justifying the search *incident to an arrest.* "The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law." *Carroll v. United States, supra.* "Automobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office (citations omitted). The cases so holding have, however, always insisted that the officers conducting the search have 'reasonable or probable cause' to believe that they will find the instrumentality of a crime or evidence pertaining to a crime before they begin their warrantless search." *Dyke v. Taylor Implement Manufacturing Co.,* 391 U.S. 216, 20 L.Ed. 2d 538, 88 S.Ct. 1472 (1968).

[5] If there is probable cause to search an automobile, the officer may either seize and hold the vehicle before presenting the probable cause issue to a magistrate, or he may carry out an immediate search without a warrant. "For constitutional purposes we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate

search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." *Chambers v. Maroney,* 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1975 (1970). *See* Note, *Chambers v. Maroney:* New Dimensions in the Law of Search and Seizure, 46 Ind. L. J. 257 (1971). *Compare Coolidge v. New Hampshire,* 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022, reh. den. 404 U.S. 874, 30 L.Ed. 2d 120, 92 S.Ct. 26 (1971).

[6] Applying the foregoing legal principles to the facts in this case, we hold that Officer Hartley acted on reasonable grounds and with probable cause when he searched defendant's car on the spot. The officer observed defendant, apparently nude, in a parked car on the parking lot of a business establishment at midnight. Any alert officer under such circumstances would stop and investigate. When this officer stopped, defendant tried to drive away. Then he was seen brushing something out of his lap into the floorboard of the car. Then he appeared to kick something under the seat with his left leg and foot. Such suspicious, furtive conduct would alert any officer to the fact that defendant had something to hide. The totality of these exigent circumstances was sufficient to lead a man of prudence and caution to believe defendant's car contained contraband of some sort, and Officer Hartley was fully justified in the examination of the car which he made. He would have been remiss in the performance of his duties as a law enforcement officer had he done otherwise. Thus, given probable cause, the search which Officer Hartley made was reasonable by Fourth Amendment standards, and the fruits of the search were properly admitted in evidence. *Chambers v. Maroney, supra; State v. Hill,* 278 N.C. 365, 180 S.E. 2d 21 (1971); *State v. Dobbins,* 277 N.C. 484, 178 S.E. 2d 449 (1971); *State v. v. Jordan,* 277 N.C. 341, 177 S.E. 2d 289 (1970). These assignments of error are overruled.

The trial court, over defendant's objection, admitted for jury consideration the following statements made to Officer Hartley: (1) Defendant's statement that he had shot a woman out off Fisher Road; (2) defendant's statement that Officer Hartley was a cop and for him to find out for himself the location off Fisher Road where the shooting took place; and (3) defendant's statement that Officer Hartley should try to find the woman because she may not be dead and Hartley could be a hero. Defendant contends these statements were erroneously admitted because he was an indigent, charged with a capital

offense, undergoing in-custody interrogation by an officer, and was entitled to counsel during such interrogation under G.S. 7A-451, citing *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971), as authority for his position. Admission of these incriminating statements constitutes defendant's fourth assignment of error.

[7, 8] In our view, neither G.S. 7A-451 (1969) nor the decision of this Court in *State v. Lynch, supra,* have any application to the factual circumstances of this case. Furthermore, although the officer warned defendant of his constitutional rights and defendant stated he understood them, the decisions of the United States Supreme Court in *Escobedo v. Illinois,* 378 U.S. 478, 12 L.Ed. 2d 977, 84 S.Ct. 1758 (1964), and in *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), have no application to the factual circumstances revealed by this record. Here, an officer on night patrol stopped to investigate the unusual circumstances of an apparently nude man in a parked car on the parking lot of a business establishment at midnight. In consequence of what the officer saw and his discovery of the pistol, he arrested defendant for carrying a concealed weapon, a violation of G.S. 14-269 (1969) and a petty misdemeanor.

At all times pertinent to this case, an indigent charged with a petty misdemeanor was not entitled to the services of counsel at the State's expense. G.S. 7A-451(1) (1969); *State v. Morris,* 275 N.C. 50, 165 S.E. 2d 245 (1968).

At the time Officer Hartley arrested defendant he had no knowledge that Marilyn Best had been murdered. He did not suspect defendant of murder. He had no reason to believe that defendant had committed a capital felony and did not interrogate him with reference to such a crime. Even so, immediately upon informing defendant that he was under arrest for carrying a concealed weapon, the officer fully informed him of his constitutional rights and defendant said he understood them. His subsequent police-baiting conduct clearly indicated that he did understand them, that he answered only those questions he wanted to answer, and that he felt no compulsion to answer any of them.

The conversation between Officer Hartley and defendant was not an in-custody interrogation of a murder suspect. While awaiting the wrecker which would take defendant's automobile

to the sheriff's office, Hartley "broke down" the pistol which defendant had concealed when the officer approached. When he observed that three of its nine chambers were empty, he asked defendant where he had been and what he had been shooting at. Considering the misdemeanor charge against defendant and his unusual attire for midnight travel, this offhand inquiry was not illogical. Defendant's casual and astonishing reply was, "I just shot a woman." When the officer asked who and where the victim was, defendant replied that he did not know her name and that it was out on Fisher Road. The officer's attempt to get more definite information was unsuccessful. Defendant told him he was a cop and for him to find out.

After that comment from defendant, Officer Hartley devoted his attention to filling out a storage report to have defendant's automobile stored; and while thus engaged, defendant *volunteered* the information that the woman might not be dead and that Hartley could be a hero if he found her.

At this disclosure it is rather apparent that Officer Hartley did not know whether he had on his hands a lunatic, a drug addict, a police baiter, a practical joker, or a felon. Obviously, the officer could not ignore the possibility that somewhere near Fisher Road the life of a wounded woman might depend on receiving immediate aid. He did what any officer and any other person of good will would have done when he tried to learn the woman's identity and where she could be found. To suggest that such inquiries must await a determination of indigency and appointment of counsel is unrealistic.

To such inquiries by the officer, however, defendant, in obscene language, referred to the officer as a pig and refused any further information. At one time he said, "What if I told you her name began with the letter A ? What if I told you her name began with a B?" After those baiting questions from defendant Officer Hartley ceased his efforts to ascertain the woman's whereabouts. He went back to defendant's car where he found a hatchet on the floor of the back seat and a lady's necklace watch, which defendant said belonged to his wife, on the floor of the front seat. He also found three or four wet, folded dollar bills which he gave to defendant with an admonition against leaving money in the car.

About this time the wrecker arrived and defendant inquired whether Hartley was going to charge him with murder. Hartley told him he was under arrest for carrying a concealed weapon and he would not be arrested for murder until they found a body. Defendant said "that would be good, he could spend a lot of time in the penitentiary with some good cons and learn himself a trade like bank robbery or something of that nature." Hartley then asked defendant why he shot the woman and was informed, in vulgar language, that she would not consent to have intercourse with him.

En route to the jail defendant again told the officer that he should try to find the woman. Then he added, "Oh, hell, I know she's dead because I shot her five times." At the police station, Hartley told defendant to tell Sergeant Norton what he had told him about shooting a woman and defendant said, "I didn't shoot a woman, I shot a man."

The foregoing recital is a resume of the evidence which the judge heard on voir dire in the absence of the jury. Before the jury, with reference to his conversation with defendant, Hartley was permitted to say only that defendant told him he had shot a woman off Fisher Road; that Hartley was a cop and it was for him to find out where; and that he should try to find the woman because she might not be dead and he would be a hero.

This narration of the questions put to defendant in the deserted parking lot depicts a situation entirely foreign to "in-custody interrogation" discussed and condemned in *Escobedo* and *Miranda*. It was no incommunicado interrogation of an individual in a police dominated atmosphere. After having volunteered the information that the woman he had shot might not be dead, he refused to give any additional information. His contention now that his conviction should be set aside because he was indigent and unrepresented by counsel must fall on deaf ears. Neither the law nor common sense permits or requires such a farcical result. *Cf. People v. Modesto*, 62 Cal. 2d 436, 398 P. 2d 753, 42 Cal. Rptr. 417 (1965); commented upon in K. Graham, "What is 'Custodial Interrogation?'" 14 U.C.L.A. Law Rev. 59, 118 (1966).

An officer does not question a misdemeanant at the risk of jeopardizing the prosecution of some felony he did not know

had been committed. Under the circumstances revealed by this record, we hold that the officer's questions were entirely proper and in nowise violated defendant's rights, either constitutional or statutory, and it was not error to admit for consideration by the jury the three statements which form the basis of defendant's fourth assignment of error. The first statement (that he had shot a woman) was a surprising and unexpected answer to a proper question. The second statement (that Hartley was a cop and it was for him to locate the victim) was badgering language and does not amount to a confession. The third statement (that the woman might not be dead and Hartley could be a hero) was *volunteered* and its admission into evidence is not barred under any theory of the law. *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972). Defendant's fourth assignment of error is overruled.

Other assignments relating to motion for nonsuit and for directed verdict are formal requiring no discussion. For the reasons stated the verdict and judgment of the trial court must be upheld.

No error.

Justice HIGGINS dissenting.

Because of the suspicious behaviour of the accused, I am able to go along with the Court's holding that Officer Hartley had legal justification for searching the automobile, seizing the pistol, arresting the defendant for concealing it and thereafter, to continue the search which produced the paper money, the necklace-type watch, and the military dependent's identification card issued to Marilyn Best. Although not without some misgivings, I agree that the State was entitled to introduce these articles in evidence against the defendant in his murder trial.

Officer Hartley, alone in his officially marked automobile, was on highway patrol for the purpose of protecting persons and property. After midnight he saw a Thunderbird automobile parked adjacent to a mercantile building which was unlighted and apparently closed. As the officer entered the parking lot to investigate, he saw under the wheel a man apparently naked who, after seeing the officer enter, indicated an immediate desire to be elsewhere. The time, the place, and the behaviour

of the occupant were sufficient to satisfy an alert officer that the driver should be questioned and the legality of his presence and purpose ascertained. The act of hiding something justified the officer in finding out what object the driver desired to conceal from the law. I believe the arrest and the search were warranted. *State v. Hill,* 278 N.C. 365, 180 S.E. 2d 21; *State v. Jordan,* 277 N.C. 341, 177 S.E. 2d 289; *State v. McCloud,* 276 N.C. 518, 173 S.E. 2d 753; *Chambers v. Maroney,* 399 U.S. 42, 26 L.Ed. 2d 419.

The majority opinion now approves Judge Bailey's conclusions that the defendant's confession was admissible in evidence against him in his trial for murder in the first degree. Here are Judge Bailey's legal conclusions on the basis of which he ordered the confession admitted in evidence:

> " . . . . Let the record further show that at the time the defendant was not suspected of any crime which would involve a penalty of over six months; that he was not required to waive his rights to an attorney or other constitutional rights in writing; and further there is no showing that the defendant was an indigent person at that time.
>
> "Therefore, the OBJECTION IS OVERRULED. The officer will be permitted to state what the defendant said to him in response to that question."

Judge Bailey based his conclusions on two grounds: (1) The defendant was not entitled to counsel because he was being held on a petty misdemeanor charge for which the punishment could not exceed six months; and (2) A failure to show the defendant was an indigent person at the time of the hearing. No doubt defense counsel in making up the case on appeal included only so much of the evidence as had bearing on the validity of the legal conclusion the defendant was not entitled to counsel. Totally absent is any conclusion that the defendant waived any rights. The conclusion is that a waiver was not required.

The ruling was this: "The officer will be permitted to state what the defendant said to him *in response to that question.*" (Emphasis added.) There was discussion during the voir dire as to how much questioning by the officer brought forth the admission from the defendant that he had shot a woman on Fisher Road.

On the voir dire Officer Hartley testified after finding the pistol:

> " . . . I asked Mr. Ratliff to take a seat in the rear of my car and I got into the front seat and I asked him further if he had any identification and he stated he did not. I asked him his name and he stated his name was John Ratliff and I then informed him he was under arrest for carrying a concealed weapon and I read him his constitutional rights.
>
> "I asked him if he understood them and he stated he did so."

Before the jury Officer Hartley testified:

> "After I charged Mr. Ratliff with carrying a concealed weapon, I asked him where he had been and he said out off Fisher Road and I asked him where he shot out off Fisher Road and he said he had just shot a woman. Then I asked him who it was he shot . . . . I asked him what the location off Fisher Road this was where he had shot a woman."

The Court attempts to say the defendant's admission that he shot a woman on Fisher Road did not result from interrogation. However, the record discloses that Judge Bailey, at the conclusion of the voir dire, ruled the defendant's answer to Hartley's question was properly admissible and would be received in evidence. However, Judge Bailey was not willing to base his ruling solely on the ground that the defendant was not entitled to counsel, he being in custody on a petty charge, but added he was not entitled to counsel because he failed to show he was indigent. The officer's questions with reference to the shooting on Fisher Road and the defendant's answers thereto, had no bearing whatever on the charge of carrying a concealed pistol. The officer had seen the concealment. Obviously, by his questions, he was seeking information as to any illegal use which had been made of the pistol.

The defendant, after leaving Fisher Road, stopped in the parking lot. A search on the morning following his arrest disclosed two empty twenty-two cartridge cases at the spot where his automobile had been parked. These had been fired from the High Standard pistol the officer seized. By no means improbable was the defendant's feeling that Hartley's questions were based

on the officer's knowledge that a woman had been shot on Fisher Road. Both Hartley and the defendant knew the questions and answers involved something more than carrying a concealed pistol. As soon as the officer arrived at the sheriff's office after the arrest, Hartley requested the defendant to repeat what he had said about shooting a woman on Fisher Road. Hartley wanted another witness to the admission. This evidence was before Judge Bailey on the voir dire.

While the admissions may have been proper on a charge of carrying a concealed weapon, before they could be used as evidence on a charge of murder in the first degree, they had to qualify under G.S. 7A-457. This they could not do. Judge Bailey's petty misdemeanor test where no attorney is required, must fail. *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561, required a written waiver. *State v. Wright,* 281 N.C. 38, 187 S.E. 2d 761, precluded any waiver either oral or written in a trial for murder in the first degree. The offense occurred and the admissions were made before the rewrite of G.S. 7A-457 by Chapter 1243, Session Laws of 1971.

The applicable law in effect at the appropriate time is here quoted:

> "(a) An indigent person who has been informed of his rights under this subchapter may, *in writing,* waive any right granted by this subchapter, 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 consequences of a waiver. In making such a finding, the court shall consider, among other things, such matters as the person's age, education, familiarity with the English language, mental condition, and the complexity of the crime charged. *A waiver shall not be allowed in a capital case.*" (Emphasis added.)

Judge Bailey's conclusion a waiver was not required is not sustained.

Judge Bailey's second ground for admitting the confession (lack of indigency) also must fail. The defendant had been declared to be indigent and counsel had been appointed for him long before Judge Bailey's hearing. Judge Bailey heard no evidence, made no findings with respect to indigency, and while the question of indigency may be raised at any time,

when once established, however, the finding continues until evidence is heard and the finding made that indigency no longer exists.

The case on appeal recites: "ORDER DETERMINING INDIGENCY AND APPROVING ASSIGNMENT OF PUBLIC DEFENDER appears in the original transcript on file in the Office of the Clerk of the Supreme Court." This order bears the date of July 15, 1971.

The trial judge did not hear evidence and did not make any finding on the question of indigency. Until the trial judge conducted a further inquiry and found facts showing lack of indigency, he could not ignore the former adjudication. The record does not permit assumption that indigency no longer existed. True, under G.S. 7A-450(c), "The question of indigency may be determined or redetermined by the court at any stage of the action or proceeding at which an indigent is entitled to representation." This is so because an indigent may become solvent or a solvent person may become an indigent before the case is terminated. G.S. 7A-450(a) states: "An indigent person is a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation in an action or proceeding enumerated in this subchapter."

> "Sec. 7A-451(b) In each of the actions and proceedings enumerated in subsection (a) of this Section, entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process. Entitlement continues through any critical stage of the action or proceeding, including, if applicable:
>
> (1) An in-custody interrogation;
>
> (2) A pre-trial identification procedure at which the presence of the indigent is required;
>
> (3) A hearing for the reduction of bail, or to fix bail if bail has been earlier denied;
>
> (4) A preliminary hearing;
>
> (5) Trial and sentencing; and
>
> (6) Direct review of any judgment or decree, including review by the United States Supreme Court of

> final judgments or decrees rendered by the highest court of North Carolina in which decision may be had."

The foregoing requires counsel or a valid waiver through all stages of the proceeding and it is presumed assigned counsel will continue so long as the case is undecided by the courts. *State v. Wright, supra.*

Judge Bailey did not find the defendant had waived counsel. He found defendant was not entitled to counsel. This Court, however, attempting to bolster Judge Bailey's conclusion, has attempted to add a finding (not made by him) that the confession was made voluntarily and not as a result of interrogation. Questioning by officers arouses the suspicions if the subject is under arrest or under any sort of official restraint. "We have concluded that without proper safeguards the process of in custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 719. As I read *Miranda,* any sort of in-custody interrogation "contains inherently compelling pressures." The result is any admissions made as a result of in-custody questioning are inadmissible unless proper safeguards are provided. Counsel must be provided or legally waived. The Court's attempt to evade the rule by saying the defendant was in custody only on a minor charge is certainly not persuasive. If the Court is correct, the officers may arrest for speeding, find money in the automobile, and ask questions which result in the admission of a bank robbery. The confession could be admitted in a charge of bank robbery because it was obtained while the accused was under arrest only for a petty misdemeanor. Surely the rule requiring counsel may not be abrogated by a device quite so simple and transparent.

This Court has said: "Since defendant was then arrested and in custody, the testimony as to what defendant said on that occasion would be incompetent if defendant's statements were made in response to interrogation by officers." *State v. Jackson,* 280 N.C. 563, 187 S.E. 2d 27. " . . . (I)n-custody statements attributed to a defendant, when offered by the State and objected to by the defendant, are inadmissible *for any* purpose unless, after a *voir dire* hearing in the absence

of the jury, the court, based upon sufficient evidence, makes factual findings that such statements were voluntarily and understandingly made by the defendant after he had been fully advised as to his constitutional rights." *State v. Catrett,* 276 N.C. 86, 171 S.E. 2d 398. For modification of the Catrett rule see *State v. Bryant,* 280 N.C. 551, 187 S.E. 2d 111; *Harris v. New York,* 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed. 2d 1. There is no presumption a confession is voluntary. *State v. McCloud, supra.*

This Court has made a frail attempt to say the defendant volunteered the confession and that it did not result from interrogation. What difference does it make if the confession results from a few or from many questions? The word interrogation comes to us from the Latin and is a combination of the prefix "inter" and the verb "rogare" which means to ask, to inquire, to question. Judge Bailey's reasons for admitting the defendant's confession made in response to Hartley's questions are not impressive. The Court's attempt to make them admissible as having been voluntary, does not appear to be an improvement. The Court seems to take the position the confession was not obtained by interrogation. The Court fails to advise how many questions and answers are required before the process amounts to interrogation.

What is said herein is not intended as any criticism of Officer Hartley's interrogation of the accused. In my opinion, Hartley acted properly in attempting to find out what, if any, illegal use had been made of the pistol. But the constitutional prohibition against self-incrimination and G.S. 7A-457 made the confession inadmissible for the purpose of making out the State's case in chief. The evidence, however, might very well be pertinent in rebuttal, if the case reaches the rebuttal stage. *State v. Bryant, supra; Harris v. New York, supra.* The officer could make use of the admissions in pursuing his investigation, but this use did not make them admissible in the trial.

In civil cases a trial judge is clothed with both legal and equitable powers. In criminal cases he may "temper the wind to the shorn lamb" or he may "add heat in proper degree." He sees, hears, and evaluates. On the other hand, the appellate court acts on a cold record which it must interpret according to fixed rules and standards. Penal statutes must be construed strictly in favor of the accused. *State v. Spencer,* 276 N.C.

535, 173 S.E. 2d 765; *State v. Ross,* 272 N.C. 67, 157 S.E. 2d 712. For stability, these rules and standards should remain constant. I complain that the Court's opinion in this case is trial court oriented.

A defendant, regardless of guilt, is entitled to require the State to make out its case by competent evidence. If this Court permits the guilty to be convicted on incompetent evidence, the innocent will soon fall victim to the rule.

I vote to award the defendant a new trial on the ground his confession was erroneously admitted over his objection.

STATE OF NORTH CAROLINA v. WILLIAM HARRISON BOLIN

No. 114

(Filed 16 June 1972)

1. **Homicide § 14— intentional shooting causing death — second degree murder**

If defendant intentionally shot decedent and thereby inflicted bullet wounds which proximately caused decedent's death, nothing else appearing, defendant would be guilty of murder in the second degree.

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

On a motion for judgment as in case of nonsuit, the evidence must be considered in the light most favorable to the State; contradictions and discrepancies, even in the State's evidence, are matters for the jury and do not warrant nonsuit.

3. **Criminal Law §§ 90, 104— statement by defendant — introduction by State — showing that facts are different**

The introduction in evidence by the State of a statement made by defendant which may tend to exculpate him does not prevent the State from showing that the facts concerning the crime were different from what the defendant said about them.

4. **Homicide § 14— self-defense — burden of proof**

If and when the jury found that defendant intentionally shot decedent and thereby inflicted wounds which proximately caused his death, it was incumbent on defendant to show to the satisfaction of the jury that he acted in self-defense and that in doing so he used no more force than was or reasonably appeared necessary under the circumstances to protect himself from death or great bodily harm.

5. Homicide § 21— self-defense as matter of law — insufficiency of evidence

Written statement signed by defendant, which was offered into evidence by the State, to the effect that defendant and his companion had an argument with decedent in a poolroom, that decedent stated that he had a "forty-five and a thirty-two" in his car and threatened to shoot defendant, that defendant went by his home and got a shotgun, that defendant and his companion returned to the poolroom to offer an employee of the poolroom a ride home, that the operator of the poolroom told defendant that decedent was still there and that he had better watch out, that defendant parked in a nearby parking lot, that decedent came out of the poolroom toward defendant's truck and said something like, "I'm going to teach you some manners," that defendant stuck his gun out the window and told decedent he had better look at what defendant had and stop, that decedent put his hand in his pocket and defendant thought he was going to get a knife or gun, and that defendant shot decedent when he kept coming and was about five feet away, *held* insufficient to establish as a matter of law that defendant acted in self-defense, the question of self-defense being for the jury to determine.

6. Criminal Law § 46— evidence of flight

Defendant's flight from the scene of a killing was competent for consideration by the jury in connection with other circumstances in passing upon whether defendant was guilty of unlawful homicide, but was not admissible to prove premeditation and deliberation.

7. Homicide § 21— first degree murder — sufficiency of evidence

The State's evidence was sufficient to require the submission to the jury of an issue of defendant's guilt of first degree murder where it would support findings by the jury that defendant and his companion had an argument with decedent in a poolroom, that, contrary to defendant's contention, decedent did not threaten defendant or his companion with a deadly weapon of any kind and did not have such a weapon, that defendant and his companion drove to defendant's home, got defendant's shotgun, returned to the poolroom area and parked in a nearby parking lot, that defendant returned for the purpose of confronting decedent, that defendant, with the shotgun in his lap, waited until decedent emerged from the poolroom, that decedent, after going to his car, was prompted or induced in some manner to approach defendant's truck, that decedent had a beer can in his hand and no weapon on his person, and that as decedent walked toward defendant's truck, defendant shot him and immediately drove away.

APPEAL by defendant from *Long, J.,* November 22, 1971 Session of FORSYTH Superior Court.

Defendant was indicted, in the form prescribed by G.S. 15-144, for the murder of Buiel A. Wiles on September 9, 1971.

It was stipulated that Wiles died on September 9, 1971, as the result of a gunshot wound inflicted by defendant.

The only evidence was that offered by the State. It consists of exhibits and the testimony of each of the following witnesses: Donald W. Allred (Allred); Roy Tinley Scales (Scales); Harold Gray Huff (Huff); James H. Teele (Teele); and C. E. Cherry (Cherry). Allred, Teele and Cherry are members of the Police Department of Winston-Salem. Scales is the owner of Stadium Drive Lunch. Huff works there as an employee of Scales. Exhibits include (1) a statement signed by defendant, and (2) a diagram showing what the pathologist would testify as to "the point of injury and the angle trajectory after the pellets entered the body."

There was evidence tending to show that Stadium Drive, Winston-Salem, North Carolina, runs north and south; that Stadium Drive Lunch and its unpaved parking lot are north of Kashway Food Store and its paved lot, all being on the west side of Stadium Drive; that a grass median which separates the parking lots is 18 feet wide and slopes toward the Stadium Drive Lunch parking lot; and that it is 86 feet from the north side of the median to the south side of the Stadium Drive Lunch building.

The testimony of each witness, summarized except when quoted, is set forth below.

ALLRED'S TESTIMONY

In response to a call which he received at 4:02 a.m., Allred (accompanied by J. C. Caudin, then a member of the Winston-Salem Police Department) went to the Stadium Drive Lunch (1716 Stadium Drive), arriving at 4:05 a.m. He found the lifeless body of Wiles lying on the southern edge of the grass median, 104 feet south of the Stadium Drive Lunch building and 20 feet west of the sidewalk along the west side of Stadium Drive.

Allred searched Wiles's body and the adjacent "well-lighted" area. He found "a Budweiser beer can," containing approximately two ounces, a foot from Wiles's right arm. He found no knife or gun on Wiles or in the vicinity of his body. He also searched Wiles's Thunderbird car, including the trunk, but found no weapon. The Thunderbird was parked close to

the south side of the Stadium Drive Lunch building. The keys to the Thunderbird were in the ignition.

Allred saw no people at the scene where Wiles's body was found except Scales, Huff and Ted Abrum Gerrey (Gerrey). When Allred arrived, Gerrey and Scales were inside the building. Huff came out "of the drive" when Allred drove up.

SCALES'S TESTIMONY

The Stadium Drive Lunch building fronts on Stadium Drive. It consists of two rooms. There are tables and a bar in the front room where beer and sandwiches are sold. There is a pool table in the back room. Scales and Huff, his employee, were operating this place of business on the night of September 8th and during the early morning of September 9th.

Defendant and Gerrey entered the Stadium Drive Lunch together. Wiles came in later. They played pool in the back room and stayed until all other customers had left. They played pool in the back room until Scales "told them [he] was closing" and "sent them off." Defendant and Gerrey left first. When they left the building, Scales went out "the back side door," which was between the south side of the poolroom and Stadium Drive Lunch parking lot, "to empty some trash." He saw defendant and Gerrey get in a truck and leave. Wiles stayed there "for a while" and talked to Scales and Huff while they were "cleaning the place up." When Wiles left the building, Scales "closed the place up and locked the door." "A few minutes later" Scales "heard a shot." Huff opened the back side door and left the building. Upon his return, Huff told Scales that Wiles had been shot and Huff then "called the officers and ambulance." When the officers arrived, Scales "went down to where the body [of Wiles] was." Scales noticed that the left front door of Wiles's car was open. During the evening, Scales had been "up front most of the time," not paying "a great deal of attention" to what was going on in the poolroom. He heard no argument between defendant and Wiles. He did not hear Wiles say anything "about having a gun" or "about threatening to shoot the defendant Bolin at any time that evening or at any other time." He heard no discussion between defendant and Wiles regarding a dollar bet on pool. At or about the time they were leaving, he heard them talking "about a shot that somebody had made," but knew of "no heated argument" between them.

Although admittedly uncertain as to the time (times) and time intervals, Scales testified that defendant and Gerrey came into his place between 9:00 and 10:00 p.m. on September 8th; that Wiles arrived shortly after midnight; that defendant and Gerrey left about 2:45 a.m.; that Wiles left from fifteen to forty-five minutes later; that he heard the shot from five to fifteen minutes later; and that Huff was gone from three to five minutes before returning to call the officers and ambulance.

HUFF'S TESTIMONY

Bolin and Wiles "knew one another" and "always seemed to be friends." Huff "heard no argument between Wiles and Bolin" whenever he "went back into the pool area." When he went back "to start cleaning up," he heard a discussion over a shot on the pool table. Defendant and Wiles had a dollar bet on whether Wiles could make a certain shot, and Wiles missed the shot. There "wasn't a heated argument," but "just poolroom talk is about all." "[A]s a result of the argument," Wiles passed back to defendant a dollar which defendant had previously given him. Defendant and Gerrey left the Stadium Drive Lunch together. Wiles stayed inside the place approximately 10-20 minutes and then left. Wiles had a Budweiser beer can in his hand "[w]hen he left the poolroom part of the place." "Something like ten or fifteen minutes after [Wiles] left," Huff heard a shot and thereupon went out the side door. He did not see a vehicle of any kind except Wiles's Thunderbird. He noticed that "[t]he door on the driver's side was open." Huff walked up to where Wiles's body was lying, saw that he was dead, and came back and called the police. Huff was outside "a minute, a minute and a half."

Huff "did not hear any kind of threats at all that Wiles was going to shoot Bolin," and "did not hear any statements of whether or not [Wiles] had a forty-five or thirty-two in his car or anything like that." Huff did not hear Wiles "tell Bill Bolin he was going to shoot him," and "did not see any guns outside, inside, or anywhere else." Huff also testified that Gerrey was not in the Stadium Drive Lunch building when he heard the shot but was there when he returned. Scales had been taking Huff home whenever he helped him and Huff planned to go home with Scales that evening.

TEELE'S TESTIMONY

On September 9th, after 3:00 a.m., Teele was driving south on Stadium Drive at about ten miles an hour. In passing, he observed "a couple of cars" parked in the Stadium Drive Lunch parking lot and a "light-colored pickup truck" parked in the Kashway Food Store parking lot. The headlights on the pickup were shining toward Stadium Drive. He observed that there were two people in the pickup but could not tell "whether they were black or white." Ten or fifteen minutes later, when he was approximately a mile away, Teele heard a radio broadcast "of a shooting at the Stadium Street Lunch." He "turned around," drove back and pulled into the parking lot of the Stadium Drive Lunch. As he started to get out of his car, "a person" standing at or near the front door of Stadium Drive Lunch pointed toward Kashway Food Store and said, "It happened up that way." He headed south again on Stadium Drive and started to pull into the parking lot at Kashway Food Store "when several other cars arrived at the scene." He had seen no one there when he arrived at Stadium Drive Lunch. He saw the body "on the north edge of the parking lot with the upper portion . . . turned to the north . . . into a grassy area and the lower part . . . extending onto the parking lot." (Note: Apparently, Teele left the scene without participating with other officers in the investigation.)

CHERRY'S TESTIMONY

At 4:30 a.m. on September 9th, Detective Sergeant Cherry was assigned to investigate the killing of Wiles. After talking with Scales and Huff, he attempted without success to locate defendant, checking at his home and "at the Post Office where he was employed."

On Sunday, September 12th, about 2:00 a.m., at his residence, Cherry received a telephone call from a man who identified himself as defendant's brother. As a result, the sheriff met defendant, one of defendant's brothers and defendant's attorney, at 9:00 a.m. on Sunday, September 12th, in the office of the Detective Division. Defendant was advised fully of his constitutional rights and signed "a waiver of rights," which was witnessed by defendant's brother. Defendant then made a statement which was taken down in shorthand, transcribed, submitted to defendant for corrections, then signed by defendant

and witnessed by Cherry and by defendant's brother. Defendant's statement, which was admitted in evidence without objection, is quoted below.

"I was leaving to go home. I was down at Southside with Mr. Yates in the six hundred block of Waughtown adjacent to McLean Trucking Company just to the east side. They have a shuffleboard game in there and I was playing a game of shuffleboard and one or two other people got in the game. I don't know their names, but one was a blond-headed girl and a man named Gene Dudley was watching. There were two more, but I don't know their names. This man that I know, Teddy Gerrey, he asked if I would give him a ride to Roy's Lunch on Stadium Drive, about the eight hundred block. I said, 'Yes, I will give you a ride,' so we arrived down there and I went in and sat down and was just sitting there and Ted asked if I would like to play a game of pool and I said, 'Yes, I'll play you a game,' so we went back to the poolroom to play a game of pool and some of the people that were there were Charlie Cryner and Gene Dudley. I played a couple of games and Ted left the poolroom and somebody said, 'Let's just play for a beer,' and I said, 'Okay, let's play and the loser will buy the beer,' so, I won a game or two and then Bill Wiles won a game. We played three or four games.

"After nearly through the last game, I offered to bet Bill Wiles a dollar that he would not make the last ball and buy a beer. Bill Wiles was not going to win the game because this dark-haired guy about five feet seven inches or five feet eight inches about a hundred eighty-five or ninety pounds was going to win. He was a gentle acting man. This was about 12:30. I knew that I should have already been home. I wasn't paying any attention to the time. When Bill lost, he got awfully mad and he was going to jump all over me, and Ted Gerrey told him he heard what was going on and the man was right and to leave me alone. I said, 'Bill, listen to the man or ask this other fellow sitting here.' He said yes, he heard what was said and it was just like what he said and then Bill jumped on Ted. He didn't ever hit me. He jumped on Ted. Then, Bill Wiles said, 'If you people don't like what I do, I have got a forty-five and a thirty-two out in the car and I'll just blow your brains out.' Huff and Ted Gerrey heard Bill Wiles say this. Then, the dark-haired man pushed Bill Wiles out of the door and

took him to the car. So, I walked up to the front and I said hello to Charlie Cryner. He works at McLean's and I was talking to him and he was kidding Harold Huff and I was going to ask Harold Huff if he wanted a ride home and Charlie said, 'Do you need to borrow any money,' and I said, 'No, I have got some money in my pocket.' So, I was going to see if Huff wanted a ride home, so I told Ted to come on and I would give him a way home. He said, 'That man is going to do what he says. Bill means what he says.' So, I went by my home and picked up my shotgun and Ted was with me.

"So, I stopped by Roy's and parked out front and Roy walked out the front door and I said, 'Is Huff still there?' and Roy Scales said, 'Look out, that fellow is still in there and you had better watch out. You had better not park here.' So, I just pulled on down the street and stopped on the parking lot of Kashway Food Store and my truck was headed north of the luncheon. Just as soon as I got stopped, Bill Wiles came tearing out that door and he came up the bank walking south. He came out the side door and walked south towards my truck and he came up and looked at me and said something to me, I can't remember, but it was something like 'I'm going to teach you some manners,' and he kept on walking and he reached in his pocket and I thought he was going to get a knife or gun. I didn't know what he was doing. I thought about leaving, but I didn't know what he was going to do. I said, 'Bill, you better stop where you are,' and he was about four or five feet away from me. He was on the left side of my truck. I just told him he better stop, but he didn't stop. He just kept on coming and he just moved faster. I had my shotgun in my lap and I just raised my gun up and shot him. The first time I told him to stop, I stuck my gun out the window and told him he had better look at what I had and stop, but he didn't. He just put his hand in his pocket. I just cut loose when he kept on coming and he fell in front of my truck. He was about five feet away when I shot him. Ted Gerrey was in the truck at this time. He jumped out of the truck and ran in the luncheon in the back door and told me to go on so I did.

"I don't know if anybody was drinking beer in there or not. Gerrey was present when Bill Wiles told me he had a thirty-two and a forty-five in his car and so was Huff. They heard Wiles say he would blow my brains out. After I left the parking lot at the luncheon, I went to Thomasville and

came back through High Point and stopped in High Point and cashed a check and got some gas at a service station and came back halfway between Winston-Salem and High Point and drove down Cumley Road and drove to a sawmill and got a hose and tried to commit suicide. I stayed there for two nights. Then, Saturday night, I came back home. I figured I had better get it straight."

After signing the statement, defendant was "taken into custody and charged with the offense" for which he was tried.

Cherry testified that defendant told him that Gerrey was in the truck when defendant shot Wiles; and that defendant had thrown the gun "in Salem Creek."

Cherry also testified that it was exactly 2.2 miles from Stadium Drive Lunch to where defendant lived.

In his cross-examination of Cherry, defendant's counsel elicited testimony which tended to show the following: Scales had told Cherry that Wiles and defendant "had started arguing after they started closing up and he [Scales] went back and told them he didn't want any trouble, they would have to leave." After defendant was "taken in custody," Gerrey was picked up and brought to the Police Department. After reading defendant's statement, Gerrey said "it was a true and accurate account of what had taken place"; "that when they had left Roy's Lunch that he was planning to go home but that the defendant drove to his house instead and got the shotgun and came back."

The jurors were instructed to return one of the following verdicts: "guilty of first degree murder; or guilty of first degree murder with a recommendation of life imprisonment; or guilty of second degree murder; or guilty of manslaughter; or not guilty."

The jury returned a verdict of "guilty of first degree murder with a recommendation of life imprisonment." Whereupon, the court pronounced judgment which imposed a sentence of life imprisonment. Defendant excepted and appealed.

Attorney General Morgan and Associate Attorney Sauls for the State.

White, Crumpler & Pfefferkorn, by Fred G. Crumpler, Jr., Michael J. Lewis and G. Edgar Parker, for defendant appellant.

BOBBITT, Chief Justice.

Defendant assigns as error (1) the court's denial of his motion under G.S. 15-173 for judgment as in case of nonsuit, (2) the court's denial of his motion as in case of nonsuit in respect of the charge of murder in the first degree, and (3) portions of the court's charge to the jury.

The applicable substantive law is well settled and need not be restated. For the elements of murder in the first degree, see *State v. Reams,* 277 N.C. 391, 401-02, 178 S.E. 2d 65, 71 (1970), and cases cited. For the elements of murder in the second degree and of voluntary manslaughter, see *State v. Duboise,* 279 N.C. 73, 81-2, 181 S.E. 2d 393, 398 (1971), and cases cited. For the legal principles applicable to the right of self-defense, see *State v. Wynn,* 278 N.C. 513, 519, 180 S.E. 2d 135, 139 (1971), and cases cited. Consideration of the charge shows that Judge Long instructed the jury in substantial accord with our decisions.

[1] The evidence, inclusive of the stipulation and of portions of defendant's written statement of September 12th, was sufficient to support a finding that defendant intentionally shot Wiles and thereby inflicted bullet wounds which proximately caused Wiles's death. If so, *nothing else appearing,* defendant would be guilty of murder in the second degree. *State v. Duboise, supra* at 81-2, 181 S.E. 2d at 398, and cases there cited. Defendant contends that this statement of September 12th discloses that he acted within his legal right of self-defense; and, having offered the statement in evidence, the State is bound by the portions thereof which are favorable to defendant.

[2] On a motion for judgment as in case of nonsuit, the evidence must be considered in the light most favorable to the State. Contradictions and discrepancies, even in the State's evidence, are matters for the jury and do not warrant nonsuit. *State v. Murphy,* 280 N.C. 1, 7, 184 S.E. 2d 845, 849 (1971), and cases cited.

[3] "When the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements." *State v. Carter,* 254 N.C. 475, 479, 119 S.E. 2d 461, 464 (1961), and cases cited. Accord: *State v. Gaines,* 260 N.C. 228, 232, 132 S.E. 2d 485, 487 (1963);

State v. Bruton, 264 N.C. 488, 499, 142 S.E. 2d 169, 176 (1965). The introduction in evidence by the State of a statement made by defendant which may tend to exculpate him, does not prevent the State from showing that the facts concerning the homicide were different from what the defendant said about them. *State v. Cooper,* 273 N.C. 51, 57, 159 S.E. 2d 305, 309 (1968), and cases cited.

[4-6] If and when the jury found that defendant intentionally shot Wiles and thereby inflicted bullet wounds which proximately caused his death, it was incumbent on defendant to show to the satisfaction of the jury that he acted in self-defense and that in doing so he used no more force than was or reasonably appeared necessary under the circumstances to protect himself from death or great bodily harm. Standing alone, the facts stated in defendant's statement of September 12th are insufficient to show as a matter of law that defendant was entitled to complete exoneration on the ground of self-defense. Considered in the light most favorable to defendant, these facts were sufficient only to permit the jury to find to its satisfaction that defendant so acted. In any event, when the testimony of Allred, Scales, Huff, Teele and Cherry is considered, the court properly denied defendant's motion for judgment as in case of nonsuit. In this connection, we note that defendant's flight from the scene of the killing was competent for consideration by the jury in connection with other circumstances in passing upon whether defendant was guilty of unlawful homicide but was not admissible to prove premeditation and deliberation. *State v. Payne,* 213 N.C. 719, 723-24, 197 S.E. 573, 576 (1938), and cases cited.

Having concluded that the facts narrated in defendant's statement of September 12th did not establish as a matter of law that he acted in self-defense, we turn now to consider whether the State's evidence was sufficient to require submission of murder in the first degree as a permissible verdict. The answer to this question requires an analysis of the evidence offered by the State other than defendant's statement of September 12th, with emphasis upon those portions which are in conflict, expressly or impliedly, with defendant's explanatory statement.

Defendant's explanation of the incident in the poolroom when Wiles missed the shot and lost the bet and of his depar-

ture from Stadium Drive Lunch and his return is as follows: Wiles got awfully mad and was going to "jump all over" defendant until Gerrey spoke up and told Wiles he had heard what was going on and asked Wiles to leave defendant alone. Thereupon, Wiles "jumped on" Gerrey. Then, according to defendant's statement, "Wiles said, 'If you people don't like what I do, I have got a forty-five and a thirty-two out in the car and I'll just blow your brains out.' Huff and Ted Gerrey heard Bill Wiles say this." Thereupon, "the dark-haired man" pushed Wiles out of the door and took him to his car. Defendant then walked up to the front, talked with one Charlie Cryner, and "was going to ask Harold Huff if he wanted a ride home." He told Gerrey to come on and he would take him home. Gerrey said that Wiles was going to do what he said. Accompanied by Gerrey, defendant left Stadium Drive Lunch, went by his own home and picked up his shotgun. Defendant and Gerrey returned to the Stadium Drive area, first stopping in front of Stadium Drive Lunch. Scales walked out the front door and defendant asked, "Is Huff still there?" Whereupon, Scales told him: "Look out, that fellow is still in there and you had better watchout. You had better not park here." Defendant then pulled down the street, and stopped on the Kashway parking lot.

The testimony of Scales and of Huff is in sharp conflict with the foregoing explanation of defendant. They testified that they did not hear Wiles say anything about having "a forty-five or thirty-two in his car" and did not hear him make threats of any kind. Too, they testified explicitly that defendant and Gerrey left Stadium Drive Lunch first and that Wiles was the last customer to leave. Their testimony contains no reference to a departure by Wiles under escort of a "dark-haired man," prior to the departure of Cryner, Bolin and Gerrey. Nothing in defendant's explanation indicates that he in fact asked Huff if he wanted a ride home. Huff's testimony was that he planned for Scales to take him home as usual. No testimony of Scales or of Huff indicates that either of them saw defendant or Gerrey between the time defendant and Gerrey left in defendant's truck and the later time when Wiles left the Stadium Drive Lunch building.

Defendant's explanation as to what occurred after he parked his truck on the Kashway parking lot was as follows: Just as soon as defendant stopped, Wiles came "tearing out" of

the side door and "came up the bank walking south" toward defendant's truck and said something like, "I'm going to teach you some manners." Wiles reached in his pocket and defendant thought Wiles "was going to get a knife or gun." Defendant thought "about leaving but . . . didn't know what [Wiles] was going to do." When Wiles was four or five feet away, defendant told Wiles he had "better stop" where he was. Wiles was on the left side of defendant's truck. Wiles did not stop but kept on coming, moving faster. When defendant first told Wiles to stop, defendant "stuck [his] gun out of the window and told [Wiles] he had better look at what [defendant] had and stop," but Wiles "just put his hand in his pocket." Defendant "just cut loose when [Wiles] kept on coming and [Wiles] fell in front of [defendant's] truck." Defendant shot Wiles when Wiles was "about five feet away." Gerrey was in the truck when defendant shot Wiles, but Gerrey "jumped out of the truck and ran in the luncheon in the back door and told [defendant] to go on so [defendant] did."

Although Scales and Huff were present when Wiles left, nothing in the testimony of either suggests that Wiles went "tearing out" of Stadium Drive Lunch. Huff testified that when Wiles came out of the poolroom he had a Budweiser beer can in his hand. Allred testified that he found no weapon of any kind on or near Wiles's body but did find "a Budweiser beer can" near his right arm. The diagram, tending to show "the point of injury and the angle trajectory after the pellets entered the body," indicates the shot entered the right anterior wall of Wiles's chest and coursed downward. This evidence, defendant's statement that Wiles "came up the bank walking south," and Allred's testimony as to where Wiles's body was found, permitted the inference and a finding that Wiles was shot as he approached the top of the bank.

Defendant's statement that Wiles came from his left is in accord with Teele's testimony that the lights of the truck on the Kashway lot were burning and headed toward Stadium Drive. Defendant's statement that Wiles came "tearing out" of the Stadium Drive Lunch "[j]ust as soon" as he stopped on the Kashway parking lot is in conflict with Teele's testimony that defendant had been parked there when Teele passed, which was 10 or 15 minutes before Teele heard the radio broadcast "of a shooting at the Stadium Street Lunch."

Cherry testified that Gerrey told him that the statement made by defendant was correct. This included a statement that Gerrey was in the truck with defendant when defendant shot Wiles. Circumstances testified to by other witnesses permit contrary inferences. According to Huff, Gerrey was not in the Stadum Drive Lunch building when he left to go where Wiles's body was lying. The truck left during the brief interval between the firing of the shot and the times when Huff and Allred viewed Wiles's lifeless body. When Huff returned, he found Gerrey inside the Stadium Drive Lunch building. Too, Allred testified that Gerrey and Scales were in this building when he arrived upon the scene.

There was evidence that the left door of the Thunderbird was open and that the car keys were in the ignition. It may be inferred from this evidence that Wiles, upon leaving the Stadium Drive Lunch, had gone first to the Thunderbird. Whatever may have induced him to leave the Thunderbird and approach defendant's truck, the fact that he had no weapon of any kind (unless a Budweiser beer can can be considered a weapon) and that defendant had and exhibited his shotgun negates rather than supports an inference that Wiles approached defendant's truck in a threatening and menancing manner.

[7] The foregoing evidence would permit and support jury findings that there was an argument in the poolroom of the Stadium Drive Lunch between defendant and Gerrey on the one hand and Wiles on the other; that Wiles did not threaten defendant or Gerrey with a deadly weapon of any kind and did not have such a weapon; that defendant and Gerrey left in defendant's truck, leaving Wiles inside the Stadium Drive Lunch building; that, instead of taking Gerry home as originally planned, defendant drove to his own home, 2.2 miles away, and got his shotgun; that, armed with his shotgun, defendant and Gerrey returned to the Stadium Drive Lunch area and parked in the Kashway parking lot, with the truck headed toward the exit to Stadium Drive; that defendant returned to confront Wiles, not to offer Huff a ride; that defendant, with the shotgun in his lap, waited until Wiles emerged from the building; that Wiles, after first going to his Thunderbird car, was prompted or induced in some manner to approach defendant's truck; that, when he approached defendant's truck, Wiles had "a Budweiser beer can" in his hand and no weapon on his

person; that, as Wiles walked up the slope of the grassy median toward defendant's truck, defendant shot him and immediately drove away; that Gerrey was not in the truck when defendant drove away but shortly thereafter showed up inside the Stadium Drive Lunch building. We conclude that the evidence tending to show these facts was sufficient to require submission of guilty of murder in the first degree as a permissible verdict and to support such verdict.

Since defendant was not a witness, there was no cross-examination as to what was said in his statement. True, when the State introduced his extra-judicial statement, it was bound by what he said except insofar as it was contradicted and shown to be false. It was contradicted in material respects. In determining its credibility in these respects, the jury no doubt considered the fact that defendant had had the opportunity to reflect for more than three days before he gave any explanation as to what had occurred.

We have considered carefully each of defendant's assignments of error to the court's charge. As indicated above, none discloses prejudicial error. Elaboration of well-settled principles would serve no useful purpose.

Defendant having failed to show prejudicial error, the verdict and judgment will not be disturbed.

No error.

THOMAS G. ALLGOOD, JR., FRANKIE C. BIDDLE, DAVID M. CHAPPELL, JAMES ELMER CLARK, J. WALLACE COOPER, RUSSEL HERMAN DEW, JOHNNY EARL EASON, SPENCER L. EDWARDS, DIEDRICK H. GASKILL, DAVID H. GRIFFIN, GEORGE W. HARRELL, EDWARD A. HARRIS, S. M. KINSINGER, JOE LEON LANE, JEROME K. LEGGETT, MRS. RALPH B. LIVESAY, WILLIAM C. MORRIS, JR., ROBERT L. NORRIS, JOHN W. NORVILLE, EFFIE S. OGBURN, JOHNNY DALE PIGG, WILLIAM ASHTON PROCTOR, HERBERT W. RAMSEY, DONALD R. ROSE, ALLEN B. ROSS, NORRIS W. SMITH, ELBERT L. STOCKS, JENNINGS B. TEAL, GERALD M. WARD, MOODY H. WARD, GRAHAM A. WEST, AND MRS. W. G. WHITE v. THE TOWN OF TARBORO, NORTH CAROLINA, E. L. ROBERSON, MAYOR, CARL D. ANDREWS, A. B. BASS, REX BROWNING, GRAHAM HARRIS, C. W. MAYO III, M. A. RAY, L. G. SHOOK, AND JOSEPH A. TAYLOR, MEMBERS OF THE TOWN COUNCIL OF THE TOWN OF TARBORO, AND CLYDE L. BRITT, BUILDING INSPECTOR OF THE TOWN OF TARBORO

— AND —

EASTERN REALTY AND INVESTMENT CORPORATION

No. 120

(Filed 16 June 1972)

1. Municipal Corporations § 30— comprehensive zoning ordinance — amendment

A comprehensive zoning ordinance adopted by a municipality did not constitute a contract between the municipality and property owners which precluded the municipality from changing the boundaries, nor did it vest in any property owner the right that the restrictions imposed by it upon his property or the property of others should remain unaltered.

2. Municipal Corporations § 30— amendment of zoning ordinance

A comprehensive zoning ordinance may be amended or changed when the action is authorized by the enabling statute and does not contravene constitutional limitations on the zoning power; constitutional limitations, however, forbid arbitrary and unduly discriminatory interference with property rights in the exercise of such power.

3. Municipal Corporations § 30— amendment of zoning ordinance — presumption of validity

An amendment to a municipal zoning ordinance is presumed to be valid and the burden is on the complaining party to show its invalidity.

4. Municipal Corporations § 30— rezoning — Community Shopping District — validity

The rezoning of a 25-acre tract from a Residential District to a Community Shopping District was not arbitrary and capricious and did not constitute spot zoning, where the evidence showed that when the city's comprehensive zoning ordinance was adopted, the property

was outside the city limits in an area of comparatively undeveloped farm land, served only by a two-lane road, that when the property was rezoned it had been brought into the city limits, that the property lies at the intersection of a four-lane highway and U. S. Highway 64 Bypass, both heavily traveled highways, that the city has installed water and sewer service in the area, that 24 multi-family apartment units have been constructed on adjoining property, and that a zoning classification of Community Shopping District would have been justified when the zoning ordinance was originally adopted if the present conditions had existed at that time.

5. **Municipal Corporations § 30— rezoning — shopping center — market analysis**

Zoning ordinance requirement that the "owner" of property sought to be rezoned to a Community Shopping Center classification furnish a market analysis prepared by an independent market analyst was complied with when the original individual owner filed such an analysis in connection with his application for the rezoning, notwithstanding the property was conveyed to a corporation while the rezoning application was pending and the property was rezoned while owned by the corporation.

6. **Municipal Corporations § 30— zoning — shopping center — business permitted**

There is no merit in plaintiffs' contention that a proposed shopping center is "regional" in character and therefore beyond the scope and size permitted by a Community Shopping District zoning classification, the businesses carried on by the proposed tenants being within the uses permitted in a Community Shopping District, and there being no maximum area provided for such zoning classification.

7. **Municipal Corporations § 30— building permit — validity**

A building permit was not rendered invalid by the fact that the application listed the estimated cost of the building at $475,000 and the contractor named in the application had a license which limited it to construction not exceeding $300,000, where the permit was issued to the owner, not the building contractor, and the contractor obtained an unlimited contractor's license prior to beginning construction of the building.

APPEAL by plaintiffs from *Cowper, J.*, at the 25 October 1971 Civil Session of EDGECOMBE Superior Court, certified for initial appellate review by the Supreme Court under G.S. 7A-31(b)(1) upon motion of all parties.

Civil action to declare an amendment to the comprehensive Zoning Ordinance of the Town of Tarboro void and of no effect.

The complaint alleges three causes of action: (1) That the purported adoption of an amendment to the Zoning Ordinance of the Town of Tarboro by the Town Council on 11 January 1971, by which the 25-acre tract in question was rezoned from

RA-12, Residential District, to B-3, Community Shopping District, constituted "spot zoning"; and that this action was arbitrary, unreasonable, capricious, contrary to the Zoning Ordinance and pertinent laws, and therefore null and void; (2) that even if this zoning amendment is valid, the said B-3, Community Shopping District, does not permit the use for which the developer seeks to put the property; that the proposed use will be in violation of the zoning laws and will irreparably damage the value of the residential property of the plaintiffs and others in that vicinity; and (3) that the building permit issued by the Building Inspector for a building to be located upon this tract was not properly issued and therefore should be cancelled.

Defendants in their answers deny plaintiffs' allegations and allege that the amendment to the Zoning Ordinance is in all respects valid, that the proposed uses are permitted uses under the amendment, and that the building permit was properly issued.

The uncontradicted facts in this case show the following: On 14 January 1963 the Town Council of Tarboro adopted a comprehensive Zoning Ordinance. When this ordinance was passed, the 25-acre tract in question was outside the city limits but within one mile of the city, and this tract and property owned by some of the plaintiffs was placed in Planning District 17 and zoned RA-12, Residential District.

On 12 July 1968, H. W. Hull and his wife acquired this 25-acre tract and later that month filed a request to have three acres of the 25-acre tract rezoned from RA-12, Residential District, to B-3A, Neighborhood Shopping District. On 9 September 1968 the Zoning Ordinance was so amended by the Town Council.

On 14 July 1969, Hull filed a request to rezone the entire 25-acre tract to B-3, Community Shopping District. A public hearing was held on this request by the Town Council on 13 October 1969. At that time statements were made in favor of and in opposition to the proposed shopping center. The matter was then referred to the Planning Board and Zoning Commission of the Town of Tarboro and Its Environs (hereinafter referred to as the Planning Board). The Planning Board met on 24 November 1969, and on 1 December 1969 voted five to five

on the Hull request for a rezoning. The Town Council next met on 8 December 1969, heard arguments by proponents and opponents concerning the requested change, and then voted unanimously to rezone the entire 25-acre tract to B-3, Community Shopping District.

Some of the plaintiffs in the instant case brought suit on 2 March 1970 against the Town of Tarboro and others, alleging that the action of the Council was arbitrary, capricious, unreasonable, unlawful, and contrary to the Zoning Ordinance in various particulars.

On 17 September 1970, while that action was pending, Hull and his wife conveyed the 25-acre tract to defendant-intervenor, Eastern Realty and Investment Corporation. This first action was heard by Judge Walter W. Cohoon without a jury at the October-November 1970 Session of Edgecombe Superior Court, and after finding the facts Judge Cohoon concluded as a matter of law:

> "(1) The Amendment to the Zoning Ordinance enacted by the Tarboro Town Council on December 8th, 1969, affecting the property of Defendants Hull is not invalid for the reason that the Town Council acted arbitrarily and capriciously in adopting said Zoning Ordinance.
>
> "(2) That the Amendment to the Zoning Ordinance pertaining to the property of Defendants Hull which was enacted by the Town Council on December 8th, 1969, is invalid for the reason that the Notice of the Public Hearing was not properly published for the October 13th, 1969 public meeting of the Town Council, and that said action taken by the Town Council with respect thereto is invalid."

Judgment was entered in accordance with these conclusions on 25 November 1970, and no appeal was taken by any of the parties.

On 10 December 1970, Hull filed a new request to rezone the 25-acre tract to a B-3, Community Shopping District, in order that the proposed Park Hill Shopping Center might be constructed thereon. Eastern Realty and Investment Corporation, as the new owner of the land in question, joined Hull in this request.

The Town Council on 14 December 1970 referred the request to the Planning Board. At their 15 December 1970 meeting, the Planning Board recommended that the change be made and that the Town Council call a meeting for a public hearing on the matter. The Council held such hearing on 11 January 1971, and after hearing witnesses and attorneys both for and against the proposal, voted unanimously to rezone the entire tract to B-3, Community Shopping District.

Plaintiffs thereafter on 15 February 1971 brought this action against the Town of Tarboro, the Mayor, the members of the Town Council, and the Building Inspector. Eastern Realty and Investment Corporation filed a motion to intervene alleging that as the owner of the land in question it was a necessary party to the action and entitled to intervene by virtue of G.S. 1A-1, Rule 24(a)(2) of the Rules of Civil Procedure. This motion was allowed by Judge Tillery on 4 May 1971.

The case was heard before Judge Albert W. Cowper without a jury. After hearing the evidence and arguments of counsel, Judge Cowper found, among others, the following facts:

> "5. . . . The Land Development Plan dated 1963 was the basic study which led to the adoption on January 14, 1963, by the Town Council of the Town of Tarboro of the Zoning Ordinance of the Town of Tarboro and Its Environs. This study or plan divided the Town of Tarboro and the area lying outside of but within one mile of the corporate limits into eighteen (18) planning districts. The property on which the Park Hill Shopping Center is proposed to be built was located in Planning District Seventeen (17) and all of said planning district was located outside of the corporate limits of the Town of Tarboro . . . . The existing land use in said planning district indicated by said Plan was a small residential subdivision located in the southeast corner of the Planning District on Howard Avenue (State Road 1211), a large area of undeveloped land extending westerly from the corporate limits of the Town of Tarboro to a larger residential subdivision known as Speight Forest and then another large area of essentially undeveloped land extending westerly to the western boundary of the Planning District.
>
> "The Plan indicated that except for the small subdivision referred to above and the Speight Forest Sub-

division, the District was served neither by public water or sewerage service. The Speight Forest Subdivision had public water service but no sewerage service and only the small residential subdivision located in the southeast corner of the District adjacent to the corporate limits of the Town of Tarboro had both public water and sewerage service. At the time of the study and preparation of the Plan, there existed no school, park or recreational facilities in the District. The only major thoroughfare in the District was Howard Avenue (State Road 1211) which was the southern boundary of the District . . . .

* * *

"6. Some of the plaintiffs own and reside in homes located near or in the immediate neighborhood of the proposed location of the Shopping Center, but no plaintiff owns or resides in a home immediately adjacent to the location of the proposed Shopping Center.

* * *

"21. The conditions existing in Planning District Seventeen, adjoining Planning Districts and the overall Planning Area of the Town of Tarboro at the time of the adoption of the zoning amendment in question on January 11, 1971, differ from those conditions which existed at the time of the 1963 Land Development Plan and the adoption on January 14, 1963 of the Zoning Ordinance of the Town of Tarboro in the following particulars:

"A. Western Boulevard (U. S. Highway No. 64 Bypass) had been constructed at its present location giving access to land on both sides thereof and a portion of this highway abuts the eastern line of the Shopping Center site and intersects Howard Avenue (State Road 1211) a portion of which abuts the southern line of the Shopping Center site. This boulevard or highway was and is capable of handling high volumes of traffic and had become and is one of the major thoroughfares in the Town of Tarboro. While the construction of this boulevard or highway was contemplated by the 1963 Land Development Plan, it was not known at that time when said boulevard or highway would be constructed and at what precise location;

"B. Howard Avenue (State Road 1211) had been widened from one lane of traffic in each direction to two lanes of traffic in each direction from its intersection with Western Boulevard (U. S. Highway 64 Bypass) in an easterly direction towards Main Street and becomes a five lane highway before intersecting Main Street. This avenue or road was and is capable of handling high volumes of traffic both into and from Western Boulevard (U. S. Highway No. 64 Bypass);

"C. The Shopping Center site, Speight Forest Subdivision and areas north and east of the Shopping Center site had been annexed into the corporate limits of the Town of Tarboro and the public water and sewer facilities had been extended to serve these and other surrounding areas;

"D. The Zoning Ordinance of the Town of Tarboro had been amended to provide for a B-3, Community Shopping District, and increasing the minimum size of such district;

"E. C. B. Martin Junior High School had been constructed and a Town Park developed north of the school property and on the east side of Western Boulevard (U. S. Highway No. 64 Bypass) . . . .

"F. Further development of Speight Forest Subdivision had occurred, apartment buildings had been constructed north of the Shopping Center Site, and in the general vicinity of the Shopping Center Site new subdivisions had been developed and old subdivisions had been expanded and property in the adjoining planning districts and in the general vicinity of the Shopping Center Site had been reclassified from residential to other purposes and a portion of the Shopping Center site had been reclassified as B-3A, Neighborhood Shopping District. . . . "

Based upon his findings of fact, Judge Cowper concluded as a matter of law that the Town Council had ample plausible basis for adopting the amendment in question; that the Council did not act arbitrarily or capriciously, but acted in good faith, reasonably and consistently with the comprehensive plan; that the rezoning did not constitute "spot zoning"; that the commer-

cial uses indicated by the final plan are consistent with the B-3, Community Shopping District, purposes; and that any irregularity which occurred in the issuance of Building Permit No. 5721 was of form rather than substance and was rendered moot by subsequent events.

Judge Cowper thereupon entered judgment for defendants and defendant-intervenor denying all relief prayed for by the plaintiffs and taxing plaintiffs with the costs.

From this judgment plaintiffs appealed to the Court of Appeals. On 4 April 1972, at the request of plaintiffs and defendants, this Court granted *certiorari* for appellate review by the Supreme Court without prior determination by the Court of Appeals.

Bridgers & Horton by H. Vinson Bridgers; Claude V. Jones for plaintiff appellants.

Taylor, Brinson & Aycock by Z. Creighton Brinson for defendant appellees.

Weeks & Muse by T. Chandler Muse for defendant-intervenor appellee.

MOORE, Justice.

Plaintiffs allege no procedural irregularity in the adoption of the 11 January 1971 amendment to the comprehensive Zoning Ordinance. They attack the amendment on the ground that the original classification of the property in 1963 as RA-12, Residential District, was sound; that there have been no changes in use or character in Planning District 17 sufficient to legally support rezoning the 25-acre tract to B-3, Community Shopping District; and that the attempt to do so by the Town Council on 11 January 1971 constituted "spot zoning" and was illegal, unauthorized by law, arbitrary, and void.

The original zoning power of the State reposes in the General Assembly. *Marren v. Gamble,* 237 N.C. 680, 75 S.E. 2d 880 (1953). The General Assembly has delegated to the legislative body of a municipality the power to adopt zoning regulations "for the purpose of promoting health, safety, morals or the general welfare of the community." G.S. 160-172; *Marren v. Gamble, supra.* The legislative body in this case is the Town

Council of Tarboro. *Keiger v. Board of Adjustment,* 278 N.C. 17, 178 S.E. 2d 616 (1971).

G.S. 160-172 provided in part:

"Grant of power.—For the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of cities and incorporated towns is hereby empowered to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes. . . . "

G.S. 160-173 provided:

"Districts.—For any or all said purposes it may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this article; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land. All such regulations shall be uniform for each class or kind of building throughout each district, but the regulations in one district may differ from those in other districts."

G.S. 160-174 provided:

"Purposes in view.—Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality."

(G.S. 160-172, G.S. 160-173, and G.S. 160-174, as amended in 1971, now appear as G.S. 160A-381, G.S. 160A-382, and G.S. 160A-383.)

Pursuant to these statutory provisions, the Town of Tarboro on 14 January 1963 adopted a comprehensive Zoning Ordinance setting up, among other districts, Planning District 17, in which the property in question is located. This property, as well as some of the other property in District 17 was zoned RA-12, Residential District, for single-family residences. Other property in District 17 was zoned RA-20, Residential and Agricultural. In an RA-20 zone, apartments, churches, sanatariums, fire stations, hospitals, kindergartens, and schools are permissible.

[1, 2] The comprehensive ordinance did not constitute a contract between the Town and property owners which precluded the Town from changing the boundaries if at a later date it deemed a change to be desirable. Neither did this ordinance vest in any property owner the right that the restrictions imposed by it upon his property or the property of others should remain unaltered. Such regulations may be amended or changed when the action is authorized by the enabling statute and does not contravene constitutional limitations on the zoning power. *Blades v. City of Raleigh,* 280 N.C. 531, 187 S.E. 2d 35 (1972); *Allred v. City of Raleigh,* 277 N.C. 530, 178 S.E. 2d 432 (1971); *Zopfi v. City of Wilmington,* 273 N.C. 430, 160 S.E. 2d 325 (1968); *In re Markham,* 259 N.C. 566, 131 S.E. 2d 329 (1963). See 1 Yokley, *Zoning Law and Practice* § 7-3, p. 306 (3d Ed. 1965). Constitutional limitations, however, forbid arbitrary and unduly discriminatory interference with property rights in the exercise of such power. *Heaton v. City of Charlotte,* 277 N.C. 506, 178 S.E. 2d 352 (1971).

Plaintiffs do not attack the validity of the comprehensive ordinance. They only attack the 11 January 1971 amendment.

G.S. 160-176 provided for amendments: "Such regulations, restrictions and boundaries may from time to time be amended, supplemented, changed, modified or repealed," and G.S. 160-175 provided: "The legislative body of such municipality shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established and enforced, and from time to time amended, sup-

plemented or changed." (G.S. 160-176 and G.S. 160-175, as amended in 1971, now appear as G.S. 160A-385 and G.S. 160A-384).

The comprehensive Zoning Ordinance of Tarboro provides (Section 14.1): "The Town Council may, on its own motion or upon motion or upon petition by any person within the zoning jurisdiction of the Town of Tarboro, after public notice and hearing, amend, supplement, change, modify or repeal the regulations herein established or the maps which are a part of this Ordinance, subject to the rules prescribed in Subsections 14.2 and 14.3 of this Section." Subsection 14.2 is not pertinent to this case. Subsection 14.3 provides that any such amendment shall be referred to the Planning Board for its recommendation and report prior to its adoption.

In the original Zoning Ordinance the Town Council found (Section 2.2): "In the creation, by this ordinance, of the respective districts, the Town Council of the Town of Tarboro has given due and careful consideration to the peculiar suitability of each and every district for the particular regulations applied thereto, and the necessary, proper and comprehensive groupings and arrangements of various uses and densities of population in accordance with a well-considered comprehensive plan for the physical development of the community." And, with specific reference to a B-3, Community Shopping District, the Town Council states (Section 9.7(I)): "The Town Council and the Planning Board believe the current Zoning Map to be valid and proof of a need for amending it shall be furnished by the proponents of a planned business center . . . . "

Plaintiffs contend that the property in question was properly placed in a residential zone under the original ordinance; that it was stipulated by the parties that this property is still suitable for residential purposes; that no need for a change has been shown; and that the Town Council acted arbitrarily and capriciously in changing the property from residential to commercial.

[3] The Planning Board, as required by the comprehensive Zoning Ordinance, examined the application of Hull and Eastern Realty and Investment Corporation to rezone the property in question and by a vote of eight to one recommended its approval. The Town Council, after giving the required notice, then held

a public hearing on 11 January 1971 on the proposed amendment and voted unanimously to adopt it. There is a presumption that the Town Council adopted this amendment in the proper exercise of its police power. *Heaton v. City of Charlotte, supra; Raleigh v. Morand,* 247 N.C. 363, 100 S.E. 2d 870 (1957). And the plaintiffs who assert its invalidity have the burden of proving its invalidity. *Helms v. Charlotte,* 255 N.C. 647, 122 S.E. 2d 817 (1961).

The facts in the case of *Zopfi v. City of Wilmington,* 273 N.C. 430, 160 S.E. 2d 325 (1968), were strikingly similar to those in the instant case. In *Zopfi* the property involved was a 60-acre tract which was triangular in shape with the apex of the triangle at the intersection of two heavily traveled highways. The base of the triangle adjoined a residential subdivision. The tip of the apex was zoned C-1, Commercial, but the rest of the tract was zoned R-1AA, single-family residences only. The owners sought to have the twenty-seven and one-half acres nearest the apex zoned C-1, Commercial, for the construction of a shopping center; to have the next twelve acres zoned R-3, multiple-family apartment use; and to leave the remaining acreage, lying along the base of the triangle, R-1AA. The City Council so rezoned this property. The named plaintiffs, on behalf of themselves and others, instituted an action seeking a declaratory judgment to determine the validity of the ordinances rezoning the property. The trial judge heard the evidence, found the facts, and concluded as a matter of law that the rezoning ordinances were duly adopted and valid, and that in adopting them the City Council did not act arbitrarily or capriciously but in good faith and in a reasonable manner consistent with its comprehensive zoning plan. The plaintiffs appealed and this Court affirmed. Justice Lake, speaking for the Court, stated:

> " . . . (T)he amending ordinances before us do not fall into the category of spot zoning. They apply to approximately forty acres constituting a triangle lying between two heavily traveled highways and separated from the property of the plaintiffs by a buffer strip of twenty acres of the Morton-Cocke tract still zoned for single family residences. There is ample support in the record for the conclusion that the rezoning of the Morton-Cocke tract was not arbitrary or discriminatory, may reasonably be

deemed related to the public welfare and is not inconsistent with the purpose for which the city is authorized by the statute to enact zoning regulations. The conclusion of the trial judge that the City Council, in adopting the amending ordinances, did not act arbitrarily or capriciously but acted in good faith, reasonably and consistent with its comprehensive zoning plan, is supported by the court's findings of fact, which, in turn, are supported by competent evidence in the record."

[4] In the present case, the uncontradicted evidence showed that in 1963 when the comprehensive ordinance was adopted, the property in question was outside the city limits in an area of comparatively undeveloped farm land, served only by Howard Avenue, a two-lane road. In 1971, when the amendment was adopted, the area had been brought into the city limits; a new school had been constructed; Howard Avenue had been four-laned to accommodate heavy traffic, and temporary U. S. Highway 64 Bypass constructed so that the 25 acres lay at the intersection of Howard Avenue and Highway 64 Bypass, both heavily traveled highways. The Town had installed water and sewer service in the area and 24 multi-family apartment units had been erected on the property adjoining the area in question.

This evidence was ample to support Judge Cowper's conclusion that the Town Council had reasonable grounds to believe that a shopping center on the 25 acres in question would, because of changed conditions, be in keeping with the comprehensive plan to encourage the most appropriate use of land throughout the city. It was also sufficient to support his conclusion that if the 1971 conditions *"had existed at the time of the 1963 Land Development Plan and the adoption of the Zoning Ordinance on January 14, 1963, the Town Council of the Town of Tarboro would have been justified at that time in zoning the area in question B-3, Community Shopping District,"* and the evidence further amply supported the court's conclusion that such amendment did not constitute "spot zoning." (Emphasis added.)

As stated in *Walker v. Elkin,* 254 N.C. 85, 118 S.E. 2d 1 (1961):

"The term 'spot zoning' has frequently been used by the courts and text writers when referring to changes

limited to small areas. Different conclusions have been reached on seemingly similar factual situations. We think the basic rule to determine the validity of an amending ordinance is the same rule used to determine the validity of the original ordinance. *Elizabeth City v. Aydlett,* 201 N.C. 602, 161 S.E. 78. The legislative body must act in good faith. It cannot act arbitrarily or capriciously. *If the conditions existing at the time of the proposed change are such as would have originally justified the proposed action, the legislative body has the power to act.*" (Emphasis added.)

Changes which had taken place in and around Tarboro since 1963 were recognized and discussed in a study by the Community Planning Division of the North Carolina Department of Conservation and Development made for the Town of Tarboro in 1969. This study found that more property was needed in the Town of Tarboro for commercial purposes and that the west side of the Town held the greatest potential for commercial expansion. Concerning the property in question (which is located on the west side) the report stated:

"LOCATION:

From an urban planning standpoint, the proposed location of Park Hill Shopping Center is one of the best areas within Tarboro. The site is on relatively flat, virgin land, and would not require the destruction and removal of existing structures, and the related social imbalance therefrom.

"SINGLE OWNERSHIP:

The fact that Park Hill would be under the control of a single developer insures that such a development would have a unified architecture. This would not be the case under single tract ownership and development.

"ADEQUATE HIGHWAYS:

An examination of data on Temporary 64 Bypass and Howard Avenue indicates that at peak shopping hours these two streets would probably not be operating at more than 80 percent of their peak capacity."

Clearly, the changes which had occurred since 1963, together with the report of the Community Planning Division,

furnished the Town Council with reasonable grounds and a plausible basis for adopting the amendment rezoning the 25 acres in question. See *Yokley, supra,* p. 315.

It is not for the Superior Court or for this Court to review the action of the Town Council for the purpose of substituting the judgment of the Court for that of the Council concerning the wisdom of permitting the proposed use of the 25-acre tract. *Blades v. City of Raleigh, supra; Zopfi v. City of Wilmington, supra.* The courts will not interfere unless it appears that the Council acted arbitrarily and capriciously. The conclusion of the trial judge that the Town Council in adopting the amending ordinance did not act arbitrarily or capriciously but acted in good faith, reasonably, and consistent with the comprehensive zoning plan, is supported by the court's findings of fact which are in turn supported by competent evidence in the record and are binding upon us. *Zopfi v. City of Wilmington, supra.* The plaintiffs' exceptions thereto are overruled.

[5] Plaintiffs next contend that the defendant-intervenor did not furnish the market analysis as provided for by Section 9.7(I) of the Zoning Ordinance. This section provides "that before an amendment to the Zoning Map providing for any future B-3 Community Shopping District is granted that the owner or owners (including optionees) shall present a valid market analysis for consideration by the Planning Board, prepared and signed by a recognized and independent market analyst, which indicates the economic feasibility of the proposed development." Plaintiffs contend that the analysis presented to the Town Council was prepared for Hull prior to the time he conveyed the property in question to Eastern Realty and Investment Corporation, that it was not presented by the owner Eastern Realty and Investment Corporation, and that it was not prepared and signed by a recognized market analyst. These contentions are without merit. The petition for rezoning the property in question was filed by Hull on 14 July 1969. At that time he was the owner of the property. The market analysis prepared by Jerry Turner and Associates and John H. Voohrees was filed in connection with that application. Thereafter, at two public meetings of the Town Council the matter was fully debated, and the Town Council on 8 December 1969 unanimously adopted the ordinance making the zoning change. Judge Cohoon on 25 November 1970 declared this ordinance invalid solely because the notice of the public hearing

was not properly published. Hull then filed a new request for rezoning, pointing out that his petition for rezoning was still pending but that the land had been transferred to Eastern Realty and Investment Corporation, a corporation wholly owned by the Hull family. This request was signed by Hull and by the Corporation. There was no attempt to show that this market analysis was out of date or that there had been any changes in the original plans as submitted. It was stipulated that the analysis was prepared by Turner and Associates and Mr. Voohrees, and the evidence fully supported the court's finding that Turner was a recognized market analyst. These assignments are overruled.

[6] Plaintiffs further contend that the uses as described in the plan submitted by the defendant-intervenor are not uses permitted in a B-3, Community Shopping District, for the reasons that the proposed shopping center is "regional" in character and therefore beyond the scope and size permitted by the Zoning Ordinance in a B-3, Community Shopping District, and that the proposed use will irreparably damage the value of residential property of plaintiffs and others. The Development Plan of the developer submitted to and approved by the Planning Board indicates that the major tenants of the shopping center would be Belk-Tyler Department Store, which would also operate a separate Tire, Battery and Accessory Store; G. C. Murphy Department Store, which would also operate a restaurant; A & P Food Store, Peoples Drug Store, and Edgecombe Bank and Trust Company, together with miscellaneous small shops offering a variety of retail goods and services. The type of business carried on by each of these proposed tenants is within the permitted uses provided for in a B-3, Community Shopping District, by the Zoning Ordinance, which uses are, among others, banks, eating and drinking establishments, filling stations, food stores, and stores or shops for the conduct of the retail businesses of drugs, dry goods, household goods, sporting goods, and variety stores. The B-3, Community Shopping District, classification provides for a minimum area of three acres, but does not provide for any maximum area. The Zoning Ordinance does not provide for a "regional" shopping center. The Town Council, in the exercise of its legislative functions and power, properly determined from the evidence before it on 11 January 1971 that the proposed development Plan submitted by the owner of the property

in question was within and would accomplish the general purposes and objectives of a B-3, Community Shopping District. The evidence does not disclose any pecuniary loss by plaintiffs, and when as here zoning regulations are adopted in the proper exercise of the police power, any resultant loss is a misfortune which they must suffer as members of society. *Armstrong v. McInnis,* 264 N.C. 616, 142 S.E. 2d 670 (1965); *Schloss v. Jamison,* 262 N.C. 108, 136 S.E. 2d 691 (1964); *In re Markham, supra; Kinney v. Sutton,* 230 N.C. 404, 53 S.E. 2d 306 (1949).

[7] Plaintiffs finally contend that the building permit issued to defendant-intervenor is invalid. The permit in question was issued to the defendant-intervenor as owner and not as a licensed contractor. The application for the permit listed Commercial Builders as the name of the contractor, and gave an estimated cost of $475,000 for a Belk-Tyler Department Store. At the time of the issuance of the permit, Commercial Builders had a contractor's license which limited it to construction not exceeding $300,000. Prior to beginning construction on the Belk-Tyler building, Commercial Builders applied for and obtained an unlimited contractor's license and paid the requisite fees and taxes to the State of North Carolina and the Town of Tarboro. The trial judge on competent evidence found these to be the facts and concluded that the building permit was in all respects valid. We agree.

We have carefully considered other assignments of error brought forward by the plaintiffs in their brief. We find no reversible error. For the reasons stated, the judgment of the Superior Court is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. ROBERT LEE THACKER

No. 112

(Filed 16 June 1972)

1. **Criminal Law § 75— in-custody statements — absence of waiver of counsel**

Although defendant was given the full *Miranda* warning, defendant understood his right to counsel and did not request the presence of an attorney during interrogation, and defendant's statement was freely and voluntarily made, the admission of defendant's inculpatory in-custody statement was erroneous where there was neither evidence nor findings that defendant waived his right to counsel, either in writing as provided by [former] G.S. 7A-457, or orally as provided by *Miranda*, defendant's failure to ask for lawyer not constituting a waiver thereof.

2. **Assault and Battery § 12— intent to kill**

Proof of an assault with a deadly weapon inflicting serious injury not resulting in death does not, as a matter of law, establish a presumption of intent to kill; such intent must be found by the jury as a fact from the evidence.

3. **Assault and Battery § 5— inference of intent to kill**

An intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances.

4. **Assault and Battery § 12— intent to kill — burden of proof**

An intent to kill is a matter for the State to prove and is ordinarily shown by proof of facts from which an intent to kill may be reasonably inferred.

5. **Criminal Law § 167— test of harmless error**

The test of harmless error is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.

6. **Assault and Battery § 13; Criminal Law § 75— in-custody statement — intent to kill — prejudicial error**

In this prosecution for assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death, the erroneous admission of defendant's in-custody statement unequivocally expressing his intent to kill the first person he caught alone constituted prejudicial error, notwithstanding there was ample evidence in the record, excluding defendant's statement, from which the jury might reasonably have inferred that defendant intended to kill the victim.

7. **Assault and Battery § 4— felony assaults — degrees**

The crime defined by G.S. 14-32(b)—assault with a firearm or other deadly weapon *per se* inflicting serious injury—is a lesser degree of the offense of assault with a deadly weapon with intent to kill inflicting serious injury defined by G.S. 14-32(a).

8. Criminal Law § 115— failure to submit lesser degrees — guilty verdict

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 charge.

9. Assault and Battery § 16— error in failure to submit lesser felony — error in submission of misdemeanors

In a prosecution for two offenses of assault with a deadly weapon with intent to kill inflicting serious injury wherein all the evidence showed that a deadly weapon was used in both assaults and that serious injury was inflicted on both victims, the trial court erred (1) in failing to submit defendant's guilt or innocence of assault with a deadly weapon *per se* inflicting serious injury, and (2) in submitting the misdemeanors of assault inflicting serious injury and assault with a deadly weapon.

10. Assault and Battery § 5— knife — deadly weapon per se

A knife with a six-inch blade is a deadly weapon *per se*.

11. Assault and Battery § 16— submission of misdemeanors — harmless error

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, defendant was not prejudiced by the erroneous submission of the misdemeanors of assault inflicting serious injury and assault with a deadly weapon, since such action was favorable to defendant.

12. Constitutional Law § 32; Criminal Law § 66— pretrial confrontation — right to counsel

Confrontation for identification purposes is a critical stage of pretrial proceedings requiring the presence of counsel unless the right to counsel is voluntarily, knowingly and intelligently waived.

13. Criminal Law § 66— confrontation at hospital — absence of counsel — in-court identification — independent origin

In-court identifications of defendant by two assault victims were competent regardless of the absence of counsel at a pretrial identification in a hospital emergency room, where the in-custody identifications had independent origins and were not based on the confrontation at the hospital.

ON *certiorari* to the Court of Appeals to review its decision, 13 N.C. App. 299, upholding judgment of *Hall, J.*, 21 June 1971 Session, WAKE Superior Court.

Defendant is charged in separate bills of indictment with a felonious assault on Brenda Gail Waddell and a felonious assault on S. Swain Pierce. Both assaults allegedly occurred on

10 March 1971 at the FCX Store in Raleigh. The cases were consolidated for trial without objection.

The State's evidence tends to show that both victims worked at the FCX Store. Miss Waddell arrived there about 7:40 a.m. on 10 March 1971, unlocked the door and prepared to open the files. In response to a knock she opened the side door and a man wearing a short green jacket and khaki trousers, later identified as defendant, asked to use the telephone. She invited him in and he dialed a number or two and said the line was busy. He then said, "There is someone at the door," and Miss Waddell opened the back door but found no one there. The man then thanked her profusely for letting him use the telephone, and she assumed he was leaving. However, when she turned her back he grabbed her from behind with an arm around her neck. They struggled and fell to the floor. Miss Waddell was screaming incessantly and the man kept repeating, "Stop screaming or I will stab you." She saw the blade of a knife coming toward her body and put up her left hand to block the blow. Her left index finger was cut as the knife went into her right arm, and with the next blow she was stabbed in the stomach. The man then released her and left by the side door through which he had entered. Miss Waddell opened the door into the garage, saw Swain Pierce and called for help. Mr. Pierce was unable to render assistance because at that moment he was stabbed under his left arm by the same man who had assaulted Miss Waddell. The assailant then ran out of the building. Other employees of the FCX Store came to the assistance of Miss Waddell and Mr. Pierce. An ambulance was summoned and they were taken to Wake Memorial Hospital. Medical examinations disclosed that Mr. Pierce had suffered a punctured lung and Miss Waddell had three wounds: one over the medial aspect of her right upper arm; one in the center of her abdomen which had traversed the abdominal wall and entered the belly cavity; and a wound of the proximal phalanx of the left index finger, dividing a nerve. Miss Waddell remained under treatment in the hospital until the 16th of March, and Mr. Pierce remained there for five days.

Meanwhile at 7:48 a.m. on 10 March 1971 defendant fell through a skylight on the roof of the H & H Tire Company which is located in the building adjacent to the FCX Store.

He landed on his feet and hands like a cat. Officers were summoned immediately and defendant was taken into custody. A knife scabbard covered with blood was found on the floor near the spot where defendant fell. A fire escape leads to the roof of the H & H Tire Company from an alley between the FCX building and the H & H Tire Company building. The officers searched the roof and found a green jacket stuffed under a platform about two feet from the skylight through which defendant had fallen. The officers took possession of the scabbard and the green jacket.

The officers carried defendant to the hospital where he was exhibited to Miss Waddell and Mr. Pierce. Each identified defendant as the assailant.

In response to a call, Officers Pegram and Benson went to the FCX but were stopped by an employee at H & H Tire Company. They saw defendant at that time. His hair was cut real short, "almost like it had been shaven and he had no mustache and he had no goatee." The officers were told what had happened. Officer Pegram warned defendant of his constitutional rights by reading them from a card, and defendant said he understood them. A voir dire examination was demanded at this point in the trial, and, in the absence of the jury, Officer Pegram stated that defendant did not request counsel. He further stated that he did not threaten or attempt to coerce defendant in any way; that defendant said he came into the building "the night before that morning" to get out of the cold. The officer offered to carry defendant to the hospital for medical treatment, placed him in the police vehicle and took him to the hospital. However, defendant refused treatment although complaining of his wrists and knees and his eye and said he felt "like he had a tooth knocked out." Defendant was not under the influence of any alcoholic beverage and no pills or medicines were found on his person. Defendant was taken from the hospital to the interrogation room of the Municipal Building where he was again advised of his rights by Officer Benson. He never at any time requested counsel. He made the following statement:

> "I was walking down Blount Street. I was mad about serving time and I wanted to get even with Mrs. Cash for putting me in prison. I decided to kill the first person I caught by theirself. I looked through the window and say the lady in the room by herself. I went and opened the

door and asked her was this the glass place. She said no and I asked her if I could use the telephone and she said yes. Then I went in and acted like I was using the telephone. She went to another room and when she came out I grabbed her and stabbed her with a knife that I had when I went in. She was screaming and then I left that office and on the way out I ran into another white man and I stabbed him. Then I ran out to the rear alley and through this alley and up some fire escapes upon the roof. I then lifted up a skylight and fell down through the skylight. I threw the knife and my coat under something on top of the building. When I fell through the skylight, I hurt my left eye, my forehead and both wrists. Then I was arrested."

The officer further testified that he wrote down what defendant related and that defendant read the statement and signed it. Defendant told the officers that he put the knife in one of the chimneys on the roof, but the officers were unable to locate it.

Defendant Thacker, testifying on voir dire, stated that he was never advised of his rights; that he was taken to the hospital by two young policemen but was not offered and did not receive any medical treatment; that he was taken into the emergency room, required to put on a green coat while there and was observed by Miss Waddell and Mr. Pierce both of whom were lying on a table; that some of the officers were using sarcastic remarks; that he requested an attorney when he was taken to the interrogation room, the request being made to Sergeant Denton; that he made the request twice to Sergeant Denton—once at the hospital and once at the police station—but was not allowed to make any telephone calls; that he was not advised of his rights when he was taken to the interrogation room; that he made no voluntary statement; that Sergeant Denton kicked him on the left leg and "said that I would talk"; that he made a statement under coercion; that Sergeant Denton forced him to make the statement by beating him and kicking him and stomping him while he was on the floor; that after the statement was written out he signed it under coercion; that he received other beatings, one by Officer F. D. Williams in a little room at the Magistrate's Office, and as a result of that beating he made a statement concerning the location of the knife.

The court found facts upon conclusion of the voir dire and concluded that the statement was admissible in evidence. The jury was recalled and, over defendant's objection, evidentiary matters elicited on the voir dire were offered for consideration by the jury, including the statement which defendant had signed.

Both Miss Waddell and Mr. Pierce positively identified defendant as their assailant and each stated that the in-court identification was based on observation of the defendant at the time of the assault at the FCX Store and not on observations of him at the hospital.

Defendant offered no evidence. At the close of the State's evidence he moved to strike the testimony of the two victims on the ground that their in-court identification was based upon an illegal out-of-court confrontation at the hospital and on the further ground that he was required to put on a jacket "which was found in the vicinity where this incident occurred." This motion was denied and defendant then moved for judgment of nonsuit in both cases. Upon denial of the nonsuit motion, defendant requested the court to instruct the jury that defendant's failure to testify should not be considered against him, and the jury was so instructed in the charge of the court.

In the Waddell case the jury convicted the defendant of assault with a deadly weapon with intent to kill inflicting serious injury, a felony, and for this offense he was sentenced to imprisonment for not less than nine nor more than ten years. In the Pierce case the jury convicted the defendant of an assault inflicting serious injury, a misdemeanor, and for this offense defendant was sentenced to imprisonment for two years, this sentence to commence at the termination of the sentence pronounced in the Waddell case. Defendant appealed to the Court of Appeals where the foregoing judgments were upheld. We allowed certiorari to review the decision of that court.

Boyce, Mitchell, Burns & Smith by Robert E. Smith, Attorneys for defendant appellant.

Robert Morgan, Attorney General, and Benjamin H. Baxter, Jr., Associate Attorney, for the State of North Carolina.

HUSKINS, Justice.

Defendant assigns as error the admission of his inculpatory statement made during an in-custody interrogation without benefit of counsel. He contends the statement was tainted and inadmissible because he had not waived his right to counsel in writing. Admission of the statement over objection constitutes his first assignment of error.

The record discloses that defendant was twice advised of his constitutional rights as required by *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), first by Officer Pegram at the H & H Tire Company shortly after his arrest and again by Officer Benson in the interrogation room at the Municipal Building. Each time defendant stated that he understood his rights. At no time did defendant request counsel according to the voir dire testimony of the officers; but according to defendant's testimony on voir dire he requested an attorney after he was taken to the police station and went to the interrogation room. Defendant further swore that his statements were coerced, while all the officers swore to the contrary. At the conclusion of the voir dire the court found facts as follows:

> "The Court finds from the evidence presented on *voir dire* that on the morning of March 10, 1971, while the defendant was in custody of the Raleigh Police he was questioned by Police Officer F. L. Benson at the Raleigh Police Station; that before any questions were asked the defendant was fully advised of his constitutional rights first by Police Officer James W. Pegram and again by Police Officer F. L. Benson. Each of these officers fully advised the defendant of his constitutional rights including his right to remain silent; that anything he said could be used in court against him; that he had a right to have a lawyer present during the interrogation; that he had a right to have counsel appointed if he could not hire a lawyer and that he could quit answering questions any time he desired to do so; that the defendant stated that he understood his rights and did not request counsel; that the defendant did in fact fully understand his rights; that the defendant had suffered some minor injuries earlier the same day for which he had been offered treatment at Wake Memorial Hospital and refused to accept treatment for said injury;

that the defendant was not under the influence of any intoxicant, was not in any severe pain or great discomfort, was in full and complete control of his mental and physical faculties and answered all questions freely, voluntarily and intelligently; that the defendant's statements were reduced to writing and the defendant read and signed the written statement freely and voluntarily; that neither Sergeant F. I. Denton nor any of the other police officers made any threats, assaults, or threatened assaults against the defendant and none of said officers made any promises to the defendant.

"The Court finds and concludes that the defendant's said written statement was in fact freely, voluntarily and understandingly made without any promise or threats and without any undue influence, compulsion or duress and that said statement is admissible in evidence."

[1] The trial court's findings of fact, supported by competent evidence, are conclusive on appeal. *State v. McRae,* 276 N.C. 308, 172 S.E. 2d 37 (1970); *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966). Consequently, we take it as established by those findings that defendant was given the full *Miranda* warning, that he understood his right to counsel, that he did not request the presence of an attorney during the interrogation, and that his statement was not coerced but was freely and voluntarily made. This, however, is not sufficient to render his statement admissible in evidence. Admission of his inculpatory in-custody statement to Officer Denton, which was reduced to writing and signed by defendant, was erroneous because there is neither evidence nor findings to show that defendant waived his right to counsel, either in writing as provided by G.S. 7A-457 (1969) on which *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971), is based, or orally as provided by *Miranda* on which *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971), is based. "An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given." *Miranda v. Arizona, supra.* The erroneous admission of this in-custody incriminating statement requires a new trial unless its admis-

sion can be treated as harmless error. We now explore that alternative.

[2-4] Proof of an assault with a deadly weapon inflicting serious injury not resulting in death does not, as a matter of law, establish a presumption of intent to kill. Such intent must be found by the jury as a fact from the evidence. *State v. Ferguson,* 261 N.C. 558, 135 S.E. 2d 626 (1964). An intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances. *State v. Revels,* 227 N.C. 34, 40 S.E. 2d 474 (1946). An intent to kill is a matter for the State to prove, *State v. Allen,* 186 N.C. 302, 119 S.E. 504 (1923), and is ordinarily shown by proof of facts from which an intent to kill may be reasonably inferred. *State v. Cauley,* 244 N.C. 701, 94 S.E. 2d 915 (1956).

[5, 6] There is ample evidence in the record, excluding defendant's inculpatory statement, from which a jury may reasonably infer that defendant intended to kill Miss Waddell. Such evidence includes defendant's repeated stabbings of Miss Waddell in vital areas of her body with a six-inch knife blade, first severing an artery in her arm as she attempted to ward off the blows and then plunging the blade four inches deep into her abdomen, completely traversing the abdominal wall and entering the abdominal cavity—done without provocation and to a person who was a complete stranger to him. The viciousness of the assault and the deadly character of the weapon used constitute impelling proof from which defendant's intent to kill may be inferred. Even so, defendant's in-custody inculpatory statement unequivocally expressing his intent to kill the first person he caught alone is so overpowering on the question of intent that its erroneous admission cannot be considered harmless. The test of harmless error is whether there is a reasonable 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). On the facts before us we think the statement very likely contributed to the finding that defendant possessed the requisite intent to kill. Hence we are unable to declare a belief that its admission was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967). Error in the admission of this evidence requires a new trial in

the Waddell case, No. 71-CR-12806. Defendant's first assignment of error is sustained.

In each of these cases defendant is charged with an assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death, a felony the maximum punishment for which is ten years imprisonment under G.S. 14-32(a) (1969). In each case the court limited the jury to one of four verdicts: (1) guilty as charged, (2) guilty of assault inflicting serious injury, (3) guilty of assault with a deadly weapon, or (4) not guilty. In the Waddell case (No. 71-CR-12806) the jury found defendant guilty as charged. In the Pierce case (No. 71-CR-12807) the jury found defendant guilty of an assault inflicting serious injury. Defendant contends the court erred in the Waddell case in failing to submit a lesser degree of the crime charged, to wit, assault with a firearm or other deadly weapon *per se* inflicting serious injury, a five-year felony under G.S. 14-32(b) (1969).

[7, 8] It suffices to say that the crime condemned by G.S. 14-32(b) is a lesser degree of the offense defined in G.S. 14-32(a), and a 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). Error in failing to submit the question of a 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 charge. *State v. Davis,* 242 N.C. 476, 87 S.E. 2d 906 (1955). However, this principle applies when, and only when, there is evidence of the lesser degrees. *State v. Smith,* 201 N.C. 494, 160 S.E. 577 (1931). "The *presence of such evidence* is the determinative factor." *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545 (1954). These principles were recently analyzed and applied in *State v. Duboise,* 279 N.C. 73, 181 S.E. 2d 393 (1971). *Compare State v. Freeman,* 275 N.C. 662, 170 S.E. 2d 461 (1969).

[9, 10] In limiting the jury to the four verdicts enumerated above, the trial judge committed two errors: (1) He failed to submit defendant's guilt or innocence of assault on Miss Waddell with a deadly weapon *per se* inflicting serious injury, a felony

punishable by a fine or imprisonment for not more than five years under G.S. 14-32(b); and (2) he submitted defendant's guilt or innocence of an assault inflicting serious injury and an assault with a deadly weapon, misdemeanors condemned by G.S. 14-33 the punishment for which is limited to two years. All the evidence tends to show that defendant wielded a knife with a six-inch blade inflicting serious injury on both Miss Waddell and Mr. Pierce. A knife with a six-inch blade is a deadly weapon *per se*, and there is no evidence showing only the commission of the misdemeanors which were submitted to the jury, and nothing more, because a deadly weapon was used in both assaults and serious injury was inflicted on both victims. Therefore, these offenses are governed by G.S. 14-32(a) if committed with intent to kill, or by G.S. 14-32(b) absent such an intent.

[11] These errors may be corrected in the Waddell case at the next trial. They are now history in the Pierce case because defendant cannot be retried for either the ten-year felony with which he was charged or the five-year felony punishable under G.S. 14-32(b). In legal fiction, if not in fact, the jury has acquitted him on those charges. In the Pierce case, the erroneous submission of the misdemeanor charges in lieu of the felony charge condemned by G.S. 14-32(b) was favorable to defendant, and he is in no position to complain. His conviction and sentence in that case will not be disturbed.

Finally, defendant contends his in-court identification was tainted by the confrontation at the hospital when he was exhibited to the victims for identification purposes without benefit of counsel. Failure to suppress his in-court identification on that ground constitutes defendant's third assignment of error.

[12, 13] Confrontation for identification purposes is a critical stage of pretrial proceedings requiring the presence of counsel unless the right to counsel is voluntarily, knowingly and intelligently waived. *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). Even so, each victim here testified that the in-court identification of defendant had an independent origin and was not based on the confrontation at the hospital. There was no evidence to the contrary. Thus, the in-court identification was competent regardless of the absence of counsel at the hospital confronta-

tion. *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581 (1968); *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345 (1969). At the next trial, upon objection, the origin of the in-court identification of defendant by each victim should be determined by the trial court on a voir dire examination with appropriate findings of fact and conclusions based thereon. The present record contains no such findings.

In light of the foregoing facts, we do not decide whether defendant's constitutional rights were violated at the hospital emergency room confrontation. At the time of that confrontation it should be noted that both victims had been stabbed and their chance of survival was uncertain and unknown. Defendant had been immediately apprehended under circumstances strongly indicating guilt. The need for immediate action was apparent, and the police followed the most, and perhaps the only, feasible procedure when they took defendant to the hospital emergency room for immediate identification or exoneration. Under these circumstances defendant's claimed violation of due process by a "one-man lineup" and his claimed violation of Sixth Amendment rights to counsel at that confrontation are arguable matters, *Stovall v. Denno,* 388 U.S. 293, 18 L.Ed. 2d 1199, 87 S.Ct. 1967 (1967); *State v. McNeil,* 277 N.C. 162, 176 S.E. 2d 732 (1970), and resolution of them is not necessary to a decision in these cases.

Inasmuch as the valid judgment of imprisonment for two years in Case No. 71-CR-12807 (Pierce) was specified to begin at the termination of the nine- to ten-year sentence imposed in Case No. 71-CR-12806 (Waddell), which is now vacated, Case No. 71-CR-12807 (Pierce) must be remanded to the Superior Court of Wake County to the end that the judgment may be modified so as to provide that the two-year sentence shall commence on the date defendant began serving the nine- to ten-year sentence in the Waddell case. The effect will be, and it is so intended, that defendant will receive credit in the Pierce case for all time heretofore served on the now vacated nine- to ten-year sentence in the Waddell case. A revised commitment shall issue accordingly. If defendant is again convicted in the Waddell case the sentence imposed therein may run consecutively or concurrently with the time remaining to be served in the Pierce case, as the court in its discretion may determine.

For the reasons stated, these cases are remanded to the Court of Appeals where they will be certified to the Superior

Court of Wake County for further proceedings in accord with this opinion.

In Case No. 71-CR-12806 (Waddell)—New trial.

In Case No. 71-CR-12807 (Pierce)—Remanded.

N. C. STATE HIGHWAY COMMISSION v. FARM EQUIPMENT COMPANY, INC.; ROBERT C. HALL, TRUSTEE; AND THE BANK OF ASHEVILLE

No. 87

(Filed 16 June 1972)

1. **Eminent Domain § 1; Highways § 5— substitute condemnation**

"Substitute condemnation" is a transaction in which the State or an agency with the power of eminent domain takes land under an agreement to compensate its owner with land to be taken in condemnation proceedings from a third person instead of with money.

2. **Eminent Domain § 3— public use**

Due process of law requires that private property be taken under the power of eminent domain only for a public use.

3. **Eminent Domain § 7; Highways § 5— condemnation proceedings — necessity and public purpose — substitute condemnation**

In ordinary condemnation proceedings, the question whether the purpose for which private property is taken is a public one is judicial, but the question of necessity and proper extent of the taking is legislative and is subject to determination by the condemning agency and in such way as the legislature may designate; in controversies concerning substitute condemnation, however, necessity is justiciable along with public purpose.

4. **Highways § 5— railroad right-of-way — highway project — substitute condemnation**

Where part of a railroad right-of-way was condemned for a highway construction project, the Highway Commission had authority to condemn, for the purpose of exchange with the railroad, land of defendant which is required for the necessary relocation and upgrading of the railroad's tracks thereon.

5. **Railroads § 3— power of eminent domain**

A railroad corporation has the power of eminent domain. G.S. 40-2(1); G.S. 40-5; G.S. 62-220(2).

6. **Railroads § 3— rights-of-way — purchase of fee — condemnation of easement**

A railway can acquire by purchase a fee in the land over which its tracks run; however, when a railway obtains such land in con-

demnation proceedings it procures merely an easement for railroad purposes which does not deprive the owner of the fee or its use for purposes not inconsistent with its use for railroad purposes.

7. Eminent Domain § 3; Highways § 5— substitute condemnation

Substitute condemnation is a valid exercise of the power of eminent domain only when the substitution of other property is the sole method by which the owner of land taken for a public use can be justly compensated, and the practical problems resulting from the taking can be solved.

8. Eminent Domain § 3; Highways § 5— substitute condemnation — effect of G.S. 136-18(16)

The intent and effect of G.S. 136-18(16) is to require, as a condition precedent to substitute condemnation, (1) a written agreement binding the owner of the land to be used in highway construction to accept substitute property in exchange, and (2) a considered finding by the Highway Commission that such an exchange will save public funds and result in a safer and better highway.

9. Eminent Domain § 5— compensation in money

A condemnor cannot force a condemnee to accept compensation in any form other than money.

10. Eminent Domain § 3; Highways § 5— substitute condemnation — public purpose — cost

The condemnation of land for exchange can only be justified when the property for which it is substituted accomplishes the public purpose for which it was taken, and the cost is not disproportionate to the benefit derived.

11. Eminent Domain § 7; Highways § 5— substitute condemnation — railroad right-of-way — easement

The Highway Commission is without authority to condemn land in fee simple for the purpose of exchanging it for railroad right-of-way property to be used in a highway construction project, but may only condemn an easement to be used for railroad purposes.

12. Railroads § 2— highway project — necessity for relocating railroad tracks — findings

Trial court's finding that a highway project did not necessitate the relocation of a railroad's tracks across defendant's property outside the railroad's existing right-of-way was unsupported by the evidence and ignored an uncontradicted affidavit to the contrary, as well as information disclosed by maps introduced in evidence.

APPEAL by plaintiff from *Judge Harry C. Martin,* 1 March 1971 Session of BUNCOMBE, 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) (1969).

As a part of State Highway Project No 8.3023203 (Project), the reconstruction of Highway No. 23, also known as Riverside Drive, the North Carolina State Highway Commission (Commission) instituted this proceeding on 12 December 1969 to condemn six separately described portions of an 8.61-acre tract of land belonging to Farm Equipment Company, Inc. (defendant).

Of the six tracts sought to be condemned three are drainage easements totaling 0.13 acres, and one is a .01-acre, triangular tract which will be a part of the new right-of-way for Riverside Drive. Commission's right to condemn these four tracts is conceded, and is not involved in this appeal. The two tracts in dispute are separately described in the complaint as "Railway Exchange Area—Tract One" and "Tract Two."

For the restricted purpose of description and location of the separate tracts sought to be condemned and of the railroad easement on the property, Commission attached to its complaint a map of defendant's property, made by J. H. Price, surveyor, on 30 October 1968. The complaint and map show, *inter alia:* Defendant's 8.61-acre tract is bounded on the east by Riverside Drive; on the north, south and west by other landowners. The French Broad River flows across the tract roughly along its western border. A spur track of the Southern Railway (Southern) traverses the land on a curve from north to south over a 20-foot right-of-way. At defendant's north property line, the east line of this right-of-way is approximatetly 125 feet from the west line of Riverside Drive as it then existed; at defendant's southern boundary, the east line of the right-of-way is approximately 35 feet from Riverside Drive.

Tracts One and Two, which contain 0.35 acres and 0.15 acres respectively, are narrow strips of land lying on each side of Southern's spur track right-of-way as it crosses defendant's property. The eastern line of Tract One is the western boundary of the right-of-way. At its north end, Tract One is 20.9 feet wide; at the south end, 28.52 feet wide. The western line of Tract Two is the eastern line of the right-of-way. At the north end, it is 10.05 feet wide; at the south, 1.5 feet wide. See the composite, illustrative sketch map attached hereto.

Upon allegations summarized below (our enumeration), Commission seeks to acquire the fee simple title to the two

tracts described above for the purpose of conveying them in fee to Southern:

(1) Southern owns land which Commission must acquire for Project. Southern has agreed in writing to accept Tracts One and Two in lieu of a portion of its property which Commission requires. Commission has determined by resolution "that an economy in the expenditure of public funds and the improvement and convenience in safety of the highway can be effected through the condemnation and exchange of the property described herein."

(2) Acting under G.S. 136-18(16), and after having complied with its terms, Commission condemns the fee simple title to Tracts One and Two "solely for the purpose of conveying said areas to the Southern Railway Company. The Commission condemns and appropriates no access to or from the above described railway exchange areas."

Answering, defendant moved to dismiss the action upon the ground that the complaint failed to state a claim upon which relief could be granted and, as a second and third defense, alleged:

(1) Southern's present easement over defendant's land is entirely sufficient for its legitimate purposes and neither Commission nor Southern has any necessity for Tracts One and Two;

(2) Commission's attempt to condemn these tracts for the purpose of conveying them to Southern is not for a public purpose;

(3) G.S. 136-18(16) does not authorize Commission to condemn land for the purpose of transferring it from one private owner to another under the circumstances of this case; if the statute does purport to authorize such a condemnation, to that extent it violates N. C. Constitution art. I, § 19 and the Fourteenth Amendment to the Constitution of the United States.

On 22 June 1971 Judge Martin conducted a pretrial hearing, presumably under G.S. 136-108. His judgment recites that, in ruling upon defendant's motion "to dismiss for failure to state a cause of action upon which relief can be granted," he considered the pleadings, briefs, and oral argument presented

by counsel for both parties as the basis for his findings of fact. The record and briefs of both appellant and appellee show that in addition to the pleadings, Commission presented to Judge Martin, and he did not exclude, the following documents:

(1) Minutes of Commission's meeting on 5 February 1970, at which it adopted the resolution referred to in the complaint.

(2) Written agreement between Commission and Southern, entered into 20 November 1968, with reference to the relocation of the spur track.

(3) Affidavit of State Highway Engineer Joseph Buckner, made 12 March 1971.

(4) Final plat showing "the property affected by the taking and superimposed thereon the nature and extent of the taking." This plat is the Price map. To it was appended Southern's Drawing No. 12-232 which showed the entire spur track system, a part of which traverses defendant's property. At the hearing these maps were introduced without restriction and without objection. From these maps it appears that the trackage on defendant's land, about 750 feet, is a small segment of the spur track.

Defendant presented no evidence.

The minutes of Commission's meeting on 5 February 1970 show that, in addition to the statement alleged in the complaint, the resolution adopted at this meeting also contained the following: For Southern's property, which Commission must acquire for Project, "Commission has agreed to furnish Southern Railway Company alternate property or pay the value of the property acquired as just compensation."

The agreement referred to in the foregoing minutes is the contract which Southern and Commission executed on 20 November 1968 as a part of the submission of Project as a Federal-aid highway. Commission agreed, *inter alia* (enumeration ours):

(1) In the construction of Project, Southern's tracks along Riverside Drive must be relocated. In connection therewith Southern and Commission will each perform certain specified work. Commission will reimburse Southern for the work it performs.

(2) In consideration of a quitclaim deed from Southern for those portions of its right-of-way located within Project, Commission will acquire and convey to Southern, as partial payment, "an unencumbered fee simple title" to the strip of land outlined in orange (Tracts One and Two) on Drawing No. 12-232. (Property lines are not shown on this drawing, but defendant's Tracts One and Two are a portion of the total land which Commission would convey to Southern.)

(3) After its conveyance of the above described property to Southern, if any individual or company shall apply to Southern for a vehicular crossing at grade over the spur track, "Commission shall cause such applicant to enter into an agreement with Company concerning said grade crossings, said agreement to be in the usual form prepared by Company and to contain the Company's standard language, including, but not limited to, the obligation of such applicant to construct and maintain such crossings at the applicant's cost and expense, and in accordance with plans and specifications approved by Company, and the assumption by the applicant of all responsibility and liability resulting from the use of such crossing or from railroad operations at or in the vicinity thereof." (The source of Commission's power to comply with this requirement after its conveyance in fee simple is not apparent.)

In the affidavit of James Buckner, highway engineer residing in Buncombe County, it is averred (enumeration ours):

(1) The strip map (Drawing No. 12-232) correctly shows the location of those sections of Southern's tracks and right-of-way which Commission must appropriate in the construction of Project. It also shows the necessary relocation and additional lateral right-of-way required to upgrade the tracks for consideration of safety.

(2) According to the Price map, the tracks over the right-of-way across defendant's property have been laterally relocated in a westerly direction 8.47 feet at Southern station 18+62.97, the point where defendant's south boundary line intersects Southern's present right-of-way. This westerly relocation continues in a northerly direction, a distance of 130 feet to Southern station 19+91.26 and from there continues northerly "across said parcel of land directly on the 'Old' centerline."

(3) The relocated and upgraded tracks have been raised in elevation 6.9 feet at defendant's south line and 3.3 feet at the north line.

(4) The additional right-of-way across defendant's property is necessary: (a) to provide for the westerly lateral relocation referred to above and to provide horizontal support for the elevated tracks; and (b) to meet safety requirements for tracks paralleling the upgraded highway facility.

Upon the pleadings, the foregoing documents, "briefs and oral argument of counsel," Judge Martin made findings of fact and conclusions of law. (Here we note that the briefs and oral arguments are not in the record for our consideration.) Judge Martin's findings of fact are summarized as follows (enumeration ours):

(1) Southern has a right-of-way for a spur track over defendant's land. The Price map accurately illustrates defendant's property, the various portions of it which Commission seeks to condemn, and Southern's existing right-of-way.

(2) Southern's right-of-way over defendant's land is only an easement; Southern does not hold the right-of-way in fee simple.

(3) Tracts One and Two lie on either side of the spur track across defendant's property. They are not within the right-of-way required for Project, and are not themselves essential for its construction.

(4) Certain portions of the spur track located south of defendant's property do lie within the area required for Project, and those portions of the track must be relocated.

(5) "[P]rior to the institution of this lawsuit . . . the general public has a right to cross Southern's right-of-way over defendant's land. . . . "

(6) Defendant's property is the last property served by the sidetrack and the public's interest in its maintenance will not be affected by the outcome of this lawsuit. The spur track in question "serves various customers of the railroad and the public in general, and the defendant does not utilize the sidetrack where it crosses its property."

(7) Project requires no relocation of the tracks outside of the pre-existing right-of-way on defendant's property. Under the contract between Southern and Commission it will not be necessary to relocate any portion of the railroad track outside the pre-existing right-of-way across defendant's property. Any work required by the contract between Commission and Southern can be done within the existing right-of-way insofar as the track crossing defendant's property is concerned.

(8) Commission can acquire Southern's tracks which lie within Project's right-of-way and effect their relocation without taking Tracts One and Two from defendant.

(9) No facts substantiate Commission's findings in its minutes of 5 February 1970 that "economy, convenience, and safety" will be effected by the acquisition and exchange of defendant's property for the relocation of Southern's spur track south of defendant's property.

(10) If Commission is permitted to condemn and convey the fee in Tracts One and Two to Southern the railway will then own in fee two parallel strips of land through defendant's property, one strip on each side of its easement which bisects defendant's property in a north and south direction, and defendant and the public will be deprived of access to and from the remaining portions of defendant's property except by permission of the railroad.

Upon the foregoing facts Judge Martin concluded as a matter of law:

(1) Commission cannot condemn Tracts One and Two and convey them in fee to Southern in exchange for its property utilized in Project, for such a taking in fee would constitute the appropriation of defendant's property for a private purpose of the railroad and would permit Southern to acquire a greater estate in the property than it could condemn.

(2) G.S. 136-18(16), a valid statute when properly construed, would be unconstitutional if applied to the facts of this case.

(3) "Although a general acquisition of the railray's easement through one unified plan by substitute compensation of alternate right-of-way across third party's properties may be

proper," it is not necessary to take any part of defendant's property to carry out such unified plan, since there is no need to relocate the tracks outside the pre-existing easement on defendant's land.

(4) The substitute condemnation of defendant's property would not result in "economizing public funds through a reduction of the amount for all damage in completing the highway project"; nor does it appear (a) that the taking of defendant's property would be the best means of compensating Southern for "the first taking" or (b) that the taking would benefit the public in any way.

Based upon the foregoing conclusions, Judge Martin dismissed the action with prejudice insofar as it related to Tracts One and Two. Commission excepted to each finding of fact and conclusion of law and appealed.

Attorney General Morgan, Deputy Attorney General White, Assistant Attorney General Hart for plaintiff.

McGuire, Baley & Wood by Charles R. Worley for Farm Equipment Company, Inc., defendant appellee.

SHARP, Justice.

At the outset we note that it is immaterial whether the proceeding before Judge Martin be considered (1) a pre-trial hearing under G.S. 136-108 (1965) or (2) a motion to dismiss, converted under G.S. 1A-1, Rule 12(b) (1969) into a motion for summary judgment by the introduction of "matters outside the pleading." In either event, it was Judge Martin's function to decide all questions of fact and adjudicate Commission's controverted right to condemn Tracts One and Two for the purpose specified. If he concluded that Commission lacked the power it sought to exercise, it was his duty to dismiss the action as to Tracts One and Two. *See Kaperonis v. Highway Commission,* 260 N.C. 587, 133 S.E. 2d 464 (1963).

The basic questions presented by the exceptions and assignments of error which appellant brings forward are these:

(1) Can Commission, in the exercise of its right to condemn property for highway purposes, take from defendant Tracts One and Two, which will not be used in the construction of Project itself, in order to exchange them for property

belonging to Southern which will be a part of Project's right-of-way?

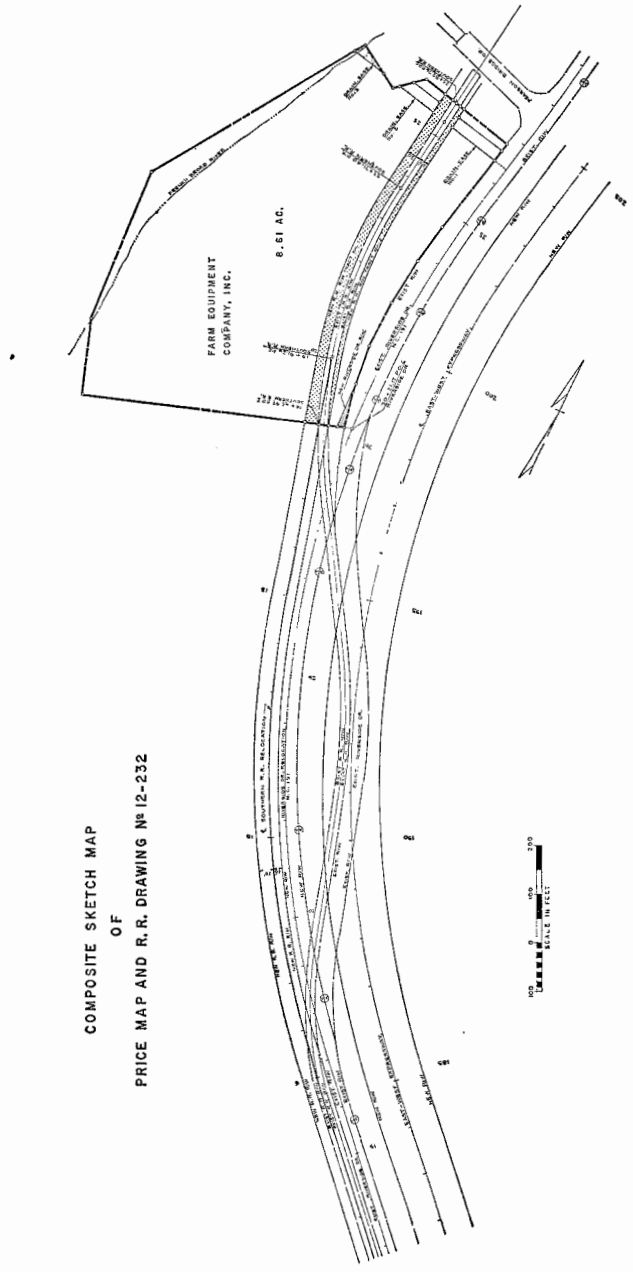
(2) If so, can Commission condemn Tracts One and Two in fee and convey them in fee to Southern?

[1] These questions involve the principle of "substitute condemnation," that is, a transaction in which the State or an agency with the power of eminent domain, A, takes land under an agreement to compensate its owner, B, with land to be taken in condemnation proceedings from a third person, C, instead of with money. The problem is well stated in 2A Nichols on Eminent Domain § 7.226 (3d Ed. 1970):

"Under certain extraordinary conditions the conventional method of compensating an owner whose property is taken by proceedings in eminent domain by paying him the value thereof is completely inadequate. To do complete justice to such an owner and, what is even more important, to meet the practical problems which arise by reason of the taking, it becomes necessary to furnish such owner with other lands as a substitute for the lands which have been taken. The question then arises whether such substituted lands may be acquired by eminent domain by the original condemnor . . . for the use of the owner who has been forced to give up his property for a conceded public use. Is such secondary acquisition of property to be considered for a public use?"

[2] Any exercise of the power of eminent domain is subject to the constitutional prohibition against the taking of property for private uses. "Private property can be taken by the exercise of the power of eminent domain only where the taking is for a public use." *Vance County v. Royster,* 271 N.C. 53, 59, 155 S.E. 2d 790, 795 (1967). Due process of law requires that private property be taken under the power of eminent domain only for a public use. *Fallbrook Irrigation District v. Bradley,* 164 U.S. 112, 161, 41 L.Ed. 369, 389, 17 S.Ct. 56, 64 (1896).

In controversies concerning substitute condemnation the ultimate condemnee, C, will usually contend, as defendant does here, that his land is being taken for a private use and that the taking is not necessary. See the excellent discussion of Substitute Condemnation in 54 Cal. L. Rev. 1097 (1966). See also Annot., 20 A.L.R. 3d 862 (1968).



COMPOSITE SKETCH MAP
OF
PRICE MAP AND R. R. DRAWING Nº 12-232

[3] In ordinary condemnation proceedings the questions of necessity and public use are separable. "Whether the purpose for which private property is taken is a public one is a judicial question, but the question of necessity and of the proper extent of a taking is legislative and is subject to determination by such agency and in such way as the State may designate." *Highway Commission v. Young,* 200 N.C. 603, 607, 158 S.E. 91, 94 (1931). See 26 Am. Jur. 2d *Eminent Domain* § 114 (1966).

In controversies concerning substitute condemnation, however, the questions of public use and necessity are so entwined as to be inseparable. "Whether land has been taken for a public use in a substitute condemnation will depend on whether fairness requires that B [whose land has been taken for an undisputed public purpose] be compensated in land and whether there is a close factual connection between the taking of B's and C's land. Whether it is necessary to exercise the power of eminent domain—the first concept of necessity—will turn on whether B can be fairly compensated only in land. Whether it is necessary to take C's property—the second concept—depends on whether there is a close factual connection between the two takings. To argue that C's land has not been taken for a public use is to dispute the necessity of the taking, because the determinance of the two issues are the same." 54 Cal. L. Rev., *supra* at 1116. In a substitute condemnation, therefore, necessity is justiciable along with public purpose.

Courts have found no denial of due process or other constitutional infirmity in substitute condemnations where the owner of the land first taken (here, Southern) with whom the ultimate condemnee's land (here, defendant's) is to be exchanged, also has the power of condemnation *and could itself have condemned the land.* See Annot., 20 A.L.R. 3d 862, §§ 4, 6 (1968). "Thus, where part of a railroad right of way is condemned for the purpose of widening a state highway, the state may also condemn other property to be used by the railroad as a substituted right of way for the one originally taken." 2A Nichols on Eminent Domain § 7.226 (3d Ed. 1970). *See Dohany v. Rogers,* 281 U.S. 362, 74 L.Ed. 904, 50 S.Ct. 299 (1929) (facts parallel to those of this case) ; *Tiller v. Railway Company,* 201 Va. 222, 110 S.E. 2d 209 (1959) (Plaintiff Railroad, seeking to acquire

a portion of a highway agreed with State of Virginia that it would condemn C's land for the highway's location.); *Mfg. Co. v. Cleveland,* 159 Ohio St. 525, 112 N.E. 2d 658 (1953) (City transit system permitted to condemn C's land upon which to relocate railroad tracks removed from land City required.); *Fitzsimons & Galvin, Inc. v. Rogers,* 243 Mich. 649, 220 N.W. 881 (1928) (facts parallel to those of this case). See also *Brown v. United States,* 263 U.S. 78, 68 L.Ed. 171, 44 S.Ct. 92 (1923).

In *Austin v. Shaw,* 235 N.C. 722, 71 S.E. 2d 25 (1952), upon the rationale of the preceding decisions, this Court used the principle of "compensation by way of substitution," to justify the expenditure of city funds for extra-territorial construction. In *Highway Comm. v. School,* 276 N.C. 556, 173 S.E. 2d 909 (1970), the Court permitted substitute condemnation in order to provide access to private property which otherwise would have been landlocked by the construction of a non-access highway. The owner, whose access route had been taken as an incident to and a requirement for the construction of the highway, could only be made whole by means of a substitute route. The decision was that the taking of defendant's property to provide it served a public purpose.

[4] That the construction of Project affects Southern's entire spur track system along the western boundary of "old Riverside Drive," and requires the relocation of certain portions of it south of defendant's property is not disputed. If any part of defendant's land is required for the necessary relocation and upgrading of the tracks thereon, the law permits Commission to condemn, for the purpose of exchange with Southern, that which is required for the purpose. It does not follow, however, that Commission can condemn defendant's land in fee for this purpose.

[5] "[A] railroad corporation is without power to acquire and hold real estate except by statutory authority, either expressly conferred or necessarily implied from the powers contained in the charter or arising to it under the general laws." *Wallace v. Moore,* 178 N.C. 114, 115, 100 S.E. 237, 238 (1919). A railroad corporation has the power of eminent domain. G.S. 40-2(1), 40-5 (1966); G.S. 62-220(2) (1965).

[6] G.S. 40-5 (Supp. 1971) empowers any railroad doing business in this State, when it has been ordered by the Utilities

Commission to construct an industrial siding as provided in G.S. 62-232 (1965), to exercise the right of eminent domain in order to acquire *such right-of-way as may be necessary* to carry out the orders of the Commission. G.S. 62-220(3) and (4) (1965) authorized every railroad corporation to take and hold by *voluntary* grants and by purchase real estate to aid in the construction and maintenance of its railroad and the stations and accommodations necessary to accomplish the objects of its incorporation. Real estate received by voluntary grant "shall be held and used for the purposes of such grant only." Thus, by purchase a railway can acquire a fee in the land over which its tracks run. *See Craig v. R. R.*, 262 N.C. 538, 138 S.E. 2d 35 (1964); *McCotter v. Barnes*, 247 N.C. 480, 101 S.E. 2d 330 (1957). However, when a railroad corporation obtains such land in condemnation proceedings it procures merely an easement to be used only for railroad purposes. Condemnation is not to be used as "a means of acquiring property for the benefit of the corporation." *Shields v. R. R.*, 129 N.C. 1, 7, 39 S.E. 582, 584 (1901). *Accord, Griffith v. R. R.*, 191 N.C. 84, 87, 131 S.E. 413, 415 (1926); *Phillips v. Telegraph Co.*, 130 N.C. 513, 524, 41 S.E. 1022, 1025 (1902); *R. R. v. Sturgeon*, 120 N.C. 225, 26 S.E. 797 (1897). It has "no right or authority to use or let the property for private or nonrailroad purposes." *Sparrow v. Tobacco Co.*, 232 N.C. 589, 593, 61 S.E. 2d 700, 703 (1950). Such a right-of-way is an easement for railroad purpose and does not deprive the owner of the fee or its use for purposes not inconsistent with its use for railroad purposes. *Bivins v. R. R.*, 247 N.C. 711, 102 S.E. 2d 128 (1958); *R. R. v. Manufacturing Co.*, 229 N.C. 695, 51 S.E. 2d 301 (1948); *R. R. v. McLean*, 158 N.C. 498, 74 S.E. 461 (1912).

The foregoing authorities notwithstanding, Commission contends that G.S. 136-18(16) empowers it to condemn Tracts One and Two in fee simple for the purpose of exchange with Southern solely upon its findings (1) that Southern has agreed in writing to accept these tracts "as a substantial portion of just compensation for the taking of its property" and (2) that, in Commission's opinion, an economy in the expenditure of public funds and highway improvement, safety and convenience will result. This section is quoted below:

"The State Highway Commission shall have authority, under the power of eminent domain and under the same procedure as provided for the acquirement of rights of way, to acquire

title in fee simple to parcels of land for the purpose of exchanging the same for other real property to be used for the establishment of rights of way or for the widening of existing rights of way or the clearing of obstructions that, in the opinion of the Commission, constitute dangerous hazards at intersections. Real property may be acquired for such purposes only when the owner of the property needed by the Commission has agreed in writing to accept the property so acquired in exchange for that to be used by the Commission, and when, in the opinion of the Commission, an economy in the expenditure of public funds and the improvement and convenience and safety of the highway can be effected thereby."

To accept Commission's interpretation of G.S. 136-18(16) would require us to hold the act unconstitutional. As Johnson, J., well said in *Brest v. Jacksonville Expressway Authority,* 194 So. 2d 658, 20 A.L.R. 3d 854 (Fla. App. 1967), *aff'd.* 202 So. 2d 748 (Fla. 1967):

"To hold otherwise would open the door wide open for abuse and would permit a condemning authority to make a deal with the owner of private property to condemn a parcel of more desirable property, maybe in a better neighborhood or on a more economically strategic corner upon which to relocate the private owner's motel or building, in exchange for the parcel needed by the expropriating authority. This would be contrary . . . to both the Federal and State Constitutional provisions safeguarding property rights.

"The Legislature cannot under the guise of exercising sovereign power of eminent domain, which can only be exercised for a public purpose, take a citizen's property without his consent and give it or sell it to another for private use, even though compensation is paid therefor, for to do so would be in violation of the Constitution of the United States Amendment 14. Also the power to take private property is in every case limited to *such* and *so much* property as is necessary for the public use in question." *Id.* at 661.

[7, 8] We hold that substitute condemnation is a valid exercise of a power of eminent domain only when the substitution of other property is the sole method by which the owner of land taken for public use can be justly compensated, and the practical problems resulting from the taking can be solved.

The intent and effect of G.S. 136-18(16) is to require, as a condition precedent to substitute condemnation, (1) a written agreement binding the owner of the land to be used in highway construction to accept substitute property in exchange, and (2) a considered finding by Commission that such an exchange will save public funds and result in a safer and better highway. Obviously, however, the fact that an exchange of C's property for B's will be less expensive than paying B the fair market value of his land cannot be the test for determining whether the taking is necessary or for a public purpose.

[9, 10] Properly construed, the statute requires the Commission to take sensible, preliminary steps before resorting to a condemnation which might otherwise turn out to have been a futile, expensive, and oppressive operation. It is well settled that a condemnor cannot force a condemnee to accept compensation in any form other than money. 3 Nichols on Eminent Domain § 8.2, and cases cited therein (3d Ed. 1965); 54 Cal. L. Rev., *supra,* 1107. Furthermore, the condemnation of land for exchange can only be justified when the property for which it is substituted accomplishes the public purpose for which it was taken, and the cost is not disproportionate to the benefit derived.

[11] We hold, therefore, that Commission is without authority to condemn any part of defendant's land in fee simple for the purpose of exchange with Southern. In this situation it may condemn no more land and no greater estate therein than Southern could condemn for itself. In short, it may only do for Southern what Southern itself could do. Southern will not be permitted to accomplish indirectly through Commission that which it could not do directly.

To allow Southern to acquire in fee Tracts One and Two, a narrow strip on each side of its 20-foot easement across defendant's property, would divide the land into two separate tracts with no access to each other. Defendant would be placed at the mercy of the railroad and conceivably deprived of any access to its land west of the tracks except by way of the river. The law of this State is calculated to prevent such a situation.

[12] The complaint does not specify the purpose for which Southern would use Tracts One and Two if and when Commis-

sion acquired and conveyed them to it. As to the tracks across defendant's property, however, in his finding of fact No. 7 (our enumeration) Judge Martin found that no relocation outside Southern's existing right-of-way was necessitated by Project and that any work required under the contract between Southern and Commission could be done within that easement. This finding, however, cannot be sustained on this record. It is unsupported by the evidence and ignores the uncontradicted Buckner affidavit to the contrary, as well as information disclosed by the two maps.

Buckner asserted that the relocation of certain portions of the track required (1) the upgrading of the entire spur-track system and additional lateral right-of-way on either side of the present right-of-way; and (2) the relocation laterally in a westerly direction 8.47 feet from defendant's south property line to Station 19+91.26, a distance the Price map shows to be 130 feet north of the southern line. From the map it appears that at defendant's southern boundary the western rail of the relocated track is, or will be, outside the right-of-way. However, for an exact interpretation of the map, and a complete understanding of the actual relocation of the tracks on the ground, the testimony of the engineer himself is required. In his affidavit, Buckner says that the entire track across defendant's property has been, or will be, elevated from 3.3 feet at the north end to 6.9 feet at the south end; that "the additional right-of-way" across defendant's property is necessary to provide for the westerly lateral relocation of the tracks; to provide horizontal support required by the elevation of the tracks; and to meet safety standards for tracks paralleling a highway.

Although the judge was not required to accept the Buckner affidavit, he could not ignore its uncontradicted assertions and make contrary findings with no evidence to support them. Neither could he ignore the maps which provided the only evidence as to the relocation of the tracks.

Judge Martin's findings of fact (our enumeration) Nos. 1 through 4 are not controverted on appeal. As to findings Nos. 5 and 6, we find no evidence in the record to support them. However, we deem them immaterial to decision here. Findings Nos. 8 and 10 are conclusions of law. Finding of fact No. 9 relates to Commission's opinion with reference to the condemnation of the fee in Tracts One and Two, and this decision renders those opinions irrelevant.

Judge Martin's conclusions of law Nos. (1) and (2) (our enumeration) are correct. Conclusions Nos. (3) and (4) are based upon factual findings not substantiated by the record and are, therefore, not correct. However, the proper disposition of this case requires that the judgment entered be vacated in its entirety and the case remanded to the Superior Court for a hearing *de novo,* and it is so ordered.

If, in consequence of Project's construction, additional right-of-way has been, or will be, required for Southern's tracks across defendant's land, and Commission desires to condemn the necessary *easement* for Southern, it may do so in accordance with the principles of law enunciated in this opinion. That course will necessitate compliance with G.S. 136-18(16), appropriate amendments to the pleadings and—thereafter—a hearing *de novo* under G.S. 136-108.

Judgment vacated and cause remanded.

BOBBY L. SKINNER, ADMINISTRATOR OF THE ESTATES OF BEVERLY KAY SKINNER, DECEASED, AND SANDRA GAIL SKINNER, DECEASED v. JOHN L. WHITLEY, ADMINISTRATOR OF THE ESTATE OF CLYDE WESLEY SKINNER, DECEASED

No. 97

(Filed 16 June 1972)

1. **Death § 3— wrongful death action — statutes**

A right of action for wrongful death exists only by virtue of G.S. 28-173 and G.S. 28-174.

2. **Parent and Child § 2— wrongful death of child — action against deceased parent's administrator**

The administrator of an unemancipated minor child may not bring an action against the administrator of its father for damages for the wrongful death of such child caused by the ordinary negligence of the deceased father in the operation of an automobile.

PLAINTIFF appeals from judgment of *Cowper, J.,* 16 November 1971 Civil Session, WILSON Superior Court.

On 26 April 1970 the motor vehicle owned and operated by Clyde Wesley Skinner, deceased, along Highway 264 west of Wilson, North Carolina, skidded into the path of an oncoming motor vehicle. The collision resulted in the death of Clyde Wes-

ley Skinner and his two daughters, Sandra Gail Skinner and Beverly Kay Skinner. This action is brought by the administrator of the estates of the two deceased daughters against the administrator of the estate of their deceased father.

Plaintiff administrator alleges that Clyde Wesley Skinner, deceased, was negligent in that he operated his motor vehicle at an excessive speed, failed to keep it under control, drove it with worn and defective tires which he knew would be unsafe, and operated his vehicle without due caution and circumspection and in a manner likely to endanger others. Plaintiff alleges that the negligence of defendant's intestate was the proximate cause of the death of Beverly Kay Skinner and Sandra Gail Skinner, seventeen and thirteen years of age respectively. Plaintiff demands judgment against defendant in the sum of $80,000 and cost of the action.

In his answer the defendant John L. Whitley, Administrator, denies all allegations of negligence on the part of Clyde Wesley Skinner, deceased, and further pleads, among other things, that plaintiff cannot legally prosecute this action against defendant by reason of the admitted parent-child relationship between Clyde Wesley Skinner and his daughters Beverly Kay Skinner and Sandra Gail Skinner.

In response to defendant's request for admission of facts, plaintiff admitted that Beverly Kay Skinner and Sandra Gail Skinner were the natural daughters of Kathleen Skinner (their mother) and defendant's intestate, Clyde Wesley Skinner (their father), and that said daughters lived in the home of their parents and under their care, custody, supervision and control until the time of the automobile accident which resulted in the deaths of plaintiff's intestates and defendant's intestate.

The defendant moved for summary judgment under Rule 56(b) of the Rules of Civil Procedure, and the trial court, being of the opinion that the deceased unemancipated minor children, had they lived, could not have maintained an action for damages against their father or his personal representative as a matter of law and therefore plaintiff administrator is not entitled to maintain this action, allowed the motion and dismissed the action. Plaintiff appealed to the Court of Appeals, petitioned this Court to certify the cause for initial appellate review by the Supreme Court, and the petition was allowed.

Narron, Holdford and Babb by Henry C. Babb, Jr., Attorneys for plaintiff appellant.

Lucas, Rand, Rose, Meyer, Jones & Orcutt by Louis B. Meyer, Attorneys for defendant appellee.

HUSKINS, Justice.

May the administrator of an unemancipated minor child bring an action against the administrator of its father for damages for the wrongful death of such child caused by the ordinary negligence of the deceased father? Answer to this question determines this appeal.

[1] A right of action for wrongful death did not exist at common law. *Broadnax v. Broadnax,* 160 N.C. 432, 76 S.E. 216 (1912). In North Carolina such right of action is conferred by statute and exists only by virtue of G.S. 28-173 and G.S. 28-174. *Horney v. Pool Co.,* 267 N.C. 521, 148 S.E. 2d 554 (1966); *Graves v. Welborn,* 260 N.C. 688, 133 S.E. 2d 761 (1963). Under these statutes the personal representative of a deceased person has a right of action only when the death of his intestate is caused by the wrongful act, neglect or default of another, "such as would, if the injured party had lived, have entitled him to an action for damages therefor." G.S. 28-173; *Lewis v. Insurance Co.,* 243 N.C. 55, 89 S.E. 2d 788 (1955).

In North Carolina and the great majority of other states, the rule is that "an unemancipated minor child cannot maintain a tort action against his parent for personal injuries, even though the parent's liability is covered by liability insurance. This rule implements a public policy protecting family unity, domestic serenity, and parental discipline. . . . Upon the same theory, an overwhelming majority of jurisdictions likewise hold that neither a parent nor his personal representative can sue an unemancipated minor child for a personal tort. . . . 'The child's immunity is said to be reciprocal of the parent's immunity.'" *Gillikin v. Burbage,* 263 N.C. 317, 139 S.E. 2d 753 (1965).

[2] Therefore, under the foregoing legal principles, the unemancipated minor daughters of Clyde Wesley Skinner, had they lived, could not have maintained an action against their father to recover damages for injuries caused by his ordinary negligence. *Watson v. Nichols,* 270 N.C. 733, 155 S.E. 2d 154 (1967);

Redding v. Redding, 235 N.C. 638, 70 S.E. 2d 676 (1952); *Small v. Morrison,* 185 N.C. 577, 118 S.E. 12 (1923); Annot., 19 A.L.R. 2d 423. Having died as a result of their injuries, their personal representative could not have maintained an action for their wrongful death against their father had he survived the accident. *Capps v. Smith,* 263 N.C. 120, 139 S.E. 2d 19 (1964); *Lewis v. Insurance Co., supra; Goldsmith v. Samet,* 201 N.C. 574, 160 S.E. 835 (1931). Their father having also died as a result of the accident, the personal representative of these children cannot maintain this wrongful death action against their father's personal representative. *Cox v. Shaw,* 263 N.C. 361, 139 S.E. 2d 676 (1965). This conclusion follows as a matter of law unless the reciprocal immunity rule between parent and unemancipated minor child is repudiated or modified in this jurisdiction.

Plaintiff concedes the law to be as above outlined but urges us to abandon the parent-child immunity doctrine in North Carolina and allow the minor children of this State "to plead their wrongs at her altar" of justice. Plaintiff argues that the rationale for the immunity rule—the maintenance of family harmony and parental discipline—cannot be applied to the facts here since, by reason of the death of the daughters and their father, there no longer exists a parent-child or other family relationship that may be disturbed by this action. For this reason plaintiff contends the immunity doctrine has no application and, should we decline to abrogate the doctrine completely, we should refuse to apply it to the facts of this case.

The doctrine of parental immunity in this country originated with *Hewlett v. George,* 68 Miss. 703, 9 So. 885 (1891), in which it was held that a daughter could not sue the estate of her deceased mother for damages resulting from the wrongful commitment of the daughter to an insane asylum. The immunity rule was expressed by the Mississippi Court in the following language: "[S]o long as the parent is under obligation to care for, guide, and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained. The peace of society, and of the families composing society, and sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of

the parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrong-doing, and this is all the child can be heard to demand."

Hewlett was followed by *McKelvey v. McKelvey,* 111 Tenn. 388, 77 S.W. 664 (1903), in which a child sued for damages for cruel and inhuman treatment allegedly inflicted upon her by her stepmother with the consent and approval of her father. It was held that such action could not be maintained. Two years later the Supreme Court of Washington held that a daughter could not sue her father for damages for raping her because "there is no practical line of demarcation which can be drawn, for the same principle which would allow the action in the case of a heinous crime, like the one involved in this case, would allow an action to be brought for any other tort." *Roller v. Roller,* 37 Wash. 242, 79 P. 788 (1905). Other states consistently adopted the rule announced in these cases, and in due course practically all the states of the Union had joined the parental immunity club. *See* Parental Immunity: Mississippi's Gift to the American Family, 7 Wake Forest L. Rev. 597 at 602, fn. 27, where cases are listed from more than forty states. See also cases collected at 19 A.L.R. 2d 423 (1951).

An examination of cases applying the parental immunity doctrine reveals five policy reasons primarily relied on to support it: (1) disturbance of domestic tranquility, (2) danger of fraud and collusion, (3) depletion of the family exchequer, (4) the possibility of inheritance, by the parent, of the amount recovered in damages by the child, and (5) interference with parental care, discipline and control. However, domestic tranquility and the discipline and control of the family's children are the policy reasons most frequently offered.

Insofar as our research discloses, no state has totally abrogated parental immunity. However, a growing minority of states have reexamined and modified the doctrine. Such modifications are expressed as exceptions to the immunity rule. Some courts hold that where death has terminated the parent-child relation there is no longer any basis for applying the parental immunity rule. *Dean v. Smith,* 106 N.H. 314, 211 A. 2d 410 (1965); *Brennecke v. Kilpatrick,* 336 S.W. 2d 68 (Mo. 1960); *Hale v. Hale,* 312 Ky. 867, 230 S.W. 2d 610 (1950). *Compare Bank v. Hackney,* 266 N.C. 17, 145 S.E. 2d 352 (1965) (administrator of the wife's estate may sue the estate

of the husband for damages for wrongful death even though the recovery will be distributed to the surviving minor children.) There is no uniformity, however, with respect to this exception. Many jurisdictions still apply the immunity rule even though the parent or child may be dead. *Durham v. Durham,* 227 Miss. 76, 85 So. 2d 807 (1956); *Owens v. Auto Mut. Indemnity Co.,* 235 Ala. 9, 177 So. 133 (1937).

Outrageous conduct on the part of the parent which invades the child's rights and brings discord into the family has been held sufficient to lift the immunity. *Oldman v. Bartshe,* 480 P. 2d 99 (Wyo. 1971); *Hoffman v. Tracy,* 67 Wash. 2d 31, 406 P. 2d 323 (1965); *Mahnke v. Moore,* 197 Md. 61, 77 A. 2d 923 (1951).

Willful and intentional injury of the child has been held to terminate the parent-child relation and thus avoid application of the parental immunity rule. *Rodebaugh v. Grand Trunk Western Railway Co.,* 4 Mich. App. 559, 145 N.W. 2d 401 (1966); *Cowgill v. Boock,* 189 Ore. 282, 218 P. 2d 445 (1959); *Nudd v. Matsoukas,* 7 Ill. 2d 608, 131 N.E. 2d 525 (1956); *Emery v. Emery,* 45 Cal. 2d 421, 289 P. 2d 218 (1955); *Aboussie v. Aboussie,* 270 S.W. 2d 636 (Tex. 1954); *Wright v. Wright,* 85 Ga. App. 721, 70 S.E. 2d 152 (1952).

Where a dual relationship exists between parent and child, such as master and servant or carrier and passenger, the domestic relationship has been described as merely incidental, affording no immunity. *Teramano v. Teramano,* 6 Ohio St. 2d 117, 216 N.E. 2d 375 (1966); *Trevarton v. Trevarton,* 151 Colo. 418, 378 P. 2d 640 (1963); *Signs v. Signs,* 156 Ohio St. 566, 103 N.E. 2d 743 (1952); *Borst v. Borst,* 41 Wash. 2d 642, 251 P. 2d 149 (1952); *Worrell v. Worrell,* 174 Va. 11, 4 S.E. 2d 343 (1939); *Lusk v. Lusk,* 113 W.Va. 17, 166 S.E. 538 (1932); *Dunlap v. Dunlap,* 84 N.H. 352, 150 A. 905 (1930).

Where the child is injured by the negligence of the parent while the parent is acting within the scope of his employment, it has been held that an infant may recover from the parent's employer on the principle of *respondeat superior.* It is said that immunity to suit for tort is personal to the parent and cannot be asserted by the employer. *Stapleton v. Stapleton,* 85 Ga. App. 728, 70 S.E. 2d 156 (1952); *Foy v. Electric Co.,* 231 N.C. 161, 56 S.E. 2d 418 (1949); *Wright v. Wright,* 229 N.C.

503, 50 S.E. 2d 540 (1948); *Mi-Lady Cleaners v. McDaniel,* 235 Ala. 469, 179 So. 908 (1938); *O'Connor v. Benson Coal Co.,* 301 Mass. 145, 16 N.E. 2d 636 (1938); 59 Am. Jur. 2d, Parent and Child, § 162; 1 A.L.R. 3d 677, 702, § 9 (1965). Other courts have held to the contrary, applying parental immunity. See 1 A.L.R. 3d 677, 700, § 8 (1965), where the cases are collected.

In *Goller v. White,* 20 Wis. 2d 402, 122 N.W. 2d 193 (1963), Wisconsin abrogated the parental immunity rule except in the following situations: "(1) where the alleged negligent act involves an exercise of parental authority over the child; and (2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care." Wisconsin's solution to the problem has been substantially followed in *Silesky v. Kelman,* 281 Minn. 431, 161 N.W. 2d 631 (1968); *Schenk v. Schenk,* 100 Ill. App. 2d 199, 241 N.E. 2d 12 (1968); *Streenz v. Streenz,* 106 Ariz. 86, 471 P. 2d 282 (1970); *Rigdon v. Rigdon,* 465 S.W. 2d 921 (Ky. 1971).

Several states have abrogated the immunity rule to allow a child to sue his parent for damages for injuries caused by the negligent operation of a motor vehicle. *Johnson v. Myers,* 2 Ill. App. 3d 844, 277 N.E. 2d 778 (1972); *Falco v. Pados,* 444 Pa. 372, 282 A. 2d 351 (1971); *Smith v. Kauffman,* 212 Va. 181, 183 S.E. 2d 190 (1971); *Gelbman v. Gelbman,* 23 N.Y. 2d 434, 245 N.E. 2d 192 (1969); *Hebel v. Hebel,* 435 P. 2d 8 (Alaska 1967); *Nuelle v. Wells,* 154 N.W. 2d 364 (N.D. 1967); *Briere v. Briere,* 107 N.H. 432, 224 A. 2d 588 (1966); *Balts v. Balts,* 273 Minn. 419, 142 N.W. 2d 66 (1966).

For more extreme departures from the parental immunity rule, see *Gibson v. Gibson,* 3 Cal. 3d 914, 479 P. 2d 648 (1971); and *Petersen v. City and County of Honolulu,* 51 Hawaii, 484, 462 P. 2d 1007 (1970).

Despite the foregoing exceptions and modifications, a great majority of jurisdictions still hold that an unemancipated minor cannot maintain an action against his parent for ordinary negligence. 59 Am. Jur. 2d, Parent and Child, § 152.

The foregoing discussion illustrates the troublesome difficulties encountered by those who seek to modify, but not repudiate, the parent-child immunity rule. Generally speaking, all seem to agree that the immunity of a parent for torts com-

mitted in and around the home by acts involving an exercise of parental authority or involving ordinary parental discretion should be maintained, but recovery should be allowed under a variety of circumstances for torts committed elsewhere.

Plaintiff in this case urges us to reverse precedents of long standing in order to eliminate immunity in one particular class of cases involving ordinary negligence in the operation of a motor vehicle. Plaintiff does not suggest the scope of such an exception to the immunity rule, but obviously it would encompass any number of alternatives: (1) all injuries arising out of the negligent operation of a motor vehicle; (2) only cases in which the negligent parent was killed and his child injured and (a) the parent had liability insurance or (b) regardless of liability insurance; or (3) only cases in which both parent and child are killed by the parent's negligence and (a) the parent had liability insurance or (b) regardless of liability insurance. Of course there are other alternatives.

Regardless of the alternative adopted, the course plaintiff urges would create more problems and inequities than it cures. If suit is allowed only in motor vehicle cases, by what logic is the right to sue denied for injury to the child incurred by the parent's negligence in operating a golf cart or a motor boat or a lawn mower or a power saw? If suit is allowed only in motor vehicle cases in which either the child or parent or both are killed by the negligent parent, what justification is there for the discrimination thus created between the injured child whose parent died, as distinguished from the injured child whose parent survived, the accident? Both reason and common sense dictate that an unemancipated child's right to sue its parent should not be contingent upon the death of the parent or the child.

Moreover, conditioning the right to sue upon the existence of liability insurance is equally tenuous. Such a rule would not only extend existing insurance contracts to coverage not contemplated when the policies were written but also would create a preferred class of minor unemancipated children—those injured in a motor vehicle accident by a negligent father who carried liability insurance. We have heretofore held that the existence of liability insurance is not a valid reason to abolish the immunity doctrine. *Gillikin v. Burbage, supra; Small v. Morrison, supra;* 3 Lee, North Carolina Family Law, § 248 (1963).

Yet total abrogation of the immunity rule would lead to judicial supervision over the conduct of parent and child in the ordinary operation of the household. This should never be done so long as the law imposes on the parents the duty and obligation to support, control and discipline their children.

Piecemeal abrogation of established law by judicial decree is, like a partial amputation, ordinarily unwise and usually unsuccessful. When the question of parental immunity was first presented to this Court nearly fifty years ago in *Small v. Morrison, supra* [185 N.C. 577, 118 S.E. 12, 31 A.L.R. 1135 (1923)], we expressed the view that the government of the home was the surest bulwark against social disorder and civic decay. We based the immunity rule on the basic principle that parents and unemancipated children in the home constitute a social unit different from all other groups so as to make suits by the one against the other for negligent injury most unseemly and productive of great mischief. Our decision there was grounded on considerations of broad public policy, and in our view those considerations still outweigh the arguments for change in cases involving ordinary negligence resulting in unintended personal injury or death. Of course, the question raised by an intentional, willful or malicious tort inflicted on a child by a parent or person *in loco parentis* is not presented on this appeal. We will pass on that question when it arises in a case properly before us.

If the immunity rule in ordinary negligence cases is no longer suited to the times, as some decisions suggest, we think innovations upon the established law in this field should be accomplished *prospectively* by legislation rather than *retroactively* by judicial decree. Such changes may be accomplished more appropriately by legislation defining the areas of nonimmunity and imposing such safeguards as may be deemed proper. Certainly that course is much preferred over judicial piecemeal changes in a case-by-case approach. A similar conclusion has been reached by others. "The simplest way to effectuate a change in the law is to enact a statute doing so. The courts have frequently said that the question of public policy is to be determined by the legislature and not by the court." 3 Lee, North Carolina Family Law, § 248. *Accord, Downs v. Poulin,* 216 A. 2d 29 (Me. 1966); *Castellucci v. Castellucci,* 94 R.I. 34, 188 A. 2d 467 (1963).

For the reasons stated, defendant's motion for summary judgment was properly allowed. The judgment of the trial court must therefore be upheld.

Affirmed.

YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF ASHEVILLE, NORTH CAROLINA, INC. v. ROBERT MORGAN, ATTORNEY GENERAL, STATE OF NORTH CAROLINA

No. 125

(Filed 16 June 1972)

1. Trusts § 4— charitable trusts — cy pres doctrine — statute

When there is a charitable trust, bequest or devise evidencing a general charitable intent by the grantor, and the specific, express purpose cannot be fulfilled because of illegality, impossibility or impracticability, the Charitable Trust Administration Act empowers the court, in the absence of an alternative disposition, to modify the trust so as to apply the fund to a purpose as nearly as possible like the originally expressed purpose. G.S. 36-23.2.

2. Trusts § 4— charitable trusts

Generally, when a trust has been created for any lawful purpose which promotes the well-being of mankind and does not contravene public policy, it is charitable in its purpose.

3. Trusts § 1— creation of trust

While a trust is based upon a direct declaration or expression of intent, no particular words are necessary to create a trust if the purpose to create is evident.

4. Wills § 28— intent of testatrix

In construing a will, the intent of the testatrix must be given effect unless contrary to public policy or some rule of law; such intent is determined by examining the will in the light of all surrounding facts and circumstances known to the testatrix.

5. Wills § 34— presumption of devise in fee — personalty

The statutory presumption that a devise is in fee applies to the disposition by will of both real and personal property. G.S. 31-38.

6. Trusts § 4— conveyance to trustee for charitable purpose — conveyance to charitable corporation — uses

Property conveyed to a trustee for a charitable purpose is limited to the uses set forth in the terms of the trust, and property conveyed to a charitable corporation, free of a trust, is limited to the purposes set forth in the corporation's charter.

7. Trusts § 4— charitable trusts — enforcement by State

The State, through its Attorney General, may institute proceedings for the enforcement of charitable trusts or gifts. G.S. 36-20; G.S. 55A-50.

8. Trusts § 4; Wills §§ 34, 38— bequest — absolute gift or trust

An absolute gift was made, and no trust was created, by a bequest of personal property "to the Young Women's Christian Association of Asheville, North Carolina, to be used by it exclusively for the upkeep and maintenance of Moorhead House," a boarding house for women, the expression as to use of the property being merely a statement of motive in making the gift.

APPEAL by Attorney General from *Martin (Harry) J.*, at the 3 March 1972 Session of BUNCOMBE Superior Court.

Plaintiff instituted a declaratory judgment action seeking determination as to the extent of its title and rights in regard to property received from three sources.

Plaintiff received a $100,000 bequest under the will of S. E. Moorhead, which provided:

> "ITEM 9th—I give and bequeath to Young Women's Christian Association of Asheville, North Carolina, the sum of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS, as a building fund to be used for the erection of such building or buildings or for the acquisition of such real estate as may be approved in writing by my Executors."

Plaintiff used the proceeds of this bequest to purchase property and to erect a building in Asheville, North Carolina, known as the "Moorhead House," which was used as a boarding house for young women.

Later, in 1943, plaintiff received personal property from the estate of Anna Johnson Moorhead pursuant to the following bequest:

> "ITEM 7th—I direct my Executors hereinafter named to divide all the rest, residue and remainder of my estate, both real and personal and whatsoever kind, nature or description and wheresoever the same may be situated or located into FOUR (4) equal parts, and I give, devise and bequeath such four equal parts of my residuary estate as follows:"
>
> * * * *
>
> (C) Two such parts to the YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF ASHEVILLE, NORTH CAROLINA, to be

used by it exclusively for the upkeep and maintenance of the MOORHEAD HOUSE.

On 21 November 1963, Edith Moorhead Bryant, the daughter of S. E. Moorhead and Anna Johnson Moorhead, assigned a certain fund to plaintiff by the following language:

> " . . . . EDITH MOORHEAD BRYANT, . . . does hereby sell, assign, set over and transfer unto YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF ASHEVILLE, NORTH CAROLINA, INC., . . . a certain trust fund . . . [which] when received by the Assignee from the Trustee, will be held by the Assignee as a separate fund, to be invested in such manner as it may deem appropriate, and the income thereof, and principal to the extent that its Board of Directors shall deem necessary, be used for the operation, upkeep, maintenance and improvement of Moorhead House, one of the units operated in Asheville, North Carolina, by the Assignee."

These funds have been exclusively used by plaintiff for the upkeep and maintenance of the Moorhead House. There remains in the fund received from Anna Johnson Moorhead the following property: 400 shares of common stock of Liggett & Myers, and 100 shares of common stock of Cannon Mills.

The parties through counsel stipulated:

1. At the time the bequests of S. E. Moorhead, Anna Johnson Moorhead, and the assignment by Edith Moorhead Bryant were received by the plaintiff, it was a religious and charitable corporation.

2. At the time said bequests and assignment were received by the plaintiff, the object for which it was chartered was "to establish and maintain in Asheville, North Carolina, a boarding house or boarding houses for the exclusive use and benefit of local and transient self-supporting women of good character, and to promote the spiritual, mental, moral and physical well-being of such women and of the women of Asheville generally."

3. The corporate purposes were amended in September 1971 as follows: "The object for which this corporation is formed is to establish and maintain in Asheville facilities for the promotion of the spiritual, mental, moral and physical well-being of the community and its members."

On 1 July 1970 the plaintiff's Board of Directors terminated the function of housing young women at the Moorhead House because such a small number used the facility that large financial losses were being incurred from its operation. Plaintiff's Board of Directors also determined that Moorhead House was in excess of its needs and that it should be disposed of. Other properties adjoining Moorhead House, which were used for different purposes, have been sold because of obsolescence.

Plaintiff contended that all assets from these funds are owned by it in fee simple, and defendant, Robert Morgan, Attorney General, asserted that the assets were received by plaintiff in trust and that any relief granted should be by application of the *cy pres* doctrine.

The cause was heard by Judge Martin on an agreed statement of facts, and upon his conclusion that as a matter of law plaintiff is the owner of all the properties and funds, free from any trust, judgment was accordingly entered.

Defendant appealed only as to the fund created by the will of Anna Johnson Moorhead.

Defendant petitioned for writ of certiorari to North Carolina Court of Appeals prior to determination. We allowed this petition on 12 April 1972.

Riddle and Shackelford, by John E. Shackelford, for plaintiff.

Attorney General Morgan, and Assistant Attorney General Christine Y. Denson for defendant.

BRANCH, Justice.

Defendant, Attorney General, contends that the trial judge erred in holding that the assets received from the estate of Anna Johnson Moorhead are held by plaintiff in fee simple, discharged of any trust. He argues that the assets are held in trust and that any relief granted should be by application of the *cy pres* doctrine.

This Court has consistently rejected application of the *cy pres* doctrine, as such. However, it has long recognized that the courts may exercise their equitable power, in proper cases, to modify a charitable trust so as to prevent its failure and so as to effectuate the primary purpose of the trustor. *Trust Co.*

v. Construction Co., 275 N.C. 399, 168 S.E. 2d 358; *Brooks v. Duckworth*, 234 N.C. 549, 67 S.E. 2d 752; *Woodcock v. Trust Co.*, 214 N.C. 224, 199 S.E. 20.

The *cy pres* doctrine derives its meaning from the Anglo-French phrase *cy pres comme possible*, meaning "near as possible." Thus, when a particular purpose set forth in a charitable trust becomes impossible, illegal or impracticable, the courts exercise their equitable powers to select a purpose as near as possible to that originally selected by the testator or trustor. Bogert, Law of Trusts and Trustees (2d ed, 1965) § 431; IV Scott, Law of Trusts (3d ed. 1967) § 399.

[1] The 1967 General Assembly enacted the Charitable Trust Administration Act, which expressly gave the courts the power to apply the *cy pres* doctrine to charitable trusts. When there is a charitable trust, bequest, or devise evidencing a general charitable intent by the grantor, and the specific, express purpose cannot be fulfilled because of illegality, impossibility or impracticability, this act specifically empowers the court, in the absence of alternate disposition, to modify the trust so as to apply the fund to a purpose as nearly as possible like the originally expressed purpose. G.S. 36-23.2. Note: "Trusts—*Cy Pres* Enacted in North Carolina," 46 NCLR 1020. The doctrine of *cy pres* applies only to charitable trusts. Bogert, Law of Trusts and Trustees (2d ed. 1965) § 431.

[2] Generally, when a trust is created for any lawful purpose which promotes the well-being of mankind and does not contravene public policy, it is charitable in its purpose. *Woodcock v. Trust Co., supra.* A charitable trust has also been defined as " . . . a fiduciary relationship with respect to property, arising as a result of a manifestation of an intent to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose." Restatement (Second) of Trusts, § 348.

The parties stipulated that plaintiff was a charitable corporation at the time it received the fund, and that one of its corporate purposes was to establish and maintain a boarding house for young women. This corporate purpose was manifestly charitable. Thus, we need to decide only whether the will of Anna Johnson Moorhead created a trust.

[3, 4] A trust is based upon a direct declaration or expression of intent *(Bowen v. Darden,* 241 N.C. 11, 84 S.E. 2d 289), yet no particular words are necessary to create a trust if the purpose to create is evident. *Morris v. Morris,* 246 N.C. 314, 98 S.E. 2d 298; *Stephens v. Clark,* 211 N.C. 84, 189 S.E. 191. Therefore, we must ascertain the intent of the testatrix, for her intent must be given effect unless contrary to public policy or some rule of law. The intent of the testatrix is in reality her will. Such intent is to be determined by examining the provisions of the will in light of all surrounding facts and circumstances known to the testatrix. *Bank v. Home for Children,* 280 N.C. 354, 185 S.E. 2d 836; *Campbell v. Jordan,* 274 N.C. 233, 162 S.E. 2d 545; *McCain v. Womble,* 265 N.C. 640, 144 S.E. 2d 857; *In re Will of Wilson,* 260 N.C. 482, 133 S.E. 2d 189.

If the whole instrument discloses an intent by the testatrix to convey the legal title to the property or fund to plaintiff, Young Women's Christian Association of Asheville, North Carolina, to hold the property and deal with it for the benefit of another, the property will be affixed with a charitable trust, and, correspondingly, equitable duties will be placed on plaintiff as holder of the legal title. *King v. Richardson,* 46 F. Supp. 510, (M.D.N.C.); *Thomas v. Clay,* 187 N.C. 778, 122 S.E. 852; *Laws v. Christmas,* 178 N.C. 359, 100 S.E. 587. If such intent be not disclosed, plaintiff will be declared absolute owner of the fund, free of any trust.

G.S. 31-38 provides:

> "Sec. 31-38. *Devise presumed to be in fee.*—When real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity."

[5] The provisions of this statute have been held to apply to the disposition by will of both real and personal property. *Worsley v. Worsley,* 260 N.C. 259, 132 S.E. 2d 579; *Heefner v. Thornton,* 216 N.C. 702, 6 S.E. 2d 506; *Barco v. Owens,* 212 N.C. 30, 192 S.E. 862.

In *Brinn v. Brinn,* 213 N.C. 282, 195 S.E. 793, this Court, speaking through Barnhill, J. (later C. J.) stated:

> "A consideration of the decisions in this jurisdiction discloses that it is now a well-established rule in this State

that where an estate is given to a person generally or indefinitely it is construed to be a devise in fee simple, unless such devise shall, in plain and express words, show or it shall be plainly indicated by the will, or some part thereof, that the testator intended to convey an estate of less dignity. It is so provided by our statute.—C.S., 4162 [now G.S. 31-38]. *Springs v. Springs,* 182 N.C. 484; *Hayes v. Franklin,* 141 N.C. 599; *Carter v. Strickland,* 165 N.C. 69; *Hardy v. Hardy, supra* [174 N.C. 505]; *Barco v. Owens,* 212 N.C. 30; *Peyton v. Smith, ante,* 155. *Carter v. Strickland, supra,* is reported and annotated in Ann. Cases, 1915D, at p. 416."

It is seldom that we find aid in prior decisions when we seek to determine the intent of a testator. Although the North Carolina authority on the question here presented deals with real property, these cases offer guidance in reaching our decision as to the intent of the testatrix in bequeathing her personal property.

This Court considered a conveyance of real estate by deed to a religious corporation in *St. James v. Bagley,* 138 N.C. 384, 50 S.E. 841. There Dr. A. J. DeRosset and wife executed a deed to the Vestry and Wardens of St. James Church, which deed contained the following recital:

" . . . that the said parties of the first part, for the purpose of aiding in the establishment of a Home for Indigent Widows or Orphans or in the promotion of any other charitable or religious objects to which the property hereinafter conveyed may be appropriated by the said parties of the second part, and in further consideration of $1 to them in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, and do by these presents grant, bargain, and sell to the said parties of the second part, ... "

The Court, in holding that no trust was created, stated:

" . . . 'The effect of a deed must depend upon the effect of the language used. A grantor can impose conditions and can make the title conveyed dependent upon their performance. But if he does not make any condition, but simply expresses the motive which induces him to execute the deed, the legal effect of the granting words

cannot be controlled by the language indicating the grantor's motive.' . . . ."

* * * *

" . . . By all of the canons of construction and the rules laid down by the courts for ascertaining the intention of the donor, we are brought to the conclusion that no trust is created by the language in this deed. In saying that no trust is created, we, of course, mean no other trust than is imposed upon all property held by the trustee or official body representing a religious society pursuant to the provisions of section 3665 of the Code. [now G.S. 61-3] The plaintiff held the property for the use of the congregation, consisting of the members of the church organized as St. James Parish, with the right and power to appropriate it to such uses and purposes as the said congregation, acting through its organized agencies, may direct . . . . *While the language used by the donor is not, strictly speaking, precatory, but rather expressive of motive, the same interpretation should be given it.* . . . (Emphasis ours.)

" . . . We simply decide that there is no declaration of trust in the deed made by Dr. DeRosset to the plaintiff, that the language sought to be construed into a trust is expressive only of his motive and purpose in conveying the property to the plaintiff, and, in our opinion, expressly excludes the idea of attaching a trust thereto."

A will was construed in order to determine title to real estate in the case of *Williams v. Thompson,* 216 N.C. 292, 4 S.E. 2d 609. The pertinent clause of the will provided:

"Item I: I leave to by niece Clarentine F. Clift lot No. 108, in the Town of Plymouth during her natural life, and after her death, I give and bequeath the said lot with all improvements and hereditaments to the Methodist Episcopal Church in this place, *to be used by the stewards or legal representatives of the said church in the Town of Plymouth, as a parsonage for the minister and for no other purpose,* in order to secure the possession of my burying ground to the aforesaid Church and to its keeping and care." (Emphasis ours.)

In holding that the will devised a fee in the land, this Court said:

"The language contained in the will, indicating that the property was to be used as a parsonage for the minis-

> ter of the church in order to secure the possession of the burying ground to the church and to its keeping and care, cannot be held to have the effect of impressing a trust upon the legal title *(St. James v. Bagley,* 138 N.C. 384, 50 S.E. 841) . . . . the will expresses the wish of the testatrix as to future use of the land, but it cannot be given the legal effect of creating a trust such as to require the aid of a court of equity to enforce its administration."

See also: *Hall v. Quinn,* 190 N.C. 326, 130 S.E. 18; *Hass v. Hass,* 195 N.C. 734, 143 S.E. 541; *Tucker v. Smith,* 199 N.C. 502, 154 S.E. 826; *Church v. Refining Co.,* 200 N.C. 469, 157 S.E. 438.

We note cases from other jurisdictions which consider the question of whether devises and bequests to charitable corporations created trusts or vested unencumbered fees.

The Supreme Court of Kansas in *Bradley v. Hill,* 141 Kan. 602, 42 P. 2d 580, considered a devise in which testator gave to the Grand Lodge of the Independent Order of Odd Fellows real and personal property to be held "for the use only in maintaining the Old Folks Home for Odd Fellows . . . . " The Court reasoned that designation of purpose for which the legacy was to be used did not necessarily indicate an intention to create a trust and that where a gift is made to a charitable corporation charging it to use the gift for a purpose for which the corporation was formed, the gift should be construed to be absolute. The Court, upon this reasoning, held that no trust was created.

The same court in *Zabel v. Stewart,* 153 Kan. 272, 109 P. 2d 177, considered the provisions of a bequest to a religious corporation "for the purpose of building a church building . . . and for the purpose of furnishing said church," and held that this gift to a charitable organization was to aid in carrying out the purposes for which it was founded and did not create a trust in any legal sense.

In the case of *Sands v. Church of Ascension, Etc.,* 181 Md. 536, 30 A. 2d 771, two members of the Vestry gave to the Vestry $20,000 in bonds which were accompanied by a letter stating, in part: "These bonds are to be deposited in a box in

the Mercantile Trust & Deposit Company in the name of the Vestry. . . . It is our wish that the income from these bonds be used only for the payment of the Ground Rent as it becomes due and said income is not to be used for any other purpose whatsoever. . . . " The Church of Ascension united with another church and suit was brought to determine the ownership of the bonds. The court held that the united churches held the bonds absolutely and that no trust had been created. In so holding, the court stated: " . . . [T]hat a person cannot be both the trustee and the cestui que trust. It is obvious that in order to create a trust the legal estate must be separated from the beneficial enjoyment and therefore a trust cannot exist where the same person possesses both. . . . Where property is given to a corporation for such uses as are within the scope of its corporate powers, the conveyance does not create a trust." Accord: *Baltzell v. Church Home and Infirmary,* 110 Md. 244, 73 A. 151; *Board of Trustees of Ruston Circuit, Etc. v. Rudy,* 192 La. 200, 187 So. 549; *Prettyman v. Baker,* 91 Md. 539, 46 A. 1020; *Rohlff v. German Old People's Home,* 143 Neb. 636, 10 N.W. 2d 686; *First National Bank v. Trinity Protestant Episcopal Church of Galveston,* 219 S.W. 2d 828 (Tex. Civ. App. 1949).

In Bogert, Law of Trusts and Trustees (2d ed. 1965) § 46, it is stated:

> "The mere statement of the purpose for which a gift is made does not *per se* show an intent to make the donee a trustee to accomplish that purpose. The donee may be expected to accomplish the named object through his own voluntary action as absolute owner."

[6, 7] It should be noted, however, that property conveyed to a trustee for a charitable purpose is limited to the uses set forth in the terms of the trust, and that property conveyed to a charitable corporation, free of a trust, is limited to the purposes set forth in its corporate charter. *St. James v. Bagley, supra;* Bogert, Law of Trusts and Trustees (2d ed., 1965) § 324. The State, through its Attorney General, may institute proceedings for the enforcement of charitable trusts or gifts. *Sternberger v. Tannenbaum,* 273 N.C. 658, 161 S.E. 2d 116; G.S. 36-20; G.S. 55A-50.

In support of his contention that a trust was created and that the doctrine of *cy pres* should be applied, the Attorney

General cites *Stephens v. Clark, et al, supra; Young v. Young,* 68 N.C. 309 (1873); *Crudup v. Holding,* 118 N.C. 222, 24 S.E. 7 (1896); *Jarrell v. Dyer,* 170 N.C. 177, 86 S.E. 1031 (1915); *Morris v. Morris, supra.* None of these cases refer to charitable trusts. Although they stand for the proposition that a trust may be created without the use of any particular words, the cases are readily distinguishable from instant case in that each of the cases cited by the Attorney General a person is named to hold the legal title for the equitable use or benefit of another, thereby evidencing a clear intent to create a trust.

[8] Decision of the question here presented requires that we now consider the language of the will in connection with circumstances known to Anna Johnson Moorhead at the time she executed that instrument. Plaintiff held Moorhead House in fee simple at the time the bequest was made. At that time Moorhead House was being used for the principal purpose set forth in plaintiff's charter. The will was drawn by a skilled lawyer. The words of the conveyance, to wit, "I give, devise and bequeath" are unequivocal and in no manner limit the conveyance or passage of the fund. The bequest was made to the Young Women's Christian Association of Asheville, North Carolina, and not to another to hold or to be dealt with for the benefit of the Young Women's Christian Association. The will contained no provision for reverter or payment over in event the fund was not used for maintenance of the Moorhead House. Nor is there any limitation as to the expenditure of the principal of the fund. The expression relied upon by defendant to limit the operative words "will, devise and bequeath" relates only to the management of the property rather than to the estate or interest bequeathed. The expression as to use is merely a statement of motive in making the bequest. There is no division of equitable and legal estates. The testatrix unequivocally gave the fund to the charitable corporation, to be used for its charitable purposes. We find nothing in the language of the bequest or any circumstances known to the testatrix which limits the operative words of the bequest.

The trial court correctly adjudged and declared plaintiff to be the owner in fee simple, free of any trusts, of the property and fund set forth in the complaint.

The judgment of the Superior Court is

Affirmed.

CHARLES E. CALLOWAY v. FORD MOTOR COMPANY AND MATTHEWS MOTORS, INC.

No. 64

(Filed 16 June 1972)

1. **Pleadings § 32— motion to amend — discretion of court — review**

After the time for answering a pleading has expired, a motion to amend the answer is addressed to the discretion of the court, and its decision thereon is not subject to review except in case of manifest abuse.

2. **Courts § 9— orders of one judge — authority of another judge**

No appeal lies from one superior court judge to another; one superior court judge may not correct another's errors of law; and ordinarily one judge may not modify, overrule or change the judgment of another superior court judge previously made in the same action.

3. **Judgments § 5; Pleadings § 32— denial of motion to amend — interlocutory order**

An order denying a motion to amend pleadings is an interlocutory order.

4. **Judgments § 35— res judicata — motions**

The doctrine of *res judicata* does not apply to decisions upon ordinary motions incidental to the progress of the trial with the same strictness as to a judgment.

5. **Courts § 9; Judgments §§ 5, 37— interlocutory orders — modification**

A judge has the power to modify an interlocutory order made by another whenever there is a showing of changed conditions which warrant such action.

6. **Pleadings § 42— motion to strike — matter of law**

When a judge rules upon a motion to strike an averment from a pleading on the ground that it is irrelevent, improper or prejudicial, he rules as a matter of law whether he allows or disallows the motion; no discretion is involved and his ruling finally determines the rights of the parties unless it is reversed on appeal.

7. **Courts § 9; Pleadings § 35— allowance of motion to amend — striking of amendment by another judge.**

When one judge allows a motion to amend a pleading in his discretion and the amendment is made in accordance with the authority granted, a second judge may not strike it on the ground that the first erred in allowing it.

8. **Courts § 9; Pleadings § 32— denial of motion to amend — renewal of motion — authority of another judge**

When one superior court judge, in the exercise of his discretion, has made an order denying a motion to amend, absent changed con-

ditions, another superior court judge may not thereafter allow the motion.

9. Courts § 9; Pleadings § 32— denial of motion to amend — changed conditions — allowance of motion by another judge.

In an action against the manufacturer and the retailer of an automobile based upon alleged negligence and breach of warranty wherein one superior court judge, in the exercise of his discretion, had denied a motion by the retailer to amend its answer to plead the statute of limitations, the fact that the manufacturer was thereafter allowed to amend its answer to plead the statute of limitations and that the manufacturer's motion for summary judgment was allowed and the action against the manufacturer was dismissed, *held* to constitute a material change in conditions which gave another superior court judge the authority to allow the retailer's renewed motion to plead the statute of limitations.

10. Appeal and Error § 54— discretionary matters — denial as a matter of law — review

When a motion addressed to the discretion of the court is denied upon the ground that the court has no power to grant the motion in its discretion, the ruling is reviewable.

11. Appeal and Error § 63— denial of motion to amend — remand — allowance of motion

Ordinarily, when the court denies a discretionary motion to amend as a matter of law, without the exercise of discretion, the cause is remanded to the superior court for reconsideration as a discretionary matter; however, where it affirmatively appears from the court's judgment that it would have allowed the amendment in its discretion, the cause will be remanded for entry of an order allowing the amendment.

Justice HIGGINS concurs in the result.

APPEAL by defendant Matthews Motors, Inc., pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals, reported in 11 N.C. App. 511, 181 S.E. 2d 764, affirming the order of *Ervin, J.*, at the November 1970 Session of BUNCOMBE. This appeal was docketed and argued at the Fall Term as No. 80.

Action for personal injuries.

These facts are alleged in the pleadings: Plaintiff is a police officer of the City of Asheville (City). On 24 February 1965 City purchased from defendant Matthews Motors, Inc. (Matthews), a certain automobile (vehicle) manufactured by defendant, Ford Motor Company (Ford), which had equipped it with seat belts bearing the notation that all GSA safety re-

quirements had been met. On 1 October 1965 plaintiff was operating the vehicle in the performance of his duties as a patrolman. While pursuing a suspected wrongdoer the vehicle skidded across the wet pavement of Tunnel Road into a power pole. Plaintiff's seat belt, which he had securely fastened, became disengaged from the floorboard attachment, and he was thrown into the windshield. The impact caused him serious and permanent injury.

In his complaint, filed 9 August 1968, plaintiff alleges that his injuries were proximately caused (1) by the negligence of Ford and Matthews in that Ford had improperly installed in the vehicle a seat belt which failed to meet either GSA or statutory standards and that Matthews had failed to inspect and discover the defective belt and its careless installation; and (2) by defendants' breach of both an express and implied warranty that the seat belt was reasonably fit for the general purpose for which it was manufactured and that it met specifications and the requirements of G.S. 20-135.2. Plaintiff seeks to recover in the sum of $100,000.00.

In an answer filed 8 November 1968 Matthews denied any liability for plaintiff's injuries and, as a further defense, alleged his contributory negligence. Ford filed a similar answer on 29 November 1969 and, as an additional defense, it alleged that there had been no contractual relationship between Ford and plaintiff and therefore no warranty existed between Ford and plaintiff.

In their answers neither defendant pled any statute of limitations.

On 27 March 1970 Matthews moved the court for permission to amend its answer in order to plead in bar of plaintiff's action his failure to institute the action within three years from the date City purchased the vehicle from Matthews. On 4 May 1970 Judge Hasty *signed* an order denying the requested permission.

On 8 May 1970, four days thereafter, Ford filed an amended answer, which began with the declaration that it was filed "by leave of Court granted by the Honorable Fred H. Hasty, Judge holding the Courts of the 28th Judicial District." However, no order permitting the amendment appears in the record.

Ford's amended answer made no material change in the original through the third answer and defense. However, the fourth further answer substituted for an allegation that plaintiff's negligence had insulated any negligence of Ford, a plea that plaintiff's right to recover was barred by the three-year statute of limitations—the same plea which Judge Hasty had denied Matthews permission to plead. Ford also pled the statute of limitations in bar of the right of City, as plaintiff's employer, to recover any sums paid by it as compensation benefits to plaintiff. Fifth and sixth further answers are not material on this appeal.

On 14 May 1970 Matthews filed an amended answer using a preamble identical with Ford's. This amended answer, like Ford's, is supported by no order in the record. In it Matthews added a second further defense in which it alleged that no warranty existed between Matthews and plaintiff. In a third defense it pled the specific dates of the sale of the vehicle to City, the collision in which plaintiff was injured, and the suit instituted. Following the last, these words appeared in parentheses "(more than three years from the date of sale to the City of Asheville.)" These followed the allegation that City had paid workmen's compensation benefits and its failure "to institute this action within three years is pleaded in bar of its subrogation rights to any recovery had by the plaintiff against this answering defendant."

On 20 May 1970 plaintiff moved to strike Matthews' amended answer on the ground that on 4 May 1970 Judge Hasty had denied Matthews' motion (filed 27 March 1970) to amend its answer. On the margin of this motion appears the following undated handwritten notation: "Motion ruled on and language deleted as marked on lines 5 and 6 of page 5 of amended answer. Fate J. Beal, Judge Presiding." An examination of a photostatic copy of the original amended answer shows the words within the parentheses, quoted in the preceding paragraph, are contained within lines 5 and 6 on page 5 of the amended answer. (This informal and confusing method of ruling upon a motion is expressly disapproved.)

On 17 July 1970 Matthews filed a motion to amend its amended answer by pleading that the negligence of Ford was primary and active; that its negligence, if any, was passive and secondary; and that it was "entitled to have indemnity over against the co-defendant, Ford." Judge Ervin allowed this motion, and the amendment was made.

On 20 October 1970 Matthews again moved the court "in the exercise of its sound discretion," for permission to amend its amended answer by pleading the three-year statute of limitations as a defense to plaintiff's right to recover for that Ford had asserted this defense and to allow Matthews "to enter the same plea would be just and equitable."

On 22 October 1970 Ford moved for summary judgment on the ground that plaintiff's complaint affirmatively revealed that City purchased the vehicle in which plaintiff was injured more than three years prior to the institution of the suit and that his action was barred by G.S. 1-52.

On 5 November 1970 plaintiff moved to strike the amended answer which Ford had filed on 8 May 1970 for that, *inter alia,* it had been filed without the court's permission. On the same day Judge Ervin denied plaintiff's motion to strike and entered summary judgment dismissing plaintiff's action against Ford with prejudice. Plaintiff gave notice of appeal but thereafter withdrew it.

On 12 November 1970 Judge Ervin entered an order denying Matthews' motion to be allowed to plead the three-year statute of limitations in bar of plaintiff's right to recover. His order recited that he was "inclined to grant this motion of Matthews" but that since Judge Hasty, in his discretion, had previously denied the same motion and Judge Beal had "made an entry on the pleadings in this cause," he lacked authority to exercise his discretion and he "must rule as a matter of law."

Matthews appealed to the Court of Appeals assigning as error (1) Judge Hasty's discretionary order of 4 May 1970 denying it permission to amend its answer by pleading the statute of limitations; and (2) Judge Ervin's ruling that he lacked authority to allow its motion of 20 October 1970. The Court of Appeals, after treating the appeal as a petition for certiorari and allowing the petition, affirmed the orders of the Superior Court, one judge dissenting. Matthews appealed to this Court as a matter of right.

Plaintiff made no appearance in the Court of Appeals or in this Court.

No counsel for plaintiff appellee.

Van Winkle, Buck, Wall, Starnes & Hyde for defendant appellant.

SHARP, Justice.

[1] This Court has consistently held that "after the time for answering a pleading has expired," an answer may not be amended as of right. A motion to amend is addressed to the discretion of the court, and its decision thereon is not subject to review except in case of manifest abuse. *Vending Co. v. Turner*, 267 N.C. 576, 148 S.E. 2d 531 (1966); *Hardy v. Mayo*, 224 N.C. 558, 31 S.E. 2d 748 (1944); *Osborne v. Canton and Kinsland v. Mackey*, 219 N.C. 139, 13 S.E. 2d 265 (1941); 6 N. C. Index *Pleadings* § 32 (1968). Although these cases were decided prior to the adoption of the new Rules of Civil Procedure, G.S. 1A-1 (1969), the rule they enunciate remains applicable today.

When Matthews moved under Rule 15(a) for permission to amend its answer by pleading the statute of limitations, G.S. 1-52(1)(5) (1969), the motion was addressed to Judge Hasty's discretion, to be exercised as justice requires "in view of the attendant circumstances." 51 Am. Jur. 2d *Limitation of Action* § 471 (1970). At that time the answers of both Matthews and Ford had been filed for more than one year and five months, and neither contained a plea of the statute. Clearly, at the time Judge Hasty denied Matthews' motion to amend, there was no basis for any contention that he had abused his discretion.

The question presented by this appeal is whether Judge Ervin, in his discretion, had authority to permit an amendment which Judge Hasty, in his discretion, had denied earlier.

[2] The well established rule in North Carolina is that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action. 2 N. C. Index 2d *Courts* § 9 (1967) and cases cited in footnote 50.

[3-5] An order denying a motion to amend pleadings is an interlocutory order, that is, "[o]ne given in the progress of a cause upon some plea, proceeding, or default which is only intermediate and does not finally determine or complete the suit." Black's Law Dictionary, p. 979 (1951); *Greene v. Laboratories, Inc.*, 254 N.C. 680, 120 S.E. 2d 82 (1961). See 50 C.J.S. *Judgments* § 620 (1938). The doctrine of *res judicata*

does not apply to decisions upon ordinary motions incidental to the progress of the trial with the same strictness as to a judgment. See 56 Am. Jur. 2d *Motions, Rules and Orders* § 30 (1971). It is frequently said that the doctrine does not apply unless the order involves "a substantial right." *Temple v. Telegraph Co.*, 205 N.C. 441, 442, 171 S.E. 630 (1933). See 5 N. C. Index 2d *Judgments* § 37 (1968). Accordingly, the rule is that a judge has the power to modify an interlocutory order made by another whenever there is a showing of changed conditions which warrant such action. Interlocutory orders are subject to change "at any time to meet the justice and equity of the case upon sufficient grounds shown for the same. *Miller v. Justice*, 86 N.C. 26, 30 (1882). *See Bland v. Faulkner*, 194 N.C. 427, 139 S.E. 835 (1927). For example, when a judge denies a motion for a change of venue upon the basis of his findings of crucial facts, his order denying the motion is conclusive of the right to remove *on the facts found.* However, because of events intervening thereafter the ends of justice might then require removal of the action. *Rutherford College v. Payne*, 209 N.C. 792, 184 S.E. 827 (1936).

[6] When a judge rules upon a motion to strike an averment from a pleading on the ground that it is irrelevant, improper or prejudicial he rules as a matter of law, whether he allows or disallows the motion. No discretion is involved and his ruling finally determines the rights of the parties unless it is reversed upon appeal. *Greene v. Laboratories, Inc., supra; Wall v. England*, 243 N.C. 36, 89 S.E. 2d 785 (1955); *Bank v. Daniel*, 218 N.C. 710, 12 S.E. 2d 224 (1940).

[7] Likewise, when one judge allows a motion to amend a pleading in his discretion and the amendment is made in accordance with the authority granted, a second judge may not strike it on the ground that the first erred in allowing it. He is "under the necessity of observing the terms of the judgment allowing the [party] to amend. *State v. Oil Co.*, 205 N.C. 123, 126, 170 S.E. 134, 135 (1933). *Accord, Dockery v. Fairbanks*, 172 N.C. 529, 90 S.E. 501; 29 N. C. L. Rev. 3, 20 (1950). In *Hardin v. Greene*, 164 N.C. 99, 80 S.E. 413 (1913), at the Fall Term 1912, the presiding judge made an order granting defendant an unrestricted right to file an amended answer. Defendant amended by pleading the statute of limitations. At the Spring Term 1913, the succeeding judge struck the plea.

On appeal it was held that the judge at a subsequent term was without authority to strike the plea.

Several decisions of this court indicate that when a judge in his discretion *denies* a motion to amend pleadings, or for a bill of particulars, his order of denial is no bar to a subsequent motion or application for the same relief to another judge.

In *Townsend v. Williams,* 117 N.C. 330, 23 S.E. 461 (1895), the defendant appealed to the judge's refusal to allow his motion for a bill of particulars. The Supreme Court declined to reverse the discretionary order but in finding "no error," said, "As its refusal was a matter of discretion and therefore not *res judicata,* it is open to the Judge below in his discretion to grant the motion now if renewed in time to avoid delay in the trial." *Id.* at 337, 23 S.E. at 463.

In *Revis v. Ramsey,* 202 N.C. 815, 164 S.E. 358 (1932), an action on a note, at the October 1931 Term the defendant Zade Ponder moved to amend his answer by alleging that he signed the note as a surety and that the action against him was barred by the three-year statute of limitations. Judge Stack denied the motion. At the February 1932 Term defendant renewed the same motion, and Judge Sink allowed it. Plaintiff appealed "upon the theory that the matter was then *res judicata* and no appeal lies from one Superior Court judge to another." The appeal was dismissed as premature, but Chief Justice Stacy pointed out that the "principle of *res judicata* does not extend to ordinary motions incidental to the progress of a cause but only to those involving substantial rights." *Id.* at 817, 164 S.E. at 358.

Overton v. Overton, 259 N.C. 31, 129 S.E. 2d 593 (1963), began as a special proceeding for the allotment of a year's allowance and dower. Petitioner had dissented to the decedent's will six months and six days after its probate. Respondents' answer was a general denial which did not plead ths six-months' statute of limitations. G.S. 30-1 (1950). At the trial respondents' motion to amend by pleading the statute was denied. Disregarding the jury's verdict in favor of petitioner the judge erroneously entered judgment for respondents. On appeal the Supreme Court reversed and remanded the case for the entry of judgment for petitioner. From the judgment so entered respondents immediately appealed. Upon the second appeal, a new trial was

ordered for errors in the judge's charge at the trial. In its opinion the court specifically authorized respondents to renew their motion to amend in the Superior Court. Citing *Revis v. Ramsey, supra,* the Court said: "It lies within the sound discretion of the court to allow or deny such motions. It is pointed out that prior rulings on motions to amend are not necessarily *res judicata.* The doctrine of *res judicata* does not apply to ordinary motions incidental to the progress of the trial, but only to those involving a substantial right." *Overton v. Overton,* 260 N.C. 139, 146, 132 S.E. 2d 349, 354 (1963).

In *Casualty Co. v. Oil Co.,* 265 N.C. 121, 143 S.E. 2d 279 (1965), the judge presiding at the January 1965 Session denied the plaintiff's motion to amend the complaint to allege negligence and proximate cause with more particularity. At the next term another judge sustained defendant's demurrer to the complaint for that it failed to allege actionable negligence. In the opinion reversing the judgment sustaining the demurrer this Court said: "The ruling of the court on plaintiff's motion to amend the complaint is not *res judicata.* If so advised, any of the parties may hereafter move in superior court for leave to amend the pleadings." *Id.* at 130, 143 S.E. 2d at 286.

The records in the preceding four cases impel the conclusion that the ends of justice required that the requested amendments be made and that this Court thought the judge below had abused his discretion in denying the motion. In actuality these decisions authorizing the movant to renew his motion in the Superior Court were an exercise of this Court's supervisory powers. If, upon remand, the motions were renewed and allowed, the judges who allowed the motions acted upon authority specifically granted by the Supreme Court. No judge, *ex mero motu,* substituted his discretion for that of another judge of coordinate and equal jurisdiction.

We do not believe that in the foregoing cases the court intended to lay down the incongruous rule that when a judge in his discretion allows a motion to amend his order binds another Superior Court judge, but when he denies the motion in his discretion another may allow the motion irrespective of any change in conditions. Such a rule is logically indefensible and could serve only to undermine the considerations of orderly procedure, courtesy and comity, which engendered the rule that one judge may not overrule or modify the judgment of another. See Annot., 132 A.L.R. 14 (1941).

[8, 9] We hold that when one Superior Court judge, in the exercise of his discretion, has made an order denying a motion to amend, absent changed conditions, another Superior Court judge may not thereafter allow the motion. *See Dockery v. Fairbanks, supra.* It does not necessarily follow, however, that in this case Judge Ervin correctly ruled that he had no authority to permit the amendment which Judge Hasty had denied. The question arises whether there had been a material change in conditions between the date of Judge Hasty's order and 12 November 1970, the date on which Judge Ervin denied Matthews' renewed motion for permission to plead the statute of limitations. Obviously, the intervention of new facts which would bear upon the propriety of allowing a previously disallowed motion to plead a statute of limitations will not often occur. However, in this case, such new facts did intervene.

On 5 May 1970, at the time of Judge Hasty's order, both Ford and Matthews were on the same footing with reference to a plea of the statute, but thereafter, on 5 November 1970, Judge Ervin permitted Ford to plead the statute by refusing to strike the amended answer which Ford had filed without permission. Furthermore, on the same day, he allowed Ford's motion for summary judgment and dismissed plaintiff's action against Ford. On this record we perceive no reason why Ford should have been allowed the permission which was denied Matthews, and neither did Judge Ervin. The recitals in his order make it quite clear that he refused Matthews permission to plead the statute only because he thought he was powerless to grant permission.

[10, 11] When a motion addressed to the discretion of the court is denied upon the ground that the court has no power to grant the motion in its discretion, the ruling is reviewable. *Highway Commission v. Hemphill,* 269 N.C. 535, 153 S.E. 2d 22 (1967); *Gilchrist v. Kitchen,* 86 N.C. 20 (1882). Ordinarily, when the court denies such a motion as a matter of law, without the exercise of discretion, the case is remanded to the Superior Court for reconsideration as a discretionary matter. *Tickle v. Hobgood,* 212 N.C. 762, 194 S.E. 461 (1938). However, in this case, since the manner in which Judge Ervin would have exercised his discretion affirmatively appears from his judgment, such reconsideration will not be necessary.

The judgment of Ervin, J., denying Matthews' motion that it be allowed to amend its pleadings to allege the three-year

statute of limitations against plaintiff's cause of action is vacated; and the cause will be remanded to the Superior Court for entry of an order allowing the amendment.

The decision of the Court of Appeals is reversed with instructions that it remand this cause to the Superior Court for the entry of judgment in accordance with this opinion.

Reversed.

Justice HIGGINS concurs in the result.

DOUGLAS O. WILSON, PLAINTIFF v. E-Z FLO CHEMICAL COMPANY, A DIVISION OF GROWERS SERVICES CORPORATION, DEFENDANT AND THIRD PARTY PLAINTIFF

v.

UNIROYAL CHEMICAL, A DIVISION OF UNIROYAL, INCORPORATED, THIRD PARTY DEFENDANT

No. 119

(Filed 16 June 1972)

1. **Sales §§ 17, 22— damage to squash crop — use of herbicide — liability of distributor**

The trial court properly determined that the distributor of a pre-emergent herbicide, Alanap, was liable for damages to plaintiff's squash crop caused by use of the herbicide, where the evidence tended to show that plaintiff's squash crop was destroyed by use of the herbicide on March 20 while the weather was still cold, that defendant distributor had recommended the herbicide for immediate use, and that the distributor failed to give plaintiff the warning furnished by the manufacturer in its herbicide marketing manual against use of the product in early spring when the weather is wet and cold.

2. **Sales § 17— damage to squash crop — use of herbicide — liability of manufacturer**

The manufacturer of a pre-emergent herbicide is not liable upon its implied warranty of fitness for damages to plaintiff's squash crop caused by use of the herbicide on March 20 while the weather was still cold, where the manufacturer had warned the distributor against use of the herbicide in early spring when the weather is wet and cold, but the distributor failed to warn plaintiff of such limitation on use of the herbicide.

ON *certiorari* to the Court of Appeals to review its decision affirming the judgment, in favor of the plaintiff, entered at the April, 1971 Session, SAMPSON Superior Court. 13 N.C. App. 610, 186 S.E. 2d 679.

The plaintiff, Douglas O. Wilson, prior to and during the year 1969, operated a truck farm four miles from Clinton in Sampson County. On March 19, 1969, he completed the planting of yellow squash on eighteen and one-half acres of carefully prepared land. On that day he requested an agent of the defendant, E-Z Flo Chemical Company, a distributor in Clinton, to recommend and to supply a pre-emergent herbicide for control of weeds and grass on the eighteen and one-half acres just planted to squash. Mr. Daughtry, an agent for E-Z Flo with whom the plaintiff was well acquainted, delivered two drums of Alanap which he recommended for immediate use. Each drum contained thirty gallons of liquid Alanap with proper instructions on the drums as to water dilution and proper amount per acre. The treatment was applied on March 20, the day following the planting. There was no warning on the drums or transmitted orally or otherwise to the grower restricting the use of Alanap.

The plaintiff applied the chemical to his entire crop except four rows near the middle of the field. He offered ample testimony that all of the crop except the four rows was destroyed. However, the four rows on which Alanap was not applied produced a fine crop of squash. The evidence permitted a legitimate inference the use of Alanap so early in spring caused the plaintiff's loss. He brought suit against E-Z Flo Chemical Company for having sold and recommended the use of Alanap which destroyed his crop. He offered evidence of damages in the amount of $9,025.88.

E-Z Flo Chemical Company filed answer to plaintiff's complaint and a cross-action against Uniroyal Chemical alleging it sold the Alanap to plaintiff and delivered it in the sealed containers exactly as received from Uniroyal, the manufacturer. E-Z Flo alleged it was only a conduit for the manufacturer who was primarily liable and demanded that it have judgment over against Uniroyal indemnifying it in the amount it was required to pay the plaintiff.

Uniroyal answered alleging it sold the Alanap to E-Z Flo and delivered at the same time its "Herbicide Marketing Man-

ual 1969" which contained a detailed description of the quantity, uses, purposes, and dangers incident to the use of Alanap. The instructions contained the following: "Do not use ALANAP on vine crops of any kind when growing conditions are very adverse; namely in early spring when weather is cold and wet." The third party defendant contends that Alanap is harmful only in the unlikely situation where some grower used it before the growing season actually begins—a very unusual situation, but even so, it cautioned the distributor against such use.

Uniroyal as a further defense denied any express warranty and alleged: "That if the original plaintiff sustained any loss or damage to his squash crop in 1969, it was not due to any breach of warranty on the part of the third party defendant, but was caused solely by the sale of the product by the third party plaintiff to the original plaintiff, and its use by the original plaintiff contrary to the warnings and instructions given by the third party defendant in its books and information." The third party defendant alleged that any damage the plaintiff sustained resulted from the failure of E-Z Flo to advise the plaintiff of the danger incident to the use in spring when weather conditions were adverse.

At the trial the plaintiff testified he had no knowledge of the warnings against the use of Alanap except what appeared on the drums. The drums contained a recommendation as to the proper amount of chemical to be used per acre for squash. The plaintiff testified: "I had dealt with Mr. Daughtry and E-Z Flo . . . I had complete confidence in E-Z Flo Chemical Company and relied upon their recommendations." The grower did not order Alanap. He ordered something to kill weeds and grasses and E-Z Flo selected and delivered Alanap.

After the plaintiff discovered the damage to his crop, he notified E-Z Flo Chemical Company and Mr. Daughtry came to inspect the damage. Then for the first time E-Z Flo disclosed the manufacturer's warning against use when growing conditions were very adverse. The plaintiff did not see or know of the marketing manual or of any warning against the use of Alanap until a copy of the manual was shown him by Mr. Daughtry.

With respect to weather conditions, the grower testified: "I do not recollect whether or not heavy rains or cold weather

occurred within a short period of time after the application of Alanap." Two growers living nearby, however, testified that in 1969 the spring weather was normal. The parties stipulated the high and low temperatures for each day between March 20 and April 1, inclusive. On each of eight days during the period, the low temperature was in the thirties or below. On three days the temperature was below freezing. On March 23 the temperature was five degrees below freezing and on March 28 was four degrees below. There was neither stipulation nor evidence as to rainfall.

The parties waived a jury trial and consented that the judge find the facts, answer issues, and enter judgment. The court answered issues and entered judgment as follows:

"(a) Was the plaintiff damaged by the alleged breach of warranty on the part of the original defendant as set forth in the complaint?

ANSWER: 'Yes'.

"(b) What amount, if any, was the plaintiff damaged by the alleged breach of warranty on the part of the original defendant?

ANSWER: '$7,620.00'.

"(c) Is the third party defendant primarily liable to the plaintiff by virtue of a breach of warranty in its manufacture and distribution of a product known as liquid Alanap?

ANSWER: 'Yes'.

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, Douglas O. Wilson, recover of the original defendant and third party plaintiff, E-Z Flo Chemical Company, Division of Growers Services Corporation, Seven Thousand Six Hundred Twenty Dollars ($7,620.00), and the costs of this action to be taxed by the Clerk; and it is

"FURTHER ORDERED, ADJUDGED AND DECREED that the original defendant and third party plaintiff, E-Z Flo Chemical Company, Division of Growers Services Corporation, recover of the third party defendant, Uniroyal Chemical, a Division of Uniroyal, Incorporated, the sum of Seven

Thousand Six Hundred Twenty Dollars ($7,620.00), together with sum taxed as costs in favor of the plaintiff, Douglas O. Wilson, against the original defendant and third party plaintiff; . . . "

After judgment was entered, E-Z Flo paid the plaintiff the amount of the award and Uniroyal appealed from the judgment decreeing that it repay E-Z Flo.

Chambliss, Paderick & Warrick by Joseph B. Chambliss for Original defendant and Third Party Plaintiff.

Smith, Anderson, Blount & Mitchell by John L. Jernigan for Third Party Defendant.

HIGGINS, Justice.

[1] The facts in this case are not in dispute. The evidence is free of any contradiction. The parties admit the plaintiff, a truck farmer, properly prepared his soil and on March 19, 1969, planted eighteen and one-half acres of squash. That day he consulted Mr. Daughtry, an agent of E-Z Flo, stating he needed a pre-emergent herbicide to kill weeds and grass and requested that Mr. Daughtry recommend and supply him with a chemical suitable for immediate use on yellow squash.

E-Z Flo Chemical Company was not an agent of Uniroyal, but carried Alanap and another herbicide in stock. Mr. Daughtry recommended Alanap and immediately delivered two thirty-gallon sealed drums to the plaintiff.

The grower opened the drums, followed directions as to the dilution with water, and on March 20 sprayed his entire crop with the exception of four rows near the middle of the field. The crop, except the four rows, turned out to be a total loss. The four rows produced a normal crop. The evidence points to Alanap as the culprit.

The evidence is undisputed that at the time the original defendant (present third party plaintiff) recommended and sold the Alanap, it had in its possession the third party defendant's sales and use manual which contained the following: "Do not use ALANAP on vine crops of any kind when growing conditions are very adverse; namely in early spring when weather is cold and wet." It seems obvious that had the plaintiff known of the warnings, he would not have purchased Alanap, even

though E-Z Flo recommended it, for use on the last day of winter. He knew in all probability there would be cold and wet weather conditions sometime after March 20. The warning was sufficient notice to those who saw it that Alanap should not be used in Piedmont, North Carolina, as early as March. According to the stipulations, on eight days in the ensuing two and one-half weeks the temperature was in the thirties or below. On three days it was below freezing.

The evidence indicates at the time of its use by the plaintiff, Alanap was a relatively new product. Obviously, any substance which is harmless to vine crops, but deadly as to grasses and weeds, must be treated with a degree of respect and used cautiously. Warning against use when weather is cold and wet should be heeded. In such weather it will turn killer on vine crops as well as on weeds and grasses. The dealer, E-Z Flo, recommended and sold without caution. It knew, or should have known, whether any warnings were placed by the manufacturer on the sealed containers. It knew, or should have known, that the warning as to the dangers of use in cold wet weather was not attached to the containers and, therefore, unknown to the grower. The dealer knew the Alanap was to be applied on March 20 and the grower was relying on the recommendation.

Actually, no one is able to tell with any degree of certainty what next week's weather will be, especially beginning on March 20. The common sense of the warning is this: Alanap should not be used on vine crops until the danger of cold wet weather is over. In no event is the danger over in Sampson County, North Carolina, until somewhat later than the last day of winter.

The grower did not select Alanap. He applied for a preemergent herbicide which would kill weeds and grasses, but would not harm squash. He accepted Alanap on the recommendation of E-Z Flo which knew of the dangers, but failed to acquaint the plaintiff with them.

The trial court properly concluded from the evidence that the grower is entitled to recover from E-Z Flo. The decision of the Court of Appeals as to E-Z Flo's liability to the plaintiff is affirmed. See *Branco Eastern Company v. Leffler*, (Colo.), 482 Pac. 2d 364.

[2] The stipulation and the evidence being free from contradiction, the conclusions to be drawn are matters of law. The conclusion of law from the evidence is that the distributor had ample notice of the warning which was a limitation (as between the manufacturer and the dealer) on the manufacturer's implied warranty of fitness. It knew the containers which it delivered did not disclose any warning of danger in the use of Alanap. At the same time it knew, or should have known, that Alanap would or might turn killer on vine crops, depending on the weather. As between the distributor who knew of the danger and failed to warn the grower, and the manufacturer who had amply warned the distributor of the danger, the primary liability must rest on the distributor.

The trial court and the Court of Appeals based decision on our cases which hold: "The supplier of a chattel (especially food or drink for human consumption) is subject to liability for injury in its use by another when the supplier knows, or should know, that its use is or is likely to be dangerous and when there is no reason to believe that the user will realize this, if, further, he (the supplier) fails to use reasonable care to warn." *Corprew v. Chemical Corp.*, 271 N.C. 485, 157 S.E. 2d 98. (Citing many cases.) The basis of liability on the part of the manufacturer and the distributor is the express warranty of fitness to the ultimate consumer appearing on the container, or the implied warranty when the product is supplied for a known use. *Simpson v. Oil Co.*, 217 N.C. 542, 8 S.E. 2d 813.

Where the retailer purchases personal property from the manufacturer or wholesaler for resale with implied or express warranty of fitness and the retailer resells to the consumer with the same warranty and the retailer has been compelled to pay for breach of warranty, he may recover his entire loss from the manufacturer. *Service Co. v. Sales Co.*, 261 N.C. 660, 136 S.E. 2d 56; G.S. 25-2-314-315. The foregoing rule is not applicable as between the manufacturer who warned and the distributor who has been warned, but fails to pass on the warning to the user. *E. I. Du Pont De Nemours & Co. v. Ladner*, 221 Mis. 378, 73 So. 2d 249.

This is not a case of the manufacturer's liability to the ultimate consumer. Here involved is the liability of the manufacturer who gave ample warning to the distributor who failed

to pass it on to the consumer. The distributor selected the product, unqualifiedly recommended it, and sold it for its immediate use (March 20). In the absence of express warranty on the part of the manufacturer, its implied warranty of limited fitness, as between the manufacturer and the distributor, placed the primary responsibility on the disitributor to notify the user of the limitation on fitness.

The manufacturer in this case serves a wide market area in which weather conditions vary greatly. To devise a weather warning suitable to all sections and attach it to each container would present some problem to the manufacturer. In this case Uniroyal attempted to solve the problem by issuing to the distributor a detailed marketing manual in which the uses and dangers of Alanap are explained in detail, trusting to the distributor to warn any grower known to contemplate use so early in the season. Surely the original defendant, a chemical company, should not recommend and sell to an unsuspecting grower a product without explaining the dangers of which it had knowledge. The grower trusted E-Z Flo which in turn relied on warm, dry weather in March.

The record fails to disclose any factual basis which would justify the court in requiring the manufacturer (who gave notice) to reimburse the distributor (who failed to give notice), which failure in all likelihood caused the plaintiff's loss. In a somewhat similar case, the Supreme Court of Mississippi held the manufacturer was not liable to the distributor. *E. I. Du Pont De Nemours & Co. v. Ladner, supra.* This is not a case involving the sale of food or drink for human consumption which requires a high degree of responsibility on the part of the packager to the consumer. *Terry v. Bottling Co.*, 263 N.C. 1, 138 S.E. 2d 753. The manufacturer's implied warranty is that the product is merchantable. Uniform Commercial Code, G.S. 25-2-314-315. The product here involved met the requirement of merchantability. The caution against an out of the ordinary use does not render it nonmerchantable.

The decision of the Court of Appeals holding the manufacturer liable to the distributor is without support in the record. The decision of the Court of Appeals in that respect is

Reversed.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

BANKING COMM. v. BANK

No. 91 PC.

Case below: 14 N.C. App. 283.

Petition for writ of certiorari to North Carolina Court of Appeals denied 13 June 1972.

GADDY v. GADDY

No. 89 PC.

Case below: 14 N.C. App. 226.

Petition for writ of certiorari to North Carolina Court of Appeals denied 13 June 1972.

GALLIGAN v. SMITH

No. 101 PC.

Case below: 14 N.C. App. 220.

Petition for writ of certiorari to North Carolina Court of Appeals denied 16 June 1972.

ORANGE COUNTY v. HEATH

No. 71 PC.

Case below: 14 N.C. App. 44.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 13 June 1972.

STATE v. ABLE

No. 108 PC.

Case below: 13 N.C. App. 365.

Petition for writ of certiorari to North Carolina Court of Appeals denied 16 June 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. CRUSE

No. 99 PC.

Case below: 14 N.C. App. 295.

Petition for writ of certiorari to North Carolina Court of Appeals denied 13 June 1972.

STATE v. GRIFFITH

No. 106 PC.

Case below: 14 N.C. App. 177.

Petition for writ of certiorari to North Carolina Court of Appeals denied 13 June 1972.

STATE v. ROYALL

No. 94 PC.

Case below: 14 N.C. App. 214.

Petition for writ of certiorari to North Carolina Court of Appeals denied 13 June 1972.

STATE v. SUTTON.

No. 76 PC.

Case below: 14 N.C. App. 161.

Petition for writ of certiorari to North Carolina Court of Appeals denied 13 June 1972.

WALTON v. MEIR

No. 100 PC.

Case below: 14 N.C. App. 183.

Petition for writ of certiorari to North Carolina Court of Appeals denied 13 June 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

PETITIONS TO REHEAR

INVESTMENT PROPERTIES v. ALLEN

No. 94.

Reported: 281 N.C. 174.

Petition by Allen to rehear allowed 28 June 1972.

KOONTZ v. CITY OF WINSTON-SALEM

No. 76.

Reported: 280 N.C. 513.

Petition by City of Winston-Salem to rehear denied 15 June 1972.

OSBORNE v. TOWN OF NORTH WILKESBORO

No. 62.

Reported: 280 N.C. 696.

Petition by Town of North Wilkesboro to rehear denied 15 June 1972.

STATE OF NORTH CAROLINA v. H. R. VESTAL

No. 108

(Filed 16 June 1972)

1. Indictment and Warrant § 14— motion to quash — question presented

Defendant's motion to quash the warrant raises the question of the sufficiency of the warrant to charge the commission of a criminal offense.

2. Criminal Law § 13; Indictment and Warrant § 14— jurisdiction — valid warrant or indictment

It is essential to jurisdiction that a criminal offense be charged in the warrant or indictment upon which defendant is tried; if the only charge therein is that the defendant violated a statute or an ordinance which is unconstitutional, a motion to quash the warrant or indictment must be allowed.

3. Indictment and Warrant § 14— motion to quash — extraneous evidence

In passing upon defendant's motion to quash a warrant charging him with violating a county zoning ordinance by failing to erect a fence along boundaries of an automobile wrecking yard adjoining public highways, the trial court properly refused to permit the State to introduce evidence of the manner in which defendant actually operates his wrecking yard, since in ruling on such motion the trial court treats the allegations of the warrant as true and considers only the record proper and the provisions of the ordinance.

4. Counties § 5; Municipal Corporations § 30— county zoning ordinance — fencing of automobile wrecking yard — unconstitutionality

Provision of a county zoning ordinance requiring that "a solid fence or wall not less than 6 feet in height shall be erected not less than 50 feet from the edge of any public road adjoining" an automobile wrecking yard in a rural, "general industrial district" of the county is unconstitutionally vague in failing to define the term "the edge of any public road," and has no relation to the public health, morals or safety such as will sustain it as a legitimate exercise of the police power.

5. Constitutional Law § 13— police power — restriction on land use — public safety

While a reasonable restriction upon the use which a landowner may make of his property may be imposed under the police power in the interest of public safety, there must be a reasonable basis for supposing that the restriction imposed will promote such safety, otherwise the restriction is a deprivation of property without due process of law.

6. Counties § 5; Eminent Domain § 2— county zoning ordinance — fencing of automobile wrecking yard — taking without compensation

If the proper construction of a county ordinance requiring a fence "not less than 50 feet from the edge of any public road ad-

joining" an automobile wrecking yard is that the fence must be built substantially within the boundaries of the lot on which the yard is located, the ordinance requirement constitutes a taking of the lot owner's property for a public use without compensation in violation of both the Federal and State Constitutions.

APPEAL by the State from *Kivett, J.*, at the 6 December 1971 Schedule "B" Session of FORSYTH, heard prior to determination by the Court of Appeals.

The Board of Commissioners of Forsyth County adopted a comprehensive zoning resolution dividing the entire county, outside the corporate limits of the City of Winston-Salem, the Town of Kernersville and the adjacent areas within one mile thereof, into seven use districts, specifying the uses which may be made of land in each such district and imposing special requirements with reference to certain such uses.

The resolution establishes a "general industrial district," designated I-3, "to provide for industries which generally require specially selected locations in the community." Auto wrecking yards, building material salvage yards, general salvage yards and scrap metal processing yards are permitted in an I-3 district only. Such yard, within an I-3 district, must be operated in conformity to certain requirements. One of these, the validity of which is here in question, is:

> "A solid fence or wall not less than 6 feet in height shall be erected not less than 50 feet from the edge of any public road adjoining the yards, and a screen of evergreen shrubs or trees not less than 8 feet in height at maturity shall be planted on the other boundaries of the property * * * . Any such fence shall be painted, unless the fence is made of aluminum or rust-proof metal or other prefinished material, and any fence or shrubs or trees shall be maintained in sound condition. No such fence shall contain advertising other than lettering which identifies the operation carried on within the enclosure. * * * Such uses existing at the time of the adoption of this resolution shall be provided with screening, as herein specified, with [sic] a period of three years after the date of adoption of this Resolution."

The resolution declares that the purpose of special conditions so imposed upon the operation of these and other types

of businesses is "to insure reasonable standards of community safety and acceptability consistent with advanced industrial practices."

The resolution further provides that the violation of any of its provisions after the expiration of ten days following the service of notice upon the violator shall be a misdemeanor punishable by a fine not to exceed fifty dollars or imprisonment for not more than thirty days, or both, each day of the continuance of such violation beyond such ten day period to be deemed a separate offense.

A Misdemeanor Summons, or warrant, was issued and served upon the defendant, charging:

> "[T]he defendant * * * did unlawfully, and wilfully fail to erect on the boundaries of his real property that adjoin public roads a solid fence or wall not less than 6 feet in height not less than 50 feet from the edge of the public roads (said roads being State Road No. 1448 of the State Highway System and Old 421 Highway) adjoining the real property owned and operated by the defendant as an auto-wrecking yard, said auto-wrecking yard owned and operated by the defendant being known as Westside Motors, said failure to erect said solid fence or wall being in violation of an ordinance of Forsyth County bearing the caption 'Zoning Resolution, Forsyth County, North Carolina' and enacted by the Board of Commissioners of Forsyth County on April 3, 1967, as amended from time to time. * * * "

In the district court the defendant moved to quash the warrant, which motion the district court allowed on the ground that the provisions of the zoning resolution pertaining to fencing or screening of the boundaries of an auto wrecking yard are unconstitutional in that they are based purely on aesthetic grounds, without any real or substantial relationship to the public health, safety, or welfare.

The State appealed to the superior court. There the defendant again moved to quash the warrant on the ground that the zoning resolution is in violation of Art. I, §§ 1 and 17, now § 19, of the North Carolina Constitution and of the Fourteenth Amendment to the Constitution of the United States, he contending that it is an arbitrary deprivation of liberty, bearing

no reasonable relation to the public health, morals, order or safety or to the general welfare, being based solely upon aesthetic considerations and being an arbitrary discrimination against operators of a wrecking yard on property adjoining a public road. The superior court allowed the motion to quash on the ground that the above quoted requirement is based solely upon aesthetic grounds, without any real or substantial relationship to the public health, safety or general welfare, and is, therefore, in violation of the above mentioned constitutional provisions.

From this decision the State appeals, assigning as error: (1) The refusal of the court to permit the State to introduce the testimony of three witnesses concerning the manner of operation of the defendant's auto wrecking yard; and (2) the entry of the order quashing the warrant. The State contends that the requirement of the resolution, here in question, was "neither solely nor predominantly based upon aesthetics or aesthetic consideration," but bears a real and substantial relation to the public health, safety and welfare.

Attorney General Morgan, P. Eugene Price, Jr., County Attorney, and Robert K. Leonard, Assistant County Attorney, for the State.

White, Crumpler and Pfefferkorn, by Fred G. Crumpler, Jr., Michael J. Lewis and G. Edgar Parker for defendant.

LAKE, Justice.

[1, 2] The defendant's motion to quash raises the question of the sufficiency of the summons, or warrant, to charge the commission of a criminal offense. *State v. Brewer,* 258 N.C. 533, 129 S.E. 2d 262, 1 A.L.R. 3rd 1323, app. dism., 375 U.S. 9; *State v. Walker,* 249 N.C. 35, 105 S.E. 2d 101; *State v. Glidden Co.,* 228 N.C. 664, 46 S.E. 2d 860. It is essential to jurisdiction that a criminal offense be charged in the warrant or indictment upon which the State brings the defendant to trial. *State v. Guffey,* 265 N.C. 331, 144 S.E. 2d 14. If the only charge therein is that the defendant violated a statute or an ordinance which is unconstitutional, the motion to quash must be allowed.

[3] In passing upon such motion, the court treats the allegations of fact in the warrant, or indictment, as true and considers only the record proper and the provisions of the statute

or ordinance. *State v. Lee,* 277 N.C. 242, 176 S.E. 2d 772; *State v. McBane,* 276 N.C. 60, 170 S.E. 2d 913; *State v. Cooke,* 248 N.C. 485, 103 S.E. 2d 846; *State v. Andrews,* 246 N.C. 561, 99 S.E. 2d 745. There was, therefore, no error in the refusal of the superior court to permit witnesses for the State to testify as to the manner in which the defendant actually operates his business. The State's Assignment of Error No. 1 is, therefore, overruled.

The summons, or warrant, in the present case charges the defendant with violation of the requirement of the ordinance that "a solid fence or wall not less than 6 feet in height shall be erected not less than 50 feet from the *edge of any public road* adjoining the yards." (Emphasis added.) As Justice Parker, later Chief Justice, speaking for this Court in *State v. Brewer, supra,* said, "The books are filled with statements by the Courts of the rule that a crime must be defined in a penal statute with appropriate certainty and definiteness." In *Connally v. General Construction Co.,* 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322, it is said, "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process." To the same effect, see: *State v. Furio,* 267 N.C. 353, 148 S.E. 2d 275; *State v. Lowry* and *State v. Mallory,* 263 N.C. 536, 139 S.E. 2d 870; *State v. Hales,* 256 N.C. 27, 122 S.E. 2d 768; *State v. Morrison,* 210 N.C. 117, 185 S.E. 674.

[4] The ordinance contains no definition of the term "the edge of any public road." The term "public road" includes, of course, both paved and unpaved roads. In oral argument, counsel for the State suggested that the edge of a road is the edge of the traveled portion thereof. In the case of an unpaved road, however, this will vary from time to time. Other possible interpretations include: the outer edge of the shoulder, the outer edge of the side ditch, the edge of the pavement in the case of a paved road, the outer boundary of the right of way. Between these possible constructions, the court is not permitted to make a selection. *State v. Morrison, supra; State v. Partlow,* 91 N.C. 550, 553. The operator of an automobile wrecking yard may not be required to guess at the required location of his fence at the risk of a fine or imprisonment if he guesses wrong as to the location which the court says was the one intended by

the legislative body. The provision of the ordinance here in question must be deemed unconstitutionally vague and for this reason, if for no other, the motion to quash was properly allowed.

The ordinance does not require, and would not necessarily be satisfied by, the erection of a fence upon the boundary of the lot whereon the automobile wrecking yard is located. It may well be that the right of way for the road may not extend as far as 50 feet from "the edge of the road," assuming that to be capable of location. In that situation, the ordinance would require the erection of a solid fence at a point which would render virtually unusable a portion of the land of the operator of the yard.

[5] The State, on behalf of the county, contends that the purpose of the requirement is not aesthetics but highway safety. It says that the lot of this defendant lies in the corner of an intersection of two public roads and contends that, without such a fence, junked automobiles, awaiting dismantling or other disposition by the defendant, will be stored so near the roads as to block the view of the drivers, thus increasing the danger of collisions in the intersection. While a reasonable restriction upon the use which a landowner may make of his property may be imposed under the police power in the interest of public safety, there must be a reasonable basis for supposing that the restriction imposed will promote such safety, otherwise the restriction is a deprivation of property without due process of law. See: *State v. Warren,* 252 N.C. 690, 694, 114 S.E. 2d 660; *Winston-Salem v. R. R.,* 248 N.C. 637, 642, 105 S.E. 2d 37; *State v. Ballance,* 229 N.C. 764, 769, 51 S.E. 2d 731; *Skinner v. Thomas,* 171 N.C. 98, 87 S.E. 976.

It is obvious that a solid fence, 6 feet high, upon, or approximately upon, the boundaries between the wrecking yard and the rights of way of two intersecting roads, would be more of an obstruction to the view of drivers than would junked automobiles, parked near but within the boundaries of the yard. Furthermore, the requirement of the ordinance is not limited to yards lying at an intersection of roads. It applies where a single road runs along one side of the automobile wrecking yard. Clearly, automobiles stored within the boundaries of such a yard will not obstruct the view of drivers of vehicles on the road. It is utterly unrealistic to suppose that the sights ob-

servable in the yard will distract drivers from attention to traffic on the highway. Consequently, we see no reasonable basis for supposing that the construction of such a fence along the boundary of the automobile wrecking yard will promote safety on the adjacent roads.

[6] If the proper construction of the ordinance is that the fence must be built substantially within the boundaries of the lot in which the automobile wrecking business is located, then the ordinance encounters the further difficulty that it is a taking of the lot owner's property for a public use without compensation, which both the Federal and State Constitutions forbid. *Del., L.&W. R. R. v. Morristown,* 276 U.S. 182, 48 S.Ct. 276, 72 L.Ed. 523; *Penna. Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322; *DeBruhl v. Highway Commission,* 247 N.C. 671, 102 S.E. 2d 229. If, in the interest of public safety at an intersection of highways, greater visibility is required than is afforded by removing obstructions from existing rights of way, land necessary to afford such increased view of approaches to the intersection may be taken by the appropriate public authorities under the power of eminent domain, but just compensation for the land so taken must be paid to the property owner. His property may not be taken for such purpose, without compensation, under the guise of a regulation of his business pursuant to the police power.

We do not have before us in the present case a charge that the defendant obstructed the right of way of either of the roads abutting his lot, by storing material thereon or by permitting material to spill over from his property onto such right of way. Nothing in this opinion is to be deemed to restrict the right of the State, or of the local authorities, to take appropriate action against such practices when and where they may occur.

[4] The requirement that the owner of an automobile wrecking yard, located in a rural, "general industrial district" of Forsyth County, erect a solid fence 6 feet high at least 50 feet from the edge of any public road adjoining the yard, has no substantial relation to the public health, morals or safety such as will sustain the requirement as a legitimate exercise of the police power of the State for any of these purposes. In this respect the present case is distinguishable from decisions in other jurisdictions sustaining city ordinances requiring fencing of junk yards. See: *Rotenberg v. City of Fort Pierce,* 202 So.

2d 782 (Fla. App.); *City of Shreveport v. Brock,* 230 La. 651, 89 So. 2d 156; *City of New Orleans v. Southern Auto Wreckers,* 193 La. 895, 192 So. 523; *Lachapelle v. Town of Goffstown,* 107 N.H. 485, 225 A. 2d 624; *Vermont Salvage Corp. v. Village of St. Johnsbury,* 113 Vt. 341, 34 A. 2d 188. Even in an industrial or commercial area of a city or town, the safety of pedestrians upon adjoining sidewalks, the fire hazard inherent in an accumulation of junk, the threat to the public health incident to the attraction of such yards for rats, the possible use of such yards as hiding places for criminal activities and the attraction of materials stored therein for playing children, offer reasonable basis for the requirement that junk yards maintained in cities or other heavily populated areas be securely fenced.

The State does not contend upon this appeal that aesthetic considerations alone will support an exercise of the police power to impose a regulation upon the manner in which a landowner may use his property for the conduct of an otherwise lawful business. Its contention is that the requirement of fencing, imposed by the ordinance before us, is valid because reasonably related to public safety. We, therefore, do not have before us the question presented to this Court in *State v. Brown* and *State v. Narron,* 250 N.C. 54, 108 S.E. 2d 74, concerning the validity of such a requirement, based upon aesthetic considerations alone. We express no opinion thereon, though we note the growing body of authority in other jurisdictions to the effect that the police power may be broad enough to include reasonable regulation of property use for aesthetic reasons only. See: *Berman v. Parker,* 348 U.S. 26, 75 S.Ct. 98, 102, 99 L.Ed. 27; *E. B. Elliott Adv. Co. v. Metropolitan Dade County,* 425 F. 2d 1141 (5th Circuit, applying the law of Florida); *Murphy v. Town of Westport,* 131 Conn. 292, 40 A. 2d 177; *Rotenberg v. City of Fort Pierce, supra; City of Shreveport v. Brock, supra; Lachapelle v. Town of Goffstown, supra; Naegele Outdoor Advertising Co. v. Village of Minnetonka,* 281 Minn. 492, 162 N.W. 2d 206; *People v. Stover,* 12 N.Y. 2d 462, 240 N.Y.S. 2d 734, 191 N.E. 2d 272, app. dism., 375 U.S. 42; Annot., 21 A.L.R. 3rd 1222, 1225.

The provision of the Forsyth County ordinance which the defendant is charged with violating being invalid for the reasons above stated, the motion to quash was properly granted.

Affirmed.

SECURITY MILLS OF ASHEVILLE, INC., RESPONDENT v. WACHOVIA BANK & TRUST COMPANY, N.A., PETITIONER

No. 102

(Filed 16 June 1972)

1. **Banks and Banking § 10; Venue § 2— action against national bank — venue**

A transitory action against a national bank may be maintained only in a court designated in 12 USC § 94 in the absence of a waiver, express or implied, by the bank of its immunity from suit in other courts.

2. **Banks and Banking § 10; Venue § 2— action against national bank — venue — waiver**

A national bank's waiver of immunity from suit in a court not designated in 12 USC § 94 may be implied from conduct of the bank prior to the institution of the action.

3. **Banks and Banking § 10; Venue § 2— action against national bank — venue — federal court — state court**

An action or proceeding brought against a national bank in a federal court must be brought in the district in which such bank is "established;" a suit brought against such bank in a state court must be brought in the county or city in which the bank is "located."

4. **Banks and Banking § 10; Venue § 2— action against national bank — venue — federal court**

An action or proceeding brought in a federal district or territorial court against a national bank must be brought in the district wherein the bank was founded, this being the district in which its charter states it has its principal office.

5. **Banks and Banking § 10; Venue § 2— action against national bank — branch bank transaction — venue**

When a national bank, "established" in this State, operates and maintains in counties other than the county of its principal office branches at which it conducts its general banking business, the corporation is present at all times in each such branch and is "located" therein within the meaning of 12 USC § 94; consequently, it is subject to suit in a state court in such county, otherwise having jurisdiction, just as it is in the county wherein its principal office is located.

6. **Banks and Banking § 10; Venue § 2— national bank — branch bank — venue — waiver by operation of branch bank**

Even if a national bank is not "located" in a county within the meaning of 12 USC § 94, by maintaining and operating in the county a branch wherein it conducts its general banking business, the bank waives its privilege against being sued in such county in an action arising out of its banking activities at such branch.

ON *certiorari* to review the decision of the Court of Appeals, reported in 13 N.C. App. 332, 185 S.E. 2d 434, vacating the denial by the District Court of BUNCOMBE County *(Allen, J.)* of the defendant's motion for change of venue and remanding the matter to the district court for further consideration.

The plaintiff instituted this action in the District Court of Buncombe County. The complaint alleges: (1) Plaintiff is a North Carolina corporation with its principal office and place of business in Buncombe County; (2) defendant is a national banking corporation "with an office in Asheville, Buncombe County, North Carolina"; (3) the defendant carelessly and negligently paid and cashed checks drawn payable to the plaintiff and presented, without authority, to the defendant by Joe P. Morris, the total amount of such checks being $5,301.96; (4) Morris had no authority, real or apparent, to endorse or cash checks payable to the plaintiff and the defendant knew or should have known of such lack of authority; (5) the defendant was negligent in that it cashed the checks though it knew or should have known that such checks had not been endorsed or presented by the plaintiff, or by one of its duly authorized agents; and (6) thereby the plaintiff has been damaged in the amount of $5,301.96 for the recovery of which sum, together with interest and costs, the plaintiff prays judgment.

In due time the defendant moved that the action be removed to the Superior Court of Forsyth County, North Carolina, for the reason that the defendant is a national banking association, chartered under the laws of the United States and is "located in the City of Winston-Salem, County of Forsyth, North Carolina." The defendant contends that 12 USC § 94 requires the granting of its motion.

At the hearing upon the motion, the defendant offered in evidence a certified copy of its charter as a national banking association. The charter provides:

> "SECOND. The main offices of the Association shall be in Winston-Salem, County of Forsyth, State of North Carolina. The general business of the Association shall be conducted at its main office and its branches.
>
> * * *
>
> "SEVENTH. The Board of Directors shall have the power to change the location of the main office to any

other place within the limits of Winston-Salem, North Carolina, without the approval of the shareholders but subject to the approval of the Comptroller of the Currency; and shall have the power to establish new branches or change the location of any branch or branches of the Association to any other location, without the approval of the shareholders but subject to the approval of the Comptroller of the Currency."

From the order of the district court denying the motion for change of venue, the defendant appealed to the Court of Appeals which, treating the appeal as a petition for certiorari, allowed the petition. The Court of Appeals vacated the order of the district court and remanded the matter to the district court for a new hearing upon the motion on the ground that the district court had failed to make a finding as to whether the branch of the defendant at which the business complained of was transacted is located in Buncombe County. The Court of Appeals held that a banking institution is located in each county in which it maintains a branch for conducting business and that 12 USC § 94 permits an action against a national banking association to be prosecuted in the appropriate court in the county in which is located the branch office at which the business giving rise to the action is located.

Upon the petition of the defendant, certiorari was granted to review the decision of the Court of Appeals.

Following the decision of the Court of Appeals, the parties stipulated that the defendant "maintains in Asheville, Buncombe County, the branch bank which transacted the business complained of in the plaintiff's complaint," the defendant neither admitting nor denying the truth or falsity of any allegation in the plaintiff's complaint.

By affidavit of its assistant vice president, set forth in the record, the defendant states that it "operates branch offices in 63 towns and cities in the State of North Carolina."

Van Winkle, Buck, Wall, Starnes and Hyde, by Emerson D. Wall, for defendant.

Hendon and Carson, by George Ward Hendon, for plaintiff.

LAKE, Justice.

The venue of suits against national banks is governed by 12 USC § 94, which provides:

> "Actions and proceedings against any association under this chapter may be had in any district or Territorial Court of the United States held within the district, in which such association may be *established,* or in any State, county, or municipal court in the county or city in which said association is *located* having jurisdiction in similar cases." (Emphasis added.)

[1] It is now settled that this statute is mandatory, not permissive as was supposed by this Court in *Curlee v. National Bank,* 187 N.C. 119, 121 S.E. 194, and that, in the absence of a waiver by the bank, a suit against a national bank may be maintained only in a court designated in this statute. *Mercantile National Bank v. Langdeau,* 371 U.S. 555, 83 S.Ct. 520, 9 L.Ed. 2d 523. Thus, *Curlee v. National Bank, supra,* which was decided prior to this determination by the Supreme Court of the United States in the Langdeau case, is no longer authoritative and is overruled, insofar as it relates to the proper venue of an action against a national bank which has not waived its immunity under the above quoted Act of Congress.

[1, 2] It is equally well settled that this statutory provision applies to transitory actions only, *Casey v. Adams,* 102 U.S. 66, 26 L.Ed. 52, and that the national bank may waive its immunity from suit in other courts, which waiver may be express or implied. *First National Bank of Charlotte v. Morgan,* 132 U.S. 141, 10 S.Ct. 37, 33 L.Ed. 282. Such waiver may be implied from the conduct of the bank prior to the institution of the action. *Lichtenfels v. Bank,* 260 N.C. 146, 132 S.E. 2d 360; Annot., 1 A.L.R. 3rd 904. The present action is, of course, transitory.

The questions presented by this appeal are, therefore: (1) Is the defendant bank "located" in Buncombe County, where it maintains a branch and conducts a general banking business, within the meaning of the Act of Congress? (2) If not, has the defendant, by maintaining such branch in Buncombe County, waived its statutory immunity to suit in the court of the county otherwise having jurisdiction of the action, the suit arising out of business transacted at such branch bank?

Our attention has been directed to no decision of the Supreme Court of the United States which determines either of these questions. Decisions of the lower federal courts, construing this Act of Congress, are not binding upon us, notwithstanding our respect for the tribunals which rendered them, and their decisions with reference to the proper venue as between the several federal courts are not in point because of the language of the statute. We must, therefore, construe this Act of Congress ourselves and determine whether the defendant is "located" in Buncombe County, within the meaning of the Act.

[3] It is to be noted that an action or proceeding brought against a national bank in a federal court must be brought in the district in which such bank is "established." On the other hand, a suit against such bank in a state court must be brought in the county or city in which the bank is "located." Each of these words, "established" and "located," has several connotations. Some of the connotations of "established" overlap those of "located," but the words are not synonymous. It is not lightly to be supposed that Congress used both words in the same sentence carelessly or inadvertently. The presumption is that it used them deliberately, having in view their different connotations.

[4] The definition of "establish" in Webster, New International Dictionary, Second Edition, most applicable to the use of the word in this statute is: "To *originate* and secure the permanent existence of; *to found;* to institute; to *create* and regulate; said of a colony, a state, or *other institution.*" (Emphasis added.) To the same effect, see: Webster, Seventh New Collegiate Dictionary; Century Dictionary (1889 Edition); Black's Law Dictionary. By the terms of the Act of Congress, therefore, an action or proceeding brought in a federal district or territorial court against a national bank must be brought in the district wherein the bank was founded, this being the district in which its charter states it has its principal office.

Obviously, a bank is "located" where it is "established," but this does not preclude the possibility that it may also be located elsewhere. Webster, New International Dictionary, Second Edition, defines "locate" to mean "to set or establish in a particular spot or position; to station." Webster's Seventh New Collegiate Dictionary defines "locate" to mean "to establish oneself or one's business: SETTLE." The Century Dictionary (1889

Edition) defines "locate" to mean "to fix in a place; establish in a particular spot or position; place; settle: as to *locate* one's self in a certain town or street." (Emphasis added.) Black's Law Dictionary does not define "located" but cites *Raiola v. Los Angeles First National Trust & Savings Bank,* 233 N.Y.S. 301, 304, as holding that a bank is "located" in the place specified in its original certificate, which it obviously is, the question being whether it can be located elsewhere also. Black's Law Dictionary also cites *Dairy Sealed v. Ten Eyck,* 288 N.Y.S. 641, 649, as holding, "Commissioner of Agriculture and Markets or any head of bureau is 'located' not only in principal office, but in authorized branch office." Thus, the word "located" does not point exclusively to the birthplace of an institution as does the word "established." Congress having used the one word with reference to suits in federal courts and the other word with reference to suits in state courts must have intended to draw this distinction.

Another definition of "locate" given by Webster's New International Dictionary, Second Edition, is "to search for and discover the position of; as to *locate* an enemy; to *locate* a fire." This element of discovery, inherent in the word "locate" but not in the word "establish," appears to have been in the mind of the Court in *Lapinsohn v. Lewis Charles, Inc.,* 212 Pa. Super. 185, 240 A. 2d 90, cert. den., 393 U.S. 952, when it said a national bank, by setting up a branch to conduct a general banking business, manifested an intent "to be found" in that jurisdiction and so had waived its statutory immunity to suit there.

We do not overlook the fact, noted in *Mercantile National Bank v. Langdeau, supra,* that the original National Banking Act of 1863 did not make mention of suits against such banks in state courts. Though the provision of the Act, relating to suits in state courts, came into it by later legislation, we must conclude that Congress intended a somewhat different rule to apply as between suits brought in federal courts and suits brought in state courts. Otherwise, it would hardly have switched from "established" to "located."

Cases in which a national bank was sued in a court of a state where it was not "established," in which it maintained no branch and in which it carried on no banking business, are distinguishable from the matter before us and broad statements

therein to the effect that a national bank may be sued only in the judicial district in which it is "established" are not convincing in the present connection. See *Michigan National Bank v. Robertson,* 372 U.S. 591, 83 S.Ct. 914, 9 L.Ed. 2d 961; *Schmitt v. Tobin,* 15 F. Supp. 35 (D.C. Nevada) ; *Cadle v. Tracy,* Fed. Case No. 2279 (S.D.N.Y.) ; *Crocker et al. v. Marine National Bank of New York,* 101 Mass. 240. Similarly distinguishable are cases in which a national bank was sued in a state court, within the state where it was "established" but in a county other than that of its principal office, there being nothing to indicate the maintenance of a branch in the county in which suit was brought. *Monarch Wine Co. v. Butte,* 249 P. 2d 291 (Cal. App.) ; *Richter v. Plains National Bank of Lubbock,* 440 S.W. 2d 76 (Tex. Civ. App.). Also distinguishable is *Leonardi v. Chase National Bank,* 81 F. 2d 19, cert. den. 298 U.S. 677, in which the defendant's principal office was in the Southern District of New York, suit being brought in the United States District Court for the Eastern District of New York, in which latter district it maintained a branch. The court held that a national bank is not "established" within each district in which it operates a branch, but is "established" only in the district wherein its principal office, as stated in its charter, is located. Since the bank could be sued in a federal court only in the district where it was "established," the dismissal of the action brought in a different district was proper.

We are not inadvertent to the case of *Gregor J. Schaefer Sons, Inc. v. Watson,* 272 N.Y.S. 2d 790, in which the Appellate Division, in a memorandum opinion, stated, "For the purposes of venue under the statute [12 USC § 94], a national bank is located at the place listed in its certificate of incorporation as its principal place of business or main office, even though it maintains branches in other counties of the state." See also, *Tuthill v. George S. May International Co., et al,* 285 N.Y.S. 2d 317 (Supreme Court). The only authorities cited by the Appellate Division in support of its decision are federal cases hereinabove cited and distinguished. In our opinion, the better view is thus stated in the dissenting opinion of Beldock, P. J., and Christ, J.: "In our opinion, it is unreasonable to hold that this appellant with 15 branches in Suffolk County is not located in Suffolk County. The cases dealing with venue in Federal Courts are not in point. The statute provides that such suits must be brought in the district in which the bank is

'established,' which means where the principal place of business of the bank is located."

[5] We conclude that when a national bank, "established" in this State, operates and maintains in counties, other than the county of its principal office, branches at which it conducts its general banking business, the corporation is present at all times in each such branch and is "located" therein within the meaning of this Act of Congress. Thus, it is subject to suit in a state court in such county, otherwise having jurisdiction, just as it is in the county wherein its principal office is located.

[6] If, however, the defendant bank is not "located" in Buncombe County within the meaning of this Act of Congress, we hold that by maintaining and operating in Buncombe County a branch wherein it conducts its general banking business, the defendant has waived its privilege against being sued in Buncombe County in an action arising out of its banking activities at such branch. In *Lapinsohn v. Lewis Charles, Inc., supra,* after holding that a national bank is not "located" in a county other than that of its principal office, though it maintains a branch therein, the Pennsylvania Court said, "If a national bank avails itself of a jurisdiction by setting up a branch to conduct general banking business, it has manifested an intent to be found in that jurisdiction for purposes of suits arising out of any business conducted there." To the same effect are: *Helco, Inc. v. First City National Bank,* 333 F. Supp. 1289 (D.C. Virgin Islands), and *Frankford Supply Co., Inc. v. Matteo,* 305 F. Supp. 794 (E.D. Pa.).

The defendant operates 63 branches scattered throughout North Carolina. It has opened and operates these branches voluntarily for the purpose of competing with other banks in this State for the deposits and other banking business of the public. It may, and frequently does, institute suits in the counties where it operates such branches. It is not unreasonable to conclude that, by so doing, it has consented to being sued in the county wherein each such branch is maintained in any controversy arising out of a transaction in the operation of such branch, notwithstanding any immunity it may be given to such suits by 12 USC § 94.

To require a depositor, or other customer, of one of the defendant's branches to incur the expense and inconvenience of going to Forsyth County to maintain such action would be a

gross injustice. In the case of the small depositor, the hardship could well preclude his resort to the courts despite the justice of his cause. We decline to give an ambiguous Act of Congress such a construction in the absence of a decision by the Supreme Court of the United States clearly so requiring.

The parties having stipulated in this Court, subsequent to the decision of the Court of Appeals, that the defendant maintains a branch bank in Buncombe County and that this action arises out of transactions therein, the remand and further hearing directed by the Court of Appeals would now serve no useful purpose. The matter is, therefore, remanded to the Court of Appeals for the entry by it of a judgment affirming the judgment of the District Court of Buncombe County.

Reversed and remanded.

IN THE MATTER OF: THE APPEAL OF W. E. KING, EDWARD A. GLASGOW, W. EARL PRIDGEN AND WALKER MATHIS, ALL OF ROCKY MOUNT, NASH COUNTY, N. C., FROM THE NASH COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1971, ALLEGING THAT THE SCHEDULES OF VALUE ADOPTED BY THE NASH COUNTY BOARD OF COMMISSIONERS ON DECEMBER 6, 1968, AND APPLIED IN THE APPRAISAL OF ALL REAL PROPERTY IN NASH COUNTY AS OF JANUARY 1, 1969, RESULTED IN INEQUALITY OF ASSESSMENT BETWEEN RURAL AND URBAN PROPERTY OWNERS IN NASH COUNTY

No. 28

(Filed 16 June 1972)

1. **Taxation § 25— ad valorem taxes — value of property**

For purposes of taxation, all property, real and personal, is required to be appraised, as far as practicable, at its true value in money, which means the amount for which such property can be sold in the usual manner of sale. G.S. 105-294.

2. **Taxation § 25— ad valorem taxes — farmland — tobacco and peanut allotments**

Tobacco and peanut allotments, held as incidents of the ownership of farmland, are among the factors to be considered in appraising such land for ad valorem taxation.

3. **Taxation § 25— duties of County Board of Equalization and Review — appeal to State Board of Assessment**

It is the duty of the County Board of Equalization and Review, when so requested, to hear any taxpayer owning taxable property in

the county with respect to the valuation of his property or of the property of others and to eliminate unlawful discriminations in the valuations of all properties in the county, G.S. 105-327(g); any taxpayer aggrieved by the order of the County Board of Equalization and Review may appeal to the State Board of Assessment. G.S. 105-329.

4. Taxation § 25— ad valorem taxes — State Board of Assessment

The State Board of Assessment is given the general supervisory power over the valuation and taxation of property throughout the State and authority to correct improper assessments. G.S. 105-275.

5. Taxation § 25— order of State Board of Assessment — judicial review

Upon appeal from the County Board of Equalization and Review, the State Board of Assessment has full authority to determine property valuations, including the standard uniform schedules of values required by G.S. 105-295 to be used in the appraisal of real property within the county, and its orders with reference to such valuations and standards of value are final and conclusive, subject only to judicial review for errors of law or abuse of discretion.

6. Taxation § 25— State Board of Assessment — ad valorem taxes on farmlands — increase in valuation of tobacco and peanut allotments

The superior court did not err in overruling a county's exceptions to an order of the State Board of Assessment revising the ad valorem taxation schedule for farmlands in Nash County by increasing the valuation of tobacco allotments from 40 cents per pound to 80 cents per pound and peanut allotments from $150 per acre to $300 per acre.

7. Costs § 1— attorneys' fees as part of costs

In the absence of statutory authority therefor, a court may not include an allowance of attorneys' fees as part of the costs recoverable by the successful party to an action or proceeding.

8. Costs § 1; Taxation § 25— tobacco and peanut allotments — proceeding before State Board of Assessment — increase in valuation — costs — attorneys' fees

The superior court properly denied taxpayers' motion for an allowance of their attorneys' fees as part of the costs of their successful action before the State Board of Assessment to increase for ad valorem taxation the valuation of tobacco allotments from 40 cents per pound to 80 cents per pound and the valuation of peanut allotments from $150 per acre to $300 per acre.

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

CROSS appeals by Nash County and by the named taxpayers from *Cowper, J.*, at the October 1971 Civil Session of NASH, heard prior to determination by the Court of Appeals.

Under the Machinery Act, Nash County was required to revalue for taxation all real property in the county as of 1 January 1969. The Board of Commissioners employed the appraisal firm of Carroll-Phelps Company to assist in the revaluation. The work of appraisal began in November 1967. At a public meeting on 15 November 1968, the Board of Commissioners approved schedules of values recommended by the appraisal firm and by the Tax Supervisor for use in the appraisal of all real property in the county. These schedules included base acreage values for the various types and qualities of farmland. In addition, tobacco allotments were valued at 80¢ per pound and peanut allotments at $300 per acre. Thus, under these schedules, farmland would be appraised for taxes by applying to the several classifications of land contained in the farm the respective base acreage values and then adding the value of the tobacco allotment, or the peanut allotment, in accordance with such value schedules therefor. To such appraisals the assessment ratio would be applied. The result would be the tax valuation to which the county tax rate would be applied.

Following widespread protests by the owners of farmlands, the Board of Commissioners again met on 6 December 1968. After hearing statements by those in attendance, the Board rescinded its resolution of 15 November 1968 and adopted a revised schedule for farmland. The revised schedule contained the same base acreage values for the various types and qualities of farmland but reduced the value of tobacco allotments to 40¢ per pound and the value of peanut allotments to $150 per acre.

On 31 December 1968, the named taxpayers who are parties to the present appeal, owners of urban property in the county, brought an action in the superior court alleging that the revised schedule, so adopted by the Board of Commissioners on 6 December 1968, would result in the gross undervaluation of farmland in Nash County and would discriminate against the owners of urban property in the county. In that action they sought and obtained from the superior court a writ of mandamus directing the Board of Commissioners and the Tax Supervisor to revalue all real property in the county at its true value in money, and an injunction to restrain them from assessing property for taxation according to the schedule of values so adopted by the Board on 6 December 1968. On appeal,

the Supreme Court reversed on the ground that the plaintiff taxpayers had not exhausted the administrative remedy provided by G.S. 105-327, G.S. 105-329 and G.S. 105-275(3). *King v. Baldwin,* 276 N.C. 316, 172 S.E. 2d 12. In so ruling, the Supreme Court stated that if the Board of Commissioners had failed to value rural land in Nash County at its true value in money, the proper procedure to be pursued by the plaintiff taxpayers was to complain to and request a hearing by the County Board of Equalization and Review and, if dissatisfied with the action taken by it, to appeal to the State Board of Assessment.

Pursuant to the direction so given by the Supreme Court, the named taxpayers, in due time, filed their complaint with the Nash County Board of Equalization and Review. From its decision that no changes should be made in the property valuations, they appealed to the State Board of Assessment which heard the matter for three days in March 1971. The evidence presented at that hearing was essentially the same as that presented to the superior court in the former action, which is summarized in detail in the opinion of the Supreme Court in *King v. Baldwin, supra,* and will not be repeated here.

On 24 June 1971, the State Board of Assessment entered its decision setting forth its findings of fact and conclusions of law, including the following:

FINDINGS OF FACT

"(9) That the farmland schedule adopted by the Board of Commissioners on December 6, 1968, provided for the valuation of rural property in accordance with the same base acreage values as the schedule approved on November 15, 1968, but reduced the valuation of tobacco allotments from 80¢ per pound to 40¢ per pound and peanut allotments from $300 per acre to $150 per acre.

"(10) That the application of the farmland schedule adopted by the Board of Commissioners on December 6, 1968, resulted in the valuation of rural land in the County at approximately 65% of its value, based on the fourteen sales. [These were fourteen bona fide farmer to farmer sales studied by the appraising company in arriving at its schedule of values.]

"(11) That with respect to urban, residential, commercial and industrial land and improvements, the application of the schedule of values recommended by the tax supervisor and the appraisal firm and adopted by the Board of Commissioners on November 15, 1968, resulted in the valuation of such properties in the range of 85% to 90% of their value based on sales of comparable properties.

* * *

"(13) That from November 15, 1968, to December 6, 1968, when the farmland schedule was reduced as aforesaid, neither the tax supervisor nor the appraised [sic] firm furnished any additional information to the Board of Commissioners.

* * *

"(17) That the action of the Board of Commissioners in reducing the farmland schedule previously adopted was based primarily upon their concern for the unfavorable outlook for tobacco farming and also on the ability of farm owners to pay their taxes.

* * *

CONCLUSIONS OF LAW

"(6) There is no evidence before this Board to support a conclusion that the decision of the Board of Commissioners on December 6, 1968, was based upon any reliable information which they had not considered when they approved the recommended schedule on November 15, 1968.

* * *

"(9) There was some disparity between the levels of appraisal in the urban and rural schedules approved by the Board of Commissioners on November 15, 1968, if sales prices alone were to be considered. Taking all of the factors into account, however, we conclude that the application of the schedules approved on November 15, 1968, would have resulted in a reasonable degree of uniformity in the appraisal of all types of property in the County. We conclude that this is not true of the reduced schedules adopted on December 6, 1968."

The decision and order of the State Board of Assessment was that the Nash County Board of Commissioners revalue all

farmland in the county at its true value in money as of 1 January 1969 by applying the schedules approved by the Board of Commissioners at its meeting on 15 November 1968. That is, the State Board of Assessment ordered the Board of Commissioners to increase the valuation of tobacco allotments from 40¢ to 80¢ per pound and the valuation of peanut allotments from $150 to $300 per acre, the said order to take effect as of 1 January 1972.

Both the county and the complaining taxpayers filed petitions for judicial review in the Superior Court of Nash County, the purpose of the petition of the complaining taxpayers, as modified in the superior court, being to procure from the court an order directing that they recover, as part of the costs in this matter, reasonable counsel fees.

The superior court being of the opinion that "the Findings of Fact and Conclusions of Law by the North Carolina State Board of Assessment are correct and based upon competent, material and substantial evidence in view of the entire record as submitted," affirmed the order of the State Board of Assessment, after making a modification therein not pertinent to this appeal, and denied the motion of the complaining taxpayers for an allowance of their attorneys' fees as part of the court costs. From the judgment so entered, both the county and the complaining taxpayers appealed.

Upon motion of the county, the superior court entered a further order staying its judgment and the order of the State Board of Assessment pending the review of the matter on appeal. The said stay order was vacated by the Supreme Court on 7 January 1972 and the appeal was transferred from the Court of Appeals to the Supreme Court for initial appellate review.

Keel & Lamar, by James W. Keel, Jr., for Nash County.

Battle, Winslow, Scott & Wiley, P.A., by Robert M. Wiley; and Biggs, Meadows & Batts, by Frank P. Meadows, Jr., for taxpayers.

Attorney General Morgan and George W. Boylan, Associate Attorney, Amicus Curiae.

LAKE, Justice.

Appeal By The County

References herein to the General Statutes relate, both as to section number and as to content, to statutes in effect prior to the 1971 revision of the Machinery Act.

[1, 2] For purposes of taxation, all property, real and personal, is required to be appraised, as far as practicable, at its true value in money, which means the amount for which such property can be sold in the usual manner of sale. G.S. 105-294. The date of valuation of the property here in question is 1 January 1969. G.S. 105-278, G.S. 105-280. In the case of farmland, the property to be appraised is the tract of land but, in making such appraisal, all of its attributes and appurtenant rights are to be considered, together with other factors which may affect its value. G.S. 105-295. These include the allocations to such land of rights to produce thereon crops, the production of which is restricted by law. Thus, the tobacco and peanut allotments, held as incidents of the ownership of farmland in Nash County, are among the factors to be considered in appraising such land for ad valorem taxation.

[3] The purpose of the statutory requirement that all property be appraised at its true value in money is to assure, as far as practicable, a distribution of the burden of taxation in proportion to the true values of the respective taxpayers' property holdings, whether they be rural or urban. It is the duty of the County Board of Equalization and Review, when so requested, to hear any taxpayer owning taxable property in the county with respect to the valuation of his property or of the property of others and to eliminate unlawful discriminations in the valuations of all properties in the county. G.S. 105-327(g). If such taxpayer is aggrieved by the order of the County Board of Equalization and Review, he may appeal to the State Board of Assessment. G.S. 105-329.

[4] Upon such appeal, the State Board of Assessment "shall hear all the evidence or affidavits offered by the appellant, appellee and the board of county commissioners, shall reduce, increase, or confirm the valuation fixed by the board of equalization and review and enter it accordingly and shall deliver to the clerk of the board of county commissioners a certified copy of such order, which valuation shall be entered upon the

fixed and permanent tax records *and shall constitute the valuation for taxation.*" (Emphasis added.) G.S. 105-329; *King v. Baldwin, supra.* The State Board of Assessment is given general supervisory power over the valuation and taxation of property throughout the State and authority to correct improper assessments. G.S. 105-275.

[5] Thus, upon appeal from the County Board of Equalization and Review, the State Board of Assessment has full authority to determine property valuations, including the standard uniform schedules of values required by G.S. 105-295 to be used in the appraisal of real property within the county. Its orders with reference to such valuations and standards of value are final and conclusive, subject only to judicial review for errors of law or abuse of discretion. G.S. 143-315; *King v. Baldwin, supra; In Re Appeal of Broadcasting Corp.,* 273 N.C. 571, 160 S.E. 2d 728.

[6] The county assigns as error the overruling by the superior court of its several exceptions to the order of the State Board of Assessment. We have considered each of these and find therein no basis for reversal of the order of the Board, pursuant to G.S. 143-315. No useful purpose would be served by a discussion of these exceptions individually.

Appeal By The Complaining Taxpayers

[7] The general rule in this State is that, in the absence of statutory authority therefor, a court may not include an allowance of attorneys' fees as part of the costs recoverable by the successful party to an action or proceeding. *Hoskins v. Hoskins,* 259 N.C. 704, 131 S.E. 2d 326; *Rider v. Lenoir County,* 238 N.C. 632, 78 S.E. 2d 745; *Horner v. Chamber of Commerce,* 236 N.C. 96, 72 S.E. 2d 21; *Trust Co. v. Schneider,* 235 N.C. 446, 70 S.E. 2d 578. G.S. 6-21 and G.S. 6-21.1 provide for the allowance for attorneys' fees as part of the costs in certain types of actions or proceedings. The present proceeding is not one of those.

The complaining taxpayers rely upon *Horner v. Chamber of Commerce, supra.* In that case, the plaintiff, a taxpayer of the City of Burlington, on behalf of himself and other taxpayers, brought suit to compel repayment to the city of funds unlawfully contributed by it to the Chamber of Commerce. The action was successful and the funds were repaid into the city treasury.

This Court held that, under those circumstances, the superior court "has implied power in the exercise of a sound discretion to make a reasonable allowance, *from the funds actually recovered,* to be used as compensation for the plaintiff taxpayers' attorney fees." (Emphasis added.)

In *Rider v. Lenoir County, supra,* this Court, speaking through Justice Barnhill, later Chief Justice, concerning the decision in *Horner v. Chamber of Commerce, supra,* said:

> "The rule as there stated comes to this: When, in an action instituted by a taxpayer to recover a fund which has been unlawfully or wrongfully expended by a municipality, it is made to appear that (1) the fund was in fact wrongfully expended, (2) the governing board of the municipality refused, on demand, to institute an action to recover the same, (3) as a result of which the taxpayer instituted his action to recover *for the benefit of the citizens of the municipality,* and (4) obtained judgment (5) which has been paid, in whole or in part, and the fund is thus restored to the public treasury, the court may allow plaintiff expense money to the extent of reasonable attorney fees, to be paid out of the fund so recovered." (Emphasis added.)

In the *Horner Case, supra,* the Court, speaking through Justice Johnson, said:

> "[W]hile ordinarily attorney fees are taxable as costs only when expressly authorized by statute [citations omitted], nevertheless, the rule is well established that a court of equity, or a court in the exercise of equitable jurisdiction, may in its discretion, and without statutory authorization, order an allowance for attorney fees to a litigant who at his own expense has maintained a successful suit for the preservation, protection, or increase of a common fund or of common property, or who has created at his own expense or brought into court a fund which others may share with him. * * *
>
> "This 'rule rests upon the ground that where one litigant has borne the burden and expense of the litigation that has inured to the benefit of others as well as to himself, *those who have shared in its benefits should contribute to the expense.*' 14 Am. Jur., Costs, Sec. 74." (Emphasis added.)

[8] The present proceeding is clearly distinguishable from the Horner case. First, in this matter no fund has been recovered for the benefit of the county. While the total valuation of taxable property in the county has been increased, this does not necessarily mean that more funds will be paid into the county treasury. The Board of County Commissioners may elect to reduce the tax rate. Presumably, this is the result which the complaining taxpayers hoped to achieve by this proceeding. Second, the proceeding has resulted in no benefits to a large segment of the taxpayers of Nash County, namely, the owners of farmlands. On the contrary, their taxes will be increased as a result of the complainants' victory in this proceeding. Those who will share in the benefits are the owners of urban property in the county. But they are not, as such, parties to this proceeding and to order the county to pay a fee to the complainants' attorneys as part of the court costs would impose the burden thereof not upon owners of urban property only but upon all taxpayers.

The denial of the motion for allowance of attorneys' fees was, therefore, proper.

Affirmed.

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

STATE OF NORTH CAROLINA v. WILLIE JACKSON HARRIS

No. 99

(Filed 16 June 1972)

1. Constitutional Law § 29; Grand Jury § 3— grand jury — absence of persons 18 to 21 years old

The absence from the jury list of the names of persons between the ages of 18 and 21 during the period from 21 July 1971, the effective date of the amendment of G.S. 9-3 lowering the age requirement for jurors from 21 years to 18 years, and 7 September 1971, the date the indictment against defendant was returned, does not constitute systematic exclusion of this age group from grand jury service.

2. **Robbery § 4— armed robbery — weapon within reach**

Evidence that defendant had a pistol within easy reach while he took the prosecutrix' money, that defendant had threatened the prosecutrix with it, and that she was in fear of her life when defendant took her money, *held* sufficient to be submitted to the jury in a prosecution for robbery with firearms.

3. **Criminal Law § 89— cross-examination of defendant — indictments for other crimes — nonretroactivity of new rule**

The rule that a witness, including the defendant in a criminal case, may no longer be cross-examined for impeachment purposes 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 applies only to trials begun after 15 December 1971, the date of the decision of *State v. Williams*, 279 N.C. 663.

APPEAL by defendant from *McLean, J.*, at the 28 October 1971 Criminal Session of MECKLENBURG Superior Court.

Defendant was tried and convicted on separate bills of indictment for the rape and armed robbery of Evelyn Louise Jones. On the rape charge the jury recommended that defendant's punishment be imprisonment for life. From sentences of life imprisonment for the rape and 30 years' imprisonment for the armed robbery, defendant appealed to this Court under G.S. 7A-27(a).

The prosecutrix testified that about 4 p.m. on 11 June 1971 she left work and was standing at a bus stop on Newland Road. A car driven by defendant stopped on the other side of the street. The driver, who was alone, called her. Thinking that she recognized him, she approached the car. When she drew nearer, she realized that she did not know him. At that point defendant pulled out a pistol and ordered her to get into the car. Defendant then drove her to a new housing development, threatened to shoot her if she did not cooperate, and forced her at gunpoint to undress and have intercourse with him twice. The prosecutrix testified that defendant was driving a Plymouth Fury, that she recognized the name "Willie" on a piece of paper attached to the steering wheel, and that she also saw something hanging from the dashboard in the shape of a small pine tree. After defendant completed the acts of intercourse, he wiped himself with a handkerchief and threw it out the window of the car. Defendant and the prosecutrix then got out of the car. Defendant placed his pistol on the roof of the car, took the prosecutrix' pocketbook from the back seat and

removed fourteen dollars and some change from it. Defendant told the prosecutrix that he was a dope addict and had to have money to support this habit.

After threatening to disfigure the prosecutrix if she told anyone what had happened, defendant drove the prosecutrix to a place near her home and let her out. She stayed away from home for awhile fearing that the defendant would return. When she finally went home, she called the police.

Officer S. E. Jolley testified that on 11 June 1971 he drove to the home of the prosecutrix in response to a call about an alleged rape. He accompanied the prosecutrix to a spot in a relatively uninhabited residential development where the prosecutrix stated the rape occurred. Officer Jolley found a fresh set of tire tracks and a handkerchief nearby. The officer then drove the prosecutrix to Charlotte Memorial Hospital where she was examined by Dr. James O. Johnson about 9:30 that night. Dr. Johnson testified that the prosecutrix was visibly upset, though not hysterical; that his examination of her vagina revealed the presence of non-moving or dead male sperm, and that in his opinion the prosecutrix had engaged in sexual intercourse within the previous twenty-four hours.

The prosecutrix gave Officer Jolley a description of her assailant and the car he drove. Defendant was arrested on 17 June 1971 by Officer D. T. Jones. When arrested defendant was driving a Plymouth Fury which matched the description given by the prosecutrix in color and design. On the steering column of the car was the automobile registration with defendant's name "Willie Harris" printed on it, and a small air freshener in the shape of a pine tree was hanging from the dashboard.

The evidence for the defendant tended to establish an alibi. Defendant testified that on the day and at the time of the alleged offenses, he was working in his sister's store and that he did not know the prosecutrix, nor did he rape or rob her. Defendant further testified that earlier that same day he had been to see a doctor at the Nalle Clinic and had been treated for an injury to his instep caused by slamming a car door on his foot, and that because of swelling the doctor had wrapped it.

Pauline Pharr, sister of the defendant, corroborated his testimony that on the date in question the defendant arrived at her grocery store about 2 p.m. and stayed until 7 p.m. She further testified that defendant's foot was bandaged, and that he was limping, though not in pain.

Carolyn Jordan, the supervisor of the record room at the Nalle Clinic, testified that the records of the Clinic showed that on 11 June 1971 a patient named Willie Jackson Harris was treated for a foot injury. The patient had the same date of birth and gave the same address as the defendant.

Attorney General Robert Morgan and Assistant Attorney General Millard R. Rich, Jr., for the State.

Plumides & Plumides by John G. Plumides for defendant appellant.

MOORE, Justice.

[1] Defendant first assigns as error the refusal of the trial court to quash the bill of indictment for the reason that the grand jury panel and the trial jury panel excluded persons between the ages of eighteen and twenty-one. Defendant did not offer any evidence to show a systematic exclusion from the jury panel of persons falling within this age group. From the record we do not know that they were excluded. *State v. Brinson,* 277 N.C. 286, 177 S.E. 2d 398 (1970); *State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765 (1970). Assuming however that they were excluded, prior to 21 July 1971, G.S. 9-3 provided that only those persons twenty-one years of age or over were qualified to serve as jurors. G.S. 9-3 was amended by the 1971 General Assembly changing the age from twenty-one years of age or over to eighteen years of age or over, effective 21 July 1971. At the time the jury list in question was prepared, the jury commissioners were precluded by the provisions of G.S. 9-3 from placing the names of any person under twenty-one years of age on the jury list. G.S. 9-2 required that the jury commissioners "at least 30 days" prior to 1 January 1972 begin preparation of a new jury list for the ensuing biennium.

The bill of indictment in this case was returned on 7 September 1971. Thus, if there was any discrimination against the age group under twenty-one, it must have resulted from the

failure of the jury commissioners to place names representing such group on the jury list during the period from 21 July 1971 to 7 September 1971.

In *State v. Cornell,* 281 N.C. 20, 187 S.E. 2d 768 (1972), Justice Branch, with reference to a similar motion to quash a bill of indictment returned by the grand jury in Forsyth County on 21 September 1971, stated:

> "We know of no reasonable method by which the Forsyth County Jury Commission could have obtained a fair cross-section of the age group in question within a period of two months and one day. None of the names of this age group appeared on the voter registration records; very few of such names appeared on the tax lists; a large number of this group would have been in school, and many of them, being still dependent upon their parents, would not have established an independent address.
>
> * * *
>
> "The absence from the jury list of the names of persons between the ages of eighteen and twenty-one for the short period of time here complained of [21 July 1971 to 21 September 1971] is not unreasonable, and does not constitute systematic and arbitrary exclusion of this age group from jury service."

In the present case an even shorter period of time intervened between 21 July 1971 and the date of the indictments. For the reasons stated by Justice Branch in *Cornell,* this assignment is overruled.

Defendant next assigns as error the denial of his motion for judgment as of nonsuit on the armed robbery charge. Defendant contends that there was no evidence to indicate that a gun was present or used during the time the alleged armed robbery occurred. The record does not sustain this contention. The prosecutrix testified:

> "At the time the defendant, Willie Harris, was taking my money from my pocketbook, the gun that I have been describing was sitting on top of the car, he had it up on the top of the roof. We were standing on the outside. The gun was on the roof of the car. I was standing right there. I was standing right there at him in relation to the defend-

ant, Willie Harris. I did not at any time reach for the gun. I have not ever recovered the money that Mr. Harris took."

G.S. 14-87 states:

"Robbery with firearms or other dangerous weapons.—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."

[2] In the instant case, defendant threatened the prosecutrix with his pistol when he ordered her to get into his car and when he forced her to have intercourse with him. The prosecutrix testified that at all times she was in fear for her life and that although defendant placed his pistol on top of the car while he took her money, the weapon was easily within defendant's reach. The gist of the offense of robbery with firearms is the accomplishment of the robbery by the use or threatened use of firearms or other dangerous weapons whereby the life of a person is endangered or threatened. *State v. Swaney,* 277 N.C. 602, 178 S.E. 2d 399 (1971); *State v. Rogers,* 273 N.C. 208, 159 S.E. 2d 525 (1968); *State v. Williams,* 265 N.C. 446, 144 S.E. 2d 267 (1965). The evidence that defendant had a pistol within easy reach, that he had threatened the prosecutrix with it, and that she was in fear for her life when he took her money, was sufficient to go to the jury on the robbery with firearms charge. This assignment is overruled.

Defendant next contends that the trial court erred when it charged the jury on the issue of armed robbery. This assignment does not challenge the content of the charge; rather defendant contends that there was not sufficient evidence to submit to the jury the issue of armed robbery and that to charge on this offense was error. For the reasons stated above,

the trial court was correct in submitting the issue of armed robbery to the jury and in charging the jury on this issue. G.S. 1A-1, Rule 51.

Finally, the defendant contends that the trial court erred in overruling his objections to the following questions:

"Q. That would be it. What else at this time, Mr. Harris, are you presently under indictment for?

"MR. BELL: Objection.

"COURT: Overruled, exception.

"I'd rather not say.

"Q. Answer the question.

"A. Do I have to answer?

"COURT: Yes.

"I have been indicted for rape. I have been indicted for rape in another case.

"Q. And that was alleged to have occurred on June 16, 1971, wasn't it?

"MR. BELL: Objection.

"COURT: Overruled, exception.

"I wouldn't know the exact date that the bill of indictment that charges me with rape is.

"Q. If I hand you the warrant in the case that was served on you, would it refresh your recollection?

"MR. BELL: Objection.

"COURT: Overruled, exception.

"That is what they have me charged for.

"Q. And you were indicted in that matter for the rape on June 16, 1971, on the body of one Ramona Lisa Spencer, is that not correct?

"MR. BELL: Objection.

"COURT: Overruled, exception.

"I was indicted for the rape on June 16, 1971, on the body of Ramona Lisa Spencer.

"Q. That lady seated out there in the audience today in the red coat in the first row, is that not correct?

"MR. BELL: Objection.

"COURT: Overruled, exception.

"Q. Do you deny raping the woman in the red coat who just stood up in the first row on June 16, 1971?

"A. Yes, I (sic) have.

"EXCEPTION No. 3."

The recent case of *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174 (1971), reversed the long-standing rule as set forth in *State v. Maslin,* 195 N.C. 537, 143 S.E. 3 (1928), which, for the purpose of impeachment, permitted a defendant testifying as a witness in his own defense to be questioned concerning other indictments against him. In *Williams,* Chief Justice Bobbitt, speaking for the Court, stated:

> "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* [195 N.C. 537, 143 S.E. 3 (1928)], and decisions in accord with Maslin, on the basic ground that an indictment cannot rightly be considered as more than an unproved accusation."

Defendant in this case was tried before the decision in *Williams.* Defendant contends, however, that the rule adopted in *Williams* should be applied retroactively and that defendant should be granted a new trial for the error committed by the trial court in overruling his objections to questions concerning other indictments. We disagree. The change in the law that resulted from the *Williams* case was a change in a rule of evidence and affected no contractual or vested right of defendant. *Spencer v. Motor Co.,* 236 N.C. 239, 72 S.E. 2d 598 (1952). The Court merely altered a rule of evidence which it had adopted some forty-four years ago in *State v. Maslin, supra.* The Court can apply this new rule of evidence prospectively or retro-

actively as it sees fit. See *Rabon v. Hospital,* 269 N.C. 1, 152 S.E. 2d 485 (1967); *Mason v. Cotton Co.,* 148 N.C. 492, 62 S.E. 625 (1908); *State v. Bell,* 136 N.C. 674, 49 S.E. 163 (1904).

The United States Supreme Court, in dealing with recent developments in constitutional law, has been called on frequently to decide whether or not a new case will be given retroactive effect. See, *e.g., Adams v. Illinois,* 405 U.S. 278, 31 L.Ed. 2d 202, 92 S.Ct. 916 (1972); *Williams v. United States,* 401 U.S. 646, 28 L.Ed. 2d 388, 91 S.Ct. 1148 (1971); *Stovall v. Denno,* 388 U.S. 293, 18 L.Ed. 2d 1199, 87 S.Ct. 1967 (1967); *Johnson v. New Jersey,* 384 U.S. 719, 16 L.Ed. 2d 882, 86 S.Ct. 1772 (1966); *Linkletter v. Walker,* 381 U.S. 618, 14 L.Ed. 2d 601, 85 S.Ct. 1731 (1965).

In *Linkletter v. Walker, supra,* the Supreme Court stated: " . . . (W)e believe that the Constitution neither prohibits nor requires retrospective effect." In determining when to grant retroactive effect to new standards in these recent cases, the Supreme Court has used three basic criteria: " . . . (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall v. Denno, supra.* In *Stovall,* the Supreme Court refused to accord retroactive effect to *United States v. Wade,* 388 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926 (1967) and *Gilbert v. California,* 388 U.S. 263, 18 L.Ed. 2d 1178, 87 S.Ct. 1951 (1967). Those cases required the exclusion of identification evidence that had been tainted by exhibiting the accused to identifying witnesses before trial. The Court, per Mr. Justice Brennan, stated:

> " . . . We have also retroactively applied rules of criminal procedure fashioned to correct serious flaws in the fact-finding process at trial. See for example *Jackson v. Denno,* 378 U.S. 368. Although the *Wade* and *Gilbert* rules also are aimed at avoiding unfairness at the trial by enhancing the reliability of the fact-finding process in the area of identification evidence, 'the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree.' *Johnson v. New Jersey, supra* [384 U.S.], at 728-729. The extent to which a condemned prac-

tice infects the integrity of the truth-determining process at trial is a 'question of probabilities.' 384 U.S., at 729. Such probabilities must in turn be weighed against the prior justified reliance upon the old standard and the impact of retroactivity upon the administration of justice."

[3] Applying this language to the instant case, since *State v. Maslin, supra,* it has been an approved practice to cross-examine defendants as to prior or pending indictments, and no doubt such questions have been allowed in many trials which have resulted in guilty verdicts. To give *Williams* retroactive effect could easily disrupt the orderly administration of our criminal law. Doubt would be cast upon verdicts of guilty returned in those cases where such questions were asked and answered over objection. Prisoners convicted in such trials could seek release or new trials in post-conviction proceedings. See *Johnson v. New Jersey,* 384 U.S. at 731, 16 L.Ed. 2d at 891, 86 S.Ct. at 1780 (1966). Accordingly, we hold that the rule announced in *Williams* applies only to those trials begun after 15 December 1971, the date of the filing of the opinion in that case. *Johnson v. New Jersey, supra.* It should also be noted that in the present case the defendant's attorney, in cross-examining the arresting officer D. T. Jones, brought out the fact, without objection, that the officer had two warrants which he served on the defendant charging him with two separate crimes of rape and that Officer Jones had talked with defendant about the other rape charge. Had there been error in allowing the questions concerning the indictment in the other rape case, such error would not have been prejudicial. *State v. Wright,* 270 N.C. 158, 153 S.E. 2d 883 (1967); Stansbury, N. C. Evidence § 30 (2d Ed. 1963); 3 Strong, N. C. Index 2d, Criminal Law § 169.

Defendant having failed to show prejudicial error, the verdicts and judgments will not be disturbed.

No error.

IN THE MATTER OF JOHN B. DICKINSON, JR., SURF SONG COTTAGE, ROUTE 1, MOREHEAD CITY, NORTH CAROLINA, ASSESSMENT OF ADDITIONAL INCOME TAXES FOR THE YEAR 1967

No. 73

(Filed 16 June 1972)

1. **Taxation § 28— income tax — multistate partnership — resident partner — income earned in other states**

A resident partner of a partnership which has one or more nonresident partners and which operates in North Carolina and also in one or more other states is required to include in his gross income, for North Carolina income tax purposes, his distributive share of the net income of the partnership earned in states other than North Carolina; however, the resident partner is allowed a credit against his North Carolina tax for the amount of the tax paid to another state on the same income.

2. **Taxation § 28— partnership income derived from other states — resident partner — income taxation**

The proviso of G.S. 105-142(c) does not exempt from North Carolina income taxation a resident partner's share of the net income of the partnership which is derived from sources other than North Carolina, the sole purpose of the proviso being to provide a method for determining the portion of the net income attributable to North Carolina of a multistate partnership with nonresident members.

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

APPEAL by John B. Dickinson, Jr., from *Clark, J.*, May 31, 1971 Civil Session of WAKE Superior Court, certified, pursuant to G.S. 7A-31, for initial appellate review by the Supreme Court, docketed and argued as No. 118 at Fall Term 1971.

This is an appeal by John B. Dickinson, Jr., hereafter called taxpayer, from a judgment entered June 17, 1971, which affirmed "Administrative Decision No. 112 of the Tax Review Board entered January 26, 1970." The Tax Review Board had affirmed the "Final Decision of Commissioner of Revenue" entered October 1, 1968. This decision by the Commissioner was made after a hearing on taxpayer's protest of the proposed additional assessment of North Carolina Income Tax for the taxable year 1967.

Taxpayer is and was during the year 1967 a resident of North Carolina. During the income year 1967, he was a partner

in the firm of A. M. Pullen and Company, Certified Public Accountants, and engaged in practice as a certified public accountant. At the time here involved, the firm of A. M. Pullen and Company had offices in the District of Columbia and in the states of New York, Virginia, North Carolina, South Carolina, Tennessee and Georgia.

Taxpayer timely filed an income tax return for 1967 which showed he was due a refund of $302.98. The gross income reported therein as being taxable by North Carolina did not include taxpayer's share of the partnership net income from A. M. Pullen and Company earned in the District of Columbia and states other than North Carolina. As a result of a pre-refund audit an adjustment was made in taxpayer's return to include in the gross income reported to North Carolina taxpayer's share of the net partnership income of A. M. Pullen and Company earned in the District of Columbia and in states other than North Carolina. On the basis of this adjustment, an assessment of additional income tax of $985.20 plus interest for the taxable year 1967 was made against taxpayer by the Individual Income Tax Division of the North Carolina Department of Revenue.

Taxpayer excepted to and appealed from Judge Clark's judgment. In a separate order, Judge Clark stayed the decision of the Tax Review Board "pending the outcome of the appeal to the Court of Appeals of North Carolina." On September 7, 1971, at the request of taxpayer and of Commissioner, this Court granted *certiorari* for appellate review by the Supreme Court without prior determination by the Court of Appeals.

McLendon, Brim, Brooks, Pierce & Daniels, by Claude C. Pierce, Charles B. Robson, Jr., and E. Norman Graham, for petitioner appellant.

Attorney General Morgan and Assistant Attorney General Lake for Commissioner of Revenue, appellee.

BOBBITT, Chief Justice.

[1] The question for decision is whether a resident partner of a partnership, which has one or more nonresident partners and which operates in North Carolina and also in one or more other states, is required to include in his gross income, for North Carolina income tax purposes, his distributive share of

the net income of that partnership earned in states other than North Carolina.

The statutory provisions quoted below are applicable to the income tax year beginning January 1, 1967. Chapter 1110, §§ 3 and 18, Session Laws of 1967, hereafter referred to as the 1967 Act. They are included in the "Individual Income Tax Act" (G.S. 105-133), which is Division II (Individual Income Tax) of Schedule D (Income Tax) of G.S. Chapter 105 (Replacement 1972).

G.S. 105-136 imposes a tax "upon every resident of this State which shall be levied, collected, and paid annually, with respect to the net income of the taxpayer as herein defined, and upon the net income derived from North Carolina sources of every nonresident individual which is attributable to the ownership of any interest in real or tangible personal property in this State or which is from a business, trade, profession, or occupation carried on in this State, ..."

G.S. 105-140 provides that "[t]he words 'net income' mean the gross income of a taxpayer, less the deductions allowed by this Division."

G.S. 105-141(a) provides in pertinent part that " 'gross income' for purposes of this Division shall mean *all income in whatever form and from whatever source derived,* including (but not limited to) the following items: . . . (13) Distributive share of partnership income subject to the provisions of G.S. 105-142(c); . . . ." (Our italics.)

Until rewritten by the 1967 Act, G.S. 105-141(a), which defined "gross income," contained no specific reference to a distributive share of partnership income. (G.S. Vol. 2D, Replacement 1965.)

G.S. 105-136 imposes a tax on *all* of a resident's net income. It imposes a tax only on that portion of the net income of a nonresident which is derived from North Carolina sources.

In fact, taxpayer's gross income included *all* of his share of the net partnership income of A. M. Pullen and Company, whether earned in North Carolina or elsewhere. His entire share, whether derived from North Carolina or other sources, was included in "gross income" as defined in G.S. 105-141(a)

unless some statutory provision exempted the portion derived from sources other than North Carolina.

G.S. 105-151(a) provides, subject to the conditions set forth therein, that "[i]ndividuals who are residents of this State shall be allowed a credit against the taxes imposed by this division for income taxes imposed by and paid to another state or country on income taxed under this division, ... " "[A]nother state or country" could lawfully impose an income tax only on that portion of the income of a resident of North Carolina derived from sources in that "state or country." G.S. 105-151(a) implies that such income is to be taxed by North Carolina, but allows a credit on the North Carolina income tax for payments, if any, to "another state or country."

Taxpayer does not seek a credit on his North Carolina income tax under G.S. 105-151(a). He contends that the portion of his share of the net income of the partnership which is derived from sources other than North Carolina is *exempt* from North Carolina income tax.

"Taxation is the rule; exemption the exception." *Odd Fellows v. Swain,* 217 N.C. 632, 637, 9 S.E. 2d 365, 368 (1940). "[S]tatutes providing exemption from taxation are strictly construed." *Sale v. Johnson, Commissioner of Revenue,* 258 N.C. 749, 755, 129 S.E. 2d 465, 469 (1963), citing prior decisions.

Since taxpayer relies largely upon G.S. 105-142(c), particularly the proviso, we quote the provisions thereof in full with our capitalization (for convenient reference) of the first words in each of the first three sentences and of the word "Provided" following the third sentence.

G.S. 105-142(c) provides: "AN INDIVIDUAL carrying on the business in partnership shall be liable for income tax only in his individual capacity, and shall include in his gross income, whether distributed or not, his distributive share of the net income of the partnership and dividends from foreign corporations for each income year. IF AN ESTABLISHED BUSINESS in this State is owned by a nonresident individual or by a partnership having one or more nonresident members, the manager of the business in this State shall report the earnings of such business in this State, and the distributive share of the income of each nonresident owner or partner and pay the tax as levied

on individuals in this division for each such nonresident owner or partner. THE INDIVIDUAL OR PARTNERSHIP business carried on in this State may deduct the payment required to be made for such nonresident individual or partner or partners from their distributive share of the profits of such business in this State: PROVIDED, that if an established unincorporated business owned by a nonresident individual or a partnership having one or more nonresident members is operating in one or more other states the net income of the business attributable to North Carolina shall be determined by multiplying the total net income of the business by the ratio ascertained under the provisions of G.S. 105-130.4, and shall be entitled to the rights and privileges accorded corporations therein. Total net income shall be the entire gross income of the business less all expenses, taxes, interest and other deductions allowable under this division which were incurred in the operation of the business."

The first sentence of G.S. 105-142(c) requires any partner to report "his distributive share of the net income of the partnership." The next two sentences relate to partnerships with *nonresident* members. The second sentence requires the manager of a partnership with nonresident members to report its North Carolina earnings and the share of each nonresident partner, and to pay the nonresidents' taxes thereon. The third sentence permits the partnership to deduct such payment from each nonresident's share of the partnership's North Carolina net income. The third sentence is followed by a proviso which is specifically applicable to a *multistate* partnership with nonresident members which has operations in North Carolina as well as in other states. According to the proviso, "the net income of [such partnership] attributable to North Carolina shall be determined by multiplying the total net income of the business by the ratio ascertained under the provisions of G.S. 105-130.4, and shall be entitled to the rights and privileges accorded corporations therein." The proviso to the third sentence prescribes the method for determining the portion of the net income attributable to North Carolina of a multistate partnership with nonresident members. Since there is no controversy with reference to the portion of the net income of A. M. Pullen and Company for 1967 attributable to North Carolina, it is unnecessary to discuss the provisions of G.S. 105-130.4.

[2] We hold that the proviso relates solely to the second and third sentences of G.S. 105-142(c) and that its sole purpose is

to provide how the net income of such multistate partnership attributable to North Carolina is to be determined. When determined, this is the basis on which G.S. 105-136 levies an income tax on a nonresident partner, the amount thereof to be reported and paid as provided in the second and third sentences of G.S. 105-142(c).

G.S. 105-147 (G.S. 143, Vol. 2, 1955 Cumulative Supplement) in part provided: "In computing net income there shall be allowed as deductions the following items: . . . (10) Income earned in another state, nation, territory or possession (hereinafter referred to as 'state') by resident individuals and domestic corporations to the extent hereinafter provided. . . . (b) Resident individuals having an established business or an investment in real or tangible property in another state or other states may deduct the net income from such business or property but only to the extent that such income is in fact reported for taxation in such other state or states which levies or levy a net income tax . . . . " Based on the quoted portion of (b), in 1947 the Attorney General expressed this opinion: "[I]f [a resident] taxpayer earns income through a partnership which has an established business in the State of Alabama and she reports that income to the State of Alabama for income taxation, she is entitled to the deduction provided for in Paragraph (b) of subsection 10 of Section 322 of the Revenue Act [G.S. 105-147(10)(b)]." 29 Biennial Report of the Attorney General of the State of North Carolina 220 (1946-48).

The former statute referred to above as G.S. 105-147(10)(b) was repealed by Subsection (d), Section 4, Chapter 1340, of the Session Laws of 1957, p. 1343. The proviso of the statute now codified as G.S. 105-142(c) was enacted by Subsection (v), Section 4, Chapter 1340, of the Session Laws of 1957, p. 1352. Taxpayer's contention that the proviso of G.S. 105-142(c) was enacted in substitution for former G.S. 105-147(10)(b) is without substance. As stated above, the proviso of G.S. 105-142(c) relates solely to the method for determining the portion of the net income attributable to North Carolina of a multistate partnership with nonresident members.

[1] Former G.S. 105-147(10)(b) allowed a resident taxpayer, when computing his net income, to deduct his net income earned in another state or states "but only to the extent that such income [was] in fact reported for taxation in such other state

or states which levies or levy a net income tax." Now, under G.S. 105-151(a), instead of allowing such a deduction in computing taxable net income, the income tax of a resident is computed on the basis of his entire net income and he is allowed a credit against his North Carolina tax for the amount of *the tax paid* to another state or country on the same income.

Taxpayer cites G.S. 105-149(b), which relates to personal exemptions. After full consideration, we find nothing therein which supports taxpayer's contention on this appeal.

For the reasons stated, the judgment of the court below, which affirmed "Administrative Decision No. 112 of the Tax Review Board entered January 26, 1970," is affirmed.

Affirmed.

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

STATE OF NORTH CAROLINA v. LEWIS PIERSON WILLIS

No. 48

(Filed 16 June 1972)

1. Constitutional Law § 29; Jury § 6— prospective jurors — solicitor's questions — death penalty

In a prosecution for first degree murder, questions which the solicitor asked prospective jurors on *voir dire* were proper for the purpose of determining whether such jurors could, under any circumstances, vote for a verdict which would require imposition of the death penalty.

2. Homicide § 20— photograph of body — identification

In this homicide prosecution, the trial court properly allowed the victim's sister to identify the victim by use of a duly authenticated photograph of the victim's body.

3. Criminal Law § 61— casts of tire tracks — competency

Evidence relating to casts made of automobile tracks at the place where a homicide victim's body was found was competent to identify the tracks as having been made by an automobile owned by defendant's accomplice and to corroborate the accomplice's testimony that he and defendant had transported the body to the place where it was found; discrepancies as to the dates on which the comparisons were made had bearing on the weight and not the competency of the evidence.

4. Criminal Law § 87— leading questions — discretion of court

The allowance of leading questions rests in the sound discretion of the presiding judge and will not be reviewed on appeal absent a showing of prejudice.

APPEAL by defendant from *Rouse, J.*, September 13, 1971 Session, CARTERET Superior Court.

In this criminal prosecution, Lewis Pierson Willis was charged by bill of indictment with the capital offense of murder in the first degree in the killing of Eugene Thomas Givens. According to the bill of indictment, proper in form, the offense occurred in Carteret County on April 10, 1971.

At the formal arraignment the defendant, through court-appointed counsel, entered a plea of not guilty. The court directed that the jury selection be conducted in the manner approved by this Court in *State v. McNeil,* 277 N.C. 162, 176 S.E. 2d 732. After twelve veniremen were called, seated, and sworn to speak the truth concerning their fitness and competency to serve on the jury, the solicitor addressed his inquires to each juror and his replacement. The record does not indicate which side excused which juror. The record does disclose the defendant objected to the solicitor's examinations of all who were called and examined. Altogether 178 veniremen were so examined. It is obvious the solicitor by his questions sought to obtain a jury which was not opposed to capital punishment.

The State's evidence is here given in short summary. On and prior to April 10, 1971, Joseph Dennis Merrill operated The Village Shoppe in Ho Ho Village near Morehead City in Carteret County. Marine Sergeant Eugene Thomas Givens and his wife lived in a house trailer across the road from the Merrill store. Merrill conceived a plan to "eliminate" Givens. He contacted his friend Stroud who made arrangements with the defendant, Lewis Pierson Willis, to do the eliminating. The defendant agreed to kill Givens for $5,000.00 in cash. Merrill borrowed the $5,000.00 from the bank and delivered it to Stroud who notified the defendant the money was ready. The defendant accepted $200.00 from Stroud as a down payment and apparently called his friend, John Braxton Richardson from Norfolk, Virginia, to assist in executing the plan. Richardson came from Norfolk directly to the Willis home, arriving April 9th. Willis identified Givens as the person to be killed.

On the night of April 10, 1971, Merrill invited Givens to visit the rear room of the store after closing time for the purpose of joining him in a drink. Merrill had alerted the defendant, advising him that the rear door would be unlocked and that he (Merrill) would leave the store by way of the front door. Soon after 10 o'clock, Merrill left the store by way of the front door, tipping off the defendant and Richardson that Givens was inside. Willis and Richardson were parked near the store in Richardson's automobile. The defendant entered the store from the rear and in a few minutes returned, saying he had shot Givens four or five times in the head.

The defendant and Richardson placed the body on the automobile which Richardson drove to a dirt road (Merrill's Boulevard) where they dumped it on the side of the road. This occurred just before 11 o'clock. After the body was removed, Merrill returned to the room and attempted to remove the blood stains by scrubbing. Richardson attempted to remove the blood stains from the automobile by washing. Neither was entirely successful because human blood stains were disclosed both on the floor of the room and on the rear of the automobile.

As Marine Lieutenant Michael Green and another officer were returning to their base from Morehead City shortly after 11:30 p.m., they observed the body on the side of the road. Green left his companion, Lieutentant Fredburg, at the body and went to Merrill's store nearby to call officers. A light in the back room of the store was on, but no one answered his knock. From a telephone booth outside, Lieutenant Green called the rescue squad, the Marine Corps, and county officials. One of the officers removed Givens' identification card from the dead body.

The officers made plaster casts of the automobile tire tracks near the body. The autopsy disclosed Givens had died as a result of four bullet wounds in the head. The recovered bullets disclosed they were of thirty-eight caliber.

After the defendant and Richardson left the body, they threw the pistol into the water from a causeway. Richardson returned to Norfolk after receiving $500.00 for his part in the killing. Most of this was recovered when he was arrested on April 11th. $4,800.00 of the money paid to Stroud for Willis was also recovered by the officers. Merrill admitted he bor-

rowed $5,000.00 from the bank in Morehead City and gave it to Stroud to be used in the payoff. The evidence indicated Merrill had an affair with Givens' wife. Merrill, however, claimed his differences related to business matters.

The incriminating evidence came from the witnesses, Virgil Stroud, John Braxton Richardson, and Joseph Dennis Merrill, all of whom were under indictment and awaiting trial for participating in the killing. The defendant did not testify and did not offer evidence in his defense.

The jury returned a verdict finding the defendant guilty of murder in the first degree and as a part of the verdict, recommended the punishment be imprisonment for life in the State's prison. From the judgment accordingly, the defendant appealed assigning errors.

Robert Morgan, Attorney General, by Christine A. Witcover, Associate Attorney, and James F. Bullock, Deputy Attorney General, for the State.

Wheatly & Mason by C. R. Wheatly, Jr., for defendant appellant.

HIGGINS, Justice.

The State's evidence in this case shows a planned gangster type murder in which three of the four involved testified for the State against the fourth who did the actual killing. The alert trial lawyer, who represented the defendant at the trial and argued the case here, entered 264 exceptions. However, the only assignments of error discussed in the brief here are quoted in full:

"1. Did the Court commit error in permitting the solicitor to question the jury on his voir dire examination?

a) To such an extent that he created the impression that the sole issue for the jury was punishment rather than guilt or innocence?

b) By describing a case to be considered as being 'bad', 'horrible'?

"2. Did the Court commit error on the evidentiary rulings in:

a) Permitting testimony as to the identity of an automobile tire track without proper connecting evidence?

b) Permitting the solicitor to elicit testimony by the constant use of leading questions?

c) The use of a photograph and other evidence which served no evidentiary purpose and was used solely to inflame the passions of the jury against the defendant?"

The statement in the brief as to the questions involved may be treated as the abandonment of all others. "Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him." Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, page 810. *State v. Clayton,* 251 N.C. 261, 111 S.E. 2d 299.

[1] After the arraignment, the court announced the jury selection would proceed in the manner approved in the case of *State v, McNeil, supra; State v. Perry,* 277 N.C. 174, 176 S.E. 2d 729. However, the solicitor addressed his questions to each juror individually. The following is typical:

"Q . . . I'll ask you if you should be chosen to sit on the jury in a murder case—not this case, but a homicide case—I ask you if you could listen to the evidence that comes from the mouths of the witnesses on the witness stand, and the Judge's charge, and then retire to the jury room and the twelve jurors should consider the evidence and find from the evidence and beyond a reasonable doubt that the defendant is guilty, I'll ask you, sir, if then you could consider voting to bring in a verdict that would require the Judge to sentence the defendant to the death penalty?

Objection — Overruled.

"A No, sir.

"Q . . . I'll ask you: Can you imagine a case in which the circumstances are so bad, not this case, and the jury, after having heard the evidence, goes into the jury room and then they find from the evidence and beyond a reasonable doubt that the defendant is guilty, I'll ask you could you then consider voting to bring in a verdict that would require the Judge to sentence the defendant to the gas chamber?"

The solicitor's usual questions ended with that which preceded the answer, "No, sir." However, in a few instances the second question (in substance) was added. The solicitor's examination of the jurors covers ninety-six pages of the record. All questions by defense counsel are omitted. Except in a few instances, the jurors' answers to the questions are also omitted. The solicitor's questions indicate his purpose was to find a jury which was not opposed to capital punishment. Nothing objectionable on the question of guilt or innocence is alleged or discovered. Notwithstanding the solicitor's effort to obtain a jury which would vote for capital punishment, the jury by unanimous agreement fixed the punishment at life imprisonment.

The defendant does not assign as error the selection of any particular juror. The parties stipulated the State exhausted its eight peremptory challenges. The defendant exhausted only thirteen of its fourteen peremptories. The solicitor's questions were intended to determine whether the prospective jurors were qualified in the light of the rules discussed in *Witherspoon v. Illinois,* 391 U.S. 510, 20 L.Ed. 2d 776; *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671; *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241; *State v. Spence,* 274 N.C. 536, 164 S.E. 2d 593.

[2, 3] We have reviewed the evidence which the court admitted over objection. The review fails to disclose prejudicial error. The defendant's plea of not guilty required the State to prove all material elements of the offense charged, including the identity of the victim. The identification card found on the body was the first step in the identification procedure. The sister of the victim, by the use of a duly authenticated photograph of the body, completed the identification. *State v. Doss, supra; State v. Cutshall,* 278 N.C. 334, 180 S.E. 2d 745; *State v. Atkinson, supra; State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10. The use of casts made of automobile tracks at the place in the highway where the body was found was competent to identify the tracks as having been made by Richardson's automobile. *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572; *State v. Palmer,* 230 N.C. 205, 52 S.E. 2d 908. The discrepancies as to the dates on which the comparisons were made had bearing on the weight and not on the competency of the evidence. Actually, the State's witness Richardson testified without equivocation that he and the defendant transported the body from the

store to Merrill's Boulevard. The tire tracks at the scene corroborated Richardson's testimony.

[4] The claim of error based on the solicitor's leading questions is not well founded. The few leading questions which the court permitted were intended as time saving or as an indication whether further inquiry should be pursued. Leading questions, especially in a long trial, may be time saving and the judge should be trusted to sustain objection if the question and answer appear in any wise prejudicial. Leading questions may be left to the sound discretion of the presiding judge and are not reviewable absent a showing of prejudice. *State v. Doss, supra; State v. Clanton,* 278 N.C. 502, 180 S.E. 2d 5; *State v. Johnson,* 272 N.C. 239, 158 S.E. 2d 95; *State v. Pearson,* 258 N.C. 188, 128 S.E. 2d 251.

The evidence of guilt was overwhelming. The direct evidence was buttressed all along the line by proof of strongly corroborating circumstances.

This Court has reviewed all assignments of error which counsel has discussed in the brief and in the argument. Nothing appears which could have influenced the jury to the prejudice of the defendant. Hence, in the trial, verdict, and judgment, we find

No error.

STATE OF NORTH CAROLINA v. ELDON BOBBY LEWIS

No. 39

(Filed 16 June 1972)

1. **Larceny § 5— possession of recently stolen property**

To give rise to the presumption that one found in the unexplained possession of recently stolen property is the thief, it is not necessary that the stolen property be found actually in the hands of or on the person of the accused, it being sufficient if it was found in a container or place of deposit under his exclusive personal control.

2. **Burglary and Unlawful Breakings § 5; Larceny § 5— possession of recently stolen property — breaking and entering — presumptions**

When it is established that a store or warehouse has been broken into and entered and that merchandise has been stolen therefrom, the discovery of the stolen articles in the possession of defendant soon

after the theft raises a presumption that he is guilty both of the breaking and entering and of the larceny.

3. Larceny §7— possession of recently stolen property — tools in car trunk

The evidence was sufficient to support a finding that stolen tools found in a tool box in the trunk of a car in which defendant was sitting in the back seat were in the possession of defendant, where a police officer testified that the car was defendant's car, defendant's wife testified on cross-examination that defendant kept his tool box in the trunk of the car and that he was the individual who "had the key for the car," an officer testified that the defendant gave permission for the opening of the trunk of the car and actually opened it, and defendant's wife testified that the driver was defendant's friend.

4. Trial § 15— waiver of objection

An objection to evidence not taken in apt time is waived.

5. Criminal Law § 169— erroneous admission of evidence — admission of similar testimony without objection

Admission of testimony by a police officer that a representative of a builders supply company came to the city in which defendant was arrested and identified tools found in the trunk of defendant's car, and that the tools were thereupon delivered to the sheriff of the county in which the builders supply company was located, if error, was rendered harmless when the tools in question were thereafter identified by an employee of the builders supply company as having come from its stock of merchandise.

6. Criminal Law § 60— footprints — non-expert testimony — harmless error — expert testimony

The trial court did not err in permitting a non-expert witness, a policeman, to testify that he compared defendant's shoes with a shoe print on a ledger found near a rifled safe and that "it was the shoes I was looking for to the best of my knowledge;" even if the admission of such testimony constituted error, it would be harmless in view of the competent opinion testimony of an expert in the identification of footprints that defendant's left shoe made the print on the ledger.

APPEAL by defendant from *Bailey, J.*, at the 4 October 1971 Criminal Session of CUMBERLAND.

By indictment, proper in form, the defendant was charged with felonious breaking and entering, felonious larceny after breaking and entering, and safecracking. He was found guilty of each of the offenses so charged and was sentenced to imprisonment for 10 years upon each of the first two charges, these sentences to run consecutively, and to imprisonment for

life upon the charge of safecracking, this sentence to run concurrently with the other two.

The evidence on behalf of the State was to the following effect:

The place of business of Builders Wholesale Supply of Fayetteville, Inc., was closed and its employees left at noon on Saturday, 30 January 1971. At that time a ledger of the company was put in its safe in the office and the safe was locked.

At approximately 11 a.m. on Sunday, 31 January 1971, employees of the company and Deputy Sheriff Martin went to the company's place of business. They found that a corner of the building, constructed at that point of corrugated metal, had been ripped open sufficiently to permit a person to enter. The large safe had been overturned and forced open by the use of chisels and a sledge hammer. On the floor of the office lay the ledger. On the outside cover of the ledger was the print of a shoe with semicircular ridges or lines across the sole. Approximately $1,500 in money and a large number of tools, including screwdrivers, chisels, and a sledge hammer were missing.

Shortly after midnight of 31 January 1971, Harold Priest, a police officer in Elizabethtown, observed the defendant and another man in a 1960 Ford automobile, the defendant being in the back seat, the other man driving. The defendant opened the trunk of the car and permitted Officer Priest to examine it. In the trunk were approximately 50 tools, including a large sledge hammer, hand saws, crow bars, screwdrivers, tin snips, and cold chisels, together with a metal tool box. An unusually large cold chisel, a sledge hammer, a crow bar and a nail puller so found in the trunk of the automobile were identified in court by an employee of Builders Wholesale Supply as having been part of its stock of merchandise. The identifications were made by inventory and cost marks placed on the items by the witness and, in the case of the chisel, by his personal recollection of having attempted, unsuccessfully, to sell it to a customer on the day prior to the break-in. Other tools so found in the trunk of the automobile were of the same brands as those sold by Builders Wholesale Supply and were new but bore no identifying marks.

The ledger had no footprint on its cover when it was locked in the company's safe at closing time prior to the break-

in. The shoes worn by the defendant at the time of his arrest in Elizabethtown bore the same type of ridges on the sole as those observed in the shoe print on the cover of the ledger. In the opinion of an expert witness in the realm of footprint identification, based upon these markings and upon others made by scratches and cuts, the print on the ledger cover was made by the left shoe worn by the defendant at the time of his arrest. The ledger, the shoes and the above mentioned tools were introduced in evidence.

The defendant was not an employee of Builders Wholesale Supply and was not its regular customer.

The evidence for the defendant, who did not testify, tended to establish an alibi, being to the effect that he was in the company of his wife from noon until shortly after midnight on Saturday, 30 January 1971, and immediately thereafter entered into an all-night poker game, which he did not leave until after the break-in was discovered. Upon cross-examination, the defendant's wife testified that he customarily kept his tool box and work shoes in the trunk of his car and he was the individual who had the key for the car.

Attorney General Morgan and Associate Attorney Ricks for the State.

Sol G. Cherry, Public Defender, and James R. Nance, of Counsel, for defendant appellant.

LAKE, Justice.

[1, 2] "It is the general rule in this State that one found in the unexplained possession of recently stolen property is presumed to be the thief. This is a factual presumption and is strong or weak depending on circumstances—the time between the theft and the possession, the type of property involved, and its legitimate availability in the community." *State v. Raynes,* 272 N.C. 488, 158 S.E. 2d 351; *State v. Allison,* 265 N.C. 512, 144 S.E. 2d 578; Strong, N. C. Index, 2d, Larceny, § 5. To give rise to this presumption, it is not necessary that the stolen property be found actually in the hands of or on the person of the accused, it being sufficient if it was found in a container or place of deposit under his exclusive personal control. *State v. Foster,* 268 N.C. 480, 487, 151 S.E. 2d 62. When it is established that a store or warehouse has been broken into and

entered and that merchandise has been stolen therefrom, the discovery, soon after such theft of articles, so stolen, in the possession of the defendant raises a presumption that he is guilty both of the breaking and entering and of the larceny. *State v. Allison, supra.*

[3] The court so instructed the jury in the present case. The defendant assigns this as error. He contends that there was no sufficient evidence that the tools, identified as having been stolen from the place of business of Builders Wholesale Supply and as having been found in the tool box in the trunk of the car in which the defendant was sitting, were in the possession of the defendant. There is no merit in this contention. While the defendant was not the driver, Officer Priest testified, without objection, that the car was "Mr. Lewis' car." He further testified that the tools, identified by the employee of Builders Wholesale Supply as having been stolen from its place of business, were found by him in the tool box in the trunk of the car. On cross-examination, the defendant's wife testified that the defendant kept his tool box in the trunk of the car and that he was the individual who "had the key for the car." Officer Priest testified that the defendant gave permission for the opening of the trunk of the car and actually opened it, whereupon the tools and tool box were observed by the officer. The defendant's wife testified that the driver was the defendant's friend. The evidence is ample to support a finding that the tools were in the possession of the defendant when discovered by Officer Priest. His unexplained possession of the stolen merchandise raised the presumption that the defendant was guilty both of the breaking and entering and of the larceny of the tools.

The defendant does not contend that the presence of the tools in the trunk of the car was discovered in the course of an unlawful search. The testimony of Officer Priest that the defendant not only consented to the search but actually opened the trunk, himself, is uncontradicted. The record does not disclose that the defendant was under arrest at the time.

[4, 5] The defendant contends that the court erred in failing to strike the testimony of Officer Priest to the effect that a representative of Builders Wholesale Supply came to Elizabethtown and identified the tools in question and that, thereupon, Officer Priest delivered the tools to Sergeant Frye of the Cum-

berland County Sheriff's Department. He contends that this was incompetent as hearsay. There was no objection to the question which elicited this testimony. To some extent, the answer was not responsive to the question but there was no motion to strike until after a further question was propounded to the witness. The court overruled the motion to strike, saying, "It comes too late." In this there was no error. An objection to evidence not taken in apt time is waived. *State v. Hunt*, 223 N.C. 173, 25 S.E. 2d 598; Strong, N. C. Index, 2d, Trial, § 15; Stansbury, North Carolina Evidence, 2d Ed, § 27. Furthermore, had there been error in this ruling it would have been harmless since, thereafter, without objection, the tools in question were positively identified by Witness Hardison, an employee of Builders Wholesale Supply, as having come from its stock of merchandise.

[6] Detective Sergeant Frye, an employee of the Cumberland County Sheriff's Department, testified, without objection, that following the defendant's arrest by Officer Priest, he observed the shoes worn by the defendant and could see that they were the same kind of shoes he was looking for in relation to the shoe print which he had observed on the ledger found near the rifled safe. He testified that he then asked the defendant for his shoes and the defendant gave them to him. The shoes so received from the defendant, having been identified by Sergeant Frye, and the ledger were admitted in evidence as exhibits of the State. Sergeant Frye then testified that he made a "visual comparison" between the shoes and the shoe print on the ledger. He was then asked, "What were your observations concerning [the ledger] and any comparison you made between the three items [the ledger and the shoes]?" Over objection, the witness testified, "From the best I can tell, it was the shoes I was looking for to the best of my knowledge." There was no error in the admission of this testimony. *State v. Warren*, 228 N.C. 22, 44 S.E. 2d 207. Had there been error, Sergeant Frye not being qualified as an expert in the identification of footprints, it would be harmless in view of the subsequent detailed testimony by Special Agent Jones of the State Bureau of Investigation, a qualified expert in that field. Mr. Jones testified in detail as to identifying marks upon the defendant's left shoe, in relation to the print on the ledger, and stated his opinion to the effect that this shoe made the print. His testimony was clearly competent under the test laid down in *State*

v. Palmer, 230 N.C. 205, 52 S.E. 2d 908, and applied in *State v. Pinyatello,* 272 N.C. 312, 158 S.E. 2d 596, the latter case having a striking similarity to the present one.

Obviously, there was ample evidence to require the submission to the jury of the question of the defendant's guilt on each of the charges. There was no error in the denial of his motions for judgment of nonsuit.

We have considered each of the other assignments of error by the defendant and find no merit therein. No useful purpose would be served by a detailed discussion of any of them.

The defendant does not assign as error the imposition of the sentence of life imprisonment on the charge of safecracking. We nevertheless observe that G.S. 14-89.1 provides that the punishment for this offense is "a sentence, in the discretion of the trial judge, of from ten years to life imprisonment in the State penitentiary." There was, therefore, no error of law in the imposition of the sentence to life imprisonment. The sentence having been lawfully imposed in the discretion of the trial judge, this Court has no authority to modify it. The trial judge in this, as in other criminal cases, has the opportunity to observe the defendant and to consider his former record of criminal convictions, if any, which the appellate court, being limited to the printed record before it, does not have. If the sentence imposed is unduly severe, the proper authorities from which to seek relief on that count is the Board of Paroles.

No error.

RUTH P. ROSS v. SEBORN PERRY

No. 74

(Filed 16 June 1972)

1. Brokers and Factors § 6— real estate broker — right to commission

A real estate broker, employed by the owner to sell or lease designated property, is entitled to his commission when he negotiates a sale or lease within the terms of his authority; and his right is not affected if the principal voluntarily cancels the contract which the broker negotiated.

2. Brokers and Factors § 6— lease of property — realtor's commission — condemnation of the property

Where an agreement entered into by the lessor of hotel property and a realtor provided that, as compensation for the realtor's services in procuring a 50-year lease of the property, the lessor would pay the realtor "5% of the rent received from" the lessee, that the lessor was to send the realtor a check for his 5% within five to fifteen days from the time the lessor received the lessee's check, and that the lessee "will continue to do this as long as the lease is in force. No longer," it was *held* that the lessor's obligation to pay the 5% commission terminated when a municipal redevelopment commission condemned and took possession of the property.

3. Eminent Domain § 5— condemnation of rental property — value — rent or income

When rental property is taken for a public use, the owner is entitled to recover only the fair market value of the property; in determining its fair market value, the rental value, or income, of the property is merely one of the factors to be considered.

4. Eminent Domain § 16— condemnation of rental property — award — rights of lessee

When condemned land is subject to a leasehold estate the tenant is entitled to share in the award since the value of his interest is a part of the value of the fee; ordinarily the value of the lease is the difference between the rental value of the unexpired term and the rent reserved in the lease.

5. Eminant Domain §§ 5, 16— condemnation of rental property — award — rent

When the owner of the fee is required to divide a condemnation award with the owner of the leasehold, he is not receiving rent from the lease but is, in effect, paying a penalty for it.

6. Brokers and Factors § 6; Eminent Domain § 5— condemnation of rental property — unaccrued rents — realtor's commissions

Where, as compensation for the procurement of a 50-year lease of hotel property, a realtor was to receive a commission each month as long as the lease continued and rents were collected from the tenant, the realtor cannot base a claim for commissions on an award to the owner for condemnation of the property by a municipal redevelopment commission, since the award was not a payment of unaccrued rentals but was the fair market value of the hotel property in cash.

APPEAL by plaintiff pursuant to G.S. 7A-30(2) (1969) from the decision of the Court of Appeals, reported in 12 N.C. App. 47, 182 S.E. 2d 655 (1971), affirming the judgment of *Exum, J.*, at the 26 October 1970 Session of GUILFORD. This appeal was docketed and argued at the Fall Term as No. 119.

Action to recover a brokerage commission.

Without a jury Judge Exum heard this case upon the admissions and stipulations of the parties, documentary evidence, and the testimony of defendant, who was examined by plaintiff as an adverse witness. All the evidence supports the facts found by Judge Exum and stated in his judgment. These findings are set out in full in the opinion of the Court of Appeals, to which reference is made. The pertinent facts are summarized as follows:

In 1943 defendant and his wife, who is now dead, owned the property known as the Elwood Hotel in High Point. A part of the building was located on the right-of-way of the Southern Railway Company. As defendant's broker, on 31 July 1943 plaintiff's husband, W. F. Ross, a realtor, negotiated a fifty-year lease of the property to Arthur M. Lee. The stipulated rental was $18,000.00 annually for ten years from 1 September 1943; $20,000.00 for the next ten years; and $25,000.00 for the following thirty years. Lee's lease was made subject to a lease from the Railway Company to defendant.

After the execution of the lease to Lee, Ross submitted to defendant a proposed contract for the payment of his commissions, which defendant rejected. *Inter alia,* the proposal contained a provision which would have permitted defendant at any time to discharge his obligation to Ross in connection with the lease by paying him in cash 2½ percent of the unaccrued rental stipulated therein. The agreement reached between the two was contained in the body of the following letter, dated 20 September 1943, from defendant to Ross:

"Having read carefully the contract you gave me concerning the commissions and rent of the Elwood Property will say that I do not care to enter into any more contract than the one we have—i.e., that I am to pay you 5% of the rent received from Arthur Lea (sic) of William Street NYC, for acting as my agent in making this lease.

"Your check for five percent will be sent to you within five to fifteen days from the time I receive Mr. Lea's (sic) check—and I will continue to do this as long as the lease is in force. No longer; and there are no other obligations on either of us, regarding this particular matter."

Ross is now dead, and plaintiff has succeeded to all his rights under the foregoing agreement. Defendant has paid to Ross and to plaintiff five percent of all rents which accrued between 1 September 1943 and 1 February 1967. On the latter date the Redevelopment Commission of the City of High Point condemned the Elwood Hotel property. The tenant under the lease gave up the occupancy, and the hotel was subsequently demolished. After 1 February 1967 defendant received no rent from the property. The total fair market value of the property was assessed in the Superior Court at $942,500.00. Of this sum defendant received 71% for his reversionary interest in the land; the tenant, 29% for his leasehold estate.

After 1 February 1967 defendant discontinued his monthly payments of $104.16 and disclaimed any further obligation to plaintiff. On 11 March 1969, alleging that she was entitled to recover "the present cash value of 5% of all unpaid rentals provided for in the lease between defendant and Lee," plaintiff instituted this action. Her prayer for relief was that she recover commissions at the rate of $104.16 per month from 1 February 1967 through 31 August 1993 ($33,217.04).

Judge Exum concluded as a matter of law: (1) The continued existence of the lease and the receipt of rentals under it were conditions precedent to defendant's obligation to pay commissions to plaintiff. (2) The condemnation of the hotel property terminated both the lease and plaintiff's right to receive commissions from defendant. (3) No part of the award of $942,500.00 was a payment of rentals under the lease. He entered judgment decreeing that defendant's obligation to plaintiff terminated as of 1 February 1967. Plaintiff appealed to the Court of Appeals, assigning as error the entry of judgment in favor of defendant. The Court of Appeals affirmed the judgment, one judge dissenting, and plaintiff appealed as a matter of right.

McLendon, Brim, Brooks, Pierce & Daniels and E. Norman Graham and C. Allen Foster for plaintiff appellant.

Jordan, Wright, Nichols, Caffrey & Hill and William L. Stocks for defendant appellee.

SHARP, Justice.

The question presented is: What effect did the unanticipated condemnation of defendant's property have upon the right of Ross' successor to continue to receive the commissions stipulated in defendant's letter of 20 September 1943 to Ross?

[1] The rule is that a real estate broker, employed by the owner to sell or lease designated property, is entitled to his commission when he negotiates a sale or lease within the terms of his authority; and his right is not affected if the principal voluntarily cancels the contract which the broker negotiated. *Bonn v. Summers,* 249 N.C. 357, 106 S.E. 2d 470 (1958); *House v. Abell,* 182 N.C. 619, 109 S.E. 877 (1921). Relying upon this rule, plaintiff contends that she is entitled to the commissions for which she has sued because "defendant, as lessor, and his lessee entered into a mutual cancellation of the lease." This contention, however, is without merit and finds no support in the record.

[2] The lease was terminated on 1 February 1967 when the City of High Point took the hotel property in condemnation proceedings. While it might reasonably be argued that all parties contemplated the possibility that the lease might terminate before its expiration date because of the hotel's encroachment on the Railroad right-of-way, plaintiff concedes that condemnation by the City was a contingency which neither defendant nor Ross envisioned on 20 September 1943. Notwithstanding, their agreement on that date specifically provided that defendant would pay Ross commissions only as long as the lease continued and rents were collected from the tenant.

The contract between defendant and Ross is too clear to permit interpretation. "If there be no dispute in respect to the terms of the contract, and they are plain and unambiguous, there is no room for construction. The contract is to be interpreted as written." *Jones v. Realty Co.,* 226 N.C. 303, 305, 37 S.E. 2d 906, 907 (1946). *Accord, Barham v. Davenport,* 247 N.C. 575, 101 S.E. 2d 367 (1957).

Defendant's agreement was not an unconditional promise to pay monthly commissions for fifty years on the rent stipulated in the lease. Ross' right to commissions was expressly conditioned upon (1) the tenant's payment of rent and (2) the continuation of the lease "in force." Therefore, in the absence

of a voluntary cancellation of the lease by defendant, or some arbitrary, capricious, unreasonable or wrongful act on his part, plaintiff's right to commissions ended with the termination of the lease on 1 February 1967. *See Jones v. Realty Co., supra; Segal Brokerage Co. v. Lloyd L. Hughes, Inc.*, 96 F. 2d 208 (9th Cir. 1938); *Dallas Dome Wyoming Oil Fields Co. v. Brooder*, 55 Wyo. 109, 97 P. 2d 311 (1940); *Lind v. Huene*, 205 Cal. 569, 271 P. 1087 (1928). See annot., 74 A.L.R. 2d 437 §§ 12, 19(a) (1960); 12 Am. Jur. 2d *Brokers* §§ 195, 199 (1964). Certainly, no voluntary or wrongful act by defendant put an end to the lease; defendant neither instigated the condemnation nor could he have prevented it.

Lest it be thought they were overlooked, we mention certain additional contentions and assertions made by plaintiff. Before doing so, however, we observe that they are without merit. Plaintiff contends that in the division of the compensation award the lessee received the value of his lease less the rents defendant would have received for the remaining 26 years and 7 months of the lease, and "thus the lease was 'in force' between the parties to the lease." Plaintiff asserts that defendant "not only received the benefit of the remaining rental payments due him under the lease but he received the benefit of the remaining 26½ years of rent telescoped into one lump sum." On this assumption she says she asks "only for the commuted value, and in a case where the lessor has received full payment for rents due to the end of the lease."

Plaintiff's assumption finds no support in the record or the law. The jury's verdict was a sum of money which could only be construed to represent the full and fair market value of the hotel property as of 1 February 1967.

[3] When an entire tract is taken for public use the owner is entitled to recover only the fair market value of the property. His award is the purchase price which the condemnor pays for the fee simple title to the land. In determining its fair market value the rental value, or income, of the property is merely one of the factors to be considered. Income from the property is material only insofar as it throws light upon its market value.

"When rental property is condemned the owner may not recover for lost rents, but rental value of property is competent upon the question of the fair market value of the property at

the time of the taking." *Kirkman v. Highway Commission,* 257 N.C. 428, 432, 126 S.E. 2d 107, 110 (1962). See 27 Am. Jur. 2d *Eminent Domain* § 433 (1966).

[4, 5] When condemned land is subject to a leasehold estate the tenant is entitled to share in the award since the value of his interest is a part of the value of the fee. See 27 Am. Jur. 2d *Eminent Domain* § 250 (1966); 29A C.J.S. *Eminent Domain* § 198 (1965). "As a consequence, the owner is required to account to his lessee for the value of his lease." *Durham v. Realty Co.,* 270 N.C. 631, 635, 155 S.E. 2d 231, 234 (1967). Ordinarily the value of a lease is the difference between the rental value of the unexpired term and the rent reserved in the lease—29A C.J.S. *Eminent Domain* § 143(b) (1965). If a forfeited lease is worth nothing more than the stipulated rent, the lessee has sustained no damage. He suffers a loss only when his lease is worth more than the rent he pays, that is, only when his lease is a bargain. Thus, when the owner of the fee is required to divide a compensation award with the owner of the leasehold he is not receiving rent from the lease but is, in effect, paying a penalty for it.

[6] The record before us contains no explanation, or even a suggestion, of the method by which defendant and his lessee arrived at the value of the lease or the apportionment of the award between them. Nor does the record provide any clue as to what influence the lease may have had upon the evaluation of defendant's property in the condemnation proceeding. Whether the lease was in evidence, whether the tenant participated in the trial, whether stipulations were made, we do not know. However, in no view of this case can plaintiff base a claim for commissions upon defendant's award. It was not a payment of unaccrued rentals; it was the fair market value of the hotel property in cash, capital which had to be invested to earn income in lieu of the forfeited rents. Finally, defendant had agreed to pay commissions only as long as the lease remained in force and upon the rent paid by the tenant.

The decision of the Court of Appeals is

Affirmed.

MACON GOWER, JR. v. AETNA INSURANCE COMPANY

No. 104

(Filed 16 June 1972)

1. **Courts § 2; Process § 2— determination of jurisdiction — appeal — collateral attack**

When a defendant challenges the authority of a court on the ground it has not acquired personal jurisdiction, the court's determination of its own jurisdiction may be questioned only by appeal and not collaterally.

2. **Courts § 2; Rules of Civil Procedure § 41— dismissal without barring litigation on merits — determination of authority — appeal — collateral attack.**

A judgment by a court determining its statutory authority to dismiss an action in such way as not to bar further litigation on the merits therein may be questioned only by appeal and not collaterally.

3. **Judgments § 36; Rules of Civil Procedure § 41— dismissal of action — extension of statute of limitations — failure to appeal — estoppel**

Where defendant insurer failed to seek appellate review of a judgment which dismissed without prejudice plaintiff's former action on a fire policy on account of defective service of process and granted plaintiff the right to commence a new action after expiration of the one-year limitation period specified in the policy, the insurer is estopped to attack in plaintiff's new action that portion of the judgment in the former action which granted plaintiff the right to commence a new action after the one-year limitation period had expired.

Justice LAKE dissenting.

ON *certiorari* to review decision of the Court of Appeals, which affirmed the order denying defendant's motion for summary judgment entered by *Bone, E. J.*, at July 12, 1971 Civil Session of WAKE Superior Court.

In the present action, the complaint was filed and the summons was issued on November 5, 1970. Plaintiff alleged loss by fire on June 7, 1969, of merchandise and other property insured under a described policy issued to him by defendant; that he gave defendant notice of his loss "immediately after June 7, 1969"; and that defendant denied liability under the policy and refused to pay any part of plaintiff's loss. In an answer filed December 2, 1970, defendant admitted its refusal to pay any part of plaintiff's loss and denied liability under the policy. Defendant alleged, as a "Fifth Defense," plaintiff's failure to commence this action within twelve months next after inception of the loss.

The hearing below was on defendant's motion for summary judgment. Judge Bone's order recites that "[n]o affidavits were offered by either side and no oral evidence was offered by either side" and that motion was heard "upon the undisputed facts" enumerated in his order. For the full provisions of Judge Bone's order, reference is made to the opinion of the Court of Appeals. 13 N.C. App. 368, 185 S.E. 2d 722. The facts stated therein pertinent to decision on this appeal are narrated below.

In the prior action by plaintiff against defendant upon the same claim as that involved in the present action, the complaint was filed and the summons was issued on April 7, 1970. On May 13, 1970, "judgment by default and inquiry" was rendered by the clerk in favor of plaintiff and against defendant. On May 15, 1970, the clerk entered an order setting aside the default judgment; also, on May 15, 1970, defendant filed an answer in which it alleged, as one of its defenses, "that the court lacked jurisdiction over the person of the defendant and the process and service of same in said action [were] insufficient."

On October 15, 1970, after a hearing on a motion by defendant "for a dismissal of said former action, on the ground that the court lacked jurisdiction over the person of the defendant and that the process and service of process were insufficient," Judge Hall signed a judgment containing the following provision: "That the purported service of process in this action be, and the same is hereby, quashed, this action being discontinued and this action is hereby dismissed pursuant to Rule 41(b), without prejudice; provided, however, that any new action by plaintiff may be commenced within thirty days of the date of this order."

The insurance policy issued by defendant to plaintiff is a standard fire insurance policy issued pursuant to the provisions (then in effect) of G.S. 58-176. It contains the following required provision: "Suit: No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss." (Note: Effective January 1, 1972, as to fire insurance policies issued thereafter, Chapter 476, Session Laws of 1971, amended G.S. 58-176(c) by substituting "three years" for "twelve months" in line 161 of the Standard Fire Policy.)

Plaintiff commenced the present action on November 5, 1970, which is more than twelve months after June 7, 1969, the date of inception of the loss, but less than thirty days from October 15, 1970, the date of Judge Hall's judgment.

Upon the foregoing facts, Judge Bone "ORDERED, ADJUDGED AND DECREED that the said motion of defendant for a summary judgment in its favor dismissing this action be, and the same is hereby, DENIED." Defendant excepted.

The Court of Appeals allowed defendant's application for *certiorari*, and, after hearing, affirmed Judge Bone's order. On March 7, 1972, this Court allowed defendant's petition for *certiorari*. 280 N.C. 721, 186 S.E. 2d 923.

Earle R. Purser and Dan Lynn for plaintiff appellee.

Young, Moore & Henderson, by J. C. Moore and Joseph W. Yates, III, for defendant appellant.

BOBBITT, Chief Justice.

Since neither party appealed, the judgment entered by Judge Hall in plaintiff's former action against defendant on the same claim became the law of the case and established the respective rights of the parties to that action. This appeal is from the order of Judge Bone. Judge Hall's judgment in the former action was not reviewable and was not reviewed by Judge Bone in this action. Since plaintiff had commenced the present action within the time permitted by Judge Hall's judgment, Judge Bone simply denied defendant's motion for summary judgment.

The record on this appeal does not disclose the factual basis upon which Judge Hall quashed "the purported service of process" and "discontinued" and "dismissed" the action. The record before us does not contain the summons in the former action or any evidence or stipulation as to when and under what circumstances "the purported service of process" was made. It does appear that the clerk entered a "judgment by default and inquiry" in the former action on May 13, 1970, which he set aside by further order on May 15, 1970. It does not appear whether the "judgment by default and inquiry" entered by the clerk on May 13, 1970, was vacated by him on his own motion, on motion of defendant or by consent. Whether

Judge Hall's ruling was correct or erroneous, plaintiff is bound by that portion of the judgment which discontinued and dismissed the former action.

In plaintiff's former action, in its answer to the complaint therein, defendant alleged, as *one* of its defenses, "that the court lacked jurisdiction over the person of the defendant and the process and service of same in said action [were] insufficient." This answer was filed on May 15, 1970, which was within twelve months next after the inception of the loss. This plea of lack of personal jurisdiction was heard on October 15, 1970, and decided in defendant's favor. Under these circumstances, the question arose: In dismissing the action, did Judge Hall have discretionary authority under the last sentence of Rule 41(b) to authorize plaintiff to commence a new action?

[1, 2] By dismissing plaintiff's former action on account of defective service of process, Judge Hall in effect determined that the court, because it lacked personal jurisdiction of defendant, was unable to proceed to the merits of the case. However, in the very same judgment he also determined that Rule 41(b) gave him authority to extend the one-year limitation period and thereby give plaintiff a chance to get to the merits. Defendant contends that the second portion of the judgment is void and should be disregarded. It seeks to accept the portion of the judgment in its favor and to reject the portion thereof in plaintiff's favor. We hold that just as plaintiff is bound by his failure to appeal, so must defendant be bound by its failure to appeal. When a defendant challenges the authority of a court on the ground it has not acquired personal jurisdiction, the court's determination of its own jurisdiction may be questioned only by appeal and not collaterally. *Baldwin v. Traveling Men's Assn.*, 283 U.S. 522, 75 L.Ed. 1244, 51 S.Ct. 517 (1931); Phillips, 1970 Supplement § 939.20, to 1 McIntosh, North Carolina Practice and Procedure (2d ed.). A necessary corollary is that a judgment by a court determining its statutory authority to dismiss an action in such a way as not to bar further litigation on the merits therein may be questioned only by appeal and not collaterally. In both instances the court is specifically determining the extent of its powers. Absent appeal, all provisions of Judge Hall's judgment are determinative as between plaintiff and defendant.

Treating the provisions of Rule 4(e) and the last sentence of Rule 41(b) *in pari materia,* the Court of Appeals held that Judge Hall was authorized, when dismissing plaintiff's former action, to specify that the dismissal was without prejudice and to specify in his order "that a new action based on the same claim may be commenced within one year or less after such dismissal." Reasons tending to support this view are set forth forcefully in the opinion of Chief Judge Mallard.

On this appeal, we find it unnecessary to approve or disapprove the decision of the Court of Appeals with reference to the authority of Judge Hall under the last sentence of Rule 41(b) to extend the time within which an action to recover on the insurance contract may be brought. On this appeal, it is unnecessary to attempt to reconcile the apparent conflict between Rule 4(e) and the last sentence of Rule 41(b). Legislative clarification seems desirable.

[3] On this appeal, we hold that defendant, having failed to seek appellate review, is estopped to attack in the present action that portion of Judge Hall's judgment which granted plaintiff the right to commence a new action within thirty days.

Although based on a different ground, the decision of the Court of Appeals, which affirmed Judge Bone's order, is affirmed.

Affirmed.

Justice LAKE dissenting.

The loss by fire occurred 7 June 1969. The policy issued by the defendant, in the form prescribed by G.S. 58-176, provides that no suit on the policy shall be sustainable in any court of law unless commenced within twelve months next after inception of the loss. The former suit was instituted 7 April 1970. It was dismissed on the ground that the court lacked jurisdiction over the person of the defendant due to defective service of process. In the judgment dismissing the former action for that reason, Judge Hall undertook to allow the plaintiff to commence a new action within thirty days from the date of his judgment, which was 15 October 1970. Within such thirty days, but more than a year after the loss by fire, the plaintiff brought the present action.

It is my view that Judge Hall could not, by his judgment, alter the terms of the contract between the parties so as to enlarge the time for the bringing of a suit on the policy, and certainly could not do so in a proceeding in which the court, over which he was presiding, had no jurisdiction over the person of the defendant. The only thing which Judge Hall could do in that situation was to dismiss the action then before him. I, therefore, dissent from the majority opinion.

MILDRED H. YOUNTS v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

No. 96

(Filed 16 June 1972)

1. **Rules of Civil Procedure § 50— motion for directed verdict — consideration of evidence**

On a motion for a directed verdict by the defendant, the court must consider 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. G.S. 1A-1, Rule 50(a).

2. **Insurance § 106— automobile liability policy — action by injured third party — burden of proof**

In an action by an injured person to recover under an owner's automobile liability policy issued to the negligent driver, the injured person has the burden of alleging and proving that the negligent driver was insured under such policy at the time of the accident.

3. **Insurance § 80— owner of automobile**

Under the Motor Vehicle Responsibility Act of 1953, the "owner" of a vehicle includes the holder of title and a mortgagor, conditional vendee or lessee having the right of purchase and the right of possession.

4. **Evidence § 31— best evidence rule**

Ordinarily, a document is the best evidence of its own contents, and before parol testimony is competent to prove the contents, the party offering such testimony must first account satisfactorily for his failure to produce the original, such as proof of loss or destruction of the original.

5. **Evidence § 31— best evidence rule — contents of automobile title certificate**

The trial court properly excluded parol testimony as to the contents of an automobile title certificate where there was no evidence that the title certificate had been lost or destroyed, the certificate itself being the best evidence of its contents.

6. Insurance § 106— automobile owner's liability policy — action by injured third party — insured not owner of the automobile

The trial court properly allowed defendant insurer's motion for directed verdict in an action by an injured third party to recover under an owner's automobile liability policy issued to the negligent driver, against whom plaintiff had previously obtained a judgment, where the evidence showed that on the date the accident occurred the registered title holder of the automobile in question was a person other than the insured, and there was no attempt to show that the registered title holder had transferred title in the manner prescribed by G.S. 20-72(b), or that the lienholder which purportedly transferred title to the insured had foreclosed its lien or complied with G.S. 20-77 in order to procure a new title certificate.

APPEAL by plaintiff pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals affirming the judgment of *Beal, S.J.*, at the 4 January 1971 Session of RANDOLPH Superior Court, reported in 13 N.C. App. 426, 185 S.E. 2d 730 (1972).

On 1 June 1962 defendant State Farm Mutual Automobile Insurance Company issued an owner's automobile liability policy to Donald Joe Myers covering a 1953 Oldsmobile. Thereafter, on 3 November 1962, while driving the 1953 Oldsmobile, Myers was involved in an accident with the plaintiff Mildred H. Younts. Plaintiff subsequently instituted suit against Myers for injuries sustained in this accident and recovered a default judgment against him in the amount of $6,500. In January 1967 plaintiff instituted this suit against State Farm to recover the sum of $6,500, the amount of the default judgment against Myers, alleging that the policy of 1 June 1962 was in force on the date of the accident and that her injuries were caused by the negligence of Myers.

Defendant in its answer admitted the issuance of the policy to Myers, but denied that Myers was the owner of the 1953 Oldsmobile or had any insurable interest therein, and further alleged that the policy in question had been canceled some months before the accident.

Plaintiff sought to introduce the testimony of Billy Joe Wright to the effect that he at one time owned a 1953 Oldsmobile, serial No. 1546464; that he sold this automobile and executed a North Carolina Department of Motor Vehicles title certificate for it to Arthur Lee Charles; that the Lexington State Bank had a lien against the automobile; and that in May or June of 1962 he saw Donald Joe Myers sign an application for a title certificate for this car and saw a representative of

the Lextington State Bank sign a transfer of title for this car to Myers. The trial judge excluded this evidence.

At the close of plaintiff's evidence, defendant's motion for a directed verdict was allowed.

Plaintiff appealed to the Court of Appeals. That court, in an opinion written by Judge Brock, concurred in by Judge Graham, affirmed. Judge Vaughn dissented.

John Randolph Ingram for plaintiff appellant.

Edwin T. Pullen for defendant appellee.

MOORE, Justice.

Plaintiff contends the trial court erred in granting defendant's motion for a directed verdict at the close of plaintiff's evidence.

[1] On a motion for a directed verdict by the defendant, the court must consider 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. G.S. 1A-1, Rule 50(a), Rules of Civil Procedure; *Adler v. Insurance Co.*, 280 N.C. 146, 185 S.E. 2d 144 (1971); *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971); 5A Moore's Federal Practice § 50.02[1] (2d Ed. 1969).

The motion presents substantially the same question for sufficiency as did a motion for an involuntary nonsuit under former G.S. 1-183. As to the rules which governed the motion for an involuntary nonsuit under G.S. 1-183, see *Bowen v. Gardner*, 275 N.C. 363, 168 S.E. 2d 47 (1969). See also Comment by Phillips in 1969 Pocket Part to McIntosh, North Carolina Practice and Procedure § 1488.15 (2d Ed. 1969).

[2] The insurance policy on which plaintiff seeks to recover is an owner's liability policy covering a 1953 Oldsmobile, serial No. R546464, issued by defendant to Myers as owner on 1 June 1962. G.S. 20-279.21(a)(b). In order for the plaintiff to recover on this policy, the burden is on plaintiff to allege and prove that Myers was insured under this policy on 3 November 1962, the date of the accident in which plaintiff was injured. *Brevard v. Insurance Co.*, 262 N.C. 458, 137 S.E. 2d 837 (1964); 4 Strong, N. C. Index 2d, Insurance § 106. Defendant is liable

to the plaintiff only if its liability accrues under the provisions set out in the contract of insurance between defendant and its insured, Myers. *Kirk v. Insurance Co.*, 254 N.C. 651, 119 S.E. 2d 645 (1961). The policy provides that State Farm shall " . . . pay on behalf of the insured all sums which the insured shall become legally obligated to pay. . . arising out of the *ownership,* maintenance or use of the *owned* automobile. . . . " (Emphasis added.) In the absence of any provision in the Financial Responsibility Act broadening the liability of the insurer, such liability must be measured by the terms of the policy as written. In *Underwood v. Liability Co.*, 258 N.C. 211, 218, 128 S.E. 2d 577, 582 (1962), this Court quotes with approval:

> " 'As is said in *Byrd v. American Guarantee & Liability Ins. Co., supra,* 180 F. 2d 249, "There is no insurance separate and distinct from the ownership of the car." This is so because an owner's motor vehicle liability policy is a contract between the insurance company and the owner.' "

Accord: Howell v. Indemnity Co., 237 N.C. 227, 74 S.E. 2d 610 (1953).

The question presented then is: Who, within the purview of the Motor Vehicle Financial Responsibility Act of 1953 (Chapter 20, Article 9A), was the owner of the 1953 Oldsmobile on 3 November 1962?

[3] G.S. 20-279.1(9) defines "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 the right of purchase and the right of possession. See *Insurance Co. v. Hayes,* 276 N.C. 620, 174 S.E. 2d 511 (1970).

The evidence in this case shows that on the date the accident occurred, 3 November 1962, the registered title holder of the 1953 Oldsmobile in question was Arthur Lee Charles, not

the insured Myers. In order to transfer title, G.S. 20-72(b) as amended by the General Assembly in 1961 provided that the owner shall " . . . endorse an assignment and warranty of title, including in such endorsement the name and address of the transferee and the date of transfer, in form approved by the Department upon the reverse side of the certificate of title or execute an assignment and warranty of title of such vehicle and a statement of all liens or encumbrances thereon, which statement shall be verified under oath by the owner, who shall deliver the certificate of title to the purchaser or transferee at the time of delivering the vehicle. . . . Transfer of ownership in a vehicle by an owner is not effective until the provisions of this subsection have been complied with."

In *Insurance Co. v. Insurance Co.*, 276 N.C. 243, 172 S.E. 2d 55 (1970), Justice Huskins, in construing G.S. 20-72(b), said:

> "We hold therefore that after 1 July 1961, the effective date of the amendments, no title passed to the purchaser of a motor vehicle until (1) the certificate of title has been assigned by the vendor, (2) delivered to the vendee or his agent, and (3) application made for a new certificate of title. This accords with prior decisions in *Bank v. Motor Co., supra* [264 N.C. 568, 142 S.E. 2d 166], and *Credit Co. v. Norwood, supra* [257 N.C. 87, 125 S.E. 2d 369]." (The accident in the present case occurred 3 November 1962.)

See *Insurance Co. v. Insurance Co.*, 279 N.C. 240, 182 S.E. 2d 571 (1971), and *Insurance Co. v. Hayes, supra,* for cases construing this statute subsequent to the 1963 amendment.

In this case, there is no evidence that Myers was the holder of a legal title to the Oldsmobile in question or that he was a mortgagor, conditional vendee, or lessee, having the right of purchase and the right of possession. *Insurance Co. v. Hayes, supra.* The only evidence offered by plaintiff concerning the ownership of the 1953 Oldsmobile was the testimony of one Billy Joe Wright. Wright testified that he had been the owner of a 1953 Oldsmobile, serial No. 1546464. (It is noted that the insurance policy in question described the insured automobile as a 1953 Oldsmobile, serial No. R546464.) Wright undertook to testify that he sold this automobile and transferred the title to Charles; that during the latter part of May 1962 he

saw Myers sign on the Charles title certificate a purchaser application for a new certificate of title to that vehicle; and that he also saw a representative of the Lexington State Bank sign this title certificate to Myers. Both the application and the title certificate were signed before a notary public. Wright further undertook to testify that his sale of the automobile to Charles had been financed by the Lexington State Bank and that when Charles failed to pay the bank he (Wright) paid the note and the bank transferred title to Myers. Wright further testified that he took a personal lien on the car, the bank gave him the title certificate which he gave to Myers so that Myers could get his insurance, and that was the last he ever saw of this certificate. The court sustained defendant's objection to Wright's testimony concerning the title certificate. Plaintiff assigns this as error.

[4, 5] Neither Myers nor his wife testified concerning the title to the car although the attorney for the plaintiff stipulated at a pretrial conference that both were available and would testify. Ordinarily, a document is the best evidence of its own contents, and before parol testimony is competent to prove the contents the party offering such testimony must first account satisfactorily for his failure to produce the original—such as, proof of the loss or destruction of the original. *Orr v. Twiggs,* 210 N.C. 578, 187 S.E. 791 (1936); *Dumas v. Powell,* 14 N.C. 103 (1831); 3 Strong, N. C. Index 2d, Evidence § 31; Stansbury, N. C. Evidence §§ 190-192 (2d Ed. 1963). Until plaintiff offered some testimony to the effect that the title certificate in this case had been lost or destroyed, the certificate itself was the best evidence of its contents, and, in the absence of such testimony, the parol testimony of the witness Wright as to its contents was properly excluded by the trial judge.

[6] There was no attempt to show that the registered title owner Charles had transferred title in the manner prescribed by G.S. 20-72(b) or that the Lexington State Bank, if it had a lien, had foreclosed this lien or complied with G.S. 20-77 in order to procure a new title certificate. Under these circumstances, Charles was still the owner of the vehicle on the date of the accident in question. *Insurance Co. v. Hayes, supra; Insurance Co. v. Insurance Co.,* 276 N.C. 243, 172 S.E. 2d 55 (1970). Since Myers was not the owner of the 1953 Oldsmobile at the time of the collision, Myers was not insured under the owner's policy

issued by the defendant to Myers on 1 June 1962. Therefore, plaintiff is not entitled to recover on this policy and the trial court correctly allowed defendant's motion for a directed verdict.

The decision of the Court of Appeals is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. LEONARD H. CUTSHALL

No. 53

(Filed 16 June 1972)

1. **Jury § 2— jurors drawn from another county — discretion of court**

Where there had been two prior trials and widespread publicity of this first degree murder case, the trial court acted within its discretion in allowing the State's motion that the jury be drawn from another county. G.S. 9-12.

2. **Jury § 5— jury selection**

The trial court in this first degree murder prosecution did not err in ordering that the jury be selected by the "whole panel" method.

3. **Criminal Law § 153— motion to set aside verdict — appeal pending**

The trial judge properly held that he was without jurisdiction to hear defendant's motion to set aside the verdict and for a new trial based upon the method of drawing and summoning jurors from another county which was made before the trial judge in his office after defendant had given notice of appeal and court had adjourned.

APPEAL by defendant from *Grist, J.*, September 27, 1971 Criminal Session, MADISON Superior Court.

The defendant, Leonard H. Cutshall, by bill of indictment, proper in form, was charged with the first degree murder of Richard Jack Reeves. The offense occurred in Madison County on January 30, 1970.

The defendant entered a plea of not guilty at his arraignment during the May 25, 1970 Criminal Session, Madison Superior Court. A jury was selected and empaneled. Both the State and the defendant introduced evidence. Before verdict, however, the presiding judge was advised that one of the jurors

had been approached about the case. He conducted a hearing, found facts, and based thereon, adjudged the defendant had tampered with a juror. Thereupon, he withdrew the juror from the panel, declared a mistrial, and continued the case for the term.

At the September 1970 Criminal Session, Judge McLean ordered a special venire from the adjoining County of Buncombe for the trial of the case. At the conclusion of the trial the jury returned a verdict finding the defendant guilty of murder in the first degree and recommended his punishment be imprisonment for life. From the verdict and judgment the defendant appealed.

This Court in an opinion reported in 278 N.C. 334, 180 S.E. 2d 745, reviewed the trial in detail, summarized the material evidence both for the State and the defendant, and ordered a new trial upon the ground the State was erroneously permitted to offer evidence impeaching the testimony of a defense witness on a collateral matter.

At the new trial the court, on the ground of widespread publicity, ordered a special venire from Avery County. The officers of Avery County, in the short time allowed, had difficulty in locating and serving the veniremen whose names were drawn from the jury box. When it appeared that the venire ordered might not be filled from the members summoned from Avery County, the court entered an additional writ directing a venire of twenty-five men be drawn from Mitchell County.

The court ordered that the selection of the jury be made in the manner approved by this Court in *State v. McNeil,* 277 N.C. 162, 176 S.E. 2d 732, and *State v. Perry,* 277 N.C. 174, 176 S.E. 2d 729. The twelve regular jurors were selected from the Avery County list. Four alternate jurors were selected from the Mitchell County venire. The alternates, however, were excused after the evidence and the court's charge. The alternates did not participate in the verdict.

The State's evidence at the trial now under review was essentially the same as the competent evidence offered at the previous trial and summarized in this Court's opinion on the first review.

The defendant's evidence was also essentially the same as that summarized in this Court's opinion, with this exception:

He offered the testimony of additional witnesses tending to support his alibi. The defendant did not testify in either trial.

After the argument and the charge, the court excused the alternate jurors and the twelve regulars (all from Avery County) returned into court a verdict finding the defendant guilty of murder in the first degree and recommended life imprisonment. From the judgment according to the jury's finding and recommendation, the defendant appealed, assigning errors.

Robert Morgan, Attorney General, by Edwin M. Speas, Jr., Associate Attorney, for the State.

Ronald W. Howell Attorney for defendant.

HIGGINS, Justice.

The Court is now reviewing a case in which the evidence has been heard by three juries. The first jury was discharged by the trial judge before verdict, upon a finding that the defendant had tampered with one of the jurors. At the next term a jury summoned from Buncombe County heard the evidence, returned a verdict finding the defendant guilty, and recommended his punishment be imprisonment for life. This Court granted a new trial because of error in permitting the State to impeach a defendant's witness by showing he had made contradictory statements on a collateral matter. This Court is now conducting its second review. The former opinion settled all except a few new questions which arose at the last trial.

The record of the case on appeal contains three hundred and seventy-five pages. The defendant entered three hundred and fifty-six exceptions and brings them here for review under forty-three assignments of error.

The evidence, in short summary, disclosed that about 11:30 p.m. on January 30, 1970, Blanche Gentry Cutshall, the divorced wife of the defendant Leonard H. Cutshall, had been to Greeneville, Tennessee, with her friend, the deceased Richard Jack Reeves. The two were riding in the Ford automobile owned by the deceased but being driven by the witness. The deceased was on the passenger side of the front seat. As the witness and the deceased approached the home of the deceased, the witness observed that the lights of an automobile had been following them for some distance. She stopped on the side of the road,

the following car (a 1964 black Oldsmobile) drove alongside, and the driver who was alone in the Oldsmobile fired a number of gunshots, killing Reeves instantly. The automobile sped away. The witness identified the defendant as the lone occupant of the Oldsmobile and the one who fired the fatal shots. The pathologist testified that death was caused by gunshot wounds. The corroborating evidence disclosed the defendant owned a 1964 black Oldsmobile and a repeating rifle of the caliber matching the bullets found in the Ford automobile and the empty shells found beside it which apparently were ejected as the shots were fired.

Only three persons were at the scene—the witness, the deceased, and the defendant. The witness gave evidence clearly identifying the accused as having fired the fatal shots. The defendant did not testify. He did, however, offer two or three additional witnesses not heard in the former trials whose evidence tended, albeit somewhat loosely, to corroborate his evidence of alibi.

Although many exceptions and assignments of error were entered, the defendant simplifies our task by the two concluding sentences from his lengthy brief. "If the evidence for the State is taken as true and all inconsistencies resolved in its favor, then there would obviously be enough evidence to go to the jury. The defendant does contend, however, that the errors herein above discussed with respect to the admission of the evidence, and the selection of the jury constitute prejudicial error and demand that the defendant be given a new trial."

[1, 2] Due to the prior trials and the widespread publicity, the court on motion of the State was justified in ordering the trial jury drawn from another county. G.S. 9-12. So the writ of *venire facias* to Avery County was within the sound discretion of the trial judge. *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123; *State v. Childs,* 269 N.C. 307, 152 S.E. 2d 453. The court ordered the "whole panel" method of selecting the jury. The defendant's objections thereto are not sustained. *State v. Atkinson,* 278 N.C. 168, 179 S.E. 2d 410; *State v. McNeil, supra; State v. Perry, supra.*

[3] The trial jury was selected, empaneled, heard the evidence, the argument, the court's charge, returned its verdict, and was discharged. The court imposed judgment, the defendant gave

notice of appeal, and the court adjourned. Thereafter, defense counsel attempted to raise some question with respect to the method of drawing and summoning the jurors from Avery County. The defense counsel filed affidavits and moved before the trial judge at his office in Charlotte that the verdict be set aside and a new trial be ordered. Judge Grist held, and we think properly so, that he was without jurisdiction to hear the motion. *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241; *State v. Grundler,* 251 N.C. 177, 111 S.E. 2d 1; *State v. Arthur,* 244 N.C. 586, 94 S.E. 2d 648; *State v. McLamb,* 208 N.C. 378, 180 S.E. 586.

We have examined the court's rulings on evidence and the charge to the jury. Nowhere do we find any ground which would justify another trial.

No error.

STATE OF NORTH CAROLINA v. BONNIE LEE DAYE

No. 42

(Filed 16 June 1972)

1. Criminal Law § 162— admission of evidence — assignment of error

An assignment of error to the admission of evidence must set out the evidence which defendant contends should not have been admitted. Supreme Court Rule 19(3).

2. Criminal Law § 162— waiver of objection

Defendant waived objection to questions asked by the solicitor by failing to object thereto.

3. Criminal Law § 88— cross-examination of defense witnesses — insulting or impertinent questions

While a solicitor may ask a defendant or his witness questions tending to discredit his testimony, no matter how disparaging the questions may be, the solicitor may not needlessly badger or humiliate a witness by asking insulting or impertinent questions which he knows will not elicit competent or relevant evidence.

4. Criminal Law § 88— scope of cross-examination — discretion of court

The trial judge, who sees and hears the witnesses and knows the background of the case, has wide discretion in controlling the scope of cross-examination.

5. Criminal Law § 128— mistrial — discretion of court

A motion for mistrial in cases less than capital is addressed to the trial judge's sound discretion, and his ruling thereon (without findings of fact) is not reviewable without a showing of gross abuse of discretion.

6. Criminal Law §§ 89, 169— cross-examination of defendant — acquaintance with other persons on trial calendar

In a prosecution for possession and sale of heroin, the trial court did not commit prejudicial error in permitting the solicitor to cross-examine defendant by reading from the trial calendar numerous names of persons charged with violating narcotic laws and asking defendant questions concerning his acquaintance and association with each of them, such evidence not being so material and prejudicial to defendant's rights in light of defendant's past record, his answers to the questions and the State's compelling eyewitness testimony that a different result would have likely ensued.

7. Criminal Law § 89— cross-examination of defendant — indictments for other crimes — nonretroactivity of new rule

The rule that a witness, including the defendant in a criminal case, may no longer be cross-examined for impeachment purposes 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 applies only to trials begun after 15 December 1971, the date of the decision of *State v. Williams*, 279 N.C. 663.

ON *Certiorari* to the North Carolina Court of Appeals to review its decision (13 N.C. App. 435) finding no error in the trial before *Hobgood, J.*, at 12 April 1971 Session of DURHAM Superior Court.

Defendant was charged in a bill of indictment with the felonious possession of heroin, and in a separate bill of indictment he was charged with the felonious sale of heroin. The charges, to which he entered pleas of not guilty, were consolidated for trial.

The State's evidence tended to show that on 16 February 1971 police officer S. H. Conant, while working as an "undercover agent" for the Narcotics Squad of the Durham Police Department, purchased 13 bindles of white powder from defendant. A chemist employed by the State Bureau of Investigation testified that the white powder contained heroin.

Defendant testified and denied that he had ever possessed or sold heroin to anyone and, particularly, that he had never sold heroin to Officer S. H. Conant. On direct examination

defendant testified that he had been convicted of numerous crimes.

Danny Gilbert Barbee, testifying for defendant, stated that he was, at that time, in jail awaiting trial on charges of possession and sale of narcotics. He stated that upon his arrest his bond was set at $10,000.00, and that thereafter Durham police officers had released him for the purpose of "setting up" Bonnie Lee Daye by putting dope in his house. Barbee was brought back to jail because he failed to "bust Bonnie Daye." Cross-examination of defendant and his witness will hereinafter be more fully considered.

The jury returned verdicts of guilty to both charges, and defendant appealed from judgment imposing prison sentences of five years on each charge, to run consecutively. We allowed defendant's petition for certiorari to the North Carolina Court of Appeals on 7 March 1972.

Attorney General Morgan, Deputy Attorney General Bullock, and Associate Attorney Conely for the State.

A. H. Borland and Ronald H. Ruis for defendant.

BRANCH, Justice.

Defendant's first assignment of error is that the trial court erred in allowing impeachment of defendant and defendant's witness by reference to the week's trial calendar on which the name of the witness appeared.

On direct examination defendant testified concerning numerous arrests and convictions resulting from violations of the liquor and motor vehicle laws. He stated that he had served time in federal prisons on three occasions, and in the State's prisons on two occasions. He further stated: "I have never messed with dope. Naw, Sir, I have never sold anybody any dope."

On cross-examination the Solicitor, *without objection*, read from the trial calendar numerous names of persons charged with violating narcotic laws, and questioned defendant concerning his acquaintance and association with each of them. One typical example of these exchanges is as follows:

Q. . . . Now, you know a young man "Tramp"?

A. Yes sir.

Q. What is his real name?

A. I don't know.

Q. Harry Gulledge, that sound familiar to you?

A. Naw.

Q. How far does he live from you?

A. About a block.

Q. Right down the way from you, right down a little old dirt path, isn't it, right on down from your house?

A. Oh, you can go down it.

Q. —right on down through the dirt path?

A. Uh huh.

Q. And how old is Tramp?

A. I don't know.

Q. He is about 21 or so, isn't he?

A. I don't know. I guess so, looks like he might have been like that.

Q. All these folks live right around you, right within a block of you, don't they?

A. That is right.

Q. Of course, you are aware that all of them too have been arrested this year for selling heroin, aren't you?

A. Yes sir.

Throughout this interrogation defendant did not admit that any of these persons worked for him or were associated with him in the handling of narcotics.

Defendant further stated that his means of livelihood for the past twelve months had been gambling. He admitted that several automobiles which he drove, and which were titled in other persons' names, belonged to him. It was only after the

Solicitor began to examine defendant as to his income tax that his counsel interposed objection. This objection was sustained, and thereafter defendant's counsel requested that the jury be excused. Defendant's counsel, in the absence of the jury, made a motion for mistrial based on the questions directed to defendant's having a retained lawyer and to defendant's income tax. The motion was denied.

[1, 2] Defendant's assignments of error are not in accord with our rules and decisions, in that they do not set out within the assignment the evidence which he contends should not have been admitted. North Carolina Supreme Court Rules of Practice 19(3); *State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561; *S. v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416. Furthermore, defendant failed to object to the questions relating to the trial calendar and thereby waived his objections. *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534; *State v. Sanders,* 276 N.C. 598, 174 S.E. 2d 489. However, we do not choose to dispose of this assignment of error because of failure to observe the rules of this Court.

[3-5] A Solicitor may ask a defendant or his witness questions tending to discredit their testimony, no matter how disparaging the question may be. Nevertheless, the Solicitor may not needlessly badger or humiliate such witnesses by asking insulting and impertinent questions which he knows will not elicit competent or relevant evidence. *State v. Wyatt,* 254 N.C. 220, 118 S.E. 2d 420; *State v. Phillips,* 240 N.C. 516, 82 S.E. 2d 762. It is well recognized, however, that the trial judge, who sees and hears the witnesses and knows the background of the case, has a wide discretion in controlling the scope of cross-examination. *State v. McPherson,* 276 N.C. 482, 172 S.E. 2d 50; *State v. Ross,* 275 N.C. 550, 169 S.E. 2d 875. Likewise, a motion for mistrial in cases less than capital is addressed to the trial judge's sound discretion, and his ruling thereon (without findings of fact) is not reviewable without a showing of gross abuse of discretion. *State v. Battle,* 267 N.C. 513, 148 S.E. 2d 599; *State v. Pfeifer,* 266 N.C. 790, 147 S.E. 2d 190; *State v. Birckhead,* 256 N.C. 494, 124 S.E. 2d 838.

[6] We are unable, from the cold record, to determine the impact upon the jury of the questions directed to defendant concerning people whose names appeared on the trial calendar. Its force is made very questionable by the very fact that it did not stir the defendant's experienced trial lawyer to interpose ob-

jection. In light of defendant's past record, defendant's answers and the State's compelling eyewitness testimony, we do not think that the evidence towards which this assignment of error was aimed was so material and prejudicial to defendant's rights that a different result would have likely ensued. *State v. Swaney,* 277 N.C. 602, 178 S.E. 2d 399; *State v. Brinson,* 277 N.C. 286, 177 S.E. 2d 398; *State v. Sanders, supra.* Certainly, this record does not disclose that the trial judge's ruling or failure to act *ex mero motu* constituted an abuse of his discretion.

For reasons stated, this assignment of error is overruled.

[7] Defendant next contends that the impeachment of defendant and his only witness by questions showing prior arrests and indictments for criminal offenses by each of them, constituted prejudicial error.

In this connection we note that defendant abandoned this assignment of error in the Court of Appeals in light of the weight of authority contrary to his contention. However, on 15 December 1971 this Court handed down the opinion in the case of *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174, which, *inter alia,* states:

> "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* [195 N.C. 537, 143 S.E. 3], and decisions in accord with *Maslin,* on the basic ground that an indictment cannot rightly be considered as more than an unproved accusation."

Defendant, relying on the holding in *State v. Williams, supra,* petitioned this Court for certiorari, and this Court allowed certiorari. The Court in *Williams* did not decide whether its holding would be applied retroactively. However, in *State v. Harris,* (filed this day) this Court determined that the holding in *Williams* should be applied prospectively only. The Court noted that the change accomplished in *Williams* affected only a rule of evidence, and did not affect a contractual or a vested right. In reaching the conclusion that the decision in *Williams*

should be applied prospectively, Moore, J., speaking for the Court, stated:

> " . . . To give *Williams* retroactive effect could easily disrupt the orderly administration of our criminal law. Doubt would be cast upon verdicts of guilty returned in those cases where such questions were asked and answered over objection. Prisoners convicted in such trials could seek release or new trials in post-conviction proceedings. See *Johnson v. New Jersey,* 384 U.S. at 731, 16 L.Ed. 2d at 891, 85 S.Ct. at 1780 (1966). Accordingly, we hold that the rule announced in *Williams* applies only to those trials begun after 15 December 1971, the date of the filing of the opinion in that case. . . . "

Here, the trial commenced on 14 April 1971. *State v. Williams, supra,* does not apply, and this assignment of error is overruled.

The decision of the Court of Appeals is

Affirmed.

IN THE MATTER OF GENEVA H. THOMAS, AND DY-DEE SUPPLY COMPANY, INC. AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 116

(Filed 16 June 1972)

1. **Master and Servant § 108— unemployment compensation — availability for work — quantum of proof**

The Employment Security Commission erred in requiring a 70-year-old claimant for unemployment compensation to show by clear, cogent and convincing evidence that she had re-entered the labor force after having voluntarily retired from her job as a laundry worker, the claimant having the burden to show that she was "available for work" only by the greater weight of the evidence. G.S. 143-318(1).

2. **Master and Servant § 111— Employment Security Commission — findings — appellate review**

Findings by the Employment Security Commission are conclusive on appeal if supported by competent evidence.

APPEAL by the Employment Security Commission from the decision of the Court of Appeals reported in 13 N.C. App.

513, 186 S.E. 2d 623. The decision purports to reverse the judgment entered by *Kivett, J.* at the June 7, 1971 Session, FORSYTH Superior Court. The case is here for review by reason of the dissent in the Court of Appeals.

The proceeding originated by claims for unemployment benefits filed by Geneva H. Thomas before the North Carolina Employment Security Commission under G.S. 96-1 to 96-27, inclusive.

The claimant, Geneva H. Thomas, was employed as a laundry worker by Dy-Dee Supply Company in Winston-Salem. She voluntarily retired on June 10, 1970, at the age of seventy years, after having completed twenty years of service with the same employer. The employer did not provide retirement pay for its employees. At the end of the first week following her retirement, Mrs. Thomas began filing with the Employment Security Commission weekly claims for unemployment benefits. After full hearing, the Commission on March 9, 1971, by Decision No. 4300 denied the claims on the ground the claimant had not shown her eligibility to receive them.

In support of her claims, Mrs. Thomas testified she worked as a laundry hand in Dy-Dee Supply Company for twenty years. In 1962 she became eligible for and received Social Security payments of $89.00 per month. She worked at her job only a sufficient number of hours so that her regular pay did not exceed $1,680.00 annually. Hence she was eligible for the full annual payment of Social Security benefits. She retired voluntarily because she was seventy years old although at the time she was in good health which has continued to the present time.

At the conclusion of the hearings the Commission entered among others the following findings:

> "4. The claimant is 70 years old, has a fifth grade education and her work history indicates that she has worked as a laundry hand the past twenty years. Prior thereto, she had some experience as a worker in a tobacco factory. She has no other work experience. The claimant lives with and cares for a 54 year old retarded daughter. The claimant is not altogether certain she can arrange care for her daughter should she find employment.

"5. The claimant earned $1.45 per hour at the laundry at the time of her retirement. Additionally, since 1962, the claimant has received social security (OASI) benefits and the current monthly benefit is $89.00. Under social security regulations, pensioners under 72 years of age are permitted to earn a maximum of $1,680.00 annually without having their monthly benefits reduced. The claimant testified that she has not earned more than $1,680.00 in any year since 1962.

"6. Due to the claimant's advanced age, limited skills, and fifth grade education, the likelihood of her obtaining employment is reduced by about 95 percent. In the Winston-Salem area, employers do not customarily employ persons 70 years of age."

Among the Commission's conclusions were the following:

"In the instant case, the record indisputably shows that the claimant became unemployed voluntarily; that she voluntarily quit her job in order to retire on June 10, 1970. Insofar as the record shows, she could have continued working for her last employer had she desired further employment. This notwithstanding, on June 17, 1970, precisely one week after her retirement on June 10, 1970, the claimant filed a claim for unemployment insurance benefits. It is difficult to reconcile the claimant's alleged availability in the labor market on June 17, 1970, (as indicated by her filing of the claim) with the fact that she voluntarily quit her employment on June 10, 1970, for the avowed purpose of retirement.

"The claimant received no retirement pay or pension from her last employer, but she has been receiving monthly social security (OASI) benefits in the sum of $89.00 since 1962, some eight years prior to her retirement. Under the laws and regulations governing the payment of these benefits, the recipient under the age of 72 years is permitted to earn a maximum annual wage of $1,680 before her monthly benefit amount is reduced. In this case, the claimant has testified under oath that she has not earned in excess of $1,680 per year in any year since 1962. She has further testified that she earned $1.45 per hour at her last employment prior to her retirement.

"Assuming a normal forty hour work week for fifty weeks at $1.45 per hour, the claimant would have earned approximately $2,900 per annum from her last employer. Inferentially, then, the claimant was a part-time or seasonal worker. Since the claimant apparently has worked under such an arrangement since 1962, it challenges credulity to assume that the claimant has, at age 70, made herself available for FULL-TIME work, a prime requisite of eligibility.

* * * * * * * * * * * *

"The claimant's act of voluntarily retiring from gainful employment raises a strong presumption that she is no longer in the labor market. It must be shown by clear, cogent, and convincing evidence that she is available for work under the law. This has not been done in this case.

* * * * * * * * * * * *

"Considering the fact that the claimant voluntarily relinquished her employment to retire when she could have continued working, it is concluded that the claimant is not realistically an active member of the labor force. She is therefore not available for work and is ineligible for benefits.

"DECISION: It is now, therefore, ordered, adjudged, and decreed that:

"(1) The claimant is ineligible for benefits from November 4, 1970, through January 19, 1971; . . . "

Upon the claimant's appeal to the superior court, Judge Kivett affirmed the decision of the Commission. The claimant appealed to the North Carolina Court of Appeals.

The panel of the Court of Appeals which heard the case filed three separate opinions. What purported to be the decision of the Court written by Judge Hedrick recites:

"For the reasons stated, the judgment of the superior court affirming the decision of the Employment Security Commission is reversed and the case is remanded to the superior court for the entry of an order remanding the proceeding to the Employment Security Commission with directions that the Commission make a conclusion with respect to whether the claimant was available for work from 4 November 1970 through 19 January 1971, based on the

facts already found and not inconsistent with the principles expressed in this opinion."

Judge Hedrick's opinion ordered the judgment of the superior court reversed and remanded for decision in accordance "with the principles expressed in this opinion." The Commission appealed.

Thorns Craven The Legal Aid Society of Forsyth County for claimant appellee.

D. G. Ball, Garland Crenshaw, Howard G. Doyle, H. D. Harrison, Jr. for appellant.

Moore and Van Allen by William K. Van Allen and R. Michael Childs, Attorneys for Associated General Contractors of the Carolinas, Associated Industries, Capital Associated Industries, Central Piedmont Industries, North Carolina Textile Manufacturers Association, Piedmont Associated Industries, Western Carolina Industries, Inc., and Western Carolina Manufacturers Association, Amici Curiae.

HIGGINS, Justice.

Judge Hedrick's opinion, and the partial dissents by Judge Graham and by Chief Judge Mallard, are before us. Judge Graham dissented from the Hedrick opinion "which directs the Commission to enter an order awarding benefits." With respect to the claimant's rights, Judge Graham concluded: "When she quit her job to retire, claimant removed herself from the labor market. Whether she thereafter re-entered the labor market and became 'available for work' is a question which still must be determined by the Commission." This is apparently so because of the quantum of proof required.

Chief Judge Mallard concurring in part and dissenting in part, expressed the view the Employment Security Commission's findings and conclusions are correct except in one particular:

> "The Commission, however, in its 'conclusions of law,' stated the degree of proof it used in finding the facts, as follows: 'It must be shown by clear, cogent, and convincing evidence that she (claimant) is available for work under the law. This has not been done in this case.' This was error. The degree of proof required is by the greater weight of the evidence. See G.S. 143-318(1).

"Had the Commission found the facts by the greater weight of the evidence, it is my opinion that its legal conclusions are correct and that the claimant 'is not realistically an active member of the labor force,' and '(s)he is therefore not available for work and is ineligible for benefits.' "

To what extent Judge Hedrick's opinion is a majority opinion of the panel seems open to some question. It does appear from the separate opinions of Judge Graham and Chief Judge Mallard that an order reversing the superior court and directing that judgment be entered as directed in the opinion is not warranted.

[1] The record before us, in our opinion, discloses the Commission committed error of law in requiring the claimant to show by clear, cogent, and convincing evidence that she had reentered the labor force after having voluntarily retired. The question before the Commission was whether the claimant at the times covered by her claims for benefits was "available for work" and the burden was on her to show such availability, but only by the greater weight of the evidence. The Commission's requirement, therefore, placed too great a burden on her. As pointed out by Chief Judge Mallard, G.S. 143-318(1) requires the State agencies and boards charged with the duty of finding facts to observe the rules of evidence "as applied in the superior and district courts." In the superior court, except in extraordinary cases, the burden of proof is by the greater weight of the evidence. Proof beyond a reasonable doubt is confined to criminal offenses. Proof by clear, cogent, and convincing evidence is required to establish parol trusts, contents of lost documents, and such matters. *McCorkle v. Beatty,* 226 N.C. 338, 38 S.E. 2d 102; *Williams v. Building and Loan Asso.,* 207 N.C. 362, 177 S.E. 176.

[2] After a careful review of the record we conclude that the hearing and decision of the case by the Employment Security Commission and by the Superior Court of Forsyth County were in accordance with law and were free from error save and except the placing of an undue burden on the claimant, Mrs. Thomas, to show by clear, cogent, and convincing evidence that she has become "available for work under the law." The Commission's error, in the quantum of proof required, is directly

challenged by Assignment of Error No. 5. Because of the error in so placing too great a burden upon her, the Employment Security Commission will review the proceeding and determine by the greater weight of the evidence whether the claimant has established the fact that she is available for work. The Commission will make disposition of the claims for benefits in accordance with the findings. *In re Watson,* 273 N.C. 629, 161 S.E. 2d 1; *Dwyer v. Appeal Board of Michigan Unemp. Comp. Com'n.,* 321 Mich. 178, 189, 32 N.W. 2d 434, 438; *Weiner v. Director of Division of Employment Sec.,* 327 Mass. 360, 99 N.E. 2d 57; *Mohler v. Department of Labor,* 409 Ill. 79, 97 N.E. 2d 762. The Commission's findings if supported by competent evidence are conclusive on appeal. *In re Steelman,* 219 N.C. 306, 13 S.E. 2d 544; *Unemployment Comp. Com. v. Willis,* 219 N.C. 709, 15 S.E. 2d 4; *Employment Security Comm. v. Freight Lines,* 248 N.C. 496, 103 S.E. 2d 829.

The decision of the Court of Appeals, to the extent it conflicts with the disposition herein directed, is reversed and the cause will be remanded to the North Carolina Employment Security Commission for further hearing and disposition as herein directed.

Reversed and remanded.

SYLVIA ANNE COLLINS SCHOOLFIELD AND HUSBAND, JAMES NORMAN SCHOOLFIELD, PETITIONERS v. WANDA LOUISE COLLINS (SINGLE); JOHN W. COLLINS AND WIFE, MYRTLE COLLINS; NASH R. COLLINS AND WIFE, ANN COLLINS; STEVE C. COLLINS AND WIFE, FREDA SINK COLLINS; ALICE COLLINS MAYS AND HUSBAND, GARLAND D. MAYS; DORA LUCILLE COLLINS (SINGLE); HAZEL COLLINS THOMPSON AND HUSBAND, WADE THOMPSON; FLEET M. COLLINS AND WIFE, CAROLYN COLLINS; AND RAYMOND COLLINS AND WIFE, JUANITA COLLINS, RESPONDENTS

No. 80

(Filed 16 June 1972)

1. Evidence § 28.5; Rules of Civil Procedure § 56— affidavit defined

An affidavit is a written or printed declaration or statement of facts which was made voluntarily and confirmed by the oath or affirmation of the party making it before an officer having authority to administer such oath.

2. Rules of Civil Procedure § 56— motion for summary judgment — verified pleading — consideration as affidavit

A properly verified pleading which meets all the requirements for affidavits may be considered as an affidavit in support of or in opposition to a motion for summary judgment.

3. Evidence §§ 11, 33— parol trust — hearsay — dead man's statute

Testimony as to statements made by respondent's mother, now deceased, is hearsay and therefore incompetent to show an alleged parol agreement that respondent's brother would hold title to real property in trust for respondent and her mother, and respondent is precluded by G.S. 8-51 from testifying to such personal transaction with her brother, who is also deceased.

4. Trusts § 13— resulting trust — pro tanto payment of purchase price

Respondent's contribution of approximately $100.00 toward the down payment of $310.00 on a house and lot, with no obligation to make further payments of any kind, was insufficient to establish in favor of respondent any ascertainable trust interest in the house and lot based on *pro tanto* payment of the purchase price.

5. Trusts § 13— resulting trust — insufficiency of assertions

Where respondent's assertions were insufficient to show what amounts, if any, were paid by respondent's mother to the seller of property conveyed to respondent's mother and brother, such assertions were insufficient to establish a resulting trust in favor of respondent's mother in the one-half undivided interest in the property to which respondent's brother held legal title.

6. Wills § 2— contract to devise — trust in favor of promisee

A written contract executed by respondent, her mother and her brother, whereby real property in which the three parties had an interest was to go to respondent upon the prior death of her mother and brother was a contract to devise, and, upon the prior death of respondent's brother without devising his interest in the property to respondent, the court will fasten a trust on such interest in favor of respondent.

7. Wills § 2— implied promise to devise

An agreement that a third party beneficiary shall have land at the death of the promisor implies his promise to devise or convey the property so as to effectuate the contract between the promisor and the promisee.

8. Rules of Civil Procedure § 38— proceeding commenced prior to new Rules — last pleading after new Rules — failure to demand jury trial in apt time

Where a proceeding was commenced prior to the effective date of the new Rules of Civil Procedure, but the last pleading was filed on 13 January 1970 after the new Rules had become effective, both parties were precluded from demanding a jury trial ten days after the last pleading was filed, and the denial of respondent's belated

demand for a jury trial filed on 18 February 1970 was within the discretion of the trial judge. G.S. 1A-1, Rules 38(b) and (d).

ON *certiorari* granted on petition of respondent Dora Lucille Collins to review decision of the Court of Appeals affirming judgment entered by *Johnston, J.*, at June 1, 1970 Civil Session of GUILFORD Superior Court, docketed and argued in the Supreme Court as No. 144 at Fall Term 1971.

Petitioners instituted this special proceeding on October 15, 1969, for the partition sale of a house and lot at 1213 Westside Drive, Greensboro, N. C., referred to hereafter as the subject property.

The petition and the answer of respondent Dora Lucille Collins, who is referred to hereafter as respondent, constitute the pleadings. None of the other persons named as respondents filed an answer or other pleading. Guilford County was permitted to intervene solely to assert its lien for unpaid taxes.

Alma C. Collins, a widow, died in Guilford County on March 24, 1963, survived by eight children, namely, respondents John W. Collins, Nash R. Collins, Steve C. Collins, Alice Collins Mays, Dora Lucille Collins, Hazel Collins Thompson, Fleet M. Collins and Raymond Collins. She was survived also by petitioner Sylvia Anne Collins Schoolfield and respondent Wanda Louise Collins, who are children of Robert W. Collins, a deceased son of Alma C. Collins.

Petitioners alleged that Alma C. Collins died intestate; that Sylvia Anne Collins Schoolfield and Wanda Louise Collins each owned a 5/18th undivided interest in the subject property; and that each of the surviving children of Alma C. Collins owned a 1/18th undivided interest therein. Respondent denied these allegations.

Petitioners alleged that Cone Mills Corporation, by warranty deed dated January 14, 1963, conveyed an undivided one-half interest in the subject property to Alma C. Collins (widow) and an undivided one-half interest therein to Louise G. Collins, Wanda Louise Collins and Sylvia Anne Collins; and that, by a quitclaim deed dated January 14, 1963, Louise G. Collins conveyed her entire interest in the subject property to Wanda Louise Collins and Sylvia Anne Collins.

Respondent admitted that Cone Mills Corporation signed the "paper writing" referred to by petitioners but "specifically denied that said paper writing constitutes a valid conveyance of said property to the persons named in that paper writing, because then, as now, the legal and beneficial interest to the entirety of said property was vested in the answering respondent, Dora Lucille Collins." Respondent admitted that Lucille G. Collins signed the "quitclaim deed" referred to by petitioners but "specifically denied that said paper writing conveyed any interest in this property whatever."

After answering petitioners' allegations, respondent alleged as further answers and defenses the matters set forth below.

In her "FIRST FURTHER ANSWER AND DEFENSE" respondent alleged the following: She and Alma purchased the property, furnishing all consideration (down payment, monthly payments, and mortgage insurance premiums). She was not named in the contract of sale, dated May 26, 1958, "for the reason that at the time of its execution she was an invalid confined to the home and could not appear with the other parties before a notary public at the Cone Mills office." Robert W. Collins, through whom feme petitioner claims, was named in the contract "for the sole purpose of obtaining mortgage life insurance on the contract, since Alma C. Collins was at that time uninsurable." A copy of the contract of sale was attached to the answer. Robert, Alma and respondent agreed from the beginning that Robert was to hold the property only as "a trustee for Alma C. Collins and the respondent." Alma died on March 24, 1963, leaving a will, dated February 8, 1959, probated January 5, 1970, leaving the contested property to respondent. A copy of the will was attached to the answer. On April 4, 1959, Robert, Alma and respondent entered into a written contract whereby the property was to go to respondent upon the death of Alma and Robert. A copy of this contract was attached to the answer. Respondent was in possession of the property on May 26, 1958, and has been ever since. Alma was also in possession until her death. Robert was also in possession, "with the express permission" of Alma and respondent, until his death on December 21, 1962. Respondent received no notice of any efforts by anyone to interfere with her possession until the commencement of this proceeding on October 15, 1969.

In the succeeding further answers and defenses, respondent alleged: (1) In respect of the subject property, Robert was the trustee of a resulting trust in favor of respondent and Alma; (2) respondent, as sole devisee under her will, became the owner of the undivided one-half interest of Alma; (3) feme petitioner and Wanda Louise Collins hold legal title to the subject property in constructive trust for respondent by virtue of the contract of April 4, 1959, entered into by Alma, Robert and respondent; (4) the claim of petitioners is barred by the statute of limitations on account of respondent's adverse possession of the subject property.

The purchase contract of May 26, 1958, designated Cone Mills Corporation as "Seller" and "Alma C. Collins (Widow) and son, Robert W. Collins," as "Purchaser." It provides that, as purchase price for the subject property, the "Purchaser" agrees to pay the principal sum of $6,200.00, consisting of a down payment of $310.00 and monthly payments of $52.43; and that the necessary portion of each installment payment shall be applied by the seller to the payment of interest, insurance premiums and ad valorem taxes.

The will of Alma C. Collins provides in part: "I want all my household good[s] to go to Lucille Collins and my house to go to Lucille Collins at my Death . . . . "

The contract of April 4, 1959, is quoted in full below.

TO WHOM IT MAY CONCERN:

Re: Alma C. Collins and Robert W. Collins — One house located at 1213 Westside Drive Greensboro, North Carolina

If the death of Mrs. Alma C. Collins should occur before Lucille Dora Collins, her interest in the above mentioned property shall go to Lucille Dora Collins. I[n] case of death of Lucille Dora Collins before the death of Alma C. Collins her interest in the above mentioned property shall go to Robert W. Collins. In case of death of Robert W. Collins before the death of Lucille Dora Collins his interest in the above mentioned property shall go to Lucille Dora Collins. In case of death of Alma C. Collins before Lucille

Dora Collins all personal belongs [*sic*] shall go to Lucille Dora Collins.

Given this the 4th day of April under our hands and seals.

Robert W. Collins (SEAL)
Lucille Dora Collins (SEAL)
Mrs. Alma C. Collins (SEAL)

Witness:

Ralph J. Ritter

North Carolina

Guilford County

Sworn to and subscribed before me this the 4th day of April 1959.

Ruth L. Pritchett
Notary Public

My Commission expires 7-18-60

We note that respondent is designated in the caption and pleadings as "Dora Lucille Collins," in Alma's will as "Lucille Collins," and in the contract of April 4, 1959, as "Lucille Dora Collins."

Respondent prayed that the petition be dismissed and that the costs of the proceedings be taxed against petitioners.

Petitioners did not reply to the allegations of respondent's further answers and defenses.

Pursuant to Rule 33, G.S. 1A-1, petitioners filed "Interrogatories" on March 12, 1970. In her answers thereto, respondent asserted facts set forth in the opinion.

On June 1, 1970, petitioners filed a motion for summary judgment in their favor upon all issues arising in this cause, asserting "that the pleadings, together with the answers to interrogatories, show that there is no genuine issue as to material fact and that they are entitled to judgment as a matter of law."

Petitioners' motion for summary judgment was heard on June 10, 1970, at which time, as recited in the judgment, Judge Johnston "read the pleadings, the interrogatories, the answers

to the interrogatories," and an affidavit of Henry N. Patterson, Jr., an attorney for respondent.

In accordance with the allegations in respondent's first further answer and defense, the court found as a fact that on January 5, 1970, which was after the filing of petitioners' (amended) petition, "a holographic will of Alma Collins, deceased, was probated in common form in the Estates Division of this Court," and that counsel for petitioners and respondent had stipulated "that said will is now binding on the parties for purposes of this action; that under the terms of said will, Dora Lucille Collins is the sole devisee of the real property of Alma Collins, deceased, who was the owner of an undivided one-half interest in said real property . . . ."

Based upon this stipulation and the documents referred to above, the court entered summary judgment which adjudged that, subject to the lien in favor of Guilford County for taxes, petitioner Sylvia Anne Collins Schoolfield and respondent Wanda Louise Collins each owned an undivided one-fourth interest in the subject property and that respondent Dora Lucille Collins owned an undivided one-half interest therein.

(Note: Prior to the hearing on petitioners' motion for summary judgment, respondent's motions for a jury trial of the issues arising on the pleadings had been denied. The facts pertinent to respondent's exception to this order will be stated in the opinion.)

Upon respondent's appeal, the Court of Appeals affirmed Judge Johnston's judgment. 12 N.C. App. 106, 182 S.E. 2d 648 (1971). On October 5, 1971, this Court granted respondent's petition for *certiorari.*

Turner, Rollins & Rollins, by Elizabeth O. Rollins, for petitioner appellees.

Smith & Patterson, by Henry N. Patterson, Jr., for respondent appellant.

BOBBITT, Chief Justice.

Rule 56, G.S. 1A-1, which became effective on January 1, 1970, has been considered in *Kessing v. Mortgage Corp.,* 278 N.C. 523, 180 S.E. 2d 823 (1971); *Harrison Associates v. State Ports Authority,* 280 N.C. 251, 185 S.E. 2d 793 (1972); *Singleton v. Stewart,* 280 N.C. 460, 186 S.E. 2d 400 (1972); *Koontz v. City of Winston-Salem,* 280 N.C. 513, 186 S.E. 2d 897 (1972);

Blades v. City of Raleigh, 280 N.C. 531, 187 S.E. 2d 35 (1972). The general rules applicable to summary judgment under Rule 56 as laid down in *Kessing* are approved and applied in the later cases. In each of these cases, summary judgment was held to be proper under the circumstances of the particular case.

The Court of Appeals held that respondent's answers to the interrogatories failed "to disclose competent evidence of facts showing that there is a genuine issue for trial"; that the "answers to the interrogatories reveal that no genuine issue as to a material fact exists"; and that "upon the facts established petitioner was entitled to judgment as a matter of law." The opinion does not set forth what facts the court considered established or the reasons for its conclusion that petitioners were entitled to judgment as a matter of law.

As noted in our preliminary statement, respondent made a part of her answer a copy of the purchase contract of May 26, 1958, in which Cone Mills Corporation was designated as "Seller" and "Alma C. Collins (Widow) and son, Robert W. Collins," were designated "Purchaser." She alleged that Robert W. Collins died on December 21, 1962. She admitted that Cone Mills Corporation had executed the deed dated January 14, 1963, which, in terms, conveyed an undivided one-half interest in the subject property to Alma C. Collins (widow) and an undivided one-half interest to Louise G. Collins, Wanda Louise Collins and Sylvia Anne Collins. She also admitted that Louise G. Collins had executed a quitclaim deed dated January 14, 1963, which, in terms, conveyed her entire interest in the subject property to Wanda Louise Collins and Sylvia Anne Collins. (Note: Respondent's petition for *certiorari,* which is verified by respondent, asserts (1) that "the mortgage life insurance on the life of Robert Collins paid the balance due on the land contract" and (2) that Louise G. Collins was the estranged wife of Robert W. Collins.)

Upon the admitted facts stated in the preceding paragraph, *nothing else appearing,* feme petitioner and respondent Wanda Louise Collins, as heirs of Robert W. Collins, would own an undivided one-half interest in the subject property and summary judgment in their favor would be correct. Any genuine issue as to a material fact must relate to facts alleged as the basis for respondent's asserted further answers and defenses.

Under Rule 56(c) the absence or presence of a genuine factual issue may be shown by *"the pleadings,* depositions, answers to interrogatories, and admissions on file, together with the affidavits, *if any."* (Our italics.) While the object of the last two sentences of Rule 56(e) is to pierce *general allegations* in the non-movant's pleadings, Rule 56(e) does not deny that a properly verified pleading which meets all the requirements for affidavits may effectively "set forth specific facts showing that there is a genuine issue for trial."

[1, 2] In her pleading, respondent alleged specific facts within her *personal knowledge.* Her pleading was verified in the manner prescribed by Rule 11(b), sworn to and subscribed before a notary public. An affidavit is "[a] written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath." Black's Law Dictionary, 80 (Rev. 4th ed. 1968); *Ogburn v. Sterchi Brothers Stores, Inc.,* 218 N.C. 507, 11 S.E. 2d 460 (1940). Respondent's pleading meets all of these requirements; and, in respect of the specific facts stated therein, is an affidavit. "[T]here is nothing in the rules which precludes the judge from considering a verified answer as an affidavit in the cause." *Fletcher v. Norfolk Newspapers,* 239 F. 2d 169 (4th Cir. 1956). "To the extent that a verified pleading meets [the requirements of Rule 56(e)] then it may properly be considered as equivalent to a supporting or opposing affidavit, as the case may be." 6 Moore's Federal Practice, par. 56.11[3], at 2176 (2d ed. 1965).

[3] We consider first respondent's allegation that "[i]t was initially and always the agreement among respondent Dora Lucille Collins and Alma C. Collins and Robert W. Collins, that the interest of Robert W. Collins in said property was that only of a trustee for Alma C. Collins and the respondent Dora Lucille Collins." As to whether this allegation, if supported by competent evidence, would defeat petitioners' claim, see *Bryant v. Kelly,* 279 N.C. 123, 181 S.E. 2d 438 (1971). In her answer, respondent asserted she had knowledge of the alleged agreement. In her answers to interrogatories, she asserted that three named persons had knowledge of statements made to them by Alma C. Collins which tended to support respondent's said general allegation. Testimony as to statements made by Alma would be incompetent as hearsay and G.S. 8-51 would preclude

respondent from testifying to such personal transaction with Robert. In short, respondent's answers to the interrogatories fail to show the existence of competent evidence to support her general allegations in reference to the alleged parol trust.

[4] Independently of the alleged parol trust agreement, respondent alleges that she and Alma together "furnished all of the consideration for the down payment and for all of the monthly payments, including mortgage insurance premiums, until the property was paid for in full." Answering interrogatories pertinent to this allegation, respondent asserted that she personally "provided approximately one hundred dollars toward the down payment" for the subject property. She asserted that she observed Alma take funds which she (Alma) had received from the Social Security Administration and funds which were given her by respondent "when she went to the Cone Mills office to make the down payment" on the subject property. Respondent's contribution of *approximately* $100.00 toward the down payment, with no obligation to make further payments of any kind, is insufficient to establish in favor of respondent any ascertainable trust interest in the subject property based on *pro tanto* payment of the purchase price. *Rhodes v. Raxter,* 242 N.C. 206, 208, 87 S.E. 2d 265, 267 (1955).

[5] Alternatively, respondent asserts ownership of the subject property as beneficiary under Alma's will. This contention presupposes that Alma became sole owner because of contributions she made toward the purchase thereof.

With reference to payments subsequent to the down payment, respondent asserted that she "observed Alma Collins each month take funds derived from her social security check to make the monthly payments on the land contract and send this money by different individuals to the Cone Mills Plant." Although she asserted that "receipts for the monthly payments state that they were received of Alma Collins," no receipts were produced and identified. Garland C. Mays was identified as a person to whom "Alma Collins on a number of occasions gave money . . . to take to the Cone Mills Proximity Plant to make the monthly payments on the land contract." No affidavit of Garland Mays was presented. Respondent did not identify any other individual to whom Alma gave money to be taken to Cone Mills Corporation to make the monthly payments on the purchase contract.

Cone Mills Corporation acknowledged receipt of the down payment of $310.00 from the "Purchaser." Alma and Robert became equally obligated for the payment of the balance of $5,890.00 plus interest, taxes and insurance premiums. Respondent's assertions, although competent, were insufficient to show what amounts, if any, were paid to Cone Mills Corporation by Alma. When Robert died, the unpaid balance was paid from the insurance on his life.

Absent affidavits disclosing competent evidence of the existence of the express parol trust *alleged* by respondent, respondent's assertions were not sufficient to establish that Robert held the legal title to an undivided one-half interest in the subject property as trustee for Alma. With reference to resulting trusts, see *Waddell v. Carson,* 245 N.C. 669, 97 S.E. 2d 222 (1957), and cases cited; also, *Bryant v. Kelly, supra.*

Even so, for the reasons stated below, the court erred in granting petitioners' motion for summary judugment. The facts asserted by respondent in her verified pleading and in her answers to interrogatories which, for present purposes, must be accepted as true, include those narrated below.

On April 4, 1959, Robert, Alma and respondent executed the contract quoted in full in our preliminary statement. This contract provides for the disposition of the subject property upon the death of the three persons having an interest therein. One provision states: "I[n] case of death of Lucille Dora Collins before the death of Alma C. Collins, *her interest* in the above mentioned property shall go to Robert W. Collins." (Our italics.) Robert W. Collins died December 21, 1962. The contract further provides: "In case of death of Robert W. Collins before the death of Lucille Dora Collins *his interest* in the above mentioned property shall go to Lucille Dora Collins." (Our italics.) The contract also provides: "If the death of Mrs. Alma C. Collins should occur before Lucille Dora Collins, *her interest* in the above mentioned property shall go to Lucille Dora Collins." (Our italics.)

In May, 1958, respondent was completely disabled and confined to a wheel chair. She had been disabled since about 1950 and was receiving social security benefits as a dependent child of her father who died in 1956. Alma, her mother, also was receiving social security benefits. The amounts which Alma

sent to Cone Mills Corporation in payment of monthly installments for the subject property were derived from Alma's social security benefits. Respondent contributed her social security benefits to pay for household expenses of the family. Robert Collins helped buy some groceries and small household items which constituted his contribution to the operation of the household on Westside Drive during the period from May, 1958, until he became disabled. Robert Collins's two children, Wanda and Sylvia, resided in the household.

Respondent was in possession of the subject property on May 26, 1958, and since then has been in continuous actual possession of the property. She shared the possession of the property with her mother, Alma C. Collins, until her death on March 24, 1963. Robert W. Collins lived there from May 26, 1958, until his death on December 21, 1962.

The affidavit of Henry N. Patterson, Jr., states that on June 5, 1970, he examined records in the Guilford County Department of Social Services pertinent to the present proceeding; that "[t]hese records contain a signed admission by Robert W. Collins that he was purchasing the property which is the subject of this proceeding along with his mother (Alma Collins) and his sister (Dora Lucille Collins)"; and that these records had been subpoenaed for production in evidence. However, it does not appear that these records were produced for consideration by Judge Johnston. They are not in the record before us and are not necessary to decision on this appeal.

[6] Respondent's contention that she is the beneficiary of a trust created by the contract of April 4, 1959, is supported by our decisions. The contract is a contract to devise even though it is not expressly so termed.

[7] "An agreement that a third-party beneficiary shall have land at the death of the promisor implies his promise to devise or convey the property so as to effectuate the contract between the promisor and the promisee. *Ledingham v. Bayless,* 218 Md. 108, 145 A. 2d 434, and the authorities cited therein at 116, 145 A. 2d at 439." *Wells v. Dickens,* 274 N.C. 203, 211, 162 S.E. 2d 552, 557 (1968).

In the cited Maryland case of *Ledingham v. Bayless,* this statement appears: "The authorities make it plain that if there is a contractual obligation under which property is to pass at

the death of the promisor, a contract to bequeath or devise will be implied, although there is no express undertaking by the promisor to execute a will. A promise that the promisee shall receive the property, or that it shall be his at the death of the promisor, is sufficient and it is not necessary that the means by which title is to pass shall be spelled out. Page [Wills, Lifetime Edition], Sec. 1710; 94 C.J.S. Wills §§ 111, 112, pp. 863, 865-866." Decisions cited in support of this statement include *Stockard v. Warren,* 175 N.C. 283, 95 S.E. 579 (1918), in which this Court declared a trust was created when the landowner promised his nephew that if he would come and take care of the farm and stock, at the death of the landowner and his wife, "all the stock and 200 acres of land on home place shall be yours to have and hold forever in fee-simple."

An annotation following *Naylor v. Shelton,* 102 Ark. 30, 143 S.W. 117, Ann. Cas. 1914A 394 (1912), contains this statement: "[W]hile a court of chancery is without power to compel the execution of a will, and therefore the specific execution of an agreement to make a will cannot be enforced, yet if the contract is sufficiently proved and appears to have been binding on the decedent, and the usual conditions relating to specific performance have been complied with, then equity will specifically enforce it by seizing the property which is the subject matter of the agreement, and fastening a trust on it in favor of the person to whom the decedent agreed to give it by his will." Ann. Cas. 1914A at 399. This statement is quoted with approval in *Stockard v. Warren, supra* at 285, 95 S.E. at 580, and in *Clark v. Butts,* 240 N.C. 709, 714, 83 S.E. 2d 885, 889 (1954).

Specific facts set forth by respondent, with special emphasis on the contract of April 4, 1959, are sufficient to defeat petitioners' motion for summary judgment. These specific facts have not been controverted affirmatively by reply, affidavits or otherwise. Whether respondent's pleading be deemed an affirmative defense or a counterclaim *not* denominated as such, no responsive pleading was required and respondent's allegations of specific facts are to be taken as *denied* by petitioners. Rule 8(d). Such denial is sufficient to raise issues of fact to be determined at trial.

[8] Respondent's appeal also presents the question whether the court erred in denying her motions for a jury trial.

The original petition was filed October 15, 1969. An amendment thereto was filed December 18, 1969. Respondent's answer was filed January 13, 1970. It contained no demand for a jury trial. On February 18, 1970, respondent filed a one-sentence "DEMAND FOR JURY TRIAL." On March 13, 1970, respondent filed a "MOTION FOR JURY TRIAL," wherein respondent requested the trial court in its discretion to order a jury trial under Rule 39(b). On March 19, 1970, Judge Crissman, in the exercise of his discretion, denied this motion.

The new Rules of Civil Procedure went into effect on January 1, 1970. Chapter 803, Session Laws of 1969. Under prior North Carolina law, a request for jury trial was not required. G.S. 1-172 (Recompiled 1953) provided, "An issue of fact must be tried by a jury, unless a trial by jury is waived or a reference ordered." G.S. 1-184 (Recompiled 1953) provided that the means for waiver of jury trial were default or consent. However, Rule 38(d) of the new Rules provides that "the failure of a party to serve a demand as required by this rule . . . constitutes a waiver by him of trial by jury."

Rule 38(b) provides, "Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after commencement of the action and not later than 10 days after the service of the last pleading directed to such issue . . . ."

Section 10 of Chapter 954, Session Laws of 1967, provided: "This Act shall be in full force and effect on and after July 1, 1969, and *shall apply to actions and proceedings pending on that date* as well as to actions and proceedings commenced on and after that date." (Our italics.) Chapter 803 of the Session Laws of 1969 repeated this provision in its entirety, except that the effective date was changed to January 1, 1970. The clear intent of the General Assembly was to apply the new Rules from the effective date to all civil cases, and not to permit the confusion which would be attendant upon trying to apply different procedures to cases begun before and to cases begun after the effective date.

The denial of respondent's belated demand for a jury trial was within the discretion of Judge Crissman. No abuse of discretion or error of law is involved.

No constitutional question is presented. Petitioners and respondent are equally denied a jury trial. The last pleading

was filed on January 13, 1970. Ten days from that date *both* parties were precluded from demanding a jury trial. Rules 38(b) and (d).

The foregoing leads to this conclusion: The decision of the Court of Appeals is reversed. The cause is remanded to that court with direction to vacate the summary judgment and to remand the cause to the Superior Court for trial in accordance with Rule 52(a)(1).

Reversed and remanded.

STATE OF NORTH CAROLINA v. HUGH McDONALD KELLY

No. 121

(Filed 16 June 1972)

Narcotics § 5; Criminal Law § 138— possession of hypodermic needle and syringe — offense changed to misdemeanor pending appeal

A defendant whose conviction of felonious possession of a hypodermic needle and syringe for the purpose of administering habit-forming drugs was pending on 1 January 1972, the effective date of the Controlled Substances Act which reduced that offense to the grade of general misdemeanor, is not entitled to have his sentence of not less than two nor more than three years reduced to a maximum of two years, since provisions of the Controlled Substances Act are prospective only.

ON *certiorari* to the North Carolina Court of Appeals to review its decision (13 N.C. App. 588) modifying and affirming judgment of *Fountain, J.*, at 1 March 1971 Session of NEW HANOVER Superior Court.

Defendant was tried on a bill of indictment which charged:

"That Hugh McDonald Kelly late of the County of New Hanover on the 29th day of January 1971 with force and arms, at and in the County aforesaid, did unlawfully, wilfully and feloniously have in his possession a hypodermic syringe or needle for the purpose of administering habit-forming drugs, and he, the said Hugh McDonald Kelly, did not have a valid certificate of a physician issued within the preceding year authorizing such possession, against the form of the statute in such case made and provided and against the peace and dignity of the State."

The indictment was drawn pursuant to G.S. 90-108 which at that time provided, *inter alia:*

> "No person except a manufacturer or a wholesaler or a retail dealer in surgical instruments, pharmacist, physician, dentist, veterinarian, nurse or interne shall at any time have or possess a hypodermic syringe or needle or any instrument or implement adapted for the use of habit-forming drugs by subcutaneous injections and which is possessed for the purpose of administering habit-forming drugs, unless such possession be authorized by the certificate of a physician issued within the period of one year prior thereto; . . . "

The jury returned a verdict of "guilty of the offense of possession of hypodermic needle and syringe." A prison sentence of not less than two years nor more than three years was imposed. Defendant moved to arrest judgment on the ground that the bill of indictment was insufficient. The motion was denied, and defendant appealed to the North Carolina Court of Appeals.

The Court of Appeals affirmed the trial judge's denial of the motion in arrest of judgment. However, the Court of Appeals noted that while the case was on appeal the General Assembly enacted "The Controlled Substances Act," effective 1 January 1972, which reduced the charge for which defendant was convicted to a general misdemeanor [G.S. 90-113.4(b)] and thereupon modified the judgment "to reflect the grade of offense as that of a misdemeanor and by striking the portion providing 'nor more than three (3) years,' thereby reducing the maximum period of defendant's sentence to two years imprisonment."

We allowed the Attorney General's petition for certiorari on 4 April 1972.

Attorney General Morgan and Associate Attorney Henry E. Poole for the State.

H. P. Laing for defendant.

PER CURIAM.

The Attorney General's petition for certiorari is directed only to the modification of the trial court's judgment as to

punishment. Defendant does not bring forward and argue in his brief any other assignment of error as required by the Rules of Practice in the Supreme Court, Supplementary Rule 7. Thus, the sole question presented by this appeal is whether the North Carolina Court of Appeals erred by modifying the judgment so as to reduce the grade of offense to a misdemeanor and so as to reduce the maximum period of defendant's sentence to two years' imprisonment. This question is squarely controlled by the holdings in *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706, and *State v. McIntyre,* 281 N.C. 304, 188 S.E. 2d 304.

Defendant argues that his case does not come within the holdings of *Harvey* and *McIntyre* because the Controlled Substances Act unqualifiedly reduced the offense of which he stands convicted to a misdemeanor. The Act, on the other hand, created a presumption of the felony of possession of marijuana for purpose of sale when the accused, as in *Harvey* and *McIntyre,* possesses more than five grams of marijuana. This distinction is invalid because it relates to degree of crime and punishment, rather than to the question of whether the Act is prospective. The expressed intent of the General Assembly that the provision of the Controlled Substances Act be prospective relates to the entire Act (G.S. 90-113.7). There is no indication in the Act that any particular provision shall be otherwise treated.

The decisions in *State v. Harvey, supra,* and *State v. McIntyre, supra,* require that the modification of the trial court's judgment be reversed. This cause is remanded to the North Carolina Court of Appeals with direction that the judgment of the Superior Court be reinstated and affirmed.

Reversed.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

BAXTER v. JONES

No. 113 PC.

Case below: 14 N.C. App. 296.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 July 1972.

BUILDERS SUPPLIES CO. v. GAINEY

No. 150 PC.

Case below: 14 N.C. App. 678.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 1 August 1972.

CONSTRUCTION CO. v. HAMLETT

No. 70 PC.

Case below: 14 N.C. App. 57.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 July 1972.

CONSTRUCTION CO. v. HOLIDAY INNS

No. 114 PC.

Case below: 14 N.C. App. 475.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 July 1972.

FOSTER v. POULTRY INDUSTRIES

No. 149 PC.

Case below: 14 N.C. App. 671.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 July 1972.

IN RE POTTS

No. 126 PC.

Case below: 14 N.C. App. 387.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 August 1972.

INSURANCE CO. v. POULTRY CO.

No. 105 PC.

Case below: 14 N.C. App. 242.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 August 1972.

JARMAN v. JARMAN

No. 128 PC.

Case below: 14 N.C. App. 531.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 July 1972.

LANE v. HONEYCUTT

No. 123 PC.

Case below: 14 N.C. App. 436.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 July 1972.

LEWIS v. GOODMAN

No. 134 PC.

Case below: 14 N.C. App. 582.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 July 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

MILLSAPS v. CONTRACTING CO.

No. 130 PC.

Case below: 14 N.C. App. 321.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 July 1972.

PRESSLEY v. CASUALTY CO.

No. 136 PC.

Case below: 14 N.C. App. 561.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 July 1972.

RICKERT v. RICKERT

No. 115 PC.

Case below: 14 N.C. App. 351.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 31 July 1972.

RIVENBARK v. CONSTRUCTION CO.

No. 127 PC.

Case below: 14 N.C. App. 609.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 August 1972.

SAVINGS & LOAN ASSOC. v. TRUST CO.

No. 135 PC.

Case below: 14 N.C. App. 567.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 1 August 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. ANDREWS

No. 16.

Case below: 14 N.C. App. 662.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 1 August 1972.

STATE v. BLACK

No. 30.

Case below: 14 N.C. App. 373.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 31 July 1972.

STATE v. CAMPBELL

No. 118 PC.

Case below: 14 N.C. App. 493.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 July 1972. Appeal dismissed 31 July 1972.

STATE v. CAMPBELL

No. 14.

Case below: 14 N.C. App. 493.

State's petition for writ of certiorari to North Carolina Court of Appeals allowed 31 July 1972.

STATE v. COFFEY

No. 148 PC.

Case below: 14 N.C. App. 642.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 July 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. EPPLEY

No. 22.

Case below: 14 N.C. App. 314.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 31 July 1972.

STATE v. GIBSON

No. 23.

Case below: 14 N.C. App. 594.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 1 August 1972.

STATE v. HAIGLER

No. 133 PC.

Case below: 14 N.C. App. 501.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 July 1972.

STATE v. HARRISON

No. 124 PC.

Case below: 14 N.C. App. 450.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 July 1972.

STATE v. HART

No. 111 PC.

Case below: 14 N.C. App. 120.

Petition for writ of certiorari to North Carolina Court of Appeals denied for lack of merit 31 July 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. HINTON

No. 122 PC.

Case below: 14 N.C. App. 564.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 July 1972.

STATE v. JORDAN

No. 107 PC.

Case below: 14 N.C. App. 453.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 July 1972.

STATE v. KILLIAN

No. 119 PC.

Case below: 14 N.C. App. 446.

Petition for writ of certiorari is treated as an appeal by reason of the dissent in the Court of Appeals decision. Appeal allowed 1 August 1972.

STATE v. MOFFITT

No. 183 PC.

Case below: 9 N.C. App. 694.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 August 1972.

STATE v. NOBLES

No. 137 PC.

Case below: 14 N.C. App. 340.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 August 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. ROMES

No. 131 PC.

Case below: 14 N.C. App. 602.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 July 1972.

STATE v. WADE

No. 125 PC.

Case below: 14 N.C. App. 414.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 July 1972.

STATE v. WILLIAMS

No. 117 PC.

Case below: 14 N.C. App. 431.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 August 1972.

STATE v. WILSON

No. 121 PC.

Case below: 14 N.C. App. 399.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 August 1972.

STATE v. WRIGHT

No. 145 PC.

Case below: 14 N.C. App. 675.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 August 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. YARBOROUGH

No. 138 PC.

Case below: 5 N.C. App. 207.

Motion of Attorney General to dismiss petition for writ of certiorari to North Carolina Court of Appeals allowed 31 July 1972.

STEINER v. STEINER

No. 112 PC.

Case below: 14 N.C. App. 657.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 July 1972.

TAYLOR v. CASUALTY CO.

No. 129 PC.

Case below: 14 N.C. App. 418.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 August 1972.

Glusman v. Trustees and Lamb v. Board of Trustees

KENNETH GLUSMAN, PETITIONER v. THE TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA, RESPONDENTS

— AND —

ANTHONY B. LAMB, PETITIONER v. THE BOARD OF TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA, RESPONDENT

No. 113

(Filed 31 July 1972)

1. Domicile § 1— nonresident student — presumption

A nonresident who enrolls in an institution of higher education in this state and continues his studies in such institution is presumed to be in this state primarily for educational purposes.

2. Colleges and Universities— in-state tuition — regulations — test of validity

The validity of regulations relating to eligibility for in-state tuition at an institution of higher education is to be tested by traditional equal-protection standards, not by the more stringent standard of whether they were necessary to promote a compelling state interest.

3. Constitutional Law § 20— equal protection — classifications

The traditional equal-protection test does not require the very best classification in the light of a legislative or regulatory purpose; it does require that such classification in relation to such purpose attain a minimum (undefined and undefinable) level of rationality.

4. Colleges and Universities; Constitutional Law § 20— in-state tuition — regulations — residence requirements — constitutionality

Regulations of the Board of Trustees of the University of North Carolina which require, as prerequisites for eligibility for in-state tuition, that the student be domiciled in this state and in addition have been so domiciled without being enrolled in an institution of higher education for at least the six months preceding the date of first enrollment or re-enrollment in such an institution, *held* not violative of equal protection as guaranteed by the Fourteenth Amendment of the U. S. Constitution.

5. Colleges and Universities; Domicile § 2— married female student — domicile — standing to object to regulation

A male student whose domicile in this state was stipulated does not have standing to object to a regulation which automatically bestows domicile on a nonresident female student who marries a North Carolina domiciliary, but which does not confer such status on a male student who marries a domiciliary of this state.

6. Colleges and Universities— domicile — woman who marries N. C. resident — regulation — equal protection

A regulation providing that the legal residence of a wife follows that of her husband does not grant in-state tuition to a nonresident woman who marries a North Carolina domiciliary solely on account

of her sex and thus deny to men similarly situated a benefit in violation of the Equal Protection Clauses of the North Carolina and United States Constitutions, since domiciliary status is not equivalent to in-state tuition status under the regulations, and the regulations place upon all students domiciled in North Carolina, regardless of sex, the burden of showing that they have been domiciled in this state for six months while not in attendance at an institution of higher education in order to qualify for in-state tuition.

Justice HIGGINS dissenting.

APPEAL by respondent, Board of Trustees of the University of North Carolina, from *Braswell, J.*, January 10, 1972 Civil Session of WAKE Superior Court, certified, pursuant to G.S. 7A-31, for initial appellate review by the Supreme Court.

Kenneth Glusman (Glusman) seeks to recover a judgment for $1,407.50, the asserted difference between in-state and out-of-state tuition fees in the Law School of the University of North Carolina at Chapel Hill (Law School) for the academic years 1969-1970 and 1970-1971, contending that he established his domicile in North Carolina on February 1, 1969. Anthony B. Lamb (Lamb) seeks an order classifying him as eligible for in-state tuition status in the Law School as of January, 1970, contending that he established his domicile in North Carolina at that time. Petitioners assert as ground for their claims that the regulations of the Board of Trustees on resident status for tuition payment deny to them the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

In their petitions for review filed in July, 1971, under G.S. 143-307, Glusman and Lamb alleged that their applications to respondent for change of tuition status had been denied. These allegations were admitted in respondent's answers. (Note: Neither the date nor the contents of petitioners' applications to respondent or of respondent's decisions with reference thereto appear in the record before us.)

The two proceedings were heard together by Judge Braswell upon the following

AGREED STATEMENT OF FACTS

"I. That the tuition regulations under consideration were adopted by the Board of Trustees of the University of North Carolina on November 10, 1967, and read as follows:

'1. *General:* The tuition charge for legal residents of North Carolina is less than for nonresidents. To qualify for in-state tuition, a legal resident must have maintained his domicile in North Carolina for at least the six months preceding the date of first enrollment or re-enrollment in an institution of higher education in this State.'

'3. *Adults:* A person twenty-one years of age or older is eligible for in-state tuition if he has maintained continuous domicile in North Carolina for the six months next preceding the date of enrollment or re-enrollment, exclusive of any time spent in attendance at any institution of higher education. An in-state student reaching the age of twenty-one is not required to re-establish residence provided that he maintains his domicile in North Carolina.'

'4. *Married Students:* The legal residence of a wife follows that of her husband, except that a woman currently enrolled as an in-state student in an institution of higher education may continue as a resident even though she marries a nonresident. If the husband is a nonresident and separation or divorce occurs, the woman may qualify for in-state tuition after establishing her domicile in North Carolina for at least six months under the same conditions as she could if she were single.'

'8. *Change of Status:* The residence status of any student is determined as of the time of his first enrollment in an institution of higher education in North Carolina and may not thereafter be changed except: (a) in the case of a nonresident student at the time of his first enrollment who, or if a minor his parents, has subsequently maintained a legal residence in North Carolina for at least six months, and (b) in the case of a resident who has abandoned his legal residence in North Carolina for a minimum period of six months. In either case, the appropriate tuition rate will become effective at the beginning of the term following the six-month period.'

"II. That petitioner Glusman came to North Carolina in September of 1968 and within a few days of his arrival began attending the School of Law of the Universitiy of North Carolina at Chapel Hill and attended the School of Law from September 1968 until June 1969; from September of 1969 until June of 1970; and from September of 1970 until June of 1971.

At the time petitioner Glusman came to North Carolina he had the intent of remaining in the State for an indefinite period of time and at all times involved petitioner Glusman was charged nonresident tuition as required by the regulations adopted by the Board of Trustees of the University of North Carolina on November 10, 1967.

"III. That petitioner Lamb came to North Carolina in September of 1969 and began attending the School of Law of the University of North Carolina at Chapel Hill and attended the School of Law from September of 1969 until June of 1970; from September of 1970 until June of 1971; and from September of 1971 until December of 1971. At the time petitioner Lamb came to the State of North Carolina he had the intention of remaining in the State for an indefinite period of time and at all times involved the petitioner Lamb was charged nonresident tuition.

"IV. That the Board of Trustees Regulations in question do not impede inter-state travel and that all times in question there were numerous nonresident students enrolled in the School of Law of the University of North Carolina at Chapel Hill.

"V. That at all times involved nonresident students enrolled in the School of Law of the University of North Carolina were charged higher rates of tuition than were charged of the resident students enrolled. That for the years designated below, the tuition charged both resident and nonresident students enrolled in the School of Law of the University of North Carolina were as follows:

	Resident	Nonresident
1968-69	$175.00	$700.00
1969-70	$175.00	$850.00
1970-71	$225.00	$950.00

"VI. That for the 1969-70 school year, the General Assembly of North Carolina appropriated from State funds to the University of North Carolina at Chapel Hill $1,540.00 for the costs per capita student per annum; that the General Assembly of North Carolina appropriated from State funds to the University of North Carolina at Chapel Hill for the 1970-71 school year, $1,584.00 costs per student per annum. That these figures are reflected from the current operations appropriation

advice prepared by the Budget Division, Department of Administration, State of North Carolina, which advice is attached hereto as Exhibit 1.

"VII. That during the period of time in question, both petitioners Glusman and Lamb have established residence in the State of North Carolina for the purposes of voting and payment of taxes. That the only reason why both were denied, after six months had elapsed, reclassification for tuition purpose to that of resident is that neither maintained a residence in the State for six continuous months exclusive of time spent while in attendance at the University of North Carolina School of Law.

"VIII. That the Board of Trustees Regulation No. 4, set forth in I of the Stipulations permits a nonresident female to acquire a residence through marriage but does not give a nonresident male the same opportunity."

The portion of Judge Braswell's judgment denominated findings of fact consists of the facts set forth in the agreed statement and in addition thereto the following:

"Virtually all the time spent [by Glusman] in Chapel Hill has coincided with his enrollment in the University of North Carolina. At the time of initiating the proceedings for administrative relief Mr. Glusman was twenty-four years of age, married, and living in Chapel Hill."

"At the time of initiating his administrative petition for relief, Mr. Lamb was twenty-nine years of age, married to a person who has heretofore been classified by the Board of Trustees as a resident of the State of North Carolina. He has lived in Carrboro since September, 1969. Virtually all of the time spent in North Carolina has coincided with his enrollment in an institution of higher education, the University of North Carolina."

"[T]he Residence Status Committee of the University of North Carolina, and the Board of Trustees of the University of North Carolina, have not given either petitioner a hearing to listen to the alleged facts of a bona fide change in residence, since the time of first enrollment in an institution of higher education in North Carolina; but the administrative procedures and review prior to reaching Superior Court did determine

that neither student dropped out of enrollment at any time, and neither student re-enrolled after a lapse of six months and that each re-enrollment was a continuing thing in the normal academic year of the University of North Carolina."

Lamb "became a married man after his initial enrollment. His wife was a legal resident of the State of North Carolina. She was entitled to a lower tuition rate than her husband."

After the portion thereof denominated conclusions of law, the judgment entered by Judge Braswell provides:

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that the tuition regulations which provide that the residence status of any student is forever to be determined as of the time of his first enrollment in an institution of higher education in North Carolina, and that residence status may not thereafter be changed if he continues re-enrollment without first having dropped out of school for at least a six-months' period, is declared unconstitutional.

"The cases of Kenneth Glusman, petitioner, and Anthony B. Lamb, petitioner, are each, hereby remanded to the Residence Status Committee of the University of North Carolina at Chapel Hill; which Committee shall conduct a hearing, after notice, and it shall make a determination of residence of each petitioner during the period involved in each petition; and it shall make such ruling and order as the true facts warrant.

"In its determination of residence status of each petitioner the respondent shall not apply its regulations so as to discriminate against a male student who, being married, has since his first enrollment established a bona fide residence in North Carolina, and whose wife would be qualified to be enrolled as an in-state resident by virtue of the husband being then a legal resident of the State of North Carolina.

"Court costs are taxed against the respondent."

Respondent excepted "[t]o the foregoing findings of fact and conclusions of law, and entry of judgment," and gave notice of appeal. By supplemental order under G.S. 143-316, Judge Braswell stayed the foregoing judgment pending the outcome of respondent's appeal.

Attorney General Morgan and Deputy Attorney General Vanore for respondent appellant.

Kenneth Glusman for petitioner appellees.

BOBBITT, Chief Justice.

I

The regulations governing tuition status at the time petitioners were enrolled in the Law School established certain requirements for eligibility for in-state tuition. To be eligible, a prospective student (1) must have lived in this state, (2) with intent to make it a home, (3) for at least six months, and (4) without being enrolled in an institution of higher education during the six-month period. Thus, to qualify for in-state tuition, the regulations required that the student be domiciled in this state and in addition have been so domiciled without being enrolled in an institution of higher education for at least the six months preceding the date of first enrollment or re-enrollment in such institution. For full discussion of domicile, see *Hall v. Board of Elections,* 280 N.C. 600, 187 S.E. 2d 52 (1972).

Petitioners do not contest the validity of Regulation No. 1, which provides that "[t]he tuition charge for *legal residents* of North Carolina is less than for nonresidents" and that "[t]o qualify for in-state tuition, *a legal resident* must have maintained his domicile in North Carolina for at least the six months preceding the date of first enrollment or re-enrollment in an institution of higher education in this State." (Our italics.) The State's right to charge nonresidents higher tuition than residents is not challenged and has been repeatedly upheld as reasonably related to the State's legitimate interest in operating, maintaining and financing its educational institutions. *Johns v. Redeker,* 406 F. 2d 878 (8th Cir.), *cert. den. sub nom. Twist v. Redeker,* 396 U.S. 853, 24 L.Ed. 2d 102, 90 S.Ct. 113 (1969). See also, *Bryan v. Regents of University of California,* 188 Cal. 559, 205 P. 1071 (1922); *Landwehr v. Regents of University of Colorado,* 156 Colo. 1, 396 P. 2d 451 (1964); *Clarke v. Redeker,* 259 F. Supp. 117 (S.D. Iowa 1966); *Clarke v. Redeker,* 406 F. 2d 883 (8th Cir.), *cert. den.* 396 U.S. 862, 24 L.Ed. 2d 115, 90 S.Ct. 135 (1969); *Kirk v. Board of Regents of Univ. of California,* 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1st Dist. Ct. App. 1969), *app. dism.* 396 U.S. 554, 24

L.Ed. 2d 747, 90 S.Ct. 754 (1970); *Starns v. Malkerson,* 326 F. Supp. 234 (D. Minn. 1970), *aff'd without opinion,* 401 U.S. 985, 28 L.Ed. 2d 527, 91 S.Ct. 1231 (1971); *Thompson v. Board of Regents of University of Neb.,* 187 Neb. 252, 188 N.W. 2d 840 (1971); Spencer, "The Legal Aspects of the Nonresident Tuition Fee," 6 Ore. L. Rev. 332 (1927); Note, "The Constitutionality of Nonresident Tuition," 55 Minn. L. Rev. 1139 (1971); Note, 8 Wake For. L. Rev. 265 (1972).

Petitioners were nonresidents, 21 years of age or more, when they first enrolled in the Law School of the University of North Carolina. It was stipulated that each petitioner had the intention of remaining in North Carolina indefinitely when he came into this state; that, "during the period of time in question," each petitioner "established residence in the State of North Carolina for the purposes of voting and payment of taxes"; and that "the only reason why both were denied, after six months had elapsed, reclassification for tuition purpose[s] to that of resident is that neither maintained a residence in the State for six continuous months exclusive of time spent while in attendance at the University of North Carolina School of Law."

[1] Petitioners concede that respondent could by regulation provide that a nonresident who enrolls in an institution of higher education in this state and continues his studies in such institution is *presumed* to be in this state primarily for educational purposes. *Clarke v. Redeker,* 259 F. Supp. at 122; 55 Minn. L. Rev. at 1158-59. Such a presumption is part of our law, aside from the regulations involved in this case. *Hall v. Board of Elections, supra* at 608, 187 S.E. 2d at 57. Petitioners contend that the *absolute* requirement that they reside in this state for at least six months preceding the date of their reenrollment exclusive of any time spent in attendance in any institution of higher education, notwithstanding they have become domiciliaries, unconstitutionally denied to them rights accorded other domiciliaries of North Carolina.

Petitioners stress *Carrington v. Rash,* 380 U.S. 89, 13 L.Ed. 2d 675, 85 S.Ct. 775 (1965). In that case the United States Supreme Court invalidated a provision of the Texas Constitution prohibiting any member of the Armed Forces who moved his home to Texas during the course of his military duty from ever voting in any election in that state so long as

he was a member of the Armed Forces. It was held that this provision established an "incontrovertible presumption of nonresidence," and, as applied to a bona fide domiciliary of Texas, violated the Equal Protection Clause of the Fourteenth Amendment. The real holding in *Carrington* was that a burden may not be imposed on, or a right denied to, a group labeled "nonresident," when such labeling, with such attendant imposition or denial, is not reasonably related to the state interest it seeks to protect. In the present case, petitioners are not labeled as "nonresidents." Whether the denial of a benefit to a certain class of residents (domiciliaries) in the present case, with its peculiar facts, is reasonably related to the state interest the classification is meant to protect, is not determined by the holding in *Carrington,* involving an entirely different set of facts.

In *Shapiro v. Thompson,* 394 U.S. 618, 22 L.Ed. 2d 600, 89 S.Ct. 1322 (1969), the Supreme Court held that state durational residence requirements penalized the exercise of a person's basic constitutional right to travel freely from one state to another by rendering him ineligible for welfare assistance, thereby depriving him of a right secured by the Equal Protection Clause of the Fourteenth Amendment. In *Dunn v. Blumstein,* 405 U.S. 330, 31 L.Ed. 2d 274, 92 S.Ct. 995 (1972), the Supreme Court considered Tennessee constitutional and statutory provisions which required residence in the state for one year for eligibility to vote in a state election. It was held that these provisions, as applied to a bona fide resident of Tennessee for less than one year, deprived such a resident of the rights to vote and to freedom of interstate travel in violation of the Equal Protection Clause of the Fourteenth Amendment.

In *Shapiro* and in *Dunn,* the state durational residence requirements were subjected to the most stringent test, namely, whether they were *necessary* to promote a *compelling* state interest.

[2] A person's right to eligibility for in-state tuition is quite different from his basic constitutional right to travel freely from one state to another *(Shapiro* and *Dunn)* or his basic constitutional right to vote *(Dunn).* We take notice of the stipulation that the regulations in the present case "do not impede interstate travel." Since they do not relate to basic constitutional rights, the regulations are to be tested by the less stringent traditional equal-protection standards.

[3] The traditional equal-protection test does not require the very best classification in the light of a legislative or regulatory purpose; it does require that such classification in relation to such purpose attain a minimum (undefined and undefinable) level of rationality. "In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " *Dandridge v. Williams,* 397 U.S. 471, 485, 25 L.Ed. 2d 491, 501-02, 90 S.Ct. 1153, 1161 (1970).

In *Landwehr v. Regents of University of Colorado, supra,* and in *Thompson v. Board of Regents of University of Neb., supra,* statutory provisions requiring as prerequisites for eligibility for in-state tuition, domiciliary status *and* actual residence within the state for a specified period exclusive of time spent in any institution of higher education, were upheld as reasonably related to a legitimate state objective. In *Newman v. Graham,* 82 Idaho 90, 349 P. 2d 716, 83 A.L.R. 2d 492 (1960), a similar requirement was held to be unconstitutional on the ground that it was "arbitrary, capricious and unreasonable."

In the establishment and operation of its institutions of higher education, North Carolina's obligation and primary purpose is to provide opportunities to citizens of this state. In furtherance thereof, in-state students are not required to pay tuition fees equivalent to the per capita cost but may enroll upon payment of the low in-state tuition. North Carolina is not in a position to provide opportunities to citizens of other states on this low-cost basis. Indeed, in view of present crowded conditions, only a limited number of persons domiciled in other states may be enrolled in our institutions of higher education.

[4] North Carolina's right to require a domiciliary of another state to pay the higher out-of-state tuition fees upon his initial enrollment in an institution of higher education is not in dispute. The question is whether it is reasonable for the State to require that such person, in addition to being domiciled in North Carolina, be so domiciled while not in attendance at an institution of higher education for a six-month period, before he may qualify for in-state tuition.

We hold that such requirement is reasonable. The object is to assure that students who benefit from the in-state tuition subsidy the State provides for its citizens are in fact its own citizens. The Board of Trustees has determined that domicile alone is insufficent for this purpose. Domicile is solely a matter of physical presence plus the intent to make a home. All students enrolled in our institutions of higher education visibly meet the first requirement of domicile. The second requirement, however, is a concept in the mind of a particular student. It is true, as this Court emphasized in *Hall v. Board of Elections, supra,* that there are objective indicia by which a person's statement of intent may be tested. Even so, a statement of intent is usually difficult to disprove; and the determination of a student's domicile is especially difficult and subject to doubt. Ordinarily, whatever plans students may have with reference to where they will locate when they complete their attendance in an institution of higher education are in flux, frequently changed as unforeseeable circumstances and opportunities influence their future careers. Hence, the Board of Trustees has determined that domicile is only one of the prerequisites for in-state tuition status.

The State has no obligation to provide educational opportunities to noncitizens. Its interests require that it subsidize only those students whom it may be certain are North Carolina citizens. Moreover, uncertainty as to the circumstances under which the tuition status of students may change is fiscally and administratively undesirable.

The six-month nonattendance requirement adds objectivity and certainty to the requirement of domicile. It is a certainty not obtained by placing an unreasonable burden on students. Petitioners were not barred by respondent's regulations from becoming domiciliaries of North Carolina. Nor were they barred from becoming eligible for in-state tuition. Rather, they were only required, if they wanted that status, to be domiciled in North Carolina for six months while not in the Law School. They must be deemed to have enrolled in the Law School with full knowledge of the tuition-status requirements. If they had complied with the requirements for eligibility for in-state tuition, their statement of intent to make North Carolina their home would have been borne out by an objective indication of their earnestness. That the Board of Trustees might have

chosen other objective indicators to test the domiciliary intent of applicants for in-state tuition is not to say the one chosen was unreasonable. That there may be hardship cases resulting from the enforcement of these regulations is also not to say they are unreasonable. The constitutional test is whether the regulations have tended in general to assure that only North Carolina citizens get the benefit of in-state tuition. We hold that they have.

II

[6] Apart from the foregoing, petitioner Lamb contends he became eligible for in-state tuition status as of January, 1970, under Regulation No. 4, because of his marriage to a North Carolina domiciliary. Regulation No. 4 provides: "4. *Married Students:* The legal residence of a wife follows that of her husband, except that a woman currently enrolled as an in-state student in an institution of higher education may continue as a resident even though she marries a nonresident. If the husband is a nonresident and separation or divorce occurs, the woman may qualify for in-state tuition after establishing her domicile in North Carolina for at least six months under the same conditions as she could if she were single." Lamb contends that Regulation No. 4 grants in-state tuition to a nonresident woman who marries a North Carolina domiciliary solely on account of her sex and thus denies to men similarly situated a benefit in violation of the Equal Protection Clauses of the North Carolina and United States Constitutions.

Paragraph VIII of the AGREED STATEMENT OF FACTS provides "[t]hat the Board of Trustees Regulation No. 4 . . . permits a nonresident female to acquire a residence through marriage but does not give a nonresident male the same opportunity." Although not included in the stipulations, the court found that Lamb "became a married man after his initial enrollment"; that "[h]is wife was a legal resident of the State of North Carolina"; and that "[s]he was entitled to a lower tuition rate than her husband." The date of Lamb's marriage is undisclosed. Presumably, since the court found that "[s]he was entitled to a lower tuition rate than her husband," Mrs. Lamb had been a domiciliary for at least six months exclusive of any time spent in attendance at any institution of higher education. The record indicates she had not enrolled in any institution of higher education but was employed at the Research Triangle Institute.

The foregoing constitutes the only pertinent factual data before us with reference to Lamb's claim to in-state tuition status on account of his marriage.

Regulation No. 4 makes no provision for a change in the "legal residence" (domicile) of a nonresident man upon his marriage with a resident woman. The difference in the treatment of the sexes is this: When the nonresident woman marries the resident man, *ipso facto* she becomes a domiciliary of this state from the date of her marriage. *Kirk v. Board of Regents of Univ. of California, supra.* When the nonresident man marries the resident woman, he does not automatically become a domiciliary of this state but must establish that he has become a domiciliary by traditional proofs. For the reasons stated below, we need not consider whether this difference constitutes unreasonable discrimination.

[5] Independent of his marriage to a North Carolina resident, the stipulations establish that Lamb became a domiciliary of North Carolina as of a date prior to completion of his attendance in the Law School. Since Lamb's domiciliary status has never been in question in this case, Lamb does not have standing to object to the automatic bestowal of domicile on a nonresident woman who marries a North Carolina domiciliary.

[6] As stated above, the regulations required that Lamb, to be eligible for in-state tuition status, show not only (1) that he was a domiciliary of North Carolina, but also (2) that he was a domiciliary of North Carolina for six continuous months exclusive of time spent while in attendance at the Law School. Under the regulations, domiciliary status was not equivalent to in-state tuition status. Although a woman was deemed a domiciliary of North Carolina from the date of her marriage, to become eligible for in-state tuition a married woman, just as Lamb or any other student, had to establish actual residence in this state for six continuous months exclusive of the time spent while in attendance at an institution of higher education. The regulations, including Regulation No. 4, placed upon *all* students domiciled in North Carolina, *regardless of sex,* the burden of showing that they had been domiciled in North Carolina for six months while not in attendance at an institution of higher education, to qualify for in-state tuition. Therefore, Lamb's equal-protection argument fails.

Only two cases have come to our attention which involve regulations similar in some respects to Regulation No. 4.

In *Kirk v. Board of Regents of Univ. of California, supra,* the regulation provided that "[t]he residence of the husband is the residence of the wife . . . . " The petitioner (wife), a resident of Ohio, married a California resident on July 1, 1967, and became a resident of California as of that date. The denial of her right to enroll in the University of California in September, 1967, as an in-state student was upheld because she was not "a resident student," a term defined in the regulations as "any person who has been a bona fide resident of the State for more than one year immediately preceding the opening day of a semester during which he proposes to attend the university." The court rejected the petitioner's contention that the period of her husband's residence in California preceding the marriage should be retroactively "tacked" to the period of her residence after the marriage.

In *Clarke v. Redeker,* 259 F. Supp. 117, a three-judge federal court upheld a regulation which provided: "The residence of a wife is that of her husband. A nonresident female student may attain residence through marriage, and correspondingly, a resident female student may lose residence by marrying a nonresident."

We hold that the regulations as interpreted herein are valid and are not subject to successful attack by petitioners. Accordingly, the judgment of the court below is reversed.

Reversed.

Justice HIGGINS dissenting.

In the short time at my disposal and before the majority opinion becomes the law of this case, I have prepared and now record my dissent. The trustees, I think, have authority to fix a higher tuition rate for nonresident students than required of resident students for the same course of study. In my opinion, they do not have authority to fix a different rate for resident students.

The record indicates that all students are required to register and pay tuition in advance at the beginning of each school

year. If a nonresident student becomes a resident of North Carolina during a school term, in my opinion, thereafter he is entitled to register and pay tuition according to his actual residential status. Any other rule would be discriminatory and the denial of equal protection of the laws.

In order to prevent false claims of change in residence, the trustees require that when a nonresident student registers he continues to be a nonresident continually thereafter so long as he remains a student. He cannot raise the question of his actual residence until he quits school for at least six months and then re-enters. Hence the rule for all practical purposes raises a conclusive, irrebuttable presumption that he has not changed in fact, but continues a nonresident. The trustees say any other rule would permit false claims. However, the purpose of the hearing is to determine the bona fides of a claim rather than conclusively to presume it to be false. That a rule may on occasion be violated is not just cause for abrogation. An occasional violation is not the test either of its validity or its wisdom. The fact that false claims may be filed is not ground to deny just ones.

In this case, Glusman and Lamb each registered as a nonresident and paid the required nonresident tuition fees. Before they completed their courses of study they alleged they became residents of North Carolina, registered, voted, and paid taxes as such.

At the beginning of the next school year, they sought to register as residents of North Carolina and to be admitted on the payment of tuition fees charged other residents. Their claims were denied on the ground the first registration froze their status and they could not thereafter raise the question of their actual residence. At registration they were required to pay nonresidence fees approximately four times the amount charged other residents of the State. They filed claims for refund which the committee of the trustees denied; thereupon, they filed this action in the Superior Court of Wake County for review of the administrative decision denying their claims.

After hearing in the Superior Court, Judge Braswell entered judgment of which the following is a part:

> "2. That the tuition regulations of November 10, 1967, do establish an irrebuttable presumption of nonresidence

for all students twenty-one years of age or over who first enroll as a nonresident. Each petitioner is over twenty-one years of age. Each petitioner first enrolled as a nonresident.

"3. The Board of Trustees of the University of North Carolina may not establish an irrebuttable presumption of nonresidence upon the basis that a student once enrolled as a nonresident, paying nonresident tuition fees, cannot thereafter become a bona fide resident, short of dropping out of enrollment in an institution of higher education in North Carolina for at least six months before re-enrollment as a student. This irrebuttable presumption denies each petitioner the equal protection of the law. The petitioners should have the opportunity to present their facts before the Residence Status Committee of the University.

* * * * * * * * * * *

"5. There is no rational or reasonable basis on which an individual who has been a bona fide resident of and domiciled in the State of North Carolina for the initial time period required by law, why he should be denied the right to prove the fact of bona fide domiciled resident simply because he was in attendance of an institution of higher education in this State.

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that the tuition regulations which provide that the residence status of any student is forever to be determined as of the time of his first enrollment in an institution of higher education in North Carolina, and that residence status may not thereafter be changed if he continues re-enrollment without first having dropped out of school for at least a six-months' period, is declared unconstitutional."

Judge Braswell ordered the case remanded to the proper committee of the trustees for determination of the citizenship status of the students at the time they registered and paid the fees now involved in this proceeding.

Judge Braswell refused to recognize the validity of the trustees' claims that a student's residential status is fixed for all years following his registration unless he quits school and remains absent for at least six months. For all intents and purposes the rule creates a conclusive, irrebuttable presumption against any change of residential status.

The foregoing is contrary to our rule which is succinctly stated by a great lawyer who graced this Court during the present generation. In *Trust Company v. Andrews,* 264 N.C. 531, 142 S.E. 2d 182, Justice William B. Rodman, Jr. stated the rule: "The power to create a presumption cannot be made a device to short-circuit constitutional prohibitions." A student, or any other person who becomes of age, has a right to change his residence. The denial of this right, or its lawful exercise, is a denial of a constitutional guarantee. *Newman v. Graham,* 349 P. 2d 716; *Carrington v. Rash,* 380 U.S. 89, 13 L.Ed. 2d 675.

The motif of the Court's opinion in this case is political rather than judicial and denies to the claimants the right to be heard on the bona fides of their claims.

I vote to affirm the judgment of the Superior Court.

STATE OF NORTH CAROLINA v. CEPHUS JEROME DAWSON, NATHANIEL SMITH, AND SAMUEL VEREANELL ROSEBORO

No. 36

(Filed 31 July 1972)

1. Criminal Law § 92— denial of motion for severance

The trial court did not err in the denial of defendants' motion for severance of their rape trial where defendants were jointly indicted for the rape of the same person, and the evidence upon which the State relied for conviction of each relates to a single transaction and involves all defendants, notwithstanding the State's evidence tended to show that only one defendant had sexual intercourse with the victim and the guilt of the other two defendants, if any, rested on evidence that they aided and abetted the first defendant in the commission of the crime.

2. Jury § 5— jury selection — questioning conducted by court

Although G.S. 9-15(a) assures a defendant of the right to have due inquiry made as to the competency and fitness of any person to serve as a juror, the actual questioning of prospective jurors to elicit the pertinent information may be conducted either by the court or by counsel for the State and counsel for the defendant; the trial judge, in his discretion, may decide which course to pursue in a particular case.

3. Rape § 5— principals in second degree — sufficiency of evidence

The State's evidence was sufficient to support a conviction of two defendants for the crime of rape as principals in the second

degree where it tended to show that such defendants were standing by while a third defendant committed a rape, that they were undertaking to protect the third defendant from interference, that each of them obstructed the attempts of two witnesses to rescue the victim from the third defendant, and that the three defendants together fled from the scene while a witness was trying to call the police.

4. **Criminal Law § 99— ejectment of spectators**

The trial court in a rape prosecution did not err in ejecting two black girls from the courtroom for disrupting the trial and in instructing them not to return to the courtroom until they decided to behave themselves.

5. **Rape § 6— failure to submit lesser degrees**

In this rape prosecution, the trial court did not err in failing to submit lesser included offenses to the jury where the State's evidence tended to show that one defendant was guilty of rape as principal in the first degree and that the two remaining defendants were guilty as principals in the second degree of the crime committed by the first defendant, and there was no evidence from which the jury could find that any defendant committed an included crime of lesser degree.

Justice LAKE concurring in result.

APPEAL by defendants from *Cooper, J.*, August-September 1971 Criminal Session of COLUMBUS.

Defendants, Cephus Jerome Dawson (Dawson), Nathaniel Smith (Smith) and Samuel Vereanell Roseboro (Roseboro), were jointly indicted for the rape of one Edell Hughes on July 18, 1971.

Upon arraignment on September 2, 1971, each defendant, through Edward L. Williamson, Esquire, his court-appointed counsel, pleaded not guilty. Defendants' motions for severance of the cases were denied and each defendant excepted. Thereupon, a jury was selected, sworn and empaneled. Evidence was offered by the State and in behalf of defendants. None of defendants testified.

STATE'S EVIDENCE

Testimony of Mrs. Edell Hughes

Mrs. Edell Hughes testified that she left home about 10:30 or 11:00 p.m. on the night of Saturday, July 17, 1971, and started walking toward Whiteville, N. C., where she was employed at the Whiteville Convalescent Center. Ordinarily, she went to work by car, a distance of a mile and a quarter; but

her husband had left in their car and was not expected back that night. Mrs. Hughes had to be at work at 6:00 a.m. Sunday morning, July 18th. Since she "didn't have any transportation to work the next morning," she decided to go to Whiteville and spend the night there with a friend or at the hotel.

When attacked, Mrs. Hughes was in the middle of Pine Log Road, walking toward U. S. Highway 701 By-Pass. As she "neared" the Sherwood Drive-In and Sellers Service Station, three or four "colored" surrounded and "grabbed hold of her" and "started taking her off of the street." When she begged them to leave her alone, they would not listen but told her they would kill her "if she didn't stop that noise." They carried her "off the street." Her slacks were torn off. She was hit on the side of her head. Somebody "got on top of her and proceeded to have intercourse." She did not recognize any of them.

The "next thing she knew," she heard someone say, "Get off that white woman and leave her alone." A boy and a girl had come to her rescue. Both were colored. Mrs. Hughes did not know them and had never seen them. After the girl had helped Mrs. Hughes get her clothes on, the boy and girl took Mrs. Hughes to the police station.

Testimony of Viola Collins

Viola Collins testified that she was at the Sherwood Drive-In between 12:30 and 1:00 a.m. on Sunday, July 18th. A "boy named Dennis," with whom she had come to the Sherwood Drive-In, had gone "around to the back" and, upon his return, he "told her not to go around there because they had a white woman around there." Contrary to Dennis's advice, she "went on around behind the building, a distance of about the length of the courtroom to a point behind Pridgen's Refrigerator Service and Sellers Gas Station, a vacant lot." She then saw Dawson on top of the lady later identified as Mrs. Hughes. Four or five other people were there but she heard no one say anything to Dawson.

Dawson was "on top [of Mrs. Hughes] having intercourse with her." Smith and Roseboro were "standing there." Viola Collins told Dawson "to get up" and pulled "a towel or something" from Mrs. Hughes's face and got her by the arm. Mrs. Hughes, who seemed to have been "asleep or something," then "woke up," grabbed Viola Collins by the arm and asked for

help. Viola Collins tried to pull Dawson off of Mrs. Hughes, but he would not get up and told her to wait until he had finished. She then told him: "[Y]ou stay there until you finish and I am going to call a cop." While she was trying to get Dawson off of Mrs. Hughes, Smith, who "was standing a foot from [Dawson]," told her to leave Dawson alone. Roseboro "told her to shut up and get away or they would get her down."

After Dawson had refused to get off of Mrs. Hughes, Viola Collins then went to the Sherwood Drive-In for some change and then went to the phone booth. She "didn't know the number" and could not get the operator. She then "went back around there" and found that "all of them had gone." Mrs. Hughes's face was bruised on the side. She helped Mrs. Hughes get her clothes on and then she and Larry McMillan took Mrs. Hughes to the police station.

On cross-examination, Viola Collins testified that Mrs. Hughes said something about having had a quarrel with her husband; that Mrs. Hughes said that, after she had left home, some white boys picked her up and put her out down by Sellers Service Station; and that Mrs. Hughes had been drinking but she (Viola Collins) "didn't know about her being drunk."

Testimony of Larry McMillan

Larry McMillan testified that he knew Dawson, Smith and Roseboro and that he was at Sherwood Drive-In between 12:30 and 12:40 a.m. on July 18th. As a result of what "a guy" said, he "went around there" and saw Dawson "having intercourse with the lady." Dawson had his pants down to his ankles. He heard Roseboro tell Dawson "that he was greedy" and he heard Smith say something to Viola Collins but "didn't know what it was." He tried to make Dawson "get up off the lady." Dawson swung his left arm back but did not hit McMillan. While Dawson "was on her," Smith was standing about two feet from Dawson's head and Roseboro was standing about two feet to the right of Smith. Viola Collins ran to call the police. The three defendants left together, running. Viola Collins returned and "helped the lady" find her clothes. He and Viola Collins helped Mrs. Hughes put her clothes on and stood her up. Mrs. Hughes fell back when she attempted to stand alone and they helped her up again.

Larry McMillan further testified that "he heard Mrs. Hughes say please get up, and Viola turned to Dawson and told him to get off."

Testimony of Dr. F. M. Carroll

F. M. Carroll, a medical doctor, testified that on July 18, 1971, about 1:25 a.m., he made an examination of Mrs. Hughes "and in particular the pelvis examination." He observed that there was a bruise and abrasion on the left side of her face and left shoulder and some bruises on her back, mostly on the left side. She was "dirty and a lot of dirt and grass were on her clothes." "[H]er back and external female parts were dirty with grass and dirt about this area." "[S]he was undergoing a menstrual period." A microscopic examination of secretion taken from her vagina disclosed that sperm were present, and in his opinion she had had intercourse with someone within three or four hours. On the occasion of his examination, "intoxication was not noticeable."

Testimony of George Dudley

George Dudley testified that he is a Sergeant in the Whiteville Police Department and that he investigated the alleged rape of Edell Hughes on July 18, 1971. Each of the defendants made a statement to him. The court sustained defendants' objections to statements, if any, made by them to Sgt. Dudley.

DEFENDANTS' EVIDENCE

Testimony of Tony H. Shipman

Tony H. Shipman testified that he is 14 years of age. About 11:30 p.m., when walking in "the most direct route" from the bowling alley on U. S. 701 By-Pass to the Sherwood Drive-In he saw the lady later identified as Mrs. Hughes. She was lying on the grass, with her head resting on a suitcase, "between Pridgens and Sellers," about 50 yards off the paved sidewalk that ran along the edge of Powell Boulevard. She "had on pants, blouse, and shoes." He "ran to the Sherwood and told someone she was there." He "went back there with someone" and "the lady was still there, lying in about the same position." She was "not awake," and made no response when he tried to talk to her. She "did not ever say anything in his presence and she did not get up." Defendant Smith was one of "a lot of people" who went back there with him. Shipman did not see Roseboro

or Dawson. He left for his home in a friend's car and he did not know whether defendant Smith was still there when he left to go home. Shipman did not attempt to help the lady, "just glanced at her and left."

Testimony of Sylvester Baldwin

Sylvester Baldwin testified that he operates the Sherwood Drive-In. He was at his place of business from about 7:00 p.m. on Saturday, July 17th, until about 2:00 a.m. on Sunday, July 18th, "waiting on customers." He went outside the building several times that night. There were "several people," "quite a crowd," out in front. He did not recall having seen a white woman on Pine Log Road in front of his place of business at any time that night. He did not learn of the alleged offense until about 2:00 a.m. "[H]e did not go back there behind the Drive-In nor did anyone come in and tell him about what was going on." He had known defendant Dawson well since he was about nine years old but did not know the other two defendants.

Testimony of Bobby Randall

Bobby Randall testified that he lives in Whiteville, is 23 years of age, and has known the defendants a long time. On the night of July 17, 1971, he "was down [at Sherwood Drive-In] from about 9:00 to 11:30, just sitting around drinking beer and talking." He left "about 11:30" but "went back to Sherwood about 12:00 or 12:15." "[H]e did not recall seeing a white woman walking down the road with a suitcase." "[H]e was sitting out in front of Sherwood before he left at about 11:30 and quite a few people were sitting in cars." "[H]e was in front of Sherwood when Viola Collins came around the building." She asked him to take her and her father across town, and he agreed. "[W]hen he started out, someone from behind the building came and told us that they got a woman back there." "[H]e also went back there, in the area where the activity was taking place and there were quite a few back there when he got there," "between seven and ten people." "[H]e did not know about what happened back there in the lot and did not know whether or not Mrs. Hughes walked down the road with a suitcase."

CHARACTER WITNESSES

Annie P. Shipman, age 72, and Mrs. J. E. Baldwin, age 70, and Mamie Maultsby, age 81, testified with reference to the

general reputation of Roseboro. John Bennett testified with reference to the general reputation of Dawson. Freddie Barkley testified with reference to the general reputation of Smith.

(Note: When referring to events which occurred on Saturday, which was July 17, 1971, certain witnesses erroneously referred to such events as having occurred on July 18, 1971, which was Sunday.)

As to each of the three defendants, the jury returned a verdict of guilty of rape with a recommendation of life imprisonment. Thereupon the court, in separate judgments, sentenced each defendant to life imprisonment.

Each defendant excepted and appealed.

An order entered by the trial judge extended the time for docketing the record on appeal in the Appellate Division.

Attorney General Morgan and Associate Attorney Lloyd for the State.

Edward L. Williamson for defendant appellants.

BOBBITT, Chief Justice.

[1] Defendants' assignments of error based on exceptions to the denial of their motions for severance are without merit. Defendants were jointly indicted in a single bill for the rape of Mrs. Edell Hughes on July 18, 1971. The evidence upon which the State relied for the conviction of each relates to a single transaction and involves all defendants.

The record does not disclose what reason, if any, was advanced in the trial court in support of the motions for severance. In this Court, Smith and Roseboro assert that they were prejudiced by their trial with Dawson because the State's evidence tended to show Dawson had actual sexual intercourse with Mrs. Hughes but that their guilt, if any, rested on evidence tending to show that they aided and abetted Dawson in his commission of the crime of rape.

It was proper and appropriate for the three defendants to be tried together. The court properly instructed the jury that they would return verdicts of not guilty as to Smith and Roseboro if they failed to find beyond a reasonable doubt that Daw-

son committed the actual completed crime of rape. Too, the court properly instructed the jury that, if they found Dawson guilty of rape, they would consider and determine separately whether Smith was guilty of rape as an aider and abettor and whether Roseboro was guilty of rape as an aider and abettor. Properly, the court gave a separate charge or mandate as to each defendant in respect of the essential findings necessary to warrant a verdict of guilty as to that defendant.

Defendants have failed to show prejudice on account of the denials of their motions for severance. No evidence of any statement made by any defendant was admitted which tended to incriminate or prejudice any other defendant.

The jury was selected in the manner described and approved in *State v. Perry,* 277 N.C. 174, 176 S.E. 2d 729 (1970), and approved in *State v. McNeil,* 277 N.C. 162, 176 S.E. 2d 732 (1970), and in *State v. Willis, ante* 558, 189 S.E. 2d 190 (1972). There is no merit in defendants' assignment of error challenging this jury selection procedure.

[2] Defendants assign as error the denial of their counsel's request that he be permitted to question the prospective jurors as to their fitness and competency to serve as jurors.

The agreed case on appeal contains the following: "After the selection of the twelve jurors had been completed for the State, the attorney for the defendants requested permission of the presiding Judge that he be permitted to ask questions of the jurors on behalf of the defendants in the selection of the jury. The Court denied the request of the attorney for the defendants and informed counsel for the defendants that said counsel will not direct their own questions to the jury. Counsel for the Defendants thereupon made a request of the presiding Judge that he be allowed to conduct personal interrogation of each of the jurors, please. The presiding Judge denied the request and required counsel for the defendants to present the questions to the presiding Judge who would conduct his own voir dire. DEFENDANTS' EXCEPTION NO. 3."

A motion by the Attorney General suggesting diminution of the record was allowed by this Court. Defendants interposed no objection. Pursuant thereto an addendum was filed which contains a full transcript of the jury selection proceedings. The transcript discloses the following:

After twelve persons were called and seated in the jury box, the presiding judge proceeded to question these prospective jurors as to whether any of them knew (1) any of the defendants, (2) defendants' counsel, (3) the solicitor, (4) Mrs. Hughes, (5) Viola Collins, (6) Larry McMillan or (7) George Dudley. Each prospective juror who gave an affirmative response was then questioned closely by the court with reference to whether his (her) relationship would affect his (her) ability to base his (her) verdict solely on the evidence. Each juror stated his (her) name, address, and place of employment. In response to the court's inquiry, the solicitor announced that the State did not wish to challenge any of the jurors but was satisfied with those then seated in the jury box.

After the State had accepted the original twelve, the court asked defendants' counsel if he wished "the Court to ask any additional questions." Defendants' counsel stated that he "would like permission to ask questions on behalf of the defendants [himself], if the Court would permit it." To this request, the presiding judge replied that he would be happy to ask any questions defendants' counsel wanted him to ask, but that under the procedure they were using counsel "will not direct their own questions to the jury." Thereafter, the judge did ask all questions he was requested to ask by defendants' counsel, including questions addressed to particular prospective jurors as well as to those addressed to all. At the conclusion of this further questioning by the court, defendants' counsel challenged peremptorily four of the prospective jurors and accepted eight of them. The State accepted all the four prospective jurors called to replace the four challenged peremptorily by defendants. This procedure continued until the twelve who were sworn and empaneled had been accepted by the State and by defendants.

The transcript contains no entry of an objection or exception by defendants' counsel to the jury selection procedure.

Prior to final acceptance, the State had used only one of the twenty-seven peremptory challenges to which it was entitled under G.S. 9-21(b), and defendants had used only eight of the forty-two peremptory challenges to which they were entitled under G.S. 9-21(a).

G.S. 9-15(a) provides: "The court, or any party to an action, civil or criminal, shall be allowed, in selecting the jury,

to make inquiry as to the fitness and competency of any person to serve as a juror, without having such inquiry treated as a challenge of such person, and it shall not be considered by the court that any person is challenged as a juror until the party shall formally state that such person is so challenged."

In *State v. Allred,* 275 N.C. 554, 558-59, 169 S.E. 2d 833, 835 (1969), we quoted with approval the following from *State v. Brooks,* 57 Mont. 480, 486, 188 P. 942, 943 (1920), *viz:* "The *voir dire* examination of jurors is a right secured to the defendant by the statutes and has a definite double purpose: First, to ascertain whether there exist grounds for challenge for cause; and, second, to enable counsel to exercise intelligently the peremptory challenges allowed by law."

Although G.S. 9-15(a) assures a defendant of the right to have due inquiry made as to the competency and fitness of any person to serve as a juror, the actual questioning of prospective jurors to elicit the pertinent information may be conducted either by the court or by counsel for the State and counsel for the defendant. The trial judge, in his discretion, may decide which course to pursue in a particular case. If the court, when it conducts the questioning, declines to ask a question requested by the defendant's counsel, an exception may be noted so that an appellate court can consider the propriety, pertinence and substance of such question. The procedure followed in the present case avoided repetitive questioning without precluding or restricting any inquiry suggested and requested by defendants' counsel. The procedure followed was not violative of G.S. 9-15(a) or otherwise objectionable, and defendants have failed to show any prejudice on account thereof. Hence, the assignment based on what appears in the record as "DEFENDANTS' EXCEPTION NO. 3" is without merit.

Each defendant assigns as error the denial of his motion for judgment as in case of nonsuit. In testing its sufficiency, the evidence must be considered in the light most favorable to the State. Contradictions and discrepancies, even in the State's evidence, are matters for the jury and do not warrant nonsuit. *State v. Murphy,* 280 N.C. 1, 7, 184 S.E. 2d 845, 849 (1971), and cases cited.

Although the State's evidence strongly suggests that Mrs. Hughes, while walking along Pine Log Road, was grabbed,

struck, and taken from the road, and that defendants or one or more of them were involved in these events, there was no evidence sufficient to identify any of defendants until the testimony of Viola Collins and Larry McMillan was introduced, indicating that they observed the three defendants in the area behind the Sherwood Drive-In. The State's case against defendants rests upon what happened there, not upon whether defendants or any of them were involved in taking her to that location.

There was plenary evidence that Dawson raped Mrs. Hughes and is guilty as principal in the first degree. The guilt of Smith and Roseboro turns on the application of the legal principles quoted in the following paragraph:

"All who are present at the place of a crime and are either aiding, abetting, assisting, or advising in its commission, or are present for such purpose to the knowledge of the actual perpetrator, are principals and equally guilty. [Citations.] An aider and abettor is one who advises, counsels, procures, or encourages another to commit a crime. [Citations.] To render one who does not actually participate in the commission of a crime guilty of the offense committed there must be some evidence tending to show that he, by word or deed, gave active encouragement to the perpetrator of the crime or by his conduct made it known to such perpetrator that he was standing by to lend assistance when and if it should become necessary. [Citation.]" *State v. Ham,* 238 N.C. 94, 97, 76 S.E. 2d 346, 348 (1953). Decisions in accord are cited in *State v. Aycoth,* 272 N.C. 48, 51, 157 S.E. 2d 655, 657 (1967).

[3] There was evidence tending to show that Smith and Roseboro were standing by while Dawson was raping Mrs. Hughes; that they were undertaking to protect Dawson from interference; that each of them obstructed the attempts of Viola Collins and of Larry McMillan to rescue Mrs. Hughes from Dawson; and that the three defendants, together, fled from the scene while Viola Collins was trying to telephone the police. Our preliminary statement sets forth the evidence in detail. When considered in the light most favorable to the State, it was sufficient to support the conviction of Smith and of Roseboro of the crime of rape as principals in the second degree.

[4] Defendants assign as error the conditional exclusion of two black girls from the courtroom, contending the incident was prejudicial to defendants.

The record shows that immediately after Viola Collins testified that she saw Dawson "on top of Mrs. Hughes," the following occurred: "AT THIS point, the proceedings were interrupted by conduct in the Courtroom. The presiding Judge stopped the cross-examination and called two black girls who were sitting in the Courtroom. One in a green dress and the one next to her and told them to get up and get out of the Courtroom and when you decide to behave yourselves, you may come back. That either one or both of the girls laughed and the Judge said wait just a minute, what do you think is so funny. Whereupon the girl in the green dress said, 'I don't know.' Thereupon the Court called the girls up to the area between counsel table and the bench and asked them what is so funny. The girl in the green dress answered, 'Nothing.' The Court told her not to lean against the bench and instructed both girls to get out of the Courtroom and told them that when they decided to behave themselves, they could come back."

In view of the disruptive and unseemly conduct of the two girls, the requirement that they leave the courtroom until they decided to behave themselves was necessary if the trial was to continue under circumstances of judicial decorum and fairness to all concerned. Assuming the girls left the courtroom, it does not appear whether they or either of them returned and behaved themselves. We find no prejudicial error in the manner in which the presiding judge dealt with the inexcusable conduct of the two girls.

[5] Each defendant assigns as error the court's failure to charge the jury "on a lesser crime" and to submit guilt of "a lesser offense" as a permissible verdict.

The State's evidence tended to show that Dawson was guilty of rape as principal in the first degree. There was no evidence from which the jury could find that Dawson committed any included offense of lesser degree. Smith and Roseboro, if guilty at all, were guilty as principals in the second degree of the crime committed by Dawson. There was no evidence that Smith or Roseboro was guilty as a principal in the second degree of any crime except that of rape. Since there was no evi-

dence from which the jury could find that any defendant committed an included crime of lesser degree, defendants' assignments of error are without merit. For decisions supporting this conclusion, see the majority and dissenting opinions in *State v. Bryant,* 280 N.C. 551, 187 S.E. 2d 111 (1972).

Defendants' other assignments of error have been fully considered. None discloses prejudicial error or requires discussion.

The evidence discloses that Viola Collins and Larry McMillan acted with courage and compassion when they came to Mrs. Hughes's rescue and prevented the further exploitation and sexual abuse of this helpless woman. Their conduct deserves appreciation and commendation. Apparently, there were others who "passed by on the other side."

Each defendant has failed to show prejudicial error. Therefore, the verdicts and judgments will not be disturbed.

No error.

Justice LAKE, concurring in result. I concur in the result reached by the majority opinion and in all parts of that opinion except the approval of the trial court's denial of the request by counsel for the defendant that he, himself, be permitted to address questions to prospective jurors individually. In my opinion, this was error but, since the defendant did not exhaust his peremptory challenges, no prejudice to the defendant has been shown in this case.

As the majority opinion states, G.S. 9-15(a) provides: "The court, *or any party* to an action, civil or criminal, *shall be allowed,* in selecting the jury, *to make inquiry* as to the fitness and competency of any person to serve as juror * * *." (Emphasis added.) In *State v. Allred,* 275 N.C. 554, 558, 169 S.E. 2d 833, this Court said:

> "In selecting the jury, the court, or any party to an action, civil or criminal, has the right to make inquiry as to the fitness and competency of any person to serve as a juror. G.S. 9-15(a). 'The voir dire examination of jurors is a right secured to the defendant by the statutes and has a definite double purpose: First, to ascertain whether there exist grounds for challenge for cause; and, second, to enable

counsel to exercise intelligently the peremptory challenges allowed by law.' *State v. Brooks,* 57 Mont. 480, 188 P. 942."

Unquestionably, the trial judge has wide discretion in the conduct of the interrogation of prospective jurors so as to avoid needless repetition and waste of time. The requirement, however, that counsel relay through the court all questions to prospective jurors does not have the virtue of saving time except insofar as it may discourage inquiry by making it a tedious and laborious process. The statute seems to contemplate that a party may propound his own questions directly to the jury, assuming the propriety of the question. Such has been the prevailing, if not the universally accepted, practice under the statute in the courts of this State. I see no virtue and some danger in departing from it.

STATE OF NORTH CAROLINA v. CHARLES E. MEMS

No. 2

(Filed 31 July 1972)

1. **Criminal Law § 146— unconstitutionality of statute — issue raised first time on appeal**

Where defendant relies on a statute for the first time on appeal, the State is not precluded from raising the issue of the constitutionality of the statute for the first time on appeal.

2. **Criminal Law § 146— constitutionality of statute — grounds of appeal**

A statute will not be declared unconstitutional if the appeal can be determined on another ground.

3. **Criminal Law § 162— incompetent evidence — admission with no objection**

Admission of incompetent evidence, without objection, is not ground for a new trial, except when use of the evidence is precluded by a statute enacted in furtherance of public policy.

4. **Criminal Law § 162— in-court identification of defendant — objection — voir dire — failure to renew objection**

When defendant objected to a proposed in-court identification of himself, a *voir dire* examination was conducted, with the court holding that such testimony would be competent, whereupon defendant excepted; however, when the jury returned and the testimony was heard, defendant did not renew his objection, but such renewal was not necessary to preserve the question for appellate review, though renewal would have been the better practice.

5. Constitutional Law § 32— right to counsel — when it attaches

A person's right to counsel under the Sixth and Fourteenth Amendments attaches only after adversary judicial proceedings have been initiated against him.

6. Constitutional Law § 32— right to counsel — police lineup — waiver of counsel

Where a lineup is held only two or three hours after an offense is committed and no indictment has been sought or returned, no formal charge has been made, no warrant has been issued and no preliminary hearing has been set, a lineup which is not unnecessarily suggestive and conducive to irreparable mistaken identification is merely a step in the police investigatorial process and a defendant, having been given a full *Miranda* warning, may voluntarily waive his Sixth and Fourteenth Amendment right to counsel.

7. Constitutional Law § 4— standing to challenge constitutionality of statute

The unconstitutionality of a statute may be asserted only by a litigant adversely affected by the statute, but the State is such a litigant when the declaration of the validity of a statute will defeat the State's right to introduce otherwise competent and vitally important evidence, and so, its right to carry out the judgment which it has obtained against the defendant in the superior court.

8. Criminal Law § 66— findings of fact conclusive

Findings of fact made by the trial judge, being fully supported by the evidence on *voir dire,* are conclusive.

9. Constitutional Law § 32— right to counsel — waiver

The defendant in a criminal proceeding, whether it is a trial or pre-trial police lineup, has a right to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes.

10. Constitutional Law §§ 20, 32— equal protection — waiver of counsel — discrimination between indigent and affluent

G.S. 7A-457(a) makes an unconstitutional discrimination between indigent defendants and defendants having enough funds to pay for counsel, as it forbids waiver of counsel by an indigent, but leaves untouched the right of one who is affluent to waive counsel.

11. Constitutional Law §§ 20, 32— equal protection — waiver of counsel — basis for classification

Indigency is a sufficient basis for classification with reference to the right to court appointed, publicly paid counsel, but it is not a reasonable basis for classification as to the right to represent one's self.

12. Constitutional Law § 20— equal protection — reasonableness of classification

When a special class of persons is singled out by the Legislature for special treatment, there must be a reasonable relation between the classification and the object of the statute.

13. Constitutional Law § 32— right to counsel — indigent defendant — waiver of counsel

G.S. 7A-457(a), the statutory provision in effect at the time of defendant's trial, prohibiting an indigent from making any waiver of counsel in a capital case, is unconstitutional.

Chief Justice BOBBITT concurring in result.

Justices HIGGINS and SHARP join in concurring opinion.

APPEAL by defendant from *Godwin, J.*, at the 26 April 1971 Criminal Session of CUMBERLAND.

By an indictment, proper in form, the defendant was charged with the rape of Mrs. Sharon Machamer. The jury returned a verdict of guilty with a recommendation that the defendant's punishment be imprisonment for life. From a sentence imposed in accordance with the verdict, the defendant appeals. He was represented at the trial and on appeal by the Public Defender.

Mrs. Machamer testified concerning the details of the offense, which occurred at her trailer home in Fayetteville shortly after 12:30 p.m. on 2 March 1971. At the time, she was alone in her home save for her two infant children, her husband having gone to work in the early morning. Her assailant, whom she had observed in the vicinity about an hour earlier, entered her home and, upon being ordered by her to leave, struck her several times about the head and arms as she resisted him, then forced her into the bedroom, bound her hands and twice committed the offense, together with an unnatural sexual act, stating that he would not kill her and the children if she did what he wanted her to do. He was a Negro, about six feet in height and in his early twenties, dressed in dark colored pants and a navy blue "sweat type jacket" with the hood pulled up so that his eyes, nose and mouth alone were visible. Upon his departure she notified the police. Upon their arrival she described her assailant to them. At the trial she identified a blue sweat shirt (State's Exhibit 1) and a pair of green trousers (State's Exhibit 2) as those worn by her assailant. At the time of the offense, and for a considerable period prior thereto, a steady rain was falling.

Early in Mrs. Machamer's testimony the defendant objected to a proposed in-court identification by her of the defendant as her assailant. The court thereupon conducted an ex-

tensive voir dire. At its outset defendant's counsel suggested to the court that two other witnesses for the State, Mrs. Lora Boras and Mrs. Josefa Williams, might be asked by the solicitor to make in-court identifications of the defendant as the man they had seen in the vicinity of the Machamer trailer at the time of the offense and, if so, the defendant would object on the ground that their identifications, like that of Mrs. Machamer, were tainted by a prior unlawful lineup, this being a different lineup from that in which Mrs. Machamer made her identification. The court thereupon, on voir dire, heard evidence as to the competency of in-court identifications by all three of these witnesses.

At the conclusion of the voir dire, the court made full findings of fact and ordered:

> "1. That defendant's objection to an in-court identification of the defendant by Mrs. Machamer as her assailant be, and the same is, sustained.
>
> "2. That the defendant's objection to an in-court identification of the defendant by Mrs. Boras and Mrs. Williams, as the man they saw walking along the street in the rain in the neighborhood of their home and that of Mrs. Machamer, about mid-day on March 2, 1971, will be overruled and that such evidence will, if ordered, be received in evidence in defendant's trial."

To this order the defendant excepted. Thereupon, the jury returned to the courtroom and Mrs. Machamer's testimony, as above related, proceeded without objection. Mrs. Boras and Mrs. Williams then testified, without further objection.

Mrs. Boras and Mrs. Williams each identified in court the defendant as the Negro man she saw walking about her own trailer home, across the street from that of Mrs. Machamer, immediately prior to and after the assault. Each testified that, at a lineup conducted by the police on the afternoon of the offense, she observed and identified the defendant as the man she had so seen. The six men in the lineup were Negroes of about the same size and age. None of them was then wearing either a blue hooded sweat shirt or green pants such as those worn by the man she observed in the vicinity of the Machamer trailer. Each witness identified the hooded sweat shirt (State's Exhibit 1) as the one worn by the man so observed by her at

the trailer. Mrs. Williams likewise identified the green pants (State's Exhibit 2). These were the same garments identified by Mrs. Machamer as those worn by her assailant and by police officers as those taken by them from the defendant. Both Mrs. Boras and Mrs. Williams also identified shoes (State's Exhibit 3), taken from the defendant at the time of his arrest, as those worn by the man observed by them in the vicinity of the Machamer trailer. Mrs. Williams testified that she saw the man enter the Machamer trailer and leave it approximately half an hour later, that she followed him in her automobile after he left the Machamer trailer and, upon the arrival of the police a few minutes later, told them what she had seen.

Approximately one hour after the offense, police officers went to the home of the defendant and found him there with his mother. They arrested him "for investigation of rape," giving him the full Miranda warning. At that time the defendant was wearing the pair of green pants and the shoes identified by the women (State's Exhibits 2 and 3). The pants were quite wet. He told the officers he had been out of the house approximately one hour before their arrival and had then been wearing a pair of brown pants and a dark blue sweat shirt, both of which he handed to the officers, the sweat shirt being the one identified by Mrs. Machamer, Mrs. Boras and Mrs. Williams (State's Exhibit 1). It was "soaking wet" when handed to the officers by the defendant in his home, but the brown pants were dry.

The defendant did not testify. He offered witnesses in his behalf whose testimony was to the effect that he was at a Fort Bragg field house four or five miles from the Machamer trailer at the time Mrs. Machamer's assailant was observed walking about and entering her trailer. One of them testified that he then saw the defendant playing baseball, the other that he then saw him playing basketball and that the defendant, between 12:30 p.m. and 12:45 p.m., "signed out" from the witness a pair of basketball shoes. The second man was not called at the trial to testify in person and so was not cross-examined. Due apparently to his absence on military duty, his affidavit, dated 9 March 1971, was received in evidence, it being stipulated that he would so testify if present.

The defendant did not offer in evidence any document showing such "signing out" of the shoes by him on 2 March 1971 and there is nothing in the record to indicate that, at the

time of his arrest (less than two hours after he was so said to have been playing either baseball or basketball at the field house), he mentioned this circumstance to the arresting officers or that he otherwise called it to the attention of the police or of the solicitor prior to the introduction of the evidence at his trial.

The defendant's mother and his girl friend testified that, approximately an hour before Mrs. Machamer's assailant was observed walking about the trailers, the defendant left home wearing "brownish" or "goldish-tan" pants. His mother testified that he was still wearing these when he returned home shortly before the arrival of the officers, that he did not again go out because of the rain, and that the green pants he was wearing when the officers arrived were dry.

The State offered in rebuttal two witnesses who lived in the vicinity of the defendant. The first testified that she saw him with his girl friend at the bus stop approximately an hour before the offense. He was then wearing dark green pants and a blue jacket with a hood, these being similar in appearance to the State's Exhibits 1 and 2. She again saw him walking along the street in front of her home "heading toward town," about 12:30 p.m., this being the same time his witnesses said he was playing either baseball or basketball at the field house four or five miles away. He then had the hood of the jacket pulled up around his head, just as did Mrs. Machamer's assailant. The other rebuttal witness testified that she, too, saw the defendant at approximately 12:30 p.m. walking along the street near her home with the hood of his sweat shirt pulled up over his head.

After all the evidence was in, on motion of the defendant, the voir dire examination into the question of the lineup, at which Mrs. Boras and Mrs. Williams identified the defendant, was reopened. Upon the original voir dire hearing, at which the defendant elected not to testify, the evidence was that, prior to the lineup, the defendant was fully advised of his constitutional rights. He having said he wanted a lawyer at the lineup, the officers sent for one, but, prior to the lawyer's arrival, the defendant voluntarily signed a written waiver of counsel and the lineup proceeded without the presence of counsel.

Upon the reopening of the voir dire, the defendant called Attorney Joe Brown Chandler, Jr., who testified that he was in the district courtroom when the sheriff advised him there was a man in the Detective's Bureau in the basement of the courthouse who was requesting an attorney. Thereupon Mr. Chandler went to the Detective's Bureau. Upon his arrival the lineup was in progress. He was immediately informed by the officers that the suspect, the defendant, had changed his mind and did not want the services of an attorney. Thereupon, Mr. Chandler took no part in the lineup procedure but observed that all the persons in the lineup were Negro males of about the same weight and height, all were dressed in casual clothing with nothing remarkable about their dress and that nothing abnormal or constituting an infringement of the defendant's rights in the formation of the lineup was apparent.

The defendant's counsel then stated his desire to call the defendant for the purpose of testifying on this resumption of the voir dire. The court refused to permit the defendant to so testify for the reason that he had been present at the original voir dire hearing and had then chosen not to testify.

At the conclusion of this resumption of the voir dire, the court stated it would not disturb its former ruling. To this the defendant objected and excepted.

Following the charge by the court, to which the defendant took no exception, the jury returned and announced its verdict. Thereupon, the defendant's counsel announced that he desired to make a motion "before the verdict is finally received." The motion was one for a mistrial on the ground of alleged improprieties by members of the jury during the course of the trial. The court immediately conducted an extensive hearing and, finding there had been no such irregularities, denied the motion. The court then polled the jury. Each juror having replied that he or she still assented to the verdict of guilty with the recommendation that the punishment be life imprisonment, the court accepted the verdict and imposed sentence accordingly.

Attorney General Morgan, Deputy Attorney General Bullock, and Associate Attorney Conely for the State.

James Godwin Taylor, Assistant Public Defender, for defendant.

LAKE, Justice.

The defendant has argued upon his appeal eight assignments of error. We have considered each carefully and find no merit in any of them. The only one meriting detailed discussion is that the trial judge erred in failing to grant the defendant's motion to suppress the in-court identifications of the defendant by Mrs. Boras and Mrs. Williams.

In his brief, the defendant asserts:

> "Under North Carolina law in effect at the time of the present lineup the defendant was clearly, unequivocally entitled to the services of counsel at the lineup. He was guaranteed this right by Article 36 of Chapter 7A of the General Statutes of North Carolina and could not waive this right. The provisions of NCGS 7A-457(a) prohibit his waiver of right to counsel at any critical stage of the proceedings in a capital case. A lineup such as that conducted here is such a critical stage of the proceedings. NCGS 7A-451(b)(1). See *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971) and *State v. Chance,* 279 N.C. 643 (1971)."

[1] Nothing in the record indicates that in the superior court the defendant relied upon the provision in G.S. 7A-457(a), "A waiver shall not be allowed in a capital case." On the contrary, all the examination on voir dire related only to whether the lineup was impermissibly suggestive and to whether his written waiver of counsel was made with full knowledge of the surrounding circumstances. It was not until the defendant filed his brief in this Court that he advanced the contention that his waiver of counsel at the lineup was ineffective by reason of this provision in G.S. 7A-457(a). The State, in its brief, asserts that this attack must fail because this provision of the statute is unconsitutional.

The State had no opportunity to attack the constitutionality of this statutory provision in the lower court. Its evidence was admitted by the lower court. There was no contention therein that this provision of the statute made the evidence incompetent. Thus, the State's contention as to its invalidity is not barred from our consideration by the familiar rule to the effect that a question as to the constitutionality of a statute may not be raised for the first time in this Court when the party raising

it could have done so in the lower court. See: *Lane v. Insurance Co.*, 258 N.C. 318, 128 S.E. 2d 398; *Pinnix v. Toomey*, 242 N.C. 358, 87 S.E. 2d 893; *Baker v. Varser*, 240 N.C. 260, 82 S.E. 2d 90; *Phillips v. Shaw, Comr. of Revenue*, 238 N.C. 518, 78 S.E. 2d 314; 16 AM. JUR. 2d, Constitutional Law, § 115; 16 C.J.S., Constitutional Law, § 96b. The reason for this rule is that a litigant's failure to make a timely assertion of his constitutional right is deemed a waiver of it. See: *Yakus v. United States*, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834; *Oklahoma v. Civil Service Commission*, 330 U.S. 127, 67 S.Ct. 544, 91 L.Ed. 794; *State v. Gaiten*, 277 N.C. 236, 176 S.E. 2d 778. It has no application where, as here, the statutory provision in question is injected into the litigation for the first time in the appellate court.

[2] The State also contends in its brief that the defendant failed to object to the testimony in question when it was offered before the jury and, therefore, may not now assert that its admission constituted reversible error. If this were correct, we would not reach on this appeal the constitutional question raised by the State, for it is also a well established rule that a statute will not be declared unconstitutional if the appeal can be determined on another ground. *State v. Blackwell*, 246 N.C. 642, 99 S.E. 2d 867; *Fox v. Commissioners of Durham*, 244 N.C. 497, 94 S.E. 2d 842; *State v. Jones*, 242 N.C. 563, 89 S.E. 2d 129; *In Re Parker*, 209 N.C. 693, 184 S.E. 532; 16 AM. JUR. 2d, Constitutional Law, § 113.

[3, 4] The admission of incompetent evidence, without objection, is not ground for a new trial, except when use of the evidence is precluded by a statute enacted in furtherance of public policy. *Reeves v. Hill*, 272 N.C. 352, 158 S.E. 2d 529; Stansbury, North Carolina Evidence 2d, § 27. We do not now need to determine whether, by reason of G.S. Chapter 7A, Article 36, the testimony of the witnesses here in question falls within the exception to this rule. While there was no objection made at the moment that Mrs. Boras and Mrs. Williams testified before the jury, the record shows clearly that, in the course of the voir dire examination resulting from his objection to a proposed in-court identification of him by Mrs. Machamer, the defendant also brought to the attention of the court his objection to any testimony by Mrs. Boras and Mrs. Williams identifying him as the man seen by them. Thereupon, the voir dire examination was expanded and the court ruled that such testi-

mony would be competent. The defendant excepted. The jury then returned to the courtroom and the testimony was immediately offered and received. While it would have been the better practice for the defendant then to have renewed his objection, we think that, under these circumstances, it was not necessary for him to do so in order to preserve the question for appellate review.

[5, 6] There is nothing in the record to indicate a violation of the defendant's constitutional rights in the admission of this evidence. It is now established that "a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him," and the rule of *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, is limited to lineups conducted after "the onset of formal prosecutorial proceedings." *Kirby v. Illinois,* 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed. 2d 411, 40 Law Week 4607. The lineup here in question was held only two or three hours after the offense was committed. The defendant was in custody "for investigation of rape," but no indictment had been returned or even sought, no formal charge had been lodged against him, no warrant had been issued and no preliminary hearing had been set. The lineup was merely a step in the police investigatorial process. All of the evidence compels the finding that there was nothing in the lineup procedure which made it "unnecessarily suggestive and conducive to irreparable mistaken identification" so as to violate the defendant's rights under the Due Process Clause of the Fifth and Fourteenth Amendments, as construed in *Stovall v. Denno,* 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed. 2d 1199, and *Foster v. California,* 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed. 2d 402. Furthermore, the record shows clearly that the defendant, after being given the full warning required by *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694, with full understanding of his constitutional right to counsel, waived it voluntarily. This he may do. *Miranda v. Arizona, supra.*

The defendant's assignment of error must, therefore, fail unless it is supported by Article 36, Chapter 7A of the General Statutes. G.S. 7A-451, which is part of that article, provides that an indigent person is entitled to services of counsel in "any felony case," which entitlement begins as soon as feasible

after he is taken into custody and "continues through any critical stage of the action or proceeding, including * * * a *pretrial* identification procedure at which the presence of the indigent is required * * *." (Emphasis added.) G.S. 7A-452 provides, "Counsel for an indigent person shall be assigned by the court," except that a public defender may tentatively assign himself or his assistant to represent an indigent person, subject to subsequent approval by the court. G.S. 7A-453 provides that if a defendant, taken into custody in a district which has a public defender, "states that he is indigent and desires counsel, the authority having custody shall immediately inform the defender" who shall make a preliminary determination as to the person's entitlement to his services, and "proceed accordingly." G.S. 7A-457(a), prior to the 1971 Amendment which has no application to this appeal, provided:

> "(a) An indigent person who has been informed of his rights under this subchapter may, in writing, waive any right granted by this subchapter, 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 consequences of a waiver. In making such a finding, the court shall consider, among other things, such matters as the person's age, education, familiarity with the English language, mental condition, and the complexity of the crime charged. *A waiver shall not be allowed in a capital case.*" (Emphasis added.)

This was a capital case. The trial court found:

> "16. That at the time of his arrest at his home in Fayetteville during the afternoon of March 2, 1971, the defendant was advised of his constitutional rights as required by Miranda.
>
> "17. That after he reached the courthouse in custody of Sheriff's Officers, following his arrest, he was advised that Sheriff's Officers desired to establish a lineup of several men to be viewed by Mrs. Machamer and other witnesses in order that they might determine if they could identify the defendant as a person seen by them earlier that day in the neighborhood of the Machamer mobile home, and that he was entitled to be represented by counsel in connection with the lineup; that if he was unable to employ counsel, counsel would be appointed for him without ex-

pense to him; that thereupon the defendant advised the Sheriff's Officer that he wished to have counsel present with him at the time of the lineup;

"18. That Sheriff's Officers agreed to see that legal counsel was furnished to him without expense to him, and that they began to search for an attorney to be present and represent the defendant in connection with the lineup;

"19. That before the arrival of counsel and before the lineup was made up, the defendant changing his mind, advised Sheriff's Officers that he did not desire to be represented by counsel in connection with the lineup and that he waived his right to counsel in writing."

The trial court thereupon concluded:

"4. That the defendant knowingly and intentionally waived his right to be represented by legal counsel in connection with the aforesaid lineup."

These findings and this conclusion of the trial court comply with the requirements of G.S. 7A-457. The competency of the testimony, therefore, turns upon the validity of the provision in G.S. 7A-457(a), *"A waiver shall not be allowed in a capital case."* (Emphasis added.)

Effective 30 October 1971, subsequent to the trial of this defendant, the Legislature rewrote Section 7A-457 and eliminated therefrom the provision prohibiting waiver of counsel by an indigent defendant in a capital case, insofar as out-of-court proceedings are concerned. Such rewriting of the statute has no effect upon this appeal and we are not here concerned with the validity of any provision of the statute as rewritten.

[7] It is well settled that the unconstitutionality of a statute may be asserted only by a litigant who is adversely affected by the statute. *Nicholson v. Education Assistance Authority,* 275 N.C. 439, 168 S.E. 2d 401; *D&W, Inc. v. Charlotte,* 268 N.C. 577, 151 S.E. 2d 241; *Charles Stores v. Tucker,* 263 N.C. 710, 140 S.E. 2d 370. In this case, the State is a party litigant. Its right to introduce evidence, otherwise competent and vitally important to its case, and so, its right to carry out the judgment which it has obtained against the defendant in the superior court will be defeated if this provision of G.S. 7A-457(a), before the 1971 revision, is valid and is given the effect for which

the defendant contends. Thus, the State has standing to raise the question of the constitutional validity of this statutory provision.

[8] The findings of fact made by the trial judge, being fully supported by the evidence on voir dire, are conclusive. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1, cert. den., 386 U.S. 911; *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344; *State v. Chamberlain,* 263 N.C. 406, 139 S.E. 2d 620; *State v. Outing,* 255 N.C. 468, 121 S.E. 2d 847, cert. den., 369 U.S. 807, 82 S.Ct. 652, 7 L.Ed. 2d 555. It is, therefore, established, for the purposes of this appeal, that the defendant, after being fully advised of his right to counsel at the lineup, knowingly, understandingly and voluntarily waived that right in writing. Unless the above quoted prohibition of such waiver in G.S. 7A-457 requires a different conclusion, he may not now assert the absence of counsel at the lineup as ground for a new trial. If that provision of the statute, in effect at the time of his trial, was valid, he must be given a new trial. The admission of the testimony of Mrs. Boras and Mrs. Williams positively identifying him as the man they saw walking about and entering the Machamer trailer immediately prior to the offense cannot be deemed harmless, notwithstanding the presence of other testimony sufficient to support the jury's verdict.

Under the circumstances of this case, it would make no difference had the attorney summoned by the sheriff actively participated in and approved the manner of conducting the lineup. This attorney was not chosen or accepted by the defendant. He was not appointed by the court. Nothing in the record indicates that he was a member of the staff of the Public Defender. He was not designated by the Public Defender to represent the defendant. He was simply selected by the police officers who had no authority, by statute or otherwise, to select an attorney for the defendant in the absence of the defendant's acquiescence in the selection.

The defendant's statutory right to have the services of duly appointed counsel at this lineup conducted prior to the inception of prosecutorial proceedings is not here in question. He voluntarily and understandingly waived that right in writing. The only question for us to determine is the validity of the statutory provision denying him the right to waive it.

[9] This Court has repeatedly held that the defendant in a criminal proceeding has a right to handle his own case without

interference by, or the assistance of, counsel forced upon him against his wishes.

In *State v. McNeil,* 263 N.C. 260, 267-268, 139 S.E. 2d 667, Justice Parker, later Chief Justice, said:

> "The United States Constitution does not deny to a defendant the right to defend himself. Nor does the constitutional right to assistance of counsel justify forcing counsel upon a defendant in a criminal action who wants none. *Moore v. Michigan,* 355 U.S. 155, 2 L.Ed. 2d 167; *Carter v. Illinois,* 329 U.S. 173, 91 L.Ed. 172; *United States v. Johnson,* 6 Cir. (June 1964), 333 F. 2d 1004."

In *State v. Bines,* 263 N.C. 48, 138 S.E. 2d 797, Justice Higgins said:

> " 'The constitutional right (to counsel), of course, does not justify forcing counsel upon an accused who wants none.' *Moore v. Michigan* [supra]; *Herman v. Claudy,* 350 U.S. 116, 76 S.Ct. 223, 100 L.Ed. 126."

In *State v. Morgan,* 272 N.C. 97, 157 S.E. 2d 606, this Court said:

> "Having been fully advised by the court that an attorney would be appointed to represent him if he so desired, he [the defendant] had the right to reject the offer of such appointment and to represent himself in the trial and disposition of his case."

In *State v. Williams,* 276 N.C. 703, 174 S.E. 2d 503, this Court affirmed a death sentence imposed for murder in the first degree upon a defendant who was tried without counsel, pursuant to his declaration that he did not want counsel. Our decision was reversed by the Supreme Court of the United States, but upon another ground and without mention of the defendant's having been tried without counsel.

In *United States v. Plattner,* 330 F. 2d 271 (2nd Circuit 1964), the judgment of the trial court was reversed and the matter remanded because the defendant "expressed the desire to be his own counsel," but the trial court "thereupon appointed counsel from Legal Aid to represent him because petitioner was not schooled in the law." The Court of Appeals, speaking through Circuit Judge Medina, said:

"As we hold that a defendant on the trial of a criminal case, including a *coram nobis* proceeding at which the defendant is present and witnesses are to be examined and cross-examined, has a right to conduct and manage his own case *pro se,* we reverse the order appealed from and remand the case. Moreover, we hold the right to act *pro se* as above stated is a right arising out of the Federal Constitution and not the mere product of legislation or judicial decision. * * *

"Under the Fifth Amendment, no person may be deprived of liberty without due process of law. Minimum requirements of due process in federal criminal trials are set forth in the Sixth Amendment. * * * Implicit in both amendments is the right of the accused personally to manage and conduct his own defense in a criminal case."

Also declaring that the right of a defendant to represent himself in a criminal proceeding is a constitutional right are: *Lowe v. United States,* 418 F. 2d 100 (7th Circuit 1969), cert. den., 397 U.S. 1048, and *United States v. Sternman,* 415 F. 2d 1165 (6th Circuit 1969), cert. den., 397 U.S. 907, rehear. den., 397 U.S. 1081.

[9] It not infrequently happens that a defendant is dissatisfied with the counsel appointed for him by the court. While he may not insist that the court appoint a different counsel to represent him, the defendant has the right to insist that his case not be handled by an attorney in whom he has no confidence. If he so desires, he has the right, in that situation, to represent himself. In this there is no distinction between a capital case and any other case. See *State v. Williams,* supra. If he may represent himself, as we there held, through the intricacies of an actual trial, he surely has the right to look after his own interest at a police lineup free from threats, duress and unduly suggestive indications that he is the person the police desire to have selected by the viewer. This right the Legislature may not deny a defendant, be he indigent or affluent.

[10] Furthermore, G.S. 7A-457 makes an unconstitutional discrimination between indigent defendants and defendants having enough funds to pay for counsel. The statute forbids waiver of counsel by an indigent, but leaves untouched the right of one who is affluent to waive counsel in any case, capital or otherwise.

Let us suppose that two individuals are arrested jointly by the police under suspicion that together they committed a capital crime. One is indigent, the other affluent. The arrest occurs late in the evening. Both protest their innocence. Both are transients, passing through the community. The officers offer them the opportunity to appear in a lineup conducted without any unduly suggestive procedures. With the above quoted provision of G.S. 7A-457(a) in effect, the suspect with enough money in his pocket to employ counsel may, if he so desires, accept the offer and, if not identified, proceed on his way. The indigent suspect, equally willing, must remain in custody until counsel can be appointed by the court or the Public Defender, if any, can be located and brought to observe the lineup. Neither the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, Article I, Section 19 of the present Constitution of North Carolina, nor Article I, Section 17 of the Constitution of North Carolina, as it read at the time of this defendant's trial, permit such discrimination.

[11, 12] Indigency is obviously a sufficient basis for classification with reference to the right to court appointed, publicly paid counsel, but it is not a reasonable basis for classification as to the right to represent one's self. Poverty is not synonymous with lack of intelligence or even with limited education, and possession of funds does not necessarily mean possession of good judgment or of knowledge of legal procedure. When a special class of persons, such as indigents, is singled out by the Legislature for special treatment, there must be a reasonable relation between the classification and the object of the statute. *Quaker City Cab Co. v. Pennsylvania,* 277 U.S. 389, 48 S.Ct. 553, 72 L.Ed. 927; *Power Manufacturing Co. v. Saunders,* 274 U.S. 490, 47 S.Ct. 678, 71 L.Ed. 1165; *State v. Glidden Co.,* 228 N.C. 664, 46 S.E. 2d 860; 16 AM. JUR. 2d, Constitutional Law, § 501. The purpose of the statutory provision for appointment of counsel, at public expense, for indigent defendants is to put indigent defendants on an equality with affluent defendants in trials upon criminal charges. To deny, or to restrict the right of the indigent to waive counsel, i.e., to represent himself, while permitting the affluent defendant to exercise such right, has no reasonable relation to the objective of equal opportunity to prevail at the trial of the case. Such classification is beyond the power of the Legislature.

[13] We, therefore, hold that the provision which appeared in G.S. 7A-457(a) at the time of the defendant's trial, "A waiver shall not be allowed in a capital case," is unconstitutional and of no effect. It follows that the defendant's Assignment of Error No. 1, to the failure of the court to grant his motion to suppress the in-court identifications by Mrs. Boras and Mrs. Williams, is without merit and must be overruled.

No error.

Chief Justice BOBBITT concurring in result.

The court found that defendant had knowingly and intentionally waived *in writing* his right to be represented by counsel at the lineup at which Mrs. Boras and Mrs. Williams identified him.

The lineup was on March 2, 1971, the date the crime was committed. G.S. 7A-457(a) *then* provided that waiver of counsel by an indigent person "shall not be allowed in a capital case."

Whether a nonindigent person could have successfully contended that he was entitled to the same protection it purported to confer on an indigent person is not presented. I do not share the view that the State's counsel have standing to challenge as unconstitutional a right which the General Assembly saw fit to confer on an indigent person.

Defendant, an indigent, relies upon this provision of G.S. 7A-457(a) and was in fact represented by counsel in all in-court proceedings. I do not share the view that the State's counsel have standing to challenge this statutory provision as unconstitutional on the ground that some other indigent defendant *may assert* his constitutional right to *refuse* representation by counsel. This case involves a waiver of the right to counsel, not the right *to refuse* representation by counsel.

My concurrence in result is on a different basis. As used in G.S. 7A-457(a), a "capital case" is a criminal prosecution for a crime which is or may be punished by death. Under the June 29, 1972, decision of the Supreme Court of the United States in *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726, punishment by death is not permissible under statutory provisions such as those incorporated in North Caro-

lina statutes. By its decision in *Furman,* the Supreme Court invalidated and rendered obsolete that portion of G.S. 7A-457(a) which related solely to a "capital case."

Justices HIGGINS and SHARP join in this concurring in result opinion.

STATE OF NORTH CAROLINA v. ROY ARTHUR HADDOCK

No. 101

(Filed 31 July 1972)

1. Criminal Law § 75— voluntariness of in-custody statement

Where defendant was twice advised of his constitutional rights, stated each time that he knew his rights and fully understood them, then freely, knowingly and understandingly signed a written waiver of his right to the presence of counsel, the requirements of *Miranda* were fully met, and defendant's statement was competent as far as federal constitutional standards are concerned.

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

Where an indigent defendant charged with a capital offense makes a statement competent under *Miranda,* the statement may still be rendered incompetent by reason of G.S. 7A-457(a) which provides that a waiver of counsel shall not be allowed in a capital case; but it is only in those instances where defendant's statement is the result of a custodial interrogation that such statement is incompetent.

3. Criminal Law § 75— in-custody statement — waiver of counsel — indigent defendant charged with capital offense

An indigent defendant's statement with respect to his commission of a capital crime was admissible, though made without benefit of counsel, because the statement was not the result of an in-custody interrogation, but was defendant's own voluntary narration.

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

Under former G.S. 7A-457(a), an indigent defendant in a capital case could not waive the right to counsel either orally or in writing; however, the statute so providing had no application to volunteered statements.

5. Criminal Law § 75— voluntary statements — admissibility

Volunteered statements are competent evidence, and their admission is not barred under any theory of the law, state or federal.

6. Criminal Law § 75— in-custody statement — questioning by officers

A voluntary in-custody statement does not become the product of an "in-custody interrogation" simply because an officer, in the

course of defendant's narration, asks defendant to explain or clarify something he has already said voluntarily.

Chief Justice BOBBITT concurring in result.

Justices HIGGINS and SHARP join in concurring opinion.

APPEAL by defendant from *Seay, J.*, 23 August 1971 Criminal Session, GUILFORD Superior Court.

Defendant was tried upon a bill of indictment charging him with the murder of Robert Earl DeShazo in Guilford County on 19 April 1971.

The State's evidence tends to show that about 3 a.m. on 19 April 1971 Robert Earl DeShazo, an attendant at a Kayo Service Station near Greensboro, North Carolina, was shot and killed. His body was found on the service station driveway. Near his right hand was a .32 caliber snub-nosed revolver containing two spent cartridges and five live rounds in the chamber.

Policeman R. L. Grogan had stopped defendant earlier that night, before the murder, and given him a traffic ticket. At that time defendant was driving a light-colored Plymouth bearing North Carolina License No. FR-9702. Between 2:00 and 2:30 a.m. two men in a white Plymouth drove into the Gate Service Station located one-half mile from the Kayo Service Station where DeShazo was killed, and asked for a Coke. The attendant was suspicious and told the men to get the Cokes themselves, whereupon they drove rapidly away. The attendant noted the license number of the vehicle was FR-9702. A short time later he saw the car heading in the direction of the Kayo Service Station.

Eugene Porterfield operates a cafe on Highway 49 near Roxboro and during the day of 19 April 1971 observed a light-colored 1967 Plymouth parked near his place of business. Its left front window was shot out and there was blood on the front seat of the car. Porterfield notified the highway patrol, and Patrolman A. J. Johnson investigated. He found the left front window of the car broken out and scattered pieces of glass in the car. He noticed bloodstains on the driver's seat. He discovered on the front seat, in plain view, the traffic citation which had been issued to the defendant by Policeman Grogan on the 18th of April. This citation was offered in evidence as State's Exhibit No. 6.

Doctor S. V. Hulbanni testified that on the 19th of April he removed a bullet from the left arm of the defendant in the Norfolk General Hospital in Norfolk, Virginia. There was no infection, indicating the defendant's wound was fresh.

As a result of information received, SBI Agent Henry Poole went to Danville, Virginia, with Deputy Sheriff Worrell. There they obtained a fugitive warrant for defendant's arrest. The officers then proceeded to the Danville bus station where they met Bus No. 3114 upon its arrival. They boarded the bus and found the defendant asleep. He was placed under arrest by Sergeant Wyatt of the Danville Police Department and fully advised of his constitutional rights by SBI Agent Poole. Defendant was then taken to the Danville Police Station. Upon entering an office which had been furnished to Agent Poole, the defendant indicated he wanted to make a statement. Mr. Poole advised the defendant to wait but defendant spoke anyway and said he was coming to turn himself in. At that point Mr. Poole again advised defendant of his constitutional rights. Defendant indicated he understood those rights and signed a written "Waiver of Rights." He then reiterated that he was coming to turn himself in and said, "The hardest thing I ever did was to pull that trigger." Officer Poole asked him to explain that statement and he said: "I pulled in the service station to rob the man. He had his hand in his pocket. I told him to take his hand out of his pocket. When he did, he had a gun in it." Defendant then stated that the man shot him in the arm and that he shot the man; that he got back into his car and the man shot a second time, shooting out the glass in the car. Defendant said he then "sort of laid down" in the front seat of the car and drove away as quickly as he could.

Defendant further related to Officer Poole that prior to the shooting incident he had been to the Kayo Station and had pulled into a Gate Service Station and asked for directions; that he had been engaged in a fight with some Negroes and had gone to Burlington where he obtained his shotgun; that he purchased two dollars' worth of gas at the Kayo Station on his return trip to Greensboro; that after purchasing the gas he went to look for the Negroes but was unable to find them and decided to return to the Kayo Station to rob the man.

Defendant further stated that he had been to a doctor in Norfolk, Virginia, who removed a bullet from his arm. Defendant

thereupon took a bullet from his wallet, identifying it as the one removed from his arm by the doctor, and gave it to the officer. He told the officer that he had thrown the shotgun with which he shot DeShazo into a creek near Greenville and gave minute directions leading to a bridge on a dirt road from which he had thrown the weapon. Those directions were followed and the weapon was recovered from the creek. This weapon, a sawed-off shotgun, was offered in evidence over defendant's objection.

E. B. Pearce, a specialist in firearms identification with the State Bureau of Investigation, testified that he compared the bullet removed from defendant's arm with a bullet he test fired from the .32 caliber pistol found on the service station driveway near the right hand of Robert Earl DeShazo, the deceased, and found many identical characteristics; that in his opinion the bullet taken from defendant's arm was fired from State's Exhibit 5, the .32 caliber revolver. The bullet was offered in evidence over defendant's objection.

Upon defendant's timely objection the jury was excused and a voir dire conducted with respect to the foregoing inculpatory statements made to SBI Agent Poole and other officers. Both the State and the defendant offered evidence on the voir dire, at the conclusion of which the court made findings of fact and concluded that defendant's statement to the officers "was made freely, voluntarily and understandingly, after the defendant had been warned as per the *Miranda* decision and his constitutional rights explained to him." Defendant's motion to suppress the evidence was denied; and the bullet taken from his arm, the shotgun recovered from the creek, and defendant's statement to Officer Poole were admitted in evidence before the jury over defendant's objection.

Defendant offered no evidence before the jury. The jury convicted him of murder in the first degree and recommended life imprisonment. Judgment was pronounced accordingly, and the defendant appealed to the Supreme Court assigning errors noted in the opinion.

Wallace C. Harrelson, Public Defender, and Dale Shepherd, Assistant Public Defender, for the defendant appellant.

Robert Morgan, Attorney General, and Roy A. Giles, Jr., Assistant Attorney General, for the State of North Carolina.

HUSKINS, Justice:

Defendant assigns as error the admission of his inculpatory statements to SBI Agent Poole, made while in custody and without benefit of counsel. He contends the incriminating statements are tainted and inadmissible because he was indigent at the time, charged with a capital offense, and incapable of waiving his right to counsel by the express language of G. S. 7A-457(a). He relies on that statute and on *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971), and *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384 (1972), in support of his position.

[1, 2] The record discloses that defendant was twice advised of his constitutional rights as required by *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). Each time defendant said he knew his rights and fully understood them. He then freely, knowingly and understandingly signed a written waiver of his constitutional right to the presence of counsel. Thus the requirements spelled out in *Miranda* were fully met, and defendant's entire statement was competent insofar as federal constitutional standards are concerned. *Miranda v. Arizona,* supra. If defendant's statement, or any part of it, was incompetent, its incompetency arises solely by reason of G.S. 7A-457(a) (1969) which at that time provided, *inter alia:* "A waiver shall not be allowed in a capital case." The State contends defendant's statement was volunteered and not the result of a custodial interrogation. This requires a review of the setting and the circumstances under which defendant's incriminating statement was made.

The record reveals that upon his arrival at the Danville Police Station defendant had indicated he wanted to make a statement. He had already been given the *Miranda* warning when he was removed from the bus. Officer Poole "asked him to wait just a moment" and again advised him of his rights as follows:

> "Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. If you cannot afford a lawyer, one will be appointed for you before any questions, if you wish. If you decide to

answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer."

Officer Poole thereupon handed defendant the paper from which the *Miranda* warnings had been read. Defendant read the warnings himself and stated that he understood his rights. The paperwriting contained a Waiver of Rights at the bottom of the page in the following language:

"I have read this statement of my rights, and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me, and no pressure or coercion of any kind has been used against me."

Defendant then signed the waiver. Then, without any questions on the part of the officers, defendant reiterated his earlier statement that he was coming to turn himself in and added, "The hardest thing I ever did was to pull that trigger." When Officer Poole asked him to explain that statement defendant said: "I pulled in the service station to rob the man. He had his hand in his pocket. I told him to take his hand out of his pocket. When he did, he had a gun in it." He said the man shot him in the arm and he then shot the man after which he got back into his car and the man shot a second time, shooting out the glass in the car. Defendant then said he "sort of laid down in the front seat of the car and drove away as quickly as he could." He said that prior to this incident he had been to the Kayo Station once before that morning, awakened the attendant, purchased two dollars' worth of gas, and departed. He said there was another party with him at that time and that earlier that night they had had a fight with some Negro males as a result of which he had gone to Burlington and obtained his shotgun and returned to Greensboro; that after purchasing the gas he went looking for the Negro males, couldn't find them, and returned to the Kayo Station to rob the man.

Defendant further stated that he had been to a doctor in Norfolk, Virginia, and had a bullet removed from his arm. Officer Poole asked him if he had the bullet and defendant took it from his wallet and handed it to the officer. Officer Poole asked defendant where the shotgun was and defendant

stated he had thrown it in a creek near Greenville. Officer Poole asked him where this creek was located and defendant stated that "as you go out of Greenville on Highway 264, you take the right road toward the Bel Arthur section. That, after you take the right-hand road to the Bel Arthur section, you would turn left on the first dirt road; that approximately a quarter of a mile down this dirt road there was a bridge; that he threw this weapon off the left-hand side of the bridge." These directions were later followed and the weapon was found at that exact spot in the creek.

Is the foregoing narration of events the result of "custodial interrogation" and its admissibility prohibited by G.S. 7A-457(a) due to absence of counsel? We think not.

[3] The United States Supreme Court said in *Miranda v. Arizona, supra:* "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. . . . Any statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." Thus, assuming defendant's indigency, the presence of counsel was not required because defendant's statement at the police station in Danville was not the result of an in-custody interrogation initiated by the officers. Rather, it was defendant's own voluntary narration, freely and understandingly related. It is perfectly apparent that from the moment defendant was removed from the bus he was anxious to talk and that his entire narration of events is properly classified as a volunteered statement. In fact, the officers would not allow him to talk until he had twice been advised of his constitutional rights and had freely, knowingly and understandingly waived those rights, including the right to counsel, *in writing.* Defendant's volunteered confession would have been admissible by constitutional standards even in the absence of warning or waiver of his rights. By the same token they were admissible in the trial of this case notwithstanding the provision in G.S. 7A-457(a) (1969) that "[a] waiver shall not be allowed in a capital case."

No waiver is involved with respect to volunteered statements, and the quoted language defendant relies on has no application to the factual situation depicted by the setting and circumstances under which defendant's incriminating statement was made. Officers are not required to gag the guilty who want to confess.

State v. Lynch, supra, was not a capital case and is not authority for defendant's position here. In *Lynch* defendant was fully advised of his constitutional rights, stated he did not want a lawyer, but did not sign a *written* waiver as then required by G.S. 7A-457(a) (1969). Even so, it was held that Lynch's voluntary narrative statement was not the result of an *in-custody interrogation* and was therefore admissible in evidence even though the statement was given in the absence of counsel. Only certain tape recorded statements in response to in-custody interrogation by the officers were held inadmissible because defendant's waiver of counsel was not in writing. Thus *Lynch,* in these respects, supports our conclusion that defendant's narration of events which occurred the night DeShazo was killed is properly classified as a volunteered statement.

[4] We said in *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384 (1972): "At all times pertinent to this case, an indigent defendant in a capital case could not waive the right to counsel either orally or in writing," citing G.S. 7A-457 and *State v. Lynch, supra.* The quotation has no application to volunteered statements.

[5, 6] Volunteered statements are competent evidence, and their admission is not barred under any theory of the law, state or federal. *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972); *State v. Ratliff,* 281 N.C. 397, 189 S.E. 2d 179 (1972); *State v. Chance,* 279 N.C. 643, 185 S.E. 2d 227 (1971); *Miranda v. Arizona, supra.* And a voluntary in-custody statement does not become the product of an "in-custody interrogation" simply because an officer, in the course of defendant's narration, asks defendant to explain or clarify something he has already said voluntarily.

We hold that defendant's statement to the officers was truly the product of free choice, entirely devoid of physical or mental intimidation, and without the slightest compulsion of in-custody interrogation procedures. The sturdy pillar of Fifth Amendment rights against self-incrimination so forcefully up-

held in *Miranda* would be subverted by a contrary view. Defendant spoke in the unfettered exercise of his own will, and his statements may not now be distorted into something they never were.

The constitutionality of the no-waiver sentence in G.S. 7A-457 was not raised in *Lynch, Bass, Chance,* or in this case. It should be noted, however, that the sentence in that statute which forbids an indigent to waive counsel in a capital case was held unconstitutional in *State v. Mems,* 281 N.C. 658, 190 S.E. 2d 164 (filed 31 July 1972).

Defendant's first assignment of error is overruled.

Other assignments relating to admissibility of the bullet, the sawed-off shotgun defendant used to kill DeShazo, and defendant's statements concerning them, lose their vitality in light of our holding that defendant's narration of events on the night of the murder was volunteered and not the result of questioning initiated by the officers.

Evidence of defendant's guilt is overwhelming. His conviction results from a trial free from prejudicial error. The verdict and judgment of the trial court must therefore be upheld.

No error.

Chief Justice BOBBITT concurring in result.

I concur in the result on these grounds: (1) Defendant's statements to Officer Poole were made voluntarily and were not the product of an "in-custody interrogation." (2) By its decision in *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726, decided June 29, 1972, the Supreme Court of the United States, holding that punishment by death is not permissible under statutory provisions such as those incorporated in present North Carolina statutes, has invalidated and rendered obsolete that portion of G.S. 7A-457(a) which relates solely to a "capital case."

As stated in my concurring *in result* opinion in *State v. Mems, ante* 674, 190 S.E. 2d 174, I do not share the view that the State's counsel have standing to challenge the constitutionality of G.S. 7A-457(a). Surely, the General Assembly

has greater authority to declare and determine the State's policy and position than the State's prosecuting attorneys.

Justices HIGGINS and SHARP join in this concurring in result opinion.

CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, PETITIONER v. MARGARET C. McNEELY AND HUSBAND, SAM S. McNEELY, JR., RESPONDENTS

No. 82

(Filed 31 July 1972)

1. **Eminent Domain § 3— public purpose**

In any condemnation proceeding the question of what is a public purpose is one for the court.

2. **Eminent Domain § 3— public purpose — construction or enlargement of street**

The taking of property to construct or enlarge a public street is, as a matter of law, a taking for a public purpose, and the advisability of widening a public street is a matter within the discretion of a city's governing body.

3. **Eminent Domain § 1— choice of route — review**

A city council's choice of a route, or the land to be condemned for a street, will not be reviewed on the ground that another route may have been more appropriately chosen unless it appears that there has been an abuse of discretion.

4. **Eminent Domain § 1— abuse of discretion — allegations — question of fact**

Upon specific allegations tending to show bad faith, malice, wantonness, or oppressive and manifest abuse of discretion by the condemnor, the issue raised becomes a question of fact to be determined by the judge.

5. **Costs § 1— statutory authority**

Costs may be taxed solely on the basis of statutory authority.

6. **Costs § 4— unnecessary expenses**

Even when allowed by statute, costs and expenses unnecessarily incurred by the prevailing party may not be taxed against the unsuccessful party.

7. **Costs § 4— expense of surveys, maps, etc.**

The expense of procuring surveys, maps, plans, photographs and documents are not taxable as costs unless there is clear statutory authority therefor or they have been ordered by the court. G.S. 38-4.

8. Costs § 4— witness fees

Unless authorized by statute, witness fees cannot be allowed and taxed for a party to the action.

9. Costs § 4— witness fees — expert witness fees — party's own testimony

A successful party is not entitled to have either a witness fee or an expert witness fee for his own testimony taxed against his losing adversary.

10. Costs § 4— time spent in hearing

A party is not entitled to recover as costs either the statutory compensation for witnesses or an hourly wage or per diem for time such party spent in attending hearings and securing evidence.

11. Costs § 4— attending hearings and securing evidence — mileage, meals, and hotel

A party is not entitled to recover as costs an allowance for mileage and for meals and hotel bills expended in securing evidence and attending hearings.

12. Costs § 4— expert witness fees — competency of testimony

Expert witness fees can be taxed against an adverse party only when the testimony of the witness examined (or tendered) was (or would have been) material and competent.

13. Costs § 4— engineering expenses — expert witness fee — irrelevancy of evidence

Where a proceeding instituted by a city to condemn a right-of-way over respondents' land for the purpose of widening a street was dismissed without prejudice because the city had not complied with statutory procedural requirements, the respondents are not entitled to recover as costs taxable against the city (1) engineering expenses incurred for the purpose of showing that public convenience did not require the city to widen the street and that another plan more acceptable to respondents was as good as the city's plan, or (2) an expert witness fee for testimony by a civil engineer that the plan favored by respondents was as good as the city's plan, since such evidence was totally irrelevant to the question of the city's right to condemn the property in question.

14. Costs § 4— attorneys' fees

In the absence of express statutory authority, attorneys' fees are not allowable as part of the court costs in civil actions.

15. Costs § 4— condemnation proceeding — counsel fees — taxation as costs

Unless the petitioner in a condemnation proceeding submits to a voluntary nonsuit or otherwise abandons the proceeding, the court is authorized to tax counsel fees as a part of the costs of such proceeding only for an attorney appointed by the court to appeal for and protect the rights of any party in interest who is unknown or whose residence is unknown. G.S. 40-2; G.S. 40-24.

16. Costs § 4— interest on costs

Interest on costs properly assessed may not be allowed without statutory authority, and such interest is expressly disallowed by statute in this State. G.S. 24-5.

APPEAL by respondents from *Thornburg, S. J.*, 15 March 1971 Civil Non-jury 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); docketed and argued at the Fall Term 1971 as Case No. 147.

This was a condemnation proceeding which was dismissed by the court without prejudice. The appeal stems from respondents' petition for the allowance of additional costs.

On 2 April 1965, the City of Charlotte (City), acting under a charter provision authorizing it to condemn property as provided "by the Public Laws of North Carolina," instituted this proceeding to condemn a 20-foot right-of-way over respondents' land for the purpose of widening Alleghany Street.

City alleged that the public necessity for condemning respondents' land had been "duly determined" by the City Council and that City had attempted, without success, to buy the property. Answering, respondents admitted their refusal to negotiate with City for the sale of any part of their land and alleged that City, in bad faith, and pursuant to "a diabolical and reprehensible scheme," was attempting to appropriate their property without due process of law when there was no public necessity for the taking.

After "some eleven hearings" during which "nine books of testimony was taken" the Clerk made thirty findings of fact, the twenty-fourth being as follows: "There is no evidence that the City Council has officially or specifically authorized the widening and paving of Alleghany Street between Wilkinson Boulevard and Denver Avenue, but did approve condemnation proceedings to take the Respondents' land for that purpose." Upon his findings the clerk concluded as a matter of law that public convenience and necessity did not require the condemnation of respondents' land; that City had acted arbitrarily and abused its legal discretion; and that City was not entitled to condemn the property in suit. On 2 August 1966 he signed an order dismissing the proceeding, and City appealed to the judge.

On 11 August 1969 Judge Bryson adopted each of the clerk's findings of fact and conclusions of law, and affirmed his order dismissing the proceeding. City appealed to the Court of Appeals.

The Court of Appeals, in an opinion by Judge Parker, reported in 8 N.C. App. 649, 175 S.E. 2d 348, held: (1) The record failed to show City's compliance with G.S. 160-207, which required City's governing body (a) to pass a resolution describing generally the nature of the proposed street improvement for which land must be condemned; and (b) to hold a public hearing after ten days published notice of time, place, and purpose, at which reasons for or against the proposed improvements may be voiced. (2) City's failure to comply with G.S. 160-207 supports the trial court's Finding of Fact No. 24 and supports the judgment dismissing this proceeding. (3) Certain other findings of fact made by the court are irrelevant and may be treated as surplusage.

The Court of Appeals affirmed the judgment of the Superior Court but specifically pointed out that "[d]ismissal of the present proceeding in no way bars the City, if it is so advised, from widening Alleghany Street or any other street in the City as the City's governing body may decide, and for such purpose the City may institute new condemnation proceedings in compliance with currently applicable charter and statutory procedural requirements."

On 11 August 1970 respondents filed with the clerk of the Superior Court a "petition for allowance of respondents' court costs." In brief summary, they allege that in consequence of the "illegal nature" of this proceeding and the "irresponsible abandon" with which the City pursued it, in the defense of their property respondents incurred the following costs, which they are entitled to recover from City (enumeration ours):

1. Miscellaneous Maps, Document Reproductions and Ordinances	$ 80.44
2. Hearings and Transcript Records	546.10
3. (a) Compensation of respondent Sam McNeely, Jr., at $10 per hr. for 1,363.5 hrs. consumed in attending hearings and securing evidence, etc.	13,635.00
(b) Margaret C. McNeely, 777 hrs. at $3.00 per hour	2,331.00

4. Travel Expenses			
(a) Mileage, 2,096 miles at .10 in securing evidence and attending hearings		$206.90	
(b) Meals and hotel bills		55.77	262.67
5. Engineering Costs and Testimony			
(a) F. N. Cunningham		55.50	
(b) Spratt-Seaver, Inc.		60.00	
(c) Ralph Whitehead & Associates Three invoices of $25.00, $360.18, and $423.52, respectively		808.70	924.20
6. Legal Expenses			2,250.00
7. Interest on Principal (the above items)			5,500.00
8. Zerox copies of Invoice No. A 920390 obtained from the Clerk of Superior Court 4-27-70			6.50
9. Copy of Court of Appeals opinion			2.50
FINAL TOTAL			$25,538.41

The clerk heard respondents' petition and found that their legal fees were "exceptionally reasonable"; that at the hearings only two witnesses, both offered by respondents, were found to be experts: Ralph Whitehead in civil engineering and respondent Sam S. McNeely, Jr., in map reading and map making; that respondents had "put aside their business pursuits and spent practically full time" for nine months working on this proceeding to "irreparable damage of their general insurance agency." He concluded as a matter of law that City had "acted in abuse of discretion and without adequate determining principal" in attempting to condemn respondents' property, and equity and good conscience require that respondents' "direct costs" in the amount of $25,535.91 be taxed against City (the total of the items set out in respondents' petition less Item 9, the cost of a copy of the opinion of the Court of Appeals, in the amount of $2.50).

On 16 September 1970, "in the discretion of this court," the clerk taxed the sum of $25,535.91 against City and directed its disbursement to respondents immediately upon payment. City moved the clerk to retax the costs except as to Item 2 ($546.10

for transcripts of the various hearings). The clerk denied the motion and City appealed to the judge.

Judge Thornburg heard City's appeal and entered his judgment on 18 March 1971. In it he approved the assessment of items 1 and 2, and disapproved in toto items 3(b), 4, 5(a) and (b), 6, 7 and 9. As to Item 5(c) he held that the findings did not support the assessment but ruled that, if the clerk should find "that Ralph L. Whitehead testified as an expert witness, he may be paid a reasonable expert witness fee" for so testifying. Item 3(a) was disapproved "except insofar as the Clerk may determine said party [Sam F. McNeely, Jr.,] has testified as an expert witness, in which event reasonable payment shall be allowed for this service only." Item 9 was disallowed by the clerk, and the judge seems to have overlooked Item 8 as his judgment contains no reference to it.

Judge Thornburg overruled the clerk's conclusion of law and noted that neither he nor the clerk made any finding that City had abandoned its efforts to condemn respondents' property. His judgment remanded the proceeding to the clerk "for proceedings consistent with this order and for the assessment of proper costs."

Respondents excepted "to the signing and entry of this order" and gave notice of appeal.

W. A. Watts for petitioner-appellee.

Sam S. McNeely, Jr., in propria persona for respondent-appellants.

SHARP, Justice.

Appellants' statement of case on appeal, assignments of error, and brief do not comply with the rules of the Appellate Division, and are rife with extraneous matter which serve only to multiply pages and increase the costs of this appeal. The only question which arises on this record is whether respondents are entitled to have certain of the items allowed by the clerk, and disallowed by the judge, taxed against City as a part of their recoverable costs in this proceeding. Despite respondents' failure to comply with the rules of appellate procedure, because they are laymen appealing without counsel, and because of the extraordinary nature of the bill of costs taxed by the clerk, we have decided to answer the questions presented.

At the outset it is emphasized that the Court of Appeals affirmed the dismissal of this proceeding upon the sole ground that City had failed to comply with certain procedural statutory requirements, and that the dismissal was without prejudice to its right to reinstitute the proceeding upon compliance with the conditions. Neither party attempted to have this ruling reviewed, and the decision of the Court of Appeals became the law of the case.

It is also noted that, from the beginning, respondents have contended that City's governing body abused its discretion when it decided to widen Alleghany Street and to take a right-of-way over their property for that purpose. The Court of Appeals properly held that, on the record, the findings of clerk and judge in accordance with these contentions by respondents were immaterial and surplusage. The applicable principles of law are these:

[1-4] In any condemnation proceeding the question of what is a public purpose is one for the court. The taking of property to construct or enlarge a public street is, as a matter of law, a taking for a public purpose. The public purpose being established, "the question as to the necessity or expediency of devoting the property to the public use is one which must be left to the legislative department." *Jeffress v. Greenville,* 154 N.C. 490, 498, 70 S.E. 919, 922 (1911). Thus, the advisability of widening a public street is a matter within the discretion of a city's governing body. When the applicable statutes have been followed, neither the landowner affected nor the court can interfere with the exercise of this power until the question of compensation is reached. *Durham v. Rigsbee,* 141 N.C. 128, 53 S.E. 531 (1906). *See Morganton v. Hutton & Bourbonnais Company,* 251 N.C. 531, 112 S.E. 2d 111 (1959); *Highway Commission v. Young,* 200 N.C. 603, 158 S.E. 91 (1931). Further, a city council's choice of a route, or the land to be condemned for a street, "will not be reviewed on the ground that another route may have been more appropriately chosen unless it appears that there has been an abuse of the discretion." *Charlotte v. Heath,* 226 N.C. 750, 754, 40 S.E. 2d 600, 603 (1946). Upon specific allegations tending to show bad faith, malice, wantonness, or oppressive and manifest abuse of discretion by the condemnor, the issue raised becomes the subject of judicial inquiry as a question of fact to be determined by the judge. *In re Housing Authority,* 235 N.C. 463, 70 S.E. 2d 500 (1952); *Selma v. Nobles,* 183 N.C. 322, 111

S.E. 543 (1922); *Power Co. v. Wissler,* 160 N.C. 269, 76 S.E. 267 (1912); *Jeffress v. Greenville, supra.* See *Kaperonis v. Highway Commission,* 260 N.C. 587, 133 S.E. 2d 464 (1963).

[5] In considering any question involving court costs the following principles are pertinent: At common law neither party recovered costs in a civil action and each party paid his own witnesses. *Chadwick v. Insurance Co.,* 158 N.C. 380, 74 S.E. 115 (1912). Today in this State, "all costs are given in a court of law in virtue of some statute." *Costin v. Baxter,* 29 N.C. 111, 112 (1846). The simple but definitive statement of the rule is: "[C]osts in this State, are entirely creatures of legislation, and without this they do not exist." *Clerk's Office v. Commissioners,* 121 N.C. 29, 30, 27 S.E. 1003 (1897). See 2 McIntosh, N. C. Practice and Procedure § 2538 (1956).

[6] Since costs may be taxed *solely* on the basis of statutory authority, it follows a fortiori that courts have no power to adjudge costs "against anyone on mere equitable or moral grounds." 20 C.J.S. *Costs* §§ 1, 2 (1940). Furthermore, even when allowed by statute, "[c]osts and expenses unnecessarily incurred by the prevailing party will not be taxed against the unsuccessful party." 20 C.J.S. *Costs* § 256 (1940). *See Chadwick v. Insurance Co., supra.*

City properly concedes that respondents, to whom judgment was given, are entitled to recover their actual costs reasonably incurred and specifically authorized by statutes. Clearly, however, such reimbursement is the limit of their entitlement. *See* G.S. 6-1, G.S. 6-23 (1964); *Whaley v. Taxi Co.,* 252 N.C. 586, 114 S.E. 2d 254 (1960).

In *Morris, Solicitor v. Shinn,* 262 N.C. 88, 89, 136 S.E. 2d 244, 245 (1964), this Court said: "An award of costs is an exercise of statutory authority; if the statute is misinterpreted, the judgment is erroneous." Therefore, we consider the legality of the various items which appellants seek to have taxed as costs.

Items 1, 2, 8 and 9

[7] *Item 1.* Judge Thornburg allowed Item 1, the cost of unidentified "miscellaneous maps, document reproductions and ordinances" in the amount of $80.44. Since City did not appeal, the allowance of this charge is res judicata. We note, however, the expense of procuring surveys, maps, plans, photographs and "documents" are not taxable as costs unless there is clear statu-

tory authority therefor or they have been ordered by the court. 20 C.J.S. *Costs* §§ 219, 220 (1940). *See* G.S. 38-4 (1966) and cases cited in the annotation thereunder.

Item 2. On the hearing before Judge Thornburg City did not contest its liability for this item, the cost of transcripts of the hearings in the amount of $546.10.

Item 8. City's liability for this item, $6.50 to the clerk for Xerox copies of an invoice, cannot be adjudicated on this appeal since the judge did not rule upon it and no hint of its purpose appears in the record.

Item 9. This charge of $2.50, the "expense of obtaining copy of Court of Appeals opinion," is res judicata. It was the one item in respondents' petition which the clerk *disallowed.*

Items 3, 4, 5, 6 and 7

[8] *Item 3, Compensation to Respondents for Time Spent in Preparing for and Attending Hearings.* The general rule is that, unless authorized by express statute provision, witness fees cannot be allowed and taxed for a party to the action. 20 C.J.S. *Costs* § 222 (1940); *Hopkins v. General Electric Co.*, 93 F. Supp. 424 (D. Mass. 1950); *Shepherd v. Morrison's Cafeteria Co.*, 29 Ala. App. 189, 194 So. 427 (1940); *Leonard v. Bottomley*, 210 Wis. 411, 245 N.W. 849 (1932); *Bostrom v. Duffield*, 28 S.W. 2d 610 (Tex. Civ. App. 1930). Our statute, G.S. 6-1 (1969), in pertinent part, provides: "To either party for whom judgment is given there shall be allowed as costs his actual disbursements for fees to the officers, witnesses, and other persons entitled to receive the same."

Since the right to tax costs did not exist at common law and costs are considered penal in their nature, "[s]tatutes relating to costs are strictly construed." 20 Am. Jur. 2d *Costs* § 6 (1965). However, in construing G.S. 6-1, it is not necessary to resort to rules of construction. Clearly, the legislature did not contemplate that a party would disburse or become liable to himself for a fee when he testified as a witness for himself in his own case. Neither did it contemplate that a party would pay an officer to subpoena himself as a witness. The losing party is taxed with the costs of his adversary's witness only if the witness was subpoenaed and examined or tendered. G.S. 6-53. *Chadwick v. Insurance Co., supra;* 2 McIntosh, N. C. Practice and Procedure § 2538(1) (1956).

The following quotation contained in *Hinton v. Scharoun Industries,* 41 N.Y.S. 2d 595, 596 (1943) is applicable to this case: "The legislature never intended, I think, in allowing parties to be witnesses for themselves, to put them on a par with other witnesses in respect to witness fees, when they attend the trial to give evidence in their own favor. This would open a door to much abuse, which I should be unwilling to sanction till the legislature so commands."

[9] A fortiori, if a successful party is not entitled to have a witness fee for himself taxed against his losing adversary he is not entitled to have taxed an expert witness fee for himself. Therefore, Judge Thornburg erred in authorizing the clerk, upon retaxing the costs to allow respondent Sam S. McNeely, Jr., "reasonable payment" for his testimony as an expert witness. Although this error was against City, which did not appeal, public policy requires that such a practice not be initiated. Therefore, in the exercise of our supervisory powers, N. C. Const. art. IV, § 12(1) (1970); G.S. 7A-32 (1969), this ruling is vacated.

[10] Respondents are entitled to recover neither the statutory compensation for witnesses nor an hourly wage or per diem for the time they expended in "attending hearing, securing evidence, exhibits, et cetera." In *Horner v. Chamber of Commerce,* 236 N.C. 96, 72 S.E. 2d 21 (1952), a case in which attorney's fees were held properly allowable as costs to a plaintiff who had recovered public funds in an action the City of Burlington had refused to bring, this Court said: "We are not unmindful that the power to make an allowance of counsel fees from a fund brought into court is susceptible of great abuse, and should be exercised with jealous caution. . . .[but] with the power of award being limited to items of reasonable attorney fees and expenses, *so as to exclude compensation or allowance of any kind for the time and effort of the suing taxpayer, thus fixing it so the taxpayer may not capitalize on the suit,* we see no real danger of abuse." (Emphasis added.) *Id.* at 101, 72 S.E. 2d at 24-25. The foregoing statement recognizes the well established rule, and the reason for it, that a party is not entitled to compensation for the time and effort he devotes to the litigation. Respondents' bills, $13,635.00 for Sam McNeely, Jr., and $2,331.00 for Margaret C. McNeely, seem to demonstrate the wisdom of the rule.

Judge Thornburg properly disallowed in its entirety Item 3(b), and he erred in not disallowing Item 3(a) in its entirety.

[11] *Item 4 Travel Expenses.* As to this item, an allowance to respondents of $206.90 for mileage and $55.77 for meals and hotel bills expended "in securing evidence and attending hearings," the exposition on Item 3 is equally applicable here. No statute authorizes the inclusion of such expenses in court costs, and Judge Thornburg properly disallowed them.

[12] *Item 5, Engineering Costs and Testimony.* From the entire record of this proceeding, from respondents "Statement of the Case" incorporated therein, and from their brief, it is quite clear that respondents incurred these costs solely for the purpose of showing (1) that public necessity and convenience did not require City to expand Alleghany Street (a thoroughfare leading to Harding High School) into four lanes; and (2) that, in any event, another plan prepared by Ralph L. Whitehead, professional engineer, was equally as good as City's and more acceptable to respondents since it would require only a 10-foot right-of-way over their land. Such evidence was irrelevant to the question before the clerk and Judge Bryson. As earlier noted the law left these matters to the judgment of City's governing body. As the Court of Appeals held, the only question properly before the clerk and Judge Bryson was whether City had followed statutory requirements before instituting the proceeding.

Because City had not complied with the statutory requirements the Court of Appeals held that the proceeding must be dismissed, but it also held that the dismissal was without prejudice to City's right to condemn the property upon compliance with the applicable statutory provisions. It also specifically noted that the clerk's other findings, which Judge Bryson adopted, were irrelevant and to be treated as surplusage.

[13] As previously pointed out, under Item 1, unless specifically authorized by statute, or by an order of the court in a proper case, the cost of obtaining maps, surveys, and plats for use on trial are not allowed as taxable costs. Further, expert witness fees can be taxed against an adverse party only when the testimony of the witness examined (or tendered) was (or would have been) material and competent. *Chadwick v. Insurance Co., supra;* 20 C.J.S. *Costs* § 244 (1940). Conceding, as

the clerk found, that Ralph L. Whitehead is an expert civil engineer, his testimony that his plan for widening Alleghany Street was as good as City's, was totally irrelevant to the question of City's right to condemn the property in question. The record discloses no facts which would justify taxing, as a part of the costs for which City is liable, an expert witness fee for Mr. Whitehead. If one is to be taxed, as permitted by Judge Thornburg's order, it must be taxed against respondents, whose witness he was. As against City, Item 5 must be disallowed in toto.

[14, 15] *Item 6, Legal Expenses.* In this jurisdiction, in the absence of express statutory authority, attorneys' fees are not allowable as part of the court costs in civil actions. *Bowman v. Chair Co.*, 271 N.C. 702, 157 S.E. 2d 378 (1967), and cases cited therein. *See Trust Co. v. Schneider,* 235 N.C. 446, 70 S.E. 2d 578 (1952); 2 McIntosh, N. C. Practice and Procedure § 2538 (2) (1956). With one exception, in eminent domain proceedings the court is authorized to tax counsel fees as a part of the costs only for an attorney appointed by the court "to appeal for and protect the rights of any party in interest who is unknown or whose residence is unknown." G.S. 40-24 (1966). It is counsel appointed under G.S. 40-24 (1966) to which G.S. 40-19 (1966) refers in providing that a landowner is divested of title when the condemnor pays into court the sum assessed as damages for the taking of his property, "together with costs and counsel fees allowed by the court." *Light Company v. Creasman,* 262 N.C. 390, 137 S.E. 2d 497 (1964); *Durham v. Davis,* 171 N.C. 305, 88 S.E. 433 (1916); *R. R. v. Goodwin,* 110 N.C. 175, 14 S.E. 687 (1892).

The one exception referred to above is contained in G.S. 1-209.1 (1969), which provides: "In all condemnation proceedings authorized by G.S. 40-2 or by any other statute, all clerks of the superior courts are authorized to fix and tax the petitioner with a reasonable fee for respondent's attorney in cases in which the petitioner takes or submits to a voluntary nonsuit or otherwise abandons the proceeding." This section, as Judge Thornburg noted, has no application to the facts of this case. (Although not pertinent to decision here, City's brief asserts that it has proceeded with a new action, which is now pending.)

The statutes cited by respondents in support of their contention that they should be allowed counsel fees—G.S. 6-21(5),

G.S. 21.1, G.S. 21.2 (1969); G.S. 136-114, G.S. 136-119 (1964); G.S. 40-19 (1966)—have no application to this proceeding. Judge Thornburg correctly disallowed Item 4.

[16] *Item 7, Interest on Costs.* Since the greater portion of this item of $5,500.00 is interest calculated on items of disallowed costs, it could not be sustained in any event. However, it is the general rule that interest on costs properly assessed may not be allowed without statutory authority. 20 C.J.S. *Costs* § 190 (1940). In this State, interest on costs is expressly disallowed by statute. G.S. 24-5 (1965), provides, *inter alia*, that "the amount of any judgment or decree, *except the costs*, rendered or adjudged in any kind of action, though not on contract, shall bear interest till paid, and the judgment or decree of the court shall be rendered according to this section." The judge properly disallowed Item 7.

It is obvious that from the beginning respondents have contested this proceeding upon a misapprehension of City's legal rights. They were entitled, if so advised, to require City to comply strictly with all statutory procedures. However, after having done so, on the facts disclosed, City would be entitled to reinstitute the proceeding and proceed with the condemnation as originally planned.

It is a matter of regret that in a condemnation proceeding involving a 20-foot right-of-way over land, which commissioners assessed at $4,071.00 in April 1965 (according to City's brief), respondents have expended in time or money (according to their calculations) $25,538.41. However, they made a judgment decision and must abide the consequences.

Judge Thornburg correctly vacated the clerk's order allowing respondents to recover from City court costs in the amount of $25,538.41, less $2.50. However, that portion of his judgment remanding the cause to the clerk for the assessment of proper costs in conformity with his order is vacated. The cause will be remanded to the clerk for the assessment of costs in accordance with this opinion. This means that of the items claimed by respondents in their petition for allowance of court costs, the clerk will tax against City only items 1 and 2, miscellaneous maps, document reproductions and ordinances ($80.44) and hearing and transcript recordings ($546.10), a total of $626.54.

Respondents will pay the costs of this appeal.

Modified and affirmed.

Page v. Sloan

CATHERINE D. PAGE, ADMINISTRATRIX C.T.A. OF THE ESTATE OF CHANNING NELSON PAGE, DECEASED v. GEORGE SLOAN AND HIS WIFE, REA SLOAN, CO-PARTNERS, TRADING AND DOING BUSINESS AS OCEAN ISLE MOTEL

No. 10

(Filed 31 July 1972)

1. **Negligence § 53; Innkeepers § 5— motel owner — liability to guests — negligence of independent contractor**

An innkeeper's duties to exercise due care to keep his premises in a reasonably safe condition and to warn guests of any hidden peril are nondelegable, and liability cannot be avoided on the ground that their performance was entrusted to an independent contractor.

2. **Negligence § 53; Innkeepers § 5— motel owner — liability to guests — nondelegability of duty to use due care**

The rule of nondelegability is grounded on the premise that an innkeeper's duty to use due care for the safety of his guests is a responsibility so important to the public that he should not be permitted to transfer it to another.

3. **Master and Servant § 21; Innkeepers § 5— torts of independent contractor — liability of employer of the contractor — negligence of motel owner — application of res ipsa loquitur to explosion of water heater**

Where plaintiff's testator was killed while a paying guest in defendants' motel as a result of the explosion of a water heater installed on the premises by an independent contractor, defendants could be liable on one of three bases: (1) failure to use due care for safety of their guests by employing a plumber instead of an electrician to repair the electrical heating element on the water heater; (2) since innkeepers' duties are nondelegable, liability for an injury or death caused by the plumber's negligent failure properly to repair the water heater as if they had made the repairs themselves; (3) application of *res ipsa loquitur*.

4. **Rules of Civil Procedure § 56— summary judgment — requisites**

On motion for summary judgment, the moving party has the burden of showing that there is no genuine issue as to any material fact and that he is entitled to a judgment as a matter of law.

5. **Rules of Civil Procedure § 56— summary judgment — necessity of counter-affidavits — verified complaint as affidavit**

Upon plaintiff's failure to file counter-affidavits to defendants' motion for summary judgment, plaintiff could not have her verified complaint treated as an affidavit to defeat defendants' motion unless the complaint was made on personal knowledge, set forth facts as would be admissible in evidence and showed affirmatively that the affiant was competent to testify as to the matters stated therein; however, failure of plaintiff to file affidavits and failure of her

complaint to meet these requirements did not shift from defendants the burden of proving themselves entitled to summary judgment.

6. **Rules of Civil Procedure § 56— summary judgment — negligence case**

It is only in exceptional negligence cases that summary judgment is appropriate because the rule of the prudent man (or other applicable standard of care) must be applied, and ordinarily the jury should apply it under appropriate instructions from the court.

7. **Rules of Civil Procedure § 56— summary judgment — material issue of fact**

Where evidentiary material offered by defendants to support their motion for summary judgment presented material issues of fact on which reasonable men could reach different conclusions, summary judgment was not properly entered.

8. **Rules of Civil Procedure § 56; Negligence §§ 6, 31— summary judgment — judgment as a matter of law — applicability of res ipsa loquitur**

On motion for summary judgment, defendants failed to show that they were entitled to judgment as a matter of law in that they did not clearly establish the inapplicability of the doctrine of *res ipsa loquitur* to the death of plaintiff's testator as the result of an explosion of defendant innkeepers' water heater.

ON *certiorari* to the Court of Appeals to review its decision reversing judgment of *Long, J.*, 18 January 1971 Session, MOORE Superior Court.

Plaintiff brought this action to recover for the wrongful death of Channing Nelson Page. She alleged in her complaint that defendants owned and operated the Ocean Isle Motel in Brunswick County, North Carolina. On and prior to 29 August 1964 Channing Nelson Page was a paying guest in said motel, assigned to a room adjoining the utility room which contained the motel's 82-gallon electric water heater. The heater exploded about 6:30 a.m. on 29 August 1964 resulting directly and proximately in the death of plaintiff's testator. She further alleged that said electric water heater was in the exclusive possession and control of the defendants and its explosion was caused by, or due to, the actionable negligence of the defendants in that: (1) they failed to equip the heater with proper and adequate safety valves, electrical controls and thermostat devices which would have prevented the accumulation of steam pressure in the heater; (2) they failed to keep the heater in a proper state of repair; (3) they failed to have the heater inspected as required by the North Carolina Boiler Law, Rules and Regula-

tions; (4) they used a plastic dip tube in the water heater when they knew, or should have known, that if the water in the heater became too hot it would cause the plastic dip tube to melt and flow into the outlet pipes completely plugging them, thereby permitting extremely high pressure to develop; (5) they failed to maintain a proper adapter and used a non-approved type relief valve; and (6) they failed to keep the relief valve in a proper state of repair so as to avoid the accumulation of extremely high pressure in the water heater. Plaintiff says that by reason of the death of her testate, proximately caused by the joint and concurrent negligence of the defendants as alleged, she is entitled to recover $75,000.00. She prays judgment in that amount.

In their answer, defendants admit (1) the death of Channing Nelson Page at the time and place mentioned in the complaint; (2) their ownership and operation of Ocean Isle Motel; (3) that Page was a paying guest and occupied a room adjoining the utility room; and (4) that the electric water heater exploded at the time and place alleged in the complaint. Defendants specifically deny each and every allegation of negligence on their part and aver that the explosion of the water heater was due to causes beyond their control and amounted to an unavoidable accident; that any defects that might have existed in the water heater resulted from the negligence of others, which was the proximate cause of the explosion, and not from any negligence on the part of the defendants. Defendants further assert in their answer that if the electric water heater had any defects in its manufacture, installation, or servicing, such defects were not known to defendants and could not have been known to them prior to the explosion by reason of the fact that the electric water heater was in a sealed container with no external controls. Defendants aver that they acted at all times as reasonable and prudent persons similarly situated would have acted. Defendants pray that the action be dismissed.

The pretrial stipulations of the parties tend to show the facts set out in the numbered paragraphs which follow:

1. Plaintiff is the duly appointed, qualified and acting administratrix C.T.A. of the Estate of Channing Nelson Page who died testate on 29 August 1964.

2. The defendants George Sloan and Rea Sloan are the owners and operators of the Ocean Isle Motel at Ocean Isle,

Brunswick County, North Carolina, and were the owners and operators of said motel at all times pertinent to this case.

3. On 27 August 1964 plaintiff's testator, Channing Nelson Page, was accepted as a paying guest at the Ocean Isle Motel and assigned a corner room which adjoined the utility room in which an electric water heater was located. At about 6:30 a.m. on 29 August 1964 said water heater exploded with tremendous force and violence and the explosion resulted in the death of Channing Nelson Page.

4. The original units of Ocean Isle Motel were constructed by George Sloan and Rea Sloan in 1957, and the water heater for these original units was installed by a plumber named Olaf Thorsen.

5. Five additional units were constructed as a separate building at Ocean Isle Motel in 1962, and the plumbing work was done by Shallotte Hardware Company, including the furnishing and installation of the electric water heater in question. The explosion involved in this case occurred in one of these additional rooms, used as a utility room, where Shallotte Hardware Company had installed the water heater in April 1962. It was an eighty-two gallon electric water heater manufactured by State Stove and Manufacturing Company. As thus installed it remained in operation and use in the five additional units from about April 1962 until the explosion on 29 August 1964. George Sloan and Rea Sloan added four more rooms in April 1964 with hot water to be furnished to these four additional units by this same eighty-two gallon electric water heater. Olaf Thorsen performed the plumbing work in April 1964 with respect to these four additional units.

6. In June or July 1964, due to a complaint of insufficient hot water by motel guests, George Sloan and Rea Sloan called plumber Olaf Thorsen to check the water heater. This water heater was rated by an inscription on a plate attached thereto at 3000 watts for the upper heating element, 2500 watts for the lower heating element, and at 3000 watts maximum. When manufactured and assembled at State Stove and Manufacturing Company it was equipped with two thermostats and wiring between the two thermostats and the two heating elements, but was not equipped with any additional electrical wiring, any plumbing fixtures, or any relief valve of any type. It had holes for two

pipes at the top of the tank, one for a hot water pipe and the other for a cold water pipe, with the pipes to be furnished by the installer. The hot water unit was a sealed container with no external controls. The thermostats were covered by a shield which was screwed onto the sealed container. Shallotte Hardware Company had furnished and installed a one-half inch pressure relief valve set to work at 125 p.s.i. by its manufacturer; and Alton Millikan, a partner of Shallotte Hardware Company, was in charge of the installation work and supplied the electrical and plumbing connections.

7. Olaf Thorsen was a licensed plumber, and Alton Millikan was a licensed electric and plumbing contractor. When the eighty-two gallon electric water heater in question was installed at the Ocean Isle Motel in April 1962 by Shallotte Hardware Company, it was not inspected by the Boiler Inspection Division of the North Carolina Department of Labor as required by G.S. 95-54 et seq; but the installation was inspected by the Brunswick County Inspector.

8. When Olaf Thorsen checked the water heater in question in June or July 1964 at the request of George Sloan and Rea Sloan, due to complaints by motel guests of insufficient hot water as set out in paragraph No. 6 above, he removed the lower heating element of the water heater (2500-watt size), obtained a replacement from Shallotte Hardware Company (4500-watt size), and installed same. After the explosion on 29 August 1964, it was determined that the lower heating element in the water heater at the time of the explosion was an element of 4500-watt size.

Defendants moved for summary judgment under Rule 56 of the Rules of Civil Procedure, with supporting affidavit and depositions, contending there was no genuine issue of fact for trial. Plaintiff filed no opposing affidavits. Upon consideration of the pleadings, affidavit, depositions and stipulations, the trial judge, being of the opinion that there was no genuine issue of any material fact, allowed the motion and entered summary judgment for the defendants. Plaintiff appealed, and the Court of Appeals reversed for reasons stated in its decision, 12 N.C. App. 433. We allowed certiorari.

Anderson, Nimocks & Broadfoot by Henry L. Anderson, Attorneys for defendant appellants.

W. D. Sabiston, Jr., and Tharrington & Smith, Attorneys for plaintiff appellee.

HUSKINS, Justice.

Did the Court of Appeals err in reversing summary judgment entered by the trial court in favor of defendants? Answer depends upon whether defendants, in light of an innkeeper's duty to a guest, have borne the burden which the law places upon a movant for summary judgment.

What standard of care is required of innkeepers with respect to their guests?

[1] An innkeeper is not an insurer of the personal safety of his guests. He is required to exercise due care to keep his premises in a reasonably safe condition and to warn his guests of any hidden peril. *Barnes v. Hotel Corp.*, 229 N.C. 730, 51 S.E. 2d 180 (1949). The duties thus imposed upon an innkeeper for the protection of his guests "are nondelegable, and liability cannot be avoided on the ground that their performance was entrusted to an independent contractor." 40 Am. Jur. 2d, Hotels, Motels and Restaurants § 81. *Compare* the English rule, Chapman, Liability for the Negligence of Independent Contractors, 50 L.Q. Rev. 71 (1934). *See* Prosser on Torts (4th ed. 1971), § 71 at p. 470.

[2] The rule of nondelegability is grounded on the premise that an innkeeper's duty to use due care for the safety of his guests is a responsibility so important to the public that he should not be permitted to transfer it to another. The Restatement of the Law of Torts expresses and illustrates the rule as follows: "One who employs an independent contractor to maintain in safe condition land which he holds open to the entry of the public as his place of business, or a chattel which he supplies for others to use for his business purposes or which he leases for immediate use, is subject to the same liability for physical harm caused by the contractor's negligent failure to maintain the land or chattel in reasonably safe condition, as though he had retained its maintenance in his own hands." Restatement of Torts 2d, § 425. The second illustration following this section is especially pertinent: "2. A operates a hotel. He employs B as a

plumber to install a shower bath. B negligently transposes the handles so that the hot water pipe is labeled cold. C, a guest, deceived by the label, turns on the hot water and is scalded. A is subject to liability to C."

The rule of nondelegability has been applied where plaintiff was injured by the negligent operation or maintenance of an elevator located in defendant's premises. *Stott v. Churchill,* 36 N.Y.S. 476 (1895), aff'd 157 N.Y. 692, 51 N.E. 1094; *Brown v. George Pepperdine Foundation,* 23 Cal. 2d 256, 143 P. 2d 929 (1943). Even where the company which manufactured and installed the elevator had by contract assumed responsibility for the inspection, repair and maintenance of the elevator, the rule was applied and defendant owner of the premises was held liable. *Otis Elevator Co. v. Bond,* 373 S.W. 2d 518 (Tex. Civ. App. 1963). A like result is reached in *Blackhawk Hotels Co. v. Bonfoey,* 227 F. 2d 232 (C.A. 8th 1955). *Accord, Friedman v. Schindler's Prairie House,* 230 N.Y.S. 44, aff'd, 250 N.Y. 574, 166 N.E. 329 (1929).

[3] Thus, depending on the evidence offered at the trial, defendants in this case could be liable on any of the following bases:

> (1) Failure to use due care for the safety of their guests by employing a plumber instead of an electrician to repair the electrical heating element on the water heater, thereby failing "to exercise reasonable care to employ a competent and careful contractor (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or (b) to perform any duty which the employer owes to third persons." Restatement of Torts 2d, § 411. While making repairs to the heating element of an electric water heater is not "inherently" or "intrinsically" dangerous work, it involves work which will likely cause injury if proper safety precautions are not observed. *Compare Evans v. Rockingham Homes, Inc.,* 220 N.C. 253, 17 S.E. 2d 125 (1941). If defendants knew, or in the exercise of due care should have known, that a plumber was not competent to do such work and if the plumber's negligence was a proximate cause of the explosion and ensuing death of plaintiff's testate, defendants would be liable.

(2) Since the duties imposed upon an innkeeper for the protection of his guests are nondelegable and liability cannot be avoided on the ground that their performance was entrusted to an independent contractor, defendants would be subject to the same liability for an injury or death caused by the plumber's negligent failure properly to repair the electrical heating element on the water heater as if they had made the repairs themselves.

(3) Application of the doctrine of *res ipsa loquitur*.

We now turn to the propriety of summary judgment for the defendants.

Guiding principles applicable to summary judgment under Rule 56 are detailed in *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971), and have since been applied in various cases by this Court, including *Harrison Associates v. State Ports Authority*, 280 N.C. 251, 185 S.E. 2d 793 (1972); *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972); *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897 (1972); *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E. 2d 35 (1972); *Schoolfield v. Collins*, 281 N.C. 604, 189 S.E. 2d 208 (1972).

[4] Our Rule 56 and its federal counterpart are practically the same. Authoritative decisions both state and federal, interpreting and applying Rule 56, hold that the party moving for summary judgment has the burden of "clearly establishing the lack of any triable issue of fact by the record properly before the court. His papers are carefully scrutinized; and those of the opposing party are on the whole indulgently regarded." 6 Moore's Federal Practice (2d ed. 1971) § 56.15[8], at 2439; *Singleton v. Stewart, supra.* Rendition of summary judgment is, by the rule itself, conditioned upon a showing by the movant (1) that there is no genuine issue as to any material fact, and (2) that the moving party is entitled to a judgment as a matter of law. G.S. 1A-1, Rule 56(b); *Kessing v. Mortgage Corp., supra.*

[5] Have defendants carried the burden of proof so as to entitle them to summary judgment? We first note that plaintiff filed no counter-affidavits. Rule 56(e) provides, *inter alia:* "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the

mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Thus plaintiff cannot rely on her verified complaint to defeat defendants' motion, accompanied, as it is, by competent affidavits and depositions.

A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein. Rule 56(e); *Williams v. Kolb,* 145 F. 2d 344 (D.C. App. 1944); *Fletcher v. Norfolk Newspapers, Inc.,* 239 F. 2d 169 (C.A. 4th 1956). Plaintiff's complaint here meets neither the first nor the third requirements of the rule for affidavits and therefore may not be considered.

Even so, defendants still have the burden of showing that there is no triable issue of fact and that they are entitled to judgment as a matter of law. Hence plaintiff may yet succeed in defending against the motion for summary judgment if the evidence produced by the movant and considered by the court is insufficient to satisfy the burden. *Walling v. Fairmont Creamery Co.,* 139 F. 2d 318 (C.C.A. 8th 1943); *Griffith v. William Penn Broadcasting Co.,* 4 F.R.D. 475 (E.D. Pa. 1945). "Where by the nature of things, the moving papers themselves demonstrate that there is inherent in the problem a factual controversy then, while it is certainly the part of prudence for the advocate to file one, a categorical counter-affidavit is not essential." *Inglett & Company v. Everglades Fertilizer Co.,* 255 F. 2d 342 (C.A. 5th 1958). To the same effect but stated somewhat differently: "Where the moving papers affirmatively disclose that the nature of the controversy presents good faith, actual, as distinguished from formal, dispute on one or more material issues, summary judgment cannot be used." *Murphy v. Light,* 257 F. 2d 323 (C.A. 5th 1958).

Thus we consider only the supporting documents presented by defendants together with the stipulations of the parties contained in the Order on Final Pre-trial Conference, filed 28 January 1971. The stipulations of fact contained therein will be considered as admissions. 6 Moore's Federal Practice (1971

Supp.) § 56.11[1.-5] at 100; *Stubblefield v. Johnson-Fagg, Inc.*, 379 F. 2d 270 (C.A. 10th 1967).

Due consideration of the supporting documents and materials presented by defendants leads us to the conclusion that the granting of summary judgment by the trial court was erroneous. We hold that defendants have failed to carry the movant's burden of proof.

[6] While our Rule 56, like its federal counterpart, is available in all types of litigation to both plaintiff and defendant, "we start with the general proposition that issues of negligence . . . are ordinarily not susceptible of summary adjudication either for or against the claimant, but should be resolved by trial in the ordinary manner." 6 Moore's Federal Practice (2d ed. 1971) § 56.17[42] at 2583; 3 Barron and Holtzoff, Federal Practice and Procedure (Wright ed. 1958) § 1232.1, at 106. It is only in exceptional negligence cases that summary judgment is appropriate. *Rogers v. Peabody Coal Co.*, 342 F. 2d 749 (C.A. 6th 1965); *Stace v. Watson*, 316 F. 2d 715 (C.A. 5th 1963). This is so because the rule of the prudent man (or other applicable standard of care) must be applied, and ordinarily the jury should apply it under appropriate instructions from the court. Gordon, The New Summary Judgment Rule in North Carolina, 5 Wake Forest Intra. L. Rev. 87 (1969).

Moreover, the movant is held by most courts to a strict standard in all cases; and "all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion." 6 Moore's Federal Practice (2d ed. 1971) § 56.15[3], at 2337; *United States v. Diebold, Inc.*, 369 U.S. 654, 8 L.Ed. 2d 176, 82 S.Ct. 993 (1962).

Application of these rules to the evidentiary material demonstrates the impropriety of summary judgment in this case.

The material offered by defendants in support of their motion for summary judgment contains the following sworn statements by Olaf Thorsen, the plumber selected by defendants to repair the electric water heater:

> "I don't know what the wattage was on the old element I removed or on the new element I purchased from Shallotte Hardware. . . . I did not know up to the time of the

explosion I had installed a 4500 watt element. . . . I have had some education and can read. . . . I didn't pay enough attention to this particular one to notice the wattage stamped on the side of it."

The material offered by defendants in support of their motion includes the deposition of Alton Millikan, a duly licensed plumber *and electrician.* The following sworn statements appear in his deposition:

"When your wattage goes up, your current goes up, and so does the arc that the thermostat draws. Each time it breaks it makes a bigger arc, and I never had any trouble with water heaters under 4500 watts. All the trouble we have encountered had 4500 watts on it. The function of a 4500 watt heating element would be to just heat the water quicker. The thermostat is rated 6,000 watts which should normally interrupt this current, but on all problems I ever encountered in heaters, it had 4500 watt. . . . If the thermostat is designed to and has operated with 3,000 watt element or 2500 watt element, and a 4500 watt element is thrown in and used, the thermostat could or might have trouble in cutting off that current because of it being additional wattage. . . . The current that gets to the element has to go through the thermostat, and by having increased the wattage, that is a larger arc of electricity. That extra arc could or might have damaged the points on the thermostat. It will tend to weld them quicker than a smaller load. When I say weld them, that means that the arc or current softens materials on the contact, and sticks together. That could or might cause the points to stick and hang. If that occurs the thermostat would freeze so that it would no longer control the temperature. . . . After an element is installed with increased wattage up to 4500 watts, it could or might operate for some period of time before it is damaged to the point of sticking. . . . That damage is simply the increased current damaging the metal points. . . . Any time you alter whatever was shipped with the unit, you should add additional safety devices. . . . Other factors that would cause the thermostat to become inoperative is lightning, but mostly lightning is pressure, and it tends to blow out rather than melt the thing together."

[7] In our opinion reasonable men could reach different conclusions on the evidentiary material offered by defendants to support their motion for summary judgment. Were defendants negligent in selecting a plumber instead of an electrician to repair an electrical element on the water heater? See Restatement of Torts 2d, § 425 at 412, Appendix, § 425 at 71; Prosser on Torts (4th ed. 1971), pp. 470 et seq. Was the plumber negligent in making the repairs? Was his negligence a proximate cause of the explosion and ensuing injury? The evidentiary material offered by defendants would permit a jury to answer all these questions in the affirmative as well as the negative. These are material issues of fact and demonstrate that the movants have failed to satisfy the burden of "clearly establishing the lack of any triable issue of fact by the record properly before the court."

[8] Moreover, defendants have not shown that they are entitled to a judgment as a matter of law. The evidentiary materials of record do not clearly establish the inapplicability of the doctrine of *res ipsa loquitur* because these materials tend to show that the water heater in question was under the exclusive control and management of the defendants; and explosion of a water heater is something which, in the ordinary course of events, does not happen if those who have the management of it use proper care. Under those circumstances the explosion itself would be some evidence of negligence on the part of those in control and would tend to establish a *prima facie* case requiring its submission to the jury. Evidence tending to explain the cause of the explosion merely accentuates the jury's role in this controversy and the unwisdom of summary judgment.

Whether *res ipsa loquitur* applies and whether this case should be submitted to the jury under that doctrine or under some other theory of law, or dismissed, are questions for determination by the trial judge at the close of the evidence. It would be inappropriate at this juncture, upon affidavits, to determine any of those matters. Our comments are intended merely to demonstrate defendants' failure to carry the burden of showing they are entitled to judgment as a matter of law.

"If there is to be error at the trial level it should be in denying summary judgment and in favor of a full live trial. And the problem of overcrowded calendars is not to be solved by summary disposition of issues of fact fairly presented in an

action." 6 Moore's Federal Practice (2d ed. 1971) § 56.15 [1.-12], at 2316.

For the reasons stated the decision of the Court of Appeals reversing the entry of summary judgment in favor of defendants is

Affirmed.

IN THE MATTER OF THE FORECLOSURE OF THE DEED OF TRUST OR MORTGAGE OF CASTILLIAN APARTMENTS, INC.

No. 105

(Filed 31 July 1972)

1. **Mortgages and Deeds of Trust § 33— surplus from foreclosure sale — attachment of junior lien**

A second lien deed of trust attached to the surplus arising from a foreclosure sale under the first lien deed of trust.

2. **Usury § 1— effect of usury**

Where a loan evidenced by a note has been held usurious, the usury invalidated only those provisions of the note providing for the payment of interest.

3. **Mortgages and Deeds of Trust § 33— foreclosure sale — surplus — right of holder of junior lien**

Where a note secured by a second lien deed of trust does not bear interest because the loan evidenced by the note has been declared usurious, and monthly payments on the principal are not in default, the holder of the note secured by the second lien deed of trust is not entitled to have the surplus arising from a foreclosure sale under the first lien deed of trust immediately disbursed to it for application and credit on the principal of the note.

4. **Mortgages and Deeds of Trust § 10— waste — default on senior lien**

A default on which the foreclosure of a first lien deed of trust was based does not constitute "waste" within the meaning of a provision of a second lien deed of trust that the indebtedness secured thereby is due and payable if the debtor permits "any waste or injury to such extent as to impair the value of the premises as security," since the word "waste" refers to destruction, impairment or injury to the property itself.

APPEAL by National Mortgage Corporation from *Long, J.*, November 15, 1971 Civil Session of ORANGE Superior Court,

certified, pursuant to G.S. 7A-31, for initial appellate review by the Supreme Court.

This special proceeding was instituted by petitioner, National Mortgage Corporation (Mortgage Corporation), before the Clerk of the Superior Court of Orange County under G.S. 45-21.32 to recover surplus funds paid into the office of the clerk as the result of the foreclosure of a deed of trust. The respondents are Jonas W. Kessing Company (Kessing Company), Jonas W. Kessing (Kessing) and Alice H. Kessing (Mrs. Kessing).

The subject of controversy is $118,659.98 deposited with the clerk as authorized by G.S. 45-21.31(b), this being the surplus realized from the foreclosure of a *first lien* deed of trust on certain real estate in the Town of Chapel Hill, Orange County, N. C., referred to hereafter as the Castillian Apartments property.

Mortgage Corporation is the owner and holder of a note for $250,000.00, which was executed by Kessing Company as maker and by Kessing and Mrs. Kessing as endorsers and secured in part by a *second lien* deed of trust on the Castillian Apartments property. The principal of this $250,000.00 note is payable in monthly installments of $500.00, beginning May 1, 1970, and continuing until June 30, 1974, when the balance of principal is payable.

In *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971), this Court held that the loan evidenced by the $250,000.00 note was usurious; that all interest thereon was forfeited; and that, on account of payments theretofore made as interest, $25,000.00 was to be credited on principal.

There has been no default in respect of the payment of any monthly installment of principal. Neither the $250,000.00 note nor the deed of trust constituting security therefor contains any provision for the accelleration of the maturity date of the indebtedness because of foreclosure of the *first lien* deed of trust or default in the payment of any obligation which it secured.

The present unpaid principal balance on the $250,000.00 note substantially exceeds the $118,659.98 deposited with the clerk.

The court below denied Mortgage Corporation's petition that the $118,659.98 be disbursed to it *forthwith* for application and credit on the principal of the $250,000.00 note. It further ordered the Clerk of the Superior Court, pursuant to G.S. 2-55(6), to invest the net surplus foreclosure fund of $118,659.98, after payment of an attorney's fee of $300.00 to counsel for respondents as authorized by G.S. 45-21.32(d), in a certificate of deposit, consistent with the stipulation of counsel filed herein; and, until otherwise ordered by the court, to transmit to Kessing Company all interest income realized therefrom. The court taxed the costs of this proceeding against Mortgage Corporation.

A stipulation was entered as to what would constitute a proper investment by the clerk of the surplus fund.

Mortgage Corporation excepted to the judgment and appealed.

Manning, Allen & Hudson, by James Allen, Jr., and Bryant, Lipton, Bryant & Battle, by Donald G. Lawrence, for appellant.

Newsom, Graham, Strayhorn, Hedrick & Murray, by Josiah S. Murray III, for appellees.

BOBBITT, Chief Justice.

"Surplus money arising upon a sale of land under a decree of foreclosure stands in the place of the land itself in respect to liens thereon or vested rights therein. They are constructively, at least, real property, and belong to the mortgagor or his assigns." 3 Jones on Mortgages 685, § 2164 (8th ed., 1928). Accord: 59 C.J.S. *Mortgages* 1032, § 596; 55 Am. Jur. 2d *Mortgages* 808, § 931.

[1] Mortgage Corporation's *second lien* deed of trust attached to the surplus arising from the foreclosure sale under the first lien deed of trust. *Markey v. Langley,* 92 U.S. 142, 155, 23 L.Ed. 701, 705 (1876); *W. A. H. Church, Inc. v. Holmes,* 60 App. D.C. 27, 46 F. 2d 608 (1931); *Cowan v. Stoker,* 100 Utah 377, 115 P. 2d 153 (1941); *Paroni v. Quick,* 211 A. 2d 765 (D.C. App. 1965).

The surplus fund of $118,659.98 takes the place of the *second lien* deed of trust *as security* for the $250,000.00 note. Respondents concede that Mortgage Corporation has and will

continue to have an equitable lien on the principal of this surplus fund until the debt due Mortgage Corporation has been paid. However, the $250,000.00 note does not bear interest and no monthly installment of principal is in default.

[2] Usury invalidated only those provisions of the $250,000.00 note providing for the payment of interest. *Wilkins v. Finance Co.*, 237 N.C. 396, 403, 75 S.E. 2d 118, 123 (1953). According to the note and deed of trust, no portion of the principal becomes due prior to June 30, 1974, except the monthly installments of $500.00 each.

[3] Ordinarily, the impounding of the surplus pending the maturity of a second lien deed of trust would be of no benefit to the persons obligated to pay the debt secured thereby. The interest received on a certificate of deposit would be insufficient to cover the interest on the note. The unique feature of the present case is that the $250,000.00 note has been stripped of all obligations relating to payment of interest. Under present conditions, the income on a certificate of deposit for the amount of the surplus fund would exceed the amount necessary to make the monthly payments on principal. More important, the crediting of these monthly payments on the principal will reduce substantially the amount of the unpaid principal on June 30, 1974. The receipt by Mortgage Corporation of the surplus fund prior to the maturity of respondents' obligations in respect of the payment of principal would nullify substantially the adverse consequences of its usurious transaction.

Mortgage Corporation cites *Fagan v. People's Sav. & Loan Ass'n*, 55 Minn. 437, 57 N.W. 142 (1893), which involved the following: One Haugen executed two mortgages on the same real estate, a first mortgage to the defendant (People's Savings & Loan Association) and a second mortgage to the plaintiff (Fagan). Default having been made in the conditions thereof, the first mortgage was foreclosed and the defendant became the purchaser. The plaintiff alleged that the purchase price exceeded the amount due on the first mortgage debt and that the amount of this excess should be paid to it for application on the second mortgage debt. The court determined that there was an excess and that Fagan was entitled thereto notwithstanding his mortgage debt was not then due. The court called attention to a Minnesota statute (Minn. Gen. Stats. of 1878, Ch. 81, § 4) which provided in part that, upon foreclosure of a real estate

mortgage which secured a debt payable in installments, some due and others not due, "the proceeds of such sale shall, after satisfying the interest, portion or instalment of the principal due, with interest and costs of sale, be applied towards the payment of the residue of the sum secured by said mortgage, and not due and payable at the time of such sale; and if such residue does not bear interest, such application shall be made with a rebate of the legal interest for the time during which the residue shall not be due and payable; and the surplus, if any, shall be paid to the mortgagor, his legal representatives or assigns." The court held that this statutory principle applied to the disbursement of the surplus resulting from the foreclosure of the first mortgage to the payment of a second mortgage debt which was not due. These factual distinctions are noted: (1) Nothing suggests that the second mortgage debt did not bear interest; and (2) the owner of the equity of redemption was not a party. The controversy was between the defendant, the first mortgagee, who had no pretense of right to retain the excess, and the plaintiff, the second mortgagee.

Mortgage Corporation cites *Nielsen v. Heald,* 151 Minn. 181, 186 N.W. 299 (1922), where the subject property was subject to the lien of first and second mortgages and also asserted lien claims in connection with the construction of an apartment building. Default had occurred in the payment of the debts secured by *both* mortgages. The evidence disclosed that the debts secured by the mortgages plus the amount of the undetermined lien claims exceeded the value of the mortgaged property. Under these circumstances the Supreme Court of Minnesota upheld the appointment of a receiver to take charge of the property and collect the rents and profits during the pendency of the action.

Mortgage Corporation cites *Pioneer Credit Corporation v. Bloomberg,* 323 F. 2d 992 (1st Cir. 1963), where a surplus fund resulting from the foreclosure of a senior mortgage was the subject of conflicting claims by the mortgagor and by the holder of a junior mortgage. Each claimed the entire fund, the mortgagor basing his claim on the ground that the debt secured by the second mortgage debt was not due. In rejecting this contention, the court held, *based on a Massachusetts statute* (Mass. Gen. Laws 1958, Ch. 183, § 20), that the entire indebtedness secured by the junior mortgage had become due because of

the mortgagor's failure to perform conditions of the prior mortgage. If the court had allowed the mortgagor's claim, the owner of the indebtedness secured by the second mortgage would have lost his security. Nothing suggests that the second mortgage debt did not bear interest.

Although cited by Mortgage Corporation, we find nothing in *Gorrin v. Higgins,* 73 N.J. Super. 243, 179 A. 2d 554 (1962), which significantly supports its present contention.

[4] Mortgage Corporation's second lien deed of trust provides in substance that the indebtedness secured thereby is to become due and payable if Kessing Company permits "any waste or injury to such extent as to impair the value of the [premises] as security." We have not overlooked Mortgage Corporation's contention that the default on which the foreclosure of the first lien deed of trust was based constituted "waste" within the meaning of this provision. However, we think the word "waste" refers only to waste in the traditional sense of destruction, impairment or injury to the property itself. *Thomas v. Thomas,* 166 N.C. 627, 629, 82 S.E. 1032, 1033 (1914), and cases cited.

The record contains no evidence of the identity of the purchaser of the Castillian Apartments property at the foreclosure sale under the first lien deed of trust or of the value of the Castillian Apartments property when the foreclosure sale was made. Assuming the price paid by the purchaser was the fair market value of the property, Mortgage Corporation's position in respect of security has not been impaired by the foreclosure. After June 30, 1974, or earlier if respondents default in the payment of any monthly installment of principal, it may proceed against respondents personally and against any security it may have.

[3] Having concluded that Mortgage Corporation is not at present entitled to the principal of the surplus fund of $118,659.98, the order of the court below is affirmed.

Affirmed.

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

No. 40

(Filed 31 July 1972)

1. **Municipal Corporations § 30— building permit — subsequent ordinance — good faith expenditures**

The issuance of a building permit, to which the permittee is entitled under the existing zoning ordinance, creates no vested right to build contrary to the provisions of a subsequently enacted ordinance unless the permittee, acting in good faith, has made substantial expenditures in reliance upon the permit at a time when they did not violate declared public policy.

2. **Municipal Corporations § 30— building permit — knowledge of pending ordinance — nonconforming use — expenditures**

When, at the time a builder obtains a permit, he has knowledge of a pending ordinance which would make the authorized construction a nonconforming use and thereafter hurriedly makes expenditures in an attempt to acquire a vested right before the law can be changed, he does not act in good faith and acquires no rights under the permit.

3. **Municipal Corporations § 30— rezoning ordinance — notice**

A rezoning ordinance adopted by a municipal governing body without compliance with the notice provisions of G.S. 160-175 and the municipal code is invalid and ineffective.

4. **Municipal Corporations § 30— special use permit — void rezoning ordinance**

An applicant's right to a special use permit for construction of a mobile home park, denied under an existing valid zoning ordinance which entitled him to it, may not be defeated by a purported amendment of the zoning ordinance which was void *ab initio* because it was not adopted as required by the enabling statute.

APPEAL by respondents from *Kivett, J.*, 26 July 1972 Civil Session of FORSYTH, transferred to this Court for initial appellate review under G.S. 7A-31 (a).

This proceeding, which is now before us for the second time, involves petitioners' application to the Winston-Salem Board of Adjustment (Board) for a special use permit to construct a mobile home park. The following facts are pertinent to this appeal:

On 20 August 1969 Charles F. Keiger and Mamilee Enterprises, Inc. (petitioners), applied to the Board for a special use permit to build a 102-unit mobile home park upon a 14.5-acre site, a part of a larger tract of about 50 acres zoned B-3 (Highway Business). In such a district mobile home parks are allowed upon a special use permit issued by the Board. Petitioners' plans met every ordinance standard and site requirement for a mobile home park. Notwithstanding, on 4 September 1969, after a duly advertised public hearing, the Board denied the permit.

Thereafter petitioners duly applied to the Superior Court for a writ of certiorari to review the Board's action. The petition was granted and, on 28 October 1969, the record and transcript of proceedings before the Board were filed in the Superior Court.

Prior to review by the Superior Court, on 14 January 1970, respondents filed a "motion to dismiss," in which they asserted that petitioners' application for a special use permit had been rendered moot on 3 November 1969 when the Winston-Salem Board of Aldermen enacted an ordinance rezoning a portion of their property from B-3 to R-4 (single-family residences), a category in which mobile home parks are not allowed. Attached to the motion was a copy of a purported ordinance describing two tracts of land by metes and bounds.

Judge Exum denied the motion to dismiss and—without regard to the alleged ordinance—entered judgment affirming the Board's denial of the permit.

Petitioners appealed and the Court of Appeals affirmed the judgment of the Superior Court. *Keiger v. Board of Adjustment,* 8 N.C. App. 435, 174 S.E. 2d 852 (1970). Upon petitioners' appeal to this Court that decision was reversed. In an opinion written by Chief Justice Bobbitt this Court held that the Board's denial of petitioners' application was unlawful and in violation of petitioners' constitutional rights. Because the record contained no stipulation, finding or evidence with reference to the adoption of the purported ordinance attached to respondents' motion to dismiss, and no stipulation that any of petitioners' property was included in the land described therein, the proceeding was ordered remanded to the Superior Court with instructions that, after considering the effect, if any, of the rezoning ordinance allegedly enacted after the Board's denial

of the permit, it enter judgment consistent with the law as stated in the opinion. Specifically the mandate was: "Upon further consideration in the Superior Court, all parties should be afforded an opportunity to develop all pertinent facts with reference to the adoption of the alleged rezoning ordinance on November 3, 1969, and its effect, if any, upon petitioners' asserted right to construct a mobile home park on the 14.5-acre site. Unless precluded by such rezoning ordinance, petitioners are entitled to have issued the special permit for which they have applied." *Keiger v. Board of Adjustment,* 278 N.C. 17, 25, 178 S.E. 2d 616, 621 (1971).

After the case was returned to the Superior Court the parties stipulated the following facts (enumeration ours):

1. On 26 September 1969 the developers of the Country Club Loggia, Inc., and others petitioned the Board of Aldermen to rezone a portion of petitioners' 14.53 acres from B-3 to R-4. As required by Winston-Salem Code Section 29-20, the petition was referred to the City-County Planning Board for its review and recommendation.

2. Thereafter (time not specified) the Superior Court denied petitioners' application for an injunction "to stay the proposed rezoning" until its right to the special use permit had been judicially determined.

3. After due advertisement, as required by Section 29-20(A)(6) of the Winston-Salem Code, on 16 October 1969, the Planning Board conducted a public hearing on the proposal to rezone petitioners' property. The minutes of the hearing, attached to the stipulation, disclose that adjacent landowners in R-4 zones sought to insulate their property from a mobile home park by a strip of land zoned R-4 along petitioners' eastern and northern boundary lines. Petitioners and their attorney were present and were heard in opposition to the change. Petitioners stated that the proposed buffer zone was approximately 270 feet wide across the north side of the property and 300 feet along the east side.

4. On Friday, 31 October 1969, the Planning Board filed its report with a recommendation that the Board of Aldermen approve the requested rezoning. Winston-Salem Code § 29-20(A)(7) required the Planning Board, at the time of filing its report, to mail or deliver a copy to the persons requesting

the zoning change *"and also to the opponent, if any."* Any person desiring to be heard in opposition to the report was required to notify the city manager within ten days after a copy of the report was mailed, or delivered, to him.

5. Petitioners, who were entitled to the report, contend that the Planning Board neither mailed nor delivered them a copy. "The records of the Planning Board do not indicate whether or not such a report was mailed."

6. On Monday, 3 November 1969, three days following the submission of the Planning Board's report, the Board of Aldermen passed an ordinance purporting to rezone petitioners' land as recommended. No notice that action would be taken on the report, or of any hearing before the Board of Aldermen, had been published. Petitioners, however, appeared and were given an opportunity to oppose the rezoning. Three days thereafter, on 6 November 1969, a copy of the report of the Planning Board was mailed to petitioners' attorney. (Petitioners' attorney, in an affidavit which is a part of the record, avers that this was the only copy of the report ever made available to him or his clients; that at the hearing before the aldermen on 3 November 1969 he was unaware of the contents of the report; that without it he was unable to make adequate preparation for the hearing; and that his clients were prejudiced in consequence.)

On 7 September 1971 this proceeding came on to be heard before Judge Kivett upon the mandate of this Court quoted above. After considering "stipulated facts, oral arguments of counsel, and briefs filed by both the petitioners and the respondents," Judge Kivett adjudged "that the action of the Board of Aldermen on 3 November 1969 in which property of the petitioners is allegedly rezoned" has no legal effect upon petitioners' right to the special use permit requested because the rezoning occurred, and "the rezoning machinery instituted," after the unlawful denial of the permit. Whereupon he remanded the proceeding to the Board with orders that it issue the permit.

R. Kason Keiger for petitioner appellees.

Roddey M. Ligon, Jr., and Zeb E. Barnhardt, Jr., for respondent appellants.

SHARP, Justice.

The trial judge concluded that a rezoning ordinance, instigated after petitioners' application for a permit to construct

a mobile home park on their 14.5-acre site, could have no effect whatever upon their right to the permit. Therefore, he did not adjudicate the validity or invalidity of the ordinance purporting to change the classification of petitioners' property.

[1, 2] It is the rule in this State that *the issuance* of a building permit, to which the permittee is entitled under the existing ordinance, creates no vested right to build contrary to the provisions of a subsequently enacted zoning ordinance, unless the permittee, acting in good faith, has made substantial expenditures in reliance upon the permit at a time when they did not violate declared public policy. *Warner v. W & O, Inc.*, 263 N.C. 37, 138 S.E. 2d 782 (1964). *See In Re Appeal of Supply Co.*, 202 N.C. 496, 163 S.E. 462 (1932). See 101 C.J.S. *Zoning* § 243 (1958); 58 Am. Jur. *Zoning* § 185 (1948). When, at the time a builder obtains a permit, he has knowledge of a pending ordinance which would make the authorized construction a nonconforming use and thereafter hurriedly makes expenditures in an attempt to acquire a vested right before the law can be changed, he does not act in good faith and acquires no rights under the permit. *Town of Hillsborough v. Smith*, 276 N.C. 48, 170 S.E. 2d 904 (1969); *Stowe v. Burke*, 255 N.C. 527, 122 S.E. 2d 374 (1961).

The foregoing rule determines the effect of a rezoning ordinance upon a permit *previously issued* in conformity with the applicable law. This case, however, involves the right to a permit which was never issued, a permit which was unlawfully refused at a time when no zoning change affecting the property was impending. Thereafter—within the time the law allowed petitioners to apply to the court for a review of the Board's refusal—owners of land adjacent to petitioners' 14.5 acres filed a request for the rezoning of a substantial part of the property. While petitioners awaited judicial review by the Superior Court of the Board's refusal to issue the permit they could not, of course, make "substantial expenditures" or otherwise change their position in reliance upon a permit they did not have. In the meantime, the Planning Board reviewed the proposed amendment to the zoning ordinance and recommended its passage. Three days after that report and recommendation was filed, on 3 November 1969, the Board of Aldermen purported to adopt the requested amendment in a manner which ignored the law applicable to changes in the zoning ordinance.

G.S. 160-176 (1964) provides that a zoning ordinance may, from time to time, be "amended, supplemented, changed, modified or repealed" upon compliance with the requirements of G.S. 160-175 (1964) "relative to public hearings and official notice." G.S. 160-175 provides that no zoning regulation, restriction or boundary—or change therein—shall become effective until after a public hearing of which notice "shall be given once a week for two successive calendar weeks in a newspaper published in such municipality, or, if there be no newspaper published in the municipality, by posting such notice at four public places in the municipality, said notice to be published the first time or posted not less than fifteen days prior to the date fixed for said hearing."

Winston-Salem Code, Section 29-20 AMENDMENTS provides: "In no case shall final action by the Board of Aldermen be taken amending, changing, supplementing, modifying, or repealing the regulations established by this ordinance or changing the district boundaries hereby established until a public hearing has been held by the Board of Aldermen at which parties in interest and citizens shall have an opportunity to be heard. A notice of such public hearing shall be given once a week for two successive calendar weeks in a newspaper published in Winston-Salem, the first publication of said notice being not less than ten (10) days prior to the date fixed for the hearing."

[3] Since the ordinance of 3 November 1969 was passed within three days after the Planning Board filed its recommendation with the Board of Aldermen, that board obviously made no pretense of complying with the notice provisions of G.S. 160-175 or its own Code Section 29-20.

A municipality's authority to enact and amend zoning ordinances "is subject to the limitations imposed by the enabling statute and by the Constitution. These limitations forbid arbitrary and unduly discriminating interference with property rights in the exercise of such power. . . . Thus, a zoning ordinance or an amendment thereto which is not adopted in accordance with the enabling statute is invalid and ineffective." *Heaton v. City of Charlotte,* 277 N.C. 506, 513, 178 S.E. 2d 352, 356 (1970). *Accord, Walker v. Elkin,* 254 N.C. 85, 118 S.E. 2d 1 (1960); *Kass v. Hedgpeth,* 226 N.C. 405, 38 S.E. 2d 164 (1946).

The stipulated facts clearly prove the invalidity and ineffectiveness of the ordinance of 3 November 1969.

Where a permit has been illegally withheld from an applicant entitled to it under the existing zoning law, the effect of a subsequently enacted restrictive amendment upon the applicant's right to the permit varies from state to state. The decisions are conflicting; the situations and solutions are many and varied. See 101 C.J.S. *Zoning* § 221 (1958) and (Supp. 1972); 58 Am. Jur. *Zoning* § 182 (1948) and (Supp. 1972); 3 Anderson, Am. Law of Zoning § 21.22 (1968); 8 McQuillin, *Mun. Corp.* § 25.155 (3d Ed. 1965); Annot., 75 A.L.R. 2d 168, 236 (1961); Annot., 169 A.L.R. 584 (1947); Annot., 138 A.L.R. 500, 505 (1942); Annot., 40 A.L.R. 928, 934 (1926). For an opinion collecting authorities and discussing the effect of a rezoning ordinance, instigated and passed after the unlawful denial of a permit, upon applicant's rights see *Ben Lomond, Inc. v. City of Idaho Falls,* 92 Idaho 595, 448 P. 2d 209 (1968).

[4] In this case we do not reach the question of what effect a validly enacted rezoning ordinance would have had on petitioners' right to construct the mobile home park. For decision here it suffices to say that an applicant's right to a permit, denied under an existing valid ordinance which entitled him to it, may not be defeated by a purported amendment which was void *ab initio* because it was not adopted as required by the enabling statute. We hold that petitioners are entitled to the permit for which they applied. Accordingly, the judgment of the Superior Court is

Affirmed.

Plemmer v. Matthewson

WALTER PLEMMER, JR., MARTHA PLEMMER, ASBURY BATCHELOR, ARTHUR REYNOLDS, ROBERT BRIDGERS, E. C. DAIL, JAMES C. POWELL, LUTHER RUFFIN, JR., CAROLYN POWELL, MAIZE W. FREEMAN, JOHNNY HOWELL AND MAGGIE PERKINS, ON BEHALF OF THEMSELVES AND SUCH OTHER CITIZENS OF EDGECOMBE COUNTY AS MAY CARE TO JOIN v. W. RAY MATTHEWSON, MAYOR, DAVID PITTMAN, DAVID TYSON, ALONZA WHITEHEAD AND LEONARD JONES, MEMBERS OF THE BOARD OF COMMISSIONERS OF THE TOWN OF PRINCEVILLE, NORTH CAROLINA AND THE TOWN OF PRINCEVILLE, A MUNICIPAL CORPORATION OF THE STATE OF NORTH CAROLINA

No. 106

(Filed 31 July 1972)

1. **Appeal and Error § 2— contention not raised below**

A contention not raised in the court below may not be raised for the first time on appeal.

2. **Municipal Corporations § 2— enlargement of corporate boundaries — power of legislature**

The General Assembly, by a special act, may constitutionally enlarge the boundaries of a town which it has created, and may also provide statutory procedures for extending the corporate limits of a municipality organized and existing under the laws of the State.

3. **Municipal Corporations § 2— annexation — special legislative act — delegation of legislative authority**

The General Assembly did not delegate legislative authority in violation of Art. I, § 6 or Art. II, § 1 of the N. C. Constitution by a special act delegating to the commissioners of Princeville the discretionary right to decide whether to enlarge the corporate limits as specified in the act.

4. **Municipal Corporations § 2— annexation — special legislative act — statutory procedures**

Where the General Assembly passed a special act authorizing the commissioners of Princeville to annex a specified area, it was not necessary for the town commissioners to follow the procedures set forth in G.S. Ch. 160, Art. 36, Part 1, in order to annex such area, since the General Assembly did not render itself powerless to extend corporate limits when it enacted statutory procedures by which municipalities may annex territory without a special act of the legislature.

APPEAL by plaintiffs from *Cowper, J.*, 2 November 1971 Session of EDGECOMBE, certified for initial appellate review by the Supreme Court under G.S. 7A-31(b) upon motion of defendants.

Plaintiffs are residents of an area adjacent to the town of Princeville which the town seeks to annex. Defendants are the town's mayor and board of commissioners.

On 8 July 1971, the General Assembly enacted Chapter 801 of the Session Laws of 1971, entitled "AN ACT TO ENABLE THE COMMISSIONERS OF THE TOWN OF PRINCEVILLE TO ANNEX A CERTAIN AREA SERVED BY THE WATER SYSTEM" (the Act). It authorized the commissioners, by a majority vote within sixty days of 8 July 1971, to extend the corporate limits of the town. Upon such a vote the Act provided that the limits would be as described by metes and bounds therein.

On 29 July 1971, the commissioners adopted a resolution stating their intent to consider the authorized annexation. It also gave notice that a public hearing on the question would be held 9 August 1971 and that final action would be taken 16 August 1971. This resolution, together with the description of the proposed new boundaries of the town, was published in a newspaper of general circulation in Edgecombe County.

Sometime between 29 July and 9 August 1971 plaintiffs filed with the town clerk a petition requesting that the question be submitted to the residents of the area in a referendum called in accordance with G.S. 160-445 to -453. The petition was purportedly signed by more than fifteen percent of the qualified voters of the area being considered for annexation.

At the hearing on August 9th, approximately two hundred residents of the area appeared and voiced their opposition to its annexation. The mayor informed the protestants that a referendum was not a condition precedent to annexation; that the hearing was being conducted only as a courtesy to the citizens; that the only action required was an affirmative vote by a majority of the town commissioners, "which action would be taken by said board on the 16th day of August 1971."

The board of commissioners met on 16 August 1971 and enacted an ordinance entitled, "A VOTE AND ENACTMENT TO EXTEND THE CORPORATE LIMITS OF THE TOWN OF PRINCEVILLE UNDER THE AUTHORITY GRANTED BY CHAPTER 801 OF THE 1971 SESSION LAWS OF THE GENERAL ASSEMBLY OF NORTH CAROLINA" (the Ordinance). It recited that the board had "taken into full consideration the statements presented at the public hearing held on the 9th day of August, 1971," but had concluded that "amendment of the charter and annexation of the area described herein is necessary to the orderly growth and development of the Town of Princeville." As provided in the Act the town charter was declared amended to show the corporate limits

to be those set out therein and to add a fifth ward to the town for the purpose of the election of commissioners. At this meeting the commissioners rejected plaintiffs' request for a referendum.

On 19 August 1971 plaintiffs brought this action to restrain defendants from exercising any governmental control over the area "purportedly annexed" and to have the annexation ordinance declared invalid. They alleged the ordinance is in contravention "of Article 36, Part 1 of G.S. 160-445 *et seq.*," N. C. Const. art. I, § 19, and the Fourteenth Amendment to the Constitution of the United States. On the same day Judge Cowper issued a temporary restraining order enjoining defendants from exercising jurisdiction over the area. Thereafter defendants filed answer in which they admitted defendants' factual allegations and denied their legal conclusions.

Judge Cowper heard the matter and rendered final judgment on 8 November 1971. He found that defendants, in annexing the area, acted in full compliance with Chapter 801 of the 1971 Session Laws of North Carolina and did not purport to follow the procedures specified in Article 36, Chapter 160 of the General Statutes. He concluded as a matter of law that the Act enabled the commissioners to annex the area "solely by its own terms, and without compliance with any provisions of Article 36 of Chapter 160 of the General Statutes." He thereupon dismissed the action at the cost of plaintiffs.

Plaintiffs gave notice of appeal and the restraining order was continued in effect pending the appeal.

Pearson, Malone, Johnson & Dejarmon for petitioner appellants.

M. L. Cromartie, Jr., Ball, Coley & Smith for respondent appellees.

SHARP, Justice.

Plaintiffs allege—and have contended both in the lower court and on appeal—that the Ordinance is invalid because the board of commissioners did not comply with the annexation procedures specified in N. C. Gen. Stats., Ch. 160, Art. 36, Part 1. Plaintiffs also alleged in their complaint that the enactment of the Ordinance violated the equal protection clauses of the North Carolina and United States Constitutions. The latter

contention does not appear to have been made in the court below, and it is not made in the brief filed in this Court. It is, therefore, deemed abandoned. *Railroad v. Beaufort County,* 224 N.C. 115, 29 S.E. 2d 201 (1944); 1 N. C. Index 2d *Appeal and Error* § 45 (1967).

Plaintiffs now contend (1) that the Act violates N. C. Const., art II, § 1, in that it delegates legislative authority without sufficient guidelines, and (2) that "the legislature must have intended that the Commissioners comply with the standards set out . . . in Chapter 160 of the General Statutes of North Carolina" and, since they failed to do so, the Ordinance is invalid.

[1, 2] Since plaintiffs' first contention was not made in the court below it may not be raised for the first time on appeal. *Bland v. City of Wilmington,* 278 N.C. 657, 180 S.E. 2d 813 (1971). However, even if it were properly before this Court, this contention would be without merit. There is no constitutional provision prohibiting the creation of a municipality by an act of the General Assembly, *Chimney Rock Co. v. Lake Lure,* 200 N.C. 171, 156 S.E. 542 (1931). *A fortiori,* by a special act, it may constitutionally enlarge the boundaries of a town which it has created. It may also provide statutory procedures for extending the corporate limits of a municipality organized and existing under the laws of the State. *In re Annexation Ordinances,* 253 N.C. 637, 117 S.E. 2d 795 (1961); *Highlands v. Hickory,* 202 N.C. 167, 162 S.E. 471 (1932).

This Court has frequently held that the enlargement of municipal boundaries by the annexation of new territory, resulting in the extension of municipal corporate jurisdiction, is a legitimate subject of legislation. "In the absence of constitutional restriction, the extent to which such Legislation shall be enacted, both with respect to the terms and circumstances under which the annexation may be had, and the manner in which it may be made, rests entirely in the discretion of the Legislature. With its wisdom, propriety or justice we have naught to do. It has, therefore, been held that an act of annexation is valid which authorized the annexation of territory, without the consent of its inhabitants . . . ." *Lutterloh v. Fayetteville,* 149 N.C. 65, 69, 62 S.E. 758, 760 (1908). *Accord, Dunn v. Tew,* 219 N.C. 286, 13 S.E. 2d 536 (1941); *Matthews v. Blowing Rock,* 207 N.C. 450, 177 S.E. 429 (1934). *Cf. Cox v. Kinston,* 217 N.C. 391, 8 S.E. 2d 252 (1940).

[3] In delegating to the town commissioners the discretionary right to decide whether to enlarge the corporate limits as specified in the Act, the General Assembly did not delegate legislative authority in violation of N. C. Const. art. II, § 1, or art. I, § 6. Except for approval by the town's board of commissioners, the Act was complete in every respect at the time of its ratification. The only discretion given the commissioners was to decide whether or not to annex the territory specified in the Act, a determination they were required to make within sixty days. In authorizing the annexation, the General Assembly determined that the annexation was suitable and proper.

In *In re Annexation Ordinances, supra,* this Court upheld the authority of the General Assembly to authorize the governing bodies of municipalities to annex territory upon meeting the requirements of N. C. Gen. Stats., Ch. 160, art. 36, Part 3. The Court made the following statements which are equally applicable here: "The only discretion given to the governing boards of such municipalities is the permissive or discretionary right to use this new method of annexation provided such boards conform to the procedure and meet the requirements set out in the Act as a condition precedent to the right to annex." *Id.* at 647, 117 S.E. 2d at 802.

"The decisions of this Court support the view that ordinary restrictions with respect to the delegation of power to an agency of the State, which exercises no function of government, do not apply to cities, towns, or counties." *Id.* at 649, 117 S.E. 2d at 803-04. *See also Jackson v. Board of Adjustment,* 275 N.C. 155, 162, 166 S.E. 2d 78, 83 (1969).

[4] Plaintiffs' second contention is, in effect, that Princeville could only annex the area in question by complying with N. C. Gen. Stats., Ch. 160, art. 36, Part 1. (Part 2, which applies to municipalities of less than 5,000, exempts Edgecombe County from its application and provides that Part 1 shall apply to that county. G.S. 160-453.12.) This contention assumes that, by the enactment of statutory procedures by which municipalities may annex territory without a special act of the legislature, the General Assembly rendered itself powerless to extend corporate limits. This contention is untenable. An act of the General Assembly is legal unless the Constitution contains a prohibition against it. *McIntyre v. Clarkson,* 254 N.C. 510, 119 S.E. 2d 888 (1961). "[O]ne Legislature cannot restrict or limit by

statute the right of a succeeding Legislature to exercise its constitutional power to legislate in its own way." *State v. Norman,* 237 N.C. 205, 211, 74 S.E. 2d 602, 607 (1953). *Accord, State v. Wall,* 271 N.C. 675, 157 S.E. 2d 363 (1967). Since defendants proceeded under the Act they did not comply with N. C. Gen. Stats., Ch. 160, art. 36, Part 1, nor as Judge Cowper correctly held, were they required to do so.

The judgment of the Superior Court, which dissolved the restraining order and dismissed the action, is

Affirmed.

STATE OF NORTH CAROLINA v. JAMES RAY HOFFMAN

No. 93

(Filed 31 August 1972)

1. **Criminal Law § 106— motion for nonsuit — sufficiency of evidence**

Defendant's motion for nonsuit was properly overruled where there was substantial evidence of all material elements constituting the offense of first degree murder for which the accused was tried.

2. **Bill of Discovery § 1— criminal prosecution — common-law right of discovery — list of State's witnesses**

In the absence of a statute requiring the State to furnish it, the defendant in a criminal case is not entitled to a list of the State's witnesses who are to testify against him; there is no such statute in North Carolina.

3. **Bill of Discovery § 1— criminal prosecution — statutory discovery procedures — list of State's witnesses**

G.S. 8-74 providing for taking the deposition of an incapacitated defense witness whose name must be given to the court does not entitle defendant in a criminal case to a list of all the State's witnesses.

4. **Criminal Law § 91— continuance — witnesses' names omitted from State's list — claim of surprise**

Where defendant claims surprise by reason of the testimony of four witnesses he did not expect to appear, his proper motion is one for continuance and not one to suppress the testimony.

5. **Criminal Law § 87; Witnesses § 1— list of State's witnesses — competency of testimony by witness not listed**

In a first degree murder prosecution wherein the State furnished defense counsel a list of State's witnesses before trial, the trial court did not abuse its discretion in allowing four witnesses whose names

did not appear on the list to testify on behalf of the State, as the testimony of these four could not have taken defendant by surprise, and hence prejudiced him.

6. **Searches and Seizures § 1— search without warrant — reasonable belief that felon concealed in premises — admittance demanded**

Officers' entry and seizure of "plain-view" items from the home of a suspected felon when there are reasonable grounds to believe the felon is concealed therein are not illegal after admittance has been demanded and there has been no response. G.S. 15-44.

7. **Arrest and Bail § 3— arrest without warrant — reasonable grounds — reliable hearsay**

Reasonable grounds for belief can be based upon information given to an officer by another, the source of such information being reasonably reliable.

8. **Searches and Seizures § 1— search without warrant — articles in plain view**

Since officers were lawfully in defendant's home, observation and seizure of a rifle and cartridges in plain view were not in themselves unlawful.

9. **Constitutional Law § 32; Criminal Law § 76— confession — capital crime — right to counsel — determination of indigency**

For purposes of G.S. 7A-457(a) providing that an indigent defendant cannot waive counsel in a capital case, an indigent is defined as one who does not have available, at the time they are required, adequate funds to pay a necessary cost of his defense; hence, defendant's claim that he was an indigent when he waived counsel at the time of his interrogation was untenable as his sworn statement indicated that he had $160.00 in the bank, an amount more than necessary to obtain counsel for defendant's immediate need. G.S. 7A-450(a).

Justice HIGGINS concurring in result.

APPEAL by defendant from *Godwin, S. J.*, 10 May 1971 Special Session of LENOIR.

Defendant was indicted and convicted of the murder of Gene Autry Stocks on 21 October 1970. He appeals the life sentence imposed upon the verdict.

The State's presentation of evidence before the jury was several times interrupted by lengthy *voir dire* hearings before the judge. Testimony tending to show the facts hereinafter set out within brackets was heard by the judge on *voir dire* in the absence of the jury. In each instance the same testimony, in substance, was thereafter heard by the jury.

Defendant offered no evidence, either on *voir dire* or before the jury. The evidence for the State, summarized insofar as possible in chronological order, tended to show:

On 21 October 1970 defendant and his wife were separated. She was living in the home of her daughter, the wife of deceased (Stocks). Earlier in the year, before the Hoffmans separated, in the presence of Mr. and Mrs. Stocks and Mrs. Thelma Barfield, Stocks's mother, defendant accused his wife of having met a man on a trip she had made with the Stocks and Mrs. Barfield. When they all denied this accusation, defendant called them liars and said he was going to kill Stocks. Thereafter, during the following August, defendant told the Stocks and Mrs. Barfield they were "all going to die one of these days in a pile."

On 28 September 1970 defendant followed his wife to the Stocks's home from her work. There he called the women "ugly names" and ignored Mrs. Stocks's request to leave until she called Stocks to come home. Defendant soon returned, however. This time Stocks ordered him away. Defendant told Stocks that he was capable of killing anybody and if Stocks did not stay out of his affairs he was liable to be the next. As he left, defendant said to Stocks, "I'll get you if it is the last thing I ever do." Mrs. Bertie Croombs, a friend of both the Hoffmans and Stocks families, was present and heard this threat.

On the morning of 21 October 1970, Stocks drove Mrs. Hoffman and her daughter, Mrs. Rebecca Moore, to their work at the Dover Garment Factory. Defendant pulled in behind them driving his green 1970, two-door Chevrolet Nova. After telling his wife she would not live to see the next morning, and neither would anyone else who got in his way, he sped away without speaking to Stocks.

Thereafter, sometime after 10:00 a.m., defendant purchased from the Woolco Department Store a .22-caliber Remington rifle, serial No. 2129176, and two boxes of ammunition. The saleslady testified that defendant appeared to be normal in every respect.

About 12:15 p.m. that day, James Foyles, while driving on Dover Road, saw two similar automobiles stopped ahead of him at an intersection, one car about six feet behind the other. A man with a rifle was standing by the left door of the rear car. Foyles saw this door open, a man emerge, take several steps, go into a spin, and fall. This man was Stocks. The man with the rifle then ran to the front car and drove hurriedly away.

Responding to a call instigated by Foyles, the sheriff and other officers arrived at the scene between 12:20 and 12:30 p.m. It was raining at the time. The officers found the door of Stocks's 1969 green Chevrolet Nova open, the motor running, and the windshield wipers operating. There were three bullet holes in the windshield directly in front of the steering wheel, one through the left headlight, one in the driver's headrest, and one had broken the back glass. Stocks, who was lying near the center of the highway, apparently dead, had been shot in the chin, hand, on the left side of his chest, and over the right eye. His shirt was wet with rain and blood.

When the coroner arrived at 1:00 p.m. he pronounced Stocks dead. The body was taken to the morgue at Lenoir Memorial Hospital. Here a .22-caliber bullet was taken from it and, in due course, delivered to the SBI Laboratory in Raleigh. A search of his car and of his person revealed no weapons of any kind on Stocks. Scattered around the automobile the officers found eight empty .22-caliber long-rifle cartridges and one which had not been fired. These bullets, in due course, were also delivered to the SBI Laboratory.

From the scene of the shooting the officers went to Stocks's home, approximately 1.5 miles away. In consequence of information obtained from Mrs. Stocks, about 1:15 p.m., the officers went to defendant's home. Getting no response to their knocks, they left without entering the house.

After further conversations with Mrs. Stocks and Mrs. Hoffman defendant became the prime suspect. From them they learned that defendant was living alone and that his automobile looked to be almost identical with Stocks's. An All Points Bulletin (APB) was issued for defendant and his automobile.

[On the afternoon of 21 October 1970, E. E. Whaley, the owner of the Coastal Plain Detective Agency and Stocks's employer, at their request, was assisting the officers in their search for defendant and his automobile. The road by defendant's house was being patroled periodically, but the house was not under constant surveillance. Between 3:30 and 4:00 p.m., as Whaley drove past defendant's home, he saw a "swishing movement" of the curtains at a back window. They were "going together and dangling." He immediately radioed this information to the Sheriff's Department, and, in about five minutes,

the sheriff, two of his deputies, and SBI Agent Campbell arrived.]

[About 4:00 p.m., after knocking loudly and "hollering" to defendant to come out, the sheriff entered by the unlocked back door as his Deputy Garris entered by the front door, also unlocked.]

[While searching for defendant, in plain view in the kitchen the officers saw a Remington carton such as would encase a new rifle and several unused .22-caliber, long-rifle cartridges. Inside the front bedroom, also in plain sight they observed standing in the corner a .22-caliber Remington semi-automatic rifle, serial No. 2129176. From the rifle SBI Agent Campbell removed five cartridges. A thorough search of the house and grounds satisfied the officers that defendant was not there. As they left they saw 15-20 spent cartridges in the backyard.]

Defendant was arrested between 8:30 and 9:00 a.m. on the morning of 22 October 1970 by a highway patrolman, and Officer Garris promptly obtained and served upon defendant a warrant charging him with the murder of Stocks. A search of defendant's person disclosed a sales slip from Woolco Department Store showing a purchase in the amount of $59.08. [Thereafter, between 9:00 and 11:00 a.m. Deputy Sheriff Garris and SBI Agent Campbell each talked separately to defendant. Before doing so, each advised defendant he had the right to remain silent and make no statement whatever; that anything he said could, and would be, used against him in court; that he had the right to talk to a lawyer and secure his advice before he was questioned and to have him, or anyone else he wanted, present while he was being questioned; that if he was unable to employ a lawyer before he was questioned one would be appointed to represent him at State expense; that he could exercise his rights at any time and refuse at any time to answer any question or make any statement. Defendant told both Garris and Campbell that he understood his rights; that he wished to talk. When asked specifically if he wanted a lawyer he said he did not and was ready to talk without one. Neither Garris nor Campbell threatened defendant nor offered him any inducement to talk. He appeared to each to be sober and in possession of all of his faculties, and he made intelligent and coherent replies. At no time during questioning did he indicate a desire to remain silent or request counsel.]

In substance, defendant made the following statement to Garris and Campbell: On 21 October 1970, after a beer for breakfast at 6:30 a.m., he reported to the construction company for which he worked but, because of rain, there was no work. About 7:30 a.m., he drove to the Dover Garment Factory where he talked momentarily with his wife in the presence of Stocks and another person. He told her she was going to get killed if she kept on living the life she was, and from there he went to his residence, where he stayed until 9:00 a.m. and then went to Woolco Shopping Center. After cashing a check for $100.00 at the Wachovia Bank he went to Woolco Department Store where he bought a .22-caliber rifle and two boxes of .22-caliber ammunition shortly after the store opened. Returning to his residence he made practice shots at pine cones in the backyard with the rifle he had purchased. He then set the weapon behind the bed, took two beers from the refrigerator, got into his car and set out for Oriental. He ate lunch at a cafe about ten miles from Bridgeton. At Oriental he failed to find the paving crew which was supposed to be working there; so he went to a motel on Highway 17, where he spent the night. The next morning, about 7:00 a.m., he learned from the radio that he was wanted for murder. While driving back to Kinston on Highway No. 11, he was stopped by a State trooper, who brought him to the Lenoir County Sheriff's Department.

At no time did defendant tell the officers he shot Stocks. He said that if he shot Stocks he should be punished for it, but he didn't recall shooting anyone that day.

Testimony by SBI agents tended to show that the rifle, the eight spent cartridges which the officers found at the scene of the shooting, the shirt Stocks was wearing at the time he was shot, and the bullet removed from the body of deceased were, in due course, all delivered to the SBI Laboratory in Raleigh. There they were examined by ballistics expert E. P. Pierce. In his opinion the bullet removed from Stocks's shoulder had been fired from the rifle and seven of the eight bullets which Deputy Sheriff Garris had found beside Stocks's automobile had also been fired from that rifle. (The eighth bullet showed insufficient markings to make an identification.) In addition, his microscopic and chemical examination of the shirt Stocks was wearing at the time he was shot revealed a concentration of powder around the hole on the left pocket similar to

the concentration left by that same rifle when it fired a .22-caliber, long-rifle ammunition into blotters.

Further facts pertinent to this decision will be discussed in the opinion.

Robert Morgan, Attorney General, Charles A. Lloyd, Associate Attorney, for the State.

Hodges & Rochelle by James A. Hodges, Jr., for defendant appellant.

SHARP, Justice.

Defendant brings forward four assignments of error. The first is to the court's refusal to grant his motion for nonsuit made at the conclusion of the State's evidence. The rule, succinctly stated by Justice Higgins in *State v. Stephens,* 244 N.C. 380, 383, 93 S.E. 2d 431, 433 (1956), is as follows:

"Taking the evidence in the light most favorable to the State, if the record here discloses substantial evidence of all material elements constituting the offense for which the accused was tried, then this court must affirm the trial court's ruling on the motion. The rule for this and for the trial court is the same whether the evidence is circumstantial or direct, or a combination of both."

[1] The record here contains plenary evidence that defendant, after threatening to do so, and procuring a rifle for the purpose, on 21 October 1970 shot and killed Stocks with malice, premeditation, and deliberation. His motion for nonsuit was, therefore, properly overruled. *State v. Walters,* 275 N.C. 615, 170 S.E. 2d 484 (1969).

The second assignment which defendant argues is that the judge erred in denying defendant's motion to suppress the testimony of Mrs. Gene Autry Stocks, Mrs. Thelma Barfield, Mrs. Bertie Croombs, and Mrs. Rebecca Moore. Defendant based his motion on the following facts:

On or about 15 March 1971 counsel for defendant moved in writing before Judge Cohoon that the solicitor be directed to furnish defendant's attorney a list of all witnesses whom the State intended to produce at defendant's trial. Judge Cohoon, after ascertaining that the solicitor had no objection to furnish-

ing the names of the persons the State then proposed to call as witnesses, orally directed that he give defendant the requested information. Deputy Sheriff Garris immediately prepared and delivered to defendant's attorney a handwritten list which omitted the names of Mrs. Stocks, Mrs. Barfield, Mrs. Moore, and Mrs. Croombs.

At the beginning of the trial the State called Mrs. Stocks as its first witness. Defendant moved to suppress her testimony and that of any other person called whose name had not been on the list. After hearing the motion, Judge Godwin entered an order in which he found, in addition to the facts set out in the preceding paragraph, that the State now proposed to call, *inter alia,* Mesdames Stocks, Barfield, Moore and Croombs; that defendant's motion before Judge Cohoon was not made under G.S. 8-74; that the State's failure to furnish defendant with the name of every person sworn as a witness when the case was called for trial, and whose testimony it then proposed to use, had not prevented defendant from making full and proper preparation for his trial. Whereupon he denied defendant's motion to suppress, and thereafter the four women above named testified. Defendant excepted but did not move to continue the case.

[2] "The common law recognized no right of discovery in criminal cases." *State v. Goldberg,* 261 N.C. 181, 191, 134 S.E. 2d 334, 340 (1964). In the absence of a statute requiring the State to furnish it, the defendant in a criminal case is not entitled to a list of the State's witnesses who are to testify against him. *McDaniel v. State,* 191 Miss. 854, 4 So. 2d 355 (1941); *Padgett v. State,* 64 Fla. 389, 59 So. 946 (1912); *State v. Matejousky,* 22 S.D. 30, 115 N.W. 96 (1908); 21 Am. Jur. 2d *Criminal Law* § 328 (1965); 16 C.J.S. *Criminal Law* § 2030 (1938). There is no such statute in this State.

[3] Defendant, however, claims that G.S. 8-74 gives him the right to a list of the State's witnesses. This statute, however, provides for taking the deposition of an incapacitated defense witness, "whose name must be given" to the court. Patently this section has no application to defendant's motion.

Although defendant was not entitled to the list as a matter of right, Judge Godwin found that an order to furnish it had been made and that the State had purported to comply with it.

Thus, the question presented is whether the omission of the names of Mrs. Stocks, Mrs. Barfield, Mrs. Moore and Mrs. Croombs prejudiced defendant's defense and deprived him of a fair trial.

Defendant contends that he was prejudiced because the testimony of these four witnesses supplied the sole evidence of motive, premeditation and deliberation. Certainly these witnesses gave material evidence tending to show essential elements of the crime with which defendant was charged. Notwithstanding, a defendant is not legally prejudiced merely because the State proves its case against him.

As stated by the Kentucky Court of Appeals in *Evans v. Commonwealth,* 230 Ky. 411, 19 S.W. 2d 1091 (1929), prejudicial surprise results from events "not reasonably to be anticipated or perhaps testimony contrary to a prior understanding between the parties or something resulting from fraud or deception." *Id.* at 415-16, 19 S.W. 2d at 1093. Neither the presence nor testimony of these four women—the wife of deceased, his mother, his sister-in-law, and a family friend of both defendant and deceased—could have taken defendant by surprise.

[4] Defendant suggests, however, that had he known the ladies were to testify, he might have found "possible rebuttal witnesses" or searched for ground upon which to impeach their credibility. Had there been a reasonable probability of finding such witnesses or grounds, a motion for a continuance would have been appropriate. Defendant's motion, however, was to suppress the testimony of the witnesses, whatever it might be, and not to continue the trial so that he would have an opportunity to disprove it.

[5] The record fails to show that defendant's defense was prejudiced by the omission of the four names from the list furnished him. Permitting these witnesses to testify was a matter in the discretion of the trial judge, not reviewable on appeal in the absence of a showing of abuse. *State v. Anderson,* 281 N.C. 261, 188 S.E. 2d 336 (1972). No abuse of discretion appears.

[6] The third question raised by defendant's assignments of error is the legality of the officers' entrance into his residence during the late afternoon of 21 October 1970 and the seizure

of the .22-caliber rifle found therein. He contends that both the entry and seizure were unlawful and, in consequence, neither the rifle nor the ballistic tests made with it were admissible in evidence. Upon defendant's objection to any testimony involving the rifle, Judge Godwin held a *voir dire* in which he heard the evidence summarized within the brackets and also a substantial portion of the applicable testimony which was later given in the presence of the jury. He then found facts in accordance with the evidence and concluded that the officers had reasonable grounds to believe defendant was concealed in the house. He held that their entry and subsequent seizure of "plain-view" items were legal and overruled defendant's objection in the evidence. In this ruling we find no error.

G.S. 15-44 (1965) provides: "If a felony . . . has been committed, or a dangerous wound has been given and there is reasonable ground to believe that the guilty person is concealed in a house, it shall be lawful for any sheriff . . . or police officer, admittance having been demanded and denied, to break open the door and enter the house and arrest the person against whom there shall be such ground of belief."

[6, 7] Indubitably Stocks had been murdered and the officers had reasonable grounds to believe that defendant had committed the murder. About 1:15 p.m. on the day of the murder, officers had gone to defendant's home, but when he did not answer their calls, they had left without entering. The thrust of defendant's argument is that Judge Godwin should not have believed Whaley's testimony that between 3:30 and 4:00 p.m. he saw the kitchen curtains move. This testimony was not inherently incredible and was sufficient to support the court's findings. They are, therefore, binding on appeal. *State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289 (1971). Reasonable grounds for belief can be based upon information given to an officer by another, "the source of such information being reasonably reliable." *State v. Roberts*, 276 N.C. 98, 107, 171 S.E. 2d 440, 445 (1969). Further, the fact that silence greeted the officers' demands for entrance and that defendant was not found in the house did not make their entry illegal.

[8] Being lawfully in defendant's residence, the officers could examine and, without a warrant, seize " 'suspicious objects in plain sight' . . . . If the officers' presence was lawful the observation and seizure of what was then and there apparent could

not in itself be unlawful." *State v. Howard,* 274 N.C. 186, 202, 162 S.E. 2d 495, 505-06 (1968); *Accord, State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706 (1972); *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28 (1970); *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376 (1968). The rifle, the bullet which was removed from Stocks's body, and the testimony of ballistics expert Pierce that in his opinion the bullet was fired from the rifle were, therefore, properly admitted in evidence. The assignments of error upon which defendant bases his third proposition are overruled.

Defendant's final assignment of error is that the court erred in admitting the statements which he made to Deputy Sheriff Garris and SBI Agent Campbell as a result of their in-custody interrogation of him.

On *voir dire,* upon plenary supporting evidence, Judge Godwin found facts which show that both Garris and Campbell fully advised defendant of all his constitutional rights in strict compliance with all *Miranda* requirements; that after being thus warned defendant freely, voluntarily, understandingly, and without being induced by threats or promises, specifically waived his constitutional right to remain silent and to have counsel present when he talked to the officers. Upon these findings, Judge Godwin overruled defendant's objections, and admitted his statements to the officers in evidence.

On appeal, defendant makes no contention that he did not orally waive the presence of counsel at his interrogation, or that he did not voluntarily submit to the officers' questioning. The evidence shows that he did both. Thus, the admission of his statements involves no federal constitutional question. *See State v. Lynch,* 279 N.C. 1, 13-14, 181 S.E. 2d 561, 569 (1971); *State v. Chance,* 279 N.C. 643, 185 S.E. 2d 227 (1971); *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971).

[9] Defendant's contention is that at the time of his interrogation he was an indigent, in custody on a capital charge; and that, under G.S. 7A-457(a) (1969), as it read on 22 October 1970, he could not waive his right to counsel at an in-custody interrogation either orally or in writing. This contention is untenable, for the record affirmatively discloses that at the time of his interrogation defendant had funds, immediately available and adequate, with which to employ counsel to provide

the legal advice he then needed. The admissibility of defendant's statements to the officers was not, therefore, affected by G.S. 7A-450 to -459 (1969). The statements were competent evidence and defendant's assignments of error relating to their admission are overruled.

An indigent person for whom the State must provide counsel is defined by G.S. 7A-450(a) as "a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation in an action or proceeding enumerated in this subchapter." Section (c) of this same statute provides: "The question of indigency may be determined or redetermined by the court at any stage of the action or proceeding at which an indigent is entitled to representation." G.S. 7A-455(a) (1969) requires the court, if it is of the opinion that "an indigent person is financially able to pay a portion, but not all, of the . . . necessary expenses of representation (to) order the partially indigent person to pay such portion to the clerk of superior court for transmission to the State treasury."

The foregoing statutes clearly manifest the legislative intent that every defendant in a criminal case, to the limit of his ability to do so, shall pay the cost of his defense. It is not the public policy of this State to subsidize any portion of a defendant's defense which he himself can pay. An indigent is not one who lacks sufficient funds over and above his homestead and personal property exemptions and his pre-existing debts and obligations to pay the total costs of his defense from beginning to end. An indigent is one who does not have available, at the time they are required, adequate funds to pay a necessary cost of his defense.

At the time of defendant's arrest, according to his sworn statement, he had $160.00 in the bank. He owed no debts except the monthly payments on his 1971 Chevrolet Nova. We take judicial notice that for a fee of less than $160.00 defendant could have obtained counsel for the purpose of advising him with reference to the course of conduct which would serve his best interest at that time. In short, he could pay for the legal services he needed on the morning of his arrest. His ability to pay the costs of subsequent proceedings was not then a question. That was a matter to be determined when that question arose.

Upon defendant's request for counsel and his affidavit of indigency, the district court assigned counsel, who represented him at his preliminary hearing and at his trial in the superior court, and the State paid counsel's fee. We note, however, that this appeal is not at State expense and that defendant was able to post bond for the costs. Prima facie, it was for such situations as this that G.S. 7A-450(c) was enacted.

The decision here is not in conflict with *State v. Wright,* 281 N.C. 38, 187 S.E. 2d 761 (1972). In that case, at the time of his arrest, the defendant had $5.00 in cash, an automobile on which he was paying $56.00 per month, and two recently purchased government bonds. These bonds, which had cost $18.75 each, were in his mother's possession in Ohio, unavailable even if adequate. The amount of his equity in the automobile was not disclosed, and it was immaterial at that time. The defendant, under arrest for three serious felonies, one of which was rape, was in no position to negotiate either a mortgage or a sale of his automobile. As a practical matter he had only $5.00 with which to meet the immediate emergency, and that was not enough to secure the advice of counsel which he needed then and there. At the time the defendant Wright was interrogated he was, in truth and in fact, an indigent; defendant Hoffman was not.

In the trial below we find

No error.

Justice HIGGINS concurring in result.

I cannot agree with that part of the opinion which intimates that if a defendant is able to employ counsel for the purpose of advising him, or being with him at the interrogation, that he is not an indigent within the meaning of § 7A-451 of the General Statutes.

The entitlement begins when the defendant is taken into custody or served with initiating process and continues through all critical stages including reviews by appeal. The statute does not contemplate that separate counsel may be appointed for each successive step in the trial, but I think contemplates that the same counsel will continue from beginning to end subject

to the right of the court to excuse or allow substitution of counsel at any proper state.

"Entitlement continues through any critical stage of the action or proceeding including identification procedure, preliminary hearing, trial, sentencing, and review." These are specifically stated in § 7A-451.

I concur in result.

STATE OF NORTH CAROLINA v. ROGER VERNON MILLER

No. 132

(Filed 31 August 1972)

Homicide § 31; Criminal Law § 135— first degree murder — death sentence — remand for sentence of life imprisonment

Pursuant to a mandate of the Supreme Court of the United States vacating the death penalty imposed upon defendant for first degree murder, the case is remanded to the superior court for imposition of a sentence of life imprisonment.

ON remand from the Supreme Court of the United States.

HIGGINS, Justice.

At the September 8, 1969 Session, DUPLIN Superior Court, the defendant, Roger Vernon Miller, was tried and convicted of the crime of murder in the first degree and sentenced to death. Upon defendant's appeal this Court found no error in the verdict and judgment of the Superior Court. *State v. Miller*, 276 N.C. 681, 174 S.E. 2d 481. The defendant then filed a petition for writ of certiorari to the Supreme Court of the United States. On June 29, 1972, this Court received from the Supreme Court of the United States the following mandate:

"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 Roger Vermon Miller, No. 14, Spring Term, 1970, wherein the judgment of the said Supreme Court was duly entered on the Twelfth day of June A.D. 1970, as appears by an inspection of the petition for writ of certiorari to the said Supreme Court and the response thereto.

"AND WHEREAS, in the 1971 Term, 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 29, 1972, by this Court that the judgment of the Supreme Court of North Carolina in this cause be vacated insofar as it leaves undisturbed the death penalty imposed, and that this cause be remanded to the Supreme Court of the State of North Carolina for further proceedings. See *Stewart v. Massachusetts,* 408 U.S. 845 (1972).

"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 of certiorari notwithstanding.

"Witness the Honorable WARREN E. BURGER, Chief Justice of the United States, the twenty-sixth day of July in the year of our Lord one thousand nine hundred and seventy-two.

MICHAEL RODAK, JR.
Clerk of the Supreme Court of the
United States

No. 70-5018

Roger Vermon Miller,

v.

North Carolina"

The opinion in *Stewart v. Massachusetts,* referred to in the foregoing mandate, is as follows:

"PER CURIAM.

The appellant in this case was sentenced to death. The imposition and carrying out of that death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Furman v. Georgia,* 408 U.S. 238 (1972). The motion for leave to proceed *in forma pauperis* is granted. The judgment is therefore vacated insofar as it leaves undisturbed the death panalty imposed, and the case is remanded for further proceedings."

Pursuant to the foregoing mandate of the Supreme Court of the United States vacating the death penalty imposed on the defendant, this cause is remanded to the Superior Court of Duplin County with directions to proceed as follows:

1. The presiding judge of the Superior Court of Duplin County will cause to be served on the defendant, Roger Vernon Miller, and on his attorneys of record, notice to appear during a session of said Superior Court authorized to hear criminal cases at a designated time not less than ten days from the date of the order, at which time, in open court, the defendant 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 September 8, 1969 Session, Duplin Superior Court, will pronounce judgment that the defendant be imprisoned for life in the State's prison.

2. The presiding judge of the Superior Court of Duplin County will issue a writ of habeas corpus to the official having custody of the defendant, Roger Vernon Miller, to produce him in open court at the time and for the purpose of being present when the judgment imposing life imprisonment is pronounced.

The foregoing accords with our previous orders entered in the following cases: *State v. Hill,* 279 N.C. 371, 183 S.E. 2d 97; *State v. Atkinson,* 279 N.C. 385, 183 S.E. 2d 105; *State v. Atkinson,* 279 N.C. 386, 183 S.E. 2d 106; *State v. Williams,* 279 N.C. 388, 183 S.E. 2d 106; *State v. Sanders,* 279 N.C. 389, 183 S.E. 2d 107; *State v. Roseboro,* 279 N.C. 391, 183 S.E. 2d 108 (1971); *State v. Childs,* 280 N.C. 576, 187 S.E. 2d 78 (1972).

Remanded for judgment.

STATE OF NORTH CAROLINA v. RAY HAMBY

— AND —

STATE OF NORTH CAROLINA v. CRAIG BARRY CHANDLER

No. 129

(Filed 31 August 1972)

Homicide § 31; Criminal Law § 135— first degree murder — death penalty — remand for sentence of life imprisonment

Pursuant to a mandate of the Supreme Court of the United States vacating sentences of death imposed upon defendants for first degree murder, the case is remanded to the superior court for imposition of sentences of life imprisonment.

ON remand from the Supreme Court of the United States.

SHARP, Justice.

At the 8 September 1969 Session of the Superior Court of LINCOLN County defendants were tried and convicted of the crime of murder in the first degree, and each was sentenced to death. Upon defendants' appeal this Court found no error in the verdicts and judgments of the Superior Court. *State v. Hamby* and *State v. Chandler,* 276 N.C. 674, 174 S.E. 2d 385 (1970). Defendants then filed a petition for writ of certiorari in the Supreme Court of the United States. On 29 July 1972 this Court received from the Supreme Court of the United States the following mandate:

"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 Ray Hamby and Craig Barry Chandler, No. 4, Spring Term, 1970, wherein the judgment of the said Supreme Court was duly entered on the twelfth day of June A.D. 1970, as appears by an inspection of the petition for writ of certiorari to the said Supreme Court and the response thereto.

"AND WHEREAS, in the 1971 Term, 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 29, 1972, by this Court that the judgment of the Supreme Court of North Carolina in this cause be vacated insofar as it leaves undisturbed the death penalty imposed, and that this cause be remanded to the Supreme Court of the State of North Carolina for further proceedings. See *Stewart v. Massachusetts,* 408 U.S. 845 (1972).

"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 of certiorari notwithstanding.

"Witness the Honorable WARREN E. BURGER, Chief Justice of the United States, the twenty-sixth ..... day of July in the year of our Lord one thousand nine hundred and seventy-two.

MICHAEL RODAK, JR.
Clerk of the Supreme Court of the
United States

No. 70-5006
Ray Hamby and Craig Barry
Chandler

v.

North Carolina"

The opinion in *Stewart v. Massachusetts,* referred to in the foregoing mandate, is as follows:

"PER CURIAM.

The appellant in this case was sentenced to death. The imposition and carrying out of that death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Furman v. Georgia,* 408 U.S. 238 (1972). The motion for leave to proceed *in forma pauperis* is

granted. The judgment is therefore vacated insofar as it leaves undisturbed the death penalty imposed, and the case is remanded for further proceedings."

Pursuant to the foregoing mandate of the Supreme Court of the United States vacating the death penalty imposed upon defendants, this cause is remanded to the Superior Court of Lincoln County with directions to proceed as follows:

1. The presiding judge of the Superior Court of Lincoln County will cause to be served on the defendants, Ray Hamby and Craig Barry Chandler, and on their attorneys of record, notice to appear at a designated time during a session of said Superior Court authorized to hear criminal cases. The time fixed shall not be less than ten days from the date of the order. At that time, defendants being present in open court and represented by their attorneys, based on the verdicts of guilty of murder in the first degree returned by the jury at their trial at the 8 September 1969 Session, the presiding judge will pronounce judgment that each defendant be imprisoned for life at the State's prison.

2. The presiding judge of the Superior Court of Lincoln County will issue a writ of habeas corpus to the official having custody of the defendants Hamby and Chandler to produce them in open court at the time and for the purpose of being present when the judgment imposing life imprisonment is pronounced.

The foregoing is in accordance with our previous orders entered in the following cases: *State v. Hill,* 279 N.C. 371, 183 S.E. 2d 97; *State v. Atkinson,* 279 N.C. 385, 183 S.E. 2d 105; *State v. Atkinson,* 279 N.C. 386, 183 S.E. 2d 106; *State v. Williams,* 279 N.C. 388, 183 S.E. 2d 106; *State v. Sanders,* 279 N.C. 389, 183 S.E. 2d 107; *State v. Roseboro,* 279 N.C. 391, 183 S.E. 2d 108 (1971); *State v. Childs,* 280 N.C. 576, 187 S.E. 2d 78 (1972).

Remanded for judgment.

STATE OF NORTH CAROLINA v. DANNY CHANCE

No. 133

(Filed 31 August 1972)

Rape § 7; Criminal Law § 135— rape — death sentence — remand for sentence of life imprisonment

Pursuant to a mandate of the Supreme Court of the United States vacating the death penalty imposed upon defendant for the crime of rape, the case is remanded to the superior court for imposition of a sentence of life imprisonment.

ON remand from the Supreme Court of the United States.

BRANCH, Justice.

At the 29 March 1971 Session of the Superior Court of CUMBERLAND County, North Carolina, defendant was tried and convicted of the crime of rape and sentenced to death. Upon defendant's appeal, this Court found no error in the trial and judgment. *State v. Chance,* 279 N.C. 643, 185 S.E. 2d 227 (1971). Defendant then filed a petition for writ of certiorari in the Supreme Court of the United States. On 29 July 1972 this Court received from the Supreme Court of the United States the following mandate:

"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 Danny Chance, No. 78, Fall Term, 1971, wherein the judgment of the said Supreme Court was duly entered on the fifteenth day of December A.D. 1971, as appears by an inspection of the petition for writ of certiorari to the said Supreme Court and the response thereto.

"AND WHEREAS, in the 1971 Term, 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 29, 1972, by this Court that the judgment of the said Supreme Court of North Carolina in this cause be vacated insofar as it leaves undisturbed the death penalty imposed, and that this cause be remanded to the Supreme Court of the State of North Carolina for further proceedings. See *Stewart v. Massachusetts,* 408 U.S. 845 (1972).

"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 of certiorari notwithstanding.

"Witness the Honorable WARREN E. BURGER, Chief Justice of the United States, the twenty-sixth ..... day of July ..... in the year of our Lord one thousand nine hundred and seventy-two.

MICHAEL RODAK, JR.
Clerk of the Supreme Court of the
United States

No. 71-6224

Danny Chance

v.

North Carolina"

The opinion in *Stewart v. Massachusetts,* referred to in the foregoing mandate, is as follows:

"PER CURIAM.

The appellant in this cause was sentenced to death. The imposition and carrying out of that death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Furman v. Georgia,* 408 U.S. 238 (1972). The motion for leave to proceed *in forma pauperis* is granted. The judgment is therefore vacated insofar as it leaves undisturbed the death penalty imposed, and the case is remanded for further proceedings."

Pursuant to the foregoing mandate of the Supreme Court of the United States vacating the death penalty imposed upon

defendant, this cause is remanded to the Superior Court of Cumberland County with directions to proceed as follows:

(1) The presiding judge of the Superior Court of Cumberland County shall cause to be served on the defendant, Danny Chance, and on his attorneys of record, notice to appear at a designated time during a session of said Superior Court authorized to hear criminal cases. The time fixed shall not be less than ten days from the date of the order. At that time, defendant being present in open court and represented by his attorneys, based on the verdict of guilty of rape returned by the jury at his trial at the 29 March 1971 Session, the presiding judge will pronounce judgment that defendant be imprisoned for life in the State's prison.

(2) The presiding judge of the Superior Court of Cumberland County will issue a writ of habeas corpus to the official having custody of the defendant, Danny Chance, to produce him in open court at the time and for the purpose of being present when the judgment imposing life imprisonment is pronounced.

The foregoing is in accordance with our previous orders entered in the following cases: *State v. Hill,* 279 N.C. 371, 183 S.E. 2d 97; *State v. Atkinson,* 279 N.C. 385, 183 S.E. 2d 105; *State v. Atkinson,* 279 N.C. 386, 183 S.E. 2d 106; *State v. Williams,* 279 N.C. 388, 183 S.E. 2d 106; *State v. Sanders,* 279 N.C. 389, 183 S.E. 2d 107; *State v. Roseboro,* 279 N.C. 391, 183 S.E. 2d 108 (1971); *State v. Childs,* 280 N.C. 576, 187 S.E. 2d 78 (1972).

Remanded for judgment.

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

No. 130

(Filed 31 August 1972)

Homicide § 31; Criminal Law § 135— first degree murder — death sentence — remand for sentence of life imprisonment

Pursuant to a mandate of the Supreme Court of the United States vacating the death penalty imposed upon defendant for first degree murder, the case is remanded to the superior court for imposition of a sentence of life imprisonment.

On remand from the Supreme Court of the United States.

HUSKINS, Justice.

At the 2 November 1970 Criminal Session of the Superior Court of MECKLENBURG County defendant was tried and convicted of the crime of murder in the first degree and sentenced to death. Upon defendant's appeal this Court found no error in the verdict and judgment of the superior court. *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971). Defendant then filed a petition for writ of certiorari to the Supreme Court of the United States, and on 29 July 1972 this Court received from the Supreme Court of the United States the following mandate:

"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 James Nathaniel Westbrook, Jr., No. 94, Fall [sic] Term, 1971, wherein the judgment of the said Supreme Court was duly entered on the tenth day of June A.D. 1971, as appears by an inspection of the petition for writ of certiorari to the said Supreme Court and the response thereto.

"AND WHEREAS, in the 1971 Term, 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 29, 1972, by this Court that the judgment of the Supreme Court of North Carolina in this cause be vacated insofar as it leaves undisturbed the death penalty imposed, and that this cause be remanded to the Supreme Court of the State of North Carolina for further proceedings. See *Stewart v. Massachusetts*, 408 U.S. 845 (1972).

"NOW, THEREFORE, THE CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause, in con-

formity 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 of certiorari notwithstanding.

"Witness the Honorable WARREN E. BURGER, Chief Justice of the United States, the twenty-sixth .....day of July in the year of our Lord one thousand nine hundred and seventy-two.

MICHAEL RODAK, JR.
Clerk of the Supreme Court of the
United States

No. 71-5395

James Nathaniel Westbrook, Jr.,

v.

North Carolina"

The opinion in *Stewart v. Massachusetts,* referred to in the foregoing mandate, is as follows:

"PER CURIAM.

The appellant in this case was sentenced to death. The imposition and carrying out of that death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Furman v. Georgia,* 408 U.S. 238 (1972). The motion for leave to proceed *in forma pauperis* is granted. The judgment is therefore vacated insofar as it leaves undisturbed the death penalty imposed, and the case is remanded for further proceedings."

Pursuant to the foregoing mandate of the Supreme Court of the United States vacating the death penalty imposed upon defendant, this cause is remanded to the Superior Court of Mecklenburg County with directions to proceed as follows:

1. The presiding judge of the Superior Court of Mecklenburg County will cause to be served on the defendant, James Nathaniel Westbrook, Jr., 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, 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 2 November 1970 Criminal Session, will pronounce judgment that defendant be imprisoned for life in the State's prison.

2. The presiding judge of the Superior Court of Mecklenburg County will issue a writ of habeas corpus to the official having custody of the defendant, James Nathaniel Westbrook, Jr., to produce him in open court at the time and for the purpose of being present when the judgment imposing life imprisonment is pronounced.

The foregoing accords with our previous orders entered in the following cases: *State v. Hill,* 279 N.C. 371, 183 S.E. 2d 97; *State v. Atkinson,* 279 N.C. 385, 183 S.E. 2d 105; *State v. Atkinson,* 279 N.C. 386, 183 S.E. 2d 106; *State v. Williams,* 279 N.C. 388, 183 S.E. 2d 106; *State v. Sanders,* 279 N.C. 389, 183 S.E. 2d 107; *State v. Roseboro,* 279 N.C. 391, 183 S.E. 2d 108 (1971); *State v. Childs,* 280 N.C. 576, 187 S.E. 2d 78 (1972).

Remanded for judgment.

STATE OF NORTH CAROLINA v. OWEN SWANSON DOSS

No. 131

(Filed 31 August 1972)

Homicide § 31; Criminal Law § 135— first degree murder — death sentence — remand for sentence of life imprisonment

Pursuant to a mandate of the Supreme Court of the United States vacating the death penalty imposed upon defendant for first degree murder, the case is remanded to the superior court for imposition of a sentence of life imprisonment.

On remand from the Supreme Court of the United States.

MOORE, Justice.

At the 30 November 1970 Special Criminal Session of the Superior Court of PITT County, North Carolina, defendant was tried and convicted of the crime of murder in the first degree

and sentenced to death. Upon defendant's appeal, this Court found no error in the trial and judgment. *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671 (1971). Defendant then filed a petition for writ of *certiorari* in the Supreme Court of the United States. On 29 July 1972 this Court received from the Supreme Court of the United States the following mandate:

"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 Owen Swanson Doss, No. 1, Fall Term, 1971, wherein the judgment of the said Supreme Court was duly entered on the thirteenth day of October A.D. 1971, as appears by an inspection of the petition for writ of certiorari to the said Supreme Court and the response thereto.

"AND WHEREAS, in the 1971 Term, 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 29, 1972, by this Court that the judgment of the said Supreme Court of North Carolina in this cause be vacated insofar as it leaves undisturbed the death penalty imposed, and that this cause be remanded to the Supreme Court of the State of North Carolina for further proceedings. See *Stewart v. Massachusetts,* 408 U.S. 845 (1972).

"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 of certiorari notwithstanding.

"Witness the Honorable WARREN E. BURGER, Chief Justice of the United States, the twenty-sixth ..... day of July in the year of our Lord one thousand nine hundred and seventy-two.

MICHAEL RODAK, JR.
Clerk of the Supreme Court of the
United States

No. 71-6001

Owen Swanson Doss,

v.

North Carolina"

The opinion in *Stewart v. Massachusetts*, referred to in the foregoing mandate, is as follows:

"PER CURIAM.

The appellant in this case was sentenced to death. The imposition and carrying out of that death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Furman v. Georgia*, 408 U.S. 238 (1972). The motion for leave to proceed *in forma pauperis* is granted. The judgment is therefore vacated insofar as it leaves undisturbed the death penalty imposed, and the case is remanded for further proceedings."

Pursuant to the foregoing mandate of the Supreme Court of the United States vacating the death penalty imposed upon defendant, this cause is remanded to the Superior Court of Pitt County with directions to proceed as follows:

(1) The presiding judge of the Superior Court of Pitt County shall cause to be served on the defendant, Owen Swanson Doss, and on his attorneys of record, notice to appear at a designated time during a session of said Superior Court authorized to hear criminal cases. The time fixed shall not be less than ten days from the date of the order. At that time, defendant being present in open court and represented by his attorneys, based on the verdict of guilty of murder in the first degree returned by the jury at his trial at the 30 November 1970 Special Criminal Session, the presiding judge will pronounce judgment that the defendant be imprisoned for life in the State's prison.

(2) The presiding judge of the Superior Court of Pitt County will issue a writ of habeas corpus to the official having custody of the defendant, Owen Swanson Doss, to produce him in open court at the time and for the purpose of being present when the judgment imposing life imprisonment is pronounced.

The foregoing accords with our previous orders entered in the following cases: *State v. Hill,* 279 N.C. 371, 183 S.E. 2d 97; *State v. Atkinson,* 279 N.C. 385, 183 S.E. 2d 105; *State v. Atkinson,* 279 N.C. 386, 183 S.E. 2d 106; *State v. Williams,* 279 N.C. 388, 183 S.E. 2d 106; *State v. Sanders,* 279 N.C. 389, 183 S.E. 2d 107; *State v. Roseboro,* 279 N.C. 391, 183 S.E. 2d 108 (1971); *State v. Childs,* 280 N.C. 576, 187 S.E. 2d 78 (1972).

Remanded for judgment.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

BARNEY v. HIGHWAY COMM.

No. 155 PC.

Case below: 14 N.C. App. 740.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 31 August 1972.

BASS v. MOORESVILLE MILLS

No. 151 PC.

Case below: 15 N.C. App. 206.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1972.

BATTLE v. ELECTRIC CO.

No. 197 PC.

Case below: 15 N.C. App. 246.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1972.

BEASLEY v. FOOD FAIR

No. 7 PC.

Case below: 15 N.C. App. 323.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 14 September 1972.

BERGOS v. BOARD OF ALCOHOLIC CONTROL

No. 168 PC.

Case below: 15 N.C. App. 169.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

CHRISTIE v. POWELL

No. 16 PC.

Case below: 15 N.C. App. 508.

Petition for writ of certiorari to North Carolina Court of Appeals denied 14 September 1972.

ELECTRICAL WORKERS UNION v. COUNTRY CLUB EAST

No. 182 PC.

Case below: 14 N.C. App. 744.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 31 August 1972.

FAGGART v. FAGGART

No. 176 PC.

Case below: 15 N.C. App. 214.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1972.

GAY v. SUPPLY CO.

No. 158 PC.

Case below: 15 N.C. App. 240.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1972.

GOARD v. BRANSCOM

No. 159 PC.

Case below: 15 N.C. App. 34.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

HARRISON v. LEWIS

No. 146 PC.

Case below: 15 N.C. App. 26.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 31 August 1972.

HAYMORE v. HIGHWAY COMM.

No. 154 PC.

Case below: 14 N.C. App. 691.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1972.

HUDSON v. STEVENS AND CO.

No. 153 PC.

Case below: 15 N.C. App. 190.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1972.

IN RE ESTATE OF OVERMAN

No. 171 PC.

Case below: 14 N.C. App. 712.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1972.

LINDSTROM v. CHESNUTT

No. 180 PC.

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

Petition for writ of certiorari to North Carolina Court of Appeals denied 14 September 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

MARKHAM v. JOHNSON

No. 175 PC.

Case below: 15 N.C. App. 139.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1972.

MAYO v. CASUALTY CO.

No. 8 PC.

Case below: 15 N.C. App. 309.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 14 September 1972.

PAYSEUR v. RUDISILL

No. 164 PC.

Case below: 15 N.C. App. 57.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1972.

REEVES BROTHERS, INC. v. TOWN OF RUTHERFORDTON

No. 1 PC.

Case below: 15 N.C. App. 385.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 14 September 1972.

RICH v. CITY OF GOLDSBORO

No. 5 PC.

Case below: 15 N.C. App. 534.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 14 September 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

SAVAGE v. SAVAGE

No. 169 PC.

Case below: 15 N.C. App. 123.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1972.

SIMMONS v. TEXTILE WORKERS UNION

No. 152 PC.

Case below: 15 N.C. App. 220.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1972.

STATE v. ALTMAN

No. 2 PC.

Case below: 15 N.C. App. 257.

Petition for writ of certiorari to North Carolina Court of Appeals denied 14 September 1972.

STATE v. BANDY

No. 36.

Case below: 15 N.C. App. 175.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 31 August 1972.

STATE v. BANDY

No. 177 PC.

Case below: 15 N.C. App. 188.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. BARR

No. 179 PC.

Case below: 15 N.C. App. 116.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1972.

STATE v. CROUCH

No. 160 PC.

Case below: 15 N.C. App. 172.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1972.

STATE v. DAMERON

No. 172 PC.

Case below: 15 N.C. App. 84.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1972. Appeal dismissed ex mero motu for lack of substantial constitutional question 31 August 1972.

STATE v. FLOYD

No. 9 PC.

Case below: 15 N.C. App. 438.

Petition for writ of certiorari to North Carolina Court of Appeals denied 14 September 1972.

STATE v. HAILSTOCK

No. 11 PC.

Case below: 15 N.C. App. 556.

Petition for writ of certiorari to North Carolina Court of Appeals denied 14 September 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. HEGLER

No. 161 PC.

Case below: 15 N.C. App. 51.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1972.

STATE v. JOHNSON

No. 54.

Case below: 13 N.C. App. 323.

Motion of Attorney General to dismiss appeal for failure to file appeal bond allowed 15 September 1972.

STATE v. KIRBY

No. 49.

Case below: 15 N.C. App. 480.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 14 September 1972.

STATE v. LASSITER

No. 198 PC.

Case below: 15 N.C. App. 265.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1972.

STATE v. MARTIN

No. 32.

Case below: 14 N.C. App. 132.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1972. Appeal dismissed for failure to comply with rules of Supreme Court 31 August 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. MELTON

No. 173 PC.

Case below: 15 N.C. App. 198.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1972.

STATE v. PHILLIPS

No. 178 PC.

Case below: 15 N.C. App. 74.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1972.

STATE v. PRICE

No. 46.

Case below: 15 N.C. App. 599.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 15 September 1972.

STATE v. ROBINSON

No. 6 PC.

Case below: 15 N.C. App. 362.

Petition for writ of certiorari to North Carolina Court of Appeals denied 14 September 1972.

STATE v. SUMMERS

No. 191 PC.

Case below: 15 N.C. App. 282.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. TAYLOR

No. 170 PC.

Case below: 14 N.C. App. 703.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1972.

STATE v. THOMAS

No. 195 PC.

Case below: 15 N.C. App. 289.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1972.

STATE v. WESTRY

No. 157 PC.

Case below: 15 N.C. App. 1.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1972.

STATE v. WOOTEN

No. 35.

Case below: 15 N.C. App. 193.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 31 August 1972.

THOMPSON v. COBLE

No. 165 PC.

Case below: 15 N.C. App. 231.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

WYCHE v. ALEXANDER

No. 166 PC.

Case below: 15 N.C. App. 130.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1972.

APPENDIXES

RULES GOVERNING ADMISSION TO
THE PRACTICE OF LAW

AMENDMENT TO
STATE BAR RULES

AMENDMENT TO
NORTH CAROLINA SUPREME COURT
LIBRARY RULES

RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

The attached amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina were duly adopted at a regular quarterly meeting of the Council of The North Carolina State Bar.

BE IT RESOLVED that the Rules Governing Admission to the Practice of Law in the State of North Carolina be and the same are hereby amended by rewriting the Rules as appear in 279 N. C. 734 and 790 as follows:

RULE V

Applications of General Applicants

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 $100.00. Every application by a general applicant who is not a resident of the State of North Carolina shall be accompanied by a fee of $100.00 plus such fee as the National Conference of Bar Examiners or its successors may charge from time to time for processing an application of a nonresident.

RULE XI

Examinations

Section 2. The examination shall be held in the City of Raleigh between July 1 and August 31 on such dates as the Board may set from time to time.

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 24th day of July, 1972.

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 31st day of July, 1972.

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 31st day of July, 1972.

MOORE, *J.*
For the Court

AMENDMENT TO STATE BAR RULES

The following amendment to the Rules and Regulations of The North Carolina State Bar was duly adopted at a regular quarterly meeting of the Council of The North Carolina State Bar.

BE IT RESOLVED by the Council of The North Carolina State Bar, that Article X of the Certificate of Organization of The North Carolina State Bar be and the same is hereby amended by striking from Canon 12 as appears in 221 N. C. 596 as follows:

Paragraph three (3) of Canons of Ethics number twelve (12) which reads:

"In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee."

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of The North Carolina State Bar has been duly adopted by the Council of The North Carolina State Bar at a regular quarterly meeting of said Council.

Given over my hand and the Seal of The North Carolina State Bar, this the 24th day of July, 1972.

B. E. JAMES, *Secretary-Treasurer*
The North Carolina State Bar

After examining the foregoing amendment to the Rules and Regulations of The North Carolina State Bar as adopted by the Council of The North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 31st day of July, 1972.

WILLIAM H. BOBBITT, *Chief Justice*
Supreme Court of North Carolina

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the 31st day of July, 1972.

MOORE, *J.*
For the Court

AMENDMENT TO NORTH CAROLINA SUPREME COURT LIBRARY RULES

Pursuant to Section 7A-13 of the General Statutes of North Carolina, the following amendment and appendix to the North Carolina Supreme Court Library Rules as promulgated December 20, 1967, have been approved by the Library Committee and hereby are promulgated:

Section 1. Subsection "f" of Rule 2 is amended to read as follows:

(f) "Official Register" means that list of positions of the State of North Carolina that is appended to these Rules as Appendix I.

Section 2. Appended at the end of these Rules shall be the following:

APPENDIX I

OFFICIAL REGISTER STATE OF NORTH CAROLINA

(1) The Senators, Representatives, Principal Clerks, Reading Clerks, Sergeants-at-Arms, Legislative Services Officer, and Director of Research of the General Assembly.

(2) The Governor, Lieutenant Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance.

(3) The Secretary of the Department of Administration; Secretary of Transportation and Highway Safety; Secretary of the Department of Natural and Economic Resources; Secretary of Human Resources; Secretary of Social Rehabilitation and Control; Secretary of Commerce; Commissioner of Revenue; Secretary of Art, Culture and History; and Secretary of Military and Veterans' Affairs.

(4) The Judges of the Superior Court and the Judges of the District Court.

(5) The Solicitors and the Public Defenders.

(6) The State Librarian.

(7) The Director of the Office of Archives and History.

(8) The Director, Assistant Director, and Assistant Counsel of the Administrative Office of the Courts.

(9) The Secretary-Treasurer of The North Carolina State Bar.

This the 28th day of November, 1972.

RAYMOND M. TAYLOR
Librarian

APPROVED:
SUSIE SHARP
Chairman, For the Library Committee

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

APPEAL AND ERROR

§ 31. Assignment of Error to Charge

Assignment of error to the charge as a whole that specifies no portion of the charge deemed erroneous and no additional instructions deemed to be required is broadside and ineffective. *Investment Properties v. Allen,* 174.

§ 54. Review of Discretionary Matters

When a motion addressed to the discretion of the court is denied on the ground the court has no power to grant the motion in its discretion, the ruling is reviewable. *Calloway v. Motor Co.,* 496.

ARREST AND BAIL

§ 5. Method of Making Arrest

There was sufficient compliance with requirement that entrance be demanded and denied before a police officer can forcibly enter a dwelling for the purpose of making an arrest. *S. v. Harvey,* 1.

Although defendant had been erroneously identified as the person who sold heroin to an SBI agent, defendant's arrest under a warrant charging the sale of heroin to the SBI agent was lawful. *Ibid.*

ASSAULT AND BATTERY

§ 4. Criminal Assault in General

The crime defined by G.S. 14-32(b)—assault with a firearm or other deadly weapon *per se* inflicting serious injury—is a lesser degree of the offense of assault with a deadly weapon with intent to kill inflicting serious injury defined by G.S. 14-32(a). *State v. Thacker,* 447.

§ 5. Assault with a Deadly Weapon

An intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances. *S. v. Thacker,* 447.

A knife with a six-inch blade is a deadly weapon *per se. Ibid.*

§ 12. Presumptions

Proof of an assault with a deadly weapon inflicting serious injuries not resulting in death does not establish a presumption of intent to kill. *S. v. Thacker,* 447.

§ 13. Competency of Evidence

In a prosecution for felonious assault, the erroneous admission of defendant's in-custody statement unequivocally expressing his intent to kill the first person he caught alone constituted prejudicial error, notwithstanding there was ample additional evidence in the record from which the jury could have inferred that defendant intended to kill the victim. *S. v. Thacker,* 447.

§ 16. Submission of Lesser Degrees

In a prosecution for two offenses of assault with a deadly weapon with intent to kill inflicting serious injury, the trial court erred (1) in failing to submit defendant's guilt or innocence of assault with a deadly

BROKERS AND FACTORS

§ 6. Right to Commissions

Obligation of an owner of a hotel to pay a realtor a monthly 5% commission as compensation for the realtor's services in procuring a 50-year lease of the hotel property terminated when a municipal redevelopment commission condemned and took possession of the property. *Ross v. Perry*, 570.

BURGLARY AND UNLAWFUL BREAKINGS

§ 4. Competency of Evidence

When it is established that a store or warehouse has been broken into and merchandise has been stolen therefrom, possession of the stolen articles by defendant soon after the theft raises a presumption that he is guilty both of breaking and entering and larceny. *S. v. Lewis*, 564.

§ 5. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient for the jury in prosecution for first degree burglary. *S. v. Miller*, 70.

Defendant's conviction of second degree burglary cannot stand where all the State's evidence tends to show that the crime occurred in the daytime; and jury verdict is treated as a verdict of guilty of felonious breaking and entering. *S. v. Cox*, 131.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 8. Pleadings

Under Rule 9(b), facts relied upon to establish fraud, duress or mistake must be alleged. *Mangum v. Surles*, 91.

Where defendants failed to object to plaintiff's evidence not supported by the pleadings that defendants fraudulently induced her to sign a deed by representing the instrument to be a note, plaintiff is entitled to have the issue of fraud submitted to the jury and to amend her complaint to conform her pleadings to the evidence. *Ibid.*

§ 10. Sufficiency of Evidence and Nonsuit

Plaintiff's evidence was sufficient to make out a prima facie case of fraud in the factum in inducing plaintiff to sign a deed by telling her it was a note. *Mangum v. Surles*, 91.

COLLEGES AND UNIVERSITIES

Regulations of Board of Trustees of University of N.C. which require, as prerequisites for eligibility for in-state tuition, that the student be domiciled in this State and have been so domiciled without being enrolled in an institution of higher education for at least six months preceding the date of first enrollment or re-enrollment, held constitutional. *Glusman v. Trustees*, 629.

CONSTITUTIONAL LAW

§ 20. Equal Protection

Indigency is sufficient basis for classification with reference to the right to court appointed, publicly paid counsel, but it is not a reasonable

CONSTITUTIONAL LAW—Continued

basis for classification as to the right to represent one's self. *S. v. Mems*, 658.

Regulations of Board of Trustees of University of N. C. which require, as prerequisites for eligibility for in-state tuition, that the student be domiciled in this State and have been so domiciled without being enrolled in an institution of higher education for at least six months preceding the date of first enrollment or re-enrollment, held constitutional. *Glusman v. Trustees*, 629.

§ 29. Right to Indictment and Trial by Duly Constituted Jury

Defendant's evidence that the black adult population of the county amounted to 20% of the total county population and that beginning January 1970 approximately 10% of the petit jurors were Negroes, held insufficient to make out a prima facie case of racial discrimination; even if a prima facie case was shown, defendant's evidence relieved the State of the burden of going forward. *S. v. Cornell*, 20.

Testimony by jury commissioners that, in some instances, they could determine from the address shown on the raw jury list card that the person named thereon lived in a predominantly black or predominantly white neighborhood was insufficient to make out a prima facie case of racial discrimination. *Ibid.*

A jury list is not discriminatory or unlawful because it is drawn from the tax list of the county, and the jury commission is not limited to the sources specifically designated by the statute. *Ibid.*

Trial court properly allowed State's challenges for cause to prospective jurors who stated that under no circumstances would they return a verdict which would result in the death penalty. *S. v. Watson*, 221; *S. v. Anderson*, 261.

Sentences of death could not constitutionally be imposed on defendant for crimes of first degree murder committed while the statute allowing a defendant to plead guilty to a capital crime and receive a life sentence was in effect. *S. v. Anderson*, 261.

Questions which the solicitor asked prospective jurors were proper for the purpose of determining whether such jurors could, under any circumstances, vote for a verdict which would require imposition of the death penalty. *S. v. Willis*, 558.

Absence from the jury list of names of persons 18 to 21 years old did not constitute systematic exclusion of this age group from grand jury service. *S. v. Cornell*, 20; *S. v. Harris*, 542.

§ 30. Due Process

Defendant was not denied his constitutional right to a speedy trial by the delay between his appeal from recorder's court on 24 September 1968 and his trial de novo in superior court in June 1971. *S. v. Harrell*, 111.

Defendant was not denied his constitutional right to a speedy trial by a delay of ten months between his arrest and trial on charges of possessing and growing marijuana. *S. v. Spencer*, 121.

Defendant was not denied his constitutional right to a speedy trial by the delay between the issuance of a warrant charging him with homicide on 19 July 1969 and his trial at the 19 April 1971 session of court. *S. v. Watson*, 221.

CONSTITUTIONAL LAW—Continued

§ 31. Right of Confrontation, Time to Prepare Defense, and Access to Evidence

Trial court properly denied defendant's motion that the solicitor furnish defendant (1) the names and addresses of all witnesses known to the State who might offer testimony favorable to defendant and (2) copies of written statements or transcripts of oral statements made by any witness. *S. v. Peele,* 253.

Defendant's rights of confrontation and effective assistance of counsel were not violated by the denial of a motion for continuance made on the ground that defendant needed to get information from her home in order to know what witnesses she wanted subpoenaed. *S. v. Cradle,* 198.

In a homicide prosecution, defendant's right to confrontation and right to due process were violated by admission of statement in the victim's death certificate as to the cause of death; however, the admission of such evidence was harmless error. *S. v. Watson,* 221.

§ 32. Right to Counsel

Trial court erred in finding that defendant was not an indigent and in refusing to appoint counsel to represent her at her preliminary hearing on a felony charge; however, such error was harmless beyond a reasonable doubt. *S. v. Cradle,* 198.

The right to assistance of counsel includes the right of counsel to confer with witnesses, to consult with the accused and to prepare his defense. *Ibid.*

Right to counsel attaches only after adversary judicial proceedings have been initiated. *S. v. Mems,* 658.

Defendant in a criminal proceeding has a right to handle his own case without interference by or the assistance of counsel. *Ibid.*

G.S. 7A-457(a) prohibiting an indigent from making waiver of counsel in a capital case is unconstitutional. *Ibid.*

Where evidence indicated that defendant had adequate funds to obtain counsel prior to interrogation, defendant could not complain that he was an indigent as that term refers to one who does not have available at the time they are required adequate funds to pay a necessary cost of his defense. *S. v. Hoffman,* 727.

§ 36. Cruel and Unusual Punishment

A sentence of seven to ten years for uttering a forged check in the sum of $50 is not cruel and unusual punnishment. *S. v. Cradle,* 198.

CONTRACTS

§ 4. Consideration

A consideration moving directly to the guarantor is not essential in a guaranty contract, but the promise is enforceable if a benefit to the principal debtor is shown or if detriment or inconvenience to the promisee is disclosed. *Investment Properties v. Norburn,* 191.

§ 28. Instructions

Trial court erred in giving the jury instructions to the effect that it was necessary for the guarantor to have received something of value

COURTS

§ 2. Jurisdiction in General

A judgment by a court determining its statutory authority to dismiss an action in such way as not to bar further litigation on the merits therein may be questioned only by appeal and not collaterally. *Gower v. Insurance Co.*, 577.

§ 9. Jurisdiction of Superior Court After Orders of Another Superior Court Judge

A judge has the power to modify an interlocutory order made by another whenever there is a showing of changed conditions which warrant such action. *Calloway v. Motor Co.*, 496.

When one superior court judge, in the exercise of his discretion, has made an order denying a motion to amend, absent changed conditions, another superior court judge may not thereafter allow the motion. *Ibid.*

CRIMINAL LAW

§ 21. Preliminary Proceedings

Trial court erred in finding that defendant was not an indigent and in refusing to appoint counsel to represent her at her preliminary hearing on a felony charge; however, such error was harmless beyond a reasonable doubt. *S. v. Cradle*, 198.

The district judge, when sitting as a committing magistrate, does not render a verdict but passes only on the narrow question of whether probable cause exists and, if so, the fixing of bail if the offense is bailable; and a discharge of the accused is not an acquittal and does not bar a later indictment. *Ibid.*

Counsel's ability at the preliminary hearing to "fashion a vital impeachment tool for use in cross-examination of the State's witnesses at trial" or to "discover the case the State has against his client" is greatly diminished by the authority of the court to terminate the preliminary hearing once probable cause is established. *Ibid.*

§ 23. Plea of Guilty

A plea of guilty or nolo contendere may not be considered valid unless it appears affirmatively that it was entered voluntarily and understandingly. *S. v. Ford*, 62.

§ 25. Plea of Nolo Contendere

Evidence as to what occurred when defendant was arraigned and entered a plea of nolo contendere will be considered by the appellate court in determining if the plea was entered voluntarily and understandingly. *S. v. Ford*, 62.

Although inquiries addressed by the court to defendant and his counsel fell short of approved practice with reference to the acceptance of plea of nolo contendere, deficiencies in the court's inquiries and in defendant's responses were cured by defendant's testimony on the occasion of his arraignment and plea which discloses affirmatively that he has no defense to the crime of felonious escape for which he was indicted. *Ibid.*

§ 26. Plea of Former Jeopardy

Where defendant's conviction of felony-murder was based upon a jury finding that the murder was committed in the perpetration of an

CRIMINAL LAW—Continued

armed robbery, no separate punishment can be imposed for the armed robbery. *S. v. Peele,* 253.

§ 34. Evidence of Defendant's Guilt of Other Offenses

Portion of defendant's confession which related to his intent to commit other robberies prior to the commission of the crime for which he is charged, held competent to show defendant's intent. *S. v. Jenerett,* 81.

Evidence that defendants had pleaded guilty in federal court to the armed robbery of a bank was properly admitted in the trial of defendants for kidnapping an employee of the bank. *S. v. Cox,* 275.

§ 36.1 Evidence of Alibi

Defendants were not prevented from developing an alibi by the fact that the indictment charged them with kidnapping on 17 December 1970 and the evidence showed the crime occurred on 10 December 1970. *S. v. Cox,* 275.

§ 46. Flight of Defendant as Implied Admission

Defendant's flight from the scene of a killing was competent on the question of defendant's guilt. *S. v. Bolin,* 415.

§ 51. Qualification of Experts

Trial court properly allowed a police officer to give an opinion as to the caliber of a bullet removed from the body of deceased, although the court did not specifically find that the officer was an expert in ballistics. *S. v. Jenerett,* 81.

§ 60. Evidence in Regard to Footprints

Trial court did not err in permitting a nonexpert witness, a policeman, to testify that he compared defendant's shoes with a shoe print on a ledger found near a rifled safe and that "it was the shoes I was looking for to the best of my knowledge." *S. v. Lewis,* 564.

§ 61. Evidence as to Tire Tracks

Evidence relating to casts made of automobile tracks at the place where a homicide victim's body was found was competent to identify the tracks as having been made by an automobile owned by defendant's accomplice and to corroborate the accomplice's testimony. *S. v. Willis,* 558.

§ 66. Evidence of Identity by Sight

Trial court properly found that pretrial photographic procedure was not unnecessarily suggestive and that the prosecuting witness' identification testimony at the trial was based solely on her observations of the person in her room on the night of the burglary. *S. v. Miller,* 70.

Evidence was sufficient to support trial court's findings that in-court identifications of defendants were independent of a preview of illegally obtained photographs. *S. v. Accor,* 287.

Trial court did not err in failure to hold voir dire hearing to determine admissibility of police officer's identification testimony where there was no evidence that the officer had identified defendants in a pretrial lineup or confrontation. *S. v. Cox,* 275.

The decisions relating to right to counsel at a lineup do not apply to police officer's identification of defendants at the scene of their arrest by

CRIMINAL LAW—Continued

other police officers as the persons who a few hours before had eluded pursuit and arrest by the identifying officers. *Ibid.*

In-court identifications of defendant by two assault victims were competent regardless of the absence of counsel at a pretrial identification in a hospital emergency room, where the in-court identifications had independent origins. *S. v. Thacker*, 447.

§ 68. Other Evidence of Identity

Testimony by two bank employees referring to "he" and "they" was competent when considered in connection with other State's evidence identifying defendants. *S. v. Cox*, 275.

§ 75. Confession—Tests of Voluntariness; Admissibility in General

Trial court erred in the admission of in-custody incriminating statements made by defendant without benefit of counsel where there was neither evidence nor finding that defendant specifically waived the right to counsel. *S. v. Turner*, 118.

Error in admisison of inculpatory statement without evidence or findings that defendant waived his right to counsel was harmless. *S. v. Hudson*, 100.

Trial court committed harmless error in admitting in-custody incriminating statements made by defendant where the State failed to produce and offer in evidence at the voir dire hearing a written waiver of counsel executed by defendant in compliance with the statute then in effect. *S. v. Cox*, 275.

Former G.S. 7A-451 did not render inadmissible in a first degree murder prosecution statements made by an indigent defendant to the arresting officer without benefit of counsel, where defendant had been arrested only for the petty misdemeanor of carrying a concealed weapon when the statements were made and the officer had no knowledge that a capital felony had been committed. *S. v. Ratliff*, 397.

Defendant's unexpected statement to an officer, after he had been arrested for a petty misdemeanor, that he had shot a woman, defendant's further statement that the officer was a cop and it was for him to locate the victim, and defendant's volunteered statement that the woman might not be dead and the officer could be a hero, held not the result of "in-custody interrogation." *Ibid.*

Admission of defendant's inculpatory in-custody statement was erroneous where there was neither evidence nor findings that defendant waived his right to counsel, either in writing as provided by former G.S. 7A-457 or orally as provided by the Miranda decision. *S. v. Thacker*, 447.

In a prosecution for felonious assault, the erroneous admission of defendant's in-custody statement unequivocally expressing his intent to kill the first preson he caught alone constituted prejudicial error, notwithstanding there was ample additional evidence in the record from which the jury could have inferred that defendant intended to kill the victim. *Ibid.*

Volunteered statements are competent evidence and their admission is not barred under any theory of law, state or federal. *S. v. Haddock*, 675.

A voluntary in-custody statement does not become the product of an in-custody interrogation when an officer asks defendant to explain something he has already said voluntarily. *Ibid.*

CRIMINAL LAW—Continued

§ 76. Confession—Determination and Effect of Admissibility

Trial court in prosecution for the capital crime of rape erred in finding that defendant was not indigent at the time he confessed and that he, therefore, could not invoke the provision of former G.S. 7A-457 that counsel could not be waived in a capital case. *S. v. Wright*, 38.

§ 80. Books, Records and Private Writings

In a homicide prosecution, defendant's right to confrontation and right to due process were violated by admission of statement in the victim's death certificate as to the cause of death; however, the admission of such evidence was harmless error. *S. v. Watson*, 221.

Trial court properly denied defendant's motion that the solicitor furnish defendant (1) the names and addresses of all witnesses known to the State who might offer testimony favorable to defendant and (2) copies of written statements or transcripts of oral statements made by any witness. *S. v. Peele*, 253.

Trial court in an armed robbery and homicide prosecution properly excluded as irrelevant a letter written to defendant by an employment agency in New York. *Ibid.*

§ 84. Evidence Obtained by Unlawful Means

Police officer did not need a search warrant to seize marijuana seed lying in plain view on a freezer top or marijuana which was inside a plastic jar which he picked up to use as a container for the seized marijuana seed. *S. v. Harvey*, 1.

Right to search automobile without warrant does not depend on the right to arrest but depends on the existence of probable cause to make the search. *S. v. Ratliff*, 397.

An officer had probable cause to believe that defendant's car contained contraband of some sort, and a search of the car without a warrant was lawful. *Ibid.*

If there is probable cause to search an automobile the officer may either seize and hold the vehicle before presenting the probable cause issue to a magistrate, or he may carry out an immediate search without a warrant. *Ibid.*

§ 86. Credibility of Defendant

For the purpose of impeachment, it is permissible to cross-examine a juvenile defendant with reference to his prior convictions or adjudications of guilt of prior conduct which, if committed by an adult, would have constituted a conviction of crime. *S. v. Miller*, 70.

§ 87. Direct Examination of Witnesses

Trial court properly allowed solicitor to ask leading questions. *S. v. Cox*, 275; *S. v. Peele*, 253; *S. v. Willis*, 558.

Where the State furnished defense counsel a list of the State's witnesses before trial, the trial court did not abuse its discretion in allowing witnesses whose names did not appear on the list to testify on behalf of the State. *S. v. Anderson*, 261; *S. v. Hoffman*, 727.

§ 89. Credibility of Witnesses; Corroboration and Impeachment

Rule that defendant may no longer be cross-examined for impeach-

CRIMINAL LAW—Continued

ment purposes as to whether he has been indicted for other criminal offenses is not retroactive. *S. v. Harris,* 542; *S. v. Daye,* 592.

The trial court in a prosecution for possession and sale of heroin did not commit prejudicial error in permitting the solicitor to cross-examine defendant by reading from the trial calendar numerous names of persons charged with violating narcotic laws and asking defendant questions concerning his acquaintance and association with each of them. *S. v. Daye,* 592.

§ 90. Rule that Party is Bound by and May Not Discredit Own Witness

The introduction in evidence by the State of a statement made by defendant which may tend to exculpate him does not prevent the State from showing that the facts concerning the crime were different from what the defendant said about them. *S. v. Bolin,* 415.

§ 91. Time of Trial and Continuance

Defendant's rights of confrontation and effective assistance of counsel were not violated by the denial of a motion for continuance made on the ground that defendant needed to get information from her home in order to know what witnesses she wanted subpoenaed. *S. v. Cradle,* 198.

§ 92. Consolidation and Severance of Counts

Trial court properly consolidated for trial two indictments charging defendant with the murders of his wife and mother-in-law. *S. v. Anderson,* 261.

Trial court properly denied motion of three defendants for severance of their rape trial, notwithstanding evidence showed two defendants were guilty as aiders and abettors. *S. v. Dawson,* 645.

§ 97. Introduction of Additional Evidence

Trial court did not err in allowing the State to recall two witnesses who had previously been examined after defendant had rested and all arguments to the jury had been made. *S. v. Anderson,* 261.

§ 99. Conduct of Court and Expression of Opinion

In a prosecution for homicide committed during a robbery, defendant was not prejudiced by trial court's inquiry into the ownership of the store where the crime occurred and the merchandise therein. *S. v. Jenerett,* 81.

Trial court in rape prosecution did not err in ejecting two black girls from the courtroom for disrupting the trial. *S. v. Dawson,* 645.

§ 104. Consideration of Evidence on Motion to Nonsuit

The introduction in evidence by the State of a statement made by defendant which may tend to exculpate him does not prevent the State from showing that the facts concerning the crime were different from what the defendant said about them. *S. v. Bolin,* 415.

§ 106. Sufficiency of Evidence

A felony conviction may not be based upon a naked extrajudicial confession of guilt uncorroborated by any other evidence. *S. v. Jenerett,* 81.

CRIMINAL LAW—Continued

§ 111. Form and Sufficiency of Instructions

Trial court in kidnapping prosecution did not err in charging jury on crimes of robbery and conspiracy where the crimes were part of a single transaction. *S. v. Cox*, 275.

§ 115. Instructions on Lesser Degrees of Crime

Defendant was not prejudiced by error, if any, in the submission of lesser included offenses. *S. v. Accor*, 287.

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. *S. v. Thacker*, 447.

§ 122. Additional Instructions

Trial court's additional instructions urging jury to reach a verdict were without error. *S. v. Accor*, 287.

§ 128. Power to Set Aside Verdict and Order Mistrial

A motion for mistrial in cases less than capital is addressed to the trial judge's discretion. *S. v. Daye*, 592.

§ 135. Judgment and Sentence in Capital Cases

Judgment of life imprisonment imposed in conformity with Supreme Court order is affirmed. *S. v. Atkinson*, 151; *S. v. Atkinson*, 152; *S. v. Hill*, 312.

Sentences of death could not constitutionally be imposed on defendant for crimes of first degree murder committed while the statute allowing a defendant to plead guilty to a capital crime and receive a life sentence was in effect. *S. v. Anderson*, 261.

Trial court properly allowed State's challenges for cause to prospective jurors who stated that under no circumstances would they return a verdict which would result in the death penalty. *S. v. Watson*, 221; *S. v. Anderson*, 261.

Pursuant to mandate of U. S. Supreme Court vacating sentences of death, cases are remanded to superior court for imposition of sentences of life imprisonment. *S. v. Miller*, 740; *S. v. Hamby*, 743; *S. v. Westbrook*, 748; *S. v. Chance*, 746; *S. v. Doss*, 751.

§ 138. Severity of Sentence

Superior court may impose punishment in excess of that imposed in inferior court. *S. v. Harrell*, 111.

A defendant whose appeal from conviction of possession of more than one gram of marijuana was pending on 1 January 1972, the effective date of the act reducing that crime from a felony to a misdemeanor, is not entitled to the benefit of the more lenient punishment provisions of the new act. *S. v. Harvey*, 1; *S. v. McIntyre*, 304.

A defendant whose appeal from conviction of felonious possession of a hypodermic needle and syringe for the purpose of administering habit-forming drugs was pending on the effective date of the Controlled Substances Act, which reduced that offense to the grade of general misdemeanor, is not entitled to have his sentence reduced to a maximum of two years. *S. v. Kelly*, 618.

CRIMINAL LAW—Continued

EMINENT DOMAIN—Continued

§ 5. Amount of Compensation

Rental value of condemned property is merely one of the factors to be considered in determining the property's fair market value. *Ross v. Perry,* 570.

§ 7. Proceedings

Defendants are estopped to contest a municipality's right to condemn their property for a water reservoir project where it was stipulated that the municipality "will acquire title" to the lands upon posting the amount set forth in the petition. *City of Kings Mountain v. Cline,* 269.

§ 16. Persons Entitled to Compensation Paid

When condemned land is subject to a leasehold estate, the tenant is entitled to share in the award since the value of his interest is a part of the value of the fee. *Ross v. Perry,* 570.

When the owner of a fee is required to divide a condemnation award with the owner of the leasehold, he is not receiving rent from the lease but is, in effect, paying a penalty for it. *Ibid.*

EVIDENCE

§ 11. Transactions or Communications with Decedent

Dead man's statute precluded respondent from testifying as to alleged parol agreement that respondent's brother, now deceased, would hold title to real property in trust for respondent and her mother. *Schoolfield v. Collins,* 604.

§ 12. Communications Between Husband and Wife

Rules of Civil Procedure do not require the husband or wife in actions inter se to answer interrogatories relating to acts of adultery or conduct from which adultery might be implied during the subsistence of their marriage. *Wright v. Wright,* 159.

§ 31. Best and Secondary Evidence Relating to Writings

Trial court properly excluded parol testimony as to the contents of an automobile title certificate where there was no evidence that the title certificate had been lost or destroyed. *Younts v. Insurance Co.,* 582.

Best evidence rule did not prohibit a courtroom clerk from testifying as to his personal observations regarding the racial composition of the jury venires during a specific period simply because the clerk had made a record of his observations. *S. v. Cornell,* 20.

§ 33. Hearsay Evidence

Testimony as to statements made by respondent's mother, now deceased, is hearsay and therefore incompetent to show an alleged parol agreement that respondent's brother would hold title to real property in trust for respondent and her mother. *Schoolfield v. Collins,* 604.

Defendant's testimony that "they told me it was not a good lease" was not incompetent as hearsay. *Investment Properties v. Allen,* 174.

Appraisal testimony based on information as to price of new trailers obtained by the appraisers from a trailer manufacturer and a trailer dealer was incompetent as hearsay. *In re Trucking Co.,* 375.

EVIDENCE—Continued

§ 48. Competency and Qualification of Experts

The fact that a witness is an officer or employee, or a consultant specially retained by a party to the litigation does not disqualify him as an expert. *Utilities Comm. v. Telephone Co.*, 318.

§ 51. Blood Tests

In both criminal and civil actions in which the issue of paternity arises, the results of blood-grouping tests are admissible in evidence regardless of any presumptions with respect to paternity, and such evidence is competent to rebut any presumptions of paternity. *Wright v. Wright*, 159.

Husband was entitled to an order for blood-grouping tests where the wife alleged and the husband denied that he was the father of a child born to the wife during the subsistence of the marriage. *Ibid.*

In an action in which the issue of paternity and adultery are raised, evidence of the results of blood-grouping tests excluding the husband as the father of a child born during the subsistence of the marriage are competent on both the issue of paternity and the issue of adultery. *Ibid.*

FORGERY

§ 2. Punishment

A sentence of seven to ten years for uttering a forged check in the sum of $50 is not cruel and unusual punishment. *S. v. Cradle*, 198.

FRAUD

§ 9. Pleadings

Under Rule 9(b), facts relied upon to establish fraud, duress or mistake must be alleged. *Mangum v. Surles*, 91.

§ 12. Sufficiency of Evidence and Nonsuit

Plaintiff's evidence was sufficient to make out a prima facie case of fraud in the factum in inducing plaintiff to sign a deed by telling her it was a note. *Mangum v. Surles*, 91.

FRAUDS, STATUTE OF

§ 11. Abandonment of Contracts Affecting Realty

A lease required by the Statute of Frauds to be in writing may be rescinded orally by mutual assent of both parties. *Investment Properties v. Allen*, 174.

Lessor has no claim for rental payments or value of improvements promised under a lease if the lease was orally rescinded prior to the date the first rental payment was due. *Ibid.*

GRAND JURY

§ 3. Challenge to Composition

Testimony by jury commissioners that, in some instances, they could determine from the address shown on the raw jury list card that the person named thereon lived in a predominantly black or predominantly

HOMICIDE—Continued

§ 15. Relevancy and Competency of Evidence

In a prosecution for homicide committed during a robbery, defendant was not prejudiced by trial court's inquiry into the ownership of the store where the crime occurred and the merchandise therein. *S. v. Jenerett,* 81.

Portion of defendant's confession which related to his intent to commit other robberies prior to the commission of the crime for which he is charged, held competent to show defendant's intent on the occasion in question. *Ibid.*

§ 20. Demonstrative Evidence; Photographs

Trial court properly allowed homicide victim's sister to identify the victim by use of a duly authenticated photograph of the victim's body. *S. v. Willis,* 558.

§ 21. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of murder committed in the perpetration of armed robbery. *S. v. Peele,* 253.

In this prosecution for first degree murder, there was ample evidence *aliunde* defendant's confession to sustain a finding by the jury that defendant shot and killed deceased while robbing him. *S. v. Jenerett,* 81.

State's evidence was sufficient for the jury in a prosecution for first degree murder. *S. v. Bolin,* 415.

Written statement signed by defendant which was offered in evidence by the State was insufficient to establish as a matter of law that defendant shot decedent in self defense. *Ibid.*

§ 31. Verdict and Sentence

Pursuant to mandate of U. S. Supreme Court vacating sentences of death, cases are remanded to superior court for imposition of sentences of life imprisonment. *S. v. Miller,* 740; *S. v. Hamby,* 743; *S. v. Westbrook,* 748; *S. v. Doss,* 751.

Sentences of death could not constitutionally be imposed on defendant for crimes of first degree murder committed while the statute allowing a defendant to plead guilty to a capital crime and receive a life sentence was in effect. *S. v. Anderson,* 261.

Where defendant's conviction of felony-murder was based upon a jury finding that the murder was committed in the perpetration of an armed robbery, no separate punishment can be imposed for the armed robbery. *S. v. Peele,* 253.

INDICTMENT AND WARRANT

§ 6. Issuance of Warrants

Fourth Amendment standard of probable cause applies to an arrest warrant as well as to a search warrant. *S. v. Harvey,* 1.

Information received from a reliable informant is sufficient to support a finding that probable cause for arrest exists. *Ibid.*

SBI agent's affidavit and testimony that another SBI agent had purchased heroin from defendant furnished sufficient evidence to support

JUDGMENTS—Continued

§ 35. Conclusiveness of Judgments and Bar

The doctrine of res judicata does not apply to decisions upon ordinary motions incidental to the progress of the trial with the same strictness as to a judgment. *Calloway v. Motor Co.*, 496.

§ 36. Parties Concluded

Defendant insurer is estopped to attack a judgment in a former action giving plaintiff the right to commence a new action on a fire policy after the expiration of the one-year limitation period where the insurer failed to seek appellate review of the judgment in the former action. *Gower v. Insurance Co.*, 577.

§ 37. Matters Concluded

A judge has the power to modify an interlocutory order made by another whenever there is a showing of changed conditions which warrant such action. *Calloway v. Motor Co.*, 496.

JURY

§ 2. Special Venires

Trial court acted within its discretion in allowing the State's motion that the jury in a homicide prosecution be drawn from another county. *S. v. Cutshall*, 588.

§ 5. Selection

Trial court in first degree murder prosecution did not err in ordering that the jury be selected by the "whole panel" method. *S. v. Cutshall*, 588.

Trial court did not err in denial of defendant's challenge for cause directed to the district solicitor's father-in-law as a juror. *S. v. Watson*, 221.

§ 6. Examination

Questions which the solicitor asked prospective jurors were proper for the purpose of determining whether such jurors could, under any circumstances, vote for a verdict which would require imposition of the death penalty. *S. v. Willis*, 558.

The trial court has discretion to decide whether the actual questioning of jurors will be conducted by the court or by counsel for the State and counsel for defendant. *S. v. Dawson*, 645.

§ 7. Challenges

Defendant's evidence that the black adult population of the county amounted to 20% of the total county population and that beginning January 1970 approximately 10% of the petit jurors were Negroes, held insufficient to make out a prima facie case of racial discrimination; even if a prima facie case was shown, defendant's evidence relieved the State of the burden of going forward. *S. v. Cornell*, 20.

Testimony by jury commissioners that, in some instances, they could determine from the address shown on the raw jury list card that the person named thereon lived in a predominantly black or predominantly white neighborhood was insufficient to make out a prima facie case of racial discrimination. *Ibid.*

JURY—Continued

Absence from the jury list of names of persons between the ages of 18 and 21 during a specified period did not constitute systematic exclusion of this age group from jury service. *Ibid.*

A jury list is not discriminatory or unlawful because it is drawn from the tax list of the county, and the jury commission is not limited to the sources specifically designated by the statute. *Ibid.*

Trial court properly allowed State's challenges for cause to prospective jurors who stated that under no circumstances would they return a verdict which would result in the death penalty. *S. v. Watson,* 221; *S. v. Anderson,* 261.

KIDNAPPING

§ 1. Elements of Offense and Prosecutions

Evidence was sufficient to permit the jury to find defendant was guilty of kidnapping by practicing both fraud and intimidation to overcome the will of the victim and to secure control of her person. *S. v. Hudson,* 100.

Trial court in kidnapping prosecution did not err in charging jury on crimes of robbery and conspiracy where the crimes were part of a single transaction. *S. v. Cox,* 275.

LANDLORD AND TENANT

§ 19. Rent and Actions Therefor

Lessor has no claim for rental payments or value of improvements promised under a lease if the lease was orally rescinded prior to the date the first rental payment was due. *Investment Properties v. Allen,* 174.

LARCENY

§ 5. Presumptions

When it is established that a store or warehouse has been broken into and merchandise has been stolen therefrom, possession of the stolen articles by defendant soon after the theft raises a presumption that he is guilty both of breaking and entering and larceny. *S. v. Lewis,* 564.

§ 7. Sufficiency of Evidence and Nonsuit

Evidence was sufficient to support a finding that stolen tools found in a tool box in the trunk of a car in which defendant was sitting in the back seat were in the possession of defendant. *S. v. Lewis,* 564.

MASTER AND SERVANT

§ 59. Wilful Act of Third Person—Compensable Injuries

The deaths of two employees of a grocery store who were unexpectedly shot and killed by the femme decedent's husband while they were performing their duties on the premises of their employer did not result from injuries arising out of their employment. *Robbins v. Nicholson,* 234.

§ 79. Persons Entitled to Payment of Workmen's Compensation

Brothers and sisters of a deceased employee who are 18 years of age

MASTER AND SERVANT—Continued

or over and married are "next of kin" as defined in G.S. 97-40. *Stevenson v. Durham,* 300.

§ 108. Right to Unemployment Compensation

Claimant for unemployment compensation had burden of showing she was available for work by the greater weight of the evidence, not by clear, cogent and convincing evidence. *In re Thomas,* 598.

MORTGAGES AND DEEDS OF TRUST

§ 10. Conditions and Covenants

A default on which the foreclosure of a first lien deed of trust was based did not constitute "waste" within the meaning of the provisions of the second lien deed of trust. *In re Castillian Apts.,* 709.

§ 33. Foreclosure Sale—Disposition of Surplus

The holder of a note secured by a second lien deed of trust is not entitled to have the surplus arising from a foreclosure sale under the first lien deed of trust immediately disbursed to it for payment on the principal of the note. *In re Castillian Apts.,* 709.

MUNICIPAL CORPORATIONS

§ 2. Territorial Extent and Annexation

An appeal from order of superior court affirming an annexation ordinance was properly taken to the Court of Appeals. *Adams-Millis Corp. v. Kernersville,* 147.

The General Assembly did not delegate legislative authority in violation of the N. C. Constitution by a special act delegating to the commissioners of Princeville the discretionary right to decide whether to enlarge the corporate limits as specified in the act, and it was not necessary for the commissioners to follow procedures set forth in G.S. Ch. 160, Art. 36 to annex such area. *Plemmer v. Matthewson,* 722.

§ 30. Zoning Ordinances and Building Permits

A comprehensive zoning ordinance may be amended or changed when the action is authorized by the enabling statute and does not contravene constitutional limitations. *Allgood v. Town of Tarboro,* 430.

There is no merit in plaintiffs' contention that a proposed shopping center is "regional" in character and therefore beyond the scope and size permitted by a Community Shopping District zoning classification. *Ibid.*

The rezoning of a 25-acre tract from a Residential District to a Community Shopping District was not arbitrary and capricious and did not constitute spot zoning. *Ibid.*

A building permit was not rendered invalid by the fact the application listed the estimated cost of the building at $475,000 and the contractor named in the application had a license which limited it to construction not exceeding $300,000. *Ibid.*

Provision of a county zoning ordinance requiring that a fence be erected not less than 50 feet from the edge of any public road adjoining an automobile wrecking yard is unconstitutionally vague in failing to define the term "edge of any public road" and has no reasonable relation to the public health, morals or safety. *S. v. Vestal,* 517.

MUNICIPAL CORPORATIONS—Continued

Building permit creates no vested right to build contrary to the provisions of a subsequently enacted zoning ordinance unless the permittee has made substantial expenditures in good faith reliance on the permit. *Keiger v. Board of Adjustment,* 715.

Applicant's right to a special use permit for construction of a mobile home park, denied under an existing valid zoning ordinance which entitled him to it, may not be defeated by a purported amendment to the zoning ordinance which is void ab initio. *Ibid.*

When, at the time a builder obtains a permit, he has knowledge of a pending ordinance which would make the authorized construction a nonconforming use and thereafter hurriedly makes expenditures in an attempt to acquire a vested right before the law can be changed, he does not act in good faith and acquires no rights under the permit. *Ibid.*

NARCOTICS

§ 4. Sufficiency of Evidence and Nonsuit

One has possession of narcotics when he has both the power and intent to control its disposition or use. *S. v. Harvey,* 1; *S. v. Spencer,* 121.

Fact that narcotics are found on premises under control of the accused raises an inference of knowledge and possession. *S. v. Harvey,* 1.

Evidence was sufficient to support jury finding that marijuana was in defendant's possession where it placed defendant within three or four feet of marijuana lying on top of a freezer and in a jar in defendant's residence. *Ibid.*

State's evidence was sufficient to support jury finding that defendant constructively possessed 82.2 grams of marijuana found in a pig shed located approximately 20 yards from defendant's residence, and that defendant was guilty of feloniously growing marijuana in a cornfield some 75 yards behind his residence. *S. v. Spencer,* 121.

§ 4.5 Instructions

Trial court did not err in failing to submit misdemeanor of possession of less than one gram of marijuana. *S. v. Harvey,* 1.

§ 5. Verdict and Punishment

Defendant was not entitled to the beneflit of the statute reducing maximum punishment for first offense of possession of any quantity of marijuana to six months which was passed while defendant's appeal from conviction for possession of more than one gram of marijuana was pending. *S. v. Harvey,* 1; *S. v. McIntyre,* 304.

A defendant whose appeal from conviction of felonious possession of a hypodermic needle and syringe for the purpose of administering habit-forming drugs is pending on the effective date of the Controlled Substances Act, which reduced that offense to the grade of general misdemeanor, is not entitled to have his sentence reduced to a maximum of two years. *S. v. Kelly,* 618.

NEGLIGENCE

§ 52. Invitee

A nurse employed by the family of a nursing home patient was an invitee while in the nursing home. *Long v. Methodist Home,* 137.

NEGLIGENCE—Continued

§ 53. Duties and Liabilities to Invitees

An innkeeper's duty to use due care for the safety of his guests is nondelegable and liability cannot be avoided on the ground that its performance was entrusted to an independent contractor. *Page v. Sloan,* 697.

§ 57. Sufficiency of Evidence in Actions by Invitees

Evidence was insufficient to be submitted to jury on issue of negligence of nursing home operator in action to recover for personal injuries sustained by a private duty nurse in fall in defendant's nursing home. *Long v. Methodist Home,* 173.

PARENT AND CHILD

§ 1. Relationship Generally

In both criminal and civil actions in which the issue of paternity arises, the results of blood-grouping tests are admissible in evidence regardless of any presumptions with respect to paternity, and such evidence is competent to rebut any presumptions of paternity. *Wright v. Wright,* 159.

Husband was entitled to an order for blood-grouping tests where the wife alleged and the husband denied that he was the father of a child born to the wife during the subsistence of the marriage. *Ibid.*

In an action in which the issues of paternity and adultery are raised, evidence of the results of blood-grouping tests excluding the husband as the father of a child born during the subsistence of the marriage are competent on both the issue of paternity and the issue of adultery. *Ibid.*

§ 2. Liability of One for Injury or Death of Other

The administrator of an unemancipated minor child may not bring an action against the administrator of its father for damages for the wrongful death of such child caused by the ordinary negligence of the deceased father in the operation of an automobile. *Skinner v. Whitley,* 476.

PLEADINGS

§ 32. Amendment of Pleadings

When one superior court judge, in the exercise of his discretion, has made an order denying a motion to amend, absent changed conditions, another superior court judge may not thereafter allow the motion. *Calloway v. Motor Co.,* 496.

§ 33. Scope of Amendment

In an action to recover for injuiries received when a golf cart plaintiff had rented from defendants overturned, the pleadings were amended by implied consent to conform to the evidence and broaden the issue of negligence so the jury could consider whether defendants breached a duty by furnishing a golf cart which they knew had no brakes on it when going backwards. *Roberts v. Memorial Park,* 48.

PRINCIPAL AND AGENT

§ 4. Proof of Agency

Plaintiffs' evidence was sufficient for the jury on the question of whether defendant's brother was the agent of defendant in terminating

PRINCIPAL AND AGENT—Continued

a lease of land owned by defendant and in promising to pay for grading work performed on the land if the lease were terminated before a certain date. *Investment Properties v. Allen,* 174.

Evidence that defendant's brother negotiated a lease of defendant's land to another corporation after the lease to plaintiff was allegedly rescinded was competent on the question of the agency of defendant's brother in transactions concerning the lease with plaintiff. *Ibid.*

RAILROADS

§ 3. Extent of Easement for Right of Way

A railway can acquire by purchase a fee in the land over which its tracks run; however, when a railway obtains such land in condemnation proceedings it procures merely an easement for railroad purposes which does not deprive the owner of the fee or its use for purposes not inconsistent with its use for railroad purposes. *Highway Comm. v. Equipment Co.,* 461.

RAPE

§ 5. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient to support conviction of two defendants for crime of rape as principals in the second degree. *S. v. Dawson,* 645.

§ 6. Submission of Lesser Degrees

Trial court in rape prosecution did not err in failing to submit lesser included offenses to the jury. *S. v. Dawson,* 645.

§ 7. Verdict and Judgment

Pursuant to mandate of U. S. Supreme Court vacating sentence of death, case is remanded to superior court for imposition of sentence of life imprisonment. *S. v. Chance,* 746.

ROBBERY

§ 4. Sufficiency of Evidence and Nonsuit

Evidence that defendant had a pistol within easy reach while he took prosecutrix' money held sufficient for the jury in a prosecution for robbery with a firearm. *S. v. Harris,* 542.

RULES OF CIVIL PROCEDURE

§ 9. Pleading Special Matters

Under Rule 9(b), facts relied upon to establish fraud, duress or mistake must be alleged. *Mangum v. Surles,* 91.

§ 15. Amended Pleadings

Under Rule 15(b) the pleadings are deemed amended to conform to the evidence introduced outside the scope of the pleadings when the evidence is not objected to on the ground that it is not within the issues raised by the pleadings. *Mangum v. Surles,* 91; *Roberts v. Memorial Park,* 48.

RULES OF CIVIL PROCEDURE—Continued

Amendment by implied consent may change the legal theory of the cause of action so long as the opposing party has not been prejudiced in presenting his case; i.e., where he had a fair opportunity to defend his case. *Roberts v. Memorial Park,* 48.

§ 33. Interrogatories

Rules of Civil Procedure do not require the husband or wife in actions inter se to answer interrogatories relating to acts of adultery or conduct from which adultery might be implied during the subsistence of their marriage. *Wright v. Wright,* 159.

§ 38. Jury Trial of Right

Where a proceeding was commenced prior to the effective date of the new Rules of Civil Procedure, but the last pleading was filed after the new Rules had become effective, both parties were precluded from demanding a jury trial ten days after the last pleading was filed. *Schoolfield v. Collins,* 604.

§ 41. Dismissal of Actions

Defendant insurer is estopped to attack a judgment in a former action giving plaintiff the right to commence a new action on a fire policy after the expiration of the one-year limitation period where the insurer failed to seek appellate review of the judgment in the former action. *Gower v. Insurance Co.,* 577.

§ 50. Directed Verdict and Judgment NOV

The court may direct a verdict against the party having the burden of proof when there is no evidence in his favor. *Roberts v. Memorial Park,* 48.

Denial of a motion for a directed verdict is not a bar to a motion for judgment n.o.v. *Investment Properties v. Allen,* 174.

§ 56. Summary Judgment

A properly verified pleading which meets all requirements for affidavits may be considered as an affidavit in support of or in opposition to a motion for summary judgment. *Schoolfield v. Collins,* 604.

On motion for summary judgment, moving party has burden of showing that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. *Page v. Sloan,* 697.

A verified complaint may be treated as an affidavit to defeat motion for summary judgment when complaint is made on personal knowledge, sets forth facts as would be admissible in evidence and shows affirmatively that affiant is competent to testify as to matters stated therein. *Ibid.*

Summary judgment is appropriate only in exceptional negligence cases. *Ibid.*

§ 84. Forms

Rule 84 requires specific allegations of acts of negligence. *Roberts v. Memorial Park,* 48.

SALES

§ 17. Sufficiency of Evidence in Action for Breach of Warranty

The distributor of a pre-emergent herbicide was liable for damages to plaintiff's squash crop caused by use of the herbicide, but the manufacturer of the herbicide was not liable for such damages. *Wilson v. Chemical Co.*, 506.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

Police officer did not need a search warrant to seize marijuana seed lying in plain view on a freezer top or marijuana which was inside a plastic jar which he picked up to use as a container for the seized marijuana seed. *S. v. Harvey*, 1.

If there is probable cause to search an automobile the officer may either seize and hold the vehicle before presenting the probable cause issue to a magistrate, or he may carry out an immediate search without a warrant. *State v. Ratliff*, 397.

Right to search automobile without warrant does not depend on the right to arrest but depends on the existence of probable cause to make the search. *Ibid.*

An officer had probable cause to believe that defendant's car contained contraband of some sort, and a search of the car without a warrant was lawful. *Ibid.*

Officers' entry and seizure of "plain view" items from home of a suspected felon when there are reasonable grounds to believe the felon is concealed therein are not illegal after admittance has been demanded and there has been no response. *S. v. Hoffman*, 727.

§ 3. Requisites and Validity of Search Warrant

Officer's affidavit for a search warrant based on confidential information complied with statutory and constitutional requirements. *S. v. Spencer*, 121.

Constitutional guaranty against unreasonable search and seizure did not apply to a cornfield in which marijuana was growing approximately 75 yards from defendant's residence. *Ibid.*

TAXATION

§ 9.5. Taxes on Imports and Exports

When goods are needed, imported and irrevocably committed to supply and are actually being used to supply the daily requirements of a manufacturer, they are being used for "current operational needs" so as to lose their character as imports and their immunity from state taxation. *In re Publishing Co.*, 210.

A four-to-six week supply of newsprint ordinarily kept on hand by a newspaper publishing company, and on hand on the taxing date, including imported newsprint, constituted the "current operational needs" of the publishing company and was subject to ad valorem taxation. *Ibid.*

§ 24. Situs of Property

The tax situs of vehicles used by a trucking company in interstate commerce was the township in which the company has its principal office

TAXATION—Continued

in the State, not the township in which a lot owned by the company and designated by it as a storage place for such vehicles is located. *In re Trucking Co.*, 242.

Trucking company was taxable for the year 1970 in the county wherein its principal office was located upon the full value of its tractors and trailers operated in interstate commerce in and out of this State. *In re Trucking Co.*, 375.

The State Board of Assessment erred in allocating the value of all of a trucking company's tractors between N. C. and other states, and in using as the allocation factor the ratio of miles traveled in N. C. to the total miles traveled by all of the company's interstate vehicles. *Ibid.*

§ 25. Ad Valorem Taxes

Where appeal from an annexation ordinance was pending in the Court of Appeals on the effective date of annexation specified in the ordinance, 15 May 1969, and the decision of the Court of Appeals was certified in September 1969, property within the area being annexed was not subject to municipal ad valorem taxes for the fiscal year beginning 1 July 1969. *Adams-Millis Corp. v. Kernersville*, 147.

A four-to-six week supply of newsprint ordinarily kept on hand by a newspaper publishing company, and on hand on the taxing date, including imported newsprint, constituted the "current operational needs" of the publishing company and was subject to ad valorem taxation. *In re Publishing Co.*, 210.

Taxpayer's gross understatement of the value of its inventories for each of the years 1963-68 constituted a failure to list a portion of its inventories for those years, and the board of county commissioners was authorized to assess taxes with penalties for each of those years on the difference between the amounts reported on the tax forms as inventory and the value of the inventory shown by the taxpayer's records. *In re Tire Service*, 293.

A County Board of Equalization and Review had no authority to change a tax listing from one township to another after the time limitation set by statute for completion of its duties had expired. *In re Trucking Co.*, 242.

The board of county commissioners had no authority to change a tax listing from one township to another as "discovered property." *Ibid.*

Appraisal testimony based on information as to price of new trailers obtained by the appraisers from a trailer manufacturer and a trailer dealer was incompetent as hearsay. *In re Trucking Co.*, 375.

The State Board of Assessment erred in accepting a trucking company's book value of its tractors and trailers as the "true value in money" of such properties. *Ibid.*

Truck Blue Book may be used in determining valuation of trucks for ad valorem taxation. *Ibid.*

The State Board of Assessment did not err in increasing the valuation of tobacco allotments in Nash County from 40 cents per pound to 80 cents per pound and the valuation of peanut allotments from $150 per acre to $300 per acre. *In re King*, 533.

Superior Court properly denied taxpayer's motion for an allowance of their attorneys' fees as part of the costs of their successful action be-

VENUE

§ 2. Residence of Parties

A national bank established in this State is subject to suit in a State court in a county in which it maintains a branch bank in an action arising out of its banking activities in such branch. *Security Mills v. Trust Co.*, 525.

WILLS

§ 2. Contracts to Devise or Bequeath

A written contract executed by respondent, her mother and brother, whereby real property in which the three parties had an interest was to go to respondent upon prior death of her mother and brother was a contract to devise, and, upon the prior death of respondent's brother without devising his interest in the property to respondent, the court will fasten a trust on such interest in favor of respondent. *Schoolfield v. Collins*, 604.

§ 34. Fees, Life Estates, and Remainders

An absolute gift was made, and no trust was created, by a bequest of personal property to "the Young Women's Christian Association of Asheville, North Carolina, to be used by it exclusively for the upkeep and maintenance of Moorhead House." *YWCA v. Morgan*, 485.

The statutory presumption that a devise is in fee applies to the disposition by will of both real and personal property. *Ibid.*

WITNESSES

§ 1. Competency of Witness

Trial court in a homicide prosecution properly allowed the State to present a witness whose name was not on a list of State's witnesses furnished to defendant's counsel prior to selection of the jury. *S. v. Anderson*, 261.

WORD AND PHRASE INDEX

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