NORTH CAROLINA REPORTS

VOLUME 282

SUPREME COURT OF NORTH CAROLINA

FALL TERM 1972

SPRING TERM 1973

RALEIGH
1973

CITE THIS VOLUME

282 N.C.

TABLE OF CONTENTS

THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice

WILLIAM H. BOBBITT

Associate Justices

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

Emergency Justices

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

Clerk

ADRIAN J. NEWTON

Marshal and Librarian

RAYMOND M. TAYLOR

ADMINISTRATIVE OFFICE OF THE COURTS

Director

BERT M. MONTAGUE

Assistant Director and Administrative Assistant to the Chief Justice

FRANK W. BULLOCK, JR.

APPELLATE DIVISION REPORTER

RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTER

SHERRY L. MCMANUS

---

* Deceased 24 April 1973.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

First Division

DISTRICT	JUDGES	ADDRESS
1	WALTER W. COHOON	Elizabeth City
2	ELBERT S. PEEL, JR.	Williamston
3	ROBERT D. ROUSE, JR.	Farmville
4	**RUSSELL J. LANIER[1]**	**Beulaville**
5	BRADFORD TILLERY	Wilmington
	JOSHUA S. JAMES	Wilmington
6	**PERRY MARTIN**	**Rich Square**
7	GEORGE M. FOUNTAIN	Tarboro
8	ALBERT W. COWPER	Kinston

Second Division

9	HAMILTON H. HOBGOOD	Louisburg
10	**WILLIAM Y. BICKETT[2]**	Raleigh
	JAMES H. POU BAILEY	**Raleigh**
11	HARRY E. CANADAY	Smithfield
12	E. MAURICE BRASWELL	Fayetteville
	COY E. BREWER	Fayetteville
13	EDWARD B. CLARK	Elizabethtown
14	CLARENCE W. HALL	**Durham**
15	**THOMAS D. COOPER, JR.[3]**	Burlington
16	HENRY A. MCKINNON, JR.	**Lumberton**

Third Division

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

Fourth Division

DISTRICT	JUDGES	ADDRESS
24	W. E. ANGLIN	Burnsville
25	SAM J. ERVIN III	Morganton
26	FRED H. HASTY	Charlotte
	WILLIAM T. GRIST	Charlotte
	FRANK W. SNEPP, JR.	Charlotte
27	B. T. FALLS, JR.	Shelby
	JOHN R. FRIDAY	Lincolnton
28	W. K. McLEAN	Asheville
	HARRY C. MARTIN	Asheville
29	J. W. JACKSON	Hendersonville
30	LACY H. THORNBURG	Webster

SPECIAL JUDGES

J. WILLIAM COPELAND	Murfreesboro
ROBERT M. MARTIN	High Point
A. PILSTON GODWIN	Raleigh
MARVIN K. BLOUNT, JR.	Greenville
JOHN WEBB	Wilson
SAMMIE CHESS	High Point
DENNIS J. WINNER	Asheville

EMERGENCY JUDGES

W. H. S. BURGWYN	Woodland
ZEB NETTLES	Asheville
WALTER J. BONE	Nashville
F. DONALD PHILLIPS	Rockingham
GEORGE B. PATTON	Franklin
CHESTER R. MORRIS	Coinjock
FRANCIS O. CLARKSON	Charlotte
P. C. FRONEBERGER	Gastonia
JOSEPH W. PARKER	Windsor
ROBERT M. GAMBILL	North Wilkesboro

[1]Elected 7 November 1972. Took office 1 January 1973.

[2]Retired and appointed Emergency Judge 2 March 1973. Succeeded by Donald L. Smith, Raleigh, 2 March 1973.

[3]Resigned 28 December 1972. Succeeded by D. Marsh McLelland, Burlington, 28 December 1972.

DISTRICT COURT DIVISION

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

DISTRICT	JUDGES	ADDRESS
18	E. D. KUYKENDALL, JR. (Chief)	Greensboro
	BYRON HAWORTH	High Point
	ELRETA M. ALEXANDER	Greensboro
	B. GORDON GENTRY	Greensboro
	KENNETH M. CARRINGTON	Greensboro
	EDWARD K. WASHINGTON	Jamestown
	WALTER E. CLARK, JR.	Greensboro
19	HAL HAMMER WALKER (Chief)	Asheboro
	L. T. HAMMOND, JR.	Asheboro
	ROBERT L. WARREN	Concord
	FRANK M. MONTGOMERY	Salisbury
	ODELL SAPP	Salisbury
20	F. FETZER MILLS (Chief)	Wadesboro
	EDWARD E. CRUTCHFIELD	Albemarle
	WALTER M. LAMPLEY	Rockingham
	A. A. WEBB	Rockingham
21	ABNER ALEXANDER (Chief)	Winston-Salem
	BUFORD T. HENDERSON	Winston-Salem
	JOHN CLIFFORD	Winston-Salem
	A. LINCOLN SHERK	Winston-Salem
	ROBERT K. LEONARD	Winston-Salem
22	HUBERT E. OLIVE, JR. (Chief)	Lexington
	L. ROY HUGHES	Thomasville
	PRESTON CORNELIUS	Troutman
	C. H. DEARMAN	Statesville
23	RALPH DAVIS (Chief)	North Wilkesboro
	SAMUEL L. OSBORNE	Wilkesboro
24	J. RAY BRASWELL (Chief)	Newland
	BRUCE B. BRIGGS	Mars Hill
25	JOE H. EVANS (Chief)[2]	Hickory
	GENE SIGMON[3]	Newton
	WHEELER DALE	Morganton
	JOE K. MATHESON	Hickory
26	WILLIAM H. ABERNATHY (Chief)	Charlotte
	KENNETH A. GRIFFIN	Charlotte
	J. EDWARD STUKES	Charlotte
	P. B. BEACHUM, JR.	Charlotte
	CLIFTON JOHNSON	Charlotte
	WILLIAM G. ROBINSON	Charlotte
	LARRY THOMAS BLACK	Charlotte
27	LEWIS BULWINKLE (Chief)	Gastonia
	OSCAR F. MASON, JR.	Gastonia
	JOE F. MULL[4]	Shelby
	ROBERT W. KIRBY	Gastonia
	J. RALPH PHILLIPS	Gastonia
28	CARY WALTER ALLEN (Chief)	Asheville
	ZEBULON WEAVER, JR.	Asheville
	JAMES O. ISRAEL, JR.	Candler
	WILLIAM MARION STYLES[5]	Asheville
29	ROBERT T. GASH (Chief)	Brevard
	WADE B. MATHENY	Forest City
	LADSON F. HART	Brevard
30	F. E. ALLEY, JR. (Chief)[6]	Waynesville
	ROBERT J. LEATHERWOOD III[7]	Bryson City

[1]Appointed 30 December 1972 to succeed D. Marsh McLelland.
[2]Resigned 5 May 1973.
[3]Resigned 28 February 1973. Succeeded by Randy Dean Duncan, Hickory, 18 May 1973.
[4]Retired 31 December 1972. Succeeded by Arnold Max Harris, Ellenboro, 4 January 1973.
[5]Appointed 19 December 1972.
[6]Resigned 7 February 1973. Succeeded by J. Charles McDarris, Waynesville, 22 March 1973.
[7]Appointed Chief Judge 8 February 1973.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

ROBERT MORGAN

Deputy Attorneys General

HARRY W. MCGALLIARD
JEAN A. BENOY
JAMES F. BULLOCK
ROBERT BRUCE WHITE, JR.
ANDREW A. VANORE, JR.

Special Counsel

RALPH MOODY

Assistant Attorneys General

PARKS H. ICENHOUR
JAMES B. RICHMOND
WILLIAM W. MELVIN
JAMES L. BLACKBURN
MILLARD R. RICH, JR.
EDWARD L. EATMAN, JR.
HENRY T. ROSSER
RICHARD N. LEAGUE
MYRON C. BANKS
RUSSELL G. WALKER, JR.
I. BEVERLY LAKE, JR.
ROY A. GILES, JR.
SIDNEY S. EAGLES, JR.
HOWARD P. SATISKY
ROBERT S. WEATHERS
JAMES E. MAGNER, JR.
T. BUIE COSTEN
H. AL COLE, JR.
CLAUDE W. HARRIS
GUY A. HAMLIN
WILLIAM B. RAY
RAFFORD E. JONES
WILLIAM F. BRILEY
WILLIAM F. O'CONNELL
THOMAS B. WOOD
RAYMOND W. DEW, JR.
CHARLES M. HENSEY
DALE P. JOHNSON
ROBERT G. WEBB
RICHARD B. CONELY
JACOB L. SAFRON
THOMAS E. KANE
EUGENE HAFER
CHARLES A. LLOYD
EUGENE A. SMITH
WALTER E. RICKS III
LESTER V. CHALMERS, JR.
ALFRED N. SALLEY
DONALD A. DAVIS

SOLICITORS OF SUPERIOR COURT

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

CASES REPORTED

PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

PETITIONS FOR CERTIORARI

PETITIONS TO REHEAR

GENERAL STATUTES CITED AND CONSTRUED

G.S.	
95-81	Beasley v. Food Fair, 530
95-83	Beasley v. Food Fair, 530
105-283	Electric Membership Corp. v. Alexander, 402
105-294, 295	In re Valuation, 71
105-327(g)(2)	In re Valuation, 71
105-329	In re Valuation, 71
105-381	Reeves Brothers, Inc. v. Town of Rutherfordton, 559
115-76(1)	Lutz v. Board of Education, 208
115-129	Lutz v. Board of Education, 208
143-299.1	Barney v. Highway Comm., 278
153-77	Lutz v. Board of Education, 208
153-107	Lutz v. Board of Education, 208
160-191.1	Orange County v. Heath, 292
160A-485	Rich v. City of Goldsboro, 383

RULES OF CIVIL PROCEDURE

Rule No.	
1	In re Valuation, 71
8(c)	Rose v. Materials Co., 643
26(b)	Marks v. Thompson, 174
30(b)	Marks v. Thompson, 174
30(d)	Marks v. Thompson, 174
38	Branch v. Branch, 133
41(b)	Helms v. Rea, 610
50	Hoots v. Calaway, 477
52(a)	Helms v. Rea, 610
56	McNair v. Boyette, 230
65	Orange County v. Heath, 292
65(c)	Orange County v. Heath, 292

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

Art. I, § 1	Marks v. Thompson, 174
Art. I, § 16	State v. Waddell, 431
Art. I, § 19	Marks v. Thompson, 174
	In re Hospital, 542
Art. I, § 32	In re Hospital, 542
Art. I, § 34	In re Hospital, 542

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

Art. I, § 10	State v. Waddell, 431
Amendment VI	In re Walker, 28
Amendment XIV	In re Walker, 28

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL SESSION 1972

STATE OF NORTH CAROLINA v. JAMES E. JOHNSON, JR., ALBERT S. KILLINGSWORTH AND WIFE, ELIZABETH E. KILLINGSWORTH, HUGH M. MORTON AND WIFE, JULIA T. MORTON AND SOUTHERN NATIONAL BANK OF NORTH CAROLINA

No. 55

(Filed 11 October 1972)

1. **Eminent Domain § 6— fair market value — uses of the property**

In determining fair market value in condemnation proceedings, the essential inquiry is, "what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted—that is to say, what is its worth from its availability for all valuable uses?"

2. **Eminent Domain § 6— value of land adaptable to subdivision**

In appraising an undeveloped tract of land which is adaptable to subdivision, the question is not what the tract might be worth if subdivided and sold as improved lots but what it was worth in the open market in its existing condition on the day of the taking.

3. **Eminent Domain § 6— maps showing proposed subdivision — illustrative purposes — prejudicial error**

In a proceeding to determine the value of 268.5 acres of land condemned by the State adjacent to Confederate Fort Fisher, the trial court committed prejudicial error in the admission for illustrative purposes of two maps showing a proposed subdivision of the condemned property for resort residential use and proposed motel, marina and office sites, where the State did not contend that the land was not adaptable to resort residential use, and the trial court failed to give the jury positive instructions that it could not value the land on a per-lot basis and an explanation of why it would be improper to do so.

4. **Eminent Domain § 6— undeveloped land — conditional sale of proposed subdivision lots — evidence of value of condemned land**

In a proceeding to determine the value of undeveloped land condemned by the State, the trial court committed prejudicial error in the admission of evidence of conditional sales by respondents of eight acres of the land condemned, embracing twenty lots in a proposed subdivision of the land, for $160,000, the deeds and purchase money having been placed in escrow to be delivered only when the proposed subdivision was completed, since the transactions do not disclose what the buyers would have been willing to pay for the property as it was on the date of the purported sales.

5. **Eminent Domain § 6— value of undeveloped land — sales price of other developed land**

In this proceeding to determine the value of undeveloped land condemned by the State adjacent to Confederate Fort Fisher, the trial court erred in permitting respondents, on cross-examination of a State's expert witness, to elicit testimony that lots fronting 200 feet on the ocean and extending back 100 feet on the developed portion of Shell Island had been sold for $15,000, as there was no evidence which would make values on Shell Island evidence of the value of the condemned property, and the only purpose in eliciting the testimony was to induce thereby a liberal award.

6. **Eminent Domain § 6— value of condemned land — sales price of similar land**

The price paid at voluntary sales of land, similar in nature, location and condition to the condemnee's land, is admissible as independent evidence of the value of the land taken if the prior sale was not too remote in time; whether two properties are sufficiently similar to admit evidence of the purchase price of one as a guide to the value of the other is a question to be determined by the trial judge in the exercise of a sound discretion.

7. **Eminent Domain § 6— value of condemned property — condemnor's purchase price for other property for same project — inadmissibility**

Evidence of the price paid by the condemnor in purchasing neighboring property for the same project is inadmissible to prove the value of the condemned land, no matter how similar the lands may be, as the sale to a prospective condemnor is highly unlikely to be a fair test of market value.

8. **Eminent Domain § 6— value of condemned property — evidence of proposed uses**

The trial court in a condemnation proceeding committed prejudicial error in permitting one of the owners to testify that "at a future date" the owners "proposed" to construct a marina, a motel and condominiums on the condemned property.

9. **Eminent Domain § 6— value of condemned property — evidence that streets had been rough graded — prevention of subdivision**

In a proceeding to determine the value of 268.5 acres of land

condemned by the State, it was competent for the owners to show that, on the day of the taking, streets had been rough graded and surveyor's control stakes placed on 28.5 acres as initial steps in laying out a subdivision on that portion of the condemned property, since (1) the evidence tended to show that such area was adapted to use as a residential subdivision, and (2) the grading work was a part of the overall condition of the land when taken and one factor to be considered in determining the value which that area had at that time for development as a residential subdivision; however, the value of the property was not augumented because the condemnation proceeding prevented the owners from carrying out their plans to develop a subdivision.

10. Eminent Domain § 5— amount of compensation — character of landowner

The character of a landowner is irrelevant to his right to receive just compensation when his land is taken by the State.

11. Witnesses § 5— character evidence for corroborative purposes

Until the credibility of a party who has testified in his own behalf has been impeached by imputations of bias, inconsistencies in his statements, or otherwise, his good character may not be proved to corroborate his testimony.

12. Eminent Domain § 7— condemnation proceeding — instructions as to character of owners — error

The trial judge in a condemnation proceeding in effect made himself a character witness for the owners and thereby bolstered the credibility of the testimony of one of the owners when he instructed the jury that the owners appeared to be "fine high quality citizens, good people and they are entitled to just compensation."

13. Eminent Domain § 7— condemnation proceeding by the State — instructions on shortcomings on part of State — error

In a condemnation proceeding instituted by the State, the trial court erred in instructing the jury that it behooves all citizens and governmental agencies to strive constantly to overcome any shortcomings on the part of the State, as such instruction carried the implication that the State had not dealt fairly with respondents and suggested that the jury should right the wrong.

14. Costs § 4— expert witness fees — necessity that witnesses be subpoenaed

The trial court was without authority to allow expert fees to respondents' witnesses who testified without having been subpoenaed or to tax the State with the costs of their attendance. G.S. 7A-314(a) and (d).

Justice HIGGINS concurs in result.

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

APPEAL by the State from *James, J.*, 8 November 1971 Session of NEW HANOVER, transferred from the Court of Appeals for initial appellate review by the Supreme Court pursuant to G.S. 7A-31(a) (1969); docketed and argued as Case No. 127 at the Spring Term 1972.

This proceeding was instituted by the State on 28 June 1968 under N. C. Gen. Stat., Ch. 146, Art. 6 (1964 and Supp. 1971), in the manner prescribed by Chapter 136, Art. 9, to condemn 268.5 acres of land owned by respondents Johnson and Killingsworth. The purpose of the condemnation is to preserve the remains and relics of Confederate Fort Fisher and the approaches thereto.

The property condemned is shown on a map entitled "Map Showing a Portion of Fort Fisher," introduced in evidence as State's Exhibit A. This map shows the land to be a rough Y in shape, the base of the Y being the northern end of the tract and the western prong about one-half as long as the eastern. The northern boundary of the tract is a 667-foot line which was the southern boundary of an 11.51-acre tract purchased by the State in 1966 from Hugh Morton. (On the Morton tract is located over half of the small area known as Battle Acre. This area, which was within the ell of the old fort and the site of Colonel William Lamb's headquarters, is marked by a monument. The remains of the sea face of Fort Fisher extend southward about one mile from the angle with the land face near Battle Acre.) U. S. Highway No. 421 crosses the base of the Y, cutting off a triangle about 200 x 200 x 100 feet from the extreme northwestern corner of the property. The eastern line of the property runs approximately 11,000 feet along the Atlantic Ocean. The width of the eastern prong of the Y at its south terminus is approximately 550 feet. Between the east and west prongs are marshlands and Stillwater Bay. The inside of the Y, an irregular V in shape, is approximately 12,600 feet from the southwestern terminus of the eastern prong to the southeastern terminus of the western prong.

The last 600 feet of the south end of the west prong varies from 100 to 200 feet in width. At the base of this strip the prong is approximately 555 feet wide. The map shows the western line of the property, the right side of the Y, to be 5,900 feet in length. This line coincides with the "U. S. Government Taking Line," a line established by the federal government as

"a protection line in case of explosion" at its Sunny Point Ammunition Depot. The described property all lies above the mean high water lines of the sound and the ocean as shown on Exhibit A. Generally the elevation of the land is 5-6 feet above mean high water, the northern portion being higher than the southern.

On 11 May 1970, Judge Albert W. Cowper, pursuant to G.S. 136-108 (1964), determined the conflicting claims to the property and all other issues raised by the pleadings except the amount which the State should pay the owners as just compensation for the taking. Upon appeal, his judgment was modified and affirmed by this Court in *State v. Johnson,* 278 N.C. 126, 179 S.E. 2d 371 (1971). Following certification of that decision, which settled the southern boundary of the east prong of the Y as the line along which New Inlet had closed in 1933, the parties stipulated the location of this line to be the New Inlet line shown on State's Exhibit A. Illustrative map No. 1, drawn from Exhibit A and inserted herein, shows the boundaries of the property taken.

At the time the State filed the declaration of taking it deposited in court the sum of $237,500.00 as its estimate of just compensation for the 268.5 acres condemned. At the trial before Judge James the sole issue was the fair market value of this land on 28 June 1968, the date of the taking. The jury answered the issue, "$1,262,500.00."

Respondents' evidence of value ranged from one appraiser's low of $1,762,000.00 to respondent Killingsworth's high estimate of $4,027,500.00. The State's evidence of value ranged from a low of $225,000.00 to a high of $300,000.00. Respondents had purchased the 268.5 acres in suit on 5 July 1967 from Hugh Morton. As a witness for the State, Mr. Morton testified that he sold the property to respondents for $225,000.00 after it had been advertised for about five months in the State's major newspapers and also in the Wall Street Journal.

In addition to opinion evidence as to value, respondents offered evidence tending to show:

After purchasing the property respondents employed land planners and engineers to advise them with reference to the highest and best use, which was determined to be a residential development along the ocean and sound. Over the State's ob-

jection, respondent Killingsworth testified that, as a result of this advice, respondents planned at some future time (1) to use eight acres at the north end of the property for a motel; and (2) as an adjunct to residential development, to construct a marina on the south end of the western prong of the Y.

In March 1968 respondents employed the engineering firm of Moorman and Little, Inc., to subdivide 28.5 acres in the northeast portion of the property for a residential development. That firm worked on the project from then until 28 June 1968, when all work stopped. On the date of the taking, Moorman & Little had "developed and computed" for this acreage the lot plan shown on the map denominated "Section One, Ramsgate at Fort Fisher" (Section One). Over the State's objection, this map was introduced in evidence as Respondents' Exhibit B to illustrate the testimony of certain witnesses. It showed 79 lots, which fronted on six east-west streets stemming from two connecting north-south streets. These streets constituted one continuous thoroughfare on the western boundary of Section One. Each of the six east-west streets ended in a circle. (See Illustrative Maps 2 and 3.)

On 6 June 1968, approximately three weeks before the taking, respondents executed to Michel DeLoach, a first cousin of respondent Killingsworth, a deed for about four acres of the 28.5-acre tract. Although it contained no reference to the subdivision or to the map of it, the description in the deed actually covered the ten lots comprising the northeast corner of Section One. The consideration for this deed was $80,000.00. However, both money and deed were deposited in escrow with the Wachovia Bank & Trust Company at Wilmington to be delivered if, and when, respondents completed the subdivision in accordance with the engineering plans for its development.

At the same time—upon the same conditions, for the same consideration, and in the same manner—respondents executed a deed for an additional four acres of Section One to Del-Cook Lumber Company (Del-Cook), a corporation in which DeLoach was a minority stockholder. The metes and bounds description in this deed covered the ten lots at the southeast corner of Section One, but it likewise made no reference to the subdivision or map.

Prior to the execution of these two deeds Killingsworth had received a telegram from the State's Property Officer asking

respondents to stop all grading upon the land. At the time the deeds were executed respondents, DeLoach and Del-Cook, all had notice of the State's interest in acquiring the property in suit. When the institution of this condemnation proceeding made compliance with the conditions of the sale impossible, the bank returned the money to DeLoach and Del-Cook and the deeds to respondents.

The court found that these two "sales transactions" took place at arm's length in the ordinary course of business and, over the State's objection, admitted the testimony of respondent Killingsworth, detailed above, with reference thereto.

On 28 June 1968, the date of the taking, only the improvements planned for Section One had been started, and they were incomplete. No lots had been staked out on the ground, for property irons could not be placed until the last of the grading had been completed. However, streets had been rough graded and control stakes put in. Although the streets were ready for marl, the stone base for asphalt, no marl had been placed on the streets. Drainage ditches and culverts were still to be constructed. No drainage pipes had been put in the ground, but water laterals across the streets were in. The main drainage project, a canal approximately six feet deep and 3,000 feet long, which was to run along the western boundary of the Y abutting the U. S. Government taking line, had not been commenced. The underground electrical system had not been installed. Because soil conditions were suitable for septic tanks there was no sewage disposal plan. Moorman testified that a sewage plan "was not necessary in the first phase." A well site of approximately 200 square feet had been selected, but no well had been constructed.

On 5 June 1968 the Wilmington-New Hanover Planning Board gave conditional preliminary approval to the layout of this subdivision. This approval authorized the construction of streets, the installation of water systems and other utilities, but until the county commissioners finally approved the plans for the subdivision no sales could be made with reference to the map, Exhibit B. This final approval was dependent upon respondents meeting the requirements of the zoning ordinance and of the Board of Health. Final approval had not been obtained at the time of the taking.

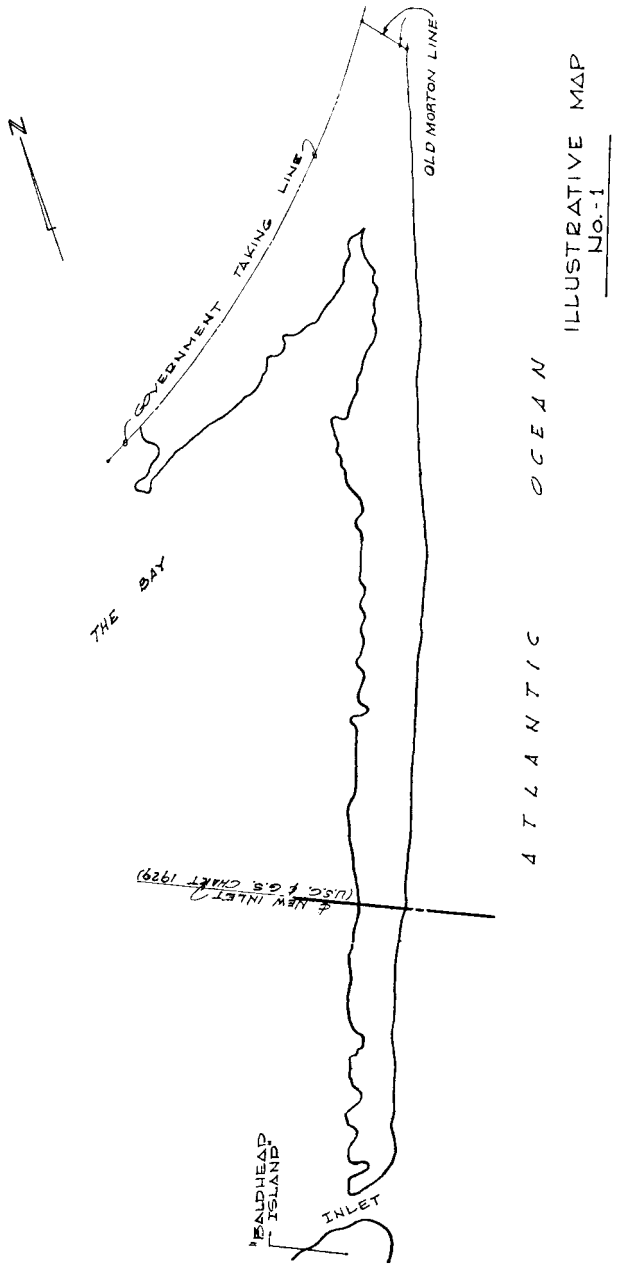
In addition to Section One, Moorman & Little had put on paper a preliminary plan for Section Two of Ramsgate. Over the State's objection, to illustrate the testimony of their witness Moorman, respondents were permitted to introduce in evidence a map, identified as respondents' Exhibit C. This map incorporated State's Exhibit A and superimposed upon it the 79 lots of Section One as shown by Exhibit B. Also superimposed upon Exhibit C in dotted lines was the preliminary plan for Section Two. This proposed subdivision of 106 lots was shown as adjoining Section One on the west and extending southwardly across the western prong of the Y. Exhibit C was placed on the wall and, in the course of his testimony, Moorman was allowed to point out Section Two to the jury. Later it was used to illustrate the testimony of respondents' witnesses Taylor, Kepley, and Stout.

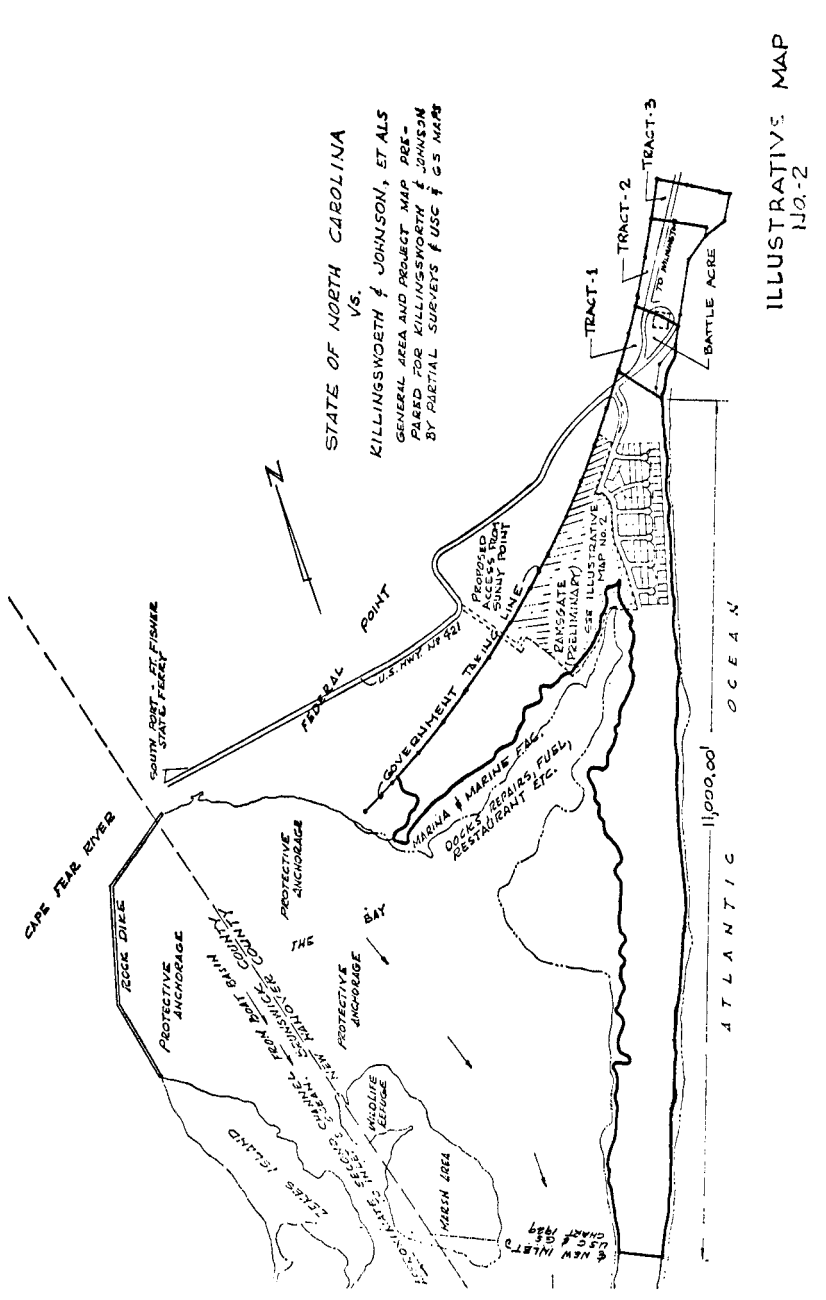
Illustrative Map No. 2, inserted herein, is drawn from respondents' Exhibit C. It shows the details essential to an understanding of that exhibit. Illustrative Map No. 3 shows on a larger scale than was possible on Map No. 2 that portion of Exhibit C which incorporated Section One (respondents' Exhibit B) and proposed Section Two (Ramsgate Preliminary).

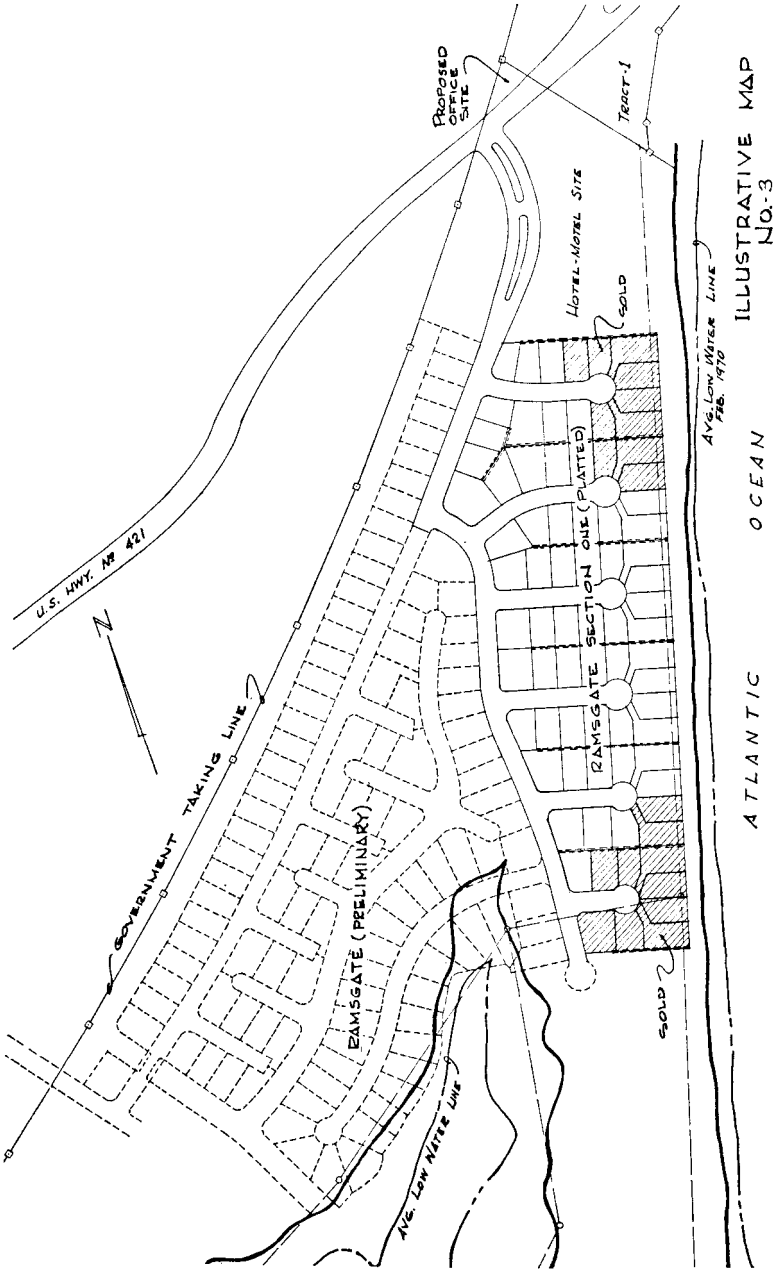
In addition to Sections One and Two, Exhibit C also showed three separate tracts of land adjacent to the 268.5 acres on the north. These tracts, which the State had previously acquired by purchase, extended the stem of the Y northwardly along the Atlantic Ocean.

Tract No. 1, which immediately adjoins the land in suit, was purchased by the State from Morton on 18 January 1966. It contains 7.513 acres exclusive of the 3.997 embraced within the highway right-of-way and the portion of Battle Acre located thereon. Tract No. 2, which adjoins Tract No. 1, was purchased from Bessie Orrell on 5 July 1963. It contains 11.215 acres exclusive of the 4.077 acres covered by the right-of-way and the remaining portion of Battle Acre. Tract No. 3, which adjoins Tract No. 2, was purchased from Orrell on 14 July 1970. It contains 10.26 acres exclusive of the highway right-of-way of .75 acres. U. S. Highway 421 traverses each of the tracts.

When respondents attempted to show by the witness Julien K. Taylor that these tracts were comparable to the property in suit, and that the price paid for each was competent evidence


ILLUSTRATIVE MAP
No.-1
OLD MORTON LINE
GOVERNMENT TAKING LINE
N
THE BAY
OCEAN
ATLANTIC
NEW INLET
(USC & GS CHART 1929)
BALDHEAD ISLAND
INLET


ILLUSTRATIVE MAP NO. 2
STATE OF NORTH CAROLINA
VS.
KILLINGSWORTH & JOHNSON, ET ALS
GENERAL AREA AND PROJECT MAP PREPARED FOR KILLINGSWORTH & JOHNSON BY PARTIAL SURVEYS & USC & GS MAPS
TRACT-1
TRACT-2
TRACT-3
BATTLE ACRE
TO WILMINGTON
PROPOSED ACCESS TO SUNSET POINT
LINE
FEDERAL POINT
U.S. HWY NO 421
GOVERNMENT TRAILS
PAMSGATE (PRELIMINARY)
SEE ILLUSTRATIVE MAP NO. 2
MARINA & MARINE FAC.
DOCKS REPAIRS FUEL RESTAURANT ETC.
SOUTH PORT - FT. FISHER STATE FERRY
CAPE FEAR RIVER
ROCK DIKE
PROTECTIVE ANCHORAGE
PROTECTIVE ANCHORAGE
PROTECTIVE ANCHORAGE
THE BAY
BRUNSWICK COUNTY
NEW HANOVER COUNTY
MARSH AREA
WILDLIFE REFUGE
ISLAND
ISLANDS
NEW INLET
USC & GS CHART 1927
11,000.00'
ATLANTIC OCEAN


ILLUSTRATIVE MAP
NO. 3
PROPOSED OFFICE SITE
TRACT 1
HOTEL-MOTEL SITE
SOLD
AVG. LOW WATER LINE FEB. 1970
U.S. HWY. NO. 421
GOVERNMENT TAKING LINE
RAMSGATE (PRELIMINARY)
RAMSGATE SECTION ONE (PLATTED)
SOLD
AVG. LOW WATER LINE
OCEAN
ATLANTIC

bearing upon the value of the 268.5 acres, the court conducted a *voir dire*. Respondents' evidence on *voir dire* tended to show:

The three tracts were "comparable properties in the sense that they are in the same proximity and they are facing the same ocean and the same latitude," as the acreage in suit. The three tracts, however, have no back water and are considered a mainland beach. Both Orrell tracts and the northern part of the Morton tract have a somewhat higher elevation than the respondents' property. They are closer to already developed Kure Beach, which has a readily available water and sewage system. All are traversed by a paved highway, No. 421. Tract No. 1 has a frontage of approximately 1,700 feet on U. S. 421; the subject property, only 400 feet. Tract No. 2 has a road frontage of 2,400 feet and Tract No. 3, a frontage of 1,004 feet. The evidence further showed that since 1963 the market value of beach property had steadily increased; and that smaller tracts, for which there are more buyers, commanded disproportionately higher prices than larger tracts, which were ordinarily sold by the acre.

The State elected to offer no evidence on the *voir dire* but later, before the jury, it offered evidence tending to show that the three tracts were not comparable to the land in suit.

At the conclusion of the *voir dire,* counsel for respondents inquired whether the State would offer evidence that it acquired the three tracts under a threat of condemnation. The State's reply was that, "It is not necessary to do so and we don't propose to do it."

Judge James held the three tracts "sufficiently comparable in location and terrain and in proximity to the subject land" to render the sales prices admissible in evidence. The State excepted and, over its objection, respondents offered evidence that the purchase price of the Tract No. 1 was $38,000.00, or approximately $5,058.00 per acre; Tract No. 2, $60,000.00, or approximately $5,349.00 per acre; and Tract No. 3, $100,000.00, or approximately $9,746.00 an acre.

In addition to the opinion, evidence as to value set out above, before the jury the State offered and elicited evidence tending to show:

Tracts Nos. 1, 2, and 3 are not comparable properties. The two Orrell tracts differ both in elevation and accessibility. The

Morton tract, although it has good frontage on a paved highway and is surrounded by land having a higher elevation, has suffered severe erosion over the years. The land in the vicinity of Battle Acre is low beach land. Within the memory of the witnesses two or three inlets have opened and crossed the land taken. At the present time the beach on the eastern prong of the Y is building up, but notwithstanding, an inlet might cut through the eastern prong at any time.

Appraisers for the State agreed with appraisers for respondents that smaller tracts of beach property tend to bring much higher prices than larger tracts and that generally a small tract has a higher per unit cost than a larger tract. R. C. Cantwell III, an expert witness for the State, testified that "the subject land is grossly larger than the three tracts which the State purchased from Morton and Orrell" and that, because of the disparity in size, the three tracts are basically incomparable. "It is," he said, "like comparing pork chops with a pig. By that I mean a pig will normally sell on the market for maybe twenty cents. We go to a restaurant and buy a pork chop for maybe two or three dollars. A pork chop is a subdivision of a pig." In any subdivision of land "there would be losses for triangulation or misshaped lots and that sort of thing." Mr. Cantwell valued the property taken at $300,000.00.

Other evidence for the State tended to show that the northern 35-40 acres of the land taken (the base of the Y) is "high and usable" for development as "resort residential"; that it has a value of $5,000.00 per acre; that the remaining acreage "going south" would require dredging and filling "at a great deal of expense" before it would be suitable for development; and that its value is not over $400.00 per acre.

On cross-examination of Cantwell, over the State's objection, respondents elicited evidence that lots fronting 200 feet on the ocean and extending back 100 feet on the *developed* portion of Shell Island, a development near Wrightsville Beach, had been sold for $15,000.00 per lot and that only four such lots remained unsold.

From the judgment entered on the verdict the State appealed, assigning errors in the admission of the evidence and in the charge.

Attorney General Morgan; Assistant Attorney General Costen; and Staff Attorney Evans for the State.

Marshall, Williams, Gorham & Brawley for Killingsworth and Johnson, respondent appellees.

SHARP, Justice.

The State assigns as error, *inter alia*, the admission into evidence of (1) respondents' Exhibits B and C; (2) testimony that respondents had sold eight acres of the land condemned, embracing twenty lots of Section One, for $160,000.00; (3) testimony that lots in a development on Shell Island were selling for $15,000.00 each (Exceptions 137-145); (4) the price which the State paid for three small tracts adjacent to the land taken; (5) testimony tending to show respondents' plans for the future use of the property taken; (6) a portion of the charge with reference to the character of respondents; (7) the court's order allowing expert witness fees to four of respondents' witnesses. (The foregoing enumeration is ours for convenience of discussion.)

The State's contentions with reference to assignments (1)-(3) are that the development of Ramsgate was still in the embryonic stage; that the challenged evidence, which tended to portray it and to value it as a finished subdivision, caused the jury to assess damages in excess of just compensation. Respondents contend that under the decisions of this Court Exhibits B and C were competent to illustrate the testimony, and that "no value on a per lot basis was stated or suggested by any witness."

[1] In condemnation proceedings, the well established rule is that in determining fair market value the essential inquiry is, "what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted—that is to say, what is it worth from its availability for all valuable uses?" *Barnes v. Highway Commission*, 250 N.C. 378, 387, 109 S.E. 2d 219, 227 (1959). The following very perceptive comment on this rule appears in 4 Nichols, *The Law of Eminent Domain* § 12.3142(1) (3rd ed. 1971) (hereinafter cited as Nichols):

"The most characteristic illustration of the rule that market value is not limited to value for the existing use and the

situation in which [the rule] is most frequently invoked *(and also most frequently abused),* is where evidence is offered of what the value of a tract of land that is used for agricultural purposes (or is vacant and unused) would be if cut up into house lots. It is well settled that if land is so situated that it is actually available for building purposes, its value for such purposes may be considered, even if it is used as a farm or is covered with brush and boulders. The measure of compensation is not, however, the aggregate of the prices of lots into which the tract could be best divided, since the expense of clearing off and improving the land, laying out streets, dividing it into lots, advertising and selling the same, holding it and paying taxes and interest until all the lots are disposed of cannot be ignored and is too uncertain and conjectural to be computed." (Emphasis added.)

[2] The last two sentences of the foregoing quotation from Nichols were quoted, and accepted as the law of this State, in *Barnes v. Highway Commission, supra* at 388-389, 109 S.E. 2d at 228. To further amplify the rule, Justice Clifton L. Moore, writing for the Court added: "It is proper to show that a particular tract of land is suitable and available for division into lots and is valuable for that purpose, but it is not proper to show the number and value of lots as separated parcels in an imaginary subdivision thereof. In other words, it is not proper for the jury in these cases to consider an undeveloped tract of land as though a subdivision thereon is an accomplished fact. Such undeveloped property may not be valued on a per lot basis. The cost factor is too speculative." *Id.* at 389, 109 S.E. 2d at 228. *Accord, Highway Commission v. Conrad,* 263 N.C. 394, 139 S.E. 2d 553 (1965). Thus, in appraising an undeveloped tract of land which is adaptable to subdivision, the question is not what the tract might be worth if subdivided and sold as improved lots but what it was worth in the open market in its existing condition on the day of the taking. *Northern Indiana Public Service Co. v. McCoy,* 239 Ind. 301, 157 N.E. 2d 181 (1959).

In *Barnes,* the Highway Commission took 12.19 acres of the petitioners' 46.86-acre tract for a limited access highway (expressway), and the petitioners brought a proceeding to obtain compensation. After the taking they had a civil engineer to make two maps of the property. One, made without reference to the expressway, showed a residential subdivision contain-

ing streets and 86 building lots. The other showed the expressway, streets, and 62 lots. At the trial, the petitioners offered the maps as substantive evidence that the land was capable of being subdivided into residential lots. The Commission's objection was sustained.

Later, after an expert realtor had testified that the property, both before and after the taking, was adaptable to practical residential subdivision, the judge admitted the maps to illustrate and explain the testimony of the witness. He excluded testimony as to the value of the property based on the number of lots before and after taking and the value per lot, less estimated cost of subdividing and developing. Disappointed in the verdict, *the petitioners* appealed, assigning as error the judge's refusal to admit the two maps as *substantive* evidence and to permit the undeveloped property to be valued on a per-lot basis. This Court held that the maps were properly excluded as substantive evidence and that the property could not be valued on a per-lot basis.

Although the Highway Commission had not appealed and no assignment of error challenged the use of the maps of the two "supposed subdivisions" for the purpose of illustrating the testimony of the witnesses, there appears in the opinion "a remark by the way" that "the maps showing subdivisions were relevant and competent to illustrate and explain the testimony as to the possibility and manner of subdividing . . . , " *id.* at 390, 109 S.E. 2d at 229, and that "petitioners had the full benefit of the maps upon those phases of the case to which they properly pertained." *Id.* at 391, 109 S.E. 2d at 229. Clearly this remark was *dictum.*

In *Highway Commission v. Conrad, supra,* the landowner offered in evidence a map showing a proposed subdivision of condemned property upon which no improvements had been made and no lots laid out. The map was offered for the purpose of illustrating testimony that the highest and best available use of the land was for a residential subdivision. The trial judge excluded the map. On appeal his ruling was affirmed because (1) there was no showing that the map was prepared by an engineer from an actual survey; (2) there was no contest as to the best and highest capability of the property; and (3) the jury had viewed the premises. Justice Moore, again

writing the Court's opinion, said that "under proper circumstances" a map of a proposed subdivision is admissible to illustrate and explain the testimony of witnesses as to the highest and best use of the property and to show that it is capable of subdivision; that the trial judge, in his discretion, may admit or exclude such evidence in accordance with the particular circumstances presented. He was careful to point out, however, that "such map should not be admitted where it is calculated to mislead the jury into allowing damages for improvements not in existence" and that where such a map is admitted in evidence testimony placing a price per lot should be excluded. *Id.* at 398, 139 S.E. 2d at 556.

Because "[e]xceptional circumstances will modify the most carefully guarded rule," 4 Nichols § 12.314, we make no attempt here to define the "proper circumstances" which will render a map of a proposed subdivision of undeveloped land admissible to explain the testimony of a witness. The opinion in *Conrad* suggests that when the highest and best use of the property is in dispute a subdivision map made by an expert engineer from an actual survey would be competent to illustrate his testimony that a subdivision was possible and practical. *See Campbell v. City of New Haven,* 101 Conn. 173, 125 A. 650 (1924), where the court in admitting such a map carefully limited it to that purpose and instructed the jury that it was not evidence of the use which the owner intended to make of the property at some future time. Certainly the admission of a map showing a subdivision which was not an accomplished fact would be an invitation to the jury to value improvements not in existence. In the absence of most positive instructions that the jury could not value the land on a per-lot basis, and an explanation of the reasons why it would be improper to do so, prejudice may be assumed.

[3] On their facts, *Barnes* and *Conrad* cannot be regarded as authorizing the admission of either Exhibit B or C in evidence in this case. We hold that the admission of these maps constituted prejudicial error.

Although the highest and best use for other portions of the 268.5 acres taken was in dispute, all the evidence tended to show that the 28.5 acres comprising Section One were adaptable to practical resort residential development. Exhibit B, therefore, was not offered to counter any contention by the State that a

subdivision of Section One was either impossible or impractical. By survey and computation an expert civil engineer had determined that the plan could become an accomplished fact and, to that end, the streets shown on Exhibit B had been rough graded and could be seen on the ground—nothing else. The development of Section One was far from being an accomplished fact. The Board of County Commissioners had not approved the plat of the proposed subdivision, and it had not been recorded. The plan could, therefore, have been changed at the will of the owners. To have sold a lot with reference to the plat would have been a misdemeanor. G.S. 153-266.6 (1964). The rough-graded streets had been neither dedicated nor accepted. Even assuming eventual approval by the county commissioners of the planned subdivision, extensive and expensive work remained to be done before the realtor who was to handle the sale of the lots could go into action. The cost of developing the land into salable lots and then advertising and selling them, the amount of taxes, interest and maintenance to be paid until all the lots should be sold—all of these items were clearly speculative and not susceptible of proof.

With reference to Exhibit B the judge told the jury only that the map was not substantive evidence and that its sole purpose was to illustrate the testimony of the witness Killingsworth. We apprehend that, as a practical matter, all the jury understood about Exhibit B from this instruction was that it showed 28.5 acres of the 268.5 taken to have been divided into 79 lots.

Thereafter Exhibit C was admitted in evidence. This map of the entire property taken showed not only respondents' immediate plans for 28.5 acres but their aspirations for much of the remaining acreage. It depicted the 79 lots of Section One laid out on the east side of the base of the Y, leaving approximately four-fifths of the entire ocean frontage apparently available for subdivision. By hatched lines it designated 20 lots which had been "sold" to DeLoach and Del-Cook. In addition, by dotted lines, it purported to show Section Two as 106 lots adjoining Section One on the west and extending south about halfway along the western stem of the Y. Section Two, which existed only in the minds of the planners, was indeed an imaginary subdivision on raw land in its original undeveloped state. Further, Exhibit C designated the entire north end of the base of the Y, which extended about 900 feet along the government

taking line and over 600 feet along the ocean front, as a "Hotel-Motel Site" and "Proposed Development Office Site." The south by the State's failure on *voir dire* to offer its evidence on this Facility, Docks, Repairs, Fuel, Restaurant, etc." See Illustrative Maps Nos. 2 and 3.

At the time Exhibit C was received in evidence and placed on the wall, the jury was instructed to consider it for no purpose whatever except to illustrate the testimony of the witness Moorman and to disregard "any references thereon or any designation or information disclosed therein except that which illustrates the testimony of this witness." This instruction asked too much of the jury. The probability that this map, which showed nonexistent subdivisions, would mislead the jury into valuing nonexistent improvements created a risk which outweighed its value for illustrative purposes. We note that the judge at no time told the jury that in determining the market value of the land taken they could not consider the number of lots shown on the map or value the undeveloped property on a per-lot basis. Exhibit C remained on the wall and was also used to illustrate the testimony of two other witnesses.

Moorman used Exhibit C to point out to the jury the 20 lots of Section One which respondents had conditionally sold to DeLoach and Del-Cook for $160,000. Testimony by Killingsworth, admitted over the State's objection, tended to show lots in Section One had been sold for $8,000 each and that, on a per-lot basis, Section One had a value of $632,000. This evidence refutes respondents' contention that "no value on a per lot basis was stated or suggested by any witness." Whether the jury applied this evidence of value to the 106 lots shown in proposed Section Two we cannot know. The admission of the maps and the evidence of these two conditional sales, however, set the stage for the jury to value undeveloped land on a per-lot basis without reference to the cost of development.

[4] Assuming the good faith of the transactions between respondents and DeLoach and Del-Cook, at most they were but conditional sales, dependent upon future accomplishments which the condemnation proceeding made impossible. Since payment of the purchase price was conditioned upon the completion of the subdivision—at what cost per lot no one could then say—the transactions in nowise disclosed what DeLoach or Del-Cook would have been willing to pay for the property as it was on

6 June 1968, the date of the "sales." The escrow arrangement, however, conclusively proved the unwillingness of each to pay $80,000.00 for 10 lots which then existed only on the map of a subdivision, the development of which had just been started. The admission of this evidence contravened decisions of this Court and constituted prejudicial error.

[5] Similarly prejudicial was the evidence that lots, fronting 200 feet on the ocean and extending back 100 feet *in the developed portion* of Shell Island, were selling for $75.00 per front foot or $15,000.00 a lot. Respondents elicited this testimony during the cross-examination of the State's expert witness Cantwell, who had testified on direct examination to his opinion of the fair market value of the land taken. It was competent for respondents to question Cantwell's knowledge of the value of coastal lands in that area and, in response to such questions, he had said that he himself had appraised Shell Island and knew at what price lots thereon had been sold and the price at which the remaining lots were listed for sale. This information satisfied the only legitimate purpose the question could have had. The record does not disclose whether Shell Island, before it was developed, was land comparable to the land in suit, the extent of its present development, or any other facts which would make values on Shell Island evidence of the value of the subject property. Respondents' purpose in eliciting the figures $75.00 and $15,000.00 before the jury could only have been "to induce thereby a liberal award. This within itself would violate the applicable rule of evidence, since such evidence under the circumstances cannot be considered on the question of value." *Barnes v. Highway Commission, supra* at 396, 109 S.E. 2d at 233.

Question (4) involves the admissibility of the purchase price of the three adjacent small tracts which the State obtained from Morton and Orrell. The State argues (1) the disparity in size between each of the three lots and the subject property made the tracts dissimilar as a matter of law; (2) all the evidence tends to show dissimilarities which negate the court's findings that the tracts were in fact "sufficiently comparable" to render the purchase prices properly admissible in evidence; and (3) evidence of the price for which a condemnor purchased other land required for a project is not admissible as evidence of the value of land being condemned for it.

When it was first offered, and on a number of occasions thereafter, the State forcefully objected to any evidence of the purchase price of these three tracts. However, on at least one occasion, this evidence went in without objection. Ordinarily such a failure to object would waive the previous objections. *Price v. Whisnant,* 232 N.C. 653, 62 S.E. 2d 56 (1950). However, in view of the highly prejudicial nature of that evidence, we consider this assignment of error. The questions it poses are certain to recur upon the retrial of this case.

[6] It is the rule in this State that the price paid at voluntary sales of land, similar in nature, location, and condition to the condemnee's land, is admissible as independent evidence of the value of the land taken if the prior sale was not too remote in time. Whether two properties are sufficiently similar to admit evidence of the purchase price of one as a guide to the value of the other is a question to be determined by the trial judge in the exercise of a sound discretion guided by law. *Redevelopment Comm. v. Panel Co.,* 273 N.C. 368, 159 S.E. 2d 861 (1968); *Highway Commission v. Conrad, supra.*

It would seem that because of the difference in size between the 268.5 acres condemned and the three tracts purchased, and because of other differences, the trial judge should have ruled that the three tracts were not comparable properties. As one of respondents' expert witnesses pointed out, the largest of the three tracts "is not even five percent of the total of the subject property."

As pointed out in 5 Nichols § 21.31[3] (1969): "It is not necessarily objectionable that the lot of land, the price of which it is sought to put in evidence, is of different size and shape from the lot taken; nevertheless, the court may properly exclude evidence of the price paid for similar land in close proximity to the land taken if the lot sold is much smaller than the land in controversy. A large piece of land cannot usually be applied profitably to the same uses as a small piece, and if the large piece is to be cut up into lots of the same size as the small piece, the length of time necessary to dispose of the lots to different purchasers is so uncertain that the price at which one such lot would sell multiplied by the number of lots is no criterion of the present value of the entire parcel." *See also* Annot., 85 A.L.R. 2d 110, 143-149 (1962).

It is quite probable that the judge's findings with reference to the three tracts in question was materially influenced by the State's failure on *voir dire* to offer its evidence on this point. However, because of the view we take with reference to State's contention (3) above, it is not necessary for us to decide whether the judge's finding of similarity exceeded sound judicial discretion or was error as a matter of law.

The majority rule is "that evidence as to the price paid by the same or another condemning agency for other real property which, although subject to condemnation, was sold by the owner without the intervention of eminent domain proceedings, is rendered inadmissible to prove the value of the real property involved merely becauses the property was sold to a prospective condemnor." Annot., 85 A.L.R. 2d 110, 163 (1962). *Accord,* 5 Nichols § 21.33 (1969); 27 Am. Jur. 2d *Eminent Domain* § 430 (1966). The rationale is that a sale to a prospective condemnor is in effect a forced sale; that at best it represents a compromise and consequently furnishes no true indication of the price at which the property could be sold in the open market to a "willing buyer"; that the condemnor may pay more in order to avoid the expense and uncertainty of the condemnation proceeding, while the seller may accept less in order to avoid the same or similar burdens. 1 Orgel, *Valuation* under the *Law of Eminent Domain* § 147 (2d ed. 1953). This reasoning also applies to amounts paid by a condemnor for neighboring land taken for the same project—however similar the lands may be—whether the payment was made as the result of a voluntary settlement, an award, or the verdict of a jury. 5 Nichols § 21.33 (1969). *See also* 29A C.J.S. *Eminent Domain* § 273(7) (1965).

In some jurisdictions it is held that evidence of a sale otherwise competent is not necessarily inadmissible because the purchaser had the power of eminent domain. However, the burden is upon the party who offers such evidence to establish as a preliminary fact not only that the respective properties are comparable but also that the purchase was not so influenced by compromise or compulsion as to influence the price and therefore to destroy its usefulness as a standard of value. *See* authorities collected in *Hannan v. United States,* 131 F. 2d 441, 442 (D.C. Cir. 1942). *See also Stewart v. Commonwealth,* 337 S.W. 2d 880 (Ky. App. 1960); *State v. McDonald,* 88 Ariz. 1, 352 P. 2d 343 (1960); *Amory v. Commonwealth,* 321 Mass.

240, 72 N.E. 2d 549, 174 A.L.R. 370 (1947); I Wigmore, Evidence § 18(E) (3d ed. 1940). In *Transwestern Pipeline Co. v. O'Brien,* 418 F. 2d 15 (5th Cir. 1969), it is said that the burden of establishing the admissibility of evidence as to the price paid by a condemnor for other similar property "is a heavy one." *Id.* at 19.

This Court held in *Light Co. v. Sloan,* 227 N.C. 151, 41 S.E. 2d 361 (1947), that the amount which the condemnor paid the respondent under a consent judgment for land taken in condemnation proceedings was incompetent to establish the value of additional land subsequently taken from the respondent. This rule was approved in *Barnes v. Highway Commission, supra. See also Highway Commission v. Pearce,* 261 N.C. 760, 136 S.E. 2d 71 (1964). In *Carver v. Lykes,* 262 N.C. 345, 356, 137 S.E. 2d 139, 148 (1964), we quoted with approval the following excerpt from II Wigmore, *Evidence* § 463 (3d ed. Supp. 1962): "[E]vidence of amounts paid by the condemnor for property similarly situated, in the absence of extraordinary circumstances, is inadmissible, because such sales are involuntary and therefore, under the substantive law, run counter to the essential ingredient of fair market value."

[7] It is our opinion that any sale to a prospective condemnor is highly unlikely to be a fair test of market value, and that a preliminary determination by the trial judge that the sale was not tainted by compulsion or compromise cannot establish it as a reliable standard. As the Court of Appeals of Kentucky said in *Stewart v. Commonwealth, supra,* "We think that such an inquiry into matters of motivation ventures too far into the realm of speculation and is not a satisfactory substitute for the rule of no admissibility. We therefore adhere to the latter rule." *Id.* at 882. For the same reason we hold that the admission of the prices paid for the three tracts, which tended to show an approximate per-acre valuation of from $5,000.00 to $9,700.00 for land adjacent to the 268.5 acres taken, constituted prejudicial error.

[8] Question (5) is whether respondent Killingsworth's testimony that "at a future date" respondents "proposed" to construct a marina, a motel, and condominiums on the 268.5 acres condemned was incompetent and prejudicial. The answer is Yes.

It was entirely proper for respondents to offer evidence tending to show the highest and best use to which different

areas of the 268.5 acres taken were adopted, whatever that use might have been. However, "[I]t is not ordinarily competent for the owner to show what use he intended to put the property, nor what plans he had for its improvement, nor the probable future use of the property, nor the profits which would arise if the property were devoted to a particular use." 27 Am. Jur. 2d *Eminent Domain* § 435 (1966).

In *Land Co. v. Traction Co.*, 162 N.C. 503, 78 S.E. 299 (1913), the sole issue was the market value of land which defendants had condemned. The trial judge admitted evidence that the owner intended to convert a part of the condemned property into a park and beautify it "by laying off walks and building summer houses and otherwise." Upon appeal the Court awarded the defendants a new trial because the judge "erred in admitting evidence as to the speculative uses to which the owner intended to put the property and as to its contemplated improvement. . . . " *Id.* at 505, 78 S.E. at 299. Chief Justice Clark pointed out that, although it was proper to show the condition of the property, its surroundings and all the uses to which the land was adapted, it was not competent to prove by the owner the uses to which he had intended to devote it. *Accord, Light Co. v. Clark,* 243 N.C. 577, 91 S.E. 2d 569 (1956).

In condemnation proceedings the determinative question is: In its condition on the day of the taking, what was the value of the land for the highest and best use to which it would be put by owners possessed of prudence, wisdom, and adequate means? "The owner's actual plans or hopes for the future are completely irrelevant." Such aspirations being "regarded as too remote and speculative to merit consideration." 4 Nichols § 12.314 (1971).

[9] Here it was competent for the owners to show that, on the day of the taking, streets had been rough graded and surveyor's control stakes placed on the 28.5 acres as initial steps in laying out a subdivision on that portion of the condemned property. This evidence bore directly upon the value of the land on the day of the taking. (1) The actual laying out of streets tended to show that this section was adapted to use as a residential subdivision, and (2) the grading which had been done was a part of the overall condition of the land on the day it was taken and one of the factors to be considered

in determining the value which Section One had at that time for development as a residential subdivision. However, the value of the property was not augmented because the condemnation proceeding prevented respondents from carrying out their plans to develop a subdivision. "[T]he value of the property may not be enhanced by reason of the frustration of the owner's plans with respect to his property. . . . " 4 Nichols § 12.3142[3] (1971).

Of course, the actual laying out of streets also evidences the owner's intended use of the property, but such evidence is not prejudicial when its purpose and effect is simply to show or illustrate the adaptability of a condemnee's land for the proposed use. However, evidence as to intended use "becomes improper and prejudicial if and when its purpose and effect is 'to show enhanced loss because the owner is prohibited from carrying out that particular improvement,' . . . or 'if the object is to enhance the damage by showing such a [proposed] structure would be a profitable investment.' " *Empire Dist. Electric Co. v. Johnston,* 241 Mo. App. 759, 766, 268 S.W. 2d 78, 82 (1954). Obviously, appropriate instructions are required to avoid confusion in the minds of the jurors when an owner's plans for his property have been demonstrably thwarted by a condemnation proceeding.

Question (6) is a challenge to the following portions of the charge:

"The payment of just compensation does not depend on whether the owners are of good character or otherwise. That is not the criterion. In this case, the owners, from outward appearance and insofar as we know, are fine high quality citizens, good people, and they are entitled to just compensation. No more and no less. If there was any reason to suspect or know that they were less than good people, your duty would remain the same. They would be entitled to just compensation. No less and no more. Because it is a cardinal principle upon which our government is founded, that all citizens are entitled to just treatment whether they be high, low, rich or poor, humble or proud, and regardless of race, color or creed. If there are times and occasions when our State or any governmental agency or local part thereof does not attain that ideal it is because of human weaknesses and limitations and it behooves all citizens

and governmental agencies to strive constantly to overcome those shortcomings."

[10, 11] The character of an owner is clearly irrelevant to his right to receive just compensation when his land is taken by the State. Evidence of the good or bad character of a party to a civil action is generally inadmissible. Such evidence, *inter alia,* offers "a temptation to the jury to reward a good life or punish a bad man instead of deciding the issues before them." Stansbury, *N.C. Evidence* § 103 (2d ed. 1963). Until the credibility of a party who has testified in his own behalf has been impeached by imputations of bias, inconsistencies in his statements, or otherwise, his good character may not be proved to corroborate his testimony. *Id.* § 50.

[12, 13] In this case only one of the owners, respondent Killingsworth, testified. Neither the State nor respondents offered any evidence bearing upon his general character. The State contends that, in telling the jury the owners appeared to be "fine high quality citizens, good people and they are entitled to just compensation," in effect, the judge made himself a character witness for the owners and thereby bolstered the credibility of Killingworth's estimate as to the value of the land and other disputed portions of his testimony. The State further contends that the court's admonition that it behooves all citizens and governmental agencies to strive constantly to overcome any shortcomings on the part of the State carried the implication that the State had not dealt fairly with respondents, as well as the suggestion that the jury should right the wrong.

The State's contentions have merit. The quoted charge was uncalled for in this case, and we apprehend that the jurors may have misinterpreted it to the State's prejudice. Such a result, of course, the judge did not intend. However, it is error for the court to charge upon an abstract principle of law or duties not applicable to the evidence in the case. *White v. Cothran,* 260 N.C. 510, 133 S.E. 2d 132 (1963); *Electric Co. v. Dennis,* 259 N.C. 354, 130 S.E. 2d 547 (1963).

[14] The State's final assignment of error for discussion is that the court erred in taxing against the State expert witness fees totaling $1,600.00 for four of respondents' witnesses: Walter Moorman, whom the court found to be an expert engineer in the field of land development, planning, and drainage—$300.00; J. K. Taylor, Jr., Richard Kepley, and D. M. Stout,

each of whom the court found to be an expert appraiser of real property—$300.00, $400.00, and $600.00 respectively. The State's contention is that none of these witnesses were under subpoena and the court was, therefore, without authority to allow them expert witness fees. Respondents contend that, in contrast to other witnesses, there is no requirement that an expert witness must be under subpoena to collect a witness fee.

The court's power to tax costs is entirely dependent upon statutory authorization. *City of Charlotte v. McNeely,* 281 N.C. 684, 190 S.E. 2d 179 (1972). In support of respective positions the parties rely upon G.S. 7A-314 (Supp. 1971) which, in pertinent part, provides:

"(a) A witness under subpoena, bound over, or recognized, other than a salaried State, county, or municipal law-enforcement officer, or an out-of-state witness in a criminal case, whether to testify before the court, jury of view, magistrate, clerk, referee, commissioner, appraiser, or arbitrator shall be entitled to receive five dollars ($5.00) per day, or fraction thereof, during his attendance, which must be certified to the clerk of superior court.

* * *

(d) An expert witness, other than a salaried State, county, or municipal law-enforcement officer, shall receive such compensation and allowances as the court, in its discretion, may authorize. A law-enforcement officer who appears as an expert witness shall receive reimbursement for travel expenses only, as provided in subsection (b) of this section.

(e) If more than two witnesses are subpoenaed, bound over, or recognized, to prove a single material fact, the expense of the additional witnesses shall be borne by the party issuing or requesting the subpoena."

Respondents' position is that Section (a) above has no application to Section (d). As we interpret G.S. 7A-314, however, Sections (a) and (d) must be considered together. Section (a) makes a witness fee for any witness, except those specifically exempted therein, dependent upon his having been subpoenaed to testify in the case, and it fixes his fee at $5.00 per day. As to expert witnesses, Section (d) modifies Section (a) by permitting the court, in its discretion, to increase their

compensation and allowances. The modification relates only to the amount of an expert witness's fee; it does not abrogate the requirement that all witnesses must be subpoenaed before they are entitled to compensation.

Since the witnesses Moorman, Taylor, Kepley, and Stout did not testify in obedience to a subpoena, we hold that the court was without authority to allow them expert fees or to tax the State with the costs of their attendance. "A witness who attends court without having been summoned is not entitled to prove his attendance or to charge the losing party with the amount of his tickets." *State v. Means*, 175 N.C. 820, 822, 95 S.E. 912, 913 (1918). *See also* G.S. 6-53 (Supp. 1971). This holding renders Section (e) immaterial to decision here. However, we note that the testimony of witnesses Taylor, Kepley, and Stout tended to prove a single material fact, the fair market value of the land being taken. Thus, had these three witnesses been subpoenaed, under Section (e) the fees of only two could have been taxed against the State.

We deem it unnecessary to discuss the State's remaining assignments of error since they raise questions not likely to recur at the next trial. For the errors pointed out in the opinion the judgment of the Superior Court is vacated, and this cause is remanded for a retrial.

New trial.

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

Justice HIGGINS concurs in result.

IN THE MATTER OF VALERIE LENISE WALKER

No. 26

(Filed 11 October 1972)

1. Infants § 10— undisciplined child petition — no right to counsel

Neither the Due Process Clause nor G.S. 7A-451(a)(8) required that counsel be afforded a minor at a hearing on an initial petition alleging her to be an undisciplined child, for under the wording of G.S. 7A-286(4) (1969) that hearing could not result in her commitment to an institution in which her freedom would be curtailed.

2. **Courts § 15; Infants § 10— undisciplined child petition — criminal proceedings**

The "critical stage" test used by the U. S. Supreme Court in determining the scope of the Sixth Amendment right to counsel in criminal prosecutions is not applicable to a juvenile proceeding in which the child is alleged to be undisciplined because such proceeding is not a criminal prosecution within the meaning of the Sixth Amendment which guarantees the assistance of counsel "in all criminal prosecutions."

3. **Courts § 15; Infants § 10— undisciplined children — adults — probation and incarceration — equal protection under the laws**

Though G.S. 7A-286 subjects an undisciplined child to probation and the concomitant risk of incarceration when the child has committed no criminal offense, while adults are subjected to probation and incarceration only for actual criminal offenses, the statute does not violate the Equal Protection Clause by classifying and treating children differently from adults since the classification is based on the difference in ability of adults and children to protect themselves and since the statute is intended to provide children with needed supervision and control.

4. **Courts § 15; Infants § 10— undisciplined child — delinquent child — right to counsel — equal protection under the laws**

The State's statutory scheme allowing a child to be adjudged undisciplined and placed on probation without benefit of counsel, while at the same time requiring counsel before a child may be adjudged delinquent does not deny equal protection of the laws to the undisciplined child since, in seeking solutions which provide for the protection, treatment, rehabilitation and correction of children, it is relevant to the achievement of the State's objective that distinctions be made between undisciplined and delinquent children. G.S. 7A-278(5); G.S. 7A-285; G.S. 7A-286(2) and (4).

5. **Courts § 15; Infants § 10— juvenile delinquency hearing — due process**

In delinquency proceedings wherein a child was charged with violation of probation conditions, the Due Process Clause did not require that the judge make findings beyond a reasonable doubt since the delinquency charge did not arise from violations amounting to a crime.

6. **Courts § 15; Infants § 10— juvenile delinquency proceeding — inference with respect to quantum of proof**

Since there is no statutorily established quantum of proof in juvenile proceedings in North Carolina, in the absence of record evidence that the judge followed some other standard, there is a permissible inference that he followed the applicable law and found the facts beyond a reasonable doubt.

Chief Justice BOBBITT dissenting.

Justice SHARP joins in dissenting opinion.

RESPONDENT appeals from decision of the Court of Appeals upholding order of *Gentry, District Judge,* 11 October 1971 Session, GUILFORD County District Court.

On 2 August 1971 Mrs. Katherine Walker, mother of Valerie Lenise Walker, filed a petition in the district court alleging in pertinent part:

> "1. That the above named child is less than sixteen years of age and resides in the district at the address shown above, or was found in the district as alleged herein.
>
> 2. That the names and addresses of the child's parents . . . are as follows:
>
> Name: Mr. & Mrs. John Walker
> Relation or Title: Parents
> Address: 541 E. Bragg Street
> Greensboro, North Carolina
>
> 3. Said child is an undisciplined child as defined by G.S. 7A-278 in that she has been regularly disobedient to her parents during the last six months; that the said child will not mind and obey; that the child goes and comes as she pleases and keeps late hours; that the child associates with persons of questionable character and frequents places not approved by the parents; further, that the child is almost beyond the control of her parents.
>
> Petitioner prays the court to hear the case to determine whether the allegations are true and whether the child is in need of the care, protection or discipline of the State."

A juvenile summons was thereupon issued and served upon Valerie Lenise Walker and her parents on 9 August 1971, summoning them to appear in juvenile court for a hearing on the allegations in the petition, copy of which was served with the summons.

The matter came on for hearing before Judge Gentry on 17 August 1971. Valerie was present with her mother and the court counselor, Mrs. Ann M. Jones. Valerie was not represented by an attorney at this hearing. Judge Gentry heard evidence and found (a) that Valerie Lenise Walker, born 14 April 1957, is a child under sixteen years of age in the custody and under the supervision and control of her parents, Mr. and Mrs.

John Walker; (b) that Valerie has been regularly disobedient to her parents in that she goes and comes without permission, keeps late hours, associates with persons that her parents object to, and goes to places where her parents tell her not to go; and (c) that Valerie is an undisciplined child and in need of the discipline and supervision of the State. This order was signed on 19 August 1971.

Based on the foregoing findings, it was ordered, adjudged and decreed that Valerie was an undisciplined child within the meaning of the law. She was placed on probation subject to the following conditions:

"1. That she be of good behavior and conduct herself in a law-abiding manner;

2. That she mind and obey her parents and not leave home without permission and then to go only to places that she has permission to go and return as directed;

3. That she attend school regularly during the school year and obey the school rules and regulations;

4. That she report to the court counselor as directed, truthfully answer questions put to her concerning her conduct, behavior, associates and activities and carry out requests given her concerning such;

5. That this matter be reopened for further orders on March 22, 1972 at 2:00 p.m.

This matter is retained for further orders of the court."

Thereafter, on 21 September 1971, Ann M. Jones, Court Counselor, filed a verified petition and motion in the cause for further consideration and review of the case, alleging:

"That the said child is a delinquent child as defined by G.S. 7A-278(2) in that the said child has violated Conditions No. 1, 2, and 3 of the probation order dated August 19, 1971, in that the said child continuously disobeys her parents in that she goes and comes as she pleases; keeps late hours; and frequents places not approved by her parents; further, the said child refuses to obey school rules and regulations in that she misbehaves in the class-

room and is disrespectful to school officials; further, the said child is beyond the control of her parents."

A juvenile summons was thereupon issued and served upon Valerie and her parents, notifying them to appear in juvenile court for a further hearing upon the matters alleged in the motion, copy of which was served with the summons on 22 September 1971.

Prior to the hearing the public defender of the Eighteenth Judicial District was appointed to represent Valerie, and the matter came on for hearing before Judge Gentry on 15 October 1971. At that time Valerie was present with her mother and was represented by Wallace C. Harrelson and J. Dale Shepherd, Public Defenders. Present representing the State was Thaddeus A. Adams, III, Assistant Solicitor.

Prior to the introduction of evidence, Valerie's counsel moved to vacate the order dated 19 August 1971 finding that Valerie was an undisciplined child and placing her on probation for that she was not represented by counsel at that time and was unable to defend herself on the charge that she was an undisciplined child, resulting in a denial of due process. Her counsel further moved to dismiss the petition and motion in the cause filed 21 September 1971 by Ann M. Jones, Court Counselor, for that G.S. 7A-278 violates the Equal Protection Clause of the Fourteenth Amendment in that the statute provides for an adjudication of delinquency when the respondent has violated none of the laws of the State of North Carolina. Both motions were denied and respondent duly excepted.

Katherine Walker, mother of Valerie, testified that she lives with her husband and seven small children, including Valerie; that she and her husband both work and that Valerie is usually not at home when she returns from work; that Valerie fails to do the chores which have been assigned to her, such as cleaning her room, the bathroom, and taking her turn washing dishes; that when Valerie comes home she usually says she has been at Mrs. Cunningham's house with Vanessa Cunningham; that Valerie has been told not to leave home without telling her mother where she is going but she continues to disobey in that respect; that Valerie keeps late hours and sometimes comes in at eleven, twelve, one and two o'clock at night; that Valerie has been to Paradise Inn in violation of

parental instructions; that Paradise Inn sells beer and has a bad reputation and is no place for a fourteen-year-old girl; that during Valerie's nocturnal absences her parents do not know where she is.

Mrs. Walker further testified that she is the mother of ten children; that Valerie is lazy and disobedient; that Valerie signed for a registered letter from school officials, addressed to her mother, and then destroyed the letter. Mrs. Walker said: "All I want her to do is to behave like a fourteen year old should."

Howard King, Assistant Principal at Mendenhall Junior High School, testified that Valerie came to his school on September 8, 1971, and was placed in special education with a group of students who had similar defects in adjusting; that from September 8 to September 21 he saw Valerie in his office many times on referral from all of her teachers except one for disrupting the class; that he had numerous conferences with Valerie and specifically recalls one problem which arose due to Valerie's refusal to dress out in the physical education class; that she refused to dress for physical education practically every day and gave no reason for her refusal; that he could not communicate very well with Valerie because she sucked her thumb, did not talk for a while, "and when she does start talking it's almost impossible to keep her from talking and it doesn't have any meaning to what we're talking about when she comes to the office. . . . It was not something that was relevant."

Mr. King further testified that Valerie was large for her age and as compared to the other children in the class; that Valerie was sent by her teachers to the office practically every day, does not fit into the classroom and disrupts whatever the teachers try to do; that he would have suspended her each day but had no way to get her home; that he simply required her to sit in the office and occasionally she would leave the office without permission; that Valerie does not respond to any methods of discipline available at the school.

The probation officer testified that Valerie had problems at her previous school similar to those described by Mr. King; that her attitude was bad toward her probation officer as well as others and that her behavior has not shown improvement; that Valerie does not have a receptive attitude toward

her probation officer or the school or her mother in regard to discipline.

The respondent elected to offer no evidence and moved to dismiss the proceeding at the close of all the evidence. The motion was denied, and under date of 27 October 1971 Judge Gentry signed an order providing in pertinent part as follows:

> "The court finds, upon hearing evidence, that the child was before the court on August 17, 1971 and that she was adjudged to be an undisciplined child and placed on probation, one of the conditions of probation being that she be of good behavior and conduct herself in a law-abiding manner; another condition being that she mind and obey her mother and not be away from home without permission. Another condition was that she attend school regularly and obey the school rules and regulations. The court finds that the said child did not obey her parents in that she left home without permission and did keep late hours at night. That she went to places that she was told not to go to by her parents and that she failed to do chores assigned to her by her mother. The court further finds that the child was sent out of the classroom in school a number of times for disobeying the teachers and disturbing the class. That she also refused to dress for her Physical Education classes without giving any reasons for doing so. The court finds that these acts of the child constitute a violation of the conditions of probation and that she is a delinquent child for having violated the conditions of probation and that she is in need of the discipline and supervision of the state. Court further finds that since September 21, 1971, the said child has been a constant behavior problem in school and has not responded to disciplinary actions taken and that she continues to disobey her mother. The court finds that she is in need of more discipline and supervision than can be provided for her within Guilford County.
>
> IT IS NOW THEREFORE ORDERED, ADJUDGED AND DECREED THAT Valerie Walker, having been found to be a delinquent child, that the said child is hereby committed to the North Carolina Board of Juvenile Correction and is to be in the custody and under the control and supervision of the officials thereof until discharged, in keeping

with the requirements of law. That she is to remain in the temporary custody of the court until she can be delivered to the designated correction school by Court Counselor Mrs. Jones.

This the 27th day of October, 1971.

B. GORDON GENTRY
JUDGE PRESIDING"

From the foregoing order respondent appealed to the Court of Appeals which found no error, 14 N.C. App. 356. Respondent thereupon appealed to the Supreme Court, allegedly as of right, asserting involvement of substantial constitutional questions arising under the Constitution of the United States and of this State.

Wallace C. Harrelson, Public Defender, and J. Dale Shepherd, Assistant Public Defender, for the Respondent Appellant.

Robert Morgan, Attorney General, and R. S. Weathers, Assistant Attorney General, for the State of North Carolina, appellee.

Norman B. Smith of Smith, Patterson, Follin & Curtis, Counsel for Respondent Appellant's Amicus Curiae, North Carolina Civil Liberties Union Legal Foundation, Inc.

HUSKINS, Justice.

[1] Appellant Valerie Walker contends that she had a constitutional right to counsel at the hearing on the initial petition alleging her to be an *undisciplined* child. We first consider whether the Constitution affords her such right.

In *In re Gault*, 387 U.S. 1, 18 L.Ed. 2d 527, 87 S.Ct. 1428 (1967), the United States Supreme Court held, *inter alia*, that "the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child." A similar statutory right to counsel for indigent juveniles at a hearing which could result in commitment to an institution is afforded by G.S. 7A-451(a)(8).

The initial petition alleging that Valerie was an *undisciplined* child was heard on August 17, 1971. At that time the 1969 version of Article 23, Chapter 7A of the North Carolina General Statutes (Jurisdiction and Procedure Applicable to Children) was in effect. It was not until September 1, 1971, that the present version of that article became effective. See 1971 Session Laws, ch. 1180. Therefore, we must consult the 1969 version to determine whether the hearing of the "undisciplined child" petition was a proceeding "which may result in commitment to an institution in which the juvenile's freedom is curtailed."

The 1969 version of Article 23 of Chapter 7A of the General Statutes, in relevant part, contains the following definitions in G.S. 7A-278:

> "(1) 'Child' is any person who has not reached his sixteenth birthday.
>
> "(2) 'Delinquent child' includes any child who has committed any criminal offense under State law or under an ordinance of local government, including violations of the motor vehicle laws or a child who has violated the conditions of his probation under this article.
>
> "(5) 'Undisciplined child' includes any child who is unlawfully absent from school, or who is regularly disobedient to his parents or guardian or custodian and beyond their disciplinary control, or who is regularly found in places where it is unlawful for a child to be, or who has run away from home."

G.S. 7A-286 (1969), after requiring the judge to select the disposition which provides for the protection, treatment, rehabilitation or correction of the child, as may be appropriate in each case, makes the following alternatives available to any judge exercising juvenile jurisdiction: "(4) In the case of any child who is delinquent or undisciplined, the court may: a. Place the child on probation . . . ; or b. Continue the case . . . : or, *if the child is delinquent*, the court may c. Commit the child to the care of the North Carolina Board of Juvenile Correction. . . . " (Emphasis added.)

Despite the somewhat awkward structure of G.S. 7A-286 (1969), it is clear that under its terms no judge exercising

juvenile jurisdiction had any authority upon finding the child to be *undisciplined* to commit such child to the Board of Juvenile Correction for assignment to a State facility in which the juvenile's freedom is curtailed. The statute permitted incarceration of *delinquent* children only. A contrary holding by the Court of Appeals in *In re Martin,* 9 N.C. App. 576, 176 S.E. 2d 849 (1970), is apparently based on a misconstruction of the statute and is not authoritative. We emphasize that there was no authority under G.S. 7A-286 (1969) for the commitment of an *undisciplined* child to the North Carolina Board of Juvenile Correction where the child may be assigned to a State facility in which the juvenile's freedom is curtailed.

Therefore, we hold that neither *Gault, supra,* nor G.S. 7A-451(a)(8) afforded Valerie Walker the right to counsel at the hearing on the initial petition alleging her to be an undisciplined child, for under the wording of G.S. 7A-286(4) (1969) that hearing could not result in her commitment to an institution in which her freedom would be curtailed. Nor would there be such a right under the statute as presently written. *See* G.S. 7A-286(5) (1971).

[2] Appellant would have this Court go further than *Gault* requires. She argues for the right to counsel at the hearing of an *undisciplined child* petition on the theory that such a hearing is a critical stage in the juvenile process since it subjects the child to the risk of probation and since a violation of probation means that the child is *delinquent* and subject to commitment. In such fashion appellant seeks to engraft upon the juvenile process the "critical stage" test used by the United States Supreme Court in determining the scope of the Sixth Amendment right to counsel in *criminal prosecutions. See Coleman v. Alabama,* 399 U.S. 1, 26 L.Ed. 2d 387, 90 S.Ct. 1999 (1970); *Gilbert v. California,* 388 U.S. 263, 18 L.Ed. 2d 1178, 87 S.Ct. 1951 (1967); *Hamilton v. Alabama,* 368 U.S. 52, 7 L.Ed. 2d 114, 82 S.Ct. 157 (1961). We find no authority for such engraftment. Whatever may be the proper classification for a juvenile proceeding in which the child is alleged to be undisciplined, it certainly is not a criminal prosecution within the meaning of the Sixth Amendment which guarantees the assistance of counsel "in all criminal prosecutions." *In re Burrus,* 275 N.C. 517, 169 S.E. 2d 879 (1969), aff'd. 403 U.S. 528, 29 L.Ed. 2d 647, 91 S.Ct. 1976 (1971).

The right to counsel delineated in *Gault* has not been extended to other procedural steps in juvenile proceedings. Neither this Court nor the United States Supreme Court has ever applied the "critical stage" test to the juvenile process. Accordingly, we hold that counsel is not constitutionally required at the hearing on an *undisciplined child* petition. See *In re Gault, supra* (n. 48) in which it is stated: "[W]hat we hold in this opinion with regard to procedural requirements at the adjudicatory stage has no necessary applicability to other steps of the juvenile process."

The fact that a child initially has been found to be undisciplined and placed on probation is merely incidental to a later petition and motion alleging delinquency based on violation of the terms of probation. The initial finding can never legally result in commitment to an institution in which the juvenile's freedom is curtailed. It is only the latter petition and motion, and the finding that the child is a *delinquent* child by reason of its conduct since the initial hearing, that may result in the child's commitment. *See* G.S. 7A-286(4)(b) and (c) (1969). *Compare State v. Green,* 277 N.C. 188, 176 S.E. 2d 756 (1970).

[3] Appellant's second contention is that G.S. 7A-286 violates the Equal Protection Clause of the Fourteenth Amendment in that it subjects an undisciplined child to probation and the concomitant risk of incarceration when the child has committed no criminal offense, while adults are subjected to probation and incarceration only for actual criminal offenses. *See* G.S. 15-197.

The Equal Protection Clause "avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary." *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 55 L.Ed. 369, 31 S.Ct. 337 (1911). Thus, if a classification is "based on differences that are reasonably related to the purposes of the Act in which it is found," then it does not offend the Equal Protection Clause, *Morey v. Doud,* 354 U.S. 457, 1 L.Ed. 2d 1485, 77 S.Ct. 1344 (1957); *State v. Greenwood,* 280 N.C. 651, 187 S.E. 2d 8 (1972), unless the classification affects "fundamental" interests or is "inherently suspect," *e.g., Williams v. Rhodes,* 393 U.S. 23, 21 L.Ed. 2d 24, 89 S.Ct. 5 (1968); *Harper v. Virginia Board of Elections,* 383 U.S. 663, 16 L.Ed. 2d 169, 86 S.Ct. 1079 (1966); *Douglas v. California,* 372 U.S. 353, 9 L.Ed. 2d 811, 83 S.Ct. 814 (1963); *Griffin v. Illinois,*

351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585 (1956); *Skinner v. Oklahoma,* 316 U.S. 535, 86 L.Ed. 1655, 62 S.Ct. 1110 (1942), in which event it "must be closely scrutinized and carefully confined," and the State must advance a "compelling interest which justifies imposing such heavy burdens" in order for the classification to be constitutional. *Harper v. Virginia Board of Elections, supra; Williams v. Rhodes, supra.* A showing of mere rationality is insufficient.

The purpose of the Juvenile Court Act "is not for the punishment of offenders but for the salvation of children." *Commonwealth v. Fisher,* 213 Pa. 48, 62 A. 198 (1905). The Act treats "delinquent children not as criminals, but as wards and undertakes . . . to give them the control and environment that may lead to their reformation and enable them to become law-abiding and useful citizens, a support and not a hindrance to the commonwealth." *State v. Burnett,* 179 N.C. 735, 102 S.E. 711 (1920). The State must exercise its power as "*parens patriae* to protect and provide for the comfort and well-being of such of its citizens as by reason of infancy . . . are unable to take care of themselves." *McLean v. Humphreys,* 104 Ill. 378 (1882). Thus, juveniles are in need of supervision and control due to their inability to protect themselves. In contrast, adults are regarded as self-sufficient.

Therefore, the classification here challenged is based on differences between adults and children; and there are so many valid distinctions that the basis for challenge seems shallow. These differences are "reasonably related to the purposes of the Act"—that is, to provide children the needed supervision and control. Consequently, the classification does not offend the Equal Protection Clause under the test laid down in *Morey v. Doud, supra;* and even if it be said that the classification here challenged affects "fundamental interests" or is "inherently suspect," it is our view that the desire of the State to exercise its authority as *parens patriae* and provide for the care and protection of its children supplies a "compellingly rational" justification for the classification.

The conclusion we reach—that G.S. 7A-278 and related statutes do not violate the Equal Protection Clause by classifying and treating children differently from adults—has also been reached in numerous cases upholding juvenile Acts in other states. "These juvenile statutes have been construed,

applied and upheld in many decisions of this Court including *State v. Burnett, supra* (179 N.C. 735, 102 S.E. 711); *State v. Coble,* 181 N.C. 554, 107 S.E. 132; *In re Hamilton,* 182 N.C. 44, 108 S.E. 385; *In re Coston,* 187 N.C. 509, 122 S.E. 183; *Winner v. Brice,* 212 N.C. 294, 193 S.E. 400. Furthermore, statutes similar to our own have been held constitutional in over forty states against a variety of attacks. *In re Gault, supra* [387 U.S. 1, 18 L.Ed. 2d 527, 87 S.Ct. 1428]. See *Paulsen, Kent v. United States:* The Constitutional Context of Juvenile Cases, 1966 Supreme Court Review 167, 174." *In Re Burrus, supra* (275 N.C. 517, 169 S.E. 2d 879).

[4] Appellant makes the further contention that North Carolina's statutory scheme, G.S. 7A-278(5), 7A-285 and 7A-286(2) and (4), allowing a child to be adjudged *undisciplined* and placed on probation *without benefit of counsel,* while at the same time requiring counsel before a child may be adjudged *delinquent,* denies equal protection of the laws to the undisciplined child.

This argument has no merit and cannot be sustained. The Equal Protection Clause is offended only if the classifications of "undisciplined" and "delinquent" rest on grounds wholly irrelevant to the achievement of the State's objective. "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland,* 366 U.S. 420, 6 L.Ed. 2d 393, 81 S.Ct. 1101 (1961). In seeking solutions which provide in each case for the protection, treatment, rehabilitation and correction of the child, it is impellingly relevant to the achievement of the State's objective that distinctions be made between undisciplined children on the one hand and delinquent children on the other. The one may need protection while the other needs correction. In our opinion, the statutes under attack embody no violation of the Equal Protection Clause. In a procedural context, as here, the Equal Protection Clause requires no more than the Due Process Clause requires.

[5] Finally, appellant urges that the trial judge's failure to state in his order that he found "beyond a reasonable doubt" that appellant had violated the conditions of her probation was

constitutional error under *In re Winship,* 397 U.S. 358, 25 L.Ed. 2d 368, 90 S.Ct. 1068 (1970).

In *Winship,* the juvenile was accused of stealing $112 from a woman's pocketbook and was brought into juvenile court on a petition alleging him to be delinquent. The juvenile was adjudged delinquent and placed in a training school, subject to confinement for as long as six years. The juvenile judge acknowledged that pursuant to a New York statute his determination of the delinquency issue was based on a preponderance of the evidence. The juvenile, contending that due process required proof beyond a reasonable doubt, carried the case by successive appeals to the Supreme Court of the United States. The Court held that the Due Process Clause requires proof beyond a reasonable doubt in delinquency proceedings wherein the child is charged with an act that would constitute a crime if committed by an adult. Here, Valerie Walker was charged with delinquency by reason of probation violations, none of which violations amounted to a crime. *See* G.S. 7A-278(2). Therefore, *Winship* does not apply to these findings, and is not authority for the argument that the findings here must be made upon proof beyond a reasonable doubt.

[6] Even in cases where *Winship* applies, we think the failure of the trial judge to state that he finds the facts "beyond a reasonable doubt" is not fatal if the evidence is sufficient to support his findings by that quantum of proof. Of course, the better practice dictates that the judge's order recite affirmatively that the findings are made beyond a reasonable doubt. Even so, since there is no statutorily established quantum of proof in juvenile proceedings in North Carolina, in the absence of record evidence that the trial judge followed some other standard, there is a permissible inference that he followed the applicable law and found the facts beyond a reasonable doubt as required by *Winship. Compare Chappell v. Winslow,* 258 N.C. 617, 129 S.E. 2d 101 (1963) (rebuttable presumption that when court sits without a jury it ignores incompetent evidence and acts only on competent evidence); *State v. Griggs,* 223 N.C. 279, 25 S.E. 2d 862 (1943) (in absence of findings, presumption that trial judge found such facts as would support his rulings); *State v. Hines,* 266 N.C. 1, 145 S.E. 2d 363 (1965) (jury charge not in record, presumption that charge is correct).

This record reveals that the basic requirements of due process and equal protection with respect to the adjudication of delinquency were fully met. No error of law by the courts below has been made to appear. For the reasons stated, the result reached by the Court of Appeals upholding the order entered by Judge Gentry is

Affirmed.

Chief Justice BOBBITT dissenting.

Valerie Lenise Walker, who was born April 14, 1957, appeals from an order entered October 27, 1971, which, based on a finding that Valerie was a delinquent child, committed her to the North Carolina Board of Juvenile Correction, to be and remain in the custody and under the control and supervision of the officials thereof until discharged in accordance with law. The basis for the finding that Valerie was a "delinquent child" was that she had violated the conditions of probation set forth in an order of August 19, 1971, which adjudged that Valerie was an "undisciplined child."

The order of August 19, 1971, had been entered by Judge Gentry after a hearing on August 17, 1971, on a petition filed by Mrs. Katherine Walker, Valerie's mother, which asserted, in the phraseology of G.S. 7A-278(5), that Valerie was an "undisciplined child." This order recites that Valerie, Mrs. Walker, and Mrs. Jones, Court Counselor, were present for the hearing. The record before us does not show what evidence was then heard. Valerie was not represented by counsel at this hearing on August 17th.

On September 21, 1971, a petition filed by Mrs. Jones, Court Counselor, asserted that Valerie "ha[d] violated Conditions No. 1, 2, and 3 of the probation order dated August 19, 1971." Judge Gentry found that Valerie was an indigent person and appointed the Public Defender to represent her.

In Valerie's behalf, the Public Defender moved that the order dated August 19, 1971, be vacated; that Valerie be given a plenary hearing on the allegations contained in the petition filed August 2, 1971; and that she be provided counsel to represent her at such hearing. Exception was taken to the court's denial of this motion.

Thereafter, the court heard testimony relating to Valerie's conduct *subsequent* to August 19th. An assistant solicitor offered the testimony of Mrs. Walker, Valerie's mother, of Mr. Howard King, Assistant Superintendent of the Junior High School which Valerie attended, and of "the Probation Officer." Valerie alone testified in her own behalf.

For present purposes, I accept as valid the conditions of probation and the sufficiency of the evidence to support Judge Gentry's findings that Valerie's conduct subsequent to August 19th was in violation of the conditions of her probation.

The applicable statutory provisions quoted below appear in G.S. Volume 1B, Replacement 1969.

G.S. 7A-278(5) provides: " 'Undisciplined child' includes any child who is unlawfully absent from school, or who is regularly disobedient to his parents or guardian or custodian and beyond their disciplinary control, or who is regularly found in places where it is unlawful for a child to be, or who has run away from home."

G.S. 7A-278(2) provides: " 'Delinquent child' includes any child who has committed any criminal offense under State law or under an ordinance of local government, including violations of the motor vehicle laws or *a child who has violated the conditions of his probation under this article.*" (Our italics.)

G.S. 7A-285 includes the following: "The juvenile hearing shall be a simple judicial process designed to adjudicate the existence or nonexistence of any of the conditions defined by G.S. 7A-278 (2) through (5) which have been alleged to exist, and to make an appropriate disposition to achieve the purposes of this article. In the adjudication part of the hearing, the judge shall find the facts and shall protect the rights of the child and his parents in order to assure due process of law, including the right to written notice of the facts alleged in the petition, the right to counsel, the right to confront and cross-examine witnesses, and the privilege against self-incrimination. In cases where the petition alleges that a child is delinquent *or* undisciplined *and* where the child *may* be committed to a State institution, the child shall have a right to assigned counsel as provided by law in cases of indigency." (Our italics.)

Valerie was found delinquent and committed solely on the ground she had violated certain of the probation conditions

imposed when she was adjudicated an "undisciplined child" on August 19th. The adjudication that she was an "undisciplined child" was absolutely essential to a valid commitment for violation of probation conditions. The Court holds that she was entitled to assigned counsel *only at the final hearing* to determine whether the probation conditions had been violated. In my opinion, she was equally entitled to assigned counsel at the earlier hearing to determine whether she should be adjudged an "undisciplined child."

Here a fourteen-year-old girl was brought before the juvenile court upon the complaint of her mother. Absent counsel, she stood alone before the court. In addition to the statutory requirement, it is my opinion that due process required that counsel be assigned to represent her at any hearing which might result in an adjudication prejudicial to her.

For the reasons indicated, I would reverse the decision of the Court of Appeals, vacate Judge Gentry's order of October 27, 1971, and remand the cause with direction that a plenary hearing be conducted when Valerie is represented by counsel for *de novo* consideration and determination of the charge in the original petition that she is an "undisciplined child."

Justice SHARP joins in this dissenting opinion.

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF NEW BERN, NORTH CAROLINA v. BRANCH BANKING & TRUST COMPANY, A BANKING CORPORATION; CHASE MANHATTAN BANK OF NEW YORK, A BANKING CORPORATION; THE HANOVER INSURANCE COMPANY, A CORPORATION; AND UNITED STATES FIRE INSURANCE COMPANY, A CORPORATION

No. 39

(Filed 11 October 1972)

1. **Rules of Civil Procedure § 56— motion for summary judgment — burden of proof**

Irrespective of who has the burden of proof at trial upon issues raised by the pleadings, upon motion for summary judgment the burden is upon the party moving therefor to establish that there is no genuine issue of fact remaining for determination and that he is entitled to judgment as a matter of law.

2. **Bills and Notes § 7; Rules of Civil Procedure § 56— motion for summary judgment — affidavit based on hearsay — issue of forgery**

In an action by a savings and loan association to recover an amount charged back against it by a bank because of the purported forgery of the indorsement of one of the payees on a draft issued by defendant insurance company, an affidavit by defendant's attorney was insufficient to show that there is no genuine issue of fact as to the forgery where it was based on hearsay and incorporated an affidavit of another person concerning the forgery which was hearsay as to the attorney.

3. **Bills and Notes § 2; Uniform Commercial Code § 25— draft — absence of words of negotiability — applicability of U.C.C.**

A draft payable to two named payees without the addition of the words "or order" or any similar words of negotiability is not a negotiable instrument; nevertheless, Article 3 of the Uniform Commercial Code applies to the draft, except that no holder of it could be a holder in due course. G.S. 25-3-805.

4. **Bills and Notes § 7; Uniform Commercial Code § 26— forgery of indorsement of one payee — interest of transferee**

Where plaintiff, a savings and loan association, took a draft upon the indorsement of one of the payees and the forged indorsement of the other, such transfer conferred upon plaintiff the interest of the payee who indorsed the draft, and no more. G.S. 25-3-202(3).

5. **Bills and Notes § 7; Uniform Commercial Code § 26— draft — forgery of indorsement of one payee — interest of other payee — issue of fact**

In an action by plaintiff savings and loan association to recover an amount charged back against it by a bank because of the forgery of the indorsement of one of the two payees named in a draft issued by defendant insurance company, an issue of material fact raised by the pleadings existed as to the extent of the interest, if any, the payee who indorsed the draft had in the proceeds and which, by her indorsement, she transferred to the plaintiff.

6. **Uniform Commercial Code § 25— drawee of a draft**

An insurance company which issued a draft, not the collecting bank, was the drawee of the draft. G.S. 25-3-120.

7. **Bills and Notes § 7; Uniform Commercial Code §§ 30, 40— genuineness of indorsement of draft — liability of drawee**

The drawee of a draft is not held to know the signature of an indorser, whether the payee or an intermediate indorser, and is under no duty to examine the draft to determine the genuineness of an indorsement, but may rely upon the warranty made to him by the person receiving payment that such person has title to the instrument.

8. **Bills and Notes § 7; Uniform Commercial Code § 40— forgery of indorsement — knowledge by drawee — notice to bank of deposit — reasonable time**

When the drawee of a draft learns that an indorsement, necessary to the title of the person who has received payment, is forged, the

drawee must then act with reasonable promptness or his right to recover from the person receiving payment, or a prior indorser, will be barred to the extent of any loss which such person sustains by reason of the drawee's delay. G.S. 25-4-207.

9. **Bills and Notes § 7; Uniform Commercial Code § 40— drawee's knowledge of indorsement forgery — notice to bank of deposit — reasonable time — issue of fact**

In an action by plaintiff savings and loan association to recover an amount charged back against it by a bank because of the forgery of the indorsement of one of the two payees named in a draft issued by defendant insurance company, a genuine issue of material fact raised by the pleadings existed as to when defendant discovered the forgery of the indorsement and whether defendant was negligent in failing to give plaintiff notice of lack of title to the draft due to the forgery until approximately 27 months after defendant paid the draft.

10. **Bills and Notes § 7; Uniform Commercial Code § 40— drawee's knowledge of indorsement forgery — notice to bank of deposit — reasonable time**

There is no rule of law establishing the time within which the drawee must notify the person receiving payment, or a prior indorser, that such person's title to the draft was defective by reason of a forged indorsement; a reasonable time for such action depends upon the circumstances in each case.

11. **Rules of Civil Procedure § 56— summary judgment — actions involving reasonable care**

Generally, summary judgment is not appropriate in actions wherein the right of recovery depends upon the exercise of reasonable care.

CERTIORARI to the Court of Appeals to review its judgment, reported in 14 N.C. App. 567, 188 S.E. 2d 661, affirming summary judgment by *Rouse, J.*, on motion of defendant, The Hanover Insurance Company, at the November 1971 Civil Session of CRAVEN.

The complaint purports to allege two causes of action against the defendants Branch Banking & Trust Company, Chase Manhattan Bank of New York and The Hanover Insurance Company, hereinafter called Branch, Chase and Hanover, respectively, and a third cause of action against the defendant United States Fire Insurance Company only.

For the first cause of action against Branch, Chase and Hanover, the complaint alleges:

On 26 June 1968, Hanover issued and delivered its draft for $11,107.71 payable to Geraldine M. Stallings and Winter Park Federal Savings & Loan Association, hereinafter called Winter Park, the draft being payable through Chase upon acceptance. On 5 July 1968, the draft, indorsed by the payees, was deposited with the plaintiff and credited to the account of Geraldine M. Stallings, the plaintiff thereby becoming the absolute owner of the draft. On 8 July 1968, the plaintiff deposited the draft in its account with Branch in the regular course of its business. On 10 July 1968, the draft was accepted by Hanover and paid through Chase. Thereafter, the plaintiff permitted Geraldine M. Stallings to withdraw from her account the full amount of the proceeds of the draft. On 5 October 1970 (approximately 27 months after payment of the draft), Hanover and Chase wrongfully charged back the amount of the draft to Branch, and Branch wrongfully charged back the amount to the plaintiff. Branch now wrongfully withholds the amount of the draft from the plaintiff. At the time the draft was deposited with the plaintiff, the plaintiff was entitled to receive the proceeds thereof. Neither Branch, Chase nor Hanover did anything inconsistent with the acceptance and payment of the draft until such charge-backs occurred and the plaintiff at all times relied upon the acceptance and payment of the draft. The plaintiff is entitled to recover from Branch, Chase and Hanover the amount of $11,107.71 with interest.

For the second cause of action against Branch, Chase and Hanover, the plaintiff alleges in its complaint:

The defendants negligently induced and permitted the plaintiff to act and rely upon the acceptance and payment of the draft and ultimately to pay over the amount thereof to Geraldine M. Stallings. They did not, until after a great lapse of time following the payment of the draft, do anything inconsistent with an admission of the ownership of the draft by the plaintiff. They failed to use reasonable care to advise the plaintiff of any facts and circumstances inconsistent with the ownership of the draft by the plaintiff. By reason of the failure of the defendants to use due care and to give notice within a reasonable time of any facts contrary to the ownership of the draft, the plaintiff has been damaged in the amount of $11,107.71.

For the third cause of action, which is against the United States Fire Insurance Company only, the plaintiff alleges that

on 1 January 1968, this defendant executed and delivered to the plaintiff its bond which provided that this defendant would indemnify the plaintiff against any losses through forgery of any instrument. If it should be determined that the plaintiff is not entitled to the relief prayed for against Branch, Chase and Hanover in the first and second causes of action, such determination would be for causes insured against by the United States Fire Insurance Company in its said bond, and in such event, the plaintiff is entitled to recover $11,107.71, with interest from the United States Fire Insurance Company.

Hanover filed its answer, asserting four defenses: First, that the complaint fails to state a claim against Hanover upon which relief can be granted; second, that the action should be stayed until the resolution of a previously instituted action by Winter Park against the plaintiff involving the same transaction; third, that all of the allegations of the second cause of action set out in the complaint and all material allegations of the first cause of action are denied except Hanover's issuance of the draft as described in the complaint, the deposit of the draft by the plaintiff in its account with Branch and payment of the draft on 10 July 1968 through Chase; and fourth:

On 26 June 1968, Hanover issued its draft, as described in the complaint, and delivered it to Geraldine M. Stallings. The draft was presented for payment and was paid through Chase on 10 July 1968. The draft was indorsed by the plaintiff and deposited with Branch. It then passed through the regular commercial channels, each bank guaranteeing to Hanover the genuineness of the indorsements by the payees. After payment of the draft, Winter Park gave notice to Hanover of its nonreceipt of payment and submitted to Hanover proofs that the purported indorsement of the draft by Winter Park was a forgery. Hanover and Chase exercised due diligence following the ascertainment of the forgery and issued notices of dishonor and charged the amount of the draft back through the commercial channels to the plaintiff. Hanover has received repayment of the amount of the draft and, under its contract of insurance with Winter Park, thereafter paid Winter Park $11,107.71. The forged indorsement is pleaded by Hanover as an affirmative defense in bar of any right of recovery by the plaintiff from Hanover.

Hanover moved for summary judgment dismissing the action on the ground that there is no genuine issue as to any

material fact and that from the pleadings and an attached affidavit and matters incorporated therein by reference, it is entitled to such judgment as a matter of law.

Attached to and in support of the motion for summary judgment was an affidavit of David L. Ward, Jr., Attorney for Hanover. This affidavit asserts: The draft in question was delivered to Geraldine M. Stallings and was thereafter deposited with the plaintiff; at the time of such deposit the indorsement of Winter Park had been forged and, upon notice and pusuant to normal banking procedures, the amount of the draft was charged back to the plaintiff, it being the original holder under the forged indorsement; in the interim, Winter Park brought an action against the present plaintiff to collect from it the amount of the said draft, which action is still pending; First Federal has filed in that action a counterclaim covering the same claim made by it in the present action; and in that action there had been filed an affidavit of Agnes L. Coate, a copy of which was attached to and incorporated by reference into the affidavit of David L. Ward, Jr.

The affidavit by Agnes L. Coate, so attached to the affidavit of Mr. Ward, states that she was secretary-treasurer of Winter Park and that the draft here in question "was not endorsed by the bank"—i.e., Winter Park—and the signature upon the draft, purporting to be that of Agnes L. Coate, was not her signature but a forgery.

On 5 November 1971, Hanover served upon counsel for the plaintiff notice of its motion for summary judgment on the ground that there is no genuine issue as to any material fact, stating therein that it would move the court for such judgment at the 22 November 1971 Session.

No counter affidavit or other evidence was offered by the plaintiff at the hearing upon the motion for summary judgment, though counsel for the plaintiff and for the other defendants appeared and were heard. The court allowed the motion and entered judgment dismissing the action as to Hanover with prejudice. The record does not disclose what disposition of the action has been made as to the other defendants.

On appeal, the Court of Appeals affirmed the judgment on the ground that Hanover, having presented affidavits to the effect that the indorsement of Winter Park was a forgery and

that the draft was charged back in normal collection channels according to standard banking practice, the burden was upon the plaintiff to set forth specific facts showing a genuine issue for trial, and the plaintiff having presented nothing at the hearing except its complaint, summary judgment was properly entered. As to plaintiff's contention that it should be allowed to go to trial to show what interest Geraldine M. Stallings had in the draft and that such amount should not have been charged back to the plaintiff, the Court of Appeals said the complaint was silent on this point and in its answer Hanover alleges that the full amount of the draft was paid by it to Winter Park and that nothing in the record indicates Winter Park was not entitled to the full amount of the draft.

It appears from the answer filed by Hanover and upon the face of the draft that the draft was issued in payment of a loss under a contract of fire insurance. In the plaintiff's petition for writ of certiorari, it is stated that the insured property was in the State of Florida and was owned by Geraldine M. Stallings, subject to a deed of trust in favor of Winter Park as security for a loan made by it to her. Nothing in the record shows whether the draft was for an amount in excess of the balance due upon the loan so secured. The record does not indicate the date on which Hanover received notice that the indorsement of Winter Park upon the draft was a forgery, nor does the record indicate the date on which Geraldine M. Stallings withdrew the proceeds of the draft from her account with the plaintiff, except that this occurred at some time between the payment of the draft and the charge-back.

Barden, Stith, McCotter & Sugg, by Laurence A. Stith, for plaintiff.

Ward, Tucker, Ward & Smith, by David L. Ward, Jr., and J. Troy Smith, Jr., for defendant.

LAKE, Justice.

The question for decision is whether the record before us will support summary judgment for the defendant. Rule 56(c) provides that upon motion for summary judgment such judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, "show that there is no genuine issue as to

any material fact and that any party is entitled to a judgment as a matter of law."

Paragraph (e) of this rule provides that when a motion for summary judgment is made and supported as provided in Rule 56, "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." This paragraph of the rule then provides that if the adverse party "does not so respond, summary judgment, *if appropriate,* shall be entered against him." (Emphasis added.)

The plaintiff, though served with notice of the defendants' motion for summary judgment 17 days before the opening of the session at which the motion was heard, and though appearing at such hearing, filed no counter affidavit or other evidence and did not seek a continuance, as permitted by paragraph (f) of this rule, in order to permit the obtaining of affidavits, the taking of depositions or the filing of interrogatories. Thus, the question is whether summary judgment is appropriate, that is, whether the pleadings, together with the affidavit of Hanover's counsel, including the attachment thereto, show (1) that there is no genuine issue as to any material fact, and (2) that Hanover is entitled to a judgment as a matter of law.

Summary judgment is a drastic remedy. Its purpose is not to provide a quick and easy method for clearing the docket, but is to permit the disposition of cases in which there is no genuine controversy concerning any fact, material to issues raised by the pleadings, so that the litigation involves questions of law only. See: *Kessing v. National Mortgage Corp.,* 278 N.C. 523, 180 S.E. 2d 823.

[1] Irrespective of who has the burden of proof at trial upon issues raised by the pleadings, upon a motion for summary judgment the burden is upon the party moving therefor to establish that there is no genuine issue of fact remaining for determination and that he is entitled to judgment as a matter of law. Phillips, 1970 Supplement to McIntosh, North Carolina Practice and Procedure, 2d Ed., 1660.10. Dean Phillips also says in section 1660.5 of this supplement, "If the movant's forecast [of evidence which he has available for presentation at trial] fails to do this, summary judgment is not proper, whether

or not the opponent responds." Thus, as Judge Morris said for the Court of Appeals in *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E. 2d 425, "The evidentiary matter supporting the moving party's motion may not be sufficient to satisfy his burden of proof, even though the opposing party fails to present any competent counter-affidavits or other materials."

[2] Paragraph (e) of Rule 56 provides that affidavits filed in support of a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The affidavit of Mr. Ward, counsel for Hanover, which, together with an attached and incorporated affidavit by Agnes L. Coate made in another action, and a copy of the draft, is the sole support for Hanover's motion for summary judgment, does not meet the requirements of this portion of Rule 56. It does not show affirmatively that Mr. Ward is competent to testify, of his own personal knowledge, concerning the matters therein stated. The far greater probability is that his account of the delivery of the draft to Geraldine M. Stallings, of its deposit with the plaintiff and of the procedure followed in making the charge-back are based on hearsay. Clearly, the attached and incorporated affidavit of Agnes L. Coate concerning the forgery of Winter Park's indorsement is, as to Mr. Ward, hearsay. The Coate affidavit was prepared for and was filed in a different action between Winter Park and the present plaintiff. Nothing in the Ward affidavit brings the Coate affidavit within any exception to the hearsay rule. Thus, Mr. Ward, if called as a witness at the trial of the present action, would not be competent to testify to the fact of the alleged forgery. Since the affidavit filed by Hanover does not comply with Rule 56(e), the granting of its motion for summary judgment was error.

To send this action back to the superior court for further proceedings on that ground alone would merely invite a renewal of the motion for summary judgment, supported by affidavits from persons competent to testify concerning the matters set forth in the Ward affidavit. Consequently, we observe that, had the affiant Ward been competent to testify of his personal knowledge to all matters set forth in his affidavit and in the attachment thereto, the entry of a summary judgment in favor of Hanover upon such affidavit would not be appropriate for the further reason that it does not show "there is no genuine

issue as to any material fact" and that Hanover "is entitled to a judgment as a matter of law." While the Ward affidavit, if not subject to the above mentioned objections, considered in conjunction with the silence of the plaintiff, would have been sufficient to show that there is no genuine issue as to the fact of the forgery of the purported indorsement by Winter Park, or as to the facts that the draft was collected and then charged back by the respective banks, the establishment of these facts would not entitle Hanover to a judgment as a matter of law, there being other material issues raised by the pleadings and not touched by the Ward affidavit.

The complaint, liberally construed, alleges that Hanover, the drawee of the draft, negligently failed to give the plaintiff notice within a reasonable time of the plaintiff's lack of title to the draft due to the forgery of the indorsement of Winter Park and that, by reason of such negligence by Hanover and the charge-back, the plaintiff has been damaged. Hanover, in its answer, denies this allegation and affirmatively alleges that it exercised due diligence following its ascertainment of the forgery of the indorsement, issued notices of dishonor and charged the draft back through commercial channels. Upon these conflicting allegations, an issue of fact arises. The affidavit on which Hanover relies in its motion for summary judgment does not state when Hanover discovered the forgery of the indorsement or how soon thereafter it notified the collecting bank, the intermediate bank or the plaintiff. Nothing in Hanover's affidavit relates to whether Geraldine M. Stallings withdrew the amount credited to her account by the plaintiff before or after Hanover discovered the forgery of the Winter Park indorsement.

Again, construing the complaint liberally, it alleges that by virtue of the indorsement by Geraldine M. Stallings the plaintiff became the absolute owner of the draft. The answer of Hanover denies this allegation, thus raising an issue of law and of fact. Upon its appeal, both in the Court of Appeals and in this Court, the plaintiff contends that Geraldine M. Stallings had, at least, some interest in the draft, which interest passed to the plaintiff by her indorsement and subsequent withdrawal of the credit given her by the plaintiff. Nothing in Hanover's affidavit touches upon the extent of the interest, if any, which Geraldine M. Stallings had in the proceeds of the draft and which, by her indorsement, she transferred to the plaintiff.

Thus, there remain genuine issues of fact raised by the pleadings and not resolved by the affidavit in support of Hanover's motion. If these are material to the plaintiff's right to recover from Hanover, summary judgment in favor of Hanover was unauthorized.

[3] We observe that this draft was not a negotiable instrument since it was payable to the two named payees without the addition of the words "or order," or any similar words of negotiability. G.S. 25-3-104; G.S. 25-3-110. Nevertheless, Article 3 of the Uniform Commercial Code applies to this draft, except that no holder of it could be a holder in due course. G.S. 25-3-805. Thus, for the purposes of this appeal, the rights of the parties are to be determined as if the draft were a negotiable instrument.

[4] The plaintiff took the draft upon the indorsement of one of the payees and the forged indorsement of the other. Such transfer conferred upon the plaintiff the interest of Geraldine M. Stallings in the draft, and no more. G.S. 25-3-202(3); 11 AM. JUR. 2d, Bills and Notes, § 323; 10 C.J.S., Bills and Notes, § 194. Neither the right of Hanover, the drawee of the draft, to refuse to pay it upon presentment by one claiming under the indorsement of only one of the two joint payees nor Hanover's liability to the non-indorsing payee is before us. See, Britton, Bills and Notes, § 81. The draft was paid.

[5] The plaintiff alleges and Hanover admits that, thereafter, Hanover caused Branch to charge back to the plaintiff's account the full amount so paid by Hanover on the draft when it was presented for payment. If, as the plaintiff alleges, Geraldine M. Stallings, at the time of her indorsement to the plaintiff, was entitled to any part of the proceeds of the draft, this right passed to the plaintiff, and the plaintiff was entitled to retain that portion of the proceeds so paid by Hanover upon the presentment of the draft for payment. If, on the other hand, Winter Park was entitled to the full amount of the draft, as Hanover seems to imply in its allegation that, since the discovery of the forgery of the indorsement, it has paid the full amount to Winter Park, then the plaintiff, who succeeded to none of the rights of Winter Park, would have no right to retain any portion of the proceeds of the draft. Thus, a material issue of fact was raised by the pleadings in this action and the affidavit filed by Hanover in support of its motion for

summary judgment, even if otherwise competent, does not resolve this so as to show the absence of any genuine issue of fact in relation to this matter. The issue of fact which remains is the amount of interest, if any, of Geraldine M. Stallings in the proceeds of the draft which was transferred by her indorsement to the plaintiff.

[6] Hanover, not Chase, was the drawee of the draft. G.S. 25-3-120. The draft states upon its face that it was payable "upon acceptance." No acceptance appears upon the face of the paper. Therefore, it was not accepted. G.S. 25-3-410. However, Hanover, the drawee, having paid the draft, is not in a position to assert, and it does not assert in this action, that the payment could be recovered for this reason. Hanover asserts that the charge-back, which it caused Branch to make to the plaintiff's account with Branch, was proper because the indorsement of Winter Park, one of the joint payees, was forged and Hanover has subsequently paid the full amount of the draft to Winter Park; i.e., to the person entitled to the entire proceeds.

Assuming arguendo that Geraldine M. Stallings had no right to retain any portion of the proceeds of the draft at the time of her indorsement to the plaintiff, we turn to the right of the drawee, Hanover, to charge the draft back to the collecting bank, and, through it, to the plaintiff, approximately 27 months after the draft was paid by Hanover. G.S. 25-3-417 provides that any person who obtains payment of an instrument, and any prior transferor thereof, warrants to a person who pays it in good faith that he has a good title to the instrument or is authorized to obtain payment on behalf of one who has a good title to it. This warranty is broken if such person claims through the forged instrument of a joint payee having any interest in the proceeds of the paper.

Article 4 of the Uniform Commercial Code, Chapter 25 of the General Statutes, is applicable to drafts forwarded for collection through a bank or banks. G.S. 25-4-207(1) provides that each customer or collecting bank who obtains payment of such paper, and each prior customer and collecting bank, "warrants to the payor bank *or other payor*," who in good faith pays the paper, that he has a good title to it or is authorized to obtain payment on behalf of one who has a good title thereto. With reference to the transaction involved in this action, Hanover is such "other payor," Chase was the collecting bank who

obtained payment, Branch was such prior collecting bank and the plaintiff was such prior customer. Paragraph (4) of G.S. 25-4-207 provides: "Unless a claim for breach of warranty under this section is made within a reasonable time after the person claiming learns of the breach, the person liable is discharged to the extent of any loss caused by the delay in making claim." If, under this statute, or under G.S. 25-3-407, Hanover was entitled to proceed directly against the plaintiff for reimbursement of the amount paid by Hanover upon the draft, Hanover would not be liable to the plaintiff in this action for having caused Branch to make the charge-back against the plaintiff's account with Branch.

G.S. 25-4-406, relating to the duty of a customer of a bank to discover and report to his bank unauthorized signatures and alterations, has no application to the right of Hanover to proceed against the plaintiff for the recovery of the amount paid by Hanover upon this draft. The applicable rule is thus stated in 11 AM. JUR. 2d, Bills and Notes, § 1015:

> "It is generally recognized that the right of a maker or drawee to recover a payment made on a forged indorsement may be lost if he is guilty of negligence or laches whereby the position of the person receiving payment is changed to the damage of such person. Thus, it is held that a drawee may recover if, after discovery of the forgery, he is guilty of no negligence that is injurious to the person receiving payment. But delay in discovering a forged indorsement ordinarily is not negligence and does not preclude recovery, particularly where no injury to the holder results.
>
> "In order for a drawee or other person to recover a payment made upon a forged indorsement it is a general requisite that he give timely notice after discovery of the forgery. Prompt notice of the discovery of the forgery is not a condition precedent to suit, but if it is shown that the drawee or other payor on learning that an indorsement was forged did not give prompt notice of it, and that damage resulted, recovery of the payment by such person is barred. * * * But the damage occasioned by the delay must be established, and not left to conjecture."

[7, 8] The drawee of a draft is not held to know the signature of an indorser, whether the payee or an intermediate indorser.

He is under no duty to examine the draft to determine the genuineness of an indorsement, but may rely upon the warranty made to him by the person receiving payment that such person has title to the instrument. When, however, the drawee learns that an indorsement, necessary to the title of the person who has received payment, is forged, the drawee must then act with reasonable promptness or his right to recover from the person receiving payment, or a prior indorser, will be barred, to the extent of any loss which such person sustains by reason of the drawee's delay.

[9] Here, the plaintiff alleges Hanover negligently induced the plaintiff to rely upon Hanover's payment of the draft and thereby induced the plaintiff to pay over to Geraldine M. Stallings the amount received by it as the proceeds of the draft, and that Hanover thereby damaged the plaintiff in the amount of $11,107.71. Hanover, in its answer, has denied this allegation. Thus, the pleadings raised an issue of fact material to the plaintiff's cause of action. The affidavit in support of Hanover's motion for summary judgment is silent as to when Hanover discovered the forgery of Winter Park's indorsement. Thus, Hanover has failed to show that there is no genuine issue as to a material fact.

[10, 11] Furthermore, there is no rule of law establishing the time within which the drawee must notify the person receiving payment, or a prior indorser, that such person's title to the draft was defective by reason of a forged indorsement. A reasonable time for such action depends upon the circumstances in each case. 10 AM. JUR. 2d, Banks, § 636. Generally, summary judgment is not appropriate in actions wherein the right of recovery depends upon the exercise of reasonable care. Phillips, 1970 Supplement to McIntosh, North Carolina Practice and Procedure, 2d Ed., § 1660.5.

It was error to grant summary judgment in favor of Hanover upon the showing made on this record. The judgment of the Court of Appeals, affirming such summary judgment, is, therefore, reversed and the matter is remanded to the Court of Appeals for the entry by it of a judgment remanding this action to the superior court for further proceedings according to law.

Reversed and remanded.

STATE OF NORTH CAROLINA v. LEWIS BURLEY FOUNTAIN

No. 13

(Filed 11 October 1972)

1. **Jury § 2— exhaustion of original venire — additional jurors selected — no error**

Defendant in a first-degree murder prosecution was not prejudiced by the selection of ten additional jurors from the jury list after the original venire was exhausted where defendant failed to move for a continuance in order to review the names of the additional jurors, where the record does not show that the clerk failed to read over the names of the additional jurors in the presence and hearing of defendant and his counsel before the jury was impaneled, and where the record did not reveal the acceptance of any juror after the exhaustion of defendant's peremptory challenges. G.S. 9-21; G.S. 9-11.

2. **Criminal Law § 73— testimony outside personal knowledge of witness — hearsay testimony properly excluded**

The defendant's attempt to establish the existence of a shotgun or shell casing through witnesses who stated they had no personal knowledge concerning the matter was properly excluded by the trial court in a murder prosecution, as such testimony would have been hearsay evidence.

3. **Criminal Law § 162— appeal — evidentiary questions — assignment or error — requirements**

When a record fails to show what the witness would have testified had he been permitted to answer questions objected to, the exclusion of such testimony is not shown to be prejudicial; an assignment of error which does not set out the excluded evidence but merely refers to the record page where the asserted error may be discovered is not sufficient.

4. **Criminal Law § 88— cross-examination — denial of prior convictions — "sifting the witness" proper**

The trial court did not err in permitting a solicitor to further cross-examine defendant witness concerning an alleged prior conviction after defendant denied having been convicted of the crime where the solicitor acted in good faith and with information concerning the crime and where the solicitor's questions amounted to a "sifting of the witness" in light of evasive and equivocal answers given by the witness.

5. Homicide § 21— first-degree murder — sufficiency of State's evidence to withstand nonsuit

Defendant's motion for nonsuit in a first degree murder prosecution, made at the close of all the evidence, was properly denied where the evidence was sufficient to permit a jury finding of premeditation and deliberation in that it tended to show that the defendant and deceased had had previous difficulties, that ill will existed between the two and that the younger male defendant inflicted seventeen separate knife wounds upon the older female victim.

APPEAL by defendant from *Long, J.*, 17 January 1972 Criminal Session of ROCKINGHAM Superior Court.

Defendant was tried upon a bill of indictment charging him with the murder of Vera Parker. He entered a plea of not guilty.

The State offered evidence which, in substance, is as follows:

Curtis Parker testified that on 28 August 1971 he had been harvesting tobacco, and that late in the afternoon he went to his house and sent his wife and daughter to light the fire at the tobacco barn. Later, as a result of a conversation with his daughter, Dorothy, he went out and found his wife's body lying three or four feet from the edge of the road. She was dead. He had earlier seen defendant, Lewis Burley Fountain, his daughter Dorothy, and some of their children standing across the road near the place where he found his wife's body. Dorothy was married to defendant; they had been separated for about four years, and their eight children lived at the Parker residence. Curtis Parker thereafter testified that he kept a shotgun and rifle locked up in a wardrobe, and after he heard what had happened he unlocked the wardrobe and obtained the shogun.

Dr. Paul Mabe, a practicing physician and Assistant Medical Examiner for Rockingham County, testified that he examined the body of Vera Parker in the Annie Penn Memorial Hospital at Reidsville on the night of 28 August 1971. In his opinion her death resulted from shock due to loss of blood caused by some seventeen lacerations or stab wounds. He described the wounds as follows:

"One laceration was noted over the posterior of the scalp, the base of the skull area, which was approximately some two inches in length; there were two facial lacera-

tions, over the left side of the face, approximately four or five inches in length the longer one, two six inch deep lacerations over the left posterior shoulder, over the upper back area off on the left, they were quite deep extending through not only the skin and through the muscle but not into the chest cavity, two small lacerations over the left shoulder, one ten inch laceration over the left chest wall extending around the left lateral side of the chest wall, two eight inch deep lacerations over the right anterior chest area over the right front part of the chest, one penetrating in the chest cavity on the right.

"There were five small lacerations over the anterior chest, two, three to four inch lacerations over the upper abdomen, one penetrating into the right abdomen cavity and two lacerations of the left forearm and hand. . . . "

In his opinion deceased could not have lived over four or five minutes after receiving the injuries.

Florence Parker stated that at the request of her father, Curtis Parker, she and her mother went to light the fire at the tobacco barn. On the way to the barn she saw defendant, his wife Dorothy, and their sons Richard and Burley, Jr., across the road near a patch of pine trees. Defendant had a knife on Dorothy's throat and at that time her mother, Vera Parker, went toward Burley, telling him "not to do that, that he was not supposed to be there, and that she did not want any trouble." Defendant pushed his wife aside, went toward Vera Parker and cut and stabbed her. She (Florence) pulled on Burley until she fell down. Dorothy ran toward the house, and after Vera Parker fell to the ground, Burley left.

Florence said on cross-examination that defendant did not go to Vera Parker, but that Vera Parker was going toward Burley. She did not see a shotgun at the scene. She stated that defendant and her mother had previously had trouble and that defendant had shot into their house four times. On another occasion her mother had shot Burley.

Deputy Sheriff Duke Setliff testified that he arrived at the scene of the killing at 9:00 p.m. He described the condition of the deceased's body and stated that when the body was removed a bloody knife blade was found where the body had been. The blade was a little over four inches long.

Burley Fountain, Jr., aged eight, testified that defendant cut Vera Parker, and at that time Vera was not doing anything to defendant, but that Florence Parker was hitting defendant on the back during the time he was cutting Vera. On cross-examination he stated that he was playing ball in the house and later returned to the place of the cutting with his mother.

Deputy Sheriff Setliff was recalled, and further cross-examination of him revealed that on the night of 28 August 1971, at about 10:15 p.m., after he had warned defendant Burley Fountain of his constitutional rights, defendant made a statement. In essence, the statement was that defendant was visiting with his wife and children across the road from the Parker house when Vera Parker came out of the house "fussing and arguing." She threatened that if he came to the house she would kill him. Vera later came out of the house, fired a shotgun, and threw it to the ground. Florence picked up the gun and started to beat him on the head with it while Vera held him. After stabbing Vera until she fell to the ground, he left.

Deputy Sheriff Edward Page, testifying for defendant, stated that Burley Fountain arrived at his (Page's) home at about 9:30 p.m. on 28 August, 1971. He told the officer about the cutting and voluntarily placed himself in custody. Deputy Sheriff Page later returned to the scene searching for a knife blade, because Burley Fountain had told him "he cut her until the blade came out of the knife." He found a 12-gauge shotgun shell lying on the ground about four feet from the blood.

Glynton Strader testified that on 28 August 1971 Burley Fountain had worked with him in the tobacco field, and that he had put defendant off near the Parker home in later afternoon. Strader returned to the scene of the killing a short time thereafter and found Curtis Parker and Eugene Troxler in possession of firearms. The guns, an empty single shot 12-gauge shotgun and a loaded .22 rifle, were given to him.

Dr. Evans Charles Fowler, a psychiatrist employed at Cherry Hospital in Goldsboro, in pertinent part testified:

> " . . . I made these determinations. The diagnosis was: Primary: Schizophrenia, Residual type, Non-Psychotic. Secondary: Mental retardation, Mild to borderline. Another doctor and myself saw Fountain and the disposition was

signed by both of us. It reads: 'It is our opinion that this subject, Lewis B. Fountain, is able to differentiate between right and wrong and further that he can understand the probable consequences of his acts and is able to plead to the indictment pending against him. It is further our opinion that he is able to consult with counsel in the preparation of his own defense.' "

Defendant testified that he was married to Vera Parker's daughter, Dorothy, and that they had eight children. He stated that on 28 August 1971 Mr. Strader let him off at the Parker mailbox, and his children and wife walked across the road where he usually met them. He saw Vera Parker near the house and heard her say, "If that s.o.b. don't leave from here I am going to kill him." He paid no attention to what Vera Parker said. Later, he looked up and saw Vera Parker pointing a shotgun at him. At this time he grabbed his wife and backed up. He had a knife out. Vera Parker fired the shotgun and grabbed him. Florence then began beating on his back with the shotgun, and during "the shuffle" he cut Vera Parker several times.

On cross-examination defendant testified that he weighed 216 pounds and was six feet two inches tall. He admitted having been convicted of assaulting his wife on numerous occasions and having been convicted of various misdemeanors. He was on probation when he killed Vera Parker.

The jury returned a verdict of guilty of first degree murder with a recommendation for life imprisonment. Defendant appealed from judgment imposing the mandatory life sentence.

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

Benjamin R. Wrenn, Court-Appointed Attorney, for defendant.

BRANCH, Justice.

Defendant assigns as error the failure of the trial court to grant his motion for mistrial.

[1] In selecting the jury the original venire was exhausted, and Judge Long ordered that ten additional jurors be selected from the jury list in the same manner as provided for the

selection of regular jurors. Defendant objected to the drawing of the additional jurors and on the next day moved for a mistrial on the ground that the tales jurors were not called as members of the original venire prior to the seating of any jurors. Defendant relies on the provisions of G.S. 9-21, which provides:

> Peremptory challenges in criminal cases.—(a) In all capital cases each defendant may challenge peremptorily without cause 14 jurors and no more. In all other criminal cases each defendant may challenge peremptorily six jurors without cause and no more. *To enable defendants to exercise this right, the clerk shall read over the names of the jurors on the panel, in the presence and hearing of the defendants and their counsel, before the jury is impaneled.* (Emphasis ours.)
>
> (b) In all capital cases the State may challenge peremptorily without cause six jurors for each defendant and no more. In all other criminal cases the State may challenge peremptorily without cause four jurors for each defendant and no more. The State's challenge, peremptory or for cause, must be made before the juror is tendered to the defendant. The State does not have the right to stand any jurors at the foot of the panel.

G.S. 9-11 provides:

> Supplemental jurors; special venire.—(a) If necessary, the court may, without using the jury list, order the sheriff to summon from day to day additional jurors to supplement the original venire. Jurors so summoned shall have the same qualifications and be subject to the same challenges as jurors selected for the regular jury list. If the presiding judge finds that service of summons by the sheriff is not suitable because of his direct or indirect interest in the action to be tried, the judge may appoint some suitable person in place of the sheriff to summon supplemental jurors. The clerk of superior court shall furnish the register of deeds the names of those additional jurors who are so summoned and who report for jury service.
>
> (b) The presiding judge may, in his discretion, at any time before or during a session direct that supplemental jurors or a special venire be selected from the jury list

in the same manner as is provided for the selection of regular jurors. Jurors summoned under this subsection may be discharged by the court at any time during the session and are subject to the same challenges as regular jurors, and to no other challenges.

The language of G.S. 9-11 is clear and unambiguous, and its provisions authorize the trial judge to order the summonsing of supplemental jurors in order to insure orderly, uninterrupted, and speedy trials.

This Court is without power to interpolate or superimpose provisions not contained in a clear and unambiguous statute. *Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 166 S.E. 2d 663; *N. C. Board of Architecture v. Lee*, 264 N.C. 602, 142 S.E. 2d 643.

In construing statutes dealing with similar subject matter, the statutes must be construed in *pari materia* and harmonized so as to give effect to each other. *Utilities Comm. v. Electric Membership Corp., supra; Gravel Co. v. Taylor*, 269 N.C. 617, 153 S.E. 2d 19.

The procedure of impaneling a jury is not statutory but is an ancient rite still in general use in the courts of this State. It is the final procedure or ceremony in the formation of a jury.

The provisions of G.S. 9-11 and G.S. 9-21 are easily harmonized. The requirement in G.S. 9-21 that the clerk read the names of the jurors to enable defendants to exercise their rights of challenge before the jury is impaneled applies to original venires and additional venires with equal force, and relates to the time before the jury is finally formed. Clearly the purpose of this provision is to keep the defendant and his counsel informed as to the composition of the jury venires until the time the jury is impaneled.

We have been unable to find any authority in this jurisdiction as to the precise issue here presented. We do find authority from other jurisdictions supporting the general rule that an accused is not prejudiced because he is not furnished a list of persons called as supplemental jurors where it became necessary to summons them after the court had properly excluded jurors from the original venire. 47 Am. Jur. 2d, Jury § 162;

Demato v. People, 49 Colo. 147, 111 P. 703; *State v. McKee,* 170 La. 630, 128 So. 658; *Makley v. State,* 49 Ohio App. 359, 197 N.E. 339.

Instant record shows that defendant failed to move for a continuance in order to review the names of the additional jurors drawn upon order of the trial judge. The record does not reveal that the clerk failed to read over the names of the additional jurors in the presence and hearing of defendant and his counsel before the jury was impaneled. Further, defendant has failed to show any prejudice since the record does not reveal the acceptance of any juror after the exhaustion of his peremptory challenges. To follow defendant's contention would result in a procedure which would impede the orderly dispatch of court business and defeat the primary purpose of our court system: to afford defendants fair and speedy trials.

We find no merit in this assignment of error.

[2] Defendant next assigns as error the action of the trial judge in sustaining the State's objection to cross-examination of Florence Parker and Deputy Sheriff Setliff concerning a shotgun and shotgun shell casing purportedly found at the scene of Vera Parker's death.

On cross-examination of the witness Florence Parker, the following occurred:

Q. Now you say that you don't know anything about a shotgun?

A. No, sir, but they said one was out there.

Q. Who is they?

SOLICITOR SCOTT: Objection to what somebody said, if she does not know about it.

COURT: Sustained.

EXCEPTION NO. 2.

The same type question was put to Deputy Sheriff Setliff concerning the shell casing. He had previously answered that he had no personal knowledge of the existence of a shell casing at the scene, but that someone had told him one was there.

Defendant in both instances attempted to establish the existence of the shotgun or shell casing through witnesses who stated they had no personal knowledge concerning the matter. Had the court allowed defendant to elicit this testimony as to what someone other than the witnesses personally knew about the shotgun or the shell casing, it would clearly have been hearsay evidence. 2 Strong's N.C. Index 2d, Criminal Law § 73, p. 572; Stansbury, N.C. Evidence 2d, Hearsay § 138, pp. 335-339.

[3] In any event, the record on appeal does not show what the responses to these questions would have been.

It is well recognized that when a record fails to show what the witness would have testified had he been permitted to answer questions objected to, the exclusion of such testimony is not shown to be prejudicial. This rule applies to questions asked on direct and cross-examination. *State v. Fletcher* and *State v. St. Arnold,* 279 N.C. 85, 181 S.E. 2d 405; *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416.

This assignment of error does not set out the excluded evidence but merely refers to the record page where the asserted error may be discovered. This is not sufficient. *State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561; Rule 19(3), Rules of Practice in the Supreme Court of North Carolina.

This assignment of error is overruled.

[4] By his Fifth Assignment of Error defendant asserts that the trial court erred in allowing the solicitor to further cross-examine defendant concerning an alleged prior conviction after defendant denied having been convicted of the crime. We quote portions of the record pertinent to this contention:

> Q. State to the court and the jury whether or not you were indicted and convicted for shooting into the home down there?
>
> A. They say that I shot into it but I didn't.
>
> Q. Were you convicted of that?
>
> A. Er, no.
>
> Q. Were you convicted or did you plead guilty?
>
> A. I was not convicted of it.

Q. Did you plead guilty?

A. I don't remember.

Q. That was in Caswell County that I am talking about and you don't remember whether you were —

ATTORNEY WRENN: Objection, the solicitor is bound by the answer of the defendant, your Honor.

COURT: Overruled.

EXCEPTION No. 7.

I did not plead guilty of shooting into no house. The court made some sort of settlement or something. I do not know what kind of a settlement it was. It did not involve me. I don't know if I pleaded guilty in May, 1971 or shooting into the house of Vera Parker. I do not remember who the judge was. I was on probation at the time I killed Vera Parker. I was not at Vera Parker's home. One of the conditions of my probation was that I was not to go to Vera Parker's home or molest her.

Q. And I will ask you now even if you went not convicted, I will ask you if you did not actually shoot into the home of Vera Parker on the 20th day of February, 1971?

A. I did not.

ATTORNEY WRENN: Objection.

COURT: Overruled.

EXCEPTION No. 8.

. . . .

Q. You pled guilty?

A. No, I did not plead guilty to shooting in no house.

Q. Can you read? You can write, can't you, look at that did you sign that?

A. I might have signed that but I have signed a lot of forms here that I don't really understand.

Q. Did you sign that?

A. That is my signature on that.

Q. Don't you know that is a transcript of a plea of guilty to the felony of discharging a firearm in an occupied dwelling wasn't it?

A. I signed a stack of forms here but I never read a line, they said signed it here.

Q. Didn't the judge read it over to you and ask you if you agreed to it or not?

A. I don't know.

Q. And you answered, "Yes, sir," didn't you?

A. I signed some forms here and they were not read or nothing.

ATTORNEY WRENN: I object, he is asking the man what he was tried and convicted of for one purpose and I asked the Court to instruct the jury about that, but I renew my objection to this line of questioning.

SOLICITOR SCOTT: The State is trying to do several things among others, to show motive.

COURT: Overruled.

EXCEPTION NO. 9.

When a defendant in a criminal action elects to take the stand and testify, he is subject to impeachment as other witnesses, including impeachment by cross-examination concerning prior criminal convictions. *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174; *State v. Sheffield,* 251 N.C. 309, 111 S.E. 2d 195. However, cross-examination as to prior convictions must be made in good faith and be based on information. *State v. Heard,* 262 N.C. 599, 138 S.E. 2d 243; *State v. Sheffield, supra.*

"It is a general rule of evidence in North Carolina 'that answers made by a witness to collateral questions on cross-examination are conclusive, and that the party who draws out such answers will not be permitted to contradict

them; which rule is subject to two exceptions, first, where the question put to the witness on cross-examination tends to connect him directly with the cause or the parties, and second, where the cross-examination is as to a matter tending to show motive, temper, disposition, conduct, or interest of the witness toward the cause or parties.' *State v. Jordan,* 207 N.C. 460, 177 S.E. 333 (1934)." *State v. Long,* 280 N.C. 633, 187 S.E. 2d 47.

However, this does not preclude the solicitor from pressing or "sifting the witness" by further cross-examination. *State v. Robinson,* 272 N.C. 271, 158 S.E. 2d 23; *State v. King,* 224 N.C. 329, 30 S.E. 2d 230. The extent of cross-examination rests largely in the discretion of the trial judge. *State v. Bumper,* 275 N.C. 670, 170 S.E. 2d 457; 7 Strong's N.C. Index 2d, Witnesses § 8, p. 703.

The record shows that the solicitor acted in good faith and had information concerning the crime to which his examination was directed. There was no abuse of discretion on the part of the trial judge in allowing the solicitor to "sift the witness" in light of the evasive and equivocal answers given by the witness.

We note that, in most instances, the answers were given long before objection was interposed, and the objection was thereby waived. *State v. Sanders,* 276 N.C. 598, 174 S.E. 2d 487.

Although we do not commend the use by the solicitor of defendant's signature on the purported transcript of the guilty plea during his cross-examination of defendant, we are unable to find anything in this assignment of error so material and prejudicial that a different result would likely have been reached had the solicitor not pursued this line of questioning. *State v. Temple,* 269 N.C. 57, 152 S.E. 2d 206.

This assignment of error is overruled.

Defendant assigns as error the denial of his motion for judgment as of nonsuit at the close of the State's evidence and at the close of all the evidence.

[5] Defendant argues that the trial judge should have allowed his motion as to first degree murder since there was not sufficient evidence of premeditation or deliberation.

First degree murder is the unlawful killing of a human being with malice and premeditation and deliberation. *State v. Duboise,* 279 N.C. 73, 181 S.E. 2d 393; *State v. Reams,* 277 N.C. 391, 178 S.E. 2d 65; *State v. Moore,* 275 N.C. 198, 166 S.E. 2d 652. Thus, the question presented by this assignment of error is whether the State has presented such substantial evidence as would permit a jury to find that defendant, after premeditation and deliberation, formed a fixed purpose to kill and thereafter accomplished his purpose. *State v. Reams, supra; State v. Walters,* 275 N.C. 615, 170 S.E. 2d 484; *State v. Robbins, supra.*

Premeditation means "thought beforehand for some length of time, however short." *State v. Reams, supra; State v. Benson,* 183 N.C. 795, 111 S.E. 869.

"Deliberation means that the act is done in a cool state of blood. It does not mean brooding over it or reflecting upon it for a week, a day, or an hour, or any appreciable length of time, but it means an intention to kill, executed by the defendant in a cool state of the blood, in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation." *State v. Reams, supra; State v. Benson, supra.*

The elements of premeditation and deliberation are not ordinarily susceptible to direct proof, but are inferred from various circumstances, such as ill will, previous difficulty between the parties, or evidence that the killing was done in a vicious and brutal manner. *State v. Duboise, supra; State v. Reams, supra; State v. Hamby,* 276 N.C. 674, 174 S.E. 2d 385; *State v. Stanley,* 227 N.C. 650, 44 S.E. 2d 196; *State v. Watson,* 222 N.C. 672, 24 S.E. 2d 540.

This record is replete with evidence of previous difficulties between defendant and Vera Parker. It also clearly shows the existence of ill will between them. Defendant, who was 32 years old, weighed 216 pounds, and stood six feet two inches in height, savagely and brutally inflicted seventeen separate

knife wounds upon the 45-year-old Vera Parker. By his own statement "he cut her until the blade came out of his knife."

There was sufficient substantial evidence to permit a jury to find that after premeditation and deliberation defendant formed a fixed purpose to kill Vera Parker. The trial judge correctly overruled defendant's motion for nonsuit.

Our examination of the entire record reveals nothing which would justify disturbing the verdict and judgment in this case.

No error.

IN THE MATTER OF THE AD VALOREM VALUATION OF PROPERTY LOCATED AT 411-417 WEST FOURTH STREET (F. W. WOOLWORTH COMPANY, LESSEE), IN FORSYTH COUNTY, NORTH CAROLINA, FOR THE YEAR BEGINNING JANUARY 1, 1968

No. 40

(Filed 11 October 1972)

1. **Taxation § 25— standing to question valuation — lessee of retail store building**

A retailer which leased a lot and store building and was required to list for taxation its stock of merchandise and equipment was a taxpayer which both owned and controlled taxable property assessed for taxation in the county, and the retailer thus had standing to appeal the valuation of the store building to the State Board of Assessment. G.S. 105-327(g)(2); G.S. 105-329.

2. **Taxation § 25— standing to request hearing by Board of Equalization and Review**

The right to request a hearing by and relief from the County Board of Equalization and Review is not limited to the owner in fee simple of the assessed property or to other taxpayers seeking a higher valuation upon that property.

3. **Administrative Law § 4; Rules of Civil Procedure § 1— proceedings before State Board of Assessment — inapplicability of new Rules**

The Rules of Civil Procedure do not apply to proceedings before the State Board of Assessment. G.S. 1A-1, Rule 1.

4. **Taxation § 25— standing of lessee to question tax valuation**

Where the lessee of real property was required by the terms of the lease to pay a portion of the taxes assessed on the property, the lessee was a real party in interest and could question the valuation placed on the property for tax purposes.

5. Taxation § 25— tax value of store building — vacancy of second floor — vacancies in other buildings

In determining the value of a store building for tax purposes, the State Board of Assessment could properly consider evidence that the second floor of the building is in such a condition that it could not be used or rented without substantial renovation and improvement and that the majority of second floor spaces in the neighborhood had been vacant for several years.

6. Taxation § 25— tax value — location — attractiveness for commercial use — declining income

In determining the valuation of property for tax purposes, the State Board of Assessment may consider disadvantages inherent in the location of the property, its declining attractiveness for commercial use, and any established declining trend in income. G.S. 105-295.

7. Taxation § 25— tax value of downtown store building — competition from shopping centers

In hearing an appeal concerning the valuation of a store building in a downtown area, the State Board of Assessment should consider the commonly known fact that in recent years retail stores in downtown metropolitan areas have suffered severely from the competition of shopping centers located in the outer edges of the city where ample parking facilities are available.

8. Taxation § 25— revaluation — economic blight of downtown area

The policy of equality in valuations, commanded by G.S. 105-294, compels tax assessors and, upon appeal, the State Board of Assessment, to take the economic blight of a downtown area into account when revaluing property for tax purposes.

9. Taxation § 25— tax value — ability of property to produce income

The ability of the property to produce income is one of the elements to be considered in determining its value for tax purposes.

10. Taxation § 25— valuation — fair rental value — rent under existing lease

As one of the factors to be considered in determining the valuation of property, the State Board of Assessment may substitute the fair rental value of the property on the valuation date for the actual rent payable under an existing long term lease which present conditions show to have been improvident from the point of view of the tenant, or the Board may consider both.

11. Taxation § 25— conclusiveness of value fixed by State Board of Assessment

The valuation fixed by the State Board of Assessment is conclusive when the Board's findings are supported by the evidence and, in turn, support its conclusion as to the value of the property.

12. Taxation § 25— valuation of all buildings at replacement cost — income producing property

Valuation of all buildings in the county at replacement cost was improper, although much of the property in the county is not

income producing, since G.S. 105-295 expressly directs that consideration be given to the income producing ability of the property where appropriate.

13. Taxation § 25— factors in valuation of property for taxation

G.S. 105-295 contemplates that tax assessors, and the State Board of Assessment on appeal, will consider those attributes specified in the statute which apply to each specific piece of property in appraising its true value in money.

APPEAL by Forsyth County from *Gambill, J.*, at the 4 April 1972 "A" Session of FORSYTH, heard prior to determination by the Court of Appeals.

The judgment of the superior court affirmed the order of the State Board of Assessment directing the county taxing officials to reduce the tax valuation of the property in question for the year 1968 from $479,560 to $411,690, such reduction to be made in the value of the improvements upon the land.

The F. W. Woolworth Company, hereinafter called Woolworth, operates a store in a building owned by Fourth and Spruce Corporation at 411-417 Fourth Avenue, Winston-Salem, North Carolina. Woolworth occupies the building under a lease, the term of which began in 1955 and is to terminate in 1996. Under the lease Woolworth pays $42,500 per year in rent, after certain charge-offs provided for in the lease, and, in addition, is obligated to pay any excess of the ad valorem taxes assessed upon the lot and building over and above the taxes assessed in a designated base year.

Forsyth County revalued all real property in the county for tax purposes as of 1 January 1968. In that process it valued the property here in question at $479,560, of which $208,070 was the valuation of the land and $271,490 was the valuation of the building. Woolworth appealed to the County Board of Equalization and Review, contending that such valuation was excessive and should be reduced to a total of $125,000. The County Board of Equalization and Review having denied any relief, Woolworth appealed to the State Board of Assessment.

Before the State Board, Woolworth contended that the building, a two story structure completed in 1932, has experienced substantial physical depreciation and obsolescence, and that, in this location, there is a serious parking problem as compared to the condition at shopping centers in outlying areas

of the city. Woolworth asserted that, as a result, it had experienced a constantly decreasing volume of sales in this store, and that such valuation resulted in an assessment of this property at a higher percentage of its true market value than that used in the assessment of other similar properties throughout the county.

Prior to the hearing before the State Board, Forsyth County filed its motion to dismiss the appeal for the reason that Woolworth has no standing to appeal from the assessment of the property in question since it is not the owner of such property and, therefore, is not a taxpayer. The denial of this motion by the State Board is assigned as error upon the present appeal.

At the hearing before the State Board, Woolworth offered evidence consisting of an appraisal of the property prepared by Raymond J. Nicosia, a real estate appraiser, and the testimony of Mr. Nicosia in support and explanation thereof. Objections by the county to portions of the evidence introduced by Woolworth do not relate to the qualification of Mr. Nicosia to testify as an expert witness. The substance of his testimony and report is:

He visited the property, examined it and appraised it to determine its fair market value, which, in his opinion, is $270,000. He arrived at this conclusion by appraising the property at $290,000 on the basis of the value of the lot plus the cost of replacement of the building, less depreciation and obsolescence, at $270,000 on the basis of the income from rent which the property would normally attract and at $250,000 on the basis of sales of comparable property in the area. In his opinion, the income approach is the best indication of its fair value. He found that the first floor of the building was used by Woolworth for a retail store, the basement was partially used and the second floor was vacant. While Woolworth has the right under its lease to sublet the second floor, the condition of the building is such that substantial expenditures would be required to put it in a rentable or usable condition. The downtown area of Winston-Salem is presently in a declining stage. Commercial activity tends to relocate to the outer limits of the city. At the time of his appraisal, approximately one-third of the stores and the vast majority of second floor spaces were vacant and had been for several years. This store depends on

pedestrian traffic. Because of the changing conditions in the downtown area, this store's volume of sales has declined drastically over the last several years. The witness' valuation of the property is his capitalization of the estimated net income it is capable of producing on the basis of the fair rental income, which, in his opinion, is $28,512 per year. In determining the reasonable rental value of the property, he took into consideration the rent paid on other properties in the area, adjusted to make these comparable to the property in question. These rentals on other properties indicate a downward trend of rentals for retail stores in the area.

Evidence for the county consisted of a "Statement in the Defense of Value on Building" prepared by its appraiser, Lewis J. Kolter, and brief testimony by Mr. Kolter and by Fred C. Perry, Tax Supervisor for the County. The substance of this evidence is:

The paramount purpose of a revaluation for tax purposes is to attain equalization of values. In Forsyth County approximately 90,000 properties were appraised. Since only a small portion of these are income producing and only a relatively few are sold in a single year, the basis of appraisal was the cost of replacement with a substitute of like utility. Such "cost approach" takes into account physical and functional depreciation. In the opinion of the witness, the rent actually paid under the existing lease would have more bearing on the worth of the building than the increase or decrease in the volume of business done by the tenant. Capitalization of the net rental actually paid under the existing lease would result in a valuation in excess of the appraised value placed upon the property by the county pursuant to the reproduction cost appraisal made by this witness.

Upon this evidence, the State Board of Assessment made findings of fact, including the finding that the second floor of the building is in poor condition and would require substantial renovation to make it usable or rentable, and the finding "that the downtown area of Winston-Salem has experienced some economic decline in recent years—particularly in retail operations—and the sales volume of the appellant has shown a steady decline over the past several years."

Upon these findings, the State Board concluded that the County Board of Equalization and Review did not give proper

consideration to the condition of the property, especially as to the functional and economic factors affecting it, and that the valuation placed upon the property by the County Board is in excess of the fair market value, which the State Board concluded to be $411,690. The State Board thereupon ordered that the county taxing officials reduce the valuation to that figure.

The county appealed to the superior court, alleging as error: (1) The denial of its motion to dismiss for want of standing by Woolworth to appeal to the State Board of Assessment; (2) the insufficiency of Woolworth's statement of its grounds for appeal to the State Board in that the grounds stated constitute "general economic circumstances and factors which are inadmissible, incompetent and irrelevant"; (3) the admission by the State Board of evidence alleged by the county to be "speculative, irrelevant, immaterial, incompetent and otherwise unworthy of consideration"; and (4) that the order of the State Board is unsupported by competent, material or substantial evidence in view of the entire record.

The superior court entered judgment affirming the decision of the State Board of Assessment. From that judgment, the county now appeals assigning, in substance, the same errors assigned in its appeal to the superior court.

P. Eugene Price, Jr., for plaintiff.

Hatch, Little, Bunn, Jones & Few, by James C. Little and Harold W. Berry, Jr., for defendant.

LAKE, Justice.

Since this appeal relates to the valuation of the property for the tax year 1968, all citations herein to the General Statutes, both as to section number and as to content, refer to the statutes in effect prior to the revision of the Machinery Act by the General Assembly of 1971.

[1] There was no error in the denial by the State Board of Assessment of the county's motion to dismiss the appeal by Woolworth to that Board. G.S. 105-327(g)(2) provided: "The board shall, on request, hear *any and all* taxpayers who own or *control* taxable property assessed for taxation in the county in respect to the valuation of *such property or the property of others.*" (Emphasis added.) G.S. 105-329 provided: "*Any* prop-

erty owner, *taxpayer* or member of the board of county commissioners may except to the order of the board of equalization and review and appeal therefrom to the State Board of Assessment * * * . " (Emphasis added.) G.S. 105-306(14) and (15) required the listing for taxation of merchandise held for the purpose of sale and of office furniture, fixtures and equipment. The record shows that Woolworth, by virtue of its lease, had control of the lot and building in question and that it operated therein a retail store. The State Board of Assessment could take judicial notice of the fact that Woolworth had in the store a stock of merchandise and equipment which it was required by law to list for taxation. G.S. 143-318. Thus, Woolworth was clearly a taxpayer who both owned and controlled taxable property assessed for taxation in the county.

[2] It is well established that the right to request a hearing by and relief from the County Board of Equalization and Review is not limited to the owner in fee simple of the property, the valuation of which is in question. *In re King,* 281 N.C. 533, 189 S.E. 2d 158; *King v. Baldwin,* 276 N.C. 316, 172 S.E. 2d 12. Nothing in these decisions lends support to the idea that this right is limited to such owner and other taxpayers seeking a higher valuation upon that property.

[3, 4] The Rules of Civil Procedure do not apply to proceedings before the State Board of Assessment. G.S. 1A-1, Rule 1. However, the record shows that Woolworth, by the terms of its lease, was obligated to pay at least a portion of the taxes assessed upon this lot and building. Thus, it was a real party in interest. This Court considered upon its merits an appeal by a lessee, required by its lease to pay taxes on the property, from a judgment of the superior court affirming an order of the State Board of Assessment, which, in turn, had affirmed the denial by the County Board of Equalization and Review of the lessee's petition for reduction in the valuation of the property, no question being raised therein as to the standing of the lessee so to proceed. *In re Pine Raleigh Corp.,* 258 N.C. 398, 128 S.E. 2d 855.

G.S. 105-294 required that all property, real and personal, be valued at its true value in money; that is, the amount of cash or receivables for which the property can be sold in such manner as such property is usually sold. There is no distinction between owners of real and personal property as to their right to insist

upon equality of valuation or as to their standing to pursue the remedies provided in the Machinery Act for error in the valuation of properties.

There is likewise no merit in the county's contention that the State Board of Assessment erred in receiving and in taking into consideration evidence that the second floor of the building was vacant and not in condition for rental or evidence that, due to the continuing economic deterioration of downtown Winston-Salem, Woolworth's volume of sales in this building had declined steadily over the past several years. Again, there is no merit in the county's contention that, if the income approach be used to determine the valuation of the property, the determination should be made on the basis of the rent actually payable under the existing lease rather than the fair rental value of the property under conditions existing upon the valuation date.

[5] The mere fact that the lessee of the building elects not to use or to sublet a portion of it does not, of course, affect the valuation of the building for tax purposes. In this case, however, the evidence goes much further. It is to the effect that the second floor of this building is in such condition that it could not be used or rented without substantial renovation and improvement and that the majority of second floor spaces in the neighborhood had been vacant for several years. These are clearly material circumstances in the determination of the value of the building.

[6] The statutory standard for valuation of property for tax purposes was the amount for which it can be sold in the manner that such property is usually sold. G.S. 105-294. In determining this, the assessors were directed by G.S. 105-295 to take into consideration "its advantages as to location * * * adaptability for * * * commercial or industrial uses, the past income therefrom, its probable future income * * * and any other factors which may affect its value." G.S. 105-295. The statutory direction to consider advantages inherent in the location of the property necessarily requires consideration of any disadvantages inherent in such location. Consideration of the adaptability of property to commercial uses necessarily requires consideration of its declining attractiveness for such use. Consideration of past income and probable future income clearly requires that attention be given to an established declining trend in income.

Furthermore, the statute expressly directs that consideration be given to "any other factors which may affect" the value of the property.

[7] The State Board of Assessment, like other administrative agencies, is authorized, in the hearing of an appeal concerning valuation of property, to take notice of "judicially cognizable facts." G.S. 143-318. It is a matter of common knowledge that in recent years retail stores in downtown metropolitan areas have suffered severely from the competition of shopping centers located in the outer edges of the city where ample parking facilities are available. For the State Board of Assessment to ignore the effect of this circumstance upon the sale value of store buildings in the downtown area of a large city would be to shut its eyes to an established fact of common knowledge. The State Board of Assessment is neither required nor permitted to do this in discharging its duties under G.S. 105-329.

[8] The economic blight of a downtown area in a city is not the result of a general, county-wide economic decline, affecting all properties in the county substantially alike. It is a disturbance of a preexisting relation between such downtown areas and other areas in the city or county. The policy of equality in valuations, commanded by G.S. 105-294, compels the assessors and, upon an appeal, the State Board of Assessment to take this economic development into account when revaluing property for tax purposes.

[9] The ability of the property in question to produce income is clearly one of the elements to be considered in determining its value. *In re Pine Raleigh Corp., supra.* In the Pine Raleigh case, the petitioner contended that the valuation should be reduced because the petitioner had made an improvident long term sublease whereby it was receiving a substantially lower rental income than the property could otherwise have been rented for at the time of the valuation. This Court, speaking through Justice Rodman, said:

> "But the income referred to is not necessarily actual income. The language [G.S. 105-295] is sufficient to include the income which could be obtained by the proper and efficient use of the property. * * *
>
> "Net income produced is an element which may properly be considered in determining value, but it is only

one element. If it appears that the income actually received is less than the fair earning capacity of the property, the earning capacity should be substituted as a factor rather than the actual earnings. The fact-finding board can properly consider both."

[10] The same reasoning permits the State Board of Assessment, upon an appeal such as the present, to substitute the fair rental value of the property, on the valuation date, for the actual rent payable under an existing long term lease, which present conditions show to have been improvident from the point of view of the tenant. It is to be observed that in this instance the State Board of Assessment did not reduce the tax valuation to a capitalization of the fair rentals to which Woolworth's expert witness testified, but valued the property at a figure between such value and that placed upon the property by the county. Thus, the State Board of Assessment having both before it, evidently considered both the actual rental income under the lease and the fair rental at the time of valuation. This Court approved a valuation based upon consideration of both in the Pine Raleigh case.

[11] The findings by the State Board of Assessment in these respects are supported by the evidence and, in turn, support the conclusion as to its valuation of the property. That being true, the valuation fixed by the State Board of Assessment is conclusive. Neither the superior court nor this Court is authorized to make findings at variance with the findings of the State Board so supported. *In re Appeal of Broadcasting Corp.*, 273 N.C. 571, 160 S.E. 2d 728; *In re Pine Raleigh Corp., supra.*

[12, 13] The county contends that its appraisers acted properly in selecting replacement cost as the more appropriate basis for valuation of buildings since much of the property in the entire county is not income producing. G.S. 105-295, however, expressly directs that consideration be given to the income producing ability of the property where appropriate. Obviously, this is an element which affects the sale of properties, the purpose of which is the production of income. To conform to the statutory policy of equality in valuation of all types of properties, the statute requires the assessors to value all properties, real and personal, at the amount for which they, respectively, can be sold in the customary manner in which they are sold. Not every attribute specified in G.S. 105-295 is applicable to every piece

of property in the county. The statute contemplates that the assessors, and the State Board of Assessment on appeal, will consider those which apply to each specific piece of property in appraising its "true value in money." See, *In re Appeal of Broadcasting Corp., supra,* at p. 578.

G.S. 143-318 requires the rules of evidence, as applied in the superior court and the district court divisions of the General Court of Justice, to be followed by the State Board of Assessment in the hearing of an appeal from a county board of equalization and review. *In re Trucking Co.,* 281 N.C. 375, 189 S.E. 2d 194. The record discloses no material error in the admission of evidence before the State Board. *In re Trucking Co., supra,* is distinguishable from the present case. Here, the protestant's appraiser, Mr. Nicosia, testified that he personally inspected the property to be appraised and testified as to his own opinion as to its value. His testimony as to the condition of the second floor of the building and as to the large number of vacant stores in the vicinity was based upon his own observations. His testimony that he was told that these vacancies had continued for a substantial period was hearsay, but this is not sufficient ground for the rejection of his appraisal. It is a matter of common knowledge that the general appearance of buildings in an area would indicate to such an appraiser whether existing vacancies had been of substantial duration. Furthermore, the record does not show any objection to his testimony as to what the people to whom he talked in the course of his appraisal told him about these vacancies.

We have carefully examined the record in connection with each contention of the county and find therein no error by the State Board of Assessment which would have permitted the superior court to reverse its order or remand the matter for further proceedings.

No error.

IN THE MATTER OF THE AD VALOREM VALUATION OF PROPERTY LOCATED AT 406-411 NORTH LIBERTY STREET (F. W. WOOLWORTH COMPANY, LESSEE), IN FORSYTH COUNTY, NORTH CAROLINA, FOR THE YEAR BEGINNING JANUARY 1, 1968

No. 41

(Filed 11 October 1972)

APPEAL by Forsyth County from *Gambill, J.*, at the 4 April 1972 "A" Session of FORSYTH, heard prior to determination by the Court of Appeals.

The judgment of the superior court affirmed the order of the State Board of Assessment directing the county taxing officials to reduce the tax valuation of the property in question for the year 1968 from $273,280 to $232,910, such reduction to be made in the value of the improvements upon the land.

P. Eugene Price, Jr., for plaintiff.

Hatch, Little, Bunn, Jones & Few, by James C. Little and Harold W. Berry, Jr., for defendant.

LAKE, Justice.

This case is a companion to Case No. 40 in the matter of the ad valorem valuation of property located at 411-417 West Fourth Street in the City of Winston-Salem, decided this day. The two matters were heard together in the State Board of Assessment. The facts in the two cases are identical, except as to the location of the properties and the numerical data. The county's assignments of error and the questions of law raised thereby are the same. For the reasons set forth in our decision in Case No. 40, we find no error in the judgment of the superior court.

No error.

NINA H. FERGUSON v. JACK MORGAN, D/B/A J. E. MORGAN TRUCKING

No. 17

(Filed 11 October 1972)

1. **Execution § 5— judgment creditor — lien on personalty — valid levy**

A judgment creditor acquires no lien on personalty until there has been a valid levy. G.S. 1-313(1).

2. **Chattel Mortgages § 10; Registration § 2— lien on motor vehicle — where recorded**

It is no longer necessary to record the mortgage or lien on a motor vehicle in the county where the debtor resides.

3. **Chattel Mortgages § 10; Registration § 2— security interest in motor vehicle — delivery of application for notation — absence of notation on title certificate**

Plaintiff's security interest in a truck was perfected as of the date of delivery to the Department of Motor Vehicles of an application for notation of the lien signed by the registered owner and accompanied by the required fee, 30 March 1970, notwithstanding the security interest was never actually recorded on the truck's certificate of title; consequently, plaintiff's lien had priority over a judgment creditor's lien acquired 15 April 1970 by the sheriff's levy on the truck, and as purchaser pursuant to foreclosure of her lien on 30 June 1970, plaintiff's title to the truck is superior to any rights acquired by defendant by reason of its purchase at the execution sale held on 25 May 1970.

APPEAL by plaintiff under G.S. 7A-30(2) from decision of the Court of Appeals which affirmed the judgment entered by *Thornburg, J.*, at the 4 January 1972 Session of BUNCOMBE Superior Court.

The plaintiff instituted this action on 10 November 1970. She alleged she was the owner of a 1963 Mack Dump Truck with Serial No. B61SX44385 and was entitled to recover possession thereof from defendant. Answering, defendant denied plaintiff's essential allegations, asserted his ownership and right to possession of the subject truck and prayed for summary judgment in his favor.

Plaintiff filed affidavits of Bob Monteath, Thomas H. Ferguson, Nina H. Ferguson and James H. Stamey, together with a motion for summary judgment in her favor. Defendant filed no affidavit in response to those offered by plaintiff but re-

newed his prayer that summary judgment be entered in his favor.

The judgment entered by Judge Thornburg recites that "the Plaintiff and the Defendant ha[d] stipulated, by and through their respective counsel in open court, that there is no genuine issue as to any material fact in this action"; that "the Court ha[d] considered the affidavits . . . of Nina H. Ferguson, Thomas H. Ferguson, James H. Stamey and Bob Monteath"; and that this was a proper action for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure.

Thereafter, the judgment sets forth that "it appear[ed] to the Court" that the facts quoted below were not controverted.

"1. That in December 1963, Rock Products, Inc. purchased a 1963 Mack Dump Truck, Serial Number B61SX44385 from Eason Truck Sales, Inc., of Asheville, North Carolina for the approximate purchase price of $22,000.

"2. That by Deed of Trust dated April 30, 1966, Rock Products, Inc. created a lien on said vehicle in favor of the Plaintiff to secure a promissory note for a cash loan actually made by the Plaintiff to Rock Products, Inc. in the amount of $82,178.67. That said Deed of Trust was recorded in the Office of the Register of Deeds of Jackson County, North Carolina, on July 15, 1966 but was never recorded in Buncombe County, North Carolina. That said Deed of Trust included all trucks and other vehicles owned by or in which Rock Products, Inc. had an interest.

"3. That by Security Agreement dated March 21, 1968, Rock Products, Inc. created a lien on said vehicle in favor of The Northwestern Bank in the amount of $6,000.00; which lien was noted as a first lien on the Certificate of Title to said vehicle.

"4. That on March 30, 1970, the Plaintiff mailed to the North Carolina Department of Motor Vehicles an application for recording the lien of the Deed of Trust dated April 30, 1966 on Form MVR-6, which form indicated the make, style, title number, year model and serial number of said vehicle and, in addition to the lien of said Deed of Trust, indicated a first lien in the amount of $6,000.00 dated March 21, 1968 to The Northwestern Bank. Said form was executed by the registered

owner of said vehicle and the application was accompanied by the required fee in the amount of $1.00.

"5. That there was received by the North Carolina Department of Motor Vehicles on March 31, 1970 the Form MVR-6 Application for Recording of a Lien which had theretofore been filled out and mailed by the Plaintiff on March 30, 1970.

"6. That on March 31, 1970 the Certificate of Title to said vehicle was in the possession of The Northwestern Bank, which was a prior lienholder, under the custody and control of its employee, Robert Vannoy.

"7. That Rock Products, Inc. had used said vehicle in the hauling of crushed stone and other materials from December, 1963 until Saturday, April 11, 1970, at which time said vehicle was taken to R. T. Clapp Co., Inc., in Asheville, North Carolina for repairs to its electrical system.

"8. That, pursuant to execution issued on February 26, 1970 in the case entitled *'The Northwestern Bank v. Rock Products, Inc. and United Bonding Co.'*, on Tuesday, April 14, 1970, the Sheriff of Buncombe County, North Carolina, by his deputy, George W. Sutton, employed Monteath's Gulf Service to send its wrecker to R. T. Clapp Co., Inc., to seize said vehicle and on Wednesday, April 15, 1970, the wrecker of Monteath's Gulf Service was dispatched to R. T. Clapp Co., Inc., on Coxe Avenue, Asheville, North Carolina, and on said date said vehicle was brought to the storage yard of Monteath's Gulf Service and retained there until May 25, 1970.

"9. That on May 25, 1970 the Sheriff of Buncombe County sold said vehicle to the Defendant pursuant to the execution issued on February 26, 1970.

"10. That said execution sale was held at Monteath's Gulf Service on Ashland Avenue in Asheville, North Carolina and that Thomas H. Ferguson was present at said sale and notified each and every person in attendance at said sale, including the Defendant, of the lien and security interest of the Plaintiff in said vehicle prior to the sale of said vehicle to the Defendant.

"11. That at the time of the levy and at the time of the sale of said motor vehicle to the Defendant, there was no lien to Nina H. Ferguson recorded on the Certificate of Title for

said vehicle for the amounts set forth in said Deed of Trust, nor has there been to this date.

"12. That after said sale on May 25, 1970 the North Carolina Department of Motor Vehicles issued a Certificate of Title for said vehicle to the Defendant and such Certificate is presently issued in his name. That Plaintiff's security interest has not been recorded on the Certificate of Title for said vehicle to this date.

"13. That Rock Products, Inc. defaulted in the payment of said promissory note and, Marcellus Buchanan, the Trustee in said Deed of Trust having renounced said trust, the Plaintiff appointed Jerry L. Hensley as Substitute Trustee on June 30, 1970.

"14. That on June 30, 1970 said Substitute Trustee gave notice of sale at public auction of said vehicle and on August 7, 1970 conducted a public sale at which sale the Plaintiff purchased said vehicle for $3,200.00 and subject to the lien of The Northwestern Bank created by the Security Agreement dated March 21, 1968.

"15. That the Plaintiff is not presently nor at any time has she ever been any of the following: the owner, whether directly or indirectly, of any of the capital stock in Rock Products, Inc., a corporate officer of said corporation, an employee of said corporation or a director of said corporation. That the Plaintiff is the wife of Thomas H. Ferguson who was during the times complained of Secretary of Rock Products, Inc."

"Based upon the foregoing uncontroverted facts," the court set forth "Conclusions of Law" and adjudged that defendant was the owner and entitled to the possession of the subject truck.

The Court of Appeals affirmed Judge Thornburg's judgment. 14 N.C. App. 520, 188 S.E. 2d 672. One member of the hearing panel having dissented, plaintiff appeals to this Court as a matter of right under G.S. 7A-30(2).

Hendon & Carson, by George Ward Hendon, for plaintiff appellant.

Wade Hall for defendant appellee.

BOBBITT, Chief Justice.

Plaintiff excepted to each of the court's conclusions of law, to the court's failure to adopt the conclusions of law tendered by plaintiff, and to the judgment.

The judgment of Judge Thornburg and the decision of the Court of Appeals are based on the legal conclusion that plaintiff failed to perfect her security interest as required by G.S. 20-58 *et seq.* For the reasons stated below, we take the opposite view.

The security agreement dated 21 March 1968, executed by Rock Products, Inc., to The Northwestern Bank as security for a $6,000 debt, *was* and *is* a first lien on the subject truck and was so noted on the title certificate.

[1] Defendant bases his alleged ownership of the subject truck on his purchase thereof on 25 May 1970 from the Sheriff of Buncombe County, at a sale pursuant to an execution issued 26 February 1970 for enforcement of a judgment obtained by The Northwestern Bank in an action entitled, *"The Northwestern Bank v. Rock Products, Inc. and United Bonding Co."* As stipulated in this Court, the first lien of The Northwestern Bank created by the security agreement of 21 March 1968 was not involved in that action. The judgment obtained therein was based on an independent and unrelated claim. A judgment creditor "acquires no lien on the personalty until there has been a valid levy. G.S. 1-313(1); *Finance Corp. v. Hodges,* 230 N.C. 580, 55 S.E. 2d 201." *Credit Co. v. Norwood,* 257 N.C. 87, 91, 125 S.E. 2d 369, 372 (1962). Hence, there was no lien on the subject truck on account of that judgment and execution until the seizure and levy by the sheriff on 15 April 1970.

The subject truck was purchased by Rock Products, Inc., in 1963. Upon its registration with the Department of Motor Vehicles, the certificate of title was issued to Rock Products, Inc., in accordance with G.S. 20-50 and G.S. 20-52.

Defendant's contention that plaintiff's deed of trust was not recorded in the proper county is beside the point.

[2] With reference to vehicles subject to registration with the Department of Motor Vehicles, the provisions of G.S. 20-58 through G.S. 20-58.10 govern the perfecting and giving notice of security interests obtained on and after 1 January 1962. Chap-

ter 835, Section 6, Session Laws of 1961 (G.S. 20-58.10). Section 12 of the 1961 Act added the following new subdivision to G.S. 47-20.2(b): "(5) If the personal property concerned is a vehicle required to be registered under the motor vehicle laws of the State of North Carolina, then the provisions of this Section shall not apply but the security interest arising from the deed of trust, mortgage, conditional sales contract, or lease intended as security of such vehicle may be perfected by recordation in accordance with the provisions of G.S. 20-58 through G.S. 20-58.10." "It is no longer necessary to record the mortgage or other lien in the county where the debtor resides." *Credit Co. v. Norwood, supra* at 91, 125 S.E. 2d at 372. Plaintiff's security agreement having been entered into in 1966, neither the recording in Jackson County nor the failure to record in Buncombe County has legal significance.

G.S. 25-9-302(3) provides: "The filing provisions of this article do not apply to a security interest in property subject to a statute . . . (b) of this State which provides for central filing of, or which requires indication on a certificate of title of, such security interests in such property." Provisions of the Uniform Commercial Code with reference *to the place for filing financing statements* have no application to the present factual situation.

[3] An application signed by Rock Products, Inc., accompanied by the required fee, was mailed by plaintiff to the Department of Motor Vehicles on 30 March 1970 and received on 31 March 1970. The certificate of title of Rock Products, Inc., was then in the possession of The Northwestern Bank with notation thereon of the bank's first lien. No notation of plaintiff's security interest was entered thereon prior to the sheriff's seizure of the subject truck and levy thereon on 15 April 1970. The crucial question is whether plaintiff's security interest was perfected prior to 15 April 1970.

Decision depends upon the provisions of the General Statutes quoted below:

"§ 20-58. *Perfection by indication of security interest on certificate of title.*—Except as provided in G.S. 20-58.8, a security interest in a vehicle of a type for which a certificate of title is required shall be perfected only as hereinafter provided.

* * *

"(2) If the vehicle is registered in this State, the application for notation of a security interest shall be in the form prescribed by the Department, signed by the debtor, and containing the amount, date and nature of the security agreement, and the name and address of the secured party from whom information concerning the security interest may be obtained. The application must be accompanied by the existing certificate of title unless it is in the possession of a prior secured party. *If there is an existing certificate of title issued by this or any other jurisdiction in the possession of a prior secured party, the application for notation of the security interest shall in addition, contain the name and address of such prior secured party.*" (Our italics.)

"§ 20-58.1. *Duty of the Department upon receipt of application for notation of security interest.*—(a) Upon receipt of an application for notation of security interest, the required fee and accompanying documents required by G.S. 20-58, the Department, if it finds the application and accompanying documents in order, shall either endorse upon the certificate of title or issue a new certificate of title containing, the name and address of each secured party, the amount of each security interest, and the date of perfection of each security interest as determined by the Department. The Department shall deliver or mail the certificate to the first secured party named in it and shall also notify the new secured party that his security interest has been noted upon the certificate of title.

"(b) *If the certificate of title is in the possession of some prior secured party,* the Department, when satisfied that the application is in order, shall procure the certificate of title from the secured party in whose possession it is being held, for the sole purpose of noting the new security interest. Upon request of the Department, a secured party in possession of a certificate of title shall forthwith deliver or mail the certificate of title to the Department. Such delivery of the certificate does not affect the rights of any secured party under his security agreement." (Our italics.)

"§ 20-58.2. *Date of perfection.*—If the application for notation of security interest with the required fee is delivered to the Department within ten days after the date of the security agreement, the security interest is perfected as of that date. *Otherwise, the security interest is perfected as of the date of delivery of the application to the Department.*" (Our italics.)

The provisions of the General Statutes quoted above are based on and brought forward from Chapter 838, Session Laws of 1969. Section 1 of this 1969 Act contains the following: "Chapter 20 of the General Statutes is hereby amended to conform to the Uniform Commercial Code by rewriting G.S. 20-58 through G.S. 20-58.8 to read" as set forth therein. The following provision of the Uniform Commercial Code is noted: "§ 25-9-403. . . . (1) Presentation for filing of a financing statement and tender of the filing fee or acceptance of the statement by the filing officer constitutes filing under this article." The Official Comment and the North Carolina Comment are to the effect that, contrary to the rule under prior law, subsection (1) of G.S. 25-9-403 provides that the security instrument serves as constructive notice *from the time of filing, i.e.*, the presentation thereof and the payment of the fee, notwithstanding any failure on the part of the registrar to perform his or its statutory duty. Similarly, G.S. 20-58.2 provides expressly that the security interest evidenced by a security agreement is perfected as of the date of the delivery of the application to the Department and the payment of the required fee.

Attached to the affidavit of James H. Stamey, the Director of the Registration Division of the Department of Motor Vehicles, is a certified copy of the application executed in behalf of Rock Products, Inc., by Thomas H. Ferguson. It is on the required form and gives in detail the required information concerning plaintiff's security agreement and all other information required by G.S. 20-58(2).

Both Rock Products, Inc., and plaintiff as of 31 March 1970 had done all they were required to do and could do to perfect plaintiff's lien. Under G.S. 20-58.2, which relates solely and specifically to the date of perfection of the lien, plaintiff's security interest was "perfected as of the date of delivery of the application to the Department," that is, 31 March 1970.

The record is silent as to whether the Department of Motor Vehicles requested or obtained from The Northwestern Bank the certificate of title of Rock Products, Inc., for the purpose of noting thereon the facts concerning plaintiff's lien. G.S. 20-56 requires the Department to maintain indexes and records with reference to each registered vehicle. Presumably, the Department of Motor Vehicles could have and would have provided the exact facts concerning liens on the subject truck in response to inquiry for this information.

The present factual situation discloses no element of estoppel. At the execution sale on 25 May 1970 defendant was given actual notice that plaintiff claimed a security interest which constituted a lien on the subject truck prior to that based on the sheriff's levy. Nothing indicates that defendant had seen the title certificate or had knowledge of its contents prior to his purchase of the subject truck at the execution sale. Too, the amount of defendant's successful bid at the execution sale is not disclosed.

In his brief, defendant makes contentions which are not supported by the facts set forth in Judge Thornburg's judgment. Two illustrations are noted. Although paragraph 2 of the uncontroverted facts states that plaintiff's deed of trust created a lien on the subject truck, defendant asserts plaintiff's deed of trust is invalid on account of insufficiency in the description. Although paragraph 13 of the uncontroverted facts states that Rock Products, Inc., had "defaulted" in the payment thereof, plaintiff's brief asserts that there was no evidence that the debt secured by plaintiff's deed of trust was in default.

In view of the provision in the judgment that the parties had stipulated that there was no genuine issue as to any material fact, we must accept as stipulated facts the facts set forth and referred to in the judgment as facts which "are not controverted."

Since plaintiff's security interest was perfected on 31 March 1970, it had priority over the lien acquired 15 April 1970 by the sheriff's seizure and levy. Hence, as purchaser pursuant to foreclosure of the prior lien, plaintiff's title to the subject truck is superior to any rights acquired by defendant by reason of its purchase at the execution sale on 25 May 1970. Therefore, plaintiff is the owner and entitled to the possession of the subject truck encumbered by the first lien of The Northwestern Bank.

Accordingly, the decision of the Court of Appeals is reversed; the judgment entered by Judge Thornburg is vacated; and the cause is remanded to the Court of Appeals with direction that it remand the cause to the Superior Court of Buncombe County for the entry of summary judgment for plaintiff.

Reversed and remanded.

STATE OF NORTH CAROLINA v. DELMOS EUGENE BRYANT, STEVE HOLLOMAN, AND SHERMAN WHITE

No. 28

(Filed 11 October 1972)

1. **Indictment and Warrant §§ 1, 4— no preliminary hearing — hearsay evidence before grand jury — no denial of due process**

Neither the failure to furnish a preliminary hearing nor the use of hearsay evidence before the grand jury is ground for quashal of a bill of indictment, nor does the sum of the two result in such a denial of due process that the indictment must be quashed.

2. **Jury § 6— examination of prospective jurors — supervision by trial judge — no abuse of discretion**

Where two questions put to prospective jurors by defense counsel were confusing and contained an incorrect and inadequate statement of the law with respect to burden of proof in a criminal case, the trial court did not abuse its discretion in sustaining objections to the questions.

3. **Criminal Law § 89— corroborative statement — slight variance — admissibility of statement**

Slight variances between a witness's testimony and his corroborative written statement did not render the statement inadmissible.

4. **Criminal Law § 89— corroborative statement — failure to request limiting instructions**

Failure of the trial court to instruct at the time of its admission that certain evidence was admitted for corroborative purposes only did not render the evidence inadmissible in the absence of defendant's request for a limiting instruction.

5. **Criminal Law § 95— presumption that jury followed instructions**

Where the trial court properly instructs the jury not to consider challenged evidence as to one defendant, that defendant is in no position to complain, as the law presumes that the jury follows the judge's instructions.

6. **Criminal Law §§ 112, 168— instruction of reasonable doubt as possibility of innocence — favorable to defendant — no error**

In a first degree murder prosecution, the trial judge's definition of reasonable doubt as a possibility of innocence was more favorable to defendants than was required and therefore did not constitute prejudicial error.

7. **Criminal Law § 114— no expression of opinion in jury instructions**

The trial judge's instruction to the jury having to do with their attitudes and conduct and arrival at a just and proper verdict did not constitute an expression of opinion in violation of G.S. 1-180.

8. **Criminal Law § 172— possible verdict imposing death penalty — verdict of life imprisonment — error cured**

Where a verdict imposing the death penalty is erroneously submitted to a jury, a defendant is not entitled to a new trial on that ground alone; hence, the verdict of the jury in a first degree murder prosecution requiring imposition of a sentence of life imprisonment cured any possible error in submitting to the jury as one of the possible verdicts a verdict imposing the death penalty.

APPEAL by defendants from *Braswell, J.*, 2 February 1972 Criminal Session of WAKE Superior Court.

Defendants were tried upon bills of indictment charging each of them with first degree murder. Each defendant entered a plea of not guilty, and the cases were consolidated for trial.

The State's evidence tended to show that on 14 October 1971 three men entered a grocery store located on E. Edenton Street in Raleigh known as Smiley's Produce & Grocery. Mrs. Smiley, the store owner's wife, was in the back part of the store when the men entered. John Thomas Massey, the victim, was in the front of the store. One of the men who entered the store carried a shotgun. This man, who was later identified as defendant Delmos Eugene Bryant, shot and killed Mr. Massey after the other men took approximately $34.00 from the cash drawer. The three men fled in an automobile driven by Sherman White, one of the defendants.

The State relied heavily on the testimony of James Henry Williams, who admitted his part in the crime while implicating defendants. Mrs. Smiley stated that she heard the shot after hearing Mr. Massey say, "Take the money and don't hurt me" or "don't bother me." She saw three "colored men" leave the store, but she was unable to make an in-court identification of any of the defendants.

The State's other evidence need not be recounted for the purposes of this decision.

Defendant Sherman White testified and denied taking part in the crime. He also offered other evidence in the nature of an alibi. Defendant Bryant testified that he was in no way involved in the crime. Defendant Holloman offered no evidence.

The jury returned verdicts of guilty of murder in the first degree with a recommendation of life imprisonment as to each defendant. Each defendant appealed from judgment imposing a sentence of life imprisonment.

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

Roger W. Smith of Tharrington & Smith, for defendant White.

William W. Merriman III, of Merriman & Liles for defendant Holloman.

John H. Parker of Sanford, Cannon, Adams & McCullough, for defendant Bryant.

BRANCH, Justice.

[1] Defendants' first Assignment of Error is stated as follows: "Where a criminal defendant is not afforded a preliminary hearing and the Grand Jury returns a true bill of indictment based upon hearsay evidence alone, should the indictment be dismissed?"

A preliminary hearing is not an essential prerequisite to the finding of a true bill of indictment in this State, and the absence of a preliminary hearing is not ground for quashal of an indictment. *State v. Hartsell,* 272 N.C. 710, 158 S.E. 2d 785; *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44; *State v. Hargett,* 255 N.C. 412, 121 S.E. 2d 589; *State v. Hackney,* 240 N.C. 230, 81 S.E. 2d 778.

It is also recognized in this State that an indictment is not subject to being quashed on the ground that the testimony before the Grand Jury was based on hearsay. *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174; *State v. Wall,* 273 N.C. 130, 159 S.E. 2d 317; *State v. Hartsell, supra; State v. Turner,* 268 N.C. 225, 150 S.E. 2d 406.

A defect in a bill of indictment can be taken advantage of only by a motion to quash or by a motion in arrest of judgment. *State v. Walker,* 249 N.C. 35, 105 S.E. 2d 101; *State v. Faulkner,* 241 N.C. 609, 86 S.E. 2d 81. Even conceding that the proper motion was made by each defendant in due time, this assignment of error cannot be sustained.

Defendants concede that the failure to furnish a preliminary hearing is not a ground for quashal of the bill of indictment. They likewise concede that the use of hearsay evidence before the grand jury is not ground for quashal. Defendants offer, without authority, the ingenious argument that the *sum*

of the two results in such denial of due process that the indictment must be quashed. We do not agree.

[2] Defendant Bryant contends that the trial judge erred in sustaining the solicitor's objection to certain questions during the examination of prospective jurors.

The portion of the record pertinent to decision of this question is as follows:

> MR. PARKER: Members of the jury, I will ask you several questions as a group. My questions may require your raising your hands. As you heard the Judge's statement regarding reasonable doubt, each of you as members of the Jury, know that you have to return a verdict of not guilty or guilty. If you heard the evidence as presented here in this case and you thought that Delmos was probably guilty, and if you were not convinced absolutely that he was not guilty and you just thought he was probably guilty, will you be able to return a verdict of not guilty?
>
> OBJECTION SUSTAINED.
>
> EXCEPTION BY DEFENDANT BRYANT.
>
> DEFENDANT BRYANT'S EXCEPTION NO. 5.
>
> THE COURT: SUSTAINED as to phraseology. It is not in keeping with the rules and the laws.
>
> MR. PARKER: Members of the jury, would it bother or weigh on your conscience to render a verdict of not guilty if you thought the defendant was probably guilty?
>
> OBJECTION SUSTAINED.
>
> EXCEPTION BY DEFENDANT BRYANT.
>
> DEFENDANT BRYANT'S EXCEPTION NO. 6.

The Court, or any party to a civil or criminal action, has the right to inquire into the fitness or competency of a juror to determine whether grounds to challenge for cause exist and to enable counsel to intelligently exercise the peremptory challenges allowed by statute. The right to challenge is not given so as to allow a party to pick a jury, but so that he may obtain an impartial jury. G.S. 9-15(a); *State v. Allred,* 275 N.C. 554, 169 S.E. 2d 833.

In this jurisdiction counsel's exercise of the right to inquire into the fitness of jurors is subject to the trial judge's close supervision. The regulation of the manner and the extent of the inquiry rests largely in the trial judge's discretion. *Karpf v. Adams* and *Runyan v. Adams,* 237 N.C. 106, 74 S.E. 2d 325. The overwhelming majority of the states follow this rule. See 99 A.L.R. 2d 7, ANNO. JURY—VOIR DIRE—HYPOTHETICAL QUESTION, for a full discussion and citation of authority.

A hypothetical question is improper when it is faulty in form so as to be ambiguous and confusing, or when it is phrased so as to contain an incorrect or inadequate statement of the law. *State v. Faciane,* 233 La. 1028, 99 So. 2d 333; *State v. Foster,* 150 La. 971, 91 So. 411; *Cadena v. State,* 94 Tex. Crim. 436, 251 S.W. 225; *Harrison v. State,* 80 Tex. Crim. 457, 191 S.W. 548.

Grizzell v. State, 164 Tex. Crim. 362, 298 S.W. 2d 816, is factually similar to instant case. There the trial judge excluded the following question: "[If] you thought the defendant might be guilty but if you believed that the State had failed to show you by its evidence beyond a reasonable doubt the defendant was guilty, would you return a verdict of not guilty?" In affirming the action of the trial judge, the reviewing court, *inter alia,* pointed out that the jury had been informed that the State had the burden of proving the defendant guilty beyond a reasonable doubt and stated that the trial judge "must be allowed some discretion in limiting examination of prospective jurors or some trials would never terminate."

In instant case Judge Braswell had informed the jury that the burden of proof was on the State to prove defendant guilty beyond a reasonable doubt prior to the examination of the jurors by defense counsel. It is noted that in sustaining the solicitor's objection to the above quoted questions the trial judge stated that the objection was sustained as to phraseology. Manifestly, the question was confusing and contained an incorrect and inadequate statement of the law. Nothing else appears in the record concerning defendant's inquiry as to the fitness of jurors, and we must therefore assume that defendants in all other respects were allowed to fully inquire into the fitness and competency of the jurors.

No abuse of discretion is shown, and this assignment of error is overruled.

[3] Defendant White objected to the introduction of a written statement made by witness James Henry Williams after Williams had testified. He first argues that the written statement did not corroborate the prior testimony of the witness. To sustain this argument he points to certain variances between the actual testimony of Williams and the written statement made by Williams, to wit:

> "(1) Williams' TESTIMONY was that 'Holloman told White, "Delmos shot the man." Sherman said that he heard the shot.' His STATEMENT WAS: 'Delmos told Sherman the gun went off and Sherman said "I heard the shot back there."' (2) TESTIMONY: 'Holloman said he was going somewhere and get a gun. Sherman White and Steve Holloman left in the car.' STATEMENT: 'I heard Steve tell Sherman to carry him over to his house to get a pistol.' (3) TESTIMONY: 'We counted the money and Steve Holloman said "to think we killed a nigger for $7.00."' STATEMENT: 'Steve told Delmos and Sherman to think they would kill a nigger for eight dollars.'"

The evidence tending to corroborate a witness is admissible for that purpose, *State v. Lippard,* 223 N.C. 167, 25 S.E. 2d 594, and slight variances in the corroborative testimony do not render it inadmissible. *State v. Case,* 253 N.C. 130, 116 S.E. 2d 429; *State v. Litteral,* 227 N.C. 527, 43 S.E. 2d 84.

Clearly, there were no material variances between the testimony of Williams and his written statement.

[4] Defendant White further argues that the written statement was improperly admitted because the court failed to give a limiting instruction when it was admitted. Defendant failed, however, to request a limiting instruction when the corroborative written statement was admitted.

When a defendant does not specifically request an instruction restricting the purpose of corroborative evidence, its admission is not assignable as error. Rule 21, North Carolina Supreme Court Rules; *State v. Corl,* 250 N.C. 252, 108 S.E. 2d 608; *State v. Lee,* 248 N.C. 327, 103 S.E. 2d 295; *State v. Walker,* 226 N.C. 458, 38 S.E. 2d 531.

White also contends the corroborative evidence was improperly admitted because he was deprived of his right to cross-examine Williams concerning the written statement.

Ordinarily, as here, corroborative evidence is introduced after the witness has testified. The rule requiring that there can be no material variance between the witness' testimony and the evidence offered in corroboration diminishes the necessity of recross-examination of the witness. Defendant's counsel must have recognized the futility of further cross-examination of Williams, for he failed to request permission to recall him.

We find no error in the admission of the corroborative evidence.

[5] Defendant White next asserts that he was prejudiced by certain testimony elicited from the witness Iredell Staton concerning an article printed in the Raleigh Times and the admissions relating thereto by defendant Holloman. The court sustained White's objection, stating: "It is not competent against him" and "Don't consider this together. It is competent only as to the defendant Steve Holloman."

White is not in a position to complain. His objection to the evidence was sustained, and the court properly instructed the jury not to consider the challenged evidence as to him. The law presumes the jury followed the judge's instructions. *State v. Long,* 280 N.C. 633, 187 S.E. 2d 47; *State v. Moore,* 276 N.C. 142, 171 S.E. 2d 453.

There is no merit to this assignment of error.

[6] All defendants contend that the trial judge improperly defined "reasonable doubt" as a "possibility of innocence." In its charge the court defined reasonable doubt as follows:

> "When I speak of reasonable doubt I mean a possibility of innocence based on reason and common sense arising out of some or all of the evidence that has been presented, or lack of evidence as the case may be.
>
> "If after weighing and considering all of the evidence you are fully satisfied and entirely convinced of the defendant's guilt, you would be satisfied beyond a reasonable doubt.
>
> "On the other hand, if you have any doubt based on reason and common sense arising from the evidence in the case, or the lack of evidence as to any fact necessary to constitute guilt, you would have a reasonable doubt, and

it would be your duty to give that defendant the benefit of that doubt and find him not guilty."

All defendants excepted and assigned as error the first paragraph set forth above.

The innovative portion of the charge which uses the phrase "possibility of innocence" has not been and is not now approved by this Court.

Other jurisdictions have considered similar phraseology in defining "reasonable doubt." In the case of *Connell v. State,* 153 Ga. 151 (2), 111 S.E. 545, the Georgia Court stated that reasonable doubt "is more than a possibility of innocence." A like statement is found in the case of *Teal v. State,* 122 Ga. App. 532, 177 S.E. 2d 840. In *United States v. Stead,* 422 F. 2d 183 (8th Cir. 1970) the Court stated: " . . . it is not necessary for the government to prove the guilt of the defendant beyond all possible doubt," and in *Hooper v. United States,* 216 F. 2d 684 (10th Cir. 1954) the Court stated that reasonable doubt is doubt based on reason. It is a "substantial doubt, as distinguished from a flimsy one" and is a "significant, an important doubt . . . . " See *State v. Bright,* 237 N.C. 475, 75 S.E. 2d 407.

We are of the opinion that the portion of the charge to which defendants here except places a greater burden on the State than the approved usage of such terms as "fully satisfied," "entirely convinced," or "satisfied to a moral certainty."

This portion of the charge is more favorable to defendants than that to which they are entitled. They therefore fail to show error prejudicial to them. *State v. Ingland,* 278 N.C. 42, 178 S.E. 2d 577; *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334; *State v. Shinn,* 238 N.C. 535, 78 S.E. 2d 388.

[7] Defendants maintain that the trial judge violated the provisions of G.S. 1-180 by expressing an opinion in his instructions concerning the jurors' attitudes during their deliberations. The asserted violation is embodied in the following excerpt from the trial judge's charge:

> The attitude and conduct of jurors at the outset of their deliberations are matters of considerable importance. It is rarely productive of good for a juror upon entering the jury room to make an emphatic expression of his

opinion on the case or to announce a determination to stand for a certain verdict.

When one does that at the outset his sense of pride may be aroused, and he may hesitate to recede from an announced position, if shown it is false.

Remember that you are not partisans or advocates, but rather judges. The final test for quality of your service will lie in the verdict that you return to the Court, and not in the opinion any of you may hold as you retire. Have in mind that you will make a definite contribution to the efficient judicial administration if you arrive at a just and proper verdict in this case.

The challenged portion of the charge is taken from CALJIC, (3rd Ed.), a publication of West Publishing Company.

The California courts have approved instructions nearly identical to those in the above quotation. *People v. Selby,* 198 Cal. 426, 245 P. 426; *People v. Moraga,* 244 Cal. App. 2d 565, 53 Cal. Rep. 563.

In *State v. Pugh,* 183 N.C. 800, 111 S.E. 849, the jury, after some deliberation, returned to the courtroom without reaching a verdict. The trial judge at that time, *inter alia,* stated to the jury: "The case is one of importance to the State and to the defendant, and some jury must pass upon it." The court also stated that it was their duty "to consider the evidence and not to decline to agree on account of stubbornness . . . . " See also: *State v. Brown,* 280 N.C. 588, 187 S.E. 2d 85; *State v. Green,* 246 N.C. 717, 100 S.E. 2d 52.

The trial judge's instructions, without expressing an opinion as to whether any fact has been sufficiently proved, should segregate the material facts of the case, array the facts on both sides, and apply the pertinent law to the facts. *State v. Yoes,* 271 N.C. 616, 157 S.E. 2d 386; *State v. Biggs,* 224 N.C. 722, 32 S.E. 2d 352; *State v. Friddle,* 223 N.C. 258, 25 S.E. 2d 751.

We doubt that the instructions under attack added to the strength or clarity of the charge; however, when contextually read and tested by the principles above stated, we find no error prejudicial to defendants.

[8] Finally, defendants White and Bryant contend that the trial judge erred in submitting to the jury as one of the possible verdicts a verdict imposing the death penalty.

Defendants rely on *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346, as holding that there can be no death penalty in North Carolina. Assuming, *arguendo,* that *Furman* laid to rest any question as to the viability of the death penalty in North Carolina, we cannot sustain defendants' argument.

It has long been recognized in this State that submission of a question regarding the guilt of a defendant of murder in the second degree became harmless when the jury returned a verdict of manslaughter. *State v. Brannon,* 234 N.C. 474, 67 S.E. 2d 633; *State v. Artis,* 233 N.C. 348, 64 S.E. 2d 183; *State v. Beachum,* 220 N.C. 531, 17 S.E. 2d 674; *State v. Blackwell,* 162 N.C. 672, 78 S.E. 316.

We think the United States Supreme Court has taken an analogous position in a case in which a verdict imposing the death penalty was alternatively submitted to the jury. In *Bumper v. North Carolina,* 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed. 2d 797, decided on the same day as *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 2d 776, the Court stated:

> "In *Witherspoon v. Illinois,* 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770, we have held that a death sentence cannot constitutionally be executed if imposed by a jury from which have been excluded for cause those who, without more, are opposed to capital punishment or have conscientious scruples against imposing the death penalty. *Our decision in Witherspoon does not govern the present case, because here the jury recommended a sentence of life imprisonment.* The petitioner argues, however, that a jury qualified under such standards must necessarily be biased as well with respect to a defendant's guilt, and that his conviction must accordingly be reversed because of the denial of his right under the Sixth and Fourteenth Amendments to trial by an impartial jury. *Duncan v. Louisiana,* 391 U.S. 145, 20 L.Ed. 2d 491, 88 S.Ct. 1444; *Turner v. Louisiana,* 379 U.S. 466, 471-473, 13 L.Ed. 2d 424, 428, 429, 85 S.Ct. 546; *Irvin v. Dowd,* 366 U.S. 717, 722-723, 6 L.Ed. 2d 751, 755, 756, 81 S.Ct. 1639. We cannot accept that contention in the present case. The petitioner

adduced no evidence to support the claim that a jury selected as this one was is necessarily "prosecution prone," and the materials referred to in his brief are no more substantial than those brought to our attention in Witherspoon. Accordingly, we decline to reverse the judgment of conviction upon this basis." (Emphasis added.)

The United States Supreme Court during its 1971 Term granted petitions for certiorari in the cases of *State v. Chance,* 279 N.C. 643, 185 S.E. 2d 227; *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671; *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572; *State v. Miller,* 276 N.C. 681, 174 S.E. 2d 481; and *State v. Hamby and Chandler,* 276 N.C. 674, 174 S.E. 2d 385. On the same date that *Furman v. Georgia, supra,* was decided, the Court directed mandates to this Court in which it vacated judgments of the North Carolina Supreme Court in the above cases only "insofar as it leaves undisturbed the death penalty imposed." Opinions in accord with this mandate were filed by this Court on 31 August 1972. *State v. Miller,* 281 N.C. 740, 190 S.E. 2d 841; *State v. Hamby and Chandler,* 281 N.C. 743, 191 S.E. 2d 66; *State v. Chance,* 281 N.C. 746, 191 S.E. 2d 65; *State v. Westbrook,* 281 N.C. 748, 191 S.E. 2d 68; *State v. Doss,* 281 N.C. 751, 191 S.E. 2d 70.

We conclude, after carefully considering decisions of this Court and the Supreme Court of the United States, that where a verdict imposing the death penalty is erroneously submitted to a jury, a defendant is not entitled to a new trial on that ground alone.

Here the verdict of the jury required imposition of a sentence of life imprisonment, and this verdict, in effect, cured any possible error in submitting a verdict imposing the death penalty.

Defendants fail to show prejudicial error in the trial below.

No error.

STATE OF NORTH CAROLINA v. NORMAN GETTYS HICKS

No. 10

(Filed 11 October 1972)

1. **Criminal Law § 91— motion for continuance — no prejudice in preparing for trial — denial of motion proper**

Where defendant was transferred from the unsafe Polk County jail to the N. C. Department of Correction for assignment to a safe prison and it was ordered that he be returned to Polk County two weeks prior to the beginning of superior court session in order for him to confer with his attorney and prepare for trial, defendant showed no prejudice resulting from his being returned twelve days prior to the beginning of court rather than two weeks before; hence, his motion for continuance was properly denied.

2. **Constitutional Law § 30— speedy trial**

Defendant could not complain of denial of his right to a speedy trial where he was indicted at the first criminal session of superior court after the commission of the offense, and was tried at the first session for criminal cases which convened thereafter.

3. **Burglary and Unlawful Breakings § 5— first degree burglary — sufficiency of evidence to withstand nonsuit**

State's evidence was sufficient to withstand defendant's motion for nonsuit in a first degree burglary prosecution where it tended to show that defendant called at the home of the burglary victim on two occasions before the commission of the offense, that defendant and another man broke into the victim's home at night and assaulted him, that defendant took all the money which the victim had, and that the victim identified defendant as the perpetrator of the offense.

4. **Criminal Law § 66— in-court identification of defendant — independent observation**

An in-court identification of defendant made by the victim of the burglary was of independent origin where the victim observed defendant on two occasions before the offense and where the victim observed defendant while under a strong light during the commission of the offense, and such identification was not tainted by the showing of photographs to the victim before trial.

APPEAL by defendant from *Fountain, J.*, August 23, 1971 Session, POLK Superior Court.

In this criminal prosecution the defendant, Norman Gettys Hicks, was charged in the following bill of indictment:

"INDICTMENT — BURGLARY (Filed 1/25/71)
70 CR-930

STATE OF NORTH CAROLINA
County of Polk

In the General Court
of Justice
Superior Court Division
January Session, 1971

The State of North Carolina
vs.
Norman Gettys Hicks, Defendant

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Norman Gettys Hicks, late of the County of Polk, on the 4th day of October, 1970, about the hour of 9:00 P.M., in the night of the same day, with force and arms, at and in the county aforesaid, the dwelling house of one Landon Clark, Hickory Grove, there situate, and then and there actually occupied by one Landon Clark, feloniously and burglariously did break and enter, with intent, the goods and chattels of the said Landon Clark in the said dwelling house then and there being, then and there feloniously and burglariously to steal, take and carry away U. S. Money, television, radio, furniture, and clothing, against the peace and dignity of the State.

M. L. LOWE Solicitor"

Following his arraignment and the plea of not guilty, the defendant filed motions: (1) To continue the case for the term; (2) to quash the warrant of arrest and the grand jury indictment; (3) to dismiss the charges for failure of the State to give the defendant a speedy trial.

The evidence on behalf of the State tended to show that on the night of October 4, 1970, two men broke through the glass door in the home of Mr. Landon Clark, assaulted him by beating him with a shotgun, and forced him to open his safe. Failing to find any money in the safe, they took from the victim's wallet five dollars—all he had. One of the robbers had a thin stocking mask over his face. Mr. Clark was able to identify the defendant as the one wearing the mask. He had observed him under a good light during the time he was in the house. The witness testified that on Friday before the robbery the defendant " . . . (C)ame to my house and asked to borrow

a screwdriver. . . . Then, on Saturday afternoon . . . the defendant came to my house and rang the doorbell and said he was selling typewriters, sewing machines and portable televisions."

The witness testified he is an architect and trained to observe details. Although the man had a stocking over his head, his features still showed plainly. The witness especially observed the way the defendant carried his head and moved his hands and arms so that he had no doubt of his identity.

On cross-examination Mr. Clark was asked whether he had seen a photograph or photographs of the defendant in the hands of the officers. He said he had seen two photographs of the defendant among a large display, but that these photographs played no part whatever in his identification of the defendant which was based entirely on observation during the robbery.

The defendant did not testify. However, his mother and father appeared and testified for him. They said the defendant was at their home in South Carolina on October 4. The father testified he was certain of the date, that he signed the defendant's bond to get him out of jail on the evening of October 4 at Spartanburg, South Carolina. In rebuttal, however, the State called Officer Ralph Lamb of the Spartanburg Sheriff's Department who said he knew the defendant, that he was released from jail on bond on October 1.

At the close of the testimony, the court overruled a motion to dismiss.

After the jury returned its verdict finding the defendant guilty of burglary in the first degree coupled with the recommendation the punishment be imprisonment for life, the court imposed the mandatory sentence recommended by the jury. The defendant appealed.

Robert Morgan, Attorney General, by Thomas B. Wood, Assistant Attorney General, for the State.

William H. Miller, for defendant appellant.

HIGGINS, Justice.

The defendant's many objections to the trial do not find support in the record before us. The offense was committed on the night of October 4, 1970, in Polk County. A warrant charging burglary in the first degree was executed on October 19,

1970. The defendant was arrested in South Carolina, waived extradition, and was returned to Polk County on October 24, 1970. On January 26, 1971 (the first criminal session after the arrest) Judge Hasty, without objection, entered an order finding the defendant could not be tried in Polk County until the August session of superior court; that he had a record of one escape; and that the Polk County jail was unsafe. Based on these findings, Judge Hasty entered an order transferring the defendant to the State Department of Correction for assignment by the director to a safe prison. The order directed his return to Polk County two weeks prior to the beginning of the August session of the superior court, to the end that his attorney could confer with him and make trial preparations.

[1, 2] However, the prisoner was actually returned twelve days before the beginning of the court, rather than the two weeks fixed in the order. Nevertheless, nothing indicates any lack of time to prepare for the trial or other prejudice resulted from the two days' delay. *State v. Flowers,* 244 N.C. 77, 92 S.E. 2d 447. The record does not show error or prejudice in the denial of the motion to continue. Likewise there was no merit in the motion to dismiss for failure of the State to give the defendant a speedy trial. *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274. Actually the defendant was indicted at the first criminal session of Polk County Superior Court January 25, 1971, after the commission of the offense. He was tried at the first session for criminal cases which convened thereafter.

[3, 4] The defendant contends that the State's evidence was insufficient to survive the motion to dismiss. The contention cannot be sustained. Mr. Clark saw the defendant first when he asked to borrow a screwdriver on Friday, and again on Saturday when he called at the Clark home posing as a salesman. These calls apparently were to "case" Mr. Clark's home where antiques worth many thousands of dollars were kept. Mr. Clark testified that he recognized the defendant without question although he had a thin women's stocking over his face. "The stocking did blunt the full facial features but the profile was still the same and particularly under a strong light." Mr. Clark further testified that while he was still in the house "I observed his ears and everything physical about him . . . and how he carried his head. He does not carry his head straight, he carries it slightly to the left."

On cross-examination by defense counsel, Mr. Clark testified he had seen some photographs of the defendant in the possession of the police department. However, he made it plain that these photographs played no part in his identification of the defendant. The trial court so found. Mr. Clark testified: " . . . I am an architect and I have been trained to observe details for over 50 years."

The court's finding that the identification was of independent origin and the photographs played no part in the identification of the defendant is supported by competent evidence. The defendant's motion to dismiss was properly denied. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1.

The broadside objections to the charge cannot be sustained. In fact we find nothing "off color" in the trial.

No error.

STATE OF NORTH CAROLINA v. ARTHUR LAYTON DAVIS

No. 33

(Filed 11 October 1972)

1. **Constitutional Law § 31; Criminal Law § 80— discovery denied — fishing expedition — work product of police**

Defendant's motion for discovery in a prosecution for rape and first degree burglary was properly denied where such motion was not made in accordance with G.S. 15-155.4 and where the motion amounted to a request for a fishing expedition and a request to receive the work product of police and State investigators.

2. **Criminal Law § 131— newly discovered evidence — no motion for new trial — assertion of matter for first time on appeal**

Where defendant discovered, during jury deliberation, new evidence bearing on the charge of rape, but he failed to request a reopening of the case or to move for a new trial, he could not assert the matter for the first time on appeal.

3. **Burglary and Unlawful Breakings § 8— first degree burglary — life imprisonment — cruel and unusual punishment**

Defendant who was sentenced to life imprisonment in a first degree burglary case could not complain of denial of his motion to quash the indictment on the ground that G.S. 14-52 authorizing the death penalty or life imprisonment was violative of the cruel and unusual punishment prohibition of the Constitution.

4. Criminal Law § 105— exception to refusal to grant motion for nonsuit — waiver

Where defendant introduced evidence in his own behalf, he was precluded from raising on appeal the denial of a motion for nonsuit at the close of the State's evidence. G.S. 15-173.

5. Burglary and Unlawful Breakings § 3— first degree burglary — improper street address — valid indictment

Reference in an indictment for first degree burglary to a street address as 840 Washington Drive rather than as 830 Washington Drive did not render the indictment fatally defective.

6. Indictment and Warrant § 17— variance of one day — time not of the essence — no fatal variance

The statement in an indictment that the offense of burglary took place on 13 November 1971 while the evidence showed that it occurred on 14 November 1971 did not subject the indictment to quashal for variance since an offense in which time is not of the essence does not require absolute specificity in the indictment as to the date the crime was committed. G.S. 15-155.

7. Criminal Law § 169— admission of evidence over objection — similar evidence admitted without objection

Defendant could not complain of admission of testimony over his objection with respect to his prior criminal convictions where he subsequently testified in his own behalf as to his crimnal record and imprisonment.

8. Criminal Law § 162— appeal — evidentiary questions — assignment of error — requirements

An assignment of error with respect to the exclusion of testimony should set forth within itself the question asked, the objection, the ruling on the objection, and what the witness would have answered if he had been permitted to testify; where the record fails to show what the witness would have answered, the exclusion of his testimony is not shown to be prejudicial.

9. Criminal Law § 115— first degree burglary — failure to charge on lesser degrees of crime — no error

Where there was no evidence to support a conviction of a lesser crime than first degree burglary, the trial court did not err in failing to instruct the jury on lesser included offenses.

10. Criminal Law § 127— motion in arrest of judgment

A motion in arrest of judgment is generally made after verdict to prevent entry of judgment based on a defective indictment or some fatal defect on the face of the record proper.

11. Criminal Law § 132— setting aside verdict as being contrary to weight of evidence

A motion to set aside the verdict as being contrary or against the weight of the evidence is addressed to the discretion of the trial court, and a refusal to grant the motion is not reviewable on appeal.

State v. Davis

APPEAL by defendant from *Hall, J.*, at the March 20, 1972 Criminal Session of CUMBERLAND Superior Court.

Defendant was tried on separate bills of indictment charging him with first degree burglary and with rape. The cases were consolidated for trial, and the jury returned a verdict of not guilty of rape but guilty of first degree burglary with a recommendation of life imprisonment. From sentence imposed in accordance therewith, defendant appealed.

The evidence for the State tends to show: Nina Ruth Baker, who resides alone at 830 Washington Drive, Fayetteville, North Carolina, came home from work about 4:30 p.m. on 13 November 1971, went out to pay some bills, and returned about 6:30 p.m. She remained at home all evening and retired around 11 p.m. Before retiring she ascertained that the two outside doors were locked. At 2 a.m. Miss Baker was awakened by the sound of breaking glass. She left the bedroom and went into the kitchen where she saw the defendant kicking the back door, the upper part of which was glass. The defendant forced the door open and entered the kitchen. Miss Baker "hollered," ran into the front room of the house and squatted between a table and television set. The defendant came into the room, grabbed her throat with his right hand and began choking her, saying, "You are going to do it, you are going to do it." He dragged Miss Baker into the bedroom and forcibly and against her will had sexual intercourse with her. Afterwards, in order that she might see his face, Miss Baker asked defendant to help clean up the broken glass in the kitchen. He agreed and picked up some of the glass, put it in a paper bag and placed the bag in the garbage can. While defendant was doing this, Miss Baker turned on the light in the kitchen and for the first time recognized the individual who had raped her as the defendant, Arthur Layton Davis. After he helped clean up, the defendant left through the kitchen door. Miss Baker then went to a neighbor's house and called the police. W. L. Truitt, the investigating officer, testified that ". . . the door had been forced open and had a hasp on it that was broken loose. The hasp was inside and there was glass on the kitchen floor. Some glass was left in the door. Glass had been scattered in the kitchen area . . . . I saw marks about her person. Some marks were on her throat and I believe one was on her knee also. The marks resembled fingerprints, the size of a finger or thumb."

The evidence of the defendant tends to show: On the night in question Nina Ruth Baker was at a place of business known as Big John's or Flintstones from about 8:30 p.m. to 11:00 p.m. drinking beer with a group of boys. Defendant and a friend, Joe McDowell, saw her there but left and later went to get some food at Vick's Drive-In II. They passed Miss Baker's house about 1:30 a.m. Miss Baker was on the porch and asked defendant to come in and pick up some glass on the floor. Joe McDowell waited on the porch while defendant went into the house, picked up the glass and put it into a paper bag. When he asked what had happened, Miss Baker said, "You broke in my house." The defendant responded, "You are crazy," and left out the front door. At no time did the defendant assault Miss Baker or have sexual intercourse with her.

Attorney General Robert Morgan and Assistant Attorneys General William W. Melvin and William B. Ray for the State.

Neill Fleishman, Assistant Public Defender, for defendant appellant.

MOORE, Justice.

[1] On 4 February 1971 defendant's counsel made a "Motion for Discovery," requesting that he be furnished all statements made by the prosecuting witness, the reports of the investigating officers in the case, all physical evidence obtained by these officers, any and all medical evidence and statements by physicians who may have examined the prosecuting witness, the names and addresses of all the State's witnesses and written summaries of their relevant testimony, and all other relevant information in possession of the sheriff's department or the solicitor's office. This motion was denied, and this constitutes defendant's first assignment of error.

The common law recognizes no right to discovery in criminal cases. *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334, cert. den. 377 U.S. 978, 12 L.Ed. 2d 747, 84 S.Ct. 1884 (1964). Subsequent to the decision in *Goldberg,* Chapter 1064, Session Laws of 1967, now codified as G.S. 15-155.4, was enacted. This statute provides that a pretrial order may require the solicitor, upon written demand, to produce for inspection and copy specifically identified exhibits to be used in the trial and to permit defense counsel to examine specific expert witnesses who may be called.

The purpose is to enable a defendant to guard against surprise documents and surprise expert witnesses. *State v. Peele,* 281 N.C. 253, 188 S.E. 2d 326 (1972); *State v. Macon,* 276 N.C. 466, 173 S.E. 2d 286 (1970). Defendant does not rely on G.S. 15-155.4 and did not attempt to comply with the terms of that statute. Defendant contends that since he did not know what exhibits the State might introduce or what expert witnesses might be called, it was impossible for him to comply with the requirements of the statute, and that he was therefore deprived of his right to pretrial discovery. Defendant further contends that without pretrial discovery he has been denied his right to due process of law, equal protection of law, and his right to effective assistance of counsel, contrary to the Constitutions of the United States and of the State of North Carolina. In *Goldberg,* where the defendants also made a motion for broad discovery, Justice Parker (later Chief Justice) disposed of a similar contention:

> "In our opinion, and we so hold, defendants here have not shown facts which would have warranted the trial court to enter an order in its discretion or as a matter of right allowing them to inspect the files of the State Bureau of Investigation in these criminal cases pending against them as prayed in their petition, and the denial of their petition does not violate any of their rights under Article I, sections 11 and 17 of the North Carolina Constitution, and under the Fifth, Sixth, Seventh, and Fourteenth Amendments to the United States Constitution."

Accord, 23 Am. Jur. 2d, Depositions and Discovery § 312 (1965).

In the present case only one exhibit, a piece of glass which was picked up in the kitchen by the prosecuting witness, was introduced. No expert witnesses were called or testified, and no statement of any witness was introduced. The defendant's motion requested practically the complete files of the sheriff's department and the solicitor's office pertaining to this case, and all the information obtained as the result of the investigation by the sheriff's department and the solicitor's office. "We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." *Moore v. Illinois,* 408 U.S. 786, 33 L.Ed. 2d 706, 92 S.Ct. 2562 (1972). Defendant was not entitled to the granting of his motion for a fishing

expedition nor to receive the work product of police or State investigators.

[2] The record does not show that the prosecuting witness was examined by a physician or that any statements were obtained from a physician. The defendant for the first time in his brief asserts that during jury deliberation he heard that the prosecuting witness was taken to the doctor and the doctor's report showed that her sexual organ had not been abused and no sperm was found in her vagina. Defendant did not request the trial judge to reopen the case for further cross-examination of the prosecuting witness or for the offer of testimony from the physician, nor did he make a motion for a new trial on the ground of newly discovered evidence. Defendant now seeks to bring up on appeal a matter which was not before the trial court and which is not before this Court and cannot now be asserted. *State v. Grundler* and *State v. Jelly,* 251 N.C. 177, 111 S.E. 2d 1, cert. den. 362 U.S. 917, 4 L.Ed. 2d 738, 80 S.Ct. 670 (1959); *State v. Dobbins,* 277 N.C. 484, 178 S.E. 2d 449 (1971).

[3] Defendant next contends that the court erred in denying his motion to quash the indictment on the ground that G.S. 14-52 authorizing the death penalty or life imprisonment is violative of the cruel and unusual punishment prohibition of the Eighth Amendment to the United States Constitution. This issue was disposed of by this Court in *State v. Barber,* 278 N.C. 268, 179 S.E. 2d 404 (1971). In that case defendant was convicted of rape and first degree burglary with the recommendation of life imprisonment. The Court stated:

> " . . . G.S. 14-21 provides for the death penalty for rape, and G. S. 14-52 provides for the death penalty for burglary in the first degree. Both statutes provide that the jury may recommend life imprisonment. . . . The punishment imposed in this case was life imprisonment. When punishment does not exceed the limits fixed by statute, it cannot be classified as cruel and unusual in a constitutional sense."

The Supreme Court of the United States in *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726 (1972), held that the imposition of the death penalty, under certain state statutes and in the application thereof, was unconstitutional. That decision did not affect the conviction but only the death

sentence. *State v. Westbrook,* 281 N.C. 748, 191 S.E. 2d 68 (1972); *State v. Doss,* 281 N.C. 751, 191 S.E. 2d 70 (1972); *State v. Chance,* 281 N.C. 746, 191 S.E. 2d 65 (1972); *State v. Miller,* 281 N.C. 740, 190 S.E. 2d 841 (1972); *State v. Hamby and Chandler,* 281 N.C. 743, 191 S.E. 2d 66 (1972). In this case the jury recommended life imprisonment and this was the judgment of the trial court. The defendant has cited no authority in support of his contention that life imprisonment is cruel and unusual in violation of constitutional prohibition, and research has revealed none. This assignment of error is without merit.

[4] Defendant next assigns as error the court's denial of his motion for nonsuit under G.S. 15-173 at the close of the State's evidence. G.S. 15-173 precludes a defendant on appeal from raising the denial of a motion for nonsuit at the close of the State's evidence if defendant has introduced evidence in his own behalf. *State v. Greene,* 278 N.C. 649, 180 S.E. 2d 789 (1971); *State v. Prince,* 270 N.C. 769, 154 S.E. 2d 897 (1967). Defendant in this case testified in his own behalf and presented nine witnesses who testified for him. This assignment is without merit.

[5] Defendant also contends that the court should have granted his motion for a directed verdict of not guilty at the close of all the evidence. G. S. 15-173. Defendant does not challenge the sufficiency of the evidence to go to the jury. The basis for this motion is two variances between the indictment and the evidence offered during the trial. The indictment alleges that the defendant "did unlawfully . . . break and enter the dwelling house of Nina Ruth Baker located at *840* Washington Drive, Fayetteville, North Carolina." (Emphasis ours.) Miss Baker testified that she lived at *830* Washington Drive. There was no controversy as to the location of her residence, and the allegation that defendant "did unlawfully . . . break and enter the dwelling house of Nina Ruth Baker in Fayetteville, North Carolina," would have been sufficient.

The description of the house in this case was adequate to bring the indictment within the language of the statute. This house was also identified with sufficient particularity as to enable the defendant to prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense. *State v. Banks,* 247 N.C. 745, 102 S.E. 2d 245 (1958). As Chief Justice Parker stated in *State v. Sellers,*

273 N.C. 641, 161 S.E. 2d 15 (1968), quoting with approval from *State v. Burgess*, 1 N.C. App. 142, 160 S.E. 2d 105 (1968):

> " ' . . . The ownership of the personal property in this case is alleged to be in an individual and the premises described, among other things, as the dwelling house occupied by Dreame A. Glover. In the light of the growth in population and in the number of structures (domestic, business and governmental), the prosecuting officers of this State would be well advised to identify the subject premises by street address, highway address, rural road address or some clear description and designation to set the subject premises apart from like and other structures described in G.S. Chap. 14, Art. 14. Nevertheless, in this case we hold that the indictment sufficiently described and designated the premises. The defendant's motion in arrest of judgment on the first count is denied.' "

The State in this case attempted to follow this recommendation of Chief Justice Parker, but erred in stating the street number. We hold, however, that this inconsequential error in the street address appearing in the indictment does not render the indictment fatally defective.

[6] Defendant further contends that the indictment is defective since it states that the offense occurred on 13 November 1971 whereas the evidence shows that the offense took place on 14 November 1971. An offense in which time is not of the essence does not require absolute specificity in the indictment as to the date the crime was committed. "The date mentioned in the bill of indictment was not of the essence of the offense charged. In such case, both by statute and by the decisions of this Court, it has been established that variance between allegation and proof as to time is not material where no statute of limitations is involved." *State v. Trippe*, 222 N.C. 600, 24 S.E. 2d 340 (1943). See *State v. King*, 256 N.C. 236, 123 S.E. 2d 486 (1962); *State v. Gillyard*, 246 N.C. 217, 97 S.E. 2d 890 (1957); G.S. 15-155. Defendant's assignment of error as to both variances is overruled.

[7] Patricia Thompson, a witness for the defendant, after having testified that she saw defendant in Big John's on 13 November 1971, testified: "Q. And did Arthur Layton Davis do that often? . . . Come in and drink and get nicknacks? A. Anytime after he (the defendant) got out he came there. From

the time I was coming up, he came up there, you know; he was coming up there. Q. After he got out of where? Defendant objected. A. Prison, just like I said. COURT: OVERRULED." Defendant assigns as error the overruling of his objection to the question, "After he got out of where?" Normally, inquiry may not be made into criminal convictions of the defendant unless he has taken the stand and by testifying in his own behalf placed his credibility in issue. However, in this instance, the question of the solicitor was for the limited purpose of clarifying the previous statement of the witness. Assuming *arguendo* that the evidence was inadmissible, there was no prejudicial error. In the instant case the defendant subsequently testified in his own behalf as to his criminal record and his imprisonment on other charges. An objection to inadmissible testimony is waived when evidence of the same or like import is introduced without objection. *State v. Wright,* 270 N.C. 158, 153 S.E. 2d 883 (1967); *Mallet v. Huske,* 262 N.C. 177, 136 S.E. 2d 553 (1964). This assignment is overruled.

[8] The prosecuting witness on cross-examination testified that she knew William Burns but had never lived with him and had never threatened him. William Burns was called as a witness for defendant. He testified that he had lived with Miss Baker for four months on one occasion and two weeks on another. He was also asked: "Q. Has Miss Baker talked to you about this case? A. She said she was going to kill me. Q. Are you afraid of Miss Baker? OBJECTION by the State. COURT: SUSTAINED." Defendant contends the trial court erred in not allowing the witness to answer the question, "Are you afraid of Miss Baker?" This assignment does not comply with this Court's Rule 19(3) since the record does not show what the witness would have answered had he been permitted to do so. Therefore, it is impossible for us to know whether the ruling was prejudicial or not. Where the record fails to show what the witness would have testified had he been permitted to answer questions objected to, the exclusion of such testimony is not shown to be prejudicial. *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1969). The assignment of error should set forth within itself the question asked, the objection, the ruling on the objection, and what the witness would have answered if he had been permitted to testify. *Douglas v. Mallison,* 265 N.C. 362, 144 S.E. 2d 138 (1965). In our view, however, this question is immaterial, and the assignment is overruled.

The witness Burns was next asked the question: "Q. Has Miss Baker ever shown violence towards you? OBJECTION by State. A. She cut me across my foot. MOTION by State TO STRIKE. COURT: MOTION ALLOWED." Defendant contends that the court erred in allowing the State's motion to strike. Prior trouble between the prosecuting witness in this case and the witness Burns is irrelevant and immaterial. This assignment is without merit.

[9] Defendant next contends that the court erred in not instructing the jury on any lesser included offense under the indictment for first degree burglary. The elements of burglary in the first degree are: (1) the breaking (2) and entering (3) in the nighttime (4) with the intent to commit a felony (5) into a dwelling house or a room used as a sleeping apartment in any house or sleeping apartment (6) which is actually occupied at the time of the offense. *State v. Accor,* 277 N.C. 65, 175 S.E. 2d 583 (1970); G.S. 14-51. The evidence for the State showed a breaking and entering of the dwelling house of Nina Ruth Baker, accomplished by breaking the glass of the kitchen door and forcing it open, while the house was occupied by her at approximately 2 a.m., with the resulting commission of the felony of rape on the person of Nina Ruth Baker. Defendant's defense was in the nature of an alibi—that no crime was committed or, if so, he was not the perpetrator thereof. There is no evidence of a lesser included offense. The necessity for charging on the crime of a lesser degree arises only when there is evidence from which the jury could find that a crime of lesser degree was committed. *State v. Murry,* 277 N.C. 197, 176 S.E. 2d 738 (1970); *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969); 3 Strong, N.C. Index 2d, Criminal Law § 115. This assignment is overruled.

Defendant noted several exceptions to the charge. Although all have been considered, further discussion of these exceptions is unnecessary. The charge as a whole presents the law fairly and clearly to the jury, and isolated portions of it will not be held prejudicial. *State v. Alexander,* 279 N.C. 527, 184 S.E. 2d 274 (1971); *State v. Cook,* 263 N.C. 730, 140 S.E. 2d 305 (1965). The instructions are in substantial accord with our decisions, and the assignments relating thereto are without merit.

[10, 11] Defendant finally contends that the trial court erred in overruling his motion for arrest of judgment and his motion

to set aside the verdict as being contrary to the weight of the evidence. A motion in arrest of judgment is generally made after verdict to prevent entry of judgment based on a defective indictment or some fatal defect on the face of the record proper. *State v. Fletcher,* 279 N.C. 85, 181 S.E. 2d 405 (1971); *State v. Kirby, supra.* No such defect appears in this case. A motion to set aside the verdict as being contrary or against the weight of the evidence is addressed to the discretion of the trial court, and a refusal to grant the motion is not reviewable on appeal. *State v. Henderson,* 276 N.C. 430, 173 S.E. 2d 291 (1970). This assignment is overruled.

Upon sharply conflicting evidence the jury found the defendant guilty of first degree burglary. We have carefully examined the entire record and in the trial, verdict, and judgment we find no prejudicial error.

No error.

STATE OF NORTH CAROLINA v. EUGENE BROWN

No. 20

(Filed 11 October 1972)

1. **Constitutional Law § 30— speedy trial — reasonableness of delay**

The length of the delay, the cause of the delay, prejudice to the defendant, and waiver by defendant are interrelated factors to be considered in determining whether a trial has been unduly delayed.

2. **Constitutional Law § 30— speedy trial — 17 months between offense and trial**

Defendant in a murder prosecution was not denied his right to a speedy trial where seventeen months elapsed between the offense and the trial, where no substantial actual prejudice to defendant appeared in the record, where the delay resulted from a congested docket, a lack of judges for special sessions, and an attempt to give priority to jail cases, and where defendant agreed to a continuance as late as four and a half months prior to trial.

3. **Constitutional Law § 30— speedy trial — length of delay alone**

Length of delay in absolute terms is never *per se* determinative on the issue of denial of a defendant's right to a speedy trial.

4. **Constitutional Law § 30— speedy trial — court congestion a justification for delay**

Congestion of criminal court dockets has consistently been recognized as a valid justification for delay between commission of an offense and trial.

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

Defendant failed to carry his burden of showing that delay in trying his case was due to the neglect or willfulness of the prosecution where the record showed that there was a blacklog of approximately 1000 criminal cases on the docket, that 125 jail cases had priority over defendant's case, and that despite the congestion the trial took place eight months after the solicitor prosecuting the case took office.

APPEAL by defendant from decision of the North Carolina Court of Appeals affirming the judgment of *Fountain, J.*, at the 30 August 1971 Session of MECKLENBURG Superior Court, reported in 14 N.C. App. 570, 188 S.E. 2d 765 (1972).

Defendant was charged in a bill of indictment returned at the 11 May 1970 Session of Mecklenburg Superior Court with the first degree murder of his wife, Dorothy Brown, on 22 March 1970.

The evidence favorable to the State tends to show: Defendant resided at 4016 Crestridge Drive with his wife, his wife's nephew and mother, and his stepson. The deceased, defendant's wife, went to bed about 9 p.m. on the evening of 22 March 1970. About midnight defendant went into his wife's bedroom with a pistol. He held the gun on her and as she stood up in the bed with her hands up, he shot her. The deceased ran into the hallway adjacent to the bedroom where the defendant shot at her again. She died as a result of a gunshot wound inflicted on this occasion. After shooting his wife, the defendant threatened his wife's mother and his stepson with the gun, but did not harm them. Immediately thereafter the defendant left the house and caught a taxi downtown where he was arrested by the police. When arrested defendant had a 22-caliber German-make revolver in his pocket, containing three live cartridges and two spent cartridges.

The evidence of the defendant tended to establish self-defense. He testified that while he was sitting on the bed taking off his shoes, his wife attacked him with her fists and began shouting at him. Her mother came into the room with a butcher knife and only then did he take his gun from under the mattress. He went out into the hallway and his wife, who had previously left the bedroom, approached him with a raised knife in her hand. Defendant contends that he shot her at that moment out of fear for his life.

At the close of all the evidence defendant's motion to dismiss as to the charge of murder in the first degree was allowed. The case was submitted to the jury on the charge of second degree murder or manslaughter. The jury returned a verdict of guilty of manslaughter, and from sentence imposed defendant appealed to the Court of Appeals. That court found no error, and defendant appealed to this Court pursuant to G.S. 7A-30(1).

Attorney General Robert Morgan by Assistant Attorney General Mrs. Christine Y. Denson for the State.

Paul L. Whitfield for defendant appellant.

MOORE, Justice.

The sole question presented by this appeal is whether defendant was denied a speedy trial and due process of law as guaranteed him under the Constitutions of the State of North Carolina and of the United States.

The facts pertinent to this question are: Three arrest warrants were issued for defendant Eugene Brown, each charging him with the first degree murder of Dorothy Brown, his wife, on 22 March 1970. The defendant was arrested and placed in jail on 22 March 1970. Two of these warrants were issued on 22 March 1970 and were later *nolle prossed* apparently because of a defect pointed out by defendant's attorney. The third warrant was issued on 10 April 1970. Defendant waived a preliminary hearing on this warrant and was bound over to Superior Court on 17 April 1970. From the time of his arrest defendant remained in jail for approximately 27 days and then was released under a $5,000 appearance bond. On 11 May 1970 the grand jury of Mecklenburg County returned an indictment charging defendant with the first degree murder of his wife.

On 10 April 1970 Paul Whitfield was employed by defendant as privately retained counsel. The law firm of Plumides and Plumides was employed by the family of the deceased as private prosecutor. During the summer of 1970 defendant's attorney met with an associate of Plumides and Plumides and discussed a possible date for the trial of this case. Defendant's attorney indicated that he was not anxious for the case to be calendared for trial since he had not yet received his full fee. The case was first calendared for trial on 21 September 1970.

At the request of defendant's attorney, the case was continued at that term due to the fact that defendant's attorney was appearing in another case in a different court.

On 1 January 1971 Thomas F. Moore replaced the former solicitor in the Mecklenburg Solicitorial District. At that time there were approximately 850 to 1,000 criminal cases pending in the District. On the average a number in excess of 125 were in jail awaiting trial. For this reason the solicitor adopted a conscious policy of giving priority to cases in which the defendants were in jail.

During 1971 this case was calendared for trial four times without being tried, the first time being 24 February 1971. The case was continued at that time on a Thursday due to the determination by the solicitor's office that there was not sufficient time to complete the case that week. The second continuance was granted on 19 April 1971. At that time the law firm of Plumides and Plumides withdrew as private prosecutor, and the presiding judge entered an order which stated in part: "Let the record show . . . that defendant's counsel was agreeable that the case be continued and other private prosecution be employed, if it was so desired." This order reset the case for trial during the week of 17 May 1971. However, the case was not calendared for that week because the assistant solicitor felt that it would "be more expeditious to dispose of the jail cases prior to getting into a trial that appeared to require so much time." The case was calendared for trial 23 June 1971 but was again continued because of the backlog of jail cases.

On 19 April 1971 defendant filed a motion entitled "Plea in Abatement and Motion to Quash," alleging that 13 months had passed without a trial since the date of the alleged offense and that this constituted a denial of his constitutional rights to a fair and speedy trial. On 17 August 1971, at a full evidentiary hearing on the 19 April 1971 motion before Judge McLean, Solicitor Moore testified:

> " . . . The most pressing priority is putting on cases in which the defendant is in jail, move the jail cases as speedily as possible.
>
> "After that would come the other crimes that are pending. That is the most priority. I have been handicapped in recent months due to shortage of Judges for trial

sessions in Mecklenburg County. For instance, this week in which this term now, I have asked for two Judges and could get only one for this term. This will be the case next week. This difficulty is obtained for all the eight months, shortage of judges and shortage of solicitorial help."

Mr. Gilchrist, the assistant solicitor, testified as to why this case had not been tried:

" . . . The reason has been crowded docket and we knew, or anticipated this case would take some two or three days. In view of the jail cases that we have been scheduling almost every single date, I thought that priority should take place where a three day case should not take place over men in jail. For that reason when it has come up on the trial calendar it has been continued due to attempts to dispose of the cases in jail first.

* * *

" . . . We have attempted to put more jail cases on the docket than we could dispose of in an effort to take care of the jail cases first, should there be any breakdown in the trial calendar. We have had enough cases in the jail alone to more than cover the time on the dates for trial."

After hearing the evidence, Judge McLean found the facts substantially as set out above and entered an order denying the motion as follows:

" . . . (T)hat the defendant was admitted to bail in April of 1970 and has been on bail since that time and is presently on bail; that the matter has been placed on the calendar for trial some four times but has not been tried due to other cases of those confined in jail being tried first; that the witnesses for the defendant are all present in court today; that the defendant has suffered no loss in having his witnesses present to present his defense; that the solicitor has been diligent in attempting to bring this matter to trial.

"Upon the foregoing, the Court concludes that the State has been diligent, has not unduly delayed this case for trial; that the motion of the defendant to quash and dismiss the action is denied. The defendant excepts.

"This the 17th day of August, 1971."

The findings of fact made by Judge McLean are fully supported by competent evidence in the record, and these findings support the conclusions of law.

The case was set for trial on 30 August 1971 and the defendant again filed a "Motion to Dismiss" for the reason that the State had not acted with reasonable diligence in providing defendant with a speedy trial. Based on the findings of fact made by Judge McLean in his order of 17 August 1971, Judge Fountain, Judge Presiding at the 30 August 1971 Session, overruled defendant's motion after defendant's counsel stated that the "status and condition of the defendant as relates to his trial is the same today as it was on August 17, 1971, the date of Judge McLean's order." Defendant was then arraigned and the trial proceeded.

Defendant did not allege in the "Plea in Abatement and Motion to Quash" filed 19 April 1971 or in the "Motion to Dismiss" filed 30 August 1971 that he had been prejudiced by the delay in any manner except that furniture and other household goods belonging to defendant were converted to the use of other members of his household while defendant was incarcerated in the common jail of Mecklenburg County for 27 days without privilege of bond, and that the State had not acted with reasonable diligence in providing defendant with a speedy trial. At the hearing before Judge McLean on 17 August 1971 defendant's attorney, Mr. Whitfield, testified: "My witnesses are here and available for trial and have been three or four times, and these are the same witnesses that I would have had all along and I have not lost any witnesses as a result of the delay." Defendant's counsel stated that the same conditions existed on 30 August 1971 when the case was called for trial.

Defendant was charged with first degree murder, and the State's evidence, if believed, would have sustained that charge. Defendant could have been held without bond pending his trial or until bond was set by a Justice or a Judge of the General Court of Justice. G. S. 15-102(1). Bond was set and defendant was released on bail within 27 days from the date of his arrest and remained on bail until his trial. Defendant does not contend that his rights so far as his trial was concerned were in any way prejudiced by the delay in allowing bail. The real question is whether the lapse of time from his arrest on 22 March 1970 until his trial on 30 August 1971, some 17 months later, was

such as to deprive the defendant of his right to a speedy trial as guaranteed by both the Constitution of the United States and the Constitution of the State of North Carolina.

[1] 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 the particular case. The length of the delay, the cause of the delay, prejudice to the defendant, and waiver by defendant are interrelated factors to be considered in determining whether a trial has been unduly delayed. *State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779 (1972); *State v. Harrell,* 281 N.C. 111, 187 S.E. 2d 789 (1972); *State v. Ball,* 277 N.C. 714, 178 S.E. 2d 377 (1972); *State v. Hatcher,* 277 N.C. 380, 177 S.E. 2d 892 (1970); *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274 (1969); *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). See *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).

[2] Defendant contends that under *Dickey v. Florida,* 398 U.S. 30, 26 L.Ed. 2d 26, 90 S.Ct. 1564 (1970), he is entitled to his discharge. In *Dickey* petitioner was in Federal custody. The State of Florida issued a warrant for him on a State criminal charge. Over a period of seven years while still in Federal custody and available to the State of Florida, petitioner made repeated but unsuccessful efforts to secure a trial in the State court. In the interim between arrest and trial, two witnesses died, another potential defense witness allegedly became unavailable, and police records which might have been relevant were lost. The Supreme Court held that petitioner had been deprived of his right to a speedy trial and that the State charge should be dismissed. *Dickey* is distinguishable from the present case in four significant respects: (1) The length of delay was six years longer in *Dickey.* (2) Substantial actual prejudice to the defendant appeared in the record in *Dickey* but none was shown in this case. (3) No valid reason for the delay existed in *Dickey.* The delay in this case resulted from a congested docket, a lack of judges for special sessions, and an attempt to give priority to jail cases. (4) The defendant in *Dickey* did nothing which could be construed as a waiver. The defendant in this case agreed to a continuance as late as four and a half months prior to trial.

[3] While the length of delay in absolute terms is never *per se* determinative, admittedly a delay of 17 months, as in this case, could contravene the right to a speedy trial under some circumstances, and such delay should be avoided if possible. The proscription in cases of this kind, however, is against purposeful or oppressive delays and delays which the prosecution could have avoided by reasonable effort. *Pollard v. United States, supra; State v. Spencer, supra; State v. Johnson, supra.*

[4] The congestion of criminal court dockets has consistently been recognized as a valid justification for delay. Both crowded dockets and lack of judges or lawyers, and other factors, make some delays inevitable. *Dickey v. Florida, supra.* In *State v. George,* 271 N.C. 438, 156 S.E. 2d 845 (1967), Justice Pless said:

> " . . . (W)e must also recognize that in both Mecklenburg and Gaston Counties the criminal dockets are congested, and that regardless of the efforts of the judge and the solicitor, it is impossible to grant every defendant an immediate trial."

Also, Justice Sharp stated in *State v. Hollars, supra:*

> "We do not approve a delay of two years in trying any defendant's case. We must note, however, that the ever increasing number of criminal cases is putting a heavy strain upon speedy trial. . . . The combination of circumstances here . . . the congested condition of the docket, plus the fact that a retrial could not have resulted in defendant's immediate release from prison—negate any wilful failure on the part of court officials to give defendant a speedy trial."

[5] When Solicitor Moore took office on 1 January 1971, he had a backlog of some 1,000 criminal cases on the docket, including about 125 cases in which the defendants were confined in jail awaiting trial. Under these circumstances, a delay from 1 January 1971 to 30 August 1971 could hardly be considered "willful or oppressive." *Pollard v. United States, supra.* The burden is clearly on the accused who asserts the denial of his right to a speedy trial to show that the delay is due to the neglect or willfulness of the prosecution. *State v. Ball, supra; State v. Hatcher, supra; State v. Johnson, supra; State v. Hollars, supra.* Defendant has failed to carry that burden.

In the present case defendant's counsel stated in the summer of 1970 that he was in no hurry to bring the case to trial; he asked for a continuance in September 1970 and was agreeable to a continuance as late as April 1971. "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.*

This case also reveals a record devoid of any evidence of prejudice. All of defendant's witnesses were available for the trial, and defendant neither alleged nor offered proof of actual prejudice. Nothing in the record suggests that his ability to present his defense was in any way impaired by the delay.

Defendant's contention that he has been denied his right to a speedy trial is without merit. The delay of 17 months under the circumstances in this case was not prohibitively long. The reason for the delay was valid. No actual prejudice has been shown, and there is substantial evidence of waiver in the record. For these reasons, the decision of the Court of Appeals is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. KENNETH CAMPBELL

No. 14

(Filed 11 October 1972)

1. **Criminal Law § 149— dissent in Court of Appeals — right of State to appeal**

The aggrieved party, whether the State or the defendant, may appeal to the Supreme Court as of right from any decision of the Court of Appeals in which there is a dissent. G.S. 7A-30(2).

2. **Searches and Seizures § 3— probable cause defined**

Probable cause means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender. G.S. 15-25(a).

3. **Searches and Seizures § 3— search warrant — necessity of affidavit**

An affidavit signed under oath or affirmation by the affiant and indicating the basis for the finding of probable cause by the

issuing magistrate must be a part of or attached to the warrant. G.S. 15-26(b).

4. **Searches and Seizures § 3— affidavit based on hearsay — necessity of setting out underlying facts or circumstances**

The affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant; but the affidavit in such case must contain some of the underlying circumstances from which the affiant's informer concluded that the articles sought were where the informer claimed they were, and some of the underlying circumstances from which the affiant concluded that the informer, whose identity need not be disclosed, was credible and his information reliable.

5. **Searches and Seizures § 3— description of premises — insufficiency of affidavit to support warrant**

An affidavit describing premises rented by defendant and detailing the existence of arrest warrants for defendant and two others on charges of possession and sale of narcotics was insufficient to support the issuance of a search warrant for the premises in that the affidavit revealed no underlying facts and circumstances from which the issuing officer could find that probable cause existed to search the premises described, but the affidavit implicated the premises solely as a conclusion of the affiant.

6. **Searches and Seizures § 3— sufficiency of affidavit — implication of described premises**

An affidavit must 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.

7. **Criminal Law § 84— admissibility of evidence of LSD tablets — insufficient affidavit to support warrant**

Evidence of 289 LSD tablets found in defendant's apartment was improperly admitted where such evidence was obtained as a result of a search warrant issued upon an affidavit insufficient to establish probable cause for a search of the described premises.

ON appeal and *certiorari* to review decision of the Court of Appeals, 14 N.C. App. 493, 188 S.E. 2d 560.

The bill of indictment charged defendant with the unlawful possession of 289 LSD tablets in his residence on Highway 55 near Coats, North Carolina, on 20 May 1971.

The State's evidence tends to show that at 7:30 p.m. on 19 May 1971 a search warrant was obtained; and at approximately 6:00 a.m. on 20 May 1971, SBI agents searched defendant's residence located on Highway 55 near Coats, occupied by him

and two other men, and found 289 LSD tablets in the freezer compartment of a refrigerator in the kitchen.

In apt time defendant challenged the competency of this evidence on the ground that the search warrant was invalid because the affidavit upon which the warrant was obtained failed to show probable cause for the issuance of a warrant to search the premises described. Following a voir dire examination, the trial court held the affidavit sufficient, the search warrant valid, and the fruits of the search competent. The evidence was then admitted over defendant's objection.

Defendant offered no evidence.

The jury found defendant guilty as charged, and from judgment imposing a prison sentence the defendant appealed. The Court of Appeals held that the affidavit failed to show probable cause for issuance of a warrant to search the premises in question and awarded defendant a new trial, Britt, J., dissenting.

On the basis of Judge Britt's dissent the State gave notice of appeal to the Supreme Court as a matter of right, G. S. 7A-30(2), and alternatively petitioned for certiorari in the event it should be held that the State could not appeal. We granted certiorari pending resolution of that question.

Robert Morgan, Attorney General, and Henry E. Poole, Associate Attorney, for the State of North Carolina, appellant.

Woodall, McCormick & Arnold by Edward H. McCormick, Attorney for defendant appellee.

HUSKINS, Justice.

[1] May the State appeal from a decision of the Court of Appeals in which there is a dissent?

When the General Assembly created the North Carolina Court of Appeals as a part of the appellate division of the General Court of Justice, it enacted a system of appeals to accommodate the existence of two appellate courts in the appellate division. G.S. 7A-30 is a part of that system and reads as follows:

> "*Appeals of right from certain decisions of the Court of Appeals.*—Except as provided in § 7A-28 [pertaining to

post conviction hearings], from any decision of the Court of Appeals rendered in a case

(1) Which directly involves a substantial question arising under the Constitution of the United States or of this State, or

(2) In which there is a dissent, or

(3) Which involves review of a decision of the North Carolina Utilities Commission in a general rate-making case, an appeal lies of right to the Supreme Court."

By this enactment "the General Assembly of North Carolina intended to insure a review by the Supreme Court of questions on which there was a division in the intermediate appellate court. . . . " *Hendrix v. Alsop,* 278 N.C. 549, 180 S.E. 2d 802 (1971). North Carolina is a "double appeal" state (first to the Court of Appeals and then to the Supreme Court) as a matter of right in cases (1) involving a substantial constitutional question, or (2) in which there is a dissent in the Court of Appeals, or (3) involving review of a decision of the North Carolina Utilities Commission in a general rate-making case. *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376 (1968). Thus the aggrieved party, whether the State or the defendant, may appeal to the Supreme Court as of right from any decision of the Court of Appeals in which there is a dissent. G.S. 7A-30(2). Had the General Assembly intended to limit double appeals in criminal cases to the defendant only, we think it would have said so.

We now turn to the basic question posed: Was the search warrant in this case issued upon a showing of probable cause to search the house in which defendant resided? If so, the search warrant was valid and the fruits of the search were competent evidence; otherwise not. G.S. 15-27(a); *State v. Colson, supra* (274 N.C. 295, 163 S.E. 2d 376); *Mapp v. Ohio,* 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961).

Statutory and constitutional provisions relating to search warrants prohibit their issuance except upon a finding of probable cause for the search. U.S. Const. amend. IV; G.S. 15-25(a).

[2] Probable cause, as used in the Fourth Amendment and G.S. 15-25(a), means a reasonable ground to believe that the

proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender. *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971).

Probable cause "does not mean actual and positive cause, nor does it import absolute certainty. The determination of the existence of probable cause is not concerned with the question of whether the offense charged has been committed in fact, or whether the accused is guilty or innocent, but only with whether the affiant has reasonable grounds for his belief. If the apparent facts set out in an affidavit for a search warrant are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a search warrant." 47 Am. Jur., Searches and Seizures, § 22.

[3] An affidavit signed under oath or affirmation by the affiant and indicating the basis for the finding of probable cause by the issuing magistrate must be a part of or attached to the warrant. G.S. 15-26(b).

[4] The affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant; but the affidavit in such case must contain some of the underlying circumstances from which the affiant's informer concluded that the articles sought were where the informer claimed they were, and some of the underlying circumstances from which the affiant concluded that the informer, whose identity need not be disclosed, was credible and his information reliable. *State v. Vestal, supra; Spinelli v. United States,* 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1969); *Aguilar v. Texas,* 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964); *Jones v. United States,* 362 U.S. 257, 4 L.Ed. 2d 697, 80 S.Ct. 725, 78 A.L.R. 2d 233 (1960).

Whether the affidavit is sufficient to show probable cause must be determined by the issuing magistrate rather than the affiant. This is constitutionally required by the Fourth Amendment. *Johnson v. United States,* 333 U.S. 10, 92 L.Ed. 436, 68 S.Ct. 367 (1948).

[5] The affidavit upon which the search warrant in this case was obtained reads in pertinent part as follows:

"Peter Michael Boulus, Special Agent; N. C. State Bureau of Investigation; being duly sworn and examined under oath, says under oath that he has probable cause to believe that Kenneth Campbell; M. K. Queensberry and David Bryan has on his premises certain property, to wit: illegally possessed drugs (narcotics, stimulants, depressants), which constitutes evidence of a crime, to wit: possession of illegal drugs . . . .

The property described above is located on the premises described as follows: a one story white frame dwelling .9 miles from the Coats city limits on Hwy. 55 west toward Angier; on the right side of the hwy. directly across from Ma's Drive In also known as Bill's Drive-in. The facts which establish probable cause for the issuance of a search warrant are as follows: (See attached Affidavit) . . . .

AFFIDAVIT

Affiant is holding arrest warrants charging Kenneth Campbell with sale of Narcotics on April 16, 1971 and possession of narcotics on April 16, 1971 and April 28, 1971.

Affiant is holding arrest warrants on M. D. Queensberry for sale of narcotics on April 16, 1971, April 28, 1971 and April 29, 1971. Also affiant has four arrest warrants charging Queensberry with four counts of possession of Narcotics.

Affiant is holding arrest warrants charging David Bryan with sale and possession of narcotic drugs on April 1, 1971.

All of the above subjects live in the house across from Ma's Drive-in on Hwy. 55. They all have sold narcotics to Special Agent J. M. Burns of the SBI and are all actively involved in drug sales to Campbell College students; this is known from personal knowledge of affiant, interviews with reliable confidential informants and local police officers.

The house is owned by Macia Walker and leased to Kenneth Campbell who also pays the utility bills."

Probable cause cannot be shown "by affidavits which are purely conclusory, stating only the affiant's or an informer's

belief that probable cause exists without detailing any of the 'underlying circumstances' upon which that belief is based. . . . Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police." *United States v. Ventresca,* 380 U.S. 102, 13 L.Ed. 2d 684, 85 S.Ct. 741 (1965). The issuing officer "must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion. . . ." *Giordenello v. United States,* 357 U.S. 480, 2 L.Ed. 2d 1503, 78 S.Ct. 1245 (1958).

In *Nathanson v. United States,* 290 U.S. 41, 78 L.Ed. 159, 54 S.Ct. 11 (1933), the United States Supreme Court laid down the following rule: "Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from *facts or circumstances* presented to him under oath or affirmation. Mere affirmance of suspicion or belief is not enough." (Emphasis added.)

Tested by the constitutional principles stated above, the affidavit in this case is fatally defective. It details no underlying facts and circumstances from which the issuing officer could find that probable cause existed *to search the premises described.* The affidavit implicates those premises *solely as a conclusion of the affiant.* Nowhere in the affidavit is there any statement that narcotic drugs were ever possessed or sold in or about the dwelling to be searched. Nowhere in the affidavit are any underlying circumstances detailed from which the magistrate could reasonably conclude that the proposed search would reveal the presence of illegal drugs in the dwelling. The inference the State seeks to draw from the contents of this affidavit—that narcotic drugs are illegally possessed on the described premises—does not reasonably arise from the facts alleged. Therefore, nothing in the foregoing affidavit affords a reasonable basis upon which the issuing magistrate could conclude that any illegal possession or sale of narcotic drugs had occurred, or was occurring, on the premises to be searched.

[6] Nowhere has either this Court or the United States Supreme Court approved an affidavit for the issuance of a search warrant that failed to implicate the premises to be searched. *See, e.g., United States v. Harris,* 403 U.S. 573, 29 L.Ed. 2d

723, 91 S.Ct. 2075 (1971); *Rugendorf v. United States,* 376 U.S. 528, 11 L.Ed. 2d 887, 84 S.Ct. 825 (1964); *Jones v. United States, supra* (362 U.S. 257, 4 L.Ed. 2d 697, 80 S.Ct. 725); *State v. Bullard,* 267 N.C. 599, 148 S.E. 2d 565 (1966).

We spoke on the question in *State v. Vestal, supra* (278 N.C. 561, 180 S.E. 2d 755), in the following language: "The affidavit is sufficient if it supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence *upon the described premises* of the objects sought and that they will aid in the apprehension or conviction of the offender." (Emphasis added.) And, in *Dumbra v. United States,* 268 U.S. 435, 69 L.Ed. 1032, 45 S.Ct. 546 (1925), the United States Supreme Court said that there must be "reasonable grounds at the time of . . . issuance of the warrant for the belief that the law was being violated *on the premises to be searched. . . .*" (Emphasis added.)

Furthermore, other jurisdictions have uniformly held that the failure of the affidavit to establish reasonable grounds to believe that the crime was occurring on the premises to be searched invalidates the warrant issued thereon. *See People v. Massey,* ..... Colo. ....., 495 P. 2d 1141 (1972), where it was held that an affidavit stating that an informant was present when defendant Massey sold marijuana did not in any way link such activities to Massey's apartment and that the affidavit therefore failed to establish probable cause for a search of his apartment. *See also Barker v. State,* 241 So. 2d 355 (Miss. 1970); *State v. Kline,* 42 N.J. 135, 199 A. 2d 650 (1964). *Cf. People v. Brethauer,* 174 Colo. 29, 482 P. 2d 369 (1971).

[7] In light of the authorities cited, and for the reasons stated, we hold that the affidavit in this case did not provide a sufficient basis for a finding of probable cause to search the premises described in the warrant and that the evidence obtained as a result of the search warrant was inadmissible in the trial below.

The decision of the Court of Appeals awarding defendant a new trial is

Affirmed.

HATTIE LUCAS BRANCH v. CLARENCE BRANCH

No. 25

(Filed 11 October 1972)

1. **Constitutional Law § 4; Divorce and Alimony § 2— contested absolute divorce action — preservation of right to jury trial**

Defendant's request for a jury trial in an absolute divorce action should be governed by former G.S. 50-10, in effect at the time he filed his answer, providing that request be made "prior to the call of the action for trial" rather than by Rule 38 of the Rules of Civil Procedure, providing that request be made within ten days after the service of the last pleading; consequently, by reason of his written request filed before trial but more than ten days after service of the last pleading, defendant was entitled to a jury trial.

2. **Divorce and Alimony § 1— contested divorce action — trial at criminal session — void judgment**

Trial of a contested divorce action at a criminal session of district court over defendant's protest and in disregard of his motion for continuance for trial at a civil session rendered judgment in that action a nullity. G.S. 7A-49.2(a).

ON *certiorari* to review the decision of the Court of Appeals which affirmed a judgment entered by *Chief District Court Judge Maddrey* at the 4 August 1971 Criminal Session of the District Court of HALIFAX County.

Plaintiff-wife instituted this action for absolute divorce on 13 August 1970. Defendant-husband admitted plaintiff's allegations that they were married on 21 June 1951; that one child, Phyllis Anita Branch, age 12, was born to the marriage; and that defendant had been a resident of North Carolina for more than six months next preceding the institution of the action.

As ground for divorce, plaintiff alleged that she and defendant separated on 30 July 1969 and had lived separate and apart since that time. By answer, defendant *denied* these allegations.

At the request of plaintiff's counsel, the case was calendared for trial at the 4 August 1971 Criminal Session. It was then heard by Judge Maddrey, without a jury; and, based on evidence offered by plaintiff, the court answered the issues in her favor and entered a judgment of absolute divorce.

Neither defendant nor his counsel was present at the 4 August 1971 Criminal Session.

In apt time, defendant excepted to the judgment and gave notice of appeal. Appeal entries were signed by Judge Maddrey on 13 August 1971.

The Court of Appeals affirmed on the grounds (1) that defendant had failed to prepare and serve a case on appeal as required by G.S. 1-282, and (2) that it found no error on the face of the record proper. 14 N.C. App. 651, 188 S.E. 2d 528.

James R. Walker, Jr., for defendant appellant.

No counsel for plaintiff appellee.

BOBBITT, Chief Justice.

Although lacking in clarity, the assertions in defendant's notice of appeal that he had been denied his constitutional rights to due process and to a jury trial seem sufficient to entitle him to appeal as a matter of right under G.S. 7A-30(1). However, since all of the questions we deem appropriate for consideration may not involve constitutional rights, we have elected to treat and allow defendant's notice of appeal as a petition for *certiorari.*

Defendant does not contend that errors were committed during the progress of the trial. The error asserted by defendant is that the District Court undertook to try the case *without a jury* and undertook to do so *at a criminal session.*

"When the errors relied on by the appellant are presented by the record proper, no case on appeal is required." *Russos v. Bailey,* 228 N.C. 783, 784, 47 S.E. 2d 22, 23 (1948), and cases cited.

The record proper, certified by the Clerk of the Superior (District) Court of Halifax County, includes the following: Summons, showing personal service on defendant; Complaint; Answer; "Objections and Motion" filed by defendant on 3 August 1971; Judgment of Judge Maddrey dated 4 August 1971; Order of Judge Maddrey dated 4 August 1971 and filed 10 August 1971, overruling defendant's "Objections and Motion"; defendant's "Notice of Appeal" filed 11 August 1971; defendant's "Bill of Specific Exceptions" filed 13 August 1971; and "Appeal Entries" dated and filed on 13 August 1971.

The question for decision is whether error appears on the face of the record proper.

[1] Provisions of the Constitution of North Carolina pertinent to the right of jury trial in civil actions are quoted below.

Art. I, § 25, provides: *"Right of jury trial in civil cases.* In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable."

Art. IV, § 13(2), contains this provision: "No rule of procedure or practice shall abridge substantive rights or abrogate or limit the right of trial by jury."

Art. IV, § 14, provides: *"Waiver of jury trial.* In all issues of fact joined in any court, the parties in any civil case may waive the right to have the issues determined by a jury, in which case the finding of the judge upon the facts shall have the force and effect of a verdict by a jury."

When this action was instituted, G.S. 50-10 provided in pertinent part that "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 . . . *unless such defendant, or the plaintiff, files a request for a jury trial with the clerk of the court in which the action is pending, prior to the call of the action for trial.*" (Our italics.) Under the italicized provisions, defendant was entitled to a jury trial upon filing a request therefor with the clerk prior to the call of the action for trial. Defendant's explicit request for a jury trial was filed with the clerk on 3 August 1971.

The judgment signed by Judge Maddrey contains this recital: ". . . and it further appearing to the Court and the Court finding that neither the defendant nor the plaintiff has filed a request for a jury trial with the Clerk of the Superior Court of Halifax County prior to the time this action was called for trial and that the parties have waived their respective rights to have the facts determined by a jury. . . ." Defendant's demand that "the call and trial of the action be had at a regular Civil Session of the District Court before a jury," set forth in the "Objections and Motion" filed by defendant on 3 August 1971, contradicts and negates this recital.

Defendant had and has a right to a jury trial unless he has waived his right thereto by his failure to demand a trial

by a jury *at the time and in the manner* prescribed by Rule 38(b) of the Rules of Civil Procedure.

G.S. 50-10 was rewritten by Chapter 17, Session Laws of 1971, effective from its ratification on 19 February 1971. In rewriting G.S. 50-10, the General Assembly deleted the italicized words quoted above and substituted therefor the following: ". . . 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."

The Rules of Civil Procedure, G.S. 1A-1, went into effect on 1 January 1970. *Schoolfield v. Collins,* 281 N.C. 604, 617, 189 S.E. 2d 208, 216 (1972).

Rule 1 provides: "These rules shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature *except when a differing procedure is prescribed by statute.*" (Our italics.) When this action was commenced, and thereafter until 19 February 1971, G.S. 50-10 prescribed the time and manner for requesting a trial by jury in a contested divorce action based on a one year separation.

Rule 38, entitled "Jury trial of right," provides:

"(a) *Right preserved.*—The right of trial by jury as declared by the Constitution or statutes of North Carolina shall be preserved to the parties inviolate.

"(b) *Demand.*—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. Such demand may be made in the pleading of the party or endorsed on the pleading.

"(c) *Demand—specification of issues.*—In his demand a party may specify the issues which he wishes so tried; otherwise, he shall be deemed to have demanded trial by jury for all the issues so triable. If a party has demanded trial by jury for only some of the issues, any other party within 10 days after service of the last pleading directed to such issues or within 10 days after service of the demand, whichever is later, or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues in the action.

"(d) *Waiver.*—Except in actions wherein jury trial cannot be waived, the failure of a party to serve a demand as required by this rule and file it as required by Rule 5 (d) constitutes a waiver by him of trial by jury. A demand for trial by jury as herein provided may not be withdrawn without the consent of the parties who have pleaded or otherwise appear in the action."

The answer, the last pleading, was filed 24 August 1970, nearly six months prior to the 1971 amendment of G.S. 50-10. The 1971 amendment contains no reference to pending actions. On and after 19 February 1971, the effective date of the 1971 amendment, it was impossible for defendant to demand a jury trial "as provided in the Rules of Civil Procedure." Mindful of the constitutional limitation stated in Art. IV, § 13(2), and the legislative intent expressed in Rule 38(a), we hold that the 1971 amendment did not nullify the right to request a jury trial "prior to the call of the action for trial" conferred by G.S. 50-10 at the time defendant filed his answer. Consequently, by reason of his written request therefor filed 3 August 1971, the defendant was and is entitled to a jury trial on the issues raised by the pleadings.

[2] Moreover, in the absence of defendant's consent, the District Court had no authority to try this contested civil action for absolute divorce at a criminal session.

G.S. 7A-49.2(a) provides: "At criminal sessions of court, motions in civil actions may be heard upon due notice, and trials in civil actions may be heard *by consent of parties.* Motions for confirmation or rejection of referees' reports may also be heard upon ten days' notice and judgment may be entered on such reports. The court may also enter consent orders and consent judgments, and try *uncontested* civil actions and *uncontested* divorce cases." (Our italics.) The purported trial of this contested divorce action was a nullity. It was conducted over defendant's protest and in disregard of his motion for continuance for trial at a civil session.

It is noted that plaintiff has not been represented by counsel in connection with defendant's appeal to the Court of Appeals or in connection with his appeal to this Court.

The decision of the Court of Appeals is reversed; the judgment of absolute divorce entered at the 4 August 1971 Criminal

Session is vacated; the cause is remanded to the Court of Appeals with direction that it remand the case to the District Court of Halifax County for trial by a jury at a civil session of that court.

Reversed and remanded.

STATE OF NORTH CAROLINA v. LEROY KILLIAN

No. 38

(Filed 11 October 1972)

Burglary and Unlawful Breakings § 5; Larceny § 7— breaking and entering — larceny — sufficiency of evidence

The State's evidence was insufficient to withstand defendant's motion for nonsuit in a prosecution for felonious breaking and entering and felonious larceny where it tended to show that the State's witness left two women in his extra apartment along with his wife's wedding rings, that when officers went to the apartment the back door was locked, a glass panel in the door was broken and broken glass and a broken bottle were lying outside the door, that blood and defendant's fingerprints were on the broken glass and bottle, that when an officer entered the apartment defendant jumped out a window and fled, that the two women left in the apartment were found in the apartment nude, that when apprehended defendant had the wedding rings on his person, that defendant did not have permission of the State's witness to enter his apartment, and that defendant's arm was cut.

APPEAL by defendant under G.S. 7A-30(2) (1969) from the decision of the Court of Appeals finding no error in the trial before *Friday, J.*, at the October 1971 "A" Criminal Session of MECKLENBURG.

Defendant was tried upon a bill of indictment which charged (1) that on 1 April 1971 he feloniously broke and entered the dwelling of John Crowell at 2322-B Horne Drive in Charlotte; and (2) that after having feloniously broken and entered the dwelling of John Crowell with intent to steal, he feloniously took and carried away "A Wedding Ring Set of the value of $60.00" of the chattels of John Crowell.

Evidence for the State tended to show:

John Crowell is a bus driver employed by the Charlotte City Coach Company. On 1 April 1971 he resided with his

wife at 3320 Barfield Drive in Charlotte. He also maintained an apartment at 2322-B Horne Drive. About 5:00 p.m. on 1 April 1971 he took "Joy Funderburke and her partner," Rhonda High to the apartment. He had not previously been there that day. When he left about 5:30 or 5:45 p.m. the girls remained at the apartment. The front door, on which he kept a padlock and chain, was closed, and no glass was broken in the back door at that time.

At approximately 6:00 p.m. on 1 April 1971, R. H. Miller, a patrolman of the Charlotte City Police Department, and Officer Swain went to 2322-B Horne Drive. They had no warrants. After speaking with the occupant of the neighboring apartment, 2222-A, they went to the front door of Crowell's apartment. Finding it locked Miller went to the rear door. It was shut. The lower portion of the far left pane was broken. On the floor beneath were four or five drops of blood. Glass was scattered between the back door and the screen door. "The main part" of a broken soft-drink bottle lay on the step. On it were dark spots which appeared to be blood. The neck of the bottle was about three and one-half feet from the door. A subsequent examination by an SBI fingerprint expert revealed defendant's fingerprints on the bottle and on the pieces of the broken pane.

Upon seeing the broken glass Officer Miller turned the knob of the back door and found it unlocked. However, it was immediately slammed shut from the inside. Miller drew his weapon and rushed into the kitchen. There he saw defendant, who ran into the bedroom and jumped through a closed window. It was "a regular type window," with panes of glass separated by pieces of wood. In the bedroom were two nude white girls, aged about 18 and 22 years respectively.

Miller and Swain rushed outside and pursued defendant on foot for about half a mile. However, their strength failed and defendant, who had a head start, was outdistancing them. Miller summoned aid on his portable radio, and Patrolman Frye caught defendant after seeing him emerge from a patch of woods. Defendant had numerous small cuts on him and "numerous blood." On his right forearm was a large cut.

Officer Frye searched defendant and removed from his pocket a wedding ring set (State's Exhibit No. 3). Crowell testified that "to the best of [his] knowledge about 5:45 that eve-

ning State's Exhibit No. 3 was in the apartment." He said the rings were his wife's wedding rings and, on 1 April 1971, he "had loaned them to Nathaniel Phifer to get married in." After making the foregoing statement the prosecuting attorney asked Crowell the following questions, which he answered as follows:

"Q. Do you know what occasion they would have to have been in your apartment or do you know where they were?

"A. In the front bedroom.

"Q. What location? What address?

"A. 2322-B Horne Drive. He had gotten married that morning prior to this."

No further reference to the rings appears in the record.

Crowell testified that he did not know defendant and had not given him permission to be in the apartment.

Defendant offered no evidence. His motions for judgment of nonsuit on both counts in the indictment, made at the close of all the evidence, were overruled. The jury's verdict was, "Guilty as charged in the bill of indictment." From a single sentence of 5-7 years imposed upon both counts defendant appealed. The Court of Appeals, Judge Brock dissenting, found no error in the trial, and defendant appealed as a matter of right to this Court.

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

James J. Caldwell for defendant appellant.

SHARP, Justice.

The only question presented by this appeal is whether the State's evidence is sufficient to withstand defendant's motions for nonsuit. The answer is No.

Taking the evidence as true and considering it in the light most favorable to the State, it is sufficient to establish the following facts:

Crowell left two young women in his apartment about 5:30 or 5:45 p.m. About 6:00 p.m. police officers entered the apartment through the back door, which they found unlocked. Shortly

before they came to the back door a glass pane in the door had been broken from the inside, probably with the bottle found on the steps. As Officer Miller turned the door knob to enter, defendant slammed the door shut and ran from the kitchen. The officers entered in time to see him run into the bedroom, jump through a closed, glass-paned window, and flee down the steep incline back of the row of apartments. At that time there were two nude white women in the bedroom. Miller and other officers pursued defendant. He was eventually caught and searched. On his person Officer Frye found a wedding ring set. Earlier that same day, Crowell had lent these rings, the property of his wife, to Nathaniel Phifer "to get married in." Crowell did not know defendant and had not given him permission to enter the apartment.

This evidence strongly suggests that 2322-B Horne Drive was a place of prostitution, and it *proves* that defendant did not want to explain his presence there to the police. However, with reference to the charges in the indictment, it raises material questions which remain unanswered. The first is, where and how did defendant get the rings? Under the circumstances disclosed, Crowell's testimony that "to the best of his knowledge" the rings were in his apartment about 5:45 that evening is merely one way of saying he did not know whether they were there or not. Prior to the time he delivered the girls to his apartment he had not been there that day. He was careful not to say that he had left the rings there. Further, his answers to the obfuscating questions propounded by the prosecutor fall far short of a prima facie showing that Phifer and his bride had been in the apartment "prior to this" on that day. While Crowell said he did not know defendant, there is no evidence that defendant and Phifer were strangers; nor is there evidence that they were acquainted.

If, perchance, the Phifers had been in the bedroom and left the rings there, defendant had obtained them before the officers arrived, for he picked up nothing but his feet thereafter. Without some evidence that defendant got the rings from Crowell's apartment there is no reason to suspect that he obtained them by theft. If he got possession of them there, the more reasonable inference would be that it was with the knowledge and consent of the two women. However, the evidence does not disclose for what purpose or from whom he got them.

Likewise, it gives no clue why defendant broke either the soft drink bottle or the pane in the unlocked kitchen door.

The State failed to call as witnesses the two women whom the officers found in the bedroom. Although they might not have been able to explain defendant's possession of the rings they undoubtedly could have clarified the manner of his entrance into the apartment and perhaps the purpose of his visit. While conceding that the fantastic situation the officers found defies analysis, we concur with Judge Brock that the more reasonable inference arising from the evidence is that defendant entered the apartment with the consent of the two women, and that his purpose was not to steal.

We hold that the State failed to make a prima facie showing either that defendant broke or entered the Crowell apartment with the intent to steal or that he was guilty of the larceny of the rings. This conclusion makes unnecessary any discussion of defendant's argument that, because the evidence disclosed the rings were the property of Crowell's wife, there was a fatal variance between the charge and the proof on the count of larceny. As to this contention see *State v. Smith*, 266 N.C. 747, 147 S.E. 2d 165 (1966); *State v. Law*, 228 N.C. 443, 45 S.E. 2d 374 (1947); *State v. Hauser*, 183 N.C. 769, 111 S.E. 349 (1922); *State v. Bishop*, 98 N.C. 773, 4 S.E. 357 (1887); 52A C.J.S. *Larceny* §§ 81(2)d, 99b(2) (1968).

The decision of the Court of Appeals is

Reversed.

STATE OF NORTH CAROLINA v. NATHANIEL INGRAM

No. 4

(Filed 11 October 1972)

1. **Criminal Law § 161— no assignments of error — error on face of record**

When the case on appeal contains no assignments of error, the judgment must be sustained, unless error appears on the face of the record.

2. **Criminal Law § 161— first degree murder — no error on face of record**

Where the conflict between State's evidence and defendant's evidence was resolved by the jury in favor of the State, the charge

of the judge was a full and correct statement of the law, and the evidence was sufficient to withstand defendant's motion for nonsuit in that it tended to show that defendant killed his wife with a shotgun after threatening to do so and that he stated to officers that he had intentionally killed her, there was no prejudicial error which would entitle defendant to a new trial.

APPEAL by defendant from *Robert Martin, S.J.*, at the 6 December 1971 Special Session of MONTGOMERY.

By indictment, proper in form, the defendant was charged with the murder of Ester Little Ingram, his wife. He was found guilty of murder in the first degree with recommendation that the punishment be imprisonment for life. Sentence was imposed in accordance with the verdict.

The evidence for the State is to the following effect:

At 7:30 p.m. on 23 August 1971, Deputy Sheriffs Brady and Luther went, in response to a call, to the home of Lillie Mae Rush, the defendant's mother-in-law. Upon arrival they found the defendant and his wife involved in a fight outside the house. The defendant was chasing his wife with an unloaded shotgun in his hand and, upon overtaking her, struck her with the gun. The officers subdued him, took the gun from him, handcuffed him and carried him to jail. En route to the jail, without any interrogation by the officers, he said, "I'm going to kill her."

Upon arrival at the jail, the officers obtained from Magistrate Greene warrants charging the defendant with engaging in an affray and resisting arrest. The defendant's wife then arrived and swore out a warrant charging him with assault with a deadly weapon. At 9:30 p.m., the defendant was released on bond.

Shortly after 11:30 p.m., the defendant returned to the magistrate's office and said to the magistrate, "I have come to give myself up." The magistrate inquired, "What have you done this time?" He replied that he had shot his wife. Upon the magistrate's inquiry, "Is she dead?" He replied, "I hope so." The defendant, not under arrest, then took a seat in the magistrate's office.

Meanwhile, Officers Brady and Luther, in response to another call, had gone to the defendant's home, in the vicinity of that of his mother-in-law. There they found the body of

Ester Ingram, the defendant's wife. There was a large shotgun wound in her right chest, which, in the opinion of a medical expert witness, was the cause of her death. The officers found in the house a 12-gauge, bolt action shotgun with one spent shell in the chamber. The deceased held a screwdriver in her right hand. At about 10:30 p.m., the defendant had gone to the home of a neighbor who then had the defendant's shotgun in his possession, and had obtained the gun from the neighbor, who refused to let him have any shells for it.

After the body of Ester Little Ingram was removed by the coroner, Officers Brady and Luther went to the magistrate's office, arriving there about 20 minutes after the defendant. Finding the defendant there, Officer Brady asked him if he shot his wife. When the defendant replied that he did, Officer Brady told him he was under arrest for the murder of his wife and gave him the full Miranda warning. He then asked the defendant if anyone had searched him. The defendant thereupon took three unfired 12-gauge shotgun shells from his pocket and handed them to the officer. They were similar to the fired shell found in the gun. The defendant asked, "Is she dead?" Officer Brady replied, "Yes." The defendant then said, "Good, I meant to kill her." The defendant was not interrogated further by the officers.

The defendant testified in his own behalf to the following effect:

When he got home from work on 23 August 1971, his wife began quarreling with him. He left home, purchased a six-pack of beer and returned home. He and his stepson sat on the porch and drank the beer. His wife continued to quarrel and got a gun, which the defendant took from her and carried to his mother-in-law's house. At that time "they all" jumped on him and took the gun away from him. On former occasions his wife had shot him and stabbed him. He took the unloaded gun over to his mother-in-law's home to keep his wife from shooting him with it. The police drove up while he, his wife and his stepson were in the front yard of his mother-in-law's home scuffling for the gun. En route to the jail, he made no statement about killing his wife. After he was released on bond, he went to the home of his neighbor and got his gun, apparently a different gun from that taken from him at his mother-in-law's home.

Arriving at his home with his gun, he left it on the back porch and knocked on the door. His wife let him in and recommenced the quarrel. He got four shotgun shells from his gun belt in the bedroom and put them in his pocket. His wife told his stepson to go over to her mother's "to get the gun" and said she was going to kill the defendant. The stepson went to the grandmother's home, after advising the defendant that he would be dead if he were there when the stepson returned. The defendant then went out the back door, picked up his gun and put one shell in it for the purpose of defending himself.

The defendant then went around to the front porch of the house and thrust his hand through a hole in the door glass for the purpose of unlocking the door. His wife "snatched" his hand away and when he pushed the door open, she struck at him with something. She grabbed the gun barrel. He pulled the gun back and it fired.

The defendant did not intend to shoot his wife, but was going back into the house to get his clothes. After the shooting, he walked on through to the bedroom and threw the gun on the floor. He then left the house without calling an ambulance or a doctor, walked to a bootlegger's house, bought a pint of liquor and drank it. He then walked down to the magistrate's office. He did not intend to kill his wife and did not make any statement in the magistrate's office to that effect. He has been convicted previously of other offenses.

In rebuttal the State offered the testimony of the defendant's stepson to the effect that he was in the house when the defendant returned after being released under bond following the earlier quarrel. The defendant came into the house and changed his clothes. The stepson heard his mother tell the defendant to stop playing with the shotgun and the defendant reply, "I'm going to kill you." The stepson protested and the defendant stated he would kill both of them. The defendant then walked out of the back door and the stepson went to his grandmother's house, some 30 yards away, to tell his uncle that the defendant was "back with a shotgun." While at his grandmother's house, he heard a shotgun fire and rushed back to find his mother dead. His mother did not threaten the defendant. On former occasions his mother had shot and cut the defendant.

Attorney General Morgan and Associate Attorney Conely for the State.

Charles H. Dorsett for defendant.

LAKE, Justice.

[1] The defendant assigns no error and in his brief his counsel states that he has reviewed the record and is of the opinion that there were no errors committed during the course of the trial which prejudiced the rights of the defendant.

The appeal is, itself, an exception to the judgment. *State v. Darnell,* 266 N.C. 640, 146 S.E. 2d 800; *State v. Sloan,* 238 N.C. 672, 78 S.E. 2d 738; Strong, N.C. Index 2d, Criminal Law, § 161. "When the case on appeal contains no assignments of error, the judgment must be sustained, unless error appears on the face of the record." *State v. Higgs,* 270 N.C. 111, 153 S.E. 2d 781; *State v. Williams,* 268 N.C. 295, 150 S.E. 2d 447. No error appears on the face of the record proper in the present case.

[2] Notwithstanding the foregoing rule, due to the gravity of the offense charged and the imposition of the sentence to imprisonment for life, we have carefully examined the entire record. Like the defendant's counsel, we find therein no error which would entitle the defendant to a new trial.

The conflict between the defendant's testimony and the evidence of the State presented only a question of fact for the jury, which elected to believe the State's version of the shooting. The charge by the learned trial judge was a full and correct statement of the applicable principles of law. The evidence was obviously sufficient to withstand the defendant's motion for judgment of nonsuit.

The trial judge conducted numerous voir dire examinations before permitting the several witnesses for the State to testify concerning statements by the defendant while in the office of the magistrate. This evidence thereon fully supports the findings by the trial judge that: The defendant, while not under arrest, in the absence of any police officer, and while not under the influence of any alcoholic beverage or narcotic drug, voluntarily went to the magistrate's office and voluntarily stated that he had shot his wife and hoped she was dead; that, thereafter, though he was not under arrest or deprived

of his freedom of action in any way, the defendant remained in the office of the magistrate some 20 minutes until the arrival of Deputy Sheriffs Brady and Luther; that he was not in custody when, in response to an inquiry by Deputy Brady, he told the officers he shot his wife; and that his subsequent statement that he intended to kill her was not made in response to any interrogation by the officers.

The defendant's statement, while on the way to jail following the first episode, that he was going to kill his wife was also voluntary and was made without any question being directed to him by the officers.

No error.

STATE OF NORTH CAROLINA v. ARTHUR McLEAN, ROLAND McLEAN AND ROGER SMITH

No. 24

(Filed 11 October 1972)

1. **Criminal Law §§ 161, 166— assignments of error abandoned — review of record**

Assignments of error which are not brought forward in the brief are deemed abandoned; however, when an accused is convicted of a capital offense with recommendation of life imprisonment, the court on appeal will consider the entire record for possible prejudicial error.

2. **Criminal Law § 161— capital crime — review of record — no error**

A review of the entire record showed it to be without error where it revealed that defendants were positively identified as perpetrators of the crimes of robbery with firearms and rape, that in-court identifications of defendants were not tainted by improper pre-trial identification procedures, that defendants were represented by competent counsel, and that defendants were tried under valid indictments in a properly organized court before a fair trial judge.

APPEAL by each defendant from *Brewer, J.*, March 1972 Criminal Session of HARNETT.

Defendants Arthur McLean, Roland McLean and Roger Smith were each charged in separate bills of indictment with the rape of Dorothy Holland. Each was also charged in separate bills of indictment with robbery with firearms of Charles Weaver.

Defendants entered pleas of not guilty, and the cases were consolidated for trial.

The State, through witnesses Charles Weaver and Dorothy Holland, offered evidence which tended to show that on the night of 19 November 1971 they were riding in a car near the Betsy Johnson Memorial Hospital in Dunn, North Carolina. Charles Weaver, the operator of the automobile, stopped for a stop sign, and a light colored automobile pulled alongside the Weaver automobile. Roland McLean was sitting in the back seat of the light colored car holding a shotgun. He entered the back seat of the Weaver automobile, leveled the shotgun at Weaver, and ordered him to follow the light colored car. The automobiles traveled a short distance and stopped on a dirt road. At this point Roger Smith and Arthur McLean left the light colored car and approached the Weaver automobile. Both Roger Smith and Arthur McLean wore stockings over their faces. By use of firearms defendants took cash from both Charles Weaver and Dorothy Holland. Arthur McLean then removed the stocking from his face, entered the automobile occupied by Dorothy Holland, removed her clothes from her body, and proceeded forcibly to have sexual intercourse with her against her will and despite her continued pleas, struggles, and protests. The other defendants held a rifle and a shotgun on Charles Weaver during the time Arthur McLean was forcibly having intercourse with Dorothy Holland.

After about ten minutes Arthur McLean left the Weaver automobile, and Roger Smith entered the front seat with Dorothy Holland. He removed the stocking from his face and proceeded to have sexual intercourse with Dorothy Holland forcibly and against her will. When Roger Smith left the Weaver automobile, Roland McLean entered the front seat, and he too forcibly and against her will had sexual intercourse with Dorothy Holland. Charles Weaver was held at gunpoint during all the assaults.

After defendants left the scene, Charles Weaver and Dorothy Holland immediately went to the Dunn Police Department, where they reported the crimes. Miss Holland was then taken to the hospital in Dunn for examination and treatment.

The State offered evidence of Sgt. J. A. Mozingo of the Dunn Police Department which tended to corroborate the testimony of Charles Weaver.

Dr. C. L. Corbett testified that he examined Dorothy Holland on the night of 19 November 1971 and obtained a smear which showed the presence of sperm. He stated that she was nervous, crying, and emotional.

Defendants offered no evidence.

The jury returned a verdict of guilty of rape against each defendant with recommendation of life imprisonment. The jury also returned a verdict of guilty of armed robbery as to each defendant.

Each defendant appealed from the sentences imposed.

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

Bryan, Jones, Johnson, Hunter & Greene for Defendant Arthur McLean.

W. A. Johnson for Defendant Roland McLean.

Wilson, Bowen & Lytch, by Wiley F. Bowen, for Defendant Roger Smith.

BRANCH, Justice.

The record reveals that each defendant made eight assignments of error; however, none of these assignments of error were brought forward and argued by any of defendants in his brief.

[1] Assignments of error which are not brought forward and discussed in the brief are deemed abandoned. *State v. Wilson,* 280 N.C. 674, 187 S.E. 2d 22; *Branch v. State,* 269 N.C. 642, 153 S.E. 2d 343; *State v. Spears,* 268 N.C. 303, 150 S.E. 2d 499; *State v. Stafford,* 267 N.C. 201, 147 S.E. 2d 925.

Ordinarily when there are no assignments of error before us, we review only the errors appearing on the face of the record as presented by the appeal itself. *State v. Higgs,* 270 N.C. 111, 153 S.E. 2d 781; *State v. Williams,* 268 N.C. 295, 150 S.E. 2d 447. Nevertheless, when an accused is convicted of a capital offense with recommendation of life imprisonment, as here, we carefully consider the entire record for possible prejudicial error. *State v. Yoes,* 271 N.C. 616, 157 S.E. 2d 386; *State v. Gaskill,* 256 N.C. 652, 124 S.E. 2d 873.

[2] In instant case the record reveals that each defendant was positively identified in court by two eyewitnesses as being the persons who committed the brutal and degrading rape upon the person of Dorothy Holland and as being the persons who robbed Charles Weaver of money by the use of firearms.

The record further reveals that the defendants, represented by competent counsel, were tried under valid indictments in a properly organized court before a scrupulously fair trial judge. The in-court identifications were not tainted by improper pre-trial identification procedures.

We have carefully examined the entire record and find it free from error.

No error.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

GREENE v. GREENE

No. 52.

Case below: 15 N.C. App. 314.

Motion by defendant Edward I. Greene to withdraw appeal allowed 25 September 1972.

HANSEN v. KESSING CO.

No. 23 PC.

Case below: 15 N.C. App. 554.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 October 1972.

HARRISON v. LEWIS

No. 57.

Case below: 15 N.C. App. 26.

Motion of defendant to withdraw appeal allowed 22 September 1972.

HELMS v. REA

No. 20 PC.

Case below: 15 N.C. App. 465.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 11 October 1972.

HOUCK v. OVERCASH

No. 24 PC.

Case below: 15 N.C. App. 581.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 3 October 1972.

IN RE CITY OF WASHINGTON
No. 14 PC.

Case below: 15 N.C. App. 505.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 October 1972.

INSURANCE CO. v. KEITH
No. 28 PC.

Case below: 15 N.C. App. 551.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 3 October 1972.

JAMES v. BOARD OF EDUCATION
No. 29 PC.

Case below: 15 N.C. App. 531.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 3 October 1972.

JOHNSON v. CITY OF WINSTON-SALEM
No. 4 PC.

Case below: 15 N.C. App. 400.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 3 October 1972.

LASSITER v. LASSITER
No. 30 PC.

Case below: 15 N.C. App. 588.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 October 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

LAUTENSCHLEGER v. INDEMNITY CO.
No. 27 PC.

Case below: 15 N.C. App. 579.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 October 1972.

MOORE v. TILLEY
No. 22 PC.

Case below: 15 N.C. App. 378.

Petition for writ of certiorari to North Carolina Court of Appeals denied 11 October 1972.

MARLOWE v. INSURANCE CO.
No. 17 PC.

Case below: 15 N.C. App. 456.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 October 1972.

REA v. CASUALTY CO.
No. 38 PC.

Case below: 15 N.C. App. 620.

Petition for writ of certiorari to North Carolina Court of Appeals denied 11 October 1972.

RUPERT v. RUPERT
No. 36 PC.

Case below: 15 N.C. App. 730.

Petition for writ of certiorari to North Carolina Court of Appeals denied 11 October 1972.

STATE v. GIBSON and STATE v. DEWALT
No. 15 PC.

Case below: 15 N.C. App. 445.

Application by defendants to withdraw appeal and withdraw petition for writ of certiorari allowed 22 September 1972.

STATE v. JACKSON
No. 174 PC.

Case below: 14 N.C. App. 288.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 October 1972.

STATE v. McCRAY
No. 26 PC.

Case below: 15 N.C. App. 373.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 October 1972.

STATE v. McCUIEN
No. 21 PC.

Case below: 15 N.C. App. 296.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 October 1972.

STATE v. MILLER
No. 31 PC.

Case below: 15 N.C. App. 610.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 October 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. REAVES

No. 12 PC.

Case below: 15 N.C. App. 476.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 October 1972.

STATE v. STIMPSON

No. 13 PC.

Case below: 15 N.C. App. 606.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 October 1972.

STATE v. THOMPSON

No. 39 PC.

Case below: 16 N.C. App. 62.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 October 1972.

UNIVERSITY v. TOWN OF CARRBORO

No. 25 PC.

Case below: 15 N.C. App. 501.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 October 1972.

PETITIONS TO REHEAR

ALLGOOD v. TOWN OF TARBORO

No. 120.

Reported: 281 N.C. 430.

Petition by Plaintiffs to rehear denied 9 October 1972.

IN RE TRUCKING CO.

No. 66.

Reported: 281 N.C. 375.

Petition by McLean Trucking Company to rehear denied 9 August 1972.

STATE OF NORTH CAROLINA v. JULIUS STEWART SUMMRELL

No. 53

(Filed 15 November 1972)

1. **Disorderly Conduct and Public Drunkenness § 1— disorderly conduct statute — unconstitutional provisions**

Provisions of the disorderly conduct statute which make it unlawful to cause a public disturbance by wilfully or wantonly creating "a hazardous or physically offensive condition" or by "offensively coarse" utterances and acts such as "to alarm and disturb persons present" *are held* unconstitutionally vague and overbroad. Former G.S. 14-288.4(a)(2) and (3).

2. **Constitutional Law § 18— freedom of speech**

The public expression of ideas may not be prohibited merely because the ideas are offensive, disturbing, or alarming to some hearers.

3. **Constitutional Law § 18— statute prohibiting constitutionally protected speech**

A statute which defines proscribed activity so broadly that it encompasses constitutionally protected speech cannot be upheld in the absence of authoritative judicial limitations.

4. **Indictment and Warrant § 12— conviction in district court — amendment of warrant in superior court**

In an appeal to the superior court from a disorderly conduct conviction in the district court, the trial court properly allowed the State to amend the warrant to comply with the trial court's construction of the disorderly conduct statute.

5. **Disorderly Conduct and Public Drunkenness § 1— disorderly conduct statute — acts or utterances likely to provoke breach of peace — constitutionality**

Provision of the disorderly conduct statute proscribing acts and language likely to provoke a breach of the peace is constitutional. Former G.S. 14-288.4(a)(2).

6. **Disorderly Conduct and Public Drunkenness § 1— hospital emergency room — public place**

A hospital emergency room is a public place within the purview of the disorderly conduct statute.

7. **Disorderly Conduct and Public Drunkenness § 2— disorderly conduct in hospital emergency room — sufficiency of evidence**

The State's evidence was sufficient for the jury on the issue of defendant's guilt of disorderly conduct by acts and language calculated to provoke a breach of the peace where it tended to show that defendant was under the influence of an intoxicant while in a hospital emergency room, that he refused medical attention from a physician

solely because the physician was white, and that when he was informed that a black doctor whom he had demanded was not immediately available, he began shouting profanities, cursing all whites, and loudly voicing unfounded complaints.

8. **Arrest and Bail § 6— resisting arrest without warrant— legality of arrest**

Defendant could not legally resist his arrest for the misdemeanor of disorderly conduct where the arresting officer had reasonable grounds to believe that defendant had committed that crime in his presence and thus was empowered to arrest defendant without a warrant. G.S. 14-223; G.S. 15-41(1).

9. **Criminal Law § 171— error relating to one charge — concurrent identical sentences — harmless error**

Erroneous instruction on a disorderly conduct charge was harmless where the sentence imposed for disorderly conduct was made to run concurrently with an identical sentence imposed for the offense of resisting arrest.

10. **Indictment and Warrant § 8— charges of resisting and assaulting officer — election by the State**

The trial judge was not required to make the State elect between the charges of resisting an officer and assaulting an officer at the beginning of the trial and before any evidence had been introduced; however, the trial court should have required such an election at the conclusion of the evidence where the evidence showed that the assaults were the means by which the officer was resisted.

11. **Constitutional Law § 34; Criminal Law § 26— double jeopardy — multiple punishments for same offense**

The constitutional guaranty against double jeopardy protects a defendant from multiple punishments for the same offense.

12. **Criminal Law §§ 26, 171— assaulting and resisting officer — double jeopardy — concurrent sentences — arrest of judgment**

Defendant's constitutional right against double jeopardy was violated when he was convicted of resisting an officer and assaulting an officer based on the same conduct, and the judgment imposed for assaulting an officer will be arrested even though concurrent, identical sentences were imposed in each case.

APPEAL by defendant under G.S. 7A-30(1) (1969) from the decision of the Court of Appeals, 13 N.C. App. 1, 185 S.E. 2d 241 (1971), which found no error in his trial before *Judge Robert M. Martin* at the 10 May 1971 Session of PITT; docketed and argued at the 1972 Spring Term as Case No. 26.

On 14 July 1970 defendant was arrested upon three warrants which charged that on 6 July 1970 he committed three separate offenses:

(A) Warrant No. 813, *Disorderly conduct,* a violation of G.S. 14-288.4(a) (1) (2) (3) (1969), in that while on the premises of Pitt County Memorial Hospital, a public place, he did unlawfully and wilfully (1) engage "in fighting and in violent and threatening behavior," and (2) "did use vulgar, profane and abusive language in such a manner as to so arouse the average person as to create a breach of the peace, alarm and disturb persons present," and (3) "did create a hazardous and physically offensive condition."

(B) Warrant No. 812, *Resisting an officer,* a violation of G.S. 14-223 (1969), in that he "did unlawfully, wilfully, resist, delay & obstruct B. F. Phillips, a police officer . . . of the City of Greenville, N. C., by striking, jerking the officer's pistol, & fighting said officer [at a time when] such officer was discharging his duty, to wit: attempting to hold defendant in custody after arresting him."

(C) Warrant No. 811, *Assaulting a public officer,* a violation of G.S. 14-33(b) (6) (1969), in that he "did unlawfully, and wilfully, commit & assault & battery upon B. F. Phillips, a police officer . . . of the City of Greenville, N. C., by striking said officer with his fist, attempting to take his pistol, threatening to kill him with his pistol, and kicking him on his head, neck & body . . . [at a time when] such officer was discharging a duty of his office, to wit: attempting to hold defendant in custody after arresting him."

On 12 August 1970, in the District Court of Pitt County, defendant was found guilty as charged in each warrant. From sentences totaling nine months, he appealed to the Superior Court, where he was tried *de novo.*

In the Superior Court, when the case was called for trial, defendant made the following motions: (1) That the State be required to elect between the charges of resisting an officer and assaulting an officer "or, in the alternative, that the warrants be quashed for duplicity . . . because [the charges] arise out of the same transaction and involve the same incident"; (2) that defendant be allowed to see any and all statements which the State took from any person during the course of its investigation of the charges against him because "the State may have some exculpatory statements"; (3) that the warrant charging disorderly conduct be quashed upon the ground that

G.S. 14-288.4(a) (1) (2) (3) is "overly broad and vague" and therefore unconstitutional.

Judge Martin overruled the first motion. He also denied the second, but granted defendant's counsel permission and time to interview each of the State's witnesses. On the third motion, he struck from the warrant charging disorderly conduct, the third count, "did create a hazardous and physically offensive condition." He denied the motion to strike counts (1) and (2), but announced that he would interpret G.S. 14-288.4(a) (2) as if that section read "makes any offensive coarse utterance, gesture or display or uses abusive language in such manner as to so arouse the average person as to create a breach of the peace." At the time he made this announcement, Judge Martin gave the solicitor permission to amend the warrant, so that it would conform to this interpretation. The solicitor made the amendment prior to the verdict by striking from count (2) the final phrase "alarm and disturb persons present."

Defendant entered pleas of not guilty to all charges and the trial proceeded. The State's evidence tended to show:

About 4:30 p.m. on 6 July 1970 defendant Summrell, a twenty-one-year-old Negro male, was a passenger in his automobile, which was being driven on Fifth Street in Greenville by Kelley Wooten. At an intersection a vehicle operated by J. A. Turnage collided with defendant's vehicle. Just before the collision Turnage observed defendant "half in and half out of the front window." Patrolman Barley F. Phillips, a twenty-seven-year-old officer who had been on the police force for three years, came to the scene to investigate the accident.

Defendant and Wooten were sent to the Pitt County Memorial Hospital. Turnage, who was not injured, accompanied Patrolman Phillips to the hospital so that the officer's investigation could be completed there. After questioning Turnage (whom he "charged"), Phillips went to the emergency room. There he obtained permission from Dr. Vick, the surgeon on call, and Miss Ruth Shaw, the nurse in charge, to talk to defendant and Wooten. He found them side by side on separate beds in a treatment cubicle.

Miss Shaw had previously tried to get a history from defendant in order to call a doctor but, after giving his name, defendant refused to divulge any further information. How-

ever, he was complaining of low back pain; so she called Dr. Vick, who came in to see defendant. Defendant refused to permit Dr. Vick, a white physician, to examine him. He ordered him out and demanded Dr. Best, a black doctor. Defendant said, "I want a doctor; you white folks don't care a thing about us Negroes. You're going to let me lay here and die." Miss Shaw immediately called both Dr. Best's office and his home; he was not at either place. When she reported to defendant that she had been unable to reach Dr. Best but would keep trying, he "got real indignant. He was cussing and saying that he was in a lot of pain and he couldn't get any attention"; that "he was dying and nobody would get a doctor for him."

It was at this juncture that Officer Phillips came into the emergency room. Miss Shaw testified that defendant was cursing and using foul language both before and after the officer came in. She told Phillips that he had her permission to talk to defendant but he had refused any treatment from Dr. Vick. Phillips, who had heard Miss Shaw trying to locate Dr. Best, assured defendant that they would have Dr. Best there as soon as he could be reached. When Phillips attempted to question defendant his reply was, "I'm not going to tell you a damn thing and don't nobody else tell him anything." Defendant's unusually loud voice was heard by the patients waiting outside the emergency room.

Phillips turned his attention to Wooten but defendant was making so much noise, "using profane language in the process of boisterous talking," he could not take a statement from Wooten. Phillips heard him say to Miss Shaw, in a loud and boisterous manner, "Get out of my face, white woman." He ordered her out and she left. A woman patient, waiting to be seen in the emergency room, was visibly disturbed by defendant's comments and conduct. Miss Shaw said she herself was disturbed but not frightened.

Because of defendant's profanity and loud talk, Phillips found it impossible to get a statement from Wooten or to finish his investigation. Phillips advised defendant that if he did not quiet down he would "have to arrest him for disorderly conduct and carry him downtown." Defendant's reply was that the officer wouldn't carry him "any G. . d . . . where." Phillips then went to the telephone at the nurses' station and requested the desk officer at the police department to procure a

warrant for defendant's arrest and send it to him at the hospital. He then informed defendant he was under arrest for disorderly conduct and procured permission from Dr. Vick and Miss Shaw to take Wooten into another room so that he could complete his investigation of the accident. Wooten accompanied the officer across the hall, but they could still hear defendant's loud and boisterous language as Phillips attempted to write down Wooten's replies to his questions.

In the meantime, defendant's mother had arrived and was trying, without success, to get him "to lay there and be quiet." His reply to her requests was, "That's the trouble now. We've been quiet too long." He said he was going to get out of "this damn hospital" and asked someone to undo the strap which Miss Shaw had placed across him so that he could not "roll off." Shortly thereafter a commotion in the hall terminated Phillips' attempts to question Wooten, and he observed defendant and his mother outside the emergency room. Phillips told defendant to go back and lie down, that he was under arrest and that the hospital had not released him. Defendant, saying he was going home, advanced toward Phillips, who had blocked the door.

R. C. Little, who was waiting for a doctor in the lobby outside the emergency room, testified that defendant's face at this time had "a terrible look"; that he said to Phillips in a loud voice, "I'll kill you" and Phillips grabbed defendant's arm; that a general scuffle followed and the officer got out his blackjack; that defendant told Phillips not to hit him, and Phillips told him he would not hit him unless he had to.

The pushing and shoving continued. Defendant, who appeared to Little to have "an abnormal amount of strength," several times hit Phillips in the head area and took his blackjack, which he raised over the officer. Phillips kicked him away, drew his revolver, and told defendant to drop the blackjack or he would shoot. Defendant threw the blackjack; it struck the officer and felled him to the floor. Defendant then pushed his mother, who had attempted to come between him and Phillips, out of his way and went through the hospital's rear door. During this commotion women in the lobby were screaming and Little, thinking "a good run was better than a bad stay," left the lobby.

Phillips overtook defendant at the door and told him to stop, that he was under arrest. Defendant ignored the order,

and Phillips struck him in the back of the head with his service revolver, which he then returned to its holster. A scuffle ensued and Phillips again hit defendant in the head with the revolver and returned it to the holster. However, his efforts to restrain defendant were unsuccessful. Defendant made his way to the front parking lot where two black women were sitting in a Pontiac. He opened the door and got into the back seat as the two women screamed. At this point Jerome Streeter, defendant's half-brother, appeared and ran toward the Pontiac. As Streeter approached, defendant threw open the car door and charged Phillips. Both he and Streeter jumped on Phillips and tried to get his gun. As they scuffled, defendant said to Streeter repeatedly, "Get his gun; we'll kill the son of a bitch; get his gun."

The testimony of two laboratory workers, who watched the fight from a hospital window, tended to show: Two black men were beating the officer and struggling with him "over some object on his side." They finally threw him to the ground, flat on his back. Streeter got astride him and held his arms while defendant kicked him about the head, and "generally abused him." However, the officer finally "regained whatever object they were fighting over." Defendant was kicking him but he backed away as Phillips got up and raised his gun and fired. At the time the first shot was fired defendant was facing the officer. Whether he continued to face the officer as he backed away the witness could not be sure. Defendant "was moving easterly. He was not running. He would not have had to have his back turned in order to move any place that he was moving."

Phillips testified that, after kicking one man off him as he lay on the ground, he saw Streeter over him. As he got up he saw defendant was about ten feet away. His vision was blurred from the kicks he had received, but he saw defendant coming toward him with clinched fists. In fear of his life, his strength gone, he fired six consecutive shots at defendant. Defendant never flinched, turned or fell, and Phillips did not know whether he had hit or missed him. After the sixth shot he lost sight of defendant. He was reloading his gun when one Henry Brown came to him and said, "Everything is okay." Phillips then observed defendant lying on the ground. Brown and Streeter helped defendant into the hospital, and Phillips ran ahead and requested the receptionist to notify a police lieutenant that he "had just had to shoot a man."

Both Phillips and defendant were admitted to the hospital. Phillips remained overnight and for six weeks thereafter was treated for the cuts, abrasions and swelling of the face and neck he had received.

Defendant's hospital record disclosed that on 6 July 1970 his blood had an alcoholic content of .18 percent. It also contained this notation: "There are two wounds involving the lateral aspect of the right lower chest at the level of the ninth rib; one is in the posterior axillary line and one is in the anterior axillary line, slightly more medial than the anterior axillary line. The anterior one is the larger one, and is assumed for that reason to be the point of exit."

Dr. Vick, who operated on defendant after he was shot, did not testify. Interpretations of his entries were made by other witnesses. Although their testimony was doubtlessly intelligible to those who saw the demonstrations which accompanied it, expressions such as, "It means around here" and "Somewhere in this vicinity" do not enlighten those who see only the written record. The entry appears to say defendant was shot in the right side of the lower chest and that the entry wound was more to the back of a line drawn downward from the armpit and the exit wound was more to the front of that line. However, one medical expert testified that the quoted note did not necessarily "indicate that a bullet or object entered from someone's back and exited in the front."

In short summary, defendant's evidence tended to show:

In the emergency room defendant was upset, scared, and in pain. All the noises he made were merely complaints about his injury. He wanted no doctor except Dr. Best. Nurse Shaw spoke hatefully when she told him she could not get Dr. Best, and Officer Phillips had told him he had "better shut up and lay there." When he heard the officer call for the warrant he set out for Dr. Best's office, which was just across the street from the hospital. The officer never told him he was under arrest. He thought he could not be arrested until the warrant arrived. His only purpose in resisting the officer was to get treatment from Dr. Best before he had to go to jail. Outside the hospital he "flipped" Phillips only because the officer persisted in hitting him in the head with the gun. He and Streeter attempted to take the gun from Phillips because the officer was

"so mad" they feared he would shoot defendant. As defendant was returning to the hospital, he "glimpsed back" and Phillips shot him in his side, or his back, and in his wrist. In consequence, he lost half his liver and now has "loose leaders" in his arm.

Upon verdicts of guilty as charged in each case, the court imposed three concurrent sentences of six months. Defendant appealed to the Court of Appeals, which found no error in his trial. Defendant appealed to this Court, asserting that substantial constitutional questions are involved.

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

Chambers, Stein, Ferguson & Lanning by Charles L. Becton and Paul and Keenan for defendant appellant.

SHARP, Justice.

Defendant, by his motion to quash the warrant upon which he was charged and convicted of disorderly conduct, challenged the constitutionality of the applicable sections of G.S. 14-288.4 (1969), the statute under which it was drawn. The court's denial of this motion raises the constitutional question upon which defendant appeals.

G.S. 14-288.4(b) provides: "Any person who *wilfully* engages in disorderly conduct is guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00) or imprisonment for not more than six months." (Emphasis added.)

G.S. 14-288.4(a), in pertinent part, provides: "Disorderly conduct is a *public disturbance* caused by any person who:

"(1) Engages in fighting or in violent, threatening, or tumultuous behavior; or

"(2) Makes any offensively coarse utterance, gesture, or display or uses abusive language, in such manner as to alarm or disturb any person present or as to provoke a breach of the peace; or

"(3) Wilfully or wantonly creates a hazardous or physically offensive condition. . . ." (Emphasis added.)

Public disturbance is defined by G.S. 14-288.1(8) (1969) to be: "Any annoying, disturbing, or alarming act or condition exceeding the bounds of social toleration normal for the time and place in question which occurs in a public place or which occurs in, affects persons in, or is likely to affect persons in a place to which the public or a substantial group has access. The places covered by this definition shall include, but not be limited to, highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood."

The foregoing sections are a part of Article 36A of Chapter 14 of the General Statutes of North Carolina. This Article was enacted by Chapter 869, N. C. Sess. Laws of 1969, Section 9 of which provides: "If any word, clause, sentence, paragraph, section, or other part of this Act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof."

Defendant concedes that a person may be legally convicted of disorderly conduct under G.S. 14-288.4(a)(1) if he wilfully engages in fighting, violence, or conduct threatening immediate violence. His contentions with reference to the charge based upon this section (count one in the disorderly conduct warrant) will be discussed in considering the assignments of error relating to the charge.

With reference to Section (a)(2) of G.S. 14-288.4, the basis for the second count in the warrant charging disorderly conduct, defendant contends that this portion of the statute violates the First Amendment guaranty of free speech and section one of the Fourteenth Amendment. He argues that this section is "facially vague and overbroad"; that its imprecise and sweeping language not only encompasses speech protected by the First Amendment but is so indefinite that men of common experience and intelligence could not know in advance what utterances and conduct would fall within its prohibition.

[1] It must be conceded that all of Section (a)(3) and that part of Section (a)(2) which proscribes "offensively coarse" utterances and acts such as "to alarm and disturb persons present" are vague. *See In Re Burrus,* 275 N.C. 517, 531, 169 S.E. 2d 879, 888 (1969). Words and conduct which would alarm and disturb one person might not faze another, and conditions hazardous or physically offensive to some might not be so re-

garded by others. It is quite clear that, under the decision of the United States Supreme Court in *Gooding v. Wilson, 405* U.S. *518,* 31 L.Ed. 2d 408, 92 S.Ct. 1103 (1972), Section (a) (3) and that portion of Section (a) (2) referred to above are unconstitutionally vague and overbroad. In *Gooding,* the Court passed upon a Georgia statute providing that "[a]ny person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor." *Id.* at 519, 31 L.Ed. at 412, 92 S.Ct. at 1104. The decision was that the statute was "facially unconstitutionally vague and overbroad" and, in the absence of an authorative construction by the Georgia court (1) narrowing its application to "fighting" words only, utterances tending to incite an immediate breach of the peace; and (2) excluding from its application speech, however vulgar or offensive, that is protected by the First and Fourteenth Amendments, that it was void.

[2, 3] It has long been established that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are offensive, disturbing, or alarming to some hearers. *Street v. New York,* 394 U.S. 576, 592, 22 L.Ed. 2d 572, 585, 89 S.Ct. 1354 (1969). Any other rule would deny the opportunity for free political discussion which is so necessary to keep government responsive to the will of the people and to effect changes by lawful means. Some persons will always be alarmed, and perhaps disturbed, by the advocates of change. Thus, a statute which defines proscribed activity so broadly that it encompasses constitutionally protected speech, cannot be upheld in the absence of authoritative judicial limitations. *See Bachellar v. Maryland,* 397 U.S. 564, 25 L.Ed. 2d 570, 90 S.Ct. 1312 (1970); *Edwards v. South Carolina,* 372 U.S. 229, 9 L.Ed. 2d 697, 83 S.Ct. 680 (1963); *Terminiello v. Chicago,* 337 U.S. 1, 93 L.Ed. 1131, 69 S.Ct. 894 (1948); *Stromberg v. California,* 283 U.S. 359, 369, 75 L.Ed. 1117, 1123, 51 S.Ct. 532, 536, 73 A.L.R. 1484 (1931).

[4] Recognizing the vagueness and "overbreadth" of the "alarm and disturb" provision in Section (a) (2) and the hazardous or physically offensive provision in Section (a) (3), upon which the third count on the warrant was based, Judge Martin struck the third count and construed Section (a) (2) to prohibit only words and conduct likely to provoke ordinary men to violence. Thus, he deleted the obscuring verbage and left undisturbed

the statutes' proscription against acts and language calculated to bring on a breach of the peace. The State was given permission to amend the second count of the warrant to comply with this construction, and, before verdict the solicitor amended by striking therefrom the words "alarm and disturb persons present." This was permissible procedure. *State v. Fenner,* 263 N.C. 694, 140 S.E. 2d 349 (1965); *State v. Thompson,* 233 N.C. 345, 64 S.E. 2d 157 (1951).

Judge Martin's "construction of severability" was authorized by Section 9 of Ch. 869, N. C. Sess. Laws of 1969 previously quoted herein. Further, it is well settled in our law that a statute will not be construed so as to raise a question of its constitutionality "if a different construction, which will avoid the question of constitutionality, is reasonable." *Education Assistance Authority v. Bank,* 276 N.C. 576, 592, 174 S.E. 2d 551, 563 (1970).

There can be no doubt that the General Assembly intended to prohibit "fighting words," words tending to cause an immediate breach of the peace wilfully spoken in a public place, and that Judge Martin's interpretation accurately expressed the legislative purpose. At this point we note that the General Assembly by N. C. Sess. Laws, Ch. 668, § 1 (1971) deleted Section (a) (3) from G.S. 14-288.4 and rewrote Section (a) (2) so that it now reads "[m]akes or uses any utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace. . . ." There is no substantial difference between the 1971 revision and the 1969 version of Section (a) (2) as Judge Martin construed it.

"The right of [freedom of speech] is not an absolute one, and the State, in the exercise of its police power, may punish the abuse of this freedom." *Stromberg v. California, supra* at 368, 75 L.Ed. at 1123, 51 S.Ct. at 535. "The prime function of government is to preserve public order and keep the State tranquil." 1 Bishop, *Criminal Law* § 533 (9th ed. 1923). Thus, it has a paramount duty to maintain order not only in the streets but in schools, hospitals, and all public places. The Supreme Court has recognized this obligation. *Grayned v. Rockford,* 408 U.S. 104, 33 L.Ed. 2d 222, 92 S.Ct. 2294 (1972); *Colton v. Kentucky,* 407 U.S. 104, 32 L.Ed. 2d 584, 92 S.Ct. 1953 (1972); *Feiner v. New York,* 340 U.S. 315, 95 L.Ed. 295, 71 S.Ct. 303

(1951); *Chaplinsky v. New Hampshire,* 315 U.S. 568, 86 L.Ed. 1031, 62 S.Ct. 766 (1941). *See also Bachellar v. Maryland, supra.*

In *Chaplinsky,* the Supreme Court upheld a New Hampshire statute, which the highest court of that State had construed as outlawing in public places words likely to provoke the average person to retaliation and thus cause a breach of the peace. Speaking for a unanimous Court, Mr. Justice Murphy said, "There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include . . . the insulting or 'fighting' words . . . those which by their very utterance . . . tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire, supra* at 571-572, 86 L.Ed. at 1035, 62 S.Ct. at 769.

[5] We hold that Section (a) (2), as construed by Judge Martin, was constitutional. It neither prohibited nor "chilled" the exercise of any right protected by the First Amendment, and we have no apprehension that any citizen of good will who respected and desired to obey the law would have had any difficulty understanding it.

Irrespective of the constitutionality of Section (a) (2) defendant contends that the State's evidence failed to establish a violation of the section as interpreted by Judge Martin, and that he erred in denying defendant's motion to nonsuit the charge of disorderly conduct. We hold, however, that the evidence, considered in the light most favorable to the State, was sufficient to support the verdict.

[6] A hospital emergency room, the place to which members of the public are taken or betake themselves when injured or stricken by sudden illness, is undoubtedly a public place. *State v. Fenner,* 263 N.C. 694, 698, 140 S.E. 2d 349, 352 (1965); *People v. Kemick,* 17 Cal. App. 3rd 419, 94 Cal. Rptr. 835 (1971). In an emergency room the most circumspect conduct is required for there, order, peace and quiet must prevail if its purpose is fulfilled. Turbulence must not be permitted. It requires no stretch of the imagination to envision the potential and inherent danger to the seriously injured and critically ill

from apprehension and shock created by boisterous cursing and swearing and threatening utterances, be they specifically or generally directed. *See People v. Ennis,* 45 N.Y.S. 2d 446 (1943).

[7] "First Amendment rights must always be applied 'in light of the special characteristics of the environment' in the particular case." *Healy v. James,* 408 U.S. 169, 180, 33 L.Ed. 2d 266, 279, 92 S.Ct. 2338, 2345 (1971). A hospital emergency room is not an appropriate forum for political discussion or the general dissemination of ideas. Nor was defendant attempting to use it as such. With an .18% concentration of alcohol in his blood stream, defendant was well under the influence of an intoxicant. 7 Cantor, *Traumatic Medicine and Surgery for the Attorney* 514 (1962); American Medical Association Manual, Chemical Tests for Intoxicants, 58-59 (1959). *See State v. Moore,* 245 N.C. 158, 161, 95 S.E. 2d 548, 551 (1956). In common parlance, he was "drunk and disorderly." He had wilfully refused medical attention from the physician, who had the emergency room duty that day and had come to treat him, solely because he was a white man. When informed that the black doctor, whom he had demanded, was not immediately available he began shouting profanities, cursing all whites, and loudly voicing unfounded complaints. Such words and mode of communication in a hospital emergency room are not protected by the First Amendment. They constituted a substantial interference with the orderly operation of the emergency room. Nurse Shaw was disturbed; patients who were waiting for medical attention were agitated.

As a practical matter, of course, neither Nurse Shaw nor any patient—no matter how much aroused or angered they may have been by defendant's conduct—would have had the temerity to fight defendant. Despite his vociferous complaints of pain in the back, the intoxicated 21-year-old male defendant, in the words of one witness, appeared to have "abnormal strength." This appearance was verified by defendant's resistance when Officer Phillips attempted to arrest him. Nurse Shaw and the patients awaiting medical treatment were not "average persons" within the sense that phrase was used in the warrant and by Judge Martin in his interpretation of Section (a) (2). However, the evidence warranted a finding that defendant's dominant purpose was to disrupt the emergency room and that the content and manner of his utterances were

likely to provoke the average person to retaliation and thus cause an immediate breach of the peace.

Nor was Phillips, to whom much of defendant's invective was directed "the average person"; he was a peace officer charged with the duty of preventing a breach of the peace. However, he reasonably interpreted defendant's utterances as "fighting words"; and he recognized his duty to prevent a breach of the peace and attempted to do so—albeit unsuccessfully.

It is regrettable that we do not have a narrowly drawn statute specifically aimed at preserving order and tranquility in hospitals and outlawing disruptive conduct which interferes with patients' welfare and treatment. *See Colten v. Kentucky, supra,* and *Grayned v. Rockford, supra.* However, we hold that defendant's conduct as shown by the State's evidence, was encompassed by Section (a) (2) as interpreted by Judge Martin.

[8] We also hold that the evidence warranted the jury's finding that Phillips had reasonable grounds to believe that defendant had committed in his presence the misdemeanor with which he was charged. Under these circumstances, irrespective of whether defendant had actually committed the crime, G.S. 15-41(1) (1965) empowered the officer to arrest defendant without a warrant. *State v. Fenner, supra.* Thus, defendant could not legally resist the arrest, and his resistance constituted a violation of G.S. 14-223 as charged in warrant No. 812. It is noted that defendant did not, by motion for nonsuit, challenge the sufficiency of the evidence to sustain this charge. He did except to the court's instructions to the jury "on the resisting arrest charge." In these instructions, however, we find no error.

In his instructions on the charge of disorderly conduct, Judge Martin directed the jury to return a verdict of guilty as charged in warrant No. 813 if satisfied beyond a reasonable doubt that defendant caused a public disturbance at the Pitt Memorial Hospital (1) by wilfully engaging in fighting or (2) by wilfully making offensively course utterances or using abusive language in such a manner as to so arouse the average person as to create a breach of the peace. Aside from the question whether this instruction adequately applied the law to the evidence as required by G.S. 1-180 (1969), it contains error.

[9] All the evidence tended to show that prior to his arrest for disorderly conduct defendant had not engaged in any actual fighting. That came *after* his arrest for disorderly conduct and was the result of the officer's attempt to hold him in custody on the charge. Fighting the officer constituted the offenses for which defendant was charged in warrants Nos. 811 and 812. It was not an element of the disorderly conduct for which he had already been arrested. Since it cannot be determined upon what ground or grounds defendant was convicted of disorderly conduct, the challenged instruction was error. However, under the circumstances of this case, the error was harmless. The six months imposed for disorderly conduct was made to run concurrently with an identical sentence imposed for the offense of "resisting arrest." Defendant's conviction and sentence upon warrant No. 812 is without error and must stand. Thus, the sentence for disorderly conduct imposes no additional burden upon him. "To permit the verdict in [No. 812] to stand would give the defendant his freedom when the valid sentence is served. To grant him a new trial would permit a further prosecution. The error, therefore, insofar as the appellant is concerned is harmless." *State v. Cephus,* 241 N.C. 562, 565, 86 S.E. 2d 70, 72 (1955). *See also* 5 Strong, North Carolina Index 2d *Criminal Law* § 172 (1967).

We discuss next the question raised by defendant's first assignment of error: Whether the two warrants, No. 812, which charged him with resisting an officer and No. 811, which charged him with assaulting an officer, referred to the same conduct. Each warrant specifies that at the time of the alleged offense "such officer [Phillips] was discharging a duty of his office (or his duty) to wit: attempting to hold defendant in custody after arresting him."

At the beginning of the trial, defendant moved that the State be required to elect between the two charges or, in the alternative, that the warrants be quashed "upon the basis of duplicity." (Obviously, the basis for the alternative motion was *duplication* of charges and not *duplicity.* An indictment or warrant is duplicitous when it charges two different and distinct offenses in one count. *State v. Burnett,* 142 N.C. 577, 55 S.E. 72 (1906); *State v. Wilson,* 121 N.C. 650, 28 S.E. 416 (1897); *State v. Cooper,* 101 N.C. 684, 8 S.E. 134 (1884).)

[10] The judge was not required to make the State elect between the charges contained in warrants Nos. 811 and 812, *at the beginning of the trial, and before any evidence had been introduced.* "He could not then intelligently have restricted it because he did not know what the evidence would be." *State v. Smith,* 201 N.C. 494, 495, 160 S.E. 577, 578 (1931); *see also State v. Stephens,* 170 N.C. 745, 87 S.E. 131 (1915). However, at the conclusion of the evidence, it had become quite clear that no line of demarcation between defendant's resistance of arrest and his assaults upon the officer could be drawn. The assaults were "the means by which the officer was resisted." *State v. Midyette,* 270 N.C. 229, 234, 154 S.E. 2d 66, 70 (1967). Although the officer formally arrested defendant for disorderly conduct he was never able to hold him in custody. *See* 5 Am. Jur. 2d *Arrest* § 1 (1962). His resistance began at the emergency room and ended with the unfortunate occurrences in the parking lot.

The warrants themselves indicate duplicate charges. Each warrant included all the elements of the offense charged in the other, and each specified only acts of violence which defendant directed at the officer's person while he was attempting to hold defendant in custody. It is noted that the warrant charging defendant with resisting, delaying, and obstructing Phillips in the discharge of his official duties did not also specify as a violation of G.S. 14-223 defendant's interference with Phillips' examination of Wooten, a necessary part of his investigation of the motor vehicle accident. *See State v. Leigh,* 278 N.C. 243, 179 S.E. 2d 708 (1971). At the close of the evidence, defendant's motion that the State be required to elect should have been allowed.

[11, 12] Defendant has been twice convicted and sentenced for the same criminal offense. The constitutional guaranty against double jeopardy protects a defendant from multiple punishments for the same offense, a principle recognized in *State v. Parker,* 262 N.C. 679, 138 S.E. 2d 496 (1964). *See also U. S. v. Benz,* 282 U.S. 304, 309, 75 L.Ed. 354, 357, 51 S.Ct. 113, 114 (1931). The fact that concurrent, identical sentences were imposed in each case makes this duplication of conviction and punishment no less a violation of defendant's constitutional right not to be put in jeopardy twice for the same offense. In this situation, the rule enunciated in *State v. Thomas,* 244 N.C. 212, 93 S.E. 2d 63 (1956), and *State v. Riddler,* 244 N.C. 78, 92 S.E. 2d 435 (1956), that where concurrent sentences are

imposed upon conviction on two counts, any error relating to one count only is deemed harmless, can have no application. Accordingly, the warrant charging defendant with assault on an officer while in the discharge of his duty is quashed, the verdict set aside, and the judgment rendered thereon arrested. *State v. Hatcher,* 277 N.C. 380, 177 S.E. 2d 892 (1970); *State v. Midyette, supra; State v. Parker, supra.*

As for defendant's motion that he be allowed to examine all statements which the State took from any person during the course of its investigation of the charges against him, "because the State may have some exculpatory statement," see *State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664, decided earlier this term.

Other questions presented by defendant's appeal require no discussion. Except as modified herein, the decision of the Court of Appeals is affirmed.

The result is this:

In defendant's conviction under warrant No. 812 (resisting an officer), we find *no error.*

In defendant's conviction under warrant No. 813 (disorderly conduct), we find *no prejudicial error.*

Defendant's conviction under warrant No. 811 (assaulting a public officer) is vacated and the *judgment arrested.*

Affirmed in part; Reversed in part.

JAMES L. MARKS, JR. v. LELLA S. THOMPSON

No. 9

(Filed 15 November 1972)

1. Rules of Civil Procedure § 26— discovery of insurance — legal right

The 1971 amendment to G.S. 1A-1, Rule 26(b), confers upon a party the legal right to obtain discovery of the existence and contents of insurance agreements referred to therein; and when a party elects to exercise such right, the discretionary authority conferred upon the judge by G.S. 1A-1, Rule 30(b) and (d), relates only to the time, place and circumstances of such discovery.

2. **Rules of Civil Procedure § 26— discovery of insurance — validity of enactment**

The 1971 amendment to Rule 26(b) allowing the discovery of the existence and contents of insurance agreements is a valid exercise of legislative authority and does not violate any rights guaranteed by Article I, Section I and Article I, Section 19 of the North Carolina Constitution.

3. **Rules of Civil Procedure § 26; Privacy— discovery of automobile liability insurance — not invasion of privacy**

The enforced discovery of automobile liability insurance as authorized by the 1971 amendment to Rule 26(b) is not an unwarranted invasion of privacy.

APPEAL by defendant under G.S. 7A-30(1) and (2) from the decision of the Court of Appeals which affirmed an order entered by *Brewer, J.*, at the Regular August Civil Session, 1971, of WAKE Superior Court.

Plaintiff's claim and defendant's counterclaim grow out of a collision on 29 January 1969 between automobiles owned and operated by them. The pleadings raise issues of negligence, contributory negligence and damages. Plaintiff seeks to recover $750,000 on account of personal injuries. Defendant seeks to recover $600 on account of damage to her car.

On 15 July 1971, pursuant to Rules 33 and 26, plaintiff requested defendant to answer the following interrogatories:

"1. Were you insured by a policy of automobile liability insurance on January 29, 1969?

"2. If so, state the name of the insurance carrier, the policy number, the effective dates, and the amounts of coverage."

On 28 July 1971, defendant, through her counsel, moved "under Rule 33, Rule 31(d), and Rule 30(b) of the North Carolina Rules of Civil Procedure for a protective order suppressing or, in the alternative, limiting the scope of the inquiry by plaintiff . . . and protecting the defendant from unreasonable annoyance, embarrassment, expense and oppression. . . ." Defendant set forth with particularity the grounds on which she based her objections to and motion to suppress the interrogatories.

Judge Brewer overruled defendant's objections and ordered "that the defendant fully answer the said interrogatories within ten (10) days of the date of this Order."

The Court of Appeals affirmed. 14 N.C. App. 272, 188 S.E. 2d 22. One member of the hearing panel dissented.

Maupin, Taylor & Ellis by William W. Taylor, Jr.; and Purrington & Purrington by A. L. Purrington, Jr., for defendant appellant.

Herman Wolff, Jr.; and Yarborough, Blanchard, Tucker & Denson by Charles F. Blanchard for plaintiff appellee.

BOBBITT, Chief Justice.

The Rules of Civil Procedure, G.S. 1A-1, went into effect on 1 January 1970. All provisions of Rule 26(b), prior to the 1971 amendment, are quoted below.

"(b) *Scope of examination.*—Unless otherwise ordered by the judge as provided by Rule 30 (b) or (d), the deponent may be examined [regarding any matter, not privileged, which is relevant to the subject matter (involved) in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of relevant facts. It 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] nor is it ground for objection that the examining party has knowledge of the matters as to which testimony is sought. But the deponent shall not be required to produce or submit for inspection any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless the judge otherwise orders on the ground that a denial of production or inspection will result in an injustice or undue hardship; but, in no event shall the deponent be required to produce or submit for inspection any part of a writing which reflects an attorney's mental impressions, conclusions, opinions or legal theories, or except as provided in Rule 35, the conclusions of an expert."

Chapter 750, Session Laws of 1971, entitled "An Act to Allow Discovery of Insurance Information in Negligence Actions," became effective upon its ratification on 5 July 1971.

This 1971 Act amended Rule 26(b) by adding a second (unnumbered) paragraph at the end thereof. The added paragraph is quoted below.

"*Insurance Agreements.*—A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement."

The provisions of the portion of our Rule 26(b) shown above within brackets were identical with all provisions of Rule 26(b) of the Federal Rules of Civil Procedure prior to the 1970 amendment of Federal Rule 26(b), except that our Rule 26(b) did not contain the word "involved" shown in parentheses. Fed. R. Civ. P. 26(b), 28 U.S.C.A. (1958).

Federal decisions based on Federal Rule 26(b) prior to the 1970 amendment, and decisions based on similar state rules of procedure, were in conflict as to whether the facts relating to the existence and amount of automobile liability insurance were "relevant to the subject matter in the pending action" and proper subject of inquiry in discovery proceedings. Decisions tending to support their respective positions are cited in the majority and dissenting opinions in the four to three decision of the Supreme Court of Nebraska in *Mecke v. Bahr,* 177 Neb. 584, 129 N.W. 2d 573 (1964). In holding that the defendant's objections to the plaintiff's interrogatories should have been sustained, the majority opinion took the view that "[t]he subject matter is the charge of negligence against the defendant which caused the injury to the plaintiff," and that disclosure was not required unless the evidence sought was relevant to a determination of the issues raised by the pleadings. *Id.* at 589, 129 N.W. 2d at 577. The dissenting opinion took the view that "[t]he term 'subject matter' of an action embrace[d] a much broader range of discovery than 'admissible evidence' as to liability issues only," and included facts relevant to the disposition of litigation through settlement negotiations. *Id.* at 592, 129 N.W. 2d at 578. For other decisions and commentaries pertinent to the conflicting views, see 8 C. Wright

& A. Miller, Federal Practice and Procedure, § 2010 (1970); Fournier, *Pre-Trial Discovery of Insurance Coverage and Limits,* 28 Ford. L. Rev. 215 (1959); Jenkins, *Discovery of Automobile Insurance Limits: Quillets of the Law,* 14 Kan. L. Rev. 59 (1965); Williams, *Discovery of Dollar Limits in Liability Policies in Automobile Tort Cases,* 10 Ala. L. Rev. 355 (1958); Comment, *Discovery of Insurance Coverage: Hazy Frontier of the Discovery Process,* 35 Tenn. L. Rev. 35 (1967); Note, 45 N.C.L. Rev. 492 (1967); Annot. 13 A.L.R. 3d 822 (1967).

In 1970 the controversy in the federal courts was settled when amendments to certain of the Federal Rules, including the amendment of Rule 26(b) to permit discovery of insurance agreements, were adopted by the Supreme Court of the United States and transmitted to Congress on 30 March 1970, in accordance with 28 U.S.C.A. § 2072. These amendments went into effect on 1 July 1970. 398 U.S. 978-79. Mr. Justice Black and Mr. Justice Douglas disapproved "of the Amendments to the Federal Rules of Civil Procedure relating to Discovery" and dissented "from the action of the Court in transmitting them to the Congress." *Id.* at 979.

The pertinent portions of Federal Rule 26(b) as amended in 1970 are quoted below.

"(b) *Scope of discovery.*—Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

"(1) *In general.*—Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

"(2) *Insurance agreements.*—A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business

may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement." Fed. R. Civ. P. 26(b); 398 U.S. at 982-83.

In proposing the 1970 amendments to the Federal Rules, the Advisory Committee stated: "New provisions are made and existing provisions changed affecting the scope of discovery: (1) The contents of insurance policies are made discoverable (Rule 26(b)(2))." 48 F.R.D. 487.

After discussing and citing decisions and articles pertinent to the above conflict concerning Rule 26(b), the Advisory Committee included in its explanation of the proposed amendment the following:

"The amendment resolves this issue in favor of disclosure. Most of the decisions denying discovery, some explicitly, reason from the text of Rule 26(b) that it permits discovery only of matters which will be admissible in evidence or appear reasonably calculated to lead to such evidence; they avoid considerations of policy, regarding them as foreclosed. See *Bisserier v. Manning, supra.* [207 F. Supp. 476 (D.N.J. 1962).] Some note also that facts about a defendant's financial status are not discoverable as such, prior to judgment with execution unsatisfied, and fear that, if courts hold insurance coverage discoverable, they must extend the principle to other aspects of the defendant's financial status. The cases favoring disclosure rely heavily on the practical significance of insurance in the decisions lawyers make about settlement and trial preparation. In *Clauss v. Danker,* 264 F. Supp. 246 (S.D.N.Y. 1967), the court held that the rules forbid disclosure but called for an amendment to permit it.

"Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation. It will conduce to settlement and avoid protracted litigation in some cases, though in others it may have an opposite effect. The amendment is limited to insurance coverage, which should be distinguished from any other facts

concerning defendant's financial status (1) because insurance is an asset created specifically to satisfy the claim; (2) because the insurance company ordinarily controls the litigation; (3) because information about coverage is available only from defendant or his insurer; and (4) because disclosure does not involve a significant invasion of privacy." 48 F.R.D. at 488-89.

Since the wording of the 1971 amendment of our Rule 26(b) and that of the 1970 amendment to Federal Rule 26(b) are identical, the only reasonable inference is that they were adopted for the same reasons and were intended to accomplish the same result.

The 1970 amendment to Federal Rule 26(b) relating to "Insurance Agreements" is now a separate paragraph designated Rule 26(b)(2). This resulted from a "Rearrangement of Rules" proposed by the Advisory Committee and adopted by the United States Supreme Court. See 48 F.R.D. at 491. Defendant undertakes to distinguish the 1971 amendment to our Rule 26(b) from the 1970 amendment to Federal Rule 26(b). No rearrangement of the several paragraphs of our Rule 26 was effected by the 1971 amendment. The 1971 amendment simply added to our Rule 26(b) a new paragraph which made specific provision for discovery of the facts relating to "Insurance Agreements."

Based on the indicated differences in respect of *the positions* of the amendments concerning "Insurance Agreements," defendant contends that, unlike the amended Federal Rule 26(b)(2), the limitations that the information must be *relevant* and *not privileged* continue to apply to "Insurance Agreements" under our amended Rule 26(b). She quotes the following from the opinion of Justice Sharp in *Sutton v. Duke,* 277 N.C. 94, 101, 176 S.E. 2d 161, 165 (1970): "All changes *in words and phrasing* in a statute adopted from another state or country will be presumed deliberately made with the purpose to limit, qualify, or enlarge the adopted rule." (Our italics.) However, since the provisions in respect of "Insurance Agreements" of the 1970 amendment to Federal Rule 26(b) and those of the 1971 amendment to our Rule 26(b) are identical, the rule stated in the quotation from *Sutton v. Duke, supra,* is inapplicable.

We note that prior to the adoption of the 1971 amendment to our Rule 26(b) evidence of the existence and contents of a

liability insurance policy, although not ordinarily relevant to issues of negligence and damages, was admissible when pertinent to an issue of ownership or employment. *Isley v. Winfrey,* 221 N.C. 33, 18 S.E. 2d 702 (1942); *Rivenbark v. Oil Corp.,* 217 N.C. 592, 8 S.E. 2d 919 (1940); *Davis v. Shipbuilding Co.,* 180 N.C. 74, 104 S.E. 82 (1920).

As indicated above, the 1971 Act amending Rule 26(b) is entitled "An Act to Allow Discovery of Insurance Information in Negligence Actions." This caption confirms the view expressed above, namely, that the sole purpose of the 1971 Act was to permit discovery of the existence and contents of insurance agreements. With reference to consideration of the caption, see *Sykes v. Clayton, Comr. of Revenue,* 274 N.C. 398, 406, 163 S.E. 2d 775, 781 (1968), and cases cited.

The 1971 amendment to Rule 26(b), which confers this right of discovery, also provides that "[i]nformation concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial." The obvious purpose is to enable the parties to conduct settlement negotiations realistically, that is, with equal knowledge of the true facts as to liability insurance coverage.

[1] We hold that the 1971 amendment to Rule 26(b) confers upon a party *the legal right* to obtain discovery of the existence and contents of insurance agreements referred to therein. When a party elects to exercise this legal right, the discretionary authority conferred upon the judge by Rule 30(b) and (d) relates only to the time, place and circumstances of such discovery.

[2] There remains for consideration whether the 1971 amendment to Rule 26(b) as interpreted herein exceeds the legislative discretion and power of the General Assembly.

In paragraph 6 of her "Objections to and Motion to Suppress Interrogatories," defendant asserts that the 1971 amendment to our Rule 26(b) "is contrary and repugnant to the Constitution of North Carolina, and, especially, Article I, Section 1, and Article I, Section 19, thereof," and then sets forth in subparagraphs (a), (b), (c), (d), (e), (f) and (g) the particulars in which she contends her constitutional rights would be violated.

It is noted that the 1970 amendment to Federal Rule 26(b) bears the imprimatur of the Supreme Court of the United States. Presumably, this accounts for defendant's failure to cite and rely on any provision of the Constitution of the United States.

Article I, Section 1, of the Constitution of North Carolina, provides: "*The equality and rights of persons.* We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."

Article I, Section 19, of the Constitution of North Carolina, provides: "*Law of the land; equal protection of the laws.* No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin."

Upon these quoted provisions defendant bases her contentions that the 1971 amendment to Rule 26(b) (a) constitutes an unconstitutional invasion of defendant's right of privacy; (b) deprives her of property without due process of law; (c) authorizes an unreasonable search and seizure of her property; (d) constitutes a denial of her right to equal protection of the law; (e) impairs her right to contract and impairs the obligations of her contract; (f) is unduly prejudicial to the public interest; (g) is inconsistent with fundamental principles of liberty and justice, rendering defendant's bargaining position subservient to that of plaintiff's.

Preliminary to consideration of the contentions of defendant in respect of the asserted denial of her constitutional rights, two familiar and well settled principles are noted: (1) "[A] doctrine firmly established in the law is that a State Constitution is in no matter a grant of power. All power which is not limited by the Constitution inheres in the people, and an act of a State legislature is legal when the Constitution contains no prohibition against it." *Lassiter v. Board of Elections*, 248 N.C. 102, 112, 102 S.E. 2d 853, 861 (1958). (2) "The presumption is that an act passed by the Legislature is constitutional, and it must be so held by the courts unless it appears to be in conflict with some constitutional provision. [Citations omit-

ted.] The legislative department is the judge, within reasonable limits, of what the public welfare requires, and the wisdom of its enactments is not the concern of the courts. As to whether an act is good or bad law, wise or unwise, is a question for the Legislature and not for the courts—it is a political question. The mere expediency of legislation is a matter for the Legislature, when it is acting entirely within constitutional limitations, but whether it is so acting is a matter for the courts. [Citations omitted.]" *State v. Warren,* 252 N.C. 690, 696, 114 S.E. 2d 660, 666 (1960).

Prior to the 1970 amendment to Federal Rule 26(b), the outcome of federal and state decisions involving discovery of the existence and contents of insurance agreements depended upon whether the court adopted the broad or the narrow interpretation of the term "subject matter." In the greater number of these decisions, the opinion contains no reference to whether a rule providing for such discovery would violate any constitutional right of a party required to make such disclosure. However, in a few of these decisions the opinon refers to contentions substantially the same as those now asserted by defendant. In upholding the right of discovery, the following cases dismissed as unsubstantial contentions asserting the unconstitutionality of compulsory discovery. *Superior Ins. Co. v. Superior Court,* 37 Cal. 2d 749, 235 P. 2d 833 (1951); *Demaree v. Superior Court,* 10 Cal. 2d 99, 73 P. 2d 605 (1937); *Lucas v. District Court,* 140 Colo. 510, 345 P. 2d 1064 (1959); *Monier v. Chamberlain,* 31 Ill. 2d 400, 202 N.E. 2d 15 (1964); *People ex rel. Terry v. Fisher,* 12 Ill. 2d 231, 145 N.E. 2d 588 (1957). See also, Jenkins, *Discovery of Automobile Insurance Limits: Quillets of the Law,* 14 Kan. L. Rev. 59 (1965); Note, *Discovery—Privilege, Relevancy, and Constitutionality in the Discovery of Automobile Liability Insurance Under the Federal Rules,* 34 Notre Dame Law. 78 (1958); Comment, *Discovery of Insurance Coverage: Hazy Frontier of the Discovery Process,* 35 Tenn. L. Rev. 35 (1967). In denying the right of discovery, the following cases referred to the contentions asserting the unconstitutionality of compulsory discovery in justification of its narrow interpretation of the term "subject matter." *Hillman v. Penny,* 29 F.R.D. 159 (E.D. Tenn. 1962); *Gallimore v. Dye,* 21 F.R.D. 283 (E.D. Ill. 1958); *State ex rel. Hersman v. District Court,* 142 Mont. 139, 381 P. 2d 799 (1963); *Mecke v. Bahr, supra.*

In *Mecke v. Bahr, supra,* the four to three Nebraska decision, Justice Brewer, concurring *in the decision,* wrote: "Constitutional questions were not before the court in considering this case and I am sure that nothing in the opinion was meant to infer that this court was in its decision passing upon that aspect of the case." *Id.* at 592, 129 N.W. 2d at 578.

The only decision which has come to our attention since the 1970 amendment to Federal Rule 26(b) is *Helms v. Richmond-Petersburg Turnpike Authority,* 52 F.R.D. 530 (E.D. Va. 1971). In that case, District Judge Merhige overruled defendant's contentions "that Rule 26(b) (2) deprives defendants of personal and property rights without due process of law; grants special privileges to a favored class of litigants; denies defendants equal protection of the law; amounts to a judicial sanction for an unlawful search and seizure; and is an unlawful invasion of privacy." His opinion includes the following: "Furthermore, disclosure of such policies is not a significant invasion of privacy, and in this Court's view to say disclosure will lead to further disclosures which should be sanctioned is too speculative to be cognizable, especially in view of the passage of a rule limited specifically to insurance agreements. Thus, the Rule is not an abridgement of the defendants' constitutional rights."

Obviously, a disclosure of the facts concerning defendant's liability insurance policy would not deprive her of property or constitute a seizure thereof. Nor would it impair defendant's right to contract or the obligations of her contract. Disclosure would take nothing from defendant's rights or her insurance company's rights under the contract. It would simply apprise plaintiff of the facts concerning the insurance agreement. Moreover, having an equal right of discovery, there is no basis for defendant's contention that plaintiff's exercise of the right of discovery would deprive defendant of the equal protection of the laws.

In support of her contention that compulsory disclosure would constitute an invasion of what she calls her constitutional right of privacy, defendant cites *Flake v. News Co.,* 212 N.C. 780, 195 S.E. 55 (1938). In *Flake,* this Court held that the facts in evidence were sufficient to constitute a tortious invasion of the plaintiff's right of privacy. Specifically, this Court held "that the unauthorized use of one's photograph in connection with an advertisement or other commercial enterprise gives

rise to a cause of action which would entitle the plaintiff, without the allegation and proof of special damages, to a judgment for nominal damages, and to injunctive relief, if and when the wrong is persisted in by the offending parties." *Id.* at 792, 195 S.E. at 64. The right of privacy was not considered as a constitutional right. Neither exploitation nor embarrassment would be involved in the disclosure by defendant of her liability insurance coverage. If defendant or her insurance company or both would prefer not to divulge this information *to the general public,* defendant could request that the court under Rule 30(b) enter a protective order that the information be given in private and withheld from the general public.

Although G.S. 20-279.18 permits alternate methods, ordinarily "[p]roof of financial responsibility," that is, "[p]roof of ability to respond in damages for liability . . . arising out of the ownership, maintenance or use of a motor vehicle," G.S. 20-279.1(11), is given by a certificate of liability insurance. G.S. 20-279.21(f)(2) provides that every "motor vehicle liability policy" given as "proof of financial responsibility" shall be subject to the provision that "[t]he satisfaction by the insured of a judgment for such injury or damage shall not be a condition precedent to the right or duty of the insurance carrier to make payment on account of such injury or damage." A regulation adopted by the Commissioner of Insurance pursuant to G.S. 58-9 and G.S. 54-33.2, and filed with the Secretary of State as provided by G.S. 143-196, provides: "Companies writing liability insurance in the State of North Carolina shall not issue any policy which relieves the company of liability on account of the insolvency of the assured nor which requires that actual payment of loss shall have been made by the assured in order to bind the Company."

In North Carolina, every policy of liability insurance is available for the benefit of a person to whom the insured is legally obligated even though the insured is insolvent and unable to discharge his liability. Liability insurance is purchased both to protect the insured from actual out-of-pocket loss and to give protection, within the policy limits, to any person for whose injuries the insured becomes legally liable. Without regard to whether the policy provides coverage in excess of the required limits, the insurer, through its counsel and adjusters, has the right and the obligation to defend the action against its insured and to conduct negotiations for settlement.

Unquestionably, inquiry as to whether defendant complied with the minimum statutory requirements in respect of liability insurance coverage cannot be considered an improper invasion of her right of privacy. Access to that information may be obtained from the Department of Motor Vehicles. G.S. 20-166.1(i). The 1971 amendment to Rule 26(b) gives an injured party the right of discovery of all facts relating to defendant's liability insurance coverage.

Seemingly, defendant is alarmed because of her apprehension that approval of the right to discover the existence and contents of a party's liability insurance policy in accordance with the 1971 amendment of Rule 26(b) would open the door for discovery of a party's general assets prior to an adjudication as to liability and damages. We first note that this question will not arise unless the General Assembly undertakes to authorize such discovery. Even if this improbable event should occur, defendant's apprehension is unwarranted. There is a marked distinction between a party's liability insurance policy and his general assets.

"Unlike other assets, a liability insurance policy exists for the single purpose of satisfying the liability that it covers. It has no other function and no other value." *People ex rel. Terry v. Fisher, supra* at 238, 145 N.E. 2d at 593. It is not an "asset" as that term is normally used. One does not pay any type of tax on the amount of his liability insurance policy. "The insurance policy is unique in that its existence is virtually the only fact bearing on the collectibility of the judgment that plaintiff either must ascertain from defendant or not at all." 8 C. Wright and A. Miller, Federal Practice and Procedure, § 2010 at p. 90 (1970).

A distinction between a liability insurance policy and general assets of an insured is well stated by Justice McCoy in *Doak v. Superior Court,* 257 Cal. App. 2d 825, 65 Cal. Rptr. 193, 27 A.L.R. 3d 1362 (1968), as follows: "A public liability insurance policy in force at the time of the tort establishes a special fund to which the injured party may look for the payment of his claim when the defendant's liability has been legally established by a judgment against him. (Ins. Code, §§ 11580, 11580.1.) That fund cannot be dissipated or destroyed by defendant during the pendency of the action. This is not true with respect to defendant's other assets. Unlike defendant's

liability insurance, the net dollar value of his other assets, real and personal, before his liability has been established by judgment, is not the measure of the collectibility of any judgment which may be entered against him. Whether such a judgment can be collected depends on the nature of his assets at and after the time the judgment is entered. Since the law does not require a potential judgment debtor in a tort action to maintain his assets intact from the date of the tort to the date of the judgment establishing his liability, it may well be that, through circumstances beyond his control, the defendant may not own any assets at the time he becomes a judgment debtor. This, of course, is a normal hazard of all tort litigation." *Id.* at 832, 65 Cal. Rptr. at 197-98; 27 A.L.R. 3d at 1369-70. In *Doak*, discovery was allowed as to the defendant's liability insurance coverage but denied as to the defendant's general assets.

As stated by Judge Hanson in *Landkammer v. O'Laughlin*, 45 F.R.D. 240 (S.D. Iowa 1968): "Information concerning defendant's general assets, moreover, may be secured by plaintiff through other sources; yet the restrictive rule would leave plaintiff ignorant of the existence and extent of the very asset which most affects the value of his judgment. The liberal rule thus does not upset the natural bargaining position of the parties. Instead, the effect of discovery of insurance coverage is to equalize the knowledge of both parties, with the result that settlements will be based more upon a fair evaluation of plaintiff's claim and less upon ignorant conjecture concerning the depth of defendant's pocket. Courts cannot forever hold themselves, as if unknowing, above that stage of litigation wherein negotiation and settlement occur."

[2, 3] We hold the 1971 amendment to Rule 26(b) is a valid exercise of legislative authority; that enforced discovery as authorized by its provisions is not an unwarranted invasion of defendant's privacy; and that this legislative enactment is not unconstitutional on any of the several grounds asserted by defendant.

We take note of defendant's contention that forced disclosure of liability insurance coverage would be "unduly prejudicial to the public interest." Suffice to say, whether the 1971 amendment to Rule 26(b) was wise or unwise was for determination by the General Assembly.

We further note defendant's contention that forced disclosure of liability insurance coverage would be "inconsistent with fundamental principles of liberty and justice" and render "defendant's bargaining position subservient to plaintiff's bargaining position." Contrary to defendant's contention, equal knowledge of all material facts equalizes the bargaining positions of plaintiff and defendant. Incidentally, there are instances in which the same insurance company has issued a liability insurance policy to each of the owners and operators involved in and injured by a collision.

In negotiations for settlement of tort litigation, the principal factors to be evaluated are (1) the evidence pertinent to the issues determinative of liability; (2) the nature and extent of plaintiff's injuries and damages; and (3) the collectibility of any judgment plaintiff may obtain. In certain cases, a defendant and his insurance carrier would prefer that the plaintiff be uninformed and forced to speculate concerning the collectibility of a judgment. On the other hand, a defendant and his insurance company would doubtless be glad to inform plaintiff and plaintiff's counsel that defendant's liability coverage did not exceed the mandatory requirements when this is the case.

Whether disclosure of insurance coverage will result in a greater number of settlements without trial is uncertain. In our view, the promotion of settlements is not the primary purpose of the 1971 amendment to Rule 26(b). Rather, its primary purpose is to enable both plaintiff and defendant to have equal information concerning all facts necessary to enable each to make a fair evaluation of his position incident to settlement negotiations.

For the reasons stated, the decision of the Court of Appeals is affirmed.

Affirmed.

State v. Foster

STATE OF NORTH CAROLINA v. WILLIE FOSTER, JR.

No. 51

(Filed 15 November 1972)

1. **Criminal Law § 21— preliminary hearing as matter of right**

A preliminary hearing is not a necessary step in the prosecution of a person accused of crime, and an accused person is not entitled to a preliminary hearing as a matter of substantive right.

2. **Criminal Law § 21— failure to provide preliminary hearing — examination of witnesses allowed — no error**

Where scheduled preliminary hearings were postponed and eventually abandoned after the grand jury returned indictments, any irregularities which may have occurred in connection with the failure to provide a preliminary hearing for defendant were insufficient to preclude prosecution of defendant for the crimes of first degree burglary and assault with intent to commit rape, particularly where the trial court provided for an examination of the State's witnesses by defendant's counsel prior to trial.

3. **Burglary and Unlawful Breakings § 5— first degree burglary — sufficiency of evidence to withstand nonsuit.**

State's evidence was sufficient to withstand nonsuit in a first degree burglary case where such evidence tended to show that an occupied dwelling was broken into during the nighttime, that things of value were stolen from the dwelling, and that a fingerprint lifted from the scene shortly after the offense and a print of defendant's index finger were identical.

4. **Indictment and Warrant § 17— variance — time not of the essence — no prejudicial error**

Where the indictment charged that the alleged burglary was committed on 5 September 1971 and the evidence tended to show that it took place on 6 September 1971, defendant was not entitled to dismissal on the ground of fatal variance since time was not of the essence of the crime and since the suggested variance would not be prejudicial to defendant. G.S. 15-155.

5. **Criminal Law §§ 60, 73— fingerprint evidence — inadmissibility as hearsay**

The admission of hearsay evidence constituted prejudicial error where such evidence consisted of testimony by defendant on cross-examination that he had hired his own fingerprint specialist who informed defendant that a fingerprint found at the crime scene and a fingerprint of defendant were identical.

APPEAL by defendant from *McLean, J.*, 1 May 1972 Schedule "C" Regular Criminal Session of MECKLENBURG Superior Court.

Defendant was tried on two bills of indictment, one charging first degree burglary and the other charging assault with intent to commit rape. The cases were consolidated for trial.

The burglary indictment charged that on 5 September 1971, during the nighttime "between the hours of 12:00 p.m. and 1:00 a.m.," defendant feloniously broke into and entered the dwelling house of James Harley Davis at 3422 Kentucky Avenue, Charlotte, N. C., then actually occupied by James Harley Davis and Rosa Davis, with the felonious intent to steal goods and chattels of James Harley Davis.

The assault indictment charged that defendant on 5 September 1971 assaulted Rosa Mae Davis with intent to rape her.

The evidence offered by the State tends to show the facts narrated below.

On 5 September 1971, all members of the Davis family were at home in their one-family dwelling at 3422 Kentucky Avenue. The family consisted of James Harley Davis (Davis), Rosa Mae Davis (Mrs. Davis), a twelve-year-old daughter and a ten-year-old son. The house had three bedrooms, a bathroom, a living room and a kitchen.

Mrs. Davis went to bed about midnight. The doors were locked. She was sleeping that night with her daughter in the front bedroom, which adjoined the living room. Davis had gone to bed "around 8:00 or 9:00 o'clock." He was sleeping that night with his son in the daughter's bedroom. The bathroom was between and accessible from the front bedroom in which Mrs. Davis was sleeping and from the back bedroom in which Davis was sleeping. The third bedroom, the son's bedroom, was unoccupied that night. During the day the Davises had been painting in this third bedroom. The windows were left open so that the odor of the paint might get out. The screens were in place and were latched by hooks.

The weather being hot, Mrs. Davis had pushed the bedspread and sheet to the foot of the bed. She was wearing "shortie pajamas." She was awakened about 1:50 a.m. A man was leaning over her with his hand high up on the inside of her leg. When she tried to raise up, the man grabbed her arm. When she first screamed, "he was right down in [her] face saying

'sh-sh-sh.' " When she screamed the second time he stood up and turned her loose. She then sat up in bed and screamed again. When she screamed the third time, the intruder hit her in the face, knocked her back on the bed, and ran toward the living room.

Davis was awakened by his wife's screams. After searching inside and outside the house and finding no one, Davis called the police.

One of the window screens had been removed from the son's bedroom and was found lying outside beside a flower bush. It was an aluminum screen and had hinges at the top. It had been latched by a hook on the inside when Mrs. Davis went to bed. Mrs. Davis testified: "You can hit them like that and they will jump up, the hooks." The front door was unlocked.

Davis's pants, which contained a billfold containing $27, his car keys and some change, had been hanging on a chair in the bedroom where he had been sleeping. He found his pants, his *empty* billfold, his car keys and some change on the floor of his son's unoccupied bedroom. None of the missing articles was thereafter identified or recovered.

The twenty-one inch Admiral portable television set and the record player were missing from the living room. A plastic flower pot on a stand approximately two and a half feet above the floor had been on each side of the television set. The two flower pots had been moved away from their former location toward the center of the living room. Each was approximately eight or ten inches across the top.

Mrs. Davis had had the two flower pots about three years, having purchased them from a Winn-Dixie store. She had put flowers in them "lots of times." From time to time, she had taken the dead flowers out, stirred the soil up and washed the pots. These flower pots had been kept inside the house.

There was evidence that neither Mrs. Davis nor Davis had known or seen defendant prior to 5 September 1971; that defendant had never been inside the Davis home; and that defendant had no permission to enter the Davis home "to carry anything out" nor for any other purpose.

Within "about 5 or 6 minutes" after Davis called the police, Officers Cobb and Adams of the Charlotte Police Department

arrived at the Davis residence. Cobb was trained and experienced in dusting for fingerprints and had with him the necessary equipment for lifting latent prints. He first went to the open window from which the screen had been removed. He dusted for prints around the interior and exterior of this window and also dusted the screen which had been removed. However, he was unable to make any "latent lifts." He dusted elsewhere in the Davis residence without success. However, he lifted three latent prints from one of the flower pots. The lifts were made by placing a tape having the appearance of Scotch tape on top of prints which showed up in the dust. The three prints lifted from the flower pot were put on the card identified as State's Exhibit No. 1. At the Davis residence, Cobb handed this card to Adams. Adams made certain identifying notations thereon, took it to the Charlotte Police Department and placed it in the "crime lab" for the attention of Officer Stubbs.

Upon receiving State's Exhibit No. 1, Officer Stubbs, a fingerprint expert, started searching the master fingerprint file maintained in his office to see if he could identify the prints on State's Exhibit No. 1 with any print in the master file. On 20 October 1971, Cobb compared the print on State's Exhibit No. 1 with the right index finger on a fingerprint card in the master file which had been taken in 1958. Over objection, Stubbs was permitted to testify that this 1958 card had on it the name "Willie Foster, Jr." Defendant was arrested and fingerprinted on 22 October 1971 in the booking office of the county jail by Preston Pendergrass, Jr. On 12 November 1971, Stubbs personally fingerprinted defendant. A card bearing this fingerprint was identified as State's Exhibit No. 2. In his opinion, the prints of the right index finger on these fingerprint cards are identical. A photographic enlargement of each of these exhibits was offered in evidence as State's Exhibit No. 3 and used by Stubbs to illustrate his testimony to the effect that there were thirteen characteristics which are identical on both prints. Stubbs based his comparison and opinion on only one of the prints on State's Exhibit No. 1, explaining that only one disclosed enough identifying characteristics to constitute a basis for a positive opinion.

With reference to the identity of the person who assaulted her, Mrs. Davis testified in substance as follows: The light

was on in the adjoining bathroom and the door between the two rooms was partially open. Her assailant had broad shoulders, was heavy-set and was "real tall," and was "taller than [her] husband." With the exception of his eyes, the assailant's whole head (including all of his hair) was covered by a black or real dark stocking or mask. His eyes were dark, deep-set and sharp. She presumed her assailant was a man from "his size, his height, and his build." She did not know whether her assailant was "black or white." Her assailant was wearing pants and a black or real dark jacket. The jacket had white stripes down both sleeves from the tops of the sleeves.

Early in her testimony, the court permitted Mrs. Davis to testify, over defendant's objection, that defendant was her assailant, although she based her identification solely on the eyes, height and general build of her assailant. Toward the end of Mrs. Davis's testimony, the court reversed this ruling and instructed the jury not to consider Mrs. Davis's prior testimony that defendant was the man whose actions had aroused her.

The testimony of defendant and of his wife, Hazeline Foster, tends to show the facts narrated below.

Defendant, his wife and Willie, their fourteen-year-old son, live at 532 Center Street, Apartment 3. On the evening of Saturday, 4 September 1971, and throughout that night, and on the evening of Sunday, 5 September 1971, and throughout that night, defendant, his wife and son were at home.

Defendant knew that Kentucky Avenue ran within a block of where he lived. However, he did not know the location of the Davis house, had never been in it and had no explanation for Officer Stubbs's testimony that in his opinion defendant's fingerprint was on a flower pot in the Davis house, and did not know how a fingerprint of his could have gotten there.

Defendant had never had a dark or black jacket with white stripes down the sleeve nor any sort of mask to go over his head.

Although born in Lancaster, South Carolina, defendant moved to Charlotte some twenty-seven years ago, when he was six years old, and was raised in Charlotte by his grandmother. His occupations consisted of caddying for several years at the

Country Club and in doing yard work for a number of named individuals and particularly the Triple-A Heating Company. His wife also was employed, having worked for the past five years for Dr. Henry Wilson.

Defendant is "six feet three inches and a half or six feet four inches tall" and weighs "172 pounds." Three witnesses, in addition to Hazeline, testified that defendant's general reputation was excellent. One of these witnesses had known him for three years and the other two had known him for nearly ten years.

After the presiding judge had completed his original charge, and before returning their verdicts, the jury returned to the courtroom. The foreman addressed the judge as follows: "Your Honor, may I ask a question? If—I don't know how to word this, but is it possible that if per chance there was an accomplice and the accomplice opened the door, would that make any difference?" The judge replied: "Now, members of the jury, there is no evidence here that there was an accomplice." However, the judge then instructed the jury fully and accurately to the effect that where two or more persons aid and abet each other in the commission of a crime, all are guilty within the meaning of the law.

With reference to the charge of assault with intent to commit rape, the court instructed the jury they could return one of three verdicts, guilty of assault with intent to commit rape, or guilty of the lesser included offense of assault on a female by a male person over eighteen years of age, or not guilty. The jury returned a verdict of not guilty, expressly answering "not guilty" when asked separately for their verdicts, first, as to assault with intent to commit rape, and second, as to assault on a female.

To the indictment charging first degree burglary, the jury returned a verdict of guilty as charged with recommendation that defendant's punishment be imprisonment for life in the State's Prison. Thereupon, judgment imposing a life sentence was pronounced. Defendant excepted and appealed.

Attorney General Robert Morgan, Assistant Attorney General William B. Ray and Associate Attorney Thomas W. Earnhardt for the State.

Hicks and Harris by Richard F. Harris III and Eugene C. Hicks III for defendant appellant.

BOBBITT, Chief Justice.

Although the undisputed and unequivocal testimony of Mrs. Davis tends to show that she was assaulted, the jury failed to find that she was assaulted by defendant. Indeed, Mrs. Davis's testimony affirmatively discloses that she could not identify defendant as her assailant. The appeal relates solely to the indictment and trial of defendant for first degree burglary.

We consider first those assignments of error which, if tenable, would require dismissal rather than a new trial.

On 14 February 1972, defendant moved that the indictments be dismissed because he had been denied a preliminary hearing. In an order dated 17 February 1972, Judge Hasty denied defendant's motion but provided for an examination of the State's witnesses by defendant's counsel prior to trial. At the commencement of the trial at the 1 May 1972 Session, the motion to dismiss was renewed by defendant and denied by Judge McLean. Defendant excepted to and assigns as error each of these rulings.

Motions filed by defendant assert the following: After his arrest on 22 October 1971, defendant was confined in jail until released on 19 January 1972. Nine warrants had been issued, two of which were for the crimes for which he was tried at the 1 May 1972 Session. Defendant was present and represented by counsel at each of five scheduled preliminary hearings. At each of the first four, the hearing was continued on motion of the State and over defendant's objection. The last was on 19 January 1972 when, by order of the presiding District Court Judge, all of the cases were dismissed from the docket of that court and in each case the entry "nolle prosse" was made.

We take judicial notice that the 3 January 1972 Session, at which the two indictments on which defendant was tried were returned, was a one-week session. A week or so after his release on 19 January 1972, defendant was rearrested on a capias based on these indictments. Seemingly, the District Court Judge who ordered defendant's release on 19 January 1972 was unaware of the fact that defendant had been indicted by the grand jury.

Admittedly, defendant was entitled to a prompt preliminary hearing. Assuming the facts to be as stated in defendant's

motions to dismiss, sufficient justification does not appear for the continued failure of the State to proceed with a preliminary hearing and its eventual abandonment of this procedure in favor of submitting a bill of indictment to the grand jury. If deemed advisable, defendant could have applied to one of the Justices or Judges of the Appellate Division or to a superior court judge for a writ of habeas corpus to review the legality of his confinement between 22 October 1971 and 19 January 1972. Upon return of such writ, the hearing Justice or Judge might well have ordered defendant's release from custody unless a prompt preliminary hearing was afforded. However, the failure of the State to proceed with the scheduled preliminary hearings did not *per se* constitute ground for complete and final dismissal of the charges against him.

[1] Neither the North Carolina nor the United States Constitution requires a preliminary hearing. A preliminary hearing is not a necessary step in the prosecution of a person accused of crime, and an accused person is not entitled to a preliminary hearing as a matter of substantive right.

"A preliminary hearing may be held unless waived by defendant. G.S. 15-85 and G.S. 15-87. But none of these statutes prescribes mandatory procedures affecting the validity of a trial. A preliminary hearing is not an essential prerequisite to the finding of an indictment in this jurisdicton." *State v. Hargett,* 255 N.C. 412, 413, 121 S.E. 2d 589, 590 (1961). "We have no statute requiring a preliminary hearing, nor does the State Constitution require it. It was proper to try the petitioner upon a bill of indictment without a preliminary hearing." *State v. Hackney,* 240 N.C. 230, 237, 81 S.E. 2d 778, 783 (1954). *Accord, Gasque v. State,* 271 N.C. 323, 329-330, 156 S.E. 2d 740, 744 (1967); *State v. Overman,* 269 N.C. 453, 467, 153 S.E. 2d 44, 56 (1967); *Vance v. North Carolina,* 432 F. 2d 984 (4th Cir. 1970); *Carroll v. Turner,* 262 F. Supp. 486 (E.D.N.C. 1966).

"If the grand jury finds an indictment, there is no need to conduct a preliminary examination." 21 Am. Jur. 2d Criminal Law, § 442 (1965). *Accord, Jaben v. United States,* 381 U.S. 214, 14 L.Ed. 2d 345, 85 S.Ct. 1365 (1965).

[2] When it was brought to Judge Hasty's attention that defendant's counsel had had no opportunity to examine the State's witnesses on account of the State's failure to conduct a prelimi-

nary hearing, an order was promptly made affording defendant's counsel an opportunity to conduct such examinations. Nothing in the record discloses that defendant was adversely affected at trial on account of the postponement of the scheduled preliminary hearings and the eventual abandonment of this procedure after the grand jury had returned the indictments. We hold that such irregularities as may have occurred in connection with the failure to provide a preliminary hearing for defendant were insufficient to preclude prosecution of defendant for the crimes for which he was indicted. Hence, the denial by Judge Hasty and by Judge McLean of defendant's motions to dismiss the indictments was proper.

Defendant assigns as error the denial of his motion to quash the indictment, citing *Furman v. Georgia*, 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726 (1972). *Furman* relates to punishment, not to the elements of any crime. The indictment is in proper form and sufficiently charges first degree burglary. Hence, the assignment is wholly without merit.

Defendant's further contention that the indictment is fatally defective because it does not sufficiently describe the property which defendant intended to steal is wholly without merit. 13 Am. Jur. 2d Burglary, § 36 (1964); 12 C.J.S. Burglary, § 39 (1938).

Defendant assigns as error the denial of his motion in arrest of judgment and as support therefor repeats the contentions previously made in connection with his motion to quash. The motion was properly denied.

[3] Defendant assigns as error the denial of his motion for judgment as in case of nonsuit.

He contends this motion should have been allowed because (1) the evidence was insufficient for submission to the jury, and (2) there was a fatal variance between the indictment and the proof.

There was ample evidence to support findings that the Davis home, then occupied by Davis, Mrs. Davis and their two children, had been feloniously broken into and entered in the nighttime with intent to commit the crime of larceny and that, in executing that intent, the television set, the record player and money were stolen.

The State's contention that defendant is guilty of burglary as charged rests upon evidence which tends to show that one of three prints lifted from one of the flower pots shortly after the breaking, entering and larceny occurred, and a print of defendant's right index finger taken by Officer Stubbs on 12 November 1971, are identical.

"To warrant a conviction, the fingerprints corresponding to those of the accused must have been found in the place where the crime was committed under such circumstances that they could only have been impressed at the time when the crime was committed." Annot., "Evidence—Finger, Palm, or Footprint," 28 A.L.R. 2d 1115, 1154, § 29 (1953). See also *State v. Smith,* 274 N.C. 159, 164, 161 S.E. 2d 449, 452 (1968), and authorities there cited.

Davis and Mrs. Davis testified they did not know defendant and had never given him permission to enter their home. Defendant testified he had not been in the Davis home on the occasion referred to in the indictment or at any other time. There was evidence the flower pot had been frequently washed and otherwise handled by Mrs. Davis during the three years it had been in the Davis home. There was evidence that the flower pot from which the latent prints were lifted had been moved from its usual position incident to the removal and theft of the television set.

The evidence most favorable to the State would permit a jury to find (1) that the print lifted from the flower pot was in fact a print of defendant's right index finger; (2) that the latent print of defendant's right index finger was placed thereon by defendant on the occasion referred to in the indictment; and (3) that defendant was present when the crime charged in the indictment was committed and at least participated in its commission. Hence, the evidence was sufficient to warrant submission of the case to the jury.

[4] As to fatal variance, the indictment charges that the alleged burglary was committed on 5 September 1971 "between the hours of 12:00 p.m. and 1:00 a.m." We take judicial notice that 5 September 1971 was a Sunday. Both Davis and Mrs. Davis testified when they went to bed and where they slept on 5 September 1971. Their testimony contains no reference to the day of the week when they first went to bed or the day of the week when they were aroused. Defendant contends the

evidence indicates they went to bed on 5 September 1971; that their home was broken into on 6 September 1971; and that this constitutes the fatal variance. This contention is not based on unequivocal evidence. The evidence discloses that Officer Adams entered "5 Sept. 71" on State's Exhibit No. 1 after Officer Cobb had completed his efforts to lift latent fingerprints. It is noted that the court instructed the jury they would return a verdict of guilty as charged if they found beyond a reasonable doubt that on 5 September 1971 defendant had committed the acts necessary to constitute the alleged crime of burglary in the first degree. Moreover, under the circumstances, the suggested variance would not be material. Time was not of the essence of the crime. G.S. 15-155; *State v. Williams*, 261 N.C. 172, 134 S.E. 2d 163 (1964). Nor does it appear that the suggested variance would be prejudicial. Defendant's evidence tends to show that both he and his wife were at home in bed throughout the night of 4-5 September 1971 and throughout the night of 5-6 September 1971.

Although his asserted grounds for dismissal are untenable, defendant is entitled to a new trial for the reason set forth below.

[5] According to the record during the cross-examination of defendant the following occurred:

"Q. Now, I believe you had your own hand—excuse me—your own fingerprint specialist examine those fingerprints, is that not correct?

MR. HICKS: Objection.

COURT: Overruled, exception.

EXCEPTION No. 56

Q. You and your lawyer hired your independent fingerprint expert to examine those fingerprints, is that not correct?

MR. HICKS: Objection.

COURT: Overruled, exception. Answer the question.

EXCEPTION No. 57

A. Yes, sir.

Q. And he told you that that fingerprint was the same as yours, is that not correct?

MR. HICKS: Objection.

COURT: Overruled, exception.

EXCEPTION No. 58.

A. That is right."

Whatever an unidentified person referred to as a fingerprint expert may have said with reference to whether in his opinion the fingerprints on State's Exhibit No. 1 were those of defendant was hearsay and inadmissible. Defendant's objections to the quoted questions should have been sustained. The prejudicial impact of the testimony elicited by these questions is obvious. The erroneous admission thereof entitles defendant to a new trial.

Upon the present record serious questions arise as to the admission over objection of testimony regarding a master fingerprint card bearing date 1958 and the name "Willie Foster, Jr.," and of testimony relating to a card referred to as showing fingerprints of defendant taken by one Pendergrass when defendant was booked on 22 October 1971, in the absence of testimony that the prints on these cards were made by defendant. A discussion of these questions is deemed unnecessary. If they arise at all at the next trial, presumably there will be additional evidence as to when and by whom these prints were taken.

Discussion of defendant's remaining assignments is unnecessary. They relate to questions which may not arise at the next trial.

New trial.

STATE OF NORTH CAROLINA v. JOHN LEE EDWARDS

No. 2

(Filed 15 November 1972)

Criminal Law §§ 75, 76— confession — finding of voluntariness unsupported by evidence — admission as prejudicial error

Evidence presented on *voir dire* was insufficient to support the judge's finding that defendant's confession was voluntarily made where such evidence tended to show that defendant, an 18-year-old retarded male, was interrogated long into the night, that defendant finally confessed to the commission of the alleged offenses, that officers reduced the confession to writing and obtained a promise from defendant that he would repeat the confession and sign it in the presence of a court appointed attorney, and that defendant did in fact adhere to his promise despite advice from his attorney not to sign the confession or to make any admission; therefore, the court committed prejudicial error in a first degree murder and first degree burglary case by allowing the State to offer defendant's confession into evidence.

APPEAL by defendant from *McKinnon, J.*, January 10, 1972 Session, ORANGE Superior Court.

The defendant, John Lee Edwards, was charged by grand jury indictments with the capital felonies of first degree burglary and first degree murder. The offenses are alleged to have been committed on the night of September 4-5, 1971. The charges involved the forcible entry into the home of Mrs. Dora Lloyd for the purpose of committing the felony of rape and the first degree murder of Mrs. Lloyd.

On the morning of September 5, 1971, the dead body of Mrs. Lloyd was discovered in the house where she lived alone in Orange County. The autopsy disclosed she had died as a result of strangulation, perhaps by human hands. At the time of her death Mrs. Lloyd was 83 years of age.

On September 23 or 24 the officers questioned the defendant, a colored male eighteen years of age, concerning his possible connection with the charges of burglary and murder. At the time of the interrogation he was a suspect, but not under arrest. After being advised of his constitutional rights, he said he had nothing whatever to do with the murder of Mrs. Lloyd or the entry into her home. He gave an account of his actions on the night of September 4-5 and named the persons who were with him.

During a further interrogation on September 24, the defendant's bondsman on another charge surrendered him to the interrogating officers who told him their information indicated he was not telling the truth. After questioning for several hours, he finally broke down, cried, and confessed that he forcibly entered the home of Mrs. Lloyd for the purpose of committing larceny. When she discovered his presence and screamed, he choked her until she ceased to resist. These admissions were obtained after midnight. The officers reduced the admissions to writing, using as nearly as possible the defendant's words. The officers requested and obtained a promise that he would repeat the admissions in the presence of an attorney when one was appointed for him.

Immediately after obtaining the confession and the promise to repeat it, the officers called the district judge and requested the appointment of counsel. Although the hour was after midnight, the judge immediately appointed Attorney F. Lloyd Noell who met the officers and the prisoner soon after they arrived at the jail in Hillsborough. Following a short interview with the defendant, Mr. Noell advised him not to make any statements and not to sign any papers.

Officer Horton on cross-examination made this admission: "I think the biggest part of the conversation between Chapel Hill and Hillsborough was the fact that John would make this statement in the presence of his attorney. . . . He was asked if he would make the statement in the presence of an attorney. . . . He was asked if you will give us the same statement in the presence of your attorney, the answer was, yes."

While the officers, the defendant, and Mr. Noell were together, the officers advised the defendant that he was not bound to accept the advice of his attorney, but that he had the right to decide for himself whether to sign the confession. At this time they presented the memorandum which had been written in Chapel Hill a short time before. The officers stated they would like for him to sign it and pointed out on the paper a place for his name. Declining the advice of his attorney, accepting the advice of the officers, he signed the confession. The hour was about 3 o'clock in the morning following a night of interrogation.

Shortly after the signing of the memorandum, defendant's counsel petitioned the court to order a psychological examina-

tion of the defendant. Pursuant to the petition, the court ordered the defendant committed to Cherry Hospital for observation. The following is the conclusion of the hospital staff:

> ". . . Psychological report reveals a mild degree of retardation at the level of IQ 60. He was tense, hostile and suspicious during the psychological testing. He admitted that just before going to sleep he hears a voice talking to him saying, 'Why come I don't get to my normal self' and also that he sees something like 'humans fighting.' The patient did actually reaffirm the presence of these hallucinatory experiences in the interview of 11-23-71.
>
> "In evaluating this case, it is the feeling of the staff that the accident referred to in the past history that occurred early in 1968 when his bicycle was struck by a car, is not likely to be a contributory factor to the abnormalities seen on the electroencephalogram (brain wave test). The abnormality described as 14 & 6 positive spike phenomenon is seen in adolescents who show abnormal particularly aggressive behavior but it is not quite conclusive for any behavior abnormality. There is definite evidence of mental retardation and environmental problems have led to sullen and resentful attitude in this individual. The brief hallucinatory experiences described are not sufficiently severe to cause this disturbed behavior and to justify the diagnosis of psychotic disorder. The only positively established diagnoses are Mental Retardation, Mild, IQ 60 and Adjustment Reaction of Adolescence, and Without Psychosis. In the opinion of the staff, John Lee Edwards is competent to stand trial."

The trial began on January 10, 1972. Without objection, the indictments were consolidated and the cases tried together. After the jury was selected the State offered evidence tending to show that Mrs. Lloyd's home had been forcibly entered and she had been killed by strangulation.

When the State offered the written confession by the defendant, his counsel objected. During the voir dire, one of the officers who conducted the interrogation testified, describing the prisoner: "I would say that he hasn't had the opportunity that those of us . . . fortunate enough to have parents. To the best of my knowledge, he more or less grew up making his own rules and fighting for his survival."

The judge, in the absence of the jury, heard the evidence heretofore recited with respect to the circumstances under which the confession was obtained and concluded it was voluntarily made by the defendant in the presence of counsel. The confession was admitted in evidence over defendant's objection. The defendant's motions to dismiss both charges were denied.

The jury returned verdicts finding the defendant guilty of burglary in the first degree and murder in the first degree as charged in the indictments. The jury, however, having failed to make any recommendation with respect to punishment, the court imposed the death sentence in each case. The defendant appealed. After the judgments were entered the defendant petitioned that his trial counsel be relieved and that the present attorneys of record be appointed to prosecute his appeal. The court made the requested orders.

Robert Morgan, Attorney General, by Burley B. Mitchell, Jr., Assistant Attorney General for the State.

Chambers, Stein, Ferguson & Lanning by Adam Stein, Kenneth S. Broun for defendant appellant.

HIGGINS, Justice.

By Exceptions Nos. 28 through 68, the defendant challenged the court's findings and order culminating in the admission of his confession in evidence before the jury. The evidence before the court with reference to the circumstances under which the confession was obtained was free from conflict. Its interpretation, therefore, became a question of law.

Here is a summary of the essential facts as disclosed by the testimony of the officers: Eighteen days after the dead body of Mrs. Lloyd was discovered, the officers questioned the defendant, an 18-year-old retarded colored male with 60 IQ. Officer Horton, describing the defendant, testified: "Both his parents are deceasesd. And he more or less grew up like . . . a weed on the street fighting for his survival."

At first he denied any knowledge of Mrs. Lloyd's death and he stated that he was out the night of September 4-5 with named friends. When questioned, they failed to corroborate his story. Thereafter, on September 23-24, the officers conducted a further interrogation, pointing out the contradictions in his stories.

While that interrogation was underway, a bondsman for the defendant in another criminal case "turned him in." Thereafter, he was in custody. The interrogation continued in the Chapel Hill solicitor's office until 1:30 a.m. At that time he began to cry and admitted to the officers he had broken into Mrs. Lloyd's house for the purpose of stealing. She awakened, began screaming, and he choked her. He then disconnected the telephone and left. The officers reduced the confession to writing, using as much of defendant's words as fitted the story. They obtained a promise from him that he would repeat the confession and sign it in the presence of an attorney when the court appointed one to represent him.

Although it was after midnight and the interrogation had been underway for several hours, the investigating officers left Chapel Hill with the defendant in custody, having called the district judge who appointed Mr. Noell attorney for the prisoner. Mr. Noell reported at once to the Hillsborough jail and conferred briefly with the defendant. The officers then, in the presence of Mr. Noell, presented the confession written in Chapel Hill and requested the defendant to sign it as he had promised to do before he saw Mr. Noell. Notwithstanding the advice of his attorney not to sign the confession or make any admissions, one of the officers reminded the defendant of his promise and admitted he said to John: " . . . (I)f this is the statement you gave me, I would like your signature here. And this is the time that John signed it." The confession was offered and admitted in evidence over the defendant's objection.

The record discloses the Miranda warnings were given before any of the interrogations, but the defendant was without the presence or the advice of counsel until just before placing his signature on the writing prepared by the officers. The incidents here involved occurred prior to October 30, 1971, when G.S. 7A-457 was amended. *State v. Wright,* 281 N.C. 38, 187 S.E. 2d 761; *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123; *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561.

It is obvious that the defendant's promise that he would repeat the confession in the presence of his attorney in Hillsborough outweighed the advice of the attorney. The confession obtained after a long questioning in the absence of counsel was inadmissible. When it was repeated pursuant to the promise, the taint was not removed. The prisoner was required to make a

decision between the advice of his attorney not to sign and the promise he had made to the officers when he was not represented by counsel that he would sign in the presence of the attorney. He chose to disregard the advice of counsel and to keep his promise to the officers. Such was the uncontradicted evidence of the State's witnesses.

There was actually no break in the interrogation procedure beginning early in the evening at Chapel Hill and culminating in the signing of the confession at 3 o'clock in the morning in Hillsborough. At the end of a long interrogation without counsel, the defendant, in tears, had made the confession. The inference is inescapable that the officers, thereafter, were in a hurry to have the defendant repeat the confession in the presence of a lawyer. As soon as the confession was obtained, although after midnight, the officers called the district judge who appointed Attorney Noell. Mr. Noell appeared promptly at the jail in Hillsborough where he advised the defendant not to make any admissions and not to sign any papers. The defendant signed after the officers told him that he need not follow the advice of his counsel. He signed on the line as requested by the officers.

The confession in Chapel Hill was inadmissible as having been induced at a time when the defendant was without counsel. The promise to repeat it was also made without counsel. It is not altogether surprising that this retarded boy paid more attention to his recent promise to the officers than he did to the advice of an attorney whom he did not know. The officers were his custodians. The attorney was a stranger. In this setting, the confession cannot qualify as voluntary.

The test by which admissibility is measured, was stated by Chief Justice Stacy in *State v. Moore,* 210 N.C. 686, 188 S.E. 421:

> "Voluntary confessions are admissible in evidence against the party making them; involuntary confessions are not. A confession is voluntary in law when—and only when—it was in fact voluntarily made . . . .
>
> * * * * * * * *
>
> "It is true that where a confession has been obtained under circumstances rendering it involuntary, a presumption arises which imputes the same prior influence to any

subsequent confession, and this presumption must be overcome before the subsequent confession can be received in evidence." (Citing authorities.)

The Supreme Court of the United States in *Clewis v. Texas,* 386 U.S. 707, 710, stated the rule:

> "On this record, we cannot hold that petitioner's third statement was voluntary. It plainly cannot, on these facts, be separated from the circumstances surrounding the two earlier 'confessions.' There is here no break in the stream of events from the time Sunday morning when petitioner was taken to the police station to the time Tuesday morning some nine days later that he signed the statement in issue, sufficient to insulate the statement from the effect of all that went before. Compare *United States v. Bayer,* 331 U.S. 532, 540 (1947) with *Reck v. Pate,* 367 U.S. 433, 444 (1961)."

In *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1, this Court stated the rule:

> " . . . 'Any circumstance indicating coercion or lack of voluntariness renders the admission incompetent.' *State v. Guffey, supra.* The fact that the defendant was in custody when he made the statement is a circumstance to be considered. *State v. Guffey, supra.* The mental capacity of the defendant is also a circumstance to be considered. *State v. Whittemore,* 255 N.C. 583, 122 S.E. 2d 396. There may, of course, be coercion of the mind without physical torture or threat thereof. *State v. Chamberlain,* 263 N.C. 406, 139 S.E. 2d 620."

On the record before us we are forced to conclude the evidence before the able trial judge was insufficient to support his finding the defendant's written confession was voluntary. The court committed prejudicial error in permitting the State to offer it in evidence.

Other Assignments of Error do not require discussion.

For the court's error in admitting the defendant's confession, the verdicts are set aside, the judgments are vacated, and it is ordered that on each charge there be a

New trial.

Lutz v. Board of Education

CLYDE A. LUTZ, RICHARD B. LACKEY, JR., MARY FORTNER HOOK, ON BEHALF OF THEMSELVES AND ALL OTHER RESIDENTS, PROPERTY OWNERS, AND TAXPAYERS OF CROWDER'S MOUNTAIN TOWNSHIP OF GASTON COUNTY, NORTH CAROLINA, SIMILARLY SITUATED v. THE GASTON COUNTY BOARD OF EDUCATION OF GASTON COUNTY, NORTH CAROLINA, CONSISTING OF LARRY K. PETTY, ROBERT STROUPE, LOWELL E. JENNINGS, BROADUS MCSWAIN, JOHN B. ARMSTRONG, REV. ROBERT B. GRIGG, JR., BOBBIE ROWLAND, CHARLES W. CRAIG, AND HOWELL STROUP; AND WILLIAM H. BROWN, SUPERINTENDENT OF THE GASTON COUNTY, NORTH CAROLINA, SCHOOL SYSTEM

No. 15

(Filed 15 November 1972)

1. **Schools § 3— school consolidation — sufficiency of studies**

Studies carried out by a county board of education and by the State Board of Education prior to action of the county board ordering the closing of two senior high schools and the merger of those two schools into a consolidated comprehensive senior high school met the requirements of G.S. 115-76(1).

2. **Schools § 3— school consolidation — time of public hearing**

Public hearing on proposed school consolidation held prior to the adoption of a formal resolution of consolidation by the county board of education met the requirements of G.S. 115-76(1), it not being required that a public hearing be held before members of the board of education had reached any fixed determinations as to their feelings on the proposed consolidation.

3. **Schools § 3— school consolidation — procedure for public hearing**

Procedure used for a public hearing on proposed school consolidation was reasonable and met the requirements of G.S. 115-76(1) where the hearing was advertised in three different local newspapers for four consecutive weeks, the hearing was held in the county schools administrative office, and the hearing was well attended by both those for and those opposed to consolidation, as well as by a representative of the State Board of Education.

4. **Schools § 7— bonds for school construction — use of proceeds to purchase land — statutory authorization**

Although a local act providing for a countywide vote to pass upon the issuance of bonds for school construction did not specifically authorize the use of bond proceeds for the purchase of land for school sites, the local act and the County Finance Act, when construed together, authorized the use of the bond proceeds for such purpose. Chapter 906, Session Laws of 1967; G.S. 153-77; G.S. 153-107; G.S. 115-129.

APPEAL by plaintiffs from *Martin, J.*, at the January 24, 1972 Civil Session of Gaston Superior Court, certified pursuant to G.S. 7A-31 for initial appellate review by the Supreme Court.

This action was instituted by the plaintiffs as property owners and taxpayers on behalf of themselves and all residents, property owners, and taxpayers of Crowder's Mountain Township in Gaston County, to permanently enjoin the closing, consolidation and merger of the Cherryville Senior High School and Bessemer City Senior High School into a new high school to be known as the Northwest Senior High School and the purchase of property for the construction of the proposed new high school.

The complaint alleges in substance: (1) The Gaston County Board of Education failed to provide a public hearing in regard to the proposed consolidation of the Bessemer City Senior High School and Cherryville Senior High School into the proposed Northwest Senior High School and the purchase of land and the construction of the new high school, in violation of the provisions of G.S. 115-76(1); (2) the Board of Education failed to cause a thorough study to be made considering geographic conditions, anticipated increase or decrease in school enrollment, the inconvenience and hardship that might result for students in the schools affected, the cost of providing additional school facilities, and the importance of the school to the people of the communities where the schools are located, as required by G.S. 115-76(1); and (3) the statutory authority for the expenditure of bond monies, Chapter 906 of the Session Laws of 1967, did not authorize the utilization of proceeds from the bonds for the purchase of land for school construction.

Defendants filed an answer denying the material allegations of the complaint.

The uncontroverted facts show: The Board of Commissioners of Gaston County employed the Public Administration Service of Chicago, Illinois, to study the organization, quality of educational programs, population and fiscal policies of the Cherryville City Board of Education, Gaston County Board of Education and the Gastonia City Board of Education. The report of the Public Administration Service dated 27 May 1966 to the Board of Commissioners of Gaston County contained three recommendations: (1) The consolidation of these three school systems into one unified county system; (2) establishment and location of six comprehensive high schools including one in the northwest section of Gaston County; and (3)

proposals for achieving adequate financial support to carry out the aforementioned recommendations. After receiving the report, the Board of Commissioners appointed a citizens committee to consider the feasibility of implementing the recommendations contained in the report.

A written report of the citizens committee to the Board of Commissioners approved, with some exceptions, the report of the Public Administration Service; approved the idea of consolidation of the three independent school systems in Gaston County and the concept of comprehensive senior high schools located strategically throughout the county. This report also approved a method by which the necessary financial backing could be secured to support the public schools, and the holding of an election on the questions of school consolidation, issuance of bonds for school construction and the levying of a uniform local supplementary school tax.

Subsequently, the General Assembly enacted Chapter 906 of the 1967 Session Laws of North Carolina providing for a countywide vote in Gaston County to pass upon the merger of the three school systems, the issuance of bonds in the amount of twenty million dollars for school construction, and a uniform supplemental school tax. On 18 December 1967 the Board of Commissioners adopted the initial bond ordinance authorizing the issuance of twenty million dollars of school building bonds for specific purposes set forth therein. On 29 December 1967 a public hearing was conducted by the Board. At the conclusion thereof, the Board, after a third and final reading as required by law, adopted the bond ordinance authorizing the issuance of twenty million dollars of school building bonds, subject to the approval of the voters of Gaston County at a countywide election.

On 20 February 1968 the voters of Gaston County approved the merger of the three school systems, the bonds for school construction, and a uniform supplemental tax. After this approval, an interim school board was created and this board asked the Division of School Planning of the North Carolina Department of Public Instruction to review their study which had been made in 1965, the reports of the Public Administration Service and the citizens committee, and to make recommendations. The report of the Division of School Planning of the North Carolina Department of Public Instruction was made to

the interim board on 27 May 1968. A committee from the interim board reviewed the prior studies and unanimously adopted a school construction priorities report containing the recommendations set forth in these studies. These reports recommended the construction of six comprehensive high schools, the Northwest Senior High School being the last to be constructed.

Upon formation of the permanent Gaston County Board of Education in December of 1968, another committee was appointed by the Board to review school construction priorities. A similar committee was appointed in 1971. Both committees reaffirmed prior action of the Board.

In September 1970 a site selection committee for the proposed Northwest Senior High School was appointed by the Board of Education, and the report of this committee recommending the purchase of a 73.643-acre tract of land owned by John W. Eaker was approved by the Gaston County Board of Education on 23 August 1971. On 9 December 1971 the Board of Commissioners of Gaston County approved the expenditure of funds in the sum of $54,500 for the purchase of the Eaker tract.

On 17 January 1972, subsequent to the filing of the plaintiffs' complaint and the issuance of the temporary restraining order, a public hearing to consider the closing of Bessemer City Senior High School and Cherryville Senior High School and the transfer of their pupils into a proposed consolidated comprehensive senior high school was held by the Board of Education at the Gaston County Schools Administrative Office. The time and place for this meeting was advertised for four consecutive weeks in the Cherryville Eagle, the Gastonia Daily Gazette and the Bessemer City Record, all being newspapers of general circulation in Gaston County. At the meeting plaintiffs and other citizens of Gaston County were given an opportunity to express their views concerning the consolidation.

After the public hearing, the Gaston Board of Education adopted a resolution approving the discontinuance of Bessemer City Senior High School and Cherryville Senior High School and the consolidation and merger of these schools into the proposed Northwest Senior High School. The State Board of Education, at its regular meeting on 3 February 1972, approved this action, effective with the school year 1973-74 or as soon thereafter as facilities became available.

On 10 December 1971 Judge John R. Friday issued a temporary restraining order enjoining the defendants from purchasing any lands for the purpose of constructing the proposed Northwest Senior High School or from taking any steps or expending any monies for the construction thereof pending further orders of the court. On 15 December 1971 Judge Sammie L. Chess continued Judge Friday's order until 24 January 1972. At the 24 January 1972 Civil Session of Gaston Superior Court, after a full hearing, Judge Martin made extensive findings of fact and concluded: (1) The public hearing held on 17 January 1972 complied with all the requirements of G.S. 115-76(1); (2) all other requirements of G.S. 115-76(1) were met; (3) the action of the Board of Education did not constitute a manifest abuse of discretion; and (4) the expenditure of funds for the purchase of land for the school site was authorized by Chapter 906 of the 1967 Session Laws of North Carolina and by the provisions of the County Finance Act as amended. Based upon the findings of fact and conclusions of law, the trial judge ordered that the temporary restraining order be dissolved and plaintiffs' action dismissed.

From this order plaintiffs appealed and we allowed motion for initial appellate review by the Supreme Court.

Atkins and Layton by James H. Atkins for plaintiff appellants.

James B. Garland for defendant appellees.

MOORE, Justice.

[1] Plaintiffs allege and contend that the action of the Board of Education in ordering the consolidation of Bessemer City Senior High School and the Cherryville Senior High School into the proposed Northwest Senior High School was illegal in that the Board had failed to make the studies required by G.S. 115-76(1).

The County Board of Education has authority "to consolidate schools located in the same district, and with the approval of the State Board of Education, to consolidate school districts or other school areas over which the board has full control, whenever and wherever in its judgment the consolidation will better serve the educational interests of the county or any part of it." G.S. 115-76; *Feezor v. Siceloff*, 232 N.C. 563, 61 S.E.

2d 714 (1950). Whether a change should be made in the location of the school, as well as the selection of the site for a new one, is vested in the sound discretion of the Board of Education. Its action cannot be restrained by the courts unless there has been a violation of some provision of law or a manifest abuse of discretion. *Dilday v. Board of Education,* 267 N.C. 438, 148 S.E. 2d 513 (1966); *Feezor v. Siceloff, supra; Board of Education v. Lewis,* 231 N.C. 661, 58 S.E. 2d 725 (1950); *Waldrop v. Hodges,* 230 N.C. 370, 53 S.E. 2d 263 (1949); *Atkins v. McAden,* 229 N.C. 752, 51 S.E. 2d 484 (1948). In determining whether two or more public schools shall be consolidated or whether a school shall be closed and the pupils transferred therefrom, the State Board of Education and the board of education of the county shall observe and be bound by the following rules:

> " . . . [T]he board of education of the county in which such school is located and the State Board of Education shall cause a thorough study of such school to be made, having in mind primarily the welfare of the students to be affected by a proposed consolidation and including in such study, among other factors, geographic conditions, anticipated increase or decrease in school enrollment, the inconvenience or hardship that might result to the pupils to be affected by such consolidation, the cost of providing additional school facilities in the event of such consolidation, and the importance of such school to the people of the community in which the same is located and their interest in and support of same. . . . " G.S. 115-76(1).

The record in this case reveals a long and careful consideration, beginning in 1965, of the need for discontinuing the existing high schools in Cherryville and Bessemer City and their merger and consolidation into a new Northwest Senior High School. After analyzing reports from various citizens and official committees which over a period of years had recommended such action, and after a public hearing as required by law, this consolidation was approved by the Gaston County Board of Education on 17 January 1972 and by the State Board of Education on 3 February 1972.

At the hearing before Judge Martin, Dr. Jester Pierce, Director of the Division of School Planning of the North Carolina Department of Public Instruction, testified in part:

"The proposed plan of the Gaston County Board of Education to establish a comprehensive senior high school in the northwest area of the county to serve the Cherryville, Bessemer City and Tryon districts is in accordance with recommendations made by the Division of School Planning, and is feasible, practicable, and desirable. The concept of constructing six comprehensive senior high schools in Gaston County is the most effective and economical approach toward establishing a good educational program on a secondary level in Gaston County."

Mr. Broadus McSwain, who was chairman of the interim Board of Education and later elected for a six-year term as chairman of the Gaston County Board of Education, testified:

" . . . [I]n my opinion, such schools would be in the best interest of the students involved although perhaps causing inconvenience to some parents. Comprehensive high schools will enable students from various sections of Gaston County to compete with one another on the same educational plane. It would be unfair to those living in Bessemer City, Tryon and Cherryville communities not to have the same educational advantages and opportunities which those in other parts of Gaston County have or will have commencing with school year 1972-73 when the fifth comprehensive high school will be completed. Both the interim board and the permanent board of the Gaston County Board of Education have spent a considerable amount of time in discussing and studying the need for the sixth comprehensive high school, currently denoted as the Northwest Senior High School, and the decision of the board in each instance has been to proceed according to the priority schedule with the construction of this facility . . . . As to whether I or any other members of the Board made a study of the extent of support of Bessemer City or the support in Cherryville, as compared to other schools, we know of the support in both these areas. I think the support has been exceptional in all of our schools."

Mr. William H. Brown, Superintendent of Schools and ex officio secretary to the Gaston County Board of Education, testified:

" . . . [T]o maintain and operate Bessemer City Senior High School having a student population of approximately

450 and Cherryville Senior High School having a student population of approximately 460 would not allow, except at prohibitive cost, the expanded curriculum which will be found in the other comprehensive senior high schools. The facility for the Cherryville Senior High School is obsolete and antiquated for senior high school purposes, and to build a new Cherryville Senior High School and to add to the existing Bessemer City High School as requested by some opponents of a northwest senior high school would cost considerably more money for construction as set forth in Exhibit 'D,' would cost more to provide comparable curriculum opportunities for the students. . . . "

Mr. Larry Petty, a member of the Gaston County Board of Education who became chairman after Mr. McSwain resigned, testified:

"Aside from the meetings at Cherryville High School and Bessemer City High School where some members of the public and the School Board were present, and the meeting of the Rotary Club in Cherryville and Lions Club in Bessemer City where I appeared, I did appear on the question of consolidation of these high schools and spoke several times in Bessemer City, Tryon and Cherryville. As a matter of fact I did speak to the Tryon PTA two or three times. . . . I have discussed the feelings of the people who are executives in industries in these communities. . . . I did not receive any indication from any of them that the closing of these schools would affect their business adversely. . . . The Gaston County Board of Education has continually given careful consideration to arguments made by both proponents and opponents of the proposed Northwest Senior High School. The Gaston County Board of Education has carefully investigated the selection of a site for this facility and has, in fact, given more attention by far to the selection of this site than to the selection of any other site acquired since merger."

Mr. Clyde Lutz, one of the plaintiffs in this case, testified:

"The importance of Bessemer City High School and the support of the community were made known to the Board as such and to the individual members of the Board, and, when we made it, the effect of the closing of the school

was made known to the Gaston County Board of Education."

Numerous studies over a period of years were also presented with regard to population trend, pupil population ratio, and other factors regarding the increase or decrease or anticipated increase or decrease in school enrollment.

The testimony of the above witnesses and others of like import, together with various exhibits, was ample to support the findings of fact by Judge Martin that prior to the public hearing the Gaston County Board of Education and the State Board of Education had caused thorough studies to be made of the need for and the location of a comprehensive high school in the northwest section of Gaston County, for the discontinuance of Bessemer City Senior High School and Cherryville Senior High School and the merger of these two schools into the new comprehensive Northwest Senior High School; and the further findings that although these studies considered primarily the welfare of the students to be affected by the proposed consolidation, they also examined and analyzed, among other factors, geographic conditions, anticipated increase or decrease in school enrollment, the inconvenience or hardship that might result to the pupils to be affected by such consolidation, the cost of providing additional school facilities in the event of such consolidation, and the importance of such schools to the people of the communities in which they were located and their interest and support of the same.

The findings of fact made by Judge Martin being supported by competent evidence are conclusive on appeal.. *Knutton v. Cofield,* 273 N.C. 355, 160 S.E. 2d 29 (1968); *Truck Service v. Charlotte,* 268 N.C. 374, 150 S.E. 2d 743 (1966); *Mills v. Transit Co.,* 268 N.C. 313, 150 S.E. 2d 585 (1966); 1 Strong, N.C. Index, Appeal and Error § 57, p. 223. This is true, notwithstanding there is evidence *contra* which might sustain a finding to the contrary. *Equipment Co. v. Equipment Co.,* 263 N.C. 549, 140 S.E. 2d 3 (1964); *Farmer v. Ferris,* 260 N.C. 619, 133 S.E. 2d 492 (1963); *Hodges v. Hodges,* 257 N.C. 774, 127 S.E. 2d 567 (1962).

The facts found by Judge Martin sustained his conclusion that the studies carried out by the County and State Boards of Education complied with all the requirements of G.S. 115-76(1),

and that the Gaston County Board of Education has not acted unreasonably or arbitrarily and in such a manner as to constitute a manifest abuse of discretion in discontinuing Bessemer City Senior High School and Cherryville Senior High School or in selecting and moving to acquire a site for the construction of the proposed Northwest Senior High School. Plaintiffs' assignments of error to these conclusions are overruled.

[2] The plaintiffs also allege and contend that the Gaston County Board of Education violated G.S. 115-76(1) in failing to provide a public hearing as required by the statute prior to making a decision on the consolidation. Plaintiffs concede that a public hearing was held prior to adoption of a formal resolution of discontinuance and consolidation. However, they assert that the hearing was a mere formality which was called for the sole purpose of complying with the statute after suit had been filed alleging noncompliance with G.S. 115-76(1).

G.S. 115-76(1) in part provides:

> "Before the entry of any order of consolidation, the county board of education shall provide for a public hearing in regard to such proposed consolidation, at which hearing the county and State boards of education and the public shall be afforded an opportunity to express their views. Upon the basis of the study so made and after such hearing, said boards may, in the exercise of their discretion and by concurrent action, approve the consolidation proposed. . . . "

On 17 January 1972 a public hearing was held at the Gaston County Schools Administrative Office. After the public hearing the Gaston County Board of Education approved by formal resolution the discontinuance of Bessemer City Senior High School and Cherryville Senior High School and their consolidation into Northwest Senior High School. At its regular meeting on 3 February 1972 the State Board of Education approved the discontinuance and consolidation in question. Consequently, in both cases "the entry of any order of consolidation" was after the required public hearing.

Plaintiffs seek a reading of G.S. 115-76(1) which would require a hearing before the members of the Board of Education had reached any fixed determinations as to their feelings on the consolidation at issue. This Court is not in a position to monitor the mental processes of the members of county boards

of education. The objective basis for determination set out in the statute is whether the public hearing took place before or after "the entry of any order of consolidation."

This objective basis is illustrated by the decision in *Dilday v. Board of Education, supra.* In that case the State Board of Education had approved the consolidation of the five schools in question on 4 November 1965—two months in advance of the public hearing on 5 January 1966. However, on 6 May 1966 the State Board of Education formally approved the consolidation of the five high schools into one central high school. This Court held that this subsequent approval related back to the date of the hearing and constituted sufficient compliance with the statute. Compliance with the standard established by the statute is all that is required and that requirement was met in the present case.

[3] Plaintiffs further contend that the procedure used in this instance for the public hearing constituted a violation of G.S. 115-76(1). The statute requires only that a public hearing be provided; it does not specify any particular form, location, or notice for such hearing. In this case, the hearing was advertised in three different local newspapers for four consecutive weeks, was held by the County Board at a logical place for such hearing—the Gaston County Schools Administrative Office—and was well attended by both those for and those opposed to consolidation, as well as a representative of the State Board of Education. The procedure used was reasonable and constitutes full compliance with the statute.

[4] Plaintiffs next assign as error the trial court's conclusion of law No. 4:

> "The expenditure of funds for the purchase of the site and for the construction of the proposed Northwest Senior High School would not be in violation of the purposes for which the 20 million dollar school building bonds were authorized by countywide vote on February 20, 1968, pursuant to the provisions of Chapter 906 of the 1967 Session Laws of North Carolina; and such expenditures are authorized under the provisions of the County Finance Act as amended, being Article 9, Chapter 153, of the General Statutes of North Carolina and do not deprive Plaintiffs of funds without due process of law."

Plaintiffs contend that the authority to issue bonds for construction of the Northwest Senior High School and the other schools under the present program is contained in Chapter 906 of the 1967 Session Laws of North Carolina, and that this Act contains no authority for the purchase of land, but rather specifies that money derived from the bond issue should be used for "construction, remodeling, and additions to the physical facilities of the consolidated school system of Gaston County."

It is conceded that Chapter 906 does not specifically authorize the use of funds from the bond issue for the purchase of land. However, the bond ordinance adopted by the Board of Commissioners of Gaston County, all notices and resolutions relative to the bond ordinance and bond election, and the official ballot cast in the election by the voters, after providing that the proceeds of the bond issue would be used for the purpose of school buildings, added, "and acquiring necessary land and equipment therefor."

Section 15 of Chapter 906 provides: "Nothing contained in this Act shall limit or restrict the power of the County of Gaston to authorize and issue bonds for school purposes pursuant to and in compliance with the County Finance Act. . . . " The County Finance Act provides that bonds issued thereunder may be used for school buildings, including *the purchase of the necessary land.* G.S. 153-77.

"Statutes dealing with the same subject matter must be construed *in para materia,* and harmonized, if possible, to give effect to each." 7 Strong, N.C. Index 2d, Statutes § 5, p. 75. When the language of a statute is clear and unambiguous, the court must give it its plain and definite meaning. *Davis v. Granite Corp.,* 259 N.C. 672, 131 S.E. 2d 335 (1963); *Hedrick v. Graham,* 245 N.C. 249, 96 S.E. 2d 129 (1956). The clear and unambiguous language of Chapter 906 provides that the proceeds of the bonds issued under Chapter 906 may be used for the purposes enumerated in the County Finance Act. The County Finance Act provides that such funds may be used for the purchase of necessary land. The County Finance Act also provides that the proceeds from the sale of bonds shall only be used for the purposes specified in the order authorizing the bonds. G.S. 153-107. Here the order specified that funds could be used for the purchase of land. Furthermore, Section 14(2) of Chapter 906 provides that the bonds issued under that

Chapter shall be "for the purpose of providing funds, with any other available funds, for construction, remodeling and additions to the physical facilities of the consolidated school system of Gaston County." Additions to the physical facilities of the consolidated school system of Gaston County, long evisioned as six new comprehensive high schools, would necessarily imply the acquisition of additional land as sites for the new buildings authorized to be constructed under that Chapter. Matters necessarily implied by the language of a statute must be given effect to the same extent as matters specifically expressed. *Board of Education v. Dickson,* 235 N.C. 359, 70 S.E. 2d 14 (1952). We hold, therefore, that giving these statutes their plain and definite meaning, the County Commissioners of Gaston County were authorized to spend in their discretion the amount of the bond money necessary for the purchase of land on which to build the new Northwest Senior High School. *Davis v. Granite Corp., supra; Hedrick v. Graham, supra;* G.S. 115-129.

All other assignments of error have been considered but are without merit.

Counsel for all parties have ably prepared and presented their case before the trial court and this Court. The facts found by the trial court are supported by the evidence and are sufficient to support the judgment. We conclude that the judgment which Judge Martin entered in the Superior Court of Gaston County is correct and should be and is now affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. ROBERT LEE KNIGHT

No. 12

(Filed 15 November 1972)

1. **Criminal Law § 66— pretrial identification — suggestiveness — likelihood of irreparable misidentification**

Conviction based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

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

Though the pretrial photographic identification procedure used in a first degree burglary case was impermissibly suggestive since the photographic showing was of only one picture and was accompanied by the statement of police, "we've got a man, is this the one," the victim's in-court identification of defendant was based on observation at the time of the offense and was of independent origin; this independent origin established the lack of a very substantial likelihood of irreparable misidentification, despite the impermissible suggestiveness of the photographic identification procedure.

3. Criminal Law § 66— suggestive pretrial identificaton procedure — inadmissibility

The introduction of testimony concerning an out-of-court photographic identification must be excluded where the procedure used is impermissibly suggestive, even though that suggestiveness does not require exclusion of the in-court identification itself.

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

Though evidence of an impermissibly suggestive pretrial identification procedure was incompetent, its admission was harmless error beyond a reasonable doubt where other competent evidence in the case overwhelmingly showed defendant guilty of first degree burglary.

5. Criminal Law § 93— order of proof

Defendant cannot complain that testimony of a police officer should have been admitted, if at all, while the State was making out its case in chief, rather than as rebuttal evidence since the order of proof is a rule of practice resting in the sound discretion of the trial court, and defendant has shown no abuse of that discretion in this case.

APPEAL by defendant from Judgment of *Brewer, J.*, 1 January 1972 Session, LEE Superior Court.

Defendant was tried on a bill of indictment, sufficient in form, charging that on 6 February 1971, about the hour of 1:20 a.m. in the night of the same day, defendant broke into and entered the dwelling house of Ervin Garner, actually occupied by him, with intent to steal and carry away the goods and chattels of Ervin Garner.

The State's evidence tends to show that a little after 1 a.m. on 6 February 1971 Ervin Garner, who resided with his wife, three children and his father, at 110 Austin Street in Sanford, was awakened by his wife and told that someone was in their bedroom. It was dim in his bedroom as the drapes were drawn

and no lights were on, but there was a light burning in the bathroom which shone into the hall between the bedroom and the kitchen and reflected light into the bedroom. Mr. Garner arose and was cut with a knife by the intruder. He saw his attacker at a distance of three feet. The bathroom light was shining in his assailant's face. He chased his attacker through the house and out the rear door. About four minutes elapsed between the time he was awakened until he reentered his house. Officers were called and the rescue squad carried Mr. Garner to the hospital where, the same day about 7 p.m., he was shown a color photograph of the defendant by the chief of police and was asked if "he was the one." He immediately, "in a split second," identified his attacker as the man shown in the photograph. He was then told that defendant was in jail. This was the only photograph shown him.

Immediately after the attack, a jacket belonging to defendant with various letters addressed to defendant and other documents bearing his name was found in the Garner's bedroom and turned over to the officers. With such information in hand, the officers had arrested defendant and placed him in jail before the photograph was ever shown to Mr. Garner.

Prior to Mr. Garner's in-court identification of defendant, a voir dire was conducted in the absence of the jury, at which only the State offered evidence. Mr. Garner testified on this voir dire that when his wife awakened him he got out of bed; that it was a moonlit night and in addition there was a light burning in the bathroom which reflected into the bedroom; that for a distance of about eight or nine feet he could get "a real good view" of an object or a face in the bedroom; that when he first awoke there was a person within three feet standing over the bed; that he had never seen that person before; that the intruder was wearing black boots above the ankles and a dark turtleneck sweater pulled up about the chin; that the intruder was facing the light coming from the bathroom and he could see his face; that he was stabbed in the neck by the intruder and later taken to the hospital where, about 7 p.m. the same day, he was shown a photograph by Chief Thomas; that he recognized defendant from the picture; that on seeing the picture, "I just noticed his face. The picture had nothing to do with my identification or description of the clothing he was wearing that night"; that when he looked at the picture he recognized the man as his assailant and he learned

later that identification papers in the jacket found in the bedroom had defendant's name on them; that when he was shown the picture the officers said "we've got a man, is this the one," and "I looked at it and said yes, sir, he is the one."

The court found facts substantially in accord with Mr. Garner's testimony, there being no evidence offered to the contrary, including a finding that Mr. Garner's in-court identification of defendant was not based upon the photograph shown him at the hospital by Chief Thomas. Defendant's motion to suppress was thereupon denied, the jury returned, and Mr. Garner testified substantially to the same facts before the jury.

Mr. Garner further testified that when he went to bed on the night of the assault his pocketbook was in his pants pocket and that the pocketbook was missing the next morning and he had not seen it since.

The State offered in evidence defendant's jacket found in the bedroom, (S-5), together with the items removed from the jacket pocket which included, *inter alia*, (1) a letter addressed to Bobby Knight, Route 2, Box 325, Sanford, (2) a certified birth certificate of Robert Lee Knight and (3) a Selective Service notice of classification bearing the name of Robert Lee Knight. These items were identified as State's Exhibit 6.

When defendant was arrested about ten o'clock on the morning following the assault on Mr. Garner, he was wearing a green turtleneck sweater and a pair of dark trousers. He did not have on any shoes when the officers arrived at his residence but later put on a regular pair of lace-up shoes. The turtleneck sweater had a red stain, like blood, on the upper portion of the neck part. The sweater (S-7) and trousers (S-8) were offered in evidence.

Defendant testified as a witness in his own behalf. He stated that about 7 p.m. on 5 February 1971 he was at the home of one Jimmy Walston on Chatham Avenue in Sanford; that he and others present there drank two pints of whiskey and then purchased more from a man named Cottcamp and drank it; that he was wearing a green flight jacket, a pair of bell bottoms, a turtleneck sweater with short sleeves, a hat and a pair of western style boots; that the green sweater offered in evidence was the one he was wearing that evening and the

flight jacket offered in evidence "appears to be my flight jacket"; that the papers offered in evidence by the State were in the inside jacket pocket and the birth certificate was his; that he left Jimmy Walston's home "that night or morning" in a car driven by a boy whose name he did not know; that he didn't know where he went in the automobile due to the pills he had been taking and the whiskey he had consumed; that when he eventually realized where he was, "I was in Jonesboro on Main Street at the railroad crossing"; that he went from there to the Pay-Lo Service Station, called the police department and told them he had been rolled—"Somebody had taken my jacket and some money that I had in my pocket. . . . I last saw my jacket at Jimmy Walston's house, they had the heat up pretty high and I pulled my jacket and my hat off. I haven't ever seen my hat since."

After calling the police, defendant testified he then got with some friends and had some more drinks and went home that morning. He was then arrested and taken to the police station. He testified that he did not enter Mr. Garner's home, did not assault him and did not steal his wallet.

Defendant admitted on cross-examination that he had been convicted of driving without a license, robbery, common-law robbery, disorderly conduct, larceny, assault with a deadly weapon, carrying a concealed weapon, forcible trespass, resisting arrest, and destruction of personal property.

Officer A. W. Poe, a defense witness, testified that on 6 February 1971 at 2:20 a.m. he received a call from defendant and went to the Pay-Lo Service Station where he found defendant standing at the phone booth dressed in a green turtleneck sweater, a dark pair of trousers and a pair of boots. He was not wearing a jacket at that time. He had been drinking and had the odor of alcohol about him. The officer said he transported defendant approximately two to two and one-half miles and let him off at the city limits; that in his opinion defendant was not under the influence of whiskey at that time.

The defendant was convicted of burglary in the first degree and sentenced to life imprisonment pursuant to the jury's recommendation. Errors assigned on appeal therefrom will be noted in the opinion.

J. W. Hoyle, Attorney for defendant appellant.

Robert Morgan, Attorney General, and Sidney S. Eagles, Jr., Assistant Attorney General, for the State of North Carolina.

HUSKINS, Justice.

Appellant's first assignment of error is based on his contention that the photographic identification procedure was so impermissibly suggestive that admission of the in-court identification violated due process of law. This contention questions the admissibility of testimony concerning the photographic identification at the hospital as well as the admissibility of Mr. Garner's in-court identification of defendant himself.

[1] In *Simmons v. United States,* 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S.Ct. 967 (1968), the Court refused to prohibit absolutely the use of identification by photograph and instead held that "each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

Factors to consider in applying the *Simmons* test are: "(1) The manner in which the pretrial identification was conducted; (2) the witness's prior opportunity to observe the alleged criminal act; (3) the existence of any discrepancies between the defendant's actual description and any description given by the witness before the photographic identification; (4) any previous identification by the witness of some other person; (5) any previous identification of the defendant himself; (6) failure to identify the defendant on a prior occasion; and (7) the lapse of time between the alleged act and the out-of-court identification." *United States v. Zeiler,* 447 F. 2d 993 (3d Cir. 1971). *Cf. United States v. Wade,* 388 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926 (1967); *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534 (1970). The first of these factors focuses upon the magnitude of the suggestiveness inherent in the photographic identification procedures employed. The facts relevant to the remaining six factors are then balanced against that suggestiveness in order to determine whether, in the par-

ticular factual context under consideration, the suggestiveness gives rise "to a very substantial likelihood of irreparable misidentification." If these facts do not give rise to such likelihood, then *Simmons* does not require reversal despite the presence of "impermissible suggestiveness" in the photographic identification procedure.

[2] With reference to the enumerated relevant factors, the evidence adduced on voir dire discloses that the pretrial photographic identification procedure used here was impermissibly suggestive since the photographic showing was of only one picture and was accompanied by the statement "we've got a man, is this the one?" If defendant's in-court identification and resulting conviction rested on that identification, it could not stand. But such is not the case. Mr. Garner had ample prior opportunity in his home to observe defendant. During the confrontation in the bedroom, he was within three feet of defendant and facing him. Light from a 50-watt bulb in the bathroom, located behind the witness, was shining into defendant's face. In addition, there was a full moon that night and there were bright yellow curtains over the bedroom windows. Also, Mr. Garner observed the defendant as he chased him through the house and out the rear door. Mr. Garner told the officers the intruder was wearing black boots above the ankles and a dark turtleneck sweater, and defendant was dressed in that fashion when first seen by Officer Poe at the Pay-Lo Service Station about 2:25 a.m. following defendant's report by telephone that he "had been rolled." Furthermore, Mr. Garner never at any time identified anyone else and promptly identified defendant by photograph and in person at the first opportunity. In light of all these circumstances, the trial judge found on voir dire "that the identification of the defendant in the courtroom was not based upon the photograph shown him at the hospital. . . ." This finding is sufficient to satisfy the *Simmons* test, even though it is not worded in the precise language used therein. *See State v. Jacobs,* 277 N.C. 151, 176 S.E. 2d 744 (1970); *State v. Accor and Moore,* 277 N.C. 65, 175 S.E. 2d 583 (1970). *Compare United States ex rel Schartner v. Pizzo,* 336 F. Supp. 1192 (M.D. Pa. 1972). The conclusion that the in-court identification was not based upon the photograph is tantamount to a conclusion that the in-court identification had an independent origin. It is this independent origin that, despite the impermissible suggestiveness of the photographic identification pro-

cedure, establishes the lack of a "very substantial likelihood of irreparable misidentification" required by *Simmons* for reversal. Therefore, the finding, being supported by competent evidence, is conclusive and must be upheld. *State v. Morris,* 279 N.C. 477, 183 S.E. 2d 634 (1971); *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966).

The competency of the testimony concerning Mr. Garner's photographic identification of defendant is another matter. "Quite different considerations are involved as to the admission of the testimony of the . . . witnesses . . . that they identified Gilbert at the lineup. That testimony is a direct result of the illegal lineup, 'come at by exploitation of [the primary] illegality,' *Wong Sun v. United States,* 371 U.S. 471, 488. The State is therefore not entitled to an opportunity to show that that testimony had an independent source. Only a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of counsel at the critical lineup." *Gilbert v. California,* 388 U.S. 263, 18 L.Ed. 2d 1178, 87 S.Ct. 1951 (1967).

[3] By analogy, the introduction of testimony concerning an out-of-court photographic identification must be excluded where, as here, the procedure used is impermissibly suggestive, even though that suggestiveness does not require exclusion of the in-court identification itself under the *Simmons* test. *See United States v. Fernandez,* 456 F. 2d 638, 641-42 (2d Cir. 1972). *Compare Foster v. California,* 394 U.S. 440, 22 L.Ed. 2d 402, 89 S.Ct. 1127 (1969).

[4] In the factual context of this case, although the showing of only one photograph to the victim accompanied by the statement "we've got a man, is this the one" was impermissibly suggestive and evidence thereof incompetent, we hold 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); *State v. Brinson,* 277 N.C. 286, 177 S.E. 2d 398 (1970). The unequivocal in-court identification of defendant by Mr. Garner, the presence of defendant's jacket in Mr. Garner's bedroom containing a letter addressed to the defendant, a certified birth certificate of defendant, and a Selective Service notice of classification bearing defendant's name, and the fact that the description of defendant's clothing given by Mr. Garner to the

police was substantially similar to the actual clothing defendant was wearing when seen by Officer Poe about one hour after the burglary, constitutes evidence of guilt so overwhelming that, in our opinion, the impact of the photographic identification on the minds of the jurors was insignificant. Unless there is a reasonable possibility that the erroneously admitted evidence might have contributed to the conviction, its admission constitutes harmless error. *Fahy v. Connecticut,* 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229 (1963); *State v. Taylor,* 280 N.C. 273, 185 S.E. 2d 677 (1972); *State v. Smith,* 278 N.C. 476, 180 S.E. 2d 7 (1971). No such possibility arises on the evidence here. "In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of [the improperly admitted evidence] is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the [incompetent evidence] was harmless error." *Schneble v. Florida,* 405 U.S. 427, 31 L.Ed. 2d 340, 92 S.Ct. 1056 (1972). *See also, Harrington v. California,* 395 U.S. 250, 23 L.Ed. 2d 284, 89 S.Ct. 1726 (1969); *State v. Swaney,* 277 N.C. 602, 178 S.E. 2d 399 (1971).

Defendant's first assignment of error is overruled.

[5] Following defendant's testimony, the State was permitted, over defendant's objection, to examine Officer Mason as a rebuttal witness. This officer testified that he and Detective Boyce examined the area surrounding the Garner residence and observed footprints leading from the house. "[T]hey were a narrow pigeon-toed shoe. They came from the back of the house around the west side and to the north in the direction of Austin down to Third, we found them again on Third Street, we lost them some few feet and picked them up again. We tracked those tracks on Third Street in two or three different areas in the direction of Sanford Tobacco Company Storage Warehouses, we picked up a similar track and it proceeded to a creek, across the creek on an iron pipe, picked it up on the other side of the creek and proceeded to the railroad tracks and lost them again. The railroad tracks lead to Jonesboro. . . . From the point where we last saw the pointed foot tracks from the Pay-Lo Station in Jonesboro is between a quarter and a half a mile." Officer Mason said these footprints were "similar" to Defendant's Exhibit 1, the boots defendant had on when Officer Poe saw him at the Pay-Lo Service Station about one

hour after the burglary was committed. They were muddy at that time. Defendant contends this evidence should have been offered by the State, if at all, while making out its case in chief and should not have been admitted as rebuttal evidence. This is the basis for defendant's second assignment of error.

In our opinion Officer Mason's testimony may properly be considered as rebuttal evidence. Defendant's testimony makes it so. He said he was elsewhere when the crime was committed and had never been in Mr. Garner's residence. Yet the footprints leading from the Garner residence were "similar" to the boots defendant was wearing one hour after the burglary, and the boots were muddy. The tracks traversed muddy ground and were followed to a point at the railroad near the Pay-Lo Service Station where defendant made his telephone call. Obviously this tends to rebut defendant's evidence.

But if it be conceded *arguendo* that Officer Mason's testimony would have been properly admissible on the State's case in chief, it was not error to admit it on rebuttal. The order of proof is a rule of practice resting in the sound discretion of the trial court. *State v. Thomas*, 244 N.C. 212, 93 S.E. 2d 63 (1956). "The court, to attain the ends of justice, may in its discretion allow the examination of witnesses at any stage of the trial." *State v. King*, 84 N.C. 737 (1881). The following quotation from American Jurisprudence accurately states the majority rule: "While as a general proposition evidence offered by the prosecution in rebuttal in a criminal case must relate directly to the subject matter of the defense and ought not to consist of new matter unconnected with the defense and not tending to controvert or dispute it, this principle is intended to promote and not to defeat justice, and it is accordingly held by the great weight of authority that the admission in a criminal prosecution of evidence as a part of the rebuttal, when such evidence would have been properly admissible in chief, rests in the sound discretion of the trial judge and will not be interfered with in the absence of gross abuse of that discretion." 53 Am. Jur., Trial, § 129. *Accord*, 88 C.J.S., Trial, § 102. *Compare State v. Anderson*, 281 N.C. 261, 188 S.E. 2d 336 (1972).

Defendant's second assignment has no merit and is overruled.

Defendant's remaining assignments relate to inconsequential matters in the charge of the court, *e.g.*, referring to the occupancy of the house "by the Garners" instead of by "Ervin Garner" as alleged in the bill of indictment, and one isolated instance when the court failed to repeat the expression "beyond a reasonable doubt," although the jury had been fully instructed on the quantum of proof. A review of these assignments impels the conclusion that the matters complained of were not prejudicial. Discussion of them is not warranted.

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

No error.

THOMAS B. McNAIR v. EDWARD LEE BOYETTE AND OSCAR LEE HALL

No. 34

(Filed 15 November 1972)

1. **Rules of Civil Procedure § 56— summary judgment — applicability to two types of cases**

The two types of cases in which summary judgment may be granted are those where a claim or defense is utterly baseless in fact and those where only a question of law on the indisputable facts is in controversy and it can be appropriately decided without full exposure of trial.

2. **Automobiles § 50; Negligence §§ 29, 30— undisputed facts — summary judgment proper**

Where plaintiff and defendant in a personal injury case arising from an automobile accident were in agreement as to all facts concerning the manner in which plaintiff was injured, only a question of law with respect to defendant's negligence was left for the court to determine; therefore, the trial court properly entertained defendant's motion for summary judgment.

3. **Automobiles §§ 50, 87; Negligence §§ 10, 29, 30— automobile collision — insulating negligence — foreseeability — granting of summary judgment proper**

Where plaintiff stopped to render aid at the scene of an automobile collision between defendant Boyette and one Fowlkes and in so doing crossed a high-speed highway where the traffic was heavy in order to borrow a flashlight with which to direct traffic, and where plaintiff was struck by defendant Hall's car as he attempted to

recross the highway, defendant Boyette's negligence, if any, was not the proximate cause of plaintiff's injury, but was insulated by the negligence, if any, of defendant Hall; therefore, the trial court properly granted defendant Boyette's motion for summary judgment.

4. **Automobiles § 72; Negligence § 17— rescue doctrine — inapplicable where no injuries sustained**

The "rescue doctrine" was not applicable in this personal injury action where plaintiff sustained his injuries while making preparations to direct traffic and not while attempting to rescue occupants of the vehicles involved in the collision.

APPEAL by plaintiff pursuant to G.S. 7A-30(2) from the decision of the North Carolina Court of Appeals (15 N. C. App. 69, 189 S.E. 2d 590 (1972)) affirming the judgment of *Braswell, J.*, at the November 15, 1971 Civil Session of WAKE Superior Court.

Plaintiff seeks to recover $500,000 for personal injuries allegedly sustained as the result of the joint and concurring negligence of defendants in the operation of automobiles owned and operated by them on 24 December 1969.

Plaintiff alleged that defendant Edward Lee Boyette was negligent in the following particulars:

"(a) He drove his vehicle on a public highway of North Carolina at a very high rate of speed, far in excess of the posted speed limit of sixty (60) miles an hour and in violation of GS Secs 20-141.

"(b) He drove his vehicle on a public highway of North Carolina in a criminally negligent manner without due caution and circumspection, weaving from one lane to another in an erratic manner and far in excess of the posted speed limit, endangering the person and property of the plaintiff and other persons then using the aforesaid highway in the vicinity of the Boyette vehicle, and amounting to careless and reckless driving in violation of GS Secs 20-140.

"(c) Upon information and belief, plaintiff alleges that he drove his vehicle upon a public highway of the State of North Carolina while he was under the influence of intoxicating liquor to the extent that his driving ability was materially impaired, in violation of GS Secs 20-138.

"(d) While his vehicle was stopped upon the aforesaid highway at a time more than a half hour after sunset and more than a half hour before sunrise and at a time when there was not sufficient light to render clearly discernible any person on the highway at a distance of 200 feet, he failed to display upon such vehicle one or more lamps projecting a white or amber light visible under normal atmospheric conditions from a distance of 500 feet to the front of such vehicle and projecting a red light visible under like conditions from a distance of 500 feet to the rear of such vehicle, in violation of GS Secs 20-134.

"(e) He negligently permitted his automobile to block the traveled portion of the aforesaid highway, in violation of North Carolina law.

"(f) He negligently failed to warn others using the highway of a dangerous condition he had created by leaving his automobile on the traveled portion of the highway when there was a duty upon him to so warn others using the highway, in violation of the laws of the State of North Carolina."

Plaintiff alleged that defendant Oscar Lee Hall was negligent in that:

"(a) He failed to reduce his speed when a special hazard existed on the highway, to wit: when the Boyette and Fowlkes vehicles wholly blocked the right lane of travel and partially blocked the left lane of travel and when the plaintiff (a pedestrian) was standing in the blocked right lane shining a flashlight in the direction of defendant, Oscar Lee Hall, to warn motorists of the special hazard, and when several cars were stopped in the left lane of travel with their emergency flashers blinking, and such failure to reduce speed was in violation of GS Secs 20-141(c).

"(b) He operated his vehicle upon the aforesaid highway at a speed greater than was reasonable and prudent under the conditions then existing, in violation of GS Secs 20-141(a).

"(c) He failed to keep a proper lookout, in violation of North Carolina law.

"(d) He failed to stop his vehicle when he saw or should have seen the plaintiff (a pedestrian) on the highway, in violation of GS Secs 20-141(c).

"(e) He failed to stop his vehicle within the radius of the lights thereof or within the range of his vision, in violation of GS Secs 20-141(e)."

Defendants denied that they were negligent, and pleaded contributory negligence on the part of plaintiff. Defendant Boyette further alleged that his negligence, if any, had ceased to operate and was passive when plaintiff was struck by defendant Hall's car, and Boyette specifically pleaded Hall's intervening negligence in bar of plaintiff's right to recover.

The evidence of the plaintiff as set out in his deposition and affidavit tends to show: On 24 December 1969 plaintiff was driving northeasterly on the Raleigh Beltline (a four-lane highway, with two lanes of travel in each direction separated by a grass median) between the Raleigh-Durham exit (U.S. 70) and the North Hills exit when a Buick automobile, owned and operated by defendant Boyette, passed him at an extremely high rate of speed. After the Buick passed, plaintiff observed that car collide with another automobile, owned and operated by Edward Bynum Fowlkes, Sr., near the North Hills exit. The two wrecked cars blocked the right-hand lane and partially blocked the left-hand lane of travel on the Beltline. Plaintiff was a member of the Durham Community Watch, a voluntary organization created to assist governmental officials in the event of emergencies, and his car was equipped with a two-way radio. Plaintiff called his partner on the radio informing him of the accident, instructing him to call the police, and requesting that he stand by in the event an ambulance was necessary. He then pulled his vehicle onto the median, turned his four-way flasher on, and crossed the highway to determine if anyone was hurt. He found that no one was injured and reported that fact to the other radio operator. In the interim several other cars had approached the scene of the accident and some congestion had occurred. Plaintiff stopped several cars by waving his arms and advised them to turn on their four-way flashing lights. He observed other cars pull onto the median and pass the wreck with difficulty. Plaintiff crossed the highway from his parked car and obtained a flashlight from one of the cars that had stopped on the right shoulder. As he

turned and stepped back on the highway to cross, he was struck by a vehicle driven by defendant Oscar Lee Hall. The impact threw plaintiff some 30 feet into the air and severely injured him.

On 28 October 1971 Boyette moved for summary judgment. This motion was heard by Judge Braswell on the pleadings, the motion for summary judgment, the deposition of plaintiff taken on 2 September 1971, and the affidavit of plaintiff dated 15 November 1971. Judge Braswell found from these that there was no genuine issue of fact to be tried, granted Boyette's motion, and dismissed the action as to him.

From the entry of summary judgment in favor of defendant Boyette, plaintiff appealed to the North Carolina Court of Appeals. That court in an opinion by Judge Campbell, concurred in by Chief Judge Mallard, affirmed. Judge Britt dissented.

Twiggs & McCain by Howard F. Twiggs and Grover C. McCain, Jr.; Yarborough, Blanchard, Tucker & Denson by Charles F. Blanchard and James E. Cline for plaintiff appellant.

Maupin, Taylor & Ellis by Armistead J. Maupin for defendant Boyette, appellee.

MOORE, Justice.

Plaintiff assigns as error the signing and granting of summary judgment for defendant Boyette contending that there is a genuine issue as to defendant Boyette's negligence being a proximate cause of plaintiff's injuries.

The rules for granting summary judgment under Rule 56 of the North Carolina Rules of Civil Procedure (G.S. 1A-1) have been fully discussed in recent decisions of this Court. *Koontz v. City of Winston-Salem,* 280 N.C. 513, 186 S.E. 2d 897 (1972); *Singleton v. Stewart,* 280 N.C. 460, 186 S.E. 2d 400 (1972); *Harrison Associates v. State Ports Authority,* 280 N.C. 251, 185 S.E. 2d 793 (1971); *Kessing v. Mortgage Corp.,* 278 N.C. 523, 180 S.E. 2d 823 (1971). It is, therefore, only necessary to briefly review the pertinent rules of law applicable to entry of summary judgment under that rule.

[1] Rule 56 is not limited in its application to any particular type or types of action, and the procedures are available to both plaintiff and defendant. The purpose of summary judg-

ment can be summarized as being a device to bring litigation to an early decision on the merits without the delay and expense of a trial where it can be readily demonstrated that no material facts are in issue. Two types of cases are involved: (a) Those where a claim or defense is utterly baseless in fact, and (b) those where only a question of law on the indisputable facts is in controversy and it can be appropriately decided without full exposure of trial.

The standard for summary judgment is fixed by Rule 56(c). "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." See 2 McIntosh, N.C. Practice and Procedure §§ 1660.5 and 1660.10 (2d Ed., Phillips' Supp. 1970); 3 Barron and Holtzoff, Federal Practice and Procedure §§ 1234 and 1236 (Wright Ed., (1958)); Gordon, *The New Summary Judgment Rule in North Carolina*, 5 Wake Forest Intra. L. Rev. 87 (1969).

"The determination of what constitutes a 'genuine issue as to any material fact' is often difficult. It has been said that an issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail. A question of fact which is immaterial does not preclude summary judgment. It has been said that a genuine issue is one which can be maintained by substantial evidence. Where the pleadings or proof of either party disclose that no cause of action or defense exists, a summary judgment may be granted. . . . " 3 Barron and Holtzoff, supra, § 1234; *Koontz v. City of Winston-Salem, supra; Singleton v. Stewart, supra; Harrison Associates v. State Ports Authority, supra; Kessing v. Mortgage Corp., supra.*

[2] A careful review of the record in the instant case reveals that, conceding defendant Boyette's negligence, plaintiff and defendant Boyette are in agreement as to all the factual particulars concerning the manner in which the plaintiff was injured. There was no "genuine issue as to any material fact." The effect of the undisputed facts was a question of law for the court to determine. 3 Barron and Holtzoff, supra, § 1231; *Koontz v.*

City of Winston-Salem, supra; Singleton v. Stewart, supra; Harrison Associates v. State Ports Authority, supra; Kessing v. Mortgage Corp., supra. The issue then becomes: Did the trial court correctly determine the question of law involved?

In an action for recovery of damages for injury resulting from actionable negligence of defendant, plaintiff must show (1) that there has been a failure on the part of defendant to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff under the circumstances in which they were placed, and (2) that such negligent breach of duty was the proximate cause of the injury, a cause that produced the result in continuous sequence, and without which it would not have occurred, and one from which a man of ordinary prudence could have foreseen that such result was probable under the facts as they existed. *Moody v. Kersey,* 270 N.C. 614, 155 S.E. 2d 215 (1967); *Morris v. Transport Co.,* 235 N.C. 568, 70 S.E. 2d 845 (1952); *Godwin v. Nixon,* 236 N.C. 632, 74 S.E. 2d 24 (1952); 6 Strong, N.C. Index 2d, Negligence § 29.

Foreseeability of injury is an essential element of proximate cause. *Luther v. Asheville Contracting Co.,* 268 N.C. 636, 151 S.E. 2d 649 (1966). It is not required that the injury in the precise form in which it occurred should have been foreseeable but only that, in the exercise of reasonable care, consequences of a generally injurious nature might have been expected. *Williams v. Boulerice,* 268 N.C. 62, 149 S.E. 2d 590 (1966). However, the law requires only reasonable prevision and a defendant is not required to foresee events which are merely possible but only those which are reasonably foreseeable. *Bennett v. R. R.,* 245 N.C. 261, 96 S.E. 2d 31 (1956); 6 Strong, N.C. Index 2d, Negligence § 9.

What is negligence is a question of law, and when the facts are admitted or established, the court must say whether it does or does not exist. This rule extends and applies not only to the negligent breach of duty but also to the feature of proximate cause. *Hudson v. Transit Co.,* 250 N.C. 435, 108 S.E. 2d 900 (1959); *Godwin v. Nixon, supra;* 6 Strong, N.C. Index 2d, Negligence § 30.

Defendant Boyette denied that he was negligent as alleged by plaintiff, but alleged that his negligence, if any, was insulated by the negligence of defendant Hall.

The material facts are not in dispute. Conceding Boyette was negligent, was his negligence insulated by the alleged negligence of defendant Hall? In the leading case on insulated negligence in North Carolina, *Butner v. Spease* and *Spease v. Butner*, 217 N.C. 82, 6 S.E. 2d 808 (1939), Chief Justice Stacy stated:

> "This doctrine of insulating the negligence of one by the subsequent intervention of the active negligence of another really belongs to the definition of proximate cause. *Boyd v. R. R.*, 200 N.C. 324, 156 S.E. 507; *R. R. v. Kellogg*, 94 U.S. 469. The principle is stated in *Craver v. Cotton Mills*, 196 N.C. 330, 145 S.E. 570, as follows: 'While there may be more than one proximate cause, that which is new and entirely independent breaks the sequence of events and insulates the original or primary negligence.' *Lineberry v. R. R.*, 187 N.C. 786, 123 S.E. 1; *Thompson v. R. R.*, 195 N.C. 663, 143 S.E. 186.
>
> * * *
>
> " ' . . . The test . . . is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected.' *Harton v. Tel. Co.*, 141 N.C. 455, 54 S.E. 299. 'The law only requires reasonable foresight, and when the injury complained of is not reasonably foreseeable, in the exercise of due care, the party whose conduct is under investigation is not answerable therefor. Foreseeable injury is a requisite of proximate cause, and proximate cause is a requisite for actionable negligence, and actionable negligence is a requisite for recovery in an action for personal injury negligently inflicted.' *Osborne v. Coal Co.*, 207 N.C. 545, 177 S.E. 796; *Beach v. Patton, supra* [208 N.C. 134, 179 S.E. 446]."

In *Insurance Co. v. Stadiem*, 223 N.C. 49, 25 S.E. 2d 202 (1943), Chief Justice Stacy said:

> "In searching for the proximate cause of an event, the question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Do the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? *Milwaukee and St. P.*

Ry. Co. v. Kellogg, 94 U.S. 469, 24 L.Ed. 256. Many causes and effects may intervene between the original wrong and the final consequence, and if they might reasonably have been foreseen, the last result, as well as the first and every immediate consequence, is to be considered in law as the proximate cause of the original wrong. But when a new cause intervenes, which is not itself a consequence of the first wrongful cause, nor under the control of the original wrongdoer, nor foreseeable by him in the exercise of reasonable prevision, and except for which the final injurious consequence would not have happened, then such injurious consequence must be deemed too remote to constitute the basis of a cause of action against the original wrongdoer. *McGhee v. R. R., supra* [147 N.C. 142, 60 S.E. 912]; *Ramsbottom v. R. R.,* 138 N.C. 38, 50 S.E. 448."

In *Godwin v. Nixon,* 236 N.C. 632, 74 S.E. 2d 24 (1952), plaintiff was a passenger in a car driven by one of the codefendants. The driver of a truck owned by the other codefendant had parked the truck on the road in a negligent manner. The driver of the car in which plaintiff was riding drove his car into the parked truck injuring plaintiff. The Court held that the negligence of the truck driver in parking his truck was insulated by the negligence of the driver of the car in which plaintiff was a passenger. Justice Winborne (later Chief Justice), speaking for the Court, said:

" . . . On the other hand, it is manifest from the evidence that the injury of which plaintiff complains was 'independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person.' In so far as Nixon Brothers [owners of the truck] are concerned, there would have been no injury to plaintiff but for the intervening wrongful act, neglect or default of the driver of the automobile in which she was riding, in failing either to keep a proper lookout for hazards of the road, such as disabled vehicles, or, in the exercise of due care to keep his automobile under such control as to be able to stop within the range of his lights. . . . "

Accord, Clark v. Lambreth, 235 N.C. 578, 70 S.E. 2d 828 (1952); *Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88 (1937).

[3] Plaintiff's own affidavit and deposition, considered by the court in passing upon Boyette's motion for summary judgment,

disclose that plaintiff left a place of safety in the median, crossed a high-speed highway where the traffic was heavy, and borrowed a flashlight from the occupant of a car parked on the right shoulder. He then turned and took one step onto the traveled portion of the highway immediately in front of the oncoming vehicle driven by defendant Hall, was struck by Hall's car, and thereby sustained the injuries for which he seeks to recover damages from both Boyette and Hall. Under these facts, which as between plaintiff and Boyette on this motion must be taken as true, defendant Boyette's negligence, if any, was not a proximate cause of plaintiff's injuries. These facts, of course, have not been established in plaintiff's case against Hall.

Plaintiff, however, contends that Boyette is not entitled to summary judgment because the "rescue doctrine" is applicable to this case, citing *Britt v. Mangum,* 261 N.C. 250, 134 S.E. 2d 235 (1963). In that case a female defendant was operating her car in a negligent manner and was pinned under the vehicle when it overturned. Plaintiff was summoned from his house by another member of his family who had seen the accident. He lifted the automobile in order to free defendant's arm, got her out of the car, and took her into his home. Plaintiff alleged that he sustained substantial injuries in his effort to lift the vehicle. This Court held that the rescue doctrine was applicable under those facts. In *Britt,* Chief Justice Denny quotes with approval from *Norris v. R. R.,* 152 N.C. 505, 67 S.E. 1017 (1910).

> "'* * * (I)t is well established that when the life of a human being is suddenly subjected to imminent peril through another's negligence, either a comrade or a bystander may attempt to save it, and his conduct is not subjected to the same exacting rules which obtain under ordinary conditions; nor should contributory negligence on the part of the imperiled person be allowed, as a rule, to affect the question, * * * (W)hen one sees his fellow-man in such peril he is not required to pause and calculate as to court decisions, nor recall the last statute as to the burden of proof, but he is allowed to follow the promptings of a generous nature and extend help which the occasion requires; and his efforts will not be imputed to him for wrong, * * * unless his conduct is rash to the degree of

reckless; and all of them hold that full allowance must be made for the emergency presented.' "

See also *Alford v. Washington,* 238 N.C. 694, 78 S.E. 2d 915 (1953).

[4] The present case is factually distinguishable from *Britt v. Mangum, supra.* Plaintiff's deposition shows that he came upon the scene of the collision, investigated and found that no one was hurt in the collision, and that neither Boyette nor Fowlkes, the driver of the other car, needed rescuing. Thereafter, plaintiff crossed the highway to get a flashlight, not for the purpose of rescuing Boyette or other occupants of either car but apparently for the purpose of directing traffic, and after obtaining the flashlight he stepped into the highway without seeing defendant Hall's car until "just as he hit me." Under these facts, the rescue doctrine does not apply.

We do not pass upon plaintiff's contributory negligence as this issue may arise in subsequent litigation between plaintiff and defendant Hall.

For the reasons stated above the decision of the Court of Appeals is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. JOHN HENRY RUSSELL

No. 48

(Filed 15 November 1972)

Forgery § 2— indictment for forgery and uttering — description of check — "Same as above" — incorporation by reference permitted

Where, in an indictment for forgery of a check and uttering a forged check, the first count charging forgery set forth the contents of the check with exactitude, reference to the check in the uttering count "Same as above" was sufficient to conform with the requirements of G.S. 15-153 in that it identified the offense charged, enabled defendant to prepare for trial, protected him from double jeopardy, and allowed the court to pronounce sentence upon conviction.

APPEAL by defendant pursuant to G.S. 7A-30(2) from decision of the North Carolina Court of Appeals (15 N.C. App.

594, 190 S.E. 2d 414 (1972)) finding no error in defendant's conviction on two counts of uttering a forged check, before *Johnson, J.*, at the 14 February 1972 Criminal Session of ROWAN Superior Court.

Defendant was tried on two bills of indictment. Each indictment charged defendant with forgery and the uttering of a forged check. One check was for $28.34 and the other $28.43, both drawn on Daniel Construction Co., Inc. In each bill of indictment the check was copied in exact detail in the forgery count. The count for uttering in each bill referred to the check uttered as "same as above."

The State's evidence tends to show: In August 1971 the office of Daniel Construction Co., Inc., in Spencer, North Carolina, was broken into and some blank payroll check forms and a check-writing machine were stolen. On 22 September 1971 defendant presented a check drawn on the Daniel Construction Co., Inc., written on one of the stolen forms, to the What-a-Burger Number One, and the check was cashed by the manager of that business. In September 1971 defendant also presented a check drawn on the Daniel Construction Co., Inc., on one of the stolen forms, to Mrs. Ruby Smith, associated with Smith's Produce, who cashed it. Both of these checks bore the forged signature of Ard T. Robertson, purporting to be an officer of Daniel Construction Co., Inc.

Defendant pleaded not guilty. The jury returned verdicts of not guilty on the forgery counts and verdicts of guilty on the uttering counts.

From sentence imposed defendant appealed to the Court of Appeals. That court in an opinion by Judge Campbell, concurred in by Judge Britt, found no error. Chief Judge Mallard dissented.

Attorney General Robert Morgan and Staff Attorney Donald A. Davis for the State.

Burke & Donaldson by George L. Burke, Jr., for defendant appellant.

MOORE, Justice.

In the Court of Appeals defendant admitted that he could find no error in the record of the trial, but requested that the

verdicts and sentence imposed be set aside and a new trial granted.

The record contains no exception or assignment of error; however, defendant's appeal presents the question whether error appears on the face of the record proper. *State v. Ford,* 281 N.C. 62, 187 S.E. 2d 741 (1972); *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).

The Court of Appeals examined the record proper and found no error. Chief Judge Mallard dissented on the grounds that in an indictment containing several counts each count should be complete within itself, and that the indictments in this case are not sufficient to charge the offense of uttering a particular forged check.

There is substantial and competent evidence in the record indicating that defendant uttered and published the forged checks in question by offering them to the What-a-Burger and to Smith's Produce with knowledge of the falsity of the checks with the intent to defraud, and that he procured by means of these forged checks a total of $56.77 in merchandise and cash. This evidence was ample to support the verdicts and the judgment in this case. The sentence was within the statutory limits set forth in G.S. 14-120. The only question for decision involves the validity of the second count in each bill of indictment.

One bill of indictment is as follows:

> "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That John Henry Russell late of the County of Rowan on the 22nd day of September 1971 at and in the County aforesaid, unlawfully and feloniously, of his own head and imagination, did wittingly and falsely make, forge and counterfeit, and did wittingly assent to the falsely making, forging and counterfeiting a certain bank check which said forged bank check is as follows, that is to say:

Daniel Construction Co., Inc. 1396
Duke Construction 66-92
P. O. Box 146 531
Spencer, North Carolina 28159

Date September 22, 1971

Pay to the order of Jerry F. Allen $28.43

The sum of $28 and 43 cts. Dollars
Wachovia Bank and Trust Company, N.A.
Salisbury, North Carolina 28144

C1-1 Daniel Construction Co., Inc.
JBR 10-23-71 CNB Ard T. Robertson
36-E-2-90 0531 0092 7 050 082 0000002843
711108058 Q2 LF FBI Laboratory
Endorsed on back as follows: Jerry F. Allen
W - A - B

with intent to defraud, against the form and statute in such case made and provided, and against the peace and dignity of the State.

"AND THE JURORS AFORESAID, UPON THEIR OATH AFORESAID, DO FURTHER PRESENT, That the said John Henry Russell afterward, to wit, on the day and year aforesaid, at and in the County aforesaid, wittingly and unlawfully and feloniously did utter and publish as true a certain false, forged and counterfeited bank check is as follows, that is to say: Same as above—with intent to defraud he, the said John Henry Russell at the time he so uttered and published the said false, forged and counterfeited bank check then and there well knowing the same to be false, forged and counterfeited against the form of the statute in such case made and provided, and against the peace and dignity of the State."

The other bill of indictment is practically identical except for the amount and number of the check.

The purpose of an indictment "is (1) to give the defendant notice of the charge against him to the end that he may prepare his defense and to be in a position to plead former acquittal or

former conviction in the event he is again brought to trial for the same offense; (2) to enable the court to know what judgment to pronounce in case of conviction." *State v. Burton,* 243 N.C. 277, 90 S.E. 2d 390 (1955); *State v. Greer,* 238 N.C. 325, 77 S.E. 2d 917 (1953); *State v. Dorsett* and *State v. Yow,* 272 N.C. 227, 158 S.E. 2d 15 (1967).

G.S. 15-153 was enacted many years ago to simplify forms of indictment. (Chapter VI, 1811 Laws of North Carolina.) This statute provides that every criminal indictment is sufficient in form for all intents and purposes if it expresses the charge in a plain, intelligible, and explicit manner, and that an indictment shall not be quashed by reason of any informality or refinement if in the bill sufficient matters appear to enable the court to proceed to judgment.

In *State v. Whitley,* 208 N.C. 661, 182 S.E. 338 (1935), the defendant was convicted on the first count in a bill of indictment charging larceny and on the second count of receiving stolen goods knowing them to have been stolen. Chief Justice Stacy stated:

> "The next position taken by the defendants is, that the second count in the bill of indictment is fatally defective, in that the names of the defendants are not repeated in charging the *scienter. S. v. McCollum,* 181 N.C. 584, 107 S.E. 309; *S. v. May,* 132 N.C. 1020, 43 S.E. 819; *S. v. Phelps,* 65 N.C. 450. This is a refinement which the act of 1811, now C.S. 4623 [now G.S. 15-153], sought to remedy. *S. v. Parker,* 81 N.C. 531. It provides against quashal for informality if the charge be plain, intelligible, and explicit, and sufficient matter appear in the bill to enable the court to proceed to judgment. *S. v. Beal,* 199 N.C. 278, 154 S.E. 604. The exception is too attenuate. *S. v. Lemons,* 182 N.C. 828, 109 S.E. 27; *S. v. Francis,* 157 N.C. 612, 72 S.E. 1041.
>
> "Speaking to the subject in *S. v. Shade,* 115 N.C. 757, 20 S.E. 537, Avery, J., delivering the opinion of the Court, said: 'The trend of judicial decision and the tendency of legislation is towards the practical view that objections founded upon mere matter of form should not be considered by the courts unless there is reason to believe that a defendant has been misled by the form of the charge, or was not apprised by its terms of the nature of

> the offense which he was held to answer. Where the defendant thinks that an indictment . . . fails to impart information sufficiently specific as to the nature of the charge, he may before trial move the court to order that a bill of particulars be filed, and the court will not arrest the judgment after verdict where he attempts to reserve his fire until he takes first the chance of acquittal. *S. v. Brady,* 107 N.C. 826.' "

G.S. 15-153 has received a very liberal construction, *State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897 (1970); *State v. Carpenter,* 173 N.C. 767, 92 S.E. 373 (1917), and the quashing of indictments is not favored, *State v. Abernathy,* 265 N.C. 724, 145 S.E. 2d 2 (1965); *State v. Flowers,* 109 N.C. 841, 13 S.E. 718 (1891). However, this does not mean that an indictment may withstand such motion when an indispensable allegation of the charge is omitted. *State v. McBane,* 276 N.C. 60, 170 S.E. 2d 913 (1969); *State v. Scott,* 241 N.C. 178, 84 S.E. 2d 654 (1954).

In the present case, is the reference in the second count to the first count, wherein the check was fully described, sufficient to incorporate by reference essential information necessary to sustain the second count?

This exact question apparently has not been decided by this Court. However, in *State v. McKoy,* 265 N.C. 380, 144 S.E. 2d 46 (1965), it is said:

> "The second (larceny) count in the bill of indictment is fatally defective. While it alleges the larceny of '$60.00 in money,' it fails to designate in any manner the owner thereof or the person in possession thereof at the time of the alleged unlawful taking. The space in the printed form for the name of the owner is blank. *Moreover, the second (larceny) count contains no reference to the first (breaking and entering) count.* In an indictment containing several counts, each count should be complete in itself." (Emphasis ours.)

By implication this would seem to indicate that had there been a reference in the second count to the first count, the decision might have been otherwise.

In the absence of definitive authority in this jurisdiction, it is helpful to look to decisions in other jurisdictions. *Darden*

v. State, 29 Ga. App. 548, 116 S.E. 41 (1923), involved an indictment which contained counts of forgery and uttering a forged check. The first count charging forgery described the check in detail. The second count charging uttering a forged check stated in pertinent part:

> "'. . . did then and there unlawfully, falsely and fraudulently utter and publish as true the *above-described false and fraudulent, forged and altered paper.* . . .'"

The Court specifically approved the incorporation by reference in the second count.

In *Lee v. State,* 81 Ga. App. 829, 60 S.E. 2d 177 (1950), the Court said:

> ". . . It is also fundamental that where an indictment is in more than one count, each count must be complete within itself and plainly, fully and distinctly set out the crime alleged, although express reference from one count to another is allowable. . . ."

Accord, Pope v. State, 42 Ga. App. 680, 157 S.E. 211 (1931).

Cases from other jurisdictions not only approve the practice of incorporation by reference between counts in an indictment but indicate that this practice is a well-accepted rule of criminal procedure.

Martinez v. People, 163 Colo. 503, 431 P. 2d 765 (1967), states:

> ". . . There are many cases, however, which follow the time honored and basic rule that one count in an information may by proper reference incorporate, without repeating, the allegations more fully set forth in another count. . . ."

The Supreme Court of Illinois in *People v. Nelson,* 399 Ill. 132, 77 N.E. 2d 171 (1948), stated:

> ". . . The use of the term 'said' or 'aforesaid' in one count to refer to matter mentioned in a former count has long been recognized as sufficient to incorporate in the subsequent count those allegations of the former count to which such reference is made. . . ."

See also, *People v. Berndt,* 101 Ill. App. 2d 29, 242 N.E. 2d 273 (1968).

The Supreme Court of Maryland in *Beard v. State,* 216 Md. 302, 140 A. 2d 672 (1958), referred to the rule permitting incorporation by reference as "well-established." See, *Imbraguglia v. State,* 184 Md. 174, 40 A. 2d 329 (1944); *Cohen v. State,* 173 Md. 216, 195 A. 532 (1937).

In the Federal courts incorporation by reference is recognized by statute. Rule 7 of the Federal Rules of Criminal Procedure entitled "The Indictment and the Information" provides in pertinent part as follows:

> "(c) *Nature and Contents.* The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . . Allegations made in one count may be incorporated by reference in another count. . . ."

For an application of this statute, see *United States v. Shavin,* 287 F. 2d 647 (7th Cir. 1961). However, incorporation by reference in criminal indictments existed in the Federal courts long before the adoption of Rule 7(c). Orfield, Criminal Procedure Under the Federal Rules § 7:57 (1966). In its supervision of the Federal court system the United States Supreme Court approved incorporation by reference as early as 1893. *Burroughs v. United States,* 290 U.S. 534, 78 L.Ed. 484, 54 S.Ct. 287 (1934); *Crain v. United States,* 162 U.S. 625, 40 L.Ed. 1097, 16 S.Ct. 952 (1895); *Blitz v. United States,* 153 U.S. 308, 38 L.Ed. 725, 14 S.Ct. 924 (1893).

41 Am. Jur. 2d, Indictments and Informations § 75 (1968), states the rule as follows:

> ". . . It is a well-settled rule that one count in an indictment or information may, by proper reference to another count in the accusation, incorporate the latter by such reference, to avoid unnecessary repetition. . . ."

See also 42 C.J.S., Indictments and Informations § 154 (1944).

Defendant in the present case knew that he was being tried for uttering the checks described in the first counts of the bills of indictment. He knew that these were the same checks on which he had obtained cash and merchandise in the amount of $56.77, and he also knew that these were the same checks which had been forged on blanks stolen from Daniel Construction Co., Inc. Defendant was fully advised as to the charges

against him even though the second count was not as specific as it might have been. We do not encourage or approve carelessness in drafting bills of indictment; on the other hand we do not favor the practice of quashing an indictment or arresting a judgment for informalities which could not possibly have been prejudicial to the rights of defendant in the trial court.

Today criminal appeals are taken on the slightest pretext, often without justification and at public expense. Prosecutors should be extremely careful in drafting bills of indictment to avoid possibilities of error. The admonition given by Justice Clark (later Chief Justice) is even more pertinent today than when given some seventy-five years ago:

> "We do not, however, approve of the departure here made from the customary form of words used for charging this offense, though we hold that it does not vitiate the bill. It is passing strange that any prosecuting officer should by negligence or inadvertence depart, especially in so important a case, from the forms so long used, and run the risk of a grave miscarriage of justice and the throwing a heavy bill of cost upon the public by such carelessness. The accustomed and approved forms are accessible and should be followed by solicitors, till (as with murder, perjury and in some other instances) they are modified and simplified by statute. The Code, section 1183 [now G.S. 15-153], was enacted to prevent miscarriage of justice, but not to encourage prosecuting officers to try experiments with new forms, or to excuse them from the duty of ascertaining and following those which have been approved by long use or by statute. The object of the statute in disregarding refinements and informalities is to secure trials upon the merits, and solicitors will best serve that end by observing approved forms so as not to raise unnecessary questions as to what are refinements and informalities and what are indispensable allegations." *State v. Barnes,* 122 N.C. 1031, 1037-38, 29 S.E. 381, 383 (1898).

In the instant case a count for forgery and a count for uttering were contained in each bill of indictment. The description of the check contained in the first count, which was exact, was an integral part of each indictment. The second count expressly referred to that description. Unquestionably, it would have been preferable for the second count in each bill to have

again set out in detail the particular check involved or to have made the reference to the first count more detailed and specific. However, we believe the reference in the second count is sufficient to identify the offense charged, to enable defendant to prepare for trial, to protect him from double jeopardy, and to allow the court to pronounce sentence upon conviction. This meets the requirements of the statute. *State v. Burton, supra.*

For the reasons stated the decision of the Court of Appeals is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. BRIAN DOUGLAS EPPLEY AND ROBERT B. BLOCK, ALIAS JAMES E. BERCH

No. 22

(Filed 15 November 1972)

1. **Larceny § 5— possession of recently stolen property — evidence of guilt of larceny**

The defendant's possession of stolen goods soon after the theft is a circumstance tending to show the defendant is guilty of the larceny and, in the absence of an explanation or other circumstance tending to destroy the basis for the inference, evidence of such possession is sufficient to justify the denial of a motion for judgment of nonsuit on the charge of larceny.

2. **Burglary and Unlawful Breakings § 5— possession of recently stolen property — inference of guilt of breaking and entering**

Upon proof of larceny following a breaking and entering, the defendant's possession of the stolen articles soon after the theft will support an inference that he committed the breaking and entering.

3. **Burglary and Unlawful Breakings § 5; Larceny § 5— recent possession doctrine — sufficiency of possession**

Defendant need not have the stolen article in his hand, on his person or under his touch in order for the inferences from the possession of recently stolen property to arise, it being sufficient that he be in such physical proximity to it that he has the power to control it to the exclusion of others and that he has the intent to control it.

4. **Criminal Law § 161— abandonment of assignments of error**

Assignments of error not brought forward in defendant's petition for *certiorari* to the Court of Appeals or in his brief are deemed abandoned. Supreme Court Rule 28.

5. **Burglary and Unlawful Breakings § 4; Larceny § 6— joint possession of stolen goods**

Both defendants were in possession of stolen guns found by the arresting officer on the floor of the motor boat occupied by defendants at the time of their arrests where defendants were acting in concert in their occupancy and use of the motor boat and both had ready access to the guns, and the guns were properly seized as an incident of the arrests and were properly admitted as evidence against both defendants in a trial for breaking and entering and larceny.

6. **Criminal Law § 84; Searches and Seizures § 1— guns seized as incident of arrest — admissibility**

Guns seized as an incident of defendants' arrests were admissible in evidence in prosecutions for offenses different from that for which defendants were arrested when the guns were seized.

7. **Burglary and Unlawful Breakings § 4; Larceny § 6— stolen rifle not named in indictment — admissibility**

In a prosecution for breaking and entering a home and larceny of property therefrom, a rifle stolen from the home which was found in defendants' possession at the time of their arrests was properly admitted in evidence even though the larceny indictment did not list the rifle among the articles it alleged to have been stolen from the home.

8. **Criminal Law § 84; Searches and Seizures § 1— trespassers — standing to object to search**

Defendants had no standing to object to the search of a house they occupied as trespassers or to object to the introduction in evidence of the fruits of the search.

9. **Criminal Law § 84— lawfulness of search — failure to hold voir dire — trespassers**

The trial court did not err in terminating a *voir dire* on the lawfulness of a search and seizure and in overruling defendants' objection to the admission of the seized articles without hearing evidence and finding facts concerning the lawfulness of the search and seizure where defendants made it clear that their sole basis for objecting to the proposed evidence was that they were actually in possession of the house that was searched, rightfully or otherwise, and the trial court concluded that defendants were trespassers on the premises and had no standing to object to the search and seizure.

10. **Larceny § 7— ownership of stolen article — fatal variance**

Defendants' motion for judgment of nonsuit of a charge of larceny of a shotgun should have been allowed where the person named in the indictment as the owner of the shotgun identified it as an article taken from his home but testified that the gun was the property of his father.

ON appeal from and *certiorari* to the Court of Appeals to review its decision affirming sentences imposed by *McLean, J.*,

at the 9 August 1971 Session of MECKLENBURG upon convictions for felonious breaking and entering and for larceny after breaking and entering.

Each defendant was charged in four separate indictments with breaking and entering and with larceny after breaking and entering. At the insistence of the defendants all of the charges were consolidated for trial. Each defendant was found guilty on each charge in each indictment. Sentences were imposed in accordance with the verdicts.

The State's evidence was to the following effect:

In midafternoon on 8 April 1971, Robert Tatum, a State Wildlife Protector, in uniform, was on routine patrol by boat on Lake Wylie in Mecklenburg County. He observed the two defendants on an island upon which there was a single house. His attention was attracted by a motor boat which had been drawn up onto the shore through some bushes. Going to the island he observed about and within the house both defendants and Eppley's daughter and son. Eppley's son was in the house cooking pancakes. In response to Mr. Tatum's inquiry, Eppley stated that the boat on shore was not his but had been left there that morning by an unidentified man, who had then borrowed Eppley's boat to go for a repairman to work on the motor. Eppley exhibited his driver's license for identification purposes and said the island belonged to his uncle.

Thereupon, Mr. Tatum resumed his patrol of the lake. While so engaged, he saw both defendants and Eppley's son and daughter walking down to the boat on the island. Mr. Tatum, accompanied by Officer Edwards, then proceeded toward the island. Before he arrived the defendants had gotten the other boat into the water and started the motor. Block was operating it, Eppley standing in the bow with a pistol in his hand. Mr. Tatum ordered the defendants to stop. Thereupon, Block headed directly toward Mr. Tatum's boat at high speed. A collision was averted. The defendants then ran their boat into a dead end cove where Mr. Tatum hemmed them in and they stopped.

When the defendants' boat stopped, Eppley put his pistol in his belt. Mr. Tatum took the pistol from Eppley and also removed from the floor of the boat a loaded shotgun and a loaded rifle, which were admitted in evidence over objection. Mr. Tatum arrested Eppley for carrying a concealed weapon

and Block for unlawful operation of a motor boat and violation of wildlife laws.

Approximately three hours later, after carrying the defendants to jail and without a search warrant, Mr. Tatum and County Police Officer Catoe went back to the island and entered and searched the house. There was no one else then on the island and no other boats about it. They found in the house numerous articles, some of which were admitted in evidence over objection.

On April 5, the residence of James Carriker on the lake shore was broken and entered and various specified articles stolen therefrom. Some of the items found by the officers in the house on the island and introduced in evidence were identified by Mr. Carriker as among those taken from his residence. On April 4 or April 5, the cabin of Earl Bynum on Lake Wylie was broken and entered and a portable radio was stolen therefrom. A radio found in the house on the island and introduced in evidence was identified by Mr. Bynum as the one so taken from his cabin. Between April 3 and April 8, the cabin of James Shuman on Lake Wylie was broken and entered and a number of items were stolen therefrom. A drill found by the officers in the house on the island and introduced in evidence was identified by Mr. Shuman as one of the items so removed from his cabin. Between April 4 and April 11, the cabin of Robert L. Hendricks on Lake Wylie was broken and entered and numerous items of property were stolen therefrom. Several articles, not found on the island but at a camp site on the mainland and admitted in evidence, over objection, as to Block only, were identified by Mrs. Hendricks as being among those so removed from the Hendricks cabin.

Neither defendant elected to testify or offer other evidence in his own behalf.

At the close of all the evidence, motions for a judgment of nonsuit as to each defendant on each count in each indictment were made and denied.

The Court of Appeals held the defendants had no right to be on the island and in possession of the house and, therefore, had no standing to object to its search without a warrant. Consequently, it rejected the contention of the defendants that the articles found in the course of such search were erroneously

admitted in evidence over their objection. It likewise found no error in the admission into evidence of the rifle and shotgun found in the bottom of the boat at the time of the arrests and no error in the charge or in other rulings on the admissibility of evidence. The Court of Appeals concluded, however, that the evidence was insufficient to withstand the motions for a judgment of nonsuit in the indictments for breaking and entering the Hendricks cabin (one of the four in question) and for larceny therefrom. It, therefore, reversed the judgment against each defendant on those charges, but concluded there was no error in the judgments entered as to each defendant upon the indictments relating to the Carriker, Bynum and Shuman cabins.

Each defendant appealed on the ground of a substantial question arising under the Constitution of the United States and under the Constitution of the State of North Carolina by reason of the search of the house and boat and the seizure of the articles found therein. Each defendant also petitioned for the issuance of a writ of certiorari to the Court of Appeals to review its judgment with reference to other assignments of error.

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

Waggoner, Hasty & Kratt, by John H. Hasty, for defendant Eppley.

James J. Caldwell for defendant Block.

LAKE, Justice.

[1, 2] In these cases the State relies upon what is called the doctrine of recent possession. While inaccurately named, the doctrine is well established and was thus stated by Chief Justice Pearson in *State v. Graves,* 72 N.C. 482: "When goods are stolen, one found in possession so soon thereafter, that he could not have reasonably got the possession unless he had stolen them himself, the law presumes he was the thief." A better statement of the rule is that the defendant's possession of stolen goods soon after the theft is a circumstance tending to show the defendant is guilty of the larceny. See *State v. Hullen,* 133 N.C. 656, 45 S.E. 513. The burden of proof is not thereby shifted to the defendant and his failure to offer evidence to explain how the stolen article came into his possession does

not compel a conviction. In the absence of an explanation, or other circumstance tending to destroy the basis for the inference, evidence of such possession is sufficient, however, to justify the denial of a motion for judgment of nonsuit on the charge of larceny. The presumption or inference is to be considered by the jury along with other evidence in determining the defendant's guilt. *State v. Foster,* 268 N.C. 480, 151 S.E. 2d 62; *State v. Ramsey,* 241 N.C. 181, 84 S.E. 2d 807; *State v. Weinstein,* 224 N.C. 645, 31 S.E. 2d 920; *State v. Holbrook,* 223 N.C. 622, 27 S.E. 2d 725; *State v. Baker,* 213 N.C. 524, 196 S.E. 829. Upon proof of larceny following a breaking and entering, the defendant's possession of the stolen articles under such circumstances will also support an inference that he committed the breaking and entering. *State v. Jackson,* 274 N.C. 594, 164 S.E. 2d 369; *State v. Parker,* 268 N.C. 258, 150 S.E. 2d 428; *State v. Allison,* 265 N.C. 512, 144 S.E. 2d 578.

[3] The possession sufficient to give rise to such inference does not require that the defendant have the article in his hand, on his person or under his touch. It is sufficient that he be in such physical proximity to it that he has the power to control it to the exclusion of others and that he has the intent to control it. 72 C.J.S. 233-234; Lee, North Carolina Law of Personal Property 4; Brown on Personal Property, p. 21; Restatement of the Law, Torts, § 216; Black's Law Dictionary, Revised 4th Edition. One who has the requisite power to control and intent to control access to and use of a vehicle or a house has also the possession of the known contents thereof. *State v. Foster, supra,* p. 487; *State v. Harrington,* 176 N.C. 716, 96 S.E. 892; *State v. Johnson,* 60 N.C. 235.

[4] The trial judge gave the jury full instructions with reference to the inferences which the jury might draw from its finding that each defendant was in possession of recently stolen articles. The Court of Appeals correctly held there was no merit in the defendants' assignments of error concerning these instructions. Neither defendant has brought these assignments of error forward to this Court in his petition for certiorari or in his brief. They are, therefore, deemed abandoned. *State v. Greene,* 278 N.C. 649, 180 S.E. 2d 789; Rule 28, Rules of Practice in the Supreme Court of North Carolina.

[5] There was likewise no error in the admission in evidence, over objection, of the guns found by the arresting officer in

plain view on the floor of the motor boat occupied by both defendants, at the time of their arrests. All of the evidence supports the conclusion that the defendants were acting in concert in their occupancy and use of the motor boat. Eppley was standing in the bow of the boat with a pistol in hand. The loaded rifle and loaded shotgun were lying on the floor between the two front seats, within Eppley's easy reach. Block was operating the motor boat. Nothing in the record indicates that it was of such size that he did not have ready access to both guns. Both defendants were in possession of the guns. *State v. Frazier* and *State v. Givens,* 268 N.C. 249, 252, 150 S.E. 2d 431. They were properly seized by the arresting officer as an incident of the arrests, the lawfulness of which arrests is not questioned by either defendant.

In *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed. 2d 685, Mr. Justice Stewart, speaking for the Court said:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. * * * And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from which he might gain possession of a weapon or destructible evidence."

[6, 7] The guns so seized by the arresting officer were properly admitted in evidence though the present prosecutions are for offenses different from that for which the defendants were arrested at the time of the seizure of the guns. *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741; *State v. Haney,* 263 N.C. 816, 140 S.E. 2d 544; *State v. Grant,* 248 N.C. 341, 103 S.E. 2d 339. Both the shotgun and the rifle so seized were identified by Mr. Carriker as weapons which were in a closet in his home immediately prior to the breaking and entering thereof and which were missing immediately thereafter. It is immaterial,

in this connection, that the indictment for larceny from the Carriker home did not list this rifle among the articles it alleged to have been stolen therefrom. The defendants' possession of this rifle was competent evidence upon the charge of breaking and entering the Carriker home. In *State v. Willoughby,* 180 N.C. 676, 103 S.E. 903, the defendant was tried and convicted of breaking and entering and of larceny of certain goods from the building so broken and entered. Justice Allen, speaking for the Court, said:

> "It was competent for the prosecuting witness to give an account of all the goods lost from the store in order that the State might have the opportunity to trace some or all of the articles to the defendant."

See also *State v. Weinstein, supra.*

In *State v. Hullen, supra,* the defendant was indicted for breaking and entering a dwelling house and stealing a watch therefrom. The prosecuting witness was permitted to testify that his house was entered and several articles were taken and carried away therefrom, including a watch and a brown leather pocketbook with a silver fringe around the corners. Another witness was permitted to testify that shortly thereafter the defendant was seen in possession of such a pocketbook. The defendant contended that this evidence was incompetent because the pocketbook was not mentioned in the indictment. Justice Walker, speaking for the Court, said:

> "We also think the testimony of the witness Hill as to the leather pocketbook was competent. It related to a fact which the jury was entitled to consider with the other facts and circumstances in the case. * * *The evidence was introduced, not to convict the defendant of stealing the pocketbook, but for the purpose of showing his possession of one piece of the stolen property, tending to prove that he stole the articles described in the bill, which were taken at the same time. [Citations omitted.]
>
> "This Court has said that 'it is an established rule of evidence that when, on a trial for larceny, identity is in question, testimony is admissible to show that other property which had been stolen at the same time was also in the possession of the defendant when he had in his possession the property charged in the indictment.' *S. v. Weaver,* 104 N.C. 760; McClain Cr. Law, sec. 514."

[8] Both defendants assign as error the admission into evidence, over their objections, of the articles found by the officers in the house on the island. The officers had no search warrant and no one gave them permission to search the house. No one else was present when the search was conducted, the defendants being in jail. The undisputed evidence is that the island is owned by Duke Power Company and it had not given either of the defendants permission to occupy the island or the house. Thus, the defendants were trespassers. This does not alter the fact that they were, prior to their arrest, in actual possession of the house and its visible contents so as to permit the above mentioned inference that it was they who stole the articles found by the officers.

This Court has repeatedly held that one having no ownership interest in or possessory right to the premises or property of another has no standing to object to a search thereof to which the owner has consented. *State v. Ray,* 274 N.C. 556, 164 S.E. 2d 457; *State v. Craddock,* 272 N.C. 160, 158 S.E. 2d 25; *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506; cert. den., 384 U.S. 1020. The reason is thus stated by Chief Justice Parker in *State v. Craddock, supra:*

> "The immunity to unreasonable searches and seizures is a privilege personal to those whose rights thereunder have been infringed. They alone may invoke it against illegal searches and seizures."

The case of *Jones v. United States,* 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed. 2d 697, 78 A.L.R. 2d 233, relied upon by the defendants, does not support their position. There the Supreme Court of the United States held that one in possession of an apartment, with the permission of the owner or lessee thereof, has standing to object to an unlawful search of it and to the introduction in evidence of articles so found. The Court, speaking through Mr. Justice Frankfurter, said:

> "No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone *legitimately* on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. This would of course not avail those who, *by virtue of their wrongful presence,* cannot invoke the

privacy of the premises searched. As petitioner's testimony established Evans' [the owner of the apartment] consent to his presence in the apartment, he was entitled to have the merits of his motion to suppress adjudicated." (Emphasis added.)

Clearly, *Jones v. United States, supra,* does not extend the protection of the Fourth Amendment to trespassers. Annot., 78 A.L.R. 2d 246; Annot., 4 L.Ed. 2d 1999, 2012. Neither the Constitution of the United States nor the law of this State confers upon a mere intruder into the house of another the right of the owner to object to a search of it and so enable him to take possession of and use the house of another as a sanctuary within which to secrete stolen property. Such intruder has no right to privacy within such house. Consequently, he has no standing to object to the introduction of the fruits of a search of the house into evidence in his prosecution for the larceny thereof. See *United States v. Gregg,* 403 F. 2d 222 (6th Cir., 1968), affirmed without comment on this point, 394 U.S. 489, 89 S.Ct. 1134, 22 L.Ed. 2d 442, rehear. den., 395 U.S. 917.

[9] The defendants contend that the trial court erred in that it did not conduct a voir dire to determine the lawfulness of the search and seizure. Upon objection to the introduction into evidence of articles, on the ground that they were discovered by an unreasonable search and seizure, the proper procedure, assuming the objector has standing to raise the question, is for the court to excuse the jury and, in its absence, hear evidence upon the question of the legality of the search and seizure, to make findings of fact and thereon to determine the legality or illegality of the search and seizure. *State v. Pike,* 273 N.C. 102, 159 S.E. 2d 334.

In the present case, upon the objection to the introduction into evidence of the articles found in the house, the court sent the jury from the courtroom and commenced a voir dire. Upon ascertaining from counsel that neither defendant claimed an ownership interest in the house, the court concluded that neither defendant had standing to object to the introduction in evidence of the fruits of the search on the ground that the search was unlawful. The court thereupon overruled the objections to the introduction of the evidence without proceeding further with the voir dire. Upon the voir dire the defendants indicated no purpose to establish or claim any right to the possession of the

house. On the contrary, they made it clear that their sole basis for objecting to the proposed evidence was that they were actually in possession of the house, rightfully or otherwise. Under these circumstances, it was not error for the trial court to terminate the voir dire and overrule the objection without hearing evidence and finding facts concerning the lawfulness of the search and seizure.

The Court of Appeals reversed the judgments of the trial court as to each defendant, both on the breaking and entering charge and on the larceny charge with reference to the Hendricks cabin (Cases No. 71CR19784 and No. 71CR19775 in the superior court) on the ground that the motions for judgment of nonsuit should have been allowed in those cases. Consequently, those judgments are not now before us.

The Court of Appeals affirmed the judgments of the trial court as to each defendant, both upon the breaking and entering charge and upon the larceny charge with reference to the Carriker home (Superior Court Cases No. 71CR19371 and No. 71CR19364), the Bynum cabin (Superior Cases No. 71CR19785 and No. 71CR19776), and the Shuman cabin (Superior Court Cases No. 71CR19372 and No. 71CR19363). We affirm those determinations by the Court of Appeals, with the exception of the charges of larceny from the Carriker home (Superior Court Cases No. 71CR19371 and No. 71CR19364).

[10] Each indictment relating to the Carriker home charged the defendant named therein with the larceny of two shotguns "of the goods, chattels and moneys of the said James Ernest Carriker." James Ernest Carriker testified for the State. He identified one shotgun as an article taken from his home, but he testified that the gun was the property of his father. Though the testimony of this witness was to the effect that this gun was in the linen closet of his home immediately prior to the break-in, nothing in the evidence shows that this witness was a bailee of the shotgun or had any other property interest therein.

The allegation of ownership of the property described in a bill of indictment for larceny is material. If the proof shows that the article stolen was not the property of the person alleged in the indictment to be the owner of it, the variance is fatal and a motion for judgment of nonsuit should be allowed. *State v.*

Brown, 263 N.C. 786, 140 S.E. 2d 413; *State v. Law*, 227 N.C. 103, 40 S.E. 2d 699; *State v. Weinstein, supra.* Consequently, the motion of each defendant for judgment of nonsuit as to the count charging him with larceny from the Carriker home should have been granted. This does not affect the count in the same indictment charging him with breaking and entering the Carriker home with intent to commit larceny therein.

We find no error in the judgment of the Court of Appeals with respect to Superior Court Cases No. 71CR19372 (defendant Eppley), No. 71CR19785 (defendant Eppley), No. 71CR19363 (defendant Block), and No. 71CR19776 (defendant Block).

We find no error in the judgment of the Court of Appeals in Superior Court Case No. 71CR19371 (defendant Eppley) with respect to the sentence imposed upon the charge of breaking and entering.

We find no error in the judgment of the Court of Appeals in Superior Court Case No. 71CR19364 (defendant Block) with respect to the sentence imposed upon the charge of breaking and entering.

The judgment of the Court of Appeals in Superior Court Case No. 71CR19371 (defendant Eppley) is reversed in respect to the sentence imposed upon the charge of larceny.

The judgment of the Court of Appeals in Superior Court Case No. 71CR19364 (defendant Block) is reversed in respect to the sentence imposed upon the charge of larceny.

The matter is, therefore, remanded to the Court of Appeals with direction that it enter its judgment reversing the judgment of the superior court in Superior Court Case No. 71CR19371 (defendant Eppley) with respect to the sentence imposed upon the charge of larceny and reversing the judgment of the superior court in Superior Court Case No. 71CR19364 (defendant Block) with respect to the sentence imposed upon the charge of larceny.

Reversed in part and remanded.

BUILDERS SUPPLIES COMPANY OF GOLDSBORO, NORTH CAROLINA, INC. v. NORWOOD A. GAINEY

No. 42

(Filed 15 November 1972)

1. **Appeal and Error § 21— denial of certiorari — not approval of reasoning of Court of Appeals**

Supreme Court's denial of a writ of certiorari to the Court of Appeals does not constitute approval of the reasoning upon which the Court of Appeals reached its decision.

2. **Easements § 1— easement defined**

An easement is a right to make some use of land owned by another without taking a part thereof.

3. **Deeds § 14; Easements § 2— profit a prendre defined**

A *profit a prendre* is the right to enter upon the land of another and take therefrom some part or product thereof, game and fish being considered a part or product of the land for this purpose.

4. **Easements § 2— grant of profit a prendre — granting same right to others**

The grant of a *profit a prendre* customarily does not preclude the grantor from exercising a like right upon the land or granting such right to others also.

5. **Easements § 2; Deeds § 12— profit a prendre — conveyance of present estate**

The grant of a *profit a prendre* is to be distinguished from a conveyance of a present estate in such material in its natural state upon the land, such as a timber deed or a deed to unmined minerals.

6. **Easements § 2; Deeds § 12— profit a prendre or present estate — intent of the parties**

The intent of the parties, when read in the light of surrounding circumstances known to the parties, determines whether a conveyance is a grant of a *profit a prendre* or a grant of a present estate in the designated portion of the grantor's land, assuming the sufficiency of the deed otherwise.

7. **Deeds §§ 12, 14; Mines and Minerals § 1— timber, minerals, sand and gravel — present conveyance or reservation**

The owner of land may make a present conveyance or reservation of standing timber, unmined minerals and other identifiable substances constituting parts of the land, including sand and gravel.

8. **Easements § 2; Deeds § 14— reservation of right to remove sand and gravel — fee simple estate**

In reserving in a deed conveying 331 acres "the right to lay out and stake off 35 acres of the above described land wherever it desires and to take therefrom all sand, gravel and sand and gravel it so de-

sires," the grantor did not intend to reserve a *profit a prendre* but intended to reserve a fee simple estate in the sand and gravel upon a tract of 35 acres to be selected by the grantor within the larger tract conveyed.

9. **Deeds § 1— undescribed tract within described larger tract — time of passage of title**

A deed purporting to convey an undescribed smaller tract contained within a described larger tract, with the grantee being authorized to locate such smaller tract, does not pass title until the selection is made, the grantee having prior to that time, at the most, a contractual right to acquire title.

10. **Equity § 2; Mines and Minerals § 1— unmined minerals — contractual right — laches**

While the owner of a vested estate in unmined minerals or like substances does not lose such rights by a mere nonuser, one who has only a contractual right to acquire such an estate may be barred by laches from enforcing it.

11. **Equity § 2— laches defined**

Laches is the negligent omission for an unreasonable time to assert a right enforceable in equity.

12. **Deeds § 14; Equity § 2; Mines and Minerals § 1— reservation of right to remove sand and gravel — laches**

The trial court properly submitted to the jury an issue as to whether plaintiff was barred by laches to assert any claim under a reservation in a deed of the right to remove sand and gravel from 35 acres to be selected by the grantor from the 331 acres conveyed, where there was evidence tending to show that when defendant grantee requested the grantor to proceed to lay off the 35-acre tract, the grantor abandoned its claim to the sand and gravel by telling defendant that it did not want any of it and that the entire property was defendant's, that six more years passed before employees of plaintiff, a successor to the grantor, staked out the 35 acres, that another six years passed before plaintiff took any steps preparatory to the removal of sand and gravel from the property, and that defendant in the meantime cleared the land and removed therefrom much of the overburden, which work was necessary in order to have access to the sand and gravel thereunder.

ON *certiorari* to the Court of Appeals to review its judgment, reported in 14 N.C. App. 678, 189 S.E. 2d 657. This is an action to remove an alleged cloud upon the title of the plaintiff to sand and gravel upon a described tract of land in Wayne County. The plaintiff and the defendant claim through a common source, Bryan Rock & Sand Company, Inc., hereinafter called Bryan. In 1952, Bryan conveyed to the defendant and wife, she being now deceased, two tracts of land containing

223.5 acres and 107.5 acres, respectively, the deed containing the following provision:

> "The party of the first part expressly reserves the right to lay out and stake off 35 acres of the above described land wherever it desires and to take therefrom all sand, gravel and sand and gravel it so desires with the right of ingress, egress and regress over any part of said land for the purpose of removing said sand or gravel."

The plaintiff alleges that by mesne conveyances Bryan's right under the foregoing reservation passed to the plaintiff; that one of the plaintiff's predecessors in title caused a tract of 33.9 acres, within the two tracts so conveyed by Bryan to the defendant and wife, to be surveyed and staked off; and that the defendant refuses to permit the plaintiff to enter thereon and remove sand and gravel therefrom. The defendant's answer denies that the plaintiff is the owner of the sand and gravel; alleges that the defendant is the owner of the described land free and clear of all claims of the plaintiff; and by way of further answers, pleads the seven year statute of limitation, laches, estoppel and the nonassignability of whatever right Bryan reserved in its deed to the defendant and his wife.

The jury found the plaintiff is barred by laches to assert any claim to the sand and gravel located on the 33.9 acre tract and is not the owner of or entitled to remove said sand and gravel. The superior court thereupon entered judgment dismissing the plaintiff's action with prejudice and adjudging that the defendant is the owner of the land, free and clear from the reservation. The Court of Appeals affirmed.

The plaintiff offered in evidence the deed conveying the two larger tracts to Bryan in fee simple; the deed dated 18 April 1952 from Bryan to defendant and his wife, conveying these tracts to them in fee simple, as tenants by the entireties and containing the above quoted reservation; and the other mesne conveyances in the plaintiff's alleged chain of title to the right so reserved by Bryan. It was stipulated that the two tracts described in the deed from Bryan to the defendant and wife adjoined and that the 33.9 acre tract here in question is included within those two tracts.

The plaintiff also offered testimony to the following effect:

In 1958 or 1959, employees of a successor to Bryan, predecessor in title to the plaintiff, entered upon the land so conveyed by Bryan to the defendant and wife and surveyed and staked out a tract of approximately 35 acres contained therein. Thereafter, one of these employees, with the knowledge of the defendant and with no objection by him, from time to time inspected the 35 acre tract.

In 1964, the plaintiff acquired its interest in the sand and gravel upon this tract. In 1965, its employees went upon the land and, with the defendant's help, located some of the stakes placed in the course of the above mentioned survey, and made a second survey. The defendant made no objection to this second survey. In the meanwhile, the defendant had taken sand and gravel from the larger tracts "up to the line" of the tract so surveyed and staked off. Approximately each six months thereafter until 1967, an employee of the plaintiff inspected the tract. On these inspections he observed that trees had been cut, crops were growing on the tract so staked off and dirt had been removed therefrom. In 1967, the plaintiff's representative went upon the tract so surveyed and staked off, for the purpose of making test drillings. The defendant objected and the plaintiff's employee desisted. The plaintiff has never listed for taxation the rights it now claims in the sand and gravel.

The defendant's evidence was to the following effect:

The defendant has been in the sand and gravel business for eleven or twelve years. Prior to that time he was engaged in farming. In 1952, he purchased the two larger tracts, which include the land here in question, from Bryan. Soon thereafter, he requested Bryan's president and principal stockholder to "get this thing staked off." Bryan's president then expressed doubt that there was any sand and gravel on the property which Bryan could use in view of the extensive overburden on it. Before anything was done toward locating the 35 acre tract, Bryan's then president died. His successor, Mr. Bailey, a witness for the defendant, was then requested by the defendant to proceed with the location of the 35 acres, pursuant to the reservation in the deed. Mr. Bailey thereupon said to the defendant: "Norwood, I don't want any of it. There is not any of it any good to use whatsoever. It is yours." This conversation

occurred in 1952. Thereafter, the defendant cleared the land and built a road into it, the road running into the smaller tract here in question. In 1953 and thereafter, the defendant planted bean and corn crops on the 33.9 acre tract and then put it into grass for grazing purposes. He has grazed livestock on it each year since that time. He goes on the property daily. Since his conversation in 1952 or 1953 with Mr. Bailey, he has cleared and removed dirt from the tract in question and no one else has done so. Bryan was dissolved in 1953. In the process of dissolution it conveyed to a predecessor of the plaintiff all of its properties, including its rights under the foregoing reservation.

Mr. Bailey, former president of Bryan, testified for the defendant to the following effect: He became president of Bryan in 1953 and is familiar with the land here in question. After Bryan delivered the deed to the defendant in 1952, Bryan was to stake off some 35 acres of the property and decide whether it wanted this small tract. Following his becoming president of Bryan, Mr. Bailey caused an examination of the property to be made and thereupon advised the defendant that Bryan had checked the property thoroughly and had no more interest in it and, as far as Mr. Bailey was concerned, the property was the defendant's. Mr. Bailey was General Manager of Bryan's successor in interest until 1959. He did not direct its employees to go upon the land to stake out the smaller tract and has no knowledge of any such instructions.

At the conclusion of all the evidence, the plaintiff moved for a directed verdict in its favor. This motion was denied.

Smith and Everett, by James N. Smith, for plaintiff.

Taylor, Allen, Warren & Kerr, by John H. Kerr III for defendant.

LAKE, Justice.

[1] The first trial of this action in the superior court resulted in a judgment for the defendant upon a directed verdict. On appeal from that judgment, the Court of Appeals held the evidence presented at that trial was sufficient to withstand a motion for a directed verdict and granted a new trial. *Builders Supplies Co. v. Gainey,* 10 N.C. App. 364, 178 S.E. 2d 794. The Court of Appeals was then of the opinion that the reservation in the deed from Bryan to the defendant gave Bryan an ease-

ment, the exact location of which within the larger tract conveyed to the defendant could be fixed by Bryan within the rule of *Gas Co. v. Day,* 249 N.C. 482, 106 S.E. 2d 678, and *Borders v. Yarbrough,* 237 N.C. 540, 75 S.E. 2d 541. This Court denied certiorari. *Builders Supplies Co. v. Gainey,* 278 N.C. 300, 180 S.E. 2d 178. Such denial does not constitute approval of the reasoning upon which the Court of Appeals reached its decision. See: Concurring opinion by Mr. Justice Frankfurter in *Brown v. Allen,* 344 U.S. 443, 491, 73 S.Ct. 397, 439, 97 L.Ed. 469, 507; *State v. Case,* 268 N.C. 330, 150 S.E. 2d 509.

Upon the second trial in the superior court, the jury rendered a verdict in favor of the defendant, finding both (1) that the plaintiff is barred by laches from asserting any claim to the sand and gravel in question, and (2) that the plaintiff is not the owner of or entitled to remove such sand and gravel. The superior court thereupon entered judgment for the defendant and, upon appeal to it, the Court of Appeals found no error. *Builders Supplies Co. v. Gainey,* 14 N.C. App. 678, 189 S.E. 2d 657. Upon such second appeal, the Court of Appeals was of the opinion that the reservation in Bryan's deed to the defendant and his wife gave Bryan not an easement nor an interest in the sand and gravel in place upon the tract in question but a profit a prendre.

[2] We agree with the latter conclusion of the Court of Appeals that the right, if any, reserved by Bryan in its deed to the defendant and his wife was not an easement. An easement is a right to make some use of land owned by another without taking a part thereof. *Richfield Oil Co. v. Hercules Gasoline Co.,* 112 Cal. App. 431, 297 P. 73; Webster, Real Estate Law in North Carolina, §§ 270, 309; 25 AM. JUR. 2d, Easements, §§ 2, 4; 28 C.J.S., Easements, § 3; Black's Law Dictionary.

[3, 4] A profit a prendre, though similar to and sometimes called an easement, see Powell on Real Property, § 405, differs therefrom in that it is the right to enter upon the land of another and to take therefrom some part or product thereof, game and fish being considered a part or product of the land for this purpose. *Council v. Sanderlin,* 183 N.C. 253, 111 S.E. 365; Webster, Real Estate Law in North Carolina, § 309; 25 AM. JUR. 2d, Easements, § 4; 28 C.J.S., Easements, § 3f; Black's Law Dictionary. Profits a prendre are frequently called "rights of common." Webster, Real Estate Law in North Carolina, § 309;

25 AM. JUR. 2d, Easements, § 4. See also Powell on Real Property, § 417. Customarily, at least, the grant of a profit a prendre does not preclude the grantor from exercising a like right upon the land or granting such right to others also.

[5] The grant of a profit a prendre is to be distinguished from a conveyance of a present estate in such material in its natural state upon the land, such as a timber deed or a deed to unmined minerals. For example, the grant of a right to enter upon the grantor's land and cut and remove firewood therefrom for the grantee's own use would be a grant of a profit a prendre and would convey no present title to standing trees, whereas a deed to all the trees of a specified type and size upon a described tract of land would convey to the grantee the present title to such standing timber.

[6, 7] The intent of the parties, as disclosed by the conveyance, when read in the light of surrounding circumstances known to the parties, determines whether the conveyance is a grant of a profit a prendre or a grant of a present estate in the designated portion of the grantor's land, assuming the sufficiency of the deed otherwise. Annot., 66 A.L.R. 2d 978, 984. Unquestionably, the owner of land may, by a conveyance otherwise valid, convey a present estate in unmined minerals, retaining in himself the title to the other parts of his land, or may convey a present estate in such other parts of the land and retain in himself the title to the unmined minerals therein. *Vance v. Guy,* 223 N.C. 409, 27 S.E. 2d 117; *Hoilman v. Johnson,* 164 N.C. 268, 80 S.E. 249; *Outlaw v. Gray,* 163 N.C. 325, 79 S.E. 676. Similarly, he may make a present conveyance, or reservation, of standing timber. *Westmoreland v. Lowe,* 225 N.C. 553, 35 S.E. 2d 613. As is said in 54 AM. JUR. 2d, Mines and Minerals, § 103, the owner of land "can divide his estate horizontally as well as vertically, so that title to the surface vests in one person and title to the minerals in another." As illustrated by conveyances of growing timber, this is not due to any peculiar quality in mineral substances. We perceive no basis for distinguishing in this respect between minerals and growing timber on the one hand and other identifiable substances constituting parts of the land of the grantor.

Sand and gravel are no less capable of identification and separation from other portions of the land than are many mineral ores in their natural state in the earth. As the Court of

Appeals noted in its opinion, commercial gravel was said not to be a "mineral" in *Lillington Stone Co. v. Maxwell,* 203 N.C. 151, 165 S.E. 351, the question for decision being the right of the plaintiff to a refund of taxes paid on gasoline used in excavating gravel under a statute permitting such refund if the gasoline was used in the operation of "mining machinery." In 54 AM. JUR. 2d, Mines and Minerals, § 8, it is said, "Generally, on the ground that they do not possess exceptional qualities or value, but are only part of the soil itself, sand, gravel and clay are not considered minerals, although there is some contrary authority." The circumstance that these substances are not included within the term "minerals," as used in statutes regulating commercial mining or relating to taxation, does not preclude these substances from being the subject of a conveyance while embedded in the earth. Sand and gravel are included in the definition of "minerals" in the Mining Act of 1971. G.S. 74-49(6).

In *Outlaw v. Gray, supra,* the owner of land conveyed to the grantee, his heirs and assigns, "the right of entering in and upon the lands hereinafter described, for the purpose of searching for all marl deposits and fossil substance, and for taking and removing therefrom said marl and fossil substance which he may find embedded in the earth of the said lands, and for mining and quarrying operations for that purpose to any extent he may deem advisable, but not to hold possession of any part of the said lands for any other purpose whatsoever." This Court said: "It must be admitted that the deed is sufficient in form to convey a fee in the land itself, had that been the subject of conveyance. That being so, it is sufficient to convey a fee in the mineral deposits described in it."

[8] We are unable to distinguish *Outlaw v. Gray, supra,* from the case before us except that in that case the land, upon which the rights in question were to be exercised, was specifically described. Consequently, we conclude that the deed from Bryan to the defendant and wife was not intended to reserve a profit a prendre to Bryan but was intended to reserve in Bryan the fee simple estate in the sand and gravel upon a tract of 35 acres to be selected by Bryan within the larger tract conveyed. Had the reservation related to the entire tract conveyed to the defendant and wife, we think it unquestionable that the reservation would have been sufficient to retain in Bryan a transferable fee simple estate in the sand and gravel upon the land.

We turn, therefore, to the sufficiency of the description in the reservation of the land to which it relates. In *Cathey v. Lumber Company,* 151 N.C. 592, 66 S.E. 580, this Court, speaking through Justice Brown, said:

> "It is self-evident that a certain part of a whole cannot be set apart unless the part can be in some way identified. Therefore, where a grantor undertakes to convey a part of a tract of land, his conveyance must itself furnish the means by which the part can be located; otherwise his deed is void, for it is elementary that every deed of conveyance must set forth a subject-matter, either certain within itself or capable of being made certain by recurrence to something extrinsic to which the deed refers."

In *Katz v. Daughtrey,* 198 N.C. 393, 151 S.E. 879, Chief Justice Stacy, speaking for the Court, said:

> "That the deed is void for vagueness and uncertainty of description would seem to admit of no doubt. It fails to describe with certainty the property sought to be conveyed, and it contains no reference to anything extrinsic, which by recourse thereto is capable of making the description certain under the principle of *id certum est quod certum reddi potest.* [Citations omitted.]
>
> "The defendant's deed presumably attempts to convey twenty-five acres of a fifty-acre tract (though this may be doubted) without fixing the beginning point or any of the boundaries of the twenty-five acres. This is too vague and indefinite to admit of parol evidence to fit the description to the thing intended to be conveyed."

In *McDaris v. "T" Corporation,* 265 N.C. 298, 144 S.E. 2d 59, Justice Clifton Moore, speaking for the Court, said: " 'Parol evidence is admissible to fit the description to the land. G.S. 8-39. "Such evidence cannot, however, be used to enlarge the scope of the descriptive words." ' *Baldwin v. Hinton,* 243 N.C. 113, 90 S.E. 2d 316. The purpose of parol evidence is to fit the description to the property, not to create a description."

In *Gas Co. v. Day, supra,* and in *Borders v. Yarbrough, supra,* this Court sustained claims of easements on the basis of the well settled rule that where a grant of an easement of way does not locate the way upon the grantor's land, which land

is described sufficiently, a subsequent, actual location of the way upon the described tract by the grantee, acquiesced in by the owner of the servient estate, locates the way sufficiently to enable the courts to protect the right of the grantee therein.

Our research has disclosed no decision by this Court applying to grants of possessory interests in land the above mentioned rule applicable to the location of easements of way. In American Law of Property, § 8.21, it is said:

> "A possessory interest, as contrasted with an incorporeal interest, involves the exclusive possession of a certain space. Hence its creation requires the designation of the space to be occupied. An easement authorizes the limited use of land within space occupied by another. Its nature does not require the precise description of that space which the creation of a possessory interest does."

In Thompson on Real Property, § 3053, it is said:

> "A deed to a specified number of acres out of a larger tract with the right in the grantee to select the location of his acreage will be valid provided the grantee makes a selection. No title passes until the selection is made. The deed itself only gives the right to make the selection, and to enforce a conveyance of the land that may be chosen in the manner provided by the deed. Until a selection is made, the grantee's continuing right thereof will pass to subsequent grantees. A right given the vendee to select a definite number of acres of land out of a larger tract affords the means of rendering the description certain."

In *Harris v. Woodard,* 130 N.C. 580, 41 S.E. 790, Justice Clark, later Chief Justice, said:

> "Here there is no subject-matter which is either definite in itself or capable of being reduced to a certainty by recurrence to something to which the deed refers. No beginning point, nor directions, nor distances are given, *and there is nothing which authorizes any one to lay off the lines of any particular three acres* out of the forty in the tract, which tract is bounded by the parties named." (Emphasis added.)

[9] It is not necessary in the present case for us to decide whether the above mentioned rule with reference to the sub-

sequent location of an easement of way applies also to a deed which purports to convey an undescribed smaller tract contained within a described larger tract, the grantee being authorized to locate such smaller tract. In any event, as shown by the foregoing quotation from Thompson on Real Property, no title passes under such a deed until the selection is made. Prior to that time the grantee would have, at the most, a contractual right to acquire title.

[12] "[A]n executory written contract to sell or convey real property may be abandoned or canceled by mutual agreement orally expressed." *Scott v. Jordan,* 235 N.C. 244, 69 S.E. 2d 557. The undisputed evidence is that when the defendant requested Bryan to proceed to lay off the 35 acre tract to which its reservation related, Bryan, through its president, informed the defendant that it did not want any of it and, so far as Bryan was concerned, the entire property was the defendant's. At least six more years passed before employees of a successor to Bryan went upon the property and staked out a tract of approximately 35 acres. At least another six years passed before the plaintiff took any steps preparatory to the removal of sand and gravel from the property.

[10, 11] While the owner of a vested estate in unmined minerals, or like substances, does not lose such rights by a mere nonuser, *Hoilman v. Johnson, supra,* one who has only a contractual right to acquire such an estate may be barred by laches from enforcing it. Laches is the negligent omission for an unreasonable time to assert a right enforceable in equity. *Stell v. Trust Co.,* 223 N.C. 550, 27 S.E. 2d 524. "In equity, where lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim, the doctrine of laches will be applied. Hence, what delay will constitute laches depends upon the facts and circumstances of each case." *Teachey v. Gurley,* 214 N.C. 288, 199 S.E. 83.

In 58 C.J.S., Mines and Minerals, § 162, it is said:

> "Where the grantor reserves not the title but a mere equitable right to enter on the land and drill an oil well, such right may be barred by an unreasonable delay in exercising it; a party holding such an equitable right cannot delay its exercise until time shall demonstrate whether or

not its right is of sufficient value to warrant its exercise, but, on the contrary, the very fact that the property has increased in value during his delay is an important factor in invoking the doctrine of laches."

[12] We agree with the Court of Appeals that the evidence of abandonment by Bryan, followed by the long delay of the plaintiff, and those under whom it claims, in asserting its alleged right to take sand and gravel from the tract ultimately selected by it, coupled with evidence that the defendant had in the meantime cleared the land and removed therefrom much of the overburden, which work was necessary in order to have access to the sand and gravel thereunder, fully justified the submission to the jury of the issue of laches.

We find no error in the decision of the Court of Appeals which would justify a reversal thereof.

No error.

VARIETY THEATRES, INC., A NORTH CAROLINA CORPORATION v. CLEVELAND COUNTY, NORTH CAROLINA; HAYWOOD ALLEN, SHERIFF OF CLEVELAND COUNTY, NORTH CAROLINA, AND ALL HIS DEPUTIES AND BERRY LEE, CHIEF OF POLICE OF SHELBY, NORTH CAROLINA, AND ALL HIS POLICEMEN

No. 43

(Filed 15 November 1972)

1. **Statutes § 5— drive-in motion picture theaters — screens visible from highway — ordinance authorized by awkwardly worded session law**

A county ordinance prohibiting the operation of drive-in motion picture theaters so that the surface of the screen upon which pictures were projected was visible to any person operating a motor vehicle upon nearby streets or roads was authorized by session law, though that law was awkwardly worded.

2. **Constitutional Law §§ 11, 18— restrictive ordinance — freedom of speech — valid exercise of police power**

An ordinance regulating motion picture screens involved no censorship as it made no attempt to regulate what was shown on the screens, imposed no prior restraints on expressions of any kind, and abridged no freedom of speech or the press; rather, the ordinance was a valid police regulation enacted to further highway safety by eliminating the distractions and congestion caused by screens adjacent to and visible from the highway.

3. Constitutional Law § 20— equal protection — justifiable classification

A county ordinance regulating motion picture screens did not violate the equal protection clauses of State and Federal Constitutions where the ordinance applied uniformly to all members of the class affected and where the classification had a reasonable basis.

APPEAL by plaintiff under G.S. 7A-30(2) (1969) from the decision of the Court of Appeals affirming the judgment of *Fountain, J.*, at the 14 February 1972 Session of CLEVELAND.

Action instituted under G.S. 1-253 *et seq.* (1969) and G.S. 7A-245 (1969) to determine the validity of an ordinance.

Purporting to act under the authority of G.S. 153-9(55) (Supp. 1971) and N.C. Sess. Laws, Ch. 1062 (1971) (Ch. 1062), on 1 December 1971 the Board of Commissioners of Cleveland County enacted an ordinance (hereinafter referred to as "the ordinance"), which makes it unlawful for an operator of a drive-in theater "to establish, operate or maintain a theater screen in the vicinity of any public street or highway in such manner that the surface of such theater screen upon which pictures are being projected is visible to any person operating a motor vehicle upon such street or highway."

The preamble to the ordinance recites that its purpose is to abate "those nuisances on private property controlled by drive-in theaters" which would interfere with the safety of persons using public thoroughfares.

G.S. 153-9(55), in pertinent part, empowers the boards of commissioners of the several counties "[t]o adopt ordinances to prevent and abate nuisances, whether on public or private property; ordinances supervising, regulating, or suppressing or prohibiting in the interest of public morals, comfort, safety, convenience and welfare, public recreations, amusements, and entertainments, and all things detrimental to the public good; and ordinances in exercise of the general police power not inconsistent with the Constitution and laws of the State or the Constitution and laws of the United States." The section provides, however, that it does not "confer upon any county any power or authority (not now possessed by such county) relating to the regulation or control of vehicular or pedestrian traffic on streets and highways under the control of the State Highway Commission. . . . "

Chapter 1062 provides:

"Section 1. The Board of Commissioners of Cleveland County shall have authority under G.S. 153-9(55) to adopt ordinances regulating any drive-in motion picture theaters which are or shall be established, operated or maintained in the vicinity of any public street or highway in such manner that the surface of such theater screen upon which pictures are being projected is not visible to any person operating a motor vehicle upon such street or highway.

"Sec. 2. This act shall be in addition to any other authority granted by law."

Plaintiff owns and operates in Cleveland County the Skyvue Drive-In Theater. The theater's motion picture screen is visible from a public highway while motion pictures are being projected upon it. In this action, upon grounds specifically set forth in the complaint, plaintiff challenges the validity of the ordinance and seeks to enjoin enforcement.

At the trial, Judge Fountain heard the case upon facts agreed and adjudicated the validity of the ordinance. Upon appeal the Court of Appeals affirmed his judgment. 15 N.C. App. 512, 190 S.E. 2d 227 (1972). One member of the hearing panel dissented, and plaintiff appealed as a matter or right to this Court.

George S. Daly, Jr., for plaintiff appellant.

Horn, West & Horn for defendant appellees.

SHARP, Justice.

Plaintiff makes the following contentions: (1) The ordinance was enacted without legislative authority for Ch. 1062 empowers the county commissioners "to regulate theater screens only if 'not visible' to any person operating a motor vehicle upon any public street or highway." (2) The ordinance imposes an "unconstitutional prior restraint on speech" in violation of the First Amendment. (3) The ordinance violates the due process and equal protection clauses of the State and Federal Constitutions in that its classification of drive-in theaters as a traffic hazard is "irrational" and discriminatory.

[1] By its first contention, plaintiff seeks to take advantage of the inept language of Ch. 1062. While conceding that this

session law is a poor example of legislative draftsmanship, plaintiff's assertion that it gives power to regulate theater screens *only if not visible* to any motorist on a public thoroughfare is not to be taken seriously. In construing any statute or ordinance the court will avoid an interpretation which would lead to absurd results. *State v. Spencer,* 276 N.C. 535, 547, 173 S.E. 2d 765, 773 (1970); *Freeland v. Orange County,* 273 N.C. 452, 160 S.E. 2d 282 (1968).

The Court of Appeals correctly construed Ch. 1062 to authorize Cleveland County to adopt ordinances regulating drive-in motion picture theaters located near any public street or highway *to the end that* the surface of any screen upon which moving pictures are being projected shall not be visible to any motorist on a public thoroughfare. No doubt Ch. 1062 was enacted at the instance of some municipal official who preferred to point to specific rather than general authority for the ordinance or who may have misconstrued the proviso in G.S. 153-9(55). There was, however, no need for its enactment.

G.S. 153-9(55) provides plenary authority for the challenged ordinance. *City of Raleigh v. R. R. Co.,* 275 N.C. 454, 168 S.E. 2d 389 (1969); *State v. Scoggin,* 236 N.C. 1, 72 S.E. 2d 97 (1952). Thus, plaintiff's allegations that Ch. 1062 is proscribed by N.C. Const. art. II, § 24(1)(a) as a local act relating to the abatement of nuisances and that it "unconstitutionally attempts a standardless delegation of authority," raise moot questions.

[2] Plaintiff's second contention is equally indefensible. In support of its argument that the ordinance "effects an unconstitutional censorship" and "prevents a movie owner from broadcasting to the traveling public at large whatever nonobscene picture he wishes," plaintiff cites the following cases: *New York Times Co. v. United States,* 403 U.S. 713, 29 L.Ed. 2d 822, 91 S.Ct. 2140 (1971); *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 29 L.Ed. 2d 1, 91 S.Ct. 1575 (1971); *Blount v. Rizzi,* 400 U.S. 410, 27 L.Ed. 2d 498, 91 S.Ct. 423 (1971); *Shapiro v. Thompson,* 394 U.S. 618, 22 L.Ed. 2d 600, 89 S.Ct. 1322 (1969); *Carroll v. Commissioners of Princess Anne,* 393 U.S. 175, 21 L.Ed. 2d 325, 89 S.Ct. 347 (1968); *Freedman v. Maryland,* 380 U.S. 51, 13 L.Ed. 2d 649, 85 S.Ct. 734 (1965); *Bantam Books v. Sullivan,* 372 U.S. 58, 9 L.Ed.

2d 584, 83 S.Ct. 631 (1963); *Near v. Minnesota,* 283 U.S. 697, 75 L.Ed. 1357, 51 S.Ct. 625 (1931).

None of the cases cited above support plaintiff's contention; nor in our opinion, do they bear upon the validity of the ordinance. In *New York Times Co.,* the Supreme Court refused to enjoin two newspapers from publishing material which the executive branch of the government insisted should not, in the national interest, be published. *Organization for a Better Austin* pertained to an injunction against the peaceful distribution of informational pamphlets. *Blount* involved the constitutionality of a federal statute designed to deny the use of the mails to commercial distributions of obscene literature. *Shapiro* declared unconstitutional statutes denying welfare assistance to residents who had not resided in their respective jurisdictions for at least one year prior to their application. *Carroll* dealt with an injunction, issued without notice, which restrained the National State's Right's Party from holding public meetings. *Freedman* invalidated a statute which prohibited the showing of any motion pictures in the State of Maryland which had not been previously approved by the State Board of Censors. *Bantam Books* involved a statutory commission set up to examine and suppress publications which it deemed inimical to youth. *Near* invalidated a statute declaring the regular publication of a malicious, scandalous and defamatory newspaper to be a nuisance, abatable in injunctive proceedings unless the owner or publisher showed "that the truth was published with good motives and for justifiable ends."

The ordinance under consideration involves no censorship; it makes no attempt to regulate what is shown on the screen. It imposes no prior restraints on expressions of any kind, nor does it abridge freedom of speech or the press. In the interest of public safety it requires plaintiff to locate its screen so that the pictures and information projected upon it will not create a nocturnal traffic hazard. The First Amendment no more licenses such a hazard than it will "protect a man falsely shouting fire in a theater and causing a panic." *Schenck v. United States,* 249 U.S. 47, 52, 63 L.Ed. 473, 39 S.Ct. 247, 249 (1919).

In *Kovacs v. Cooper,* 336 U.S. 77, 93 L.Ed. 513, 69 S.Ct. 448 (1949), the Supreme Court upheld the right of a state legislature to bar sound trucks with broadcasts of public interest, amplified to a loud and raucous volume, from the public

ways of municipalities. The Court said: "City streets are recognized as a normal place for the exchange of ideas by speech or paper. But this does not mean the freedom is beyond all control. . . . On the business streets of cities . . . such distractions would be dangerous to traffic at all hours useful for the dissemination of information, and in the residential thoroughfares the quiet and tranquility so desirable for city dwellers would likewise be at the mercy of advocates of particular religious, social or political persuasions." *Id.* at 87, 93 L.Ed. at 522, 69 S.Ct. at 453.

The ordinance was enacted by the board of commissioners of Cleveland County to further highway safety by eliminating the distractions and congestion caused by a motion picture screen adjacent to and visible from the highway. The validity of a police regulation primarily depends on "whether it is reasonably calculated to accomplish a purpose falling within the legitimate scope of the police power, without burdening unduly the person or corporation affected." *Winston-Salem v. R. R.*, 248 N.C. 637, 642, 105 S.E. 2d 37, 41 (1958). The ordinance meets this test. It therefore withstands the due process attack.

[3] Plaintiff's contention that the ordinance violates the equal protection clauses of the State and Federal Constitutions is this: Many distractions "confront the nighttime motorist in modern neon America, from dual headlights to the thousand points of light that come from your friendly used car lot." The "singling out" of drive-in movies is violative of the equal protection clause. This contention is untenable.

Indubitably, in addition to having a reasonable relation to the evils sought to be remedied, an ordinance must affect alike all those in the same class and under similar conditions. However, an ordinance passed in the interest of public safety is not void as class legislation if it is made to apply uniformly to all members of the class affected and the classification has a reasonable basis. *Cheek v. City of Charlotte*, 273 N.C. 293, 160 S.E. 2d 18 (1968); *State v. Glidden Co.*, 228 N.C. 664, 46 S.E. 2d 860 (1948). *See also Williamson v. Lee Optical Co.*, 348 U.S. 483, 99 L.Ed. 563, 75 S.Ct. 461 (1955). It is clear to us that moving picture screens showing pictures visible to motorists on a public highway are a special hazard, justifying a special classification.

We hold that the ordinance is constitutional. The decision of the Court of Appeals is

Affirmed.

MATTIE H. BARNEY, ADMINISTRATRIX OF THE ESTATE OF BETTY C. HANDY, DECEASED v. NORTH CAROLINA STATE HIGHWAY COMMISSION

No. 58

(Filed 15 November 1972)

1. **State § 10— tort claim proceeding — findings of fact — conclusiveness on appeal**

A finding of fact by the Industrial Commission in a tort claim proceeding, other than a jurisdictional finding, is conclusive on appeal if there is any evidence in the record to support it; however, the Commission's designation of a declaration by it as a finding of fact is not conclusive.

2. **State § 10—tort claim proceeding — contributory negligence — appellate review**

Negligence and contributory negligence are mixed questions of law and fact and, upon appeal, the reviewing court must determine whether facts found by the Industrial Commission support its conclusion of contributory negligence.

3. **State § 8— tort claim proceeding — burden of proving contributory negligence**

The Industrial Commission erred as a matter of law in its "comment" that in order for a claimant to prevail in a proceeding under the Tort Claims Act, the claimant must show that he was not guilty of contributory negligence, since under G.S. 143-299.1 the defendant State agency has the burden of proving contributory negligence.

4. **Automobiles § 21— sudden emergency**

A driver of an automobile, faced with a sudden emergency, is not held to the best possible choice of a means to avoid a collision but is held only to the care reasonably to be expected of one suddenly confronted with such a situation.

5. **Automobiles § 19— assumption that another driver will yield right-of-way**

In the absence of anything which gives or should give an automobile driver notice to the contrary, he is entitled, even to the last moment, to assume and to act upon the assumption that the driver of another vehicle upon or about to enter a public highway will yield the right of way when required by law to do so.

6. State § 8— tort claim proceeding — collision with motor grader — no contributory negligence

In an action under the Tort Claims Act to recover for the death of plaintiff's intestate in a collision between the intestate's automobile and a Highway Commission motor grader, there was no evidence to support a finding of fact which, in turn, would support the conclusion that plaintiff's intestate was contributorily negligent by failing to keep a proper lookout, failing to keep her car under control or driving at an excessive speed, where all the evidence showed that the motor grader was backing slowly in the intestate's direction in the lane of traffic to her left or upon the shoulder on that side of the road, that it moved backward in an arc across the center line into the intestate's lane of travel where the accident occurred, and that the motor grader had not previously been in the intestate's lane, where the record shows nothing which should have indicated to the intestate that the driver of the motor grader was unaware of the approach of her vehicle or that he intended to cross over into her lane of travel until he suddenly did so, where the only evidence of the speed of the intestate's vehicle was that it left light skidmarks on the pavement beginning 33 feet before it was struck, and where the nature of the damage to the intestate's vehicle permits of no conclusion other than that the motor grader backed into and struck the intestate's vehicle as the intestate was attempting to avoid a collision by applying her brakes and driving onto the shoulder.

CERTIORARI to the Court of Appeals to review its decision, reported in 14 N.C. App. 740, 189 S.E. 2d 641, affirming the order of the North Carolina Industrial Commission denying the plaintiff's claim for damages for wrongful death.

The plaintiff, in due time and form, filed her claim with the Industrial Commission alleging that her intestate died as the result of injuries received on 24 February 1970, when her automobile was struck by a motor grader operated negligently by Joseph Marion Hall, an employee of the North Carolina State Highway Commission. The Highway Commission filed answer denying negligence by its employee and pleading contributory negligence of the plaintiff's intestate.

It was stipulated that the plaintiff's intestate, Mrs. Handy, died as the result of injuries sustained in the accident, that the motor grader was owned by the Highway Commission and was, at the time of the collision, operated by its employee, Joseph Marion Hall, in the course and scope of his employment.

Other material facts found by the Hearing Commissioner include the following (numbering by the Commissioner):

3. The speed limit on Highway 704 was 55 miles per hour. The road was dry.

5. The motor grader, weighing 25,000 pounds, eight feet wide, 28 feet long and painted bright yellow, was equipped with four amber blinking lights.

7. The operator of the motor grader was engaged in scraping and leveling the roadway and shoulders on State Road 1600 and in the intersection of that road with Highway 704. [This is a T intersection, with Highway 704 forming the top and Road No. 1600 forming the stem of the T. Highway 704 is a paved road, Road No. 1600 a dirt road.] In this operation a ridge of dirt had been pushed onto Highway 704. The operator was "in the motion of pushing this ridge of dirt off NC 704 onto State Road 1600 and leveling it, and was in the act of backing into NC 704. The rear of the motor grader crossed the center line of Highway 704 in an arcing or semi-circle position from west to east direction and the motor grader was then in a north-south position for entering State Road 1600. It took about 20 seconds to complete this movement. The motor grader operator felt a slight impact and then saw deceased's car in the ditch west of the motor grader, and went to the car and saw deceased, who was unconscious and made no statement."

8. "Before making the last back-up movement with the motor grader, the operator looked up and down Highway 704 and could see approximately one thousand feet in an easterly direction along straight road and approximately six hundred feet further into a slight curve, and seeing no one coming moved at a slow rate of speed. The motor grader's maximum speed in second gear is 20 miles per hour and from a starting position moves very slowly." [The plaintiff excepted to this finding.]

9. "Deceased, Betty C. Handy, was * * * traveling in a westerly direction * * *. The left front fender and wheel of deceased's car and the tire on the right rear wheel of the motor grader collided." [Plaintiff excepted to this finding.]

10. "The motor grader was completely in the left lane [Mrs. Handy's left] or on the south side of Highway 704 immediately before the impact and the right rear wheel was approximately seven feet over the center line to the north when it came to a complete stop after the impact, but had rolled back two or three feet of said seven feet from the point of im-

pact and the debris. The traffic lane was approximately ten feet wide."

11. "The motor grader operator did not hear a horn blow, brakes squeal nor any noise. He only felt a slight impact which was caused by deceased's automobile striking said * * * grader."

12. "There were two tire marks on the highway beginning 33 feet prior to the point of impact, and at the point of impact there was one tire mark. At the point of the DEBRIS the left front wheel, impact wheel, was four feet onto the road surface and the right front wheel was off the road surface. There was one tire mark 24 feet beyond the point of impact and debris that slanted towards the north edge of the road. Deceased's car stopped 24 feet beyond the motor grader in the ditch next to an embankment in an upright position on all four wheels. The car had hit the embankment more than once."

13. "The left side of deceased's car was caved in beginning with the left headlight and continuing past the left front door. The motor grader was not damaged."

17. "The motor grader operator was negligent in that he backed the vehicle he was operating into the intersection without seeing that such a move could be made in safety. His negligence in this fashion was one of the proximate causes of the accident giving rise hereto."

18. "The deceased was contributorily negligent in that she was not keeping a proper lookout, did not have her car under proper control and was driving at an excessive speed under conditions then existing. The contributory negligence of plaintiff's intestate was one of the proximate causes of the accident." [Plaintiff excepted to this finding.]

The Hearing Commissioner, in stating the rules of law deemed by him to control the decision in the matter, said:

> "In order for a claimant to prevail in a proceeding under the State Tort Claims Act, he must show not only injury resulting from negligence of a designated State employee, but also that claimant was not guilty of contributory negligence. *Floyd v. State Highway Commission,* 241 N.C. 461; G.S. 143-299(1)."

The Hearing Commissioner concluded as matters of law that the operator of the motor grader was negligent, that Mrs.

Handy was guilty of contributory negligence, and, therefore, the plaintiff's claim should be denied.

On appeal to it, the Full Commission was of the opinion that all of the Hearing Commissioner's above mentioned findings of fact are supported by the evidence and that his conclusions of law were without prejudicial error. It, therefore, affirmed the decision of the Hearing Commissioner.

Upon further appeal to it, the Court of Appeals affirmed, saying: "While we agree that a jury could have found otherwise, we are of the opinion that there is competent evidence to support the finding of contributory negligence and that it was a proximate cause of the accident."

The material evidence is to the following effect:

Mrs. Handy, who was driving westwardly on Highway 704, never regained consciousness after the collision. Her car came to rest in the ditch on her right side of the highway, resting against the bank. The investigating highway patrolman found the motor grader diagonally across Highway 704, its back end being eight to ten feet across the center of the road; that is, on the north side of the pavement, Mrs. Handy's right side. There was no damage to the motor grader, but the Handy car was severely crushed in from the left headlight to the rear of the left door. There was no damage to its front end. The pavement on Highway 704 is 19 feet wide and the shoulder four feet wide.

The operator of the motor grader did not see the Handy automobile until after the impact. Immediately after the accident he told the investigating highway patrolman that he had been in Road No. 1600, the stem of the T, and was backing into Highway 704. However, the operator's own testimony was that he had been working in the intersection about five minutes prior to the accident, partly in the left (eastbound) lane of Highway 704 and partly in the intersection, the grader being headed west. Immediately prior to the accident, he made a reverse, arcing movement from west to east "in preparations to pull into [Road] 1600." He backed the grader "directly East part of the way and back and swing [sic] in a semi-circle to the northeast * * * a semi-circle across 704." In his opinion, it took him about 20 seconds to make this "sweeping, arcing movement." He heard no horn or squealing of tires. When he felt the slight impact, the grader was stopped.

The blinking lights on the motor grader were general warning beacons, not turn signals. The operator gave no signal to indicate his intent to turn his vehicle across the pavement of Highway 704. He was traveling at a slow rate of speed in making the arcing movement and at the time of impact was preparing to shift gears to go forward into Road No. 1600, the stem of the T. The arcing movement was his "first trip all the way across NC 704." Immediately prior thereto, he was completely in the left lane of Highway 704 traveling in a westwardly direction (the same direction in which Mrs. Handy was driving). The arcing movement immediately prior to the collision included some backing in an easterly direction along Highway 704.

No other person saw the collision. A witness, who heard it and reached the scene immediately thereafter, testified that the grader rolled backwards two and a half feet after the impact; that is, the point where it stopped was two and a half feet nearer the bank than was the point of impact.

Light tire skid marks on the pavement of Highway 704 in the westbound lane, Mrs. Handy's right-hand lane, began 33 feet from the grader and approximately three feet from the right-hand edge of the pavement. They angled toward the ditch. After passing the point of impact there was only one skid mark on the pavement. It continued 24 feet beyond the point of impact and was darker than those east of the point of impact. At and after the point of impact the mark of the right wheel of the automobile was off the pavement.

There was a regular Highway Department stop sign at the intersection facing traffic coming into it on Road No. 1600. There were no signs warning of highway work in progress.

White, Crumpler & Pfefferkorn, by James G. White, Fred. G. Crumpler, Jr., Michael J. Lewis, and G. Edgar Parker for plaintiff appellant.

Attorney General Morgan, by Deputy Attorney General Bullock and Associate Attorney Christine A. Witcover for defendant appellee.

LAKE, Justice.

[1, 2] Upon an appeal from the Industrial Commission in a proceeding under the Tort Claims Act, a finding of fact by the

Commission, other than a jurisdictional finding, is conclusive if there is any competent evidence in the record to support it. *Bailey v. Dept. of Mental Health,* 272 N.C. 680, 159 S.E. 2d 28; *Mica Co. v. Board of Education,* 246 N.C. 714, 100 S.E. 2d 72. The Commission's designation of a declaration by it as a finding of fact is not conclusive, however. *Brown v. Board of Education,* 269 N.C. 667, 153 S.E. 2d 335. Negligence and contributory negligence are mixed questions of law and fact and, upon appeal, the reviewing court must determine whether facts found by the Commission support its conclusion of contributory negligence. *Brown v. Board of Education, supra.* See also, *Garner v. Pittman,* 237 N.C. 328, 75 S.E. 2d 111.

Under the Tort Claims Act negligence, contributory negligence and proximate cause, as well as the applicability of the doctrine of respondeat superior, are to be determined under the same rules as those applicable to litigation between private individuals. *MacFarlane v. Wildlife Resources Commission,* 244 N.C. 385, 93 S.E. 2d 557. See also: *Crawford v. Board of Education,* 275 N.C. 354, 168 S.E. 2d 33; *Trust Co. v. Board of Education,* 251 N.C. 603, 111 S.E. 2d 844. G.S. 143-291 provides, "The Industrial Commission shall determine whether or not each individual claim arose as a result of a negligent act of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina."

[3] The Commission erred, as a matter of law, in its "comment" that in order for a claimant to prevail in a proceeding under the Tort Claims Act, the claimant must show that he was not guilty of contributory negligence. The case of *Floyd v. Highway Commission,* 241 N.C. 461, 85 S.E. 2d 703, cited by the Commission as authority for this proposition, did so hold. *MacFarlane v. Wildlife Resources Commission, supra,* held likewise. However, after the decision of this Court in *Floyd v. Highway Commission, supra,* and after the accident giving rise to the claim in *MacFarlane v. Wildlife Resources Commission, supra,* the Legislature amended the Tort Claims Act by adding thereto G.S. 143-299.1, which expressly provides that contributory negligence "shall be deemed to be a matter of defense * * * and such State department, institution or agency shall have the burden of proving that the claimant or the person in whose

behalf the claim is asserted was guilty of contributory negligence." Consequently, *Floyd v. Highway Commission, supra,* and *MacFarlane v. Wildlife Resources Commission, supra,* may no longer be considered authoritative on this question.

The Commission's error of law as to the burden of proof on the issue of contributory negligence led it into an erroneous conclusion that the claimant's intestate was guilty of contributory negligence. While inferences may be drawn by the Commission from facts leading reasonably thereto, a conclusion of negligence or contributory negligence may not be drawn in favor of the party having the burden of proof upon no basis other than speculation and unproved possibilities. The facts found by the Commission do not support its conclusion that Mrs. Handy was guilty of contributory negligence and the evidence in the record would not support a finding of fact reasonably permitting such an inference.

No witness saw Mrs. Handy's automobile prior to the collision. The only evidence of its speed lies in the skid marks on the road. There is no evidence that she failed to keep a lookout or that she did not have her automobile under control prior to the sudden movement of the motor grader into her lane of travel.

[4, 5] It is well established that a driver of an automobile, faced with a sudden emergency, is not held to the best possible choice of a means to avoid a collision but is held only to the care reasonably to be expected of one suddenly confronted with such a situation. *Forgy v. Schwartz,* 262 N.C. 185, 136 S.E. 2d 668; *Simmons v. Rogers,* 247 N.C. 340, 100 S.E. 2d 849. As observed by Chief Justice Devin in *Morgan v. Saunders,* 236 N.C. 162, 72 S.E. 2d 411, "It has several times been stated by this Court that the driver of an automobile who is himself observing the law [citation omitted] in meeting and passing an automobile proceeding in the opposite direction has the right ordinarily to assume that the driver of the approaching automobile will also observe the rule and avoid a collision." A motorist is not bound to anticipate negligent acts on the part of other drivers. *Williams v. Tucker,* 259 N.C. 214, 130 S.E. 2d 306. In the absence of anything which gives or should give him notice to the contrary he is entitled, even to the last moment, to assume and to act upon the assumption that the driver of another vehicle upon, or about to enter, a public highway will comply

with the law in the operation of his vehicle and will yield the right of way when required by the law to do so. *Carr v. Lee,* 249 N.C. 712, 107 S.E. 2d 544; *Simmons v. Rogers, supra; Garner v. Pittman, supra.*

[6] All of the evidence is to the effect that the motor grader had not previously been in Mrs. Handy's proper lane of travel and that, while clearly visible, it was moving very slowly in her direction in the lane of traffic to her left, or upon the shoulder on that side of the road. The record shows nothing which should have indicated to Mrs. Handy that the driver of the motor grader was unaware of the approach of her vehicle, or that he intended to cross over the center line into her lane of travel until he suddenly did so. According to the findings by the Commission, the motor grader moved backward in an arc from four to seven feet across the center line into Mrs. Handy's lane of traffic before the impact. Even at a speed of five miles per hour, such a movement across the center line would have taken, at the most, one second. The nature of the damage to the Handy vehicle permits of no conclusion other than that the motor grader backed into and struck the Handy vehicle as Mrs. Handy was attempting to avoid a collision by applying her brakes and driving onto the shoulder.

Light skid marks left on the pavement by the Handy vehicle, beginning 33 feet before it was struck, do not, standing alone, permit a finding of excessive speed. *Clayton v. Rimmer,* 262 N.C. 302, 136 S.E. 2d 562; *Williamson v. Randall,* 248 N.C. 20, 102 S.E. 2d 381. There is, therefore, no evidence in this record to support a finding of fact which, in turn, would support the conclusion that Mrs. Handy failed to keep a proper lookout, failed to keep her car under control, was driving at a speed in excess of that which was reasonable and prudent under prevailing conditions or was otherwise guilty of negligence which was one of the proximate causes of the collision. All of the evidence is to the effect that the force of the impact knocked her from the driver's seat and rendered her unconscious immediately. The further progress of her vehicle, even if not due entirely to the force of the blow delivered by the motor grader, cannot be attributed to any act or omission by Mrs. Handy.

The judgment of the Court of Appeals must, therefore, be reversed and this proceeding remanded to that court for the

entry by it of a judgment reversing the order of the Industrial Commission and further remanding the matter to the Commission for its determination of the amount of damages to be awarded the claimant pursuant to G.S. 143-291, and for the entry of an award in favor of the claimant in that amount, not to exceed $15,000.00, that being the maximum award permitted by the statute as it read at the time this accident occurred.

Reversed and remanded.

PEGGY SHOAF v. TED B. SHOAF

No. 8

(Filed 15 November 1972)

1. **Parent and Child § 7— duty to support child — enforcement by court**

When parents of minor children invoke the jurisdiction of the court on matters involving separation, support, custody, etc., the children become wards of the court and the court thereafter has authority to force the parent to discharge the legal obligation to support a minor child until he reaches legal age; however, the authority of the court to require support for a normal child ceases when the legal obligation to support no longer exists.

2. **Parent and Child § 7— child support — no vested right beyond emancipation**

Neither the parent nor the infant has any vested right in a support order which would extend the payments beyond the age of emancipation.

3. **Parent and Child § 7— age of emancipation — determination by Legislature**

The Legislature alone has power to determine the age at which one reaches his majority, becomes emancipated, and acquires the right to manage his own affairs free from parental control.

4. **Divorce and Alimony § 23; Parent and Child § 7— duty to support child — termination at age 18**

Where, by the terms of a consent judgment, defendant father agreed to make payments for the support of his son "until such time as said minor child reaches his majority or is otherwise emancipated," such obligation to make payments ceased upon passage of G.S. 48A fixing the age of majority at eighteen, since the child was already eighteen at the time the act was passed.

5. Divorce and Alimony § 23; Parent and Child § 7— duty to support child — changed conditions

Since child support payment becomes subject to review by the court upon change of conditions, defendant father who was under obligation to make payments until his minor child reached majority or was otherwise emancipated was entitled to relief where the Legislature unequivocally changed the conditions by fixing a different date upon which liability to support a child terminated.

APPEAL by defendant from the decision of the North Carolina Court of Appeals (14 N.C. App. 231, 188 S.E. 2d 19) affirming the order of the BUNCOMBE County District Court that the defendant pay to the plaintiff support for their son until he became twenty-one years of age. Judge Vaughn dissented and the defendant appealed.

On May 13, 1970, the plaintiff, Peggy Shoaf, wife, instituted this action against Ted B. Shoaf, husband, for alimony without divorce, for custody of, and support for Jeffrey Byron Shoaf, born January 13, 1953. On June 11, 1970, the parties, their attorneys, and the court signed a judgment fixing the amount of alimony and child support payments the defendant should pay to the plaintiff. The judgment contained the following: "That said payments of alimony, support, and maintenance for the Plaintiff shall continue during the lifetime of the Plaintiff or until such time as she remarries, *and that said payments for child support shall continue until such time as said minor child reaches his majority or is otherwise emancipated.*" (Emphasis added.)

At the time the foregoing judgment was entered, according to the common law rule, an infant became emancipated at twenty-one years. However, effective July 5, 1971, North Carolina General Statute 48A-1 provides: "The common law definition of 'minor' insofar as it pertains to the age of the minor, is hereby repealed and abrogated." G.S. 48A-2 provides: "A minor is any person who has not reached the age of 18 years."

Although Jeffrey Byron Shoaf became eighteen years of age on January 13, 1971, he was still a minor under the common law. G.S. 48A was not then in effect. He did, however, become emancipated on the effective date of Chapter 48A— July 5, 1971. The defendant made two payments subsequent to the effective date of G.S. 48A. Thereafter he declined to

make any payments to his former wife who in the meantime had obtained an absolute divorce. The plaintiff obtained from the district court a citation to the defendant to appear before the court and show cause why he should not be adjudged in contempt for failure to continue payments to the plaintiff for Jeffrey Byron Shoaf until he became twenty-one years of age.

The defendant answered the citation alleging that Jeffrey Byron Shoaf has now become an adult and that the defendant desires to assist his son on a voluntary basis without being forced to pay through the plaintiff from whom he is divorced.

The court, finding the defendant had paid the plaintiff for Jeffrey Byron Shoaf the amount specified through November, 1971, thereupon ordered the defendant to continue the monthly payments to the plaintiff for Jeffrey Byron Shoaf until he became twenty-one years of age.

From the judgment of the district court the defendant appealed to the North Carolina Court of Appeals. The Court of Appeals in an opinion by Judge Hedrick, joined by Judge Brock, affirmed the decision of the district court. Judge Vaughn dissented and on the basis of the dissent, the defendant appealed to this Court.

Riddle & Shackelford by Robert E. Riddle for plaintiff appellee.

Williams, Morris and Golding by James W. Golding for defendant appellant.

HIGGINS, Justice.

This single question of law is presented for decision: Since the effective date of G.S. 48A, does a father's legal liability for the support of his son born on January 13, 1953, continue until the son becomes twenty-one years of age, by reason of a consent judgment dated June 11, 1970, providing that "payments for child support shall continue until such time as said minor child reaches his majority or is otherwise emancipated?"

[1] When parents of minor children invoke the jurisdiction of the court on matters involving separation, support, custody, etc., the children become wards of the court. The court, thereafter has authority to force the parent to discharge the legal obligation to support a minor child until he reaches legal age.

After separation, followed by action for divorce in which a complaint has been filed or a writ of habeas corpus has issued, authority to provide for the custody of children vests in the court in which the divorce proceeding is pending. " 'Jurisdiction rests in this (trial) court so long as the action is pending and it is pending for this purpose until the death of one of the parties,' or the youngest child of the marriage *reaches the age of maturity,* (emphasis added) whichever event shall first occur. (Citing many cases.)" *Weddington v. Weddington,* 243 N.C. 702, 92 S.E. 2d 71. The authority of the court to require support for a normal child ceases when the legal obligation to support no longer exists. The parents' duty to support, as well as the right to control and to receive its wages, cease upon emancipation. *Layton v. Layton,* 263 N.C. 453, 139 S.E. 2d 732; *Wells v. Wells,* 227 N.C. 614, 44 S.E. 2d 31.

[2] The custody of minor children during their infancy cannot be controlled finally. "Changed conditions will always justify inquiry by the courts in the interest and welfare of the children, and decrees may be entered as often as the facts justify." *In re Herring,* 268 N.C. 434, 150 S.E. 2d 775; *In re Marlowe,* 268 N.C. 197, 150 S.E. 2d 204. Hence neither the parent nor the infant has any vested right in a support order which would extend the payments beyond the age of emancipation. In *Layton v. Layton, supra,* this Court in discussing a consent order to support a minor, said that nothing indicates the father bound himself to do anything beyond his legal liability to support his son.

"The rule is settled beyond a doubt that majority or minority is a status rather than a fixed or vested right and that the Legislature has such power to fix and change the age of majority." *Valley National Bank v. Glover,* 62 Ariz. 538, 159 P. 2d 292.

Change from minority to majority in legal effect means that legal disabilities designed to protect the child are removed. "The removal of the disabilities does not result in the creation of any new rights, but merely in the termination of certain privileges. There is no vested property right in the personal privileges of infancy." *In re Davidson's Will,* 223 Minn. 268, 26 N.W. 2d 223.

[3] The Legislature alone has power to determine the age at which one reaches his majority, becomes emancipated, and

acquires the right to manage his own affairs free from parental control. The legal term "majority" is defined in 42 Am. Jur. 2d, INFANTS, § 1, page 8: "Majority is the age at which the disabilities of infancy are removed, and hence a person who has reached his majority is entitled to the management of his own affairs and to the enjoyment of civic rights."

[4] The plaintiff contends, and the court seems to have agreed, that the liability for support is determined as of the date of the contract and continues as a vested right regardless of any change made by the law. The clear wording of the judgment does not require or permit this interpretation. The liability, always subject to change, continues from the time of the order until, according to its terms, the child reaches his majority or otherwise becomes emancipated. G.S. 48A makes no exception and the court can neither read one into it nor change the age at which an infant becomes an adult.

The defendant had paid every cent and more than his legal obligation required. Not only the father's, but likewise the mother's duty to support Jeffrey Byron Shoaf ceased at the time he became of age. Thereafter, he was under no obligation to conform his life to the wishes of either parent. They were freed of any legal obligation to support him.

Since the passage of the above Act, the court had no more authority to say the father's obligation to support continues to twenty-one than it had to say it stops at fifteen. The age of emancipation is precisely fixed—eighteen. It is the business of the lawmaking body to determine the age of majority. The courts are without power either to raise or lower the age so fixed. The power of the court to force the father to support his minor dependent son arises because of his legal duty to provide that support.

[5] The plaintiff contends that the law in force at the time the contract was made became a part of that contract, thus fixing the emancipation at age twenty-one. Both the district court and the Court of Appeals were misled by assuming the support payment fell in the same category as the property settlement. There is a clear distinction between a property settlement and the discharge of the obligation to support. Justice Sharp for this Court in *Holsomback v. Holsomback,* 273 N.C. 728, 161 S.E. 2d 99, points out the proper distinction. The Court had before it

a judgment signed by the parties and counsel and by the court which fixed property rights, alimony, and child support payments. The trial court undertook to set the judgment aside. This Court said: "In the consent judgment which Judge May purported to set aside, the parties agreed upon a division of their property and upon the amount of alimony which defendant should pay plaintiff until her death or remarriage. . . . The order with reference to the payment of future installments of alimony was, therefore, subject to modification by the court in the event of changed conditions. The agreed division of property, a separable provision, however, was beyond the power of the judge to modify without the consent of both parties. (Citing many cases.)"

A child support payment falls in the same category as an alimony payment and becomes subject to review by the court upon change of conditions. The Legislature unequivocally changed the conditions by fixing a different date upon which liability to support a child terminated. Certainly the mother's liability, as well as the father's to support the son ceased when he became emancipated on July 5, 1971. The father now objects to the court order that he continue to pay his divorced wife support for the son until he becomes twenty-one years of age.

The objection to the order is sustained. For the reasons given, the decision of the Court of Appeals is

Reversed.

ORANGE COUNTY, A MUNICIPAL CORPORATION v. FORREST T. HEATH AND WIFE, NANCY B. HEATH

No. 21

(Filed 15 November 1972)

1. **Municipal Corporations § 12; State § 4— governmental immunity**

The common law rule of governmental immunity prevails in North Carolina and a municipality cannot waive such immunity absent statutory authority.

2. **Pleadings § 12— governmental immunity — counterclaim against County barred**

The fact that defendants' claim arose in an action instituted by the County does not confer jurisdiction on the court to hear defend-

ants' claim for damages since allowing the counterclaim would permit defendants to do indirectly what they cannot do directly.

3. **Municipal Corporations § 12; Injunctions § 16— damages for wrongful injunction — governmental immunity**

A municipal corporation's governmental immunity against a claim for damages by a party wrongfully restrained or enjoined by the municipal corporation was not abrogated by the enactment of Rule of Civil Procedure 65(c), providing that no security for payment of damages for wrongfully obtaining an injunction shall be required of the State or its political subdivisions, but that "damages may be awarded against such party in accord with this rule."

4. **Municipal Corporations § 12; State § 4— governmental immunity — no waiver by procedural rule**

The concept of sovereign immunity is so firmly established that it should not and cannot be waived by indirection or by procedural rule; rather, any change should be by plain, unmistakable mandate of the lawmaking body.

5. **Municipal Corporations § 12; Injunctions § 16— damages for wrongful injunction — governmental immunity — no abolishment by procedural rule**

G.S. 160-191.1 empowering but not requiring a municipal corporation to waive its immunity from liability for damages only to the extent of the amount of liability insurance obtained by the corporation is a clear indication that the General Assembly did not abandon, abrogate or abolish the rule of governmental immunity by the use of equivocal language in Procedural Rule 65.

ON *certiorari* to review the decision of the North Carolina Court of Appeals (14 N.C. App. 44, 187 S.E. 2d 345) affirming an order entered in the Superior Court by *Hobgood, J.*, on September 23, 1971, denying the defendants' claim of damages. The order contains the following: " . . . (I)t appearing to the Court and the Court finds as fact:

"That the Plaintiff is a municipal corporation; that the original action was commenced to restrain the Defendants from performing acts which the Plaintiff alleged were in violation of a County Zoning Ordinance; that the Plaintiff obtained a Temporary Restraining Order, which upon a hearing in the Superior Court and upon appeal to the North Carolina Supreme Court was dissolved; that the North Carolina Supreme Court declared that the Plaintiff was not entitled to the said injunction and ordered the same dissolved.

"Upon the foregoing findings of fact, the Court concludes as a matter of law that the Plaintiff, Orange County, being a municipal corporation, has governmental immunity; that the acts of the County of Orange in obtaining said injunction were in the exercise of the County's governmental functions.

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Orange County is not liable to the Defendants for damages and that the Defendants are not entitled to recover and, therefore, their Motion in the cause is hereby dismissed."

The petition for certiorari was allowed June 13, 1972.

Graham & Cheshire by Lucius M. Cheshire for plaintiff appellee

Winston, Coleman and Bernholz by A. B. Coleman, Jr., for defendant appellants.

HIGGINS, Justice.

The history of this proceeding leading up to Judge Hobgood's order appears in our prior decision reported in 278 N.C. 688, 180 S.E. 2d 810. Judge Hobgood denied the defendants' motion for the assessment of damages on the ground the County of Orange cannot be held liable to the defendants for any damages they may have sustained as a result of the invalid restraining order issued by the court at the instance of Orange County, which order resulted in a work stoppage and delay in the completion of their mobile home park. The denial was based solely on the ground that Orange County, being a municipal corporation, having obtained the restraining order in the exercise of its governmental function, is immune from suit for damages.

[1] The common law rule of governmental immunity prevails in North Carolina: "Under this common law rule a municipality is not liable for the torts of its employees or agents committed while performing a governmental function." *Galligan v. Chapel Hill,* 276 N.C. 172, 171 S.E. 2d 427; *Taylor v. Bowen,* 272 N.C. 726, 158 S.E. 2d 837; *Millar v. Wilson,* 222 N.C. 340, 23 S.E. 2d 42. In the absence of statutory authority a municipality has no power to waive its governmental immunity. *Stephenson v. Raleigh,* 232 N.C. 42, 59 S.E. 2d 195.

[2] The fact that the defendants' claim arose in the action instituted by the County does not confer jurisdiction on the court to hear defendants' claim for damages. "The defendant in setting up this 'new matter and by way of counterclaim,' . . . is in effect bringing a cross-action against the plaintiffs for their wrongful act, as county commissioners in their official capacity, which he could not maintain if he brought directly, and therefore he cannot bring it by way of counterclaim." *Graded School v. McDowell,* 157 N.C. 316, 72 S.E. 1083.

[3] The defendants, conceding the general rule of governmental immunity, nevertheless contend that North Carolina, by the enactment of Procedural Rule 65(c) (G.S. 1A-1), waived immunity in a case of the type here involved. Rule 65(c) provides that restraining orders shall not issue except "Upon the giving of security by the applicant. . . . No such security shall be required of the State of North Carolina or of any county or municipality thereof, or any officer or agency thereof acting in an official capacity, but damages may be awarded against such party in accord with this rule." Section (e) of Rule 65 provides: "An order or judgment dissolving an injunction or restraining order may include an award of damages against the party procuring the injunction and *the sureties* (emphasis ours) . . . without a showing of malice or want of probable cause . . . . " It is arguable that the provision includes only parties who are required to give *the sureties.* This interpretation fits into Professor Sizemore's view later referred to herein. The wording of the rule as to whether it applies generally or only to parties who are required to give sureties is at least equivocal.

Prior to the enactment of G.S. 1A-1, the Bar Association and the General Statutes Commission made a study, looking toward changes in the rules of court procedure. These studies clearly indicate that G.S. 1A-1 was intended as an amendment to the procedural law of the State bringing it in line with Federal Procedural Rule 65. However, the Bar Association and the General Statutes Commission were mindful of Article IV, Section 13(2) of the North Carolina Constitution which provides this limitation: "No rule of procedure or practice shall abridge substantive rights or abrogate or limit the right of trial by jury."

[4] Professor Sizemore of the Wake Forest University School of Law, published an article in 5 Wake Forest Intramural Law

Review 1 discussing the changes in Rule 65. Professor Sizemore, a member of the drafting committee, said: "The changes in injunction procedure are minute. Certain parts of the previous statutes dealing with injunction procedure have been repealed simply because substantially the same provisions are included in Rule 65." Clearly a minute change in a procedural rule would not embrace so fundamental a change as to abolish governmental immunity. Even if attempted, the constitutional provision above quoted would require a direct and positive declaration of policy, rather than a minute procedural change. The State and its governmental units cannot be deprived of the sovereign attributes of immunity except by a clear waiver by the lawmaking body. The concept of sovereign immunity is so firmly established that it should not and cannot be waived by indirection or by procedural rule. Any such change should be by plain, unmistakable mandate of the lawmaking body.

The decision of the Supreme Court of South Carolina in *Hollifield v. Keller*, 238 S.C. 584, 121 S.E. 2d 213, is directly in point: " 'As we understand the rule relating to the immunities attaching to sovereignty, such attributes are never to be considered as waived or surrendered by any inference or implication. The surrender of an attribute of sovereignty being so much at variance with the commonly accepted tenets of government, so much at variance with sound public policy and public welfare, the Courts will never say that it has been abrogated, abridged, or surrendered, except in deference to plain, positive legislative declarations to that effect.' *Heman Const. Co. v. Capper*, 105 Kan. 291, 293, 182 P. 386."

[5] The General Assembly of North Carolina by G.S. 160-191.1, apparently repealed and re-enacted by Chapter 698, Session Laws of 1971, provided: "The governing body of any incorporated city or town, by securing liability insurance as hereinafter provided, is hereby authorized and empowered, but not required, to waive its governmental immunity from liability for any damage by reason of death, or injury to person or property, proximately caused by the negligent operation of any motor vehicle by an officer, agent or employee of such city or town when acting within the scope of his authority or within the course of his employment. Such immunity is waived only to the extent of the amount of the insurance so obtained." Hence the waiver did not involve one of the present reasons for the rule—that is the solvency of the town. The precise man-

ner in which the Legislature spelled out the waiver is a clear indication the General Assembly did not abandon, abrogate or abolish the rule of governmental immunity by the use of equivocal language in Procedural Rule 65.

The decision of the Court of Appeals affirming Judge Hobgood's order is correct and is

Affirmed.

STATE OF NORTH CAROLINA v. FRANK JAMES CARTER, JR.

No. 47

(Filed 15 November 1972)

1. **Criminal Law § 45— experimental evidence — discretion of court**

The trial court is allowed a broad latitude of discretion in the admission of experimental evidence, especially with reference to the similarity of conditions existing at the time of the crime and conditions existing at the time of the experiment.

2. **Burglary and Unlawful Breakings § 4; Criminal Law § 45; Rape § 4— experimental evidence — conditions of visibility — failure to establish similar conditions**

Where defendant in a first degree burglary and rape case sought to introduce evidence of an experiment conducted to determine visibility in prosecutrix' apartment, but only one circumstance was shown to be similar on both the night of the offense and the night of the experiment, that circumstance being that all lights in the apartment were turned off, the trial court did not err in excluding the experimental evidence since variations in the conditions of the experiment and those of the actual occurrence were such as would tend to confuse and mislead rather than aid the jury in arriving at the truth.

APPEAL by defendant from *Snepp, J.*, 12 March 1972 Session, MECKLENBURG Superior Court.

Defendant was tried upon two bills of indictment, consolidated for trial. One bill charged that on 19 December 1971 defendant broke and entered the dwelling house of Linda B. Owens between the hours of 3 a.m. and 4 a.m., said dwelling house then being actually occupied by Linda B. Owens, with intent to commit the felony of rape therein. The other bill charged that on 19 December 1971 defendant ravished and carnally knew Linda B. Owens by force and against her will.

The State's evidence tends to show that Linda B. Owens went to bed with her two children in the front bedroom of her apartment at about 1 a.m. on 19 December 1971. She left a light burning in the bathroom, locked all the doors, and closed all the windows and curtains. At about 3 a.m. she was awakened by a man standing over her with his hand over her mouth and a knife at her throat. No lights were burning in the apartment at that time. One child was also awakened and began crying. The man forced Linda B. Owens to accompany him into the back bedroom.

In the back bedroom the curtains were closed but a street light fifty feet away was burning. The "lighting condition" in the back bedroom was dim. Here the man forced Linda B. Owens to remove her clothing and he had sexual intercourse with her against her will, keeping the knife at her throat. He was on top of her five or six minutes. He then got up and left the back bedroom going toward the kitchen. Linda B. Owens returned to the front bedroom with her children and observed the man as he came from the kitchen and went out the front door. She was in the presence of her assailant for fifteen to thirty minutes. In court, she unequivocally identified defendant as the man who had raped her.

Dr. John Hill examined Linda B. Owens at 5:30 a.m. and found live motile sperm in her vagina.

In response to a telephone call, officers went to 820 Villa Court where they found defendant asleep in bed at 4:45 a.m. on 19 December 1971. His pants were unzipped and his privates exposed. Defendant was awakened and placed under arrest for housebreaking at 820 Villa Court.

Mary Jane Burton, an expert "criminalist," testified that she compared fibers found embedded in the mud on the shoes defendant was wearing when arrested with fibers from a rug in Linda B. Owens' apartment, and that they were "the same in my opinion." She also compared glass fragments embedded in that mud with the remnants of a broken glass Christmas tree ornament found in Linda B. Owens' living room, and in her opinion "it was the same." In addition, she compared animal hairs found on defendant's undershorts and shoes with animal hairs found on the bedspread upon which Linda B. Owens had been raped, and in her opinion "these hairs were all similar."

The defendant, as a witness in his own behalf, testified that he had been out dancing and drinking on the night of the crime and that he had gone to the house at 820 Villa Court with one Michael Wilson. They entered by the front door, talked to another boy therein, and decided to spend the night. Defendant then went to bed and was later arrested there. Defendant testified that he had never been in the home of Linda B. Owens and had never raped her.

Geraldine Massey, lessee of the house at 820 Villa Court, testified that she came home at 2:45 a.m. on the night of the crime and, after sitting up for "about an hour," discovered defendant asleep in her bedroom. She then called the police and they came within ten minutes.

For the purpose of impeaching the identification testimony of Linda B. Owens, defendant tendered evidence of an experiment performed on the night of 29 March 1972, bearing upon the conditions of visibility in her apartment on the night she was raped. The court conducted a voir dire in the absence of the jury to determine the competency of the proffered evidence. On the voir dire examination defendant elicited testimony tending to show that defendant's attorney, the solicitor, two police officers, and others chosen by defense counsel went to the apartment of Linda B. Owens at 11:30 p.m. on the night of 29 March 1972. They closed all the curtains except those in the living room, turned off all the lights, and then tested their ability to see each other at various distances. At the conclusion of the voir dire, the court made findings of fact and concluded as a matter of law that the testimony with respect to the experiment was inadmissible. The court excluded that testimony and defendant excepted.

The jury convicted defendant of first degree burglary and rape as charged in the bills of indictment, recommending life imprisonment in each case. Judgments were pronounced accordingly, the life sentences to run concurrently, and defendant appealed to the Supreme Court assigning as error the exclusion of the experimental evidence. The facts with respect to the experiment will be discussed in the opinion.

Charles V. Bell and Patricia E. King, Attorneys for defendant appellant.

Robert Morgan, Attorney General, and Russell G. Walker, Jr., Assistant Attorney General, for the State of North Carolina.

HUSKINS, Justice.

The sole question for decision on this appeal is whether the trial judge erred in excluding defendant's experimental evidence.

[1] The rule with us is accurately stated in *State v. Phillips*, 228 N.C. 595, 46 S.E. 2d 720 (1948), as follows:

> "The competency of experimental evidence depends upon its trustworthiness to aid in the proper solution of the problem in hand. [Citations omitted] When the experiment is carried out under substantially similar circumstances to those which surrounded the original transaction, and in such a manner as to shed light on that transaction, the results may be received in evidence, although such experiment may not have been performed under precisely similar conditions as attended the original occurrence. The want of exact similarity would not perforce exclude the evidence, but would go to its weight with the jury. [Citation omitted] Whether the circumstances and conditions are sufficiently similar to render the results of the experiment competent is of course a preliminary question for the court, and unless too wide of the mark, the ruling thereon will be upheld on appeal. [Citations omitted] * * * The measure of permissible variation in the conditions of the experiment from those of the occurrence is usually determined by whether such variation would tend to confuse or to mislead the jury. The object of every trial is to find the truth of the matter in controversy. If the experimental evidence contribute to this end it is admissible; otherwise it should be excluded."

The general practice allows the trial court some, *and more commonly a broad,* latitude of discretion in the admission of such evidence, especially with reference to the similarity of conditions existing at the time of the crime and conditions existing at the time of the experiment. See Annotation: Admissibility of experimental evidence to show visibility or line of vision, 78 A.L.R. 2d 152, where many cases on the subject are collected and discussed.

[2] Turning to the facts of this case, the following circumstances were established by the testimony of Linda B. Owens

as having existed on the night of 19 December 1971 when she was attacked: (1) A street light in front of her house, about fifty feet away, was burning and the light from it shone through the living room curtains into the back bedroom where the rape occurred; (2) no lights were burning in her apartment and all the cotton unlined curtains were closed during the attack; (3) during the fifteen to thirty minutes the attacker was in her apartment, she made a special effort to look at him carefully and to remember how he looked; (4) the weather was clear; (5) her assailant was on top of her for five or six minutes and she observed him in such close proximity during that time; and (6) Officer Price took part in the investigation on the night of the crime and was in the apartment between 4 a.m. and 5 a.m. He turned all the lights off, yet was able to see other people in the room and to make out their features.

On the voir dire as to the circumstances surrounding the experiment on the night of 29 March 1972, the evidence adduced: (1) failed to establish that the street light was burning during the experiment; (2) conflicted as to weather conditions, two witnesses testifying it was clear and four witnesses testifying that it was cloudy and overcast; (3) conflicted as to whether the curtains in the living room were open or closed, two witnesses testifying that the curtains in the living room were not completely closed and one witness testifying that the living room curtains were closed when the group entered the apartment and opened prior to the experiment, and Officer Thompson testifying that the curtains in the living room had been changed and were not the same curtains that were there on the night of the crime; and (4) reveals that the participants in the experiment disagreed on the degree of visibility during the experiment: Officer Thompson testified that he could read bold print in the newspaper, could distinguish racial identity in the living room and back bedroom, and could distinguish facial features in the back bedroom at close range; yet Solicitor Moore could not identify facial features at distances of six to eight feet and Officer Mobley, Linda Moore and Debra Black could not identify any person in the rooms except by silhouette.

At the conclusion of the voir dire the trial judge found as follows:

> "In the absence of the jury, the court conducted a hearing as to the admissibility of testimony concerning

a visit made to the residence of the prosecuting witness, Mrs. Linda Owens, between 11:00 p.m. and 11:30 p.m. on the night of March 29, 1972. The court, having heard the evidence, makes Findings of Facts as follows: (1) Between 11:00 p.m. and 11:30 p.m. on March 29, 1972, a group of persons, including counsel for the defendant, the solicitor of this District, police officers and persons chosen by defendant's counsel, went to the home of Mrs. Linda Owens at 2532 Weddington Avenue, with the permission of the court. (2) On the early morning of December 19, 1971, at approximately 3:00 a.m. the witness Mrs. Owens observed her alleged assailant for a period of approximately twenty minutes in the front bedroom of her home, in the back bedroom of her home and in the living room of her home, as the assailant walked from the kitchen across the living room to the front door. She observed him at close range, he being close enough to touch her with his moustache and having sexual intercourse while on top of her. (3) The weather in the early morning of December 19, 1971, was clear and cold. (4) The weather on the evening of March 29, 1972, was overcast and cloudy. (5) On the early morning of December 19, 1971, Mrs. Owens had been asleep since about 1:00 a.m. There were no lights in the house when she awakened. (6) On the evening of March 29, 1972, the persons present at the Owens' home entered the house when lights were turned on. The lights were thereafter switched off before observations were made. Other persons did not come closer to the witnesses during the time the room was darkened than approximately two feet and remained there only for short periods of time. (7) On the evening of March 29, 1972, no attempt was made to identify persons crossing from the kitchen of the Owens' home through the living room to the front door, as described in the testimony of Mrs. Owens.

"The conditions in the home of Mrs. Owens on the night of March 29, 1972, between 11:00 p.m. and 11:30 p.m. under which the witnesses attempted to make identifications were not shown to be substantially similar to the conditions of December 19, 1971, at about 3:00 a.m., as described in the testimony of Mrs. Owens.

"The court, therefore, concludes as a matter of law that testimony as to this experiment is not admissible. The State's objection to the testimony is sustained."

It is apparent that the crucial findings of fact are supported by the evidence offered on the voir dire. That evidence establishes only one circumstance as being similar on both nights—all lights in the Owens' apartment were turned off. As to other revelant circumstances the evidence is contradictory, and similarity is left in doubt. The variations in the conditions of the experiment from those of the occurrence are such as would tend to confuse and mislead rather than aid the jury in arriving at the truth. In holding that the conditions of the experiment were not shown to be sufficiently similar to render the evidence competent, the trial court was not "too wide of the mark" and his ruling thereon will be upheld. *State v. Phillips, supra; State v. Brown,* 280 N.C. 588, 187 S.E. 2d 85 (1972). Moreover, it has been said that "evidence of this kind is not favored by the courts, and great caution should be exercised in receiving it." 22A C.J.S., Criminal Law, § 645(1).

No error.

INGRAM v. SMITH

No. 57 PC.

Case below: 16 N.C. App. 147.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 November 1972.

JONES v. DEVELOPMENT CO.

No. 55 PC.

Case below: 16 N.C. App. 80.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 November 1972.

ORMOND v. CRAMPTON

No. 60 PC.

Case below: 16 N.C. App. 88.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 November 1972.

PATRICK v. HURDLE

No. 41 PC.

Case below: 16 N.C. App. 28.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 November 1972.

PEASELEY v. COKE CO.

No. 37 PC.

Case below: 15 N.C. App. 709.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 8 November 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

SELLERS v. REFRIGERATORS, INC.
No. 35 PC.

Case below: 15 N.C. App. 723.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 8 November 1972.

STATE v. ALEXANDER
No. 58 PC.

Case below: 16 N.C. App. 95.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 November 1972.

STATE v. ALLEN
No. 74.

Case below: 16 N.C. App. 159.

Motion of defendant to dismiss appeal of State for lack of substantial constitutional question allowed 1 November 1972.

STATE v. ALLEN
No. 71.

Case below: 15 N.C. App. 670.

Petition of State for writ of certiorari to North Carolina Court of Appeals allowed 1 November 1972. Motion of defendant to dismiss appeal denied 1 November 1972.

STATE v. EDWARDS
No. 63.

Case below: 15 N.C. App. 718.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 1 November 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. KALLAM
No. 42 PC.

Case below: 16 N.C. App. 67.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1972.

STATE v. KALLAM
No. 72.

Case below: 16 N.C. App. 67.

Motion of Attorney General to dismiss appeal for failure to file brief allowed 1 November 1972.

STATE v. JONES
No. 47 PC.

Case below: 14 N.C. App. 558.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 November 1972.

STATE v. JONES
No. 47 PC.

Case below: 14 N.C. App. 656.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 November 1972.

STATE v. McLAWHORN
No. 81.

Case below: 16 N.C. App. 153.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 1 November 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. MILLER

No. 40 PC.

Case below: 16 N.C. App. 1.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 8 November 1972.

STATE v. PARKER

No. 54 PC.

Case below: 16 N.C. App. 165.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 November 1972.

STATE v. TAYLOR

No. 49 PC.

Case below: 16 N.C. App. 122.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 November 1972.

STATE v. THOMPSON

No. 53 PC.

Case below: 15 N.C. App. 416.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 November 1972.

TAYLOR v. UNIVERSITY

No. 50 PC.

Case below: 16 N.C. App. 117.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 November 1972.

STATE OF NORTH CAROLINA, EX REL UTILITIES COMMISSION AND PUBLIC SERVICE COMPANY OF NORTH CAROLINA v. CITY OF DURHAM, SANFORD BRICK & TILE COMPANY, TRIANGLE BRICK COMPANY, BORDEN BRICK COMPANY, CHEROKEE BRICK COMPANY, LEE BRICK & TILE COMPANY AND CHATHAM BRICK & TILE COMPANY

No. 61

(Filed 13 December 1972)

1. **Gas § 1; Utilities Commission § 9— natural gas rate case — reversal by Court of Appeals — effect**

Judgment of the Court of Appeals in a natural gas rate case reversing the order of the Utilities Commission, rather than remanding the case for further action, is in effect a denial of all rate increases sought by the natural gas company and requires the company to refund the interim rate increases which had been in effect for some two years.

2. **Utilities Commission § 6— public utility rates — past service**

The Utilities Commission may not fix rates retroactively so as to make them collectible for past service. G.S. 62-136.

3. **Gas § 1; Utilities Commission § 6— natural gas rates — increase in cost of gas to company — Commission order**

The Court of Appeals erred in reversing the portion of a Utilities Commission order allowing a natural gas company to increase its rates to the extent necessary to offset an increase in the cost of gas to it.

4. **Utilities Commission § 6— public utility rates — test period**

For the purpose of making the required estimates of a public utility's revenues and operating expenses, the proper procedure is for the Utilities Commission to fix a test period of twelve months, ending, as close as practicable, before the opening of the rate hearing.

5. **Gas § 1; Utilities Commission § 6— natural gas rates — test period — abnormal temperatures — adjustment in revenues**

Where the evidence in a natural gas rate hearing is clear and undisputed that the heating season of the test period was abnormally cold or abnormally warm, the Utilities Commission is authorized, if not required, by G.S. 62-133(b)(2) to make a reasonably appropriate adjustment of the test period revenues for the abnormality in the test period experience.

6. **Utilities Commission § 6— rate hearing — review of findings**

The credibility of testimony and the weight to be given it in a public utility rate case are for the Utilities Commission, not for the reviewing court, and its findings of fact supported by competent, material and substantial evidence are conclusive on appeal.

7. **Gas § 1; Utilities Commission § 6— natural gas rates — fair value of company's properties**

The record does not support protestants' contention that the Utilities Commission arbitrarily determined the fair value of a gas company's properties by adding 20% to its figure for the original cost of the properties.

8. **Gas § 1; Utilities Commission § 6— failure to find replacement cost — harmless error**

While the Utilities Commission erred in failing to set forth its finding of replacement cost less depreciation of a public utility's properties, such error was not prejudicial.

9. **Gas § 1; Utilities Commission § 6— natural gas rates — fair rate of return**

The Utilities Commission did not err in finding that the rate of return earned by a natural gas company in the test period on the company's net investment in its properties was 7.27% and that such return was insufficient.

APPEAL by the Utilities Commission and the Public Service Company of North Carolina, hereinafter called Public Service, from the Court of Appeals, which reversed the order of the Commission permitting Public Service to increase its rates for natural gas.

On 31 July 1970 Public Service petitioned the Commission for authority to increase its several schedules of rates on the ground that the rates then in effect did not yield a fair return on the fair value of the company's properties. The increases then proposed were not uniform among the several classes of users, either in amount or percentagewise. The City of Durham intervened in opposition. The Commission designated the proceeding a general rate case and set it for hearing.

Prior to the hearing, Public Service filed another petition alleging that its sole source of natural gas, Transcontinental Gas Pipeline Corporation, hereinafter called Transco, had, with the tentative approval of the Federal Power Commission, increased its rate to Public Service. This petition sought authority to pass on such increased cost of gas to all classes of customers of Public Service, uniformly, by increasing their respective rates by the exact amount of the increase by Transco in its rate. Before the Commission could act, Transco put into effect a further increase in its rate to Public Service. Thereupon, Public Service amended its second petition to request like authority to pass along to its customers, uniformly, the exact amount of this increase also. Again, the City intervened in opposition.

The Utilities Commission consolidated the two proceedings for hearing, which began 9 March 1971, at which time certain brick manufacturers, to whom Public Service supplies gas for industrial use on an interruptible basis, were permitted to intervene as protestants. On 27 May 1971 the Commission entered its order allowing Public Service to increase its rates by amounts varying among the schedules applicable to the several classes of its customers, both in amount and in percentage of increase, the greatest percentage of increase being in the schedule applicable to interruptible industrial users. The increases so authorized included the full recovery of the additional cost of gas due to Transco's actions, $1,652,003, and approximately 50%, $1,445,168, of the increases sought by Public Service in the original proceeding designed to raise its rate of return.

The protestants appealed to the Court of Appeals, where the appeal was docketed on or about 20 October 1971, and the filing of briefs was completed on or about 15 February 1972. They made five assignments of error, summarized as follows: (1) The Commission's finding of the fair value of the properties of Public Service is arbitrary, excessive and contrary to the evidence, being reached by arbitrarily increasing the net investment of the company in the properties by 20%; (2) the Commission's finding that, without any increase, the rate of return of Public Service on its net investment was 7.27% and was insufficient is, in both respects, contrary to the evidence; (3) the Commission's finding that the increases approved by it would result in a return to Public Service upon its common equity of 16.5% is arbitrary and not supported by the evidence, the correct figure being 19.5%, which is excessive; (4) the Commission's finding that its distribution of the increase among the several rate schedules is just and reasonable is arbitrary and unsupported by the evidence, the increased rates, approved by the Commission, being excessive and discriminatory; and (5) the Commission's finding that a *pro forma* decrease in the revenues actually received by Public Service during the test period should be made, due to abnormally cold weather, is arbitrary, unsupported by the evidence and is not permitted under the laws of North Carolina.

On 30 August 1972 the Court of Appeals filed its opinion which, in its entirety, reads:

> "This appeal calls for a review of a decision of the North Carolina Utilities Commission in a general rate-making case. See G.S. 7A-30(3).

"Appellants' assignments of error numbers 1, 2, and 5 are sustained. The order appealed from is Reversed."

On 8 September 1972 Public Service and the Commission appealed to this Court. Oral argument was had on 14 November 1972.

The Commission's findings of fact pertinent to this appeal are:

"(4) Under its present rates, Applicant realized for the test period operations approximately $33,878,156 in gross operating revenues. Applicant's reasonable operating expenses for that period amounted to $29,169,955.

"(5) The Commission finds that the fair value of the Applicant's properties used and useful in rendering the natural gas service it affords to its North Carolina customers, considering original cost less depreciation, and replacement cost by trending original cost to current cost levels, is $79,272,908.

"(6) Applicant's net operating income for return at the end of the test period after applying a customer annualizing factor of 2.55% is $4,828,260, resulting in a rate of return on net investment prior to consideration of the increases requested herein of 7.27%, which the Commission deems insufficient considering the Applicant's current operation [sic] conditions.

"(7) The rate of return deemed necessary on the fair value of its 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 to compete in the market for capital funds, thereby fulfilling its obligations to its customers, is 6.66%, which said rate of return on fair value will afford the Applicant an opportunity to realize additional annual gross revenues of approximately $3,097,171. The Commission deems this amount of dollar return to the Applicant to be sufficient for it to compete in the market for capital funds on a reasonable basis.

"The total increases granted by this Order amount to 67.12% of the increases requested by the Applicant in this proceeding, including the cost of purchased gas in-

creases. Excluding the cost of purchased gas, which said increases amount to $1,652,003, this Order affords to Applicant approximately $1,445,168 in additional annual gross revenues in its general rate request * * * .

"(9) The additional revenues provided by the increases herein will result in a return on common equity to the Applicant of approximately 16.5%.

"(10) After consideration of the increases allowed by this Order, Applicant's net investment in utility plant of approximately $66,060,757 when related to its projected net operating income for return of $5,279,671 after consideration of the customer annualizing factor, produces a return on net investment to the Applicant of approximately 7.99%.

"(11) * * * The increases granted herein are deemed to be just and reasonable and result in a fair and equitable rate distribution among the classes of Applicant's customers.

"(13) The record in this case indicates that the weather for the test period ending September 30, 1970, was significantly colder than normal. The Commission finds that an adjustment should be made to reflect normal weather conditions, thereby making the test period more representative. The adjustment to reflect normalized weather has been computed by the Applicant and the Commission Staff, utilizing substantially the same method and the same base period as hereinabove described. The adjustment by the Commission Staff to Applicant's revenues because of abnormal weather conditions is just and reasonable and is adopted by the Commission in this Order."

Prior to the hearing, the Commission permitted Public Service to put its proposed rate increases into effect upon its undertaking to make refunds, with interest, of any such portion thereof as might not be allowed in the final order.

Commissioners Wells and McDevitt dissented from the making of the *pro forma* adjustment to test period revenues due to cold weather and from the allowance of that portion of the increase designed to raise the company's rate of return. Neither Commissioner Wells nor Commissioner McDevitt dis-

sented from the allowance of so much of the increase as was designed to offset the added cost of gas by virtue of the actions of Transco.

At the hearing before the Commission, voluminous statistical exhibits and oral testimony were introduced by Public Service and by the Commission Staff. The City introduced three exhibits relating to service agreements between Public Service and Transco which are not germane to this appeal. No other evidence was offered by the intervening protestants.

The substance of the evidence for the company, pertinent to this appeal, is as follows:

The company's last previous general rate hearing was in 1960. Approximately 70% of the company's investment in plant has been made since 1960. But for intervening inflation, the original cost, less depreciation, would be the approximate present fair value of its properties.

Public Service is not able to obtain from Transco enough gas completely to supply the desires of all its industrial customers in addition to the demands of its residential, and other firm customers, for heating and other uses. Consequently, in extreme cold weather, in order to supply the needs of its heating customers, it must divert gas to them from its interruptible industrial customers. Since the interruptible customers pay at a substantially lower rate than the firm customers, gas so diverted in periods of extreme cold weather yields to Public Service greater revenues than it would have received in such period had the weather been normal. By reason of the limited total supply of gas, all of the gas available to Public Service is sold regardless of weather conditions. The only effect of cold weather is to increase the volume sold to firm customers at the higher rates and decrease the volume sold to interrruptible customers at the lower rates. Thus, in a period of intensely cold weather, the total revenues received by Public Service are abnormally large. The reverse is true in periods of abnormally warm weather in the heating season. For this reason, the company's accountant made a *pro forma* subtraction of $944,674 from its revenues actually received in the test period.

The total impact of the two rate increases by Transco increased the cost of gas to Public Service by approximately $1,700,000 per year.

The original cost of the plant in service at the end of the test period, exclusive of construction work in progress, was $77,550,108, the accumulated reserve for depreciation $13,600,-809. The total net investment, plus materials and supplies and cash-working capital, was $67,418,630.

Operating revenues actually received during the test period were $33,878,156. Operation and maintenance expense, depreciation and taxes amounted to $29,169,955, leaving an actual net operating income for the test period of $4,708,201. After all accounting and *pro forma* adjustments, including the decrease in revenues due to abnormally cold weather, the company's return on its net investment at the end of the test period was 6.32%.

The new rate schedules proposed by the company distribute the portion of the increase attributable to the rise in the rates charged by Transco uniformly, per unit of gas, among the various classes of customers.

The current cost of the company's properties at the end of the test period was computed by the American Appraisal Company at $94,927,815. This is the trended original cost of the properties less observed depreciation, including obsolescence and inadequacy, but does not include materials and supplies or cash-working capital. The term "current cost" used in this appraisal is the cost of reproducing or acquiring the identical facilities at current prices. The current, undepreciated cost of the plant at the end of the test period was $110,516,254, or 43% higher than the original cost. The observed depreciation, so computed by the appraiser, was 14.4% of the undepreciated current cost. The accumulated depreciation reserve of the company is approximately 18% of the original cost of these properties. (There is no evidence in the record to show that either of these figures is too high or too low.) Had the appraiser used a figure for depreciation equal to the proportion that the accumulated reserve bears to the original cost, his computation of the current cost, less depreciation, would have been approximately $91,000,000.

A cost of service study was made to determine the cost of service to each of the several classes of customers. This is one factor in the proper design of rate schedules so as to spread the burden fairly among the respective classes of customers. Other factors which should be taken into account include com-

petitive conditions, consumption characteristics of the several classes and the value of the service to each class, which is indicated to some extent by the cost of alternate fuels available. The schedules proposed by Public Service are, in the opinion of the witness making this study, not unjustly discriminatory or preferential as to any class.

The embedded cost to Public Service of its present debt capital is 5.72%. Its long term debt was 63.5% of its total capital structure as of the end of the test period, its preferred stock, on which it pays dividends of 4.4% and 6%, was 13.3% thereof and the common equity is 23.2%, which is unusually low, the average gas distributing company's common equity being approximately 42% of its total capital. Its earnings in the test period covered its interest payments 1.8 times, which, in the opinion of the company's expert witness, is inadequate. On the other hand, its common stock has sold in the market above its book value, which is in contrast to the stock of a number of gas distributing companies. The bonds issued by Public Service have been sold privately and are not rated by Moody's Investment Service or by Standard & Poor.

In the opinion of the company's expert witness, the cost of common equity capital to Public Service is in the range of 15% to 17½% and the total cost of capital to the company as of the end of the test period was, in the opinion of this witness, from 8.08% to 8.59%. A return in that range on its total invested capital would cover interest charges from 2.07 times to 2.20 times and would be sufficient to attract debt capital as required. The rate increase requested by the company would, in the opinion of this witness, produce earnings near the lower limit of this range. Because of the greater risk inherent in its unusually high debt ratio, Public Service requires a higher than usual return on its equity capital.

When the temperature falls below 65 degrees, there is a close relationship between the temperature and the use of gas for heating. The term "degree day" means that the mean temperature of a day is one degree below 65 degrees. Thus, there would be 30 degree days assigned to a day on which the mean temperature is 35 degrees. The United States Weather Bureau keeps records of average degree days and publishes this information. Using these records over a 39 year period, the company witness determined the normal number of degree days per year at three weather stations in the company's service area. In the

test period, there were 22% more degree days in the Raleigh area than in a normal year, 17% more in the Charlotte area and 8½% more in the Asheville area. By a complex procedure, described in detail by the company's witness, a professional heating engineer, Public Service computed the amount of gas sold in the test period to its firm customers for heating usage above the amount which would have been sold to them for this purpose had the temperature been normal. Had the abnormally high usage of gas for heating, due to the abnormally cold weather, not occurred, such gas could have been sold by Public Service to its interruptible industrial customers at the lower rate applicable to them.

The Commission Staff called as its witnesses its Chief Staff Engineer and its Director of Accounting. Their testimony was to the following effect:

There is a direct relationship between sales of gas by Public Service to its firm customers and the degree days experienced in the area. The test period had approximately 18% more degree days than is normal. This resulted in a sale of 1,698,525 MCF to firm customers during the test period in excess of the amount which would have been sold to such customers in a year of normal weather in the heating season. This increased the company's revenues from such customers during the test period by $1,604,722 as compared with a year of normal temperatures in the heating season. Subtracting the revenues which would have been received had this gas been sold to interruptible industrial customers, the Staff Engineer computed that the appropriate adjustment because of the colder than normal weather was a deduction of $893,126 from the actual test period revenues. The Accounting Department of the Commission Staff made a *pro forma* adjustment in the company's actual test period revenues of this amount in this computation of the rate of return for the test period under the rates then in effect. (The company's accountant deducted $944,674 for this adjustment. The Commission adopted its staff's figure.)

The Staff Engineer also made a study of the cost of alternate fuels used by the company's interruptible customers when gas service to them is interrupted. Based upon this study, it was his opinion that the company's schedule of rates applicable to industrial interruptible customers is reasonable.

After all accounting and *pro forma* adjustments deemed appropriate by the Commission's Director of Accounting, includ-

ing the *pro forma* decrease of revenues by reason of abnormally cold weather, he concluded that in the test period the company had a net operating income of $4,612,397, giving it a return of 6.94% upon its net investment of $66,422,957. Allowance in full of the increases in rates sought by the company would increase the rate of return on net investment to 9.02%. With no increase in rates, Public Service would have a return sufficient to cover its fixed charges 1.76 times and would have a return on the common equity component of its capital structure of 11.667%. With the full proposed rate increases in effect throughout the test period, the company's net operating income would have been sufficient to cover its fixed charges 2.27 times and its return on the common equity component of its capital structure would have been 21.53% after all appropriate accounting and *pro forma* adjustments, including the above adjustment for cold weather.

In the opinion of the Commission's Director of Accounting, a 15% return on the common equity component of the company's capital structure might well be within the range of reasonableness. In his opinion, the higher debt ratio is favorable to the ratepayers. It is also his opinion that a 2.00 coverage of fixed charges is adequate.

Edward B. Hipp and Maurice W. Horne for North Carolina Utilities Commission.

Mullen, Holland & Harrell, by J. Mack Holland, and Boyce, Mitchell, Burns & Smith by F. Kent Burns, for Public Service Company of North Carolina.

Claude V. Jones for City of Durham.

Broughton, Broughton, McConnell & Boxley, by J. Melville Broughton, Jr., for Sanford Brick & Tile Company et al.

LAKE, Justice.

[1, 2] The judgment of the Court of Appeals is that the order of the Utilities Commission be reversed rather than that the proceedings be remanded to the Commission for further action by it. Thus, its effect is a denial of all rate increases sought by Public Service and the dismissal of the proceedings. Since the rates in question were put into effect subject to the undertaking by Public Service to refund such portions thereof as might not be authorized by the final order, the result of the judgment of

the Court of Appeals, if affirmed by us, would be that Public Service must now refund to its customers all of the amounts collected in approximately two years by reason of these rate increases. While Public Service could institute a new proceeding before the Commission, in such new proceeding the Commission could not grant to Public Service the right to retain or to collect retroactively any part of the increases here in question. This is true for two reasons: First, to do so would be contrary to the judgment, and second, the Commission may not fix rates retroactively so as to make them collectible for past service. G.S. 62-136; *Utilities Commission v. Morgan, Attorney General,* 277 N.C. 255, 267, 177 S.E. 2d 405.

The extreme brevity of the opinion of the Court of Appeals deprives us of the benefit of the reasoning upon which its judgment is based. It would appear that the Court of Appeals was inadvertent to the fact that there were two proceedings before the Commission, not one. In the first, Public Service sought increases in rates which would yield it additional revenue in the amount of $2,904,328 per year for the purpose of increasing the company's rate of return upon its properties. In the second, Public Service sought rate increases for the purpose not of increasing the company's return upon its properties but of recovering the additional cost to it of gas purchased from its supplier so as to avoid a reduction in such return.

The evidence is ample to show that Transco increased its rates to Public Service. The Commission found the net effect of the changes by Transco in its rates to Public Service was to increase the cost of gas to Public Service by $1,652,003 per year. There is no evidence in the record and no contention by the protestants to the contrary. It follows, necessarily, that if Public Service is not allowed to increase its own rates so as to pass this additional cost on to its customers, the return of Public Service upon its properties will be decreased by $1,652,003 per year, unless there is some offsetting reduction in its other expenses or some other offsetting increase in its revenues, neither of which is suggested in the record. Such a reduction in the return to Public Service upon its properties could be justified only by a finding by the Commission, supported by substantial evidence in the record, that the return earned by Public Service upon its properties, prior to the increases in the rates charged by Transco, was excessive and unreasonable. There has been no such finding by the Commission and we have found

no evidence in the record which would have sustained such a finding.

The effect of the judgment of the Court of Appeals, if affirmed by this Court, would be to require Public Service to make a refund of more than $3,000,000 collected by it for the sole purpose of offsetting its additional operating costs due to the increases in the rates of Transco. We are confident that the Court of Appeals was inadvertent to this consequence of its judgment. The Court of Appeals sustained the protestants' Assignments of Error 1, 2 and 5. Nothing in these suggests that, had the increases in rates charged by Transco not occurred, the earnings of Public Service during the test period were excessive, so as to justify a reduction in its rates. Neither of the two dissenting commissioners disagreed with the majority of the Commission with respect to so much of the order as permitted Public Service to increase its rates to the extent necessary to offset the increase in the cost of gas to it.

[3] Neither this Court nor the Court of Appeals is authorized to fix rates for a public utility. That is the function of the Utilities Commission. Neither this Court nor the Court of Appeals is authorized to substitute its judgment for that of the Commission or to reverse an order of the Commission setting rates except for one of the causes specified in G.S. 62-94(b). None of those grounds for reversal of the Commission's order, insofar as it relates to rate increases designed only to offset the increased cost of gas to Public Service, appears in this record. To that extent, therefore, the judgment of the Court of Appeals is in excess of the statutory power of the court and must be vacated.

We turn now to the second aspect of the order of the Commission, which relates to the increases in the rates allowed for the purpose of enabling Public Service to receive a greater return upon its properties. For this purpose the Commission allowed increases in rates designed to yield additional revenues totaling $1,445,168 per year. To this portion of the order, Commissioners Wells and McDevitt dissented, and to it the protestants' assignments of error, sustained by the Court of Appeals, relate.

G.S. 62-133(b) prescribes five steps to be taken by the Commission in a proceeding to fix rates for such purpose. These are: (1) Ascertain the fair value of the public utility's prop-

erty used and useful in providing the service; (2) estimate the utility's revenue under the present and proposed rates; (3) ascertain the utility's reasonable operating expenses, including depreciation; (4) fix a fair rate of return on the fair value of such properties; and (5) fix the rates to be charged by the public utility which will enable it, in addition to paying such operating expenses, to earn such rate of return on the fair value of such properties.

Paragraph (d) of this statute further requires the Commission to consider "all other material facts of record that will enable it to determine what are reasonable and just rates."

[4] For the purpose of making the required estimates of the public utility's revenues and operating expenses, the customary and a proper procedure is for the Commission to fix a test period of twelve months, ending, as close as practicable, before the opening of the hearing. As we said in *Utilities Commission v. Morgan, Attorney General,* 278 N.C. 235, 236-7, 179 S.E. 2d 419:

> "The basic, underlying theory of using the company's operating experience in a test period, recently ended, in fixing rates to be charged by it for its service in the near future is this: Rates for service, in effect throughout the test period, will, in the near future, produce the same rate of return on the company's property, used in rendering such service, as was produced by them on such property in the test period, adjusted for known changes in conditions."

The actual experience of the company during the test period, both as to revenues produced by the previously established rates and as to operating expenses, is the basis for a reasonably accurate estimate of what may be anticipated in the near future if, but only if, appropriate *pro forma* adjustments are made for abnormalities which existed in the test period and for changes in conditions occurring during the test period and, therefore, not in operation throughout its entirety.

In the present record, the evidence is clear, abundant and uncontradicted that: (1) The weather during the heating season in the test period was abnormally cold; (2) with or without such cold weather, Public Service would have sold all the gas available to it from Transco and, therefore, the weather conditions did not affect the volume of gas purchased by it or the

cost to it of such gas; (3) by reason of such cold weather, a greater than usual portion of its gas was sold by Public Service to its firm customers for heating purposes and a correspondingly smaller portion was sold by it to its interruptable industrial customers; (4) the rates charged by Public Service to firm customers are higher, per unit of gas, than the rates charged by it to interruptible industrial customers; and (5) as a result, during the test period, Public Service received more revenues than it would have received from the sale of the same volume of gas in a test period of normal weather.

Therefore, to use the actual experience of the company in the test period as a basis for estimating the probable revenues it will earn in the future under the same rates for service would result in an overestimate of such future revenues and be unfair to the company. Conversely, in a test period in which the weather during the heating season was abnormally warm, so that a smaller than customary volume of gas was used for heating purposes at the higher rates for firm service and a larger than customary volume of gas was sold to interruptible industrial users at the lower rates applicable to that service, would show less revenues than should reasonably be anticipated in the future. In the latter event, to fail to adjust the test period revenues upward would lead to higher rates for service than necessary to yield the return to the company contemplated by G.S. 62-133(b) and would be unjust to the users of gas.

[5] Of course, weather conditions fluctuate and there is no way in which the Commission, engaged in fixing rates, can determine whether the weather in future twelve month periods will be colder or warmer than that of the test period, or colder or warmer than the average in past years. Rate making is, of necessity, a matter of estimate and prediction since rates are set for the future. The statute does not require the Commission to make an adjustment for a slight variation between the weather of the test period and the weather of an average year. The maxim, *de minimis non curat lex,* is applicable to what might be called normal variations from the average. Where, however, as in the present record, the evidence is clear and undisputed that the heating season of the test period was abnormally cold (or abnormally warm), the Commission is clearly authorized, if not required, by G.S. 62-133(b)(2) to make a reasonably appropriate adjustment for such abnormality in the test period experience.

[6] In the present instance, expert witnesses, both for the company and for the Commission Staff, testified to the substantial abnormality of the temperature in the heating season of the test period. They were in substantial agreement. The protestants offered no evidence relating to this matter and elicited by cross-examination no information disclosing error in the studies of these witnesses. The formulae used by these witnesses for computing the amount of adjustment in revenues to be made by reason of the abnormally cold weather appear to us unnecessarily complex. It would seem that a relatively simple and reasonably accurate computation could be made by determining from the company's records the number of days, or hours, in which service to the interruptible customers was interrupted and the volume of gas thus diverted to heating customers. Nothing in the record, however, indicates or suggests that the more complex formulae used by these witnesses resulted in a materially inaccurate computation of the gas so diverted and sold at the higher rate. The Commission elected to accept and use the determination of the amount of such diversion computed by its Staff Engineer. The credibility of testimony and the weight to be given it are for the Commission, not for the reviewing court, and its findings of fact, supported by competent, material and substantial evidence, are conclusive upon appeal. *Utilities Commission v. Telephone Co.*, 281 N.C. 318, 336, 189 S.E. 2d 705; *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.

The Commission's Finding of Fact No. 13, set forth above, is supported by substantial, competent evidence in the record and the Court of Appeals erred in sustaining the protestants' Assignment of Error No. 5, which is directed thereto.

As above noted, G.S. 62-133(b)(1) requires the Commission, as the first step in fixing rates to be charged by a public utility, to ascertain the fair value of the properties used and useful in providing the service. The statute prescribes that, in the ascertainment of such fair value, the Commission shall consider the reasonable original cost, less depreciation, the replacement cost of the property and all other relevant factors. It further provides that the Commission may determine the replace-

ment cost by trending original cost to current cost levels or by any other reasonable method.

In the present case, the Commission had before it evidence of the original cost of the properties, the accumulated reserve for depreciation, the result of trending original cost to current cost levels, the observed depreciation, including obsolescence and inadequacy, and the deduction to be made from current cost on account of depreciation if it be assumed that the actual depreciation has occurred at the same rate as that at which the reserve for depreciation has been accumulated, this being a somewhat larger amount than the observed depreciation according to the testimony of the company's expert witness. There is in the record no substantial conflict in the testimony concerning any of these items. The protestants offered no evidence as to any of them and the cross-examination of the witnesses who testified thereto did not disclose any errors in their computations. The credibility of such testimony and the weight to be given to it are for the Commission. *Utilities Commission v. Telephone Co., supra,* at pp. 339, 358. It, not the reviewing court, is to make the determination of the fair value of the properties. Its determination, if supported by substantial evidence in the record, is conclusive on appeal. G.S. 62-94(b); *Utilities Commission v. Telephone Co., supra,* at pp. 336, 339.

The Commission found the fair value of the properties to be $79,272,908. The protestants' Assignment of Error No. 1, sustained by the Court of Appeals, is directed to this finding, it being the contention of the protestants that the Commission arbitrarily and capriciously added 20% to the net investment of the company in the properties.

The Commission did not make an express finding of the original cost of the properties, less depreciation. It did, however, in its Finding No. 6, find that the company's net operating income for return, appropriately adjusted, was $4,828,260 and that this resulted in a rate of return on net investment, i.e., original cost less depreciation, of 7.27%. A simple arithmetic computation shows that the Commission thus found the original cost of the properties, less depreciation, as of the end of the test period, was $66,413,480. This amount lies between two computations of net investment appearing in the testimony of the Commission's Staff Accountant and is somewhat less than the lowest figure for net investment in the testimony of the company's witnesses. Thus, the Commission's finding of net investment

(original cost less depreciation, plus the allowance for working-capital) is supported by substantial evidence and, if somewhat on the low side, is not prejudicial to the protestants.

[7] In its Finding of Fact No. 5, the Commission expressly found the fair value of the properties (including the allowance for working-capital) to be $79,272,908. Again, a simple arithmetic calculation discloses that the fair value thus found is slightly more than 19% above the original cost so found. It is a mathematical truism that there is a percentage relationship between any two numbers. Such relationship between the figure found as the fair value and the figure found as the original cost of the properties does not, per se, support the protestants' charge that the Commission arrived at its figure for fair value by arbitrarily adding to its figure for original cost a certain percentage thereof. We find nothing else in the record to support such charge.

The only evidence in the record concerning the replacement cost of the properties was the testimony and exhibits of the company's witness, Mr. Russell, who computed the replacement cost by trending the original cost to current cost levels and subtracting from the figure so computed his estimate of actual, observed depreciation, including obsolescence and inadequacy. His testimony was that, so computed, the replacement cost, depreciated, was $94,626,596 and that, had he subtracted for depreciation a percentage of the trended original cost equivalent to the ratio of the accumulated reserve for depreciation to original cost, the resulting figure for replacement cost would have been approximately $91,000,000. Thus, the amount found by the Commission to be the fair value of the properties was approximately midway between the net original cost, less depreciation, and Mr. Russell's lower figure for replacement cost, less depreciation, being slightly nearer the latter figure. We find in this no indication that the Commission, in reaching its conclusion as to the fair value of the properties, failed to observe the mandate of G.S. 62-133(b)(1) that it take into consideration the original cost less depreciation, the replacement cost and other relevant factors disclosed in the record.

In *Utilities Commission v. Telephone Co. supra,* at p. 358, we said: "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." As Chief Justice Denny, speaking for this Court, observed in *Utilities Commission v. Telephone Co.*, 266 N.C. 450, 146 S.E. 2d 487, "Ordinarily, the fair value of a utility's property is found to be less than the reconstruction cost of the property." Clearly, G.S. 62-133(b)(1) contemplates that normally the Commission will so find.

[8] Here, as in *Utilities Commission v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705, the Commission failed to set forth its finding of replacement cost, depreciated. As we there said, this was error. In fairness to the Commission, we note that its order in the present case was entered prior to our decision in that case. As we there said, at p. 360, having made findings of the original cost less depreciation, and replacement cost less depreciation, the weight to be given those figures in reaching the ultimate finding of fair value is to be determined by the Commission, not by the reviewing court.

The protestants have not shown wherein they have been prejudiced by this technical error of the Commission. We, therefore, do not deem this error by the Commission sufficient ground for the sustaining of the protestants' Assignment of Error No. 1 and the reversal of the order. G.S. 62-94(c) provides that, upon an appeal from an order of the Commission, "due account shall be taken of the rule of prejudicial error." Paragraph (b) of this section of the statute further provides that the reviewing court may reverse or modify the decision of the Commission "if the substantial rights of the appellants have been prejudiced" because the Commission's findings, inferences, conclusions or decisions are affected by errors of law. We conclude, therefore, that the Court of Appeals erred in sustaining the protestants' Assignment of Error No. 1 and in basing its reversal of the order thereon.

[9] The protestants' Assignment of Error No. 2, also sustained by the Court of Appeals, relates to the Commission's finding that the rate of return earned by Public Service in the test period on the company's net investment in its properties was 7.27% and insufficient. Insofar as this assignment of error relates to the Commission's finding as to what rate of return was earned, its basis appears to be the Commission's determination that a *pro forma* adjustment in test period revenues should be made on account of abnormally cold weather. As hereinabove stated, we find no error in this. Insofar as this assignment of error relates to the sufficiency of the rate of return so found, the testi-

mony of the company's expert witness supports the finding of the Commission and the testimony of the Commission's Staff Accountant is not in substantial conflict therewith. The protestants offered no evidence relating to the question of what rate of return would be fair.

G.S. 62-133(b)(4) requires the Commission to fix such rate of return on the fair value of the properties as will enable the company by sound management to produce a "fair profit for its stockholders," to maintain its facilities and services and to compete in the market for capital funds on reasonable terms, fair to its customers and to its existing investors. Here, too, the finding of the Commission, if supported by substantial evidence, is conclusive upon appeal, even though the reviewing court might deem a lower rate of return adequate. We find in the record no basis for the sustaining of this assignment of error.

We, therefore, conclude that the Court of Appeals erred in reversing the order of the Commission, that its judgment must, therefore, be reversed and the matter remanded to it for the entry by it of a judgment overruling each of the protestants' assignments of error and affirming the order of the Commission.

Reversed and remanded.

STATE OF NORTH CAROLINA v. CONNELL CARROLL AND ARCHIE MOORE STEWART

No. 31

(Filed 13 December 1972)

1. Constitutional Law § 29; Jury § 7— jury selection — racial discrimination — racial designation on tax and voter lists

Defendants' evidence that the tax and voter registration lists, from which the jury list was made up, designate race by W. and C. was insufficient to make a *prima facie* case of racial discrimination in the selection of the trial jury where the evidence also showed that there was no designation of race or color in the preparation of the jury list or the discs used for drawing a jury, that the discs contain only numbers and no names, that the jurors are chosen by drawing a disc and matching its number with numbers on the jury list, and that from four to eight colored jurors reported for jury service each term.

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

Defendants' confessions were properly admitted in their trial for first degree murder where the uncontradicted evidence on *voir dire* showed that the arresting officer personally knew the defendants and took great pains to explain their rights before he would permit them to make any statements or sign any waivers, and the trial court concluded that the confessions were in fact voluntarily made.

3. **Criminal Law § 26; Homicide § 31— murder in perpetration of robbery — separate punishment for robbery — double jeopardy**

Where defendant's conviction of first degree murder was based on 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.

4. **Constitutional Law § 36; Criminal Law § 135; Homicide § 31— first degree murder — unconstitutionality of death penalty**

The death penalty may not be imposed for the crime of first degree murder where the court or the jury is given the discretion to decide whether punishment shall be death or life imprisonment.

APPEAL by defendants from *Brewer, J.*, April 10, 1972 Criminal Session, JOHNSTON Superior Court.

In these criminal prosecutions both defendants, Connell Carroll and Archie Moore Stewart, were charged by grand jury indictments with the first degree murder and the armed robbery of Clarence Hill. The offenses occurred on December 17, 1971, in Johnston County. After the defendants were arrested, the present attorneys of record were appointed as their counsel. Indictments thereafter were duly returned. The defendants, on application of their counsel, were committed to Dorothea Dix Hospital for psychiatric evaluation. After the examination was completed, the hospital certified as to each defendant, "Without psychosis . . . competent to stand trial . . . ."

Upon arraignment, and before plea, each defendant alleged he was a member of the Negro race; that Clarence Hill, the victim, was a member of the white race; and in the selection of the grand jury which returned the indictments, the regular jurors, and the special venire, the members of defendants' race were systematically excluded from the jury list. The defendants moved the indictments be quashed, the regular panel and the special venire be dismissed, and the court "order a fair and just selection of jurors."

At the beginning of the court's inquiry into the manner of jury selection, the defendants and the State entered into certain

stipulations, among them the following: "The defendants abandoned Paragraph 7 of the petition to quash as same relates to the organization and construction of the Grand Jury panel." The parties further stipulated: ". . . (A)ccording to the United States 1970 Census there were 61,737 inhabitants in Johnston County . . . 13,096 members of the black race or approximately 21% of the total." The evidence disclosed that 46 regular jurors were drawn for service at the trial here involved. However, only 28 of those drawn appeared in court. Among this number were four members of the Negro race. The record does not disclose how many of those excused or failed to appear were also of the Negro race.

The defendants introduced evidence tending to show that 46 names are regularly drawn for jury service at each term of court except those terms in which a grand jury is required and in that event 55 are drawn. No records were kept showing race during recent terms of criminal court. However, the oral evidence disclosed that at such terms from 4 to 8 blacks were on the panel.

The evidence disclosed that the jury list in Johnston County is made up from the tax list and the voter registration list. Approximately 29,000 names were on the tax list and 30,800 were on the voter registration list. Patently most taxpayers are voters and most voters are taxpayers. The lists were given to the Jury Commission for the purpose of eliminating the duplications, striking the names of those who are deceased or have removed from the county, and those who have been convicted of felonies or otherwise disqualified to serve as jurors. The voter registration list designates race by W. and C. The tax list also designates race in the same manner.

In making up the jury list, the Jury Commission first eliminates the duplications in the tax and voter registration lists and thereafter by inquiry determines and removes the names of those deceased, removed from the county, the felons, and those otherwise disqualified for jury service. Approximately 7% of those on the list were removed for reasons other than duplications. The final jury list contains about 29,000 names, each numbered serially. Nothing whatever on the jury list indicates race or color. The testimony disclosed that no one was left off the list by reason of race or color.

After the list was completed, a disc was made and numbered for each name on the list. However, there was nothing on

the disc except the serial number. The jurors were drawn for each session of court by drawing a disc and thereafter determining the identity of the juror drawn by matching the disc and the number on the jury list.

The foregoing is a summary of the evidence offered by the defendants. The evidence being free of contradiction, the court concluded that the defendants had failed to make out a prima facie case of racial discrimination in the selection either of the regular jury or of the special venire. The court denied the motions to dismiss both the regular panel and the special venire.

After the jury was selected in the manner indicated and empaneled, the State offered evidence tending to show the following: For 20 years prior to December 17, 1971, Clarence Hill, a white man, had operated a country store and filling station near Moore's School in Johnston County. Thurman Raper, who lived about one-half mile from Hill's store, testified that on December 17, 1971, he went to the store about 1 o'clock and remained with Mr. Hill until about 3:30 when he went home. About 2 o'clock the defendants, Connell Carroll and Archie Moore Stewart, came to the store apparently on foot. They stayed at the store and were playing checkers when he left. Bobby Narron testified that the defendants were in the Hill store playing checkers when he left the store at about 4:15. Rudy Johnson, who lived nearby, testified he went to the store about 4:40 and found Mr. Hill's dead body behind the counter near the cash register. Dr. Richardson was called, examined the body, and discovered a bullet wound in the head which in his opinion had caused death.

Deputy Sheriff Lewis, who lived nearby, was called and given the information that two colored boys were left in the store shortly before Mr. Hill's body was discovered. Officer Lewis began an investigation and found the two defendants on foot a short distance from the store. They were endeavoring to "thumb a ride." Before asking any questions he gave the defendants the full warnings, reading from a prepared statement. After having their rights explained to them, each stated that he understood them fully, was willing to make a statement, and that he did not want a lawyer present. Officer Lewis was well acquainted with the defendants. He offered to contact a lawyer or permit the defenders to use the telephone to make any calls that they wished. They stated their willingness to talk, to make statements, did not desire a lawyer, or that anyone be called.

The defendants consented to be searched. Carroll had in his right back pocket a wad of money which he said he had found beside the road. The defendant Stewart had $191.00 in the lining of his hat. The boys were questioned in the presence of each other. Their stories agreed that earlier in the day they had planned to rob the Narron store which is located near the Hill store. Carroll had a .45 army pistol. They left home, went to the Narron store, found it closed, then decided to rob the nearby Hill store.

They found a number of customers at the Hill store. They played checkers until all those present had left. Then Carroll approached Mr. Hill near the cash register, shot him one time with the .45 automatic pistol, took the money from Mr. Hill's pocket, and all except the change from the cash register. They also took Mr. Hill's .22 caliber revolver. They left the store on foot, turned down a dirt road where they threw the two pistols into the woods and returned to the highway where Sheriff Lewis apprehended them. They agreed to, and did, show Officer Lewis where they had thrown the pistols. It was then dark and rainy and no search was made for the weapons until the following day. Officer Lewis went back to the place indicated and recovered the .45 automatic pistol and the .22 revolver. Officer Lewis found a .45 caliber empty cartridge case in Hill's store. Ballistic tests disclosed that the empty case found in the store and the bullet removed from Mr. Hill's body had been fired from the automatic pistol recovered by Officer Lewis.

The State's evidence disclosed that the defendants were members of the Negro race and that each was sixteen years of age. Carroll had passed the tenth grade and Stewart the ninth grade in school. The defendants did not testify and did not offer evidence.

The court charged the jury as to each defendant that if the State had satisfied them beyond a reasonable doubt that the defendant Carroll and the defendant Stewart conspired and agreed to rob Mr. Hill and in the attempt to perpetrate such robbery either or both did kill Mr. Hill, it would be their duty to return a verdict of guilty of murder in the first degree as to each defendant.

The court then submitted charges of robbery with firearms and instructed the jury as to the circumstances under which the jury would be warranted in returning verdicts of guilty of the armed robbery.

The jury returned verdicts finding both defendants guilty of murder in the first degree and guilty of armed robbery. The jury as a part of its verdict finding the defendant Stewart guilty of murder in the first degree, recommended punishment be life imprisonment. In finding the defendant Carroll guilty of murder in the first degree, the jury did not make any recommendation with respect to punishment.

The court imposed these judgments: As to Carroll in the charge of murder in the first degree—death by asphyxiation, and life imprisonment as to Stewart; on the charges of robbery with firearms a sentence of 30 years as to each defendant. The defendants excepted and appealed.

Robert Morgan, Attorney General, by Edwin M. Speas, Jr., Associate Attorney for the State.

Grady & Shaw by Philip C. Shaw; Corbett & Corbett by Albert A. Corbett for defendant appellants.

HIGGINS, Justice.

[1] The trial court after careful review concluded the defendants had failed to make out a prima facie case of discrimination against the defendants in the manner in which the trial jury was selected. The evidence, which is without contradiction, apparently refutes any claim of discrimination. The only apparent shadow in the picture is the designation of race on the tax list and the voter registration list from which the jury list was made up. However, when the purpose of the designation is understood, even the shadow is dissipated.

It is a matter of history and within the realm of common knowledge that upon emancipation many of the slaves were given the family names of their former owners. Likewise, it is a matter of common knowledge that many of the slaves remained in the vicinity of their birth so that as a result persons of both races had the same names. For example, there was Joe Brown, W. and Joe Brown, C.; John Smith, W. and John Smith, C. By indicating on the registration books the color designation, the election officials could see to it that each white and each black voted one time and neither voted twice.

Likewise the same designation on the tax records served a useful purpose. When taxes are properly listed they become liens on real property. When Joe Brown or John Smith, W. paid his

taxes his lands were cleared of the lien. When Joe Brown or John Smith, C. paid his taxes his property was cleared of the lien. Absent the designation, uncertainty and confusion could be eliminated only by going back to the lister's scrolls to determine with certainty whose land is burdened with the lien.

However, in the preparation of the jury list and the discs there was no designation of race or color. Hence the procedure followed does not lend itself to racial discrimination in jury selection because the jury list carried no distinction. In addition, the discs which contain only numbers and no names are selected and each juror identified only after the number on the disc is compared with the number on the jury list. According to the evidence, 4, 6 or 8 colored jurors reported for jury service at each term of court. The evidence does not make a prima facie case of discrimination. The jury in *State v. Lowry* and *State v. Mallory,* 263 N.C. 536, 139 S.E. 2d 870, was drawn from a jury list which carried the race designation. The defendants' objections on the grounds of discrimination are not sustained. *State v. Cornell,* 281 N.C. 20, 187 S.E. 2d 768; *State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765; *State v. Ray,* 274 N.C. 556, 164 S.E. 2d 457; *State v. Yoes* and *Hale v. State,* 271 N.C. 616, 157 S.E. 2d 386; *Whitus v. Georgia,* 385 U.S. 545, 17 L.Ed. 2d 599; *Arnold v. N. C.,* 376 U.S. 773, 12 L.Ed. 2d 77; *Brown v. Allen,* 344 U.S. 443, 97 L.Ed. 469.

[2] When the defendants challenged the State's right to introduce the confessions, the court, in the absence of the jury, conducted a detailed voir dire. Mr. Lewis, the arresting officer, had personally known the defendants and took great pains to explain their rights before he would permit them to make any statements or sign any waivers. The defendants did not offer evidence on the voir dire. Hence there were no contradictions or discrepancies in the evidence. The court properly concluded the admissions were in fact voluntarily made and were properly admissible in evidence. *State v. Williams,* 276 N.C. 703, 174 S.E. 2d 503; *State v. Lentz,* 270 N.C. 122, 153 S.E. 2d 864; *State v. Pearce,* 266 N.C. 234, 145 S.E. 2d 918; *State v. Davis,* 253 N.C. 86, 116 S.E. 2d 365; *Davis v. N. C.,* 384 U.S. 737, 16 L.Ed. 2d 895; *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694.

We conclude, therefore, the jury was properly chosen, the confessions were legally admitted in evidence, and the assign-

ments of error based thereon are not sustained. Nevertheless, in view of the gravity of the charges, the verdicts, and judgments, we have carefully examined the record before us and find certain errors appearing therein which we feel it our duty to correct.

[3] It appears conclusively that the armed robbery charges were proved as essential elements in the capital offense of murder in the first degree upon which the defendants were convicted. The robberies, therefore, became a part of and were merged into the murder charges. Having been so used, the defendants cannot again be charged, convicted and sentenced for these elements although the robberies constituted crimes within themselves. The following is quoted from *State v. Peele,* 281 N.C. 253, 188 S.E. 2d 326:

> "Examination of the indictments, verdicts, and judgments discloses 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."

[4] Likewise the face of the record discloses the trial court pronounced the death sentence on defendant Carroll, the jury having failed to recommend life imprisonment. Heretofore, in cases involving death sentences for murder, the Supreme Court of the United States has vacated the death sentences and *remanded the cases to this Court for further proceedings.* We are forced to conclude, therefore, that in this case the State is without authority to execute a death sentence for murder in the first degree even though the jury failed to make any recommendation with respect to punishment. The reasoning seems to be that in cases wherein the state law gives either the court or the jury the option to decide whether punishment shall be death or life imprisonment, the judgment must be life imprisonment in order to obey the mandate of the Eighth Amendment to the

Constitution of the United States. *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346.

Notwithstanding the doubts in the minds of certain members of this Court concerning the validity of a death sentence for murder in the first degree, we must recognize and obey the decisions of the Supreme Court of the United States. *State v. Chandler & Hamby,* 281 N.C. 743, 191 S.E. 2d 66; *State v. Chance,* 281 N.C. 746, 191 S.E. 2d 65; *State v. Westbrook,* 281 N.C. 748, 191 S.E. 2d 68; *State v. Doss,* 281 N.C. 751, 191 S.E. 2d 70; *State v. Miller,* 281 N.C. 740, 190 S.E. 2d 841.

In view of the mandates referred to in *State v. Miller, supra,* and the other cases, we take the practical view and remand the first degree murder charge against Carroll to the Superior Court of Johnston County and direct that the judge presiding at a criminal session of the court bring the defendant and his counsel of record before the court, vacate the death sentence, and impose in lieu thereof a sentence of life imprisonment.

On the charges of armed robbery, for the reasons assigned, the verdicts as to both defendants are set aside, the judgments are vacated, and the charges dismissed.

On the charge of murder against defendant Stewart—no error.

STATE OF NORTH CAROLINA v. ERNEST MACK

No. 62

(Filed 13 December 1972)

1. **Criminal Law § 99— conferences at bench — neutrality of court**

Conferences between the judge and the solicitor at the bench during the course of defendant's trial for first degree murder did not compromise the court's neutrality to defendant's prejudice.

2. **Criminal Law § 89— prior inconsistent statements — impeachment without laying foundation**

Where prior inconsistent statements of a witness are offered into evidence for purposes of impeachment, a foundation need not be laid before the inconsistency may be shown where the statement relates to a matter pertinent and material to the pending inquiry.

3. Criminal Law § 89— indirect inconsistency — impeachment without laying foundation

A defense witness's in-court testimony that she had heard deceased threaten defendant was indirectly inconsistent with her earlier failure to so state at the time she told a police officer that she had heard defendant threaten deceased; the police officer could properly testify to this inconsistency without the laying of a foundation since it related to defendant's plea of self-defense, a matter pertinent and material to the pending inquiry.

4. Criminal Law § 86— impeachment of defendant — prior misconduct

The trial court did not err in allowing the solicitor to ask defendant on cross-examination questions with respect to fourteen previous occasions of misconduct by defendant.

5. Criminal Law § 86— impeachment of defendant — prior arrest or indictment

Although a defendant may not be asked if he has been accused, arrested or indicted for a particular crime, specific acts of criminal and degrading conduct may be inquired about since such questions relate to matters within the knowledge of the witness.

6. Criminal Law § 89— impeachment of State's witness — prior criminal conduct

The record does not support defendant's contention that the court refused to permit defense counsel to cross-examine a State's witness concerning prior criminal conduct for purposes of impeachment.

7. Criminal Law § 50— epileptic seizure of deceased — testimony as to observed facts not opinion evidence

Admission of testimony by a witness that she observed deceased having an epileptic seizure did not constitute prejudicial error since the question of whether deceased was having a seizure was wholly immaterial to the inquiry.

8. Criminal Law § 50— bullets fired at close range — opinion of medical examiner — personal observations

Where the county medical examiner was not offered as an expert witness in the field of ballistics, his opinion testimony that bullets entering deceased's ear were fired at close range was nevertheless competent since it was based on his personal observations; moreover, even if the statement were technically incompetent, its admission resulted in no prejudice to defendant because its exclusion would not likely have produced a different result.

9. Criminal Law § 21; Indictment and Warrant § 14— first degree murder indictment — trial for second degree murder — motion to quash properly denied

Defendant was not entitled to quashal of the bill of indictment returned by the grand jury charging him with first degree murder where, following a preliminary hearing, he was bound over for trial on the lesser charge of second degree murder.

10. Criminal Law § 93— order of proof — matter within discretion of trial court

The admission in a criminal prosecution of evidence as a part of the rebuttal, when such evidence would have been properly admissible in chief, rests in the sound discretion of the trial judge and will not be interfered with in the absence of gross abuse of that discretion.

DEFENDANT appeals from judgment of *McLean, J.*, 29 May 1972 Schedule "C" Session, MECKLENBURG Superior Court.

Defendant was tried upon the following bill of indictment:

"THE JURORS FOR THE STATE UPON THEIR OATH DO PRESENT, That Ernest Mack late of the County of Mecklenburg on the 3 day of March 1972, with force and arms, at and in the said county, feloniously, wilfully, and of his malice aforethought, did kill and murder Nathaniel Reid contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

Laura Springs Daniels, the State's principal witness, testified that on 3 March 1972 Nathaniel Reid was walking up Manson Street in the City of Charlotte, Ernest Mack was following him, and she was walking behind both of them; that they went from Manson Street to Church Street, and she heard Ernest Mack tell Nathaniel Reid that he was going to beat him up; that they reached a vacant lot beside a cafe on the corner of Summit and South Church Streets and walked along a little path crossing the vacant lot; that Nathaniel Reid was walking backwards facing Ernest Mack; that Ernest Mack struck Nathaniel Reid with his fists and knocked him down; that Reid arose and Mack knocked him down again and fired a shot while Reid was on the ground; that Mack then stood over Reid with a pistol in his hand while Reid was "having a fit or seizure or whatever you call it"; that after watching Reid for about five minutes, Mack picked Reid up by the hair of the head, placed the gun to the left side of Reid's head and pulled the trigger; and, as she left hurriedly for the nearby cafe to call the police, she heard a third shot. This witness further testified that she had seen Ernest Mack and Nathaniel Reid fighting many times and that they were always arguing "about this lady. . . . I don't know her name. She lives with Ernest Mack."

Robert Fulwiley, Jr., testified that on the afternoon of 3 March 1972 he saw defendant entering his house holding a pistol in his hand and heard him say "it was all over."

Dr. Hobart R. Wood testified that he examined the body of Nathaniel Reid after it had been removed to the morgue and found three gunshot wounds, two in the left ear which penetrated the brain, showing powder markings around the entry wounds. The third gunshot wound was in the neck over the Adam's apple, the bullet lodging in the back of the neck at the base of the skull. All three bullets were recovered. Dr. Wood testified over objection that in his opinion the three bullets were fired "at very close range, within matter of inches."

Arthur L. Reid testified that he saw Ernest Mack and Nathaniel Reid at Robert Fulwiley's house on the afternoon of 3 March 1972 prior to the shooting; that defendant struck Nathaniel Reid across the head with a pistol and knocked him down whereupon Reid ran around the house and defendant followed him; that defendant returned a short time later with a pistol in his hand and said it was all over.

Sergeant S. T. Stone of the Charlotte Police Department went to the scene following the shooting and found Nathaniel Reid lying facedown and apparently dead at that time. He saw Ernest Mack crossing the street a block away, overtook him and placed him under arrest.

The defendant testified as a witness in his own behalf. He said he had known Nathaniel Reid all of his life; that Reid had become "a little fresh" with defendant's wife and he decided to speak to Reid about it; that Reid denied the accusation saying, "I ain't messing with your damn wife"; that Reid continued his associations with defendant's wife and had whipped her and threatened to kill her and the defendant; that on several occasions previous to the shooting Nathaniel Reid attempted to start a fight but defendant said he didn't want any trouble; that on one occasion the deceased pulled a knife and threatened to kill defendant; that on March 2, Reid called him on the telephone and said: "The next time you see me be ready, I have heard you have got a gun and I have got one too."

Defendant further testified that on 3 March 1972 he met Nathaniel Reid on the corner of Summit and Church Streets at the vacant lot where they exchanged angry words and Reid struck him; that he then knocked Reid down and Reid put his hand in the bib of his overalls to get a gun; that he saw the handle of Reid's gun and, thinking Reid intended to kill him in view of the threats, he pulled his gun, fired three shots,

returned his gun to his pocket and went back up the street. Defendant said his gun was about four feet from Nathaniel Reid's head when he fired the three shots, "one after another."

James Daniel Rice testified that he had seen Nathaniel Reid with the defendant's wife occasionally; that he had seen her enter the back door of Reid's house and that she would stay there a day or two at the time.

Ben Teasley testified that on the morning of 3 March 1972, the day Reid was killed, he saw Reid walking up and down the street with a pistol, drinking while walking, and saying he was going to kill Ernest Mack.

Janie Crawford, a witness for defendant, testified that she had seen Nathaniel Reid with the defendant's wife; that she had spent the night at the Reid home and defendant's wife occupied the same bed with Reid; that on one occasion Mrs. Mack stayed at the Reid home for three weeks; that she had heard Nathaniel Reid threaten the life of defendant on various occasions. This witness further stated that she was married and lived at the same house where Ernest Mack was living; that she had a key to the front door.

By way of rebuttal, the State offered Mary Jane Burton, a "criminalist" with the Charlotte-Mecklenburg Crime Laboratory, who testified that she examined the gun with which Nathaniel Reid was killed and found traces of blood inside the barrel; that she examined the shoes defendant was wearing and found human blood on the tops of the shoes near the front.

W. D. Starnes, a Charlotte police officer, testified that he went to the scene of the shooting, examined the body of Nathaniel Reid there on the ground, and found no gun on him. This officer further testified that he had talked with defendant's witness Janie Crawford at defendant's residence about 7:30 p.m. on the evening of 3 March 1972 during his investigation of the crime. Over objection this witness was permitted to testify "for the purpose of contradicting Janie Crawford" that she had said Ernest Mack had threatened the life of Nathaniel Reid several times in the past few weeks but had made no statement that Nathaniel Reid had ever threatened the defendant Ernest Mack.

The jury convicted defendant of murder in the first degree and recommended life imprisonment. Judgment was pro-

nounced accordingly and defendant appealed. Errors assigned will be noted in the opinion.

John R. Ingle, Attorney for defendant appellant.

Robert Morgan, Attorney General, and Thomas B. Wood, Assistant Attorney General, for the State of North Carolina.

HUSKINS, Justice.

[1] During the course of the trial, the presiding judge twice called the solicitor to the bench and conferred with him, following which the solicitor resumed his examination of the witness then on the stand. Defendant contends these conferences were highly suggestive to the jury and compromised the court's neutrality to the prejudice of the defendant. This constitutes defendant's first assignment of error.

What was said between the judge and solicitor is not shown by the record. Whispered conferences at the bench between the judge and the solicitor, or the judge and defense counsel, or both, are common occurrences and are often necessary to facilitate the trial and avoid delays incident to excusing the jury. Sinister motives and prejudicial consequences may not be inferentially attributed to such occurrences with nothing in the record to support the inference. This assignment is overruled without further discussion.

Janie Crawford, a defense witness, testified that she had heard the deceased threaten the life of defendant. There was no cross-examination concerning other threats, if any, she might have heard. In rebuttal, over objection and after a proper limiting instruction, Officer Starnes was permitted to testify that during his investigation he had talked with Janie Crawford shortly after the murder; that she had told him the *defendant* had threatened deceased quite often in the past few weeks but had said nothing whatsoever about the *deceased* having threatened the defendant. The admission of this testimony by Officer Starnes for the limited purpose of contradicting and impeaching the testimony of Janie Crawford constitutes defendant's second assignment of error.

[2] Prior statements of a witness which are inconsistent with his present testimony are not admissible as substantive evidence because of their hearsay nature. *Hubbard v. R. R.*, 203 N.C. 675, 166 S.E. 802 (1932); *State v. Neville*, 51 N.C. 423

(1859). Even so, such prior inconsistent statements are admissible for the purpose of impeachment. *State v. Chance,* 279 N.C. 643, 185 S.E. 2d 227 (1971); *State v. Britt,* 225 N.C. 364, 34 S.E. 2d 408 (1945); Stansbury, N. C. Evidence, § 46 (2d ed. 1963). Whether a foundation must be laid before a prior inconsistent statement may be shown depends on whether the prior inconsistency relates to *a matter pertinent and material to the pending inquiry,* or is merely *collateral.* If the former, the statement may be shown by other witnesses without the necessity of first laying a foundation therefor by cross-examination. *State v. Wellmon,* 222 N.C. 215, 22 S.E. 2d 437 (1942); *State v. Carden,* 209 N.C. 404, 183 S.E. 898 (1936); *Jones v. Jones,* 80 N.C. 246 (1879); *State v. Patterson,* 24 N.C. 346 (1842); Stansbury, N. C. Evidence, § 48 (2d ed. 1963). Accordingly, if Janie Crawford's prior statement to Officer Starnes that defendant had threatened the deceased when coupled with her *failure* also to state that the deceased had threatened defendant was inconsistent with her in-court testimony and concerned matters pertinent and material to the inquiry, then that prior statement was properly admitted for impeachment purposes and laying a foundation therefor by cross-examination was unnecessary.

[3] Applying the foregoing principles, we hold that Janie Crawford's in-court testimony that she had heard deceased threaten defendant was inconsistent with her earlier *failure* to so state at the time she told Officer Starnes she had heard defendant threaten deceased. " . . . [I]f the former statement fails to mention a material circumstance presently testified to, which it would have been natural to mention in the prior statement, the prior statement is sufficiently inconsistent," McCormick, Evidence, § 34 (2d ed. 1972), and is termed an *indirect inconsistency. Esderts v. Chicago Rock Island & Pacific Co.,* 76 Ill. App. 2d 210, 222 N.E. 2d 117 (1966). *See also Erickson v. Erickson & Co.,* 212 Minn. 119, 2 N.W. 2d 824 (1942). Surely Janie Crawford, a friend of defendant who lived in his home, when being questioned by officers about the relationship between defendant and deceased would naturally have related threats made by deceased against defendant as well as threats made by defendant against deceased. Therefore, her failure to tell Officer Starnes of such threats by deceased when it was natural to do so is indirectly inconsistent with her in-court testimony concerning such threats. Hence, evidence of such failure was admissible to impeach her testimony to that effect.

In the context of this record, this evidence was admissible without laying a foundation by cross-examination of Janie Crawford. Defendant, relying on his plea of self-defense, had testified that deceased had frequently threatened his life and had warned him to "be ready." Janie Crawford later testified that she too had heard deceased threaten defendant. Such threats, although apparently not communicated to defendant, were competent to corroborate defendant's testimony. *State v. Baldwin,* 155 N.C. 494, 71 S.E. 212 (1911); *State v. Turpin,* 77 N.C. 473 (1877). Therefore, when Janie Crawford failed to relate to Officer Starnes that she had heard deceased threaten defendant, she failed to relate a fact pertinent and material to the case under circumstances in which it would have been natural to do so. Under the rule enunciated, this failure may be shown without laying a foundation. *Compare State v. Taylor,* 250 N.C. 363, 108 S.E. 2d 629 (1959). The evidence of Officer Starnes was properly admitted, and defendant's second assignment of error is overruled.

[4] The State was permitted over defendant's objection to ask him on cross-examination a series of questions concerning his prior criminal conduct. Rather than asking defendant what he had been convicted of, the solicitor phrased these questions as follows: "Directing your attention back to the year 1950, did you assault someone with a deadly weapon which resulted in serious injury?" Similar questions were propounded with respect to fourteen different offenses between 1950 and 1970. Defendant stated that he had committed five of the offenses, including sodomy, crime against nature and assault with a deadly weapon inflicting serious injury, but he denied having committed the other nine offenses. Defendant contends that cross-examination for impeachment purposes concerning criminal conduct is limited to inquiry about prior *convictions* and assigns the allowance of these questions as error.

It has long been the rule that where a defendant in a criminal case testifies in his own behalf, specific acts of misconduct may be brought out on cross-examination to impeach his testimony. *State v. Colson,* 194 N.C. 206, 139 S.E. 230 (1927); Stansbury, N. C. Evidence § 111 (2d ed. 1963). Such "cross-examination for the purpose of impeachment *is not limited to conviction of crimes.* Any act of the witness which tends to impeach his character may be inquired about or proven by cross-examination." *State v. Sims,* 213 N.C. 590, 197 S.E. 176 (1938).

[5] Although a defendant may not be asked if he has been accused, arrested or indicted for a particular crime, *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174 (1971), he may be asked if he in fact committed the crime. "It is permissible, for purposes of impeachment, to cross-examine a witness, including the defendant in a criminal case, by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct. [Citations omitted.] Such questions relate to matters *within the knowledge of the witness,* not to accusations of any kind made by others." *State v. Williams, supra. See also State v. Griffin,* 201 N.C. 541, 160 S.E. 826 (1921); *State v. Colson, supra.* Of course, such questions must be asked in good faith, *State v. Williams, supra; State v. Bell,* 249 N.C. 379, 106 S.E. 2d 495 (1959). When this assignment is subjected to these rules, its lack of merit is quite apparent.

[6] Defendant's fourth assignment of error is based on the contention that the trial court did not allow him to impeach a State's witness on cross-examination by questions concerning her prior criminal conduct.

The record pertinent to this assignment reveals the following exchange among the court, defense counsel and the witness:

"Q. [by Mr. Ingle, defense counsel] In April of 1971 you were tried—

COURT: Wait just a minute. Members of the jury, you step out to your room a minute, please.

(JURY RETIRES TO JURY ROOM.)

COURT: What are you going by?

MR. INGLE: Your Honor, I am going by records I got down in the police department.

COURT: . . . Now, what did you say about your conviction?

A. [by witness] Well, this is the way it was. My husband was caught stealing and I was with him. I had not done anything, the officer said, but I was—Judge Gatling placed me on probation. He gave me six months suspended under two years probation. I got arrested again for damage to real property. I was on probation and my probation officer had it over on me and she revoked by probation and I was tried before you.

COURT: Did you appeal to this court?

A. Yes, I appealed.

COURT: What happened when you got up here?

A. They declared a mistrial, took me off probation.

COURT: Tell the clerk. He will have to get the file. What else do you want to ask her about?

MR. INGLE: I wanted to ask her about occupying a room for immoral purposes.

A. Yes, I wasn't tried for it. It was throwed out of court. Mistrial. I didn't say anything. They told me to go home. It was a mistrial.

MR. INGLE: I was going to ask you about breaching the peace on April of this year.

A. Yes, I was at home.

COURT: Were you tried and convicted of it? This is the important part.

A. I pleaded guilty.

COURT: For disorderly conduct?

A. Yes.

Q. [by Mr. Ingle] What else have you been tried and convicted of?

A. That is it.

COURT: Well, you will have to get the file on this other now. Anything else you want to ask her?

MR. INGLE: About criminal matters, no, sir.

* * *

COURT: After we look into this other matter I will let you recall her and ask her about something else. You may stand aside.

MR. RANKIN [solicitor]: I would like to ask a few more questions on redirect.

COURT: Let the jury come back."

The jury returned and, following Mr. Rankin's redirect examination, defense counsel further cross-examined the witness at length but failed to propound any question concerning her prior criminal conduct. This suggests that he either overlooked the matter or was satisfied with what he had already brought out before the jury. In any event, the record does not support the contention that the court refused to permit counsel to cross-examine the witness concerning prior criminal conduct for purposes of impeachment. Defendant's fourth assignment of error is overruled.

Defendant's fifth assignment of error, addressed to the refusal of the court to record the solicitor's argument to the jury, is overruled without discussion on authority of *State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897 (1970).

[7, 8] Defendant next contends that lay witnesses were permitted to testify concerning matters calling for an expert. He argues it was error (1) to permit Laura Springs Daniels to state: "Nathaniel Reid was having a fit or seizure or whatever you call it," and (2) to permit Dr. Hobart R. Wood, the medical examiner for Mecklenburg County, to state that in his opinion the bullets entering Nathaniel Reid's ear "were fired at very close range, within matter of inches." The record does not reveal that the medical examiner was offered as an expert witness in the field of ballistics. It does show that Laura Springs Daniels knew the deceased was an epileptic and had often observed him undergoing a seizure.

Even if erroneously admitted, which is not conceded, the first statement was harmless and its admission in no sense could constitute prejudicial error. Whether the deceased was having a seizure is wholly immaterial to the inquiry. In regard to Dr. Wood's statement, the witness Daniels had already testified without objection that she saw defendant place the gun to the left side of Nathaniel Reid's head and pull the trigger. Dr. Wood had already testified without objection that the two gunshot wounds entering Reid's head at the left ear "showed powder markings, distinct zone of powder marking around the entry wound." In light of these personal observations by Dr. Wood, a man who had done an estimated three thousand autopsies according to his testimony, it would not require a ballistics expert to conclude that the gun was in close proximity to the victim's head when the bullets were fired. Dr. Wood's statement, based on his personal observations, was competent

and its admission was not error. Moreover, even if his statement be regarded as technically incompetent, its admission resulted in no prejudice to defendant because its exclusion would not likely have produced a different result. *State v. Bailey,* 280 N.C. 264, 185 S.E. 2d 683 (1972); *State v. Barbour,* 278 N.C. 449, 180 S.E. 2d 115 (1971); *State v. Barrow,* 276 N.C. 381, 172 S.E. 2d 512 (1970); *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969); *State v. Temple,* 269 N.C. 57, 152 S.E. 2d 206 (1967); *State v. Norris,* 242 N.C. 47, 86 S.E. 2d 916 (1955); *State v. Bennett,* 237 N.C. 749, 76 S.E. 2d 42 (1953). This assignment is overruled.

[9] Defendant was tried on a bill of indictment returned by the grand jury charging him with murder in the first degree. He moved to quash the bill on the ground that, following a preliminary hearing, he was bound over for trial on the lesser charge of second degree murder. Denial of the motion constitutes his seventh assignment of error, but he cites no authority in support of his position.

A preliminary hearing is not an essential prerequisite to the finding of a valid bill of indictment. *State v. Hartsell,* 272 N.C. 710, 158 S.E. 2d 785 (1968); *State v. Hackney,* 240 N.C. 230, 81 S.E. 2d 778 (1954). "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. . . . [A]nd 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)." *State v. Cradle,* 281 N.C. 198, 188 S.E. 2d 296 (1972). Manifestly, when a prosecuting officer is satisfied that a higher grade of offense than that returned by the committing magistrate has been committed, he may draw the bill accordingly. This assignment has no merit and is overruled.

[10] Finally, defendant contends that certain evidence presented by the State on rebuttal should have been offered by the State while making out its case in chief and thus was erroneously admitted as rebuttal evidence.

The order of proof is a rule of practice resting in the sound discretion of the trial court. *State v. Thomas,* 244 N.C. 212, 93 S.E. 2d 63 (1956). "The court, to attain the ends of justice, may

in its discretion allow the examination of witnesses at any stage of the trial." *State v. King,* 84 N.C. 737 (1881). It is held by the great weight of authority that "the admission in a criminal prosecution of evidence as a part of the rebuttal, when such evidence would have been properly admissible in chief, rests in the sound discretion of the trial judge and will not be interfered with in the absence of gross abuse of that discretion." 53 Am. Jur., Trial § 129. *Accord,* 88 C.J.S., Trial, § 102; *State v. Knight,* 282 N.C. 220, 192 S.E. 2d 283 (1972). This assignment is overruled.

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

No error.

R. W. MAYO, PLAINTIFF v. AMERICAN FIRE AND CASUALTY COMPANY, ORIGINAL DEFENDANT, AND MAX G. CREECH, ADDITIONAL PARTY DEFENDANT

No. 67

(Filed 13 December 1972)

1. **Insurance § 2— insurance agent — duty to use reasonable diligence**

If an insurance agent or broker undertakes to procure for another insurance against a designated risk, the law imposes upon him the duty to use reasonable diligence to procure such insurance and holds him liable to the proposed insured for loss proximately caused by his negligent failure to do so.

2. **Insurance § 2— procurement of insurance — liability of agent to insured**

If an agent or broker, in fact, procured the contemplated insurance coverage from a competent, solvent insurer, so that it was in effect at the time of the casualty against which the proposed insured sought coverage, he has performed his undertaking and is not liable to the insured thereon.

3. **Insurance § 4— binder as oral or written communication**

A valid binder for fire insurance coverage may be oral or written, and no specific form or provision is necessary to render a memorandum or an oral communication intended as a binder a valid contract of insurance.

4. **Insurance § 4— binder — inclusion of statutory standard fire policy**

The provisions of the statutory standard fire insurance policy are read into a binder, whether oral or written. G.S. 58-177.

5. Insurance § 4— *binder — extension of credit to insured for premium*

An extension of credit to the insured for the premium does not destroy the validity of the binder.

6. **Insurance § 4— valid oral binder — necessity for written memorandum**

Where the insured and the agent contemplated coverage effective immediately upon the making of the oral agreement, it is immaterial that they also contemplated a subsequent delivery of a written memorandum which did not occur until after the loss.

7. **Appeal and Error § 57— findings of fact supported by evidence — conclusiveness on appeal**

In an action to recover on a fire insurance policy, the trial court's finding that defendant agent, having been requested by the plaintiff to insure his building and its contents in specified amounts, advised plaintiff that the property was insured with defendant company was fully supported by the evidence and was binding on appeal.

8. **Appeal and Error § 57— error in conclusions of law**

Findings of fact by the trial court would compel the conclusion that defendant agent, on behalf of defendant company, entered into a valid binder affording plaintiff the insurance coverage which plaintiff requested and the agent undertook to obtain, but would not support the conclusions of the trial court to the effect that the agent did not bind the company to a contract of fire insurance but negligently failed to procure such coverage.

9. **Insurance §§ 2, 4— issuance of binder by agent — failure to give notice to company**

The agency agreement between defendant agent and defendant insurance company did not make the sending of notice of commitment of liability to the company a condition precedent to the company's liability upon a binder, but merely provided for recourse by the company upon defendant agent if, due to his negligent failure to notify the company, it sustained a loss.

10. **Principal and Agent § 5— undisclosed limitations on agent's authority — failure to bind third party**

Undisclosed, private limitations upon the authority of an agent do not bind a third party who, being unaware of them, contracts with the agent within the customary scope of such agent's authority.

11. **Appeal and Error § 63— error in conclusions of law — judgment reversed**

In an action to recover on a fire insurance policy where the trial court made findings as to all material facts and such findings were supported by competent evidence, error made in conclusions of law based thereon would not require a new trial but would require only a reversal of the judgment insofar as it imposed liability upon defendant agent.

ON *certiorari* to the Court of Appeals to review its decision, reported in 15 N.C. App. 309, 190 S.E. 2d 398, granting a new trial upon appeal to it by the additional defendant, Creech, from *Brewer, J.*, at the 10 January 1972 Session of JOHNSTON.

The plaintiff instituted this action against the American Fire and Casualty Company, hereinafter called American, to recover upon an alleged binder insuring him against loss by fire of a building and its contents. American having filed answer denying liability, he filed an amended complaint and made Creech an additional defendant. The amended complaint alleges in substance:

On 20 May 1969 Creech was the agent of American, authorized to write fire insurance and policies and binders. On that date, upon plaintiff's request to write a binder insuring the plaintiff against loss by fire of his building and its contents, in the amounts of $4,000 and $1,500, respectively, Creech advised the plaintiff that the property was so insured by American and that the binder had been issued. On 28 May 1969 the building and its contents were completely destroyed by fire. American denied that any such policy of insurance was issued and advised the plaintiff that Creech neglected or failed to write and issue such binder. For such negligence American and Creech are jointly liable to the plaintiff. Creech, acting as agent for American, contracted with the plaintiff to issue such binder, and such contract was completed. The defendants are bound by such binder and are jointly and severally liable to the plaintiff in the amount of his loss "by virtue of this agreement."

American filed answer denying the sufficiency of the amended complaint to state a cause of action against it, denying all the material allegations of the amended complaint, and asserting that Creech had no authority to issue any contract of insurance or any binder on behalf of American insuring the plaintiff's property. American also alleged a cross claim against Creech for indemnity against loss by virtue of any recovery from it by the plaintiff.

Creech filed answer denying the sufficency of the amended complaint to state a cause of action against him, alleging that Creech was the agent of American and authorized to issue binders on its behalf, that he was requested by the plaintiff to issue the binder referred to in the complaint, that he did issue such

binder on behalf of American, that he so notified the plaintiff and if the plaintiff is entitled to recover of anyone, he is entitled to recover of American and not of Creech. Answering the cross claim of American, Creech alleged its cross claim failed to state a cause of action against him, that he was authorized by American to issue a binder on its behalf to the plaintiff, and that if he was negligent in any manner, such negligence was not the proximate cause of any loss to American.

By consent, the matter was tried without a jury. The following facts, summarized, were stipulated:

Creech is an insurance broker, representing both the insurers and insureds. Creech and American entered into an agency contract, a copy of which was attached to the stipulation. On 20 May 1969 the plaintiff requested Creech to obtain immediately a fire insurance policy insuring the building in the amount of $4,000 and its contents in the amount of $1,500. Creech advised the plaintiff that the property was so insured, and prepared certain written notes, a copy of which was attached to the stipulation. On 28 May 1969 the building and contents were damaged by fire, the extent of the damage being $3,500 to the building and $1,500 to the contents.

The agency agreement, so stipulated, granted Creech authority to issue policies and binders. It further provided: "Notice of any commitment of liability by the Agent shall be sent to the Company on or before the date on which the insurance is effective. All binders or policies shall be in accordance with the manuals and written or printed instructions of the Company now or hereafter furnished to the Agent. * * * The Agent shall be liable for any loss sustained by the Company from any negligent delay in complying with the provisions of this paragraph."

Neither defendant offered any evidence. Creech testified as an adverse witness for the plaintiff. The plaintiff testified to the following effect:

He was the owner of the building and its contents. On 20 May 1969 he went to the office of Creech, who had been handling his insurance for several years. Creech told the plaintiff he could insure the building and its contents and issue a binder but would have to ascertain the rating before the policy itself could be issued. Creech told the plaintiff that he was

insured as of that date in the amount of $4,000 on the building and $1,500 on the contents. His best recollection is that Creech told him the property would be insured with American. Thereafter, prior to the fire, Creech confirmed that the property was insured. When the plaintiff called to notify Creech of the loss, Mrs. Barbour, secretary to Creech, advised the plaintiff that he was covered through a binder. Creech billed the plaintiff for the premium and the plaintiff paid it.

Creech, called as a witness by the plaintiff, testified to the following effect:

The stipulated agency agreement was in effect on 20 May 1969. Under that contract, as agent for American, Creech then undertook to insure the plaintiff's property. The plaintiff was to pay the premium on an open account and payment was not a condition precedent to the issuance of the insurance. During the conversation, Creech made appropriate notes so that the customary written documents could be prepared. After the plaintiff left his office, Creech instructed his secretary to obtain a rating from the Rating Bureau and to prepare and issue a binder. She made notes of these instructions.

The day after the fire, the plaintiff telephoned Creech to inquire as to whether the insurance coverage was in effect. Creech told him that it was. Thereafter, Creech's secretary advised him that she had requested a rating from the Rating Bureau but had forgotten to issue the binder. Creech immediately communicated with the special agent of American. This was his first communication with American concerning this coverage. Rule 4 of the Rules and Regulations of the North Carolina Fire Insurance Rating Bureau provides that, in preparing written binders, one copy should be sent to the Bureau, one to the Company and one to the insured, and a fourth copy retained for the agent's file.

In the conversation on 20 May 1969, Creech told the plaintiff that he was insured as of that date, that Creech would place the insurance with American and would send a binder to the plaintiff by mail, but would have to get a rating from the Rating Bureau before he could tell the plaintiff what the premium would be. Getting a rating from the Rating Bureau is not a prerequisite to entering into a contract of insurance. Creech did not receive the rating from the Rating Bureau prior to the fire. He had never been instructed by American not to enter into

oral contracts of insurance. After the loss, Creech prepared a binder showing that the rate was to be promulgated by the Rating Bureau and showing the effective date of the binder as 20 May 1969. This written binder, having been issued more than 30 days after its stated effective date, was a mere memorandum showing what binder Creech intended to write on 20 May 1969.

Mrs. Barbour, Creech's secretary, testified that, while the plaintiff was in Creech's office on 20 May 1969, Creech instructed her that "We are going to insure the building for Mr. Mayo for $4,000 and $1,500 on the contents and that it would be insured with American Casualty, and that we had to ask the Bureau to promulgate the rate, and I had to issue a binder on it." She was told that the insurance was to be effective on that date, 20 May 1969. The written binder was not issued because she forgot to do so.

Judge Brewer entered a judgment containing findings of fact and conclusions of law as here summarized:

FINDINGS OF FACT

1. Under the terms of the agency contract, Creech's authority to bind American required notice of any commitment of liability by the agent to be sent to the company on or before the date on which the insurance was to be effective.

2. On 20 May 1969 the plaintiff, a client of Creech, requested Creech to insure the building in the amount of $4,000 and its contents in the amount of $1,500. Creech advised the plaintiff that such property "was now insured and that such insurance would be with the American Fire and Casualty Company," and that Creech would prepare a written binder of insurance with American and would mail a copy thereof to the plaintiff.

3. On 20 May 1969 Creech instructed his secretary to prepare such written binder.

4. On 20 May 1969 it was the intention of Creech to insure the property with American through a written binder in order to provide American with proper notice of the risk.

5. On 28 May 1969 the plaintiff's property was damaged by fire in the amount of $3,500 to the building and $1,500 to the contents. At the time of this fire, Creech's secretary had for-

gotten and neglected to prepare and issue the written binder, as directed by Creech, and there was no binder of insurance insuring such property with American.

6. Creech first notified American of the proposed contract after the fire.

CONCLUSIONS OF LAW

1. Creech agreed to procure fire insurance coverage for the plaintiff, effective 20 May 1969, as alleged in the complaint.

2. Creech negligently failed to procure such insurance.

3. Creech failed to give American timely notice of his intention to bind American to such fire insurance coverage.

4. Creech did not bind American to a contract of fire insurance coverage on behalf of the plaintiff.

5. The plaintiff is entitled to recover of Creech the sum of $5,000.

6. The costs of the action should be taxed against Creech.

Pursuant to these findings and conclusions, the superior court adjudged that the plaintiff have and recover of Creech $5,000, together with the costs of the action, and that the plaintiff have and recover nothing of American, as to whom the action was dismissed.

Creech excepted and gave timely notice of appeal to the Court of Appeals. The plaintiff did not except to the judgment or appeal therefrom.

Creech assigned as error: (1) The signing of the judgment for that the findings of fact do not support the judgment and the conclusions of law are contrary to the findings of fact, and are unwarranted and erroneous; and (2) the findings of fact do not support the judgment for that the court found Creech and American entered into an agency contract but did not include in the finding the terms thereof as to Creech's authority to bind American.

The Court of Appeals held the judgment of the superior court is a final adjudication as between the plaintiff and American. It further held the superior court's conclusion that Creech did not bind American to a contract of insurance with the plaintiff is based upon the finding that Creech did not notify Ameri-

can of any commitment of liability as he was required to do under his agency contract. The Court of Appeals being of the opinion that this finding does not support the conclusion, a new trial was ordered. The Court of Appeals directed: "If, on the next trial, the trial judge determines that [Creech] had authority to bind [American] by an oral contract, he will then determine whether, for valid consideration, appellant orally agreed on behalf of the company to provide insurance for plaintiff until a more formal written binder or policy could be issued; and whether the content of the oral agreement was sufficient to constitute a valid binder."

Robert A. Spence for plaintiff appellant.

Teague, Johnson, Patterson, Dilthey & Clay by Ronald C. Dilthey, for American Fire and Casualty Company.

James A. Wellons, Jr., for defendant appellant Creech.

LAKE, Justice.

[1] The plaintiff's alleged cause of action against Creech is for damages caused by Creech's negligence in failing to procure, for the benefit of the plaintiff, insurance coverage which Creech undertook to procure. It is well established in this State that, if an insurance agent or broker undertakes to procure for another insurance against a designated risk, the law imposes upon him the duty to use reasonable diligence to procure such insurance and holds him liable to the proposed insured for loss proximately caused by his negligent failure to do so. *Wiles v. Mullinax* (second appeal), 270 N.C. 661, 155 S.E. 2d 246; *Wiles v. Mullinax* (first appeal), 267 N.C. 392, 148 S.E. 2d 229; *Bank v. Bryan*, 240 N.C. 610, 83 S.E. 2d 485; *Meiselman v. Wicker*, 224 N.C. 417, 30 S.E. 2d 317; *Case v. Ewbanks*, 194 N.C. 775, 140 S.E. 709; *Elam v. Realty Co.*, 182 N.C. 599, 109 S.E. 632; 18 A.L.R. 1210. See also: 43 Am. Jur. 2d, Insurance, § 174; Annot., 29 A.L.R. 2d 171, 175.

[2] Conversely, if the agent or broker, in fact, procured the contemplated insurance coverage from a competent, solvent insurer, so that it was in effect at the time of the casualty against which the proposed insured sought coverage, he has performed his undertaking and is not liable to the insured thereon. *Wiles v. Mullinax* (third appeal), 275 N.C. 473, 168 S.E. 2d 366; *Case v. Ewbanks, supra; Milwaukee Bedding Co. v. Graebner*, 182 Wis. 171, 196 N.W. 533. In the latter event, nothing else appearing,

the agent or broker is not a party to the contract of insurance and is not liable thereon, irrespective of any default in the performance thereof by the insurer and irrespective of the insured's lack of success in an action against such defaulting insurer. Creech contends that he is not liable to the plaintiff in this action for the reason that he, as agent for American and on its behalf, entered into a binder agreement with the plaintiff, which was in effect at the time of the fire and afforded the plaintiff the insurance coverage which Creech undertook to provide.

[3-6] A valid binder for fire insurance coverage may be oral or written. G.S. 58-177; *Moore v. Electric Co.*, 264 N.C. 667, 142 S.E. 2d 659; *Lea v. Insurance Co.*, 168 N.C. 478, 84 S.E. 813. No specific form, or provision, is necessary to constitute a memorandum, or an oral communication, intended as a binder, a valid contract of insurance. *Wiles v. Mullinax* (second appeal), *supra*. It is not required that the writing, or oral communication, set forth all the terms of the contemplated contract of insurance. *Distributing Corp. v. Indemnity Co.*, 224 N.C. 370, 30 S.E. 2d 377. The provisions of the statutory standard fire insurance policy are read into a binder, whether oral or written. G.S. 58-177; *Wiles v. Mullinax* (second appeal), *supra; Lea v. Insurance Co., supra*. An extension of credit to the insured for the premium does not destroy the validity of the binder. *Lea v. Insurance Co., supra;* Couch on Insurance, 2d Ed, § 14:29. Where the insured and the agent contemplated coverage effective immediately upon the making of the oral agreement, it is immaterial that they also contemplated a subsequent delivery of a written memorandum which did not occur until after the loss. See, *Wiles v. Mullinax* (second appeal), *supra*.

In *Milwaukee Bedding Co. v. Graebner, supra,* the facts were similar to those in the present case, except that there the agent handed to the contemplated insured a copy of her written notes concerning the terms of the policy which she was to prepare and deliver. The Supreme Court of Wisconsin said:

> "It is a general rule that, where an application for insurance is made to an agent who represents several companies, no contract of insurance is engendered between the insured and any particular company until such company is designated by the agent. But, where the company is selected by the agent, and in some manner designated as the company in which the insurance is to be written, a binding contract results. In such case the agent becomes the

agent of the insured for the purpose of selecting the company." (Citations omitted throughout.)

[7] In the present case the superior court found as a fact that Creech, having been requested by the plaintiff to insure his building and its contents in specified amounts, "advised plaintiff that such property was now insured and that such insurance would be with the American Fire and Casualty Company." This finding is fully supported by the evidence of the plaintiff himself. The parties having waived a trial by jury, this finding of fact by the Court, has the effect of a verdict of the jury and is conclusive on appeal. *Knutton v. Cofield,* 273 N.C. 355, 160 S.E. 2d 29; *Young v. Insurance Co.,* 267 N.C. 339, 148 S.E. 2d 226; *Everette v. Lumber Co.,* 250 N.C. 688, 110 S.E. 2d 288; *Insurance Co. v. Lambeth,* 250 N.C. 1, 108 S.E. 2d 36; Strong, N. C. Index 2d, Trial, § 58.

[8] The notes prepared by Creech at the time of the conference with the plaintiff on 20 May 1969, the parties having stipulated the authenticity of a copy contained in the record on appeal, show the plaintiff's name, the name of American, the description of the building and its location, the amount of coverage and that the insurance was to be a standard fire policy. Nothing else appearing, the above mentioned finding of fact, supported as it is by the evidence in the record, compels the conclusion that Creech, on behalf of American, entered into a valid binder affording the plaintiff the insurance coverage which the plaintiff requested and Creech undertook to obtain, and does not support the contrary conclusions reached by the trial court to the effect that Creech did not bind American to a contract of fire insurance coverage and negligently failed to procure such coverage. It is apparent that the trial court reached its said conclusions by reason of its finding that Creech, through his secretary, forgot and neglected to issue the written memorandum, as contemplated, and the finding that the contract between Creech and American required Creech to send to American a notice of any commitment of liability on or before the date on which such insurance was to be effective.

[9, 10] The agency agreement between Creech and American, the authenticity of the copy thereof contained in the record being stipulated, specifically authorized Creech to issue binders. While it required that notice of any commitment of liability by the agent be sent to the company on or before the date on which the insurance is effective, it further provided that the agent

would be liable for any loss sustained by the company from his negligent delay in doing so. Thus, the contract does not make the sending of the notice to the company a condition precedent to the company's liability upon a binder, but merely provides for recourse by the company upon Creech if, due to his negligent failure to notify the company, it sustains a loss. Furthermore, nothing in the record indicates that the plaintiff had notice of this provision. Undisclosed, private limitations upon the authority of an agent do not bind a third party who, being unaware of them, contracts with the agent within the customary scope of such an agent's authority. *Lochner v. Sales Service,* 232 N.C. 70, 59 S.E. 2d 218; *Warehouse Co. v. Bank,* 216 N.C. 246, 4 S.E. 2d 863; *R. R. v. Smitherman,* 178 N.C. 595, 101 S.E. 208; Strong, N. C. Index 2d, Principal and Agent, § 5.

[11] The trial court having made findings as to all material facts, which findings are supported by competent evidence and which findings preclude recovery by the plaintiff against Creech, and having fallen into error only in its conclusions of law based thereon, such error does not require a new trial but a reversal of the judgment insofar as it imposes liability upon Creech. See: *Conger v. Insurance Co.,* 266 N.C. 496, 146 S.E. 2d 462; Strong, N. C. Index 2d, Appeal and Error, § 63. In this respect only the judgment of the Court of Appeals is in error.

The appeal of Creech did not bring before the Court of Appeals, and so does not present to us, so much of the judgment of the superior court as adjudicated the right of the plaintiff to recover from American. Creech, having appealed, is not bound by that adjudication and is not precluded from attacking the soundness of the conclusions of law upon which it was based. See, *Conger v. Insurance Co., supra.*

The judgment of the Court of Appeals is therefore vacated and this matter is remanded to it for the entry of a judgment reversing the judgment of the superior court insofar as that judgment relates to the right of the plaintiff to recover from the defendant Creech.

Vacated and remanded.

STATE OF NORTH CAROLINA v. HORACE RAY McCLAIN

No. 45

(Filed 13 December 1972)

1. **Criminal Law § 34— evidence of defendant's guilt of other offenses — exceptions to inadmissibility**

In a prosecution for a particular crime the State generally cannot offer evidence tending to show that the accused has committed another distinct, independent or separate offense; however, evidence that defendant committed an offense similar to the one for which he was on trial was admissible if it tended to show that defendant was the perpetrator of the crime for which he was being tried or if it tended to establish a common plan or scheme.

2. **Criminal Law § 34— admissibility of defendant's guilt of other offenses — to show common plan — to identify defendant**

Evidence of a crime allegedly committed by defendant a week after the crime for which he was on trial was properly admitted where similarities between the two crimes tended to show a *modus operandi*, a common plan embracing the commission of both crimes, and also established a chain of circumstantial evidence which tended to identify defendant as the perpetrator of the crime for which he was being tried.

3. **Rape § 5— sufficiency of evidence to withstand nonsuit**

State's evidence in a rape case was sufficient to withstand nonsuit where such evidence tended to show that defendant accosted his victim late at night in a parking lot, that he held a metal teasing comb to her throat, that he took her some distance in his car before raping her, that defendant's car and items therein were identified by the victim as belonging to her abductor and that defendant was apprehended a week later while in the process of committing a second offense in a similar fashion.

4. **Criminal Law § 127—arrest of judgment — no error in record proper**

Where no error appeared on the face of the record proper, defendant's motion in arrest of judgment was properly denied.

DEFENDANT appeals from judgment of *Braswell, J.*, First March 1972 Regular Session, WAKE Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging him with the rape of Margaret Jane Elliott on 13 October 1971 in Wake County.

Margaret Jane Elliott, the prosecuting witness, testified that she was a student in her senior year at North Carolina State University in Raleigh. On the night of 13 October 1971, she studied in the library located on the campus until approxi-

mately 10:15 p.m. when she left the campus to return to her home. She walked across Hillsborough Street to the Wachovia Bank parking lot where she was accosted by a black male who threatened to kill her if she screamed. He placed a metal Afro teasing comb to her neck and said, "Where is your car?" She replied, "I don't have a car." He said, "Sure, you have a car, or you wouldn't be walking through the parking lot." Miss Elliott replied, "No. My apartment is in this direction and I have to walk through the lot to get there." Her assailant thereupon dragged her to some nearby bushes where he tied her hands behind her back and put a gag of cotton in her mouth. He took her pocketbook which contained $1.13, removed the dollar and left the change. He then placed a garment, apparently a knitted sweater, over the victim's head and led her up the street several blocks, concealing her in the bushes when cars were passing. He took her to a parked car and placed her in the front seat. Then, holding a metal teasing comb against her neck, he drove to an area near the Meredith Village Apartments off Lake Boone Trail and down an unpaved, bumpy road. There, in a secluded area, the victim was forced to disrobe and lie down on the car seat where she was raped by her assailant. She was then allowed to dress, and her assailant drove from the secluded area to the highway where he put her out of the car and drove away. She did not see her assailant's face well enough to identify him.

Miss Elliott went to some nearby apartments and announced hysterically that she had been raped. Officer Perry came in response to a call and took her to Rex Hospital.

Miss Elliott was permitted to testify, over defendant's objection, that she told the officers her assailant was a black male; and that the car in which she was raped was a two-door 1963 or 1964 Chevrolet, white or pastel color, with a long, narrow dash panel with lights underneath, and a rear-view mirror suspended from the roof on a kind of metal post with two furry cats hanging from it. Officers Perry and Martin, over objection, corroborated her testimony in this respect.

About 12:30 a.m. on 19 October 1971, police officers observed a 1968 Chevrolet II Nova running without headlights on Halifax Street in Raleigh. The officers stopped the car and defendant got out on the driver's side. At that moment, a woman named Patricia Conklin jumped out of the car screaming hysterically, and the officers took defendant into custody. The officers

saw him take an Afro comb from his pocket and stick it in his hair.

Mrs. Patricia Conklin testified, over objection, that she had been to the State Fair on the night of 18 October and returned to her home at 100 N. Bloodworth Street shortly after midnight. She parked her car in front of the house, and when she started to get out, defendant pushed her over in the seat and stuck a metal object to her throat. He entered her car and told her if she screamed he would kill her. He took her car keys, held a metal Afro teasing comb to her throat and proceeded to drive the car away. Mrs. Conklin was hysterical and asked him what he wanted. Defendant said, "We'll see, just wait and see." She offered him her money and her car if he would let her go. She tried to escape when the car stopped for a traffic light, but defendant restrained her. Shortly thereafter, the police stopped the car for driving without lights and she informed the officers what had happened.

Officers searched the area surrounding the 100 block of N. Bloodworth Street and found a yellow two-door 1964 Chevrolet, license number RE-4304, parked on the 300 block of E. Edenton Street, about fifty yards from Mrs. Conklin's residence at 100 N. Bloodworth Street. A check with the Department of Motor Vehicles by radio revealed that the car was registered to Horace Ray McClain. Officer D. W. Martin drove the car to police headquarters and parked it in an enclosed area. He stayed with the car until Margaret Jane Elliott, the prosecuting witness in this case, arrived. She testified over defendant's objection: "I immediately noticed the floor mats because I kind of have an affinity for the fleur-de-lis French emblem and I automatically knew that those floor mats were the same ones that I had seen in the car previously. Also, the panel again was a long, narrow panel and the light came from under the left and maybe right side. The mirror was suspended from the ceiling and a pair of cats which had for some reason been put into the trunk at this time were in the trunk. The car was a two-door, it was a coupe, it was a '64 Chevrolet." Miss Elliott immediately identified the car as the vehicle in which she had been raped the previous week.

A metal teasing comb buried in defendant's hair was taken from him at the police station and offered in evidence as State's Exhibit D.

The State also offered in evidence, over defendant's objection, the two furry cats (Exhibit A), the floor mat from defendant's car (Exhibit B), and Miss Elliott's notebook found on the Wachovia Bank parking lot (Exhibit C).

Defendant, after being fully advised of his right to offer evidence and to testify or remain silent, offered no evidence and elected to remain silent. He stipulated that a 1964 Chevrolet two-door automobile with North Carolina license number RE-4304 was registered in his name for the year 1971.

Defendant's motion for judgment of nonsuit was denied. The jury found defendant guilty of rape with recommendation for life imprisonment, and judgment was pronounced accordingly. He appealed to this Court assigning errors noted in the opinion.

Twiggs & McCain by Grover C. McCain, Jr., attorney for defendant appellant.

Robert Morgan, Attorney General; Sidney S. Eagles, Jr., and Russell I. Walker, Jr., Assistant Attorneys General, for the State of North Carolina.

HUSKINS, Justice.

Defendant preserves and presents twelve assignments of error, most of which are groundless and merit no discussion. It was competent for the victim to testify that a metal object, initially thought to be a knife but later ascertained to be a metal teasing comb, was held against her neck by her assailant. It was likewise competent for her to describe the car in which she was raped. Officers Perry and Martin were properly permitted, for corroborative purposes, to testify to Miss Elliott's prior consistent statements to them concerning the make, year, model, color and other identifying characteristics of the vehicle. Evidentiary rules establishing the competency of these matters are so well established as to require no citation of authority. All assignments of error addressed to them are overruled without discussion.

This case turns upon whether the court erred (1) in admitting the testimony of Mrs. Patricia Conklin and Officers Gray and Harley relating to defendant's subsequent commission of a similar abduction involving Mrs. Conklin and (2) in denying defendant's motion for nonsuit at the close of the State's evidence.

[1] Defendant strongly contends that all testimony of Mrs. Patricia Conklin and Officers Gray and Harley should have been excluded by the court since its only relevancy was to show that defendant had committed another distinct, independent, separate crime. We now examine the validity of that contention.

It is a general rule of evidence 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. Exceptions to this general rule of inadmissibility, as well recognized as the rule itself, are discussed and documented in *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954). The fourth and sixth exceptions are stated in *McClain* as follows:

> "4. Where the accused is not definitely identified as the perpetrator of the crime charged and the circumstances tend to show that the crime charged and another offense were committed by the same person, evidence that the accused committed the other offense is admissible to identify him as the perpetrator of the crime charged." [Citations omitted.]
>
> "6. Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission. [Citations omitted.] Evidence of other crimes receivable under this exception is ordinarily admissible under the other exceptions which sanction the use of such evidence to show criminal intent, guilty knowledge, or identity."

Stansbury formulates the rule in these words: "Evidence of other offenses is inadmissible if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime." Stansbury, N. C. Evidence, § 91 (2d ed. 1963); *State v. Choate,* 228 N.C. 491, 46 S.E. 2d 476 (1948).

It now becomes our duty to determine whether the testimony of Mrs. Patricia Conklin and Officers Gray and Harley tends to identify defendant as the man who raped Miss Elliott,

or tends to establish a common plan or scheme. If so, evidence of defendant's attack upon Mrs. Conklin was properly admitted in the trial of this case; otherwise not.

[2] Examination of the circumstances surrounding the attack upon Miss Elliott on 13 October 1971 and the attack upon Mrs. Conklin on 19 October 1971 reveals the following similarities: (a) Both attacks were late at night on a lone woman; (b) Miss Elliott's assailant told her, "If you scream I'll kill you," and defendant told Mrs. Conklin the same thing; (c) Miss Elliott's assailant held a metal teasing comb to her throat, and defendant stuck a metal teasing comb to the throat of Mrs. Conklin; (d) defendant used Mrs. Conklin's car in her abduction, and Miss Elliott's assailant intended to use *her* car, using his own only after he became convinced she did not have a vehicle; (e) Miss Elliott's assailant parked his car some distance from the parking lot where he accosted her, and defendant's car was found parked about fifty yards from where he abducted Mrs. Conklin; (f) the make, model and color of defendant's car coincided with the description of the car in which Miss Elliott was raped; (g) defendant's car had a floor mat with the French fleur-de-lis design on it, and so did the car in which Miss Elliott was raped; and (h) two light-colored furry cats were hanging from the rear-view mirror in the car in which Miss Elliott was raped, and two light-colored furry cats were found in the trunk of defendant's car. We further note that defendant sought to conceal the color and whereabouts of his car, saying it was black and in his brother's possession at Fuquay, when in fact it was yellow and parked within fifty yards of the point where he had abducted Mrs. Conklin.

The enumerated similarities tend to show a *modus operandi,* a common plan embracing the commission of both crimes, and also establish a chain of circumstantial evidence tending to identify defendant as the man who raped Miss Elliott. Thus, evidence of the Conklin offense was admissible and should not be rejected because it incidentally proves defendant guilty of another crime. Its logical relevancy to the rape of Miss Elliott is obvious. The trial judge instructed the jury to consider such evidence "only as it relates to the identity of the defendant, Horace Ray McClain," as the man who raped Miss Elliott on 13 October 1971. It was competent on the question of identity and properly admitted. Stansbury, N. C. Evidence, § 91 (2d ed. 1963); *State v. McClain, supra* (240 N.C. 171, 81 S.E. 2d 364);

State v. Fowler, 230 N.C. 470, 53 S.E. 2d 853 (1949); *State v. Biggs,* 224 N.C. 722, 32 S.E. 2d 352 (1944). Defendant's assignments of error addressed to the alleged incompetency of this evidence are overruled.

[3] On motion for nonsuit, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable intendment thereon and every reasonable inference to be drawn therefrom. *State v. Vincent,* 278 N.C. 63, 178 S.E. 2d 608 (1971); *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225 (1969). When the evidence here is so considered, it gives rise to the permissible inference that Miss Elliott was raped on the night of 13 October 1971 and that the defendant was the perpetrator, and affords a reasonable basis upon which the jury might so find. "Regardless of whether the evidence is direct, circumstantial, or both, if there is evidence from which a jury could find that the offense charged has been committed and that defendant committed it, the motion to nonsuit should be overruled." *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968). When considering a nonsuit motion, the court is not concerned with the weight of the testimony but only with its sufficiency to carry the case to the jury and sustain the indictment. *State v. Primes, supra; State v. McNeil,* 280 N.C. 159, 185 S.E. 2d 156 (1971). When tested by these principles, the State's evidence was sufficient to carry the case to the jury. The motion for compulsory nonsuit was properly denied.

Defendant's motions to set aside the verdict and for a new trial are merely formal and require no discussion. Such motions are addressed to the sound discretion of the trial court, and refusal to grant them is not reviewable. *State v. Downey,* 253 N.C. 348, 117 S.E. 2d 39 (1960); *State v. Reddick,* 222 N.C. 520, 23 S.E. 2d 909 (1943).

[4] Finally, defendant assigns as error the denial of his motion in arrest of judgment. Judgment may be arrested when, and only when, some fatal error or defect appears on the face of the record proper. *State v. Higgins,* 266 N.C. 589, 146 S.E. 2d 681 (1966). When based on such defect, the motion may be made at any time. *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1970). "The record proper in any action includes only those essential proceedings which are made of record by the law itself, and as such are self-preserving. [Citations omitted.] The evidence in a case is no part of the record proper. [Citations omitted.] In consequence, defects which appear only by the aid of evidence

cannot be the subject of a motion in arrest of judgment." *State v. Gaston,* 236 N.C. 499, 73 S.E. 2d 311 (1952). Ordinarily, the record proper in criminal cases 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). Since examination of the record proper reveals no error of law, defendant's motion in arrest of judgment was properly denied.

In the trial, verdict and judgment we find

No error.

STATE OF NORTH CAROLINA v. DWAIN EDWARD WRIGHT AND CECIL LEON GLENN

No. 50

(Filed 13 December 1972)

1. **Constitutional Law § 31; Criminal Law § 95— implicating statement of codefendant — right to cross-examination of declarant — admission proper**

Testimony by an officer with respect to a statement made to him by one defendant which implicated a codefendant in the murder for which defendants were on trial was properly admitted where the codefendant had an opportunity to cross-examine the defendant making the statement but failed to do so and where the officer had previously testified, without objection, to the implicating statement.

2. **Homicide § 24— felony-murder rule — sufficiency of evidence to support instruction**

Evidence was sufficient in a first degree murder case to support an instruction on the felony-murder rule where such evidence tended to show that defendants and one Chavis left defendant Wright's home with a common intent to commit robbery against an undetermined person, that defendant Glenn and Chavis discussed robbing a cab driver in the presence of defendant Wright and that the three engaged a cab to take them to a given destination after which Glenn or Wright shot and killed the cab driver with Wright's pistol. G.S. 14-17.

3. **Criminal Law § 86— cross-examination of defendant — inquiries concerning prior convictions**

Inquiries made of defendant Wright on cross-examination concerning prior convictions for unrelated criminal offenses were admissible for purposes of impeachment.

4. **Criminal Law §§ 80, 169— recorded past recollection admissible — admission of similar testimony without objection**

Testimony of record of a pawnshop employee of sale of ammunition to one D. E. Wright several days before the murder of a cab driver with a pistol requiring the same caliber ammunition was admissible as a recorded past recollection though the employee testified that he did not recognize defendant Wright and that he had no independent recollection of the transaction apart from his records.

5. **Homicide § 21— sufficiency of evidence to withstand nonsuit**

Evidence in a first degree murder prosecution was sufficient to withstand motion for nonsuit where such evidence tended to show that the two defendants and one Chavis were at a bus station armed with a pistol belonging to defendant Wright, that after discussing the robbery of a cab driver, Wright engaged a cab to a given destination, that bullets found in deceased cab driver's body were fired from Wright's pistol, that Wright led police officers to the place where the gun was hidden after the crime and that defendant Glenn told an officer that Wright shot the man.

6. **Criminal Law §§ 112, 114, 168— jury instructions — reasonable doubt as possibility of innocence — caution against jurors taking strong individual positions — no error**

The trial court did not commit prejudicial error in its instructions to the jury when it cautioned the jurors against taking strong individual positions from the outset of their deliberations and defined reasonable doubt as a possibility of innocence.

7. **Constitutional Law § 36; Criminal Law § 135— first degree murder — sentence of life imprisonment — possibility of death sentence not prejucial**

Where the jury returned a verdict recommending life imprisonment in a first degree murder case, the defendants had no standing to challenge the constitutionality of the statute under which they were indicted providing for punishment of death, nor could defendants complain of the court's instruction to the jury that one of the possible verdicts was first degree murder, resulting in punishment of death.

8. **Criminal Law § 113— jury instructions supported by evidence**

Statements with respect to defendant Wright made by the trial judge in his recapitulation of the evidence to the jury were fully supported by the evidence.

APPEAL by defendants from *Braswell, J.*, at the 2 April 1972 Regular Criminal Session of WAKE Superior Court.

Defendants Dwain Edward Wright and Cecil Leon Glenn were indicted in separate bills of indictment for the murder of Willard Pearson Moore on 9 February 1972. Defendants entered pleas of not guilty, and the cases were consolidated for trial.

The evidence for the State tends to show: Michael L. Chavis met defendant Glenn near the recreation center in Chavis Heights, Raleigh, around 8 p.m. on 8 February 1972. They went to Glenn's grandmother's home nearby and asked her for money. She refused them and they went to defendant Wright's home. Glenn asked Wright for money but Wright claimed that he had none. While there Glenn said: "Let's rob a drunk or fast-talk somebody out of some money." Thereafter, the three left Wright's house. Wright was carrying a pistol. They went to Gail's Tavern where they remained for a substantial period of time shooting pool, talking with friends, and listening to the jukebox. Around closing time they left accompanied by Glenn's girl friend. The defendants and Chavis walked the girl home, and Wright then suggested that they go to the bus station. There they observed an elderly man who appeared to be intoxicated. The man had a yellow slip in his hand which they thought was a check or a bus ticket. Glenn said that "whatever it is we knock him off and snatch it he couldn't catch us no way." However, they did not take the yellow slip from him.

Later defendant Wright saw an individual in the station named David Watts, who was in a juvenile detention center at the same time Wright and Chavis were there. Wright asked Chavis to jump on the boy and ask him if he had any money. Chavis refused. Wright then went up to Watts and asked him if he could loan him some money. An argument ensued and Watts and an individual with him left the station. Glenn then noticed an overnight case sitting under a bubblegum machine and told Wright to go get it. Wright got the overnight case, and the three men then left the bus station by the side door. Wright suggested that they take a taxi, and while outside they saw several taxis but did not take one. It was cold so they went back inside the bus station. Wright went outside several times, and the second or third time he returned and said there was a taxi across the street.

The three men went across the street and got in the taxi driven by the deceased, Willard Pearson Moore. They rode to Haywood Street where at the request of Chavis the taxi was stopped. Chavis got out, went into the front yard of a house where a girl named Sheila White lived, and called her name. Receiving no response, Chavis returned to the taxi and rode with the defendants to Chavis Heights. There the taxi pulled in between Dare Terrace and a nursery school. Chavis got out of

the taxi again and began walking away. When he was approximately forty or forty-five feet away from the taxi, he noticed the taxi had not pulled out from the curb and he turned around and looked back. He saw Glenn standing on the outside of the taxi pointing a gun at the deceased who was sitting in the driver's seat. Wright was standing on the left side of the taxi near the rear fender or rear door. Glenn shot the driver once; Chavis heard but did not see a second shot fired. After the shooting Chavis began walking away from the scene. Wright and then Glenn caught up with him, and the three went to Wright's house where they spent the night. On the way to Wright's house Glenn stated that he had shot the deceased but did not know whether he had actually killed him.

The police arrived at the scene of the shooting at 2 a.m. and discovered the driver of the taxi wounded but still alive. The overnight case taken from the bus station was wedged under the rear axle of the taxi. The left front window of the taxi was partially rolled down, the left rear door was open, and the motor was running. The driver subsequently died as a result of a gunshot wound in his chest. The day after the shooting defendant Wright gave a pistol to a friend named Juanita Green and asked her to keep it for him. She hid it under a nearby house. The next day the police went with Wright to see Miss Green and at Wright's request she gave the police the pistol which Wright had left with her. Bullets found in the body of the deceased and empty shells found in the taxi were fired from this pistol.

Defendant Glenn offered evidence which tends to show that he and the witness Chavis had gotten out of the taxi and were walking away when they heard the two shots. No one other than Wright was in the vicinity.

Defendant Wright offered evidence which tends to show that he and the witness Chavis had gotten out of the taxi and were walking away when he saw the defendant Glenn shoot the deceased.

Other evidence pertinent to decision will be stated in the opinion.

The jury returned a verdict of guilty of murder in the first degree with a recommendation of life imprisonment as to each defendant. From sentences imposed in accordance therewith, defendants appealed.

Attorney General Robert Morgan and Assistant Attorney General Charles M. Hensey for the State.

Tharrington & Smith by Roger W. Smith for defendant Wright, appellant.

Robert P. Gruber for defendant Glenn, appellant.

MOORE, Justice.

[1] Detective J. O. Stoudenmire testified without objection that after his arrest Wright told him that he overheard a conversation at the bus station between Chavis and Glenn in which they discussed robbing a taxi driver. On cross-examination Stoudenmire testified over Glenn's objection that Wright said Glenn and Chavis had talked about robbing a cab driver. Glenn contends that it was error to allow this testimony since it relates to a statement by a codefendant which implicates Glenn in the crime, citing *Bruton v. United States,* 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968); *Roberts v. Russell,* 392 U.S. 293, 20 L.Ed. 2d 1100, 88 S.Ct. 1921 (1968); and *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492 (1968).

In *Bruton* one Evans and Bruton were tried jointly for armed postal robbery. Evans did not testify but a postal inspector was allowed to testify to Evans' oral confession that Evans and Bruton had committed the robbery. The Supreme Court of the United States held that since Evans did not testify and was not subject to cross-examination, Bruton's right of confrontation on cross-examination under the Sixth Amendment was violated even though the trial court instructed the jury not to consider the confession against Bruton. In *Roberts,* under subtantially similar facts, the Court in a *per curiam* opinion followed the rule as stated in *Bruton.* In *Fox* this Court, with reference to the holding in *Bruton* and *Roberts,* stated:

> "The result is that in joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or the declarant. If such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately. The foregoing pronouncement presupposes (1) that the confession is inadmissible as to the codefendant (see *State v. Bryant, supra* [250 N.C. 113,

108 S.E. 2d 128]), and (2) that the declarant will not take the stand. *If the declarant can be cross-examined, a co-defendant has been accorded his right to confrontation.* See *State v. Kerley, supra* [246 N.C. 157, 97 S.E. 2d 876] at 160, 97 S.E. 2d at 879." (Emphasis added.)

See also *State v. Jones,* 280 N.C. 322, 185 S.E. 2d 858 (1971).

Bruton, Roberts, and *Fox* are factually distinguishable from the present case, since Wright testified and was subject to cross-examination. Although Stoudenmire's testimony concerning Wright's statement came during his rebuttal testimony after Wright had testified, Glenn had the right—which he did not pursue—to ask the court's permission to recall Wright for further cross-examination. In the absence of such request, Glenn waived his right to further cross-examine Wright. Furthermore, Stoudenmire had previously testified, without objection, that Wright told him "Mike and Cecil discussed robbing the cab driver." An exception is waived when other evidence of the same import is admitted without objection. *State v. Hairston* and *State v. Howard* and *State v. McIntyre,* 280 N.C. 220, 185 S.E. 2d 633 (1971); *Glace v. Pilot Mountain,* 265 N.C. 181, 143 S.E. 2d 78 (1965); *Adams v. Godwin,* 254 N.C. 632, 119 S.E. 2d 484 (1961); 1 Strong, N. C. Index 2d, Appeal and Error § 43, p. 196. This assignment is without merit.

[2] Defendants contend that the evidence in this case did not warrant an instruction on the felony-murder rule. G.S. 14-17 provides in pertinent part that "a murder which . . . shall be committed in the perpetration or attempt to perpetrate . . . robbery . . . shall be deemed to be murder in the first degree. . . . " See *State v. Hairston* and *State v. Howard* and *State v. McIntyre, supra; State v. Thompson,* 280 N.C. 202, 185 S.E. 2d 666 (1971); *State v. Lee,* 277 N.C. 205, 176 S.E. 2d 765 (1970); *State v. Haynes,* 276 N.C. 150, 171 S.E. 2d 435 (1969). In such cases the law presumes premeditation and deliberation, and the State is not put to further proof of either. *State v. Bunton,* 247 N.C. 510, 101 S.E. 2d 454 (1957); *State v. Mays,* 225 N.C. 486, 35 S.E. 2d 494 (1945). The State's evidence in the instant case tends to show that the two defendants and Chavis, armed with a pistol belonging to Wright, left Wright's home on the evening of 8 February 1972 with a common intent to commit robbery against an undetermined person. During the course of the evening, defendants contemplated rob-

bing an elderly man and a young boy. Wright actually stole an overnight case which was sitting in the bus station. The evidence further shows that in the presence of Wright, Glenn and Chavis discussed robbing a cab driver, following which the three engaged a cab to take them to Chavis Heights, and that after arriving there Glenn or Wright shot and killed the deceased with Wright's pistol.

In *State v. Smith,* 221 N.C. 400, 405, 20 S.E. 2d 360, 363-64 (1942), it is said:

> " . . . If many engage in an unlawful conspiracy, to be executed in a given manner, and some of them execute it in another manner, yet their act, though different in the manner, is the act of all who conspired. [Citations omitted.]
>
> "And the liability also extends to acts not intended or contemplated as a part of the original design, but which are a natural or probable consequence of the unlawful combination or undertaking. [Citations omitted.] The general rule is, that if a number of persons combine or conspire to commit a crime, or to engage in an unlawful enterprise, each is responsible for all acts committed by the others in the execution of the common purpose which are a natural or probable consequence of the unlawful combination or undertaking, even though such acts are not intended or contemplated as a part of the original design. [Citations omitted.]"

The evidence was sufficient to support a finding by the jury that defendants and Chavis had formed a conspiracy to rob the taxi driver Moore, and that in attempting to perpetrate this crime Glenn or Wright shot and killed Moore. Under these facts, each of the defendants is guilty of murder in the first degree. On this evidence Wright and Glenn were not only co-conspirators but both were actually present, aiding and abetting in the crime charged, and were therefore principals. *State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561 (1970); *State v. Johnson,* 272 N.C. 239, 158 S.E. 2d 95 (1967). This assignment is overruled.

[3] During the course of his cross-examination of Wright, the solicitor asked him about his prior convictions. Defendant's counsel objected; the jury was excused, and all counsel approached the bench. The court was shown a card held by the

solicitor which showed various charges against Wright. The solicitor stated to the court, however, that he did not care to ask about any of the charges if in fact defendant had not been convicted, and that he would confine his examination to the charges on which defendant had been convicted. After a conference between counsel for Wright and the solicitor, the jury returned and Wright was only questioned about his actual convictions. This assignment is without merit. For impeachment purposes a witness, including the defendant in a criminal action, may be asked on cross-examination whether he has been convicted of unrelated criminal offenses. *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971).

[4] An employee of a local pawnshop, Jessie Murchison, testified that he made a record of a sale of 380 ammunition on 4 February 1972 to one D. E. Wright of Raleigh, North Carolina, whose Social Security number was 240-90-9981 and whose date of birth was 7 August 1951. This ammunition was the same caliber as defendant Wright's pistol. On cross-examination Murchison testified that he did not recognize Wright and that he had no independent recollection of the transaction apart from his records. Defendant contends that it was error to admit this testimony. Murchison's record was admissible as a "recorded past recollection." Stansbury, North Carolina Evidence § 33 (2d Ed. 1963), and cases therein cited. Moreover, this testimony in no way prejudiced Wright since Wright himself testified later in the trial that he did buy this ammunition from Murchison. *State v. McDaniel*, 274 N.C. 574, 164 S.E. 2d 469 (1968).

[5] Wright assigns as error the court's overruling his motion for judgment as 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. *State v. Dawson*, 281 N.C. 645, 190 S.E. 2d 196 (1972); *State v. Murphy*, 280 N.C. 1, 184 S.E. 2d 845 (1972). Here the evidence for the State tends to show that the two defendants and Chavis were at the bus station armed with a pistol belonging to Wright, and that after some discussion concerning the robbery of a cab driver, Wright engaged a cab and told the driver where to go. There was also evidence that the bullets found in the body of the deceased and the empty shell cases found in the cab were fired from Wright's pistol, and that Wright led the police officers to the place where the gun was hidden after the crime. Without

objection, Glenn testified that he told Officer Heath: "I did not shoot the man. Dwain [defendant Wright] shot the man." This evidence, together with other offered for the State, was sufficient to withstand defendant Wright's motion for judgment as of nonsuit.

[6] Defendants assign as error several portions of the trial judge's instructions to the jury. They contend that it was improper for the trial judge (1) to caution the jurors against taking strong individual positions from the outset of their deliberations, and (2) to define "reasonable doubt" as a possibility of innocence.

The trial judge's caution against strong individual positions is taken from California Jury Instructions Criminal (CALJIC, 3d Ed.), a publication of West Publishing Company. The California courts have approved substantially the same instruction as the one given in this case. *People v. Moraga,* 244 Cal. App. 2d 565, 53 Cal. Rep. 563 (1966); *People v. Selby,* 198 Cal. 426, 245 P. 426 (1926). In *State v. Bryant, Holloman and White,* 282 N.C. 92, 191 S.E. 2d 745 (1972), this Court specifically held that this instruction did not constitute prejudicial error. See also *State v. Pugh,* 183 N.C. 800, 111 S.E. 849 (1922). In *Bryant, Holloman and White* this Court also held that defining "reasonable doubt" as a possibility of innocence not only was not reversible error but constituted an instruction more favorable to the defendant than the usual definitions such as "fully satisfied," "entirely convinced," or "satisfied to a moral certainty." These contentions, therefore, are without merit.

[7] The defendants assign as error the failure of the court to grant their motion to quash the bill of indictment asserting that the statute, G.S. 14-17, supporting the indictment is unconstitutional. They also contend that it was error for the court to instruct the jury that one of the possible verdicts was first degree murder, resulting in punishment of death. In disposing of a contention similar to these in *State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664 (1972), this Court said:

> "The Supreme Court of the United States in *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726 (1972), held that the imposition of the death penalty, under certain state statutes and in the application thereof, was unconstitutional. That decision did not affect the conviction but only the death sentence. *State v. Westbrook,* 281 N.C.

748, 191 S.E. 2d 68 (1972); *State v. Doss*, 281 N.C. 751, 191 S.E. 2d 70 (1972); *State v. Chance*, 281 N.C. 746, 191 S.E. 2d 65 (1972); *State v. Miller*, 281 N.C. 740, 190 S.E. 2d 841 (1972); *State v. Hamby and Chandler*, 281 N.C. 743, 191 S.E. 2d 66 (1972)."

Furthermore, the *Furman* case is without significance when the jury returns a verdict recommending life imprisonment. In that situation the defendant has no standing to raise the constitutionality of the death penalty or of a statute because it provides for that punishment. *State v. Bryant, Holloman and White, supra.* These assignments are without merit.

[8] Defendant Wright in his assignments of error Nos. 7 and 11 asserts that the trial judge in his recapitulation of the evidence to the jury made material misstatements of the facts in the case. Two such misstatements are alleged by the defendant. The first is as follows: " . . . that at that time the defendant Wright was by the left rear fender or left rear door, which was at that time open." Secondly: "There is evidence which tends to show from the defendant Glenn that it was the defendant Wright who fired the shot at the taxicab driver, Willard Pearson Moore." A review of the record of this case indicates that in both instances the statements complained of were fully supported by the evidence. These assignments are, therefore, overruled.

Other assignments of error have been carefully considered but are without merit.

For the reasons indicated, the verdicts and judgments will not be disturbed.

No error.

GLORIA OVERTON RICKERT v. JAMES BRYANT RICKERT

No. 37

(Filed 13 December 1972)

1. Divorce and Alimony § 18— alimony pendente lite — finding of facts required

Though the former rule was that no findings of fact were necessary in alimony *pendente lite* matters unless adultery was charged

against the wife, G.S. 50-16.8(f) now specifically provides that the judge shall find the facts from the evidence presented upon a hearing upon an application for alimony *pendente lite.*

2. **Divorce and Alimony § 18— consent judgment for permanent alimony — subsequent award of counsel fees — applicable laws**

The statutes and rules of law apposite to *pendente lite* subsistence and counsel fees should govern in an award of counsel fees made after an award of permanent alimony where the consent judgment awarding permanent alimony expressly provided that the question of counsel fees would later be submitted to and determined by the judge entering the consent judgment.

3. **Divorce and Alimony § 18— award of counsel fees — prerequisites**

The clear and unambiguous language of the applicable statutes provides as prerequisites for determination of an award of counsel fees that the spouse be entitled to the relief demanded, that the spouse be a dependent spouse and that the dependent spouse have insufficient means upon which to subsist during the prosecution of the suit and to defray the necessary expenses thereof. G.S. 50-16.3.

4. **Divorce and Alimony § 18— counsel fees and subsistence pendente lite — proof necessary to support order**

The allowance of counsel fees and subsistence *pendente lite* does not lie solely within the discretion of the trial judge; rather, the facts required by the statutes must be alleged and proved to support an order for subsistence *pendente lite* or an award of counsel fees.

5. **Divorce and Alimony § 18— counsel fees and alimony pendente lite — review of award on appeal**

Proper exercise of the trial judge's authority in granting alimony, alimony *pendente lite,* or counsel fees is a question of law reviewable on appeal.

6. **Divorce and Alimony § 18— amount of counsel fees and alimony pendente lite — discretionary matter — review on appeal**

When subsistence *pendente lite* or counsel fees are allowed pursuant to the statutory requirements, the amount of the allowance is in the trial judge's discretion, and is reviewable only upon showing an abuse of discretion.

7. **Trial § 6— stipulations — construction and effect**

A stipulation is a judicial admission, encouraged and looked upon with favor by the courts, but it will be construed with a view to effecting the intention of the parties and will not be extended beyond the limits set by the parties or by the law.

8. **Divorce and Alimony § 18; Trial § 6— stipulation concerning alimony pendente lite — ineffectiveness to support award of counsel fees**

Standing alone, defendant's stipulation in an order for alimony *pendente lite* that "for the purpose of this hearing plaintiff is entitled to such an order . . . " did not support a subsequent award of counsel

fees where both the order awarding alimony *pendente lite* and the consent judgment awarding permanent alimony included statements that the court expressly refrained from ruling on the question of counsel fees.

9. Divorce and Alimony § 18— award of counsel fees erroneous

Counsel fees should be awarded when they are necessary to enable the wife, as litigant, to meet the husband, as litigant, on substantially even terms by making it possible for her to employ adequate counsel; therefore, an award of counsel fees to the wife was erroneous where the record shows that she received $800 per month from the husband for alimony and child support, that she had the use of the homeplace and all personal property therein free of ad valorem taxes, that she had an automobile and the right to enjoy family membership in the country club and that she owned stocks and bonds valued at around $140,000 and had an annual income therefrom of around $2250.

ON *certiorari* to the North Carolina Court of Appeals to review its decision (14 N.C. App. 351) affirming judgment of *Allen, Chief District Court Judge,* entered at the 14 June 1971 Session of BUNCOMBE County District Court.

This is a civil action pursuant to G.S. 50-16.1 *et seq.* for alimony pendente lite, custody and support of a child born to the marriage, permanent alimony without divorce, and counsel fees.

By her complaint plaintiff alleged that her husband had committed numerous acts of adultery, told her that he no longer loved her, threatened to kill her and their infant son, and by these and other specified acts and conduct had rendered plaintiff's condition intolerable and her life burdensome. Defendant by his answer entered a general denial.

Judge Harry C. Martin heard the matter in the Superior Court of Buncombe County, and at that time defendant stipulated, for the purposes of that hearing, that plaintiff was entitled to an award of alimony pendente lite. On 27 August 1970 Judge Martin entered an order reciting that by agreement of the parties plaintiff and the minor child born to the marriage should have possession of the homeplace and its contents and have full use of an automobile, and that defendant would pay all taxes, all insurance premiums, and all country club dues and assessments. By court order plaintiff was also awarded temporary custody of the only child along with alimony pendente lite in the sum of $600 per month and $200 per month for support of the minor child. Judge Martin expressly re-

frained from ruling on the question of attorneys' fees for plaintiff's attorneys and stated that the motion for attorneys' fees might be ruled upon at the final determination of the action.

Thereafter, upon Buncombe County's becoming a part of the Uniform District Court System, the matter came on for hearing before Chief Judge C. Walter Allen of Buncombe County District Court.

On 25 June 1971 Chief Judge Allen entered a consent judgment which settled all matters between the parties, excluding the issue of counsel fees. This consent judgment embraced substantially all of Judge Martin's order and decreed that plaintiff be awarded permanent alimony and support and that the granting of custody become permanent. Chief Judge Allen refused at that time to make a determination of the question involving counsel fees.

On 26 July 1971, after the parties stipulated that the court could consider the entire record in deciding the issue of counsel fees, Chief Judge Allen entered an order in which certain findings of fact were made:

"1. That the plaintiff and defendant are citizens and residents of Buncombe County, North Carolina, and are properly before the court and the court has jurisdiction of all necessary parties in said action.

2. That the plaintiff and defendant entered into a consent judgment on the 25th day of June, 1971.

3. That plaintiff's counsel, Earl J. Fowler and Robert S. Swain, have been paid no attorneys' fees by the plaintiff up through and including the date of the final hearing on the above captioned matter.

4. That from the record evidence the income of the plaintiff was $2,253.00 per year.

5. That from the record evidence, the defendant's 1969 net income was $17,657.84.

6. That the defendant has stocks and bonds having an approximate value of $677,637.27; and the plaintiff has stocks and bonds in the amount of $141,362.50, the plaintiff's estate being derived principally from the mother of the defendant."

Based upon the above findings of fact, the court made the following conclusion of law:

> "That the plaintiff is a dependent spouse and that the defendant is the supporting spouse in contemplation of law."

and ordered that defendant pay plaintiff's attorneys $8,500 as counsel fees.

Defendant excepted to findings of fact 3, 4, 5 and 6, and the conclusions of law as set out in the judgment. Defendant also excepted to the refusal of the judge to make and enter numerous findings of fact and conclusions of law tendered by him.

We granted certiorari on 31 July 1972.

Robert S. Swain, by Joel B. Stevenson, Attorneys for plaintiff.

Bennett, Kelly & Long, by Harold K. Bennett, Attorneys for defendant.

BRANCH, Justice.

The principal question for decision is whether Chief District Judge C. Walter Allen erred by ordering defendant to pay plaintiff's counsel fees *in any amount.* G.S. 50-16.1 *et seq.*, particularly G.S. 50-16.3 and G.S. 50-16.4, are pertinent to decision of this appeal. G.S. 50-16.4 provides:

> § 50-16.4. Counsel fees in actions for alimony.—At any time that a dependent spouse would be entitled to alimony pendente lite pursuant to G.S. 50-16.3, the court may, upon application of such spouse, enter an order for reasonable counsel fees for the benefit of such spouse, to be paid and secured by the supporting spouse in the same manner as alimony.

G.S. 50-16.3 provides, in part:

> § 50-16.3. Grounds for alimony pendente lite.—(2) A dependent spouse who is a party to an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce, shall be entitled to an order for alimony pendente lite when:

(1) It shall appear from all the evidence presented pursuant to G.S. 50-16.8(f), that such spouse is entitled to the relief demanded by such spouse in the action in which the application for alimony pendente lite is made, and

(2) It shall appear that the dependent spouse has not sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof.

[1] We note that G.S. 50-16.8(f) specifically provides that the judge shall find facts from the evidence presented upon a hearing upon an application for alimony pendente lite. This statutory requirement, effective 1 October 1967, changes the prior rule recognized in the line of cases represented by *Mercer v. Mercer,* 253 N.C. 164, 116 S.E. 2d 443, that no findings of fact were necessary in alimony pendente lite matters unless adultery was charged against the wife.

[2] The judgment awarding permanent alimony was entered on 25 June 1971, prior to the award of counsel fees. Ordinarily, the award of permanent alimony terminates an order for subsistence pendente lite or counsel fees. *Harris v. Harris,* 258 N.C. 121, 128 S.E. 2d 123. However, the consent judgment awarding permanent alimony expressly provided that the question of counsel fees would be later submitted to and determined by Chief Judge C. Walter Allen. Thus the statutes and rules of law apposite to pendente lite subsistence and counsel fees govern this decision.

[3] The clear and unambiguous language of the statutes under consideration provide as prerequisites for determination of an award of counsel fees the following: (1) the spouse is entitled to the relief demanded; (2) the spouse is a dependent spouse; and (3) the dependent spouse has not sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof.

There is some language in our decisions which leaves the impression that the allowance of counsel fees and subsistence pendente lite lies solely within the discretion of the trial judge, and that such allowance is reviewable only upon a showing of an abuse of the judge's discretion. This seems to be plaintiff's contention.

[4, 5] The correct rule, overwhelmingly approved by our Court, is that the facts required by the statutes must be alleged and proved to support an order for subsistence pendente lite. *Deal v. Deal,* 259 N.C. 489, 131 S.E. 2d 24; *Briggs v. Briggs,* 234 N.C. 450, 67 S.E. 2d 349; *Bateman v. Bateman,* 233 N.C. 357, 64 S.E. 2d 156; *Cameron v. Cameron,* 231 N.C. 123, 56 S.E. 2d 384. Proper exercise of the trial judge's authority in granting alimony, alimony pendente lite, or counsel fees is a question of law, reviewable on appeal. *Smith v. Smith,* 219 N.C. 768, 14 S.E. 2d 788; *Covington v. Covington,* 215 N.C. 569, 2 S.E. 2d 558; *Holloway v. Holloway,* 214 N.C. 662, 200 S.E. 436; *Dawson v. Dawson,* 211 N.C. 453, 190 S.E. 749; *Caudle v. Caudle,* 206 N.C. 484, 174 S.E. 304; *McManus v. McManus,* 191 N.C. 740, 133 S.E. 9; *Moore v. Moore,* 130 N.C. 333, 41 S.E. 943; *Morris v. Morris,* 89 N.C. 109; *Pain v. Pain,* 80 N.C. 322; *Schonwald v. Schonwald,* 62 N.C. 215 (Phil. Eq. 215). See also, *Garner v. Garner,* 270 N.C. 293, 154 S.E. 2d 46; *Butler v. Butler,* 226 N.C. 594, 39 S.E. 2d 745; 24 Am. Jur. 2d Divorce & Alimony, § 549, p. 672.

[6] Allowance of counsel fees does not *require* allowance of subsistence pendente lite. *Deal v. Deal, supra.* Nor does the allowance of subsistence pendente lite *require* the allowance of counsel fees. *Schloss v. Schloss,* 273 N.C. 266, 160 S.E. 2d 5. It is true that when subsistence pendente lite or counsel fees is allowed pursuant to the statutory requirements, the *amount* of the allowance is in the trial judge's discretion, and is reviewable only upon showing an abuse of his discretion. *Stanback v. Stanback,* 270 N.C. 497, 155 S.E. 2d 221; *Harrell v. Harrell,* 253 N.C. 758, 117 S.E. 2d 728; *Mercer v. Mercer, supra; Fogartie v. Fogartie,* 236 N.C. 188, 72 S.E. 2d 226.

Plaintiff contends that the defendant's stipulation in the order for alimony pendente lite that "for the purpose of this hearing plaintiff is entitled to such an order . . . . " amounted to the ultimate fact upon which the resident judge could, in his discretion, award counsel fees.

We first consider the effect of this stipulation in the factual context of instant case.

[7] A stipulation is a judicial admission. *Nationwide Homes v. Trust Co.,* 267 N.C. 528, 148 S.E. 2d 693; *Farmer v. Ferris,* 260 N.C. 619, 133 S.E. 2d 492; *Moore v. Humphrey,* 247 N.C. 423, 101 S.E. 2d 460. It has been said in North Carolina that

courts look with favor on stipulations, because they tend to simplify, shorten, or settle litigation as well as saving cost to the parties. *Rural Plumbing & Heating, Inc. v. H. C. Jones Constr. Co.*, 268 N.C. 23, 149 S.E. 2d 625; *Chisolm v. Hall*, 255 N.C. 374, 121 S.E. 2d 726.

In *Lumber Co. v. Lumber Co.*, 137 N.C. 431, 49 S.E. 946, this Court considered judicial admissions, and Walker, J., speaking for the Court, stated: "Such agreements and admissions are of frequent occurrence and of great value, as they dispense with proof and save time in the trial of causes. The courts recognize and enforce them as substitutes for legal proof, and there is no good reason why they should not. . . . While this is so, *the court will not extend the operation of the agreement beyond the limits set by the parties or by the law.*" (Emphasis added.)

It has been the policy of this Court to encourage stipulations and to restrict their effect to the extent manifested by the parties in their agreement. *Rural Plumbing & Heating, Inc. v. H. C. Jones Constr. Co., supra; Lumber Co. v. Lumber Co., supra.* See also, 50 Am. Jur. Stipulations § 9, p. 610. In determining the extent of the stipulation we look to the circumstances under which it was signed and the intent of the parties as expressed by the agreement. Similarly, " . . . stipulations will receive a reasonable construction with a view to effecting the intent of the parties; but in seeking the intention of the parties, the language used will not be so construed as to give the effect of an admission of a fact obviously intended to be controverted, or the waiver of a right not plainly intended to be relinquished, . . . " 36 Cyc. 1291, 1292; *Huegel v. Huegel*, 329 Mo. 571, 46 S.W. 2d 157.

[8] Judge Martin's order enumerated concisely each of defendant's obligations, all of which related to subsistence and child custody. Further, the fact that the stipulation did not include an award of counsel fees is reflected in the following portion of Judge Martin's order: "The court expressly refrains from ruling on the question of attorneys' fees for plaintiff's attorneys at this time, and that said motion for attorneys' fees may be ruled upon at the final determination of this action."

Recognition that allowance of counsel fees had not been considered by either judge was again clearly shown by para-

graph 15 of the consent order awarding permanent alimony and child custody signed by Judge Allen on 25 July 1971, to wit:

> (15) The court has heretofore expressly refrained from ruling on the question of attorneys' fees for plaintiff's attorneys, and the parties have been unable to agree as to whether or not any attorneys' fees shall be paid by the defendant, and if so, the amount thereof. It is, therefore, agreed that these questions shall be submitted to and determined by the undersigned Chief Judge of the Buncombe County District Court.

This order was consented to by both parties and their respective attorneys.

Manifestly, it was not the intent of the parties or the understanding of the respective trial judges that allowance of counsel fees be affected by defendant's stipulation. We cannot by construction broaden or extend this stipulation to encompass allowance of counsel fees. We therefore hold that defendant's stipulation, standing alone, did not support the award of counsel fees.

The trial judge could not have, without more, awarded counsel fees even if we concede defendant's stipulation included admissions of all requirements of G.S. 50-16.3 as relating to subsistence, and that the stipulation met the statutory prerequisite that plaintiff was entitled to the principal relief demanded.

[9] The case of *Schloss v. Schloss, supra,* although decided before the repeal of G.S. 50-16 and the subsequent enactment of G.S. 50-16.1 *et seq.,* clearly states the basis for allowing counsel fees. There Justice Lake, speaking for the Court, stated:

> "The award of counsel fees rests upon a different basis. Apart from statute, there is no duty upon the husband, before or after separation, to furnish his wife with legal counsel, whether he or another be the adverse party to her controversy. . . . *The purpose of the allowance of counsel fees pendente lite is to enable the wife, as litigant, to meet the husband, as litigant, on substantially even terms by making it possible for her to employ adequate counsel.* See: *Stanback v. Stanback,* 270 N.C. 497, 155 S.E. 2d 211 (counsel fees awarded on final judgment) ; *Myers v. Myers, supra; Deal v. Deal, supra; Harrell v. Harrell,* 253 N.C. 758, 117 S.E. 2d 728; *Mercer v. Mercer, supra; Fogartie v.*

Fogartie, supra; Oliver v. Oliver, 219 N.C. 299, 13 S.E. 2d 549.

The award of counsel fees is not a necessary consequence of the award of subsistence." (Emphasis added.)

We have carefully compared the provisions of former G.S. 50-16 and the provisions contained in G.S. 50-16.1 *et seq.* and find nothing which changed the rules of law so as to preclude application of *Schloss* to the present facts. Nor do we find such factual differences as would preclude such application.

The record shows that at the time of the entry of the order allowing counsel fees a consent judgment was in effect by which plaintiff was awarded alimony in the amount of $600 per month and the sum of $200 per month for support of the minor child born to the marriage of plaintiff and defendant. This same judgment awarded plaintiff the use of the homeplace together with all personal property located therein free of ad valorem property taxes. She was awarded a 1970 Pontiac convertible automobile and the privilege of enjoying the family membership in the Biltmore Country Club. Most significantly, the record reveals that plaintiff owned stocks and bonds valued at $141,362.50 and had an annual income therefrom in the amount of $2,253.

The evidence in this case clearly shows that an award of counsel fees was not necessary to enable the wife as litigant, to meet the husband, as litigant, on substantially even terms by making it possible for her to employ adequate counsel. The order allowing counsel fees was, therefore, erroneously entered.

In view of our holding, we do not deem it necessary to consider whether the amount of the award was unreasonable. The fee which plaintiff will pay her counsel is now a matter between them.

The decision of the Court of Appeals is

Reversed.

JANE RICH AND VICKY KIM RICH, BY HER GUARDIAN AD LITEM, GEORGE F. TAYLOR v. CITY OF GOLDSBORO

No. 65

(Filed 13 December 1972)

1. **Municipal Corporations § 12— governmental immunity — governmental and proprietary functions**

Generally a municipal corporation is immune to suit for negligence of its agents in the performance of its governmental functions; however, a city may be liable if the injury occurs while the agents of the city are performing a proprietary rather than a governmental function.

2. **Municipal Corporations § 12— special corporate benefit — pecuniary profit — governmental immunity waived**

In order to deprive a municipal corporation of the benefit of governmental immunity, the act or function must involve special corporate benefit or pecuniary profit inuring to the municipality.

3. **Municipal Corporations § 18— operation of parks — governmental function**

A city in operating its parks and playgrounds for the benefit of the public is acting in its proper governmental capacity.

4. **Municipal Corporations § 18— operation of park — incidental income — no waiver of governmental immunity**

Where defendant received a donation of $1200 from operation of a train in the park in which plaintiff was injured and such amount constituted less than one percent of the operating costs, the trial court properly concluded that the donation was incidental income, totally insufficient to support a conclusion the defendant was operating the park as a proprietary or business venture and had therefore waived its governmental immunity against a suit for personal injuries.

5. **Municipal Corporations §§ 12, 18— liability insurance obtained by municipal corporation — inapplicability to playground equipment**

G.S. 160-191.1 (now 160A-485) providing that municipalities may waive their right to claim governmental immunity for the negligent acts of their agents in the operation of motor vehicles to the extent of liability insurance obtained therefor does not cover maintenance of playground equipment and would not apply in an action by a plaintiff injured in a fall from a defective seesaw in a park maintained by defendant city.

ON *certiorari* to the Court of Appeals to review its decision filed August 2, 1972, reversing the summary judgment entered in the Superior Court of WAYNE County dismissing the action.

The plaintiff, Vicky Kim Rich, a minor, by her personal representative, and Jane Rich, her mother, instituted this civil action in the Superior Court of Wayne County to recover $15,000.00 damages and $1,084.65 cost of medical treatment for injuries sustained by Vicky Kim Rich as a result of a fall from a seesaw board in Herman Park operated by the City of Goldsboro as a public playground.

The plaintiffs' verified complaint (to which no answer was filed) alleged the City of Goldsboro maintained within its borders a recreational area known as Herman Park. As a part of the playground equipment, the area contained a seesaw board which it had permitted to become worn and wobbly. According to plaintiffs' allegations, the city negligently failed to provide handholds or stabilizing devices and as a result of the failure, the minor plaintiff was thrown from the board and injured. The plaintiff's mother spent $1,084.65 for her daughter's necessary medical treatment.

The complaint further alleged that the City of Goldsboro had in force a policy of liability insurance to indemnify the city against liability resulting from the use of the playground. However, the city's answer to the interrogatories disclosed that the City of Goldsboro carried a general liability insurance policy, but the policy did not cover the playground equipment.

The Goldsboro Director of Finance, in response to the plaintiffs' interrogatories, certified the recreational program cost the city the sum of $167,912.66 for the year in which the plaintiff sustained her injuries. The City of Goldsboro donated $145,817.00. The County of Wayne donated $5,000.00. A few other donations for special equipment amounted to about $16,000.00. The report disclosed that during the fiscal year the only revenue of any kind derived by the city from any activities in Herman Park was $1,200.00 donated by the Kiwanis Club of Goldsboro, which sum represented one-half the net profits the Club received from operating a Kiddie Train in the park. The Kiwanis Club made a charge for rides on the train, but there was no charge for any other activity in Herman Park.

The City of Goldsboro, without answering, filed a motion for summary judgment that the action be dismissed upon the ground it appears from the pleadings, affidavits, and interrogatories that the playground and its equipment were provided by the City of Goldsboro in its governmental capacity and not as

a proprietary or business enterprise and the defendant city, therefore, is immune from suit.

At the conclusion of the hearing in the superior court, Judge Cowper found, "(T)here is no genuine issue of fact to be submitted to the trial court . . . that the Defendant is entitled to judgment as a matter of law, . . ." The court entered summary judgment dismissing the action. On the plaintiffs' appeal, the Court of Appeals reversed the judgment of the superior court, 15 N.C. App. 534, 190 S.E. 2d 229. Our writ of certiorari brought the case here for further review.

Sasser, Duke and Brown by John E. Duke and J. Thomas Brown, Jr.

Herbert B. Hulse for plaintiff appellees.

Taylor, Allen, Warren & Kerr by John H. Kerr III for defendant appellant.

HIGGINS, Justice.

[1] This case involves the legal question whether Goldsboro is liable in damages for the negligent acts of its officers or agents in failing to inspect, discover defects, and keep in good repair the playground equipment in Herman Park, the city's public playground. In determining liability, the Court is confronted with the well established rule that generally a municipal corporation is immune to suit for negligence of its agents in the performance of its governmental functions. However, the rule is subject to this modification: A city may be liable if the injury occurs while the agents of the city are performing a proprietary rather than a governmental function. *Orange County v. Heath,* 282 N.C. 292, 192 S.E. 2d 308; *Koontz v. Winston-Salem,* 280 N.C. 513, 186 S.E. 2d 897; *Steelman v. New Bern,* 279 N.C. 589, 184 S.E. 2d 239; *Galligan v. Chapel Hill,* 276 N.C. 172, 171 S.E. 2d 427; *Glenn v. Raleigh,* 248 N.C. 378, 103 S.E. 2d 482; *Glenn v. Raleigh,* 246 N.C. 469, 98 S.E. 2d 913.

The Court of Appeals, as authority for reversing the judgment of the superior court, relied on a statement in *White v. Charlotte,* 211 N.C. 186, 189 S.E. 492. The statement is repeated in *Glenn v. Raleigh* (246 N.C. 469) intimating that a suit may be maintained against the city for injuries arising out of the negligent maintenance of playground equipment in a city's public park. Actually, in *White v. Charlotte, supra,* the plaintiff

sued for damages resulting from the wrongful death of the plaintiff's intestate who fell or was thrown from a defective swing in a city park. Judgment of nonsuit was entered in the superior court and notwithstanding the statement, this Court affirmed the nonsuit. The authority for the above statement cited in White, is *Fisher v. New Bern,* 140 N.C. 506, 53 S.E. 342. In Fisher this Court was discussing the liability of a city for injuries caused by the agents of the city's Water and Light Commission performing proprietary functions for which the city received income. The Court said: "If, as in cities and towns, they have both governmental and business corporate powers conferred, their liability to suits for the torts of their servants and agents depends upon the sphere of activity in which the wrong complained of is committed."

[2] This Court has held *(Glenn v. Raleigh,* 246 N.C. 469) that: "In order to deprive a municipal corporation of the benefit of governmental immunity, the act or function must involve special corporate benefit or pecuniary profit inuring to the municipality."

[3] This Court has also held that a city, in operating its parks and playgrounds for the benefit of the public, is acting in its proper governmental capacity. *Atkins v. Durham,* 210 N.C. 295, 186 S.E. 330, citing many cases.

The evidence in the cases of *Glenn v. Raleigh, supra,* showed the city received income from park charges amounting to 11% of the entire operating cost. In Koontz, the city received revenue equaling 9½% of the entire cost of operating the landfill.

[4] In the case now under review, the City of Goldsboro received from the Kiwanis Club the sum of $1,200.00 which was less than one percent of the operating costs. The trial court properly concluded the Kiwanis Club's donation was incidental income, totally insufficient to support a conclusion the city was operating Herman Park as a proprietary or business venture.

In *Glenn v. Raleigh* (246 N.C. 469) the superior court entered judgment for the plaintiff and this Court, finding error in the charge, granted a new trial. On the second hearing, the evidence disclosed that the City of Raleigh, during the year of Glenn's injury, received from Pullen Park revenue amounting to $18,531.14 and the total outlay for the year in operating Pullen Park was $25,135.00. Based upon the ground the income

was of sufficient financial advantage to the city to constitute the operation of Pullen Park a proprietary rather than a governmental operation, the holding withdrew from the City of Raleigh the right to claim the benefit of governmental immunity. The holding in Glenn was based upon the fact the evidence showed the city operated the park as a business enterprise rather than in the governmental capacity of providing recreation for its citizens.

In discussing a city's liability for negligently inflicting injury, this Court in *James v. Charlotte,* 183 N.C. 630, 112 S.E. 423, said:

> "Again it is insisted that the city is not protected from liability in this instance because it charges a fee for removal of garbage, but the position is without merit. True . . . where a municipal corporation enters into the business of selling light and power . . . for profit, they are not regarded as being in the exercise of governmental functions, and under proper circumstances may be held to civil liability . . . ."
>
> "But the principle invoked has no application where, as in this instance, the city merely makes a charge covering actual expense . . . ."

In the action now under review, the receipt of $1,200.00 donated by the Kiwanis Club as one-half of its profits in operating the Kiddie Train must be classed as "incidental income," insufficient to constitute a waiver of Goldsboro's governmental immunity against suit. *Hamilton v. Hamlet,* 238 N.C. 741, 78 S.E. 2d 770; *Stephenson v. Raleigh,* 232 N.C. 42, 59 S.E. 2d 195.

Although the doctrine of governmental immunity has been under attack and has been abandoned in some states, nevertheless, the doctrine still prevails in North Carolina except in limited instances not applicable to this case. For a full discussion, see *Steelman v. New Bern, supra.*

[5] The Legislature has provided by G.S. 160-191.1 (now 160A-485) that towns and cities may, by obtaining liability insurance to the extent thereof, waive their right to claim governmental immunity for the negligent acts of their agents *in the operation of motor vehicles.* Even though the City of Goldsboro may have general liability insurance, the statute authorizes a waiver

only in actions involving the operation of motor vehicles. The waiver does not cover maintenance of playground equipment. Neither Koontz nor Glenn, nor any other case, furnishes authority for holding the City of Goldsboro waived its immunity from suit on the basis of a $1,200.00 donation made by the Kiwanis Club from its receipts for fares on a Kiddie Train which the Club operated in the city's park.

The Superior Court of Wayne County was correct in entering summary judgment for the city, dismissing the action on the ground that Goldsboro has not waived its governmental immunity. On the motion for summary judgment, the trial court properly considered the pleadings, affidavits, answers to interrogatories, and documentary evidence. In such instances where no real issue of fact is involved, summary judgment is proper. *Koontz v. Winston-Salem, supra.*

The decision of the North Carolina Court of Appeals is

Reversed.

HERMAN FLAKE BRASWELL, INDIVIDUALLY, AND CLYDE M. HUNTLEY, INDIVIDUALLY AND ALSO AS BISHOP AND ELDER OF THE SHILOH TRUE LIGHT CHURCH OF CHRIST, RESPECTIVELY AND THE SHILOH TRUE LIGHT CHURCH OF CHRIST v. JAMES ROMMIE PURSER, JAMES TED GRIFFIN, MARLEY C. GRIFFIN, ROBERT L. WATSON AND TIMMY EARP

— AND —

JAMES ROMMIE PURSER, INDIVIDUALLY, AND AS ELDER OF THE SHILOH TRUE LIGHT CHURCH OF CHRIST, ROBERT L. WATSON, INDIVIDUALLY, AND AS DEACON OF THE SHILOH TRUE LIGHT CHURCH OF CHRIST ON BEHALF OF THE SHILOH TRUE LIGHT CHURCH OF CHRIST AND THE MEMBERS THEREOF v. HERMAN FLAKE BRASWELL, CLYDE M. HUNTLEY, NANCY HUNTLEY, M. E. AUSTIN, DEVON HILL, NETTIE S. HORD, GLENN E. AUSTIN, PHYLLIS ANN AUSTIN, AND ALL OTHER PERSONS IN ACTIVE CONCERT WITH THEM

No. 73

(Filed 13 December 1972)

1. **Religious Societies and Corporations § 3— jurisdiction of court — determination of type of church organization**

The courts of the State have jurisdiction as to civic, contract and property rights which are involved in or arise from a church controversy, including the right to determine the type organization of a particular church.

2. **Religious Societies and Corporations § 2— connectional church — congregational church**

Churches whose organization is connectional are governed by larger bodies and bear the same relationship to the governing body as counties bear to the State, while churches which are congregational are subject to no control or supervision by a higher body but are governed by the majority of their own members.

3. **Appeal and Error § 1— conflicting evidence — jury finding binding on appeal**

The finding by the jury, upon conflicting evidence, that the church in question was congregational in its church polity is conclusive on appeal, the jurisdiction of the Supreme Court being limited to matters of law and legal inference.

4. **Religious Societies and Corporations § 2— congregational church — leadership determined by majority vote**

Where the church in question as a congregational church selected appellee Purser as its elder by a majority vote, the Conference or association in which appellant Braswell claimed leadership had no authority to appoint an elder or overrule the local church in its selection of Purser as its elder.

APPEAL by plaintiffs *(Braswell v. Purser)* and defendants *(Purser v. Braswell)* under G.S. 7A-30(2) from decision of the Court of Appeals which affirmed the judgment entered by *Stukes, District Judge,* 29 November 1971 Session of MECKLENBURG District Court.

These two cases involve a dispute between Herman Flake Braswell and James Rommie Purser, and supporters of each, over the leadership of the Shiloh True Light Church of Christ. The first action was instituted on 31 December 1969 by "Herman Flake Braswell, Individually and Clyde M. Huntley, Individually and also as Bishop and Elder of the Shiloh True Light Church of Christ, Respectively and the Shiloh True Light Church of Christ v. James Rommie Purser, James Ted Griffin, Marley C. Griffin, Robert L. Watson and Timmy Earp." The second action was instituted on 4 March 1970 by "James Rommie Purser, Individually, and as Elder of the Shiloh True Light Church of Christ, Robert L. Watson, Individually, and as Deacon of the Shiloh True Light Church of Christ on Behalf of the Shiloh True Light Church of Christ and the members thereof v. Herman Flake Braswell, Clyde M. Huntley, Nancy Huntley, M. E. Austin, Devon Hill, Nettie S. Hord, Glenn E. Austin, Phyllis Ann Austin, and all other persons in active concert with them."

The allegations and testimony of Herman Braswell and his supporters may be summarized as follows: A number of True Light Churches of Christ, including the Shiloh Church, exist in North and South Carolina. These churches, sometime called societies, are organized in a connectional form of ecclesiastical government. A head elder or head bishop, selected by the elders, preachers and deacons from the various societies duly assembled in conference, is the temporal head of the True Light Churches. The head elder is authorized to appoint elders for each of the local churches or societies. The term "elder" as here used is substantially synonymous with the term "minister." Prior to his death on 23 December 1969 E. H. Mullis served in the dual capacity of elder of the Shiloh Church and head elder of all the True Light Churches. After Mr. Mullis's death, on 26 December 1969 a conference of the elders, preachers and deacons of the various True Light societies elected Herman Flake Braswell as the head elder of the True Light Church. Mr. Braswell as head elder appointed Clyde M. Huntley (now deceased) as the elder of the Shiloh True Light Church. On Sunday, 28 December 1969, Braswell, as head elder, went to the Shiloh Church for the purpose of presiding over a regular worship service. There he was forcibly removed from the church and threatened with physical violence to himself and his supporters if he continued in his efforts to carry out the duties of his office. Braswell further alleges that he and his supporters have the right to control the organizational machinery of the Shiloh Church, and that James Purser and his supporters have usurped control of the church without legal right and by means of unlawful physical force.

Conversely, James Purser and his supporters allege in their complaint and offer testimony tending to show that the True Light Church of Christ was formerly a collection of five or six congregationally governed churches, with each church or society having total autonomy over its affairs and selection of its leadership; that one of these churches closed in 1928 and the remaining True Light Churches, with the exception of Shiloh, closed during the period from 1966 through 1969, and Shiloh is now the only True Light Church still active. On 14 January 1970, at a duly called meeting of the membership of the Shiloh Church, James Purser, who had served as assistant to Elder E. H. Mullis prior to his death, was elected elder of the church by the members with a vote of 323 for and 3 against. On Sunday, 1 March 1970, a group under the constructive control of Braswell

attempted to disrupt a regularly scheduled service being conducted by James Purser. The True Light Church does not now and never has had an office of head elder, and Braswell has no lawful position of authority in the Shiloh Church.

Both parties sought a judicial determination of the lines of authority in the Shiloh Church and a temporary injunction restraining the other faction from interference in the operation of the church. On 2 March 1970, following a hearing on Braswell's motion for a temporary injunction, the district court found facts in favor of Purser and entered an order denying Braswell's motion. On 13 March 1970 following a hearing, the district court found as a fact that Braswell is not "Bishop" or "Head Bishop" and is without authority to rule the Shiloh Church, and entered an order that Braswell and those acting in concert with him be enjoined from directly or indirectly interfering with worship services at Shiloh Church.

On 29 November 1971 Braswell's attorney, James Caldwell, was permitted to withdraw as counsel, and Braswell at his request was allowed to represent himself and his supporters. By agreement the cases were consolidated for trial on the merits. At trial Braswell and Purser each offered evidence in support of his position. In addition to the testimony of several witnesses, two documents, "Articles of Faith of the Truelight Church of Christ" and "Minutes of the 1920-1924 Conferences of the Truelight Church of Christ," were introduced into evidence. The "Articles of Faith" contained no reference to church government. The "Minutes of the 1920-1924 Conferences of the Truelight Church of Christ" did, however, make the following statement about church government and organization:

> "The government of the True Light Church is congregational ruled by a two-third majority in matters of discipline for example, when a member commits an act, sufficient to be brought before the church for trial it is the duty of the Elder, of that particular society where the deed is committed to notify his organization when said member is to have a hearing, after this notice is given two thirds of those present in said trial with the Elder has authority to retain the member in the church or discard said member from the fellowship of the church. . . . And further we would say when a community of True Lights increase to a sufficient number to justify it, they should organize by appointing one of their influential members of good re-

port as Elder, to look after the spiritual welfare of that particular society."

The minutes reveal that a chairman for the Conference was elected at the 1920, 1921, and 1922 meetings; and that at the 1923 meeting J. D. Reynolds and R. H. Reynolds were elected "to serve permanently as chairman and clerk respectively." No reference was made to the election of a head elder or head bishop, and no minutes of any Conference after that of 1923 were introduced.

It was stipulated between the parties that "the property of the Shiloh True Light Church of Christ was conveyed by M. L. Mullis and wife, Annie P. Mullis, J. D. Mullis, R. D. Huntley and wife, Nancy Huntley, to the deacons of Shiloh Church known as True Light Church, W. E. Pinyon, R. D. Huntley, M. L. Huntley, deacons of said church and their successors in office to be held by them for and on behalf of the church and its membership, said deed being dated January 16, 1906."

Issues were submitted to and answered by the jury as follows:

"1. Is the Truelight Church of Christ a connectional church governed by a Chief Elder, Chief Bishop or by a person referred to as Head of the Truelight Church of Christ?

ANSWER: No.

"2. If so, was Herman Flake Braswell duly elected as Chief Elder, Chief Bishop or Head of the Church at a duly called and constituted conference of the Truelight Church of Christ on December 26, 1969?

ANSWER: .....

"3. If so, does Herman Flake Braswell, as such Chief Elder, Chief Bishop or Head of the Church, have authority to appoint Elders of the separate societies, including the Shiloh Truelight Church of Christ?

ANSWER: .....

"4. Is the Truelight Church of Christ a congregationally governed church?

ANSWER: Yes.

"5. If so, was James Rommie Purser duly elected as Elder of the Shiloh Truelight Church of Christ by the congregation thereof on December 28, 1969, or on January 14, 1970?

ANSWER: Yes."

Based upon the answers to these issues, judgment was entered that the True Light Church is a congregationally governed church, that Purser is the duly elected elder of the Shiloh Church and that Braswell and those in concert with him be permanently enjoined from interfering with the operation of the Shiloh Church. Braswell and his supporters appealed. The Court of Appeals in an opinion by Judge Britt, concurred in by Judge Campbell, affirmed Judge Stukes' judgment. 16 N. C. App. 14, 190 S.E. 2d 857 (1972). Chief Judge Mallard dissented, and Braswell and his supporters appealed to this Court as a matter of right under G.S. 7A-30(2).

James J. Caldwell for plaintiff appellants and defendant appellants Braswell et al.

Bailey & Davis by Douglas A. Brackett for defendant appellees and plaintiff appellees Purser et al.

MOORE, Justice.

[1] The courts of the State have no jurisdiction over and no concern with purely ecclesiastical questions and controversies. There is a constitutional guarantee of freedom of religious profession and worship, as well as an equally firmly established principle of separation of church and state. However, the courts do have jurisdiction as to civic, contract and property rights which are involved in or arise from a church controversy, including the right to determine the type organization of a particular church. *Reid v. Johnston,* 241 N.C. 201, 85 S.E. 2d 114 (1954), and cases therein cited. See also *Conference v. Creech* and *Teasley v. Creech and Miles,* 256 N.C. 128, 123 S.E. 2d 619 (1961); *Simmons v. Allison,* 118 N.C. 763, 24 S.E. 716 (1896).

The present cases are proceedings invoking the equity jurisdiction of the court to restrain interference by the opposing parties with official church duties. At issue is whether Shiloh Church must accept as elder an appointee of Braswell or retain Purser who was elected by its membership. The de-

cisive question for determination is whether the Shiloh True Light Church is subject to congregational or connectional form of ecclesiastical government. Braswell contends that it is connectional, and that he was elected head elder by the Conference of the True Light Churches of Christ and as such had the right to appoint Clyde M. Huntley as elder of the Shiloh Church. Purser contends that there is no Conference since Shiloh is now the only active True Light Church of Christ. He further contends that Shiloh is and always has been a congregational church and as such had the authority to elect Purser as its elder.

[2] Concerning the difference between those churches whose organization is connectional and those congregational, Chief Justice Clark in *Conference v. Allen,* 156 N.C. 524, 72 S.E. 617 (1911), stated:

> "In *Simmons v. Allison,* 118 N.C. 770, we had occasion to call attention to the distinction between those churches whose organization is connectional, such as the Protestant Episcopal, the various Methodist churches, the Presbyterian, the Roman Catholic, and others which are governed by large bodies, such as dioceses, conferences, and synods and the like, in which the individual congregations bear the same relation to the governing body as counties bear to the State, and, on the other hand, the congregational system which is in use among the Baptists, the Congregational, and the Christian and other denominations. In these latter, the individual congregation is each an independent republic, governed by the majority of its members and subject to control or supervision by no higher authority. . . . The churches of the congregational system often combine into associations, conferences, and general conventions. But unlike such organizations under the connectional system, these bodies under the congregational system are purely voluntary associations for the purpose of joining their efforts for missions and similar work, but having no supervision, control, or governmental authority of any kind whatsoever over the individual congregations, which are absolutely independent of each other."

[3] In the instant case, upon conflicting evidence, the jury found that the Shiloh Church was congregational in its church polity. The verdict of the jury upon conflicting evidence is conclusive, the jurisdiction of the Supreme Court being limited to

matters of law and legal inference. *Jones v. Horton,* 264 N.C. 549, 142 S.E. 2d 351 (1965); *Lucas v. Britt,* 264 N.C. 601, 142 S.E. 2d 129 (1965); *Jyachosky v. Wensil,* 240 N.C. 217, 81 S.E. 2d 644 (1954).

The appellant Braswell should not now complain of the jury's verdict since the 1920-24 Conference Minutes of the True Light Church of Christ, introduced by him, state: "The government of the True Light Church is congregational ruled by a two-third majority. . . ." As a congregational church Shiloh had the authority to select its own elder or minister. The jury on substantial evidence found that it had done so by electing Purser.

[4] Assuming *arguendo* that Shiloh Church once belonged to a Conference composed of other local True Light Churches, as a congregational church the Conference or association had no authority to appoint an elder or to overrule the local church in its selection of Purser as its elder. *Reid v. Johnston, supra; Windley v. McCliney,* 161 N.C. 318, 77 S.E. 226 (1913); *Conference v. Allen, supra.*

Appellants bring forward numerous assignments of error relating to the trial judge's instructions to the jury. These assignments were each dealt with separately by Judge Britt in a thorough and well-reasoned opinion in the Court of Appeals and were found to be without merit. This Court has considered each assignment of error and finds that Judge Britt's disposition of each was correct. It would serve no useful purpose to again discuss each assignment specifically. The instructions of the trial judge were complete, free from prejudical error, and correctly applied the law to the facts of the case in such a manner as to leave no reasonable cause to believe the jury was mislead or misinformed.

Other assignments of error properly brought forward have been carefully considered and found to be equally without merit.

In the present case the record overwhelmingly supports the rights of the appellee Purser and his followers. The parties should now heed the advice given by Justice Parker (later Chief Justice) in *Reid v. Johnston, supra:*

> " . . . The heat of conflict is over and the time has come . . . for the exercise of the Christian graces of re-

conciliation, forbearance, brotherly love and unity, according to the admonition given by the Apostle Paul to the Church at Corinth."

Since no prejudicial error appears, the decision of the Court of Appeals is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. HORACE RAY McCLAIN

No. 69

(Filed 13 December 1972)

1. **Criminal Law § 112— charge on reasonable doubt — no error**

The trial judge's charge on reasonable doubt in a kidnapping case which contained the statement that, "If after considering, comparing and weighing all of the evidence the minds of the jurors are left in such condition that they cannot say that they have an abiding faith to a moral certainty in the defendant's guilt, then they have a reasonable doubt; otherwise not," was in accord with definitions of that term approved by the Supreme Court.

2. **Criminal Law §§ 113, 118, 119— desired instructions not supported by evidence — instruction on contentions — failure to request instruction**

There was no error in the trial court's failure to allude in its charge to defendant's contention that he was in his kidnap victim's vehicle at her request where there was no evidence to support such contention, where the trial judge did not undertake to state any contention either of the State or of the defendant, and where the record did not indicate any suggestion by defendant to the trial court concerning any failure to state his contention in the court's jury instructions.

3. **Criminal Law §§ 113, 119— omission in instructions not material — failure to request instruction**

Failure of the court to call to the attention of the jury the circumstance that an arresting officer testified that at the approach of the officers the defendant got out of the victim's vehicle before the victim escaped therefrom and sought the aid of the officers was not a material omission and defendant's failure to request full instructions on that point at the time the jury charge was given precludes him from assigning the omission as error on appeal.

4. **Criminal Law § 128— motion to set aside verdict — denial proper**

Defendant's motion to set aside the guilty verdict in a kidnapping case by reason of alleged errors in the court's instructions was properly denied.

State v. McClain

APPEAL by defendant from *Braswell, J.*, at the Second June 1972 Criminal Session of WAKE.

Upon an indictment, proper in form, the defendant was tried upon the charge of kidnapping Mrs. Patricia Florence Conklin. He entered a plea of not guilty. The jury found him guilty as charged and he was sentenced to imprisonment for life.

The defendant offered no evidence. The State's evidence was to the following effect:

Mrs. Conklin, returning from a visit with friends to the State Fair about 12:30 a.m. on 19 October 1971, brought her automobile to a stop in front of her home on North Bloodworth Street in Raleigh. She turned off the motor and lights, removed the keys, opened the door and started to get out of the car to enter the house. There was no street light nearby. The defendant, whom she had not previously observed, came up suddenly, pushed her over in the car seat, placed a sharp metal object upon her neck and told her that if she screamed or tried to get away he would kill her. She offered him her money and car if he would let her go. He did not reply, but took her car keys and, holding her with one hand, started the car and drove away. In response to her pleading that she be allowed to go and her inquiry as to what he was planning to do to her, he merely laughed and said, "Well, just wait and see." When she said, "I know what you're planning on doing but you're going to have to kill me first," he just laughed.

After driving a few blocks, the defendant stopped for a stoplight. Mrs. Conklin opened the car door and got halfway out of the vehicle, whereupon the defendant seized her with both hands, dragged her back into the car and drove on. The headlights of the automobile were not turned on but the windshield wipers were operating, though it was not raining. After the defendant had driven some two blocks beyond the stoplight, two officers of the State Capitol Police, observing the Conklin car proceeding without lights, drove up behind it. Thereupon, the defendant brought Mrs. Conklin's car to a stop and, telling her to remain in it until he got away, got out of the car. One of the officers (Harley) got out of the police car and confronted the defendant. Mrs. Conklin then screamed, jumped out of her car and ran to the other officer (Gray), telling him, hysterically, "He is going to kill me."

At no time did Mrs. Conklin consent to go with the defendant. She had never seen him before and was frightened. After the defendant got into the automobile, Mrs. Conklin saw that the metal object which he had been holding against her neck was an Afro comb, similar to the one offered in evidence by the State. She could not see what it was while the defendant was holding it against her neck. She did not know the police car was following them until the defendant brought her car to a stop.

Upon cross-examination, Mrs. Conklin was asked if it were not true that when she drove up in front of her home she saw the defendant in his car, blew her horn at him, signaled to him and, upon his approach, asked him where she could get some whiskey. She flatly denied that she had done so. There was no evidence whatever to support this question by defendant's counsel.

When Officer Harley confronted the defendant, the defendant had his hand in his pocket. In obedience to Officer Harley's direction, he took his hand out of his pocket, pulling from the pocket an Afro comb, offered in evidence by the State, and stuck it in his hair.

Officer Warren of the Raleigh City Police reached the scene in two or three minutes in response to the call of Officer Gray. On his arrival, Mrs. Conklin was seated in the car of the Capitol Police and was "very upset." He arrested the defendant and took the comb out of the defendant's hair. At the police station Officer Warren took a statement from Mrs. Conklin, which substantially corroborated her testimony.

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

Garland B. Daniel for defendant.

LAKE, Justice.

[1] The defendant makes four assignments of error. The first is that, with reference to the term "reasonable doubt," the court instructed the jury as follows:

> "A reasonable doubt is not a vain, imaginary or fanciful doubt but is a sane, rational doubt. It means that the

jury must be satisfied of the defendant's guilt to a moral certainty of the truth of the charge.

"If after considering, comparing and weighing all of the evidence the minds of the jurors are left in such condition that they cannot say that they have an abiding faith to a moral certainty in the defendant's guilt, then they have a reasonable doubt; otherwise not."

The defendant's exception is to the words "otherwise not" in the foregoing instruction. There is no merit in this exception. The law does not require any set formula in defining "reasonable doubt," it being sufficient that the trial judge, if he undertakes to define the term, do so in substantial accord with definitions approved by this Court. *State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133. In *State v. Schoolfield,* 184 N.C. 721, 114 S.E. 466, this Court, speaking through Justice Stacy, later Chief Justice, defined "reasonable doubt" in precisely the same terms used by the trial judge in this case. As Justice Denny, later Chief Justice, said in *State v. Hammonds, supra,* "The above or other approved formulae may be found in scores of our decisions."

[2] The defendant's second assignment of error is that the court, in its charge, failed to allude to the contention of the defendant that he was in the automobile of Mrs. Conklin at her request and that they were going after some whiskey. There is nothing whatever in the record to suggest any such contention, except that on cross-examination Mrs. Conklin was asked if that were not the case. She stated positively and unequivocally that this was not true. There is not merit in this assignment of error.

The trial judge did not undertake to state any contention either of the State or of the defendant.

In *State v. Cook,* 273 N.C. 377, 381, 160 S.E. 2d 49, this Court, speaking through Justice Huskins, said:

"A trial judge is not required to state the contentions of the litigants. But when he undertakes to give the contentions of one party he must fairly charge as to those of the other. Failure to do so is error. [Citations omitted.] Here, however, the judge did not undertake to give the contentions of either the State or the defendants."

Furthermore, as this Court said in *State v. Butler,* 269 N.C. 733, 153 S.E. 2d 477, if the defendant's contentions were not properly stated, the defendant "should have called the attention of the court to any omissions or errors, so that they could have been supplied or corrected." See also: *State v. Sanders,* 276 N.C. 598, 174 S.E. 2d 487; *Sherrill v. Hood, Comr. of Banks,* 208 N.C. 472, 181 S.E. 330; *Manufacturing Co. v. Building Co.,* 177 N.C. 103, 97 S.E. 718. The record does not indicate any suggestion by the defendant to the trial court concerning any statement of or failure to state his contentions in the court's instructions to the jury.

There was no evidence whatever to indicate that Mrs. Conklin signaled to the defendant or was aware of his presence prior to his assault upon her, that she consented to his presence in her vehicle or that she made any suggestion or request to him except to plead that she be allowed to leave the automobile. "The court should never give the jury instructions based upon a state of facts not presented by some reasonable view of the evidence produced on the trial, nor upon a supposed state of facts." *State v. Wilson,* 104 N.C. 868, 873, 10 S.E. 315. "A judge should never charge the jury upon a state of facts not presented by some reasonable view of the evidence of the case." *State v. Hollingsworth,* 263 N.C. 158, 162, 139 S.E. 2d 235. "No instruction should be given which is not reasonably supported by the evidence, or which is not based on some theory logically deductible from some portion of the evidence." 23A C.J.S. Criminal Law, § 1313.

[3] The defendant's third assignment of error is that the court, in reviewing the evidence in its charge to the jury, failed to state that Officer Gray testified that when the car of the State Capitol Police drove up the defendant got out of the automobile of Mrs. Conklin before she did. There is no merit in this assignment of error. The trial judge correctly instructed the jury: "It is your duty to remember and consider all of the evidence whether called to your attention by counsel or the Court or not, for all of the evidence is important * * * . " Any error or omission by the court in its review of the evidence in the charge to the jury must be then called to the attention of the court so that the court may have an opportunity to make the appropriate correction. In *State v. Sanders, supra,* Justice Moore, speaking for the Court, said: "The recapitulation of all the evidence is not required under G.S. 1-180, and nothing more

is required than a clear instruction which applies the law to the evidence and gives the position taken by the parties as to the essential features of the case. *State v. Thompson,* 257 N.C. 452, 126 S.E. 2d 58. If defendant desired fuller instructions as to the evidence or contentions, he should have so requested. His failure to do so now precludes him from assigning this as error." Accord: *State v. Greene,* 278 N.C. 649, 180 S.E. 2d 789; *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28; *State v. Guffey,* 265 N.C. 331, 144 S.E. 2d 14; Strong, N. C. Index 2d, Criminal Law, § 113. The failure of the court to call to the attention of the jury the circumstance that Officer Gray testified that the defendant got out of the Conklin vehicle before his victim escaped therefrom and sought the aid of the officers was not a material omission. Quite clearly, the interval involved was but a few seconds at most, the victim was in justified fear of her life and but a few moments earlier had been forcibly pulled back into the automobile by the defendant when she attempted to escape from it.

[4] The defendant's fourth assignment of error is to the denial of his motion to set aside the verdict by reason of the alleged errors in the court's instructions hereinabove discussed and found to be without merit. Consequently, no further discussion of this assignment is required. It has no merit.

The instructions of the trial judge to the jury set forth accurately and completely the elements of the offense of kidnapping and stated correctly the nature and degree of proof required of the State in order to justify a verdict of guilty. The defendant was caught in the course of the perpetration of the crime with which he was charged and has been fairly tried and convicted. The sentence imposed is in accordance with the statute. G.S. 14-39.

No error.

ALBEMARLE ELECTRIC MEMBERSHIP CORPORATION, BLUE RIDGE ELECTRIC MEMBERSHIP CORPORATION, BLUE RIDGE MOUNTAIN ELECTRIC MEMBERSHIP CORPORATION, BRUNSWICK ELECTRIC MEMBERSHIP CORPORATION, CARTERET-CRAVEN ELECTRIC MEMBERSHIP CORPORATION, CENTRAL ELECTRIC MEMBERSHIP CORPORATION, CRESCENT ELECTRIC MEMBERSHIP CORPORATION, DAVIDSON ELECTRIC MEMBERSHIP CORPORATION, JONES-ONSLOW ELECTRIC MEMBERSHIP CORPORATION, MOUNTAIN ELECTRIC COOPERATIVE, PAMLICO-BEAUFORT ELECTRIC MEMBERSHIP CORPORATION, PIEDMONT ELECTRIC MEMBERSHIP CORPORATION, ROANOKE ELECTRIC MEMBERSHIP CORPORATION, RUTHERFORD ELECTRIC MEMBERSHIP CORPORATION, SOUTH RIVER ELECTRIC MEMBERSHIP CORPORATION, SURRY-YADKIN ELECTRIC MEMBERSHIP CORPORATION, TRI-STATE ELECTRIC COOPERATIVE, INC., AND WAKE ELECTRIC MEMBERSHIP CORPORATION v. THOMAS W. ALEXANDER, WILLIAM C. STOKES, JOHN WINFIELD, CEDRIC D. LANGSTON, HUDSON C. STANSBURY, ACTING AS THE NORTH CAROLINA STATE BOARD OF ASSESSMENT

No. 7

(Filed 13 December 1972)

1. **Taxation § 25— electric membership corporation — valuation of property for taxation purposes — showing of excessiveness**

In order to obtain relief from valuations placed upon their property for purposes of taxation by the State Board of Assessment, appellant electric membership corporations must show that the methods used in determining true value were illegal and arbitrary and that appellants were substantially injured by a resulting excessive valuation of their property.

2. **Taxation § 25— valuation of property — uniform appraisal standard**

The primary consideration in assessing an ad valorem tax is property valuation, and the North Carolina General Assembly has adopted "market value" or "true value in money" as the uniform appraisal standard for valuation of property for tax purposes. G.S. 105-294 (now G.S. 105-283).

3. **Public Officers § 8— State Board of Assessment — presumptions as to official acts**

Members of the State Board of Assessment are public officers, and the Board's official acts are presumed to be made in good faith and in accordance with law.

4. **Taxation § 25— State Board of Assessment — court intervention in assessment determinations**

Duties of the State Board of Assessment are quasi-judicial in nature and require the exercise of judgment and discretion, and it

is only when the actions of the Board are found to be arbitrary and capricious that courts will interfere with tax assessments because of asserted violations of the due process clause.

5. **Taxation § 25— property valuation — overcoming presumption of correctness of State Board of Assessment**

Appellant electric membership corporations may overcome the presumed correctness of the State Board of Assessment's valuation placed upon their properties only upon showing by competent evidence that the valuation was unreasonably high.

6. **Taxation § 25— property valuation — local tax listings— insufficiency of evidence to upset Board's valuation**

Where the only evidence offered by appellants as to the value of their property was their local tax listings, such declarations alone were of insufficient probative force to overcome the presumption of correctness and regularity accompanying the actions of the State Board of Assessment in the valuation of appellants' property.

7. **Taxation § 25— property valuation — insufficiency of evidence to upset Board's valuation**

Where appellants failed to offer sufficient evidence of probative value showing the true value of their property, the value set by the State Board of Assessment must stand.

APPEAL by petitioners from *Braswell, J.*, First January Regular Civil Term, 1972, WAKE Superior Court.

Each appellant is an electric membership corporation organized and operating under Chapter 117 of the General Statutes of North Carolina or domesticated and doing business in North Carolina pursuant to Article III of that Chapter. Since 1 January 1967, appellants have been subject to ad valorem taxation by the various local governmental units of the State, and their property valuations have been subject to review and excess valuation determination, if so found, by the State Board of Assessment.

All references to statutes contained in Chapter 105 of the General Statutes refer to the applicable provisions prior to their revision or recodification by the 1971 General Assembly.

Acting in accordance with G.S. 105-355, each appellant duly filed information statements with the State Board of Assessment for the year 1970. From the information furnished, the Board valued and assessed the property of each appellant, taking into account the following factors: (1) plant and equipment cost. A figure represented by this factor was arrived at by

averaging depreciated plant and equipment, plus materials and supplies, as of 31 December 1968 and 1969 after reducing percentages of idle services; (2) capitalized income. A capitalization rate of 6% for the two-year (1968 and 1969) average of patronage capital and operating margins before deduction of interest on long-term debt was applied in determining this factor; and (3) equity and debt. The figure representing this factor was calculated by totaling amounts of membership fees, patronage capital, operating margins from prior years, contributions in aid of construction, operating margins from the current year and the actual long-term mortgage debt excluding book dollars relating to nonoperating properties.

After averaging the figures, the Board arrived at the fair market value of each appellant by averaging the three factors and reducing the result by 5%. Taking this value, the Board deducted from it the total value of all real and personal property listed by each appellant in each county in which it had property. The amount remaining would then have been taxed by the proper counties, but the appellants protested and sought a formal hearing on the question of value.

Pursuant to G.S. 105-357 a formal hearing was held before the State Board of Assessment. The Board found facts consistent with those above stated, and concluded:

> "1. The burden of proof is upon the protestants to establish that fair market value is less than that found by the Board.
>
> 2. By offering no evidence of fair market value, the protestants have failed to carry their burden of proof."

The Board thereupon ordered "that the tentative valuations heretofore set by the State Board of Assessment with respect to the nineteen protesting electric membership corporations for the year 1970 become final."

Judge Braswell affirmed the decision of the Board, and appellants appealed to the North Carolina Court of Appeals. We allowed the petition for writ of certiorari prior to determination by the Court of Appeals on 2 May 1972 pursuant to G.S. 7A-31(b).

Robert Morgan, Attorney General by Myron C. Banks, Assistant Attorney General Attorneys for respondents.

Crisp and Bolch by Thomas J. Bolch Attorneys for petitioner-appellant.

BRANCH, Justice.

Appellants contend the State Board of Assessment employed an erroneous method in valuing their property which resulted in their property being valued substantially in excess of its true money value, thereby imposing a confiscatory tax in violation of § 17, Art. 1 (now § 19, Art. 1) of the North Carolina Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

The provisions of G.S. 105-271, et seq. constitute the State Board of Assessment appraisers and assessors of the property of public utilities and electric membership corporations for the purpose of ad valorem taxation.

Black's Law Dictionary defines the word "assess" as follows: "In connection with taxation of property, [assess] means to make a valuation and appraisal of property, usually in connection with listing of property liable to taxation, and implies the exercise of discretion on the part of officials charged with duty of assessing, including the listing or inventory of property involved, determination of extent of physical property, and placing of a value thereon. *Montana-Dakota Power Co. v. Weeks,* D.C.N.D., 8 F. Supp. 935, 936. To tax. *Johnson City v. Clinchfield R. Co.,* 163 Tenn. 332, 43 S.W. 2d 386, 387."

G.S. 105-358, (since revised and recodified as G.S. 105-336) as applied to appellants, specifically provided for the ascertainment of true value of their property by adding the equity (value of capital) and the debt (aggregate amounts of any mortgage or mortgages).

Appellants argue that the Board should have considered the *value* of their respective mortgage indebtedness rather than the *amount* of such mortgage indebtednesses.

In this connection the Board heard the testimony of Mr. Gwyn Price, Chairman of North Carolina's Rural Electric Authority from its inception to his retirement in 1972, who testified: "I don't think the employment by the Board of the

REA mortgage debt factor is a proper method to use in arriving at these values. *I think that it should be supplemented, Mr. Chairman, with other data and with other information; particularly do I think it should be supplemented with some rate of return.*" (Our emphasis.)

Harry B. Caldwell, an outstanding agricultural leader and the Executive Vice-President of the Farmers Cooperative Council, outlined the history and philosophy of the REA. He questioned the wisdom of using the mortgage indebtedness as a factor in determining true value.

The witness Clyde T. Ellis, Manager Emeritus of the National Rural Electric Cooperative Association, stated that in his opinion the use of the mortgage debt of the electric membership corporations was not valid as a fair and proper base for the computation of true value of property.

W. R. Underhill, a Utilities Evaluation Analyst for the State Board of Assessment, stated that "if we could have determined the market value of REA debt and the market value of the remaining equity, that would have been the market value, but we feel that it's impossible to do so."

Mr. Joe Mayes, a partner of Southern Engineering Company, testified that his experience in evaluating electric membership property was limited to forced sales situations. He recommended depreciated book value plus materials and supplies factors for non-revenue producing items and capitalized earnings as the major components of a better formula for ascertaining the true value. This formula, he suggested, should be averaged over a period of time greater than the two-year period employed by the Board in valuing appellants' property. In his opinion mortgage indebtedness was a "skew factor."

REA was created to meet a need that investor-owned utilities could not profitably meet. The Congress adopted a policy which allowed 2% interest loans to be granted upon security which would not have attracted private capital. An electric membership corporation is a non-profit service organization created to carry central electric service to sparsely settled rural areas. Considering these factors with the available market, if there should be a sale of an electric membership corporation, it becomes fairly obvious that there is firm basis for appellants' contention that generally the amount of the

mortgage debt and equity of a membership corporation may in many cases exceed the value of the mortgage debt and equity.

We do not, however, intend to say that the statutory formula was without any value in determining the true value of appellants' property. We do think the Board wisely followed the procedure approved by the witness Gwyn Price and used other factors widely recognized as proper in determining true value of similar property. Further, we note that after the Board averaged the three factors they reduced the result by 5%. Nevertheless, appellants attack the additional factors used by the Board to supplement the statutory directions for determining true cash value of the membership property.

They first contend that the capitalization of their earnings at less than 7-8% was erroneous.

We consider cases from other jurisdictions which are pertinent to this contention.

In the case of *Chicago and North Western Railway Co. v. Prentis*, ... Iowa ....., 161 N.W. 2d 84, the tax commission had for several years been capitalizing income at the rate of 6%. Plaintiff objected to the use of this rate and offered witnesses who testified that the proper percentage should be 6½%, 7½% and 8%. The court held that the taxpayer's burden is not met by showing a difference of opinion, but that the taxpayer must show the action of the commission in following its long established rate was arbitrary and capricious. Consequently, the 6% rate was approved.

Another jurisdiction considered the same question in *Pleasant v. Missouri-Kansas-Texas R. Co.*, 66 F. 2d 842 (10th Cir. 1933). There the court stated the tax commission capitalized the taxpayers' net revenues on a 6% basis, and the master had used 7%. The court held that both percentages were in the "zone of reason," and that there was no error in the use of the 6% rate.

In this connection the witness Underhill testified that the Board in the past had adhered to the figure of 6% in calculating utility property until the rise in interest rates. Recently, the Board has used higher capitalization rates for higher risk companies but retained the 6% rate for determining value of properties belonging to electric membership corporations.

The witness Mayes testified he would have employed a figure of 7 or 8% in capitalizing the earnings. Referring to these percentages he further testified:

> "I would have to put many things in and weigh them and this would be my judgment and I think this is a judgment figure. I am convinced in my own mind that *this is generally a judgment figure.*" (Our emphasis.)

Appellants seek to support their argument for a higher capitalization rate by offering evidence that the North Carolina Utilities Commission has approved a rate of return of 7.75% for Duke Power Company. Duke Power Company differs from appellants in that it is investor owned, seeks to make a profit for its investors, must obtain its financing in the "money markets" and there pay such interest rates as prevailing circumstances require. Recognizing the difference between investor-owned companies and electric membership corporations, we find little probative force in the evidence that the North Carolina Utilities Commission allowed Duke Power Company a 7.75% rate of return.

Here the evidence discloses that the Board has historically used the figure of 6% in determining true value of the property owned by electric membership corporations, and that the determination of the rate is a matter of judgment. We find nothing in the record which indicates that the Board departed from the "zone of reason" or acted arbitrarily in adopting the 6% capitalization rate.

[1] We have briefly outlined some of appellants' major contentions asserting error in the method used by the Board to find the true value of appellants' property. We do not deem it necessary to discuss all of these contentions since an erroneous method of determination, standing alone, will not be decisive of this appeal. In order to obtain relief appellants must show that the methods used in determining true value were illegal and arbitrary, *and* that appellants were substantially injured by a resulting excessive valuation of their property.

[2] The primary consideration in assessing an ad valorem tax is property valuation. The fundamental rule of valuation is actual market or fair cash value. 51 Am. Jur. Taxation, § 696; 84 C.J.S. Taxation, § 410. The North Carolina General Assembly has adopted "market value" or "true value in money" as the

uniform appraisal standard for valuation of property for tax purposes. G.S. 105-294 (now G.S. 105-283).

[3] The members of the State Board of Assessment are public officers, and the Board's official acts are presumed to be made in good faith and in accordance with law. The burden is upon the party asserting otherwise to overcome such presumptions by competent evidence to the contrary. Every reasonable intendment will be made in support of these presumptions. *Housing Authority v. Wooten,* 257 N.C. 358, 126 S.E. 2d 101; *Huntley v. Potter,* 255 N.C. 619, 122 S.E. 2d 681; *Kirby v. Board of Education,* 230 N.C. 619, 55 S.E. 2d 322; 51 Am. Jur. Taxation, § 655.

[4] The duties of the State Board of Assessment are quasi-judicial in nature and require the exercise of judgment and discretion. 51 Am. Jur. Taxation, § 663. It is only when the actions of the Board are found to be arbitrary and capricious that courts will interfere with tax assessments because of asserted violations of the due process clause. *Great Northern Ry. Co. v. Weeks,* 297 U.S. 135, 56 S.Ct. 426, 80 L.Ed. 532; *Hotel Company v. Morris,* 205 N.C. 484, 171 S.E. 779; *Alaska Land Company v. King County,* 77 Wash. 2d 247, 461 P. 2d 339; 51 Am. Jur. Taxation, § 771. G.S. 143-315, in defining the scope of review and power of the court in disposing of decisions of certain administrative agencies (including 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 substantial 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."

G.S. 143-307 provides that "any person who is aggrieved by a final administrative decision . . . is entitled to judicial review . . . " This court has defined a person aggrieved as one "adversely or injuriously affected; damnified, having a grievance, having suffered a loss or injury, or injured; . . . " *In re Assessment of Sales Tax,* 259 N.C. 589, 131 S.E. 2d 441.

[5] There is an abundance of authority from other jurisdictions to the effect that appellants cannot obtain relief by showing only an arbitrary or illegal method of valuation, and that they may overcome the presumed correctness of a taxing authority's assessment only upon showing by competent evidence that the assessment substantially exceeds the true value of the property. *Majestic Great West. Sav. & Loan Ass'n v. Reale,* 30 Colo. App. 564, 499 P. 2d 644; *Abbot v. State Tax Commission,* 88 Idaho 200, 398 P. 2d 221; *State Board of Tax Comrs. v. Traylor,* 141 Ind. App. 324, 288 N.E. 2d 46; Appeal of Kresge-Newark, Inc., 30 N.J. Super. 489, 105 A. 2d 12; *City of San Marcos v. Zimmerman,* 361 S.W. 2d 929 (Tex. Civ. App. 1962); *Ozette Ry. Co. v. Grays Harbor County,* 16 Wash. 2d 459, 133 P. 2d 983. Simply stated, appellants must show that the valuation was unreasonably high.

[6] The only evidence offered by appellants as to the value of their property was their local tax listings. We do not think these declarations alone have sufficient probative force to overcome the presumption of correctness and regularity accompanying the Board's actions. The State Board of Assessment is by statute given the power to value appellants' property. Implicit in this power is the power to reject a value declared by the taxpayer. The futility of allowing a taxpayer to fix the final value of his property for taxation is so apparent it decries discussion. See, Listing and Assessing of Property for County and City Taxes in North Carolina, Brandis, p. 108; *Rodeo Telephone Mem. Corp. v. County of Greeley,* 181 Neb. 492, 149 N.W. 2d 357.

The case of *Newberry Mills v. Dawkins,* ..... S.C. ....., 190 S.E. 2d 503 (decided 6 July 1972) is closely analogous to instant case. There the plaintiff filed its information return with the South Carolina Tax Commission pursuant to applicable South Carolina statutes. Plaintiff then protested the Commission's valuation and assessment of its property and, after exhausting its administrative remedies, paid the taxes under protest. Plaintiff brought an action in the Court of Common

Pleas to recover the taxes paid, contending, *inter alia,* that the Commission's method of valuation made the assessment void. Plaintiff appealed from an adverse ruling of the Court of Common Pleas. The South Carolina Supreme Court affirmed the lower court stating, in part:

> "The second question to be decided deals with the Commission's method of valuation, which plaintiff contends is constitutionally impermissible. Briefly stated, the Tax Commission uses the original cost of the property and carries that figure forward each year as the fair market value of the property. As items of equipment or taxable property are replaced, there is no change in the valuation of the property, the replacement factor being somewhat of an allowance for depreciation and obsolescence. The plaintiff asserts that this results in a patent failure to ascertain fair market value and that because of this the resulting assessment is void.
>
> Such argument is not without appeal in view of constitutional provisions set forth above, and in view of Code Section 65-1648, which requires all property to be valued 'at its true value in money' for taxation. Nonetheless, plaintiff's exceptions cannot be sustained. . . .
>
> Plaintiff's coveted relief hinges upon the allegation that the valuation of its property was invalid since it was not the constitutionally—and statutorily—required *actual* or *true* valuation. It was therefore incumbent upon plaintiff to prove to the administrative bodies below that the Property Tax Division's valuation of its property was not equivalent to the actual value or true value of the property. This plaintiff has failed to do. No evidence of the actual value of (sic) fair market value of plaintiff's property was presented to the Tax Commission. Plaintiff failed to establish that the 'book value' method did not produce the proper valuation of its property. . . .
>
> Of more importance than the method used in determining the valuation is the result reached. In the absence of proof to the Commission of some other 'actual' value, the value set by the Commission must stand. This action in effect asked the lower court to review the action of the Commission and the Tax Board of Review. In a sense it is an appeal. If a valuation is incorrect, then the actual value

should be proven to that body charged by law with the duty of determining the value."

[7] Appellants have failed to offer sufficient evidence of probative value showing the true value of their property. The value set by the State Board of Assessment must stand in absence of proof of other value.

There was ample record evidence to support the findings of the Board, the conclusions reached and the order entered.

Judge Braswell's judgment correctly stated:

"The findings of fact and decision of the Respondents herein are supported by competent, material and substantial evidence in view of the entire record as submitted and the substantial rights of the Petitioners have not been prejudiced; and said decision is in compliance with applicable constitutional provisions, within the statutory authority and jurisdiction of the Respondents and pursuant to law and lawful procedure, is neither arbitrary nor capricious and upon the entire record the decision herein judicially reviewed should be affirmed."

The judgment entered by Judge E. Maurice Braswell under date of 17 January 1972 is

Affirmed.

STATE OF NORTH CAROLINA v. CHARLES DOUGLAS DUNCAN

No. 70

(Filed 13 December 1972)

1. **Homicide § 12— indictment for first degree murder — allegation of premeditation and deliberation**

An indictment for first degree murder need not allege deliberation and premeditation, it being sufficient if the form prescribed by G.S. 15-144 is followed.

2. **Criminal Law § 92— consolidation of murder and assault charges**

The trial court properly consolidated for trial indictments charging defendant with the murder of one person and the felonious assault of another person with a shotgun where the assault and murder were so connected as to make one continuous criminal episode, and the evidence of the whole affair is pertinent and necessary to establish the identity of defendant as the guilty party.

3. Homicide § 18— premeditation and deliberation — circumstantial evidence

Circumstantial evidence is competent to prove premeditation and deliberation.

4. Homicide § 21— first degree murder — sufficiency of evidence

The State's evidence was sufficient for the jury on the issue of defendant's guilt of first degree murder of his estranged wife where it tended to show that defendant first shot his wife in the face from the door of his mobile home and then followed her several hundred yards and shot her at close range at least two times with a sawed-off shotgun, and where there was no evidence that deceased had any weapon or at anytime offered any threat to defendant.

5. Homicide § 15— testimony concerning exhibits not yet introduced — identification

Where a shotgun and shells had been identified by a police officer as having been found at the scene of a homicide, a firearms identification specialist was properly allowed to testify concerning the shotgun and shells although they had not yet been introduced in evidence.

6. Homicide § 20— gruesome photographs of victim's body — admissibility

The trial court did not err in the admission of photographs of a homicide victim taken at the scene of the shooting, including one showing the body of deceased with her internal organs exposed and lying on top of her stomach, where the photographs were properly authenticated as portrayals of conditions observed and related by the witnesses who used the photographs to illustrate their testimony.

7. Homicide § 28— first degree murder — defense of intoxication — instructions

In this prosecution for first degree murder, the charge of the court properly presented to the jury the question arising upon the evidence with reference to the intoxication of defendant and correctly stated the law applicable thereto.

8. Constitutional Law § 36; Criminal Law § 135— sentence of life imprisonment — standing to question death penalty

Where the jury in a first degree murder prosecution returned a verdict recommending life imprisonment, defendant has no standing to question the constitutionality of the death penalty or of a statute because it provides for that punishment.

APPEAL by defendant from *Friday, J.*, 13 March 1972 Schedule "B" Session of MECKLENBURG Superior Court.

Defendant was charged in one bill of indictment with the murder of Martha Turner Duncan on 28 November 1971 and in another with a felonious assault upon Jack Sanders with a shotgun on the same date. The cases were consolidated for trial.

The evidence for the State tends to show the deceased Martha Duncan was separated from her husband, defendant Charles Douglas Duncan, and was living with her mother in Charlotte. On 28 November 1971 Lillian Sanders, a friend of the deceased, came to visit her, and the two ladies went to the home of Jack Sanders, Lillian Sanders' husband, from whom Lillian was separated at the time. Around 7 p.m. Mrs. Sanders, her husband Jack Sanders, and the deceased went to the Charlotte Trailer Park located on Hovis Road to pick up a coat belonging to the deceased and to visit some of her relatives who resided there. When they arrived at the trailer park, defendant was standing in front of his trailer. A brief verbal altercation took place between defendant and the deceased. The deceased and her companions started to leave but defendant called and said, "Come here." The deceased then said, "Let's go over there and see what he wants." The three started toward the trailer and when they were still approximately 20 to 30 feet from it, defendant fired a shotgun wounding both Jack Sanders and the deceased about the face and head. Jack Sanders told his wife that he had been shot and asked her to call an ambulance. Mrs. Sanders assisted her husband across a ditch and they ran into a church parking lot adjacent to the trailer park where they attempted unsuccessfully to get into a parked car. After trying to get into the car, Mr. and Mrs. Sanders tried to enter the Thomasboro Nazarene Church. However, the church door was locked and they went back to the trailer park where they called an ambulance. While Mr. and Mrs. Sanders were trying to escape, defendant carrying a shotgun chased the deceased, who was bleeding profusely about the face and head, down Hovis Road and through some of the yards abutting the road. As they were running down Hovis Road, defendant fired another shot into the deceased apparently wounding her in the abdomen. When defendant and deceased reached the driveway of a filling station at the intersection of Hovis Road and Hoskins Road, Mrs. Betty Kenner was in her car stopped at a stop sign at that intersection. Defendant and deceased were pulling and pushing each other in the filling station driveway. The deceased leaned toward Mrs. Kenner's car, stretched out her arms and said, "Please." As Mrs. Kenner was attempting to pull her car into the driveway, defendant shot the deceased in the chest and she fell backward on the pavement. Defendant dropped the shotgun to the pavement, stood over the deceased for a moment, and

then ran back to the trailer park. He immediately went into his trailer where he was arrested by the Charlotte City Police about 7:30 p.m.

Martha Duncan died as a result of two massive shotgun wounds, one in the chest and one in the abdomen. She also had wounds on her face, shoulder, and arm from shotgun pellets. The fatal shots were fired from close range, and the wounds were the type caused by a shotgun. A sawed-off .410 gauge shotgun was found lying next to the body of the deceased. Other evidence pertinent to decision will be stated in the opinion.

Defendant offered no evidence.

The jury returned verdicts of guilty of murder in the first degree with recommendation of life imprisonment, and guilty of an assault with a deadly weapon. From a sentence of life imprisonment in the murder case and a sentence of six months' imprisonment in the assault case, defendant appealed. We allowed motion to bypass the Court of Appeals on the assault case.

Attorney General Robert Morgan and Special Counsel Ralph Moody for the State.

T. O. Stennett for defendant appellant.

MOORE, Justice.

[1] The bill of indictment in this case did not allege premeditation and deliberation. Defendant contends for this reason that his motion to quash should have been allowed. This contention is without merit. The bill of indictment followed the form prescribed by G.S. 15-144, which provides in pertinent part:

> ". . . (I)t is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law . . . and any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for murder or manslaughter, as the case may be."

This Court has held many times that an indictment for murder need not allege deliberation and premeditation, and that an indictment in the form prescribed by the statute is sufficient.

State v. Haynes, 276 N.C. 150, 156, 171 S.E. 2d 435, 439 (1969); *State v. Roman,* 235 N.C. 627, 70 S.E. 2d 857 (1952); *State v. Kirksey,* 227 N.C. 445, 42 S.E. 2d 613 (1949).

[2] Defendant was charged in one bill of indictment with the murder of Martha Turner Duncan on 28 November 1971 and in another with a felonious assault upon Jack Sanders with a shotgun. The cases were consolidated for trial. Defendant assigns this as error. Both cases arose out of the same set of facts and circumstances on the same occasion. G.S. 15-152 authorizes the consolidation of two or more indictments where the charges are for "two or more acts or transactions connected together." The assault on Sanders with a shotgun and the murder of Mrs. Duncan were so connected and tied together as to make one continuous criminal episode. The evidence of the whole affair is pertinent and necessary to establish the identity of defendant as the guilty party. The two charges were properly consolidated and tried together. *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652 (1972); *State v. Arsad,* 269 N.C. 184, 152 S.E. 2d 99 (1967); *State v. Bryant,* 250 N.C. 113, 108 S.E. 2d 128 (1959); *State v. Combs,* 200 N.C. 671, 158 S.E. 252 (1931).

[3] Defendant next contends that circumstantial evidence is not competent to prove premeditation and deliberation, and that the court erred in overruling his motion for judgment as of nonsuit on the charge of first degree murder. "Premeditation and deliberation are not usually susceptible of direct proof, and are therefore susceptible of proof by circumstances from which the facts sought to be proved may be inferred." *State v. Walters,* 275 N.C. 615, 170 S.E. 2d 484 (1969).

> "Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are: Want of provocation on the part of deceased. [Citations omitted.] The conduct of defendant before and after the killing. [Citations omitted.] Threats and declarations of defendant before and during the course of the occurrence giving rise to the death of the deceased. [Citations omitted.] The dealing of lethal blows after deceased has been felled and rendered helpless. [Citations omitted.]" *State v. Faust,* 254 N.C. 101, 118 S.E. 2d 769 (1961).

The rule as to nonsuit is stated by Justice Higgins in *State v. Stephens,* 244 N.C. 380, 383, 93 S.E. 2d 431, 433 (1956), as follows:

"When a case comes here on exception to the refusal of the trial court to sustain the motion to dismiss, the rule applicable to this Court is the same as that applicable to the trial court. 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.*" (Emphasis added.)

[4] The evidence in the present case disclosed that defendant first shot his wife in the face from the door of his mobile home and then followed her several hundred yards and shot her at close range at least two times with a sawed-off shotgun. There is no evidence that the deceased had any weapon or at anytime offered any threat to defendant. The want of provocation, absence of any excuse or justification, coupled with the other evidence, permitted a legitimate inference of premeditation and deliberation and was sufficient to be submitted to the jury on the issue of murder in the first degree. *State v. Perry,* 276 N.C. 339, 172 S.E. 2d 54 (1970); *State v. Faust, supra.*

[5] Defendant next contends that the court erred in allowing the witness Cleon C. Mauer to testify over defendant's objection as to shells and the gun which at the time had not been introduced in evidence. The sawed-off .410 gauge single-shot shotgun was identified by an officer as having been found near the body of the deceased soon after the shooting occurred. Three empty .410 gauge shotgun shells were also identified by this officer. One of these was found lying near the body, one was in the gun, and the third was found immediately inside the front door of the trailer. A partial box of loaded .410 gauge shotgun shells was also found in defendant's trailer. Mauer, a Firearms Identification Specialist at the Charlotte-Mecklenburg Crime Laboratory at Charlotte, testified that the three spent shotgun shells had been fired from this .410 gauge shotgun. The gun and shells were first identified. Then it was proper for Mauer to testify concerning them. Later in the trial the gun and shells were introduced into evidence. *State v. Wilson,* 280 N.C. 674, 187 S.E. 2d 22 (1972); *State v. Bass,* 249 N.C. 209, 105 S.E. 2d 645 (1958); *State v. Macklin,* 210 N.C. 496, 187 S.E. 785 (1936); Stansbury, North Carolina Evidence § 118 (2d Ed. 1963). This contention is without merit.

[6] Defendant assigns as error the introduction of photographs of the body of the deceased taken at the scene of the shooting, contending that the pictures are highly inflammatory and prejudicial to defendant. One photograph apparently showed the body of the deceased with her internal organs exposed and lying on top of her stomach. The photographs were not brought forward in the record, but were properly authenticated at the time as portrayals of conditions observed and related by the witnesses who used the photographs to illustrate their testimony. "The fact that a photograph depicts a horrible, gruesome and revolting scene, indicating a vicious, calculated act of cruelty, malice or lust, does not render the photograph incompetent in evidence, when properly authenticated. . . ." *State v. Atkinson,* 275 N.C. 288, 311, 167 S.E. 2d 241, 255 (1969). *Accord, State v. Frazier, supra; State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10 (1967); Stansbury, North Carolina Evidence § 34 (2d Ed. 1963). This assignment is overruled.

[7] Defendant next contends that the court erred in letting the case go to the jury on the charge of first degree murder where there was ample evidence that defendant was drunk or intoxicated at the time of the shooting. One officer testified for the State that in his opinion the defendant was drunk, but further testified that defendant's voice was clear and that he was able to walk without any help. Another officer testified that he saw the defendant soon after the shooting and that in his opinion defendant was under the influence of some intoxicating liquor. He also testified that when he questioned the defendant: "He understood what I said to him and replied to that correctly. His speech was clear. I understood everything he said. It did not slur at all. I observed an odor of alcohol about his breath. . . . I observed the defendant out there. I talked to him. I watched him walk. He seemed to be a little excited."

With reference to voluntary intoxication as a defense to a charge of murder this Court has said:

> "A specific intent to kill is an essential element of first degree murder. *State v. Propst,* 274 N.C. 62, 71, 161 S.E. 2d 560. While voluntary drunkenness is not, per se, an excuse for a criminal act, *State v. Propst, supra,* it may be sufficient in degree to prevent and, therefore, disprove the existence of a specific intent such as the intent to kill. *State v. Cureton,* 218 N.C. 491, 494, 11 S.E. 2d 469; *State v. Murphy,* 157 N.C. 614, 72 S.E. 1075. As stated by Justice

Barnhill, later Chief Justice, in *State v. Cureton, supra:* 'No inference of the absence of deliberation and premeditation arises as a matter of law from intoxication; and mere intoxication cannot serve as an excuse for the offender. The influence of intoxication upon the question of existence of premeditation depends upon its degree and its effect upon the mind and passion. For it to constitute a defense it must appear that the defendant was not able, by reason of drunkenness, to think out beforehand what he intended to do and weigh it and understand the nature and consequence of his act.' " *State v. Wilson,* 280 N.C. 674, 680-81, 187 S.E. 2d 22, 26 (1972).

The trial judge in the present case stated the evidence relating to defendant's intoxication and then instructed the jury:

". . . (I)n order to convict of Murder in the First Degree, the State must satisfy the Jury from the evidence and beyond a reasonable doubt that the defendant unlawfully killed Mrs. Duncan with malice and in addition must satisfy the Jury from the evidence beyond a reasonable doubt that he did so in execution of an actual, specific intent to kill, previously formed after premeditation and deliberation, as heretofore more fully explained to you, Members of the Jury. Now, the Court instructs you that where specific intent is an essential element of the crime, such an actual specific intent to kill, the fact of drunkenness or intoxication may negative the existence of such actual, specific intent.

* * *

"Now, the Court instructs you that the mere fact . . . the defendant had been drinking or was under the influence of some intoxicant at the time of the alleged killing is insufficient. It must appear, Ladies and Gentlemen, that he was so drunk as to be mentally incapable of forming an actual, specific intent to kill or to premeditate or to deliberate the killing of Mrs. Duncan. The Court instructs you that if this defendant, Charles Douglas Duncan, at and prior to the time of the killing, was so drunk as to be mentally incapable of forming an actual, specific intent to kill, to premeditate or deliberate the killing of Mrs. Duncan, he would not be guilty of the crime of Murder in the First Degree, but would be guilty of Murder in the Second

> Degree or guilty of Manslaughter or not guilty of any crime at all, according as the Jury may find the facts, with reference to other phases and aspects of this case."

This charge properly presented to the jury the question arising upon the evidence with reference to the intoxication of the defendant and correctly stated the law applicable thereto. *State v. Wilson, supra.* This assignment of error is overruled.

[8] Defendant in his brief argues that our statute on murder is unconstitutional and has been invalidated by the decision in *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726 (1972). This question was not raised in the trial court and is not based on any exception. Appellate courts will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court. *State v. Grundler* and *State v. Jelly,* 251 N.C. 177, 187, 111 S.E. 2d 1, 8, cert. den. 362 U.S. 917, 4 L.Ed. 2d 738, 80 S.Ct. 670 (1959); *State v. Jones,* 242 N.C. 563, 89 S.E. 2d 129 (1955). However, this same contention has been considered by this Court in a number of recent cases and has been decided adversely to defendant's contention. In *State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664 (1972), this Court said:

> "The Supreme Court of the United States in *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726 (1972), held that the imposition of the death penalty, under certain state statutes and in the application thereof, was unconstitutional. That decision did not affect the conviction but only the death sentence. *State v. Westbrook,* 281 N.C. 748, 191 S.E. 2d 68 (1972); *State v. Doss,* 281 N.C. 751, 191 S.E. 2d 70 (1972); *State v. Chance,* 281 N.C. 746, 191 S.E. 2d 65 (1972); *State v. Miller,* 281 N.C. 740, 190 S.E. 2d 841 (1972); *State v. Hamby and Chandler,* 281 N.C. 743, 191 S.E. 2d 66 (1972)."

Furthermore, the *Furman* case is without significance when the jury returns a verdict recommending life imprisonment. In that situation the defendant has no standing to raise the constitutionality of the death penalty or of a statute because it provides for that punishment. *State v. Bryant, Holloman and White,* 282 N.C. 92, 191 S.E. 2d 745 (1972); *State v. Wright and Glenn,* 282 N.C. 364, 192 S.E. 2d 819 (1972). This contention is overruled.

Other assignments of error have been considered but found to be without merit.

Evidence of defendant's guilt is overwhelming. He was convicted in a trial free from error. The verdict and judgment of the trial court must therefore be upheld.

No error.

STATE OF NORTH CAROLINA v. RONALD CLAY JOHNSON

No. 3

(Filed 13 December 1972)

1. **Criminal Law §§ 113, 118, 163— jury charge on contentions of parties — necessity for objection**

Ordinarily, a misstatement of contentions by the trial judge must be brought to the trial judge's attention so as to allow opportunity for correction; however, where the trial judge, in stating contentions, erroneously defines the intensity of proof or gives contentions for the State not supported by evidence, or fundamentally misconstrues a defendant's contentions, error results even though there be no objection at the time.

2. **Criminal Law § 118; Rape § 6— jury charge on defendant's contentions — no error**

The trial court in a rape case properly presented contentions of defendant with respect to penetration and force where defendant had entered a plea of not guilty and where, by defendant's own testimony, he negated penetration and force directed to the commission of rape.

APPEAL by defendant from *McKinnon, J.*, 14 June 1971 Special Criminal Session of WAKE.

Defendant was tried upon a bill of indictment charging rape. He entered a plea of not guilty.

The State's evidence tended to show that in the evening of 18 March 1971 Mrs. Ruth Pruden was working in her yard when defendant stopped and asked her how to find a family in the neighborhood for whom he was to do some plumbing work. Mrs. Pruden gave him directions, and he left. She worked until dark, and when she entered her house she was struck from behind and rendered unconscious. When consciousness returned, a sweater was wrapped around her head, which prevented her from seeing. Her assailant took her to a field behind her house

and began to remove some of her clothing. He then told her that if she would be reasonable they would go back to the house. They returned to the house, whereupon defendant had sexual intercourse with her against her will. Thereafter, he asked about a radio and left the room. Mrs. Pruden obtained a pistol from under her pillow and shot three times in the direction of defendant. She believed she had hit him twice. He ran, and she immediately went to a neighbor's home and related what had happened. Mrs. Pruden was then taken to the hospital, where she was examined by Dr. Hartzog. The doctor testified at trial that there was evidence of recent sexual intercourse.

The State also offered evidence of a statement made by defendant to police officers which tended to corroborate defendant's testimony hereinafter related.

Defendant testified that he entered the Pruden home with intent to steal, and when Mrs. Pruden entered the house he forced her to take him to her pocketbook. While he was searching the pocketbook she shot him. He ran away and removed the bullet from his arm himself. He denied that he assaulted or raped Mrs. Pruden and stated that the only force used was when he forced her to take him to the pocketbook.

The jury returned a verdict of guilty of rape with recommendation of life imprisonment. Defendant gave notice of appeal but the appeal was not timely perfected. Defendant petitioned for writ of certiorari to Wake County Superior Court to the end that he be allowed a belated appeal. The petition was allowed on 7 March 1972.

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

W. Brian Howell, Harris, Poe, Cheshire & Leager for defendant.

BRANCH, Justice.

The sole question presented by this appeal is whether the trial judge erred in stating defendant's contentions.

Defendant points to that portion of the charge which, in substance, stated that defendant contended that there was not sufficient evidence of penetration to establish rape, and that there was not sufficient evidence of force or threat of force to

cause the prosecuting witness to submit against her will to sexual intercourse. In this portion of the charge the trial judge further charged that defendant had consistently denied any assault or sexual attack upon Mrs. Pruden's person and that defendant contended that "from the inconsistencies and discrepancies in the State's evidence that you should find, and from his evidence, that you should find that he did not commit any assault or assault with intent to rape, on Mrs. Pruden whatsoever." Defendant argues that at no point in the record did he challenge the sufficiency of the State's evidence regarding penetration of the person of Mrs. Pruden or the sufficiency of the State's evidence regarding force or threat of force essential to the crime of rape. He therefore contends these instructions placed the burden of proof upon him to prove lack of penetration and consent.

Defendant failed to bring this objection to the court's attention in apt time to afford the trial judge opportunity for correction.

[1] Ordinarily, a misstatement of contentions of the trial judge must be brought to the trial judge's attention so as to allow opportunity for correction. *State v. Lee,* 277 N.C. 205, 176 S.E. 2d 765; *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28; *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469. Nevertheless, where the trial judge, in stating contentions, erroneously defines the intensity of proof or gives contentions for the State not supported by evidence, or fundamentally misconstrues a defendant's contentions, error results even though there be no objection at the time. *State v. Lee, supra; State v. Dooley,* 232 N.C. 311, 59 S.E. 2d 808; 3 Strong's N. C. Index, Criminal Law, §§ 118, 163.

[2] Defendant's plea of not guilty called into question all the State's evidence and required the State to prove beyond a reasonable doubt every element of the offense charged. *State v. Clayton,* 272 N.C. 377, 158 S.E. 2d 557; *State v. McLamb,* 235 N.C. 251, 69 S.E. 2d 537. By his own testimony he negated penetration and force directed to the commission of rape. Nowhere in this record is it conceded that any one of the elements of rape was present.

The trial judge placed defendant's contentions in the proper perspective by prefacing them with the following statement: "The defendant contends that he is not guilty. The defendant by his plea of not guilty denies the charge. He denies the suf-

ficiency of the State's evidence to satisfy you beyond a reasonable doubt of his guilt." The trial judge correctly defined the term "reasonable doubt" and in no less than six places in the charge correctly placed the burden upon the State to prove defendant's guilt beyond a reasonable doubt. We find no fundamental misconstruction of defendant's contentions by the trial judge.

A contextual reading of the entire charge discloses it to be full, fair, and free from prejudicial error.

We have carefully examined this entire record and find

No error.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

CASUALTY CO. v. INSURANCE CO.
No. 101 PC.

Case below: 16 N.C. App. 194.

Petition for writ of certiorari to North Carolina Court of Appeals denied 13 December 1972.

CITY OF WINSTON-SALEM v. RICE
No. 89 PC.

Case below: 16 N.C. App. 294.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 December 1972.

CROTTS v. PAWN SHOP
No. 95 PC.

Case below: 16 N.C. App. 392.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 December 1972.

BOWEN v. RENTAL CO.
No. 59 PC.

Case below: 16 N.C. App. 70.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 5 December 1972.

BRAWLEY v. HEYMANN
No. 46 PC.

Case below: 16 N.C. App. 125.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 December 1972.

GRAHAM v. BANK

No. 86 PC.

Case below: 16 N.C. App. 287.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 December 1972.

HATHCOCK v. LOWDER

No. 77 PC.

Case below: 16 N.C. App. 255.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 December 1972.

IN RE BONDING CO.

No. 84 PC.

Case below: 16 N.C. App. 272.

Petition of Mooneyham for writ of certiorari to North Carolina Court of Appeals denied 5 December 1972. Appeal of Mooneyham dismissed for lack of substantial constitutional question 5 December 1972.

KOOB v. KOOB

No. 82 PC.

Case below: 16 N.C. App. 326.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 5 December 1972.

LONG v. CLUTTS

No. 90 PC.

Case below: 16 N.C. App. 217.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 December 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

MAYBERRY v. CAMPBELL
No. 91 PC.

Case below: 16 N.C. App. 375.

Petition for writ of certiorari to North Carolina Court of Appeals denied 13 December 1972.

STATE v. COXE
No. 96 PC.

Case below: 16 N.C. App. 301.

Petition for writ of certiorari to North Carolina Court of Appeals denied 13 December 1972.

STATE v. DRAUGHN
No. 80 PC.

Case below: 16 N.C. App. 426.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 December 1972.

STATE v. GARCIA
No. 74 PC.

Case below: 16 N.C. App. 344.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 December 1972.

STATE v. GUFFEY
No. 66 PC.

Case below: 16 N.C. App. 444.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 13 December 1972.

STATE v. HANFORD and STATE v. MARTINDALE
No. 73 PC.

Case below: 16 N.C. App. 353.

Petition for writ of certiorari to North Carolina Court of Appeals denied 13 December 1972.

STATE v. HIGGENS
No. 87 PC.

Case below: 16 N.C. App. 434.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 December 1972.

STATE v. JEFFERIES
No. 88 PC.

Case below: 16 N.C. App. 235.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 December 1972.

STATE v. JENNINGS
No. 79 PC.

Case below: 16 N.C. App. 205.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 December 1972. Motion of Attorney General to dismiss appeal allowed 5 December 1972.

STATE v. LASSITER
No. 94 PC.

Case below: 16 N.C. App. 377.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 December 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. MILLER
No. 31 PC.

Case below: 15 N.C. App. 610.

Petition of defendant Jones for writ of certiorari to North Carolina Court of Appeals denied 5 December 1972.

STATE v. PEELE
No. 67 PC.

Case below: 16 N.C. App. 227.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 December 1972.

STATE v. SCOTT
No. 98 PC.

Case below: 16 N.C. App. 424.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 December 1972.

STATE v. STARNES
No. 83 PC.

Case below: 16 N.C. App. 357.

Petition for writ of certiorari to North Carolina Court of Appeals denied 13 December 1972.

STATE v. TANT
No. 43 PC.

Case below: 16 N.C. App. 113.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 December 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. WILLINGHAM
No. 81 PC.

Case below: 16 N.C. App. 439.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 December 1972.

STATE v. WRENN
No. 97 PC.

Case below: 16 N.C. App. 411.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 December 1972.

TEACHEY v. WOOLARD
No. 68 PC.

Case below: 16 N.C. App. 249.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 December 1972.

STATE OF NORTH CAROLINA v. JAMES HOWARD WADDELL

No. 5

(Filed 18 January 1973)

1. **Constitutional Law § 36; Criminal Law § 135— death penalty — discretion of jury — unconstitutionality**

Under the decision of *Furman v. Georgia*, 408 U.S. 238, the death sentence may not be inflicted if either judge or jury is permitted to impose that sentence as a matter of discretion.

2. **Constitutional Law § 36; Criminal Law §§ 120, 135; Rape § 7— rape— jury discretion to recommend life imprisonment — unconstitutionality — mandatory death sentence**

The decision of *Furman v. Georgia*, 408 U.S. 238, invalidated the proviso of G.S. 14-21 giving the jury the discretion to recommend and thus fix the punishment for rape at life imprisonment; however, the invalid proviso is severable from the remainder of the statute, leaving death as the mandatory punishment for rape in North Carolina.

3. **Criminal Law §§ 120, 135— capital case — instructions to jury — mandatory death sentence**

Upon the trial of any defendant charged with rape, murder in the first degree, arson or burglary in the first degree, the trial court may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment, but the court should charge on the constituent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned; upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death. G.S. 14-17; G.S. 14-21; G.S. 14-52; G.S. 14-58.

4. **Constitutional Law § 35— ex post facto clause — applicability to judiciary — increase in punishment**

While the letter of the *ex post facto* clause is addressed to legislative action, the constitutional ban against the retroactive increase of punishment for crime applies as well against judicial action having the same effect.

5. **Constitutional Law § 35; Criminal Law § 135— mandatory death penalty — prospective effect of decision**

Since a judicial decision in effect changing the penalty for rape or other capital crimes from death or life imprisonment in the discretion of the jury to mandatory death would be *ex post facto* as to such offenses committed prior to the change, North Carolina's mandatory death penalty for rape, murder in the first degree, burglary in the first degree and arson may not be constitutionally applied to any offense committed prior to 18 January 1973, the date of this decision. Art. I, § 16, N. C. Constitution; Art. I, § 10, U. S. Constitution.

Justice LAKE concurring.

Chief Justice BOBBITT concurring in part and dissenting in part.

Justice HIGGINS concurring in result.

Justice SHARP concurring in the opinion of Chief Justice BOBBITT.

DEFENDANT appeals from judgment of *Blount, J.*, December 1971 Session, SAMPSON Superior Court.

Defendant was tried on a bill of indictment, proper in form, charging him with the rape of Mrs. Thelma Jackson on the 8th day of June 1971.

The State's evidence tends to show that when Mrs. Thelma Jackson returned from work about 6 p.m. on 8 June 1971 she unlocked the back door and entered her home. She found a black man standing behind a chair in her living room. He had a stocking over his face and a butcher knife in his pocket. He placed Mrs. Jackson in a chair, tied her hands together with a small cord, and told her he would kill her if she made a noise. Then, using the same cord, he tied her ankles together. She screamed when a neighbor passed on a tractor, and he placed the knife to her neck and threatened to cut her throat.

The intruder then placed Mrs. Jackson on the couch, sat beside her, and said: "I know all about you. I know your husband has been dead about four and a half or five years and you never had any children and you live alone and I know about you." After several minutes of conversation with Mrs. Jackson, he pulled her up from the couch and walked her to the bedroom. This operation took about ten minutes since her feet were still tied. He sat her down in a reclining chair in the bedroom, unzipped her dress in the back, untied her hands, and stripped all her clothing down to the waist. He then tied her hands again, untied her feet and completely undressed her. He then stuffed a large roll of cotton in her mouth but removed it when it appeared she was unable to breathe. He ripped a pillowcase into strips, tying one strip over her mouth and blindfolding her with another. He then placed her on the bed and raped her.

While Mrs. Jackson was still blindfolded, her assailant removed her from the bed, put her clothing back on her, bound her legs together again, and sat her in a chair. He then moved about the house, apparently gathering foodstuffs and other items. In response to Mrs. Jackson's inquiry after he had made several trips to the kitchen, he stated he was doing "what I

have to do." He finally left about 7:30 p.m., having been in Mrs. Jackson's presence about an hour and a half, the last thirty minutes of which she was blindfolded. She had observed and talked with him for one hour while he was in her home.

Mrs. Jackson was bleeding badly from her privates and needed medical attention. She eventually worked her hands free, removed her blindfold, untied her feet, and sought help at the home of a black family who lived across the road. Deputy Sheriff Chase arrived within ten minutes after being called.

Items missing from Mrs. Jackson's home included an old pair of Knapp shoes belonging to her deceased husband (S-3), a small teaspoon (S-10), and a roll of adhesive tape. When apprehended, defendant was wearing the shoes and had the spoon and a roll of Johnson & Johnson Adhesive Tape in a little leather case. At the preliminary hearing and in court at the trial, Mrs. Jackson stated that she recognized defendant by his build, "his looks and all of it," and said she would recognize his voice if she ever heard it again. She positively identified defendant as the man who raped her.

After interviewing Mrs. Jackson the night of the rape, officers began an investigation of the crime scene, checking for fingerprints and footprints. Fingerprints were lifted from the windowsill where defendant had entered the house, from the front of the medicine cabinet mirror in the kitchen of the Jackson residence, from the first drawer of the chest of drawers in Mrs. Jackson's bedroom where defendant had obtained the pillowcases he ripped up, from inside the medicine cabinet door, and from a kitchen cabinet. All these fingerprints were later compared by an expert with ink impressions of defendant's fingerprints and in the opinion of the expert were identical.

A set of footprints led from Mrs. Jackson's home to a point in the woods at the base of a pine tree about one hundred fifty yards away where the officers found a pile of articles, including a lady's stocking, a piece of cord, an empty pear can, a pair of brown gloves, a pair of lady's panties and two pieces of a torn pillowcase. Many of these items were identified as having come from Mrs. Jackson's home.

While officers were searching for Mrs. Jackson's assailant, Bruce Jackson, a former highway patrolman, saw defendant in the woods eight to ten miles from Mrs. Jackson's home. Although many officers were in the area searching, Bruce Jackson was

alone at the time. He spoke to defendant who said his name was Jackson; that he worked for the Town of Dunn and "they had sent him down there to help capture that man that had messed that white woman about." When asked for some identification, defendant grabbed Bruce Jackson's shotgun and the two men tussled over it for ten or fifteen minutes. Defendant kept repeating, "I am the one that you are looking [for] but you ain't going to tell anybody because I am going to kill you right here and now." During the tussle Mr. Jackson succeeded in firing the shotgun and thus attracted the attention of other officers in the woods. They converged on the scene and took defendant into custody.

Defendant offered no evidence. At the close of the State's evidence his motion for judgment of nonsuit was denied. The jury returned a verdict of guilty of rape as charged in the bill of indictment. Defendant's motion to set the verdict aside was denied and defendant was sentenced to death. He appealed to the Supreme Court assigning as error the denial of his motions and further contending that the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

David J. Turlington, Jr., Attorney for defendant appellant.

Robert Morgan, Attorney General, and Jean A. Benoy, Deputy Attorney General, for the State of North Carolina.

HUSKINS, Justice.

We overrule defendant's assignments of error based on denial of his motions for nonsuit and to set aside the verdict. The evidence is overwhelmingly sufficient to carry the case to the jury and to support the verdict. Likewise, defendant's third assignment addressed to the charge has no merit and cannot be sustained. The court's charge on circumstantial evidence is free from prejudicial error. We therefore put aside these assignments without discussion and go directly to the constitutional question raised by defendant and argued in the briefs.

Defendant contends that the imposition and carrying out of the death penalty was held in *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct 2726 (1972), to constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The State, on the other hand, disputes

defendant's interpretation of the holding in *Furman* and argues that the death sentence was lawfully and constitutionally imposed in this case and should be carried out. These antagonistic positions require an analysis of the *Furman* decision.

Furman v. Georgia was consolidated with *Jackson v. Georgia* and *Branch v. Texas* for decision. Each defendant was black. Furman killed a Georgia householder while seeking to enter the home at night. Jackson entered a Georgia home after the husband left for work, held scissors against the neck of the wife and raped her. Branch entered the Texas home of a 65-year-old widow, a white woman, while she slept and raped her, holding his arm against her throat. Furman was convicted of murder, Jackson and Branch of rape, and each was sentenced to death after a trial by jury which, under applicable Georgia and Texas statutes, had discretionary authority to determine whether to impose the death penalty. On certiorari, the United States Supreme Court reversed the judgment in each case insofar as it left undisturbed the death sentence imposed, and the cases were remanded for further proceedings. In an opinion expressing the views of five members of the Court, it was held that the imposition and carrying out of the death sentence in the three cases before the Court constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Four members of the Court dissented, voting to sustain the constitutionality of the statutes under which defendants were tried and sentence of death imposed.

Prior to the decision in *Furman v. Georgia, supra,* the United States Supreme Court implicitly approved or, albeit in dictum, expressly upheld the constitutionality of capital punishment in many cases, including *Wilkerson v. Utah,* 99 U.S. 130, 25 L.Ed. 345 (1879); *In re Kemmler,* 136 U.S. 436, 34 L.Ed. 519, 10 S.Ct. 930 (1890); *Weems v. United States,* 217 U.S. 349, 54 L.Ed. 793, 30 S.Ct. 544 (1910); *Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 91 L.Ed. 422, 67 S.Ct. 374 (1947); *Trop v. Dulles,* 356 U.S. 86, 2 L.Ed. 2d 630, 78 S.Ct. 590 (1958); *Witherspoon v. Illinois,* 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968); *McGautha v. California,* 402 U.S. 183, 28 L.Ed. 2d 711, 91 S.Ct. 1454 (1971). Thus, since the ratification of the Eighth Amendment one hundred eighty-one years ago, no decision of the United States Supreme Court prior to *Furman* casts the slightest doubt on the constitutionality of capital punishment. Therefore, since the decision in *Furman* is not grounded on prior decisions of the Court, the scope of

that holding must be gleaned from the separate opinions of the Justices themselves.

The nine opinions focus upon the Eighth Amendment which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The proscription of cruel and unusual punishments is applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Powell v. Texas*, 392 U.S. 514, 20 L.Ed. 2d 1254, 88 S.Ct. 2145 (1968); *Robinson v. California*, 370 U.S. 660, 8 L.Ed. 2d 758, 82 S.Ct. 1417 (1962).

We note at the outset that only two members of the Court, Mr. Justice Brennan and Mr. Justice Marshall, concluded that capital punishment for all crimes under all circumstances is prohibited by the Eighth Amendment. Mr. Justice Brennan summarized his views in these words:

> "At bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishment. . . . The test, then, will ordinarily be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes. . . . Under these principles and this test, death is today a 'cruel and unusual' punishment."

Mr. Justice Marshall reached a like conclusion when he wrote:

> "There is but one conclusion that can be drawn from all of this—*i.e.*, the death penalty is an excessive and unnecessary punishment which violates the Eighth Amendment. . . . In addition, even if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history."

Thus, it may be seen that these two Justices joined in the *Furman* decision on the basis that capital punishment is *per se* unconstitutional.

Mr. Justice Douglas rested his concurrence on a different basis. He wrote:

> "In these three cases the death penalty was imposed, one of them for murder, and two for rape. In each *the determination of whether the penalty should be death or a lighter punishment was left by the State to the discretion of the judge or of the jury.* In each of the three cases the trial was to a jury. [Emphasis added] . . . In a nation committed to Equal Protection of the laws there is no permissible 'caste' aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, poor and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position. . . . Thus, these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination. . . . Any law which is nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment. *Yick Wo v. Hopkins,* 118 U.S. 356. Such conceivably might be the fate of a mandatory death penalty, where equal or lesser sentences were imposed on the elite, a harsher one on the minorities or members of the lower castes. *Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach.*" (Emphasis added.)

It seems clear that Mr. Justice Douglas left open the question of the constitutionality of a mandatory death penalty and voted to invalidate the death sentence in *Furman* and companion cases on the ground that the trial jury was given statutory discretion as to whether a defendant convicted of rape or murder should be sentenced to death or to life imprisonment.

Mr. Justice Stewart joined the majority opinion on similar grounds: That under the Georgia and Texas statutes, the death penalty was not mandatory for murder and rape but could be imposed in the unfettered discretion of trial juries, and that the exercise of this discretion resulted in "freakish" selection of those who should be executed for their crimes. He expressed his views as follows:

> "[A]t least two of my Brothers have concluded that the infliction of the death penalty is constitutionally im-

permissible in all circumstances under the Eighth and Fourteenth Amendments. Their case is a strong one. *But I find it unnecessary to reach the ultimate question they would decide.* [Emphasis added] . . . The constitutionality of capital punishment in the abstract is not, however, before us in these cases. For the Georgia and Texas Legislatures have not provided that the death penalty shall be imposed upon all those who are found guilty of forcible rape. And the Georgia Legislature has not ordained that death shall be the automatic punishment for murder. . . . These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."

Mr. Justice White concurred in the majority opinion for reasons substantially similar to those of Justice Stewart. The following language from his concurring opinion depicts his views:

"In joining the Court's judgments, therefore, I do not at all intimate that the death penalty is unconstitutional *per se* or that there is no system of capital punishment that would comport with the Eighth Amendment. . . . I cannot avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice. . . . That conclusion, as I have said, is that the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not. The short of it is that the policy of vesting sentencing authority primarily in juries . . . has so effectively achieved its aims that capital punishment within the confines of the statutes now before us has for all practical purposes run its course."

Four members of the Court dissented and voted to uphold the constitutionality of the Georgia and Texas statutes under which Furman, Jackson and Branch were tried and sentenced to death. The position of the four dissenters is best summed up by Chief Justice Burger as follows:

> "There are no obvious indications that capital punishment offends the conscience of society to such a degree that our traditional deference to the legislative judgment must be abandoned. . . . Capital punishment is authorized by statute in 40 States, the District of Columbia and in the federal courts for the commission of certain crimes. On four occasions in the last eleven years Congress has added to the list of federal crimes punishable by death. In looking for reliable indicia of contemporary attitude, none more trustworthy has been advanced. . . . Today the Court has not ruled that capital punishment is *per se* violative of the Eighth Amendment; nor has it ruled that the punishment is barred for any particular class or classes of crimes. The substantially similar concurring opinions of Mr. Justice Stewart and Mr. Justice White, which are necessary to support the judgment setting aside petitioners' sentences, stop short of reaching the ultimate question. . . . The critical factor in the concurring opinions of both Mr. Justice Stewart and Mr. Justice White is the infrequency with which the penalty is imposed. This factor is taken not as evidence of society's abhorrence of capital punishment . . . but as the earmark of a deteriorated system of sentencing. It is concluded that petitioners' sentences must be set aside, not because the punishment is impermissibly cruel, but because juries and judges have failed to exercise their sentencing discretion in acceptable fashion."

[1] The foregoing quotations from the various separate opinions in *Furman* compel the conclusion that capital punishment has not been declared unconstitutional *per se*. Rather, the *Furman* decision holds that the Eighth and Fourteenth Amendments will no longer tolerate the infliction of the death sentence if either judge or jury is permitted to impose that sentence as a matter of discretion.

[2] We now consider the effect of the *Furman* decision on G.S. 14-21 which reads as follows:

> "Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or

more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: *Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.*" (Emphasis added)

Does *Furman* invalidate G.S. 14-21 in its entirety or invalidate only the discretionary proviso, leaving death as the mandatory punishment for rape in North Carolina? A look at history is necessary to put the question in proper perspective.

Blackstone's Commentaries tell us:

"Rape was punished by the Saxon laws . . . with death . . . . But this was afterwards thought too hard: and in its stead another severe, but not capital, punishment was inflicted by William the conqueror; *viz,* castration and loss of eyes; which continued till after Bracton wrote, in the reign of Henry the third. * * *

"In the 3 Edw. I. [1275] by the statute Westm. 1. c. 13. the punishment of rape was much mitigated: the offence itself being reduced to a trespass, if not prosecuted by the woman within forty days, and subjecting the offender only to two years imprisonment, and a fine at the king's will. But, this lenity being productive of the most terrible consequences, it was in ten years afterwards, 13 Edw. I. found necessary to make the offence of rape felony, by statute Westm. 2. c. 34. And by statute 18 Eliz. c. 7. it is made felony without benefit of clergy . . . . " 4 W. Blackstone, Commentaries, 211-2 (1st ed. 1769).

In 1778, the State of North Carolina enacted what is now G.S. 4-1 which states:

"All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State."

By this statute the common law death penalty for rape was adopted in North Carolina. This punishment was codified in Vol. 1, c. 34, § 5 of the 1837 Revised Statutes of North Carolina.

In 1869, the General Assembly of North Carolina reenacted the punishment for rape in the following language:

> "Every person who is convicted, in due course of law, of ravishing and carnally knowing any female of the age of ten years or more by force and against her will; or who is convicted, in like manner, of unlawfully and carnally knowing and abusing any female child under the age of ten years, shall suffer death." Public Laws of 1868-69, c. 167, § 2.

An amendment in 1917 raised the age of consent from ten to twelve years. See Public Laws 1917, c. 29.

Thus, death has been the punishment for rape in North Carolina for almost two hundred years. Our present statute on the subject, G.S. 14-21, was amended in 1949 by adding the proviso which (1) empowers the jury in its discretion to recommend and thus to fix the punishment at life imprisonment, and (2) requires the trial judge to so instruct the jury. Session Laws of 1949, c. 299, § 4.

Since the 1949 amendment adding the proviso, seventeen bills or resolutions have been introduced in the General Assembly of North Carolina designed to abolish or limit the imposition of the death penalty for rape or other capital offenses. See House Bills 924, 925, 927 and 928 in the 1955 Session; House Bill 113 in the 1961 Session; House Bill 35, Senate Bill 27 and Senate Resolution 173 in the 1963 Session; House Bills 103 and 351 in the 1965 Session; House Bills 68, 71, 138 and 314 in the 1967 Session; House Bill 160 in the 1969 Session; and House Bill 397 and Senate Bill 251 in the 1971 Session. All of these bills and resolutions failed to receive a favorable report from the committee to which referred, or were tabled or defeated on the floor of the House in which introduced.

The new State Constitution, which was ratified by the people in the general election of 1970, retained the provision contained in the former Constitution of North Carolina authorizing the General Assembly to provide by statute for the imposition of the death penalty for murder, arson, burglary and rape. See Constitution of North Carolina, Article XI, Sec-

tion 2. Thus, there is nothing in the legislative or constitutional history of this State to indicate an intent by the Legislature, or by the people, to reduce the punishment for rape from death to life imprisonment, or to indicate that the 1949 proviso was enacted for that purpose except upon the discretionary recommendation of the jury, or to indicate that such proviso would have been enacted at all had its unconstitutionality been foreseen by the 1949 General Assembly. Rather, such history demonstrates a constant intent by the people and their representatives to retain the death penalty for murder, arson, burglary and rape notwithstanding the proviso added in 1949.

It is the proviso, and the proviso alone, which creates the discretionary difficulty condemned by the *Furman* decision; and it is quite clear that *Furman* strikes down the proviso as violative of the Eighth and Fourteenth Amendments.

The question then arises: Does the remainder of G.S. 14-21 stand alone with death as the mandatory punishment for rape? Or, is the proviso such a constituent and inherent part of a single statutory scheme of punishment that it is inseverable and the entire statute must fall?

In 16 Am. Jur. 2d, Constitutional Law, § 186, the rule of severability is thus stated:

> "If the objectionable parts of a statute are severable from the rest in such a way that the legislature would be presumed to have enacted the valid portion without the invalid, the failure of the latter will not necessarily render the entire statute invalid, but the statute may be enforced as to those portions of it which are constitutional. If, however, the constitutional and the unconstitutional portions are so dependent on each other as to warrant the belief that the legislature intended them to take effect in their entirety, it follows that if the whole cannot be carried into effect, it will be presumed that the legislature would not have passed the residue independently, and accordingly, the entire statute is invalid."

The original portion of G.S. 14-21 with its mandatory death penalty for rape stood alone and was given full effect by the courts of this State for a century prior to the enactment of the 1949 proviso. Grammatically, as well as historically, the two portions of the statute are distinct and separate and the con-

stitutional invalidity of the added portion will not destroy the part which was in existence prior to the enactment of the unconstitutional portion.

"Usually, when an amendatory exception to a statute proves unconstitutional, the original statute stands wholly unaffected by it." 16 Am. Jur. 2d, Constitutional Law, § 184. "When exceptions, exemptions, or provisos in a statute are found to be invalid, the entire act may be void on the theory that by striking out the invalid exception the act has been widened in its scope and therefore cannot properly represent the legislative intent. *This result is not reached, however, when the repugnant exception was added by way of amendment,* as it may be said that the Legislature did intend, at least originally, to pass the act without offering the exception." (Emphasis added) Sutherland, Statutes and Statutory Construction, § 2412 (3d ed. 1943).

In *Frost v. Corporation Commission,* 278 U.S. 515, 73 L.Ed. 483, 49 S.Ct. 235 (1929), the United States Supreme Court dealt with an Oklahoma statute which, as originally enacted, required a certificate of public convenience and necessity in order to engage in the business of operating a cotton gin. The statute was thereafter amended to insert a proviso exempting gins operated by cooperatives. The Court held the proviso violated the Equal Protection Clause of the Fourteenth Amendment but upheld the statute as initially written, saying:

> "Here it is conceded that the statute, before the amendment, was entirely valid. When passed, it expressed the will of the legislature which enacted it. Without an express repeal, a different legislature undertook to create an exception, but, since that body sought to express its will by an amendment which, being unconstitutional, is a nullity and, therefore, powerless to work any change in the existing statute, *that statute must stand as the only valid expression of the legislative intent.*" (Emphasis added)

In *United States v. Jackson,* 390 U.S. 570, 20 L.Ed. 2d 138, 88 S.Ct. 1209 (1968), the Supreme Court of the United States held invalid a proviso in the Federal Kidnapping Act (18 U.S.C. § 1201(a)) providing for the death sentence upon conviction of kidnapping under certain circumstances if the jury so recommended in its verdict. Originally, the statute made the crime punishable by imprisonment only. The Court held that

the remainder of the statute was valid since the unconstitutional proviso was severable from it, saying:

> "As we said in *Champlin Rfg. Co. v. Commission,* 286 U.S. 210, 234: 'The unconstitutionality of a part of an Act does not necessarily defeat . . . the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'
>
> "Under this test, it is clear that the clause authorizing capital punishment is severable from the remainder of the kidnapping statute and that the unconstitutionality of that clause does not require the defeat of the law as a whole."

The fact that the proviso in G.S. 14-21 gives the jury the discretion to recommend life imprisonment rather than death does not distinguish the case before us from *United States v. Jackson, supra.*

In *Bank v. Lacy,* 188 N.C. 25, 123 S.E. 475 (1924), this Court said: "The invalidity of one part of a statute does not nullify the remainder when the parts are separable and the invalid part was not the consideration or inducement for the Legislature to enact the part that is valid." To like effect: *Jackson v. Board of Adjustment,* 275 N.C. 155, 166 S.E. 2d 78 (1969); *Clark v. Meyland,* 261 N.C. 140, 134 S.E. 2d 168 (1964); *Fox v. Commissioners of Durham,* 244 N.C. 497, 94 S.E. 2d 482 (1956); *Power Co. v. Clay County,* 213 N.C. 698, 197 S.E. 603 (1938); *Connolly v. Union Sewer Pipe Co.,* 184 U.S. 540, 46 L.Ed. 679, 22 S.Ct. 431 (1902).

It is the proviso which confers upon juries the discretion to send one defendant to death and another to prison for life for the same crime committed under substantially similar circumstances. This, and only this, is what *Furman* condemns as violative of the Eighth and Fourteenth Amendments. The proviso, then, can no longer be given effect as part of the law of North Carolina. This leaves in effect the original statute making the death sentence mandatory upon a conviction of rape, and forbids an instruction to the jury that it may, in its discretion, fix a different punishment.

In light of the authorities cited, we hold that the unconstitutional proviso in G.S. 14-21 is severable and the remainder

of the statute with death as the mandatory punishment for rape remains in full force and effect. A similar conclusion was reached by the Supreme Court of Delaware in *State v. Dickerson,* ... Del. ....., ... A. 2d ....., 12 Cr. L. 2145 (decided 1 November 1972).

[3] We recognize that the Legislature, not the courts, decides public policy, responds to public opinion and, by legislative enactment, reflects society's standards. The matter of retention, modification or abolition of the death penalty is a question for the law-making authorities rather than the courts. In view of the decision in *Furman,* the Legislature may wish to delete the unconstitutional proviso from G.S. 14-21 (rape), G.S. 14-17 (murder), G.S. 14-52 (burglary), and G.S. 14-58 (arson); or it may wish to rewrite these statutes altogether to give expression to what it conceives to be the public will. Meanwhile, we hold that the effect of the *Furman* decision upon the law of North Carolina concerning the punishment for rape, murder in the first degree, arson and burglary in the first degree is this: Upon the trial of any defendant so charged, the trial judge may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment. The trial judge should charge on the constituent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned. Upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death. The punishment to be imposed for these capital felonies is no longer a discretionary question for the jury and therefore no longer a proper subject for an instruction by the judge.

Since the invalid proviso in G.S. 14-21 was given effect from the time it was enacted in 1949 to the date of the *Furman* decision in all cases wherein the defendant was convicted of rape or other capital crimes under the statutes applicable thereto, the practical effect of a judicial determination that the proviso is severable and therefore eliminated from the statute is to change the penalty for rape (or other capital crimes) from *death or life imprisonment in the discretion of the jury* to *mandatory death.* An upward change of penalty by legislative action cannot constitutionally be applied retroactively. Article I, section 16 of the Constitution of North Carolina forbids the enactment of any *ex post facto* law. The Federal Constitution contains a like prohibition against *ex post facto* enactments

by a state. See Constitution of the United States, Art. I, sec. 10. It has been held that this section of the Constitution "forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer. * * * It hardly could be thought that, if a punishment for murder of life imprisonment or death were changed to death alone, the latter penalty could be applied to homicide committed before the change." *Lindsey v. Washington,* 301 U.S. 397, 81 L.Ed. 1182, 57 S.Ct. 797 (1937). It thus appears that where the punishment at the time of the offense was death or life imprisonment in the discretion of the jury, as in the case before us, a change by the Legislature to death alone would be *ex post facto* as to such offenses committed prior to the change. *State v. Broadway,* 157 N.C. 598, 72 S.E. 987 (1911).

[4] While we recognize that the letter of the *ex post facto* clause is addressed to legislative action, the constitutional ban against the retroactive increase of punishment for a crime applies as well against judicial action having the same effect. "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids. An *ex post facto* law has been defined by this Court as one 'that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action' or 'that aggravates *a crime,* or makes it *greater* than it was, when committed.' [Citation omitted] If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Bouie v. Columbia,* 378 U.S. 347, 12 L.Ed. 2d 894, 84 S.Ct. 1697 (1964).

[5] For the reasons stated, we hold that North Carolina's mandatory death penalty for rape, murder in the first degree, burglary in the first degree and arson may not be constitutionally applied to any offense committed prior to the date of this decision but shall be applied to any offense committed after such date. *Compare, Johnson v. New Jersey,* 384 U.S. 719, 16 L.Ed. 2d 882, 86 S.Ct. 1772 (1966).

We now turn to the task of applying the *Furman* decision, and the holding here, to the death sentence imposed upon defendant in this case.

Defendant was tried, convicted and sentenced under G.S. 14-21, and the trial judge instructed the jury, *inter alia*, as follows: "If you return a verdict of guilty of rape, you may accompany your verdict with a recommendation of life imprisonment. If you make no such recommendation, the law provides that the defendant will be put to death in the gas chamber. If you do so recommend, the punishment will be imprisonment for life. You are completely free to accompany a verdict of guilty with a recommendation of life imprisonment or not, as the law leaves that to your complete and unbridled discretion. Thus members of the jury, depending on how you find the facts, there are three possible verdicts which you may return, you may find the defendant guilty of rape with no recommendation; guilty of rape with a recommendation of life imprisonment or not guilty." Thus, the jury was permitted to exercise its discretion and choose between death and life imprisonment. The proviso in G.S. 14-21 requiring the judge to so charge and permitting the jury in its discretion to so choose is not materially different from the discretion vested in the jury by the Georgia and Texas statutes condemned by *Furman*. It is apparent, therefore, that *Furman* forbids the imposition of the death penalty in this case. This conclusion is buttressed by the fact that, following the decision in *Furman*, five cases in which we had affirmed the imposition of the death sentence were remanded to this Court by the Supreme Court of the United States "for further proceedings," the judgment of this Court having been vacated "insofar as it leaves undisturbed the death penalty imposed." We remanded those cases to the respective superior courts for imposition of sentences of life imprisonment. *State v. Miller*, 281 N.C. 740, 190 S.E. 2d 841 (1972); *State v. Hamby and Chandler*, 281 N.C. 743, 191 S.E. 2d 66 (1972); *State v. Chance*, 281 N.C. 746, 191 S.E. 2d 65 (1972); *State v. Westbrook*, 281 N.C. 748, 191 S.E. 2d 68 (1972); *State v. Doss*, 281 N.C. 751, 191 S.E. 2d 70 (1972).

Accordingly, the judgment of the Superior Court of Sampson County insofar as it imposed the death penalty upon this defendant is reversed. The case is remanded to the Superior Court of Sampson County with directions to proceed as follows:

1. The presiding judge of the Superior Court of Sampson County will cause to be served on the defendant, James Howard Waddell, 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 notice, at which time, in open court, the defendant, James Howard Waddell, being present in person and being represented by his counsel, the presiding judge, based on the verdict of guilty of rape returned by the jury at the trial of this case at the December 1971 Session, will pronounce judgment that the defendant, James Howard Waddell, be imprisoned for life in the State's prison.

2. The presiding judge of the Superior Court of Sampson County will issue a writ of habeas corpus to the official having custody of the defendant, James Howard Waddell, to produce him in open court at the time and for the purpose of being present when the judgment imposing life imprisonment is pronounced.

REMANDED FOR JUDGMENT.

Justice LAKE concurring.

I concur in all parts of the opinion of Justice Huskins. In view of the length of the dissenting portion of the opinion of the Chief Justice and of the number of authorities cited therein, and because of the importance of the issue, I deem it advisable to state, as briefly as possible, why I do not find its argument persuasive or the citations convincing upon the question with which the opinion of Justice Huskins deals.

The jury having returned a verdict of guilty of rape without making a recommendation that the defendant's punishment be life imprisonment, a sentence to death was imposed by the trial court pursuant to G.S. 14-21. It is, therefore, our duty to determine the effect now to be given that statute by the courts of North Carolina. We may not properly bypass that task, nor escape our responsibility for it by labeling the question one of policy for determination by the Legislature.

The Supreme Court of the United States being the higher authority on the validity of judgments under the Constitution of the United States, its mandates, issued in reliance upon *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346, vacating the death sentences previously affirmed by this Court in the five cases cited in the opinion of Justice Huskins, became the law of those five cases. Under the compulsion of those mandates, this Court remanded those cases to the respective superior courts for the imposition of sentences of life imprisonment.

The present case, on the contrary, is before us for the first time. In it we have no mandate from the Supreme Court of the United States vacating the death sentence imposed upon this defendant. In the absence thereof, it is our duty, not that of the Legislature, to determine just what the United States Supreme Court decided in *Furman v. Georgia, supra,* and to determine the present state of the law of North Carolina with reference to punishment for the crime of rape in the light of that decision.

Only this Court can determine whether any portion of G.S. 14-21 is the law of North Carolina today and, if so, which portion. The Legislature, now in session, cannot make that determination. The Legislature can determine what the law of this State ought to be and shall be in the future. That is policy making and that is the Legislature's prerogative and responsibility. It is for us, and for us alone, to determine what part of G.S. 14-21, if any, is the law of North Carolina today and determinative of the validity of the sentence from which this defendant appeals. That is not policy making but the interpretation of the statute—an exercise of the judicial function which we may not abdicate or assign to the Legislature. Constitution of North Carolina, Art. I, § 6; Art. IV, § 1.

It is quite clear, as the opinion of Justice Huskins plainly states, that it is for the Legislature, not for this Court, to determine the policy of this State as to what acts shall be deemed crimes and as to the punishment therefor; that is, to determine what punishment ought to be and shall be imposed for the offense of rape hereafter committed. Constitution of North Carolina, Art. I, § 6; Art. II, § 1; Art. XI, § 2. But the Legislature has spoken in G.S. 14-21 and, until it speaks again, it is the duty of this Court to determine what, if anything, remains of its pronouncement in G.S. 14-21 after the decision in *Furman v. Georgia, supra.* No officer or agency, save this Court, can make that determination.

The determination of that question as stated in the opinion of Justice Huskins is, in my view, unassailably correct. If the Legislature, now sitting, deems the result of our determination is unwise, as a matter of policy, it may, as to rapes hereafter committed, adopt and promulgate a different rule as to punishment. That is its responsibility, not ours.

The opinion of the Chief Justice states:

> "If *Furman* had decided that the portion of G.S. 14-21 quoted above was separable and invalid and that death is now the sole and exclusive punishment for rape, such decision would apply to all rapes committed subsequent to 29 June 1972, the date *Furman* was decided. But this was not the decision in *Furman*."

Of course, it was not, for the simple reason, if for none other, that the Supreme Court of the United States does not have the authority to decide that question. Whether a statute is separable or inseparable is a question of statutory interpretation. It is well settled that the interpretation of a state statute is a question to be determined by the supreme court of the state. The Supreme Court of the United States has repeatedly accepted as binding upon it the interpretation placed upon state statutes by the highest courts of such states.

Thus, the Supreme Court of the United States has not said, and may not properly determine that G.S. 14-21 is or is not separable. What it has said in *Furman v. Georgia, supra,* is that the discretion which the proviso in G.S. 14-21 undertook to vest in North Carolina juries cannot be conferred upon them consistently with the Fourteenth Amendment. It having so held, it is now the prerogative and duty of this Court, and this Court alone, to determine whether the proviso is severable from the original statute unto which the proviso was attached by amendment in 1949. Thus, it is the date of the decision of that question by this Court—today—not the date of the decision in *Furman v. Georgia, supra,* which fixes the offenses of rape for which a death sentence may be imposed without running afoul of the Ex Post Facto principle.

The opinion of the Chief Justice further states:

> "*Furman* simply held that *the death penalty provision* of G.S. 14-21 as now constituted was invalid and that, absent amendment, no death sentence can be constitutionally imposed and carried out."

I do not find the words, "absent amendment," in any of the nine opinions by the justices in *Furman v. Georgia, supra,* nor in the per curiam statement of the decision therein. *Furman v. Georgia, supra,* did not hold "the death penalty provision of

G.S. 14-21" invalid. It held, as the opinion of Justice Huskins states, that the death penalty cannot be imposed *at a time when juries or judges are given the discretion to impose the death penalty on one defendant and life imprisonment on another for the same offense*—quite a different thing.

I am unable to agree with the reasoning by which the Chief Justice reaches the conclusion that the defeat in 1971 of the legislative proposal to abolish the death penalty for rape and make life imprisonment the mandatory punishment therefor now compels us to hold that, since *Furman v. Georgia supra,* life imprisonment has become the mandatory punishment for the crime. Quite obviously, the 1971 Legislature preferred, as a matter of policy, to leave North Carolina juries in possession of the discretion which the 1949 amendment to G.S. 14-21 attempted to give them. It seems to me perfectly clear that the 1971 Legislature did not believe the then prophecy that the United States Supreme Court would decide as it did in *Furman v. Georgia, supra.* As the opinions of the four dissenting justices in *Furman v. Georgia, supra,* show, the earlier decisions of the Court afforded ample basis for such legislative disbelief. However, in any event, the Chief Justice's opinion, if adopted by this Court, would result in our declaring G.S. 14-21 now to mean precisely what the 1971 Legislature expressly refused to make it say. This we may not do. The Legislature of 1971 obviously wanted the whole of G.S. 14-21, including the proviso, which it believed constitutionally permissible, but this is far from showing it wanted the whole or nothing. It certainly fails to show that, if unable to have the whole, it wanted the part which it refused to adopt, standing alone, in preference to the part which it refused to repeal.

The array of decisions from other states, cited in the opinion of the Chief Justice, are simply in point on the question of the severability of G.S. 14-21. In the first place, substantially all of them, if not all, held only that the death penalty may not be imposed by a state in a case which arose and was adjudicated while the state undertook to give its juries the discretion which *Furman v. Georgia, supra,* held cannot be vested in juries. In so holding these decisions do not conflict with the opinion of Justice Huskins. In the second place, of all the cited decisions only those from Mississippi and Florida appear to contain any discussion of the question of the severability of the various state statutes involved and the Mississippi and Florida decisions

appear to rest on the acceptance by those courts of the view that their statutes were severable and the life sentence provisions therein were the parts which survived the decision in *Furman v. Georgia, supra.* In the third place, decisions from other states as to the severability of their statutes cannot help us materially in determining whether our own statute is severable, even if the wording of the statutes be identical, because the legislative history of the respective statutes may well be quite different. As the opinion of Justice Huskins demonstrates, the history of G.S. 14-21 leads to the conclusion that the proviso, added by the amendment of 1949, is severable from the remainder of the statute.

It is one thing to hold, as the Mississippi and Florida Courts appear to have done, that a statute like G.S. 14-21 is severable and the part which survives *Furman v. Georgia, supra,* is that providing for a life sentence. This would, as Justice Huskins has demonstrated, simply be a most strained and improbable view of the intent of the North Carolina Legislature in the light of its repeated refusals to abolish capital punishment. It is a far different thing to say, as the opinion of the Chief Justice suggests, that G.S. 14-21 is an inseparable whole.

If this view suggested in the opinion of the Chief Justice were correct, it would necessarily follow that the imposition of a sentence to imprisonment for life would be unlawful. It is well settled, as shown by the authorities cited by Justice Huskins, that if the provisions of a statute are, indeed, so interrelated that they are an inseparable whole, the statute cannot be partly unconstitutional and partly constitutional. Quite obviously, the effect of *Furman v. Georgia, supra,* is that G.S. 14-21 is not, in its entirety, constitutional. If it be inseparable, then the entire statute would fall under the impact of *Furman v. Georgia, supra,* and G.S. 14-21 would authorize no sentence whatever. In that event, rape being a felony at common law and no specific punishment being provided by a valid statute, G.S. 14-2 would apply and the maximum sentence for rape would be imprisonment for ten years plus a fine.

Of course, the real thrust of the opinion of the Chief Justice is not that G.S. 14-21 is inseparable but that it is separable and that the proviso is the surviving portion. This I find inconsistent with the legislative history of the statute, correctly set forth by Justice Huskins.

Chief Justice BOBBITT concurring in part and *dissenting* in part.

I agree with the majority's conclusion that "the *Furman* decision [*Furman v. Georgia*, 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726 (1972)] holds that the Eighth and Fourteenth Amendments will no longer tolerate the infliction of the death sentence if either judge or jury is permitted to impose that sentence as a matter of discretion." Under North Carolina statutes, whether the punishment for first degree murder, or rape, or burglary in the first degree, or arson, is to be death or life imprisonment depends solely on how the jury exercises its unbridled discretion.

Prior to *Furman*, this Court had sustained the convictions and death sentences in *State v. Miller*, 276 N.C. 681, 174 S.E. 2d 481 (1970); *State v. Hamby and Chandler*, 276 N.C. 674, 174 S.E. 2d 385 (1970); *State v. Chance*, 279 N.C. 643, 185 S.E. 2d 227 (1971); *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971); and *State v. Doss*, 279 N.C. 413, 183 S.E. 2d 671 (1971). On authority of *Furman*, the Supreme Court of the United States vacated the judgment(s) in each of these cases "insofar as it [left] undisturbed the death penalty imposed," and remanded the case to this Court for further proceedings. *Miller v. North Carolina*, 408 U.S. 937, 33 L.Ed. 2d 755, 92 S.Ct. 2863 (1972); *Hamby and Chandler v. North Carolina*, 408 U.S. 937, 33 L.Ed. 2d 754, 92 S.Ct. 2862 (1972); *Chance v. North Carolina*, 408 U.S. 940, 33 L.Ed. 2d 764, 92 S.Ct. 2878 (1972); *Westbrook v. North Carolina*, 408 U.S. 939, 33 L.Ed. 2d 761, 92 S.Ct. 2873 (1972); *Doss v. North Carolina*, 408 U.S. 939, 33 L.Ed. 2d 762, 92 S.Ct. 2875 (1972). Thereupon, this Court remanded each of these cases to the superior court which had tried it with direction that judgments imposing a sentence of life imprisonment be pronounced. *State v. Miller*, 281 N.C. 740, 190 S.E. 2d 841 (1972); *State v. Hamby and Chandler*, 281 N.C. 743, 191 S.E. 2d 66 (1972); *State v. Chance*, 281 N.C. 746, 191 S.E. 2d 65 (1972); *State v. Westbrook*, 281 N.C. 748, 191 S.E. 2d 68 (1972); *State v. Doss*, 281 N.C. 751, 191 S.E. 2d 70 (1972).

The decision on this appeal is that *Furman* requires that this Court vacate the death sentence and remand *this case* to the superior court for the pronouncement of judgment imposing a life sentence. I emphatically agree with this decision. Moreover, I do not think *any death sentence* may be constitutionally in-

flicted unless *our General Assembly* strikes from our present statutes the provisions which leave to the unbridled discretion of a jury whether the punishment shall be death or life imprisonment. In my opinion, this Court has no right to ignore, delete or repeal these provisions, which were put there by the General Assembly as an integral part of its plan for the punishment of crimes for which the death sentence was permissible. *Furman* did not repeal them. This Court has no right to repeal them.

While unnecessary to the disposition of this appeal, the majority opinion states the views of four members of this Court with reference to the conduct of trials and the sentencing of defendants in the future for crimes of murder in the first degree, rape, burglary in the first degree and arson *committed subsequent to the present decision.* Since the decision in *Furman,* several cases have been tried in our superior courts in which the defendants were convicted and sentenced to life imprisonment when the jury returned verdicts of guilty (no recommendation as to punishment being involved) and at least two cases in which upon a like verdict the defendant received a death sentence. My dissent is not directed to the fact that the majority are giving an advisory opinion or directive to our superior court judges with reference to crimes committed *subsequent to Furman.* Although the appeals in these cases will come to us in due course, I agree that our superior court judges are *now* entitled to some directive from this Court. *The ground on which I dissent is that the majority are giving what I consider to be the wrong advisory opinion or directive.*

The views expressed in the majority opinion *to which I dissent* may be summarized as follows: The *Furman* decision invalidates the portion of G.S. 14-21 which reads: "Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury." The invalidation of this provision leaves intact that portion of the statute which precedes it and provides for punishment by death. The *Furman* decision does not invalidate the death penalty under present North Carolina statutes. It makes death the sole and exclusive punishment for rape. However, the death penalty is not to be imposed and carried out except for crimes committed subsequent to the filing of *this* decision.

If *Furman* had decided that the portion of G.S. 14-21 quoted above was separable and invalid and that death is now

the sole and exclusive punishment for rape, such decision would apply to all rapes committed subsequent to 29 June 1972, the date *Furman* was decided. But this was *not* the decision in *Furman*. *Furman* simply held that *the death penalty provision* of G.S. 14-21 as now constituted was invalid and that, absent amendment, no death sentence can be constitutionally imposed and carried out. The dismemberment of G.S. 14-21, and the declaration that death is the sole and exclusive punishment for rape, are neither required nor warranted by the decision in *Furman*.

Under Article XI, §§ 1 and 2, of the Constitution of North Carolina, the General Assembly is authorized to provide that the crimes of murder, rape, burglary and arson, and these only, may be punishable by death. Pursuant thereto, the General Assembly has enacted statutes which provide that a person convicted of first degree murder, G.S. 14-17, or of rape, G.S. 14-21, or of first degree burglary, G.S. 14-52, or of arson, G.S. 14-58, shall suffer death *unless* the jury, at the time of rendering its verdict in open court, recommends that the defendant's punishment shall be imprisonment for life in the State's prison.

There has been no change in any of the provisions of G.S. 14-17, G.S. 14-21, G.S. 14-52, and G.S. 14-58, since the enactment of Chapter 299, Session Laws of 1949, which contains the following: "Sec. 4. Section 14-21 of the General Statutes of North Carolina is hereby *rewritten* so as to read as follows:

"Sec. 14-21. Punishment for rape. Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: *Provided,* if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury." (Our italics.)

Sections 14-17, 14-52 and 14-58 of the General Statutes were rewritten by sections 1, 2 and 3 of Chapter 299, Session Laws of 1949. As rewritten they prescribed in like manner the punishment for murder in the first degree, burglary in the first degree and arson, respectively.

Our General Assembly has provided that no death sentence can be pronounced unless (1) the jury is instructed that the

mandatory punishment will be death unless the jury when returning its verdict in open court recommends that the punishment be imprisonment for life in the State's prison, and unless (2) notwithstanding such instruction the jury returns a verdict of guilty and does not recommend that the punishment be imprisonment for life in the State's prison. Subsequent to the enactment of the 1949 Act, whether the punishment for murder in the first degree, or for rape, or burglary in the first degree, or for arson was to be death or life imprisonment was to be determined by juries, case by case, rather than by law applicable to all who committed crimes bearing those names. This Court consistently held that no constitutional right of a defendant was violated by provisions which authorized the jury, upon finding a defendant guilty of murder in the first degree, or of rape, or of burglary in the first degree or of arson, to determine whether the punishment was to be death or imprisonment for life, notwithstanding the absence from the statute of any standards to guide the jury in making that determination.

Notwithstanding our decisions upholding G.S. 14-17, G.S. 14-21, G.S. 14-52 and G.S. 14-58, the possibility that the Supreme Court of the United States would render a decision substantially like the decision in *Furman* had been anticipated. In the report submitted by the Judicial Council for consideration by the General Assembly of 1969, attention was called to this possibility. *If the General Assembly wished to continue the death penalty for the crime of rape,* it was recommended that G.S. 14-21 be amended by *striking the following:* "Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's Prison, and the court shall so instruct the jury." Similar recommendations were made with reference to G.S. 14-17 (first degree murder), G.S. 14-52 (first degree burglary) and G.S. 14-58 (arson). To implement these recommendations, bills were prepared and introduced. H.B. No. 136 (relating to rape, first degree burglary and arson), and H.B. No. 137 (relating to murder in the first degree), were referred to Judiciary Committee No. 2 of the House. Both received unfavorable reports. The General Assembly, although advised that the provision for the imposition of a death sentence might be held invalid, refused to prescribe death as the punishment for rape without providing for the alternative of life imprisonment if the jury so recommended.

H.B. No. 397 was introduced in the General Assembly of 1971. Section 2 thereof provided: "Sec. 2. G.S. 14-21 is hereby amended by striking the following words: 'shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison.', and by inserting in lieu thereof the following words: 'shall suffer punishment by imprisonment for life in the State's prison.' " Sections 1, 3 and 4 of H.B. No. 397 provided for the amendment in like manner of the provisions of G.S. 14-17, G.S. 14-52 and G.S. 14-58 relating to punishment for murder in the first degree, burglary in the first degree and arson. H.B. No. 397 was referred to and (as amended) reported favorably by Judiciary Committee No. 2 but failed to pass the House on second reading.

The reasonable inference from the foregoing is that the General Assembly wanted G.S. 14-17, G.S. 14-21, G.S. 14-52 and G.S. 14-58 to remain exactly as they had been since 1949 and as upheld by the decisions *of this Court.* All provisions of G.S. 14-21 relate to the single subject indicated by the caption, to wit, "Punishment for rape." The provisions thereof constitute a single legislative plan. Only the *death penalty provision* was invalidated by *Furman.*

It is the decision of a majority of this Court—not the decision in *Furman*—which dismembers G.S. 14-21 and declares a particular portion thereof invalid and undertakes—in direct conflict with *Furman*—to validate the death penalty provision of G.S. 14-21 and adjudge that under present statutes death is the sole and exclusive punishment for rape. The main thrust of *Furman* is to restrict the circumstances in which capital punishment may be imposed. It is not only legally unsound but ironic and unrealistic to use *Furman* as a basis for holding that *hereafter under present statutes* death will be the sole permissible punishment for rape.

Whether the General Assembly *would have prescribed* death or life imprisonment if it had been confronted with the necessity of making that decision cannot be answered. In my view, this question must be answered now by the General Assembly rather than by this Court's speculation as to what the General Assembly at previous sessions would have done if they had been confronted with the necessity of making that decision.

The reliance placed by the majority on *United States v. Jackson,* 390 U.S. 570, 20 L.Ed. 2d 138, 88 S.Ct. 1209 (1968),

invites further consideration of that decision. In *Jackson, the death penalty provision* of the Federal Kidnapping Act (18 U.S.C. § 1201 (a)) was held *invalid* because it imposed an impermissible burden upon an accused's exercise of his Fifth Amendment right not to plead guilty and his Sixth Amendment right to demand a jury trial. In *Pope v. United States,* 392 U.S. 651, 20 L.Ed. 2d 1317, 88 S.Ct. 2145 (1968), based on *Jackson, the death penalty provision* of the Federal Bank Robbery Act (18 U.S.C. § 2113(e)) was held *invalid.* No other provision of either of these statutes was invalidated.

The provision for punishment by death "if the verdict of the jury shall so recommend" considered in *Jackson* was incorporated in the Federal Kidnapping Act when rewritten by the Act of May 18, 1934, 48 Stat. 781-82. The death penalty provision considered in *Pope* was a part of the original Federal Bank Robbery Act of May 18, 1934, 48 Stat. 783. Section 3 provided that the violation thereof "shall be punished by imprisonment for not less than 10 years, or by death if the verdict of the jury shall so direct." No statute *amending* or *rewriting the original Act* was involved.

Whether the death penalty provision was a part of the original act or incorporated by later amendment or rewriting was not the basis of decision in either *Jackson* or *Pope.* Moreover, the decisions in *Jackson* and *Pope* were not based upon the discretionary power granted to the jury. They were based upon the fact that Rule 23(a) of the Federal Rules of Criminal Procedure provided: "Cases required to be tried by a jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the Government." Under this rule, if a defendant was permitted to plead guilty or to waive a jury trial, he would thereby avoid the possibility of a death sentence.

In *State v. Anderson,* 281 N.C. 261, 188 S.E. 2d 336 (1972), the defendant appealed to this Court from a judgment which imposed death sentences based on verdicts of guilty of murder in the first degree (without recommendation of life imprisonment). The murders for which defendant was indicted and convicted were committed on 29 June 1971.

The opinion in *State v. Anderson, supra* at 267, 188 S.E. 2d at 340, states: "*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."

Chapter 616, Session Laws of 1953, codified as G.S. 15-162.1, provided 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."

This Court, being of the opinion that the procedure authorized by G.S. 15-162.1 did not preclude a sentence of death after a conviction by a jury without recommendation of life imprisonment, upheld the convictions and death sentences in the following cases: *State v. Atkinson* (murder), 275 N.C. 288, 167 S.E. 2d 241 (1969); *State v. Hill* (murder), 276 N.C. 1, 170 S.E. 2d 885 (1969); *State v. Roseboro* (murder), 276 N.C. 185, 171 S.E. 2d 886 (1970); *State v. Sanders* (murder), 276 N.C. 598, 174 S.E. 2d 487 (1970); *State v. Williams* (murder), 276 N.C. 703, 174 S.E. 2d 503 (1970); *State v. Atkinson* (rape), 278 N.C. 168, 179 S.E. 2d 410 (1971).

Subsequently, based on *Jackson* and *Pope*, the Supreme Court of the United States reversed the judgments in these cases "insofar as [they] impose[d] the death sentence" and remanded the cases to this Court for further proceedings. *Atkinson v. North Carolina*, 403 U.S. 948, 29 L.Ed. 2d 859, 91 S.Ct. 2283 (1971); *Hill v. North Carolina*, 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2287 (1971); *Roseboro v. North Carolina*, 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2289 (1971); *Sanders v. North Carolina*, 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2290 (1971); *Williams v. North Carolina*, 403 U.S. 948, 29 L.Ed. 2d

860, 91 S.Ct. 2290 (1971); *Atkinson v. North Carolina,* 403 U.S. 948, 29 L.Ed. 2d 861, 91 S.Ct. 2292 (1971).

Thereafter, this Court remanded each of these cases to the superior court where it was tried with directions that judgments imposing sentences of life imprisonment be pronounced. *State v. Atkinson,* 279 N.C. 386, 183 S.E. 2d 106 (1971); *State v. Hill,* 279 N.C. 371, 183 S.E. 2d 97 (1971); *State v. Roseboro,* 279 N.C. 391, 183 S.E. 2d 108 (1971); *State v. Sanders,* 279 N.C. 389, 183 S.E. 2d 107 (1971); *State v. Williams,* 279 N.C. 388, 183 S.E. 2d 106 (1971); *State v. Atkinson,* 279 N.C. 385, 183 S.E. 2d 105 (1971).

In the report submitted by the Judicial Council for consideration by the General Assembly of 1969, attention was called to the possibility that the Supreme Court of the United States would hold that a death sentence could not be imposed and carried out if a defendant could avoid the possibility of a death sentence by pleading guilty and thereby surrendering his right to jury trial. If the General Assembly wished to continue the death penalty, it was recommended that G.S. 15-162.1 be repealed. G.S. 15-162.1 was repealed by Chapter 117, Session Laws of 1969. It is here noted that G.S. 15-162.1 was not detached and invalidated by the decisions of the Supreme Court of the United States in the six cases referred to above.

As noted in *State v. Anderson, supra:* "[F]or 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]." The murders having been committed when (reinstated) G.S. 15-162.1 was in effect, this Court vacated the death sentences and remanded the cases to the superior court for the pronouncements of judgments imposing sentences of life imprisonment.

From 1953 until the repeal of G.S. 15-162.1, North Carolina's legislative plan in respect of the death penalty was embodied in G.S. 14-17, G.S. 14-21, G.S. 14-52, G.S. 14-58 and in G.S. 15-162.1. Although enacted in 1953 as a separate statute, G.S. 15-162.1 was *in pari materia* with G.S. 14-17, G.S. 14-21, G.S. 14-52 and G.S. 14-58 as rewritten in 1949. Hence, G.S. 15-162.1 had to be considered as if its provisions were incorporated in G.S. 14-17, G.S. 14-21, G.S. 14-52 and G.S. 14-58 as rewritten in 1949. When the Supreme Court of the United States, on authority of *Jackson* and *Pope,* vacated the death sentences which this Court had upheld in *Atkinson, Roseboro, Sanders,* and *Williams,* it did not hold that G.S. 15-162.1 was invalid. As this Court recognized in *State v. Anderson, supra,* what the Supreme Court held was that so long as G.S. 15-162.1 remained a part of our legislative plan, no death sentence could be imposed or carried out. This objection could be and was removed by the repeal of G.S. 15-162.1. In like manner, the decision in *Furman* does not invalidate any particular clause of G.S. 14-17, G.S. 14-21, G.S. 14-52 or G.S. 14-58. It simply holds that no death sentence can be imposed and carried out as long as our statute contains provisions which leave to the unbridled discretion of a jury whether the punishment shall be death or life imprisonment.

The *Furman* decision was filed 29 June 1972. Its impact upon state statutes similar to our G.S. 14-17, G.S. 14-21, G.S. 14-52 and G.S. 14-58 was considered in the decisions discussed below.

In *State v. Johnson,* 31 Ohio St. 2d 106, 285 N.E. 2d 751 (1972), the jury found the defendant guilty of murder in the first degree and did not recommend mercy. His appeal from a death sentence was decided by the Supreme Court of Ohio on 19 July 1972. The pertinent portion of the Ohio statute provided: "Whoever violates this section is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life." Ohio R.C. § 2901.01 (1954).

The following excerpts from the opinion of Justice Brown set forth the disposition of the appeal and the rationale of the Court's decision:

"The United States Supreme Court, in *Furman v. Georgia* . . . has held that the carrying out of a death penalty imposed

at the discretion of the trier of the facts constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

"Under that holding, which we are required to follow, the infliction of the death penalty under the existing law of Ohio is now unconstitutional (with the possible exception of the taking of the life or attempting to take the life of the President, Vice President, or a person in the line of succession to the presidency [R.C. 2901.09], or of the Governor or Lieutenant Governor [R.C. 2901.10], which statutes purport to impose a mandatory penalty of death).

"We have reviewed the record of the proceedings in this case and find ample evidence of guilt of murder in the first degree.

* * *

"It is our conclusion that, except as to the death sentence, the judgment of the Court of Appeals is affirmed. With regard to the death sentence, the judgment of the Court of Appeals must be modified and the sentence is reduced to life imprisonment, as prescribed in R.C. 2901.01."

In *Capler v. State,* Miss., 268 So. 2d 338 (1972), the defendant was convicted of murder and sentenced to suffer death. His conviction and sentence were affirmed by the Supreme Court of Mississippi, which also denied his petition for a rehearing. The Supreme Court of the United States granted his petition for certiorari and ordered "that the judgment of the Supreme Court of Mississippi in this case 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 Mississippi for further proceedings." *Capler v. Mississippi,* 408 U.S. 937, 33 L.Ed. 2d 754, 92 S.Ct. 2862 (1972). This order and mandate followed the decision in *Furman.*

The pertinent Mississippi statute provided: "Every person who shall be convicted of murder shall suffer death, unless the jury rendering the verdict shall fix the punishment at imprisonment in the penitentiary for the life of the convict; or unless the jury shall certify its disagreement as to the punishment as provided by section 1293 [Code of 1930; § 2536, Code of 1942] in which case the court shall fix the punishment at imprisonment for life." Miss. Code of 1942, § 2217 (1957). Upon further consideration, the Supreme Court of Mississippi remanded the

case to the trial court for the pronouncement of a judgment of life imprisonment. The rationale of this decision is empitomized by Chief Justice Gillespie in these words: "The only infirmity in section 2217 is that the harsher penalty of death may not lawfully be imposed. The remaining part of the statute is complete, and it does not follow that the remaining provision providing for imprisonment in the penitentiary for the life of the defendant must fall. We hold that because of the decision in *Furman v. Georgia* the death penalty cannot be inflicted; that the remainder of the statute is valid, and the only other punishment for murder is life imprisonment." *Accord, Peterson v. State,* Miss., 268 So. 2d 335 (1972).

In *State v. Square,* La., 268 So. 2d 229 (1972), the defendant's conviction of murder and the death sentence pronounced thereon had been affirmed by the Supreme Court of Louisiana but the Supreme Court of the United States, citing *Stewart v. Massachusetts,* 408 U.S. 845, 33 L.Ed. 2d 744, 92 S.Ct. 2845 (1972), following *Furman v. Georgia,* vacated the judgment insofar as it left undisturbed the death penalty imposed and remanded the case for further proceedings. 408 U.S. 938, 33 L.Ed. 2d 760, 92 S.Ct. 2871 (1972). The pertinent portion of the Louisiana statute provided: "In a capital case the jury may qualify its verdict of guilty with the addition of the words 'without capital punishment,' in which case the punishment shall be imprisonment at hard labor for life." L.S.A.C.Cr.P. art. 817 (1967).

Upon consideration upon remand, the per curiam opinion of the Supreme Court of Louisiana contains the following:

"We construe the Mandate of the United States Supreme Court to require the imposition of a sentence other than death. Cf., *State v. Shaffer,* 260 La. 605, 257 So. 2d 121 (1971) and *State v. Duplessis,* 260 La. 644, 257 So. 2d 135 (1971).

"Accordingly, in compliance with the Mandate of the United States Supreme Court, the death sentence imposed upon defendant is annulled and set aside, and the case is remanded to the 4th Judicial District Court with instructions to the trial judge to sentence the defendant to life imprisonment.

"Case remanded."

In *Garcia v. State,* 501 P. 2d 1128 (Okla. Crim. 1972), the jury found the defendant guilty of murder and fixed his

punishment at death. The pertinent Oklahoma statute provided: "Every person convicted of murder shall suffer death, or imprisonment at hard labor in the State penitentiary for life, at the discretion of the jury. Upon trial of an indictment for murder, the jury, if they find the defendant guilty, must designate in their verdict whether he shall be punished by death or imprisonment for life at hard labor, and the judgment of the court shall be in accordance therewith. But upon a plea of guilty the court shall determine the same." 21 Okla. Stat. Ann. § 707 (1958). On 21 June 1972, the Court of Criminal Appeals of Oklahoma affirmed the conviction and death sentence. However, that decision was modified 26 October 1972, on rehearing, at which time the following order was entered: "In the light of *Furman v. Georgia, Jackson v. Georgia,* and *Branch v. Texas* . . . the judgment and sentence of death by electrocution is modified to a term of life imprisonment, and as so Modified, the judgment and sentence is Affirmed." 501 P. 2d at 1141.

In *People v. Speck,* Ill., 287 N.E. 2d 699 (1972), the jury found the defendant guilty of murder in each of eight cases. His convictions and the death sentences pronounced thereon were affirmed by the Supreme Court of Illinois. However, the Supreme Court of the United States reversed each judgment insofar as it imposed a death sentence.

The pertinent portions of the Illinois statutes (S.H.A. ch. 38 (1972)) are quoted below:

"§ 9-1. *Murder*

* * *

"(b) Penalty.

"A person convicted of murder shall be punished by death or imprisonment in the penitentiary for any indeterminate term with a minimum of not less than 14 years. If the accused is found guilty by a jury, a sentence of death shall not be imposed by the court unless the jury's verdict so provides in accordance with Section 1-7 (c) (1) of this Code."

* * *

"§ 1-7. *Judgment, Sentence and Related Provisions*

* * *

"(c) Capital Offenses.

"(1) Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, the jury may return a verdict of death. Where such verdict is returned by the jury, the court may sentence the offender to death or to imprisonment. Where such verdict is not returned by the jury, the court shall sentence the offender to imprisonment."

Upon remand of the *Speck* case, Justice Schaefer, speaking for the Supreme Court of Illinois, said: "The Supreme Court has now held that a defendant could not be validly sentenced to death under the same Illinois statutes that are applicable to this case. *(Moore v. Illinois* (1972), ... U.S. ....., 92 S.Ct. 2562, 33 L.Ed. 2d 706; *Furman v. Georgia.* . . .) Therefore, the death penalty cannot be reimposed on the defendant, and the only remaining question is the procedure to be followed in resentencing him to a sentence other than death."

In *Commonwealth v. Bradley,* Pa., 295 A. 2d 842 (1972), the jury found the defendant guilty of murder in the first degree and fixed the penalty at death. On direct appeal, the conviction was affirmed but the death sentence was vacated and the *defendant was sentenced to life imprisonment.* The pertinent portion of the Pennsylvania statute provided: "Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall, in the manner hereinafter provided, fix the penalty." 18 Pa. Stat. Ann. § 4701 (1963). The ground of decision was stated by Justice Roberts as follows: "In *Furman v. Georgia,* . . . the United States Supreme Court recently held *that the imposition of the death penalty under statutes such as the one pursuant to which the death penalty was imposed upon appellant is violative of the Eighth and Fourteenth Amendments.* Accordingly, appellant's sentence of death may not now be imposed." 295 A. 2d at 845. (Our italics.) *Accord, Commonwealth v. Sharpe,* Pa., 296 A. 2d 519 (1972); *Commonwealth v. Lopinson,* Pa., 296 A. 2d 524 (1972); *Commonwealth v. Ross,* Pa., 296 A. 2d 629 (1972).

In *Graham v. State,* Ark., 486 S.W. 2d 678 (1972), the jury found the defendant guilty of murder in the first degree and did not recommend a life sentence. The pertinent Arkansas statute provided: "The jury shall have the right in all cases where the punishment is now death by law, to render a verdict

of life imprisonment in the State penitentiary at hard labor." Ark. Stat. Ann. § 43-2153 (Repl. 1964). Upon defendant's appeal, the Supreme Court of Arkansas upheld the conviction but remanded the case to the trial court for the pronouncement of a judgment of life imprisonment. The following excerpt from the opinion of Justice Byrd indicates the ground of decision: "[T]he U. S. Supreme Court, as presently constituted, has recently decided that where a jury is permitted to decide between the punishments of life and death, the death penalty constitutes 'cruel and unusual punishment' and that such interpretation is applicable to the several states through the Fourteenth Amendment. See *Furman v. Georgia*. . . .

"So long as the ruling in *Furman v. Georgia, supra,* is made applicable to this State, we are obliged to reduce appellant's sentence from death to life imprisonment as being the next highest available penalty, Ark. Stat. Ann. § 43-2308 (Repl. 1964)." 486 S.W. 2d at 679.

In *State v. Baker,* Wash., 501 P. 2d 284 (1972), the jury found defendant guilty of murder in the first degree and asked that the death penalty be inflicted. The pertinent portion of the Washington statute provided: "Murder in the first degree shall be punishable by imprisonment in the state penitentiary for life, unless the jury shall find that the punishment shall be death. . . . " R.C. Wash. Ann. § 9.48.030 (1961). Notwithstanding the jury's request, the trial judge deferred imposition of the death penalty on the condition that the defendant be incarcerated for life not subject to parole. The case was before the Supreme Court of Washington on the State's appeal from that order. In remanding the case for a proper sentence in the light of *Furman,* the Court said: "The decision in *Furman* has rendered the issue presented here moot *since the state is now precluded from any attempt to have the death penalty imposed under the existing statute.* The question whether a trial court may defer the death penalty has become academic." *Id.* at 284-85. (Our italics.)

In *Huggins v. Commonwealth,* Va., 191 S.E. 2d 734 (1972), the jury found the defendant guilty of first degree murder and fixed his punishment at death. The pertinent statute provided: "Murder of the first degree shall be punished with death, or by confinement in the penitentiary for life, or for any term not less than twenty years." Va. Code 1950 § 18.1-22. Based on *Furman,* Justice Poff, for the Supreme Court of Virginia, said:

"Insofar as it authorized discretionary imposition of the death penalty, Virginia's statute is unconstitutional. With respect to the death sentence, the judgment is vacated." *Id.* at 735. The conviction was upheld and the case was remanded for a new trial on the issue of punishment, that is, to determine whether the confinement in the penitentiary was to be for life, or for a term of twenty years, or for a term exceeding twenty years. *Accord, Hodges v. Commonwealth,* Va., 191 S.E. 2d 794 (1972).

Although the above-cited decisions in which death sentences were reversed and sentences of life imprisonment were substituted therefor involved crimes committed prior to *Furman,* none suggests that a death sentence may be imposed and carried out unless and until present statutory provisions are amended. All either state or clearly imply that under existing statutes the death sentence may not be imposed and carried out without regard to whether the crime was committed before or subsequent to *Furman.*

The Florida, Louisiana and Pennsylvania cases discussed below relate to current and future problems of procedure because of unequivocal holdings that under existing statutes a death penalty cannot be imposed and carried out.

In *Donaldson v. Sack,* 265 So. 2d 499 (Fla. 1972), Donaldson, who had been indicted for murder in the first degree, filed his petition in the Supreme Court of Florida for a writ of prohibition. Fla. Const. Art. V, § 9(2), vested in the criminal courts of record jurisdiction of "all criminal cases not capital." Fla. Const. Art. V, § 6(3), vested in the circuit courts "all criminal cases not cognizable by subordinate courts." Donaldson asserted that respondent, Circuit Court Judge Sack, had no jurisdiction to proceed with his case because, as a result of the decision in *Furman,* "capital cases" no longer existed in Florida.

On 29 June 1972, when *Furman* was decided, Florida statutes then in force included the following:

"The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in § 775.082." Fla. Stat. Ann. § 782.04(1) (1972 Supp.).

"Whoever ravishes and carnally knows a female of the age of ten years or more by force and against her will, or unlawfully or carnally knows and abuses a female child under the age of ten years, shall be guilty of a capital felony, punishable as provided in § 775.082. . . . " Fla. Stat. Ann. § 794.01 (1972 Supp.).

"A person who has been convicted of a capital felony shall be punished by death unless the verdict includes a recommendation to mercy by a majority of the jury, in which case the punishment shall be life imprisonment. A defendant found guilty by the court of a capital felony on a plea of guilty or when a jury is waived shall be sentenced to death or life imprisonment, in the discretion of the court." Fla. Stat. Ann. § 775.082(1) (1972 Supp.).

A Florida statute which became effective 1 October 1972, and is now codified as section 775.082(2) and (3), provided: "(2) In the event *the death penalty* in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a person who has been convicted of a capital felony shall be punished by life imprisonment.

"(3) In the event *the death penalty* in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment with no eligibility for parole." (Our italics.)

Exerpts from the opinion of Judge Dekle are quoted below.

"Since *Furman v. Georgia* . . . in effect 'removes' (until new legislation which may revive it) 'capital cases,' then there appears to be no logical escape from the fact that our circuit courts at this time, and until any legislation which may revive 'capital cases,' do not have jurisdiction in those cases heretofore delineated as 'capital' and accordingly subsequent to *Furman* jurisdiction in such cases now pending or being filed vests in the courts of record and may be transferred there in those 17 counties of Florida which have such courts."

"We are unable in the face of existing authorities and logic to find support for the continuance of 'capital offense' as heretofore applied. Accordingly, it must fall with the U. S. Supreme

Court's holding against the death penalty as provided under present legislation. Our decision is compelled by that Court's action."

"We find no difficulty with a continuation of the *sentencing* for these former 'capital offenses' under § 775.082(1) as automatically life imprisonment upon conviction, inasmuch as that is the only offense left in the statute. . . . The elimination of the death penalty from the statute does not of course destroy the entire statute. We have steadfastly ruled that the remaining consistent portions of statutes shall be held constitutional if there is any reasonable basis for doing so and of course this clearly exists in these circumstances."

"The removal of capital punishment only removes 'capital cases' as that term has been known. The *offense*—and the imposition of a life sentence upon conviction—remains. . . . There simply is not at this time such a designation as a 'capital case' as set forth in the several provisions of our Constitution, statutes and rules."

Since there were no "capital cases" under existing Florida statutes, the court then discusses the drastic impact of its decision upon Florida's Criminal Rules relating to (1) the requirement of twelve jurors in a "capital case," (2) provisions for a speedy trial, (3) jury selection procedures, (4) bifurcated trial procedures, (5) necessity for indictment by a grand jury, and (6) right to bail.

In *Anderson v. State,* 267 So. 2d 8 (Fla. 1972), the Supreme Court of Florida, based on *Furman,* vacated the death sentences of forty defendants. It corrected the sentences of those who had been convicted of murder in the first degree by providing that each be imprisoned for the term of his natural life. In doing so, the Court said: "The elimination of the death penalty from the statute prescribing the penalty for murder in the first degree does not destroy the whole statute. The only sentence which can now be imposed upon conviction of the crime of murder in the first degree is life imprisonment. This is an automatic sentence and a reduction from the sentence previously imposed. The Court has no discretion." The defendants in the rape cases having been convicted for rapes committed prior to 1 January 1972, were subject to imprisonment for life *or* for any term of years within the discretion of the Court. Fla. Stat.

Ann. § 794.01 (1944). Their cases were remanded for resentencing.

On authority of *Donaldson* and *Anderson, supra,* the Supreme Court of Florida in *State v. Whalen,* 269 So. 2d 678 (Fla. 1972), held that a trial judge, sitting as sole trier of fact after accepting a plea of guilty to first degree murder and holding an evidentiary hearing on the issue of the extent of penalty, did not have power to impose the death sentence. Chief Justice Roberts said: "This question concerning bifurcated trials is moot since at the present time capital punishment may not be imposed. This Court has held that there are currently no capital offenses in the State of Florida. If there is no capital offense, there can be no capital penalty." *Id.* at 679.

In *Ex Parte Contella,* 485 S.W. 2d 910 (Tex. Crim. 1972), the appeals were from orders in habeas corpus proceedings in which the accused were denied bail after indictment for murder with malice. The Texas Constitution contained this provision: "All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident. . . . " A Texas statute provided: "All prisoners shall be bailable unless for capital offenses when the proof is evident." A capital felony was defined by statute as "[a]n offense for which the highest penalty is death." The cited Texas decisions had held that "[t]he term 'proof is evident' means the accused, with cool and deliberate mind and formed design, maliciously killed the deceased, and that upon a hearing of the facts before the court a dispassionate jury would, upon such evidence, not only convict but would assess the death penalty." Vernon's Ann. P.C. art. 1257 provides: "The punishment for murder shall be death or confinement in the penitentiary for life or for any term of years not less than two." Vernon's Ann. C. Crim. Proc. art. 37.07 (1972 Supp.) provides that, in capital cases, where the state has made it known in writing prior to trial that it will seek the death penalty, the punishment must be assessed by the jury.

The following excerpts from the opinion of Judge Roberts set forth the disposition of the appeals and the rationale of the decision.

"In the case of *Furman v. Georgia* . . . the United States Supreme Court held that the death penalty, at least insofar as it is currently imposed in this country, 'constitutes cruel and

unusual punishment in violation of the Eighth and Fourteenth Amendments.' That being the case, we conclude that the death penalty, as it is currently authorized, may not be imposed as a penalty for the crime of murder.

"In light of this holding, the question which is before the Court is whether, in terms of our Constitution and statute, bail may now be denied in cases in which, prior to the holding in *Furman v. Georgia, supra,* the death penalty could have been imposed. We conclude that bail may not be denied in such cases.

* * *

"We therefore conclude that bail may no longer be denied on the ground that the offense is a capital offense and the proof is evident. Since the death penalty may not be imposed, there no longer exists a 'capital felony' as defined in Art. 47, V.A.P.C. Likewise, since the death penalty is no longer a possible penalty, it is impossible for the State to offer evidence, in this or any other case, sufficient to establish that the 'proof is evident' as that term is defined in *Ex parte Paul, supra.* Therefore, there is no case in which bail may be denied under the provisions of Art. 1, Section 11 of the Texas Constitution or Art. 1.07, V.A.C.C.P.

"The orders denying bail are reversed and the trial judge is ordered to set bail herein." 485 S.W. 2d at 911-912.

In *Commonwealth v. Truesdale,* Pa., 296 A. 2d 829 (Nov. 1972), the defendant was awaiting trial on indictments of first degree murder and conspiracy. Under the Pennsylvania Constitution a "capital" offense is not bailable and defendant had been denied bail. After the decision in *Furman,* defendant made an application for his release on bail on the ground that *Furman* abolished the death penalty as it theretofore had existed in Pennsylvania. After a hearing, the trial court granted bail. The Commonwealth immediately filed a petition in the Supreme Court requesting the assumption of plenary jurisdiction to determine whether defendant had a right to bail pending trial. The Court observed that "[w]ith the decision of the United States Supreme Court in *Furman v. Georgia* . . . as well as this Court's decision in *Commonwealth v. Bradley,* Pa., 295 A. 2d 842 (1972), *which cases have invalidated the death penalty as it presently exists in Pennsylvania,* we are left to decide if the definition of 'capital offense' which we adopted in *Alberti*

requires that the the bail set for Truesdale was proper." 296 A. 2d at 832 (Our italics.) Holding that bail was properly granted, the Court stated that "since there are presently no criminal offenses in the Commonwealth for which the death penalty may be imposed, there are no 'capital offenses'; hence, by mandate of our Constitution, all offenses are bailable prior to trial." *Id.* The Court clearly recognizes and accepts the fact that the effect of the *Furman* decision was to make "the maximum penalty for murder in the first degree . . . life imprisonment." 296 A. 2d at 835.

In *State v. Holmes,* La., 269 So. 2d 207 (1972), and in *State v. Flood,* 269 So. 2d 212 (La. Nov. 1972), the Supreme Court of Louisiana held that *Furman* did not destroy the classification of certain crimes in Louisiana as capital offenses. The impact of *Furman* was described in these words: "The crime [of murder] remains unchanged; only the penalty has been changed. True, the penalty is what made murder a capital offense, and is not actually a capital offense in Louisiana today. But the *nature* of the offense has not changed—only the punishment." *State v. Flood, supra* at 214. Hence, *Holmes* held that a person charged with a crime formerly punishable by death had to be tried by a jury of twelve, all of whom must concur to render a verdict; and *Flood* held that a person so charged was not entitled *as of right* to be released on bail.

The majority opinion cites *State v. Dickerson,* Del. Supr., 298 A. 2d 761 (Nov. 1972). This is the only decision disclosed by our research which supports to any extent the view of the majority herein. Dickerson was charged with a first degree murder committed prior to the decision in *Furman.* Two questions of law were certified by the Superior Court to the Supreme Court, to wit: "1. Are the discretionary mercy provisions of 11 *Del.C.* § 3901 unconstitutional under *Furman v. Georgia?* 2. If the answer to Question 1 is yes, is the mandatory death penalty prescribed in 11 *Del.C.* § 571 constitutional?" Both questions were answered "Yes."

11 Del.C. § 571 provided that whoever committed the crime of first degree murder as defined therein "shall suffer death." 11 Del.C. § 3901 provided: "In all cases where the penalty for crimes prescribed by the laws of this state is death, if the jury, at the time of rendering their verdict, recommends the defendant to the mercy of the Court, the Court may, if it seems proper

to do so, impose the sentence of life imprisonment instead of death."

The questions certified seem to have been adroitly phrased to elicit the answers which were given. The true question was whether *Furman* had invalidated the death penalty provision of the Delaware statute. All justices (3) of the Supreme Court of Delaware concurred in answering the certified questions as stated above. The majority (2) held that the death penalty could not be applied retroactively to the defendant in the case under consideration. This is an excerpt from the majority opinion: "Having determined that the mandatory death penalty provision of the Murder Statute, standing alone, may not be applied retroactively, we are left with the problem of pointing to the statutory, common law, or inherent power of the Superior Court under which the sentence may be imposed upon a conviction of murder in the first degree for which the mandatory death penalty of the Murder Statute may not be imposed. That question was not certified and was not briefed or argued by counsel." Chief Justice Wolcott dissented from "the majority's conclusion that 11 *Del.C.* § 571 may not be applied retroactively by the courts of this State." His dissent is based on this premise: "The Supreme Court of the United States—not this Court—has held that the Mercy Statute is unconstitutional. We, of course, are bound by this decision, but we have not made it." Suffice to say, in my view *Furman* held only that *the death penalty provision* of the Delaware statute was invalid. Therefore, as I see it, the holdings of the Supreme Court of Delaware in Dickerson were not required or supported by *Furman.*

I agree that the *Furman* decision has not established the proposition that capital punishment under all circumstances constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. Moreover, nothing in the *Furman* decision would seem to invalidate a statute of our General Assembly prescribing death as the sole and exclusive punishment for murder in the first degree, rape, burglary in the first degree, or arson. Whether such a statute should be enacted is for legislative determination. The majority opinion states: "We recognize that the Legislature, not the Courts, decides public policy, responds to public opinion and, by legislative enactment, reflects society's standards. The matter of retention, modification or abolition of

the death penalty is a question for the law-making authorities rather than the courts." With this statement I emphatically agree. However, in their directive that death shall be the sole and exclusive punishment for all crimes of first degree murder, rape, first degree burglary, and arson, committed *after the filing of this decision,* the majority, in my view, have assumed to act in a legislative rather than in a judicial capacity. Thereby they demonstrate the difference between precept and practice. Of course, the practical effect of today's decision is to place upon those members of the General Assembly who favor the abolition or limitation of capital punishment the burden of initiating and passing legislation to that effect.

It is my view that, unless and until G.S. 14-17, G.S. 14-21, G.S. 14-52, and G.S. 14-58 are amended by our General Assembly, *Furman* requires that trials be conducted solely to determine the guilt of the defendant; and, if found guilty of murder in the first degree, rape, burglary in the first degree, or arson, that the defendant be sentenced to life imprisonment as the only permissible punishment.

Justice HIGGINS concurring in result.

A Court opinion must reflect the views of the majority of the Court. A concurring in result opinion may reflect the individual views of the writer.

In my opinion, *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, does not work any change in North Carolina trial procedure. The decision deals with punishment only. Hence in what are now our four capital felonies the trial court should, as in other cases, omit any reference to punishment and charge on the constituent elements of the offenses and instruct the jury under what circumstances a verdict of guilty should be returned. As a result of the Court's holding in *Furman,* a charge on the right of the jury to recommend life imprisonment is now an idle gesture and should be omitted. The recommendation is not authorized until the jury unequivocally finds guilt. A conviction without a jury recommendation now requires life imprisonment and permits nothing more.

After discussing the effect of the 1949 amendment giving the jury power to recommend life imprisonment in our four capital felony cases, the majority opinion concludes: "It is the proviso, and the proviso alone, which creates the discretionary

difficulty condemned by the *Furman* decision; and it is quite clear that *Furman* strikes down the proviso as violative of the Eighth and Fourteenth Amendments."

I do not so interpret the effect of *Furman.* That decision does not strike down the proviso and does not hold that it violates the Eighth and Fourteenth Amendments. *Furman* holds that after the jury determines guilt and the State law permits either the court or the jury discretion whether the punishment shall be death or life imprisonment, life imprisonment must be imposed. Where discretion is given, *Furman* holds that a life sentence is valid but strikes down the death penalty. The rationale of the rule seems to be that if discretion between a death sentence or life imprisonment is given either to the court or the jury, the milder punishment must be imposed because in the interpretation of criminal statutes that which is the more favorable to the accused must be accepted.

The fixing of punishment for crime is a legislative function. The General Assembly, in my view, may fix death as the punishment for either or all of the four offenses named in Article XI, Section 2 of the North Carolina Constitution. The Legislature may provide the death penalty or it may provide life imprisonment, but when it undertakes to give an option, the milder judgment must be imposed.

In my opinion, this Court can no more strike out the proviso for life imprisonment than it can strike out the death penalty. Both provisions were inserted in the law by the General Assembly. I am unfamiliar with any authority this Court has to legislate on the subject by repealing either provision.

This further objection to the opinion: After the Court has "eliminated" the right of the jury to recommend life imprisonment in this case, the Court further decrees that capital punishment shall be restored after this Court's opinion is handed down. This holding seems to be required in order that the Court may dig itself out of the hole it fell into by its holding that *Furman* "strikes down the proviso as violative of the Eighth and Fourteenth Amendments." *Furman,* as I understand it, holds that life imprisonment is valid, but because of the option, *Furman* strikes down the death penalty.

Since writing the above I have read the well documented opinion of the Chief Justice. I fully concur therein.

Justice SHARP concurring in the opinion of Chief Justice Bobbitt:

I concur fully with the views expressed by the Chief Justice in his well-documented opinion and in his conclusion that the effect of *Furman* is to invalidate the death penalty under the laws of this State as presently written and to make life imprisonment the punishment for first degree murder, rape, arson, and first degree burglary. In signifying my concurrence I add these comments:

In my view, there are no constitutional infirmaties in capital punishment *per se* and, under the conditions prevailing today, I do not consider the death penalty cruel and unusual punishment for the crimes for which the State Constitution authorizes the General Assembly to prescribe it. Thus, were I to permit my personal views on capital punishment as a State policy to dictate my decision in this case, I would have voted with the majority. This, however, I am not at liberty to do.

The majority decision is based upon the supposition that in 1949, when the legislature *rewrote and re-enacted* G.S. 14-21, it would have left the statute unchanged had it known the United States Supreme Court would invalidate the death penalty as authorized in the rewritten section. With all deference, I do not attribute to the majority such occult powers. They cite the failure of seventeen bills or resolutions introduced in the General Assembly to abolish or limit capital punishment. However, they fail to mention the similar fate of the two Judicial Council bills which, in 1969 and 1970, sought to repeal the power of commutation which the legislature had given the jury trying a capital case and to make the death sentence mandatory for the four crimes. In short, the legislature rejected the proposal that capital punishment be retained without the discretionary power in the trial jury to determine whether the convict's sentence should be death or life imprisonment.

The question of capital punishment is one of high public policy, and the constitutional mandate is that it shall be determined by the legislature—not by the judiciary. N. C. Const. art. I, § 6 declares: "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." The history of the Supreme Court of North Carolina has been one of judicial restraint and strict adherence to the doctrine of the separation of powers. Our opinions abound with declarations that public policy is the exclusive

province of the legislature and its determination is not subject to judicial review; and that the wisdom or impolicy of the law is solely for the legislature and we have neither the power nor the desire to usurp its prerogative. *See* 2 North Carolina Digest *Const. Law* §§ 6, 10 (1967) and cases cited therein.

This Court, which has consistently deplored the encroachment of other courts upon the legislative prerogatives during the past decade, now follows suit and sets its own example of judicial overreaching by changing the penalty for rape, first degree murder, arson and first degree burglary "from death or life imprisonment in the discretion of the jury to mandatory death." The majority concede that this is "an upward change of penalty" which cannot be applied retroactively. Thus, while giving lip service to the doctrine of separation of powers, this Court does today what the legislatures of 1969 and 1971 declined to do. Had this action been taken by the General Assembly, I would have neither legal nor personal objections. However, when the Court takes such action, in my view, it violates fundamental constitutional principles. I therefore dissent from the conclusion reached by the majority in the advisory opinion.

ALLEN F. HOOTS AND WIFE, SALLIE B. HOOTS v. H. R. CALAWAY AND WIFE, ALICE B. CALAWAY

No. 44

(Filed 26 January 1973)

1. **Contracts § 5; Evidence § 32— part of contract in parol and part in writing**

When part of a contract is in parol and part in writing, the parol part can be proven if it does not contradict or change that which is written.

2. **Frauds, Statute of § 7; Vendor and Purchaser § 1— oral guarantee of acreage**

A guarantee of the number of acres to be conveyed is not required to be in writing.

3. **Evidence § 32— memorandum of sale of realty — parol evidence — guarantee of acreage**

Where the evidence established that the parties did not intend to incorporate their entire agreement in a memorandum of sale stating that the sales price of two farms was $110,000 and that the farms contained 400 acres, the parol evidence rule did not preclude plaintiffs' evidence that defendant had agreed orally on a sales price of $275 per acre for a guaranteed 400 acres and had agreed orally to refund to plaintiffs $275 per acre for any shortage of acreage, since the

alleged oral agreement was not in conflict with any of the provisions of the memorandum of sale.

4. **Rules of Civil Procedure § 50— allowance of judgment n.o.v. — ruling on alternate motion for new trial**

Even though the trial court allows a motion for judgment n.o.v., the court must also rule on an alternative motion for a new trial so that a party can appeal conditionally from an adverse ruling on the alternate motion. G.S. 1A-1, Rule 50.

APPEAL by defendant H. R. Calaway under G.S. 7A-30(2) from a decision of the Court of Appeals which reversed the judgment *non obstante veredicto* entered by *Long, J.*, at the 10 January 1972 Session of FORSYTH Superior Court, reinstated the verdict of the jury and remanded the cause to the superior court for the entry of judgment on the verdict.

Plaintiffs alleged they agreed to purchase from defendants at $275 per acre certain tracts of land in Davie County, North Carolina; that defendant H. R. Calaway represented and guaranteed to plaintiffs that the tracts contained a total of 400 acres and that, if in fact they contained less than 400 acres, the purchase price would be reduced or refunded by an amount equal to $275 per acre multiplied by the difference between the actual acreage and the 400 acres represented by defendants to be in the tracts; that the tracts were conveyed by defendants to plaintiffs by deed dated 2 July 1968 at the purchase price of $110,000 based on 400 acres at $275 per acre; and that plaintiffs made a down payment of $30,000 in cash and executed five balance purchase-price notes dated 1 July 1968, each for $16,000, bearing interest at 5% per annum, due on the 1st of July in each of the years 1969, 1970, 1971, 1972 and 1973 and secured payment thereof by a deed of trust on the tracts to Lester P. Martin, Jr., Trustee.

Plaintiffs further alleged that "[s]ome months subsequent to July, 1968, plaintiffs learned that the aforesaid real estate did not in fact contain 400 acres, but rather contained only 358 acres"; and that, on account of the deficiency of 42 acres, plaintiffs were entitled to a reduction or refund in the amount of $11,550 and in addition a credit of $1,155, the amount of the interest plaintiff had paid on $11,550 for the years ending 1 July 1969 and 1 July 1970.

Plaintiffs alleged separately three alternative claims (bases) for the relief sought: (1) Right to recover for over-

payment on account of guarantee of acreage; (2) breach of warranty clause in deed; (3) false and fraudulent representations as to the acreage made by defendant H. R. Calaway.

Answering, defendants denied all of plaintiffs' essential allegations, alleging that the tracts sold and conveyed by defendants to plaintiffs consisted of two farms, the lines and corners of which were well known to plaintiffs; and that the writings constituted the entire contract between the parties. Defendants expressly pleaded the statute of frauds, G.S. 22-2, and the parol evidence rule, in bar of plaintiffs' right to recover on any alleged parol agreement.

Plaintiffs elected to proceed only on their first claim for relief, abandoning their second and third claims.

Evidence was offered by plaintiffs and by defendants.

The evidence offered by plaintiffs included testimony of plaintiff Allen F. Hoots (Hoots) to this effect: When approached by Hoots and asked what he would take for his farms, defendant H. R. Calaway (Calaway) replied: "$300 an acre, or $120,000." With reference to the acreage, Calaway said "that he had 400 acres that he could guarantee [Hoots] was there," and added: "I've got 400 acres. There might be a half acre over or an acre, but forget that, I've got 400 acres that I know is there." Hoots protested that this price was too high and said, "I will give you $275 an acre, which would be a total of $110,000." Referring to this offer, Calaway, after figuring a bit, said: "I believe I'll take it." Hoots replied: "All right, Mr. Calaway." The land involved consists of two farms in Davie County. The larger farm is on the Yadkin River and is about two and one-half miles east of Advance, where Hoots and Calaway had their first conversation. The smaller farm is located about two and one-half miles west of Advance.

On the Wednesday following their conversation in Advance, Hoots and Calaway went over both farms. The lines and corners of each farm were pointed out to Hoots. Their tour of the farm was made in a Jeep operated by Cecil Robertson, a worker on Calaway's farm(s).

We quote below a portion of the testimony of Hoots, viz: "So we went back to the other farm. He carried me all over it, showed me where the boundaries were, where the fences and gates and buildings were on it, and so forth. And we were

coming back from looking at the northwest corner up the branch on the big farm, the one east of Advance, and when we come through the bridge, coming under the bridge there, why I said to Mr. Calaway, I says, 'Mr. Calaway, now, how do we want to handle this in the event of any shortage in this land? How should we handle it? Do you want to go to a lawyer and draw up an agreement? Or, how is the best way? Or, how had you rather handle it?' And he says, 'There isn't but one way to handle it, and that is to handle it the same way that I handled this piece of land we just looked at, the upper tract.' He says, 'I bought it from Mr. Lester Riley, and the deed called for 77 acres, and when I bought it, I thought I was getting 77 acres,' and he said, 'I paid him for the land and . . . at a later date I had it surveyed and it was only 65 acres, and . . . he had to bring the money back, or he did bring the money back and give it to me . . . it liked to have killed him, but he did do it, and . . . that's the only way to handle this deal. . . . In the event there is a shortage, a shortage in the acreage, why I will refund your money at the rate of $275 per acre.' "

After Calaway had shown Hoots the boundaries around the farms, they went "to the house." There Calaway got out "some maps or plots" and "laid them out on the table" and showed Hoots the boundaries all around the farm. At that time, Calaway said: "Now, here is what you get. Here is the amount of acreage. There is 400 acres in the total thing, in the total plot." After pointing out the lines Calaway said: "This is the boundary. That is it." Hoots testified: "And the plot showed the amount of land that he had said was there, so I accepted his word for it as being there." It was agreed that they would meet the following Saturday at which time they would work out the details and Hoots would make the down payment.

On the following Saturday, 29 June 1968, Hoots and his son, Gene Hoots, and Calaway and his lawyer son, Stephen Calaway, met at the riverside farm. On that occasion, Hoots delivered his check for $30,000 payable to H. R. & Alice B. Calaway as down payment on the purchase price of $110,000. Stephen Calaway drafted in longhand on a yellow legal pad a document entitled "Memorandum of Sale" and read it over to Hoots, Hoots's son, Gene, and to Calaway. The "Memorandum of Sale," which was signed by Calaway but not by Hoots, is quoted in full below:

"North Carolina Memorandum of Sale
Davie County

H. R. Calaway — Seller
Allen F. Hoots — Buyer

Farm

Total Sales Price	110,000.00
Down payment	30,000.00
Time Balance	80,000.00
Financed 5 years	16,000.00 annually
Interest 5%	

Notes as follows:

	dated	interest	due	interest payable
Note 1	July 1, 1968	5%	July 1, 1969	July 1, 1969 &
Note 2	July 1, 1968	5%	July 1, 1970	on July 1 of
Note 3	July 1, 1968	5%	July 1, 1971	each year till
Note 4	July 1, 1968	5%	July 1, 1972	all notes paid
Note 5	July 1, 1968	5%	July 1, 1973	in full —

Default in one cause others to fall due —

escrow priviledge [sic] re substitution of collateral to clear title —
~~if notes carried over interest to 6% -~~
purchase money mortgage—release if sell
65 acre lester place —

Received of Allen F. Hoots the sum of $30,000.00 as down payment on purchase price of 2 farms in Advance, N. C. (400 acres more or less). The total price of farm is $110,000.00. The balance of $80,000.00 on purchase price will be financed for 5 years at 5% interest. The notes, deed of trust, and deed will be executed on July 1, 1968 or as soon thereafter as attorneys for both parties hereto can complete arrangements.

*Allen F. Hoots *H. R. Calaway
[No signature] Signed H. R. Calaway"

[* Handwriting of Stephen Calaway.]

When asked whether he had any discussion with Calaway concerning the "65-acre Lester place," Hoots testified: "Yes. I told him when I was buying this that I probably would have

to sell the 65 acres, or would need to sell the 65-acre tract; and he says, 'All right. If you want to sell it, I'll give you escrow privileges to go ahead and sell it for the purchase price,' or 'The price of $275 per acre will be applied on the notes with escrow privileges that will go towards paying off your notes, the total price.' "

At their meeting on 29 June 1968, the "Memorandum of Sale" and the keys to the buildings on the farms, were delivered to Hoots. It was agreed that the transaction was to be completed the following Tuesday.

The transaction was closed on Tuesday, 2 July 1968, at which time the following documents were executed and delivered: (1) Deed dated 2 July 1968 from Harley Robert Calaway and wife, Alice Ball Calaway, to Allen F. Hoots and wife, Sallie B. Hoots. This deed recites a consideration "of TEN DOLLARS AND OTHER VALUABLE CONSIDERATIONS ($10.00 ovc)." The description consists of nine separately described tracts of land. (2) Deed of trust dated 2 July 1968 from Allen F. Hoots and wife, Sallie B. Hoots, to Lester P. Martin, Jr., Trustee, which conveys the identical land described in the Calaway-Hoots deed, securing the payment of five notes, each for $16,000, bearing interest at the rate of 5% per annum, payable on the second day of July in the years 1969, 1970, 1971, 1972 and 1973, respectively. (3) The five notes described in and secured by the deed of trust to Lester P. Martin, Trustee.

Additional evidence offered by plaintiffs tends to show that Hoots had the property surveyed by Franklin Surveying Company in May-June 1968. The survey he had made disclosed that the riverside farm contained 296.41 acres or 296.29 acres, depending upon the method of computation, and that the smaller farm contained 61.00 acres or 61.02 acres.

With reference to payments, Hoots testified (at the 10 January 1972 Session) that three of the $16,000 notes had been paid and that the last two had not been paid. His testimony is silent as to whether *plaintiffs* had paid any one or more of the three notes which had been paid.

Neither the deed nor any other writing contained an agreement to the effect that the property was sold and conveyed under a contract providing for a refund if it turned out that the actual acreage was less than 400 acres. The deed of trust

contained no provision relating to the release therefrom of the "65-acre Lester place" upon payment of $275.00 per acre or otherwise.

The testimony of Hoots indicates he had sold the property which he purchased from the Calaways. However, his testimony is silent as to when, to whom, and upon what terms the property had been sold.

Of the nine tracts described separately in the Calaway-Hoots deed, eight are portions of the larger (riverside) farm. The ninth tract is the smaller farm. Immediately following the description by metes and bounds of the ninth tract are the words, "containing 79½ acres, more or less." The ninth tract is also described as being Lot No. 11 as shown on a map of the E. E. Vogler property. A portion of the ninth tract described by metes and bounds and referred to as containing "1.1 acre, more or less," was excepted from the conveyance. The total of all acreages referred to in the descriptions of the nine tracts, after deducting excepted acreages, is 411.63 acres, more or less. Hoots had been advised that the ninth tract contained approximately 65 acres.

The evidence offered by defendants included testimony of Calaway tending to show that he agreed to sell both farms to plaintiffs for the lump sum of $110,000, payable as subsequently set forth in the "Memorandum of Sale"; that he did not guarantee that the farms contained 400 acres or agree that, if they contained less than 400 acres, he would reduce or refund the purchase price by an amount equal to $275 per acre multiplied by the difference between the actual acreage and 400 acres; that he exhibited to Hoots his deed and maps which described the farms by metes and bounds and indicated the acreage was in excess of 400 acres; that, although the sale was not made on a per acre basis, it was his understanding that the two farms did contain at least 400 acres; that in his conversations with Hoots he called attention to the discrepancy in the description of the ninth tract, that is, that it actually contained 65 acres rather than the recited 77 plus acres.

Further review of defendants' evidence is unnecessary to decision of the question presented by this appeal.

At the conclusion of all the evidence, each defendant moved for a directed verdict. The motion of defendant Alice B. Calaway was granted. The motion of defendant H. R. Calaway was

denied. Thereupon, the court submitted and the jury answered the following issues:

"1. Did the defendant, H. R. Calaway, contract with the plaintiff, Allen F. Hoots, to sell two farms on a per acre basis as alleged in the Complaint?

"ANSWER: Yes.

"2. If so, did the real estate contained in the two farms contain less than 400 acres?

"ANSWER: Yes.

"If so, how much less?

"ANSWER: 42 acres."

Plaintiffs tendered judgment in their favor and excepted to the court's failure and refusal to sign it.

The court signed and entered the following judgment:

"THIS CAUSE coming on to be heard and being heard before the Honorable James M. Long, Judge Presiding over the January 10, and January 17, 1972, Sessions of Superior Court for Forsyth County, North Carolina, and being heard before a jury, and it appearing to the Court that at the close of the plaintiffs' evidence the defendants moved pursuant to Rule 50, G.S. 1A-1 for a directed verdict, and the Court being of the opinion that the motion should be allowed but submitted the issues as appear of record to the jury for answer, and directed the defendants, if they be so advised, to move under Rule 50(b) for a judgment notwithstanding the verdict in the event issues were answered for the plaintiffs.

"And it appearing to the Court that the issues were answered in favor of the plaintiffs as appear of record and that the defendants, within the time allowed by law, have filed written motion for judgment notwithstanding the verdict, and the Court still being of the opinion that the motion for directed verdict should have been allowed, and that the motion for judgment notwithstanding the verdict should now be allowed.

"And it further appearing to the Court that the plaintiffs made an alternative motion for a new trial and that the motion should be denied.

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

"(1) That the verdict rendered by the jury in this cause be and the same is hereby set aside and vacated.

"(2) That the defendants' motion for directed verdict is hereby allowed and that the defendants' motion for judgment notwithstanding the verdict is hereby allowed; that this action is hereby dismissed with prejudice.

"(3) That the plaintiffs' alternative motion for a new trial be and the same is hereby denied.

"Let the costs of this action be taxed against the plaintiffs.

"By consent of the parties, this judgment is signed out of term and outside the district."

Plaintiffs excepted and appealed. The Court of Appeals reversed, one member of the hearing panel dissenting.

Booe, Mitchell, Goodson and Shugart by William S. Mitchell and Wayne C. Shugart for plaintiff appellees.

White and Crumpler by James G. White and Michael J. Lewis for defendant appellant.

BOBBITT, Chief Justice.

The sole question presented by this appeal is whether, as a matter of law, the evidence offered by plaintiffs, when considered in the light most favorable to them, was sufficient to be submitted to the jury. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971); *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971); *Roberts v. Memorial Park*, 281 N.C. 48, 187 S.E. 2d 721 (1972).

Plaintiffs' action is based on legal principles stated by Justice (later Chief Justice) Barnhill in *Queen v. Sisk*, 238 N.C. 389, 391-92, 78 S.E. 2d 152, 155 (1953), as follows:

"When a sale is consummated upon an acreage basis and there is a deficiency in the quantity actually conveyed, a court of equity will abate the value of the deficiency at the agreed price per acre. [Citations omitted.]

"Where the purchase and sale is upon an acreage basis and the purchaser sues to recover on account of an alleged deficiency in the acreage and a consequent overpayment, he is not required

to allege or prove fraud. The action to recover the excess payment is an action in *assumpsit* for money had and received to the use of the plaintiff, under the doctrine of unjust enrichment. [Citations omitted.]"

Unquestionably, the testimony of Hoots as to his alleged parol agreement with Calaway, if competent, was sufficient to require submission of the first issue and to support an affirmative answer. Its competency is challenged by Calaway as inadmissible under the parol evidence rule.

For a general statement of the parol evidence rule, see Stansbury, N. C. Evidence 2d, § 251, quoted by Judge Morris in her opinion for the Court of Appeals. 15 N.C. App. 346, 351, 190 S.E. 2d 328, 331 (1972).

Having reached the conclusion that consideration of the testimony of Hoots as to the alleged parol agreement is not precluded by the parol evidence rule, we are not presently concerned with whether the rule is one of substantive law, as stated by Stansbury, or a rule of evidence, as implied in certain of our decisions. See *Products Corporation v. Chestnutt,* 252 N.C. 269, 275, 113 S.E. 2d 587, 593 (1960).

[1, 2] We agree with Judge Morris that *Stern v. Benbow,* 151 N.C. 460, 66 S.E. 445 (1909), is authority for the decision of the Court of Appeals and our decision in this case, and that the legal principles here applicable are stated by Chief Justice Clark as follows:

"When a contract is reduced to writing, parol evidence cannot be admitted, to vary, add to, or contradict the same. But when a part of the contract is in parol and part in writing, the parol part can be proven if it does not contradict or change that which is written. [Citations omitted.]

"It is true, also, that an agreement for the conveyance of the land is not binding unless reduced to writing and signed by the party to be charged; but a guarantee of the number of acres, like the receipt of the purchase-money or recital of the consideration, is not required to be in writing. [Citations omitted.]" *Id.* at 463, 66 S.E. at 446.

In *Sherrill v. Hagan,* 92 N.C. 345 (1885), the action was for the surrender and cancellation of a note and for money paid. Plaintiff purchased a tract of land known as the "George

Hooper Place" from defendant for $2,000, $1,000 of which was paid in cash and the balance secured by two notes. The first note was paid when due. The plaintiff paid $300 on the second note [presumably a $500 note] when it was due. Other than the deed and notes, there was no written evidence of the contract of sale. Over defendant's objection [based on the "parol evidence rule" and the "statute of frauds"] plaintiff was permitted to testify that before the date of the deed the defendant orally agreed with plaintiff that if the tract did not contain as much as 350 acres the defendant would make good the deficiency and refund the amount of the deficiency at the rate of $5.71 3/7 per acre. After the deed was delivered, plaintiff had the land surveyed and found that it contained only 298 3/4 acres. Defendant denied any such oral guarantee.

Three issues were submitted to the jury and answered as follows:

1. Did the defendant Hagan agree to pay or refund plaintiff $5.71 per acre for the difference between 350 acres and the number of acres actually contained in the land described in the pleadings, in case said land did not contain as much as 350 acres? The jury answered, "Yes." 2. How many acres did the land contain? The jury answered, "298½ acres." 3. How much does defendant owe plaintiff, if anything? The jury answered, "$294.06." The defendant appealed from the judgment entered on the verdict. The Supreme Court, finding no error, affirmed.

The following excerpts from the opinion of Justice Ashe show the basis of decision:

"[T]he undertaking to make good the deficiency in the number of acres was a distinct and independent contract, and did not purport or stipulate to pass any interest in the land, and, therefore, was not such an agreement as falls within the statute of frauds." *Id.* at 348-49.

"[C]onceding it to be all one contract, the deed is evidence of one part of the agreement, and the promise to make good the deficiency in the number of acres is another part of the contract left in parol, so that the parol proof offered and admitted did not add to or contradict the deed." *Id.* at 349-50.

McGee v. Craven, 106 N.C. 351, 11 S.E. 375 (1890), and *Currie v. Hawkins,* 118 N.C. 593, 24 S.E. 476 (1896), and *Stern v. Benbow, supra,* involve factual situations similar to

that considered in *Sherrill v. Hagan, supra,* and the decisions in the four cases and the bases of decision are in accord.

However, the only documents involved in those cases were deeds, purchase-money notes, and mortgages. Here consideration must be given to the "Memorandum of Sale."

[3] The evidence indicates that this "Memorandum of Sale" was prepared by Stephen Calaway and signed by Calaway on the occasion Hoots delivered his $30,000 check. On its face, the "Memorandum of Sale" is an informal document. As noted by Judge Morris, both Calaway and Stephen Calaway testified that this writing did not purport to embrace all terms of the Hoots-Calaway agreement. Stephen Calaway testified: "My intent was a receipt for the money and a summary recital of the payment terms and agreement as to the sale, but not the complete agreement." The pertinent question is whether the alleged oral agreement in respect of a guarantee of acreage is in conflict with any of the provisions of the "Memorandum of Sale."

We note that there is no controversy as to the identity of the land involved. The lines and corners of each farm were known to Hoots and to Calaway. According to Hoots, Calaway guaranteed the acreage to be at least 400 acres. The sale price of $110,000 is in accord with Hoots's testimony that the sale was based on 400 acres at $275 per acre. Calaway, according to his own testimony, thought the two farms contained 400 acres or more. He testified that his deeds and maps indicated he owned 400 acres or more. The "Memorandum of Sale" refers to "two farms in Advance, N. C. (400 acres more or less)." The tabulation of the acreage in the nine tracts described in the Calaway-Hoots deed exceeds 400 acres. In our view, the alleged oral agreement is not in conflict with any of the provisions of the "Memorandum of Sale."

We hold that the evidence, when considered in the light most favorable to plaintiffs, was sufficient to be submitted to the jury; that the original denial of defendant's motion for a directed verdict was correct; and that the court erred by entering judgment for Calaway notwithstanding the verdict.

There remains for consideration a feature of the case which is not discussed in the briefs.

The case is before us solely on plaintiffs' appeal. The judgment dismissed plaintiffs' action with prejudice. Defendant

(Calaway) did not except to or appeal therefrom. Hence, the record does not show exceptions, if any, defendant may have noted with reference to the admission or exclusion of evidence or to other features of the trial.

[4] The record shows: After the jury returned the verdict in plaintiffs' favor, defendant made a motion for judgment notwithstanding the verdict and joined with this motion an alternative motion for a new trial as authorized by G.S. § 1A-1, Rule 50(b)(1). [See Rule 59 relating to grounds for a new trial.] In granting defendant's motion for judgment notwithstanding the verdict, the court expressed the view that this rendered unnecessary the ruling on defendant's alternative motion for a new trial and failed to rule thereon.

We note that the court denied an alternative motion of *plaintiffs* for a new trial if the court denied their motion for judgment in accordance with the verdict.

G.S. § 1A-1, Rule 50(c)(1) provides: "If the motion for judgment notwithstanding the verdict, provided for in section (b) of this rule, is granted, the court shall also rule on the motion for new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for new trial is thus conditionally granted, the order thereon does not effect the finality of the judgment. In case the motion for new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate division has otherwise ordered. *In case the motion for new trial has been conditionally denied, the appellee on appeal may assert error in that denial;* and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate division." (Our italics.)

The court should have ruled on the merits of defendant's alternative motion for a new trial but failed to do so. If the court had conditionally denied the defendant's alternative motion for a new trial, defendant, as provided in Rule 50(c)(1), could have excepted to such order of denial and appealed conditionally therefrom. Incident to such conditional appeal, defendant was entitled to have *his* exceptions included in the case and record on appeal and to set forth the assignments of error which he asserted entitled him to a new trial in the event the judgment n.o.v. was reversed on appeal.

In future cases, the trial court must rule on an alternative motion for a new trial and a party must appeal conditionally from an adverse ruling thereon. In this connection, see generally *Montgomery Ward & Co. v. Duncan,* 311 U.S. 243, 85 L.Ed. 147, 61 S.Ct. 189 (1940); 5A J. Moore, Federal Practice, Pars. 50.13-50.17; 9 C. Wright and A. Miller, Federal Practice and Procedure, §§ 2537-2540 (1971).

We note that, under our judicial system, the judge who conducted the trial of this case is no longer the presiding judge of the Twenty-first Judicial District. We deem it inappropriate for a superior court judge who did not try the case to pass now upon defendant's alternative motion for a new trial.

Under the circumstances of the present case, we have reached the conclusion that justice requires that defendant be afforded an opportunity to have considered on appeal any asserted errors of law which he contends entitles him to a new trial. Accordingly, the judgment of the Court of Appeals, which reverses the judgment n.o.v. and remands the cause for entry of judgment for plaintiffs on the verdict, is affirmed with direction that upon the entry of such judgment defendant be permitted, if so advised, to except thereto and appeal therefrom and upon appeal obtain a review of the errors for which he asserts he is entitled to a new trial.

Affirmed with directions as to order of remand.

STATE OF NORTH CAROLINA v. BILLY C. DIX

No. 19

(Filed 26 January 1973)

1. **False Imprisonment § 1; Kidnapping § 1— kidnapping and false imprisonment defined**

   Kidnapping is the unlawful taking and carrying away of a human being against his will by force; false imprisonment is illegal restraint of a person against his will.

2. **Kidnapping § 1— asportation — removal from one part of jail to another**

   There was not a sufficient asportation to constitute the offense of kidnapping where defendant forced a jailer at gunpoint to go from the front door of the jail to the jail cells, a distance of some 62

feet, compelled the jailer to release three prisoners, and locked the jailer in a cell.

Justice HUSKINS dissenting.

Justice HIGGINS joins in the dissenting opinion.

APPEAL by defendant from the decision of the Court of Appeals (14 N.C. App. 328, 188 S.E. 2d 737), which found no error in his trial before *Exum, Judge,* at the 7 December 1971 Session of ROCKINGHAM.

Defendant was convicted of kidnapping upon an indictment which charged that, on 19 April 1971, he did unlawfully and feloniously "kidnap, seize and detain H. C. Crowder against his will by carrying and forcing the said H. C. Crowder, assistant jailer, from a first floor section of the Rockingham County jail to a lower floor section thereof at the point of a pistol and locking [him] into a barred cell in said jail. . . . " From a sentence of 12-25 years, subject to specified time credits, defendant appealed. The Court of Appeals affirmed, two members of the hearing panel concurring, one dissenting. Defendant appeals to this Court as a matter of right under G.S. 7A-30(2) (1969).

Attorney General Morgan, Assistant Attorney General Satisky for the State.

Gwyn, Gwyn & Morgan for defendant appellant.

SHARP, Justice.

The determinative question is the sufficiency of the evidence to withstand defendant's motion for nonsuit. The facts material to decision are not controverted.

On 18 April 1970 defendant (aged 23) was incarcerated in the State's prison camp at McLeansville in Guilford County. There, four days earlier, he had begun serving sentences totaling four years which had been imposed by the Superior Court of Rockingham County the preceding week. About noon on 18 April 1970, defendant and three other prisoners escaped.

Before defendant was removed from the Rockingham County jail in Wentworth he had promised his "buddy," Bobby Brown, that he would come back and get him. About 1:30 a.m. on 19 April 1970 defendant knocked on the front door of the Wentworth jail, and H. C. Crowder, the assistant jailer on duty, opened the door. Defendant "threw a gun" in his face,

ordered him to turn around with his hands up, and said, "You got three of my buddies and I will kill you if I don't get them." With a 25-caliber automatic "stuck in [Crowder's] back," defendant marched him from the jail vestibule through the office and into a hall from which two steps gave access to the lower cell blocks. Keeping the gun at the back of Crowder's head, and repeating his threats to kill him, defendant compelled Crowder to open the cell-block door. After Bobby Brown and two other prisoners came out, defendant forced Crowder into the cell. From the front door to the cell defendant had forced Crowder to walk a distance of 62 feet.

Crowder testified that after he entered the cell defendant made about three paces backward and then advanced on him saying, "Damn you, I will kill you"; that he then held the gun up to Crowder's head and snapped it; that the gun did not go off and defendant backed out. After locking the cell block defendant and his three companions fled. Nine minutes later Crowder was released by a trusty, who heard his cries for help.

In brief summary, defendant's testimony tended to show: He broke into the jail with "full intention of committing the crime of aiding and abetting and helping the prisoners to escape," but with no intention of kidnapping Mr. Crowder. He never threatened Crowder in any way. His only purpose in "putting the gun on him" was to scare him, but he told him he was not going to do anything to him but lock him in the cell. He left the keys to the cell block on the desk in the office. In defendant's opinion the distance from the front door to the cell was only 50 feet. He was captured in the State of Virginia about sundown that same day.

Kidnapping, which was a misdemeanor at common law, in this State is one of the most serious of crimes. By statute it is made a felony punishable by imprisonment for a term of years or for life in the discretion of the court. G.S. 14-39 (1969); *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216 (1966); *State c. Lowry,* 263 N.C. 536, 139 S.E. 2d 870, *appeal dismissed sub. nom.,* 382 U.S. 22, 15 L.Ed. 2d 16, 86 S.Ct. 227 (1965); *State v. Kelly,* 206 N.C. 660, 175 S.E. 294 (1934). North Carolina, however, is one of the few states which has not, by statute, redefined kidnapping and its associated common law offense, false imprisonment. *See* Note, 110 U. Pa. L. Rev. 293 (1961). "Thus the common law with respect to kidnapping and false

imprisonment is the law of this State." *State v. Ingland,* 278 N.C. 42, 50, 178 S.E. 2d 577, 582 (1971). *See generally* 2 Burdick, *Law of Crime* §§ 387-389 (1946); Perkins, *Criminal Law* 129-136 (1957).

[1] In our decisions, *kidnapping* is defined generally as the unlawful taking and carrying away of a human being against his will by force, threats, or fraud. *State v. Murphy,* 280 N.C. 1, 184 S.E. 2d 845 (1971); *State v. Barbour,* 278 N.C. 449, 180 S.E. 2d 115 (1971) *cert. denied,* 404 U.S. 1023 (1972); *State v. Ingland, supra; State v. Bruce, supra; State v. Gough,* 257 N.C. 348, 126 S.E. 2d 118 (1962). *False imprisonment* is the illegal restraint of a person against his will. *State v. Lunsford,* 81 N.C. 528 (1879). "Our decisions hold that the unlawful detention of a human being against his will is false imprisonment, not kidnapping." *State v. Ingland, supra* at 51, 178 S.E. 2d at 582. The element of carrying away is the differentiating factor between the two offenses.

Blackstone and some other English authorities defined kidnapping as the "forcible abduction or stealing away of a man, woman, or child from their own country and sending them into another." 4 Blackstone, *Commentaries* *219. Thus, originally, a very substantial asportation was contemplated. It soon became apparent, however, "that distance and isolation could be achieved in the realm, and that even distance was not essential to isolating a victim from the law and his friends, *e.g.,* by 'secret' confinement in the immediate vicinity." Model Penal Code § 212.1, Comment (Tent. Draft No. 11, 1960). In this country it was early held that the transportation to a foreign country was not a necessary part of this offense. 1 Am. Jur. 2d *Abduction and Kidnapping* § 1 (1962).

Bishop's definition of kidnapping, "false imprisonment aggravated by conveying the imprisoned person to some other place," 2 Bishop, *Criminal Law* § 750 (9th ed. 1923), has often been quoted with approval by this Court. *See State v. Ingland, supra* at 51, 178 S.E. 2d at 583; *State v. Lowry, supra* at 540, 139 S.E. 2d at 874; *State v. Gough, supra* at 352, 126 S.E. 2d at 121; *State v. Harrison,* 145 N.C. 408, 417, 59 S.E. 867, 870-71 (1907). Every decision of this Court on the subject recognizes that, in addition to unlawful restraint, the taking, carrying away, transportation, or asportation of the victim from the place where he is seized to some other place is an essential element of common law kidnapping. Aso see *Midgett v. State,*

216 Md. 26, 39-40, 139 A. 2d 209, 216 (1958). An unlawful detention for the purpose of carrying the victim away will not constitute kidnapping until the asportation has in fact been accomplished. *State v. Ingland, supra.*

The specific question presented by this appeal is whether Crowder was "carried away" or "conveyed to some other place" as these terms are used with reference to asportation as an element of kidnapping.

This Court has heretofore decided no case in which a defendant has asported an unlawfully restrained person from one part of the building in which he was seized to another, or from one room to another; nor has it ever attempted "to calculate the requisite asportation in terms of linear measurement" or to delimit the word "place." *See People v. Adams,* 34 Mich. App. 546, 568, 192 N.W. 2d 19, 30 (1971). However, in *State v. Lowry, supra,* there appears a dictum bearing upon these matters, which we have repeated so often that decision in this case requires its examination.

In *State v. Lowry, supra,* defendants forcibly took a husband and wife from their automobile on a public street in Monroe and marched them at gun-point 100 yards to the home of R. Williams, where they were held as hostages for 3-4 hours. In disposing of the defendant's contention that G.S. 14-39 was unconstitutionally vague and overbroad, Justice Clifton L. Moore, writing the opinion for the Court, after stating the common law definition of kidnapping, added the following comment and cited the following authorities to support it:

"It is the fact, not the distance of forcible removal of the victim that constitutes kidnapping. 1 Am. Jur. 2d, *Abduction and Kidnapping,* s. 18, p. 172; *People v. Oganesoff,* 81 Cal. App. 2d 709, 184 P. 2d 953 [(1947)]; *People v. Wein,* 50 Cal. 2d 383, 326 P. 2d 457, cert. den., 358 U.S. 866, 79 S.Ct. 98, 3 L.Ed. 2d 99, reh. den., 358 U.S. 896, 79 S.Ct. 153, 3 L.Ed. 2d 122 [(1958)]." *Id.* at 541, 139 S.E. 2d at 874. The quoted sentence preceding the citations is the *"Chessman-Wein* apothegm," a phrase which was coined by the California Supreme Court in *People v. Daniels,* 71 Cal. 2d 1119, 1129, 80 Cal. Rptr. 897, 903, 459 P. 2d 225, 231 (1969) to designate the rule laid down in *People v. Chessman,* 38 Cal. 2d 166, 192, 238 P. 2d 1001, 1017 (1951) and *People v. Wein, supra* at 399-400, 326 P. 2d at 466. This rule—first laid down by the California court in *Chessman*

and reaffirmed in *Wein*—recites, "It is the fact, not the distance, of forcible removal which constitutes kidnapping in this State."

The *Chessman-Wein* apothegm is part of the first sentence in 1 Am. Jur. 2d, *Abduction and Kidnapping* § 18, at 172 (1962), cited in the preceding quotation from *Lowry*. The entire first sentence of Section 18 reads as follows: "*Under most statutes* it is the fact, not the distance, of forcible removal of the victim that constitutes kidnapping, and there are numerous states under whose legislation interstate transportation of the victims is not necessary." (Emphasis added.) Clearly, the quoted statement has no application to common law kidnapping; nor do the two California cases cited, *Oganesoff* and *Wein*, support the proposition for which they were cited in *Lowry*.

In *Oganesoff*, the asportation was substantial and fulfilled common law requirements. The defendant enticed his victim into his automobile by falsely promising to take her home. Instead he drove her to his house, a considerable distance away. When she attempted to escape he beat and kicked her and forced her into his house at knife point. In some manner she escaped into a cornfield. However, he found her, forcibly returned her to the house, and raped her. The *Chessman-Wein* apothegm thus had no more application to the facts in *Oganesoff* than it did to those of *Lowry*, since the victims in both were transported over a substantial distance from one place to another place, an entirely different environment.

In *Wein*, the court purported to be interpreting a statute. In that case the defendant gained admission to the home of his victim by a ruse, tied her up, forced her to go from room to room until she found her wallet, robbed her and then raped her. The defendant was convicted of kidnapping to commit robbery under Section 209 of the California Penal Code, which permits the imposition of the death penalty against "any person who kidnaps or carries away any individual to commit robbery" if the victim suffers bodily harm. Cal. Penal Code § 209 (West 1970). In pertinent part, Section 207 defines kidnapping as the forcible taking of any person within the State and carrying him "into another country, State or county or into another part of the same county. . . ." Cal. Penal Code § 207 (West 1970).

On appeal, the defendant in *Wein* argued that the legislature never intended asportation between rooms in a dwelling to constitute kidnapping. The California Supreme Court, how-

ever, on authority of *People v. Chessman, supra,* reaffirmed its previous interpretation of the statutes by holding that *any* movement sufficed for a conviction under the challenged sections.

Thus, from the foregoing analysis it appears that the authorities cited in support of the *Lowry* apothegm do not, in fact, support the proposition that *any* asportation will satisfy the common law requirement that a kidnapped victim be conveyed from one place to some other place. It is here noted that 18 years after the *Chessman* decision, when time had demonstrated the unwisdom of the *Chessman-Wein* apothegm, the California Supreme Court confessed error in its previous construction of Sections 207 and 209 of the Penal Code and overruled *Chessman* and *Wein. People v. Daniels, supra* at 1139-40, 80 Cal. Rptr. at 910, 459 P. 2d at 238. *See also People v. Green,* 3 Cal. App. 3d 240, 244, 83 Cal. Rptr. 491, 492 (1969).

The *Lowry* repetition of the *Chessman-Wein* apothegm that "it is the fact, not the distance of the forcible removal of the victim that constitutes kidnapping" has been reiterated in our subsequent cases. *See State v. Hudson,* 281 N.C. 100, 187 S.E. 2d 756 (1972); *State v. Murphy, supra; State v. Barbour, supra; State v. Ingland, supra; State v. Penley,* 277 N.C. 704, 178 S.E. 2d 490 (1971).

In *Ingland,* it is said that the early English common law requirement of transportation to another country had been so relaxed that now *"any* carrying away is sufficient. The distance the victim is carried is immaterial. *State v. Lowry, supra." State v. Ingland, supra* at 51, 178 S.E. 2d at 583.

The State's evidence in *Ingland* tended to show: The victim, the defendant and others were members of a group engaged in criminal activities. The defendant, armed with a shotgun and accompanied by three others, one with a knife, ushered the victim (who was suspected of being an informer) from defendant's home and into an automobile. They drove to a wooded area where the victim was "walked" 15-20 yards into the woods and laid face down on the ground, into which stakes were driven so that he could not move without causing his throat to be pierced. He remained under guard in that position for 4½ hours, after which he was released. The defendant's defense was that the victim voluntarily accompanied the group into the woods to talk out a misunderstanding and that he left them there and never returned. He appealed his conviction of kidnapping, and

this Court awarded a new trial because the judge said YES in answer to the jury's question, "Would forcible detention be classified the same as an act of kidnapping?" This was error because, as heretofore pointed out, in this State forcible detention without asportation is false imprisonment, not kidnapping.

In *Barbour,* the victim gave the defendant, a hitchhiker, a ride in his truck. After they had traveled four miles the defendant put a knife to the victim's throat, told him he was an escaped convict and ordered him to drive to a certain place. After driving ten miles with the knife at his throat, the victim suddenly jerked the truck to the left at the entrance to a filling station and in front of an approaching car. The truck door flew open, and the defendant fell out. In our opinion, affirming Barbour's conviction of kidnapping, the *Chessman-Wein* apothegm appears as a portion of a quotation from 51 C.J.S. *Kidnapping* § 1(b)(8), at 502-03 (1967). That quotation had reference to the kidnapping statutes in some states. *Lowry* was cited as being in accord with the quotation.

In *Murphy,* by fraud, defendant lured his victim from a parking lot adjacent to a public street, 150 feet down a path, under a fence, and then 60 feet into the woods. There he tied, tortured and left his victim for dead. His conviction of kidnapping was upheld. In *Hudson,* the defendant frightened a 15-year-old retarded girl into leaving her home, to which he had obtained entrance by fraud. He took her to his house trailer where he abused and permanently injured her. He then drove her to a river bank where he abused her further and left her for dead. In *Penley,* the victim was forced to drive a highjacked prison bus for more than a mile.

In *Ingland, Murphy,* and *Hudson, Lowry* is cited as authority for the statement that, in kidnapping, *"any* carrying away is sufficient. 'The distance the victim is carried is immaterial.' " Taken literally, the *Lowry* statement, as amplified in the later decisions referred to above, would make the test for asportation in kidnapping the same as in larceny. "[A] bare removal from the place where the goods are found by the thief, though he does not make off with them, is a suffcient asportation or carrying away." *State v. Craige,* 89 N.C. 475, 477 (1883). Our research has disclosed no case—and none has been called to our attention—where a common law state in which kidnapping has not been redefined by statute has thus extended the scope of the crime. The asportation in *Lowry, Ingland, Barbour, Murphy,*

Penley, and *Hudson* was substantial—not miniscule. It did not relate to such a narrow rule and, in no case decided by this Court, will the facts support it.

As earlier pointed out in the discussion of the California cases cited in *Lowry,* California Penal Code Sections 207 and 209 both made the carrying away of the victim an essential element of the crime of kidnapping. However, in *Chessman* and *Wein* the statutory words of asportation were "drained of their plain meaning." *See* Note, 110 U. Pa. L. Rev. 293, 295 (1961). Since some forcible movement is incidental to the commission of a number of crimes, the inevitable result was that many prosecutions for kidnapping were instituted for the sole purpose of securing a death sentence or life imprisonment for crimes not subject to such severe penalties—and this even though the movement had created no risk to the victim distinct from that inherent in the crime which it accompanied. At the time it considered *Cotton v. Superior Court,* 56 Cal. 2d 459, 15 Cal. Rptr. 65, 364 P. 2d 241 (1961), the California court had become aware of this situation.

In *Cotton, supra,* a group of AFL-CIO pickets invaded a labor camp for the purpose of inducing a strike. In the ensuing melee, persons were pushed to the ground, dragged around, chased and assaulted. A cook was yanked from a toilet, struck on the head, dragged 15 feet, thrown to the ground and kicked. The pickets were indicted for conspiracy, rioting, and kidnapping. The court ordered the kidnapping count dismissed since all asportation appeared "to be only incidental to the assault and rioting." *Id.* at 464, 15 Cal. Rptr. at 68, 364 P. 2d at 244. All laws, the court said, should receive "a sensible construction" and to hold the pickets guilty of kidnapping "could result in a rule which would permit every assault to be prosecuted as a kidnapping . . . [if] the slightest movement was involved." *Id.* at 465, 15 Cal. Rptr. at 68, 364 P. 2d at 244.

Eight years after *Cotton,* in *Daniels* the court specifically repudiated its former construction of Cal. Penal Code § 209 and abrogated the *Chessman-Wein* rule. In *Daniels,* the defendants were, *inter alia,* indicted and convicted under Penal Code § 209 for kidnapping three different women on three separate occasions for the purpose of robbery, the victims suffering bodily harm. Each victim was raped and robbed in her apartment after being forced to walk from one room to another, the distances

varying from 18 to 30 feet. The California Supreme Court reversed defendants' conviction of kidnapping.

Under the *Chessman-Wein* rule, these forced movements of the *Daniels'* victims would clearly have constituted carrying away and supported a conviction of kidnapping—a fact which the court acknowledged. It said, however, that out of the ferment caused by that rule "has arisen a current of common sense in the construction and application of statutes defining the crime of kidnapping." *People v. Daniels, supra* at 1127, 80 Cal. Rptr. at 901, 459 P. 2d at 229. In reaching the conclusion that the forced movements across the room, or from one room to another, could not reasonably be construed to be asportation within the meaning of the statute, the court noted that the movements were merely incidental to the robberies and rapes defendants had intended to commit and that the movements had not substantially increased the risk of harm over and above that necessarily present in those two crimes. Quoting the comment to the kidnapping section of the American Law Institute's Model Penal Code, Model Penal Code § 212.1, Comment (Tent. Draft No. 11, 1960), the court noted the absurdity of prosecuting for kidnapping in cases where the victim of a robbery is forced to open a safe in his own home or to go to the back of the store. Adverting to the rape, robbery, and burglary charges still pending against the defendants Daniels and Simmons, the court said that they might yet be prosecuted "to the fullest extent of the law" for these crimes.

(For cases in which the asportation of a victim for the purpose of robbery was held to go beyond incidental restraint and to constitute kidnapping, *see State v. Soders,* 106 Ariz. 79, 471 P. 2d 275 (1970); *People v. Thomas,* 3 Cal. App. 3d 859, 83 Cal. Rptr. 879 (1970).)

In *People v. Fain,* 18 Cal. App. 3d 137, 95 Cal. Rptr. 562 (1971), a case similar to the one we now consider, two armed prisoners forced the deputy sheriff in charge of the county jail to open cell doors and release defendant and three other inmates. The six inmates then proceeded to the first floor. There they forced Deputy Wilson to open the outside door, by which they escaped. Defendant was indicted for escape and for kidnapping Deputy Wilson, whom he had forced to move from the booking area to the door, a distance of "only a few feet." The defendant pled guilty to escape and was convicted of kidnapping. Applying the rule laid down in *Daniels,* the California

Court of Appeals reversed the conviction of kidnapping. The movement which Officer Wilson was forced to make "was incidental to the escape and did not substantially increase the risk of harm over and above that necessarily present in that offense. . . ." *Id.* at 144, 95 Cal. Rptr. at 565.

The case of *People v. Adams, supra,* also involved the confinement of a prison official within the prison where he worked. During a prison disturbance the defendant and several other armed prisoners seized an inspector whose duties customarily took him through the entire prison. He and three other prison officials were forced to accompany three armed prisoners about 1500 feet to the prison hospital. There they were held 5½ hours during which the prisoners' demands to be allowed to see certain prison officials and a newspaper reporter were met. The prison officials were released unharmed. Thereafter the defendant was indicted for kidnapping under a Michigan statute which, as interpreted by the court, required an asportation when the victim of the alleged kidnapping had not been secretly confined. The Michigan Court of Appeals held that the evidence would not support a conviction of kidnapping. In reaching this decision the court reasoned:

(1) A prison is "an atypical place" for a kidnapping, and movement from one building to another within the prison walls is not significantly different from movement from one room to another in a building.

(2) Neither defendant nor the other felons had any intention of removing the inspector from the prison, and his removal from "4-block," the place of the rioting, to the prison hospital had not exposed him to any increased risk of harm.

(3) "[U]nder the kidnapping statute a movement of the victim does not constitute an asportation unless it has significance independent of the assault. And, unless the victim is removed from the environment where he is found, the consequences of the movement itself to the victim are not independently significant from the assault—the movement does not manifest the commission of a separate crime—and punishment for injury to the victim must be founded upon crimes other than kidnapping." *Id.* at 568, 192 N.W. 2d at 30.

(4) The requisite asportation for kidnapping cannot be calculated in terms of linear measurements; nor can "environment" be defined restrictively. An asportation of 50 feet may

in some cases expose the victim to precisely those abuses which kidnapping statutes are designed to prevent; in other cases, an asportation of 500 feet may alter the victim's situation not at all. "The relevant environment is the totality of the surroundings, animate and inanimate." *Id.*

(5) A caloused concept of kidnapping creates the potential for abusive prosecutions since virtually every false imprisonment, assault, battery, rape, robbery, escape or jail delivery will involve some movement or intentional confinement. When kidnapping, by definition overruns other crimes for which the prescribed punishment is less severe, a prosecutor has the "naked and arbitrary power" to choose the crime for which he will prosecute. *Id.* at 560, 192 N.W. 2d at 26. *See also State v. Johnson*, 67 N.J. Super. 414, 422-23, 170 A. 2d 830, 835 (1961).

Reason No. (5) inveighs heavily against the *Chessman-Wein* rule, for it is generally recognized that, under it, examples of abusive prosecutions have been common. The blame for this, however, "cannot be placed exclusively at the door of the prosecutor for choosing to indict for kidnapping. When an especially outrageous crime is committed there will be a public clamor for the extreme penalty which the law permits, and it is asking too much of public officials and juries to resist such pressures." Model Penal Code § 212.1, Comment (Tent. Draft No. 11, 1960). As the author of the foregoing comment concluded, the maximum penalty for any crime, however outrageous, should be determined by reference to the applicable statute and not by the prosecutor's decision whether to prosecute for the "outrageous crime" or for kidnapping if the penalty is higher and there has been any movement, however slight, in connection with it. *(See* Note, 35 S. Cal. L. Rev. 212 (1962) where it is suggested that such unbounded discretion in the prosecutor might raise an equal protection issue.)

[2] Although *Daniels* and *Adams* involved statutes, the construction of these statutes presented the very problem raised by this appeal, and we find convincing the rationale upon which the California and Michigan courts decided those cases. Here, the movement and confinement to which defendant subjected Crowder is a far cry from common law kidnapping, the basic concept of which never included a mere technical asportation. Crowder was not carried away from the environment in which he was found; he remained inside the jail, which he had in charge. Defendant came to the jail to forcibly take another

prisoner from lawful custody—not to asport Crowder. In effecting the escape defendant "walked" Crowder a distance of not more than 62 feet and locked him in a cell, from which he was released nine minutes later by a trusty who heard his cries for help. The 62-foot asportation was purely incidental to defendant's assault upon the jailer and to the rescue or jail delivery which he accomplished. It had no other significance and created no risks to Crowder which were not inherent in the escape defendant engineered.

Defendant's criminal conduct, of course, created grave risks for himself and all those whom he involved. Upon his own testimony he committed the felony of assault with a firearm upon a law enforcement officer (G.S. 14-34.2 (1969)) and the misdemeanors of false imprisonment and aiding and abetting prisoners to escape from jail. He may also have committed the felony of aiding escaped felons (G.S. 14-259 (1969)). We hold, however, that the evidence will not support his conviction of kidnapping. The Superior Court erred in overruling defendant's motion for nonsuit.

The decision of the Court of Appeals is

Reversed.

Justice HUSKINS dissenting.

My views on kidnapping are fully expressed and documented in *State v. Hudson,* 281 N.C. 100, 187 S.E. 2d 756 (1972); *State v. Murphy,* 280 N.C. 1, 184 S.E. 2d 845 (1971); *State v. Ingland,* 278 N.C. 42, 178 S.E. 2d 577 (1971); and *State v. Penley,* 277 N.C. 704, 178 S.E. 2d 490 (1971). Like views are expressed by Chief Justice Bobbitt in *State v. Barbour,* 278 N.C. 449, 180 S.E. 2d 115 (1971). The foregoing decisions are supported by earlier decisions of this Court, including *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216 (1966); *State v. Lowry,* 263 N.C. 536, 139 S.E. 2d 870 (1965); *State v. Gough,* 257 N.C. 348, 126 S.E. 2d 118 (1962); and *State v. Kelly,* 206 N.C. 660, 175 S.E. 2d 294 (1934).

Here, the majority opinion waters down the law which I regard as settled in this State and creates uncertainties of unknown dimensions. The common law definition of kidnapping obtains in North Carolina. It has been defined as "the unlawful taking and carrying away of a person by force and against his

will." *State v. Lowry, supra.* The use of fraud instead of force in effecting kidnapping is still kidnapping, *State v. Gough, supra;* and threats and intimidation are the equivalent of actual force. *State v. Bruce, supra.* It is perfectly apparent that this defendant unlawfully took and carried away the jailer by force and against his will. The majority says defendant "took" the victim but didn't "carry him away enough." How much is enough? The more often that question is answered in future decisions, the more indefinite the definition of kidnapping will become.

I agree that a mere technical asportation of the victim, such as moving him about in the same room, is not kidnapping; but where, as here, by force and against his will, the victim is unlawfully taken and carried away from the free environment in which he was found and locked in a jail cell located elsewhere, the asportation is more than "merely technical" and the "environment" after the abduction is not the environment in which the victim was found. As I see it, the legal principles enunciated in the majority opinion, while sound when applied in a proper factual setting, should not be applied to the facts in this case.

For the reasons stated, I respectfully dissent and vote to affirm the decision of the Court of Appeals.

Justice HIGGINS joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. PAUL RAY ALLEN, JR., LEROY BRYANT, AND JOE EARL KING

No. 71

(Filed 26 January 1973)

1. **Searches and Seizures § 1— bag of money in plain view in defendants' automobile — admissibility**

In a breaking and entering and larceny case there was no error in the admission of evidence concerning a bag of money where there was evidence that an officer was given permission to enter defendants' automobile to obtain the registration card from the glove compartment and at that time, without any search, observed the bag and its contents.

2. **Arrest and Bail § 3— officer's authority to stop motorist**

Officers had authority to stop the vehicle occupied by defendants to determine the validity and presence of the driver's license and registration card. G.S. 20-183(a); G.S. 20-57.

3. Arrest and Bail § 3— driver's license check — time of arrest — necessity for probable cause

Where defendants were stopped pursuant to G.S. 20-183(a), they were not taken into custody and placed under arrest until after an officer commented on the presence of money in the vehicle and after the ensuing flight of defendant King; therefore, the existence of probable cause at the time the car was stopped was not essential.

4. Arrest and Bail § 3; Searches and Seizures § 1— statutory provision for driver's license check — constitutionality

The provisions of G.S. 20-183(a), giving an officer the authority to stop a vehicle to determine the validity and presence of the driver's license and registration card, when balanced with the State's obligation to preserve order and enforce safety on its streets and highways, do not constitute such an encroachment on the individual's constitutional rights as to render the statute invalid.

5. Searches and Seizures § 1— vehicle search at police station — reasonableness

Where defendants' automobile was stopped on a public street for a driver's license and vehicle registration check at 2:30 a.m., an officer observed money in a paper bag in the vehicle and occupants of the vehicle were taken into custody, such circumstances presented a fleeting opportunity for search which made it impractical to obtain a search warrant; therefore, the action of the officers in removing the car and searching it at the police station was reasonable if probable cause to search existed.

6. Searches and Seizures § 1— vehicle search — probable cause — admissibility of burglary tools

In a breaking and entering, larceny and safecracking case where the evidence showed (1) the presence in an automobile of two men seen running from an area behind Weil-Creech Oil Company toward the then parked automobile in the early morning hours, (2) the presence in the automobile of a bag of money, some of which was wrapped in material bearing the inscription "Weil-Creech," and (3) the flight of one of the occupants when an officer commented on the presence of the money, officers had reasonable grounds to believe that defendants had committed a crime and that the automobile in which they were riding contained evidence pertaining to the crime; therefore, evidence concerning burglary tools found pursuant to the search conducted when the vehicle was removed to the police station was properly admitted by the trial court.

ON *certiorari* to the North Carolina Court of Appeals to review its decision (15 N.C. App. 670) finding error in the trial before *Cohoon, J.*, at 19 April 1971 Session of WAYNE Superior Court.

Each defendant was charged in separate bills of indictment with breaking and entering, felonious larceny, and safecrack-

ing. The cases were consolidated for trial, and through counsel defendants entered pleas of not guilty to all charges.

When the State offered its first witness, defendants objected and moved to suppress all evidence and testimony on the grounds that the arrest of the three defendants and the ensuing search of the automobile were illegal. Judge Cohoon, in the absence of the jury, heard evidence from both the State and defendants in two separate voir dire examinations. The pertinent voir dire evidence was concisely and accurately stated by Morris, Judge, of the Court of Appeals, as follows:

> "Goldsboro Police Officers Bell and Shackleford were patroling at two o'clock a.m. on 19 January 1971 close to several businesses and in an area where stolen cars had been recovered when they saw a parked car bearing Raleigh city tags. The car was parked approximately a block and a half from the nearest house. The officers received the name and address of the owner upon request to the Department of Motor Vehicles. There was no traffic on the horseshoe shaped street, and no people were seen in the area until a few minutes later when two men were observed running from behind some businesses (including Weil-Creech Oil Company) into bushes in the direction of the parked car. Rather than pursue the men on foot, the officers chose to wait in their patrol car with the lights off. Since there were two possible exits for the parked car to take, the officers requested another patrol car to assist if needed and check the identity of anyone operating the parked car. Some 15 to 30 minutes later Officers Bell and Shackleford observed the previously parked car go by, and two of the three occupants fit the general description of the two men they had previously seen run into the bushes. Officers Bell and Shackleford pulled in behind the car, and cut on their blue light and siren. The car disregarded the blue light and siren, would not stop and instead increased its speed to 40-45 miles per hour in a 35 mile-per-hour zone. When the officers realized the car was not going to stop, they radioed the patrol car stationed ahead to pull out in the road to block its path which it did. The car's occupants were asked to step outside and subsequently frisked for weapons but none was found. Officer Bell requested the driver, defendant King, to show him his driver's license. Defendant King presented his driver's

license and stated that the registration card was in the glove compartment of the car. Defendant King told Officer Bell it was all right to get the registration card so he entered the car from the driver's side and leaned over to get to the glove compartment. In doing so, Officer Bell observed sitting on the back seat a paper bag which was open and leaning towards the front seat. Officer Bell saw that it contained paper money in a clip and coins and that one of the rolls of coins bore the name "Weil-Creech Oil Company." Upon observing the same, Officer Bell picked the bag up and stated, 'Here's a bag of money,' whereupon defendant King started running. King was apprehended and all three defendants were placed under arrest. There is no evidence that Officer Bell ever opened the glove compartment or saw the registration card. In route to the police station, Officer Bell was advised that the Weil-Creech Oil Company had been broken into. After defendants had been arrested and placed in custody, Officer Bell searched under the hood of the car which had been taken to the police station and found crowbars, hammers, pliers, chisel, etc., lying between the radiator and grille. . . . "

Judge Cohoon, after finding extensive facts, concluded that no search of the car was made at the scene because Officer Bell "saw what was plainly before his eyes after having permission to enter said car." The trial court also concluded: "That thereafter the defendants were under arrest, charged with the breaking and entering and larceny of Weil-Creech Oil Company, when the observation or search of the car at the police station was made by Officer Bell; at which time in the Court's opinion no search warrant was necessary."

Judge Cohoon thereupon denied defendants' motion to suppress the evidence concerning the bag of money observed on the backseat of the car and the burglary tools found under the hood of the car at the police station.

The State introduced evidence before the jury substantially of the same import as heard on the voir dire examinations.

The jury returned verdicts of guilty of felonious breaking and entering, felonious larceny, and safecracking as to each defendant. Upon motion of defendant King, the verdict of guilty of felonious larceny was set aside and judgment was arrested on that charge because of misnomer in the bill of indictment.

Defendants appealed from judgment entered on the remaining verdicts. The appeals were not timely perfected, but the Court of Appeals allowed certiorari on 24 September 1971 and 19 January 1972. The State petitioned this Court for certiorari to review the decision of the Court of Appeals, which was allowed on 1 November 1972.

Attorney General Morgan; Assistant Attorney General Melvin; and Assistant Attorney General Lloyd for the State.

George F. Taylor for Paul Ray Allen, Jr.

H. Martin Lancaster for Leroy Bryant.

David M. Rouse for Joe Earl King.

BRANCH, Justice.

Defendants contend that the trial judge erred in denying their motions to suppress all evidence against them. In support of this contention they argue that the police stopped them without reasonable cause, illegally searched their automobile and illegally arrested them.

No citation is necessary for the well recognized rule that evidence obtained by unreasonable search is inadmissible in both federal and state courts. However, it is also well recognized in this jurisdiction that the constitutional guarantee against unreasonable search and seizure does not prohibit the seizure and introduction into evidence of contraband materials when they are in plain view and require no search to discover them. *State v. Simmons*, 278 N.C. 468, 180 S.E. 2d 97; *State v. Hill*, 278 N.C. 365, 180 S.E. 2d 21; *State v. McCloud*, 276 N.C. 518, 173 S.E. 2d 753; *State v. Virgil*, 276 N.C. 217, 172 S.E. 2d 28.

[1] The Court of Appeals correctly held that there was no error in the admission of evidence concerning the bag of money. In this connection there is sufficient, competent evidence showing that Officer Bell was given permission to enter the automobile to obtain the registration card from the glove compartment and at that time, without any search, observed the bag and its contents.

[2] We also agree with the conclusion of the Court of Appeals that the officers had authority to stop the vehicle occupied by defendants to determine the validity and presence of the driver's license and registration card. G.S. 20-183(a); G.S. 20-57; *State*

v. Eason, 242 N.C. 59, 86 S.E. 2d 774; *State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133.

[3] Defendants argue, however, that their arrest occurred at the instant the officers stopped them pursuant to G.S. 20-183(a), and since no probable cause for arrest then existed, the warrantless arrest precluded introduction of any of the tendered evidence. The key question is whether the "stopping" of a vehicle necessarily constitutes an "arrest" of its occupants. Specifically, the legality of the evidence turns "upon the narrow question of when the arrest occurred." *Rios v. United States,* 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed. 2d 1688; *Busby v. United States,* 296 F. 2d 328 (9th Cir. 1961).

Persons detained briefly for routine police investigation under circumstances not justifying actual arrest are not *ipso facto* deprived of their constitutional rights. *Rios v. United States, supra; Wilson v. Porter,* 361 F. 2d 412 (9th Cir. 1966); *Busby v. United States, supra.* As stated by the 8th Circuit Court of Appeals, in the case of *United States v. Harflinger,* 436 F. 2d 928 (8th Cir. 1970):

> "The brief detention of a citizen based upon an officer's reasonable suspicion that criminal activity may be afoot is permissible for the purpose of limited inquiry in the course of a routine investigation, and any incriminating evidence which comes to that officer's attention during this period of detention may become a reasonable basis for effecting a valid arrest. As explicated in *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889, there is a difference between a limited detention or seizure of a person and an arrest."

Defendants rely heavily upon *Henry v. United States,* 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed. 2d 134, to support their contention that they were arrested as soon as they were stopped, for their "liberty of movement" was then restricted. Defendants can take little comfort from that case because there it was conceded by the prosecution that the arrest took place when the car was stopped. See *Busby v. United States, supra.* "Arrest connotes restraint and not temporary detention for routine questioning." *Schook v. United States,* 337 F. 2d 563 (8th Cir. 1964); *Jackson v. United States,* 408 F. 2d 1165 (8th Cir. 1969).

There is no absolute test to ascertain exactly when an arrest occurs. The time and place of an arrest is determined

in the context of the circumstances surrounding it. *Rios v. United States, supra; Cook v. Sigler,* 299 F. Supp. 1338 (D. Neb. 1969); *State v. Rye,* 260 Iowa 146, 148 N.W. 2d 632; *State v. Williams,* 97 N.J. Super 573, 235 A. 2d 684; *State v. Bell,* 89 N.J. Super 437, 215 A. 2d 369; *State v. Romeo,* 43 N.J. 188, 203 A. 2d 23, cert. den. 379 U.S. 970, 85 S.Ct. 668, 13 L.Ed. 2d 563. See also *State v. Jackson,* 280 N.C. 122, 185 S.E. 2d 202. Where a federal offense is not involved, we look to the law of the state to determine when an arrest has occurred and whether or not it is valid. *United States v. Di Re,* 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210; *Wilson v. Porter, supra; Nicholson v. United States,* 355 F. 2d 80 (5th Cir. 1966); *Hart v. United States,* 316 F. 2d 916 (5th Cir. 1963); *People v. Sanchez,* 256 Cal. App. 2d 700, 64 Cal. Rptr. 331. See *Beck v. Ohio,* 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed. 2d 142; *Ker v. California,* 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed. 2d 726.

The courts of other jurisdictions have considered various situations involving alleged arrests and have determined that a routine license check and the concomitant delay does not constitute an arrest in the legal sense. *Wilson v. Porter, supra; Nicholson v. United States, supra.* In the case of *Lipton v. United States,* 348 F. 2d 591 (9th Cir. 1965), the Court, in holding that no arrest took place when defendant was stopped for the purpose of checking his driver's license, stated: "No other way was available to the officer to determine whether appellant possessed the required license." See *United States v. Lepinski,* 460 F. 2d 234 (10th Cir. 1972) (approved stopping vehicle to demand proof of registration); *Frye v. United States,* 315 F. 2d 491 (9th Cir. 1963) (no arrest where vehicle stopped because of equipment violations); *United States v. Williams,* 314 F. 2d 795 (6th Cir. 1963) (routine questioning held no arrest); *State v. Goudy,* 52 Haw. 497, 479 P. 2d 800 (officer's approach with drawn pistol upon persons stopped for questioning held not an arrest); *State v. Carpenter,* 181 Neb. 639, 150 N.W. 2d 129, cert. den. 392 U.S. 944, 88 S.Ct. 2288, 20 L. Ed. 2d 1406 (stopping car after 3 a.m. to indentify car and its occupants held not to be an arrest). See also *Jackson v. United States, supra; People v. Superior Court of Los Angeles County,* 101 Cal. Rptr. 837, 496 P. 2d 1205; *Mincy v. District of Columbia,* 218 A. 2d 507 (D.C. Ct. App. 1966); *Gustafson v. State,* 243 So. 2d 615 (Fla. Dis. Ct. 1971); *Glover v. State,* 14 Md. App. 454, 287 A. 2d 333.

The rationale of these cases is aptly stated in *United States v. Bonanno,* 180 F. Supp. 71, at 78 (DCSDNY 1960):

> "While the Fourth Amendment may be construed as encompassing 'seizure' of an individual, it cannot be contended that every detention of an individual is such a 'seizure'. If that were the case, police investigation would be dealt a crippling blow, by imposing a radical sanction unnecessary for the protection of a free citizenry."

This Court, in the case of *Stancill v. Underwood,* 188 N.C. 475, 124 S.E. 845, stated that an arrest consisted of "taking custody of another person under real or assumed authority for the purpose of detaining him to answer a criminal charge or civil demand. The application of actual force or visible physical restraint is not essential." See *State v. Shirlen,* 269 N.C. 695, 153 S.E. 2d 364; *Hadley v. Tinnin,* 170 N.C. 84, 86 S.E. 1017; *Lawrence v. Buxton,* 102 N.C. 129, 8 S.E. 774.

Here, defendants were stopped for the purpose of making a brief, limited, routine investigation. It was only after Officer Bell commented on the presence of the money, and after the ensuing flight of defendant King that defendants were taken into custody and placed under arrest. Therefore, the existence of probable cause at the time the car was stopped was not essential.

In instant case the facts giving rise to probable cause to search and probable cause to arrest are identical. Whether probable cause existed is hereinafter determined.

[4] Defendants, without citation of authority, proffer a cursory attack upon the constitutionality of G.S. 20-183(a) on the ground that it is an unreasonable and invalid exercise of the police power. They argue that as applied to their arrest G.S. 20-183(a) was the only source of authority enabling the officers to stop their vehicle. G.S. 20-183(a) provides:

> "It shall be the duty of the law enforcement officers of the State and of each county, city, or other municipality to see that the provisions of this article are enforced within their respective jurisdictions, and any such officer shall have the power to arrest on sight or upon warrant any person found violating the provisions of this article. Such officers within their respective jurisdictions shall have the power to stop any motor vehicle upon the highways of

the State for the purpose of determining whether the same is being operated in violation of any of the provisions of this article. . . . "

Assuming *arguendo* that the officers had no power to investigate the suspicious circumstances leading to defendants' arrest, and that the officers acted pursuant to G.S. 20-183(a), we consider defendants' contention.

New Jersey has a statutory scheme similar to our G.S. 20-183(a) and G.S. 20-57 (requiring the registration card to be carried in the vehicle at all times). NJSA 39:2-9; 3-29, 8-1 *et. seq.* The courts of New Jersey have considered the constitutionality of these statutes and have held the granting of authority to officers to stop persons to ascertain violations a valid and reasonable exercise of the police power. *State v. Braxton,* 111 N.J. Super 191, 268 A. 2d 40, reversed on other grounds, 57 N.J. 286, 271 A. 2d 713; *State v. Kabayama,* 94 N.J. Super 78, 226 A. 2d 760, affirmed 98 N.J. Super 85, 236 A. 2d 164 (App. Div. 1967), 52 N.J. 507, 246 A. 2d 714. Other jurisdictions are in substantial accord. See *United States v. Ware,* 457 F. 2d 828 (7th Cir. 1972); *United States v. Turner,* 442 F. 2d 1146 (8th Cir. 1971); *Myricks v. United States,* 370 F. 2d 901 (5th Cir. 1967); *City of Miami v. Aronovitz,* 114 So. 2d 784 (Fla. 1959); *Glover v. State, supra.*

We believe the provisions of G.S. 20-183(a), when balanced with the State's obligation to preserve order and enforce safety on its streets and highways, do not constitute such an encroachment on the individual's constitutional rights as to render the statute invalid. This is not to say that persons stopped pursuant to this statute may be indiscriminately searched or arrested without probable cause in contravention of recognized constitutional principles. See G.S. 15-27 and G.S. 15-27.1; Anno., "Lawfulness of Search of Motor Vehicle Following Arrest for Traffic Violation," 10 A.L.R. 3d 314.

Finally, we consider whether the Court of Appeals, relying on *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564, reh. den. 404 U.S. 874, 92 S.Ct. 26, 30 L.Ed. 2d 120, correctly held that the trial judge erred in admitting evidence concerning the burglary tools.

There are certain exceptions to the general rule that a valid search warrant must accompany every search or seizure.

These exceptions arise when the exigencies of the situation call for unorthodox procedures. Such is the case when it is determined to be impracticable, in light of all the circumstances, to obtain a search warrant. The courts have recognized three situations which justify application of this principle to a course of conduct ordinarily forbidden by the Fourth Amendment. (One may, of course, submit or consent to a warrantless search or seizure. *State v. Virgil, supra; State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376.)

First, a warrantless search and seizure may be made when it is incident to a valid arrest. *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed. 2d 685; *Stoner v. California,* 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed. 2d 856; *State v. Jackson, supra; State v. Roberts,* 276 N.C. 98, 171 S.E. 2d 440; *State v. Shedd,* 274 N.C. 95, 161 S.E. 2d 477.

Second, evidence obtained by officers without a search warrant is admissible in evidence where the articles are seized in plain view without necessity of search. *Harris v. United States,* 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed. 2d 1067; *Ker v. California, supra; State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706; *State v. Howard,* 274 N.C. 186, 162 S.E. 2d 495; *State v. Craddock,* 272 N.C. 160, 158 S.E. 2d 25; *State v. Kinley,* 270 N.C. 296, 154 S.E. 2d 95.

Third, a warrantless search of a vehicle capable of movement may be made by officers when they have probable cause to search and exigent circumstances make it impracticable to secure a search warrant. *Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419; *Chimel v. California, supra; Brinegar v. United States,* 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879; *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, 39 A.L.R. 790; *State v. Ratliff,* 281 N.C. 397, 189 S.E. 2d 179; *State v. Hill, supra; State v. Jordan,* 277 N.C. 341, 177 S.E. 2d 289.

The search yielding the burglary tools cannot be justified as a search incident to defendants' arrest since the search was made *after* defendants were under arrest and in custody at the police station. *Chambers v. Maroney, supra; Preston v. United States,* 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed. 2d 777. Nor were the burglary tools in plain view so as to preclude the necessity of a search. Thus, if the search was reasonable, it must be because there was probable cause to search under such

exigent circumstances as to make it impracticable to obtain a search warrant. *Coolidge v. New Hampshire, supra; Chambers v. Maroney, supra; State v. Ratliff, supra; State v. Jordan, supra.*

The cases of *Chambers v. Maroney, supra, Coolidge v. New Hampshire, supra,* and *Carroll v. United States, supra,* highlight the difficulty in defining the circumstances under which there may be a warrantless search of a mobile vehicle.

In *Chambers* the automobile in which the defendants were riding was stopped because the automobile and its passengers fitted a description (one occupant of a light blue compact station wagon wearing a green sweater, another wearing a trench coat) furnished the police by a witness to an armed robbery. The defendants were arrested and the automobile was moved to a police station, where a search made shortly thereafter produced incriminating evidence. In upholding the search Justice White, speaking for the United States Supreme Court, stated:

> "In terms of the circumstances justifying a warrantless search, the Court has long distinguished between an automobile and a home or office. In *Carroll v. United States,* 267 U.S. 132 (1925), the issue was the admissibility in evidence of contraband liquor seized in a warrantless search of a car on the highway. After surveying the law from the time of the adoption of the Fourth Amendment onward, the Court held that automobiles and other conveyances may be searched without a warrant in circumstances that would not justify the search without a warrant of a house or an office, provided that there is probable cause to believe that the car contains articles that the officers are entitled to seize. . . .
>
> * * * * *
>
> " . . . Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search. Carroll, supra, holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible.
>
> "Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should

be permitted until a search warrant is obtained; arguably, only the 'lesser' intrusion is permissible until the magistrate authorizes the 'greater'. But which is the 'greater' and which the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances. 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.

"On the facts before us, the blue station wagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search. The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained. . . . "

The defendant in *Coolidge* was suspected of the murder of a 14-year-old child because he owned an automobile similar to the one seen near the place of the murder and because of his unexplained absence from his home at the approximate time of the murder. Soon after his arrest, his automobile, which he regularly parked in the driveway at his home, was towed away. At later intervals of two days, eleven months, and eighteen months, the car was searched and vacuumed without a search warrant. Defendant's motion to suppress evidence obtained from the searches of the automobile was denied. Defendant was convicted of murder, and his conviction was affirmed by the New Hampshire appellate courts. The United States Supreme Court reversed, in part stating:

"As we said in Chambers, supra, at 51, 'exigent circumstances' justify the warrantless search of 'an automobile *stopped on the highway,*' where there is probable cause, because the car is 'movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained.' '[T]he opportunity to search is fleeting . . . .' (Emphasis supplied.)

"In this case, the police had known for some time of the probable role of the Pontiac car in the crime. Coolidge was aware that he was a suspect in the Mason murder, but he had been extremely cooperative throughout the investigation, and there was no indication that he meant to flee. He had already had ample opportunity to destroy any evidence he thought incriminating. There is no suggestion that, on the night in question, the car was being used for any illegal purpose, and it was regularly parked in the driveway of his house. The opportunity for search was thus hardly 'fleeting.' The objects that the police are assumed to have had probable cause to search for in the car were neither stolen nor contraband nor dangerous."

Footnote 20 of the opinion in part is as follows:

" . . . The rationale of *Chambers* is that *given* a justified initial intrusion, there is little difference between a search on the open highway and a later search at the station. Here, we deal with the prior question of *whether* the initial intrusion is justified. For this purpose, it seems abundantly clear that there is a significant constitutional difference between stopping, seizing, and searching a car on the open highway and entering private property to seize and search an unoccupied, parked vehicle not then being used for any illegal purpose. . . . "

The language in *Coolidge* makes it abundantly clear that it does not purport to overrule either *Carroll* or *Chambers*.

Both *Coolidge* and *Chambers* stem from the Supreme Court's holding in *Carroll v. United States, supra,* to the effect that an automobile or other vehicle may be searched without a warrant when the officers have a reasonable or probable cause to believe that the vehicle is illegally transporting contraband materials. *Carroll* recognized the difference between the search of a dwelling or other structure and a mobile vehicle:

[There is] a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must

be sought." *Carroll v. United States, supra* (267 U.S. at 153).

Chambers extended the rule set forth in *Carroll* by holding that a vehicle may be searched at the police station without a search warrant when it could have been searched on the highway without a search warrant.

[5] Instant case is distinguishable from *Coolidge*. Here, the automobile occupied by defendants was stopped on a public street in the early morning darkness. The occupants had little opportunity to destroy incriminating evidence that might have been present. The officers had every reason to believe that defendants would flee. There was nothing to assure the officers that the automobile would not be moved or that articles would not be removed from it if an immediate search was not conducted. Under the existing circumstances the officers had to choose between immobilizing and searching the car or obtaining other officers for surveillance of the vehicle while they went about the patently difficult process of finding a judicial officer at approximately 2:30 in the morning to consider whether a search warrant should be issued. Therefore, if probable cause to search existed, we think the action of the officers in removing the car and searching it at the police station was reasonable. The exigent circumtances presented a "fleeting opportunity" which made it impracticable to obtain a search warrant.

[6] The remaining and crucial question is whether probable cause to search existed when defendants were arrested and placed in custody.

Justice Sharp, speaking for the Court in the case of *State v. Harris,* 279 N.C. 307, 182 S.E. 2d 364, defined probable cause as related to an arrest as follows:

> "Probable cause and 'reasonable ground to believe' are substantially equivalent terms. 'Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautions man in believing the accused to be guilty. . . . To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith. One does not have probable cause unless he has information of facts which, if submitted to a magistrate, would require the

issuance of an arrest warrant.' 5 Am. Jur. 2d *Arrests* § 44 (1962), 'The existence of "probable cause," justifying an arrest without a warrant, is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. It is a pragmatic question to be determined in each case in the light of the particular circumstances and the particular offense involved.' . . . "

The definition and attendant rules above stated are applicable to probable cause as related to searches.

Here the totality of the circumstances gave the officers reasonable grounds to believe that defendants had committed a crime and that the automobile in which they were riding contained evidence pertaining to the crime. Without repeating the voir dire evidence in the case, we point to certain evidentiary highlights supporting the officers' belief and action: (1) the presence in the automobile of two men seen running from an area behind the Weil-Creech Oil Company toward the then parked automobile in the early morning hours; (2) the presence of a bag of money, some of which was wrapped by material bearing the inscription "Weil-Creech"; and (3) the flight of one of the occupants when Officer Bell commented on the presence of the money.

We can see no constitutional difference between this case and *Chambers* and *Carroll.* Our search reveals that in similar factual situations other jurisdictions have distinguished *Coolidge* and have applied the rule and reasoning of *Chambers* and *Carroll.* See, e.g., *United States v. Ellis,* 461 F. 2d 962 (2nd Cir. 1972); *United States v. Castaldi,* 453 F. 2d 506 (7th Cir. 1971), cert. den. 405 U.S. 992, 92 S.Ct. 1263, 31 L.Ed. 2d 460; *People v. Munoz,* 21 Cal. App. 3d 805, 98 Cal. Rptr. 758; *People v. Wrona,* 7 Ill. App. 3d 1, 286 N.E. 2d 370; *Brinlee v. State,* 499 P. 2d 1397 (Okla. 1972); *Smith v. Commonwealth,* 212 Va. 606, 186 S.E. 2d 65.

Probable cause to arrest and search existed at the time of the arrest and continued to exist when the automobile was searched at the police station.

The trial judge correctly admitted evidence concerning the burglary tools found pursuant to the search conducted at the police station.

We have examined defendants' other assignments of error and find that they do not merit discussion.

For reasons stated, the decision of the Court of Appeals is

Reversed.

EMANUEL L. JOHNSON AND WIFE, DORIS A. JOHNSON v. CITY OF WINSTON-SALEM

No. 76

(Filed 26 January 1973)

Municipal Corporations § 42— tort claims against city — notice — knowledge by city employee

In an action to recover for damages allegedly sustained when a sewer line owned and operated by defendant municipality became clogged and sewage backed up and overflowed into plaintiff's residence, plaintiff's notice given to the city claims investigator and to the city attorney fell short of the statutory requirement that written notice of tort claims be given to the board of aldermen or to the mayor within ninety days and plaintiff's written notice to the mayor was given more than nine months after the occurrence; therefore, plaintiff's action was properly dismissed.

Justice LAKE dissenting.

Justice HUSKINS joins in the dissenting opinion.

ON *certiorari* to the North Carolina Court of Appeals to review its decision filed August 2, 1972, (15 N.C. App. 400, 190 S.E. 2d 342) affirming a judgment entered in the District Court of FORSYTH County dismissing the plaintiffs' action.

The plaintiffs alleged that on January 4, 1970, their dwelling and furnishings were severely damaged by the reverse flow of sewage from the city's main line through the plaintiffs' connecting line into their house. They further alleged that the reverse flow and the damages resulted from the negligence of the city's street maintenance crew in that they permitted sand and gravel from their resurfacing operations to accumulate in the manhole at the juncture blocking the outflow at the point of connection and forcing raw sewage through the plaintiffs' connecting line into the house.

The complaint further alleged, and the evidence disclosed, that on December 8, 1969, the city's maintenance crew removed

a partial obstruction from the plaintiffs' sewer line and, therefore, had notice of some defect. The plaintiffs sought to allege two bases for their cause of action: (1) That the city impliedly contracted to furnish reasonably safe sewer service suitable to the plaintiffs' needs and not to injure plaintiffs' property and that in furnishing the service the city was acting in a proprietary capacity and not in the performance of a governmental function; (2) that the city had negligently caused and permitted the city's main line and the plaintiffs' outflow line to become clogged and as a result of the pressure, the contents of the main line were forced through the joinder line causing severe damage to the dwelling and the furnishings.

The defendant filed answer admitting certain paragraphs with respect to the street work, but denied negligence. As further defenses the defendant alleged that the plaintiffs had not shown any breach of contract, that the cause of action they sought to allege was based on negligence, and that the plaintiffs had failed to file with the board of aldermen or the mayor a written claim for loss within ninety days after the claim arose as required by Section 115 of the city charter.

The plaintiffs introduced evidence which in material substance disclosed the following: The plaintiffs in October, 1967, purchased their newly constructed house on Milton Drive within the limits of Winston-Salem. Their plumbing fixtures were attached to the city sewer line. On December 8, 1969, the water backed up in the commode, drained slowly, but did not overflow. The plaintiffs notified the city inspector who opened the line without difficulty by the use of a pressure pump. Nothing indicated any defect or anything out of the ordinary in the occurrence and no further trouble developed until the following January.

On the morning of January 4, 1970, however, all members of the Johnson family were at church, but when Mr. Johnson returned home at 12:30 p.m. he found a reverse flow of sewage pouring into his home which covered the floor to a depth of several inches, spilled out into the other rooms, saturated carpets, rugs, clothing, and other furnishings as well as the building.

When the city officials charged with the duty of maintaining the sewer line responded immediately to the plaintiffs' call, two crews worked for about three hours before the reverse

flow was stopped. The stoppage seemed to have been caused by the presence of sand and gravel at the connection. This sand and gravel had been forced into the connection apparently by a road scraper or grader.

After the obstruction was removed and normal operation restored, the maintenance crew assisted the plaintiffs in the clean-up operation, removed from the home many of the damaged articles and after cleaning and repairing them, returned them to the plaintiffs. At the request of the clean-up crew, the plaintiffs made a list of the damaged articles, giving their original cost and their estimated value after they had been returned. The list was delivered to Mr. Cummings, the city's claim agent. This delivery appears to have been on February 12, 1970. Subsequently, there was some discussion between the city attorney and Mr. Cummings on the part of the city, and the plaintiffs, but no agreement was reached and no formal claim was filed.

On October 8, 1970, more than nine months after the occurrence, the plaintiffs gave the mayor this notice:

> "Dear Mayor. This is to notify that on January fourth and fifth, I experienced a great deal of difficulty with the sewer system of Winston-Salem, North Carolina. A back up in the sewer line caused a great deal of damage to my home and personal property. I have been in contact with some of the City's agents but have received no satisfaction. I thought it might be of help to write to you concerning this matter. I will appreciate all you can do for me. Sincerely, E. L. Johnson."

Mr. Johnson testified: "Other than this letter and what I have testified to, there was no other contact with the City." The other testimony related to Mr. Johnson's dealings with the maintenance crew, the claim agent, and the city attorney.

The city charter was introduced in evidence. Section 115 provided that: "All claims or demands against the City of Winston-Salem arising in tort shall be presented to the board of aldermen of said city or to the mayor, in writing, signed by the claimant, his attorney or agent, within ninety (90) days after said claim or demand is due or the cause of action accrues; . . . and, unless the claim is so presented within ninety (90) days after the cause of action accrued and unless suit is brought

within twelve (12) months thereafter, any action thereon shall be barred."

The trial court adjudged that the plaintiffs' action was in tort and that they had failed to file the written notice of loss with the city aldermen or mayor within ninety days as required by the city charter. The court entered judgment, on defendant's motion, sustaining the defense and dismissing the claim.

Within the time required, the plaintiffs prosecuted an appeal in the Court of Appeals which affirmed the judgment. Our writ brought the case here for further review.

Pettyjohn and Frenck by H. Glenn Pettyjohn for plaintiff appellants.

Womble, Carlyle, Sandridge & Rice by Allan R. Gitter and Roddey M. Ligon, Jr. for defendant appellee.

HIGGINS, Justice.

The plaintiffs' claim is based on a negligent failure of the city properly to inspect, to discover and remove defects, and to keep in good repair its sewer line along Milton Drive. The evidence indicated the city's street maintenance crew had caused sand and gravel to accumulate at the point of joinder between the city's main sewer line and the plaintiffs' branch line thus causing the back-up and overflow into the plaintiffs' home. The plaintiffs introduced ample evidence of the resulting damage.

After hearing the evidence, the trial court properly concluded the plaintiffs' claim was based on the defendant's tortious failure properly to maintain its sewer line and that the plaintiffs' claim was never filed with the board of aldermen and was not filed with the mayor until more than nine months after the plaintiffs sustained their damage.

The evidence disclosed that the agents of the sewer department and of the city's claims department had immediate notice of the plaintiffs' damages and the facts upon which their claims were based. However, the trial court and the Court of Appeals based decision on the plaintiffs' failure to give the board of aldermen or the mayor the written notice required by Section 115 of the defendant's charter, Chapter 232, Private Laws, 1927.

The lawmaking body of the State required that notice of tort claims in writing should be filed with the board of aldermen

or the mayor within ninety days of the time the damage occurred. The board of aldermen and the mayor direct the city's governmental operations. They actually employ hundreds of agents to carry on the city's activities. Obviously, a requirement that a claim against the city be filed with the board of aldermen or the mayor is a reasonable requirement. They are charged with the duty of considering and passing on the validity of the claims. Notice to other agencies does not comply with the requirements of the law.

In the case of *Sowers v. Warehouse,* 256 N.C. 190, 123 S.E. 2d 603, this Court discussing Section 115 of the city charter used this language:

> "Plaintiff did not plead she had given notice as required by Section 115 nor did she plead any facts tending to show her mental or physical inability to give the required notice. . . .
>
> "Plaintiff's failure to comply with the requirements of Section 115 of its charter constitutes a bar to her alleged action against the City of Winston-Salem. This was sufficient to require that the court grant the motion of the City of Winston-Salem for judgment of involuntary nonsuit."

The action involved an injury resulting from the defendant's defective sidewalk.

In *Carter v. Greensboro,* 249 N.C. 328, 106 S.E. 2d 564, this Court said:

> "Ordinarily, the giving of timely notice is a condition precedent to the right to maintain an action, and nonsuit is proper unless the plaintiff alleges and proves notice. (Citing authorities.) However, there is an exception to the rule. The plaintiff may relieve himself from the necessity of giving notice by alleging and proving that at the time notice should have been given he was under such mental or physical disability as rendered it impossible for him by any ordinary means at his command to give notice; and that he actually gave notice within a reasonable time after the disability was removed. (Citing authorities.)"

In addition to the cases cited in Sowers and Carter, see the following: *Webster v. Charlotte,* 222 N.C. 321, 22 S.E. 2d

900; *Foster v. Charlotte,* 206 N.C. 528, 174 S.E. 412; *Dayton v. Asheville,* 185 N.C. 12, 115 S.E. 827; *Pender v. Salisbury,* 160 N.C. 363, 76 S.E. 228.

The statute and case law of North Carolina provide that as a part of a cause of action founded in tort against a municipality, the complaint must allege and the evidence must disclose that a written claim signed by the plaintiff or his attorney be filed either with the board of aldermen or the mayor of the city within ninety days after the cause of action accrued. Otherwise the action is barred and will be dismissed. Anything short of a written claim signed by the plaintiff or his attorney and filed with the board of aldermen or the mayor within the ninety days, required a dismissal of the action.

In *Pender v. Salisbury, supra,* the plaintiff's intestate was thrown from a wagon as the result of a defect in the street. The required notice of the claim for the wrongful death was not given. The plaintiff sought to supply the defect by showing the mayor of the city was actually present at the time of the accident and had first hand information of the injury. This Court said: " 'The municipal officers of a town cannot waive any statutory requirement as to notice of claim imposed for the protection of the municipality.' "

Although the evidence in this case was sufficient to disclose that the claim agent and the attorney of the city had first hand information of the plaintiffs' damage and the cause of it, this knowledge was not sufficient to supply the requirement that a written claim be filed with the board of aldermen or the mayor.

The statute and the decided cases do not permit the court to repeal the plain wording of the requirement that notice in writing be given to the named officials within ninety days from the injury. Relaxation of the rules is within the jurisdiction of the agency that makes them—that is the General Assembly. The legislative hall—not the courthouse—is the proper place to change the rule. The stability of court decisions is of great value. Thus, we feel required to hold that the trial court in entering the judgment dismissing the action, and the Court of Appeals in affirming the judgment, acted within the requirements of law. Nothing need be added to the opinion of the Court of Appeals on other questions discussed in the briefs. Though we sympathize with the plaintiffs in their loss, we do not feel at liberty to disregard the statute and the decided

cases. Hence, we conclude that the judgment of the Court of Appeals should be

Affirmed.

Justice LAKE dissenting.

As the majority opinion states, the evidence indicated that the city's street maintenance crew caused sand and gravel to fall into the city's main sewer line, obstructing that line so that sewage backed up and overflowed into the home of the plaintiffs, damaging their property severely. The majority's sole ground for affirming the allowance of the city's motion for a directed verdict is the failure of the plaintiffs to give written notice of their claim to the mayor within the time, 90 days, specified therefor in the charter of the city.

The record shows the following, undisputed facts:

Kemp P. Cummings, Jr., is a full time employee of the city, his title being "Claims Investigator." The scope of his employment includes investigations of and reports on claims filed against the city. After his investigation and report, such claim is presented to the City Attorney for an opinion as to the City's liability. Mr. Cummings, himself, has no authority to negotiate settlement of claims. He always makes a point of advising claimants that he has no such authority. He is the only employee of the city who carries the title of "Claims Investigator."

While the flooding of the plaintiffs' home was still in progress, on Sunday, 4 January 1970, an employee of the city's water and sewer department went to the plaintiffs' residence, talked to the male plaintiff and observed the flooding. This employee and the crew under his direction being unable to remove the obstruction from the sewer main with the use of rods, he summoned a second crew of city employees, who, some three hours later, were successful in unstopping the sewer. After the overflow was halted about 3:30 p.m., the crew of city employees assisted until after dark in mopping up the accumulated overflow of water and sewage on the floors and in the basement of the plaintiffs' home.

While this flooding of the home was still in progress, Mr. Cummings, the city's only "Claims Investigator," received notice of it. He went there immediately and observed the condition

and the city employees cleaning up the house. He talked to the male plaintiff about 30 minutes on that occasion and had several discussions with him since that time "specifically about the damage to his home." He personally inspected the damage and made photographs of the conditions he observed.

The next day, Monday, 5 January 1970, a crew of city employees returned to the house and cleaned and disinfected it, removing many articles of the plaintiffs' belongings from the house to their boat shed. On the day of the flooding, or the following day, the male plaintiff made an inventory of the damage to the home and of the articles of personal property damaged by the flooding, showing the original cost and the then present value of each item. A copy of this inventory of damaged articles was mailed by the plaintiffs to Mr. Cummings "as he had suggested," on 12 February 1970, 39 days after the occurrence. Mr. Cummings, then accompanied by a city attorney, had given the male plaintiff his card and told him where to send the inventory. Later, six or eight weeks after the flooding, two of the city's attorneys went to the home of the plaintiffs and again discussed the matter with the male plaintiff. He carried them to the boat shed where the damaged articles were stored and they examined them. Having heard nothing further from representatives of the city, the male plaintiff wrote a letter to the mayor on 8 October 1970, more than 90 days after the flooding.

The question which arises upon this evidence is: When, through the negligence of the city, its sewer main becomes obstructed so that the home of the plaintiff is flooded with sewage and the city, with full knowledge of the condition, sends its official "Claims Investigator" and its attorney to inspect the damaged property and to confer with the owner, and the owner, pursuant to the request and suggestion of the "Claims Investigator," promptly sends to him a written inventory of the damaged articles, showing their value, may the city escape liability for the sole reason that the property owner, thus believing his claim was in process of adjustment, did not hand to the mayor, in person, a written notice of his claim within the time specified in the city's charter? In my opinion, this question should be answered, "No."

The majority opinion cites in support of its conclusion the following cases: *Sowers v. Warehouse,* 256 N.C. 190, 123 S.E. 2d 603; *Carter v. Greensboro,* 249 N.C. 328, 106 S.E. 2d 564; *Webster v. Charlotte,* 222 N.C. 321, 22 S.E. 2d 900; *Foster v.*

Charlotte, 206 N.C. 528, 174 S.E. 412; *Dayton v. Asheville,* 185 N.C. 12, 115 S.E. 827; *Pender v. Salisbury,* 160 N.C. 363, 76 S.E. 228. Each of those cases is distinguishable on its facts from the present case. In two of them, *Carter v. Greensboro, supra,* and *Webster v. Charlotte, supra,* the plaintiff prevailed, notwithstanding his failure to give the notice required by the city charter. These are discussed below. In none of the cases, with the exception of *Pender v. Salisbury, supra,* is there any indication in the reported decision that the city had any knowledge whatever of the plaintiff's alleged injury until it was sued. In *Pender v. Salisbury, supra,* there is nothing to indicate any knowledge by the city of a contention that there was basis of a claim against it except that the mayor, individually, attempted to assist the deceased at the time and scene of the accident. In none of these cases was there the slightest suggestion that any representative of the city discussed the plaintiff's claim with him or did anything to cause the plaintiff to believe his claim was under consideration for settlement.

The validity of provisions such as that in the charter of the City of Winston-Salem is unquestionable. As this Court said in *Pender v. Salisbury, supra,* and again in *Foster v. Charlotte, supra,* "The purpose is to give the municipal authorities an early opportunity to investigate such claims while the evidence is fresh, so as to prevent fraud and imposition." This being the purpose, this Court, in *Perry v. High Point,* 218 N.C. 714, 12 S.E. 2d 275, reversed a judgment of dismissal granted because of failure to comply technically with such a charter provision, saying that such provisions "require only a substantial compliance, without the technical nicety necessary to pleadings." There, the Court quoted with approval the following statement in 43 C.J., p. 1192 (see 63 CJS, Municipal Corporations, § 925):

> "Such statutory requirements being for the benefit of the municipality, in order to put its officers in possession of the facts upon which the claim for damages is predicated and the place where the injuries are alleged to have occurred, in order that they may investigate them and adjust the claim without the expense of litigation, a reasonable or substantial compliance with the terms of the statute is all that is required; and where an effort to comply with such requirements has been made and the notice, statement or presentation when reasonably construed is such as to accomplish the object of the statute, it should be regarded as sufficient."

In *Graham v. Charlotte,* 186 N.C. 649, 120 S.E. 466, the plaintiff was held entitled to recover on the ground that his notice complied substantially with the statute although the city contended it was defective in content. Thus it has been clearly established by the decisions of this Court that such a provision should not be interpreted or applied so as to convert it into a shield for injustice through the denial by the city of a meritorious claim of which it actually had notice within the time specified in the charter.

In *Carter v. Greensboro, supra,* a three year old child, horribly burned by negligence of the city employees, was permitted to recover though no notice of his claim was given the city until nine years after the occurrence. There, this Court properly said:

> *"Ordinarily,* the giving of timely notice is a condition precedent to the right to maintain an action, and nonsuit is proper unless the plaintiff alleges and proves notice. * * * *However,* there is an exception to the rule. The plaintiff may relieve himself from the necessity of giving notice by alleging and proving that at the time notice should have been given he was under such a mental or physical disability as rendered it impossible for him by any ordinary means at his command to give notice; and that he actually gave notice within a reasonable time after the disability was removed. * * *
>
> "In this case the plaintiff, as a part of his cause of action, alleged his failure to file the notice within the time fixed by the defendant's charter and at the same time he alleged facts which, if true, brought his case within the exception. * * * Under such circumstances is it not the policy of the law and the duty of judges to guard his rights with jealous care and to see that the door of the courthouse is not closed to him when he is without fault? * * * *Failure to give earlier notice does not justify nonsuit."* (Emphasis added.)

The foregoing statement in the Carter case is quoted with approval in *Sowers v. Warehouse, supra.* This exception is also recognized in *Foster v. Charlotte, supra,* in *Pender v. Salisbury, supra,* and in *Terrell v. Washington,* 158 N.C. 281, 73 S.E. 888. This exception is not founded upon any language of the charter provision in any such case. It is engrafted upon the legislative

provision by judicial action to prevent a statute, designed to shield municipalities against fraud and injustice, from being converted into an instrument of injustice. That is also the purpose of the judicial modification of the statutory provision so as to make substantial compliance therewith sufficient.

Again, in *Webster v. Charlotte, supra,* this Court, speaking through Chief Justice Stacy, said:

> "Undoubtedly, we have decisions to the effect that *in the absence of some valid excuse* * * * compliance must be shown with the provisions of a city charter requiring notice of claim as a condition precedent to the institution of an action against a municipal corporation for the recovery of damages." (Emphasis added.)

In that case, also, a nonsuit of an action for personal injuries to a small child was reversed though notice of the claim was not given until five years after the injury. Again, in *Dayton v. Asheville, supra,* the Court said that such notice is a prerequisite to an action against the city for the partial taking of or injury to the plaintiff's land "in the absence of a valid excuse."

It would be difficult to find a more valid excuse for failure to give written notice to the mayor within the time specified in the charter than the plaintiffs had in this case under the circumstances disclosed by this record. It is not necessary to hold that knowledge of the injury and of the cause thereof, acquired by two full crews of city employees in the course of some six hours of opening the sewer and cleaning up the resulting contamination of the plaintiffs' home, makes compliance with the charter provision unnecessary. Here, we have far more than that. The official "Claims Investigator" of the city came and investigated the matter while the flooding of the home was in progress, returned on at least one other occasion, and requested the plaintiffs to submit to him their inventory of damage, which written inventory was mailed to him well within the time allowed by the charter for such notice. Thereafter, on at least one occasion, the attorneys for the city came and inspected the damaged articles in the presence of the male plaintiff. Under these circumstances, to permit the city to escape all responsibility for the invasion of the plaintiffs' home by contaminating filth, due to the city's negligence, for the sole reason that the plaintiff did not send to the mayor a written communication until some seven months later, is to convert the statutory shield into an

instrument of harshness and injustice, which we properly refused to do in *Carter v. Greensboro, supra.*

The charter provision is valid, but the actions of the city Claims Investigator and the City Attorney are such as to estop the city from asserting this defense. *Sykes v. Belk,* 278 N.C. 106, 179 S.E. 2d 439, is not inconsistent with such a holding. There we said, "It is generally recognized in North Carolina that the doctrine of estoppel will not be applied against a municipality in its governmental, public or sovereign capacity." What we were talking about there was estoppel of a city to exercise its governmental discretion in the location of a municipal building, but, even so, the statement was dictum for we expressly said that the circumstances of that case did not present facts requiring application of the doctrine of equitable estoppel since there was no showing that the plaintiffs in that case had been prejudicially misled. The operation of a sewer system, being chiefly for the private advantage of the compact community, is a proprietary function for the negligent exercise of which the municipality is subject to liability. See: *Clark v. Scheld,* 253 N.C. 732, 117 S.E. 2d 838; *Carter v. Greensboro, supra.*

For the doctrine of equitable estoppel to apply, it is not necessary that the conduct of the defendant be with fraudulent intent. It is sufficient that its "Claims Investigator" and the attorneys misled the plaintiffs into the reasonable belief that the city, aware of their claim, was processing it for settlement and thus further, formal demand was unnecessary. The record clearly shows the plaintiffs were led so to believe.

In *Pender v. Salisbury, supra,* Justice Brown, speaking for the Court, said, "The town authorities cannot waive this statutory requirement that a demand in writing be made, even if the mayor should have imagined that a suit was to be brought." Waiver, a voluntary relinquishment of a known right, does not rest on the same basis as an estoppel. In *Pender v. Salisbury, supra,* the jury actually found the city was not negligent and this Court said there was no error in the trial with respect to that issue. Thus, the reference therein to waiver is in the nature of a dictum. In any event, there was in that case nothing to suggest a waiver and certainly no basis for a claim of estoppel in the mere fact that the mayor, apparently nearby when the deceased fell off the step of the city's fire wagon and was killed, tried to assist the dying man.

After the time for giving notice has expired and the injured party has, with no reasonable excuse, failed to give the required notice, the city's defense is absolute and no official, employee or attorney may waive it, expressly or by conduct. It is quite a different thing, in my opinion, to say that conduct of the city's "Claims Investigator" and its attorney, which reasonably leads an uninformed layman to believe that he has given the city all the information it requires for the handling and settlement of his claim, does not affect the city's right to assert that such layman is barred from recovery by his delay in filing a written statement of claim with some other city official.

To reverse the decision of the Court of Appeals, which in turn affirmed the judgment of the district court, does not require the overruling of any decision cited by it or in the majority opinion.

Justice HUSKINS joins in this dissenting opinion.

ULYSSES VERNON BEASLEY, JAMES A. KIGER, EMIDIO J. BASSETTI, AND JOE W. JONES v. FOOD FAIR OF N. C., INC. AND RAY F. MESSICK

No. 66

(Filed 26 January 1973)

1. **Master and Servant §§ 10, 15— discharge of supervisors for union membership — State regulation**

Congress and the federal courts have adopted a national industrial relations policy which gives an employer the right to discharge his supervisor for union membership, and the State is precluded from interfering with that policy.

2. **Master and Servant §§ 10, 15— discharge for union membership — right-to-work statute — applicability to supervisors**

Where plaintiff meat market managers as supervisors sought to invoke provisions of the N. C. Right-to-Work Law to recover damages against their employer for their allegedly unlawful discharge based solely upon union membership, the doctrine of federal preemption applied, and the state court was without jurisdiction over the subject matter of the controversy. G.S. 95-81; G.S. 95-83.

ON *certiorari* to review the decision of the Court of Appeals reported in 15 N.C. App. 323, 190 S.E. 2d 333 (1972), which reversed summary judgment for defendant entered by *Gambill, J.*, at the 28 February 1972 Session of FORSYTH Superior Court.

Plaintiffs jointly brought this action asking for $500,000 actual damages and $1,000,000 punitive damages without separation of damages as to each plaintiff. They allege that they were unlawfully discharged because of their support of and membership in the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, in violation of North Carolina's Right-to-Work Law, G.S. 95-81. Plaintiffs further allege that by reason of G.S. 95-83 they were entitled to damages, both punitive and otherwise.

Defendants filed a motion to dismiss, motion for judgment on the pleadings, and plea in abatement, alleging that the National Labor Relations Board had exclusive jurisdiction, precluding the State court's consideration for the reason that plaintiffs were managers of the meat markets in defendant's stores or, in the alternative, plaintiffs as supervisors did not come within the provisions of G.S. 95-78, G.S. 95-81, and G.S. 95-83. Defendants further contend that although the complaint alleged violations as to all four plaintiffs, the damages were alleged collectively without alleging individual damages; and, furthermore, in no event are punitive damages recoverable under G.S. 95-83.

Prior to bringing this action, plaintiffs filed charges with the National Labor Relations Board claiming that the discharges were unlawful under the National Labor Relations Act as amended. The Regional Director of the National Labor Relations Board dismissed the charges for the reason that plaintiffs were supervisors and not employees and, therefore, not entitled to protection of the Act. Plaintiffs appealed the Regional Director's decision, but the appeal was denied by the Board's General Counsel for the same reason.

Ray F. Messick, president of Food Fair of N.C., Inc., and one of the defendants in this action, filed an affidavit stating:

> "Each of the plaintiffs in this action was at the times alleged a manager of the meat market of one of the stores owned and operated by the defendant, Food Fair of N. C., Inc. There is a meat market at each of the corporate defendant stores and the plaintiffs, as meat market managers at their respective stores, were not responsible to either the store manager or the assistant manager. The meat markets were operated independently and each of the plaintiffs had full supervisory authority over said meat market and the

employees in the meat market. Each of the plaintiffs was supervisor of his respective meat market and its employees and had authority to hire, fire or discipline meat market employees, responsibility for directing them and adjusting their grievances by the use of their independent judgment.

"The plaintiffs, as meat market managers, independently and on their own authority scheduled regular hours and overtime hours for meat market employees. Each of the plaintiffs, as meat market managers, exercised their authority to grant time off and to tell meat market employees what to do in their employment in the meat market. Each of the plaintiffs were paid more than other employees, were provided more life insurance by the defendant corporation, got more sick leave and a larger Christmas bonus, as well as a year-end bonus, which the other meat market employees did not receive.

"On June 3, 1971, the Regional Director of the Eleventh Region of the National Labor Relations Board issued an order adjudicating Ulysses Vernon Beasley, James A. Kiger, Emidio J. Bassetti and Joe W. Jones, plaintiffs in this case, as supervisors. This order also included all other meat managers of the defendant corporation."

On 28 February 1972 Gambill, J., entered the following order:

"THIS CAUSE having been calendared for hearing on the Motion Docket at the February 21, 1972 week of Civil Court in and for Forsyth County, and having come on for hearing before the undersigned Judge of the Superior Court upon the defendants' Motion To Dismiss, Motion For Judgment On The Pleadings, and Plea In Abatement, and all parties having been represented by counsel at said hearing before the undersigned Judge and having filed briefs and presented arguments for their respective clients and positions in the matter;

"And the Court having considered the Motion To Dismiss, Motion For Judgment On The Pleadings, and Plea In Abatement; and the parties having stipulated that each of the plaintiffs in this cause was at all times complained

of a supervisor of Food Fair of N. C., Inc.; and the defendants having further filed Affidavit of Ray F. Messick, dated February 23, 1972, without objection; and the Court having further considered the Motions filed as a Motion For Summary Judgment as provided under Rule 12(c) and Rule 56;

"And the Court, having heard the matter and the arguments of counsel for all parties in the same, being of the opinion that the defendants' Motion For Judgment On The Pleadings and To Dismiss should be allowed for that the plaintiffs have failed to state a claim upon which relief can be granted; and the Court being further of the opinion that the defendants are entitled to summary judgment in their favor pursuant to Rule 56 in that the pleadings, stipulation and affidavits show that there is no genuine issue as to any material fact and that the defendants are so entitled to judgment as a matter of law; and the parties having agreed that the Judgment be presented on this date;

"NOW, THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED that the defendants' Motion For Judgment On The Pleadings and To Dismiss is hereby allowed; that the Court has further considered said Motion as a Motion For Summary Judgment and that the defendants' Motion For Summary Judgment is hereby allowed; that this action be and the same is hereby dismissed with prejudice; and that the costs of the action be taxed against the plaintiffs."

Plaintiffs Beasley, Bassetti, and Jones appealed. The Court of Appeals in an opinion by Judge Morris, concurred in by Judges Vaughn and Graham, reversed. We allowed *certiorari* on 14 September 1972.

McCaul, Grigsby and Pearsall by Robert C. Moss; Hudson, Petree, Stockton, Stockton & Robinson by R. M. Stockton, Jr., and James H. Kelly, Jr., for defendant appellants.

Larry L. Eubanks for plaintiff appellees Beasley, Bassetti, and Jones.

Haynsworth, Baldwin and Miles by James M. Miles, Attorneys for Associated Industries, Inc., Capital Associated Industries, Inc., Central Piedmont Industries, Inc., Piedmont Associated Industries, Inc., and Western Carolina Industries, Inc., Amici Curiae.

MOORE, Justice.

[1] The first question posed on this appeal is whether the courts of North Carolina have jurisdiction to adjudicate a claim brought by plaintiffs, supervisors, against their employer for damages resulting from an alleged unfair practice under the provisions of our Right-to-Work Law, Chapter 328, Session Laws of 1947, codified as G.S. 95, Sections 78 through 84.

Plaintiffs were discharged from their employment with defendant Food Fair of N. C., Inc., on June 25 and June 27, 1971. Plaintiffs allege that the discharge contravenes G.S. 95-81, which is as follows:

> "No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment."

Plaintiffs' action for damages is based on G.S. 95-83, which provides:

> "Any person who may be denied employment or be deprived of continuation of his employment in violation of §§ 95-80, 95-81, and 95-82 or of one or more of such sections, shall be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with him by appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment."

Our Right-to-Work Law has been upheld by this Court and the Supreme Court of the United States. *State v. Whitaker,* 228 N.C. 352, 45 S.E. 2d 860 (1947); *Lincoln Fed. L. U. v. Northwestern I. & M. Co.,* 335 U.S. 525, 93 L.Ed. 212, 69 S.Ct. 251, 6 A.L.R. 2d 473 (1949); 29 USC § 164(b). The determinative question then in this case is: Are supervisors entitled to protection under this Act?

Prior to the institution of this action, plaintiffs filed charges with the National Labor Relations Board claiming that their discharges were unlawful under the National Labor Relations Act as amended. The Regional Director of that Board found that the employer was engaged in commerce within the meaning of the Act and it would effectuate the purpose of the Act to assert jurisdiction, but dismissed the charges after determining that the plaintiffs were supervisors and not employees

and were not entitled to protection of the Act. The Board's General Counsel denied plaintiffs' appeal for the same reason. Thereafter the plaintiffs instituted this action.

In *Willard v. Huffman,* 250 N.C. 396, 109 S.E. 2d 233 (1959), this Court upheld a judgment for an employee awarding damages sustained as the result of his discharge by his employer for failure to abstain and refrain from membership in a labor union or labor organization. The *Willard* case is distinguishable from the present case in two important respects. First, in *Willard* the National Labor Relations Board refused to consider plaintiff's claim, stating: "Further proceedings are not warranted inasmuch as the operations of the employer do not appear to meet the required standards to warrant the Board's exercise of its jurisdiction in this matter." In the present case, the National Labor Relations Board had jurisdiction but refused to grant plaintiffs' relief due to the provisions of 29 USC § 164(a), which provides:

> "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, *but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local relating to collective bargaining.*" (Emphasis added.)

Secondly, plaintiff in *Willard* was an employee clearly entitled to protection under our Right-to-Work Law, while in the present case plaintiffs were admittedly supervisors.

The National Labor Relations Act as amended distinguishes supervisors from employees. 29 USC § 152(3) provides, *inter alia:* "The term 'employee' shall include any employee . . . but shall not include . . . any individual employed as a supervisor. . . ." 29 USC § 152(11) defines the term "supervisor" as: ". . . (A)ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances. . . ."

Since the 1947 amendments to the National Labor Relations Act, the federal courts have been called upon on numerous occasions to determine the relative rights of employers and supervisors under that statute. The federal courts have consistently held that a supervisor is not protected under the statute from

discharge due to union membership or activity. In *NLRB v. Big Three Welding Equipment Co.*, 359 F. 2d 77 (5th Cir. 1966), the Court decided that a "dispatcher" of company trucks and drivers was a supervisor. Based upon that determination, it was held that the plaintiff was not entitled to reinstatement and back pay because of his discharge for union membership and activity. *Accord, NLRB v. Charley Toppino and Sons, Inc.*, 332 F. 2d 85 (5th Cir. 1964). In *Oil City Brass Works v. NLRB*, 357 F. 2d 466 (5th Cir. 1966), the same Court said:

> "If Hammock was fired solely because of his union affiliation, there has been no unfair labor practice on which the Board can predicate its order. The National Labor Relations Act does not protect supervisory personnel. [Citations omitted.] It is settled that the Act does not preclude a company from firing or refusing to recall from layoff status a supervisory employee solely because that employee is affiliated with a union. [Citations omitted.]"

The Ninth Circuit Court of Appeals reached the same conclusion in *NLRB v. Fullerton Publishing Company*, 283 F. 2d 545 (9th Cir. 1960). In that case the county news editor of a newspaper was deemed to be a supervisor. The Court then said:

> "The law is clear that a supervisor is not entitled to the protection afforded ordinary employees under the National Labor Relations Act, and as to supervisors there can be no such thing as a discriminatory discharge or unfair labor practice. . . . "

Accord, NLRB v. Inter-City Advertising Co., 190 F. 2d 420 (4th Cir. 1951), cert. den. 342 U.S. 908, 96 L.Ed. 679, 72 S.Ct. 301 (1952); *NLRB v. Griggs Equipment, Inc.*, 307 F. 2d 275 (5th Cir. 1962).

The federal cases go further than merely holding that the National Labor Relations Act affords supervisory personnel no protection. These cases recognize the existence of the legislative intent on the part of Congress to leave employers unfettered in dealing with union affiliation on the part of their supervisory personnel. *NLRB v. Edward G. Budd Mfg. Co.*, 169 F. 2d 571 (6th Cir. 1948), cert. den. 335 U.S. 908, 93 L.Ed. 441, 69 S.Ct. 411 (1949), was one of the first cases dealing with supervisors decided after the 1947 amendments to the National Labor Relations Act. There the Court discussed the intent of Congress in enacting the amendments:

> "We believe it is clear that Congress intended by the enactment of the Labor Management Relations Act that employers be free in the future to discharge supervisors for joining a union, and to interfere with their union activities. . . . "

Congressional intent was also considered at length by Circuit Judge Pope in *NLRB v. Retail Clerks Inter. Ass'n,* 211 F. 2d 759 (9th Cir. 1954) :

> "A primary objective of § 2(11) of the Act, to which reference is made in this paragraph of the decree, was to assure to the employer his right to procure the loyalty and efficiency of his supervisors and managers. The reports which accompanied the legislative bill which Congress enacted into the Labor Management Relations Act of 1947, made this abundantly clear. The reports were specific as to certain evils which the congressional committees thought they could avoid by excluding foremen and other supervisors from the operation of the Labor Act. Much emphasis was laid upon the desirability of assuring their independence of unions of the rank-and-file. It was noted that what had been happening in respect to unionizing of foremen under the former Act was 'bad for output' and hurt the free flow of commerce which the Act was intended to promote . . . . "

Similarly, in *Carpenters District Council, Etc. v. NLRB,* 274 F. 2d 564 (D.C. Cir. 1959), that Court said:

> " . . . Congress was aware of the potential conflict between the obligations of foremen as representatives of their employers, on the one hand, and as union members, on the other. Section 2(3) evidences its intent to make the obligations to the employer paramount. That provision excepts foremen from the protection of the Act. Its purpose was to give the employer a free hand to discharge foremen as a means of ensuring their undivided loyalty, in spite of any union obligations. . . . "

"When a union attempts to organize supervisors, or when supervisors elect to become members of a union, a problem of federal preemption does arise." 4 Jenkins, Labor Law § 21.9, The Federal Preemption Doctrine, p. 103. In *San Diego Unions v. Garmon,* 359 U.S. 236, 3 L.Ed. 2d 775, 79 S.Ct. 773 (1959),

Mr. Justice Frankfurter, speaking for the majority, laid down certain guidelines when he said:

> " . . . If the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7 [29 USC § 157] or prohibited by § 8 [29 USC § 158], then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States. . . . " 359 U.S. at p. 245.

In *Hanna Mining v. Marine Engineers,* 382 U.S. 181, 15 L.Ed. 2d 254, 86 S.Ct. 327 (1965), in an opinion by Mr. Justice Harlan, expressing the view of eight members of the Court, it was held that under the circumstances of that case, the federal Act did not preempt the State's jurisdiction. Plaintiffs, employers, declined to negotiate with a union representing the marine engineers until it was established that the union represented a majority of the engineers, whereupon the union picketed plaintiffs' ships. Employers petitioned that a representation election among its engineers be held. The petition was dismissed by the National Labor Relations Board on the ground that the engineers were "supervisors" under the Act and excluded from the definition of employees. The employers' charge, alleging a violation of Section 8 (29 USC § 158) of the Act, was dismissed on the ground that the union's conduct fell outside the provisions of the Act because it sought to represent "supervisors" rather than "employees." Plaintiffs then brought suit in Wisconsin state court seeking injunctive relief. The state court dismissed for lack of jurisdiction. The Supreme Court of Wisconsin affirmed on the ground that the picketing, while illegal under Wisconsin law, arguably violated Sections 8(b)(4)(B) and 8(b)(7) of the Act (29 USC § 158(b)(4)(B) and 29 USC § 158(b)(7)) and so fell within the exclusive jurisdiction of the National Labor Relations Board. In reversing, the Supreme Court said:

> "The ground rules for preemption in labor law, emerging from our *Garmon* decision, should first be briefly summarized: in general, a State may not regulate conduct arguably 'protected by § 7, or prohibited by § 8' of the National Labor Relations Act, see 359 U.S., at 244-246, and the legislative purpose may further dictate that certain

> activity 'neither protected nor prohibited' be deemed privileged against State regulation, cf. 359 U.S., at 245."

Thus, after reaffirming the "arguably" test as set out in *Garmon*, *Hanna* recognized an additional aspect of the *Garmon* rule: "(L)egislative purpose may further dictate that certain activity 'neither protected nor prohibited' be deemed privileged against state regulation." The Court then determined that because the picketers in *Hanna* were supervisors, their activity was not arguably protected or prohibited by Sections 7 and 8. The union argued, however, that Section 14(a) indicated that Congress had affirmatively adopted a *laissez faire* attitude toward supervisors which brought the case within the second aspect of the *Garmon* rule and precluded both federal and state regulation. In answering this contention Mr. Justice Harlan said:

> "This broad argument fails utterly in light of the legislative history, for the Committee reports reveal that Congress' propelling intention was to relieve employers from any compulsion under the Act and under state law to countenance or bargain with any union of supervisory employees. Whether the legislators fully realized that their method of achieving this result incidentally freed supervisors' unions from certain limitations under the newly enacted § 8(b) is not wholly clear, but certainly Congress made no considered decision generally to exclude state limitations on supervisory organizing. . . . "

The Wisconsin law increased the restrictions on supervisor organizing and so was consistent with the national labor relations policy concerning supervisors. *Hanna,* however, specifically recognizes a national policy established by Congress "to relieve employers from any compulsion under the Act and under state law to countenance or bargain with any union of supervisory employees." The plaintiffs contend that the North Carolina Right-to-Work Law protects supervisors from discharge based solely upon union membership. If the North Carolina Right-to-Work Law, in fact, does this, the additional burden on employers and the added protection for supervisors would run counter to the legislative intent assigned to Congress by both Mr. Justice Harlan in *Hanna* and the many Circuit Court of Appeals cases herein cited. Preservation of the integrity of a national policy in the field of labor-management relations is the purpose of the doctrine of federal preemption in this context.

Further insight into the application of the preemption doctrine in situations which do not fall within the "arguably" test of *Garmon* may be found in an analysis of *Teamsters Local 20 v. Morton*, 377 U.S. 252, 12 L.Ed. 2d 280, 84 S.Ct. 1253 (1964). In that case Morton was engaged in hiring out trucks and drivers for use in highway construction. Local 20 represented Morton's employees. During a strike over the terms of a new collective bargaining agreement, Local 20 sought to exert upon Morton various forms of secondary pressure which violated Section 8(b)(4) of the National Labor Relations Act. Local 20 also persuaded the management of one of Morton's customers to refrain from doing business with Morton during the strike. Since the customer was not threatened with any form of reprisal, the persuasion to boycott Morton was not even arguably an unfair labor practice. Local 20 was, likewise, not protected in this activity by the National Labor Relations Act. A persuasive boycott, however, violated Ohio law and the state courts granted compensatory and punitive damages. The United States Supreme Court acknowledged that the union's activity did not bring the case within the *Garmon* rule:

> "It is the respondent's contention, however, that since the petitioner union's peaceful conduct was neither arguably protected under § 7 nor arguably prohibited under § 8 of the National Labor Relations Act, as amended, the trial court was free to award damages on the basis of state law for injuries caused by this conduct. But even though it may be assumed that at least some of the secondary activity here involved was neither protected nor prohibited, it is still necessary to determine whether by enacting § 303, 'Congress occupied this field and closed it to state regulation.' *Automobile Workers v. O'Brien*, 339 U.S. 454, 457. The basic question, in other words, is whether 'in a case such as this, incompatible doctrines of local law must give way to principles of federal labor law.' *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 102. . . . "

The Court then determined that a persuasive boycott was precluded from state regulation by the preemption doctrine. The Court said:

> " . . . This weapon of self-help, permitted by federal law, formed an integral part of the petitioner's effort to achieve its bargaining goals during negotiations with the respondent. Allowing its use is a part of the balance struck

by Congress between the conflicting interests of the union, the employees, the employer and the community. *Electrical Workers Local 761 v. Labor Board,* 366 U.S. 667, 672. If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focussed upon but did not proscribe when it enacted § 303 [8(b)(4)], the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy. 'For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.' *Garner v. Teamsters Union,* 346 U.S. 485, 500. . . . "

To permit a state law to deprive an employer of his right to discharge his supervisor for membership in a union would completely frustrate the congressional determination to leave this weapon of self-help to the employer. Furthermore, the balance of power between labor and management expressed in our national labor policy would be upset. *Oil City Brass Works v. NLRB, supra; NLRB v. Fullerton Publishing Co., supra; Carpenters District Council, Etc. v. NLRB, supra.* See 85 Harv. L. Rev. 1337, 1351, *Labor Law Preemption Revisited.*

Congress and the federal courts have adopted a national industrial relations policy which gives an employer the right to discharge his supervisor for union membership. The state is precluded from interfering with that policy. "When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the states from acting." *San Diego Unions v. Garmon,* 359 U.S. 236, 3 L.Ed. 2d 775, 79 S.Ct. 773 (1959). "Incompatible doctrines of local law must give way to principles of federal labor law." *Teamsters Local 174 v. Lucas Flour Co.,* 369 U.S. 95, 7 L.Ed. 2d 593, 82 S.Ct. 571 (1961).

[2] The North Carolina Right-to-Work Law defines certain rights of employers and employees. See *State v. Whitaker, supra; Lincoln Fed. L. U. v. Northwestern I. & M. Co., supra.* However, this state law cannot be construed to contravene the national policy as between employer and supervisor. When, as in the present case, the facts disclose that plaintiffs as supervisors

seek to invoke a remedy precluded by the established national policy, the doctrine of federal preemption applies, and the state court is without jurisdiction over the subject matter of the controversy. For this reason, it is not necessary to consider the other questions raised by the pleadings in this case or discussed in the opinion of the Court of Appeals.

The decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals with direction that it remand the case to the Superior Court of Forsyth for entry of judgment affirming the order of Judge Gambill dismissing the action.

Reversed and remanded.

IN THE MATTER OF: CERTIFICATE OF NEED FOR ASTON PARK HOSPITAL, INC.

No. 91

(Filed 26 January 1973)

Constitutional Law § 13; Hospitals § 2— statute requiring certificate of need for private hospital — unconstitutionality

The statute requiring a certificate of need from the Medical Care Commission in order to construct and operate a hospital or other medical care facility on private property with private funds, G.S. 90-291, constitutes a deprivation of liberty without due process of law in violation of Article I, § 19 of the Constitution of North Carolina, establishes a monopoly in existing hospitals contrary to the provisions of Article I, § 34 and grants to existing hospitals exclusive privileges forbidden by Article I, § 32.

APPEAL by Medical Care Commission from *Thornburg, J.*, at the 28 August 1972 Session of BUNCOMBE, heard prior to determination by the Court of Appeals.

Aston Park Hospital, Inc., hereinafter called Aston Park, a nonprofit corporation, filed with the North Carolina Medical Care Commission, hereinafter called the Commission, on 7 October 1971, its application for a certificate of need, pursuant to Article 21, Chapter 90 of the North Carolina General Statutes, for the construction of a general hospital of 200-bed capacity in the City of Asheville. For many years prior thereto, Aston Park owned and operated in Asheville, upon a tract of approxi-

mately one acre, a general hospital with a capacity of 50 beds. Its purpose is to discontinue the operation of this old plant and replace it with the new and larger hospital of modern design and equipment upon a tract of 69 acres acquired by it for this purpose in 1967 and now owned by it in fee simple.

After a hearing, the Commission entered its order denying the application for a certificate of need on the ground that "the insertion into the Ashville health community of a new, 200-bed general hospital would be an unnecessary and weakening duplication of services and undesirable dilution of physicians' time in treating patients at widely separated hospitals." Among other things, the Commission found that there are presently in operation seven general hospitals in the Commission's multi-county planning area B, three of which (including Aston Park's existing plant) are located in the City of Asheville, the total bed capacity of the seven hospitals being 978, and that of the three hospitals in Asheville being 641. The Commission further found that 94 additional beds should be added to the hospital facilities in the City of Asheville by 1977, but that 90 of these beds would be added by St. Joseph's Hospital pursuant to its preliminary plans filed with the Commission prior to 21 July 1971 and approved by the Commission. Thus, the additional bed capacity to be provided by Aston Park's proposed construction would result in the city's having a hospital bed capacity in excess of that which the Commission concluded is needed.

Aston Park proposes to build its contemplated new plant without the use of any public funds, State, Federal or local. It owns the unencumbered proposed site and has available to it, from trust funds and contributions, approximately $1,175,000. It has a firm commitment for a loan from a nongovernmental source of the remainder of the total cost of constructing and equipping the new hospital.

The approval by the Commission of the proposed addition of the 90-bed capacity to St. Joseph's Hospital was granted without a hearing on the ground that, since the preliminary plans therefor were filed with the Commission prior to 21 July 1971, the effective date of G.S. Chapter 90, Article 21, the statutory requirement of a certificate of need was not applicable.

Upon denial of its application for a certificate of need, Aston Park petitioned the superior court for review. The court

adjudged the order of the Commission invalid for the reason that G.S. 90-289 and G.S. 90-291 are in violation of the North Carolina Constitution, Article I, §§ 1, 19, 32 and 34 and Article II, § 1.

From that judgment the Commission appealed.

Attorney General Morgan and Assistant Attorney General Denson for Medical Care Commission.

Herbert L. Hyde for Aston Park Hospital.

Hollowell, Ragsdale & Kirschbaum, P.A., by Edward E. Hollowell for North Carolina Hospital Association, Inc., Amicus Curiae.

LAKE, Justice.

Article 21, Chapter 90 of the General Statutes, G.S. 90-289 to G.S. 90-291, was enacted and took effect on 21 July 1971. G.S. 90-289 provides:

> "*Orderly development of medical facilities.*—The General Assembly of North Carolina declares that it is the public policy of the State to encourage the necessary and adequate development of health and medical care facilities and that this development shall be accomplished in a manner which is orderly, timely, economical, and without unnecessary duplication of these facilities."

Among other definitions not material to this appeal, G.S. 90-290 defines "medical care facility" to include hospitals. The provisions of G.S. 90-291, material to this appeal, are as follows:

> "*Certificate of need.*—(a) Any other provisions of law to the contrary notwithstanding, such State agencies as administer licensing laws applicable to medical care facilities shall, as a precondition to issuing or continuing the license applied for, make a 'determination of need' with respect to any new construction, construction of additional bed capacity or conversion of existing bed capacity for which a license is requested.
>
> "(b) Any proposed medical care facility, desiring to be licensed by a State licensing agency, shall make application for a certificate of need, as required by this Article, when such facility proposes new construction. Any existing

medical care facility need not apply for a certificate of need except when the facility proposes new construction, construction of additional bed capacity, or the conversion of existing bed capacity to a different license category, except outpatient and emergency services. * * *

"(c) Certificates of need shall be issued or denied, suspended, revoked or reinstated by such agencies having responsibility for licensing medical care facilities in accordance with law and rules and regulations of the licensing agency. * * *

"No certificate of need shall be issued unless the action proposed in the application for such certificate is necessary to provide new or additional inpatient facilities in the area to be served, can be economically accomplished and maintained, and will contribute to the orderly development of adequate and effective health services. In making such determinations, there shall be taken into consideration

(1) The size, composition and growth of the population of the area to be served;

(2) The number of existing and planned facilities of similar types;

(3) The extent of utilization of existing facilities; and

(4) The availability of facilities or service which may serve as alternatives or substitutes.

* * *

"(e) Construction of a new medical care facility or expansion of an existing facility to gain additional bed capacity shall not be instituted or commenced after the effective date of this Article except upon application for and receipt of a certificate of need as provided herein: Provided that in any case which, prior to July 21, 1971, there has been proposed the construction of a new facility or the expansion of bed capacity of an existing facility and preliminary plans have been submitted to a State licensing such proposed projects are exempt to the extent of initial construction or expansion provided for in such preliminary plans from the provisions of this Article.

* * *

"(h) * * * Decisions concerning a certificate of need shall be appealable to, or subject to judicial review in, the courts as provided by law with regard to licensing decisions of any licensing agency.

"(i) The boards or commissions of State licensing agencies shall have authority to adopt policies, rules and regulations in order to effectuate the provisions and purposes of this Article."

The superior court concluded that the following provisions of the Constitution of North Carolina are violated by one or more of these statutory provisions:

Article I, § 1: "The equality and rights of persons. We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."

Article I, § 19: "Law of the land; equal protection of the laws. No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin."

Article I, § 32: "Exclusive emoluments. No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."

Article I, § 34: "Perpetuities and monopolies. Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed."

Article II, § 1: "Legislative power. The legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives."

Upon this appeal we do not have before us any question as to the authority of the Legislature to require one who proposes to operate a hospital, nursing home or other facility for the

care of sick people, to obtain from the appropriate State licensing board a license or permit. Nor do we have before us any question as to the authority of the Legislature to declare that such permit shall be denied unless the applicant meets reasonable minimum specifications concerning the design and construction of the building, its equipment, sanitation and maintenance. See: G.S. 131-126.2 to G.S. 131-126.4 and G.S. 130-170; 40 AM. JUR. 2d, Hospitals, § 4; 41 C.J.S., Hospitals, § 2; Annot., 97 A.L.R. 2d 1188. Nothing whatever in this record suggests that the hospital which Aston Park proposes to construct will not be adequate in design, structure or equipment or that it will not be maintained in accordance with the highest standards of sanitation and patient care. The Commission has made no objection to Aston Park's continuing to operate its present plant. Nothing in the record suggests that the proposed hospital will not be superior to the present plant in all these respects.

The present appeal raises no question concerning the power of the Legislature, through an appropriate board or commission, to limit the use of public funds, or other governmental aid, State or local, either in the construction or in the maintenance of a hospital, nursing home or other facility for the care of sick people, to institutions for which the appropriate State board or commission finds, by reasonable and appropriate procedures, an existing need in view of existing facilities operated for such purpose. See, *Williamson v. Snow,* 239 N.C. 493, 80 S.E. 2d 262. This appeal raises no question concerning the power of the Legislature to require the applicant for such public assistance to comply with any reasonable requirements concerning construction, operation or maintenance of such institution. See, G.S. 131-120. Aston Park seeks no grant of public funds, Federal, State or local. It proposes to construct its new facility upon property which it now owns in fee simple and to build and operate it with the expenditure of the income or principal of trust funds, established by private benefactors for its benefit, contributions received from private sources and charges to its patients.

Upon this appeal no question arises as to the power of the Legislature to confer upon cities and towns the authority to enact reasonable zoning ordinances limiting the construction and operation of a hospital, nursing home or other facility for the care of sick people to certain areas, or reasonably to regulate the location and operation of an institution for the care of per-

sons afflicted with contagious diseases or disorders of the mind. See: *State v. Tenant,* 110 N.C. 609, 14 S.E. 387; *Sisters of Bon Secours Hospital v. City of Grosse Pointe,* 8 Mich. App. 342, 154 N.W. 2d 644, 27 A.L.R. 3d 1007; Annot., 27 A.L.R. 3d 1022, 1028. Nothing in the record before us suggests that the 69 acre tract on which Aston Park proposes to construct its new hospital is not a suitable location therefor.

Nothing in this appeal presents any question concerning the power of the Legislature to require a hospital, nursing home or other facility for the care of sick people to be staffed with a reasonably adequate number of doctors, nurses, technicians and other personnel or to require that such personnel have the training and qualifications reasonably necessary to assure proper care for its patients.

In the present case, the Commission claims and the statute purports to confer upon it the authority to forbid the construction, with private funds and suitable materials, upon private property suitably located, of a well planned hospital which is to be adequately equipped and staffed with a sufficient number of well trained personnel in all categories, the sole reason of such prohibition being that, in the opinion of the Commission, there are now in the area hospitals with bed capacity sufficient to meet the needs of the population. Aston Park, which desires so to engage in the business of caring for sick, injured and infirm people, contends that this is in excess of the constitutional power of the Legislature. We agree.

In support of the statute and of its action thereunder, the Medical Care Commission contends that there is a shortage of doctors and of adequately trained hospital staff workers, especially nurses, that excess hospital construction will spread the available hospital employees more thinly and thus endanger adequate care of the patients, that the time of the doctors can be used more efficiently if the total bed capacity is concentrated, that excess bed capacity will result in a substantial amount of vacant rooms and beds, that there are certain overhead costs which increase with the number of beds whether occupied or vacant, that the overhead cost of vacant beds must be absorbed by the patients in the occupied beds and, consequently, the effect of excess hospital bed capacity will be less efficient service to patients at greater cost.

The Appellate Division of the Supreme Court of New York found a like argument persuasive. *Attoma v. State Department*

of Social Welfare, 26 A.D. 2d 12, 270 N.Y.S. 2d 167. Notwithstanding our great respect for that court and for the opinion of the Medical Care Commission, we do not find the argument convincing. It is a matter of common knowledge that in many communities hospital costs have spiralled upward in recent years while patients desiring hospitalization have been unable to find promptly a vacant hospital room.

Compulsory curtailment of facilities for the care of the sick is not a reasonable choice of a remedy for a shortage of trained hospital personnel, nurses and doctors. In any event, we hold that Article I, § 19, of the Constitution of this State does not permit the Legislature to authorize a State board or commission to forbid persons, with the use of their own property and funds, to construct adequate facilities and to employ therein a licensed professional and quasi-professional staff for the treatment of sick people, who desire the service, merely because to do so endangers the ability of other, established hospitals to keep all their beds occupied.

As Mr. Justice Harlan, speaking for the Supreme Court of the United States, observed in *Northern Securities Company v. United States,* 193 U.S. 197, 351, 24 S.Ct. 436, 48 L.Ed. 679, "It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions." Mr. Justice Harlan was, of course, speaking of monopolies created by private ingenuity and operated for profit and of legislation designed to curb their economic stranglehold upon the public. His observation, however, applies also to monopolies created by statute though not operated for profit, as such. In the ordinary businesses it has been the common experience in America that competition is an incentive to lower prices, better service and more efficient management. The record discloses no reason to suppose that the same is not true in the practice of the healing arts and in the operation of institutions for that purpose. If, however, competition results in more courteous and attentive service and a more diligent search for improved methods, these benefits may well be deemed to balance, at least, the detriment of higher prices. While in many respects a hospital is not comparable to an ordinary business establishment, we know of no reason to doubt its similarity thereto in its response to the spur of competition.

In the public utility businesses competition, deemed unnecessary, is curtailed by the requirement that one desiring to engage in such business procure from the Utilities Commission a certificate of public convenience and necessity. G.S. 62-110. However, in those fields the State has undertaken to protect the public from the customary consequences of monopoly by making the rates and services of the certificate holder subject to regulation and control by the Utilities Commission. G.S. 62-32, G.S. 62-42, G.S. 62-130. No comparable power to regulate hospital rates and services has been given to the Medical Care Commission.

Any exercise by the State of its police power is, of course, a deprivation of liberty. Whether it is a violation of the Law of the Land Clause or a valid exercise of the police power is a question of degree and of reasonableness in relation to the public good likely to result from it. To deny a person, association or corporation the right to engage in a business, otherwise lawful, is a far greater restriction upon his or its liberty than to deny the right to charge in that business whatever prices the owner sees fit to charge for service. Consequently, such a deprivation of his liberty requires a substantially greater likelihood of benefit to the public in order to enable it to survive his attack based upon Article I, § 19 of the Constitution of North Carolina.

As Justice Higgins said in *Roller v. Allen,* 245 N.C. 516, 518, 96 S.E. 2d 851, "The right to work and to earn a livelihood is a property right that cannot be taken away except under the police power of the State in the paramount public interest for reasons of health, safety, morals, or public welfare." In discussing the extent of the police power of a state under the comparable Due Process Clause of the Fourteenth Amendment to the Federal Constitution, the Supreme Court of the United States said in *Lawton v. Steele,* 152 U.S. 133, 137, 14 S.Ct. 499, 38 L.Ed. 385:

> "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with

private business, or impose unusual and unnecessary restrictions upon lawful occupations."

Obviously, the police power extends to reasonable regulation of hospitals, both as to their construction and as to their operation. However, the fact that the business of a hospital is, per se, related to the public health does not mean that every regulation of its activities falls within the scope of the police power. See, *New State Ice Co. v. Liebmann,* 285 U.S. 262, 273, 52 S.Ct. 371, 76 L.Ed. 747. As Justice Ervin said in *State v. Ballance,* 229 N.C. 764, 769, 51 S.E. 2d 731, 7 A.L.R. 2d 407: "If a statute is to be sustained as a legitimate exercise of the police power, it must have a rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare. In brief, it must be reasonably necessary to promote the accomplishment of a public good, or to prevent the infliction of a public harm." See also, *Cheek v. City of Charlotte,* 273 N.C. 293, 160 S.E. 2d 18. In *State v. Harris,* 216 N.C. 746, 6 S.E. 2d 854, 128 A.L.R. 658, Justice Seawell said, at page 759: "But the power to regulate a business or occupation does not necessarily include the power to exclude persons from engaging in it. * * * When this field has been reached, the police power is severely curtailed. * * * In one respect authorities are agreed: It is necessary to a valid exercise of the police power that the proposed restriction have a reasonable and substantial relation to the evil it purports to remedy."

We find no such reasonable relation between the denial of the right of a person, association or corporation to construct and operate upon his or its own property, with his or its own funds, an adequately staffed and equipped hospital and the promotion of the public health. Consequently, we hold that G.S. 90-291 is a deprivation of liberty without due process of law, in violation of Article I, § 19 of the Constitution of North Carolina insofar as it denies Aston Park the right to construct and operate its proposed hospital except upon the issuance to it of a certificate of need.

Such requirement establishes a monopoly in the existing hospitals contrary to the provisions of Article I, § 34 of the Constitution of North Carolina and is a grant to them of exclusive privileges forbidden by Article I, § 32.

In so holding we do not substitute our judgment for that of the Medical Care Commission as to the extent, if any, of the

present need for additional hospital bed capacity in the City of Asheville. It may prove true that Aston Park will not be able to recruit the professional and quasi-professional staff necessary to enable it to operate the proposed hospital so that its revenues will be sufficient to meet its expenses. Thus, the proposed hospital may never be able to commence operations or, if it commences them, it may be compelled for financial reasons to close. The Constitution of this State does not, however, permit the Legislature to confer upon the Medical Care Commission the power of a guardian to protect Aston Park from possible bad financial judgment. Nor does it permit the Legislature to grant to the Medical Care Commission authority to exclude Aston Park from this field of service in order to protect existing hospitals from competition otherwise legitimate.

The statutory requirement of a certificate of need being beyond the authority of the Legislature under the Constitution of this State, hereinabove discussed, we do not reach, upon this appeal, either the interesting question raised by Aston Park as to whether it has been denied the equal protection of the laws, in violation of Article I, § 19 of the Constitution of North Carolina by the denial of its application and the issuance of a permit to St. Joseph's Hospital under the provision of G.S. 90-291(e), or the question raised by it as to whether certain terms of the statute are so vague as to constitute an unauthorized delegation of legislative power to the Commission.

Affirmed.

STATE OF NORTH CAROLINA v. PAUL LESTER BYNUM

— AND —

STATE OF NORTH CAROLINA v. JOLLIE COLEY

No. 60

(Filed 26 January 1973)

1. Criminal Law § 115— rape and kidnapping — failure to charge on lesser degrees of crimes — no error

The trial court did not err in failing to charge on lesser included offenses in a rape and kidnapping case where there was no evidence of any lesser included offenses embraced within the indictments.

2. Constitutional Law § 36; Criminal Law § 135— sentence of life imprisonment imposed — standing to object to statutory provision for death sentence

Where the jury recommended and the court imposed life imprisonment sentences upon defendants in a rape and kidnapping case, defendants were without standing to challenge the validity of a death sentence provided by statute.

3. Criminal Law § 101— refusal to sequester jury — no error

The trial court did not abuse its discretion in allowing the jurors to return to their homes for the night before they had reached a verdict where the court had given the jurors detailed admonitions and cautions and where there was nothing suggesting any impropriety on the part of any juror.

Chief Justice BOBBITT dissenting.

Justice SHARP joins in the dissenting opinion.

APPEAL by defendants from *Fountain, J.*, May 1, 1972 Session, WILSON Superior Court.

The defendants, Paul Lester Bynum and Jollie Coley, were separately charged by bills of indictment with the felonies of rape and kidnapping. The alleged victim of the charges was Phyllis D. Adams, a white female, age eighteen years. The four indictments, which grew out of a single episode, were consolidated for trial.

The record discloses that upon a finding of indigency on March 14, 1972, Judge Neville appointed Allen G. Thomas attorney for the defendant Bynum. On May 29, 1972, Judge Fountain appointed Samuel Mitchell attorney for Bynum. Mitchell, originally employed by Coley and later by Bynum, appeared as trial counsel for both defendants.

After arraignment and pleas of not guilty, a jury, satisfactory to both parties, was selected and duly empaneled.

Miss Adams, a witness for the State, testified that on March 11, 1972, she, in the company of two friends, went from their homes in Wake County to the airport in Wilson County for the purpose of viewing and, perhaps, participating in a parachute drop, or exhibition. Just at dark she left the airport alone to take a short walk along the nearby highway. Her mother testified that when her daughter was disturbed, she frequently walked alone "to meditate." As she returned from her walk, the following occurred: "(T)wo men (later identified

as the defendants) pulled up to the side of the road and asked me if I wanted a ride. They were in a Red Chevrolet. I refused and kept walking, and they backed up and asked again. . . . After my refusal to ride, they backed up again and the one on the passenger's side got out. . . . The one that got out grabbed my arm and pushed me in the car." Bynum was under the wheel. The witness was forced to sit between them. The two defendants drove to a lonely spot on a side road where first Coley and then Bynum, by the threatened use of an open knife, forced the witness to have intercourse with them. Thereafter she was taken back to the main highway and released on the outskirts of town. She went to the nearby home of Mr. and Mrs. Jennings and had them call the officers to whom she reported what had happened.

Mrs. Jennings, quoting Miss Adams, testified: "(S)he had been forced into a car with two colored men at knife point." Mrs. Jennings testified that Miss Adams was very much excited and in a state of shock.

Both defendants testified they were driving on the road together in Coley's Chevrolet; that Miss Adams was standing on the side of the road "thumbing a ride." They stopped and she voluntarily entered the car. After she smoked a marijuana cigarette, both had intercourse with her with her consent. Each of the defendants testified he did not use nor possess a knife. They introduced witnesses who testified to their good character.

The jury returned these verdicts: On the charges of rape—guilty with the recommendation the punishment be imprisonment for life in the State's prison. On the charges of kidnapping—guilty. The court imposed prison sentences for life on each defendant in each case. The defendants' counsel, Mr. Mitchell, gave notice of appeal.

Subsequent developments are disclosed by this Court's order here quoted in full:

"SUPREME COURT OF NORTH CAROLINA — ORDER IN CONFERENCE (Filed October 19, 1972)

"The record now before the Court discloses that the above named defendants were indicted, tried, and convicted in the Superior Court of Wilson County at its May 1, 1972 Session on charges of rape and kidnapping. On the charges

of rape the jury recommended and the court imposed life imprisonment sentences. On the charges of kidnapping the court likewise imposed life imprisonment sentences.

"The defendants were represented at the trial by their privately employed attorney, Mr. Samuel S. Mitchell. Mr. Mitchell took proper exceptions and gave notice of appeal.

"On August 4, 1972, the defendants filed in the Superior Court of Wilson County a verified motion alleging they were dissatisfied with their privately employed counsel and desired that he be replaced by other counsel selected by them. Mr. Mitchell replied to the motion saying he had aptly represented the defendants at the trial, he had given the proper notice of appeal, and that he would share his records with other privately employed counsel.

"On August 28, 1972, Judge Perry Martin heard the motion in the Superior Court of Wilson County, found the defendants had not shown cause to require that Mr. Mitchell be displaced as counsel, ordered him to perfect the appeal and 'plead the case on appeal,' but that defendants '. . . (M)ay associate any counsel of their own choosing . . . to appear with Mr. Mitchell, and Mr. Mitchell is instructed to give such associate counsel . . . the benefit of all records and data available . . . .' The court refused to relieve Mr. Mitchell of the duty of preparing and arguing the case on appeal.

"Mr. Mitchell complied with the court's order, prepared and filed a proper record of the case on appeal and therewith a well documented brief. The case was scheduled for argument in the Supreme Court on October 10, 1972. On the morning of that day, Mr. Mitchell notified the Clerk that he was ill and unable to appear in person and requested that oral argument be waived and the appeal be heard on the briefs. The Attorney General consented to the requested waiver of the arguments.

"On October 12, 1972, the defendants filed in the Appellate Division what purports to be a notice of appeal from Judge Martin's order directing Mr. Mitchell to appear and argue the case in the Supreme Court. It appears from the record that Mr. Mitchell has complied with Judge Martin's order in all respects except the argument in this Court.

"Under the circumstances here disclosed, it appears Mr. Mitchell is entitled to be relieved of the duty to proceed further in the appellate review. However, on account of the gravity of the charges, the verdicts, and judgments, it is ordered that the cases be re-scheduled and set for argument at the December, 1972 Session of this Court and that counsel selected by the defendants (if qualified to practice in the Supreme Court) appear and argue the case. They will be permitted to file supplemental briefs not later than November 5, 1972. The Attorney General may file a reply brief not later than November 20, 1972.

"By order of the Court in conference this October 19th, 1972.

MOORE, J.

For the Court"

The defendants failed to secure the services of other counsel. However, they filed a self-prepared supplemental brief which was made a part of the record and considered by the Court before final decision on the appeal.

Robert Morgan, Attorney General by Burley B. Mitchell, Jr., Assistant Attorney General; Charles A. Lloyd, Assistant Attorney General for the State.

Samuel S. Mitchell for defendant appellants.

HIGGINS, Justice.

The defendants' original brief, by exceptions and assignments of error, presents these questions for review:

"1. Did the Court below err in refusing to grant defendants' motions for nonsuit?

"2. Did the Court below err in its charge to the jury on the element of force in kidnapping?

"3. Did the Court below err by not instructing the jury on lesser crimes included under a rape indictment?

"4. Did the Court below err by putting defendants on trial for a capital offense?

"5. Did the Court below err by abusing its discretion in not sequestering the jury?"

The defendants' supplemental brief lists the following as questions involved:

"1. Did the Court err by an unauthorized search and seizures without a warrant?

"2. Did the Court err by using a coerced confession without a signature, and not letting the defendants challenge it?

"3. Did the Court err by Double Jeopardy?

"4. Did the Court err by not recording the Solicitor arguments to the jury so the defendants could challenge it?

"5. Did the Court err by not having a doctor report?

"6. Did the Court err by not looking upon that Miss Adams was thumbling (sic) and smoking marijuana the night we came in touch or contact with her?"

Miss Adams testified she was forced into the automobile, driven to a secluded spot on a side road, and forced to submit to an act of intercourse by each defendant. Immediately after her release she entered the home of strangers in a state of shock and had the officers called. The defendants testified as witnesses in their own defense. Both admitted they picked up Miss Adams, whom they did not know, because she was thumbing a ride. They drove to a side road where both had intercourse with her. Both claimed that all acts were with her consent.

[1] The material factual disputes involved the issue whether the intercourse was voluntary or the result of force. The conflict in the testimony required its resolution by the jury. The jury chose to believe the victim. The court placed upon the State the burden of proving beyond a reasonable doubt all essential elements of the offenses charged and instructed the jury the failure of the State to carry the burden required a verdict of not guilty. There was no evidence of any included lesser offenses embraced within the indictments and hence the court was under no duty to charge on lesser included offenses.

In *State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664, Justice Moore for this Court, stated the rule: "The necessity for charging on the crime of lesser degree arises only when there is evidence from which the jury could find that a crime of lesser degree was committed. (Citing authorities.)"

The Court in *State v. McNeil,* 277 N.C. 162, 176 S.E. 2d 732, said: "The defendant was not prejudiced by the charge which required the jury to acquit of all included lesser offenses. There was no evidence of the included lesser offenses, and the court was correct in refusing to permit the jury to consider them." The same language was repeated in *State v. Bryant,* 280 N.C. 551, 187 S.E. 2d 111. (Certiorari denied by the Supreme Court of the United States, No. 71-6743, decided November 6, 1972.)

[2] The defendants were placed on trial for kidnapping, a felony, and for rape, designated by G.S. 14-21 as a capital felony with provision that if the trial jury should so recommend, the punishment should be imprisonment for life in the State's prison. The jury recommended and the court imposed the life imprisonment sentences. The defendants, therefore, are without standing to challenge the validity of a death sentence. Only the party aggrieved by the judgment may appeal. 1 Strong's N. C. Index 2d, Appeal and Error, § 7, p. 123.

[3] The record discloses that the jury deliberated for about fifty minutes after the completion of the court's charge. The court then recalled the jury to the courtroom, instructed them not to discuss the case among themselves or with any member of their families, or with anyone else, and that they should not read about or listen to any discussion of the case. Attorney Mitchell suggested to the court:

> "MR. MITCHELL: Your Honor, before they leave, I was wondering if any security should be taken for the jury during the night.
>
> "THE COURT: I don't know of any reason why it should. Do you have anything to suggest such as any impropriety in any way?
>
> "MR. MITCHELL: No, sir, I am not talking about anything that has already happened. I'm thinking about the security that the court usually takes. . . . Not that it has happened, Your Honor."

The court, after detailed admonition and cautions, permitted the jury, composed of three women and nine men, to return to their homes for the night. The jury returned next morning and after deliberation, returned the verdicts heretofore disclosed. The court did not abuse its discretion in permitting the jurors

to return to their homes for the night. Nothing indicates, or even suggests, any impropriety on the part of any juror.

We have examined the entire record and considered all matters properly raised by exceptions and assignments of error. After full consideration of all matters of law or legal inference arising on the record, we are unable to find prejudicial error in any particular.

No error.

Chief Justice BOBBITT dissenting.

For the reasons set forth in my dissenting opinion in *State v. Bryant*, 280 N.C. 551, 187 S.E. 2d 111 (1972), it is my opinion that defendants are entitled to a new trial because of the court's failure to submit guilty of assault with intent to commit rape as permissible verdicts.

Justice SHARP joins in this dissenting opinion.

REEVES BROTHERS, INC. v. THE TOWN OF RUTHERFORDTON AND THE TOWN OF RUTH

No. 64

(Filed 26 January 1973)

1. **Taxation § 38— taxpayer's remedy**

Ordinarily, absent sufficient allegations that a tax is illegal or levied for an illegal or unauthorized purpose, the taxpayer's exclusive remedy is to pay the tax and sue for a refund for such portion thereof as is excessive as provided by G.S. 105-381.

2. **Taxation § 38— plant located in two municipalities — validity of agreement as to taxation by each municipality — declaratory judgment**

Plaintiff, whose manufacturing plant is located partly in Rutherfordton and partly in Ruth, is entitled to have determined in a declaratory judgment action the validity of a 1966 agreement entered into by plaintiff, Rutherfordton and Ruth as to what properties of plaintiff are to be taxed by Rutherfordton and what properties are to be taxed by Ruth.

ON *certiorari* to review the decision of the Court of Appeals (15 N.C. App. 385, 190 S.E. 2d 345) which affirmed the judgment entered by *Falls, J.*, at the 10 January 1972 Session of RUTHERFORD Superior Court.

Plaintiff, a corporation, instituted this action on 11 June 1971 for a declaratory judgment and injunctive relief, alleging in substance, except when quoted, the facts narrated below.

The defendants are municipal corporations, both located in Rutherford County, North Carolina. Ruth adjoins Rutherfordton on Rutherfordton's northeast side.

In 1966, plaintiff owned and operated a small mill (Grace Plant) which was located partly in Rutherfordton and partly in Ruth. It was not large enough for economical operation. If the plant was to be enlarged, the only practical location for the new addition was to the northeast. In considering whether to close or to enlarge the plant, plaintiff's management determined that there was considerable uncertainty as to the location of the line dividing Rutherfordton and Ruth. Before proceeding with plant expansion, it was important that an agreement be reached by plaintiff and the two municipalities "to the end that there would be no controversy about which municipality taxed what portion of the completed mill, the goods in process, raw materials and machinery located therein," and that plaintiff "know that any relocation of goods in process, raw material, finished goods and machinery would not alter [its] tax liability to the two municipalities."

Plaintiff proceeded with its expansion program on the basis of an agreement entered into between it and the two municipalities. The terms of this agreement were embodied in identical resolutions adopted by the town council of each municipality on or about 12 March 1966.

Attached to the complaint as Exhibit A is a copy of the resolution adopted by the Town Council of Rutherfordton on 12 March 1966. The recitals include a statement that plaintiff's proposed addition "will be almost entirely in the Town of Ruth"; that, for reasons stated, plaintiff "could not go forward with the addition unless some method of apportioning taxes between Ruth and Rutherfordton is agreed upon"; and that both Rutherfordton and Ruth had agreed to the following solution of the problem: "FIRST: Rutherfordton will tax the present real estate, land and building now located in Rutherfordton; SECOND: Ruth will tax the land in Ruth and the new buildings to be added to the present plant; THIRD: The Stock in Process, Raw Materials, Finished Goods, Machines and Fixtures, and all other property of every kind and description located in the Grace Plant, (both

the old and the new addition), shall be returned on the Rutherford County return, and when the County has fixed a taxable value for this property, the Town of Rutherfordton will take twenty (20%) percent of such value and levy its tax on that amount; and the Town of Ruth will take eighty (80%) percent of its value and levy its tax upon that amount. . . ."

In reliance upon this agreement, plaintiff expanded its plant, spending "a very large sum of money"; and from 1966 through 1969 plaintiff was taxed and paid taxes to each town as set forth in the resolutions.

Attached to the complaint as Exhibit B is a copy of a letter dated 30 December 1969 in which Rutherfordton's attorney advised plaintiff that Rutherfordton repudiated completely the 1966 agreement and thereafter would levy taxes as it saw fit without regard to its previous commitment.

In his letter of 30 December 1969, Rutherfordton's attorney stated: "Please be advised that effective with 1970 the Town of Rutherfordton will assess and levy taxes upon all the real property of the Grace Plant which is *actually located* within the city limits of the Town of Rutherfordton. It has been determined that 60% of the building addition made in 1966 is situated within the Rutherfordton city limits and, consequently, 60% of the assessed value thereof is taxable by the Town of Rutherfordton and 40% by the Town of Ruth. This differs from your former practice of paying taxes on the entire value of the 1966 addition to the Town of Ruth.

"You are further advised that *all* tangible personal property of the Grace Plant is taxable by the Town of Rutherfordton, and taxes will be levied accordingly for the year 1970. This differs from your former practice of paying to the Town of Rutherfordton taxes on 20% of the value thereof and paying to the Town of Ruth taxes on 80% of the value thereof."

Plaintiff received from Rutherfordton a Tax Notice for $13,844.99. In its reply thereto (Exhibit C), plaintiff stated the tax shown thereon was incorrect and forwarded to Rutherfordton its check for $5,236.50, the amount due Rutherfordton determined as provided in the resolutions of 12 March 1966. Rutherfordton returned this $5,236.50 check to plaintiff.

Plaintiff received from Rutherfordton a tax statement dated 7 April 1971 (Exhibit D) in which plaintiff was advised that

it owed Rutherfordton as taxes for 1970 $13,832.29 plus 2% penalty.

Plaintiff having refused to pay the amount of the Tax Notice sent to it by Rutherfordton, Rutherfordton included in an advertisement (Exhibit E) of a sale to be held 14 June 1971, entitled "Rutherfordton Tax Collector's Sale—Sale of 1970 Taxes for the Town of Rutherfordton," the highest bidder "to receive Tax Sales Certificates as provided by law," which listed, among many other items, the following: "Reeves Bros. Inc. 1 lot & Imp. . . . . 13,832.33."

Attached to the complaint as Exhibit F is a copy of a letter dated 5 January 1970 from the Mayor and Commissioners of the Town of Ruth to the Mayor and Town Council of Rutherfordton in which Ruth takes the position that Rutherfordton's attempted repudiation of the agreement of 12 March 1966 is unacceptable, and that Ruth's position is in accord with that of plaintiff.

Ruth made no appearance herein by pleading or otherwise.

Rutherfordton filed a motion to dismiss under G.S. 1A-1, Rule 12(b), in which it asserted (1) that the complaint failed to state a claim against it on which relief could be granted, and (2) that the court lacked jurisdiction over the subject matter. Rutherfordton did not otherwise plead. Nor did it offer or tender evidence by affidavit or otherwise. The hearing before Judge Falls was on Rutherfordton's motion to dismiss.

Allowing Rutherfordton's motion, Judge Falls dismissed the action and taxed plaintiff with the costs. On plaintiff's appeal, this judgment was affirmed.

Hamrick and Hamrick by J. Nat Hamrick for plaintiff appellant.

Owens and Arledge by A. Jervis Arledge and Hollis M. Owens, Jr., for defendant appellees.

BOBBITT, Chief Justice.

The question presented by Rutherfordton's motion was and is whether the allegations of the complaint affirmatively disclose that plaintiff has no claim against Rutherfordton on which relief can be granted. *Sutton v. Duke,* 277 N.C. 94, 176 S.E. 2d 161 (1970). In resolving this question, the only facts to be con-

sidered are those alleged by plaintiff. Accepting these facts as true, can Rutherfordton unilaterally repudiate the 1966 agreement and completely disregard it in taxing plaintiff's properties for 1970 and subsequent years?

The record before us shows no controversy with reference to the valuation placed upon plaintiff's properties. Whether plaintiff should have pursued administrative remedies in respect of the valuation thereof is not involved.

The statute codified as G.S. 105-406 in Volume 2D, Replacement 1965, was cited by Rutherfordton in support of its motion to dismiss. This statute in part provided: "Unless a tax or assessment, or some part thereof, be illegal or invalid, or be levied or assessed for an illegal or unauthorized purpose, no injunction shall be granted by any court or judge to restrain the collection thereof in whole or in part, nor to restrain the sale of any property for the nonpayment thereof. . . ." Although this statute was repealed, effective 1 July 1971, by Chapter 806, Section 3, Session Laws of 1971, the statute now codified as G.S. 105-379 in Volume 2D, Replacement 1972, which was enacted by Section 1 of Chapter 806, provides: "No court may enjoin the collection of any tax, the sale of any tax lien, or the sale of any property for nonpayment of any tax imposed under the authority of this Subchapter except upon a showing that the tax (or some part thereof) is illegal or levied for an illegal or unauthorized purpose." Decisions in accord are cited in *Redevelopment Comm. v. Guilford County,* 274 N.C. 585, 588-89, 164 S.E. 2d 476, 478-79 (1968).

[1] Ordinarily, absent sufficient allegations that the tax is illegal or levied for an illegal or unauthorized purpose, the taxpayer's exclusive remedy is to pay the tax and sue for a refund for such portion thereof as is excessive as provided in G.S. 105-381. The question is whether the 1970 tax Rutherfordton seeks to collect from plaintiff is a legal tax within the meaning of this rule.

The facts alleged in the complaint include those narrated below.

Plaintiff's properties were and are located partly in Rutherfordton and partly in Ruth. In 1966, plaintiff had to decide whether to close its plant or enlarge it by an addition extending farther into Ruth. There was considerable uncertainty as to the location of the dividing line between Rutherfordton and

Ruth. Too, there existed the specter of variations and uncertainty in plaintiff's ad valorem tax liability to Rutherfordton and to Ruth, respectively, on stock in process, raw materials, finished goods, machinery and fixtures, depending on the particular portion of plaintiff's plant in which these properties would be located on the listing date. To remove these uncertainties and thereby induce plaintiff to enlarge its plant, the 1966 agreement was entered into and was then considered by Rutherfordton as well as by plaintiff and Ruth to be for the best interest of all concerned.

Unquestionably, plaintiff owns properties which are taxable by Rutherfordton and other properties which are taxable by Ruth. Each could levy a valid tax upon the properties subject to its jurisdiction. The problem presented in 1966 and now is what properties are taxable by Rutherfordton and what properties are taxable by Ruth. Because of the factors stated above, the 1966 agreement was entered into as a practical and appropriate method of resolving the uncertainties.

While the factual situation here involved is one of first impression, we note that this Court has approved interlocutory injunctive relief in factual situations where each of two taxing units was asserting the right to tax identical (intangible) assets. *Sherrod v. Dawson,* 154 N.C. 525, 70 S.E. 739 (1911); *Barber v. Benson,* 200 N.C. 683, 158 S.E. 245 (1931).

Here plaintiff is confronted by Ruth's reliance upon the 1966 agreement and by Rutherfordton's attempted repudiation thereof. The key question is whether the 1966 agreement is valid. If so, Rutherfordton is not at liberty to tax plaintiff's properties otherwise than in a manner consistent with its terms.

In its motion to dismiss, Rutherfordton asserted that the 1966 agreement authorized by a resolution of its town council is illegal and void. However, nothing in the record indicates that this question was considered either by the Superior Court or by the Court of Appeals. Both decisions are based solely on the ground that the procedure provided by G.S. 105-381 is exclusive and therefore plaintiff could not maintain this action for a declaratory judgment.

[2] The Declaratory Judgment Act provides in part: "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. . . ." G.S. 1-253. We

are of the opinion and hold that plaintiff is entitled to have determined in this action whether the 1966 agreement entered into between it, Rutherfordton and Ruth is valid and binding upon the parties thereto.

The record before us is skimpy. Whether a tax certificate sale was held on 14 June 1971 does not appear. Nothing in the record indicates whether a temporary restraining order was issued and in effect prior to the entry of judgment by Judge Falls. Is there evidence to support the factual statements contained in the letter from Rutherfordton's attorney purporting to repudiate the 1966 agreement? Has the Town Council of Rutherfordton undertaken by formal action to rescind its 1966 resolution or otherwise repudiate the 1966 agreement? Has plaintiff continued to pay taxes to Ruth in accordance with the 1966 agreement? Has the dividing line between Rutherfordton and Ruth been located with certainty? If so, what properties of plaintiff are now located in Rutherfordton and what properties are now located in Ruth? Present conditions as well as 1966 conditions may be relevant in determining whether the 1966 agreement if valid originally is presently binding upon the parties thereto.

In the event a restraining order is deemed necessary pending final decision in this action, it would seem appropriate that the plaintiff deposit funds or give bond in sufficient amount to cover its tax obligations to Rutherfordton and to Ruth whatever the decisions herein and in respect of the amount of taxes due each of these municipal corporations for 1970 and subsequent years.

It may be that Rutherfordton jumped the gun by its motion to dismiss. As the record now stands, the factual allegations of the complaint have not been challenged by answer or otherwise. It may be that Rutherfordton, either at trial or in support of a motion for summary judgment, can produce evidence contradictory of plaintiff's allegations and evidence of additional facts bearing upon the validity of the 1966 agreement.

In the present status of this case we express no opinion as to the validity of the 1966 agreement. We decide only that, upon the present record, plaintiff is entitled to have the validity thereof determined in this cause. Accordingly, the judgment of the Court of Appeals affirming the judgment of Judge Falls is reversed; and the cause is remanded to the Court of Appeals

with direction that it be remanded to the Superior Court of Rutherford County for further proceedings in accordance with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. JESSE LEE

No. 18

(Filed 26 January 1973)

1. **Rape § 6— jury instructions — application of law to facts**

Defendant in a rape and armed robbery case could not complain of the trial judge's charge on rape where the judge correctly defined and fully explained each essential element of the crime of rape and specifically applied the law to the possible factual situations presented by the conflicting evidence.

2. **Robbery § 5— armed robbery — necessity for instruction on common law robbery**

If the State's evidence shows an armed robbery as charged in the indictment and there is no conflicting evidence relating to the elements of the crime charged, an instruction on common law robbery is not required; hence, the trial court's failure to charge on common law robbery was proper since defendant's denial, not only that he robbed the victim by any means whatever but that he ever held a gun on her, constituted no evidence of his guilt of common law robbery.

3. **Robbery § 5— armed robbery — instruction on intent — no error**

In an armed robbery prosecution the trial judge did not err in failing to charge the jury that, in order to convict defendant, they must find that he took the victim's rings with the specific intent to convert them to his own use where the issue was not the intent with which the rings were taken, but whether they were taken at all.

BELATED appeal by defendant, Jesse Lee, from *Friday, J.*, 31 January 1972 "B" Session of MECKLENBURG; petition for certiorari allowed 31 July 1972.

Appellant, Jesse Lee, was indicted for the rape and armed robbery of Alice Mae Jones on 7 October 1971. Upon these charges he was jointly tried with Willie Huff, Jr., who was charged with the armed robbery of Alice Mae Jones and with assaulting her on 7 October 1971 with intent to commit rape.

Evidence for the State tended to show:

About 11:00 p.m. on 6 October 1971 Alice Mae Jones was walking on Eleventh Street in Charlotte. Having visited her disabled mother-in-law Mrs. Jones was returning to her home at 282 Piedmont Court, where she lived with her husband and three children. As she passed along a low wire fence defendant suddenly put a gun to her head and threatened her life if she ran or hollered. With his arm around her neck and the gun at her head, he walked her down some steps into No. 18 Piedmont Court, where Huff was sitting on the floor in the front room. As he entered, defendant said to Huff, "I got one."

Defendant pushed Mrs. Jones down on the sofa, tore the clothes from her body and had intercourse with her forcibly and against her will while Huff held the gun on her. The two men then carried Mrs. Jones upstairs, where Huff unsuccessfully attempted to have intercourse with her. Thereafter defendant again had intercourse with her while Huff held the gun and threatened to blow out her brains "for the fun of it." The two men then took her engagement ring and her wedding ring from her finger.

After her rings had been removed Huff gave Mrs. Jones some ladies' clothes from a closet. As she was putting them on, a woman, later identified as Lillian Brown, entered the house and called upstairs. Huff shot down the stairs and, as Lillian Brown ran up the steps, Mrs. Jones ran down and out of the house. Because she had no telephone in her residence Mrs. Jones fled to the home of her neighbor, Mrs. Hester Bowden, at 277 Piedmont Court. There she called the police, to whom she reported that she had been raped by two Negro males.

In response to her call the police came and took Mrs. Jones with them to No. 18 Piedmont Court. Outside the front door they found a spent shotgun shell. Inside, on the living room floor, they found a broken lamp and some torn clothing, which Mrs. Jones identified as hers. In the plastered wall at the bottom of the stairway they observed a bullet hole and embedded pellets. Upstairs, two bedrooms "were messed up." Neither defendant nor Huff was present.

After inspecting the premises at 18 Piedmont Court, officers took Mrs. Jones to the hospital. The gynecologist who examined her found a small cut on her left inner thigh and seminal fluid in the vaginal vault. Four weeks earlier, after giving birth

to a baby, Mrs. Jones had had a tubal ligation. She testified that prior to the assault upon her she had not known either defendant Lee or Huff.

Officers apprehended defendant Lee about 1:30 a.m. on 7 October 1971 as he ran across Tenth Street toward Seventh Street.

Defendant Lee testified that he had known Mrs. Jones four or five months and had had relations with her prior to 6 October 1971; that he and she had arranged to meet at Apartment No. 18 on the night Mrs. Jones testified she was raped; that when she arrived and found Huff there she inquired whether defendant and Huff wanted her to go to a friend's house to get a girl for Huff; that they said, "No," and thereafter the three "just talked." Some time later, defendant said, Mrs. Jones voluntarily took off her clothes in the front room downstairs and inquired if defendant "was going to do anything." Notwithstanding, he never touched her. Defendant denied that he, at any time, held a gun on Mrs. Jones or that he walked her down the side of a fence with a gun at her head. He also testified that he did not take Mrs. Jones' rings off, and he never told Huff to take them; that when Lillian Brown entered the apartment he and Mrs. Jones were "discussing money affairs"; that Lillian Brown left and he and Mrs. Jones then went on out together.

The jury found defendant guilty as charged in the two indictments upon which he was tried. For the crime of rape defendant was sentenced to life imprisonment; for armed robbery, 10-15 years. From these judgments he appealed, assigning errors in the charge.

Attorney General Morgan; Assistant Attorney General Ray; Associate Attorney General Speas for the State.

Lila Bellar for defendant appellant.

SHARP, Justice.

The rape case is before this Court on direct appeal from the Superior Court under G.S. 7A-27(a). Because the armed-robbery case was tried at the same time, we certified it for initial appellate review by the Supreme Court under G.S. 7A-31(a).

[1] Defendant's first assignment of error is to the following instruction: "If you find from the evidence and beyond a rea-

sonable doubt that the defendant, Jesse Lee, is guilty of rape as charged in the bill of indictment, it would be your duty to return such a verdict as charged in the bill of indictment." The contention is that in the "final mandate" the judge did not apply the law to the facts in the case.

Standing alone the preceding instruction would not fulfill the mandatory requirements of G.S. 1-180 (1969) that the judge "shall declare and explain the law arising on the evidence given in the case." A charge, however, must be considered contextually as a whole. *Lewis v. Barnhill,* 267 N.C. 457, 148 S.E. 2d 536 (1966); 7 Strong, North Carolina Index 2d *Trial* § 33, at 330 (1968). Immediately preceding the challenged instruction the judge had correctly defined and fully explained each essential element of the crime of rape, and he had also specifically applied the law to the possible factual situations presented by the conflicting evidence. Nothing had been left to the jury "to decide . . . according to its own notions." *Lewis v. Watson,* 229 N.C. 20, 24, 47 S.E. 2d 484, 487 (1948).

When considered as a whole it is quite clear that defendant has no cause to complain of his Honor's instructions upon the rape charge. On the contrary, in certain respects the instructions were more favorable to defendant than the evidence warranted.

[2] Defendant's second and third assignments of error relate to the court's instructions upon the charge of armed robbery. Assignment No. 2 presents the question whether the judge erred in failing to submit to the jury the question of defendant's guilt of common law robbery. The jury was instructed to return a verdict of "guilty of robbery with a firearm as charged in the bill of indictment or not guilty."

The essential difference between armed robbery and common law robbery is that the former is accomplished by the use or threatened use of a firearm or other dangerous weapon whereby the life of a person is endangered or threatened. G.S. 14-87 (1969); *State v. Bailey,* 278 N.C. 80, 178 S.E. 2d 809 (1971). In a prosecution for armed robbery the court is not required to submit the lesser included offense of common law robbery unless there is evidence of defendant's guilt of that crime. If the State's evidence shows an armed robbery as charged in the indictment and there is no conflicting evidence *relating to the elements* of the crime charged an instruction on

common law robbery is not required. *State v. Carnes,* 279 N.C. 549, 184 S.E. 2d 235 (1971); *State v. Cox,* 201 N.C. 357, 160 S.E. 358 (1931).

Defendant's denial, not only that he robbed Mrs. Jones by any means whatever but that he ever held a gun on her, constituted no evidence of his guilt of common law robbery. Defendant's second assignment of error is without merit. *State v. Bailey, supra.*

[3] Defendant's third assignment of error pertains to the court's charge on the elements of armed robbery. The instruction was that the jury would find defendant guilty of the robbery charged in the bill of indictment if they were satisfied beyond a reasonable doubt that by endangering or threatening the life of Mrs. Jones with a firearm defendant took her rings from her person, or in her presence, without her voluntary consent and carried them away; that at the time of the taking defendant knew he was not entitled to take this property and he intended to deprive her of its use permanently. Defendant asserts that to be guilty of robbery an accused must have taken the property "with a specific intent to deprive the owner of his property permanently *and to convert it to his own use.*" He contends that the trial judge committed prejudicial error when he omitted from his enumeration of the elements of robbery the words italicized within the preceding quotation. This contention is untenable.

Indubitably, the intent to steal is an essential element of robbery, and stealing has often been defined as the taking of the personal property of another with a specific intent on the part of the taker to deprive the owner of his property permanently and to convert it to his own use. *See State v. Norris,* 264 N.C. 470, 141 S.E. 2d 869 (1965); *State v. Lawrence,* 262 N.C. 162, 136 S.E. 2d 595 (1964); *State v. Lunsford,* 229 N.C. 229, 49 S.E. 2d 410 (1948). To define stealing in these words, however, is not a *sine qua non* to an explanation of robbery.

One who, knowing that he has no right to do so, takes and carries away the property of another with the intent to deprive the owner of his property permanently and to convert it to his own use is surely guilty of larceny. However, he is no less guilty if, when he took the property, his intention was to convert it to the use of another or to destroy it so that no one

could use it. When he takes the property to accomplish a purpose of his own he takes it with the intent to convert it to his own use. To constitute larceny it is not required that the purpose of the taking be to convert the stolen property to the pecuniary advantage or convenience of the taker. It is sufficient if the taking be fraudulent and with the intent wholly to deprive the owner of his property. *State v. Smith,* 268 N.C. 167, 150 S.E. 2d 194 (1966); *State v. Kirkland,* 178 N.C. 810, 813, 101 S.E. 560, 561 (1919).

In the two cases upon which appellant relies, *State v. Lunsford, supra,* and *State v. Lawrence, supra,* the evidence for the defendants tended to negate any intent to steal. In *Lunsford,* the defendants contended they disarmed the prosecuting witness, who was intoxicated, only to keep him from shooting one of them, and that they had no intent to deprive him permanently of his pistol. In *Lawrence,* the defense was that the defendant was guilty only of forcible trespass; that he had taken from the prosecuting witness' wallet the exact amount which the witness owed him and which he had said he would be glad to pay him. In both cases a new trial was awarded because the court had failed to explain in certain terms, understandable to a layman, the essential felonious intent implicit in the expression "felonious taking."

As Justice Clifton L. Moore said in *State v. Spratt,* 265 N.C. 524, 144 S.E. 2d 569 (1965), "The comprehensiveness and specificality of the definition and explanation of 'felonious intent' required in a charge depends on the facts in the particular case. There must be some explanation in every case. But, where the evidence relied on by defendant tends *to admit the taking* but to deny that it was with felonious intent, it is essential that the court fully define the 'felonious intent' contended for by the State and also explain defendant's theory as to the intent and purpose of the taking, in order that the jury may understandingly decide between the contentions of the State and defendant on that point. . . . Where such defenses are specifically interposed and arise on the evidence, defendant is entitled to such explanation of the law as will serve to bring clearly into focus the conflicting contentions." *Id.* at 526-27, 144 S.E. 2d at 571-72 (citation omitted) (emphasis added).

In this case defendant denies that he took Mrs. Jones' rings or that he aided Huff in taking them. The issue was not

the intent with which they were taken, but whether they were taken at all.

In the trial below, we find

No error.

STATE OF NORTH CAROLINA v. GEORGE RANKIN

No. 75

(Filed 26 January 1973)

1. **Constitutional Law § 36; Criminal Law § 135— first degree murder — sentence of life imprisonment — standing to challenge death sentence**

Where the jury recommended and the judge pronounced a sentence of life imprisonment in a first degree murder case, defendant had no standing to challenge the constitutionality of the statute under which he was tried providing for punishment of death in the jury's discretion.

2. **Criminal Law § 116— instruction on defendant's failure to testify — necessity for special request**

Absent a special request the judge is not required to instruct the jury that a defendant's failure to testify creates no presumption against him.

DEFENDANT appeals from judgment of *McLean, J.*, 5 June 1972 Schedule "C" Session, MECKLENBURG Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging him with the first degree murder of John Thomas Parrott on 28 January 1972 in the City of Charlotte.

The State's evidence tends to show that one Izonia Hawkins was the janitor at Warner Studio located at 116 South Church Street in Charlotte. It had been the custom for several months for defendant George Rankin, the deceased John Thomas Parrott, Leroy Williams, and others to meet at Warner Studio in the early evening to socialize and "take a little drink." In accordance with this custom, these men met at Warner Studio about 7 p.m. on the date named in the indictment and were admitted by Hawkins, the janitor. They were sitting around "telling little jokes" and "having a little drink." All of them, save possibly the janitor, became intoxicated. An argument arose between defendant and Parrott, the nature of which is not disclosed by the record, and Hawkins told them to leave.

Defendant thereupon pushed Parrott out the door and shot him three times in the back as Parrott ran down the street. Parrott fell thirty-five feet from the Warner Studio and died from the gunshot wounds, one of which pierced his heart.

Defendant offered no evidence. The jury was instructed by the trial judge that it could return a verdict of guilty of murder in the first degree as charged, or guilty of murder in the first degree with recommendation that the punishment be life imprisonment, or guilty of murder in the second degree, or guilty of manslaughter, or not guilty, and instructed the jury upon the law applicable to each permissible verdict. The jury convicted defendant of murder in the first degree and recommended life imprisonment. Judgment was pronounced accordingly and defendant appealed, assigning errors discussed in the opinion.

T. O. Stennett, Attorney for defendant appellant.

Robert Morgan, Attorney General, and Walter E. Ricks, III, Associate Attorney, for the State of North Carolina.

HUSKINS, Justice.

[1] Defendant was indicted and tried under G.S. 14-17 which reads in pertinent part as follows:

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

The trial judge instructed the jury in accordance with this statute; and the jury, in the exercise of its discretion, recommended life imprisonment. Defendant contends on this appeal that G.S. 14-17 is now unconstitutional and void by reason of the 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 (1972). Therefore, defendant argues, the verdict and

judgment in this case are grounded on a void statute and must be set aside.

We first note that this question was not, and could not have been, raised in the court below because the judgment here was pronounced on 9 June 1972 before the decision in *Furman* was handed down on 29 June 1972. Thus, the constitutional question posed by defendant may be raised initially in this Court.

Examination and analysis of the nine separate opinions in *Furman* compel the conclusion that capital punishment has not been declared unconstitutional *per se*. Rather, *Furman* holds that the Eighth and Fourteenth Amendments will no longer tolerate the infliction of a death sentence where either the jury or the judge is permitted to impose that sentence as a matter of discretion. The *proviso* in G.S. 14-17 gives North Carolina juries the forbidden discretion, and the trial judge permitted the jury in this case to exercise it. Had this jury decided, in its discretion, to require imposition of the death sentence by failing to recommend life imprisonment, and had the judge pronounced a sentence of death, then such sentence could not constitutionally be carried out under the holding in *Furman*. Instead, this Court would order the death sentence stricken and remand the case for imposition of a life sentence. *See State v. Miller*, 281 N.C. 740, 190 S.E. 2d 841 (1972); *State v. Hamby* and *Chandler*, 281 N.C. 743, 191 S.E. 2d 66 (1972); *State v. Chance*, 281 N.C. 746, 191 S.E. 2d 65 (1972); *State v. Westbrook*, 281 N.C. 748, 191 S.E. 2d 68 (1972); *State v. Doss*, 281 N.C. 751, 191 S.E. 2d 70 (1972). But the facts in this case do not fit that mold.

Here, the jury recommended and the judge pronounced a sentence of life imprisonment. Manifestly, the *Furman* decision has no application to, and nothing in it affects the legality or the constitutionality of, a life sentence. "Furthermore, the *Furman* case is without significance when the jury returns a verdict recommending life imprisonment. In that situation the defendant has no standing to raise the constitutionality of the death penalty or of a statute because it provides for that punishment." *State v. Wright*, 282 N.C. 364, 192 S.E. 2d 818 (1972). *Accord State v. Duncan*, 282 N.C. 412, 193 S.E. 2d 65 (1972); *State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745 (1972). Accordingly, for the reasons stated, we leave the life sentence undisturbed and overrule defendant's first assignment of error.

[2] Defendant assigns as error the failure of the trial judge to instruct the jury that defendant's failure to testify in his own behalf was merely the exercise of a privilege afforded him by G.S. 8-54 and should not be held against him by the jury. Defendant made no request for such instruction but contends it was the duty of the judge under G.S. 1-180 to give it.

G.S. 8-54 in relevant part reads as follows:

> "In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him."

Absent a special request the judge is not required to instruct the jury that a defendant's failure to testify creates no presumption against him. *State v. Rainey,* 236 N.C. 738, 74 S.E. 2d 39 (1953); *State v. Kelly,* 216 N.C. 627, 6 S.E. 2d 533 (1940); *State v. Jordan,* 216 N.C. 356, 5 S.E. 2d 156 (1939); 3 Strong, N. C. Index 2d, Criminal Law, § 116. "Ordinarily, it would seem better to give no instruction concerning a defendant's failure to testify unless such an instruction is requested by defendant." *State v. Barbour,* 278 N.C. 449, 180 S.E. 2d 115 (1971). Unless the defendant so requests, such an instruction is held in some jurisdictions to accentuate the significance of his silence and thus impinge upon defendant's unfettered right to testify or not to testify at his option. *See* Annotation: Propriety under *Griffin v. California* and prejudicial effect of unrequested instruction that no inferences against accused should be drawn from his failure to testify, 18 A.L.R. 3d 1335, and cases cited.

Since defendant did not request the instruction he now insists the court should have given, the trial court properly omitted any mention of it. This assignment has no merit and is overruled.

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

No error.

STATE OF NORTH CAROLINA v. MATTHEW WILLIAMS

No. 92

(Filed 26 January 1973)

Indictment and Warrant § 14— motion to quash indictment — insufficiency of grounds

The defendant's motion to quash the indictment against him was properly denied where the only matter challenged by defendant was the propriety of the solicitor's conduct in testifying as to the character of the prosecuting witness, a matter relating to the merits of the case and not to the validity of the bill of indictment.

THE defendant, Matthew Williams, has filed in this Court a "Notice of Appeal" from the decision of the Court of Appeals (16 N.C. App. 422, 191 S.E. 2d 915) finding no error in his trial, conviction, and sentence in the Superior Court of DURHAM County on a charge of felonious assault.

The record which counsel has filed here discloses that on September 18, 1971, an altercation took place between the defendant, Matthew Williams, and one Napoleon Lawrence. Lawrence obtained a warrant charging Williams with assault with a knife inflicting serious injury. Williams obtained a warrant charging Lawrence with a felonious assault inflicting serious injury by the use of a pistol. At the conclusion of a preliminary hearing, probable cause was found and both were bound over to the Superior Court of Durham County. At the preliminary inquiry, the solicitor for the district was present but did not participate in the hearing. The record indicates he told the counsel representing the State and the defendants that he was personally acquainted with the defendant Lawrence and would testify to his good character. However, the solicitor sent bills of indictment to the grand jury charging each defendant with a felonious assault on the other. The grand jury returned true bills.

When the cases were called for trial in the superior court they were consolidated for trial without objection. Thereupon, the solicitor after conferring with the judge applied for and was granted leave to take a nol pros of the case against Lawrence. Whereupon, the defendant Williams filed a motion alleging he had been denied due process of law by the solicitor who had agreed to appear as a witness on behalf of the defendant Lawrence who was a party with adverse interests to those of the defendant.

At the trial the State's witness (former defendant) Lawrence testified that the defendant Williams made an unprovoked assault on him by cutting him about the face, neck, and legs with a knife and that Jones, a companion of Williams, knocked the witness down and while the defendant Williams was still trying to use his knife, the witness Lawrence drew his revolver and shot both Williams and Jones.

The solicitor, Anthony Brannon, called as a State's witness, testified that he had known the witness Lawrence who had been a police officer for about three years; that he knew his general reputation in the community and that it was excellent.

Williams testified in his own behalf admitting that he and Lawrence got into an argument and that Lawrence drew his pistol and shot the defendant who in his own defense used his knife to protect himself. Williams testified that he was shot twice in the legs. The record discloses that Lawrence was hospitalized and the knife wounds were repaired by more than one hundred stitches.

The jury returned a verdict finding the defendant guilty of assault with a deadly weapon inflicting serious injury. The court imposed a prison sentence of not less than three nor more than five years.

The defendant appealed to the Court of Appeals assigning one error as follows: "1. Did the trial court err in not allowing the defendant's motion for a quashal of the indictment which in turn violated the defendant's constitutional right of due process and a fair and impartial trial?"

The Court of Appeals found no error in the trial. The defendant files the papers asking for a review by this Court on the ground the Court of Appeals committed error in failing to sustain the motion to quash.

The Attorney General has filed a motion in this Court to dismiss the proposed appeal on the ground no constitutional question is involved.

Robert Morgan, Attorney General by Ann Reed, Associate Attorney General for the State.

Kenneth B. Spaulding for defendant appellant.

PER CURIAM.

We find nothing in the record that invalidates the indictment returned against the defendant Williams. The grand jury was properly constituted. The indictment, sufficient in form, charged a violation of G.S. 14-32(a). The defendant does not contend the evidence before the grand jury was tainted or insufficient to warrant the finding of a true bill. Nor does he contend the evidence before the jury was insufficient to make out a case against him. He does contend that the solicitor's action in dismissing the indictment against Lawrence and testifying as a witness to his good character was prejudicial to the defendant's defense before the jury. In effect, he challenges as improper the appearance of the State's prosecutor as a witness to the good character of the present prosecuting witness. However, it appears that the solicitor had not participated in the preliminary hearing. His appearance as counsel consisted only in entering the nol pros against Lawrence. True, the propriety of the solicitor's conduct may be questionable, but impropriety relates to the merits of the case and not to the validity of the bill of indictment. The defendant's sole assignment of error challenges the court's denial of the motion to quash the indictment—nothing more. He does not ask for a new trial. No constitutional question is involved.

The Attorney General's motion to dismiss is

Allowed.

STATE OF NORTH CAROLINA v. ROBERT MITCHELL EDWARDS

No. 86

(Filed 26 January 1973)

Burglary and Unlawful Breakings § 8— sentence for second degree burglary — cruel and unusual punishment

A sentence of imprisonment for second degree burglary of not less than thirty years nor more than life is within the maximum provided by G.S. 14-52 and is therefore not cruel or unusual in a constitutional sense.

APPEAL by defendant from judgment entered by *Collier, J.*, at 7 August 1972 Session of FORSYTH Superior Court.

Defendant was indicted in separate bills which charged him with the commission of the crimes of burglary and of felonious escape.

The burglary indictment charged that defendant, "about the hour of twelve in the night time" of 14 November 1971, "unlawfully, feloniously and burglariously did break and enter a dwelling house of Wade A. Crews, located at Route #3, Kernersville, North Carolina, which dwelling house was then and there actually occupied by Wade A. Crews, Mary P. Crews, and Brian Crews, with the felonious intent to commit the crime of larceny in said dwelling house. . . ."

The felonious escape indictment charged in substance that defendant on 14 November 1971, while serving a sentence for felonious larceny and lawfully confined by the North Carolina Department of Correction, escaped from such lawful custody in that, after authorized to leave his place of confinement on temporary parole, defendant, in violation of his parole and of G.S. 148-45(b), failed to return to his place of confinement as directed and ordered by the North Carolina Department of Correction.

Represented by court-appointed counsel, defendant, when arraigned on the burglary indictment, tendered a plea of guilty of burglary in the second degree; and, when arraigned on the felonious escape indictment, entered a plea of guilty as charged. Subject to approval by the court, these pleas were accepted by the State.

Prior to final acceptance of the pleas, defendant in open court was fully advised as to his rights. In response to inquiries by the court, defendant stated that he understood his rights; that he was guilty of the crimes to which he had pleaded guilty; that he knew the maximum punishment for these crimes; and that his attorney had entered the pleas by his authority and with his assent.

Based upon defendant's oral and written statements, the court found that defendant had entered the pleas voluntarily and understandingly, without undue influence, compulsion or duress, and without promise of leniency.

The State also offered evidence which tended to support all allegations in the indictments in respect of the crimes to which defendant had pleaded guilty.

Upon defendant's pleas the court, having consolidated the two cases for judgment, pronounced judgment "that the defendant be imprisoned for the term of not less than thirty (30) years nor more than his natural life in the State's Prison. . . ."

Defendant excepted to the judgment and appealed.

Attorney General Robert Morgan and Associate Attorney Edwin M. Speas, Jr. for the State.

Frank W. Winfree for defendant appellant.

PER CURIAM.

Defendant's only assignment of error is that "[t]he trial court erred in sentencing defendant for a period of 30 years to life in that the evidence presented by the State and by the defendant did not warrant such cruel and unusual punishment."

The punishment for burglary in the second degree is "imprisonment in the State's prison for life, or for a term of years, in the discretion of the court." G.S. 14-52. A sentence of imprisonment 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. Cradle*, 281 N.C. 198, 209, 188 S.E. 2d 296, 303 (1972), and cases there cited.

The punishment for felonious escape (first offense) is "imprisonment for not less than six months nor more than two years." G.S. 148-45. Defendant was an escapee when he committed the crime of burglary.

The burglary case is before this Court on direct appeal as a matter of right under G.S. 7A-27(a) because the judgment pronounced includes the possibility of life imprisonment. The burglary case and the felonious escape case were heard in the superior court at the same time and a single judgment was pronounced. We allowed *certiorari* in the felonious escape case so that the appeal in both cases could be considered and decided at the same time by this Court.

Affirmed.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

AVIS v. INSURANCE CO.

No. 110 PC.

Case below: 16 N.C. App. 588.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 18 January 1973.

DAVENPORT v. INDEMNITY CO.

No. 118 PC.

Case below: 16 N.C. App. 572.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 18 January 1973.

ELECTRIC SERVICE v. GRANGER

No. 4.

Case below: 16 N.C. App. 427.

Motion of plaintiff to dismiss appeal for lack of substantial constitutional question allowed 2 January 1973.

IN RE HOLLAND

No. 93 PC.

Case below: 16 N.C. App. 398.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 January 1973.

IN RE REDDY

No. 104 PC.

Case below: 16 N.C. App. 520.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 January 1973. Appeal dismissed 2 January 1973.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

INSURANCE CO. v. VICK

No. 134 PC.

Case below: 17 N.C. App. 106.

Petition for writ of certiorari to North Carolina Court of Appeals denied 18 January 1973.

PELAEZ v. PELAEZ

No. 109 PC.

Case below: 16 N.C. App. 604.

Petition for writ of certiorari to North Carolina Court of Appeals denied 18 January 1973.

ROTH v. PARSONS

No. 119 PC.

Case below: 16 N.C. App. 646.

Petition for writ of certiorari to North Carolina Court of Appeals denied 18 January 1973.

SPENCE v. DURHAM

No. 85 PC.

Case below: 16 N.C. App. 372.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 2 January 1973.

STATE v. BRADY

No. 116 PC.

Case below: 16 N.C. App. 555.

Petition for writ of certiorari to North Carolina Court of Appeals denied 18 January 1973. Motion of Attorney General to dismiss appeal allowed 18 January 1973.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. BRYANT and STATE v. FLOYD

No. 107 PC.

Case below: 16 N.C. App. 456.

Petition for writ of certiorari to North Carolina Court of Appeals denied 18 January 1973. Appeal dismissed for lack of substantial constitutional question 18 January 1973.

STATE v. DOUGLAS

No. 117 PC.

Case below: 16 N.C. App. 597.

Petition for writ of certiorari to North Carolina Court of Appeals denied 18 January 1973.

STATE v. HIGGINS

No. 115 PC.

Case below: 16 N.C. App. 581.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 January 1973. Appeal dismissed for lack of substantial constitutional question 2 January 1973.

STATE v. HINSON

No. 132 PC.

Case below: 17 N.C. App. 25.

Petition for writ of certiorari to North Carolina Court of Appeals denied 18 January 1973.

STATE v. HUFFMAN

No. 126 PC.

Case below: 16 N.C. App. 653.

Petition for writ of certiorari to North Carolina Court of Appeals denied 18 January 1973.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. McKOY

No. 70 PC.

Case below: 16 N.C. App. 349.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 January 1973.

STATE v. SPRINGS

No. 124 PC.

Case below: 16 N.C. App. 641.

Petition for writ of certiorari to North Carolina Court of Appeals denied 18 January 1973.

STATE v. WRIGHT

No. 114 PC.

Case below: 16 N.C. App. 562.

Petition for writ of certiorari to North Carolina Court of Appeals denied 18 January 1973.

TURNER v. WEBER

No. 121 PC.

Case below: 16 N.C. App. 574.

Petition for writ of certiorari to North Carolina Court of Appeals denied 18 January 1973.

MRS. ROBERT H. PEASELEY, EXECUTRIX OF THE WILL OF ROBERT H. PEASELEY, DECEASED v. VIRGINIA IRON, COAL AND COKE COMPANY, A CORPORATION

No. 89

(Filed 2 February 1973)

1. **Appeal and Error § 1— certiorari from Supreme Court to Court of Appeals — scope of review**

As a general rule the Supreme Court will consider only those aspects of a decision of the Court of Appeals which are assigned as error in the petition for *certiorari* and which are preserved by argument or the citation of authority with reference thereto in the brief filed by petitioner in the Supreme Court.

2. **Appeal and Error §§ 1, 68— denial of certiorari by Supreme Court — law of the case**

Determination by the Court of Appeals that defendant is liable to a broker's estate for sales commissions on coal shipped after the broker's death under a contract negotiated by the broker did not become the law of the case in the Supreme Court when the Supreme Court denied *certiorari*, and the Supreme Court could properly consider that issue upon allowing *certiorari* after another appeal of the case to the Court of Appeals where defendant properly preserved the issue in its petition for *certiorari* and its brief.

3. **Brokers and Factors § 2— brokerage contract — broker "or associates" — continuation after broker's death**

A contract which gave an independent broker "or his associates" the exclusive right to offer and sell defendant's coal to a power company was not a personal service contract that terminated at the broker's death but survived him and could be carried out by his associates.

4. **Contracts § 12— construction of contract — custom in trade or business**

General custom in the business or trade may be considered in arriving at the intention of the parties to a contract, and words of the contract referring to a particular trade will be interpreted by the courts according to their widely accepted trade meaning.

5. **Brokers and Factors § 1— brokerage contract — custom — servicing of account**

A contract giving an independent coal broker or his associates the exclusive right to "offer and sell" defendant's coal to a power company and "to sell this account," as construed by actions of the parties over a period of several years, required the broker or his associates to "service" the account with the power company by dealing with the power company on a day-to-day basis and handling all the problems that arose under a contract for the sale of defendant's coal to the power company.

6. Brokers and Factors § 2— breach of coal brokerage contract

Defendant's rejection of an offer by a deceased broker's secretary to continue servicing an account with a coal company and defendant's employment of another to service the account constituted a breach by defendant of a commission contract giving the deceased coal broker or his associates the exclusive right to offer and sell defendant's coal to the power company.

7. Brokers and Factors § 6— coal brokerage contract — continuation after death of broker — right to commissions

A commission contract giving an independent broker or his associates the exclusive right to sell defendant's coal to a power company and providing that the commission would be paid directly "to you" (the broker) contemplated that compensation was to be paid to the broker alone; at his death the right to receive the commissions inured to the benefit of his estate, and his executrix was the proper party to bring an action to recover commissions under the contract.

8. Brokers and Factors § 6— breach of coal brokerage contract — damages — commissions less expenses

In an action to recover for breach of a commission contract which allowed a broker's associates to continue the broker's exclusive right to sell defendant's coal to a power company after the broker's death and requiring the associates to service the account with the power company, the broker's executrix could recover the amount of the commission called for by the contract less such reasonable expenses as would have been incurred by the broker's associates in servicing the contract had they been permitted to do so, the burden being on plaintiff to show not only the commission lost but also to show the reasonable expenses which the associates would have incurred.

Justice HIGGINS dissenting.

Justice LAKE joins in the dissenting opinion.

ON *certiorari* to review the decision of the Court of Appeals reported in 15 N.C. App. 709, 190 S.E. 2d 690 (1972), which affirmed summary judgment for plaintiff entered by *Snepp, J.*, in chambers February 18, 1972, MECKLENBURG Superior Court.

The facts of the case may be summarized as follows: Plaintiff is the executrix and widow of Robert Peaseley, a deceased coal broker. Peaseley first began doing business with the defendant Virginia Iron, Coal and Coke Company in 1956. As a coal broker Peaseley endeavored to sell the coal of a number of producers to various companies that were in the market for coal. Normally, Peaseley would receive a commission of ten cents per ton of coal actually shipped to a buyer as a result of his efforts. Virtually all the coal which Peaseley sold for Virginia Iron, Coal and Coke Company was purchased by

Mill Power Company, the purchasing agent for Duke Power Company. The volume of coal which Peaseley sold for the defendant company increased each year after 1956, both in terms of actual amount and in proportion to Peaseley's sales for other coal producers. Prior to 1956 defendant had not sold any coal to Mill Power Company. In 1956 the total amount of coal sold by Peaseley was 565,000 tons; the amount sold for Virginia Iron, Coal and Coke Company was 10,620 tons. In 1957 he sold a total of 682,000 tons; the amount sold for the defendant was 103,000 tons. In 1958 he sold a total of 763,000 tons; the amount sold for the defendant was 182,000 tons. In 1959 he sold a total of 878,000 tons; the amount sold for the defendant was 430,000 tons.

In 1960 Peaseley and the defendant entered into a commissions contract which gave Peaseley the exclusive right to sell defendant's coal to Mill Power Company for use by Duke Power Company. The contract provided for Peaseley to receive a commission of ten cents per net ton of coal actually shipped to Mill Power Company and was to remain in effect as long as Peaseley was able to place for use by Duke Power Company approximately 420,000 tons per year of defendant's coal. The letter constituting the contract is as follows:

"Mr. R. H. Peaseley
802-04 Johnston Bldg.
Charlotte, N. C.

"Dear Mr. Peaseley:

"This is to confirm our conversation in my office August 16, 1960.

"Beginning September 1, 1960, the Virginia Iron, Coal and Coke Company gives to you or your associates the exclusive right to offer and sell all coal produced and/or sold by Virginia Iron, Coal and Coke Company to Mill Power Company for use by Duke Power Company.

"In consideration for the exclusive right to sell this account, you agree to limit your commission to (10¢) ten cents per net ton. This commission will be paid directly to you by separate remittance on tons actually shipped, determined by railroad weights.

"This agreement is to remain in effect as long as you are able to place for use by the Duke Power Company

comparable Virginia Iron, Coal and Coke Company tonnage as shipped in 1959, or approximately 420,000 tons per year.

"We look forward to a continuation of the pleasant business relationship we have enjoyed in the past.

Yours very truly,

s/ F. X. Carroll
Executive Vice President

FXC:JCE
"ACCEPTED:
s/ R. H. PEASELEY
Date: Sept. 6th, 1960."

From 1960 to 1963 the volume of coal shipped by defendant to Mill Power Company as a result of Peaseley's efforts continued to increase each year. In 1960 Peaseley sold a total of 691,000 tons altogether, of which Virginia Iron, Coal and Coke Company shipped 425,000 tons. In 1961 he sold 759,587 tons, of which defendant shipped 520,000 tons. In 1962 Peaseley sold 931,000 tons, of which defendant shipped 715,000 tons. In 1963 Peaseley sold a total of 1,060,585 tons, of which defendant shipped 876,000 tons.

In June 1963 Peaseley negotiated a contract between defendant and Mill Power Company for the annual sale of coal. In this contract Mill Power Company, as agent for its principal Duke Power Company, was referred to as "Buyer," and defendant was referred to as "Seller." Under the contract the Seller agreed to sell and deliver and the Buyer agreed to buy and accept, subject to the provisions of the agreement, 960,000 tons during the first year of the contract, ten per cent more or less, at Buyer's option. The quantity in subsequent years could be increased ten per cent over the preceding year at Buyer's option by giving Seller six months' written notice prior to the beginning of each new year. The new quantity would then establish the base for calculating the ten per cent differential in subsequent years. The contract was to become effective 1 July 1963 and to continue in force for a period of three years thereafter unless terminated at any time after the completion of the first year by either the Buyer or Seller giving twenty-four months' written notice of termination to the other party.

The contract further provided that the coal was to be shipped by the Seller and accepted by the Buyer in substantially

equal weekly quantities, with the Buyer designating periodically in advance to the Seller the destination to which the coal was to be shipped. Specifications for quality and type of coal to be delivered and a specified base and net price per ton were also provided, the price to be increased or decreased by changes in production costs beyond Seller's control.

From June 1963 until his death on 11 May 1965 Peaseley was paid ten cents per ton of coal shipped to Mill Power Company under this contract. During this period Peaseley devoted the greater part of his working time to activities related to this contract and spent considerable money servicing it.

After Peaseley's death defendant refused to pay his estate any commissions on the continuing sales under the 1963 contract. In November of 1965 Mr. Harry C. Birkhead was hired by defendant as vice president in charge of sales. His chief duty was to service the contract between defendant and Mill Power Company as Peaseley had done prior to his death. The 1963 contract remained in force until April 3, 1972, at which time it was cancelled in accordance with its terms.

On 22 November 1965 plaintiff, decedent's wife, as executrix of his estate, filed an action against Virginia Iron, Coal and Coke Company alleging that Peaseley had fulfilled his obligations under the 1960 commissions contract and plaintiff was entitled to judgment of ten cents per ton of coal delivered by defendant under the 1963 contract with Mill Power Company after Peaseley's death. Defendant answered contending that the 1960 commissions contract was for personal services and terminated with Peaseley's death, an event which made further performance impossible.

The case was first tried at the 26 February 1968 Schedule "A" Civil Session of Mecklenburg Superior Court before Judge Ervin. At the close of the plaintiff's evidence, the trial judge allowed defendant's motion for involuntary nonsuit, and from judgment dismissing the action plaintiff appealed to the Court of Appeals. The Court of Appeals reversed, stating in part:

> "In the present case plaintiff has alleged and offered evidence tending to prove that coal was shipped by defendant after Peaseley's death under the very same coal contract which was the product of his skill and efforts as a salesman. In the absence of any evidence of an understand-

ing that defendant was to be relieved of commissions thereon, plaintiff is entitled to recover. . . . " *Peaseley v. Coke Co.*, 5 N.C. App. 713, 169 S.E. 2d 243 (1969).

Defendant petitioned this Court for a writ of *certiorari* which was denied.

On motion of plaintiff, summary judgment for the plaintiff was entered by Judge Snepp at the 4 January 1971 Schedule "D" Civil Session of Mecklenburg Superior Court holding defendant liable for commissions on coal sold under the contract negotiated by Peaseley delivered after his death. The issue of damages was retained for jury determination. Defendant appealed to the Court of Appeals which affirmed this summary judgment. Defendant again petitioned this Court for a writ of *certiorari* which was denied.

On 1 December 1971 plaintiff moved for summary judgment on the issue of damages. On 13 January 1972 defendant filed a response to plaintiff's motion for summary judgment and filed a cross-motion for summary judgment in its favor dismissing the action. On 26 January 1972 the parties entered into the record the following stipulations:

"The number of tons of coal shipped by the defendant to Duke Power Company from May 12, 1965, through the month of October 1971, under the terms of the contract between the defendant and Mill Power Supply Company dated June 19, 1963, as amended, on which the defendant has paid no commission either to the plaintiff or to the Estate of Robert H. Peaseley is 4,831,800 tons.

"If the plaintiff is entitled to commissions at the rate of ten (10¢) cents for each of the aforesaid 4,831,800 tons of coal, which the defendant does not admit but expressly denies, then the principal amount of such commissions would be $483,180.00."

On 18 February 1972 the parties entered into an additional stipulation:

"If the plaintiff is entitled to commissions of ten (10¢) cents for each of the 4,831,800 tons of coal, referred to in the aforesaid Stipulation of the parties, dated January 20, 1972—and the defendant does not admit but expressly denies that the plaintiff is so entitled—then the interest on

said commissions to the present date at six (6%) per cent per annum is $107,740.33."

Judge Snepp at the 18 February 1972 Session of Mecklenburg Superior Court entered summary judgment that plaintiff have and recover of defendant $590,920.33 with interest thereon at the rate of 6% per annum until paid. Defendant appealed to the Court of Appeals. That court in an opinion by Judge Hedrick, concurred in by Judges Brock and Morris, affirmed. On 8 November 1972 we allowed defendant's petition for a writ of *certiorari.*

Helms, Mulliss & Johnston by E. Osborne Ayscue, Jr., and Fred B. Helms for defendant appellant.

Blakeney, Alexander & Machen by Whiteford S. Blakeney for plaintiff appellee.

MOORE, Justice.

The Court of Appeals by its decision on the second appeal affirmed the judgment of the Superior Court, which held the defendant liable for unpaid commissions on sales subsequent to Peaseley's death and prior to the termination of the June 1963 contract. Plaintiff contends that when the Court of Appeals so held and this Court refused to allow *certiorari* that issue was definitively settled and became the law of the case.

In *Hayes v. Wilmington,* 243 N.C. 525, 91 S.E. 2d 673 (1956), this Court said:

> " . . . (I)t may be conceded that as a general rule when an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal, provided the same facts and the same questions which were determined in the previous appeal are involved in the second appeal. . . . "

Therefore, when this case was appealed to the Court of Appeals the third time, that court was bound by its determination of the liability issue on the second appeal. The fact that the Court of Appeals was bound by its own decision does not mean, however, that this Court is similarly restricted by reason of its denial of *certiorari.*

G.S. 7A-31 provides the statutory authority for discretionary review by the Supreme Court of decisions of the Court of Appeals. This statute reads in pertinent part:

> "(a) In any cause in which appeal has been taken to the Court of Appeals, except a cause appealed from the North Carolina Utilities Commission or the North Carolina Industrial Commission, and except a cause involving review of a post-conviction proceeding under article 22, chapter 15, the Supreme Court may in its discretion, on motion of any party to the cause or on its own motion, certify the cause for review by the Supreme Court, either before or after it has been determined by the Court of Appeals. . . . If the cause is certified for transfer to the Supreme Court after its determination by the Court of Appeals, the Supreme Court reviews the decision of the Court of Appeals.
>
> * * *
>
> "(c) . . . when in the opinion of the Supreme Court
>
> (1) The subject matter of the appeal has significant public interest, or
>
> (2) The cause involves legal principles of major significance to the jurisprudence of the State, or
>
> (3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court. Interlocutory determinations by the Court of Appeals, including orders remanding the cause for a new trial or for other proceedings, shall be certified for review by the Supreme Court only upon a determination by the Supreme Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm."

Under this statute this Court is to review only those cases of substantial general or legal importance or in which review is necessary to preserve the integrity of precedent established by this Court. Denial of *certiorari* does not mean that this Court has determined that the decision of the Court of Appeals is correct. Denial may simply mean that in the opinion of this Court the case does not require further review under the provisions of G.S. 7A-31(c). This statute further specifically provides that discretionary review of interlocutory determinations by the Court of Appeals shall be exercised only in unusual cases

where failure to do so would cause a delay in final adjudication or which would probably result in substantial harm. Denial in such cases *may* only mean that this Court has determined that no such harmful result is likely to occur if the petition is denied. In the present case the third appeal to the Court of Appeals is the first appeal taken from a final judgment. Absent such special circumstances as referred to in the statute, this is the first time that discretionary review by this Court has been appropriate under the statute.

Justice Lake in *Builders Supplies Co. v. Gainey,* 282 N.C. 261, 192 S.E. 2d 449 (1972), commented on the effect of the denial of *certiorari.* In that case the trial court had directed a verdict for the defendant in a case in which plaintiff was seeking to be declared the owner of the right to remove sand and gravel from a certain tract of land. The Court of Appeals reversed and this Court denied *certiorari.* In its opinion the Court of Appeals called plaintiff's interest an easement. In a second appeal to the Court of Appeals, plaintiff's interest was denominated a *profit a pendre,* and a jury verdict for defendant was affirmed. This Court allowed *certiorari* and affirmed the Court of Appeals, but determined that plaintiff's interest was neither an easement nor a *profit a pendre.* Justice Lake stated: "Such [prior] denial [of certiorari] does not constitute approval of the reasoning upon which the Court of Appeals reached its decision."

In *State v. Case,* 268 N.C. 330, 150 S.E. 2d 509 (1966), this Court considered the effect of the denial of a writ of *certiorari.* In that case defendant was convicted of forgery. He petitioned for a writ of habeas corpus alleging certain errors in his trial and demanding release from prison. The trial judge ordered a new trial for errors committed in the first trial. Defendant petitioned for *certiorari* on two grounds. First, he said the judge erred in ordering a new trial which he did not want and had not requested. Second, he said the judge committed error in not ordering him released from prison. Defendant's petition for *certiorari* was denied by this Court. A new trial was held and defendant entered a plea of double jeopardy. The plea was not allowed, and defendant was convicted. This Court reversed, holding that defendant's plea of former jeopardy should have been allowed. In discussing the effect of the denial of *certiorari,* Justice Sharp quoted with approval Mr. Justice Frankfurter in *Brown v. Allen,* 344 U.S. 443, 97 L.Ed. 469, 73 S.Ct.

437 (1952): "The denial of a writ of *certiorari* imports no expression of opinion upon the merits of the case. . . ."

The United States Supreme Court in *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 60 L.Ed. 629, 36 S.Ct. 269 (1916), dealt at length with the question of whether a denial of *certiorari* makes the lower appellate court's decision the final law of the case:

> "It is contended that this question is settled otherwise, at least as between these parties, by the decision of the circuit court of appeals on the first appeal, and our refusal to review that decision upon complainant's petition for a writ of certiorari, and that the only questions open for review at this time are those that were before the court of appeals upon the second appeal. This, however, is based upon an erroneous view of the nature of our jurisdiction to review the judgments and decrees of the circuit court of appeals by certiorari. . . . As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. [Citations omitted.] And, except in extraordinary cases, the writ is not issued until final decree. . . .
>
> "It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ is in no case equivalent to an affirmance of the decree that is sought to be reviewed. And, although in this instance the interlocutory decision may have been treated as settling 'the law of the case' so as to furnish the rule for guidance of the referee, the district court, and the court of appeals itself upon the second appeal, this court, in now reviewing the final decree by virtue of the writ of certiorari, is called upon to notice and rectify any error that may have occurred in the interlocutory proceedings. [Citations omitted.]"

Accord, Mercer v. Theriot, 377 U.S. 152, 12 L.Ed. 2d 206, 84 S.Ct. 1157 (1964).

[1] As a general rule this Court will consider only those aspects of a decision of the Court of Appeals which are assigned as error in the petition for *certiorari* and which are preserved by argument or the citation of authority with reference thereto in the brief filed by the petitioner in this Court. In *State v. Williams*, 274 N.C. 328, 163 S.E. 2d 353 (1968), Justice Lake

discussed the scope of proper review on a petition for *certiorari*. In that case defendant was found guilty of robbery by the use of firearms. In his appeal to the Court of Appeals, defendant assigned as error the admission of an identification by the prosecuting witness, the denial of his motion for judgment as of nonsuit, and a specified part of the instructions to the jury. The Court of Appeals affirmed the conviction finding no merit in any of the assignments of error. Defendant petitioned this Court for a writ of *certiorari*, which was allowed. In his petition and in his brief before this Court, the defendant did not discuss the denial of his motion for judgment as of nonsuit nor the alleged error in the instructions of the trial judge. Under these facts Justice Lake, speaking for the Court, said:

> "When this Court, after a decision of a cause by the Court of Appeals and pursuant to the petition of a party thereto as authorized by G.S. 7A-31, grants certiorari to review the decision of the Court of Appeals, only the decision of that Court is before us for review. We inquire into proceedings in the trial court solely to determine the correctness of the decision of the Court of Appeals. Our inquiry is restricted to rulings of the Court of Appeals which are assigned as error in the petition for certiorari and which are preserved by arguments or the citation of authorities with reference thereto in the brief filed by the petitioner in this Court, except in those instances in which we elect to exercise our general power of supervision of courts inferior to this Court. . . ."

[2] Under our general supervisory power, we could review the entire record, but in the present case defendant in its petition for *certiorari* to this Court assigned as error decisions of the trial court and of the Court of Appeals throughout the course of the litigation and preserved these assignments by arguments or citation of authorities in its brief filed in this Court. Under these facts we hold that the previous denials of *certiorari* do not constitute approval of either the reasoning or the merits of the prior decisions of the Court of Appeals. On the present petition this Court may review the entire proceedings and consider any errors which have occurred during the course of the litigation provided the parties have taken the proper steps to preserve the questions for appellate review.

[3] The Court of Appeals, by its decision on the second appeal of this case (12 N.C. App. 226, 182 S.E. 2d 810 (1971)),

affirmed summary judgment entered by Judge Snepp in favor of plaintiff on the question of defendant's liability for commission on coal sold to Mill Power Company under the contract of 1 July 1963 after plaintiff's testate's death. The defendant contends this was error. Defendant has never questioned its obligation to pay Peaseley commission on coal sold and shipped by it to Mill Power prior to Peaseley's death, but insists that the contract of 6 September 1960 was a contract calling for the personal services of Peaseley and as such was terminated by his death. Plaintiff to the contrary contends that Peaseley had performed all the duties required of him by the 1960 commissions contract when the contract of 1 July 1963 was executed, that the sale so far as he was concerned was completed, and that he was entitled to commission on all the coal delivered under that contract.

Obviously, many contracts calling for the services of a salesman are made on the basis of that salesman's personality, experience, contacts, knowledge, industry, and ability. Such attributes are personal to the salesman involved. For that reason courts have held that many contracts of this kind are not assignable by the salesman and do not survive his death, the rationale being that the death of the person who was to perform the personal services makes further performance impossible. *Stagg v. Spray Water Power and Land Co.*, 171 N.C. 583, 89 S.E. 47 (1916); *Siler v. Gray*, 86 N.C. 566 (1882). Cases from other jurisdictions supporting this proposition include: *Neely v. Havana Electric Railway Co.*, 136 Me. 352, 10 A. 2d 358 (1940); *Otis v. Adams*, 41 Me. 258 (1856); *Cutler v. United Shoe Mach. Corp.*, 274 Mass. 341, 174 N.E. 507 (1931); *Ruvbin v. Siegel*, 177 N.Y.S. 342, 188 App. Div. 636 (1919); *Folquet v. Woodburn Public Schools*, 146 Ore. 339, 29 P. 2d 554 (1934); *George v. Richards*, 361 Pa. 278, 64 A. 2d 811 (1949); *Blakely v. Sousa*, 197 Pa. 305, 47 A. 286 (1900); *Moran v. Wotola Royalty Corp.*, 123 S.W. 2d 692 (Tex. Civ. App. 1938); *Kanawha Banking & Trust Co. v. Gilbert*, 131 W.Va. 88, 46 S.E. 2d 225 (1947). However, in our view these cases are not pertinent to the decision in this case. Prior to the execution of the contract of 6 September 1960 defendant sent a proposed agreement to Peaseley which provided that "Beginning September 1, 1960 Virginia Iron, Coal and Coke Company gives to *you* the exclusive right to offer and sell. . . ." (Emphasis added.) Peaseley refused to accept this contract and returned it to defendant. Thereafter, at Peaseley's insistence the contract was rewritten

in its final form to provide that "Beginning September 1, 1960 the Virginia Iron, Coal and Coke Company gives to you *or your associates* the exclusive right to offer and sell. . . ." (Emphasis added.) Clearly, by the express terms of the contract entered into with complete knowledge of both parties not only Peaseley *but his associates* had exclusive right to sell defendant's coal.

In construing a contract the primary purpose is to ascertain the intention of the parties. *Realty Co. v. Batson,* 256 N.C. 298, 123 S.E. 2d 744 (1961); 2 Strong, N. C. Index 2d, Contracts § 12, p. 315. In the contract in question the parties made their intentions clear. Peaseley or his associates had the exclusive right to sell defendant's coal. The contract did not provide for the sole personal services of Peaseley. By its terms it included his associates. We hold, therefore, that the contract was not such a personal service contract as would be terminated by Peaseley's death, but that it survived him and could have been carried out by his associates.

The next question which arises is: What, if anything, was Peaseley or his associates required to do under the terms of the contract?

[4] The heart of a contract is the intention of the parties and is to be ascertained from the language used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time. General custom in the business or trade may be considered in arriving at the intention of the parties, and words of a contract referring to a particular trade will be interpreted by the courts according to their widely accepted trade meaning. *Phillips v. Construction Co.,* 261 N.C. 767, 136 S.E. 2d 48 (1964); *McAden v. Craig,* 222 N.C. 497, 24 S.E. 2d 1 (1942); *Hughes v. Knott,* 138 N.C. 105, 50 S.E. 586 (1905); 2 Strong, N. C. Index 2d, Contracts § 12, p. 315.

The rule is stated in Corbin on Contracts, Ch. 24, § 556, p. 525, as follows:

> "Usages and customs may be proved, not only to aid in interpretation of the words of the parties, but also to affect the contractual relations of the parties by adding a provision to the contract that the words of the parties can scarcely be said to have expressed. . . . If proof of usage and custom is permitted to add a provision that is not expressed in words, it is because one of the parties

asserts that they intended that it should be so included; intended it, at least, as much as they intend to include the provisions that they try to express in words. In either case, it is enough if one of them intended it and the other knew or had reason to know that he did so."

As stated by Chief Justice Stacy in *McAden v. Craig, supra,* ". . . (I)t has been held that the general custom in the business or trade may be considered in arriving at the intention of the parties."

The words of the contract "offer and sell" and "to sell this account" refer to the sale of coal by an independent coal broker and will ordinarily be interpreted by the court according to their widely accepted trade meaning. *Phillips v. Construction Co., supra.* Both parties to the contract in question construed it to mean that Peaseley was to "service" the account.

Mr. F. X. Carroll, president of defendant, testified as to the custom of the trade in connection with coal brokers and as to what Peaseley did under the contract:

"In the coal business the functions of an independent coal broker and an internal sales department are interchangeable. In one instance, you use a coal broker and have no sales department. In the other you employ your own salesman and use no brokers. Whether you use your own salesman or a broker, his function is to deal with the customer on a day-to-day basis, handling all of the variables that are written into the contract and dealing with all the problems I have outlined.

"When a wage adjustment, changing conditions in the mines or other factors increase the seller's costs, whoever is selling the coal to the power company must negotiate a new price. When analyses of the coal company and the power company are not in agreement he has to iron out the differences in order to make sure that the price computation on coal to be shipped subsequently will be fair to the shipper. When analyses of the coal run consistently low he has to persuade the power company to accept coal below the contract specifications. When the power company wants more coal than the coal company can ship or the coal company wants to ship more than the power company needs, he has to deal with the power company about this.

"Traditionally, in the coal industry some coal has been sold by independent brokers or manufacturers' representatives who handled all the relationships and dealings with the customers. These brokers may be salesmen buying and selling on their own account or selling for others on a commission basis. On the other hand, some coal companies have salaried employees who handle their dealings with customers. Whoever handles the relationship with the customer has to deal with all the problems I have described.

* * *

"Our 1963 Coal Contract with Mill Power was in no sense a completed sale. It assured Duke of a source of supply and us of a customer, but other than that we still received orders on a month-to-month basis as we had before, we still had the same problems to deal with on a frequent and regular basis, Peaseley still dealt with them and we still paid him ten cents a ton commission on coal shipped as it was shipped. Our contract with Peaseley provided that we would pay him ten cents per ton on all tonnage shipped to Duke 'as long as you are able to place for use by Duke Power' tonnage at at least the stated level. If he had quit working after the execution of the 1963 Coal Contract, the whole relationship with Duke would have promptly ground to a halt if we had not hired someone to take his place doing the job he was doing.

* * *

"Both before and after the 1963 Coal Contract Peaseley routinely did these types of things for us, to wit:

"(a) He pushed more coal to Mill Power than it ordered at certain times;

"(b) At other times, he appeased Mill Power when we were not in a position to ship coal it had ordered;

"(c) Our supply of coal to Mill Power was on two railroads, N & W and Clinchfield. He negotiated changes in the ratio of N & W coal to Clinchfield coal in accordance with our wishes;

"(d) He negotiated specifications; (1) He arranged for the customer to take a product that was below specifications on a daily basis; (2) He negotiated a settlement when

our analyses were not in agreement with those of Duke Power on the same coal. The price we were paid for our coal depended on this."

Plaintiff's evidence showed that Peaseley performed the following duties under the contracts: He received coal orders each month from Mill Power, each month's orders differing from those of the preceding month, stating the type of coal, the number of carloads and where they were to be placed. He then forwarded these orders to defendant. If defendant could not fulfill the orders, he worked out some agreement with Mill Power to revise them. When defendant needed to overship, he arranged for Mill Power to take the excess coal. When floods or other events necessitated rearrangement or curtailment of shipments, he worked this out with Mill Power. When defendant needed to change the mix of the coal it shipped from various sources, he worked this out with Mill Power. If disagreements arose between Mill Power and defendant about the weight or quality of coal shipped, he dealt with Mill Power about it on defendant's behalf. When price adjustments became necessary because of variations in quality of coal delivered, he negotiated these with Mill Power. When a renegotiation of the basic price formula became necessary, he renegotiated this with Mill Power. These things required immediate attention on a daily basis. When he was absent from the office, his secretary, Mrs. Martha Patterson Byrd, performed these duties. Mrs. Byrd testified that after the 1963 coal contract was executed Peaseley constantly worked on this account, so that in the last two or three years of his life handling the account took most of his time. The Mill Power executive with whom Peaseley dealt testified that when something was wrong Mill Power went to Peaseley and he handled it with the coal supplier and corrected it. All of Mill Power's contacts about defendant's coal were with Peaseley. Defendant never dealt with Mill Power without Peaseley.

In the present case both the parties by their actions over a period of several years construed the contracts to mean that Peaseley was to perform those services an independent coal broker usually performed in the sale of coal; that is, to deal with the customer on a day-to-day basis, handling all the problems that arose under the contract for the sale of defendant's coal to Mill Power.

The best evidence of the intention of the parties to a contract is the practical interpretation given to their contracts by the parties while engaged in their performance. As said by Chief Justice Stacy in *Cole v. Fibre Co.*, 200 N.C. 484, 157 S.E. 857 (1931):

> "The general rule is, that where, from the language employed in a contract, a question of doubtful meaning arises, and it appears that the parties themselves have interpreted their contract, practically or otherwise, the courts will ordinarily follow such interpretation, for it is to be presumed that the parties to a contract know best what was meant by its terms, and are least liable to be mistaken as to its purpose and intent. [Citations omitted.] 'Parties are far less liable to have been mistaken as to the meaning of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have impelled them to resort to law, and one of them then seeks a construction at variance with the practical construction they have placed upon it of what was intended by its provisions.' 6 R.C.L. 853.
>
> "It is often said that 'the construction of a contract, when in writing or agreed upon, is a matter of law for the courts.' *Barkley v. Realty Co.*, 170 N.C. 481, 87 S.E. 219. This is true, and in 'those written contracts which are sufficiently ambiguous or complex to require construction, the general rule is that the intention of the parties is the polar star. . . . If the words employed are capable of more than one meaning, the meaning to be given is that which it is apparent the parties intended them to have.' *King v. Davis*, 190 N.C. 737, 130 S.E. 707. Frequently, this intention can best be gathered from the practical construction of the contract which the parties themselves have adopted and observed during the period of harmonious operation. [Citation omitted.]
>
> * * *
>
> "Finally, we may safely say that in the construction of contracts, which presents some of the most difficult problems known to the law, no court can go far wrong by adopting the *ante litem motam* practical interpretation of the parties, for they are presumed to know best what was meant by the terms used in their engagements. . . ."

See *Bank v. Supply Co.*, 226 N.C. 416, 38 S.E. 2d 503 (1946); 2 Strong, N. C. Index 2d, Contracts § 12, p. 313.

[5] Adopting the interpretation placed upon the contracts by the parties themselves, we hold that under the terms of the contracts Peaseley or his associates were required to perform the services ordinarily performed by a coal broker in handling all the variables written into the contract and dealing with all the problems which arose under it—services which Peaseley satisfactorily performed until his death.

Martha Patterson Byrd, Peaseley's secretary since 1955, testified at length concerning the desire of herself and Mrs. Peaseley, as associates of R. H. Peaseley, to continue to service the 1963 contracts:

> "After Mr. Peaseley's death, the first contact I had with any official of Vicco was when Mr. Carroll and his attorney came down to discuss the contract, the commission contract. What they said about continuing to pay commissions under the commission contract was that the contract was invalid and they didn't want to continue. They did not express any willingness to go forward upon any basis whatever.
>
> "As to what I did myself with respect to the flow of coal from Vicco to Duke, after the time of the executing of the Vicco-Duke contract of June 19, 1963, when Mr. Peaseley wasn't in, when he was out of town, I would handle any complaints with Vicco, or if it was necessary to call Vicco about shipping more coal or call Mill Power, or if Mill Power called me with a complaint, I could handle it, the complaint. The specifying of the quantities or orders for coal were sent to Mr. Peaseley's office by Mill Power around the 20th or 25th of each month. I made copies of them in my office and sent them to Virginia Iron, Coal and Coke Company.
>
> "I had contact with Mr. H. D. Waters of Duke Power Company or Mill Power Supply Company with reference to continuing the relation as it had been before."

In an affidavit taken 8 January 1968 Martha Patterson Byrd testified:

> "I discussed the Mill Power Supply contract with Mr. Carroll after Mr. Peaseley's death only when Mr. Carroll

came to our office. I called VIC before that. I am not sure whether I talked to Mr. Carroll, but I did talk to someone there on the phone. Several days after Mr. Peaseley's death after Mr. Carroll had already made a trip to Charlotte, but didn't come to see me, I called him. The contract was the subject of discussion. What we discussed was just the fact that we wished to continue representing their company. Mr. Stokes and I together were talking to Mr. Carroll over the telephone. Mr. Stokes was a close friend of Mr. Peaseley's and Mr. Peaseley had asked him to help look after the business in case anything happened to him. He was not otherwise connected with Mr. Peaseley's business and received no money from it.

* * *

"Mr. Carroll and Mr. Rogers came to our office. I said a while ago that we wanted to continue the contract when we called him. We did not discuss with him any question about how it would be continued and what, if any, changes would have to be made or any changes in the commission. The conversation was a matter of whether they would allow us to continue representing the company. That was the only thing that we discussed. We didn't discuss it much over the phone. It was discussed in our meeting. All I did over the telephone was tell him or infer that he should have come to my office at the time that he was in Charlotte, because I was the only one left there to handle the business. . . .

* * *

"We discussed whether Mrs. Peaseley was an associate, or whether I was an associate or whether Mr. Stokes was an associate. We didn't reach any agreement. There was no discussion about continuation of Mr. Peaseley's business under the name of R. H. Peaseley Assoc. I don't remember discussing that. We told him that the business was to be continued and that I was to carry on the business. I don't know whether I told them we would carry on under the name of R. H. Peaseley and Associates or not, but Mrs. Peaseley and I decided on that name immediately after Mr. Peaseley's death. That name had not been used until after his death."

Mr. Carroll, president of defendant, in an affidavit dated 14 January 1971 discussed the action which his company took to

find someone to carry out the function that Mr. Peaseley had performed related to the 1963 contract prior to his death:

> "Immediately after Peaseley's death, I talked with Mr. Waters at Mill Power about how our contract was to be serviced from then on. He made it clear that it would have to be serviced by someone. He would not suggest anyone, but he asked us to tell him who the person handling the contract would be. I told him that we were thinking about bringing someone into the company to service our accounts, but that I would service his account personally until Peaseley was replaced.
>
> * * *
>
> "In November 1965 we hired Harry C. Birkhead as vice president in charge of sales. . . .
>
> * * *
>
> "Birkhead became a salaried employee of the company and took over the handling of our relationships with our customers. This was a new position. . . .
>
> * * *
>
> "All of our dealings with Mill Power and Duke with respect to these problems have been handled by Mr. Birkhead. If Mr. Peaseley had been alive he would have continued to handle them. This is the function that he was performing up until he died. . . ."

Defendant employed Mr. Birkhead to handle the problems with Mill Power as Peaseley had previously done. Nothing in the record indicates that Mrs. Peaseley and Mrs. Byrd or associates employed by them could not have continued to perform these services. They were not allowed to do so. The employment of Mr. Birkhead precluded further performance by Peaseley's associates even though Mrs. Byrd had tendered such continued performance.

[6] Defendant's rejection of Mrs. Byrd's offer to perform constituted a breach by defendant of Peaseley's commission contract. ". . . (F)ollowing the consummation of a contract, the plaintiff must show that he offered to perform his part of the agreement, or that such offer was rendered unnecessary by the refusal of the defendant to comply, before an action will lie, either for its breach or for specific performance. . . . " *McAden v. Craig, supra.* See *Seed Co. v. Jennette Bros. Co.*, 195 N.C. 173, 141

S.E. 542 (1928); *Ducker v. Cochrane,* 92 N.C. 597 (1885). In the instant case defendant not only rejected the offer of Peaseley's associates to comply with Peaseley's obligations under the contract but by employing Birkhead and assigning to him the duties formerly performed by Peaseley made further performance by Peaseley's associates impossible.

[7] The commission contract of 6 September 1960 specifically provided for performance by "Peaseley or his associates." However, as to the compensation to be paid under the contract it stated: "In consideration for the exclusive right to sell this account, you agree to limit your commission to (10¢) ten cents per net ton. This commission will be paid directly to you by separate remittance on tons actually shipped, determined by railroad weights." Clearly, the compensation was to be paid to Peaseley alone. At his death the right to receive these commissions inured to the benefit of his estate, and his executrix was the proper party to bring this action.

[8] During his lifetime Peaseley paid the expenses of performing his obligations under the contract, and had Peaseley's associates been allowed to continue such performance Peaseley's estate would have been liable for the reasonable expenses incurred by his associates in performing such duties. The amount, then, to be recovered by the plaintiff in this action is the loss of net profits to Peaseley's estate resulting from the wrongful breach of the contract by defendant insofar as they may be determined with reasonable certainty, to the end that the parties may be placed as nearly as possible in the same monetary condition that they would have occupied had the contract not been breached. *Rubber Co. v. Distributors,* 253 N.C. 459, 117 S.E. 2d 479 (1960); 2 Strong, N. C. Index 2d, Contracts § 29, p. 339.

Specifically, the loss of net profits which plaintiff is entitled to recover is ten cents per net ton of coal shipped under the contract of June 1963 from the date of Peaseley's death until the contract was terminated, reduced by such reasonable expenses as would have been incurred by his associates in servicing the contract had they been permitted to do so.

The burden of proof is on plaintiff not only to show the commissions lost as a result of the defendant's breach but also to show the reasonable expenses which Peaseley's associates

would have incurred in servicing the contract. The rule is stated in 22 Am. Jur. 2d, Damages § 296:

> "Where the plaintiff sues for profits lost because of the refusal of the defendant to permit him to complete a contract, he has the burden of proving such profits, including the constituent elements entering into the cost to him of doing the work."

In *Tillis v. Cotton Mills* and *Cotton Mills v. Tillis,* 251 N.C. 359, 111 S.E. 2d 606 (1959), plaintiff, a carrier, brought suit for breach of his shipping contract with defendant. Plaintiff established only the amount which he would have received under the shipping contract. This Court remanded for a new trial because plaintiff did not show the extent this amount would be reduced by the costs of transporting defendant's goods. Justice Clifton L. Moore, speaking for the Court, said:

> " . . . Ordinarily the measure of damages for breach of an executory contract for transporting goods, where the breach prevents plaintiff from hauling the goods, is the revenue plaintiff would have received for the services less the costs and expenses of transporting the goods.
>
> "If any of the factors involved in revenue and costs are estimated, the estimates must be based on facts. *Goforth v. Smith* (Okla. 1952), 244 P. 2d 304. A witness will not be permitted to give a mere guess or opinion, unsupported by facts, as to the amount of damages arising upon a breach of contract. The amount of damages is the ultimate issue to be determined by the jury. It is incumbent upon the plaintiff to present facts, as to all reasonable factors involved, that the jury may have a basis for determining damages. [Citations omitted.]"

See also *Haddad v. Western Contracting Co.,* 76 F. Supp. 987 (D.C.W.Va. 1948); *Whiting v. Dodd,* 39 Ala. App. 80, 94 So. 2d 411 (1957); *Clarkson v. Crawford,* 285 Pa. 299, 132 A. 350 (1926).

For the reasons stated, the decision of the Court of Appeals affirming the judgment of the Superior Court of Mecklenburg County adjudging defendant liable to Peaseley's estate for commissions on coal shipped after Peaseley's death and prior to the termination of the contract of June 1963 is affirmed. The decision of the Court of Appeals affirming the judgment of the

Superior Court of Mecklenburg County on the issue of damages is reversed, and this case is remanded to the Court of Appeals for the entry by it of a judgment reversing the decision of the Superior Court on the issue of damages and remanding the case to that court for its determination of damages in accordance with this opinion.

MODIFIED AND REMANDED.

Justice HIGGINS dissenting.

The pertinent facts in this case are clearly and succinctly stated in the Court's opinion. However, I am unable to agree with certain of the legal conclusions which the Court draws from the facts in evidence. Particularly I disagree with the conclusion that the words "or associates" in the contract give to the administratrix of Mr. Peaseley's estate the legal right to collect for the estate the commissions for sales made and commissions earned after his death.

The record discloses the manifold duties under the contract Mr. Peaseley was obligated to perform in return for a commission of ten cents per ton on all coal delivered by rail from the defendant's mines in West Virginia to the storage bins of the Duke Power Company in Charlotte, North Carolina, for use in the production of electric current. The sales agreement provided that the coal should meet certain tests and specifications as to quality and characteristics, including the moisture content, the ash and sulphur content, the size, softening temperature, and grindability. Deliveries were required at the proper time and in the quantity and quality called for by the purchaser. These requirements demanded the constant attention of the sales broker.

It is to be expected that a contract involving nearly a million tons annually would of necessity generate certain differences between the producer, the transporter, and the consumer. Settling of these differences was the function of Mr. Peaseley. He was an expert in the field. For the year preceding his death he negotiated sales and deliveries of more than 900,000 tons of coal. Did he have "associates" in the operation who were entitled to continue the contract in his name, render the services which he had contracted to render, and as associates are entitled to carry on his contract?

After the oral contract was negotiated, the coal company reduced it to writing and forwarded it to Mr. Peaseley at Charlotte for his approval. The contract provided that for his services in negotiating the sales and in performing the manifold duties involved in the deliveries of coal in the quantity and quality and at the intervals required by the purchaser, he was to receive ten cents per ton. After receiving the written memorandum of the contract, he returned it to the coal company and asked that the words "or associates" be inserted in the contract after his name. The Court says these words "or associates" exempt this contract from the general rule that a contract for personal services terminates at the death of the promissor. "Associates" in a business contract certainly carry the implication that they are in a position to perform the essential obligations required of the named party. "Associates" in a business undertaking mean something more than associates at the bridge table, the cocktail lounge, or the golf course. The added words "or associates" certainly do not imply that Mr. Peaseley had associates in the business at the time. Otherwise, the contract should have said "*and* associates" and it would have been easy to name them.

There is no evidence in the record that after the contract was entered into, Mr. Peaseley ever selected or included any associates in the operation of the sales agreement. All of the evidence is to the contrary. The evidence discloses that Mr. Peaseley's office force consisted of Mrs. Martha Byrd, his secretary-bookkeeper, and himself. Mrs. Byrd was employed in 1955 and continued to work in the office in the same capacity thereafter. The evidence does not disclose any change in her status. True, she handled many of the details when Mr. Peaseley was absent and continued to do so as she became familiar with the procedures. She has made no claim of her ability, or of the ability of anyone else, to service the contract in such manner as Mr. Peaseley had been able to do. She testified as a witness in this case: " . . . I was asked, if during the years 1956 and up until the time of Mr. Peaseley's death in 1965, whether anybody else assisted him in handling this Mill Power account . . . other than myself. I answered 'no', and that is correct."

The evidence further disclosed that Mr. Peaseley had a business telephone in his home and when he was away from Charlotte, Mrs. Peaseley answered the telephone and gave such information as to Mr. Peaseley's whereabouts or the business as she was able to furnish. So that the record discloses that

never at any time did any person participate in the business other than Mrs. Byrd and Mrs. Peaseley, and they only to the extent here disclosed. It is a fair question to ask, this being so, why did Mr. Peaseley ask for the insertion of the words "or associates"? I think the record suggests the answer.

Prior to the Second World War, Mr. Peaseley and Mr. Charles J. Stokes operated an incorporated business together. It was not very successful. However, after the war, Mr. Stokes returned, entered business, and occupied an office near Mr. Peaseley in the Johnston Building. Mr. Stokes testified: "During this time I was always in contact with Bob, and, of course, we were always friends. . . . Very close friends. . . . He was my best friend. I would say that I saw him daily during the week. . . . From time to time he showed me his monthly shipments . . . " Mr. Peaseley could well have had in mind an invitation to his former partner, Mr. Stokes, to join him in his contract with the defendant. Mr. Peaseley was able to show that a place with a handsome salary was ready for him. The words "or associates" provided Mr. Peaseley with the right to select associates if he so desired.

As further proof that there were no associates, the record discloses that only Mrs. Byrd and Mrs. Peaseley had any connection whatever with the operation and they make no claim to any rights under the contract. Mrs. Byrd testified as a witness. Mrs. Peaseley brought the suit and claimed that all commissions were earned by her husband and belonged to his estate. There were no associates at the time the contract was entered into; none has joined thereafter; none was present before the court asserting a claim to commissions. "Associates" were straw men or women. There is no need to go through the motion of knocking them down because they have never stood up. Any "associates" entitled to share with Mr. Peaseley in the obligations and in the benefits of this business necessarily would be his partners or his agents. If partners, the survivors would be required by law, G.S. 59-51, etc. to dissolve and to account. If as agents, the agency would necessarily terminate at the death of the principal.

In this case there is no allegation, no admission, and no finding by the Court that any associate of Mr. Peaseley rendered any service to the Virginia Iron, Coal and Coke Company in connection with the sale and delivery of coal to Duke Power Company after Mr. Peaseley's death. The coal company made

defendant's intestate disliked driving, plaintiff usually drove deceased's car when they were together, plaintiff drove to the party on the night of the accident and the positions of the bodies of plaintiff and deceased after the accident, injuries sustained by them and damages to the vehicle indicated that deceased was the passenger and plaintiff the driver.

3. **Rules of Civil Procedure § 41— nonjury trial — dismissal of action at close of plaintiff's evidence**

In a nonjury case Rule 41(b) now provides a procedure whereby, at the close of plaintiff's evidence, the judge can give judgment against plaintiff not only because his proof has failed in some essential aspect to make out a *prima facie* case but also on the basis of facts as he may then determine them to be from the evidence then before him, even though plaintiff has made out a *prima facie* case which would have precluded a directed verdict for defendant in a jury case. Except in the clearest cases, however, judgment should be deferred until the close of all the evidence.

4. **Rules of Civil Procedure §§ 41, 52; Appeal and Error § 63— nonjury trial — motion to dismiss at close of all evidence — failure of court to rule on merits — error**

In a personal injury action where defendant counterclaimed for wrongful death of his intestate, the trial court sitting without a jury was required by Rule 41(b) to consider and weigh all the evidence, to determine who was driving the vehicle when injury and death were sustained, and to render judgment on the merits of the claim and counterclaim in the form directed by Rule 52(a); dismissal of the counterclaim at the conclusion of all the evidence on the ground that there was no evidence upon which the trier of facts could find for defendant constituted error, and such misapprehension of the law required remand for a trial *de novo*.

Justice HIGGINS dissenting.

ON *certiorari* to review the decision of the Court of Appeals (15 N.C. App. 465, 190 S.E. 2d 290), which affirmed judgment for plaintiff entered by *McLean, J.*, at the 14 February 1972 "C" Session of MECKLENBURG.

Action for personal injuries and counterclaim for wrongful death and property damages.

Plaintiff and defendant's intestate, Mabel Rea, were the occupants of intestate's 1966 Mercedes Benz automobile when it left the traveled portion of the roadway at the intersection of Highway No. 16 (Providence Road) with R.P.R. 3612 (Cedar Lane) and collided with a utility pole and a cedar tree about 4:00 a.m. on 24 December 1968. Miss Rea died at the scene of the collision and plaintiff sustained serious and permanent injuries.

The crucial issue of fact is whether plaintiff or Miss Rea was driving when the vehicle left the highway. The parties

concede that the negligence of the driver proximately caused plaintiff's injuries and intestate's death.

Although both parties had demanded a jury trial as provided by G.S. 1A-1, Rule 38(b) (1969), when the case came on for trial they agreed that Judge McLean might find the facts and render judgment thereon. Rule 39(a)(1). At the conclusion of plaintiff's evidence defendant's motion for an involuntary dismissal under Rule 41(b) was denied. Defendant then introduced evidence, at the close of which plaintiff offered rebuttal evidence and then moved for the involuntary dismissal of defendant's counterclaim on the ground that defendant had offered no evidence which would sustain a finding that plaintiff was the driver at the time of the accident. The court set these motions for argument on a day subsequent. At that time the evidence was reopened, and defendant permitted to offer additional testimony. At the conclusion of all the evidence plaintiff moved "pursuant to Rule 41(b) and (c) of the North Carolina Rules of Civil Procedure for an involuntary dismissal of the defendant's counterclaim on the grounds that defendant had failed to present sufficient evidence to carry the case to the jury."

On 24 February 1972, after reciting the preceding motion, Judge McLean entered the following order:

"AND THE COURT having heard the arguments of counsel for the Plaintiff and Defendant with respect to said Motion, being of the opinion and finding as a fact and concluding as a matter of law that the Defendant has failed to introduce sufficient evidence upon which the Defendant's Counterclaim and any issues arising thereon might be submitted to a jury;

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff's Motion for involuntary dismissal of the Defendant's Counterclaim be and the same is hereby allowed and the Defendant's Counterclaim is dismissed with prejudice . . . . "

On the same day Judge McLean signed his final judgment in the case. In it, *inter alia,* he found that defendant's intestate was the operator of the automobile at the time of the accident and that her negligence proximately caused plaintiff's injuries. He decreed that plaintiff recover the sum of $55,249.55 and the costs of the action and, for the second time, he dismissed defendant's counterclaim.

The Court of Appeals affirmed Judge McLean's judgment, and we allowed *certiorari.*

Harkey, Faggart, Coira & Fletcher for plaintiff-appellee.

Craighill, Rendleman & Clarkson and Ervin, Burroughs & Kornfeld for defendant-appellant.

SHARP, Justice.

This appeal presents a two-fold question: (1) Did Judge McLean err in granting plaintiff's motion to dismiss defendant's counterclaim [made under G.S. 1A-1, Rule 41(b) and (c)] on the ground that there was no evidence tending to show that plaintiff was the operator of the automobile at the time of the accident in suit; and (2) if so, since this was a nonjury case, was this error of law cured by the judge's subsequent finding in his judgment on the merits that Miss Rea was the operator of the vehicle and plaintiff the passenger? This question requires us to marshal the evidence, which—in pertinent part—is briefed below:

In December 1968 Miss Rea, as president and owner of 98% of the stock of Mabel Rea, Inc., was engaged in building Swan Run Village Apartments in Charlotte. Plaintiff was employed by the corporation as superintendent. Miss Rea had living quarters in a house in the Swan Run area. Plaintiff, along with his teenage son and daughter, also lived in the house.

Plaintiff frequently drove Miss Rea's two-door Mercedes Benz automobile, and on the night of 23 December 1968 he had attached to it the license plates which had been issued to him for his 1966 Thunderbird automobile. The Mercedes had two individual bucket seats in the front compartment; they were not equipped with seat belts. Between these two seats was a console, about seat level, which went to the fire wall.

About 10:00 p.m. on that evening plaintiff and Miss Rea arrived at the home of Mrs. Dotty Ross, where a Christmas party was in progress. Plaintiff wore a tuxedo and Miss Rea, a long, formal evening gown, the skirt of which "went to the ground." Her wrap was a mink (or ermine) stole. The weather was very cold.

Plaintiff's own testimony tended to show:

Before leaving Miss Rea's house for the party at about 9:30 p.m., both he and she had had "a little drink." He drove the

Mercedes to the home of Mrs. Ross. It was common knowledge that Miss Rea did not like to drive a car and that he "almost always did the driving" when he was with her. However, it was not unusual for her to drive home from a party. At Mrs. Ross's party they both "had something to drink" and had been drinking "in each other's presence." When they left Mrs. Ross's home about 4:00 a.m., Miss Rea was driving. She drove because the car had been parked on the curb and she would have had to walk through a mud puddle to get in on the right or passenger's side. At a point about 10 miles from the Ross home, driving south on Providence Road, Miss Rea approached its intersection with Cedar Lane at a speed of 70 m.p.h. She was "in the left most lane" where a left turn was required. To avoid hitting the median, which separated the lanes for north and south-bound traffic, she swerved to the right, then to the left, and back to the right into a utility pole and a cedar tree. When plaintiff saw there would be a collision, he picked up a glass which had been setting on the console and put it between his legs "so it wouldn't get broke." The collision occurred about ten miles from the Ross home.

Police Officers Luther and Rushing received notice of the accident about 4:18 a.m. At that time the temperature was 12° and everything was frozen. Luther arrived at the scene at 4:22 a.m. and Rushing came a few minutes later. Luther found the lights burning on the Mercedes, which was located a few feet south of the east line of Cedar Lane. The vehicle was sitting diagonally across the line separating the two southbound lanes of Providence Road and pointed toward the utility pole.

Miss Rea was lying face up in the highway, her body about parallel with the line dividing the lanes for southbound traffic. Her head was to the north (toward Charlotte) and her feet were pointed toward the right front wheel of the Mercedes. Varying estimates put her feet from 3-17 feet away from the wheel and her head from 15 or 20 feet to 8.5 or 10.5 feet away. Her stole was about two feet from her body; her small clutch bag, which contained no driver's license or other identification, was on the highway close to her. The right front door of the automobile was open; the left door closed. In the opinion of Officer Rushing Miss Rea was dead when he arrived at the scene. She had hemorrhaged from her nose, mouth, and ears. On the side of her face she had a lump that stuck out from her cheekbone about three inches. Her lips were swollen as if "she had hit something real hard." The coroner reported the cause of death as a broken neck and severe head injuries.

Plaintiff was partly in and partly out of the right side of the car. His legs "from some point near the knee" were in the car and the rest of his body was hanging out of the right door of the car to the pavement. His head was angling toward the rear of the car. He was unconscious and there was an odor of alcohol about him. He had suffered head injuries, facial lacerations, broken ribs, and a ruptured right kidney.

There was no damage to the roof of the car and none to the left side. There was considerable damage on the right side. The right fender of the Mercedes was damaged and the right side of the windshield broken. However, the hole in the windshield was not large enough for a person to have gone through it. The rearview mirror, which had been attached above the windshield over the console and had protruded downward several inches from the top of the windshield, was broken off. The bloody mirror was found on the pavement approximately one foot to the right of plaintiff's belt line. There was an indentation on the right door and also extensive damage to the body back of the right door. The right rear tire was flat.

Skid marks, 250-300 feet in length, led to the automobile. They began on the right side of Providence Road north of Cedar Lane, continued through the intersection, and into the utility pole and cedar tree. The pole was located in the southeast corner of the intersection about three feet from the curb line. The tree was in line with the pole and about six to eight feet south of it. The pole was broken and the cedar tree was so badly damaged it had to be removed. Debris from the impact was scattered about the area and onto the highway.

In the floorboard of the automobile, on the left side of the console, Officer Luther found an empty drinking glass from which came the strong odor of an intoxicant.

Approximately seven and a half weeks after the accident, on 14 February 1969, Officers Rushing and Luther interviewed plaintiff at his brother's home, where he was recuperating. Plaintiff told the officers that he had no recollection whatever of the accident or of preceding events; that the last thing he remembered was getting a haircut at least twelve hours prior to the accident. After making that statement he asked the officers what they thought had happened. Each told plaintiff that, in his view, the evidence pointed to him as the driver of the car. When he asked them on what they based that opinion the

officers told him that, in their opinion, the Mercedes was traveling out of Charlotte on Providence Road at a high rate of speed; that it hit the median curb, went out of control, hit the utility pole and tree, and was whirled around 23 feet; that he and Miss Rea were thrown out, that the construction of the car, its path before and after the impact, the position of the bodies, and the damage to the car convinced them that the person on the right must have fallen out first, and that plaintiff could not have possibly been sitting on the right. In reply to this plaintiff said that he could give them no information they did not have; that he just did not know who was driving. He never denied that he was the driver.

At the trial, on cross-examination, plaintiff testified that when Rushing and Luther interviewed him he knew they were investigating a possible manslaughter case; that notwithstanding, and although he knew Miss Rea was driving and he was not, he told the officers he did not know who was driving the Mercedes. When asked why he didn't drive the car home from the party he said that, upon arriving at Mrs. Ross's, he had parked the vehicle on the shoulder of the road; that when they "came out it just so happened that there was a mud puddle there" on the passenger's side, and Miss Rea had said, "I'll drive."

Plaintiff admitted that since the accident he had been convicted of driving while intoxicated. He also said he could not remember all the speeding tickets he had received from time to time.

Billy Gene Somerset, a witness for defendant and a former escort of Miss Rea's, testified that at some indefinite time in the early morning hours of December 24th he had passed her Mercedes Benz on Rama Road and recognized plaintiff as the driver and Miss Rea as the passenger.

[1] It is well established in this jurisdiction that the identity of the driver of an automobile at the time of a collision may be established by circumstantial evidence, either alone or in combination with direct evidence. *Drumwright v. Wood,* 266 N.C. 198, 146 S.E. 2d 1 (1966); *Thomas v. Morgan,* 262 N.C. 292, 136 S.E. 2d 700 (1964); *Pridgen v. Uzzell,* 254 N.C. 292, 118 S.E. 2d 755 (1961); *Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492 (1957). "[C]ircumstantial evidence is not only a recognized and accepted instrumentality in the ascertainment of

truth, but is essential, and, when properly understood and applied, highly satisfactory in matters of the gravest moment." *State v. Alston,* 233 N.C. 341, 344, 64 S.E. 2d 3, 5 (1951). When sufficiently strong, circumstantial evidence is as competent as positive evidence to prove a fact. "In many instances facts can be proved only by circumstantial evidence, and in some instances even though there is direct testimony, the circumstantial evidence given may outweigh or be more satisfactory and convincing than direct or positive testimony." 30 Am. Jur. 2d *Evidence* § 1091, at 249-50 (1967). *See also Thomas v. Morgan, supra; Trust Company v. Railroad,* 208 N.C. 574, 181 S.E. 635 (1935).

[2] In this case, without taking into account the testimony of Somerset, plenary circumstantial evidence would have justified the judge in finding that plaintiff was driving the automobile when it was wrecked. We direct attention to some of the evidence from which it could be reasonably and legitimately inferred that plaintiff was the driver.

Miss Rea disliked to drive a car. Plaintiff was accustomed to drive her Mercedes and usually drove it when they were together. He drove to the party. Miss Rea was dressed in a full-length, formal evening gown and wearing a fur stole—a costume in which no woman would ordinarily drive an automobile. After the collision the door on the driver's side was closed; the door on the passenger's, open. Miss Rea was thrown clear of the car. Plaintiff's legs were in the car; the upper part of his body was hanging out of the right door. The position of the bodies indicated that Miss Rea was thrown out first. The bucket seats and the console between them in the small front compartment would have prevented, or made highly improbable, her passage over plaintiff. Miss Rea's small clutch bag was found near or on her body—an unlikely location for it had she been driving. The hole in the windshield on the passenger's side is consistent with her broken neck and severe facial injuries. The rearview mirror, which had been attached above the center of the windshield and protruded downward, was found, covered with blood, near Helms. He had sustained an injury to his right eye so severe that it had to be "sewed back in." These facts tend to show that Helms's head struck and detached the mirror from his passage over the console. His broken ribs and ruptured kidney were consistent with "a steering wheel injury."

Defendant's statement to the investigating officers that he remembered nothing about the collision and none of the

events preceding it, and his explanation that Miss Rea preferred to drive home rather than have him move the car so that she would not have to cross a mud puddle on a night when everything else was frozen, go to the weight of his testimony and not to the sufficiency of the evidence to establish the identity of the driver.

Had this been a jury trial and Judge McLean directed a verdict under Rule 50(a) against defendant on his counterclaim at the close of the evidence, such a ruling would clearly have been erroneous, and any judgment on issues thereafter submitted to the jury in plaintiff's action would be set aside and a trial *de novo* ordered. *See Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971).

In a nonjury case after the plaintiff (or the defendant, if the motion is directed against a counterclaim) has presented his evidence and rested his case, defendant may move under Rule 41(b) for a dismissal "on the ground that upon the facts and the law plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a)." This motion for an involuntary dismissal replaces the old motion for nonsuit in nonjury cases.

Under the former practice the motion for nonsuit presented the question whether plaintiff's evidence, taken as true, would support findings upon which the trier of facts could properly base a judgment for plaintiff. In ruling upon this motion the judge did not pass upon the credibility of the evidence either in a jury or a nonjury case. *Harrison v. Brown*, 222 N.C. 610, 24 S.E. 2d 470 (1943); 7 Strong, N. C. Index 2d *Trial* §§ 22, 58 (1968). In a jury case the motion for a directed verdict embodies the motion for nonsuit. There is no substantial difference between the two. *Younts v. Insurance Company*, 281 N.C. 582, 189 S.E. 2d 137 (1971).

[3] In a nonjury case, however, Rule 41(b) now provides a procedure whereby, at the close of plaintiff's evidence, the judge can give judgment against plaintiff not only because his proof has failed in some essential aspect to make out a case but also on the basis of facts as he may then determine them to be from the evidence then before him. As trier of the facts, the judge

may weigh the evidence, find the facts against plaintiff and sustain defendant's motion at the conclusion of his evidence even though plaintiff has made out a *prima facie* case which would have precluded a directed verdict for defendant in a jury case. 5 Moore, *Federal Practice* § 41.13[4], at 1159 (1971); Phillips, 1970 Supplement to 1 McIntosh, *North Carolina Practice and Procedure* § 1375. (For the off-cited criticism of this rule by a noted scholar, see Steffen, *The Prima Facie Case in Non-Jury Trials,* 27 U. Chi. L. Rev. 94 (1959).)

The judge is not compelled to make determinations of facts and pass upon a motion for involuntary dismissal at the close of plaintiff's evidence. He may decline to render any judgment until the close of all the evidence and, as suggested by Phillips, "except in the clearest cases" he should defer judgment until the close of all the evidence. This was the view adopted in *Rogge v. Weaver,* 368 P. 2d 810, 813 (Alas. 1962). See the comment on this case in 9 Wright & Miller, *Federal Practice and Procedure* § 2371, at 226-27 (1971).

The significance of the motion to dismiss is that it *may* be made at the close of the plaintiff's case. "There is little point in such a motion at the close of all the evidence, since at that stage the judge will determine the facts in any event. . . . When the judge decides the case, either on a motion for dismissal or at the close of all the evidence, he must make findings of fact and state separately his conclusions of law. . . . Such findings are intended to aid the appellate court by affording it a clear understanding of the basis of the trial court's decision, and to make definite what was decided for purpose of res judicata and estoppel. Finally, the requirement of findings should evoke care on the part of the trial judge in ascertaining the facts." Wright, *Law of Federal Courts* § 96, at 428-29 (1970). *See also* 9 Wright & Miller, *Federal Practice and Procedure* § 2371, at 222 (1971).

[4] Judge McLean did not dismiss defendant's counterclaim in midtrial. He dismissed it at the conclusion of all the evidence on the ground that defendant had failed to offer sufficient evidence that plaintiff was driving the Mercedes to take his counterclaim "to the jury." Clearly, this reference to "the jury" was an inadvertence. However, the presence or absence of any evidence tending to establish a specific fact remains a question of law whether the trier of facts be judge or jury. Despite

plaintiff's positive testimony that Miss Rea was driving the automobile, the record contained plenary evidence to support a finding that plaintiff himself was operating the vehicle.

In dismissing defendant's counterclaim Judge McLean did not purport to rule upon the credibility of the evidence and find the facts against defendant. He dismissed the counterclaim on the ground that there was no evidence upon which the trier of facts could find for defendant. This ruling was error. All the evidence being in, it was incumbent upon the judge to consider and weigh it all, determine who was driving the vehicle, and render judgment on the merits of the claim and counterclaim in the form directed by Rule 52(a).

Plaintiff contends that the judge did in fact rule on the merits of the entire case; that, although he entered an order dismissing defendant's counterclaim at the close of all the evidence, he immediately thereafter made findings of fact adverse to defendant and entered judgment for plaintiff; and that the "cumulative effect" of the order and judgment was a "complete determination of facts and the law." This contention ignores the fundamental error in the case.

The decisive issue in both plaintiff's claim and defendant's counterclaim was whether plaintiff or Miss Rea was driving the Mercedes. Having erroneously concluded that there was no evidence that plaintiff was driving the car, it necessarily follows that the judge failed to consider much evidence of substantial probative value tending to establish defendant's counterclaim. His finding that Miss Rea was operating the automobile at the time of the accident was unavoidably affected by his misapprehension of the applicable law. Indeed, the dismissal of the counterclaim for the reason stated, preordained this finding since either plaintiff or Miss Rea was driving the car.

It is still the rule that "[f]acts found under misapprehension of the law will be set aside on the theory that the evidence should be considered in its true legal light." *McGill v. Lumberton*, 215 N.C. 752, 754, 3 S.E. 2d 324, 326 (1939). *See also Davis v. Davis*, 269 N.C. 120, 127, 152 S.E. 2d 306, 312 (1967); *Owens v. Voncannon*, 251 N.C. 351, 355, 111 S.E. 2d 700, 703 (1959); *In re Gibbons*, 247 N.C. 273, 283, 101 S.E. 2d 16, 23-24 (1957). Accordingly, the judgment is vacated and the cause remanded to the Court of Appeals to the end that it be returned to the Superior Court for a trial *de novo* before a jury

unless the parties again waive the right to a jury trial, which they reserved initially. *See Jackson v. Gastonia,* 247 N.C. 88, 90, 100 S.E. 2d 241, 243 (1957).

New trial.

Justice HIGGINS dissenting.

This case grew out of a one car accident which occurred about 4 a.m. on December 24, 1968. The plaintiff Helms and the defendant's intestate, Miss Rea, were the only occupants of a 1965 Mercedes Benz automobile when the accident occurred.

The vehicle involved belonged to Miss Rea. There appears to have been no other witness to the wreck. However, there was overwhelming evidence that the automobile was traveling at a great rate of speed at the time it left the road and that the driver was guilty of gross negligence.

Mr. Helms instituted this action for damages alleging that Miss Rea was the driver and that he was a passenger and that her negligence caused the wreck and his serious injuries. Miss Rea's administrator answered, denying that Miss Rea was the driver or was in any way negligent or responsible for the accident. The administrator set up a counterclaim alleging that Helms was the driver, that Miss Rea was the passenger, and that his negligence caused the accident and her death. The plaintiff filed a reply to the counterclaim denying its material allegations and repeated his demand for damages.

After the issues were joined by the pleadings, the parties, as authorized by Rule 39(a), Civil Procedure, stipulated that the case be heard by the presiding judge. At the conclusion of the hearing the judge made among others the following findings:

"16. The defendant's intestate was the operator of the Mercedes automobile at the time of the accident on December 24, 1968.

"17. That the plaintiff was a passenger in said Mercedes automobile at the time of the accident on December 24, 1968.

"18. That the defendant's intestate was negligent in the operation of said Mercedes automobile in the following respects:

(a) That she operated the automobile at a speed that was greater than was reasonable and prudent under the circumstances then and there existing.

(b) That she failed to observe the highway and to keep a proper, reasonable and careful lookout.

(c) That she failed to keep the vehicle under proper control.

"19. That such negligence on the part of the defendant's intestate was the proximate cause of the accident and the injuries and damage suffered by the plaintiff."

The court entered this judgment:

"Based upon the above Findings of Fact and Conclusions of Law, the Court entered Judgment as follows:

"1. That the plaintiff have and recover of the defendant the sum of $55,249.55.

"2. That the defendant have and recover nothing by way of his counterclaim and that the same be dismissed."

The Court complains and orders a mistrial, not upon the basis of facts found, but upon the judge's comments during the hearing in explanation of his dismissal of the counterclaim. It is my view that the findings of fact that Miss Rea was the driver and that Helms was the passenger and that the driver's negligence caused the wreck and the passenger's injuries required the dismissal of the counterclaim. The findings were conclusive as to the identity and the negligence of the driver. After the findings that Miss Rea was the driver and was negligent and the negligence resulted in plaintiff's injuries, no room was left for a finding on the same evidence that Helms was the driver and that his negligence caused the death of the defendant's intestate. Therefore, the court's comments as to his reasons for dismissing the counterclaim are immaterial.

I vote to affirm the decision of the Court of Appeals.

J. A. HOUCK, ASSIGNEE v. MRS. J. B. OVERCASH AND BILL RAMSEY, T/A BILLY'S PLUMBING CO.

No. 78

(Filed 2 February 1973)

1. **Judgments § 52— payment of judgment amount by third party — assignment of judgment — validity**

Entries on the judgment docket did not show that a judgment obtained by a minor had been extinguished and that a purported assignment of the judgment by the minor "through his counsel" was invalid as a matter of law where the entries disclosed that the amount of the judgment was paid to the clerk by a third party who was not a judgment debtor, that the judgment was assigned to plaintiff as directed by the third party in consideration of such payment, and that both the payment and assignment were made on the same date, and where the entries imply that the court approved of the assignment of the minor's judgment by his attorneys as a means of obtaining the money for disbursement to or for the minor's benefit in accordance with the court's order.

2. **Judgments § 52— assignment of judgment — absence of entry on margin of judgment docket — failure of clerk to witness**

Purported assignment of a judgment was not void on its face because it was not entered on the margin of the judgment docket and witnessed by the clerk as prescribed in G.S. 1-246 since that statute refers solely to what an assignee is required to do in order to protect his rights as against a subsequent assignee or other subsequent creditors of or purchasers from the owner of the judgment.

ON *certiorari* to review the decision of the Court of Appeals reported in 15 N.C. App. 581, 190 S.E. 2d 297, which affirmed a summary judgment for defendant entered by *Grist, J.*, at the 20 March 1972 Session of the Superior Court of CALDWELL County.

Plaintiff instituted this action and filed his complaint on 22 June 1971.

Plaintiff alleges that "on June 27, 1961, Benny Allan Bumgarner, by His Next Friend, H. O. Bumgarner, recovered judgment against J. B. Overcash, Mrs. J. B. Overcash, and Bill Ramsey, t/a Billy's Plumbing Co. in the sum of Nine Thousand ($9,000.00) Dollars, plus interest and costs, which judgment is duly recorded in the office of the Clerk of Superior Court of Caldwell County . . . which judgment is hereby incorporated in this action"; that "the aforesaid judgment was assigned to J. A. Houck by Benny Allan Bumgarner"; that "this Judgment

has not been paid by the defendants"; and that defendants are indebted to the plaintiff on said judgment, inclusive of interest to date, in the sum of $14,400.

Plaintiff alleges that he "is advised that J. B. Overcash is now deceased." Neither J. B. Overcash nor a personal representative of his estate is a party to this action. Mrs. J. B. Overcash, although a defendant herein and served with process, has filed no answer or other pleading. Hereafter the word "defendant" refers solely to defendant Ramsey.

The record before us contains interrogatories submitted by defendant to plaintiff on 17 July 1971 and plaintiff's answers thereto on 2 August 1971.

By order of 17 July 1971 defendant had been allowed to and including 13 August 1971 within which to file answer or other pleading.

On 20 July 1971 defendant "move[d] the court for entry of summary judgment . . . in accordance with the provisions of Rule 56 of the North Carolina Rules of Civil Procedure, upon the grounds that the pleadings and the records appearing in the judgment docket in the office of the Clerk of Superior Court of Caldwell County show that there is no genuine issue of material fact and that this defendant is entitled to judgment as a matter of law. . . ." The only specific ground advanced in support of this motion is that the assignment of judgment was not entered on the margin of the judgment docket and was not witnessed as required by G.S. 1-246. It was urged generally that "[t]he alleged assignment . . . is incomplete and ineffective . . . for other reasons that are apparent from an examination of the alleged assignment as is shown in the said attached Exhibit A." The attached paper is quoted in full below.

"Benny Allan Bumgarner
— VS. —
O. J. Corpening, Individually,
O. J. Corpening, J. B. Overcash and
wife, Mrs. J. B. Overcash, and Charles
Fincannon, all trading as Overcash
Launderette, Bill Ramsey, Trading as
Bill's Plumbing Company

DOCKETED: 6-29-61

JUDGMENT

IT IS, THEREFORE, considered, ordered and adjudged by the Court that the plaintiff have and recover of the defendants J. B. Overcash, Mrs. J. B. Overcash; and Bill Ramsey, trading as Bill's Plumbing Company, the sum of NINE THOUSAND ($9,000.00) DOLLARS with interest thereon until paid; and it is further ordered by the Court that the defendants pay the costs of this action to be taxed by the Clerk. This the 27th day of June, 1961.

s/ J. B. CRAVEN, JR.
Judge Presiding

C.S.C.		4.00
Stenog.		3.00
Jury		5.00
Use of Plaintiff		16.35
Andrew Wilson, D.S. Morganton		.50
I. L. Willard, 302 Old Thomasville Rd., High Point, N. C.		25.00
Robert Calville, P. O. Box 281, Morganton, N. C.		25.00
Dr. J. J. Gibbons, 215 Highland Ave., Lenoir, N. C.		25.00
Dr. L. C. Strong, 109 Hill Top Lane, Lenoir, N. C.		25.00
Townsend & Todd	*	2,225.00
Dula Hospital	*	870.65
Dwight Cook	*	150.00
Benny Allan Bumgarner	#	5,754.35
		9,128.85

*

Paid 7-3-61 Check No. 7455 T & T by F.L.T.
Paid 7-29-61 Check No. 7508
Paid 7-27-61 Check No. 7502 H. O. Bumgarner
— Transferred to Misc. Accts. #3, page 200

7/3/61 Rec'd of Dr. O. J. Corpening the sum of Nine Thousand & no/100 dollars $9,000.00 as per judgment in this case —

s/ G. W. SULLIVAN, CSC

7/3/61 For consideration of the above payment plaintiff, through his counsel, Townsend & Todd, Attorneys, hereby assign, set over and transfer, according to instructions of Dr. O. J. Corpening, to J. A. Houck, this July 3, 1961 the within Judgment.

Townsend & Todd, Attorneys
By: T. Folger Townsend"

On 13 August 1971, in a pleading denominated Answer, defendant (1) "move[d] the dismissal of this proceeding, or, in the alternative, entry of Summary Judgment"; (2) answered each of the allegations of the complaint; (3) alleged further answers and defenses; and (4) moved that the executrix of the estate of O. J. Corpening be made a party and that defendant recover from her and from plaintiff, jointly and severally, damages in the amount of $15,000.

Nothing before us indicates that any order was entered making the executrix of the estate of O. J. Corpening a party.

In a reply, plaintiff denied the essential allegations of defendant's further answers and defenses and of his "counterclaim and third party action."

The hearing was on defendant's motion for summary judgment. The judgment, after reciting that "the court [had] examined the motion, exhibits, interrogatories and all pleadings filed in this cause," sets forth seven findings of fact, three conclusions of law, and then adjudges that defendant's motion for summary judgment is allowed, that the action is dismissed and taxes plaintiff with the costs. [The judgment contains this provision: "That by consent of the defendant, the counterclaim and cross action by [sic] the third party defendant is dismissed."]

Plaintiff excepted "[t]o the finding of facts, conclusions of law and judgment, and [gave] notice of appeal."

Upon plaintiff's appeal therefrom, the judgment was affirmed by the Court of Appeals.

L. H. Wall for plaintiff appellant.

Wilson & Palmer by Hugh M. Wilson for defendant appellee.

BOBBITT, Chief Justice.

The legal principles applicable in considering a motion for summary judgment under Rule 56 of the Rules of Civil Procedure, G.S. 1A-1, are set forth in *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971), and approved in later cases.

In Kessing, *supra* at 534, 180 S.E. 2d at 830, the Court quotes with approval the following from Gordon, *The New Summary Judgment Rule in North Carolina,* 5 Wake Forest Intra. L. Rev. 87, 88 (1969): "The rule does not contemplate that the court will decide an issue of fact, but rather will determine whether a real issue of fact exists."

In *Page v. Sloan,* 281 N.C. 697, 704, 190 S.E. 2d 189, 193 (1972), the Court said: "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,* [280 N.C. 460, 186 S.E. 2d 400]."

[1] Plaintiff alleges that Benny Allan Bumgarner assigned the judgment to him and that it had not been paid *by defendants.* Defendant does not allege or contend that he or any of the persons against whom the judgment was entered has paid the judgment in whole or in part. Whether the plaintiff is the owner of the judgment as assignee depends upon the validity of the purported assignment by Benny Allan Bumgarner, "through his counsel, Townsend & Todd, attorneys."

In affirming the summary judgment for defendant, the Court of Appeals noted that defendant had moved *in that Court* for dismissal of the appeal on the ground that plaintiff had not served a case on appeal as required by G.S. 1-282; that the only question presented was whether error of law appeared on the face of the record; that the hearing judge had found "that plaintiff's claim is based on a purported assignment of the judgment made after the judgment had been paid and satisfied of record"; that, since the evidence was not brought forward, the appellate court must assume that all of the evidence before the hearing judge "established that there is no genuine issue

as to this material fact"; and that "[o]nce the judgment was paid and satisfied of record it was extinguished and nothing remained for plaintiff to assign."

Plaintiff's exception to "the findings of fact" is grounded on his contention that findings of fact were unnecessary and inappropriate as a basis for decision on defendant's motion for summary judgment.

It is noted that the entries on the writing attached to defendant's motion for summary judgment show that the clerk acknowledged the receipt from Dr. Corpening of the sum of $9,000 "as per judgment in this case," but show no entry of satisfaction, cancellation or extinguishment of the judgment. On the contrary, they disclose that the assignment, which was entered immediately following the clerk's entry, was made "[f]or consideration of the above payment."

"While a judgment is not a contract in the strict sense, it is an obligation binding the parties, and it may be assigned as any other chose in action." 2 McIntosh North Carolina Practice and Procedure (2d ed. Wilson) § 1761.

"Where a party primarily liable on a judgment pays the judgment, the judgment is discharged and there can be no right of assignment." 5 Strong, N. C. Index 2d, *Judgments* § 54. The law applicable when payment is made by a stranger having no interest in the judgment is summarized in 49 C.J.S., *Judgments* § 557, as follows: "Although a judgment creditor is not bound to accept payment from a stranger . . . yet, where he does accept such payment, he is precluded from further recovery, and the judgment will be kept alive for the stranger's benefit, rather than extinguished, when, and only when, there is an intentional agreement or understanding to this effect. . . . [T]he taking of an assignment affords unequivocal evidence of an intention not to satisfy the judgment unless it is taken so long after the payment as to evidence the fact that it was only an afterthought. Such an assignment is valid and the judgment remains unextinguished in favor of a person in whose behalf it is obtained, as well where his credit is accepted as the consideration of the assignment as where it is for a payment in cash made by him."

The recital in the judgment quoted in our preliminary statement discloses that no evidence was considered or offered at the hearing before Judge Grist except plaintiff's answers to

the interrogatories. A statement in one of plaintiff's answers is the only basis in the record, apart from the entries on the judgment docket, which bears upon whether the judgment was first paid and thereafter assigned. However, the probative force of the statement in one of plaintiff's answers to the effect that the judgment had been paid prior to the assignment thereof to him is completely negated by his answers (1) that he first learned that the judgment had been assigned to him "about a week after it was entered," and (2) that he had no knowledge apart from the court records as to "(a) the settlement made with the plaintiff; (b) the manner in which the judgment would be docketed; (c) who would pay the amount of the judgment; and (d) whether any defendant other than O. J. Corpening would be required to pay anything on the judgment."

The interrogatories and plaintiff's answers thereto are included in the record preceding the clerk's certificate that the documents constituting the record are true copies of what is on file in his office. Since they were considered by Judge Grist and certified as a part of the record, we deem it appropriate to consider plaintiff's answers. They disclose unmistakably that he knew nothing of what occurred in connection with the assignment except what he learned from an inspection of what appeared on the judgment docket.

In our view, whether defendant is entitled to summary judgment depends solely upon whether the entries set forth on the exhibit attached to defendant's motion disclose as a matter of law that plaintiff is not entitled to recover.

Obviously, the payment of the amount of the judgment by Dr. Corpening to the clerk and the disbursement thereof by the clerk to or for the benefit of Benny Allan Bumgarner pursuant to the court's order terminated Benny Allan Bumgarner's interest therein. The question is whether the assignment of the judgment to plaintiff as directed by Dr. Corpening in consideration of the payment of the amount of the judgment to the clerk is an invalid assignment as a matter of law.

The writing attached to defendant's motion for summary judgment supports plaintiff's allegation that on 27 June 1961, Benny Allan Bumgarner recovered judgment for $9,000 plus interest and costs against J. B. Overcash, Mrs. J. B. Overcash, and Bill Ramsey, t/a Bill's Plumbing Co. This writing indicates

that the judgment was recovered in an action entitled, "Benny Allan Bumgarner vs. O. J. Corpening, Individually, O. J. Corpening, J. B. Overcash and wife, Mrs. J. B. Overcash, and Charles Fincannon, all trading as Overcash Launderette, Bill Ramsey, trading as Bill's Plumbing Company." Benny Allan Bumgarner acquired no judgment against O. J. Corpening, individually, as partner or otherwise. Hence, nothing else appearing, O. J. Corpening paid the amount of the judgment to the clerk when he was under no legal obligation to do so. Obviously, it was to Benny Allan Bumgarner's interest to receive the amount of the judgment he had obtained without regard to whether the payment was being made by a judgment debtor or by a purchaser-assignee thereof. The record implies that Benny Allan Bumgarner was a minor and therefore unable to execute an assignment. It shows that both the payment and the assignment were made on 3 July 1961, presumably as interrelated features of a single transaction. It implies that the court ordered the disbursement of the money received by the clerk from Dr. Corpening as itemized on the judgment docket, this itemization including compensation of $2,225 to Townsend & Todd, his attorneys.

Conceding, *arguendo,* that under ordinary circumstances an attorney of record has no *implied* authority to assign a judgment in favor of and owned by his client, the record here implies the court's approval of the assignment of Benny Allan Bumgarner's judgment by his attorneys of record as a means of obtaining the money for disbursement to or for the benefit of Benny Allan Bumgarner in accordance with the court's order.

[2] There is no merit in defendant's contention that the alleged assignment is void on its face because it was not entered on the margin of the judgment docket and witnessed as prescribed in G.S. 1-246.

G.S. 1-246 provides: "No assignment of judgment shall be valid at law to pass any property *as against creditors or purchasers for a valuable consideration from the donor, bargainor, or assignor,* but from the entry of such assignment on the margin of the judgment docket opposite the said judgment, signed by the owner of said judgment, or his attorney under power of attorney or his attorney of record, and witnessed by the clerk or the deputy clerk of the superior court of the county in which said judgment is docketed. . . . " (Our italics.)

Prior to the enactment of the statutes now codified as G.S. 1-246, this Court had held in *In re Wallace: Jennings & Sons, Inc. v. Howard,* 212 N.C. 490, 193 S.E. 819 (1937), as stated succinctly and accurately in the headnote, the following: "A prior assignee of a judgment for a valuable consideration takes the title of his assignor unaffected by a subsequent assignment of the same judgment by the assignor to another for a valuable consideration without notice of the prior assignment, in the absence of fraud, even though the second assignee has his assignment first recorded on the judgment docket, there being no statute requiring an assignment of a judgment to be recorded." See 19 N.C. L.Rev. at 462 (1941).

G.S. 1-246 refers solely to what an assignee is required to do in order to protect his rights as against a subsequent assignee or other subsequent creditors of or purchasers from the owner of the judgment. The present action involves *the validity* of a single assignment. No one other than plaintiff is claiming ownership of any interest in the judgment.

Whether plaintiff is entitled to recover may depend upon matters not before the court for consideration on defendant's motion for summary judgment, including the determination of issues raised by defendant's further answers and defenses and "counterclaim and third party action" and plaintiff's reply thereto. In our view, the writing attached to defendant's motion for summary judgment was sufficient to require the denial thereof. Summary judgment should be granted only when the movant is clearly entitled thereto. *Kessing v. Mortgage Corp., supra* at 534, 180 S.E. 2d at 830.

Accordingly, the judgment of the Court of Appeals is reversed. The summary judgment for defendant is vacated, and the Court of Appeals is directed to remand the case to the superior court for trial.

Reversed and remanded.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM 1973

STATE OF NORTH CAROLINA v. HOWARD MACK MILLER

No. 44

(Filed 14 February 1973)

1. **Searches and Seizures § 3— affidavit relating to gambling — warrant to search for intoxicating liquor — invalidity of warrant**

Although a police officer's affidavit would have been sufficient to support a finding of probable cause for issuing a warrant authorizing the search of a house for gambling equipment, it was insufficient to support a finding of probable cause as contained in the warrant actually issued authorizing a search of the house for intoxicating liquor.

2. **Searches and Seizures § 3— issuance of warrant — probable cause — duty of magistrate — invalidity of warrant**

By signing without reading a warrant placed before him by an officer, a magistrate served merely as a rubber stamp for the police, and the search warrant issued under such circumstances was a nullity; thus officers, armed with no authority to enter and search under circumstances requiring a search warrant, made an unlawful entry.

3. **Criminal Law § 84; Searches and Seizures § 1— statutory exclusionary rule — applicability in trial for murder of trespassing officer**

Though G.S. 15-27(a) provides that no evidence obtained or facts discovered by means of an illegal search shall be competent as evidence in any trial, that rule does not require the exclusion of evidence obtained after an illegal entry when that evidence is offered to prove the murder of one of the officers making the entry.

4. **Criminal Law § 84; Searches and Seizures § 1— unlawful search — murder of trespassing officer — admissibility of evidence relevant to murder**

Where officers unlawfully entered a house to search for gambling paraphernalia and one of the trespassing officers was killed, the gun

and all other evidence seized, if relevant and material to the murder charge, was admissible, and it was competent for all eyewitnesses, both for the State and the defendant, whether lawfully or unlawfully present, to testify regarding every relevant fact and circumstance seen or heard bearing upon the shooting of the officer and upon defendant's plea of self-defense.

5. **Criminal Law § 86; Homicide § 15— injuries to defendant by police officers — competency to show bias of officers**

In a prosecution for the murder of a police officer who was shot during a police raid on a gambling house, defendant had a right to cross-examine the officers with respect to beatings and injuries allegedly inflicted by them upon defendant and other occupants of the house following the shooting, as such testimony was competent to show bias of the witnesses.

6. **Criminal Law § 73; Homicide § 15— statements by third parties — competency to show state of mind of witness — hearsay**

In a prosecution for the murder of a police officer who was shot during a police raid on a gambling house, defendant's testimony as to what others had told him concerning robberies of gambling games was competent to prove the reasonableness of his apprehension that a robbery was in progress and that he was about to suffer death or serious bodily injury and such testimony was not excludable as hearsay.

7. **Criminal Law § 146— certiorari from Supreme Court to Court of Appeals — scope of review**

The Supreme Court reviews the decision of the Court of Apeals for errors of law allegedly committed by it and properly brought forward for review; hence, assignments not passed upon by the Court of Appeals are not before the Supreme Court.

ON *certiorari* to the Court of Appeals to review its decision, 16 N.C. App. 1, 190 S.E. 2d 888 (1972). This case was docketed and argued in the Supreme Court at the Fall Term 1972 as No. 90.

Defendant was tried upon a bill of indictment, proper in form, charging him with the first degree murder of R. E. McGraw on 17 October 1970.

The State's evidence tends to show that Sergeant B. S. Treadaway of the Charlotte Police Department received information from a confidential informant about 10 p.m. on 16 October 1970 that a gambling game was in progress at 1322 East Fourth Street in Charlotte. This officer and others went to that address between 11 p.m. and midnight, obtained the license numbers of cars parked there, and by checking those numbers identified the owners of some of the cars as known gamblers. Sergeant Treadaway related this information to Officer R. E. McGraw.

Acting on the information received, Officer McGraw typed an affidavit and a search warrant. The affidavit recited, among other things, that affiant had "reliable information and reasonable cause to believe that Occupants [of the premises at 1322 East Fourth Street] has [sic] on the premises and under their control cards, money, dice and gambling paraphernalia," set out the grounds for affiant's belief, and detailed the underlying circumstances upon which the affiant's belief was based. The affidavit was in all respects sufficient to support a finding of probable cause for issuing a warrant authorizing a search of the premises for gambling equipment and paraphernalia. However, the search warrant which Officer McGraw typed was prepared on a "form-type blank" labeled "Search Warrant—Intoxicating Liquor Possessed for Purpose of Sale." This warrant recited that affiant had "stated under oath that Occupants has [sic] in his possession intoxicating liquor for the purpose of sale, described in the attached affidavit," and directed the officers to search the premises "for the property in question" and "if this intoxicating liquor is found, seize it and all other intoxicating liquor found by you to be possessed there in violation of law, plus all glasses, bottles, jugs, pumps, bars, or other equipment used in the business of selling or manufacturing intoxicating liquor. . . . "

Officer McGraw delivered the affidivit and search warrant to Sergeant Treadaway who carried them to the office of J. P. Eatman, Jr., a magistrate, and requested that the search warrant be issued based on the affidavit. Sergeant Treadaway swore to the affidavit before the magistrate but did not read the warrant. The magistrate read the affidavit and "scanned over the search warrant to see if all the blanks were filled," but "did not read completely the search warrant itself." The magistrate signed the warrant within two or three minutes after Sergeant Treadaway had arrived.

Sergeant Treadaway left the magistrate's office, took the affidavit and warrant out to the car and delivered them to Officer McGraw. This occurred about 1:40 a.m. on 17 October 1970.

About ten minutes later, Sergeant Treadaway and thirteen or fourteen officers from the Charlotte Police Department and the Mecklenburg County ABC Board, all of whom were in plain clothes, went to the house at 1322 East Fourth Street. Upon arrival, Sergeant Treadaway, Officer McGraw and six other

officers went to the rear of the house, while the other officers went to the front and side. The back door was standing open, and the officers entered without knocking. They proceeded along the hallway to a second door which had a one-way glass in the top half. This door was unlocked and standing ajar. Sergeant Treadaway opened this second door so that he and the other officers could pass through. They then proceeded down the hallway to a third door, which was closed. This door also had a one-way glass in it, permitting those inside to see out. The officers had proceeded to this point along the thirteen-foot length of the hallway in a crouched position so as to avoid detection. On arrival at the third door, Sergeant Treadaway stood up and knocked lightly, and a man named McGowan, whom Sergeant Treadaway had previously arrested for gambling, opened the door. The door opened outward, and Sergeant Treadaway pulled it completely open enabling him to see into the room. At that time Officers McGraw, Taylor, Tanner, Smith and Patterson were present with Treadaway at the third door while other officers were in the hallway between the first and second doors.

Sergeant Treadaway saw two tables in the room. Seven or eight men were seated at the first table holding cards in their hands and with money on the table. Six or seven men were around the second table. Sergeant Treadaway walked into the room followed by the other officers and announced, "Police, police. Sit down." He walked past the first table at a rapid pace and had almost reached the second table when he heard a shot. A total of four, five or six shots were fired in two short bursts —first two or three shots, then a pause, then some more shots, all within two or three seconds. Sergeant Treadaway turned and saw Officer McGraw on the floor on his knees near the door through which he had just entered. Defendant was standing eight to ten feet away in the doorway to a bathroom holding a blue steel snub-nosed revolver in his right hand and pointing it toward the ceiling. Defendant then entered the bathroom. After the shooting, a blue .38 revolver similar to the one seen in defendant's hand was found in the bathroom. This revolver had five spent shells.

According to the State's evidence, Officer McGraw had followed Treadaway into the room and Officer Tanner had entered immediately behind McGraw. McGraw and Tanner had turned to the right toward the first table. Tanner was

hit by three bullets but recovered from his wounds. McGraw also received three bullet wounds, two in his back and one in his right forearm. He died as a result of the wound in his back. Officer Taylor followed McGraw and Tanner into the room and testified that he saw defendant fire at McGraw three times, the last shot after McGraw had fallen to the floor. On hearing the first shot, Taylor started to draw his own .38 Smith and Wesson from the holster on his right hip. In addition to Taylor, five other officers testified they were armed with .38 caliber pistols at the time.

An SBI expert in firearms made tests and was of the opinion that a bullet found in McGraw's clothing when he was being undressed in the emergency room at the hospital had been fired from the blue .38 revolver which Sergeant Treadaway had found in the bathroom immediately after the shooting. This expert further testified that a bullet removed from the shoulder of Officer Tanner and a bullet found in the floor had been fired from this same .38 caliber revolver, while a fourth bullet found in the floor inside the door had been fired by Officer Smith's gun. This expert witness had no further opinion as to which gun had fired a bullet removed from under McGraw's right arm or a bullet found in the east wall of the room. Sergeant Treadaway testified that his own weapon was still in its holster after the shooting; that he had not drawn it, and that to his knowledge no other officer had drawn his gun.

Defendant's evidence tends to show that one Scruggs had rented the house for gambling purposes and employed defendant to look after the place, serve food, coffee, beer and sometimes whiskey. Just prior to the officers' entrance defendant had mopped the floor around one of the tables, returned the mop to the bathroom, and heard a noise "like somebody kicking the door down." Defendant saw a man enter the room, knock McGowan to the floor and point a pistol toward the men playing cards at the second table. Two other men entered the room, one with a pistol. The word "police" was never mentioned prior to the shooting. Defendant did not know these men and when one of them told the poker players at the round table to "keep your seat, put your hands over your head, leave the money on the table," defendant thought it was a robbery, pulled his pistol and said, "Hold it." The first man who entered the room (later learned to be Sergeant Treadaway) turned his pistol toward defendant and defendant heard a shot. He ducked into the

no move or acknowledgment that it consented to the continuation by any other person of the work Mr. Peaseley was obligated to do for the company under the contract. Everything indicates the coal company was paying, and well, for Mr. Peaseley's personal services and his know-how.

A contract for personal services of the type required of Mr. Peaseley is not assignable and does not survive his death. Of course, death makes performance impossible. Justice Ruffin many years ago stated the rule which successive cases have followed: "[W]here one party covenanted to serve another . . . the death of either party dissolved the contract—such being an implied condition, it was said, in every contract for personal services. . . ." *Siler v. Gray,* 86 N.C. 566.

The decision of the Court does two things: (1) It continues in effect after death a contract for Mr. Peaseley's highly personal services; and (2) it requires the Virginia Iron, Coal and Coke Company to donate hundreds of thousands of dollars to the Peaseley estate. The Court thinks these results were within the contemplation of the parties when they entered into the contract of September 6, 1960. I am compelled to disagree and dissent. I vote to reverse the decision of the Court of Appeals and remand the case to the superior court with directions to dismiss the action.

Justice LAKE joins in this dissenting opinion.

GLENN E. HELMS v. W. REID REA, ADMINISTRATOR OF THE ESTATE OF MABEL REA, DECEASED

No. 84

(Filed 2 February 1973)

1. **Automobiles § 66— identity of driver at time of collision**

The identity of the driver of an automobile at the time of a collision may be established by circumstantial evidence, either alone or in combination with direct evidence.

2. **Automobiles § 66— identity of driver at time of collision — circumstantial evidence**

There was plenary circumstantial evidence which would have justified the trial judge in a personal injury and wrongful death action in finding that plaintiff was driving home from a party when the fatal accident occurred where such evidence tended to show that

bathroom doorway and came up shooting. He fired because he was being shot at and thought they were being robbed. Defendant then turned, reentered the bathroom and for the first time heard the words: "This is the police. Come out of the bathroom with your hands over your head." Defendant dropped his gun and came out with his hands up.

The man named McGowan testified that he was preparing to leave before the officers arrived. He looked through the one-way glass in the door and saw no one. He heard no knock or bell. He turned the doorknob and it was snatched out of his hand. Several men then rushed in carrying guns. The word "police" was not mentioned before the shooting started. A search warrant was not mentioned. Other occupants of the room testified to the same effect.

Defendant was convicted of murder in the second degree and, from judgment imposing a prison sentence, appealed to the Court of Appeals. That court awarded a new trial for the reasons set out in its decision, 16 N. C. App. 1. On petition by the State alleging errors of law, we allowed certiorari to review the decision of the Court of Appeals. Errors assigned will be noted in the opinion.

Robert Morgan, Attorney General, by Walter E. Ricks III, Associate Attorney, for the State of North Carolina, appellant.

James E. Walker and Arnold M. Stone, Attorneys for defendant appellee.

John M. Rich, Attorney for North Carolina Association of Law Enforcement Legal Advisors, Amicus Curiae.

HUSKINS, Justice.

[1, 2] Defendant contended in the trial court and in the Court of Appeals, and contends here, that the search warrant was invalid and the entry by the officers unlawful. The Court of Appeals so held and we concur.

The Fourth Amendment to the Federal Constitution prohibits the issuance of a search warrant except upon a finding of probable cause for the search. G.S. 15-25(a) is to like effect. There is no variance between Fourth Amendment requirements and the law of this State in regard to search warrants. *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971).

G.S. 15-26 requires a search warrant to describe with reasonable certainty the premises to be searched and the contraband for which the search is to be made; and an affidavit signed under oath or affirmation by the affiant *indicating the basis for the finding of probable cause* must be a part of or attached to the warrant.

The search warrant in this case was wholly invalid because it was issued without any showing of the existence of probable cause. It authorized the officers to search for and seize "intoxicating liquor possessed for the purpose of sale," plus glasses, bottles and other equipment used in the business of selling liquor, while the affidavit upon which the warrant was issued alleged that the occupants had "cards, money, dice and gambling paraphernalia" on the premises to be searched. The affidavit was amply sufficient to support a finding of probable cause for issuance of a warrant authorizing a search of the premises for gambling equipment, but there was absolutely no fact or circumstance presented to the magistrate upon which he could have found probable cause to issue a warrant to search for illicit liquor. "Under the Fourth Amendment, an officer may not properly issue a warrant to search . . . unless he can find probable cause therefor *from facts or circumstances presented to him under oath or affirmation.*" (Emphasis added) *Nathanson v. United States,* 290 U.S. 41, 78 L.Ed. 159, 54 S.Ct. 11 (1933). Here, the officer who typed the warrant made the first mistake and the magistrate, serving merely as a rubber stamp for the police, compounded the error by issuing the warrant without reading it. As a result the search warrant was issued when no facts or circumstances were presented to justify it. A search warrant issued under such circumstances is a nullity.

Thus the officers, armed with no authority to enter and search under circumstances requiring a search warrant, made an unlawful entry.

[3] Defendant moved to suppress any evidence which the officers obtained after entering the building, including testimony by the officers concerning what they saw and heard in the room at the time Officer McGraw was shot. Defendant contends that since the search warrant is invalid and the entry by the officers unlawful, all evidence obtained by such an illegal search is inadmissible by Fourth Amendment standards and is expressly excluded *in any trial* by G.S. 15-27(a).

The Court of Appeals held that defendant's motion to suppress the testimony of the officers should have been allowed. In this there was error.

The admissibility of evidence under common law rules was not affected by the means, lawful or otherwise, used in obtaining it, *Olmstead v. United States,* 277 U.S. 438, 72 L.Ed. 944, 48 S.Ct. 564 (1928); *State v. McGee,* 214 N.C. 184, 198 S.E. 616 (1938); and if the evidence was otherwise relevant and competent it was generally admissible unless its admission violated the constitutional rights of the person against whom it was offered or contravened the statutory law of the jurisdiction. 29 Am. Jur. 2d, Evidence, § 408. In abrogation of the common law rule, the Supreme Court of the United States fashioned an exclusionary rule applicable in the federal courts whereby evidence obtained in violation of the constitutional rights of the accused was not admissible. *Weeks v. United States,* 232 U.S. 383, 58 L.Ed. 652, 34 S.Ct. 341 (1914). Later, in *Mapp v. Ohio,* 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961), it was held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." Since *Mapp,* evidence unconstitutionally obtained is excluded in state courts as an essential of due process under the Fourteenth Amendment. *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376 (1968).

Our statute is to like effect. G.S. 15-27(a) provides: "No evidence obtained or facts discovered by means of an illegal search shall be competent as evidence *in any trial.*" (Emphasis added) Relying on the emphasized words the Court of Appeals erroneously extended this statute beyond its intended scope by excluding, in this murder trial, any and all evidence obtained by the officers after entering the building, including their testimony concerning what they saw and heard at the time Officer McGraw was shot.

"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. In seeking the legislative intent a construction which will operate to defeat or impair the object of the statute should be avoided if the court can reasonably do so without violence to the legislative language.

Lockwood v. McCaskill, 261 N.C. 754, 136 S.E. 2d 67 (1964). And, where possible, " . . . the language of a statute will be interpreted so as to avoid an absurd consequence." *Hobbs v. Moore County,* 267 N.C. 665, 149 S.E. 2d 1 (1966). Furthermore, "[i]f a strict literal interpretation of a statute contravenes the manifest purpose of the legislature, the reason and purpose of the law should control and the strict letter thereof should be disregarded." *State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765 (1970). *Accord, Duncan v. Carpenter,* 233 N.C. 422, 64 S.E. 2d 410 (1951); *State v. Barksdale,* 181 N.C. 621, 107 S.E. 505 (1921).

When subjected to these rules of statutory construction, we hold that G.S. 15-27(a) was not designed to exclude evidence of crimes directed against the person of trespassing officers. *Compare People v. Pearson,* 150 Cal. App. 2d 811, 311 P. 2d 142 (1957). Application of the exclusionary rule in such fashion would in effect give the victims of illegal searches a license to assault and murder the officers involved—a result manifestly unacceptable and not intended by the Legislature. Although wrongfully on the premises, officers do not thereby become unprotected legal targets. Even trespassers may not be shot with impunity. Such a strict literal interpretation of the language of G.S. 15-27(a) would contravene the manifest purpose of the Legislature and lead to an absurd result.

Admittedly, the constitutional exclusionary rule has been broadly formulated. In *Mapp v. Ohio, supra,* the Court said: "We hold that *all* evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court." (Emphasis added.) Again, in *Alderman v. United States,* 394 U.S. 165, 22 L.Ed. 2d 176, 89 S.Ct. 961 (1969), it is said: "The exclusionary rule . . . excludes from a criminal trial *any* evidence seized from the defendant in violation of his Fourth Amendment rights." (Emphasis added.) Even so, the meaning of these expressions must be discerned in light of the facts in each case. When so considered, it is apparent that the rule does not require the exclusion of evidence obtained after an illegal entry when that evidence is offered to prove the murder of one of the officers making the entry.

[4] Therefore, the gun and all other evidence seized, if relevant and material to the *murder charge,* was admissible; and it was competent for all eyewitnesses, both for the State and the defendant, whether lawfully or unlawfully present, to tes-

tify regarding every relevant fact and circumstance seen or heard bearing upon the shooting of Officer McGraw and upon defendant's plea of self-defense. Defendant's motion to suppress such evidence was properly overruled. The Court of Appeals erred in holding to the contrary.

[5] The Court of Appeals held, and properly so, that defendant had a right to cross-examine the officers with respect to beatings and injuries allegedly inflicted by them upon defendant and other occupants of the gambling quarters following the shooting. The law is well established that in both civil and criminal cases a party may cross-examine an opposing witness concerning any fact having a logical tendency to show that the witness is biased against him or has an interest adverse to him in the outcome of the litigation. "Cross-examination of an opposing witness for the purpose of showing his bias or interest is a substantial legal right, which the trial judge can neither abrogate nor abridge to the prejudice of the cross-examining party." *State v. Hart,* 239 N.C. 709, 80 S.E. 2d 901 (1954). *Accord, State v. Bailey,* 278 N.C. 80, 178 S.E. 2d 809 (1971); *State v. Wilson,* 269 N.C. 297, 152 S.E. 2d 223 (1967).

[6] The Court of Appeals held, and properly so, that defendant should have been permitted to testify with reference to what others had told him concerning recent robberies of gambling games in the Charlotte area. Hearsay is defined, and the hearsay rule has been stated, as follows: "Evidence, oral or written, is called hearsay when its probative force depends in whole or in part upon the competency and credibility of some person other than the witness by whom it is sought to produce it." *King v. Bynum,* 137 N.C. 491, 49 S.E. 955 (1905); *Chandler v. Jones,* 173 N.C. 427, 92 S.E. 145 (1917). "Expressed differently, whenever the assertion of any person, other than that of the witness himself in his present testimony, is offered to prove the truth of the matter asserted, the evidence so offered is hearsay. If offered for any other purpose, it is not hearsay." Stansbury, N. C. Evidence, § 138 (2d ed. 1963).

Here, defendant offered evidence of what others had told him concerning robberies of gambling games to prove the reasonableness of his apprehension that a robbery was in progress and that he was about to suffer death or serious bodily injury. It was competent for that purpose. This evidence was not offered to prove that other robberies had in fact occurred, thus proving the truth of the matters asserted. Accordingly, the

evidence was not hearsay at all and should have been admitted since it was relevant to defendant's state of mind in relation to his plea of self-defense. *Compare State v. Black,* 230 N.C. 448, 53 S.E. 2d 443 (1949); Stansbury, N. C. Evidence, § 141 (2d ed. 1963).

[7] Defendant made other assignments of error which we do not reach since they were not discussed by the Court of Appeals. The Supreme Court reviews the decision of the Court of Appeals for errors of law allegedly committed by it and properly brought forward for review. Hence, assignments not passed upon by the Court of Appeals are not before us. "When this Court, after a decision of a cause by the Court of Appeals and pursuant to the petition of a party thereto as authorized by G.S. 7A-31, grants certiorari to review the decision of the Court of Appeals, only the decision of that Court is before us for review. We inquire into proceedings in the trial court solely to determine the correctness of the decision of the Court of Appeals. Our inquiry is restricted to rulings of the Court of Appeals which are assigned as error in the petition for certiorari and which are preserved by arguments or the citation of authorities with reference thereto in the brief filed by the petitioner in this Court, except in those instances in which we elect to exercise our general power of supervision of courts inferior to this Court." *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353 (1968); *State v. Parrish,* 275 N.C. 69, 165 S.E. 2d 230 (1969).

For the errors noted, the decision of the Court of Appeals awarding defendant a new trial is modified to conform to this opinion, and, as thus modified, affirmed.

Modified and affirmed.

T. W. ROSE v. VULCAN MATERIALS COMPANY

No. 41

(Filed 14 February 1973)

1. Contracts § 6— illegality — affirmative defense — burden of proof

Illegality is an affirmative defense, and the burden of proving illegality is on the party who pleads it. G.S. 1A-1, Rule 8(c).

2. **Contracts § 7; Monopolies § 2— contract providing for price discrimination — intrastate sales — Robinson-Patman Act**

A contract providing that defendant would sell stone from a certain quarry to plaintiff at specified prices and would not sell such stone to anyone other than the State Highway Commission for less than specified higher prices did not violate the Robinson-Patman Act, 15 U.S.C. § 13(a), where the evidence showed that although the price discriminator was engaged in interstate commerce, all of the sales under the contract were wholly intrastate.

3. **Contracts § 7; Monopolies § 2— price discrimination in favor of buyer — no violation of state law**

The purpose of G.S. 75-5(b)(5) is to prevent a seller with several distribution points from predatorily lowering his prices in one locality where he has competition, while maintaining his prices at another locality in order to continue to generate an acceptable overall profit margin, thereby destroying his competitor in the low priced locality, the statute not being intended to outlaw price discrimination in the secondary line of competition between the buyer and his competitors; consequently, a contract creating a price discrimination in favor of a buyer of stone does not violate the statute.

4. **Contracts § 7; Monopolies § 2— contract establishing price discrimination — restraint of trade — reasonableness**

A contract establishing a price discrimination is not illegal *per se* under G.S. 75-1 but must be shown to be *unreasonably* in restraint of trade in order to violate that statute; and such a contract cannot be said to be unreasonably in restraint of trade without evidence of facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed, and the nature of the restraint and its actual or probable effect.

5. **Contracts § 7; Monopolies § 2— contracts in restraint of trade — rule of reasonableness — burden of proof**

Agreements constituting restraints of trade at early common law are *prima facie* illegal and must be shown to be reasonable by the party seeking to enforce them; other business practices not within the scope of the original common law rule but alleged to be in restraint of trade on the ground that they are "unreasonable restrictions on competition" are not *prima facie* illegal but must be shown to be unreasonable by the one asserting their illegality.

6. **Contracts § 7; Monopolies § 2— illegal price fixing — severability of contract**

Even if the portion of a contract purporting to fix the minimum price at which customers other than plaintiff could buy stone is illegal price fixing under G.S. 75-1 and G.S. 75-5(b)(7), the invalidity of such portion would not affect the validity of those provisions of the contract establishing the price at which plaintiff could buy stone since those provisions are severable from the arguably illegal provision and are in no way dependent upon the arguably illegal provision for their validity.

7. **Assignments § 4; Contracts § 14— general assignment of executory contract — implied promise to perform contract — other party as third-party beneficiary**

The assignee under a general assignment of an executory bilateral contract becomes the delegatee of his assignor's duties and impliedly promises his assignor that he will perform such duties in the absence of circumstances showing a contrary intention, and the other party to the original contract may sue the assignee as a third-party beneficiary of his promise of performance which he impliedly makes to his assignor by accepting the general assignment.

8. **Assignments § 4; Contracts § 14; Limitation of Actions § 4— assignment of sealed contract — action against assignee — statute of limitations**

When defendant accepted a general assignment of all assets and obligations of a corporation, it impliedly promised to perform the assignor's duties under a sealed contract to sell stone to plaintiff for a ten-year period at specified prices and became liable to plaintiff for refusal to sell stone at the contract price by reason of that implied promise, not by reason of defendant's unsealed promise by letter to "assume" the obligations of the contract; and since the assignor could not confer upon defendant assignee any greater immunity to suit than the assignor possessed, plaintiff's suit to recover overpayments made to defendant for stone was governed by the ten-year statute of limitations relating to sealed contracts, G.S. 1-47, not the three-year statute of limitations relating to unsealed agreements, G.S. 1-52.

9. **Contracts §§ 21, 23— breach of contract by seller — payment of higher price by buyer — waiver of breach — economic duress**

When a seller refuses to perform his contract at the agreed price and demands a higher price, the buyer who proceeds to buy at such higher price may recover damages for breach of the contract if he can establish that he acted under economic duress.

10. **Contracts § 23— breach of contract by seller — payment of higher price by buyer — waiver of breach — economic duress**

After defendant refused to sell stone to plaintiff for use in his ready-mix concrete business at the price specified in their ten-year contract, plaintiff's purchases of stone from defendant at the increased price resulted from economic duress and did not constitute a waiver of the breach where there was no other practical source of stone available to plaintiff during the contract period, plaintiff's only alternatives were to purchase from defendant or go out of business, and plaintiff had no immediate and adequate remedy in the courts which would have enabled him to resist defendant's demands.

11. **Contracts § 29— successive breaches — measure of damages — burden of proving expenses saved**

Plaintiff was entitled to recover the general measure of damages for successive breaches of a contract giving plaintiff the right to purchase stone from defendant at a specified price during a ten-year period—the aggregate of the differences between the market price charged defendant and the contract price—where plaintiff offered evidence from which the difference between those two figures could

be ascertained, and defendant failed to carry its burden of proving that sales of stone to plaintiff f.o.b. the Elkin quarry, rather than f.o.b. the Cycle quarry as provided in the contract, saved defendant hauling expenses and thus reduced the damages resulting from defendant's breaches of the contract.

12. Frauds, Statute of § 2; Corporations § 25— corporation's contract signed by president individually — statute of frauds — ratification

A contract signed by J. E. Dooley individually rather than J. E. Dooley and Son, Inc., the party sought to be charged, meets the requirements of the statute of frauds where the signer was president of the corporation and therefore its general agent, the signer testified he signed the contract in behalf of the corporation, and the instrument itself named the corporation as one of the parties to the agreement; furthermore, the corporation ratified the contract by honoring the contract and accepting the benefits thereunder without objection.

13. Interest § 2; Contracts § 29— interest on damages for breach of contract — sufficiency of judgment

In an action to recover damages for successive breaches of a contract to sell stone to plaintiff at a certain price, judgment that plaintiff recover a specified sum "with interest at six percent per annum on each overpayment from the time it was made" is not void for indefiniteness where the dates of the overpayments are easily ascertainable from relevant evidence in the case and all that remains to be done is simply a matter of mathematical calculation.

PLAINTIFF appeals from decision of the Court of Appeals, 15 N.C. App. 695, 190 S.E. 2d 719, reversing judgment of *Long, J.*, 1 November 1971 Session, FORSYTH Superior Court. This case was docketed and argued at the Fall Term 1972 as No. 68.

Plaintiff instituted this action on 28 January 1971 to recover damages for breach of contract. The case was heard by Judge Long without a jury. Facts found by him which are pertinent to the case are narrated in the following numbered paragraphs:

1. Plaintiff T. W. Rose is a resident of Yadkin County. For some time prior to 1 January 1959 he owned and operated a stone quarry in Yadkin County, North Carolina, about three miles from Jonesville. In Jonesville, he owned and operated the only ready-mix cement business in Yadkin County and used stone from his quarry in that business. He also sold crushed stone to others including the North Carolina State Highway Commission.

2. J. E. Dooley was also in the rock-crushing business in Yadkin County in competition with plaintiff. He operated under

the name of J. E. Dooley and Son, Inc., as well as J. E. Dooley, individually. Late in 1958, Mr. Dooley sought to acquire plaintiff's rock-crushing business; and on 1 January 1959, plaintiff entered into two agreements, Exhibits A and B, with J. E. Dooley, acting for himself individually and on behalf of J. E. Dooley and Son, Inc.

3. By the terms of Exhibit A, plaintiff leased his sixteen-acre quarry in Yadkin County to J. E. Dooley and Son, Inc., for a period of ten years beginning 1 January 1959, and the lessee agreed to pay a royalty of two cents per ton for each ton of stone or rock mined and sold from the leased premises. Exhibit A did not *require* the lessee to operate the quarry, but provided:

> "Should the tenant decide to operate in the above mentioned quarry he agrees to sell stone to [plaintiff] F.O.B. this quarry for the following prices:
>
> Crushed run stone at $1.45 per ton
> Clean Concrete stone at $1.80 per ton
> No. 11 stone at $2.20 per ton
>
> The tenant further agrees that he will not sell any stone produced at this quarry to anyone other than the Highway Commission for a price less than the following:
>
> Crushed Run stone at $1.70 per ton
> Clean Concrete stone at $2.00 per ton
> #11 stone at 2.20 per ton
>
> This contract shall continue and be binding on both parties until the 1st day of January 1969.
>
> T. W. ROSE (SEAL)
> J. E. DOOLEY (SEAL)"

4. Simultaneously with the execution of the lease agreement (Exhibit A), and as a part of the total agreement between the parties, they entered into a contract designated as Exhibit B which reads as follows:

> "This contract and agreement made and entered into this the 1st day of January, 1959 by and between T. W. Rose of Yadkin County, hereinafter called the buyer and J. E. Dooley and Son, Inc., of Iredell County, hereinafter called the seller.

Witnesseth, that the seller agrees to furnish the buyer stone F.O.B. the quarry site at Cycle, North Carolina at the following prices:

Crusher run stone at $1.25 per ton
Clean Concrete stone at 1.60 per ton
No. 11 stone at 2.00 per ton

It is mutually agreed that the seller of this stone will keep someone at Cycle, North Carolina at least five days a week to weigh and load the stone the buyer should need.

The buyer further agrees that he will not engage in the rock crushing business nor will he permit anyone to engage in the rock crushing business in his quarry site in Yadkin County known as the Yadkin Granite Quarry, except J. E. Dooley and Son, Inc., or the Stone Mining Company.

J. E. Dooley & Son, Inc., agree that they will not sell any stone to anyone other than the State Highway Commission for prices less than the following from the Cycle Quarry:

Crusher run stone	$1.50 per ton
Clean Concrete stone	1.80 per ton
No. 11 stone	2.00 per ton

The above restrictions shall apply only to an area of an eight mile radius of Elkin, North Carolina and shall apply for a period of ten years from the date of this contract.

The buyer agrees that he will pay for the stone purchased on or before the 10th day of each calendar month for all stone purchased in the proceeding [sic] month.

This contract shall be binding on both parties until the 1st day of January 1969.

T. W. ROSE (SEAL)
J. E. DOOLEY (SEAL)"

5. In signing Exhibits A and B, J. E. Dooley signed his name without written indication that he was signing as president of J. E. Dooley and Son, Inc., but it was his intent that both instruments be the act and deed of J. E. Dooley and Son, Inc., as well as J. E. Dooley, individually, when he affixed his signature thereto.

6. Exhibits A and B, together, constituted one entire contract, and each was executed in consideration of the other.

7. Neither J. E. Dooley and Son, Inc., nor J. E. Dooley, individually, ever operated plaintiff's sixteen-acre quarry described in Exhibit A during the period of the lease. Dooley carried on his crushing business at his own quarry at Cycle, and both plaintiff and Dooley complied with the terms of Exhibits A and B from 1 January 1959 to April 1960. Sometime prior to 12 April 1960, Dooley advised plaintiff that he had an offer from Vulcan Materials Company to purchase his quarry operations and requested plaintiff to release him from Exhibits A and B so he could consummate the sale. Plaintiff declined to do so and advised Dooley he would not release him unless Vulcan Materials Company would agree in writing to comply with all of Dooley's obligations under Exhibits A and B.

8. By a contract effective 23 April 1960 (Exhibit F), Vulcan Materials Company, a corporation doing business in interstate commerce in the quarrying and sale of stone and gravel in North Carolina and various other states, purchased the stone quarry operations and the assets and obligations of J. E. Dooley and Son, Inc., Stone Mining Company, and J. E. Dooley, individually. In confirmation thereof, Vulcan wrote plaintiff's Exhibit C on 25 April 1960 as follows:

"Dear Mr. Rose:

This is to advise you that on April 23, 1960, the stone crushing activities of J. E. Dooley & Son, Stone Mining Company and J. E. Dooley were acquired by Vulcan Materials Company.

Mr. Dooley brought to us this morning the contracts between you and his companies, copies of which are attached. This is to advise that Vulcan Materials Company assumes all phases of these contracts and intends to carry out the conditions of these contracts as they are stated.

We trust that this promise on our part will be satisfactory to you and we are looking forward to seeing you in the near future."

9. From 1 January 1959 until April 1960, Dooley made sales of crushed stone to plaintiff at the prices specified in Exhibit B. After the purchase of Dooley's stone crushing operations in April 1960, Vulcan Materials Company continued to

sell stone to plaintiff at the prices specified in Exhibit B until 11 May 1961. During all such times Dooley and Vulcan considered Exhibits A and B as binding on them insofar as the price of stone to the plaintiff was concerned.

10. In early 1961 Vulcan notified plaintiff that it would no longer sell stone to him at the prices set out in Exhibits A and B and would thereafter charge plaintiff the same prices charged all of its other customers for stone. Commencing 11 May 1961, Vulcan raised stone prices to the plaintiff to a level in excess of the prices specified in Exhibits A and B.

11. At the time Vulcan increased the prices of stone to amounts in excess of those specified in Exhibits A and B, plaintiff was engaged in his ready-mix cement business, using large quantities of stone, and had no other practical source of supply. Advising Vulcan that he intended to sue for breach of contract, he continued to purchase stone from Vulcan under protest from about 12 May 1961 through December 1968 and paid for all stone so purchased by the 10th of each month following the month of purchase. The sums shown on Plaintiff's Exhibit D as "amounts overcharged" represent the monthly amounts paid by plaintiff in excess of the contract prices in Exhibit B for specified tonnages of stone from May 1961 through December 1968. The total of these amounts over and above the prices specified in Exhibit B is $25,231.57, and plaintiff seeks to recover said amount in this action. Plaintiff's receipts for all such payments together with invoices for each month are identified as Plaintiff's Exhibit E.

12. After Vulcan assumed control of the quarry at Cycle, North Carolina, which it acquired from Dooley, it operated the quarry for several years and plaintiff purchased stone f.o.b. such quarry, at prices specified in Exhibit B, until 11 May 1961. Plaintiff thereafter purchased stone f.o.b. such quarry at the higher price until sometime prior to 1965, when Vulcan advised plaintiff that it was closing the Cycle quarry and that plaintiff could make further purchases of stone from a quarry operated by defendant near Elkin, North Carolina, referred to in the evidence as "the Elkin quarry." Plaintiff, having no other practical source of stone with which to maintain his cement business, continued thereafter to purchase stone from Vulcan f.o.b. the Elkin quarry and continued to pay prices in excess of those specified in Exhibit B. At the trial of this action, defendant offered evidence with respect to reduced mileage between

plaintiff's ready-mix cement business at Jonesville and the Elkin quarry as compared to the distance to the Cycle quarry.

At the close of all the evidence, Judge Long made extensive findings of fact and, based on such findings, concluded as matters of law: (1) That the contracts, Plaintiff's Exhibits A and B, were valid and binding with respect to the obligation of defendant to furnish stone to plaintiff at the specified prices; (2) that plaintiff at all times complied with the contracts, defendant accepted the full benefits thereof, and the contracts are no longer executory; (3) that defendant breached the contracts; (4) that plaintiff did not waive his rights to recover damages for the breach; (5) that plaintiff has been damaged by defendant's breach of contract in the sum of $25,231.57 and is entitled to recover such amount with interest at six percent per annum on each overpayment from the date it was made; and (6) that this action is not barred by the statute of limitations.

Judgment was accordingly entered in favor of the plaintiff for $25,231.57 with interest at six percent per annum "on each payment made by plaintiff to defendant from the date of each such payment and continuing until paid."

On appeal, the Court of Appeals reversed, holding that the contracts identified as Exhibits A and B were unenforceable because they violated both state and federal antitrust laws, precluding recovery of damages for breach thereof. Judge Britt dissented, and plaintiff appealed to this Court as of right under the provisions of G.S. 7A-30(2). Errors assigned will be noted in the opinion.

W. F. Maready and James H. Kelly, Jr., Attorneys for plaintiff appellant; of counsel: Hudson, Petree, Stockton, Stockton & Robinson.

Womble, Carlyle, Sandridge & Rice by Charles F. Vance, Jr., and John L. W. Garrou, Attorneys for defendant appellee.

HUSKINS, Justice.

Defendant contends that the contract denominated Exhibit B, entered into by its assignor J. E. Dooley and Son, Inc., providing that J. E. Dooley and Son, Inc., would sell stone f.o.b. the Cycle quarry to plaintiff at certain specified prices and would "not sell any stone to anyone other than the State Highway Commission for prices less than [certain specified higher prices]

from the Cycle quarry" was in violation of both the Robinson-Patman Act, 15 U.S.C. § 13(a) (1971) and State antitrust law and so was unenforceable.

[1] Illegality is an affirmative defense, G.S. 1A-1, Rule 8(c), Rules of Civil Procedure, and the burden of proving illegality is on the party who pleads it. Thus defendant has the laboring oar on this question.

[2] The contract has two distinct features: (1) It establishes the price at which plaintiff may buy stone from defendant, and (2) it fixes another, higher, minimum price at which customers other than plaintiff may purchase stone from defendant. Thus, the contract creates a *price discrimination* in favor of plaintiff. Is the contract illegal under federal or state law, or both, by reason of the price discrimination?

The Robinson-Patman Act reads in relevant part as follows:

> "It shall be unlawful for any person engaged in commerce in the course of such commerce, . . . to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . . where the effect of such discrimination may be . . . to injure . . . competition. . . . " 15 U.S.C. § 13(a) (1971).

The words "in commerce" mean in *interstate* commerce. *Borden Co. v. F.T.C.*, 339 F. 2d 953 (7th Cir. 1964).

This Act, as prerequisites to its application, requires a showing not only that the price discriminator is engaged in interstate commerce, but also that in the course of such commerce a discriminatory sale occurred *in* interstate commerce. " . . . [I]t is not enough . . . that the defendant be engaged in interstate commerce but it must also be shown that the sale complained of was one occurring in interstate commerce." *Willard Dairy Corp. v. National Dairy Products Corp.*, 309 F. 2d 943 (6th Cir. 1962). " . . . [A]t least one of the two transactions which, when compared, generate a discrimination must cross a state line." *Hiram Walker, Inc. v. A & S Tropical, Inc.*, 407 F. 2d 4 (7th Cir. 1969), cert. den. 396 U.S. 901, 24 L.Ed. 2d 177, 90 S.Ct. 212 (1969). *See also Abramson v. Colonial Oil Co.*, 390 F. 2d 873 (5th Cir. 1968); Kintner and Mayne, "Interstate Commerce Requirement of the Robinson-Patman Price Discrimination Act," 58 Geo. L. J. 1117 (1970).

In the case before us it was stipulated that "Vulcan Materials Company is a corporation doing business in interstate commerce in the quarry and sales of stone and gravel in North Carolina and various other states." This stipulation establishes only that the price discriminator, Vulcan Materials Company, was *engaged* in interstate commerce. Nothing in the record establishes the essential additional fact that in the course of such commerce one of the alleged discriminatory sales occurred *in* interstate commerce. Indeed, all the evidence shows that these sales were wholly intrastate. Therefore, the Robinson-Patman Act can have no applicability here. Accordingly, the issue of the validity of the contract in question is wholly one of state law.

We now consider the impact of G.S. 75-5(b)(5) on the contract under consideration.

The courts and commentators have developed several shorthand terms describing the various forms that price discrimination may take. The line of competition between the seller (Vulcan) and its competitors is called the "primary line"; that between the buyer (Rose) and his competitors, the "secondary line." When a seller varies his price for a given commodity from one regional market or locality to another, he has engaged in "geographic" or "area" discrimination. *See* Comment, Unlawful Primary Line Price Discriminations: Predatory Intent and Competitive Injury, 68 Colum. L. Rev. 137 (1968).

The record in this case establishes, at best, only price discrimination in the secondary line. The effect of the contract in question was to give plaintiff a favorable price for the stone used in his ready-mix cement business. As a result of that favorable price differential as to that stone, one of the components of his resale product, plaintiff gained a competitive edge of undemonstrated magnitude over his competitors in the ready-mix cement business. On this record, only these competitors, the secondary line of competition, could have been adversely affected by the price differential in question. This is so for the reason that the uncontroverted evidence shows that J. E. Dooley and Son, Inc., had *no* competition from the date of execution of the contract in question until it assigned that contract to Vulcan Materials Company, and that Vulcan Materials Company had no competition from then until 1962. There is some slight evidence, controverted by plaintiff, that after 1962 Vulcan Materials Company had at least one competitor

"around there operating a quarry," but the trial court found to the contrary. Thus, in this record there is little evidence of even the *existence* of a primary line of competition; there is no evidence at all that the favorable price was given plaintiff for the purpose of injuring competition in the primary line. In addition, there is no evidence of area discrimination on the part of J. E. Dooley and Son, Inc., or Vulcan Materials Company, for nothing in the record shows that either charged a lower price generally at the Cycle quarry than it charged at any other quarry it was operating in a different locality.

Accordingly, the issue presented by this record is quite simply stated: Does price discrimination in the secondary line violate any law of the State of North Carolina?

G.S. 75-5(b)(5) provides:

> " . . . [I]t is unlawful for any person directly or indirectly to do, or to have any contract express or knowingly implied to do, any of the following acts:
>
> * * *
>
> (5) While engaged in dealing in goods within this State, at a place where there is competition, to sell such goods at a price lower than is charged by such person for the same thing at another place, when there is no good and sufficient reason on account of transportation or the expense of doing business for charging less at the one place than at the other, or to give away such goods, with a view to injuring the business of another."

[3] We think this statute is aimed at *predatory area discrimination in the primary line.* It was not intended to outlaw price discrimination in the secondary line, and no *reasonable* construction of the statute produces that result. Apparently, the purpose of G.S. 75-5(b)(5) is to prevent a seller with several distribution points from predatorily lowering his prices in one locality where he has competition, while maintaining his prices at another locality in order to continue to generate an acceptable overall profit margin, thereby destroying his competitor in the low priced locality. Such practices would be area discrimination in the primary line and are illegal under G.S. 75-5(b)(5). Beyond such practices G.S. 75-5(b)(5) does not reach. The statute simply has no applicability to price discrimination in

the secondary line. Since defendant, having at best made out an inferential case of price discrimination in the secondary line, has not shown the contract in question to be predatory area discrimination in the primary line, his defense based on G.S. 75-5(b)(5) was improperly sustained by the Court of Appeals.

The California Supreme Court has reached an analogous interpretation of its Business and Professional Code §§ 17031 and 17040, statutes similar to G.S. 75-5(b)(5). See *Harris v. Capital Records Distributing Corp.*, 64 Cal. 2d 454, 50 Cal. Rptr. 539, 413 P. 2d 139 (1966), quoting Bermingham, "Legal Aspects of Petroleum Marketing under Federal and California Laws," 7 U.C.L.A. L. Rev. 161, 246: " ' . . . [The] act protects only first-line competition against predatory price cutting on an area basis and does not make illegal price discrimination which only injures second or third line competition at the buyer level or lower.' "

[4] Defendant also argues that the contract in question was illegal under G.S. 75-1, which says: "Every contract . . . in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal. . . . "

This section of our law was based upon section one of the Sherman Act, 15 U.S.C. § 1 (1971), which reads as follows: "Every contract . . . in restraint of trade or commerce among the several States . . . is declared to be illegal. . . . "

There has been little litigation as to the various kinds of contracts that may constitute illegal restraints of trade under G.S. 75-1. However, G.S. 75-2 says that "[a]ny . . . contract . . . in restraint of trade or commerce which violates the principles of the common law is hereby declared to be a violation of § 75-1." Thus, the common law on restraint of trade is determinative of at least the minimum scope of G.S. 75-1. And, the body of law applying the Sherman Act, although not binding upon this Court in applying G.S. 75-1, is nonetheless instructive in determining the full reach of that statute.

Under the common law at a remote period in England, "the term 'contract in restraint of trade' meant an individual's voluntary contractual restraint on his right to carry on his trade or calling." 54 Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, § 446. This inhibition against restraints of trade at common law seems at first to have had no

exception. Later, such restraints were void only if unreasonable, the test being " . . . whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; . . . it is, in the eye of the law, unreasonable." *Horner v. Graves,* 7 Bing. 735, 131 Eng. Rep. 284 (1831). Later still, the English came to "apply the rule of reason which finally evolved as to technical covenants in restraint of trade to all commercial efforts to suppress competition and to secure market dominion, and unless the particular restraints are such that they are unduly or unreasonably oppressive of either the individual rights of the contracting parties or of the public interest, the contract is upheld as valid." Note, *Monopolies—Price Fixing Agreements and the Sherman Act—Appalachian Coals, Incorporated,* 19 Va. L. Rev. 851, 855 (1933). Thus, the term "restraint of trade" evolved in England to include unreasonable restrictions on competition, despite its original common law limitation to " . . . restraint[s] suffered by the covenantor with respect to his own trade or business by virtue of his voluntary contract. . . . " Note, supra, 19 Va. L. Rev. 851, 853 (1933).

A similar course of development occurred in the United States. "In this country . . . it came . . . to pass that contracts or acts which it was considered had a monopolistic tendency, especially those which were thought to unduly diminish competition and hence to enhance prices—in other words, to monopolize—came also in a general sense to be spoken of and treated as they had been in England, as restricting the due course of trade and therefore as being in restraint of trade." *Standard Oil Co. v. United States,* 221 U.S. 1, 56-57, 55 L.Ed. 619, 31 S.Ct. 502 (1910). Thus, it is apparent that at common law in England, and later in this country, "only combinations or agreements which operate to the prejudice of the public by unduly or unreasonably restricting competition or restraining trade are illegal. . . . The combination is not objectionable if the restraint is such only as to afford fair protection to the parties thereto and not broad enough to interfere with the interest of the public." 58 C.J.S., Monopolies § 16. *See Buick Co. v. Motors Corp.,* 254 N.C. 117, 118 S.E. 2d 559 (1961); *Bradshaw v. Millikin,* 173 N.C. 432, 92 S.E. 161 (1917). This is the so-called "rule of reason."

A similar rule of reason was read into the Sherman Act with respect to certain contracts and practices. *See Chicago Bd. of Trade v. United States,* 246 U.S. 231, 62 L.Ed. 683, 38 S.Ct. 242 (1918); *United States v. American Tobacco Co.,* 221 U.S. 106, 55 L.Ed. 663, 31 S.Ct. 632 (1911); *Standard Oil Co. v. United States, supra.* However, that Act has been interpreted to make certain other contracts and practices illegal *per se* " . . . because they are . . . incapable of any legal or economic justification. They can have no other purpose or effect than that of injuring, suppressing or destroying the competitive process." 1 R. Callman, Unfair Competition Trademarks and Monopolies 336 (3d ed. 1967).

Despite this vast body of common and statutory law dealing with restraints of trade, defendant cites no cases holding that a contract establishing a price discrimination is illegally in restraint of trade for that reason alone. Nor can we discover any such cases. We conclude that price discrimination simply has not been dealt with in terms of "restraint of trade." However, we do not hold that a contract may never constitute an illegal restraint of trade solely because of a price discrimination that it establishes. Instead, we hold that such contracts are not illegal *per se,* and that this contract has not been shown to be *unreasonably* in restraint of trade by reason of the price discrimination that it establishes. The record is devoid of evidence of " . . . facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable." *Chicago Board of Trade v. United States, supra.* Without such evidence the contract cannot be said to be in violation of the rule of reason. Defendant has therefore failed to carry its burden of proving the contract illegally in restraint of trade by reason of the price discrimination that it establishes.

[5] This decision with respect to the burden of proof is not in conflict with our decision in cases such as *Kadis v. Britt,* 224 N.C. 154, 29 S.E. 2d 543 (1944). Such cases deal with what were restraints of trade at early common law—"an individual's voluntary contractual restraint on his right to carry on his trade or calling." Such restraints are *prima facie* illegal and must be shown to be reasonable by the party seeking to enforce them. As to other business practices, not within the scope of the original common law rule but alleged to be in restraint of trade on the ground that they are "unreasonable restrictions on

competition," the burden is on the one asserting their illegality to prove their unreasonableness. Such restraints are not *prima facie* illegal and must be shown to be so.

But is the contract illegal *price fixing* since it prescribes the minimum price at which buyers other than plaintiff could buy stone?

[6] Perhaps the *portion* of the contract purporting to fix the minimum price at which customers *other* than plaintiff could buy stone is illegal price fixing under G.S. 75-1 and G.S. 75-5(b)(7). *See* Aycock, Antitrust and Unfair Trade Practice Law in North Carolina—Federal Law Compared, 50 N. C. L. Rev. 199, 220 (1972). But we do not decide this question since the invalidity of this portion would not affect the validity of those provisions of the contract establishing the price at which plaintiff could buy. When a contract contains provisions which are severable from an illegal provision and are in no way dependent upon the enforcement of the illegal provision for their validity, such provisions may be enforced. *In re Publishing Co.*, 231 N.C. 395, 57 S.E. 2d 366, 14 A.L.R. 2d 842 (1950); *Glover v. Ins. Co.*, 228 N.C. 195, 45 S.E. 2d 45 (1947); *Annuity Co. v. Costner*, 149 N.C. 293, 63 S.E. 304 (1908). "It is well established that the fact that a stipulation is unenforceable because of illegality does not affect the validity and enforceability of other stipulations in the agreement, provided they are severable from the invalid portion and capable of being construed divisibly. Moreover, it makes no difference whether there are two distinct promises, whether there is one promise that is divisible, or whether the consideration for the two promises is entire or apportionable. At least this is true where the illegal provision is clearly separable and severable from the other parts which are relied upon and does not constitute the main or essential feature or purpose of the agreement." 17 Am. Jur. 2d, Contracts, § 230.

Business contracts providing protection against future price increases are quite common and are not illegal *per se*. Contracts by which a buyer assures himself of adequate supplies for a definite price over a specified period of time are a vital part of the business world. Here, from his own quarry, plaintiff was supplying himself the crushed stone he needed in his ready-mix cement business. When he leased that quarry to J. E. Dooley and Son, Inc., for ten years, "the main or essential feature or purpose" of the contract between him and Dooley was

to assure himself of an adequate amount of crushed stone for ten years at the prices specified in the contract, *viz:* $1.25 per ton for crusher run stone, $1.60 per ton for clean concrete stone, and $2.00 per ton for No. 11 stone, f.o.b. the quarry site at Cycle, North Carolina. These provisions of Exhibit B are in no way dependent for their validity upon the enforcement of the other, arguably illegal, provisions of that contract whereby J. E. Dooley and Son, Inc., agreed that it would not sell stone from the Cycle quarry to others within an eight-mile radius of Elkin for less than $1.50 per ton for crusher run stone, $1.80 per ton for clean concrete stone, and $2.00 per ton for No. 11 stone. Hence, the legal provisions of the contract are severable from the illegal provisions and may be enforced. "When the agreement found violative of public policy is separable from the remainder of the contract, the contract will be given effect as if the provision so violative of public policy had not been included therein." *Gore v. Ball, Inc.*, 279 N.C. 192, 182 S.E. 2d 389 (1971); *In re Publishing Co., supra; Durant v. Snyder*, 65 Idaho 678, 151 P. 2d 776 (1944); *Keene v. Harling*, 61 Cal. 2d 318, 38 Cal. Rptr. 513, 392 P. 2d 273 (1964); Restatement, Contracts, § 603 (1932).

Accordingly, we hold that defendant has not carried its burden of proving the portion of this contract that plaintiff seeks to enforce to be illegal under any law of the State of North Carolina.

Defendant next contends that this action is barred by the three-year statute of limitations, G.S. 1-52. It argues that although the contracts between plaintiff and J. E. Dooley and Son, Inc. (Exhibits A and B) were under seal, its letter of 25 April 1960, advising plaintiff that "Vulcan Materials Company assumes all phases of these contracts," was *not* under seal; and that since plaintiff's action is based upon the unsealed promise to "assume" the obligations of the contracts, the three-year statute applies. The trial court ruled that G.S. 1-47, the ten-year statute of limitations, applied, and defendant assigns same as error.

The agreement between the original parties, embodied in plaintiff's Exhibits A and B, consisted of mutual promises: Plaintiff, after leasing his quarry to J. E. Dooley and Son, Inc., promised not to engage in the rock-crushing business within an eight-mile radius of Elkin for a period of ten years. In return for this promise, J. E. Dooley and Son, Inc., promised, among

other things, to furnish plaintiff stone f.o.b. the quarry site at Cycle, North Carolina, at stipulated prices for ten years. Thus, the agreement was an executory bilateral contract under which plaintiff's promise not to compete for ten years gained him a ten-year option to buy stone at specified prices.

In most states, the assignee of an executory bilateral contract is not liable to anyone for the nonperformance of the assignor's duties thereunder unless he expressly promises his assignor or the other contracting party to perform, or "assume," such duties. *See Langel v. Betz,* 250 N.Y. 159, 164 N.E. 890 (1928); 3 Williston, Contracts, § 418A (3d ed. 1960); Note: Obligations of the Assignee of a Bilateral Contract, 42 Harv. L. Rev. 941 (1929). These states refuse to *imply* a promise to perform the duties, but if the assignee expressly promises his assignor to perform, he is liable to the other contracting party on a third-party beneficiary theory. 4 Corbin, Contracts, § 906 (1951). *Cf. McGill v. Baker,* 147 Wash. 394, 266 P. 138 (1928). And, if the assignee makes such a promise directly to the other contracting party upon a consideration, of course he is liable to him thereon. *See* Simpson, Contracts, § 132 (2d ed. 1965).

A minority of states holds that the assignee of an executory bilateral contract under a general assignment becomes not only assignee of the rights of the assignor but also delegatee of his duties; and that, absent a showing of contrary intent, the assignee *impliedly* promises the assignor that he will perform the duties so delegated. 3 Williston, Contracts, § 418A (3d ed. 1960); 4 Corbin, Contracts, § 906 (1951). This rule is expressed in Restatement, Contracts, § 164 (1932) as follows:

> "(1) Where a party under a bilateral contract which is at the time wholly or partially executory on both sides purports to assign the whole contract, his action is interpreted, in the absence of circumstances showing a contrary intention, as an assignment of the assignor's rights under the contract and a delegation of the performance of the assignor's duties.
>
> (2) Acceptance by the assignee of such an assignment is interpreted, in the absence of circumstances showing a contrary intention, as both an assent to become an assignee of the assignor's rights and as a *promise to the assignor to assume the performance of the assignor's duties.*" (Emphasis added.)

[7] This Court has never expressly adopted the Restatement Rule (§ 164) in North Carolina. However, in *R. R. v. R. R.*, 147 N.C. 368, 61 S.E. 185 (1908), decided before the Restatement was written, we apparently recognized the rule of implied assumption that later became the Restatement Rule. In that case plaintiff Railroad had a contract to buy a certain amount of cordwood from one Ives. Plaintiff leased its equipment to Howland Improvement Company and assigned to Howland its contract with Ives. Defendant Railroad (assignee) succeeded to the rights and liabilities of Howland and took an assignment of the Ives contract. Defendant Railroad later changed from wood-burning to coal-burning locomotives and refused to purchase wood from Ives as required by the contract. Thereupon, Ives successfully sued plaintiff Railroad (assignor) for damages caused by defendant's refusal to purchase the wood. Plaintiff assignor then sued defendant assignee for reimbursement and recovery was allowed. Despite the absence of an express promise by defendant assignee to assume the obligations of the Ives contract, this Court treated defendant as having assumed and promised to perform plaintiff assignor's duties under the contract with Ives, saying: "When the defendant bought and took an assignment of this contract for the delivery of so much cordwood on its right of way, and thus acquired the right to enforce performance by Ives or recover damages for its breach, it assumed the liability to pay for it when delivered. It could not take over the benefits of the contract without bearing its burdens. Defendant took the contract *cum onere* . . . . " Thus, *R. R. v. R. R.*, supra, recognizes that there is an implied promise of assumption which arises from acceptance of a general assignment. However, the case fails to recognize the limitation, later adopted by the Restatement, that such a promise is implied only *in the absence of circumstances showing a contrary intention.* We think the rule as limited by the Restatement is sound. We therefore adopt the Restatement rule and expressly hold that the assignee under a general assignment of an executory bilateral contract, in the absence of circumstances showing a contrary intention, becomes the delegatee of his assignor's duties and impliedly promises his assignor that he will perform such duties.

The rule we adopt and reaffirm here is regarded as the more reasonable view by legal scholars and textwriters. Professor Grismore says:

"It is submitted that the acceptance of an assignment in this form does presumptively import a tacit promise on the part of the assignee to assume the burdens of the contract, and that this presumption should prevail in the absence of the clear showing of a contrary intention. The presumption seems reasonable in view of the evident expectation of the parties. The assignment on its face indicates an intent to do more than simply to transfer the benefits assured by the contract. It purports to transfer the contract as a whole, and since the contract is made up of both benefits and burdens both must be intended to be included. It is true the assignor has power only to delegate and not to transfer the performance of duties as against the other party to the contract assigned, but this does not prevent the assignor and the assignee from shifting the burden of performance as between themselves. Moreover common sense tells us that the assignor, after making such an assignment, usually regards himself as no longer a party to the contract. He does not and, from the nature of things, cannot easily keep in touch with what is being done in order properly to protect his interests if he alone is to be liable for nonperformance. Not infrequently the assignor makes an assignment because he is unable to perform further or because he intends to disable himself for further performance. The assignee on the other hand understands that he is to carry out the terms of the contract, as is shown by the fact that he usually does, most of the decided cases being those in which the other party objected to performance by the assignee. In view of these considerations is it not reasonable to infer that the assignee tacitly promises to perform?" Grismore, Is the Assignee of a Contract Liable for the Nonperformance of Delegated Duties? 18 Mich. L. Rev. 284 (1920). *See* Note, Obligations of the Assignee of a Bilateral Contract, 42 Harv. L. Rev. 941 (1929); 4 Corbin, Contracts, § 906 (1951).

In addition, with respect to transactions governed by the Uniform Commercial Code, an assignment of a contract in general terms is a delegation of performance of the duties of the assignor, and its acceptance by the assignee constitutes a promise by him to perform those duties. *See* G.S. 25-2-210(4). Our holding in this case maintains a desirable uniformity in the field of contract liability.

[7] We further hold that the other party to the original contract may sue the assignee as a third-party beneficiary of his promise of performance which he impliedly makes to his assignor, under the rule above laid down, by accepting the general assignment. *Younce v. Lumber Co.,* 148 N.C. 34, 61 S.E. 624 (1908), holds that where the assignee makes an express promise of performance to his assignor, the other contracting party may sue him for breach thereof. We see no reason why the same result should not obtain where the assignee breaches his promise of performance *implied* under the rule of Restatement § 164. "That the assignee is liable at the suit of the third party where he expressly assumes and promises to perform delegated duties has already been decided in a few cases [citing *Younce*]. If an express promise will support such an action it is difficult to see why a tacit promise should not have the same effect." *Grismore, supra.* Parenthetically, we note that such is the rule under the Uniform Commercial Code, G.S. 25-2-210(4).

[8] We now apply the foregoing principles to the case at hand. The contract of 23 April 1960, Exhibit F, between defendant and J. E. Dooley and Son, Inc., under which, as stipulated by the parties, "the defendant purchased the assets and obligations of J. E. Dooley and Son, Inc.," was a general assignment of *all* the assets and obligations of J. E. Dooley and Son, Inc., including those under Exhibit B. When defendant accepted such assignment it thereby became delegatee of its assignor's duties under Exhibit B and impliedly promised to perform such duties.

When defendant later failed to perform such duties by refusing to continue sales of stone to plaintiff at the prices specified in Exhibit B, it breached its implied promise of performance and plaintiff was entitled to bring suit thereon as a third-party beneficiary. Therefore, it is not the promise contained in defendant's letter of 25 April 1960 that is the foundation of defendant's liability to plaintiff, and the fact that this letter was not under seal is immaterial. Instead, defendant is liable for breach of its implied promise of performance arising upon its acceptance of the general assignment.

Statutes of limitation may be characterized as a right not to be sued beyond the time limited. Here, the assignor J. E. Dooley and Son, Inc., had a right not to be sued after ten years from the accrual of a cause of action under the sealed contract it entered into with plaintiff. By assigning this contract,

Dooley and Son, Inc., could not confer upon defendant assignee a greater immunity to suit than the assignor itself possessed. This is true by analogy to the familiar principle that " . . . the assignor of a non-negotiable chose in action cannot confer upon the assignee a greater right than he possesses." *Iselin and Co. v. Saunders,* 231 N.C. 642, 58 S.E. 2d 614 (1950). When defendant impliedly assumed its assignor's contractual obligations under the general assignment, it exposed itself for ten years to suit on the sealed contract. "The assignee steps into the shoes of the assignor. . . . " *Cook v. Eastern Gas and Fuel Associates,* 129 W.Va. 146, 39 S.E. 2d 321 (1946). *See also, Gould v. Jackson,* 257 Wis. 110, 42 N.W. 2d 489 (1950); *Dennis v. Bank of America Nat. Trust & Savings Ass'n.,* 34 Cal. App. 2d 618, 94 P. 2d 51 (1939).

For the reasons stated, we hold that the ten-year statute of limitations applies. This assignment of error is therefore without merit and is overruled.

Defendant contends that when it refused to sell stone f.o.b. the Cycle quarry at the price specified in Exhibit B, plaintiff elected to pay the increased price and thus waived the breach for which he seeks to recover damages in this action. The trial court held that plaintiff did not waive the breach by continuing to buy stone from defendant at the higher price. This ruling constitutes defendant's third assignment of error.

Waiver is an affirmative defense which defendant must plead. G.S. 1A-1, Rule 8(c). Having pled waiver, defendant has the burden of proving it.

[9] When a seller refuses to perform his contract at the agreed price and demands a higher price, the buyer who proceeds to buy at such higher price may recover the overpayments in a suit for restitution if he can establish that he acted under economic duress. *See Austin Instrument, Inc. v. Loral Corp.,* 29 N.Y. 2d 124, 324 N.Y.S. 2d 22, 272 N.E. 2d 533 (1971); *Brown v. Worthington,* 162 Mo. App. 508, 142 S.W. 1082 (1912); *Mandel v. National Ice and Coal Co., Inc.,* 180 N.Y.S. 429 (1920) (recovery denied, insufficient showing of economic duress); 13 Williston, Contracts, § 1617 (3d ed. 1970); *Dalzell,* Duress by Economic Pressure, Parts I and II, 20 N.C. L. Rev. 237, 341 (1942); Dobbs, Remedies, § 10.2 (1973). *Compare Ross Systems v. Linden Dairi-Delite, Inc.,* 35 N.J. 329, 173 A. 2d 258 (1961); *Newland v. Turnpike Co.,* 26 N.C. 372

(1843). We hold that a buyer who proceeds to buy at the higher price and then sues for damages for breach of contract may likewise recover where he shows that he acted under economic duress.

What are the essential characteristics of economic duress? "A threatened violation of a contractual duty ordinarily is not in itself coercive, but if failure to receive the promised performance will result in irreparable injury to business, the threat may involve duress." 13 Williston, Contracts, § 1617 (3d ed. 1970).

"Perhaps the cases would support, for some jurisdictions at least, the generalization that a threat to breach a contract, if it does create severe economic pressure upon the other party, can constitute duress where the threat is effective because of economic power not derived from the contract itself." Dobbs, Remedies, § 10.2 (1973).

"However, a mere threat by one party to breach the contract by not delivering the required items, though wrongful, does not in itself constitute economic duress. It must also appear that the threatened party could not obtain the goods from another source of supply. . . . " *Austin Instrument, Inc. v. Loral Corp., supra.* In addition, it must appear that there was "no immediate and adequate remedy in the courts" which would enable the buyer to resist the seller's demand. *Ross Systems v. Linden Dairi-Delite, Inc., supra.*

[10] Here, the trial court found: "Plaintiff protested defendant's increased price to him and promised the defendant that he would sue for overcharges. He did so. In view of the fact that plaintiff had no other practical source for stone with which to continue his business and that he had the alternative of either going out of business or continuing to purchase from the defendant, this court finds as a fact that his conduct in continuing to purchase stone from the defendant under the circumstances did not constitute a waiver of his rights under the contracts."

When jury trial is waived and issues of fact are tried by the court, it is required to give its decision in writing with its findings of fact and conclusions of law stated separately. G.S. 1A-1, Rule 52. Its findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might

sustain a finding to the contrary. *Knutton v. Cofield,* 273 N.C. 355, 160 S.E. 2d 29 (1968). Thus, the foregoing finding, supported by competent evidence, conclusively establishes that there was no other practical source of stone available to plaintiff during the contract period and that plaintiff's only alternatives were to purchase from defendant or go out of business.

In this regard we note that plaintiff could not reasonably have rescinded the lease of his quarry (Exhibit A) and reopened it to supply himself with stone because he had sold his rock-crushing equipment to J. E. Dooley and Son, Inc., before or at the time Exhibit A was executed. Furthermore, plaintiff protested the increase in price in violation of the terms of Exhibit B, and such protest is additional evidence of duress. *Western Natural Gas Co. v. Cities Service Gas Co.,* 201 A. 2d 164 (Del. 1964); *Baker v. Allen,* 220 S.C. 141, 66 S.E. 2d 618 (1951); *Wasina Housing Corp. v. Levay,* 188 Md. 383, 52 A. 2d 903 (1947).

Under these circumstances, we think that defendant's threatened, and actual, breach of contract was coercive, and that plaintiff yielded because of economic duress. The threat was effective as a result of defendant's economic power derived from his status as sole supplier of stone, not because of any economic power derived from the contract itself. Dobbs, supra, § 10.2. This economic power continued through the entire ten-year term of the contract, so that the economic duress was likewise continuous. It is also apparent that plaintiff had no "immediate and adequate remedy in the courts" which would have enabled him to resist defendant's demands. A suit for specific performance would have been inadequate for the reason that plaintiff had immediate need for the stone in order to service his customers in the ready-mix cement business. Dobbs, supra, § 10.2.

In legal parlance, the word *waiver* means the voluntary relinquishment of a known right. Webster's New International Dictionary, Second Edition. Nothing in this record supports the suggestion that plaintiff waived defendant's breach of contract. Rather, the evidence establishes economic duress and coercive rather than voluntary action on plaintiff's part and fully supports the finding of the trial court. This assignment is overruled.

[11] Defendant's fourth assignment questions the amount of damages. The plaintiff's claim for damages is based upon the

difference between the contract price named in Exhibit B and the price he was actually charged for stone purchased from defendant after 11 May 1961.

The contract in question, Exhibit B, calls for the sale of stone f.o.b. the Cycle quarry. At some undisclosed time prior to 1965, defendant closed the Cycle quarry and, for its own convenience, shifted to its quarry located at Elkin, referred to as "the Elkin quarry." Thereafter, until the expiration of the contract on 1 January 1969, plaintiff's orders for stone were filled f.o.b. the Elkin quarry.

Defendant offered evidence tending to show that the Elkin quarry was 7.34 miles closer than the Cycle quarry to plaintiff's place of business in Jonesville; that the cost of hauling stone was four cents per ton-mile; that of the total tonnage bought by plaintiff under the contract in question, 5,082 tons were purchased f.o.b. the Cycle quarry and 98,594 tons were purchased f.o.b. the Elkin quarry; that defendant opened the Elkin quarry and closed the Cycle quarry because the Elkin quarry was closer to the centers of population. Defendant contends that plaintiff's damages, if he suffered any by reason of defendant's breach of contract, should be offset by the amount plaintiff saved due to the shorter haul; that plaintiff has the burden of proof on the issue of damages and failed to carry it in that there is no evidence as to plaintiff's "net loss." Defendant therefore argues that plaintiff failed to prove any damages and that the trial court erred in failing to find facts and make legal conclusions accordingly.

Plaintiff, on the other hand, contends that he proved overcharges in the amount of $25,231.57 and had no further burden of proof. Plaintiff argues that delivery distances depended on the location of his customers; that if buying stone at the Elkin quarry inured to his monetary advantage and lessened the damages flowing from defendant's breach, the burden of proof with respect thereto was on the defendant.

On this question, the trial court found as follows:

"23. In the trial of this action, defendant introduced evidence with respect to reduced mileage between plaintiff's place of business and the Elkin quarry, as opposed to the Cycle quarry. Defendant contends that such reduced mileage between plaintiff's place of business and the Elkin quarry would offset any damages which might have been

sustained by the plaintiff by reason of excess charges. Plaintiff's cement business involved the delivery of ready mixed concrete to his various customers in Yadkin County and surrounding areas. This concrete was mixed and delivered in large trucks such as are commonly seen in the ready mixed concrete business. It does not appear from the evidence as to where plaintiff's customer or customers were located with reference to either the Elkin or the Cycle quarries. There is no evidence as to whether the trucks delivering and mixing the concrete were loaded with the rock at the plaintiff's place of business or whether they picked up the rock at the quarry. The Court finds as a fact that there is no evidence to show that the difference in mileage asserted by defendant represented any savings to plaintiff and, depending on where plaintiff's customers were located, could have resulted in additional expense to plaintiff."

The measure of damages for breach of a contract of sale is generally the difference between the contract price and the market price of the goods at the time and place performance is due. 3 Williston, Sales, § 599 (2d ed. 1948); *Mills v. McRae*, 187 N.C. 707, 122 S.E. 762 (1924). "And where, by the terms of the contract, the goods are to be delivered by installments or at stated periods, the time of delivery will be the date for the delivery of each installment successively, the damage being the aggregate of these differences . . . as of these respective dates, and interest where allowed." *Hosiery Co. v. Cotton Mills*, 140 N.C. 452, 53 S.E. 140 (1906).

Exhibit B was not itself a contract of sale. Instead, it gave plaintiff an option to buy. It was a continuing offer to sell which, having been given for a sufficient consideration, was irrevocable for the stated ten-year period. *See* 1 Williston, Contracts, § 61B (3d ed. 1957); 1A Corbin, Contracts, § 157 (1963). Each time plaintiff placed an order with defendant there was an acceptance of the seller's offer and a contract of sale was formed. Each time defendant refused to fill such order at the contract price a separate breach occurred. Therefore, plaintiff's measure of damages for the successive breaches is the aggregate of the differences between the market price as of the date of each breach and the contract price.

All the evidence tends to show that defendant charged plaintiff "the market price" for stone after 11 May 1961. The

contract price is shown by Exhibit B. Thus, plaintiff carried his burden of proving the general measure of damages when he offered evidence from which the difference between these two figures could be ascertained. Nothing else appearing, such is the amount plaintiff is entitled to recover.

We need not decide whether the hauling expenses allegedly saved here are properly deductible as expenses saved in consequence of the breach—apparently the present rule under the Uniform Commercial Code, G.S. 25-2-713(1). The burden of proving the amount of such "saved expenses" is, in any event, on defendant. Absent such proof, the general measure of damages is recoverable. *Compare Distributing Corp. v. Seawell,* 205 N.C. 359, 171 S.E. 354 (1933); *Monger v. Lutterloh,* 195 N.C. 274, 142 S.E. 12 (1928); *Mills v. McRae, supra,* holding that the burden of proof is upon defendant to show that plaintiff has, or could have, minimized his damages for breach of contract and that in the absence of such a showing the general measure obtains.

Here, the trial court properly placed the burden of proof and defendant failed to carry it. The findings of the trial court, supported by competent evidence, are correct and binding on this appeal. Defendant's fourth assignment is overruled.

[12] Although the contract sued on, Exhibit B, is not itself a lease of land, it provides the consideration for the lease of plaintiff's quarry (Exhibit A) and was executed contemporaneously therewith as part of one transaction. The statute of frauds requires all contracts and leases affecting an interest in real property, exceeding three years in duration, to be in writing "and signed by the party to be charged therewith." G.S. 22-2. Defendant contends that since the lease of plaintiff's quarry (Exhibit A) was signed by J. E. Dooley individually rather than J. E. Dooley and Son, Inc., the party sought to be charged, it does not comply with the statute; and since the contract sued on (Exhibit B) was executed in like manner *as part of one transaction,* it contains the same defect and is not enforceable. Failure of the trial court to so hold constitutes defendant's fifth assignment of error.

The opening paragraph of Exhibit B reads as follows: "This contract and agreement made and entered into this the 1st day of January, 1959 by and between T. W. Rose of Yadkin County, hereinafter called the buyer and J. E. Dooley and Son,

Inc., of Iredell County, hereinafter called the seller." The instrument is signed "J. E. Dooley (SEAL)." With respect to this instrument, J. E. Dooley testified as follows: "In December of 1958 I owned a corporation named J. E. Dooley and Son, Inc. I was president of it and I did business under that name. As well as I can remember I signed contracts with Mr. Rose in behalf of my corporation."

Assuming arguendo, without deciding, that the contract sued on (Exhibit B) is subject to the statute of frauds, we think it meets the requirements of that statute. J. E. Dooley, the signer of the contract, was president of J. E. Dooley and Son, Inc., and therefore its general agent. He testified he signed the instrument "in behalf of my corporation." The instrument itself named the corporation as one of the parties to the agreement, thus revealing the clear intent to bind it. "The president of a corporation is *ex vi termini* its general agent," *Warren v. Bottling Co.*, 204 N.C. 288, 168 S.E. 226 (1933), and can ordinarily make contracts for the company. The statute of frauds presents no problem here. "If there be a written memorial of so much of the contract as is binding on the party to be charged therewith, so expressed that its terms can be understood, and it be signed by one who is proved or admitted by the principal to have been authorized as agent to act for him, it is a sufficient compliance with the statute if the agent sign his own name instead of that of his principal by him." *Hargrove v. Adcock*, 111 N.C. 166, 16 S.E. 16 (1892). Furthermore, a subsequent ratification of an unauthorized signing "will make it valid within the statute." *Johnson v. Sikes*, 49 N.C. 70 (1856).

J. E. Dooley and Son, Inc., as well as J. E. Dooley individually, honored this contract and accepted the benefits thereunder without objection from the date of its execution until the date of its assignment to defendant on 23 April 1960. Defendant Vulcan Materials Company honored this contract and accepted the benefits thereunder without objection from the date of assignment until it raised the price of stone on 11 May 1961. In light of these facts, we hold that the contract has been ratified and, in the eyes of the law, is binding on defendant. Even though a contract is made by an officer or agent of a corporation in his own name, the name of the corporation not appearing therein, the corporation will nevertheless be held liable "where it has adopted the contract, acquiesced therein, or received the benefits thereof." 7 Fletcher, Cyclopedia of the Law of Private Corpora-

tions, § 3016 (1964). Defendant's fifth assignment of error is overruled.

[13] Finally, defendant contends that the judgment provides for the payment of interest "but does not contain all the information necessary by which interest may be computed." The nature of the missing information is not specified. Even so, defendant contends the judgment is invalid by reason of indefiniteness.

It is provided by statute that "[a]ll sums of money due by contract of any kind, excepting money due on penal bonds, shall bear interest, and when a jury shall render a verdict therefor they shall distinguish the principal from the sum allowed as interest. . . . " G.S. 24-5. In *Bond v. Cotton Mills,* 166 N.C. 20, 81 S.E. 936 (1914), this Court referred to the statute which is now G.S. 24-5 and laid down the following rule: " . . . [W]henever a recovery is had for breach of contract and the amount is ascertained from the terms of the contract itself or *from evidence relevant to the inquiry,* . . . interest should be added. . . . " (Emphasis added.) Since the decision in *Bond,* the trend is toward allowance of interest in almost all types of cases involving breach of contract. *Construction Co. v. Crane and Denbo, Inc.,* 256 N.C. 110, 123 S.E. 2d 590 (1962).

In *General Metals v. Mfg. Co.,* 259 N.C. 709, 131 S.E. 2d 360 (1963), with reference to interest on a judgment for breach of contract, it is said: "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." The judgment in this case follows that established rule and allows interest from the date of each overpayment. Those dates are easily ascertainable from relevant evidence in the case. All that remains to be done is purely and simply a matter of mathematical calculation. There is no merit in this assignment and it is overruled.

The decision of the Court of Appeals is reversed with directions that the case be certified to the Superior Court of Forsyth County for reinstatement of the judgment of the trial court in accordance with this opinion.

Reversed.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

BRANT v. COMPTON

No. 87.

Case below: 16 N.C. App. 184.

Appeal treated as petition for writ of certiorari to North Carolina Court of Appeals denied 29 November 1972.

ELECTRIC CO. v. SHOOK

No. 144 PC.

Case below: 17 N.C. App. 81.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 6 February 1973.

FONVILLE v. DIXON

No. 133 PC.

Case below: 16 N.C. App. 664.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 February 1973.

FOSTER v. WEITZEL

No. 143 PC.

Case below: 17 N.C. App. 90.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 February 1973.

JAMES v. BOARD OF EDUCATION

No. 79.

Case below: 15 N.C. App. 531.

Motion of defendant to withdraw appeal allowed 7 December 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. BARKSDALE

No. 122 PC.

Case below: 16 N.C. App. 559.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 February 1973.

STATE v. DAVIS

No. 23.

Case below: 17 N.C. App. 84.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 January 1973. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 30 January 1973.

STATE v. GRAY

No. 147 PC.

Case below: 17 N.C. App. 131.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 February 1973.

STATE v. GREENE

No. 149 PC.

Case below: 17 N.C. App. 51.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 February 1973.

STATE v. JEFFERIES

No. 142 PC.

Case below: 17 N.C. App. 195.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 February 1973.

STATE v. KINSEY

No. 150 PC.

Case below: 17 N.C. App. 57.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 February 1973.

STATE v. LASSITER

No. 152 PC.

Case below: 17 N.C. App. 35.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 February 1973.

STATE v. LEA

No. 148 PC.

Case below: 17 N.C. App. 71.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 February 1973.

STATE v. McGHEE

No. 140 PC.

Case below: 16 N.C. App. 702.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 February 1973.

STATE v. SHANKLIN

No. 130 PC.

Case below: 16 N.C. App. 712.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 February 1973.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. WESSON

No. 131 PC.

Case below: 16 N.C. App. 683.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 February 1973.

STATE v. WEST

No. 136 PC.

Case below: 17 N.C. App. 5.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 February 1973.

STATE v. WILLIAMS

No. 145 PC.

Case below: 17 N.C. App. 39.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 February 1973.

TRUST CO. v. ROBERTSON

No. 120 PC.

Case below: 16 N.C. App. 484.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 February 1973.

Davison v. Duke University

WILBURT C. DAVISON, DORIS DUKE, JAMES R. FELTS, JR., BENJAMIN F. FEW, PHILIP B. HEARTT, RICHARD B. HENNEY, AMOS R. KEARNS, ROBERT MCCORMACK, WILLIAM B. MCGUIRE, THOMAS L. PERKINS, MARSHALL I. PICKENS, R. GRADY RANKIN, MARY D. B. T. SEMANS, J. KELLY SISK, AND KENNETH C. TOWE, AS TRUSTEES OF THE DUKE ENDOWMENT, A TRUST ESTABLISHED BY JAMES B. DUKE BY INDENTURE DATED DECEMBER 11, 1924

— v. —

DUKE UNIVERSITY; THE TRUSTEES OF DAVIDSON COLLEGE; FURMAN UNIVERSITY; JOHNSON C. SMITH UNIVERSITY, INCORPORATED; CABARRUS MEMORIAL HOSPITAL AND THE GREENVILLE HOSPITAL SYSTEM BOARD OF TRUSTEES, INDIVIDUALLY AND AS REPRESENTATIVES OF THE CLASSES OF HOSPITALS SIMILARLY SITUATED; BAPTIST CHILDREN'S HOMES OF NORTH CAROLINA, INC., AND EPWORTH CHILDREN'S HOME, INDIVIDUALLY AND AS REPRESENTATIVES OF THE CLASSES OF CHILD-CARING INSTITUTIONS SIMILARLY SITUATED; CHARGE CONFERENCE OF MCMANNEN UNITED METHODIST CHURCH, AND CHARGE CONFERENCE OF HILL'S CHAPEL MEMORIAL UNITED METHODIST CHURCH, INDIVIDUALLY AND AS REPRESENTATIVES OF THE CLASSES OF RURAL CHURCHES SIMILARLY SITUATED; REV. EDGAR NEASE, INDIVIDUALLY AND AS A REPRESENTATIVE OF THE CLASS OF SUPERANNUATED PREACHERS SIMILARLY SITUATED; MARY JANE WALTON, INDIVIDUALLY AND AS A REPRESENTATIVE OF THE CLASS OF WIDOWS OF METHODIST MINISTERS SIMILARLY SITUATED; CHARLES LEE WALTON, INDIVIDUALLY AND AS A REPRESENTATIVE OF THE CLASS OF ORPHANS OF METHODIST MINISTERS SIMILARLY SITUATED; HON. ROBERT MORGAN, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA; HON. DANIEL R. MCLEOD, ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA; NORTH CAROLINA HOSPITAL ASSOCIATION, INC.; SOUTH CAROLINA HOSPITAL ASSOCIATION; NORTH CAROLINA CHILD CARE ASSOCIATION; NORTH CAROLINA ANNUAL CONFERENCE OF THE UNITED METHODIST CHURCH, SOUTHEASTERN JURISDICTION; WESTERN NORTH CAROLINA ANNUAL CONFERENCE OF THE UNITED METHODIST CHURCH, SOUTHEASTERN JURISDICTION; DUKE POWER COMPANY; CALDWELL POWER COMPANY; CATAWBA MANUFACTURING AND ELECTRIC POWER CO.; CRESCENT LAND & TIMBER CORP.; EASTOVER LAND COMPANY; EASTOVER MINING COMPANY; GREENVILLE GAS AND ELECTRIC LIGHT AND POWER COMPANY; MILL-POWER SUPPLY COMPANY; SOUTHERN POWER COMPANY; WATEREE POWER COMPANY; AND WESTERN CAROLINA POWER COMPANY

No. 37

(Filed 14 March 1973)

1. **Trusts § 4— judicial modification of trust**

The courts will modify a trust instrument to preserve the purpose of the trust or protect its beneficiaries when some exigency or emergency not anticipated by the trustor will defeat his intent.

2. **Trusts § 4— Duke Endowment — investments — distribution of principal — judicial modification**

There was ample evidence to support findings by the trial court that the purposes and objects of the Duke Endowment have been

threatened by unanticipated changes of circumstances brought about by inflation and by provisions of the Tax Reform Act of 1969 which might require the Endowment to divest itself of all but 25% of the outstanding stock of Duke Power Company by 1979, and a provision of the Endowment indenture restricting investments by the trustees to investments in Duke Power Company and certain government bonds was properly modified by the trial court to allow the trustees to invest the trust funds in other securities and properties and to grant the trustees authority to distribute principal of the Endowment to the extent necessary to comply with the provisions of the Tax Reform Act of 1969.

3. Trusts § 10— distribution of corpus — when permitted

The general rule that the principal or corpus constituting the subject matter of a trust cannot be distributed prior to termination in the absence of express or implied authority in the trust instrument is subject to two exceptions: (1) a court may permit modification of the instrument when essential to protect the trust and its beneficiaries from an unforeseen exigency threatening to destroy the settlor's intent and purposes in creating the trust, and (2) a court may order invasion of the corpus for the necessary support of a beneficiary when the interest of another beneficiary is not thereby impaired.

4. Trusts § 4— determination of intent of trustor

The intent of a trustor will be determined by the language he chooses to convey his thoughts, the purposes he seeks to accomplish, and the situation of the other parties to or benefited by the trust.

5. Trusts § 6— extent of trustee discretion

Ordinarily, the extent of the discretion conferred upon trustees by a settlor depends upon the terms of the trust and the nature of the powers interpreted in the light of all the circumstances known to the settlor when he executed the trust instrument.

6. Trusts § 4— interpretation of trust indenture — question of law

The interpretation of a trust indenture is a question of law for the court which is subject to review by the appellate courts.

7. Trusts § 4— Duke Endowment — discretion to withhold income — options for use of withheld income — additions to corpus — subsequent distribution prohibited

In giving the trustees of the Duke Endowment the discretion to withhold income distributable to beneficiaries other than Duke University and either to (1) accumulate the withheld amounts for expenditure in future years, (2) add the withheld amounts to the trust corpus, (3) pay the withheld amounts to or for the benefit of another trust purpose, or (4) pay the withheld amounts to or for the benefit of any like charitable purpose or like charitable hospital, the trustor intended that the exercise of one option would exclude successive action under another option with respect to the same withheld funds; therefore, once the trustees added funds to the corpus under option (2), the withheld funds could not be recalled and used for another purpose pursuant to another option.

8. Trusts § 4— Duke Endowment — additions of income to corpus — excise tax — absence of emergency permitting modification of trust

The record does not show that a 4% excise tax provided by the Tax Reform Act of 1969 on approximately $115,000 of annual income derived from an accumulation of withheld distributable income which has been added to the corpus of the Duke Endowment would create such an exigency or emergency which might frustrate the intent and purposes of the trustor so as to permit judicial modification of the trust indenture to give the trustees authority to distribute such additions to corpus.

9. Trusts § 4— Duke Endowment — distribution of principal — trustees' judgment

The trial court did not err in determining that a distribution of principal of the Duke Endowment permitted by the court to the extent required by the Tax Reform Act of 1969 need not be made to the same beneficiaries, for the same purposes and in the same percentages of distribution provided in the trust indenture or in accordance with any other predetermined formula, but that such distribution should be made according to the trustees' judgment.

Chief Justice BOBBITT and Justice SHARP dissent in part and vote to affirm without modification.

APPEAL by plaintiffs, Trustees of the Duke Endowment, and defendant, The Attorney General of North Carolina, and defendants Mary Jane Walton and Bailey Patrick, Jr., Guardian ad Litem, from *Ervin, J.*, 10 January 1972 Special Session of MECKLENBURG Superior Court.

This case was docketed and argued as No. 11 at the Fall Term, 1972.

James B. Duke, on 11 December 1924, created a living trust known as the Duke Endowment. Mr. Duke, a resident of the State of New Jersey, on that date placed the following securities in the trust:

122,647 Shares of Stock of Duke Power Company, a corporation organized and existing under the laws of the State of New Jersey.

100,000 Ordinary Shares of the Stock of British-American Tobacco Company, Limited, a corporation organized and existing under the laws of Great Britain.

75,000 Shares of the Common "B" Stock of R. J. Reynolds Tobacco Company, a corporation organized and existing under the laws of said State of New Jersey.

5,000 Shares of the Common Stock of George W. Helme Company, a corporation organized and existing under the laws of said State of New Jersey.

12,325 Shares of the Stock of Republic Cotton Mills, a corporation organized and existing under the laws of the State of South Carolina.

7,935-3/10 Shares of the Common Stock of Judson Mills, a corporation organized and existing under the laws of said State of South Carolina.

The trust has perpetual existence and is governed by a self-perpetuating 15-member board. The Indenture creating the trust directed the Trustees to add 20% of the income from the trust created to the corpus of the trust until such additions aggregate $40 million. The remaining income from the trust was to be distributed as follows:

32% to Duke University

32% to North Carolina and South Carolina hospitals

5% to Davidson College

5% to Furman University

4% to Johnson C. Smith University

10% to North Carolina and South Carolina orphanages

2% to superannuated Methodist preachers and widows and orphans

6% to build Methodist Churches in North Carolina

4% to maintain Methodist Churches in North Carolina

Paragraph 6 of the Third Division of the Indenture permitted the Trustees to withhold income from beneficiaries (except Duke University) and granted them wide latitude and discretion in distributing income to charitable beneficiaries.

Pursuant to the authority of this section, the Trustees during the period 1934 through 1959 withheld income for the benefit of Duke University, Davidson College, Furman University and Johnson C. Smith University. Paragraph 6 of the Third Division of the Indenture and the resolutions withholding income thereunder will be fully quoted in the opinion.

The trustor's intent and purposes in creating the Duke Endowment are partially revealed in the Seventh Division of the Indenture.

> "SEVENTH: 1. The party of the first part hereby declares for the guidance of the trustees hereunder:
>
> 2. For many years I have been engaged in the development of water powers in certain sections of the States of North Carolina and South Carolina. In my study of this subject I have observed how such utilization of a natural resource, which otherwise would run in waste to the sea and not remain and increase as a forest, both gives impetus to industrial life and provides a safe and enduring investment for capital. My ambition is that the revenues of such developments shall administer to the social welfare, as the operation of such developments is administering to the economic welfare, of the communities which they serve. With these views in mind I recommend the securities of the Southern Power System (the Duke Power Company and its subsidiary companies) as the prime investment for the funds of this trust; and I advise the trustees that they do not change any such investment except in response to the most urgent and extraordinary necessity; and I request the trustees to see to it that at all times these companies be managed and operated by the men best qualified for such a service."

After naming Duke University, hospitals, orphans, Methodist churches, Methodist ministers, and certain members of their families as beneficiaries of the Endowment, Mr. Duke stated:

> "7. From the foregoing it will be seen that I have endeavored to make provision in some measure for the needs of mankind along physical, mental and spiritual lines, largely confining the benefactions to those sections served by these water power developments."

On the same date that he executed the Indenture creating the Duke Endowment, Mr. Duke also created the Doris Duke Trust. The Trustees named in the Duke Endowment Indenture were also appointed to manage the Doris Duke Trust. 2,000 shares of the common stock of Duke Power Company were transferred to this trust with the same investment restrictions placed on the funds in the Duke Endowment. By its provisions

the Doris Duke Trust will terminate as to two-thirds in value of its corpus (1) when neither Doris Duke nor any of her lineal descendants shall be living, or (2) 21 years after the death of the last surviving of certain relatives of James B. Duke, whichever shall occur first. Upon such termination, the Trustees shall distribute the two-thirds to the living lineal descendants of Doris Duke or, if there be no such lineal descendants, then to the Duke Endowment. Doris Duke, who was born on 22 November 1912, has no issue.

James B. Duke died testate on 12 October 1925, a resident of the State of New Jersey. His will was duly probated in Somerset County, New Jersey, and by Item 8 of this will he bequeathed $10 million to the Trustees of the Duke Endowment

> "to be added to and become a part of the corpus of said trust estate and to be held, used, managed, administered and disposed of, as well as the incomes, revenues and profits arising therefrom and accruing thereto, by the trustees of said trust under and subject to all the terms of said trust indenture, except that: . . . and (b) all the incomes, revenues and profits arising and accruing from the said Ten Million Dollars shall be utilized, paid, applied and distributed each year by said trustees upon subject to and in accordance with all the terms of said Indenture with respect to the payment and distribution of a percentage of the incomes, revenues and profits of said trust to and for said Duke University."

After disposing of a portion of his residuary estate, Mr. Duke, by Item 11 of the will, bequeathed the remainder of his residuary estate to the Trustees of the Duke Endowment

> "to be added to and become a part of the corpus of said trust and to be held, used, managed, administered and disposed of, as well as the incomes, revenues and profits arising therefrom and accruing thereto, by the trustees of said trust under and subject to all the terms of said trust indenture, except that all the incomes, revenues and profits arising from and accruing to said residue of said residuary estate shall be utilized, paid, applied and distributed each year by said trustees as to ninety per cent thereof upon, subject to and in accordance with all the terms of said indenture with respect to the payment and distribution of a percentage of the incomes, revenues and profits of said trust to

and for maintaining and securing hospitals, and as to the remaining ten per cent thereof upon, subject to and in accordance with all the terms of said indenture with respect to the payment and distribution of a percentage of the incomes, revenues and profits of said trust to and for said Duke University."

By Item 5 of his will he bequeathed to the Doris Duke Trust all shares of stock which he owned in Duke Power Company. Upon settlement of the Duke estate, the Doris Duke Trust held 127,904 shares of Duke Power Company common stock. As of 30 November 1971, the Duke Endowment held 43.15% of Duke Power Company common stock; the Doris Duke Trust held 6.69% of said common stock.

Plaintiff Trustees commenced this action against defendants (some of them individually and as representatives of classes similarly situated) seeking, *inter alia,* the following relief:

"3. That the court order the modification of the Indenture by striking the second paragraph of the 'FIFTH' division in its entirety and by striking out of the third through the eleventh paragraphs of the 'FIFTH' division the following words: 'not retained as aforesaid for addition to the corpus of this (the) trust.'

4. That the court order the modification of the Indenture by adding a new 'NINTH' division thereto as follows:

'NINTH.

The trustees shall distribute each year for any one or more of the charitable purposes expressed in this Indenture not less than the amount required to be distributed so as not to subject the trust to tax under section 4942 of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent Federal tax laws; and the trustees shall not engage in any act of self-dealing as defined in section 4941(d) of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent Federal tax laws; nor retain any excess business holdings as defined in section 4943(c) thereof, or corresponding provisions; nor make any investments in such manner as to incur tax liability under section 4944 thereof, or corresponding

provisions; nor make any taxable expenditures as defined in section 4945(d) thereof, or corresponding provisions.'

5. That the court order the modification of the Indenture by substituting a comma for the period at the end of the fifth paragraph of the 'THIRD' division and adding thereto the following:

'and to distribute the principal of this trust to the extent necessary in the judgment of the trustees to comply with the provisions of section 4942 of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal statute.'

6. That the court enter an order in such form as may be deemed appropriate giving the Trustees the power and authority to invest and reinvest the assets of The Endowment in such securities and other properties as the Trustees in their discretion may select from time to time, subject to the conditions that (a) in making any investments not expressly permitted by the original Indenture the Trustees shall act with such care and judgment under the circumstances then prevailing which persons of ordinary prudence and reasonable discretion exercise in the management of their own affairs, considering the probable income as well as the probable safety of their capital, (b) the Trustees shall file with the clerk of this court in each year a statement in reasonable detail showing such investments made during the preceding calendar year, and (c) this court shall retain jurisdiction in this cause for the entry of such further orders relating to such investments as it may from time to time deem appropriate.

7. That the court construe the sixth paragraph of the 'THIRD' Division and the resolutions adopted by the Trustees pursuant thereto in the form shown on Exhibit B to authorize the Trustees in their discretion from time to time to distribute all or part of the assets held in each of the four separate endowment funds for the exclusive benefit of Duke University, Davidson College, Furman University and Johnson C. Smith University to the respective beneficiary of such account."

The action was heard before Judge Sam J. Ervin, III, without a jury. The question of jurisdiction of the trust estates, the Trustees, and the representatives of all classes of beneficiaries, was not controverted.

By stipulation, certain testimony taken in the case of *Cocke v. Duke University,* 260 N.C. 1, 131 S.E. 2d 909, was admitted into evidence. Under this stipulation testimony of Norman A. Cocke was introduced which tended to show his active participation in the preparation of the Duke Endowment Indenture. He testified that one of Mr. Duke's dominant motives was to build up economic conditions in certain parts of North Carolina and South Carolina. He did not think Mr. Duke contemplated the vast amount of money now required to finance Duke Power Company. In 1924 the prime source of electricity was water power, but today approximately 90% of all electricity is produced by steam.

Also admitted under the stipulation was the testimony of Phillip Heartt, Chairman of the Investment Committee of the Duke Endowment, John J. McCloy, an expert in investment problems of charitable foundations, Charles D. Dickey, an investment expert, and Dr. Raymond J. Saulnier, an expert in the field of economics.

The witness Heartt testified as to the increasing cost of operating hospitals and universities. He acknowledged that the performance of Duke Power Company stock had counterbalanced the erosion of fixed-income holdings in the Duke Endowment, but he stated that in his opinion Duke Power Company had reached maturity and would not continue to do so. He further noted the desirability of diversification in Endowment investments.

Mr. McCloy, in part, testified that the ideal situation in charitable trusts allowed the trustees great latitude in diversifying the trust portfolio.

Charles B. Dickey testified, in substance, that diversification of endowment holdings was desirable and that the Endowment's holdings in Duke Power Company common stock should not be increased.

Dr. Saulnier's testimony was concerned with the constant and growing inflationary trends. Particularly emphasized was

the extremely high cost of higher education and hospital care. He concluded that diversification was important and suggested that funds be invested so as to "protect them from the erosion of inflation . . . . "

An address by William R. Perkins, personal counsel for Mr. Duke, was admitted into evidence. Much of this address was devoted to an assessment of his client. The following excerpt exemplifies the high regard he had for Mr. Duke:

> "Nature endowed Mr. Duke most generously. A truly magnificent mind was supported by a splendid physique and graced with those finer qualities that mark the true gentleman. Common sense, rugged honesty, dynamic energy, tenacity of purpose and courage of conviction were his in abundance. He was most considerate of others, their rights, opinions and pleasures, which made him always a charming host and temperate in his views and expressions. I never heard him use an oath and he rarely spoke disparagingly of anyone."

In relating his experiences in drafting the Duke Endowment Indenture, Mr. Perkins characterized the trust as "one of the outstanding philanthropies of all time." He discussed Mr. Duke's purposes and motives in establishing the Duke Endowment and stated that the document giving it life took over ten years to prepare.

Plaintiffs' witness Edward P. Lebans testified at the January 1972 trial. Mr. Lebans is Vice-President and Director of First Boston Corporation, an investment banking firm dealing in the underwriting of securities for many large corporations, including Duke Power Company. This witness described the present magnitude of Duke Power Company's financial requirements. He referred to the Company's most recent prospectus, dated 7 December 1971, which indicated that Duke's construction program for the period 1971-1973 would amount to $1.182 billion, and that the Power Company would have to obtain about $300 million a year. He was of the opinion that the Duke Endowment could not handle the financial requirements of the Duke Power Company because of the Power Company's tremendous growth and resulting financial needs. He stated that if his company were to handle a securities offering for Duke

Power Company, the Duke Endowment would be treated in the same manner as any other institutional investor.

Carl Horn, President of Duke Power Company and found by the court to be an expert in corporate utility financing, testified that Duke Power Company spent about $380 million in 1971 and expected to spend approximately $400 million in 1972-1973. Three-fourths of this amount must come from outside financing, as the Duke Endowment has been unable to meet the financial requirements of the Duke Power Company for the past six or eight years because of the Company's increase in size. He stated that 33,500 shareholders held 30,000,000 shares of the Duke Power Company's stock. As of 1970 the Duke Endowment report indicated that it owned 13,035,100 shares of the stock.

Charles W. Shaeffer, President and Chairman of the Board of T. Rowe Price and Associates, Inc., was found to be an expert in the field of investment counseling, particularly as to foundations and educational institutions. He recommended that private foundations invest 60 to 80 percent of their holdings in equities or stocks and the balance in fixed-income securities.

The respective presidents of Duke University, Davidson College, Furman University and Johnson C. Smith University testified as to each of their university's financial condition and as to the past and present contributions to the universities by the Duke Endowment.

Mr. John F. Day, Treasurer of the Duke Endowment and the person who generally supervises the Duke Endowment records, testified that the Endowment did not employ a professional investment adviser but relied on members of its Board who were in contact with banking firms, investment managers and other investment experts to aid in the making of decisions for the Endowment. He stated that the Endowment maintains a regular review committee from its membership which meets bi-monthly, and that Mr. Frederick W. Bowman, the Endowment's Investment Officer, provides a daily review of Endowment investments. The total annual rate of return from the restricted investment (considering interest, dividends and capital returns) for the years 1960, 1965 and 1970, was as follows:

Kind of Investment	1960	1965	1970
Duke Power Co. Voting Stock	2.71	2.33	5.66
Duke Power Co. Non-Voting Stock	4.62	—	—
Other Voting Stock	2.23	2.21	4.92
Other Non-Voting Stock	4.90	4.66	7.32
Duke Power Bonds	2.72	3.32	5.84
Other Bonds (including U.S.)	3.63	3.51	5.10

The Endowment's net income after deducting expenses and the 20% annual accumulation for the years as below stated was: 1925: $310,865.66; 1960: $10,628,446.25; and 1970: $19,071,-676.67 after a set aside of $968,922.80 for Federal Excise Tax.

Plaintiffs introduced many exhibits and charts tending to show inflationary trends, particularly as such inflation related to the high cost of higher education and hospital care.

Upon conclusion of plaintiffs' evidence, the Attorney General moved for dismissal of the action insofar as it pertained "to the investments to be made by the Duke Endowment." Defendant Guardian ad Litem Bailey Patrick, Jr., moved to dismiss as to "Paragraph 5 and 7 of the prayer for relief." Both motions were denied.

Defendant Mary Jane Walton offered into evidence a Duke Endowment record entitled "Transfers from Reserve Fund to Additions to Corpus Account."

Defendant Attorney General introduced certain interrogatories which tended to show that the Trustees of the Duke Endowment had not discussed alternative investments for the restricted funds at meetings during 1970-1971, nor had they at such meetings considered the possibility of investments in North Carolina industries and South Carolina industries in the event that it became necessary for the Endowment to divest itself of Duke Power Company stock. Among other alternatives, the Attorney General suggested investment in Small Business Association loans.

Upon completion of defendants' evidence, the Attorney General and Bailey Patrick, Jr., Guardian ad Litem, renewed their motions of dismissal, which motions were again denied.

The judgment, in effect:

1. Denied the Trustees' request to modify the Fifth division of the Indenture so as to delete the 20% mandatory accumulation provision.

Plaintiff Trustees appealed, but expressly conceded in their brief there was no error in this ruling.

2. Allowed plaintiffs' prayer that the Indenture be amended to comply with the provisions of the 1969 Tax Reform Act. This amendment permits the Trustees to annually distribute not less than the amount required to avoid taxation under Section 4942 of the Internal Revenue Code of 1954 or any corresponding provisions of any subsequent federal tax law. The modification further provided that the Trustees shall not engage in any act of self-dealing as defined in Section 4941(d) of the Internal Revenue Code of 1954 nor retain any "excess business holdings" as defined in Section 4943(c) thereof, nor make any investments so as to incur tax liability under Section 4944 thereof, nor make any taxable expenditures as defined in Section 4945(d) thereof, or corresponding provisions. There was no appeal from the granting of this relief.

3. Allowed plaintiffs' prayer that the Indenture be amended by adding to the 5th paragraph of the Third Division the following: "and to distribute the principal of this trust to the extent necessary in the judgment of the Trustees to comply with the provisions of Section 4942 of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal statute." The Attorney General appealed. Defendant Mary Jane Walton appealed conditionally. She appealed only if the court should hold that the funds accumulated in the "additions to corpus" accounts may be distributed. All defendants appealed the order permitting the Trustees to decide the manner in which the funds were to be distributed.

4. Allowed plaintiffs' prayer that the Indenture be amended so as to broaden the investment powers of the Trustees. The Attorney General appealed to the granting of this relief.

5. Interpreted the 6th paragraph of the Third Division of the Indenture together with certain resolutions of the Trustees to allow the Trustees to distribute the "corpus" created by such resolutions to the beneficiaries therein named. The Attor-

ney General, Mary Jane Walton and Bailey Patrick, Jr., Guardian ad Litem appealed.

This Court allowed petition for writ of certiorari to the North Carolina Court of Appeals prior to determination on 24 May, 1972.

Fleming, Robinson & Bradshaw, P.A. by Russell M. Robinson II, Attorneys for plaintiff-appellees.

Childs and Patrick, Attorneys for Bailey Patrick, Jr., Guardian ad Litem.

Helms, Mulliss & Johnston by E. Osborne Ayscue, Jr., Attorneys for the defendant-appellee The Trustees of Davidson College.

Young, Moore & Henderson by Charles H. Young, Attorneys for defendant-appellant Mary Jane Walton.

A. Kenneth Pye and Powe, Porter & Alphin by E. K. Powe, Attorneys for Duke University, defendant-appellee.

Robert Morgan, Attorney General, by Christine Y. Denson, Assistant Attorney General.

BRANCH, Justice.

We first consider whether the trial court erred in broadening the investment powers of the Trustees of the Duke Endowment and in granting authority to the Trustees to distribute principal to the extent necessary to comply with the requirements of certain tax enactments.

Paragraph 4 of the Third Division of the Indenture restricts investment by the Trustees to investments in Duke Power Company, U. S. Government bonds and certain state and municipal bonds. Paragraph 4 provides:

> "4. To invest any funds from time to time arising or accruing through the receipt and collection of incomes, revenues and profits, sale of properties, or otherwise, provided the said trustees may not lend the whole or any part of such funds except to said Duke Power Company, nor may said trustees invest the whole or any part of such funds in any property of any kind except in securities of said Duke Power Company, or of a subsidiary thereof, or in bonds validly issued by the United States of America,

or by a State thereof, or by a district, county, town or city which has a population in excess of fifty thousand people according to the then last Federal census, which is located in the United States of America, which has not since 1900 defaulted in the payment of any principal or interest upon or with respect to any of its obligations, and the bonded indebtedness of which does not exceed ten per cent of its assessed values. Provided further that whenever the said trustees shall desire to invest any such funds the same shall be either lent to said Duke Power Company or invested in the securities of said Duke Power Company or of a subsidiary thereof, if and to the extent that such a loan or such securities are available upon terms and conditions satisfactory to said trustees."

This "restricted" corpus is comprised of securities in Duke Power Company having a value of approximately $306,000,000. The remaining portion of the "restricted" corpus consists of $67,000,000 in fixed-income government and municipal bonds plus a relatively small amount of common stocks. There is an "unrestricted" corpus valued at approximately $9 million. We are here concerned only with the "restricted" corpus. It is noted that plaintiffs do not seek modification of the Indenture with respect to the Trustees' investment authority over Duke Power securities. The Trustees possess the power to sell such securities by unanimous vote.

This Court considered a similar question regarding the powers of investment of the Duke Endowment in the case of *Cocke v. Duke University,* 260 N.C. 1, 131 S.E. 2d 909. There the Court reversed the action of the trial judge in allowing modification. Rodman, J., speaking for the Court, concluded: "The evidence fails to establish facts necessary for an order authorizing the trustees to disregard the express provisions of the trust indenture. The court should have allowed the motion to nonsuit."

Certain pertinent propositions and principles of law were established in *Cocke v. Duke University, supra:*

First. The provision in the Indenture that the law of New Jersey was determinative of the appeal was adopted with the recognition that New Jersey law and North Carolina law governing modification of trust instruments are in substantial accord.

Second. A court may authorize a trustee to ignore the express provisions of the trust instrument limiting his authority with respect to the kind of securities in which he may invest. " 'But the power of the court should not be used to direct the trustee to depart from the express terms of the trust, except in cases of emergency or to preserve the trust estate.' *Penick v. Bank,* 218 N.C. 686, 12 S.E. 2d 253. 'It must be made to appear that some exigency, contingency, or emergency has arisen which makes the action of the court indispensable to the preservation of the trust and the protection of infants.' *Redwine v. Clodfelter,* 226 N.C. 366, 38 S.E. 2d 203."

New Jersey by statutory enactment recognizes the equitable power of the court, under certain circumstances, to modify the provisions of a trust instrument. N.J.S.A. 3A:15-15 (formerly 1937 R.S. 3:16-17, 18). This statute merely codified the earlier decisions of the New Jersey courts. *Morris Community Chest v. Wilentz,* 124 N.J. 580, 3 A 2d 808. See Annot., 170 A.L.R. 1219.

N.J.S.A. 3A:15-15 provides:

"Investment of trust funds; change in conditions; application to court

a. In all cases where by reason of a change in conditions which occurs, or *which may be reasonably foreseen,* the objects of any trust heretofore or hereafter created by will or other instrument, or by order of court, might be defeated in whole or in part by the investment or continuance of the investment of all the funds of such trust in the kinds of securities to which the trustee is or shall be limited by the statutes of this state or by the instrument or court order creating such trust, any trustee or beneficiary of such trust may institute an action in the superior court to secure authority permitting or directing the trustee or trustees of such trust to invest all or a part of the funds thereof in other kinds of investments.

b. If the court shall find that by reason of a change in conditions which occurs since the creation of such trust or *which may be reasonably foreseen,* the objects of the trust might be defeated in whole or in part by the investment, or continuance of the investment, of all the funds of such trust in the kinds of investments to which the trustee is then limited by the statutes of this state or by the instrument or court order creating such trust and that the objects

of the trust and the interests of all the beneficiaries thereof, whether vested or contingent, would be promoted by the investment of all, or some part, of the trust funds otherwise, the court shall by its order or judgment, notwithstanding that the trust so created may be in default in respect to the terms of the instrument creating such trust, authorize or direct the trustee of such trust to invest the whole, or such part thereof as it shall designate, in any class of investments, including common or preferred stocks of corporations of this state or of any other state or country, which in its judgment will promote the objects of the trust and the interests of all the beneficiaries thereof. However the court shall not authorize or direct the purchase of any class of common or preferred stock of any corporation unless the corporation shall have been organized and engaged in the conduct of its business for 5 calendar years immediately preceding the purchase of the stock of the corporation.

c. As used in this section 'trust' shall include 'guardianship', 'trustee' shall include 'guardian', and 'beneficiary' shall include 'ward'." (Our emphasis)

Third. "' . . . [T]he condition or emergency asserted must be one not contemplated by the testator, and which, had it been anticipated, would undoubtedly have been provided for; and in affording relief against such exigency or emergency, the court must, as far as possible, place itself in the position of the testator and do with the trust estate what the testator would have done had he anticipated the emergency.' *Cutter v. Trust Co.*, 213 N.C. 686, 197 S.E. 542." We note that substantially the same language was used by the New Jersey Court in *Pennington v. Metropolitan Museum of Art*, 65 N.J. Eq. 11, 55 A. 468, to wit: " . . . in an emergency which had not been considered by the creator of the trust, and which, if anticipated, would have been provided for, a court of equity might take the place of the creator of the trust, and do what he would have done."

[1] There is an abundance of authority in both North Carolina and New Jersey to the effect that the courts will modify a trust instrument to preserve the purpose of the trust or protect its beneficiaries when some exigency or emergency not anticipated by the trustor will defeat his intent. *Lambertville Nat.*

Bank v. Bumster, 141 N.J. Eq. 396, 57 A. 2d 525; *Morris Community Chest v. Wilentz, supra; Wachovia Bank & Trust Co. v. Morgan,* 279 N.C. 265, 182 S.E. 2d 356; *Wachovia Bank & Trust Co. v. John Thomason Const. Co.,* 275 N.C. 399, 168 S.E. 2d 358; *Wachovia Bank & Trust Co. v. Johnston,* 269 N.C. 701, 153 S.E. 2d 449; *In re Trusteeship of Kenan,* 261 N.C. 1, 134 S.E. 2d 85, later appeal 262 N.C. 627, 138 S.E. 2d 547.

Fourth. Finally, *Cocke v. Duke University, supra,* stands for the proposition that in order to displace or circumvent an express provision in the trust instrument, one must do more than show a change of economic conditions. See also, *Reiner v. Fidelity Union Trust Co.,* 126 N.J. Eq. 78, 8 A. 2d 175; Annot., 170 A.L.R. 1219.

The "restricted" corpus is made up of three funds. The first, or "original" corpus, was the fund used to create the Duke Endowment. The "original" corpus in its inception had a value of $40 million and was intended to be the nucleus of the Endowment. The remaining two funds are derived from the will and a codicil to the will which was subsequently executed by Mr. Duke. As of 30 November 1971, these three corpus funds accounted for 13,035,100 shares of Duke Power Company. This represented 43.15% of the outstanding shares of Duke Power Company on that date. This percentage is of particular significance when considered in light of the provisions of Internal Revenue Code § 4943 of the Tax Reform Act of 1969 (26 U.S.C.A. § 4943). We should here make it clear that we shall not attempt to consider all the effects and ramifications of this section of the Internal Revenue Code, but expressly limit our consideration to its effect and impact on the Duke Endowment.

Sections 4940, *et seq.,* of this Act impose certain requirements and place certain restrictions on private foundations, including the Duke Endowment. Perhaps the most restrictive and unique section is Sec. 4943, which penalizes by way of taxation "excess business holdings." As defined in Sec. 4943(c)(1), the phrase "excess business holdings" means that "amount of stock or other interests in the enterprise which the foundation would have to dispose of to a person other than a disqualified person in order for the remaining holdings of the foundation in such enterprise to be permitted holdings."

An initial tax of 5% of the value of the "excess business holdings" is levied if a foundation violates the provisions of

Sec. 4943, and an additional tax of 200% of the value of the excess holdings retained ninety days after being notified of its violation may be imposed on the foundation.

Sec. 4946(a) defines "disqualified person" as, including among others, a member of the family whose ancestor was a substantial contributor to the foundation. The Doris Duke Trust, established by James B. Duke for his daughter, is clearly a "disqualified person" under the statutory definition. It presently holds 2,020,052 shares of the Duke Power Company common stock. According to the record, there are other disqualified persons holding 1,421,057 shares of Duke Power stock. On 30 November 1971 all disqualified persons, including the Doris Duke Trust, owned 11.39% of the outstanding stock in Duke Power Company.

Sec. 4943(c)(5) of the Tax Reform Act of 1969 allows a 10-year period of grace after distribution to the foundation under a trust or will in which the trust must divest itself of the excess business holdings or suffer the severe tax penalties. Sec. 4943(c)(6) sets a 5-year period to dispose of such holdings after receipt by the foundation of gifts or bequests.

Sec. 4943 sets up an intricate network of standards and criteria. Its application depends upon the facts and circumstances existing at a given point in time. The extent of stock divestiture, if required, will be governed by such factors as the percentage of stock owned by disqualified persons and the Endowment, dilution of issued and outstanding shares, and possible changes or interpretations in the controlling tax law.

As argued by the Trustees and concluded by the trial judge, the Tax Reform Act may: (1) prevent the Duke Endowment from purchasing any more Duke Power stock; (2) limit the Endowment's ownership in Duke Power Company to 25% after 26 May 1979; and (3) require the Endowment to dispose of stock in Duke Power Company that it might receive from the Doris Duke Trust.

The enactment of Sec. 4943, at the very least, will require the Trustees to constantly review the percentage ownership of the Company as represented by their holdings, whether attributable to present holdings, additions thereto from existing trusts or agreements, or to future transfers by gifts. This review may result in the decision by the Trustees, based upon the facts as they then exist, to dispose of a large number of

shares because of the application of and sanctions imposed by Sec. 4943. Thus, it becomes readily apparent that the provisions of the 1969 Tax Reform Act will have a tremendous and far-reaching effect on the Duke Endowment.

The Trustees stressfully argue that divestment of the Duke stock will compel them to invest in fixed-yield, low income government bonds and securities, thereby seriously impairing the Endowment's capacity to meet the spiraling costs of its beneficiaries' needs.

To illustrate the rising costs and needs of those benefited by the Duke Endowment, plaintiffs introduced into evidence various charts and exhibits. It was shown, for example, that the average cost per inpatient per day in assorted hospitals increased from $20.04 in 1960 to $55.52 in 1970—an increase of 177.05% at a compound rate of approximately 11% per year. The cost of hospital construction on a per-bed average rose from $11,245 in 1950 to $19,072 in 1960 and $35,035 in 1970. The average cost per student at the four universities assisted by the Endowment climbed from $2,024 in the academic year 1960-61 to $4,294 in 1970-71. Plaintiffs estimate this 112.15% increase to represent a compound rate of almost 8% per year. Similar cost and need increases, they maintain, have afflicted the other charitable beneficiaries.

It is of interest to note that of the twenty-six foundations having assets greater than $100 million reported by Waldemar A. Nielsen in his recently published book, *The Big Foundations,* the Duke Endowment had, by far, the worst cumulative investment performance for the years 1967, 1968 and 1969. While Standard and Poor's Index showed a rate of return gain of 26.94% for the three years, the Duke Endowment suffered a cumulative performance rate of return loss of −15.65%. By the end of 1969 the Endowment had fallen in rank from the third largest foundation to the fifth largest behind Ford, Lilly, Rockefeller and Pew. See, W. Nielsen, *The Big Foundations,* (1972).

Plaintiffs further contend that their problems will be compounded and one of the stated desires of the trustor—to provide a safe and enduring investment—will be thwarted by the provisions of Sec. 4942 of the Tax Reform Act of 1969 unless their investment powers are broadened. This section, in substance, provides that a private foundation must distribute

currently all its net income other than long-term capital gains. To prevent avoidance of the requirement for distribution of income by investment in growth stocks or nonproductive land, a private foundation is required to pay out at least a specified percentage of its non-charitable assets. The minimum pay-out as applied to the Duke Endowment is presently 4½%, and is projected to reach 6% by 1 January 1975. The Secretary of the Treasury is authorized to adjust this rate from time to time. Noncompliance with these provisions would result in an initial tax of 15% of the amount of income remaining currently undistributed, and noncompliance at the close of an allowed correction period would result in a 100% tax levy on the amount remaining undistributed at that time.

The Indenture gave the Trustees no authority to invade the corpus; however, one of the portions of Judge Ervin's judgment did give the Trustees authority to comply with this and other portions of the Tax Reform Act. Even so, it is evident that every party to this action would prefer that the corpus of the trust remain intact, free from encroachment by this tax statute. Plaintiff Trustees assert that under their existing investment powers they cannot meet the requirements of Sec. 4942 and prevent erosion of the Endowment's corpus fund.

We quote a portion of Judge Ervin's Findings of Fact, Conclusions of Law, and relief granted:

FINDINGS OF FACT

"30. In 1924, there was no precedent in the history of this country for the long-term inflation that has occurred since about 1940; and in 1924 James B. Duke did not foresee, and could not reasonably have foreseen, the persistent, long-term inflation that has developed as a result of several factors that have become operative in the economy since 1924.

32. The beneficiaries of the Endowment are dependent upon the Endowment for the payment of expenses, and the importance to these beneficiaries of the support furnished by the Endowment will increase in the future.

37. The income from the Endowment's non-Duke portfolio will not increase as the needs and expenses of its beneficiaries increase to the extent that such portfolio is invested in fixed-income securities.

38. A change in conditions has occurred since the creation of the Endowment, and further changes may be reasonably foreseen, by reason of which the objects of the Endowment might be defeated in whole or in part by the investment or continuance of the investment of the funds of the non-Duke portfolio of the Endowment in the kinds of securities (that is, certain designated government bonds) to which the trustees are now limited by the fourth paragraph of the Third division of the Indenture; and the objects of the Endowment and the interest of all the beneficiaries thereof, whether vested or contingent, would be promoted by the investment of all, or some part, of the funds of the non-Duke portfolio of the Endowment in other securities.

39. The changes in conditions since the creation of the Endowment, and the probable future changes, have created an emergency which had not been considered by James B. Duke, the creator of the Endowment, and which, if anticipated, would have been provided for.

40. Some of the changes which have occurred since the creation of the Endowment in 1924, and which James B. Duke did not foresee and could not reasonably have foreseen, are:

(a) the enactment of the Tax Reform Act of 1969 which, among other things, (i) prevents the Endowment from buying any more stock of Duke Power Company, (ii) requires the Endowment to reduce its percentage of ownership in the outstanding common stock of Duke Power Company from the present 43.15% to not more than 25% by May 29, 1979, and (iii) will require the Endowment to dispose of any stock of Duke Power Company that it may acquire from The Doris Duke Trust, as a result of all of which the Endowment cannot hereafter expect to control Duke Power Company indefinitely in the manner contemplated by James B. Duke;

(b) the advent since about 1940 of an inflationary economy wherein prices have risen and will continue to rise over a long period of time at an annual rate of about 3% to 5% per annum, and wherein most people

expect such inflation and take it into consideration in their business and investment planning;

(c) changes in investment philosophy and policies whereunder it is no longer considered prudent and safe to invest all or most of a portfolio of trust investments in government bonds and whereunder, because of the erosion of inflation and because of better government regulation, it is now considered prudent and necessary to invest in a diversified portfolio of common stocks as well as fixed-income securities, with greater emphasis at the present time on common stocks;

(d) the accelerating rate and increasing scope of changes in economic and social conditions, which make it necessary for trustees of a charitable trust to have a wider range of choices and a greater flexibility in selecting and disposing of investments;

(e) the shift from conventional hydroelectric energy to steam generated energy, as demonstrated by the fact that the ratio was approximately 96% steam and 4% water power in 1970 compared with 10% steam and 90% water power in 1929, and the advent of nuclear energy, as a result of all of which Duke Power Company is and will increasingly be primarily dependent upon natural resources obtained from areas outside of North Carolina and South Carolina, instead of water power within these States, for the generation of electricity; and

(f) the growth of the financial needs of Duke Power Company so far beyond the ability of the Endowment to supply the same that it now makes no appreciable difference to Duke Power Company whether or not the Endowment buys its securities.

41. If James B. Duke had anticipated the present conditions when he created the Endowment in 1924, he would have provided that the trustees of the Endowment may now and hereafter, to the extent that any funds of the Endowment are not loaned to or invested in the securities of Duke Power Company or its subsidiaries, invest and reinvest those funds in such securities and other properties as the trustees in their discretion may select from time to

time, subject to currently appropriate limitations on the investment authority of fiduciaries."

CONCLUSIONS OF LAW

"13. The Tax Reform Act, among other provisions, (a) prevents the Endowment from buying any more shares of any class of stock, whether voting or nonvoting and whether common or preferred, of Duke Power Company, (b) requires the percentage of the total outstanding shares of common stock of Duke Power Company owned by the Endowment to be reduced to not more than 25% by May 26, 1979, and (c) would require the Endowment to dispose of stock of Duke Power Company that it might receive from The Doris Duke Trust.

14. The facts in this case are sufficient to justify the Court granting the relief requested in paragraph 6 of the prayer for relief in the Complaint, as amended."

. . . .

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

. . . .

"4. The Indenture of The Duke Endowment is hereby modified by adding the following sentence to the end of the fourth paragraph of the Third division:

> 'Provided further that the trustees may, to the extent that any funds of this trust are not loaned to or invested in the securities of Duke Power Company or its subsidiaries, invest and reinvest those funds in such securities and other properties as the trustees in their discretion may select from time to time, subject to the condition that in making any investments not expressly permitted by this Indenture the trustees shall act with such care and judgment under the circumstances then prevailing which persons of ordinary prudence and reasonable discretion exercise in the management of their own affairs considering the probable income as well as the probable safety of their capital.' "

We do not deem it necessary to recount the vast array of facts, figures and testimony offered by plaintiffs indicating the charitable beneficiaries' burgeoning needs and skyrocketing

costs. The Endowment's ability in the past to successfully cope with these problems has been amply demonstrated. There is no question but that many persons and institutions have been incalculably benefited by the Duke Endowment. This, ostensibly, is the reason the Endowment was created. To diminish the foundation's effectiveness in rendering aid and support to its beneficiaries would likewise add to the destruction of its primary purpose and importance. We believe that the inevitable effects of inflation and taxation on this trust property, which without modification will be increasingly committed to low, fixed-yield securities, will greatly impair the Duke Endowment's ability to perform in the role directed by James B. Duke.

[2] Accordingly, we are of the opinion that there was ample evidence to support Judge Ervin's Findings of Fact above quoted. Thus, it appears that unanticipated changes of circumstance, both existing and reasonably foreseeable, have created an emergency which threatens to defeat, in whole or in part, the purposes and objects of the Duke Endowment.

Upon such showing, the court must determine the intent of the settlor in order to fashion the proper remedy. *Lambertville Nat. Bank v. Bumster, supra; Pennington v. Metropolitan Museum of Art, supra; Morris Community Chest v. Wilentz, supra; In Re Trusteeship of Kenan, supra.* More simply stated, we must here seek to determine what Mr. Duke would do if he were living. In search of this answer we first look to his dominant purpose in creating the Duke Endowment. The trial judge's Finding of Fact No. 28 that "The principal purpose of the Endowment as intended by Mr. Duke and as it exists today, is to serve the needs and pay the expenses of its charitable beneficiaries by distributing funds to or for the benefit of those beneficiaries," is supported by the record evidence. We note in passing that W. M. Perkins, Mr. Duke's attorney and confidant, who spent many months with the settlor in the preparation of the Trust Indenture and his will, characterized the Duke Endowment in these words: "To uplift mankind! To promote human happiness! Such is the true philosophy and the sublime of life. Such, in its essence, is The Duke Endowment I have endeavored to portray to you."

A perusal of the pertinent documents and the record evidence discloses other satellite purposes, including control of Duke Power Company through the Duke Endowment, the development of areas of North and South Carolina through water

power for investment, and the use of Duke Power Company as the Endowment's prime investment source.

We think it necessary to consider some of James B. Duke's personal characteristics and attributes. His financial genius guided the American Tobacco Company to its place as one of the giants of American industry. He was the guiding hand in the creation and building of the great Duke Power Company. He has been characterized as being astute and adaptable to the changing needs of his time. The record relates an instance of these characteristics. In 1925 Duke Power Company was unable to supply all the demands upon it because of a severe drought. Immediately thereafter, Mr. Duke directed that a steam plant be constructed so as to prevent recurrence of such disability. The Charlotte Observer reported this prompt action as being "typical" of Mr. Duke's ability to cope with unprecedented situations.

We again refer to that portion of *Cocke v. Duke University, supra,* to the effect that modification of a trust instrument requires more than a change of economic conditions. We have some doubt as to the efficacy of that statement where it is shown that the ravages of inflation and other economic pressures threaten to destroy the dominant purposes of a trust. See, generally, *Carlick v. Keiler,* 375 S.W. 2d 397 (Ky. App. 1964); *In Re Trusteeship under Agreement with Mayo,* 259 Minn. 91, 105 N.W. 2d 900; *Troost Avenue Cemetery Co. v. First National Bank,* 409 S.W. 2d 632 (Mo. 1966); II Scott on Trusts, § 167 (3rd Ed. 1967); Bogert, Trusts and Trustees, § 561 (2nd Ed. 1965).

The *Cocke* decision, however, recognized the unfettered right of the Trustees to invest in the stock of Duke Power Company, the "prime investment" which for many years has counterbalanced inflationary trends. The Tax Reform Act of 1969 may not only preclude such investment but may well mandate divestment of a large portion of the Duke Power stock held by the Endowment. Under the existing Indenture investment provisions, the Trustees are relegated to investments in relatively low, fixed-yield securities in filling the void caused by forced divestiture of the Duke stock. Such an alternative can hardly combat the forces of inflation and at the same time satisfy the increasing needs of the Endowment's charitable beneficiaries.

We are convinced that this perceptive and shrewd businessman, were he alive today, would direct the Trustees of the Duke

Endowment to take immediate action to prevent erosion of the corpus of the trust in order to preserve the dominant purposes of the Duke Endowment: to serve the needs and pay the expenses of its charitable beneficiaries. The voluminous evidence offered by plaintiffs leads us to believe Mr. Duke would have accomplished this purpose by broadening his Trustees' powers of investment and authorizing his Trustees to distribute principal only to the extent necessary to comply with Sec. 4942 of the 1969 Tax Reform Act or corresponding provisions of any subsequent federal statute.

[2] The trial judge's Findings of Fact were supported by competent evidence, and the Findings in turn support the Conclusions of Law. We find no error of law in the trial judge's entry of judgment broadening the Trustees' powers of investment and authorizing principal distribution. In accordance with Mr. Duke's wishes the Trustees should give all possible preference, consistent with good investment practices, to investments furthering the social and economic welfare of the areas served by Duke Power Company.

We next consider whether the Trustees of the Duke Endowment may distribute funds "added to corpus" pursuant to certain resolutions. Plaintiffs requested the trial court to construe the 6th paragraph of the Third Division and the resolutions adopted by the Trustees pursuant thereto to permit distribution of all or part of these funds.

The income from the "original" corpus, one of the three principal funds constituting the Duke Endowment, is payable in specified percentages to certain beneficiaries set forth in the Fifth Division of the Indenture. The 2nd paragraph of this Division directs the Trustees to retain 20% of the net income before distribution until the total aggregate of such additions equals $40 million. 32% of the income remaining must be paid to Duke University, barring certain contingencies, as mandated by the 3rd paragraph of the Fifth Division.

Mr. Duke's will, executed on the same day as the Indenture, poured other assets into the trust. Item 8 of the will bestowed $10 million unto the Endowment, providing that the income accruing thereto be paid to Duke University. Item 11 as rewritten by codicil permitted the Trustees to expend $7 million of the residue of testator's residuary estate for Duke University's benefit and directed that 90% of the income, revenues and profits

derived therefrom be distributed to hospitals. The remaining 10% was to be paid to Duke University.

The Third Division of the Indenture lists the powers conferred upon and the restrictions imposed upon the Trustees in the management and administration of these assets. Because of its critical importance to decision of this issue, we set out paragraph 6 of the Third Division in full:

> "6. As respects any year or years and any purpose or purposes for which this trust is created (except the payments hereinafter directed to be made to Duke University) the trustees in their uncontrolled discretion may withhold the whole or any part of said incomes, revenues and profits which would otherwise be distributed under the 'FIFTH' division hereof, and either (1) accumulate the whole or any part of the amounts so withheld for expenditures (which the trustees are hereby authorized to make thereof) for the same purpose in any future year or years, or (2) add the whole or any part of the amounts so withheld to the corpus of the trust, or (3) pay, apply and distribute the whole or any part of said amounts to and for the benefit of any one or more of the other purposes of this trust, or (4) pay, apply and distribute the whole or any part of said amounts to or for the benefit of any such like charitable, religious or educational purpose within the State of North Carolina and/or the State of South Carolina, and/or any such like charitable hospital purpose which shall be selected therefor by the affirmative vote of three-fourths of the then trustees at any meeting of the trustees called for the purpose, complete authority and discretion in and for such selection and utilization being hereby given the trustees in the premises."

Acting pursuant to the above quoted provisions, the Trustees withheld and invested incomes, revenues and profits otherwise distributable. During the years 1934 to 1959 a series of resolutions were adopted by the Trustees. These resolutions, hereinafter referred to as "corpus" resolutions, were in the following form:

> "WHEREAS, acting under said power the said Trustees have withheld and invested incomes, revenues and profits therefrom which would otherwise have been distributed under the FIFTH division of said Indenture, and now acting

further under said powers they wish to make payments, applications and distributions out of said withholdings as herein stated; on motion of ..... seconded by ..... , it was unanimously

RESOLVED that the following securities and cash out of said investment of said withholdings, namely:

[Here the assets transferred are named]

be and the same are hereby added to the Corpus of the trust established by said Indenture, said additions and all the incomes, revenues and profits therefrom, and all additions and accretions thereto to be held, used, invested and administered by the Trustees of said trust and their Successor Trustees under and in accordance with all the terms of said Indenture, except that the incomes, revenues and profits accruing to and arising from said additions to said corpus shall be paid, applied and distributed to the . . . . . University mentioned and described in Division FIFTH of said Indenture for the purposes stated and subject to the powers of withholding given in said Division FIFTH as respects said University."

Each resolution provided that income from the securities therein named be paid and applied for the benefit of either Duke University, Furman University, Johnson C. Smith University or Davidson College. As of 30 November 1971, the aggregate market value of the assets in the four accounts was $44,636,160. Of this amount $40,101,079 were earmarked for Duke University, $1,824,196 for Furman University, $889,511 for Johnson C. Smith University, and $1,821,374 for Davidson College.

None of the named universities have ever had funds withheld from them pursuant to paragraph 6 of the Third Division of the Indenture. The funds were principally made up of funds withheld from hospitals. These withheld funds were channeled into four accounts, each of which being captioned "Additions to Corpus—..... University."

[3] One of the basic tenets of trust law is that the principal or corpus constituting the subject matter of a trust cannot be distributed prior to termination in the absence of express or implied authority in the trust instrument. *Bank v. Broyhill,* 263 N.C. 189, 139 S.E. 2d 214; *Woody v. Christian,* 205 N.C. 610, 172 S.E. 210; Bogert, Trusts and Trustees, § 812 (2nd Ed.

1962). See generally, Annot., 1 A.L.R. 2d 1328. There are two exceptions to this rule. First, as pointed out earlier, a court may permit modification of the instrument when essential to protect the trust and its beneficiaries from an unforeseen exigency threatening to destroy the settlor's intent and purposes in creating the trust. *Hardy v. Bankers Trust Co.*, 137 N.J. Eq. 352, 44 A. 2d 839; *Fidelity Union Trust Co. v. J. R. Shanley Estate Co.*, 113 N.J. Eq. 562, 167 A. 865; *Shannonhouse v. Wolfe*, 191 N.C. 769, 133 S.E. 93; II Scott on Trusts, § 167 (3rd Ed. 1967). Second, a court may order invasion of the corpus for the necessary support of a beneficiary when the interest of another beneficiary is not thereby impaired. *Hughes v. Federal Trust Co.*, 119 N.J. Eq. 502, 183 A. 299; *Gluckman v. Roberson*, 115 N.J. Eq. 522, 171 A. 674, aff'd 116 N.J. Eq. 531, 174 A. 488; II Scott on Trusts, § 168 (3rd Ed. 1967); Restatement of Trusts 2d § 168 (1959).

Plaintiffs do not dispute this general rule or claim to be within either of the exceptions. Nor do they argue that the withheld funds were not "added to corpus" pursuant to the second option in the 6th paragraph of the Third Division by their resolutions. It is their contention that the funds in question were placed in a distributable-type corpus, a category entirely different from the permanent corpus established by the Indenture. Plaintiffs seek to demonstrate that Mr. Duke intended to and did give his Trustees such broad powers in the accumulation, use and distribution of the income from the corpus as would allow the Trustees to create a temporary, distributable corpus, and that their actions did, in fact, create such a corpus.

Examples of the language granting the broad powers are found in paragraph 6 of the Third Division, where the Trustees are granted (except as to payments to Duke University) "uncontrolled discretion to withhold the whole or any part of said incomes and profits which would otherwise be distributed under the Fifth Division hereof . . . ," and in paragraph 8 of the same Division which granted to the Trustees "any and all other powers which are necessary or desirable in order to manage and administer the trust and the properties and funds thereof, and carry out and perform in all respects the terms of this indenture according to the true intent thereof."

Defendants, on the other hand, strongly contend that once the withheld funds were added to the corpus of the trust estab-

lished by the Indenture they became a part of the permanent corpus. Nothing, they argue, appears in the language of the trust Indenture expressly or impliedly authorizing the creation of a temporary corpus or the power to invade corpus.

All parties to this action agree that the Indenture was drawn by a careful and skilled legal craftsman; plaintiffs therefore aver that all words used by the scrivener were used with care and with a purpose. They call attention to paragraph 2 of the Fifth Division and paragraph 3 of the Fifth Division where, in providing for additions to corpus, Mr. Duke used the phrase "for the purpose of increasing the principal of the trust estate." Plaintiffs note the absence of this descriptive phrase in the discretionary powers contained in the 6th paragraph of the Third Division and urge that the difference in the language employed permits a reasonable conclusion that Mr. Duke intended to sanction a distributable as well as a permanent corpus.

Conversely, defendants take the position that no reason existed for Mr. Duke to have anticipated a distributable-type corpus made up of withheld income, for the temporary housing of such funds could be accomplished by the Trustees pursuant to the provision of paragraph 6 authorizing the withholding of incomes, revenues and profits. Since the Trustees could "withhold . . . any part of said incomes . . ." they could invest the withheld funds in accordance with the power in the 4th paragraph of the Third Division enabling them "to invest any funds from time to time arising or accruing through the receipts and collections of incomes . . ." This is, in effect, the course of action taken by the Trustees in establishing a reserve fund made up of funds withheld from certain beneficiaries. The reserve fund constituted the source from which the "additions to corpus" were made.

Defendants place their greatest reliance on the argument that each of the options listed in the 6th paragraph is mutually exclusive. Once any one option is exercised, the involved funds cannot be used pursuant to one of the other options. Therefore, once withheld funds have been "added to corpus" by resolution adopting the second option, subsequent attempts to accumulate or distribute the same funds according to the first, third or fourth options would be inefficacious. This argument highlights the "either . . . or" proposition used to introduce and join the respective options.

Black's Law Dictionary defines "or" as "a disjunctive participle, used to express an alternative or to give a choice of one among two or more things."

Our Court, construing a statute in the case of *In Re Duckett*, 271 N.C. 430, 156 S.E. 2d 838, stated: "Further, the disjunctive participle 'or' is used to indicate a clear alternative. The second alternative is not part of the first, and its provisions cannot be read into the first." On the other hand, it is recognized that the word "or" may be interpreted as the word "and" when necessary to effect the apparent intent of the person executing the trust indenture or other paper writing. *Jones v. Waldroup*, 217 N.C. 178, 7 S.E. 2d 366; *Pilley v. Sullivan*, 182 N.C. 493, 109 S.E. 359; *Ham v. Ham*, 168 N.C. 486, 84 S.E. 840. These arguments, as related to particular words or phrases, are not in themselves convincing.

Both plaintiffs and defendants have endeavored to isolate words or phrases in the instrument to show the true intent of Mr. Duke. To place exaggerated stress on such words or phrases or their absence in another part of the writing could often thwart the will of the trustor.

[4] In determining the intent of a trustor the court is not limited to a determination of what is meant by a particular phrase or word. A trust indenture is but the expression of a settlor's intention reduced to writing, and it is often necessary to go to the "four corners" of the instrument in order to gather a full understanding of his intent. *Clark v. Judge*, 84 N.J. Super. 35, 200 A. 2d 801; *Morristown Trust Co. v. Thebaud*, 43 N.J. Super. 209, 128 A. 2d 288; *Woods v. Woods*, 105 N.J. Eq. 205, 147 A. 506; *Morris v. Morris*, 246 N.C. 314, 98 S.E. 2d 298; *Trust Co. v. Schneider*, 235 N.C. 446, 70 S.E. 2d 578; *Allen v. Cameron*, 181 N.C. 120, 106 S.E. 484; *St. James v. Bagley*, 138 N.C. 384, 50 S.E. 841; 54 Am. Jur. Trusts, § 17; 90 C.J.S. Trusts, § 162. That intent is determined by the language he chooses to convey his thoughts, the purposes he seeks to accomplish, and the situation of the other parties to or benefited by the trust. *Callaham v. Newsom*, 251 N.C. 146, 110 S.E. 2d 802.

In seeking decision of the question here presented we first consider whether the trust Indenture reveals an intent by the settlor authorizing the creation of a distributable corpus. At the outset we agree that Mr. Duke intended to grant to his Trustees

broad discretionary powers in withholding, accumulating and distributing income generated by the corpus of the trust; however, it must be borne in mind that the broad discretion as to the management of these funds is delimited by and delineated in the four alternatives appearing in paragraph 6 of the Third Division.

[5] The extent of the discretion lodged in trustees by settlors may be enlarged by the use of adjectives or phrases such as "absolute" or "uncontrolled." Even the use of such strong terms does not grant unlimited discretion. The real question is whether it appears that the trustees are exercising their discretionary powers in the manner in which the settlor contemplated they should act. Ordinarily, the extent of the discretion conferred upon trustees by a settlor depends upon the terms of the trust and the nature of the powers interpreted in light of all the circumstances known to the settlor when he executed the trust instrument. III Scott on Trusts, § 187 (3rd Ed. 1967).

Mr. Duke stated in the First Division of the Indenture that the Duke Endowment shall have "perpetual existence." His mandatory directions in paragraph 2 of the Fifth Division commanding the Trustees to retain 20% of the income from the principal of the Endowment for the purpose of increasing the principal of the trust estate to as much as $40 million exemplifies his desire that the corpus should be increased and kept inviolate so as to insure the perpetuity of the Endowment. By paragraph 2 of the Sixth Division it was provided that any stock dividend or rights declared upon stock held in trust should be treated and deemed to be principal, even though it should represent earnings. Mr. Duke again sought to protect the corpus of the trust when he provided in paragraph 2 of the Eighth Division against reverter to himself or his heirs or representatives. His request for "safe and enduring investment" in the Seventh Division further illustrates his proclivity for permanence.

Unquestionably, Mr. Duke intended that there be additions to the corpus of the trust. This is evidenced by his express reservation of the right to add to the corpus in paragraph 5 of the Sixth Division, and the fact that he did so add by his will. The power to add to corpus is also specifically recognized as being lodged in the Trustees by the controversial 6th paragraph of the Third Division.

Paragraph 5 of the Sixth Division provides:

> "5. The party of the first part hereby expressly reserves the right to add to the corpus of the trust hereby established by way of last will and testament and/or otherwise, and in making such additions to stipulate and declare that such additions and the incomes, revenues and profits accruing from such additions shall be used and disposed of by the trustees for any of the foregoing and/or any other charitable purposes, with like effect as if said additions, as well as the terms concerning same and the incomes, revenues and profits thereof, had been originally incorporated herein. In the absence of any such stipulation or declaration each and every such addition shall constitute a part of the corpus of this trust for all the purposes of this Indenture."

By this paragraph Mr. Duke carefully reserved unto himself the right to make additions to the corpus and to declare that such additions as well as accruing income be used for the named trust and/or any other charitable purpose. He further provided that absent such declaration when the additions were made the additions would become a part of the corpus of the trust. This paragraph of the Indenture is significant in that only here was anyone given authority to deviate from the restrictions governing the corpus of the Endowment. It is pertinent that nowhere in the Indenture were the Trustees given the authority reserved by Mr. Duke to himself. Further, by this reservation he retained no powers to invade or alter the restrictions placed upon the corpus unless they were expressly declared when the additions were made. Undoubtedly, the last sentence in the above-quoted paragraph committed such additions to the permanent corpus of the trust.

The trust Indenture was meticulously prepared after many years of conference and consideration between the scrivener and Mr. Duke. It would not be unreasonable to presume that the granting of power to his Trustees to distribute additions to the corpus was considered and rejected by Mr. Duke and his attorney. Assuming, *arguendo*, that Mr. Duke intended to give his Trustees powers equal to those reserved to himself by paragraph 5 of the Sixth Division, it must be here noted that the Trustees made no declaration concerning the "additions to corpus" except as related to payment of income therefrom.

We have been unable to find decisions in any jurisdiction which interpret provisions indentical to those contained in paragraph 6 of the Third Division. The most analogous situation is found in those jurisdictions which recognize discretionary trusts; i.e., trusts which are not marked in fixed lines, but lodge in the trustee large discretionary powers, particularly in the payment of benefits. One of these cases is *In re Baeder's Estate,* 190 Pa. 614, 42 A. 1104. There the testator left his estate to trustees, giving each child an equal share, and as to each son providing:

> " . . . 'Fifth. I direct my trustees to pay to each of my sons as they respectively attain twenty-one years of age five thousand dollars; and on their attaining twenty-five years I empower my trustees to pay or transfer to them respectively such further sum or property as shall, together with the amount theretofore received by them from myself as an advancement or under this will, amount to the half of their share in my estate; . . . This power is to be exercised either in the whole or partially and from time to time as my trustees shall deem proper, looking to the habits, condition and circumstances of my said sons respectively. The residue of the share of my sons shall be retained by my trustees,' etc., in strict spendthrift trust. . . . "

The trustees declared as to one of the sons—Henry H. Baeder—that it was not in their judgment expedient to pay any further portion of his share. One of Henry's creditors attached the unpaid balance of a portion of one-half Henry's share. The court in holding that the attachment took nothing, stated:

> " . . . So long as their discretion was not exercised this part of the share remained under what may be called the second trust. If they exercised their discretion favorably and paid over any portion, clearly that passed out of their further control, and became part of the son's general estate. But if they decided adversely, that they would not pay, it seems equally clear that for the time being, at least, that portion was no longer under the second but passed into the final or spendthrift trust, and neither the son nor his creditors could obtain any grasp or hold upon it. This seems the logical and necessary result of the discretionary power lodged in the trustees by the testator."

Other authorities generally hold that the beneficiary of a "discretionary" trust cannot compel the trustee to pay or apply any trust benefit to him since the terms of such a trust permit the trustee to withhold payments at will. If, however, the trustee *elects* to exercise his discretion by deciding to pay the beneficiary, then the beneficiary can force the trustee to confer the benefit. Bogert, Trusts and Trustees, § 228 (2nd Ed. 1965); *Kiffner v. Kiffner,* 185 Iowa 1064, 171 N.W. 590; *Brown v. Lumbert,* 221 Mass. 419, 108 N.E. 1079; *Keyser v. Mitchell,* 67 Pa. 473. See, *Chambers v. Smith,* 3 App. Cas. 795 (1878). Cf. 71 L. Q. Rev. 464 (1955).

Defendants could well argue that since the Indenture provided for the accumulation, investment and temporary housing of funds without resort to corpus additions, the Trustees "elected" to add to the permanent corpus when they adopted the resolutions which expressly added withheld funds to corpus.

We here quote a portion of Judge Ervin's findings of fact and conclusions of law:

FINDINGS OF FACT

"49. James B. Duke, as creator of the Endowment and signatory of the Indenture, and the original trustees as signatories of the Indenture, did not intend that the four numbered clauses of the sixth paragraph of the Third division of the Indenture would mutually exclude successive action under separate such clauses with respect to the same withheld amounts so that action under one such clause with respect to a particular withheld amount would forever thereafter prohibit action under another such clause with respect to the same withheld amount. Instead, James B. Duke and the original trustees intended that such four numbered clauses would be mutually exclusive only at any particular point of time because of the necessary fact that the trustees could not act under two or more such clauses simultaneously; and they intended that the trustees of the Endowment would have the power to act under one such clause with respect to a withheld amount at one time and then, to the extent possible, to act under another such clause with respect to that same withheld amount at a later time.

50. A construction of the Indenture and the aforesaid resolutions adopted by the trustees that would permit the

trustees to distribute at any time and from time to time all or any part of the amounts referred to in paragraph 46 above to the respective schools for whose benefit they are held would be in accord with the intent, purposes and desires of James B. Duke and the original trustees of the Endowment."

CONCLUSION OF LAW

"16. The four numbered clauses of the sixth paragraph of the Third division of the Indenture do not mutually exclude successive action under separate such clauses with respect to the same withheld amounts so that action under one such clause with respect to a particular withheld amount would forever thereafter prohibit action under another such clause with respect to the same withheld amount. Instead, such four numbered clauses are mutually exclusive only at any particular point of time, and the trustees of the Endowment have the power to act under one such clause with respect to a withheld amount at one time and then, to the extent possible, to act under another such clause with respect to that same withheld amount at a later time."

[6] The trial court's findings of fact are conclusive on appeal when supported by any substantial evidence. However, the court's conclusions from the facts found involve legal questions which are subject to review on appeal. *Carolina Milk Products Association Co-op. v. Melville Dairy, Inc.*, 255 N.C. 1, 120 S.E. 2d 548. The interpretation of a contract, will or trust indenture involves the finding of intention. Such interpretation has always been recognized as being in the province of the court rather than the jury. Hence, it has uniformly been treated as a question of law subject to review by the appellate courts. *Prickett v. Royal Insurance Company Limited*, 56 Cal. 2d 234, 14 Cal. Rptr. 675, 363 P. 2d 907, 86 A.L.R. 2d 711; *Borchers v. Taylor*, 83 N.H. 564, 145 A. 666, 63 A.L.R. 874; 5 Am. Jur. 2d, Appeal and Error § 823, § 829; 57 Am. Jur. Wills § 1028.

[7] If the trustor intended that exercise of one of the four options given the Trustees in paragraph 6 of the Third Division would exclude successive action under another, then there would be no implied authority to distribute funds added to corpus pursuant to the second option. We believe Mr. Duke did so intend.

Paragraph 6 fully and completely described the methods of accumulation and distribution and those eligible to be beneficiaries in the distribution of the withheld income. The language in that paragraph evidences and is consistent with the clarity and painstaking inclusiveness characterizing the entire Indenture. It encompassed the complete range and cycle of Trustee discretionary action as to withheld funds. At the time the Indenture was written there was but one corpus, the permanent corpus. Mr. Duke in clear, unambiguous language gave the Trustees the option to add funds to that corpus. We can find nothing in the "four corners" of the instrument indicating an intent to allow the Trustees to add to corpus and later distribute those additions. The specificity of the powers given his Trustees and the same specificity found in the restrictions placed upon them compel the conclusion that if Mr. Duke had intended to grant to his Trustees the power to distribute the corpus of the trust or additions thereto, he would have said so in the same clear and unambiguous language found throughout the trust instrument.

We conclude that so long as the funds are held under the "withholding provision" of paragraph 6 of the Third Division, they might have been distributed or transferred under any of the four options designated later in that paragraph. However, once the Trustees accumulated funds under option one, or distributed funds under options three or four, or added funds to the corpus under option two, the withheld funds could not be recalled and used for another purpose pursuant to another option. The very nature of options one, three and four warrant this result, for the exercise of one of these alternatives constitutes an election to pay over to or set aside for the benefit of the named beneficiary. So placed, the funds are taken out of the further control of the Trustees. See *In re Baeder's Estate, supra; Keyser v. Mitchell, supra.* For the reasons stated above and because of its position in the scheme of distribution and accumulation in the 6th paragraph, the same is true of the second option. In short the four options are, once exercised, mutually exclusive of each other.

We now consider the effect, if any, of the Trustees' actions as related to the additions to corpus funds.

In contract law, where the language presents a question of doubtful meaning and the parties to a contract have, practically

or otherwise, interpreted the contract, the courts will ordinarily adopt the construction the parties have given the contract *ante litem motam. Mayer v. Sulzberger,* 6 N.J. Super. 327, 71 A. 2d 233; *Barclay v. Charles Roome Parmele Co.,* 70 N.J. Eq. 218, 61 A. 715, affirmed, 71 N.J. Eq. 769, 71 A. 1133; *Preyer v. Parker,* 257 N.C. 440, 125 S.E. 2d 916; *Goodyear v. Goodyear,* 257 N.C. 374, 126 S.E. 2d 113; *Cole v. Fibre Co.,* 200 N.C. 484, 157 S.E. 857.

The interpretation of wills and trust instruments, by their very nature, require a different rule.

One line of authority states that since it is the intent of the trustor which must be given effect, the activities of the trustees not participated in or known by the trustor should not be given weight in construing the trust instrument. *Booge v. First Trust & Sav. Bank of Pasadena,* 64 Cal. App. 2d 532, 149 P. 2d 32; *Merchants Nat. Bank of Aurora v. Weinold,* 22 Ill. App. 2d 219, 160 N.E. 2d 174.

Other jurisdictions hold that when there is an ambiguity, the construction placed on the instrument by the trustees is entitled to some weight. *Eagan v. Comr. of Revenue,* 43 F. 2d 881 (5th Cir. 1930); *St. Louis Union Trust Co. v. Clarke,* 352 Mo. 518, 178 S.W. 2d 359. See Annot., 67 A.L.R. 1272; 90 C.J.S. Trusts § 165.

It appears North Carolina adopted the latter rule in the case of *Smith v. Creech,* 186 N.C. 187, 119 S.E. 3. There the Court considered the interpretation of wills and, in part, stated: "While not allowed as controlling, the acts of the parties in disposing of the property as owners shows their own concept of the meaning of these wills, and, in case of ambiguity, may be considered in aid of arriving at proper interpretation." New Jersey seems to follow a similar rule. *In re Leupp,* 108 N.J. Eq. 49, 153 A. 842; *Fink v. Harder,* 111 N.J. Eq. 439, 162 A. 614.

The weight of such evidence must be determined by the circumstances of each case. For instance, in the case before us some of the original Trustees assisted in the preparation of the trust instrument, and many of these Trustees were friends and confidants of the trustor. On the other hand, the relevant actions of the Trustees in this case lose probative force because they were unilateral and occurred at least nine years after the trustor's death.

Plaintiffs contend the actions of the Trustees in setting up separate bookkeeping entries for each beneficiary named in the various "corpus" resolutions is inconsistent with an intent to commit the funds to a permanent corpus. The strength of this argument is neutralized by the manifest need for segregated bookkeeping accounts to expedite the payment of income to the respective beneficiaries.

Plaintiffs further argue that the utilization of the word "used" in the "corpus" resolutions is inconsistent with the creation of a permanent corpus since that word is interchangeable with the word "distribute." Each resolution provides that the funds will be "used" and administered "in accordance with all the terms of the trust" except as to income arising therefrom. Here it must be noted that in transferring the assets forming the "original" corpus Mr. Duke stated that they were to be held in trust to be "used, managed, administered and disposed of." It is not, of course, argued that this phrase authorized invasion of corpus.

We think the most revealing of all the actions of the Trustees is shown by the language of the resolutions adding funds to the corpus established by the Indenture. Beginning in 1934 and continuing to and including 1959, these resolutions, after naming the assets to be transferred, clearly and unambiguously stated: "the same are hereby added to the corpus of the trust established by said Indenture, said additions and all the incomes, revenues and profits therefrom and all additions and accretions thereto to be held, used, invested and administered by the Trustees . . . in accordance with all the terms of said Indenture, . . . "

The original resolution and many of the succeeding resolutions were adopted by a Board of Trustees, most of whom were original Trustees and signatories of the trust instrument. A majority of the Trustees were extremely successful businessmen, as were their successor Trustees. Two of the members of the original Board of Trustees were the attorneys who conferred with and assisted Mr. Duke in the preparation of the Indenture and will. It seems beyond comprehension that these highly intelligent businessmen, outstanding lawyers, and their competent counsel would have adopted the language contained in the "corpus" resolutions as a vehicle to create a temporary or distributable corpus. Some of them must have been familiar with the long recognized principle of law forbidding invasion of

corpus without authority from the court or trustor. Nothing in this record discloses any attempt on the part of the Trustees to distribute any portion of the withheld funds during the thirty-five year period between enactment of the first resolution and the institution of this suit; this despite ample record evidence indicating the ever-increasing needs of the charitable beneficiaries.

Whatever weight we lend to the Trustees' actions as a practical interpretation of Mr. Duke's intent is consistent with our conclusion that exercise of one option prevents successive action under another with respect to the same withheld funds and, therefore, that Mr. Duke did not intend to authorize the Trustees to create a distributable corpus.

The situation, then, is this: The trustor provided that withheld funds may be added to corpus. The trustor did not provide that corpus or funds added to corpus may be distributed. The general rule of law is that corpus may not be invaded prior to termination absent express or implied authority in the instrument. Judicial modification is the exception. There is no express or implied authority in this Indenture to invade corpus. The Trustees added to corpus. Therefore, distribution of such funds could only be accomplished by modification of the trust instrument.

[8] Section 4940 of the Tax Reform Act of 1969 provides for the levy of a 4% excise tax on "net investment income." Plaintiffs estimate this section would impose a tax on the funds accumulated by the "corpus" resolutions yielding an amount of approximately $115,000 annually. Plaintiffs do not argue and the record does not show that taxation in this amount would create such an exigency or emergency which might frustrate the intent and purposes of the trustor so as to permit judicial modification.

Our prolonged scrutiny of the trust instrument and the actions of the Trustees was in part motivated by the desire to minimize taxation of these charitable funds. Absent circumstances allowing modification, however, we agree with this statement in the case of *In re Estate of Benson,* 447 Pa. 62, 285 A. 2d 101:

> "As to the obviation of taxes, it is incontestable that almost every settlor and testator desires to minimize his

tax burden to the greatest extent possible. However, courts cannot be placed in the position of estate planners, charged with the task of reinterpreting deeds of trust and testamentary dispositions so as to generate the most favorable possible tax consequences for the estate. Rather courts are obliged to construe the settlor's or testator's intent as evidenced by the language of the instrument itself, the overall scheme of distributions, and the surrounding circumstances."

We believe the language of the Duke Indenture, the overall scheme of distributions, and the surrounding circumstances lead to the inescapable conclusion that withheld funds theretofore added to corpus may not thereafter be distributed. Accordingly, the Trustees would not be exercising their discretionary powers in the manner contemplated by the settlor if they distributed such funds.

The trial judge erred in authorizing the Trustees in their discretion to distribute funds held in the four accounts for the benefit of Duke University, Furman University, Johnson C. Smith University and Davidson College.

[9] We have heretofore held that the trial judge correctly permitted the Trustees to distribute principal to the extent required by the Tax Reform Act. Further, our holding concerning the "addition to corpus" funds has mooted the appeal of Mary Jane Walton as to this issue. There remains, however, the question of whether the funds to be distributed in compliance with the various tax statutes are to be distributed according to a predetermined formula, rather than according to the Trustees' judgment.

In this connection the trial judge found:

"It is neither feasible nor desirable to require the trustees to make such distributions of principal to the same beneficiaries, for the same purposes and in the same percentages of distribution provided under the Fifth division of the Indenture, nor to require them to make any such distributions in accordance with any other predetermined formulae or directions, inasmuch as any such requirements would cause serious administrative problems, would be contrary to the purposes of the Endowment and the interests of its beneficiaries as a whole, might under the

circumstances be inequitable, and would not be in accord with the intent, purposes and desires of James B. Duke if he were here today or could have foreseen the present circumstances."

The record evidence supports the above findings of fact and the judgment entered thereon.

We do not deem it necessary to discuss the remaining assignments of error. Except as hereinabove stated, the judgment entered by the trial court is in all respects affirmed.

This cause is remanded to the Superior Court of Mecklenburg County for entry of judgment in accordance with this decision.

Modified and affirmed.

Chief Justice BOBBITT and Justice SHARP dissent in part and vote to affirm without modification.

STATE OF NORTH CAROLINA v. VERNON CHARLES TALBERT

No. 19

(Filed 14 March 1973)

Homicide § 31— first degree murder case — verdict of guilty as charged — new trial

When, in a prosecution for homicide upon an indictment drawn under G.S. 15-144, the judge accepts a verdict of "guilty as charged" after having instructed the jury that it might return a verdict of guilty of murder in the first or second degree, or guilty of voluntary or involuntary manslaughter, such a general verdict does not establish the grade of homicide of which defendant was guilty and a new trial must be ordered.

Justice HIGGINS concurring.

APPEAL by defendant under G.S. 7A-27(a) from *McConnell, J.*, September 1972 Criminal Session of ROWAN.

At the May 1972 Session of Cabarrus defendant was indicted for murder in the form prescribed by G.S. 15-144 (1965) as follows:

"THE JURORS FOR THE STATE UPON THEIR OATH DO PRESENT, That Vernon Charles Talbert late of the County of

Cabarrus on the 5th day of May 1972, with force and arms, at and in the said county, feloniously, wilfully, and of his malice aforethought, did kill and murder Robert J. Eury contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

Upon defendant's motion the action was removed to Rowan County. There defendant was formally arraigned on 11 September 1972 and entered a plea of not guilty. The solicitor announced that the State was seeking a verdict of murder in the first degree, and the jury was selected in the manner usual in a capital case.

Evidence for the State tended to show: On 5 May 1972 defendant went to the home of his estranged girl friend, Pamela Morgan, at Midland in Cabarrus County, and stabbed her in the back with a carving knife as she fled toward the home of a neighbor. Deputy Sheriff Robert J. Eury, in response to a call, went to the Morgan home. Defendant, with pistol in hand, met him as he walked into the carport. After disarming Eury, defendant pointed two pistols at him and ordered him to crawl to his car. Eury dropped to the floor on his hands and knees, and defendant squatted on the floor beside him. Almost immediately one of the guns which defendant was holding fired. Eury was shot in the head and this shot caused his death. After Eury was killed defendant stood up, waved the two pistols, and fired several shots. He then went to Eury's car and, over its radio, said to the sheriff's office dispatcher, "I shot and killed the son of a bitch. Now come and get me. He deserved to die." At this point Deputy Sheriff Compton arrived and, over his own radio, told defendant to stop transmitting and come out. Leaving the two pistols in Eury's car, defendant came out with his hands on the back of his head.

Defendant testified that killing Eury was an accident; that while squatting in the carport, he lost his balance and, in attempting to regain it, he accidentally squeezed the trigger of one of the guns. He admitted using the sheriff's radio, but he denied calling Eury a son of a bitch and saying that he deserved to die.

In charging the jury Judge McConnell, *inter alia*, gave the following instruction:

"Under the law and evidence in this case it is your duty to return one of the following verdicts: guilty of first degree

murder; or guilty of first degree murder with a recommendation that the punishment be life imprisonment; or guilty of second degree murder; or guilty of voluntary manslaughter; or guilty of involuntary manslaughter; or not guilty."

The judge also charged, as provided in G.S. 14-17 (1969), that if the verdict was guilty of murder in the first degree defendant's punishment would be death unless the jury accompanied their verdict with a recommendation that defendant's punishment be imprisonment for life in the State's prison.

The verdict returned was "guilty as charged." At defendant's request the jury was polled, and each juror "answered that defendant was 'guilty as charged.' "

Upon this verdict Judge McConnell sentenced defendant to death. The death sentence, in writing as required by G.S. 15-189 (1965) and signed 14 September 1972, recited that the jury had "returned against [defendant] *a verdict of guilty of murder in the first degree* as charged in the bill of indictment." (Italics ours.)

Defendant gave notice of appeal to the Supreme Court, and Judge McConnell entered an order requiring the State of North Carolina to pay the cost of the appeal.

Attorney General Morgan; Assistant Attorney General O'Connell for the State.

Burke & Donaldson for defendant appellant.

SHARP, Justice.

Defendant's assignment of error No. 13 is that "the court erred in entering the judgment as it appears of record." This assignment must be sustained, for—as defendant asserts—the verdict, "guilty as charged," will not support a sentence for murder in the first degree in this case. Therefore, the verdict and judgment must be set aside and the case remanded for trial de novo.

Prior to 1893 there were no degrees of murder in North Carolina. Any unlawful killing of a human being with malice aforethought was murder and punishable by death. By Sections One and Two of N. C. Sess. Laws, Ch. 85 (1893) (now G.S. 14-17) murder was divided into two degrees. By Section Three it was provided that the division should not "be construed to

require any alteration or modification of the existing form of indictment for murder, but the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree." Section Three is now G.S. 15-172 (1965). "The existing form of indictment," to which this section referred, was prescribed by N. C. Sess. Laws, Ch. 58 (1887) and is now G.S. 15-144 (1965).

An indictment for homicide in the words of G.S. 15-144 will support a verdict of murder in the first degree, murder in the second degree, or manslaughter. *See State v. Duncan,* 282 N.C. 412, 193 S.E. 2d 65 (1972); *State v. Mays,* 225 N.C. 486, 35 S.E. 2d 494 (1945); *State v. Gilchrist,* 113 N.C. 673, 18 S.E. 319 (1893).

In requiring the jury to determine the degree of homicide of which defendant is guilty, G.S. 15-172 merely codified the well established rule that a verdict which leaves the matter in conjecture will not support a judgment. *State v. Fuller,* 270 N.C. 710, 155 S.E. 2d 286 (1967); *State v. Albarty,* 238 N.C. 130, 76 S.E. 2d 381 (1953). When, in a prosecution for homicide upon an indictment drawn under G.S. 15-144, the judge accepts a verdict of "guilty as charged" after having instructed the jury that it might return a verdict of guilty of murder in the first or second degree, or guilty of murder in either degree or manslaughter, "such a verdict on such an indictment" cannot be sustained. *State v. Truesdale,* 125 N.C. 696, 34 S.E. 646 (1899). In such case the verdict is a general one without a response as to what grade of homicide the defendant was guilty, and a new trial must be ordered. *State v. Jefferson,* 125 N.C. 712, 34 S.E. 648 (1899). *See also State v. Bazemore,* 193 N.C. 336, 137 S.E. 172 (1927); *State v. Ross,* 193 N.C. 25, 136 S.E. 193 (1927).

In *State v. Fuller, supra,* defendant was charged with murder in an indictment under G.S. 15-144. When the case was called for trial the solicitor announced that he did not seek a verdict of guilty of murder in the first degree but asked for a verdict of guilty of murder in the second degree or manslaughter, as the evidence might show. Upon a verdict of "guilty as charged" the judge imposed a sentence of 25-30 years. In ordering a new trial, this Court said, "From the sentence imposed, it is apparent that the Court considered it as a verdict of guilty of murder in the second degree. However, under these conditions, the matter should not be left to conjecture or surmise, and

the Court should have required the jury to be more specific." *Id.* at 715, 155 S.E. 2d at 289.

Verdicts of "guilty as charged" in prosecutions under G.S. 15-144 have been held sufficient to support the judgment when the judge has instructed the jury to return a verdict of murder in the first degree or not guilty and there was no evidence to warrant a verdict of guilty of murder in the second degree or manslaughter. In such a situation the verdict will be taken with reference to the charge and the evidence in the case and interpreted as a verdict of guilty of the only charge submitted. *State v. Wiggins,* 171 N.C. 813, 89 S.E. 58 (1916); *State v. Walker,* 170 N.C. 716, 86 S.E. 1055 (1915); *State v. Gilchrist, supra.* This holding is an application of the general rule that "[a] verdict apparently ambiguous 'may be given significance and correctly interpreted by reference to the allegations, the facts in evidence, and the instructions of the court.'" *State v. Thompson,* 257 N.C. 452, 457, 126 S.E. 2d 58, 61-62, *cert. denied,* 371 U.S. 921 (1962). *See also State v. Childs,* 269 N.C. 307, 152 S.E. 2d 453 (1967), *rev'd on other grounds,* 403 U.S. 948, 29 L.Ed. 2d 859, 91 S.Ct. 2278 (1971); *State v. Morris,* 215 N.C. 552, 2 S.E. 2d 554 (1939).

A verdict is not complete until it is accepted by the court, and it is the duty of the judge to require the jury to specify the crime of which they found defendant guilty. *See State v. Bagley,* 158 N.C. 608, 73 S.E. 995 (1912) and *State v. Lucas,* 124 N.C. 825, 32 S.E. 962 (1899), two cases in which this was done. As Justice (later Chief Justice) Hoke said in *State v. Bryant,* 180 N.C. 690, 692, 104 S.E. 369, 370 (1920), "[W]e deem it not amiss to again admonish the profession and officials . . . that the verdict should be rendered in the precise form that the statute requires; that is, to specify in terms of the degree of the crime of which the prisoner is convicted."

Had the verdict in this case been an unambiguous one of guilty of murder in the first degree, there being no error in the trial prior thereto, we would have disposed of the appeal by vacating the death sentence and directing the superior court to impose a life sentence in accordance with the procedure detailed in *State v. Hill,* 279 N.C. 371, 183 S.E. 2d 97 (1971). However, such a disposition is not possible.

The sentence of death imposed upon defendant seems to call for some comment. We note, therefore, that on 29 June 1972, approximately two and one-half months before defendant

was put on trial for his life at the September 1972 Session, the Supreme Court of the United States had decided *Furman v. Georgia, Jackson v. Georgia,* and *Branch v. Texas,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726. In each of these three cases, hereinafter referred to collectively as *Furman,* the defendant appealed a death sentence imposed under a statute similar to our G.S. 14-17. The Supreme Court held (four justices dissenting) that the death sentence imposed under statutes permitting either judge or jury to impose that penalty as a matter of discretion, constituted cruel and unusual punishment and violated the Eighth and Fourteenth Amendments to the United States Constitution. The judgment in each case was reversed only "insofar as it [left] undisturbed the death sentence imposed," and the cases were remanded "for further proceedings."

The *Furman* decision necessarily invalidated any death sentence imposed under G.S. 14-17 as then constituted. This section, as rewritten by the legislature in 1949, made death the punishment for first degree murder but provided (1) that if the jury so recommended at the time of rendering its verdict, the punishment would be imprisonment for life in the State's prison; and (2) that the judge should so instruct the jury. Judge McConnell so instructed. This Court had construed that proviso to leave to the jury's "unbridled discretion" the question whether a convict's sentence should be life or death. *State v. McMillan,* 233 N.C. 630, 65 S.E. 2d 212 (1951).

Obviously, at the time of the trial of this case the *Furman* decision had not come to the attention of the trial judge and the solicitor. Since then, on 18 January 1973, in *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973), this Court (three justices dissenting) held that the effect of *Furman* upon G.S. 14-17 was (1) to invalidate its proviso—as well as the identical proviso in G.S. 14-21 (rape), G.S. 14-51 (burglary), and G.S. 14-58 (arson)—, and (2) to make death the penalty for murder in the first degree, burglary in the first degree, rape, and arson. However, recognizing that this interpretation made an upward change in the penalty for these four crimes, the decision in *Waddell* was made to apply prospectively only. Thus, it is inapplicable to any such offense committed prior to 18 January 1973. It follows that if defendant should be convicted of murder in the first degree upon his second trial his sentence will be imprisonment for life.

New trial.

Justice HIGGINS concurring.

In 1893 (Chapter 85, Acts of Assembly) provision was made for the division of murder into first and second degrees. Prior thereto, by Chapter 58, Session Laws of 1887, the General Assembly prescribed the form of indictment in homicide and provided that the charge include manslaughter. This Court has continuously held that indictments so drawn include murder in the first degree and murder in the second degree as well as manslaughter. Hence, in a trial for murder it is necessary for the jury to specify whether the finding of guilt is of murder in the first degree or murder in the second degree because both are charged in the bill. A verdict "guilty as charged" is incomplete as the Court now holds.

However, if the indictment contains the additional averments that the killing was premeditated and deliberate, or in the perpetration or the attempt to perpetrate one of the named felonies, then I think a verdict "guilty as charged" would be complete and would authorize the court to proceed to judgment.

APPENDIXES

AMENDMENT TO
STATE BAR RULES

AMENDMENT TO GENERAL RULES OF PRACTICE
FOR SUPERIOR AND DISTRICT COURTS

PRESENTATION OF
PARKER PORTRAIT

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 Section 5 of Article VI of the Certificate of Organization of The North Carolina State Bar be and the same is hereby amended by adding at the end of paragraph "g" as appears in 268 N.C. 737 the attached NORTH CAROLINA RULES GOVERNING PRACTICAL TRAINING OF LAW STUDENTS, as paragraph 9.

NORTH CAROLINA RULES GOVERNING PRACTICAL TRAINING OF LAW STUDENTS

ARTICLE I — Purpose:

The Bench and Bar are primarily responsible for making available competent legal services for all persons including those unable to pay for these services. As one means of providing assistance to attorneys representing clients unable to pay for such services and to encourage law schools to provide their students with supervised practical training of varying kinds during the period of their formal legal education, the following rules are adopted.

ARTICLE II — General Definition:

Subject to additional definitions contained in these rules which are applicable to specific articles or parts thereof, and unless the context otherwise requires, in these rules:

A. *Legal Aid Clinic* — An established or proposed department, division, program or course in a law school under the supervision of at least one full time member of the school's faculty or staff who has been admitted and licensed to practice law in this State and conducted regularly and systematically to render legal services to indigent persons.

B. *Indigent Persons* — A person financially unable to employ the legal services of an attorney as determined by a standard of indigence established by a Judge of the General Court of Justice.

C. *Legal Aid* — Legal services of a civil, criminal or other nature rendered for or on behalf of an indigent person without charge to such person.

D. *Third Year Law Student* — A student regularly enrolled and in good standing in a law school in this State who has satisfactorily completed at least two-thirds of the requirements for a first professional degree in law (J.D. or its equivalent).

E. *Lawyer* — Supervising lawyer means sole practitioner, one or more lawyers sharing offices but not partners, one or more lawyers practicing together in a partnership or in a professional corporation.

ARTICLE III — Eligibility:

In order to engage in activities permitted by these rules, the law student must:

A. Be duly enrolled in this State in a law school approved by the Council of The North Carolina State Bar.

B. A student regularly enrolled and in good standing in a law school in this State who has satisfactorily completed at least two-thirds of the requirements for a first professional degree in law (J.D. or its equivalent).

C. Be certified by the Dean of his law school, on forms provided by The North Carolina State Bar, as being of good character with requisite legal ability and training to perform as a legal intern. Certification may be denied or, if granted, withdrawn by the Dean without a hearing or any showing of cause and for any reason.

D. Be introduced to the Court in which he is appearing by an attorney admitted to practice in that Court.

E. Neither ask for nor receive any compensation or remuneration of any kind from any client for whom he renders services, but this shall not prevent an attorney, legal aid bureau, law school, public defender agency, or the State from paying compensation to the eligible law student, nor shall it prevent any agency from making such charges for its services as it may otherwise properly require.

F. Certify in writing that he has read and is familiar with the Canons of Professional Ethics of North Carolina and the opinions interpretive thereof.

ARTICLE IV — Form and Duration of Certification:

A certification of a student by the Law School Dean:

A. Shall be filed with the Secretary of The North Carolina State Bar in the Office of The North Carolina State Bar

in Raleigh and, unless it is sooner withdrawn, it shall remain in effect until the expiration of 18 months after it is filed, or until the announcement of the results of the first Bar Examination following the student's graduation, whichever is earlier. For any student who passes that examination, a certification shall continue in effect until the date he is admitted to the Bar.

B. May be withdrawn by the Dean at any time without a hearing and without any showing of cause and *shall* be withdrawn by him if the student ceases to be duly enrolled as a student prior to his graduation, by mailing a notice to that effect to the Secretary of The North Carolina State Bar, at the office of The North Carolina State Bar in Raleigh, to the supervising attorney and to the student.

C. May be withdrawn by any Resident Superior Court Judge or Judge holding the Court of the judicial district in which the student is appearing or has appeared at any time without notice or hearing and without any showing of cause. Notice of the withdrawal shall be mailed to the student, to the supervising attorney, to the student's Dean, and to the Secretary of The North Carolina State Bar, at the office of The North Carolina State Bar in Raleigh.

D. Forms to be used for certification and withdrawal of certification are attached.

ARTICLE V — Supervision:

A supervising lawyer shall:

A. Be an active member of the State Bar of North Carolina, and before supervising the activities specified in Rule VI hereof, shall have actively practiced law in North Carolina as a full time occupation for at least two years.

B. Supervise no more than five students concurrently.

C. Assume personal professional responsibility for any work undertaken by the student while under his supervision.

D. Assist and counsel with the student in the activities mentioned in these rules, and review such activities with such student, all to the extent required for the proper practical training of the student and the protection of the client.

E. Read, approve and personally sign any pleadings or other papers prepared by such student prior to the filing

thereof, and read and approve any documents which shall be prepared by such student for execution by any person or persons not a member or members of the State Bar of North Carolina prior to the submission thereof for execution.

F. As to any of the activities specified by Rule VI hereof:

1. Before commencing supervision of any student, file with the Secretary of The North Carolina State Bar in the office of The North Carolina State Bar in Raleigh, a notice in writing, signed by him, stating the name of such student, the period or periods during which he expects to supervise the activities of such student, and that he will adequately supervise such student in accordance with these rules.

2. Notify the Secretary of The North Carolina State Bar in the office of The North Carolina State Bar in Raleigh in writing promptly whenever his supervision of such student shall cease.

ARTICLE VI — Activities:

A properly certified student may engage in the activities provided in this section under the supervision of an attorney qualified and acting in accordance with the provision of Section V:

A. Without the presence of the supervising attorney, a student may give advice to a client on legal matters provided that the student gives a clear prior explanation to the client that he is not an attorney and provided that the supervising attorney has given the student permission to render legal advice in the subject area involved.

B. Without being physically accompanied by the supervising attorney, a student may represent indigent persons in the following hearings or proceedings:

1. Administrative hearings and proceedings before Federal, State, and local administrative bodies.

2. Civil litigation before Courts or Magistrates, provided the case is one which could be assigned to a magistrate under North Carolina General Statute Section 7A-210(1) and (2), whether or not assignment is in fact requested or made to a magistrate.

3. In any criminal matter, except those criminal matters in which the defendant has the right to the assign-

ment of counsel under any constitutional provision, statute, or rule of Court.

C. Without being physically accompanied by the supervising attorney, a student may represent the State in the prosecution of all misdemeanors with the consent of the District Solicitor.

D. When physically accompanied by the supervising attorney who has read, approved, and personally signed any briefs, pleadings, or other papers prepared by the student for presentment to the Court, a student may represent indigent clients in the following hearings or proceedings, provided however, the approval of the presiding Judge is first secured:

1. All juvenile proceedings.

2. The presentation of a brief and oral argument in any civil or criminal matter in the District or Superior Court.

3. All misdemeanor cases.

E. A student may accompany his supervising attorney when the supervising attorney is attorney of record for an indigent client in any civil or criminal action, but may take part in the proceedings only with the consent of the presiding Judge.

F. In all cases under this Rule in which a student makes an appearance in Court or before an administrative agency on behalf of a client, he shall have the written consent in advance of the client and his supervising attorney. The client shall be given a clear explanation, prior to the giving of his consent, that the student is not an attorney. These consents shall be filed with the Court and made a part of the record in the case.

G. In all cases under this rule in which a student is permitted to make an appearance in Court or before an administrative agency on behalf of a client, he may engage in all activities appropriate to the representation of the client, including, without limitation, selection of and argument to the Jury, examination and cross-examination of witnesses, motions and arguments thereon, and giving notices of appeal.

H. Except as herein allowed, the certified student shall not be permitted to participate in any activity in the connection

with the practical training of law students unless he is under the direct and physical supervision of the supervising attorney.

ARTICLE VII — Use of Student's Name:

A. A student's name may properly:

1. Be printed or typed on briefs, pleadings, and other similar documents on which the student has worked with or under the direction of the supervising lawyer, provided the student is clearly identified as a student certified under these rules, and provided further that a student shall not sign his name to such briefs, pleadings, or other similar documents.

2. Be signed to letters written on the supervising attorney's letterhead which relate to the student's supervised work, provided there appears below his signature a clear identification that he is certified under these rules, such as "Certified Law Student under the Supervision of ....." (Supervising lawyer).

B. A student's name may not appear:

1. On the letterhead of a Supervising lawyer; or

2. On a business card bearing the name of a Supervising lawyer; or

3. On a business card identifying the student as certified under these rules.

ARTICLE VIII — Miscellaneous:

A. Nothing contained in these rules shall affect the right of any person who is not admitted to practice law to do anything that he might lawfully do prior to the adoption of these rules.

B. These rules are subject to amendment, modification, revision, supplement, repeal, or other change by appropriate action in the future without notice to any student certified at the time under these rules.

NORTH CAROLINA RULES GOVERNING PRACTICAL TRAINING OF LAW STUDENTS

IN RE:

APPLICATION OF .....

.....

.....

CERTIFICATION OF ELIGIBILITY AND GOOD MORAL CHARACTER TO PARTICIPATE IN THE PRACTICAL TRAINING OF LAW STUDENTS PROMULGATED BY THE COUNCIL OF THE NORTH CAROLINA STATE BAR

TO: THE NORTH CAROLINA STATE BAR:

The undersigned certifies as follows:

1. Name and address of person signing this certificate.

.....

2. Name and address of law school and official connection with same. .....

3. ..... is duly enrolled in the State of North Carolina in a law school approved by the Council of The North Carolina State Bar and is in good standing in said law school and has satisfactorily completed at least two-thirds of the requirements for a first professional degree in law (J.D. or its equivalent).

4. ..... is of good character with the requisite legal ability and training to perform as a legal intern pursuant to the Rules and Regulations Governing Practical Training of Law Students.

Seal (of School)

....., Dean

.....

Name of School

....., Dean of .....

Law School, being first duly sworn on oath deposes and says that he has read the foregoing certificate and he knows the contents thereof; that the statements contained therein are true of his

own knowledge, except as to those matters stated upon information and belief, and, as to those, he believes them to be true.

Sworn and subscribed to before me

this ..... day of ....., 19.....

....., Notary Public

My commission expires

Form: Dean's Certificate

NORTH CAROLINA RULES
GOVERNING PRACTICAL TRAINING
OF LAW STUDENTS

IN RE:

APPLICATION OF .....

.....

.....

WITHDRAWAL OF ELIGIBILITY TO PARTICIPATE IN THE PRACTICAL TRAINING OF LAW STUDENTS PROMULGATED BY THE COUNCIL OF THE NORTH CAROLINA STATE BAR.

TO: THE NORTH CAROLINA STATE BAR:

The undersigned, having previously certified to the Council of The North Carolina State Bar as to the eligibility for the above named individual to participate in the Practical Training of Law Students Program promulgated by The North Carolina State Bar, does hereby WITHDRAW said certificate of eligibility and does hereby notify The North Carolina State Bar that

..... is no longer eligible to participate in said program.

Seal (of School)

....., Dean

.....
Name of School

....., Dean of .....
Law School, being first duly sworn on oath deposes and says that he has read the foregoing certificate and he knows the contents thereof; that the statements contained therein are true of his own knowledge, except as to those matters stated upon information and belief, and, as to those, he believes them to be true.

Sworn and subscribed to before me

this the ..... day of ....., 19.....

....., Notary Public.

My commission expires

Form: Withdrawal of Dean's Certificate

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 30th day of October, 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 14th day of March, 1973.

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 14th day of March, 1973.

Moore, *J.*
For the Court

AMENDMENT TO RULE 3 OF THE GENERAL RULES OF PRACTICE FOR SUPERIOR AND DISTRICT COURTS, SUPPLEMENTAL TO THE RULES OF CIVIL PROCEDURE

Rule 3, entitled "Continuances," of the General Rules of Practice for the Superior and District Courts, Supplemental to the Rules of Civil Procedure Adopted Pursuant to G.S. 7A-34, published in 276 N. C. at 736, is hereby amended so as to read as follows:

"An application for a continuance shall be made to the presiding judge of the court in which the case is calendared.

"When an attorney has conflicting engagements in different courts, priority shall be as follows: Appellate Courts, Superior Court, District Court, Magistrate's Court.

"At mixed sessions, criminal cases in which the defendant is in jail shall have absolute priority."

The foregoing amendment shall become effective immediately.

Adopted by the Court in Conference this 13th day of February, 1973.

MOORE, J.
For the Court

PRESENTATION OF THE PORTRAIT OF THE LATE CHIEF JUSTICE ROBERT HUNT PARKER TO THE SUPREME COURT OF NORTH CAROLINA ON 15 DECEMBER 1972 BY JOSEPH BRANCH ASSOCIATE JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA

May it please the Court:

It is an unusual and particularly pleasant experience for me to address this Court. I am highly honored that the family of the late Chief Justice Robert Hunt Parker has allowed me to present to the Court his portrait, which was painted by Mr. Everett Raymond Kinstler of New York. My only professed qualifications for performing this task are that since childhood I have admired and respected the late Chief Justice, and in more recent years enjoyed a priceless relationship which instilled in me a deep and sincere affection for him.

This possibly may be the last public gathering dedicated to his life and memory; however, I am convinced his strong voice will never be stilled nor the tremendous impact of his life lost as long as those who knew him remain on this earth or as long as our system of jurisprudence retains its viability.

When Robert Hunt Parker died on November 10, the eve of Armistice Day 1969, North Carolina and this country lost one of its greatest patriots. Nothing characterized his life more than his loyalty and devotion to his state, his nation and his friends. Had he never entered public service, his intellect, scholarship and strength of character would have ranked him as one of the leading figures of his time. However, more than that, these superlative qualities enabled him to become a predominant figure in the field of law; a jurist of the highest caliber.

Robert Hunt Parker was born in Enfield, North Carolina, on February 15, 1892, the only son of Romulus Bragg Parker and Victoria Coleman Hunt Parker. His father's family had been residents and landowners in Halifax County for almost two hundred years, and his mother was a native of adjoining Granville County, where her family had lived for more than a century. He graduated from the public schools in Enfield, and entered the University of North Carolina in 1908, where he pursued his studies until 1911. He then transferred to the University of Virginia, where he received his A.B. degree in 1912 and his LL.B. degree in 1915. He had obtained his license to practice law at the Fall Term of this Court in the year 1914, and after his graduation from the University of Virginia

Law School he returned to his hometown to practice law. That practice was interrupted in August 1917 when he volunteered for service in the United States Army. He was first sent to Fort Oglethorpe, Georgia, where he was commissioned a Second Lieutenant in Field Artillery, and after subsequent assignments at Camp Pike, Arkansas, and Camp Dix, New Jersey, he sailed for Europe on 29 August 1918. There he served for seventeen months, part of the time as a trial judge advocate to a general court-martial sitting in Paris, France. He was demobilized at Camp Dix, New Jersey, on October 30, 1919, and resumed his practice of law in Enfield.

Robert Hunt Parker first entered public service in 1923, when he was elected as Representative from Halifax County in the General Assembly of North Carolina. His legislative career was one of distinction; thereafter and until his death he manifested a keen interest in and knowledge of legislative affairs.

On February 23, 1924 Governor Cameron Morrison appointed him Solicitor of the Third Judicial District. In that office he rapidly gained a reputation as a fiery prosecutor who acted without fear or favor, and who dealt fairly with both the defendants and the State.

It was during this period of his life that he met, courted and married the former Rie Williams Rand of Greensboro. They were married on November 28, 1925. Judge Parker was often heard to remark that the wisest thing he ever did was to convince his wife she should marry him. Their marriage brought to both of them many happy years of mutual respect, admiration and love. The strength of this relationship is mirrored by her presence here today under difficult circumstances.

Judge Parker continued to serve as Solicitor of his district until he was chosen by the District Judicial Committee on 24 September 1932 to fill the unexpired term of the late Superior Court Judge Garland Midyette. He was elected to fill Judge Midyette's unexpired term and was subsequently renominated and re-elected to that position in 1934, 1942 and 1950. It was not long before Judge Parker became widely known for his knowledge of the law and his acute sense of public responsibility. He was never known to do any act or speak any word which reflected adversely upon the dignity or integrity of the courts, and he was diligent in assuring that the courts over which he presided were accorded proper respect by everyone. I vividly recall a conversation with Judge Parker when I was

a young man. He noted that many people resented the firm manner in which he presided over his courts, but in his usual positive manner he stated that as long as he was a part of the judiciary he would take every precaution to see that there be respect for the courts and our government.

Perhaps one of the most colorful periods of his life occurred during the years in which he presided over Wake County Superior Court in 1940. The News and Observer that year related the following:

> "A terrific blow was dealt slot machine operations in North Carolina when Judge R. Hunt Parker, presiding over Wake County Superior Court, sentenced Joe Calcutt of Fayetteville, the largest single slot machine operator in the world, to serve an actual sentence of 12 months on the roads at hard labor."[1]

> "*The News and Observer* once more wishes to doff its hat to Judge R. Hunt Parker, now presiding over Wake County Superior Court [for his action in regard to] cleaning up the acknowledged dirty mess surrounding tax delinquency and election law violations in Raleigh . . . . "[2]

During his career as a Superior Court Judge he was given special assignments to cases involving election violations, tax dodgers, the Night Raiders of New Hanover County, the mob cases in Person County, and many other notorious criminal cases as well as many highly involved and technical civil cases.

The news media is replete with accounts of his service in the various counties of the State. A typical news media appraisal of one of his court tenures reads as follows:

> "Judge Hunt Parker's time in the Sixth Judicial District ends with June 30. He came to the district January 1.
>
> "The civil and criminal courts in the Sixth district have functioned smoothly during the past six months. Justice has been stern enough, but has not overshot the mark. The judge's interpretations of the law have been clear even to laymen. Jurors after being discharged have commented on the ease with which they understood his charges. There have been utmost decorum in the courts,

[1] *The News and Observer*, Raleigh, N. C., Dec. 11, 1940, at 4, col. 2.
[2] *The News and Observer*, Raleigh, N. C., Oct. 12, 1940, at 4, col. 2.

but persons with business in them have felt fully at ease. There has been proper dignity on the bench. . . .

"Few, if any, judges have ridden this circuit and made a more favorable impression."[3]

It is somewhat surprising that this sometimes stern, austere, and coldly precise man should have become a political favorite of his people. Yet it was inevitable that his tremendous intellect, erect carriage, patrician handsomeness, and obvious professional dedication would cause him to become a "storied" man and a legend in his own time. History records that in nearly every election in which he was involved during his political career he amassed more votes in his home district than any other candidate. He was boomed as a candidate for Congress and for the governship of this state, but he never evidenced any desire to remove himself from the judiciary.

In 1952 Judge Parker ran for the North Carolina Supreme Court and won the Democratic nomination for a position as Associate Justice. He was elected in the November 4, 1952 General Election and was re-elected for an 8-year term on November 8, 1960. He was appointed Chief Justice by Governor Dan K. Moore on January 1, 1967, succeeding the retiring Chief Justice Emery B. Denny. Chief Justice Parker was nominated and elected without opposition for a full term of eight years on February 7, 1966.

During his seventeen years on the Supreme Court of North Carolina, Judge Parker wrote so many fine opinions that it is difficult to select the best. His first opinion was filed January 6, 1953,[4] and his last was filed July 11, 1969.[5] These opinions are reported in forty volumes of the North Carolina Reports, beginning in 236 N.C. at page 760,[6] and ending with 275 N.C. at page 399.[7] Indicative of the quality of these opinions is the fact that 23 of them were selected for inclusion in the American Law Reports.[8] These opinions reflect the man

[3] *Kinston Daily Free Press*, June 20, 1940, at 4.

[4] *Aiken v. Sanderford*, 236 N.C. 760, 73 S.E. 2d 911 (1953).

[5] *Wachovia Bank & Trust Co. v. John Thomasson Constr. Co.*, 275 N.C. 399, 168 S.E. 2d 358 (1969).

[6] *Aiken v. Sanderford*, 236 N.C. 760, 73 S.E. 2d 911 (1953).

[7] *Wachovia Bank & Trust Co. v. John Thomasson Constr. Co.*, 275 N.C. 399, 168 S.E. 2d 358 (1969).

[8] "Opinions of Chief Justice R. Hunt Parker Selected for Inclusion in American Law Reports," enclosed in letter from Joseph C. Briggs to Raymond M. Taylor, October 31, 1972, on file in North Carolina Supreme Court Library.

and some of the strong influences upon his life. He might not have personally agreed with a certain proposition, but when he spoke as a Justice he spoke without bias and prejudice and gave the rule of law as he understood it. He resisted the idea that judges make law and insisted that they were interpreters of the Constitution and should, in most cases, follow the doctrine of *stare decisis*. His opinions reflect his love for good literature, particularly the classics. He owned many fine editions of the English masters, and Dickens, Thackery, Scott, Carlyle and Macaulay became his closest friends, in spirit; their influence is surely reflected in Chief Justice Parker's majestic writings as they appear in the North Carolina Reports. The fact that he collected beautifully bound books illustrates his closeness and genuine love for the classics. He was known to say, "I like the feel of a well bound and a well printed book."

Chief Justice Parker was a man who believed in the importance of tradition. This is not to say his mind was closed to innovation; he insisted that proposals for change must be studied against the wisdom of the past. His judicial thinking was trained against the background of the common law of England.

I think he considered his opinion in *State ex rel. Bruton v. Flying "W" Enterprises,* reported in 273 N. C. 399,[9] to have been one of his better opinions. In that case, the Court upheld a permanent injunction against commercial diving operations involving three confederate blockade runners in the coastal waters off New Hanover County, and the Chief Justice brought his love of history and the common law to the rescue of the heritage of North Carolina. He wrote:

> "We conclude that the hulks or vessels and the cargoes therein involved in the instant case were 'derelicts' which, at common law, would belong to the Crown in its office of Admiralty at the end of a year and a day . . . and are within the purview of the common law and belong to the State in its sovereign capacity."[10]

> "These sunken vessels contain articles of unique historical significance and value which cannot be replaced."[11]

[9] *State ex rel. Bruton v. Flying "W" Enterprises, Inc.*, 273 N.C. 399, 160 S.E. 2d 482 (1968).

[10] *Id.* at 414, 160 S.E. 2d at 492.

[11] *Id.* at 415, 160 S.E. 2d at 493.

His desire to preserve North Carolina's heritage was again reflected in his concurring opinion in the case of *In re Department of Archives and History,* 246 N.C. 392,[12] where the Court declared the restoration of Tryon's Palace to be a public purpose. Justice Parker wrote:

> "When Tryon's Palace is completely restored by State aid and the generous gifts of citizens of the State, and when countless thousands in the years that are ahead gaze upon the stately building, and stand in the hall where the Assembly met, and where in immediate Pre-Revolutionary and Revolutionary Times patriotic North Carolinians debated and decided upon the principles that lie at the foundation of our constitutional rights as free men, they will stand in the presence of history as those great men live again, and will thrill with pride over how their fathers wrought and won for them their liberties 'in old colonial days.' "[13]

The opinions written by Chief Jusice Parker include many other landmark cases, such as *State v. Goldberg,* 261 N.C. 181,[14] a case which drew state and national attention. This was the case affirming the conviction of professional gamblers on several counts of conspiracy to bribe college basketball players.

During his tenure as Chief Justice the State's judicial system underwent wide-ranging reform and substantial enlargement with the creation of the uniform District Courts throughout the State and the creation of the North Carolina Court of Appeals. It became his duty to appoint a Chief Judge of the Court of Appeals and the Chief District Judge in each District. An examination of these appointments reveals that he put aside his personal or political preferences and endeavored to appoint the man he felt best qualified. It is a tribute to his executive talents that these judicial changes were accomplished smoothly and without serious delay in the court processes.

Without too much effort, one could spend a great deal more time counting the contributions made by Chief Justice Parker to the judiciary, to public service and to the State as a whole. However, I think the greatest contribution that he made to society was through his own character.

---

[12] *In re Dep't of Archives & History,* 246 N.C. 392, 98 S.E. 2d 487 (1957).

[13] *Id.* at 397-98, 98 S.E. 2d at 492 (concurring opinion).

[14] *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334 (1964).

It is true that Chief Justice Parker devoted the majority of his life to his profession. Yet he did not ignore his civic responsibilities. He was a devout member of the Episcopal Church. He was much in demand in his home and adjoining communities as a public speaker, and his stirring patriotic addresses were widely acclaimed throughout North Carolina. He served as a member of the Federal Centennial Commission and the Governor Richard Caswell Memorial Commission. He was a member of the American Legion, 40 & 8, and the Veterans of Foreign Wars. He was an honorary member of the North Carolina Society of the Cincinnati. He was a loyal alumnus of the University of Virginia and the University of North Carolina. He was awarded the honorary LL.D. degree by the University of North Carolina at Chapel Hill in 1958.

Upon the death of Chief Justice Robert Hunt Parker, his friend, Jesse Helms, spoke these words:

> "Robert Hunt Parker was more than the Chief Justice of North Carolina. He was more than a courageous, gallant American who had proudly fought for the principles of his country in war and peace. He was a pervading presence, a man who was influential because he was respected, and respected because he was wise and fair and unyielding in his integrity. . . . [H]e was an unforgettable man, a vital spirit, dominant, towering, his enthusiasm for living and learning constantly engaged. . . . Thus it was with Robert Hunt Parker; soldier, statesman, a citizen of quality, a man of courage, an indominable spirit and an unforgettable friend. A defender of the faith, he was to the end, and a warrior in the battle to preserve the finer destiny of man."[15]

It is more than noteworthy that this man of tremendous intellect also possessed a sure and child-like faith in God.

Twenty-five years ago he dedicated the carillonic bells in the Enfield Methodist Church to the memory of one of his boyhood teachers. He concluded that dedication with these words:

> "There comes ringing down through the centuries the cry of the Hebrew Prophet, 'Thy dead shall live.' All does not glut the devouring grave. Surely somewhere, afar, the Spirit in whom she did live, finds occasion to continue the

[15] Editorial by Jesse Helms, WRAL-TV, Raleigh, N. C., "Viewpoint #2211," Nov. 11, 1969.

noble and unselfish service that Miss Mary did upon earth."[16]

In his last public utterance at the Annual Meeting of the North Carolina State Bar on October 24, 1969, he closed his remarks by saying:

> "Recently, some freethinkers have shouted from the house tops the strange doctrine that 'God is dead.' I do not believe such arrant nonsense. When one stands on the shores of the ocean and sees the waves roll in as at creation's dawn, and stands and sees the majestic gandeur of our mountains, I do not see how one cannot believe that the Supreme Being is alive and still rules the destinies of men and of nations."[17]

I am convinced that Chief Justice Robert Hunt Parker died a happy man. He was without fear of the beyond. He had accomplished his life's ambition—to become a great Chief Justice of the Supreme Court of North Carolina. On the way to that goal he added a new and lasting luster and dignity to the profession that he loved and, most significantly, he amassed a host of loyal and devoted friends who will always nurture his memory.

He carried himself proudly among men, yet he humbly faced the wisdom of his Lord.

The portrait of Chief Justice Robert Hunt Parker will be unveiled by his niece, Miss Adah Ruben Parker.

---

[16] Address by Judge R. Hunt Parker at the dedication of carillonic bells in memory of Miss Mary B. Collins, Methodist Church, Enfield, N. C., 1947.

[17] Address by Chief Justice R. Hunt Parker, N. C. State Bar Annual Meeting, Oct. 24, 1969, in 16 N. C. BAR, No. 4, 48 at 52-53 (1969).

REMARKS OF CHIEF JUSTICE WILLIAM H. BOBBITT IN ACCEPTING THE PORTRAIT OF THE LATE CHIEF JUSTICE ROBERT HUNT PARKER 15 DECEMBER 1972

We are grateful to Justice Branch for this informative and impressive memorial address. In addition to bringing to our attention significant events and relationships in the life of former Chief Justice Parker, Justice Branch has portrayed him rightly as a man of integrity and compassion and as a jurist who contributed greatly to the high standards of the Court. Words used to characterize Chief Justice Ruffin appropriately describe Chief Justice Parker: "A man resolved and steady to his trust, inflexible to ill and obstinately just."

All of us knew Justice Parker as a jurist and as a friend. Two of us (Justice Higgins and I) served with him as members of the Court from 1954 until his death in 1969. Incidents come to mind that impressed us and endeared him to us. It is with difficulty that we refrain from speaking of them. However, since Justice Branch has expressed our sentiments so well, the other members of the Court will only say, in legal parlance, that we *concur*.

The Court wishes to express appreciation to the Parker family for the gift of this handsome portrait. The portrait will be a source of inspiration to us and to our successors across the years.

The Marshal will see that the portrait is hung in an appropriate place on the wall of this Chamber as directed by the Court, and these proceedings will be spread upon the minutes of the Court and printed in the next volume of the North Carolina Reports.

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this index, e.g. Appeal and Error § 1, correspond with titles and section numbers in N. C. Index 2d.

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR

ARREST AND BAIL

ASSIGNMENTS

AUTOMOBILES

BILLS AND NOTES

BROKERS AND FACTORS

§ 1. Nature and Essentials of the Relationship

Contract giving coal broker or his associates the exclusive right to "offer and sell" defendant's coal to a power company and "to sell this account" required the broker or his associates to "service" the account with the power company on a day-to-day basis. *Peaseley v. Coke Co.*, 585.

§ 2. Termination of Agreement

Contract giving an independent broker "or his associates" the exclusive right to offer and sell defendant's coal to a power company was not a personal service contract that terminated at the broker's death. *Peaseley v. Coke Co.*, 585.

§ 6. Right to Commissions

In an action to recover for breach of commission contract to sell coal, broker's executrix could recover amount of commissions called for by the contract less reasonable expenses that would have been incurred by the broker's associates in servicing the contract had they been permitted to do so. *Peaseley v. Coke Co.*, 585.

BURGLARY AND UNLAWFUL BREAKINGS

§ 3. Indictment

Indictment for first degree burglary referring to an incorrect street address was not fatally defective. *S. v. Davis*, 107.

§ 4. Competency of Evidence

Experimental evidence with regard to visibility at crime scene was properly excluded where circumstances at the time of the crime and those at time of the experiment differed. *S. v. Carter*, 297.

Both defendants were in possession of stolen guns found by arresting officer on the floor of a motor boat occupied by defendants at the time of arrest, and the guns were properly admitted as evidence against both defendants. *S. v. Eppley*, 249.

In prosecution for breaking and entering and larceny, stolen rifles found in defendants' possession at the time of their arrest were properly admitted in evidence, even though the indictment did not list the rifles among the articles it alleged to have been stolen. *Ibid.*

§ 5. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient to withstand motion for nonsuit where it tended to show that defendant broke into the victim's home, assaulted him and took all his money. *S. v. Hicks*, 103.

State's evidence was insufficient to withstand defendant's motion for nonsuit in prosecution for felonious breaking and entering of an apartment and felonious larceny of wedding rings. *S. v. Killian*, 138.

Defendant's possession of stolen articles soon after the theft following a breaking and entering will support an inference that he committed the breaking and entering. *S. v. Eppley*, 249.

State's evidence was sufficient to withstand nonsuit where evidence showed that crime was committed and that fingerprints lifted from the scene were those of defendant. *S. v. Foster*, 189.

BURGLARY AND UNLAWFUL BREAKINGS — Continued

§ 8. Sentence

Sentence of life imprisonment given defendant in a first degree burglary case did not constitute cruel and unusual punishment. *S. v. Davis*, 107.

Sentence of imprisonment for second degree burglary of not less than 30 years nor more than life is not cruel or unusual punishment. *S. v. Edwards*, 578.

CHATTEL MORTGAGES

§ 10. Registration of Instruments Executed in This State

Plaintiff's security interest in a truck was perfected as of the date of delivery to the Department of Motor Vehicles of an application for notation of lien, notwithstanding the security interest was never actually recorded on the truck's certificate of title. *Ferguson v. Morgan*, 83.

CONSTITUTIONAL LAW

§ 4. Persons Entitled to Raise Constitutional Questions

Defendant's request for a jury trial in an absolute divorce action made before trial but more than 10 days after service of the last pleading should have been granted. *Branch v. Branch*, 133.

§ 13. Police Powers Governing Health

Statute requiring a certificate of need from the Medical Care Commission in order to construct and operate a hospital on private property with private funds is unconstitutional. *In re Hospital*, 542.

§ 18. Rights of Free Speech and Assemblage

A county ordinance regulating drive-in motion picture theaters involved no censorship and was a valid police regulation enacted to further highway safety. *Variety Theatres v. Cleveland County*, 272.

A statute which defines proscribed activity so broadly that it encompasses constitutionally protected speech cannot be upheld in the absence of authoritative judicial limitations. *S. v. Summrell*, 157.

§ 20. Equal Protection

A county ordinance regulating drive-in motion picture screens did not violate the equal protection clauses of State and Federal Constitutions. *Variety Theatres v. Cleveland County*, 272.

§ 29. Right to Indictment and Trial by Duly Constituted Jury

Defendants' evidence that the tax and voter registration lists, from which the jury list is made up, designated race by W and C was insufficient to make a prima facie case of racial discrimination in the selection of the trial jury. *S. v. Carroll*, 326.

§ 30. Due Process in Trial

Defendant was given speedy trial where he was indicted at first criminal session of superior court after commission of the offense and was tried at the first session for criminal cases thereafter. *S. v. Hicks*, 103.

Congestion of criminal court dockets is valid justification for delay between commission of an offense and trial. *S. v. Brown*, 117.

CONSTITUTIONAL LAW — Continued

Length of delay in absolute terms is never per se determinative on issue of denial of defendant's right to a speedy trial. *Ibid.*

Defendant was not denied his right to a speedy trial although 17 months elapsed between offense and trial. *Ibid.*

§ 31. Right to Confrontation and Access to Evidence

Defendant's motion for discovery was properly denied where it amounted to a request for a fishing expedition and request to receive the work product of police and State investigators. *S. v. Davis*, 107.

Implicating statement made by one codefendant was admissible where the other codefendant had opportunity to cross-examine him. *S. v. Wright*, 364.

§ 35. Ex Post Facto Laws

Since a judicial decision in effect changing the penalty for rape or other capital crimes from death or life imprisonment in the discretion of the jury to mandatory death would be *ex post facto* as to such offenses committed prior to the change, North Carolina's mandatory death penalty for rape, murder in the first degree, burglary in the first degree and arson may not be constitutitonally applied to any offense committed prior to 18 January 1973, the date of this decision. *S. v. Waddell*, 431.

§ 36. Cruel and Unusual Punishment

The death penalty may not be imposed for the crime of first degree murder where the court or the jury is given the discretion to decide whether punishment shall be death or life imprisonment. *S. v. Carroll*, 326.

Defendant had no standing to question the constitutionality of the death penalty where the jury recommended life imprisonment in first degree murder prosecution. *S. v. Wright*, 364; *S. v. Duncan*, 412; *S. v. Rankin*, 572; in rape and kidnapping prosecution, *S. v. Bynum*, 552.

Statutory provision giving the jury discretion to recommend and thus fix punishment for rape at life imprisonment is unconstitutional, leaving death as the mandatory punishment for rape in N. C.; such mandatory death sentence applies only to offenses committed after 18 January 1973. *S. v. Waddell*, 431.

CONTRACTS

§ 7. Contracts in Restraint of Trade

A contract providing that defendant would sell stone from a certain quarry to plaintiff at specified prices and would not sell such stone to anyone other than the State Highway Commission for less than specified higher prices did not constitute an unlawful contract in restraint of trade in violation of federal or state statutes. *Rose v. Materials Co.*, 643.

CONTRACTS — Continued

G.S. 75-5(b)(5) does not outlaw price discrimination in the secondary line of competition between the buyer and his competitors, and a contract creating a price discrimination is not illegal per se under G.S. 75-1 but must be shown to be unreasonably in restraint of trade in order to violate the statute. *Ibid.*

§ 14. Contracts for Benefit of Third Parties

The assignee under a general assignment of an executory bilateral contract becomes the delegatee of his assignor's duties and impliedly promises his assignor he will perform such duties, and the other party to the original contract may sue the assignee as the third party beneficiary of such implied promise. *Rose v. Materials Co.*, 643.

Action against assignee of duty under a sealed contract to sell stone to plaintiff for a 10-year period at a specified price was governed by the 10-year statute of limitations relating to sealed contracts. *Ibid.*

§ 23. Waiver of Breach

After defendant refused to sell stone to plaintiff at prices fixed in their 10-year contract, plaintiff's purchases of stone from defendant at an increased price resulted from economic duress and did not constitute a waiver of the breach. *Rose v. Materials Co.*, 643.

§ 29. Measure of Damages for Breach of Contract

Judgment that plaintiff recover for successive breaches of a contract a specified sum "with interest at six percent per annum on each overpayment from the time it was made" was not void for indefiniteness. *Rose v. Materials Co.*, 643.

CORPORATIONS

§ 25. Contracts and Notes

Contract signed by J. E. Dooley individually rather than J. E. Dooley and Son, Inc., the party sought to be charged, meets requirements of the statute of frauds where the signer was president of the corporation and therefore its general agent. *Rose v. Materials Co.*, 643.

COSTS

§ 4. Items of Cost

Trial court was without authority to allow expert fees to respondents' witnesses who testified without having been subpoenaed. *S. v. Johnson*, 1.

COURTS

§ 15. Criminal Jurisdiction of Juvenile Court

Statute subjecting undisciplined child to probation does not violate Equal Protection Clause by classifying and treating children differently from adults. *In re Walker*, 28.

Statute allowing child to be adjudged undisciplined makes legitimate distinctions between undisciplined and delinquent children. *Ibid.*

COURTS — Continued

Due Process Clause did not require judge to make findings beyond a reasonable doubt in delinquency proceedings but permissible inference arises that he followed such standard in absence of record evidence to the contrary. *Ibid.*

CRIMINAL LAW

§ 21. Preliminary Proceedings

Any irregularities in failure to provide defendant with a preliminary hearing were of no consequence where trial court provided for examination of State's witnesses by defense counsel prior to trial. *S. v. Foster*, 189.

§ 26. Plea of Former Jeopardy

Defendant's constitutional right against double jeopardy was violated when he was convicted of resisting an officer and assaulting an officer based on the same conduct. *S. v. Summrell*, 157.

Where conviction of first degree murder was based on jury finding that murder was committed in perpetration of an armed robbery, no separate punishment can be imposed for the armed robbery. *S. v. Carroll*, 326.

§ 34. Evidence of Defendant's Guilt of Other Offenses

Evidence of crime allegedly committed by defendant a week after crime for which he was on trial was properly admitted to show a common plan and to identify defendant. *S. v. McClain*, 357.

§ 45. Experimental Evidence

Experimental evidence with regard to visibility at crime scene was properly excluded where circumstances at the time of the crime and those at time of the experiment differed. *S. v. Carter*, 297.

§ 50. Expert and Opinion Testimony

Medical examiner could testify as to range at which bullets were fired without having first been offered as a ballistics expert. *S. v. Mack*, 334.

§ 60. Fingerprint Evidence

Admission of hearsay evidence with respect to fingerprints constituted prejudicial error in first degree burglary case. *S. v. Foster*, 189.

§ 66. Evidence of Identity by Sight

In-court identification of defendant made by victim of burglary was of independent origin and was not tainted by pre-trial photographic identification. *S. v. Hicks*, 103; *S. v. Knight*, 220.

§ 73. Hearsay Testimony

Defendant's testimony as to what others had told him concerning robberies of gambling games was competent to show defendant's state of mind at the time of the shooting in question. *S. v. Miller*, 633.

§ 75. Admissibility of Confession

Trial court erred in finding 18-year-old retarded defendant's confession was made voluntarily. *S. v. Edwards*, 201.

Defendants' confessions were properly admitted in their trial for first degree murder. *S. v. Carroll*, 326.

CRIMINAL LAW — Continued

§ 80. Books, Records and Private Writings

Defendant's motion for discovery was properly denied where it amounted to a request for a fishing expedition and request to receive the work product of police and State investigators. *S. v. Davis*, 107.

Testimony by pawnshop employee of record of sale of ammunition to defendant was admissible as recorded past recollection. *S. v. Wright*, 364.

§ 84. Evidence Obtained by Unlawful Means

Evidence of LSD tablets found in defendant's apartment was improperly admitted where such evidence was obtained as result of a search warrant issued upon an affidavit insufficient to establish probable cause. *S. v. Campbell*, 125.

Defendants had no standing to object to the search of a house they occupied as trespassers. *S. v. Eppley*, 249.

Statutory exclusionary rule does not require exclusion of evidence obtained after illegal entry when that evidence is offered to prove the murder of an officer making the entry. *S. v. Miller*, 633.

§ 86. Credibility of Defendant and Parties Interested

Although defendant may not be asked if he has been accused, arrested or indicted for a particular crime, specific acts of criminal and degrading conduct may be inquired about. *S. v. Mack*, 334.

Inquiries made of defendant on cross-examination concerning prior convictions were admissible for the purpose of impeachment. *S. v. Wright*, 364.

Evidence of injuries inflicted by police officers upon defendant and other occupants of a gambling house following the shooting of an officer was competent to show the bias of officers against defendant. *S. v. Miller*, 633.

§ 88. Cross-examination

Further cross-examination of defendant who denies prior convictions is permitted for purposes of "sifting of the witness." *S. v. Fountain*, 58.

§ 89. Credibility of Witness; Corroboration

Instructions limiting consideration of evidence for corroboration only must be requested. *S. v. Bryant*, 92.

Defense witness's indirectly inconsistent testimony with respect to threats made by deceased was admissible without laying foundation. *S. v. Mack*, 334.

§ 91. Time of Trial and Continuance

Defendant's motion for continuance was properly denied where he showed no prejudice resulting from his having 10 instead of 12 days to prepare for trial. *S. v. Hicks*, 103.

§ 92. Consolidation of Counts

Indictments charging defendant with murder of one person and felonious assault of another person were properly consolidated for trial. *S. v. Duncan*, 412.

CRIMINAL LAW — Continued

CRIMINAL LAW — Continued

§ 135. Judgment and Sentence in Capital Case

Defendant had no standing to question the constitutionality of the death penalty where the jury recommended life imprisonment in first degree murder prosecution. *S. v. Wright,* 364; *S. v. Duncan,* 412; *S. v. Rankin,* 572; in rape and kidnapping prosecution, *S. v. Bynum,* 552.

The death penalty may not be imposed for the crime of first degree murder where the court or the jury is given the discretion to decide whether punishment shall be death or life imprisonment. *S. v. Carroll,* 326; *S. v. Waddell,* 431.

Statutory provision giving the jury discretion to recommend and thus fix punishment for rape at life imprisonment is unconstitutional, leaving death as the mandatory punishment for rape in N. C.; such mandatory death sentence applies only to offenses committed after 18 January 1973. *S. v. Waddell,* 431.

§ 149. Right of State to Appeal

The State may appeal to the Supreme Court as of right from any decision of the Court of Appeals where there is a dissent. *S. v. Campbell,* 125.

§ 162. Objections, Exceptions and Assignments of Error to Evidence

Where the record fails to show what the witness would have answered, exclusion of his testimony is not shown to be prejudicial. *S. v. Davis,* 107; *S. v. Fountain,* 58.

§ 163. Exceptions and Assignments of Error to Charge

Misstatement of contentions by trial judge in jury charge must ordinarily be brought to judge's attention so as to allow opportunity for correction. *S. v. Johnson,* 421; *S. v. McClain,* 396.

§ 168. Harmless and Prejudicial Error in Instructions

Defendant cannot complain of favorable instruction that reasonable doubt is a possibility of innocence. *S. v. Bryant,* 92; *S. v. Wright,* 364.

§ 169. Harmless and Prejudicial Error in Admission of Evidence

Defendant could not complain of admission of testimony over his objection where he subsequently gave similar testimony. *S. v. Davis,* 107.

Admission of evidence of an impermissibly suggestive pretrial identification procedure was harmless error beyond a reasonable doubt. *S. v. Knight,* 220.

§ 171. Error Relating to One Count or One Degree of Crime Charged

Erroneous instruction on a disorderly conduct charge was harmless where sentence imposed for disorderly conduct was made to run concurrently with an identical sentence for resisting arrest. *S. v. Summrell,* 157.

Where defendant's constitutional right against double jeopardy was violated when he was convicted of resisting an officer and assaulting an officer based on the same conduct, judgment imposed for assaulting an officer was arrested even though concurrent identical sentences were imposed in each case. *Ibid.*

CRIMINAL LAW — Continued

§ 172. Whether Error is Cured by the Verdict

Verdict imposing sentence of life imprisonment cured any error in submitting to jury a verdict imposing the death penalty as one of the possible verdicts. *S. v. Bryant*, 92.

DEEDS

§ 1. Nature and Requisites

Deed purporting to convey undescribed smaller tract contained within a larger tract, with the grantee being authorized to locate such smaller tract, does not pass title until the selection is made. *Builders Supplies Co. v. Gainey*, 261.

§ 12. Estates Created by Construction of the Instrument

Intent of the parties determines whether a conveyance is a grant of a *profit a prendre* or a grant of a present estate in the designated portion of the grantor's land. *Builders Supplies Co. v. Gainey*, 261.

§ 14. Reservations and Exceptions

In reserving in a deed conveying 331 acres "the right to lay out and stake off 35 acres of the above described land wherever it desires and to take therefrom all sand and gravel it desires," the grantor did not intend to reserve a *profit a prendre* but intended to reserve a fee simple estate in the sand and gravel. *Builders Supplies Co. v. Gainey*, 261.

Trial court properly submitted to the jury an issue as to whether plaintiff was barred by laches to assert any claim under a reservation in a deed of the right to remove sand and gravel from 35 acres to be selected by the grantor from the 331 acres conveyed. *Ibid.*

DISORDERLY CONDUCT

§ 1. Nature and Elements of the Offense

Provisions of disorderly conduct statute making it unlawful to cause a public disturbance by creating a "hazardous or physically offensive condition" or by "offensively coarse" utterances and acts such as "to alarm and disturb persons present" are unconstitutionally vague, but another provision of the statute proscribing acts and language likely to provoke a breach of the peace is constitutional. *S. v. Summrell*, 157.

§ 2. Prosecutions

State's evidence was sufficient for jury on issue of defendant's guilt of disorderly conduct by acts and language calculated to provoke a breach of the peace in a hospital emergency room. *S. v. Summrell*, 157.

DIVORCE AND ALIMONY

§ 1. Jurisdiction

Trial of a contested divorce action at a criminal session of district court without defendant's consent rendered judgment a nullity. *Branch v. Branch*, 133.

DIVORCE AND ALIMONY — Continued

§ 2. Process and Pleadings

Defendant's request for a jury trial in an absolute divorce action made before trial but more than 10 days after service of the last pleading should have been granted. *Branch v. Branch,* 133.

§ 18. Alimony and Subsistence Pendente Lite

Trial judge must find the facts from the evidence presented upon a hearing upon an application for alimony *pendente lite. Rickert v. Rickert,* 373.

Statutes applicable to alimony *pendente lite* and counsel fees should govern an award of counsel fees made after award of permanent alimony where question of counsel fees was specifically set for later determination. *Ibid.*

Proper exercise of trial judge's authority in granting alimony and alimony *pendente lite* or counsel fees is a question of law reviewable on appeal, while amount of the allowance is discretionary matter. *Ibid.*

Defendant's stipulation that plaintiff was entitled to alimony *pendente lite* would not support subsequent award of counsel fees where court expressly refrained from ruling on question of counsel fees. *Ibid.*

§ 23. Support of Children of the Marriage

Defendant father who was under obligation to make support payments until minor child reached majority or was otherwise emancipated was entitled to relief upon passage of G.S. 48A fixing the age of majority at 18 where the child was already 18 at the time of its passage. *Shoaf v. Shoaf,* 287.

EASEMENT

§ 2. Creation of Easement by Deed or Agreement

In reserving in a deed conveying 331 acres "the right to lay out and stake off 35 acres of the above described land wherever it desires and to take therefrom all sand and gravel it desires," the grantor did not intend to reserve a *profit a prendre* but intended to reserve a fee simple estate in the sand and gravel. *Builders Supplies Co. v. Gainey,* 261.

EMINENT DOMAIN

§ 6. Evidence of Value

Trial court committed prejudicial error in the admission for illustrative purposes of two maps showing a proposed subdivision of the condemned property. *S. v. Johnson,* 1.

Trial court committed prejudicial error in the admission of evidence of conditional sales by respondents of eight acres of the condemned land. *Ibid.*

In a proceeding to condemn undeveloped land, trial court erred in permitting respondents to elicit testimony of the sales price of lots in nearby developed area. *Ibid.*

Evidence of the price paid by the condemnor in purchasing neighboring property for the same project is inadmissible to prove the value of the condemned land. *Ibid.*

GAS

§ 1. Regulation

Court of Appeals erred in reversing portion of Utilities Commission's order allowing a natural gas company to increase its rates to the extent necessary to offset an increase in the cost of gas to it. *Utilities Comm. v. City of Durham*, 308.

Utilities Commission properly made an adjustment of the test period revenues of a natural gas company because of abnormal cold weather during the test period. *Ibid.*

Utilities Commission did not err in finding that the rate of return on net investment earned by a natural gas company was insufficient. *Ibid.*

HOMICIDE

§ 15. Relevancy and Competency of Evidence

Expert was properly allowed to testify about exhibits which were identified but not yet introduced in evidence. *S. v. Duncan*, 412.

§ 20. Demonstrative Evidence; Photographs

Gruesome photographs of homicide victim's body were properly admitted for illustrative purposes. *S. v. Duncan*, 412.

§ 21. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient to withstand nonsuit where there was evidence permitting finding of premeditation and deliberation. *S. v. Fountain*, 58.

State's evidence was sufficient for jury on issue of defendant's guilt of first degree murder of his estranged wife. *S. v. Duncan*, 412.

§ 24. Instructions on Presumptions and Burden of Proof

Evidence was sufficient in first degree murder case to support an instruction on felony murder rule. *S. v. Wright*, 364.

§ 28. Instructions on Defense

Charge of the court properly presented to the jury the question arising upon the evidence with reference to the defense of intoxication in a first degree murder case. *S. v. Duncan*, 412.

§ 31. Verdict and Sentence

The death penalty may not be imposed for the crime of first degree murder where the court or the jury is given the discretion to decide whether punishment shall be death or life imprisonment. *S. v. Carroll*, 326.

Where conviction of first degree murder was based on jury finding that murder was committed in perpetration of an armed robbery, no separate punishment can be imposed for the armed robbery. *Ibid.*

Where four possible verdicts are submitted to the jury, a verdict of "guilty as charged" does not respond as to what grade of homicide the defendant was guilty and cannot be sustained. *S. v. Talbert*, 718.

HOSPITALS

§ 2. Support and Control

Statute requiring a certificate of need from the Medical Care Commission in order to construct and operate a hospital on private property with private funds is unconstitutional. *In re Hospital*, 542.

INDICTMENT AND WARRANT

§ 4. Evidence and Proceedings Before Grand Jury

Failure to furnish preliminary hearing and use of hearsay evidence before the grand jury are not grounds for quashal of indictment. *S. v. Bryant*, 92.

§ 8. Joinder of Counts

Trial judge erred in failing to require the State to elect at the conclusion of the evidence between charges of resisting an officer and assaulting an officer. *S. v. Summrell*, 157.

§ 12. Amendment

Trial court properly allowed State to amend warrant to comply with trial court's construction of disorderly conduct statute. *S. v. Summrell*, 157.

§ 14. Grounds for Motion to Quash

Defendant's motion to quash was properly denied where the only matter challenged related to the merits of the case and not the validity of the bill of indictment. *S. v. Williams*, 576.

§ 17. Variance Between Averment and Proof

Offense in which time is not of the essence does not require absolute specificity in the indictment as to the date the crime was committed. *S. v. Davis*, 107.

Indictment was not subject to quashal on ground of fatal variance where time was not of the essence. *S. v. Foster*, 189.

INFANTS

§ 10. Commitment of Minors for Delinquency

A minor has no guaranteed right to counsel at a hearing on an initial petition alleging her to be undisciplined. *In re Walker*, 28.

Statute subjecting undisciplined child to probation does not violate Equal Protection Clause by classifying and treating children differently from adults. *Ibid.*

Statute allowing child to be adjudged undisciplined makes legitimate distinctions between undisciplined and delinquent children. *Ibid.*

Due Process Clause did not require judge to make findings beyond a reasonable doubt in delinquency proceedings but permissible inference arises that he followed such standard in absence of record evidence to the contrary. *Ibid.*

INJUNCTIONS

INSURANCE

INTEREST

JUDGMENTS

JURY

JURY — Continued

§ 7. Challenges

Defendants' evidence that the tax and voter registration lists, from which the jury list is made up, designated race by W and C was insufficient to make a prima facie case of racial discrimination in the selection of the trial jury. *State v. Carroll*, 326.

KIDNAPPING

§ 1. Elements of the Offense

There was not a sufficient asportation to constitute the offense of kidnapping where defendant forced a jailer at gunpoint to go from the front door of the jail to the jail cells, a distance of 62 feet. *S. v. Dix*, 490.

LARCENY

§ 5. Presumptions and Burden of Proof

Evidence of defendant's possession of stolen goods soon after the theft is sufficient to justify the denial of a motion for nonsuit on the charge of larceny. *S. v. Eppley*, 249.

§ 6. Competency and Relevancy of Evidence

Both defendants were in possession of stolen guns found by arresting officer on the floor of a motor boat occupied by defendants at the time of arrest, and the guns were properly admitted as evidence against both defendants. *S. v. Eppley*, 249.

In prosecution for breaking and entering and larceny, stolen rifles found in defendants' possession at the time of their arrest were properly admitted in evidence, even though the indictment did not list the rifles among the articles it alleged to have been stolen. *Ibid.*

§ 7. Sufficiency of Evidence and Nonsuit

State's evidence was insufficient to withstand defendant's motion for nonsuit in prosecution for felonious breaking and entering of an apartment and felonious larceny of wedding rings. *S. v. Killian*, 138.

Defendants' motion for nonsuit of a charge of larceny of a shotgun should have been allowed where the person named in the indictment as the owner of the shotgun testified that the gun was the property of his father. *S. v. Eppley*, 249.

LIMITATION OF ACTIONS

§ 4. Accrual of Right of Action and Time from Which Statute Begins to Run

Action against assignee of duty under a sealed contract to sell stone to plaintiff for a 10-year period at a specified price was governed by the 10-year statute of limitations relating to sealed contracts. *Rose v. Materials Co.* 643.

MASTER AND SERVANT

§§ 10, 15. Wrongful Discharge; State and Federal Regulations

Plaintiff supervisors could not invoke provisions of the State right-to-work statute to recover damages against their employer for their discharge based on union membership since the doctrine of federal preemption applied. *Beasley v. Food Fair*, 530.

MINES AND MINERALS

§ 1. Nature and Incidents of Title to Mines and Minerals

Trial court properly submitted to the jury an issue as to whether plaintiff was barred by laches to assert any claim under a reservation in a deed of the right to remove sand and gravel from 35 acres to be selected by the grantor from the 331 acres conveyed. *Builders Supplies Co. v. Gainey*, 261.

MONOPOLIES

§ 2. Agreements and Combinations Unlawful

A contract providing that defendant would sell stone from a certain quarry to plaintiff at specified prices and would not sell such stone to anyone other than the State Highway Commission for less than specified higher prices did not constitute an unlawful contract in restraint of trade in violation of the federal or state statutes. *Rose v. Materials Co.*, 643.

G.S. 75-5(b)(5) does not outlaw price discrimination in the secondary line of competition between the buyer and his competitors, and a contract creating a price discrimination is not illegal per se under G.S. 75-1 but must be shown to be unreasonably in restraint of trade in order to violate the statute. *Ibid.*

MUNICIPAL CORPORATIONS

§ 12. Liability of Municipal Corporations for Torts

A county's governmental immunity against a claim for damages by a party wrongfully enjoined by the county was not abrogated by the enactment of Rule of Civil Procedure No. 65. *Orange County v. Heath*, 292.

To deprive a municipal corporation of the benefit of governmental immunity the municipality must be engaged in a proprietary function involving special corporate benefits or pecuniary profits. *Rich v. City of Goldsboro*, 383.

§ 18. Injuries in Public Parks and Playgrounds

A city in operating parks and playgrounds for the benefit of the public is acting in its proper governmental capacity. *Rich v. City of Goldsboro*, 383.

Donation to defendant from operation of train in park was incidental income, totally insufficient to support conclusion that defendant operated park as a proprietary venture and therefore waived governmental immunity against suit for personal injuries. *Ibid.*

Statutory provision for waiver of governmental immunity to extent of liability insurance obtained by the municipality does not apply to maintenance of playground equipment. *Ibid.*

MUNICIPAL CORPORATIONS — Continued

§ 42. Claims and Actions Against Municipality for Personal Injury

Plaintiff's action was properly dismissed where notice of tort claim against the city given to the city claims investigator and to the city attorney did not comply with statutory requirement that written notice be given to the board of aldermen or to the mayor within 90 days. *Johnson v. Winston-Salem*, 518.

NEGLIGENCE

§ 17. Doctrine of Rescue

The rescue doctrine was not applicable where plaintiff sustained injuries while directing traffic at the scene of an automobile collision. *McNair v. Boyette*, 230.

§ 29. Sufficiency of Evidence and Nonsuit

Where plaintiff sustained injuries while directing traffic at the scene of an automobile collision, defendant's negligence, if any, was not the proximate cause of plaintiff's injuries. *McNair v. Boyette*, 230.

PARENT AND CHILD

§ 7. Duty to Support

Authority of the court to require support for a minor child ceases when the legal obligation to support no longer exists. *Shoaf v. Shoaf*, 287.

Neither the parent nor the infant has any vested right in a support order which would extend payments beyond the age of emancipation. *Ibid.*

Defendant father who was under obligation to make support payments until minor child reached majority or was otherwise emancipated was entitled to relief upon passage of G.S. 48A fixing the age of majority at 18 where the child was already 18 at the time of its passage. *Ibid.*

PLEADINGS

§ 12. Counterclaim in Tort

Defendant's claim for damages cannot be asserted against the county by way of counterclaim. *Orange County v. Heath*, 292.

PRINCIPAL AND AGENT

§ 5. Scope of Authority

Undisclosed, private limitations upon authority of an agent do not bind third party who, unaware of them, contracts with the agent within customary scope of agent's authority. *Mayo v. Casualty Co.*, 346.

PRIVACY

The enforced discovery of automobile liability insurance as authorized by the 1971 amendment to Rule 26(b) is not an unwarranted invasion of privacy. *Marks v. Thompson*, 174.

RAPE

§ 4. Relevancy and Competency of Evidence

Experimental evidence with regard to visibility at crime scene was properly excluded where circumstances at the time of the crime and those at time of the experiment differed. *S. v. Carter*, 297.

§ 5. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient to withstand nonsuit where it tended to show that defendant transported his victim in his car before raping her and that victim identified defendant's car as belonging to her abductor. *S. v. McClain*, 357.

§ 7. Verdict and Judgment

Statutory provision giving the jury discretion to recommend and thus fix punishment for rape at life imprisonment is unconsitutional, leaving death as the mandatory punishment for rape in N. C.; such mandatory death sentence applies only to offenses committed after 18 January 1973. *S. v. Waddell*, 431.

REGISTRATION

§ 2. Sufficiency of Registration

Plaintiff's security interest in a truck was perfected as of the date of delivery to the Department of Motor Vehicles of an application for notation of lien, notwithstanding the security interest was never actually recorded on the truck's certificate of title. *Ferguson v. Morgan*, 83.

RELIGIOUS SOCIETIES AND CORPORATIONS

§ 2. Government, Management, and Property

Connectional and congregational churches defined. *Braswell v. Purser*, 388.

Selection of appellee Purser by congregational church could not be overruled by conference in which appellant Braswell claimed leadership. *Ibid.*

ROBBERY

§ 5. Instructions and Submission of Lesser Degrees of the Crime

Trial court's instruction on intent in armed robbery case was not prejudicial where the issue was not the intent with which the items were taken but whether they were taken at all. *S. v. Lee*, 566.

Trial court properly failed to charge on common law robbery in armed robbery case. *Ibid.*

RULES OF CIVIL PROCEDURE

§ 26. Depositions in a Pending Action

The 1971 amendment to Rule 26 confers upon a party the legal right to obtain discovery of the existence and contents of insurance agreements referred to therein and is a valid exercise of legislative authority. *Marks v. Thompson*, 174.

RULES OF CIVIL PROCEDURE — Continued

§ 41. Dismissal of Actions

In a nonjury case at the close of plaintiff's evidence the judge can give judgment against plaintiff on the basis of facts as he may then determine them to be from the evidence then before him, though plaintiff has made out a prima facie case which would preclude directed verdict for defendant in a jury case. *Helms v. Rea*, 610.

Upon motion to dismiss at close of all the evidence, the trial court sitting without a jury was required to rule on the merits of the case, and dismissal of defendant's counterclaim at the close of all the evidence on the ground that there was no evidence upon which the trier of facts could find for defendant constituted error. *Ibid.*

§ 50. Motion for Judgment N.O.V.

Even though trial court allows a motion for judgment n.o.v., the court must rule on an alternative motion for a new trial so that a party can appeal conditionally from an adverse ruling on the alternate motion. *Hoots v. Calaway*, 477.

§ 56. Summary Judgment

Summary judgment generally is not appropriate in actions wherein the right of recovery depends upon the exercise of reasonable care. *Savings & Loan Assoc. v. Trust Co.*, 44.

SCHOOLS

§ 3. Consolidation of Schools

In ordering the closing of two senior high schools and the merger of those two schools into a consolidated senior high school, the county board of education complied with statutory provisions as to studies required, time of public hearing and procedure for the public hearing. *Lutz v. Board of Education*, 208.

§ 7. Bonds and Allocation of Proceeds

Local act and County Finance Act, when construed together, authorized the use of school construction bond proceeds for the purchase of land for school sites. *Lutz v. Board of Education*, 208.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

Defendants had no standing to object to the search of a house they occupied as trespassers. *S. v. Eppley*, 249.

Evidence of a bag of money in plain view in defendant's automobile was admissible in breaking and entering and larceny case. *S. v. Allen*, 503.

Action of officers in removing a vehicle from a public street to the police station in order to search it was reasonable. *Ibid.*

Evidence concerning burglary tools found in defendants' vehicle was admissible where officers had reasonable grounds to believe that defendants had committed a crime and that their automobile contained evidence pertaining to the crime. *Ibid.*

TAXATION — Continued

In determining the value of a store building for tax purposes, the State Board of Assessment could properly consider evidence that the second floor of the building could not be used or rented without substantial renovation, disadvantages inherent in the location of the property, its declining attractiveness for commercial use, and any established declining trend in income. *Ibid.*

The economic blight of a downtown area should be taken into account in revaluing property for tax purposes. *Ibid.*

As a factor in determining the valuation of property, the State Board of Assessment may substitute the fair rental value of the property on the valuation date for the actual rent payable under an existing long term lease which present conditions show to have been improvident from the point of view of the tenant. *Ibid.*

Valuation of all buildings in the county at replacement cost was improper. *Ibid.*

Where the only evidence offered by plaintiffs as to value of their property was their local tax listings, such evidence was insufficient to upset valuation placed on property by the State Board of Assessment; rather, plaintiffs must show that the valuation placed upon their properties was unreasonably high. *Electric Membership Corp. v. Alexander*, 402.

§ 38. Remedies of Taxpayer Against Collection of Tax

Plaintiff, whose manufacturing plant is located partly in Rutherfordton and partly in Ruth, is entitled to have determined in a declaratory judgment action the validity of a 1966 agreement entered into by plaintiff, Rutherfordton and Ruth as to what properties of plaintiff are to be taxed by each municipality. *Reeves Brothers v. Rutherfordton*, 559.

TRIAL

§ 6. Stipulations

Defendant's stipulation that plaintiff was entitled to alimony *pendente lite* would not support subsequent award of counsel fees where court expressly refrained from ruling on question of counsel fees. *Rickert v. Rickert*, 373.

TRUSTS

§ 4. Construction and Modification of Charitable Trust

Provision of the Duke Endowment indenture restricting investments by trustees to investments in Duke Power Company and certain government bonds was properly modified by the trial court to allow the trustee to invest in other securities and properties and to grant the trustees authority to distribute principal of the Endowment to the extent necessary to comply with the provisions of the Tax Reform Act of 1969. *Davison v. Duke University*, 676.

TRUSTS — Continued

In giving the trustees of the Duke Endowment discretion to withhold income distributable to beneficiaries other than Duke University and in providing for options as to use of the withheld funds, the trustor intended that the exercise of one option would exclude successive action under another option with respect to the same withheld funds; therefore, once the trustees added funds to the corpus under one option, the withheld funds could not be recalled and used for another purpose pursuant to another option. *Ibid.*

UNIFORM COMMERCIAL CODE

§ 25. Definitions, Execution, Form and Interpretation of Commercial Papers

Summary judgment was improperly entered in favor of defendant in an action by a savings and loan association to recover an amount charged back against it by a bank because of the purported forgery of the indorsement of one of the payees on a draft issued by defendant. *Savings & Loan Assoc. v. Trust Co.*, 44.

A draft payable to two named payees without the addition of the words "or order" or any similar words of negotiability is not a negotiable instrument. *Ibid.*

§ 26. Transfer and Negotiation

Savings and loan association which took a draft upon the indorsement of one of the payees and the forged indorsement of the other received only the interest of the payee who indorsed the draft. *Savings & Loan Assoc. v. Trust Co.*, 44.

§ 40. Collection of Items

When the drawee of a draft learns that the indorsement is forged, the drawee must then act with reasonable promptness or his right to recover from the person receiving payment or a prior indorser will be barred to the extent of any loss which such person sustains by reason of the drawee's delay. *Savings & Loan Assoc. v. Trust Co.*, 44.

UTILITIES COMMISSION

§ 6. Hearings and Orders; Rates

Court of Appeals erred in reversing portion of Utilities Commission's order allowing a natural gas company to increase its rates to the extent necessary to offset an increase in the cost of gas to it. *Utilities Comm. v. City of Durham*, 308.

Utilities Commission properly made an adjustment of the test period revenues of a natural gas company because of abnormal cold weather during the test period. *Ibid.*

Utilities Commission did not err in finding that the rate of return on net investment earned by a natural gas company was insufficient. *Ibid.*

VENDOR AND PURCHASER

§ 1. Requisites and Validity of Contracts of Sale

A guarantee of the number of acres to be conveyed is not required to be in writing. *Hoots v. Calaway*, 477.

WORD AND PHRASE INDEX

PRINTED BY
COMMERCIAL PRINTING COMPANY, INC.
RALEIGH, NORTH CAROLINA