NORTH CAROLINA REPORTS

VOLUME 283

SUPREME COURT OF NORTH CAROLINA

SPRING TERM 1973

RALEIGH
1973

CITE THIS VOLUME

283 N.C.

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[1] Resigned 31 July 1973. Succeeded by Darl L. Fowler 17 August 1973.
[2] Deceased 18 September 1973.

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FRED P. PARKER III, *Executive Secretary*
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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM 1973

LOCAL 755, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

— v. —

COUNTRY CLUB EAST, INCORPORATED

— AND —

J. D. BECK, B. T. BLAIR, B. M. WAGONER, E. W. DELAPP, FRED E. SMITH, W. C. ALBERT, H. J. LEONARD AND S. G. BAILEY

— v. —

COUNTRY CLUB EAST, INC.

No. 40

(Filed 14 March 1973)

1. **Malicious Prosecution § 3— prior criminal prosecution — necessity for valid process**

When a prior criminal prosecution is the subject thereof, an action for malicious prosecution cannot be maintained unless the prior criminal prosecution was based on valid process.

2. **Injunctions § 16— remedies of person wrongfully restrained**

When a temporary restraining order is dissolved as having been improvidently issued, the following remedies are available to the party who has been wrongfully restrained: (1) he may recover damages from the party who procured the restraining order and the sureties on his injunction bond without proof of malice or want of probable cause, or (2) he may institute an action for malicious prosecution against the party who procured the restraining order and recover damages without regard to the limit of the bond upon establishing the elements necessary to constitute an action for malicious prosecution.

3. **Malicious Prosecution § 2; Injunctions § 16— temporary injunction — court of general jurisdiction — no jurisdiction of subject matter**

A party who procures a temporary injunction from a court of general jurisdiction will not be permitted to defeat an action for

malicious prosecution based on the procurement thereof solely on the ground that the court which issued the restraining order did not have jurisdiction of the subject matter.

4. **Malicious Prosecution § 1; Injunctions § 16— damages for wrongful injunction — violation of injunction not required**

A party is not required to violate a restraining order issued by a court of general jurisdiction in order to preserve his right to recover damages in the event it is determined that he was unlawfully restrained.

5. **Malicious Prosecution § 13; Master and Servant § 17— wrongful restraint of picketing — alleged informational picketing — error in dismissal of malicious prosecution action**

In a malicious prosecution action based upon defendant's procurement of a temporary restraining order preventing a union local and its members from picketing defendant's motel construction site, plaintiffs' allegations that they were engaged only in establishing "informational picket lines" and the absence from the restraining order of any reference by name to "informational picket lines" were insufficient as a basis for dismissal of the action on the ground that the order did not purport to restrain the pickets from what they were doing.

ON *certiorari* to review the decision of the Court of Appeals reported in 14 N.C. App. 744, 189 S.E. 2d 760, which affirmed a judgment for defendant entered by *Gambill, J.*, at the 31 January 1972 Session of FORSYTH Superior Court, docketed and argued in the Supreme Court as No. 59 at the Fall Term 1972.

The plaintiff in one of these actions is Local 755, International Brotherhood of Electrical Workers, AFL-CIO, referred to hereafter as Local 755. J. D. Beck is the plaintiff in the other action.

The complaints allege in substance that Local 755 and its representatives conducted an organizing campaign among employees of Salem Electric Company, referred to hereafter as Electric Company; that during August 1970, the substantial majority of these employees retained Local 755 to conduct negotiations for them with Electric Company; that Beck, an employee of Electric Company, participated in the campaign of Local 755 to organize the employees of Electric Company; that on or about 1 September 1970, Local 755 and its members and representatives, including Beck, engaged in a work stoppage at several locations where Electric Company was working and established "informational picket lines" near the entrance to the premises of defendant, Country Club East, Inc., informing

the public of Electric Company's refusal to bargain with Local 755; and that the picketing was lawful and peaceful and was the only effective method available to plaintiffs to obtain recognition by Electric Company of Local 755 as the bargaining agent for Electric Company's employees.

The plaintiffs further allege, and defendant admits, that on 4 September 1970, defendant applied for and procured from the presiding judge, Forsyth County Superior Court, an order preventing the plaintiffs herein, and all other persons acting in concert with them, jointly and severally, "from striking, picketing, inducing others to strike or to stop work, patroling, or by any other means, or in any other manner, interfering with or disrupting the normal operations of the plaintiff's [Country Club East, Inc.'s] motel construction on said premises, for the purpose of forcing, inducing or encouraging, or in any other manner hindering, interfering or stopping the passage of vehicles to and from plaintiff's premises, or encouraging employees of plaintiff or of plaintiff's contractor or subcontractors, or others working on said premises, in refusing to pass to and from said premises and conduct normal work for plaintiff in accord with the terms and provisions of the contracts between plaintiff and said contractor, subcontractors, or others working on said premises, and in any manner stopping or hindering the normal operation of local or interstate commerce vehicles to, from, or upon the premises of plaintiff or the public highways abutting thereon."

Plaintiffs further allege, and defendant admits, that defendant did not file a complaint in the prior action but "took a voluntary dismissal of the cause before a trial on the merits was had."

Plaintiffs further allege that the institution of the prior action by defendant "interfered with and restrained" Local 755 in its efforts "to represent its constituents," and Beck "in his efforts to establish contract relations with others for his own benefit"; that the institution thereof constituted an intentional and wrongful use of legal process for an improper purpose, namely, to accomplish its own selfish purposes without regard to the rights of plaintiffs, and this conduct of defendant was reckless and malicious.

Local 755 prayed that it recover compensatory damages of $50,000 and punitive damages of $50,000. Beck prayed that he

recover compensatory damages of $5,000 and punitive damages of $5,000.

Except as indicated above, the answers filed by defendant denied plaintiffs' allegations. As a separate defense, defendant alleged that Local 755 "was not a party to the law suit which this defendant instituted to enjoin picketing and, therefore, has no standing whatsoever to bring this action." Each answer alleged that "[t]he existence of probable cause for the injunctive relief obtained by this defendant was conclusively established by the Order signed by the Honorable Harvey A. Lupton, Resident Superior Court Judge of Forsyth County, on 4 September 1970, which is pleaded in bar of this action."

The record contains a "STIPULATION," signed by counsel for the respective parties, which begins: "UPON the trial of this action, the parties thereto stipulate. . . . " These stipulations, in addition to matters admitted in the pleadings and set forth above, are summarized, except when quoted, below:

In the prior action, the plaintiff therein (defendant herein) filed "an application for a temporary restraining order supported by the affidavit of one Ira B. Hall. . . . " An order to show cause was served with the summons and temporary restraining order. "[W]ithin ten (10) days following the issuance of the temporary restraining order by the Court a hearing was had or a meeting was held by the parties and their counsel with Judge Lupton and the matter was continued on motion of the Court until the 14th day of September, 1970 without any findings on the part of the Court or a reason for the continuance of the order." The parties again met with Judge Lupton on 14 September 1970. At that time, "the construction job which was the subject of said temporary restraining order, had been completed insofar as the orders [sic] of this action were concerned." On 14 September 1970 Judge Lupton signed an order entitled "VOLUNTARY DISMISSAL" dated 9 September 1970. "[T]he employees of various contractors who had previously refused to cross the existing picket lines as of the date of the injunction thereafter entered upon the premises after the picket line was removed by the Court's order and completed their portion of the work and left, and that their crossing of the picket lines was no longer at issue on the 14th day of September 1970." "[A]fter the order of September 4, 1970 was issued by Judge Lupton and served upon the parties, picketing ceased

at the Country Club East, Inc., sites and was not thereafter resumed by the plaintiffs." "[W]hile the picket line was in existence certain drivers of trucks furnishing materials to the construction job on Country Club East, Inc.'s property refused to cross said picket line of their own volition." Country Club East, Inc., had no contract with any of the parties plaintiff in this action. It "did have a contract with . . . Salem Electric Company, whereby Salem Electric Company was to furnish certain labor [and] materials for the completion of electrical work on Country Club East, Inc.'s premises." "[T]he employees of Salem Electric Company who were on strike at the sites of Country Club East, Inc. in this case were not organized in a Union but had signed membership authorization cards requesting to be represented by Local 755, International Brotherhood of Electrical Workers, AFL-CIO."

Two judgments signed by Judge Lupton, each dated 9 September 1970, appear in the record. *(Note:* According to the "STIPULATION" one or both was signed on 14 September 1970.) One of these is designated in the record as "VOLUNTARY DISMISSAL (Beck Case)." The provisions thereof are quoted below:

"THIS CAUSE coming on to be heard before the undersigned Superior Court Judge, on motion of the plaintiff that it be permitted to take a voluntary dismissal of this cause, and it appearing to the Court that no Complaint or Answer has been filed and that the motion is appropriate and should be allowed;

"NOW, THEREFORE, IT IS ORDERED and ADJUDGED that on motion of plaintiff, this cause be, and it is hereby, dismissed under the provisions of Rule [41(a)(2)] of the North Carolina Rules of Civil Procedure and that the plaintiff be taxed with the costs.

"AND IT IS FURTHER ORDERED and ADJUDGED that this order hereby revokes the Voluntary Dismissal Order heretofore entered in the cause by the undersigned judge on September 9, 1970."

The other judgment is designated simply "VOLUNTARY DISMISSAL" and appears to have been entered in an action entitled "COUNTRY CLUB EAST, INC. v. JIMMY BECK, FREDDIE SMITH, LARRY LAWSON, and ANDERSON LINVILLE, and all other persons

acting in concert with the above-named defendants, jointly and severally." The provisions thereof are quoted below:

"THIS CAUSE coming on to be heard before the undersigned Superior Court Judge, on motion of the plaintiff that it be permitted to take a voluntary dismissal of this cause, and it appearing to the Court that no Answer has been filed and that no judgment can be recovered against the plaintiff for other than the costs and that the motion is appropriate and should be allowed;

"And it further appearing, and the court so finds, that no harm has resulted to the defendants as a consequence of this action;

"NOW, THEREFORE, IT IS ORDERED and ADJUDGED that on motion of plaintiff, this cause be, and it is hereby, dismissed under the provisions of Rule [41(a)(2)] of the North Carolina Rules of Civil Procedure and that the plaintiff be taxed with the costs.

"IT IS FURTHER ORDERED and ADJUDGED that the bond given in this cause be, and is hereby dissolved and that the principal and surety on said bond are hereby released from all liability on said bond."

The judgment signed by Judge Gambill appears in the record under the caption, "JUDGMENT (Both Cases)." It recites that the causes were consolidated by consent and came on "to be heard in chambers during a pretrial conference during which conference certain stipulations were made as set out herein and upon which stipulations and pleadings the defendant moved for judgment in its favor pursuant to Rule 12(c)." The judgment then recites, following the words, "[a]nd it appearing to the Court," factual matters admitted in the pleadings or in the "STIPULATION" as set forth above. In addition, the judgment contains the following: "And it further appearing and the Court finding as a fact that the terms of the temporary restraining order did not prohibit the kind of picketing, i.e., informational picketing, which the plaintiffs allege in their complaints to have been intended by them."

The judgment concludes as follows:

"And upon the foregoing pleadings, findings, and stipulations of fact as agreed upon by counsel for all parties to this

action, the Court is of the opinion that the motion of the defendant for judgment in its favor upon the pleadings and stipulations should be allowed on the grounds that plaintiffs have failed to state a claim upon which relief can be granted; and further that there is no genuine issue as to any material fact; that the affidavit of Ira B. Hall was sufficient to warrant the issuance and continuance of the temporary restraining order; that Judge Lupton found sufficient probable cause to issue said order; that when the dismissal of the action and restraining order was taken, upon the advice of able counsel, all of the work by the defendant's subcontractors had been completed and all picketing had ceased, including not only the kind of picketing described in the temporary restraining order but informational picketing as well, which was the kind of picketing which plaintiffs alleged to have been intended by them and yet was not prohibited by the temporary restraining order; that the continued existence of the temporary restraining order had become moot; and that the entry of the voluntary dismissal of the action and temporary restraining order by Judge Lupton cannot be construed as unlawful or without probable cause or as an abuse of process under the facts and circumstances hereinabove stipulated.

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that these actions be and the same are hereby dismissed at the cost of the plaintiffs."

Plaintiffs objected and excepted "[t]o the entry of the foregoing Judgment . . . and findings of fact, conclusions of law . . . and [gave] notice of their intention to appeal to the North Carolina Court of Appeals. . . . "

In their appeal, plaintiffs assigned as error the action of the court in "granting defendant's Motion For Judgment on The Pleadings And For Summary Judgment based on the findings of fact and conclusions of law contained in the Court's Judgment. . . . "

The Court of Appeals affirmed the judgment.

Larry L. Eubanks and W. Warren Sparrow for plaintiff appellants.

Womble, Carlyle, Sandridge & Rice by Allan R. Gitter for defendant appellee.

BOBBITT, Chief Justice.

The Court of Appeals affirmed the judgment on a ground entirely different from that on which Judge Gambill based his decision.

Judge Gambill dismissed the actions on the ground that Judge Lupton's order of 4 September 1970 did not restrain the defendants in the prior action from establishing "informational picket lines" near the entrance to defendant's premises, informing the public of Electric Company's refusal to bargain with them.

The opinion for the Court of Appeals states: "The parties are in agreement that under the circumstances presented here the Superior Court did not have jurisdiction to enter the restraining order because the regulation of peaceful picketing in connection with a labor dispute affecting interstate commerce is preempted by provisions of the National Labor Relations Act." Upon this premise, the Court of Appeals held that Judge Lupton's order of 4 September 1970 was void and that an action for malicious prosecution cannot be maintained in the absence of proof that the process in the prior action was valid.

The records and briefs before us do not contain a judicial admission that Judge Lupton (Superior Court) had no jurisdiction to enter the restraining order of 4 September 1970. Even so, the decision of the Court of Appeals will be considered in the light of the premise on which it is based.

[1] When a prior *criminal prosecution* is the subject thereof, an action for malicious prosecution cannot be maintained unless the prior criminal prosecution was based on valid process. *Moser v. Fulk,* 237 N.C. 302, 74 S.E. 2d 729 (1953), and cases cited; Byrd, *Malicious Prosecution in North Carolina,* 47 N.C. L. Rev. 285, 304 (1969). It is otherwise in actions for false arrest or false imprisonment. *Hawkins v. Reynolds,* 236 N.C. 422, 72 S.E. 2d 874, 36 A.L.R. 2d 782 (1952), and cases cited. Whether an action is maintainable as an action for malicious prosecution or as an action for false arrest or imprisonment often turns upon whether the arrest or imprisonment is under valid process. *Caudle v. Benbow,* 228 N.C. 282, 45 S.E. 2d 361 (1947), and cases cited.

"It is the well-established general rule that there is no liability in tort for the damages caused by the wrongful suing

out of an injunction, unless the circumstances give rise to a cause of action for malicious prosecution. The philosophy of the matter is that an error in granting an injunction is an error of the court, for which there is no recovery in damages unless it is sufficiently intentional to be the basis of a suit for malicious prosecution." 42 Am. Jur. 2d, *Injunctions* § 359 (1969).

[2] Under our decision in *Shute v. Shute,* 180 N.C. 386, 104 S.E. 764 (1920), when a temporary restraining order is dissolved as having been improvidently issued the remedies available to the party who has been wrongfully restrained are as follows: (1) He may recover damages from the party who procured the restraining order and the sureties on his injunction bond without proof of malice or want of probable cause. In this connection, see G.S. 1A-1, Rule 65(e). (2) He may institute an action for malicious prosecution against the party who procured the restraining order and recover damages without regard to the limit of the bond upon establishing the elements necessary to constitute an action for malicious prosecution.

No decision of this Court has come to our attention which passes upon or considers whether an action for malicious prosecution can be maintained when a prior civil action or proceeding is the subject thereof *and the process therein is invalid.*

Decisions of this Court bearing upon differences between actions for malicious prosecution when the prior action is a civil action or proceeding rather than a criminal prosecution have been accurately summarized as follows:

"North Carolina, as do apparently a slight majority of American jurisdictions, permits an action for malicious prosecution in relation to some civil proceedings. Although recovery in a malicious prosecution action based upon earlier civil proceedings may include elements of damages similar to those recovered in an action based upon a prior criminal prosecution, it is clear that the proof necessary for recovery in the two situations is not identical. Where the tort action grows out of earlier criminal proceedings, the plaintiff is entitled to recover at least nominal damages upon proof that the defendant initiated the proceedings maliciously and without probable cause and that the proceedings terminated in his favor. . . . On the other hand, no cause of action arises, from *the malicious instigation of civil proceedings,* standing alone, even though begun *without*

probable cause and terminated in plaintiff's favor. Before any cause of action will exist in connection with malicious, unjustified civil proceedings, they must have resulted *in special damages* beyond those normally incident to a civil proceeding." Byrd, *op. cit.*, at 307-08. (Our italics.)

In the annotation entitled, "Court's lack of jurisdiction of subject matter in granting injunction as a defense in action on injunction bond," 82 A.L.R. 2d 1064, 1065, the author states: "The decisions are generally to the effect that in an action on an injunction bond, the fact that the court or judge granting the injunction did not have jurisdiction of the subject matter of the action or proceeding in which the injunction was issued cannot be invoked as a defense. This rule is usually predicated on the doctrine of estoppel, it being considered that the execution of the bond constitutes an implied affirmation of the jurisdiction of the court or judge to issue the injunction, and that an obligor should not be permitted later to assert the lack of such jurisdiction." The quoted statement is supported by the following cited decisions: *Adams v. Olive,* 57 Ala. 249 (1876); *Boise City v. Randall,* 8 Idaho 119, 66 P. 938 (1901); *Robertson v. Smith,* 129 Ind. 422, 28 N.E. 857, 15 L.R.A. 273 (1891); *Harvey v. Majors,* 129 Kan. 556, 283 P. 663 (1930); *Kimm v. Steketee,* 44 Mich. 527, 7 N.W. 237 (1880); *Johnson v. Howard,* 167 Miss. 475, 141 So. 573 (1932); *Tatavich v. Pettine,* 31 N.M. 479, 247 P. 840 (1926); *District Lodge 34, Lodge 804 I.A.M. v. L. P. Cavett Co.,* 111 Ohio App. 327, 14 Ohio Ops. 2d 292, 168 N.E. 2d 619, 82 A.L.R. 2d 1060 (1959); *McClintock v. Parish,* 72 Okla. 260, 180 P. 689 (1919); *Littleton v. Burgess,* 16 Wyo. 58, 91 P. 832, 16 L.R.A.N.S. 49 (1907).

For general statements substantially in accord with that quoted above, see 43 C.J.S., *Injunctions* § 293, and 42 Am. Jur. 2d, *Injunctions* § 379.

The rationale of the rule embodied in the quoted statement is expressed in *Johnson v. Howard, supra,* as follows: "Where a complainant has secured an injunction and stayed his adversary's proceedings, and thereby caused him to suffer damages, it is too late for the complainant to set up as a defense in an action on the injunction bond a want of jurisdiction in the court to grant the injunction. He is estopped to say that the court granted the injunction without jurisdiction. It does not lie in the mouth of one who has affirmed the jurisdiction of a court

to grant an injunction, where he has accomplished his purpose by the injunction, to afterwards deny such jurisdiction." 167 Miss. at 489, 141 So. at 575.

The facts in *District Lodge 34, Lodge 804 I.A.M. v. Cavett Co., supra,* are more analogous to those in the present case than the facts in the other cited cases. The plaintiffs in the prior action had obtained an injunction in an Ohio court of general jurisdiction upon giving the required injunction bonds. The injunction was upheld as valid by an Ohio appellate court, 103 Ohio App. 45, 136 N.E. 2d 276 (1956), and also by the Supreme Court of Ohio, 166 Ohio St. 508, 143 N.E. 2d 840 (1957). Subsequently, the Supreme Court of the United States reversed the Ohio judgment on the ground that the courts of Ohio had no jurisdiction of the subject matter, an alleged unfair labor practice under the National Labor Relations Act. 355 U.S. 39, 2 L.Ed. 2d 72, 78 S.Ct. 122 (1957).

After stating the general rule, 42 Am. Jur. 2d, *Injunctions* § 379, adds: "In other cases, however, it has been said that where the injunction is void ab initio, there can be no recovery of damages." As authority for this statement, *Mark v. Hyatt,* 135 N.Y. 306, 31 N.E. 1099 (1892), and *Montgomery v. Houston,* 27 Ky. (4 JJ Marsh) 488, 20 Am. Dec. 223 (1830), are cited.

Defendant contends that plaintiffs' actions were properly dismissed because Judge Lupton (the superior court) did not have jurisdiction of the subject matter. This contention is based largely on the excerpt from the opinion of the Court of Appeals of New York in *Mark v. Hyatt,* 135 N.Y. at 311, 31 N.E. at 1100, quoted in the opinion of the North Carolina Court of Appeals, 14 N.C. App. at 747, 189 S.E. 2d at 762, to the effect that compliance with an injunction which is absolutely void is not required and damages resulting from voluntary compliance therewith are not recoverable. Full consideration of that decision seems appropriate.

In *Mark v. Hyatt,* the plaintiff sued the defendants to recover damages allegedly caused by defendants' procurement of an injunction against plaintiff in a prior civil action. This injunction had restrained Mark from manufacturing certain articles under patents held by defendants notwithstanding his contention that the Hyatts had licensed him to do so. Mark obeyed the restraining order until it was dissolved and the prior action dismissed. Mark's action for damages, now under con-

sideration, was dismissed by the trial judge. His appeal was first heard in the Supreme Court, Appellate Division, which affirmed the judgment dismissing Mark's action. 61 Hun. 325, 15 N.Y. Supp. 885 (1891). The opinion states: "While it is clear that the injunction in the Superior Court was erroneously granted, it is not clear that it was granted without jurisdiction." *Id.* at 326, 15 N.Y. Supp., at 886. Seemingly, the trial judge was affirmed without regard to whether the court which issued the injunction had jurisdiction. The opinion concludes: "In the case at bar, not only did the plaintiff fail to establish his allegations of malice, but the entire course of the defendants in prosecuting the superior court suit shows that they must have sincerely believed that the court had jurisdiction." *Id.* at 327, 15 N.Y. Supp., at 886.

Mark's appeal from the Supreme Court, Appellate Division, to the Court of Appeals was considered in *Mark v. Hyatt,* 135 N.Y. 306, 31 N.E. 1099. The opinion of the Court of Appeals states that the court which issued the injunction had jurisdiction of the parties and of the subject matter; that the judgment was not void for want of jurisdiction to hear and determine the matter; and that, although the court had power to grant an injunction, "the power was erroneously exercised in not explicitly limiting its operation." Under these circumstances, Finch, J., said: "[N]o action of trespass will lie to recover the damages unless the prosecution is alleged and proved to have been malicious and without probable cause. We have held that doctrine quite firmly and clearly in cases of injunctions, declaring in substance that, although the restraining order ought not to have been granted and was set aside for that reason, yet the damages incurred, where the proceedings have been regular, cannot be recovered in the absence of an undertaking, *except upon the basis of a malicious prosecution." Id.* at 310-11, 31 N.E. at 1100. (Our italics.)

The excerpt from the opinion on which defendant herein relies was addressed to *Mark's* alternative contention that the restraining order was void and the mere issuance and service thereof constituted a trespass and afforded a basis for his recovery of damages. Immediately following the excerpt on which defendant relies, Judge Finch said: "But he [Mark] answers that the mere service of a copy of the judgment was a trespass, *because the then plaintiff could not be heard to say that the injunction which she caused to be served was void and*

ineffective. But on the theory now under consideration it is not the defendant who asserts the void character of the process, but the plaintiff himself, driven to it by the necessity of providing some sort of foundation on which to build up a claim of trespass, and he cannot assert it for his purpose and deny it when it serves hers." *Id.* (Our italics.) In contrast to the factual situation in *Mark v. Hyatt,* herein it is the defendant who seeks to defeat plaintiffs' actions on the ground that the restraining order which the *defendant* procured was issued by a court which had no jurisdiction.

Judge Finch stated plainly that he did not think the injunction was absolutely void but that "[j]urisdiction in the action was full and complete." *Id.* at 312, 31 N.E. at 1100. Even so, the dicta in the quoted excerpts do not deviate from but support and confirm the general rule stated above.

In *Montgomery v. Houston,* 27 Ky. (4 JJ Marsh) 488, 20 Am. Dec. 223, it was held that there was no liability on the injunction bond because the injunction, having been signed by one who had assumed without authority to act as a judge of the court out of which it issued, was manifestly void and should have been disregarded. This rule has been held applicable in respect of orders issued by a justice of the peace who had no authority to issue such orders *under any circumstances. Berger v. Saul,* 113 Ga. 869, 39 S.E. 326 (1901); *Vinson v. Flynn,* 64 Ark. 453, 43 S.W. 146 (1897).

[3] Although the cited decisions directly involved actions to recover on injunction bonds, the principle is applicable in independent actions for malicious prosecution. We hold that a party who procures a temporary injunction from a court of general jurisdiction will not be permitted to defeat an action for malicious prosecution based on the procurement thereof solely on the ground that the court which issued the restraining order did not have jurisdiction of the subject matter. Hence, the ground assigned by the Court of Appeals for its decision is not approved. Even so, to recover herein plaintiffs are required to establish all essentials in an action for malicious prosecution.

[4] It may be conceded, *arguendo,* that the party who violates a temporary restraining order or injunction may not be attached for contempt if and when it is determined that the court issuing the restraining order had no jurisdiction of the subject matter.

Freight Carriers v. Teamsters Local, 11 N.C. App. 159, 180 S.E. 2d 461 (1971), *cert. den.,* 278 N.C. 701, 181 S.E. 2d 601 (1971). However, a party is not required to violate a restraining order issued by a court of general jurisdiction in order to preserve his right to recover damages in the event it is determined that he was unlawfully restrained.

Having reached the conclusion that the ground assigned by the Court of Appeals was not a sufficient alternative basis for affirming the judgment, we consider next the ground on which Judge Gambill has based his judgment.

At the outset, we note that the record on appeal is defective. Although a portion of Judge Lupton's temporary restraining order of 4 September 1970 is quoted in the complaints and in the "STIPULATION," the record does not contain the entire order. Nor does it contain a copy of the application for a temporary restraining order and supporting affidavit "of one Ira B. Hall," referred to as the basis of Judge Lupton's order. Nor does it contain a copy of any injunction bond.

Plaintiffs' brief in the Court of Appeals contains what purport to be copies of (1) summons, (2) application and order extending time to file complaint, and (3) temporary restraining order in an action entitled "COUNTRY CLUB EAST, INC., Plaintiff vs. JIMMY BECK, FREDDIE SMITH, LARRY LAWSON, and ANDERSON LINVILLE, and all other persons acting in concert with the above-named defendants, jointly and severally, Defendants." *(Note:* It does not contain a purported copy of the application for the temporary restraining order.)

Under the caption, "Background and Facts," plaintiffs assert in their brief factual matters which are not in the "STIPULATION" and do not appear elsewhere in the record. For example, plaintiffs assert in their brief the following: "From the inception of the strike, employees of Salem Electric Company picketed peacefully, and on public property, just off the premises of the defendant. This picketing was peaceful and done in such a manner as not to constitute mass picketing." In this connection, it is noted that Beck's allegation "[t]hat said picketing was lawful, nonviolent and peaceful in every respect," was denied by defendant; and the complaint of Local 755 contains no allegation as to whether the picketing was violent or peaceful.

Appellee's brief in the Court of Appeals asserted that "[a] multitude of facts are set out in the appellants' Brief which are completely outside the record." The record provides ample support for this statement.

Under the circumstances we cannot do otherwise than consider the case solely on the basis of what is contained in the record.

[5] The allegations in the complaints to the effect that Local 755 and members thereof, including Beck, established "informational picket lines" and that the picketing was peaceful, were denied in defendant's answers. The issues so raised were not resolved by any provision of the "STIPULATION." The complaints do not allege, and the "STIPULATION" does not disclose, any particulars concerning the conduct of members of Local 755 which caused the alleged work stoppage. The restraining order signed by Judge Lupton does not refer to an "informational picket line." Upon the present record, we hold that plaintiffs' allegations that they were engaged only in establishing "informational picket lines" and the absence from Judge Lupton's restraining order of any reference *by name* to "informational picket lines," was insufficient as a basis for dismissal of the action on the ground that the order did not purport to restrain the pickets from what they were doing.

We note that the complaints allege that defendant maliciously instituted the prior action and procured the restraining order. Since the decisions of the Superior Court and of the Court of Appeals are based on other grounds, we do not pass upon whether the allegations of the complaint are deficient in respect of the elements of want of probable cause, special damages or otherwise. These questions are not determined and may be considered *de novo* in the further proceedings herein.

The record does not disclose whether Local 755 was a defendant in the prior action. It is not referred to by name in the portion of the restraining order quoted in the complaint. This question may arise: If Local 755 was not a defendant in the prior restraining order action, should its present action be dismissed *on that ground?*

The meager record affords no basis for a consideration of whether the jurisdiction of the Superior Court of Forsyth County under the circumstances of this particular case was

preempted by the National Labor Relations Act and vested exclusively in the National Labor Relations Board. 29 U.S.C. §§ 151 *et seq.; Aircraft Co. v. Union,* 247 N.C. 620, 101 S.E. 2d 800 (1958); *Beasley v. Food Fair,* 282 N.C. 530, 193 S.E. 2d 911 (1973); *Hanna Mining v. Marine Engineers,* 382 U.S. 181, 15 L.Ed. 2d 254, 86 S.Ct. 327 (1965). See also, Cox, "Labor Law Preemption Revisited," 85 Harv. L. Rev. 1337 (1972). Nor is there a sufficient factual basis to determine whether either plaintiffs or defendant had committed an unfair labor practice. 29 U.S.C. § 158. This question may arise: *If* plaintiffs committed an unfair labor practice of which the National Labor Relations Board had exclusive jurisdiction, should they be permitted to assert interference with their commission of such unfair labor practice as the basis for *special damages* cognizable in an action for malicious prosecution?

We note the following: The record includes interrogatories submitted by defendant in each of the two cases. In each case the interrogatories were answered by an attorney for the plaintiff. Judge Gambill's judgment makes no reference to the interrogatories but recites that it is based on the pleadings and the "STIPULATION." Apparently, the answers to the interrogatories provided the information on which certain of the stipulations were based.

We note further that the record is incorrect in indicating that the caption in one of the cases is "J. D. BECK, B. T. BLAIR, B. M. WAGONER, E. W. DELAPP, FRED E. SMITH, W. C. ALBERT, H. J. LEONARD and S. G. BAILEY v. COUNTRY CLUB EAST, INC." The record contains the pleadings and proceedings in an action entitled "J. D. BECK v. COUNTRY CLUB EAST, INC." We infer that each of the other seven persons may have instituted a similar action against Country Club East, Inc. However, in this respect as in so many others, the record is incomplete, meager and inexact.

We express no opinion as to whether plaintiffs or either of them may maintain an action for malicious prosecution. We hold solely that the dismissal of the action was premature and without justification either on the ground on which Judge Gambill based his decision or on the alternative ground on which the Court of Appeals affirmed Judge Gambill's judgment.

On this appeal, it is unnecessary to discuss plaintiffs' alternative contention that if they cannot recover in an action for

malicious prosecution they should be permitted to recover in an action for malicious abuse of process. For a discussion of the essentials of an action for malicious abuse of process, see *Barnette v. Woody*, 242 N.C. 424, 431, 88 S.E. 2d 223, 227-28 (1955), and cases there cited.

The decision of the Court of Appeals, which affirmed the judgment dismissing these actions, is reversed. The cause is remanded to the Court of Appeals with direction that it vacate the judgment of the superior court and remand the cause to the superior court for further proceedings on legal principles not inconsistent with those stated in this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. JERRY DOUGLAS WATKINS

No. 3

(Filed 14 March 1973)

1. **Criminal Law § 23; Homicide § 13— first degree murder — guilty plea**

Though there is no statute in this State specifically prohibiting a court from accepting a plea of guilty of a capital crime, the long-established practice of the judiciary not to accept such a plea has become the public policy of the State, and—until the legislature changes that policy—the Court cannot accept a plea of guilty of a capital crime.

2. **Homicide § 31— first degree murder — guilty plea — jury determination of sentence — error**

The trial court in a first degree murder prosecution erred in submitting the case to the jury upon the issue of punishment alone after defendant entered a plea of guilty to the charge since G.S. 14-17 under which defendant was charged allowed the jury's discretion as to life imprisonment or death to be exercised only in connection with its verdict upon the issues of guilt or innocence of the accused; however, the error did not require that the sentence of life imprisonment given defendant be set aside.

3. **Criminal Law § 135; Homicide § 31— first degree murder — sentence of life imprisonment only**

Defendant's contention in a first degree murder case that his plea was void because it was a plea of guilty to a capital crime was incorrect since, according to *Furman v. Georgia*, the only permissible punishment for murder in the first degree at the time of defendant's plea was life imprisonment; however, had the homicide occurred after 18 January 1973, the date of *State v. Waddell*, the contention would have had to be sustained.

State v. Watkins

APPEAL by defendant under G.S. 7A-27(a) from *Braswell, J.*, 12 June 1972 Session of WAKE.

Defendant was arrested on 26 October 1970 upon a warrant charging him with the murder of his wife, Margie Watkins, on 25 October 1970. At the 16 November 1970 Session of Wake, in the form prescribed by G.S. 15-144 (1965), he was indicted for the murder.

On the day defendant was arrested Alfonso Lloyd, Esquire, an attorney of the Wake County Bar, was appointed to represent him. Thereafter a preliminary hearing was waived and defendant bound over to the Superior Court for trial. Upon Mr. Lloyd's affidavit suggesting that defendant might be "mentally deranged," the court committed defendant to the State Hospital at Raleigh for observation pursuant to G.S. 122-91 (1964).

On 10 December 1970, the director of the Forensic Unit of the hospital reported to the court that defendant was not insane; that examination, observation, and testing revealed no evidence of insanity or any other mental disturbance which might interfere with defendant's ability to plead to the bill of indictment; that Watkins fully understood the true nature and possible consequence of his criminal charges and was able to assist in his defense; that defendant "should be returned to the court inasmuch [as] he is competent to stand trial."

During defendant's stay at the State's hospital, because of Mr. Lloyd's illness, Sheldon Fogel, Esquire, was substituted as defendant's counsel. When defendant refused to discuss the defense of his case with him, Mr. Fogel was permitted to withdraw as counsel and, upon defendant's affidavit of indigency, William W. Merriman III, Esquire, was appointed to represent him.

Defendant was brought to trial on 12 June 1972. He was formally arraigned in the manner customary in capital cases, entered a plea of not guilty of the crime charged in the indictment, and a jury was duly selected and impaneled to try the issue.

The background of this homicide emerges from the testimony of defendant's mother-in-law, Mrs. Watson Price, who testified for the State, and that of defendant himself. For con-

tinuity of exposition, their "background evidence" is summarized in the first two paragraphs below.

Defendant testified that he married when he was 19 and his wife was 16. On 25 October 1970 they had been married about ten years. Until he went to prison in 1969 for breaking and entering they had lived together. After having visited him regularly in prison, his wife had stopped coming in November 1969. From then until 25 October 1970 he had neither seen her nor talked to her on the telephone. Mrs. Price testified that about a year prior to the homicide she had changed her telephone number after defendant had called to tell her he was going to kill his wife if "they" didn't kill him first. Mrs. Price told him Margie had quit her job and left town, and she did not know where Margie was.

Defendant testified that in November 1969 he escaped from prison and, after searching unsuccessfully for his wife for three days, he went to Florida. On 25 October 1970 defendant was back in prison and in honor grade. He had been going to his mother's home every weekend for a couple of months. He had served his minimum sentence but had been turned down three times for parole. He testified he "thought his wife was writing the prison department to keep [him] in there," and he had asked her for a divorce thinking he "might get out" in that way. However, he denied that he was mad with his wife on 25 October 1970 and that he knew Mrs. Price had had her telephone number changed.

Prior to resting its case the State offered evidence, which tended to show:

On 25 October 1970 defendant's wife, Margie, was living with her parents, Mr. and Mrs. Watson Price. At approximately 9:30 p.m. defendant "pulled the front door open" and, pistol in hand, walked into the living room where Mrs. Price and Margie were sitting. He said to Margie, "I've come to blow your goddamn brains out just like I told you I was going to do." With that he shot her, turned and shot Mrs. Price, and then shot Margie again. After pulling Margie out of the chair, defendant dragged her around by her hair and "kicked her until she was worked all the way across the room." At one point he pulled out a whole handful of her hair and threw it on the floor. When he had stopped kicking his wife he said to Mrs. Price, "I am going to blow your goddamn brains out because you had your tele-

phone number changed." Upon hearing this Margie sat on the floor and begged him not to kill her mother. Defendant then shot Margie in the head twice. When she "fell over dead," defendant turned and shot Mrs. Price again. In all, he shot his wife four times and Mrs. Price three times.

When defendant arrived Mr. Price was sleeping in a bedroom adjoining the living room. Price "was awakened by a terrible noise in the house, shooting and hollering and screaming." As he started into the living room defendant turned the gun on him and he slammed the door shut. Defendant "tried his dead-level best" to get into the bedroom, all the while threatening to kill Mr. Price. At one time he shot into the room. However, "in less than five minutes," defendant gave up trying to get in, and Mr. Price dialed the telephone operator and asked her to send officers and ambulances. He remained in the bedroom with the light off until the police arrived about ten minutes thereafter.

As defendant was leaving the house, at the front door he put the pistol on top of his head and pulled the trigger. Mrs. Price saw blood come down his shirt, but he walked out the door, pistol in hand, just as Police Officers Peoples and Bissett arrived.

Mrs. Price testified that she had seen defendant when he was under the influence of intoxicants, and that he had not been drinking on the night of 25 October 1970.

Before permitting the officers to testify with reference to their encounter with defendant, Judge Braswell heard the following testimony in the absence of the jury to determine the admissibility of any statements which defendant had made to them.

Officer Peoples testified, in substance, as follows:

As he arrived at the Price home defendant came from the front door and walked toward the street. Before the officer could ask him any questions defendant handed him an empty semi-automatic pistol which would hold nine shots and said, "I've killed them, I shot them all. I've killed these people in there. Give me a cigarette." Defendant had a little spot of blood on his forehead and said he had a bullet in his head. In consequence, he was taken to the hospital. It turned out, however, that his wound was not serious, "just a small crease in the cap."

After being x-rayed and sutured, defendant was turned over to the officers. At that time he inquired if his wife was dead. When Peoples told him he did not know, defendant said, "I didn't do such a good job. If I had to do it over again, I would do a better job and make sure they were dead." He then added, "I'd like to borrow a pistol for about two minutes and I'd get rid of some more people, including some goddamn policemen and chain-gang guards." Up to this time no officer had asked defendant any questions whatever.

En route from the hospital to the police station defendant volunteered the following statement to Officer Peoples: "Watson, that fat bastard, is a lucky son of a bitch." Prior to the time defendant made this statement in the car, no one had asked him any questions at all. During the forty-five minutes Officer Peoples was with defendant he detected no odor of alcohol on his breath. His speech and walk were normal and the idea that he might have been under the influence of an intoxicant never occurred to Peoples. Officer Bissett's testimony corroborated that of Peoples.

Detective Nelson S. Lockey testified that at the Raleigh Police Department he advised defendant of his constitutional rights and gave him the full Miranda warning. Thereafter defendant said that he would talk with the officer and that he did not want an attorney at that time. At 11:40 p.m. he gave a statement in which he said he had drunk two pints of blended whiskey that day but he was not then "under the influence." Officers Lockey and Stephenson took defendant to the Wake County jail. En route, at a time when no questions were being asked him and the case was not being discussed, defendant said to the officers, "It looks like I did what I intended to do." As far as Officers Peoples, Lockey, and Stephenson could tell defendant had not been drinking. He appeared to understand what was going on, and his statements were at all times responsive to the questions asked. Officer Bissett testified that "it did not even cross [his] mind that defendant might have been drinking."

Detective Ralph Carroll, who was with defendant for an hour and a half at the Wake Memorial Hospital, testified that during that time he never detected the odor of alcohol on defendant's breath or about his person and, in his opinion, defendant was not under the influence; that knowing what had

happened he observed defendant carefully "with that question in mind" and he saw no evidence of intoxication.

On *voir dire* defendant testified that prior to 25 October 1970 he had had nothing to drink for about a year and a half; that on that day he had bought and consumed two pints of liquor, and he was drunk; that he had no recollection of going to the Price home or "ever having seen or talked with Officer Peoples or the officer in the brown coat"; that he does not recall Mr. Lockey telling him his wife was dead; that "Mr. Williams told [him] after they put [him] in a cell upstairs."

Upon the foregoing evidence Judge Braswell found that each of defendant's four statements to the officers was unsolicited, completely voluntary and spontaneous; that at the time defendant made them he was not under the influence of an intoxicant. He ruled that the statements were competent evidence. Officers Peoples, Lockey, and Carroll then gave substantially the same testimony before the jury as they had given upon the *voir dire*. An additional witness, Dr. Kaasa, an expert pathologist, testified that his autopsy of the body of defendant's wife revealed four bullet wounds, two in the head, and that her death was the result of extensive injury to the brain.

At the conclusion of the State's evidence, in the absence of the jury, defendant's counsel informed the court that defendant had authorized and directed him to enter a plea of "guilty of first degree murder."

After considering the matter Judge Braswell ruled (1) that a defendant has a constitutional right to plead guilty of murder in the first degree or any other offense with which he might be charged; (2) that under G.S. 14-17 (1969) the question whether defendant's punishment should be death or life imprisonment was for the jury; and (3) that the jury which had been impaneled to try the case should determine that issue.

After making his ruling Judge Braswell informed defendant that the punishment for murder in the first degree was in the discretion of the jury and that it was either death or life imprisonment, and that his plea, if accepted by the court, eliminated any question of his innocence and established his guilt of murder in the first degree. He then told defendant that he was going to ask him a series of questions to determine whether his plea was understandingly and voluntarily made,

to be certain defendant "understood what was happening to him" and that none of his constitutional rights had been violated. Defendant was instructed that if any of his rights had been violated he was expected to say so then or forever hold his peace. After being duly sworn, in response to questions from the court, defendant testified as follows:

He was not then under the influence of any alcohol, drugs, narcotics, medicines, or other pills. He understood that he was charged with the felony of murder in the first degree. This charge had been explained to him and he was ready for trial. He understood that he had the right to plead not guilty and to be tried by a jury. He pled guilty to this charge of murder in the first degree, and he was in fact guilty of it. He understood that upon his plea of guilty he could either be imprisoned for life or sentenced to death. He had had time to subpoena the witnesses he wanted and to talk and confer with his lawyer, Mr. William Merriman III, about this case. He had conferred with him and was satisfied with his services. Neither the solicitor, Mr. Merriman, nor any policeman, law officer, or anyone else had made any promise or threat to influence him to plead guilty in this case. No one had violated any of his constitutional rights. He had freely, understandingly, and voluntarily authorized and instructed his lawyer, Mr. Merriman, to enter in his behalf a plea of guilty to murder in the first degree. He had no questions to ask the judge about anything and no statement he desired to make. There was no one else he would like to talk to or confer with before he entered this plea of guilty to murder in the first degree. It was his own free and personal decision to enter a plea of guilty to murder in the first degree. He fully realized and understood that, upon the acceptance of this plea, the jury would return to hear any evidence which he and the State might offer concerning punishment; that thereafter the jury would be instructed to consider the evidence and decide by their verdict whether his punishment would be death or life imprisonment. He understood all that and was willing for this to happen.

(The foregoing interrogation was transcribed in question and answer form. After being sworn defendant verified and signed the transcript on 13 June 1972.)

Upon the completion of Judge Braswell's examination of defendant, his attorney, Mr. Merriman, told the court in defendant's presence that he and defendant had discussed the plea at

length that morning and defendant "has decided that it is in his best interest to enter a plea."

For the record, the solicitor stated that at the time defendant was in court for the appointment of counsel defendant told him "that he would like to be able to enter a plea of guilty to the crime"; that later defendant's attorney had approached him, but he "had thought that the law, though it did not prohibit [such a plea] as far as we know, might not be interpreted to permit it." The solicitor further informed the court defendant's counsel had requested him to agree that no arguments would be made to the jury if defendant entered a plea; that he had refused this request and, at the same time, told counsel he would argue for the death penalty. Mr. Merriman verified the solicitor's statement and said he had fully informed defendant of the solicitor's position.

The jury was then recalled and informed of defendant's plea. The judge then instructed them (1) that defendant's plea of guilty of murder in the first degree eliminated all issues except the question whether his punishment would be death or life imprisonment, a matter which the law left to their "complete and unbridled discretion"; (2) that the trial would "go forward with evidence concerning punishment."

The State, having completed its evidence, defendant offered evidence tending to show:

About 4:00 p.m. on 25 October 1970 he arrived at the home of his cousin, Larry Watkins, who lived near Morrisville. At that time defendant was drunk. After staying with his cousin only five minutes defendant left saying he was going to Durham to get another pint of liquor.

In addition to his testimony hereinbefore referred to, defendant testified, in substance, as follows: On 25 October 1970 he left his mother's house about 11:00 a.m. and went to a bootleg house. There he purchased a pint of liquor for $4.00 and bought "a nice pistol" for $10.00 from a fellow there who wanted money to buy liquor. At that time he had no idea of shooting his wife or anybody else and he had not planned to go to the Price home. Between 12:30 p.m. and the time he went to Morrisville he drank the pint. From Morrisville he went to Durham, where he bought another pint and drank that. The last thing he remembered on that day was "being out close to the airport

and sitting there drinking." He did not remember going to the Price home, shooting the pistol, or going to the hospital. The first thing he remembered after drinking the second pint was being in jail. He had been mad with his wife a year earlier, but on 25 October 1970 he was not mad with her.

At the conclusion of the evidence Judge Braswell, in a charge to which no exception is taken, instructed the jury as required by G.S. 14-17 on the question of punishment for murder in the first degree. The jury, after deliberating seventeen minutes returned their verdict. In response to the clerk's inquiry, "How say you: Shall the defendant be punished with death or do you recommend life imprisonment?" the answer was, "The jury recommends life in prison."

The court inquired whether defendant desired that the jury be polled and counsel answered, "No."

Upon the jury's verdict, on 13 June 1972, Judge Braswell entered judgment that defendant be imprisoned for the term of his natural life in the State's prison. Defendant gave no notice of appeal. However, on 20 June 1972 the clerk of the Superior Court of Wake County received from defendant in Central Prison a notice of appeal and a petition that he be allowed (1) "to proceed on appeal *in forma pauperis* as an indigent"; and (2) "to represent himself in this appeal perfection."

On 27 June 1972 Judge Braswell signed an order authorizing defendant to appeal as an indigent and directed defendant's trial attorney to "be available for such consultation and assistance in the legal technicalities of appeal [about] which the defendant appellant may want professional advice."

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

Jerry Douglas Watkins, defendant pro se.

SHARP, Justice.

Defendant's case on appeal and brief are signed "Jerry Douglas Watkins, Defendant in propria persona." His appeal, taken after a plea of guilty, presents for review only the question whether error appears on the face of the record. *State v. Caldwell*, 269 N.C. 521, 153 S.E. 2d 34 (1967); *State v. Newell*, 268 N.C. 300, 150 S.E. 2d 405 (1966).

Defendant's assignments which require discussion are that the trial court erred in accepting his plea of guilty to murder in the first degree, in accepting the verdict of the jury, and in imposing a life sentence upon him. He asserts (1) that under the law of this State a jury must determine whether murder is in the first or second degree, and a defendant will not be permitted to plead guilty to murder in the first degree; (2) that Judge Braswell's acceptance of his plea was a nullity "totally without precedent" and a violation of defendant's rights under N. C. Const. art. I, § 19 and the Fourteenth Amendment to the United States Constitution; and (3) that neither defendant's plea nor the jury's verdict will support a sentence.

At the outset, we note that defendant's plea was entered on 13 June 1972, sixteen days before the U. S. Supreme Court, on 29 June 1972, decided *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726. *Furman* invalidated any death sentence imposed under a statute which leaves to the discretion of either judge or jury whether a sentence shall be death or life imprisonment. Thus a death sentence imposed under G.S. 14-17 as then constituted cannot be carried out. *See State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973). Prior to *Furman,* the status of the death penalty under G.S. 14-17 was uncertain. However, defendant knew that G.S. 14-17 made either death or life imprisonment the penalty for first-degree murder, and he believed that if his plea was accepted his punishment would be one or the other.

The Attorney General concedes that on 13 June 1972 no statute or case law in this State specifically authorized the court to accept a plea of guilty to first-degree murder. He submits, however, that defendant has suffered no prejudice because (1) the State's evidence points unerringly to defendant's guilt of first-degree murder; (2) defendant does not challenge the fact that his plea was freely, understandingly, and voluntarily made; and (3) the jury's verdict imposed the minimum punishment of life imprisonment.

[1] Undoubtedly, at common law, a defendant of competent understanding, duly enlightened, had the right to plead guilty to a capital crime instead of denying the charge. *See Green v. Commonwealth,* 94 Mass. (12 Allen) 155 (1866); 31 N.C. L. Rev. 405 (1953). According to Blackstone, upon "the prisoner's confession of the indictment . . . the court hath nothing to

do but award judgment: but it is usually very backward in receiving and recording such confession, out of tenderness to life of the subject; and will generally advise the prisoner to retract it, and plead to the indictment." 4 Blackstone, *Commentaries* *324. In noting the reluctance of courts to accept a plea of guilty of a crime for which the penalty is death, Bishop said, "Thus, where one tendered [this plea] in a capital case, the judges would not accept it till they had explained to him its serious nature, sent him back to his cell for reflection, brought him again into court, had the indictment read to him a second time, and examined witnesses as to his sanity, and whether or not promises of clemency had been made to him . . . , [a]nd in some of the states there are varying statutory and other devices to protect defendants from improvident pleas of guilty." 2 Bishop, *New Criminal Procedure* § 795 (2d ed. 1913). *See also* 1 Greenleaf, *Law of Evidence,* § 216 (16th ed. 1899).

In this country today it is generally held that every accused has the right to plead guilty and one may do so even in a capital case unless prohibited by statute. Annot., 6 A.L.R. 694 (1920); 21 Am. Jur. 2d *Criminal Law* § 484 (1965); 22 C.J.S. *Criminal Law* § 422(1), (4) (1961). *See also* Fed. R. Crim. P. 11, 18 U.S.C.A.; *Donnelly v. United States,* 185 F. 2d 559 (10th Cir. 1950); *Territory v. Miller,* 4 Dak. 173 (1886). However, "one accused of a capital offense has no constitutional right to plead guilty." 22 C.J.S. *Criminal Law* § 422(1) (1961). *Accord,* 21 Am. Jur. 2d *Criminal Law* § 484 (1965). *See also People v. Ballentine,* 39 Cal. 2d 193, 246 P. 2d 35 (1952); Annot., 6 A.L.R. 694, 695 (1920); *Hallinger v. Davis,* 146 U.S. 314, 36 L.Ed. 986, 13 S.Ct. 105 (1892); 31 N.C. L. Rev. 405-06 (1953).

It is settled law in this State that a plea of guilty, freely, understandingly, and voluntarily entered, is equivalent to a conviction of the offense charged. *State v. Shelly,* 280 N.C. 300, 185 S.E. 2d 702 (1972); *State v. Wynn,* 278 N.C. 513, 180 S.E. 2d 135 (1970); *State v. Miller,* 271 N.C. 611, 157 S.E. 2d 211 (1967); *State v. Perry,* 265 N.C. 517, 144 S.E. 2d 591 (1965).

In *State v. Branner,* 149 N.C. 559, 63 S.E. 169 (1908), a case involving a prosecution for disturbing religious worship, in discussing the nature and effect of a plea of guilty, Justice Walker said: When a defendant "directly, and in the face of the court, admits the truth of the accusation" in the indictment, "[t]his is called a plea of guilty and is equivalent to a convic-

tion. The court then has nothing to do but award judgment as upon a verdict of guilty, but, of course, may hear evidence for the purpose of enabling it to determine the measure of punishment . . . . " *Id.* at 561, 63 S.E. at 170 (citations omitted). However, Justice Walker also said that "a judge cannot compel a defendant against his will to plead not guilty and submit to a trial, for undoubtedly a prisoner of competent understanding, duly enlightened, has the right to plead guilty instead of denying the charge, yet, in proportion to the gravity of the offense, the court should exercise caution in receiving this plea and should see that he is properly advised as to the nature of his act and its consequences. This is a matter which is left to the good judgment and discretion of the court, which should be exercised so as to protect a defendant from an improvident plea and to prevent injustice." *Id.* at 563, 63 S.E. at 171.

Although North Carolina has had no statute specifically prohibiting a court from accepting a plea of guilty in a capital case, to our knowledge no judge had ever accepted a plea of guilty of a crime for which the punishment could be (or was thought to be) death prior to Judge Braswell's acceptance of defendant's plea in this case. It has been the universal practice of the trial judges to require the entry of a plea of not guilty, and to have a jury determine the guilt or innocence of the accused. Indeed, it has been generally understood by both bench and bar that the law required this procedure. However, the authority cited for it in our decisions hardly seems to sustain the proposition.

When Sections One and Two of Chapter 85, N. C. Sess. Laws (1893) (now G.S. 14-17) divided murder into two degrees, Section Three (now G.S. 15-172 (1965)) provided that the division required no alteration in the existing statutory 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."

In *State v. Blue,* 219 N.C. 612, 14 S.E. 2d 635 (1941), the defendant who was convicted of murder upon his plea of not guilty, was awarded a new trial for errors in the charge. Justice (later Chief Justice) Winborne, said: "[I]n this State a defendant will not be permitted to plead guilty to murder in the first degree. It is provided in [G.S. 15-172] that the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree." *Id.* at 616, 14

S.E. 2d at 637. The statute and the two cases cited in *Blue* immediately following the statement that a defendant will not be permitted to plead guilty to murder in the first degree do not support the proposition.

State v. Simmons, 236 N.C. 340, 72 S.E. 2d 743 (1952), was also a case in which the defendant, convicted of murder after having pled not guilty, was awarded a new trial for errors in the charge. By way of dictum Justice Winborne again said, "In this connection, this Court has held that in this State a defendant will not be permitted to plead guilty to murder in the first degree. *S. v. Blue,* 219 N.C. 612, 14 S.E. 2d 635, and cases there cited." *Id.* at 341, 72 S.E. 2d at 744. For a statement of similar import in a factually similar case *see State v. Murphy,* 157 N.C. 614, 72 S.E. 1075 (1911).

The statutory form of an indictment for murder, prescribed by Chapter 58, N. C. Sess. Laws (1887) (now G.S. 15-144), antedated the division of murder into two degrees (G.S. 14-17). Although the form contained, *inter alia,* an averment that the accused killed his alleged victim "feloniously, wilfully and of his malice aforethought," it did not include specific averments of premeditation and deliberation, essential ingredients of murder in the first degree. This omission, however, became immaterial when legislative fiat made the existing form a sufficient indictment for murder in either the first or second degree. G.S. 15-172; *State v. Talbert,* 282 N.C. 718, 194 S.E. 2d 822 (1973); *State v. Duncan,* 282 N.C. 412, 193 S.E. 2d 65 (1973); *State v. Matthews,* 142 N.C. 621, 55 S.E. 342 (1906). Clearly, therefore, the purpose of the requirement that the jury determine whether one charged under the statutory form is guilty of murder in the first or second degree, was merely to eliminate that uncertainty *when the defendant's plea was not guilty.*

It has never been doubted that a defendant indicted for murder in the form prescribed by G.S. 15-144, could plead guilty of murder in the second degree or manslaughter. Thus, it appears that the statutory requirement that the jury determine the degree of murder of which a defendant is guilty is only incidentally related to the death penalty. *See Green v. Commonwealth, supra.*

It was suggested in *State v. Peele,* 274 N.C. 106, 111, 161 S.E. 2d 568, 572, *cert. denied,* 393 U.S. 1042 (1968), that the statutory authority for the rule stated in *Murphy, Blue,* and

Simmons, repeated in *Peele,* that our practice does not permit a defendant to plead guilty to a capital felony, was to be found in the word *convicted* as used in the first sentence of G.S. 15-189 (1965). This sentence says, "Upon the sentence of death being pronounced against any person in the State of North Carolina convicted of a crime punishable by death, it shall be the duty of the judge pronouncing such sentence to make the same in writing. . . ."

In *Peele,* we ignored the rule that when a defendant unequivocally and unconditionally pleads guilty to a specific crime he has supplied any want of evidence and furnished the necessary proof. "He has convicted himself." *State v. Branner, supra* at 562, 63 S.E. at 170; *State v. Perry, supra.* Since an accused may be convicted by his plea as well as by a verdict, we see no reason to read into G.S. 15-189 a legislative attempt to distinguish between conviction by plea and by verdict.

Notwithstanding the lack of statutory authority to sustain the rule promulgated by the Court, that an accused will not be permitted to plead guilty to a crime for which the penalty is death, the legislature has not seen fit to change it. It has long since become the public policy of this State. Indeed, one accused of a capital crime may not even waive the finding of a bill of indictment against himself. G.S. 15-140.1 (1965). The idea that a person should be allowed to decree his own death has been unacceptable, not only to the judiciary, but to the citizens at large. This State has inflicted the supreme penalty only when a jury of twelve has been convinced beyond a reasonable doubt of the guilt of the accused after a trial conducted with all the safeguards appropriate to such a proceeding.

In 1953, by G.S. 15-162.1 (repealed 1971), the General Assembly authorized a defendant charged with a capital crime, after arraignment, to tender a plea of guilty signed by himself and his counsel. However, if the plea was accepted by the State *and* the court, the statute provided that the defendant's punishment "shall be imprisonment for life in the State's prison." Thus, in the only instance in which the legislature ever authorized a plea of guilty to a crime for which the punishment *could* be death, it did so to enable the accused to avoid that ultimate punishment. With reference to this statute, in *State v. Peele, supra* at 111, 161 S.E. 2d at 572, this Court said:

"Except as provided in G.S. 15-162.1, the North Carolina practice will not permit a defendant to plead guilty to a capital

felony. * * * G.S. 15-162.1 is primarily for the benefit of a defendant. Its provisions may be invoked only on his written application. It provides that the State and the defendant, under rigid court supervision, may, without ordeal of a trial, agree on a result which will vindicate the law and save the defendant's life."

In a concurring and dissenting opinion in *State v. Spence,* 274 N.C. 536, 553, 164 S.E. 2d 593, 603, *vacated,* 392 U.S. 649, 20 L.Ed. 2d 1350, 88 S.Ct. 2290 (1968), Chief Justice Bobbitt noted that "[p]rior to the adoption of G.S. 15-162.1, the Court would not under any circumstances accept a plea of guilty of murder in the first degree."

The Supreme Court of the United States, however, caused the repeal of G.S. 15-162.1 by its decision in *U. S. v. Jackson,* 390 U.S. 570, 20 L.Ed. 2d 138, 88 S.Ct. 1209 (1968). *See* N. C. Sess. Laws, Ch. 117 (1969); N. C. Sess. Laws, Ch. 562 (1971); N. C. Sess. Laws, Ch. 1225 (1971); *State v. Miller,* 276 N.C. 681, 174 S.E. 2d 481 (1970), *vacated,* 408 U.S. 937, 33 L.Ed. 2d 755, 92 S.Ct. 2863 (1972); *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969) (dissenting opinion), *rev'd on other grounds,* 403 U.S. 948, 29 L.Ed. 2d 859, 91 S.Ct. 2283 (1971).

[2] It is quite clear that the legislature never contemplated a jury verdict upon the issue of punishment alone. G.S. 14-17 made death the penalty for murder in the first degree, *unless* "at the time of rendering [the] verdict in open court" the jury recommended that the punishment be imprisonment for life. Thus, the *jury's* discretion as to the sentence could be exercised only in connection with its verdict upon the issues of the guilt or innocence of the accused.

It follows, therefore, that Judge Braswell was in error in submitting the question of punishment to the jury. It does not follow, however, that defendant's plea and sentence must be set aside.

[3] A capital crime is one which is or may be punishable by death. *State v. Mems,* 281 N.C. 658, 674, 190 S.E. 2d 164, 175 (1972) (concurring opinion); 12 C.J.S. 1129 (1938). The basis of the rule that a defendant cannot plead guilty to a capital crime is the fixed belief that a person should not sign his own death warrant and hang himself. There is no rule which precludes a plea of guilty to a crime for which the maximum pun-

ishment is life imprisonment. On 13 June 1972, the date defendant pled guilty of a murder committed on 25 October 1970, murder was not a capital crime; the only permissible punishment for murder in the first degree was life imprisonment. *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973). Had defendant's plea been not guilty, had the jury's verdict been guilty of murder in the first degree without a recommendation that his punishment be imprisonment for life, and had Judge Braswell sentenced defendant to death, the decision in *Furman* would have required us to vacate the death sentence and to order the superior court to impose a life sentence just as we did in *Waddell,* and also in *State v. Hill,* 279 N.C. 371, 183 S.E. 2d 97 (1971) and other cases in which the United States Supreme Court vacated the death sentence under the authority of *United States v. Jackson.*

It is true that at the time defendant entered his plea of guilty he did so in the belief (shared by court and counsel) that the jury would have to fix his punishment and that it would be death, unless the jury recommended it be life imprisonment. It may also be true that defendant was moved to enter the plea by the hope that his confession of guilt would cause the jury to recommend life imprisonment. If so, the strategy accomplished his purpose. However, it was strategy based solely upon his own notions of psychology, for G.S. 15-162.1 had been repealed. The law offered him no inducement to plead guilty.

In this case the State's evidence made out a vicious case of murder in the first degree. Defendant's only defense, amnesia brought on by the voluntary consumption of alcohol, was not one likely to be readily accepted by the jury in view of the State's evidence tending to show his prior threats to kill his wife and his volunteered post-arrest statements that he had done what he intended to do. Considering all the circumstances, it is not surprising that defendant was willing to enter a plea of guilty of murder in the first degree, and it is clear that the State would have accepted no lesser plea. We can perceive no possible prejudice to defendant from his plea. The jury's verdict gave him the life sentence he had asked for, the minimum punishment for murder in the first degree under the law as it was then thought to be.

Defendant makes no contention that his plea was coerced by the fear of death or that it was not voluntarily and under-

standingly made. Indeed, the record shows it to have been his considered choice, freely made after consultation with competent counsel. Defendant's contention is that his plea was void because it was a plea of guilty to a capital crime. As heretofore pointed out, this contention is not correct. We note, however, that had the homicide occurred after 18 January 1973, the contention would have had to be sustained. See *State v. Waddell, supra.*

The judgment of the Superior Court is

Affirmed.

STATE OF NORTH CAROLINA v. GARY LEE GAINES

No. 15

(Filed 14 March 1973)

1. **Criminal Law § 66— pretrial lineup — voice characteristics of defendant — lawfulness of lineup**

A pretrial lineup for purposes of identification in a rape and burglary case was lawful and in nowise violated defendant's constitutional rights where the lineup participants were six slender young black men approximately six feet tall and within a reasonable age range, though defendant was the only subject in the lineup with voice characteristics peculiar to him alone.

2. **Criminal Law § 35— offense committed by another — exclusion of evidence proper**

In a prosecution for rape and burglary the trial court did not err in excluding testimony tending to show that officers had eliminated one other than defendant as a suspect on *erroneous* information that the third person was working at the time of the alleged attack where the actual reason for exoneration of the third person was wholly immaterial.

3. **Criminal Law §§ 33, 35— evidence of shotgun in possession of third person — exclusion proper**

In a rape and burglary prosecution testimony by a witness that she saw a third person with a double-barreled shotgun walking up and down the road threatening to shoot a girl three or four days before the prosecutrix in this case was attacked was totally lacking in probative value and was properly excluded.

4. **Criminal Law §§ 77, 113— admission of defendant to inmate — instruction proper**

The trial judge in a rape case did not err in charging on statements made by defendant while in jail to another inmate that he had

raped a woman in Trinity at gunpoint where the charge left entirely to the jury the truthfulness of the statement and the weight to be given it.

5. **Criminal Law § 117— charge on defendant's credibility — no error**

The trial court's instruction that, if the jury found defendant was telling the truth, it was to give his testimony the same weight and effect that it would give the testimony of any disinterested witness was proper.

6. **Criminal Law §§ 113, 163— statement of evidence and contentions — objections to instructions — waiver**

The evidence offered by defendant as well as by the State, together with the contentions, was recapitulated by the trial court with reasonable accuracy, and any objections by defendant to the charge not made before retirement of the jury were deemed waived.

7. **Criminal Law § 98; Trial § 5— sequestration of witnesses — discretionary with trial court**

Defendant did not show an abuse of discretion by the trial judge in refusing to sequester the witnesses in a rape and burglary case; therefore, denial of the motion to sequester is not reviewed on appeal.

8. **Criminal Law § 127; Grand Jury § 3— exclusion of persons 18-21 years old from grand jury — remedy**

If defendant wished to object to the composition of the grand jury, his remedy was by timely motion to quash the bill of indictment, not by motion in arrest of judgment.

9. **Constitutional Law § 31— pretrial discovery — right of defendant to all of State's evidence**

The trial court did not err in denying defendant's pretrial motion for discovery of "any and all evidence in the possession of or known to the State of North Carolina favorable to or tending to favor the defendant" since the solicitor had no evidence favorable to defendant and since there is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.

10. **Criminal Law § 130— question asked witness by juror — no grounds for mistrial**

Where defendant's motion for mistrial was based on the single question "Are you still here?" put to a witness by a juror, there was no showing of prejudice to defendant and the motion was properly denied.

DEFENDANT appeals from judgments of *McConnell, J.*, 28 August 1972 Regular Criminal Session, RANDOLPH Superior Court.

State v. Gaines

Defendant was charged in separate bills of indictment, proper in form, with first degree burglary and rape. The cases, by consent, were consolidated for trial.

Linda Jones, the prosecuting witness, testified that on 15 March 1972 she lived in Trinity, Randolph County, North Carolina, with her two children, ages three and five. Her husband is deceased. At approximately 11 p.m. on that date, she noticed an individual, with a double-barreled shotgun, standing at the doorway between the children's bedroom and the den. He told her to get undressed and repeated the command when she hesitated, saying, "I will give you five seconds." She requested the intruder to let the children go out and he did so, closing the door when they left. He then told her to hurry and, after she undressed, he placed the shotgun on one of the twin beds located in the room and raped Mrs. Jones on the other bed. He then removed ninety dollars from her purse and left the house the same way he had entered it. Mrs. Jones was medically examined the following morning, and a vaginal smear showed the presence of live sperm.

Mrs. Jones testified that her assailant, a Negro, was in her home about thirty minutes; that he was tall and thin, wearing a blue stocking over his head and face, a black jacket, and pants with either small checks or plaids; that he spoke in a low voice and she had difficulty in understanding what he said because he had "some kind of impediment"; that he made the following statements in her presence: "Take them off." "Get undressed." "Hurry up." "You have another bedroom?" "Who were those people here tonight?" "Where do you keep your money?" "Which bank?" "I thought you said you didn't have any money." "Are you going to call the sheriff?"

Shortly after the intruder left, officers were notified and went to her home. She described her assailant and told the officers she was not sure she could recognize him. The officers found the front screen door cut near the door handle, a one-inch pry mark on the door near the lock mechanism, and evidence that the door had been forced open.

On 24 May 1972 defendant was placed in a lineup with five other subjects. Counsel had been appointed to represent defendant and was present when the lineup was conducted. Each person in the lineup, upon request, repeated the following statements in the presence and hearing of the prosecuting witness:

(1) "Where do you keep your money?" (2) "Which bank?" (3) "I thought you said you didn't have any money." (4) "Are you expecting anybody?" Thereafter Mrs. Jones identified Number Four, the defendant, as the person who burglarized her home and raped her on the night of March 15. She explained her identification in these words: "After they repeated the questions, when he talked, I knew it, because I just couldn't forget that voice. There was no mistaking about it. The build and voice was all I used in making my identification. The tone of his voice and the way he spoke led me to identify his voice. He didn't speak very loud and it was just hard to understand. It was just his voice. It was exactly the same voice, and I am positive."

Following a voir dire examination, defendant's motion to suppress the in-court identification testimony of Mrs. Jones was denied and the evidence admitted.

Patricia Hill was in the juvenile section of the Randolph County Jail while defendant was in jail awaiting trial. She was being held for return to Samarkand Manor. She and defendant were in separate cells, within hearing distance, but could not see each other. She testified that defendant told her "that when they came and got me and took me back to Samarkand, that he was going to come down there and get me. He said he was going to rape me. . . . He said that he raped somebody. . . . I asked him how he done it, if they weren't willing. He said he just used a gun."

Sam Bagwell, deputy sheriff and assistant jailer, testified that he overheard the conversation between the defendant and Patricia Hill; that he was standing approximately eight feet from defendant's cell and that the only prisoners in the section of the jail set aside solely for juvenile personnel were Patricia Hill and the defendant; that he had just taken an elderly man up to an adjacent cell block and locked him up; that he heard defendant tell Patricia Hill that when he got out he was coming down to Samarkand and get her; that he would take her to the woods and rape her and then shoot her and leave her there so nobody would know who did it. "He told her that he was a mean fellow, that he had raped one woman in Trinity. Miss Hill asked him how he raped a woman, if she wasn't willing. He said she couldn't help herself because he had a gun on her."

Officer Bagwell further testified that he had been seeing defendant regularly for some weeks and knew his voice. "His

voice is not normal. Someway or another something about his voice, I would know it anywhere I heard it."

Defendant testified as a witness in his own behalf. He denied making any statement to Patricia Hill to the effect that he had raped a woman or that he was going to rape her. He said that while he was in jail he had difficulty with Officer Bagwell; that the officer had thrown him on the floor and stomped him. He further testified that he was in Washington, D. C., on 15 March 1972, making application for employment with the Job Corps; that he stayed with his aunt in Washington on the night of March 15 when Mrs. Jones was allegedly raped. He denied that he had ever been in the home of Linda Jones or had ever committed an assault upon her or had ever taken anything of value from her. He admitted on cross-examination that he had escaped from a training school sometime prior to 15 March 1972.

Trudah Mills testified that defendant is her nephew; that he spent the night of 14 March 1972 at her home on Eleventh Street in Washington, D. C.; that on the morning of March 15 she took him to the Job Corps Office where he applied for the Job Corps program and signed the application; that she also signed it; that he stayed with his girl friend until about 11:30 p.m. on the night of March 15 and "then I took him home with me, because I didn't feel he should stay."

Elmo T. Jones, Jr., testified he was a senior counselor employed by the Job Corps; that he saw defendant "on the 15th, I think, it was on a Tuesday or a Wednesday, I am not sure"; that he filled out a form which defendant signed. Defendant's Exhibit D-1 was identified by this witness as a Xerox copy of the form, dated March 15, 1972, bearing the signature of Gary Lee Gaines which defendant signed in his presence.

By way of rebuttal, the State offered Oliva Barrino who testified that she knew defendant; that at approximately 4:45 p.m. on the day before, she heard on the news that Mrs. Jones had been assaulted, she saw defendant on the porch at his home in Asheboro. She said: "I can't testify what day it was on the news. When I heard it on the news, I know I seen him the day before. That is a known fact."

Booker Thomas McClooney testified that his son Thomas McClooney, Jr., and defendant were close friends in March 1972;

that defendant and his sister and another girl from Thomasville came to his home after midnight on March 21; that defendant was there before March 21 and before March 15—"they was there mostly all the time. I saw him during the month of March. No question in my mind at all." This witness further testified that his son was at work between the hours of 11:00 p.m. and 1:00 a.m. on the night of March 15; that he carried the officers to the place where his son worked to verify that fact.

Defendant's rebuttal evidence tends to show that although Thomas McClooney, Jr., was paid for thirteen hours work commencing at 4:23 p.m. on 15 March 1972, he evidently did not work thirteen hours; that somebody punched his card in at 9:30 p.m. but McClooney wasn't there and the 9:30 was marked through with a pencil; that McClooney actually returned to the plant between 11:00 and 11:30 p.m. on the night of March 15.

Dolan Ingram testified that on 15 March 1972, Thomas McClooney, Jr., called about "quarter to nine and told me to come and pick him up off work for break or lunch, or something, and I picked him up at 9 o'clock and brought him to Trinity and put him out at . . . his daddy's house. . . . I didn't see him again after that."

Lonnie Burke, Jr., a rebuttal witness for defendant, testified that he knew Thomas McClooney, Jr., and the defendant; that they ran around together; that there is a wooded area between the house where Mrs. Linda Jones lives for about a half a mile before you get to Cotton Row where both defendant and McClooney live; that "in blocks, it would be about three or four blocks."

Defendant sought to prove by the witness Jessie Mae Burke that three or four days before Mrs. Jones was raped she saw Thomas McClooney, Jr., with a double-barreled shotgun walking up and down the road threatening to shoot a girl. Defendant excepts to the exclusion of this evidence.

Defendant's motion for judgment of nonsuit at the close of all the evidence was denied. The jury returned a verdict of guilty of burglary in the first degree and guilty of rape, recommending life imprisonment in each case. Judgments were pronounced accordingly and defendant appealed. Errors assigned will be discussed in the opinion.

Robert Morgan, Attorney General; Claude W. Harris and Charles M. Hensey, Assistant Attorneys General, for the State of North Carolina.

David M. Dansby, Jr., attorney for defendant appellant.

HUSKINS, Justice.

[1] Defendant contends the court erred in permitting the prosecuting witness to identify him as her assailant on the ground that her in-court identification was based upon a pretrial lineup so unnecessarily suggestive and conducive to mistaken identification as to be a denial of due process under the Fourteenth Amendment.

The constitutional principles relied on by defendant are well established. *Stovall v. Denno*, 388 U.S. 293, 18 L.Ed. 2d 1199, 87 S.Ct. 1967 (1967), states that the "totality of circumstances" may show the use of lineup procedures "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to be a denial of due process under the Fourteenth Amendment. To like effect is *Foster v. California*, 394 U.S. 440, 22 L.Ed. 2d 402, 89 S.Ct. 1127 (1969). The evidence in this case, however, does not support defendant's contention.

Here, the voir dire disclosed that the lineup in question was composed of six Negro males. The defendant was fifteen years old, 6 feet tall and weighed 135 pounds; Reginald Garner was nineteen years old, 6 feet tall and weighed 150 pounds; George Scales was twenty-four years old, 6 feet tall and weighed 156 pounds; Wiley Spinks was twenty years old, 6 feet 1½ inches tall and weighed 155 pounds; Red Coble was twenty-two years old, 6 feet 3½ inches tall and weighed 170 pounds, and Thomas McClooney, Jr., was eighteen years old, 5 feet 11 inches tall and weighed 160 pounds. Each subject was placed in the lineup and given a number. Upon request, each repeated these four statements in the presence of the prosecuting witness: (1) "Where do you keep your money?" (2) "Which bank?" (3) "I thought you said you didn't have any money." (4) "Are you expecting anybody?" Mrs. Jones identified defendant, holding Number Four, as the person who burglarized her home and raped her on the night of March 15, 1972. She explained her identification in these words: "After they repeated the questions, when he talked, I knew it, because I just couldn't forget that voice. There was no mistaking about it. The build and voice was all I

used in making my identification. The tone of his voice and the way he spoke led me to identify his voice. He didn't speak very loud and it was just hard to understand. It was just his voice. It was exactly the same voice, and I am positive."

Based upon this showing, the trial judge concluded that " . . . the lineup was a lawful lineup which in nowise violated the defendant's constitutional rights. . . ." We agree. Although there is some disparity in age, height and weight of the lineup participants, these differences do not render the identification procedures so "unnecessarily suggestive and conducive to irreparable mistaken identification" as to constitute a denial of due process. The State is not required to produce lineup subjects who are in all respects identical to the suspect. If such were the rule, no lineup would be valid because no two men are alike. Here, the lineup subjects approximated the general physical description given by the victim; and defendant was not rendered conspicuous by police procedures. The mere fact that defendant had specific identifying characteristics not shared by the other participants does not invalidate the lineup.

Thus, the fact that defendant was the only subject in the lineup with voice characteristics peculiar to him alone in nowise tainted the procedure. Manifestly, neither his tone of voice nor manner of speech was the product of police manipulation.

The fact that defendant was the youngest and the lightest man in the lineup is likewise insufficient to taint the procedure. All participants were slender young black men approximately six feet tall and within a reasonable age range. See *State v. Rogers*, 275 N.C. 411, 168 S.E. 2d 345 (1969), where cases are cited illustrating the suggestive, unfair type of lineup condemned in *Foster v. California, supra.* It is perfectly apparent that defendant has not been the victim of rigged, suggestive lineup procedures which *Stovall* and *Foster* were designed to deter. This assignment is overruled.

On cross-examination of SBI Agent David Marshall, defendant attempted to elicit testimony tending to show that the officers had eliminated Thomas McClooney, Jr., as a suspect on erroneous information that McClooney was working at the time of the attack on the prosecutrix. Upon objection, this evidence was excluded.

The court also excluded testimony defendant sought to elicit from Jessie Mae Burke that she had seen Thomas McClooney,

Jr., with a double-barreled shotgun three or four days prior to the attack on Mrs. Jones. These exclusions constitute defendant's next assignment of error.

[2] The law of this State with respect to the admissibility of evidence tending to show the guilt of one other than the accused is rather unsettled. *See* Stansbury *N. C. Evidence* § 93 (Brandis Rev. 1973); *State v. Shinn,* 238 N.C. 535, 78 S.E. 2d 388 (1953); *State v. Smith,* 211 N.C. 93, 189 S.E. 175 (1937); *State v. Gee,* 92 N.C. 756 (1885); *State v. Baxter,* 82 N.C. 602 (1880); *State v. White,* 68 N.C. 158 (1873). See 22A C.J.S. *Criminal Law* § 622 (1961) for a general discussion of the subject. We deem it unnecessary, however, to discuss this area of the law in order to decide the case before us.

Here, defendant's questions to David Marshall were apparently designed to lay a foundation for evidence tending to show that Thomas McClooney, Jr., was not in fact at work from 11:00 p.m. until 11:30 p.m. on the night Mrs. Jones was raped. By this later evidence, defendant expected to show that the officers had eliminated McClooney as a suspect on the basis of *erroneous* information that McClooney was at work at that time. However, the evidence later offered by defendant failed to show that McClooney was not at work. Instead, the testimony of Grady Brannon and Otto Wilburn tends to show that Thomas McClooney, Jr., was on the job at 11:30 p.m. Mrs. Jones testified that her assailant was first seen in her home at approximately 11:00 p.m. and remained there about thirty minutes. She lived in Trinity and McClooney worked at Hendrix Batten Company in High Point. The distance from the home of Mrs. Jones to the Hendrix Batten Company plant is not shown by the record. Nevertheless, it may be inferred that if McClooney was on the job at 11:30 p.m. he could not have been present in the home of Mrs. Jones in another county at approximately the same time. Thus, the reason the officers exonerated Thomas McClooney, Jr., was wholly immaterial, and exclusion of such evidence was not error.

[3] The fact that McClooney was seen by Jessie Mae Burke with a double-barreled shotgun walking up and down the road threatening to shoot a girl three or four days before Mrs. Jones was attacked, is totally lacking in probative value. It has no tendency to inculpate McClooney or exculpate defendant. It is wholly irrelevant in this case. Objections thereto were properly sustained and the evidence properly excluded.

Defendant's next assignment relates to various errors allegedly committed in the charge.

[4] Defendant asserts the trial court committed prejudicial error "in charging the jury that the statement attributed to him by two witnesses [Patricia Hill and Officer Bagwell] that he had raped a woman in Trinity constituted an admission. There was no statement by the defendant that he raped the prosecutrix. There was no statement that he committed rape on March 15, 1972."

We perceive no error in the court's charge on this point. "Anything that a party to the action has said, if relevant to the issues and not subject to some specific exclusionary rule, is admissible against him as an admission." Stansbury *N. C. Evidence* § 167 (2d ed. 1963); *State v. Woolard,* 260 N.C. 133, 132 S.E. 2d 364 (1963); *State v. Bryson,* 60 N.C. 476 (1864).

Here, Patricia Hill testified concerning defendant: "He said he was going to rape me. . . . He said that he raped somebody. . . . He said he just used a gun." Deputy Sheriff Sam Bagwell testified he heard defendant tell Patricia Hill that when he got out he would rape her and " . . . that he had raped one woman in Trinity. . . . She couldn't help herself because he had a gun on her." The relevancy of these statements or admissions, in light of the evidence that the prosecutrix was raped in Trinity by a man who used a double-barreled shotgun during the attack, is obvious. Referring to that evidence, the trial court said: "There is evidence which tends to show that the defendant had admitted the fact relating to the crime charged, or the crimes charged in this case, or to the crime of rape. If you find the defendant made that admission, then you should consider all of the circumstances under which it was made, and determine whether it was a truthful admission, and the weight you will give to it. . . . That is a matter for the jury to determine." While not couched in the wisest choice of words, the charge leaves entirely to the jury the determination of whether defendant raped a woman in Trinity and, if so, whether Mrs. Jones was the victim. This leaves no valid ground for complaint.

Even if the judge's statement be considered technically incorrect, it was not prejudicial for, in our opinion, it is highly unlikely that omission of this portion of the charge would have produced a different result in the trial. *Compare State v. Barrow,* 276 N.C. 381, 172 S.E. 2d 512 (1970). Be that as it may,

a charge must be construed contextually, and isolated portions will not be held prejudicial when the charge as a whole is correct. *State v. Cook,* 263 N.C. 730, 140 S.E. 2d 305 (1965); *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334 (1964).

[5] The court charged the jury to scrutinize defendant's testimony carefully in light of his interest in the outcome of the case. If the jury found he was telling the truth, it was instructed to give his testimony "the same weight and effect that you would give the testimony of any disinterested witness." Defendant argues that such an instruction is tantamount to charging that defendant's testimony should not be believed.

The challenged instruction has been approved in many decisions of this Court, including *State v. Barrow,* 276 N.C. 381, 172 S.E. 2d 512 (1970); *State v. Turner,* 253 N.C. 37, 116 S.E. 2d 194 (1960); *State v. Worrell,* 232 N.C. 493, 61 S.E. 2d 254 (1950); *State v. Parsons,* 231 N.C. 599, 58 S.E. 2d 114 (1950); *State v. Hightower,* 226 N.C. 62, 36 S.E. 2d 649 (1946); *State v. Redfern,* 223 N.C. 561, 27 S.E. 2d 441 (1943); *State v. McKinnon,* 223 N.C. 160, 25 S.E. 2d 606 (1943).

[6] Defendant further argues that the trial court "devoted almost the entire charge to recapitulation of the evidence of the State and to restating the contentions of the State," in violation of G.S. 1-180. An examination of the charge reveals no basis for this broadside attack. The evidence offered by defendant as well as by the State, together with the contentions, is recapitulated with reasonable accuracy. The law requires no more. Furthermore, it is a general rule that objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires so as to afford the trial judge an opportunity for correction; otherwise they are deemed to have been waived and will not be considered on appeal. *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28 (1970). All assignments to the charge are overruled.

[7] Defendant assigns as error denial of his motion to sequester the witnesses. Sequestration of witnesses is discretionary with the trial judge—not a matter of right. Stansbury *N. C. Evidence* § 20 (Brandis Rev. 1973). Denial of a motion to sequester is not reviewable unless an abuse of discretion is shown. *State v. Barrow, supra* (276 N.C. 381, 172 S.E. 2d 512); *State v. Clayton,* 272 N.C. 377, 158 S.E. 2d 557 (1968). Here, no abuse of discretion appears.

Defendant moved in arrest of judgment and, in support of the motion, sought to prove that all persons between eighteen and twenty-one years of age had been systematically excluded from the grand jury which returned the bill of indictment in this case. Denial of the motion is asserted as error.

[8] Defendant has misconceived his remedy. A motion in arrest of judgment is proper when, and only when, some fatal error or defect appears on the face of the record proper. *State v. McClain,* 282 N.C. 357, 193 S.E. 2d 108 (1972); *State v. Higgins,* 266 N.C. 589, 146 S.E. 2d 681 (1966). "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. [Citation 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). The record proper in criminal cases ordinarily consists of (1) the organization of the court, (2) the charge, *i.e.,* the 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). Thus, defendant's motion in arrest of judgment was properly denied. If he wished to object to the composition of the grand jury, his remedy was by timely motion to quash the bill of indictment. *See State v. Brinson,* 277 N.C. 286, 177 S.E. 2d 398 (1970); *State v. Rorie,* 258 N.C. 162, 128 S.E. 2d 229 (1962). This assignment has no merit.

[9] Defendant contends the trial court erred in denying his pretrial motion for discovery of "any and all evidence in the possession of or known to the State of North Carolina favorable to or tending to favor the defendant." Defendant does not rely on G.S. 15-155.4, and wisely so, since that statute does not contemplate anything resembling the demand embraced in his motion. *See 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). Instead, he relies on the following language from *Brady v. Maryland,* 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963):

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt

or to punishment, irrespective of the good faith or bad faith of the prosecution."

The standards enunciated in *Brady* by which the solicitor's conduct in this case is to be measured require us to determine whether there was (a) suppression by the prosecution after a request by the defense (b) of material evidence (c) favorable to the defense. Obviously, under *Brady* a refusal to grant a pretrial motion for discovery is not reversible error unless the movant shows that evidence favorable to him *was suppressed.* In order to do so, he must certainly show what that evidence was. Defendant has made no such showing here. The solicitor stated he had no evidence favorable to the defendant and nothing in this record contradicts him. "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); *State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664 (1972). Defendant's motion was properly denied.

Remaining assignments of error relate to denial of motion for nonsuit and motion for mistrial. There is no merit in either motion.

When the evidence is considered in the light most favorable to the State, it is sufficient to carry the case to the jury and to support the verdict and judgment. *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); *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968).

[10] The motion for mistrial was based upon a conversation between a juror and one of the State's witnesses. The record reveals that all the juror said to the witness was: "Are you still here?" Nothing about the case was discussed. The juror did not even know that the person to whom he spoke was a witness in the case when he spoke to him. Thus nothing improper was said or done and there was no occasion for the trial judge to order a mistrial. Ordinarily, a mistrial or new trial is not required " . . . if there is nothing to show that the communication between the jury and the witness was improper or that the party complaining was prejudiced thereby." *State v. Shedd,* 274 N.C. 95, 161 S.E. 2d 477 (1968). The discretionary ruling of the court denying the motion for a mistrial was proper on the facts.

Defendant having failed to show prejudicial error, the verdicts and judgments in the trial court must be upheld.

No error.

STATE OF NORTH CAROLINA v. WESLEY HARRIS AND STANCIL LEE STANBACK

No. 2

(Filed 14 March 1973)

1. **Jury §§ 5, 7— time of challenge — supervisory duty of trial judge**

Though G.S. 9-21(b) provides that the State's challenge, peremptory or for cause, must be made before the juror is tendered to the defendant, the statute does not deprive the trial judge of his power to regulate and supervise closely the selection of a jury.

2. **Jury § 5— re-examination of prospective juror by State — challenge for cause — no error**

The trial judge in a murder case did not commit prejudicial error where he allowed the State to re-examine a prospective juror as to her views on capital punishment after she had been passed by defendants, the State challenged the juror for cause before she had been impaneled, and the judge then gave an additional peremptory challenge to each defendant.

3. **Criminal Law § 172; Jury § 7— jury selection — possibility of prejudice cured by verdict**

In a first degree murder case any possibility of prejudice in the jury selection procedure created by allowing the State to challenge for cause prospective jurors because of their conscientious scruples against capital punishment was negated by the fact that the verdict returned by the jury precluded imposition of the death penalty.

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

Wesley Harris, Stancil Lee Stanback and Sammie Lee Walker were tried upon bills of indictment charging them with murder. Each defendant entered a plea of not guilty.

The State's evidence tended to show that Jesse Dexter Wall, Jr. was killed on the night of 22 February, 1971, at about 11:25 p.m. when he answered a knock at the front door of his home. His death resulted from severe lacerations of the brain caused by "metal slugs" discharged from a sawed-off, 12-gauge shot-

gun. The State offered as a witness Harold Wesley Jones who testified that he was present when the shooting occurred. He observed defendants Stanback and Harris as they alighted from a car driven by Sammie Lee Walker and proceeded to the front porch of the Wall home. Stanback pointed the shotgun at the door, and then Harris took the gun and fired it into the door. Harris and Stanback fled and were picked up by the witness Jones. They threw the shotgun into some bushes and returned to the Plantation Inn.

The State offered other evidence tending to implicate defendants.

The Solicitor, in open court, announced that in exchange for their truthful testimony he had promised State's witnesses Jones and James Franklin Lucky that they would not be prosecuted for the murder of Jesse Dexter Wall, Jr.

At the close of the State's evidence, the trial judge granted Sammie Lee Walker's motion for nonsuit.

Defendants offered no evidence.

The jury returned verdicts of murder in the first degree with a recommendation of life imprisonment.

Defendants appealed.

Attorney General Morgan; and Assistant Attorney General Moody for the State.

George M. Anderson for Wesley Harris.

Carl C. Churchill, Jr., for Stancil Lee Stanback.

Roger W. Smith for defendants.

BRANCH, Justice.

[1, 2] Defendants first assign as error the action of the trial judge in permitting the Solicitor to reexamine and successfully challenge for cause Mrs. Joyce Granberry, a prospective juror who had been passed by the State and tendered to defendants.

Before the State passed and tendered Mrs. Granberry to defendants, she indicated her willingness to vote for a verdict which would result in the death penalty. Prior to jury impanelment, however, Mrs. Granberry let it be known that she had

changed her opinion about capital punishment. The trial judge thereupon allowed the Solicitor to reexamine the prospective juror. This reexamination revealed that she had talked with her pastor during the overnight recess and, as a result of that conversation, she would not under any circumstances vote for a verdict which would impose the death sentence. Over defendants' objections the trial judge allowed the Solicitor to successfully challenge the prospective juror for cause. The court then gave an additional peremptory challenge to each defendant who had previously passed the prospective juror.

The competency of jurors is a matter to be decided by the trial judge. Decisions as to a juror's competency at the time of selection and their continued competency to serve are matters resting in the trial judge's sound discretion. G.S. 9-14; *State v. Johnson,* 280 N.C. 281, 185 S.E. 2d 698. The trial judge's ruling on such questions are not subject to review on appeal unless accompanied by some imputed error of law. *State v. Watson,* 281 N.C. 221, 188 S.E. 2d 289.

In the case of *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241, this Court considered the action of the trial judge in excusing certain jurors who would not take the oath. Finding no error the Court stated:

> "The desire of a prospective juror to affirm rather than take an oath is not, of itself, cause for challenge in this State. See: G.S. 9-14; G.S. 11-11. On the other hand, nothing else appearing, even the erroneous allowance of an improper challenge for cause does not entitle the adverse party to a new trial, so long as only those who are competent and qualified to serve are actually empaneled upon the jury which tried his case."

The Court further said:

> "It has long been established in this State that it is the right and duty of the court to see that a competent, fair and impartial jury is empaneled and, to that end, the court, in its discretion, may excuse a prospective juror without a challenge by either party. (Citations omitted.) It is immaterial that this is done as the result of information voluntarily disclosed by the prospective juror without questioning. *State v. Vick, supra.*"

We reaffirmed the position adopted in *State v. Atkinson, supra,* in *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572. There the defendant was on trial for murder. The trial judge excused a juror on the grounds of family hardship. The circumstances constituting the hardship came to the trial judge's attention after the juror had been accepted by both the State and the defendant and had been sworn, but not impaneled. This Court held that the trial judge's action did not constitute error. See also *State v. Spence,* 271 N.C. 23, 155 S.E. 2d 802.

The facts in the case of *State v. Vann,* 162 N.C. 534, 77 S.E. 295, are very similar to those in instant case. In *Vann,* after the juror had been accepted by both the State and the defendant, he stated that he was opposed to capital punishment and would not agree to a verdict of guilty even if the evidence in the case satisfied him beyond a reasonable doubt that the defendant was guilty as charged. The trial judge permitted the State to challenge the juror, and the court sustained the challenge upon the ground that he was "not indifferent or qualified to serve . . . . " In affirming the trial judge this Court said:

> "He was discharged, and the ruling was sustained by this Court on appeal, *Pearson, C.J.*, saying that, 'as the jury was not impaneled and charged with the case, it was within the discretion of the court to allow the solicitor the benefit of a challenge for cause, so as to secure a jury indifferent as between the State and the prisoner.' This rule of practice is well settled by the authorities. *S. v. Jones,* 80 N.C. 415; *S. v. Cunningham,* 72 N.C., 469; *S. v. Green,* 95 N.C., 614; *S. v. Ward,* 39 Ves., 225. The rule really goes beyond this, for it is the right and duty of the court to see that a competent, fair, and impartial jury are impaneled, subject to the right of peremptory challenge by the prisoner; and in the discharge of this duty, it may stand aside a juror at any time before the jury are impaneled and charged with the case. *S. v. Jones, supra; S. v. Boon, supra,* and cases therein cited. The court, therefore, may act of its own motion, in furtherance of justice, and need not wait for a formal challenge, if a juror appears to be disqualified. . . . "

Defendants rely principally on the case of *State v. Fuller,* 114 N.C. 885, 19 S.E. 797, as support for their contention. In that case the defendant was charged with murder. A pros-

pective juror was passed by the State and the defendant, but before he was sworn the juror asked to be excused because of a long friendship with the defendant, who was also connected to him by marriage. The trial judge ruled that there was no ground for challenge for cause but permitted the State to successfully challenge the juror peremptorily. The Supreme Court, finding error, reasoned:

> "The discretionary power of the judge was confined to challenges for cause. He had no more authority to extend the time for making peremptory challenges beyond the limit fixed by the statute than he had to increase the number allowed to the State beyond four. The question of the proper interpretation of the language of the statute is one for this Court, and its meaning seems so plain as to require but little further discussion of this exception . . . "

At the time *Fuller* was decided, the Revisal of 1905 of North Carolina provided that in capital cases peremptory challenges must be made before the juror is tendered to the prisoner. The 1967 General Assembly provided in General Statute 9-21(b) that in all criminal cases "The State's challenge, peremptory *or for cause,* must be made before the juror is tendered to the defendant." (Emphasis supplied.)

Defendants argue that pursuant to the authority of *Fuller* and the present wording of G.S. 9-21(b) it is error for the trial judge to permit the Solicitor to reexamine and challenge a juror, either peremptorily or for cause, once that juror has been passed by the State and tendered to the defendant.

We note that under the same statutory provisions which existed when *Fuller* was decided this Court has approved the action of trial judges in allowing challenges for cause after the State has passed and tendered a prospective juror to the defendant. *State v. Green,* 95 N.C. 611; *State v. Jones,* 80 N.C. 415; *State v. Adair,* 66 N.C. 298. Likewise, this Court has found no error when the trial judge, *ex mero motu,* excused a juror after the State had passed and tendered him when it was discovered that the juror was related to both the defendant and the deceased. *State v. Boon,* 80 N.C. 461.

We think that instant case is distinguishable from *State v. Fuller, supra.* In *Fuller,* there was no ground for challenge for cause. Here there was ground for challenge for cause since

the prospective juror was not willing to consider all the penalties provided by law, and was "irreparably committed before the trial has begun to vote against the penalty of death regardless of the facts and circumstances which might be revealed in the course of the proceeding." *State v. Anderson,* 281 N.C. 261, 188 S.E. 2d 336, *State v. Watson, supra, State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671.

If the present case and *Fuller* were not distinguishable, and *Fuller* was interpreted to hold that under a statute similar to G.S. 9-21(b) the trial judge was divested of his supervisory and discretionary powers to insure the selection of a fair, competent and impartial jury, we would be compelled by the forces of better reasoning and the overwhelming weight of authority to overrule that portion of *Fuller* so holding.

G.S. 9-21(b) provides a procedure for the orderly selection of jurors. Its effect is to give to the defendant the last opportunity to exercise his right of challenge when the State had all pertinent information concerning the fitness and competency of the juror before he was tendered to the defendant. G.S. 9-21(b) does not deprive the trial judge of his power to closely regulate and supervise the selection of a jury to the end that the defendant and the State be given the benefit of a trial by a fair and impartial jury.

We do not believe the court abused its discretion in allowing the State to challenge for cause this juror before she had been impaneled. The court demonstrated its fairness by giving additional peremptory challenges to each defendant who had previously passed the prospective juror before she was ultimately excused.

This assignment of error is overruled.

[3] Defendants also assign as error the court's refusal to permit them to examine prospective jurors successfully challenged by the State for cause because of their conscientious scruples against capital punishment.

During the process of selection of the jury, 218 jurors were examined. Upon being asked "Are your views such that you could not vote for a verdict which would result in the death penalty regardless of what the evidence was in the case?" 71 of the jurors answered in the affirmative and were stood aside.

As had been previously indicated, a juror may be successfully challenged for cause when he is "irreparably committed before the trial has begun to vote against the penalty of death." *State v. Anderson, supra; State v. Doss, supra; State v. Westbrook, supra.*

Any party to an action has a right to make inquiry as to the fitness or competency of any person to serve as a juror. G.S. 9-15(a); *State v. Dawson,* 281 N.C. 645, 190 S.E. 2d 196; *State v. Allred,* 275 N.C. 554, 169 S.E. 2d 833. This right is subject to the trial judge's close supervision, and the manner and extent of the inquiry rest largely in his discretion. *State v. Bryant,* 282 N.C. 92, 191 S.E. 2d 745. As stated in *State v. Dawson, supra:*

> "Although G.S. 9-15(a) assures a defendant of the right to have due inquiry made as to the competency and fitness of any person to serve as a juror, the actual questioning of prospective jurors to elicit the pertinent information may be conducted either by the court or by counsel for the State and counsel for the defendant. The trial judge, in his discretion, may decide which course to pursue in a particular case. If the court, when it conducts the questioning, declines to ask a question requested by the defendant's counsel, an exception may be noted so that an appellate court can consider the propriety, pertinence and substance of such question. The procedure followed in the present case avoided repetitive questioning without precluding or restricting any inquiry suggested and requested by defendants' counsel. The procedure followed was not violative of G.S. 9-15(a) or otherwise objectionable, and defendants have failed to show any prejudice on account thereof. . . ."

The answers elicited by the Solicitor concerning capital punishment were so unequivocal that challenge for cause was clearly proper. Any possibility of prejudice is negated by the fact that the verdict returned by the jury precluded the imposition of the death penalty. *Bumper v. North Carolina,* 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed. 2d 797; *State v. Bryant, supra.*

Defendants have failed to show abuse of discretion on the part of the trial judge or prejudice resulting from the procedure followed in the examination of prospective jurors.

This assignment of error is overruled.

We have carefully examined the remaining assignments of error and find no prejudicial error.

The record reveals that the defendants, represented by able counsel, received a fair trial in which there was

No error.

STATE OF NORTH CAROLINA v. CRAVEN TURNER, JR.

No. 6

(Filed 14 March 1973)

1. **Constitutional Law § 32— requirement that State furnish counsel — indigency as prerequisite**

The requirement that the State furnish counsel to each defendant charged with a criminal offense beyond the class of petty misdemeanor is conditioned upon a showing of indigency and inability to procure counsel for that reason.

2. **Constitutional Law § 32— defendant not indigent — waiver of counsel — sufficiency of oral waiver**

Where the evidence tended to show that, at the time of his arrest and confession, defendant had jobs which paid him $650 per month, that his wife's income was $480 per month, that he owned two automobiles and that he owned a stereo, a color television set and other household furnishings, defendant was not an indigent but was in a position to waive counsel, could do so orally, and did in fact make such waiver.

3. **Criminal Law § 86— testimony of interested witness — admissibility**

In a first degree murder prosecution testimony by a witness that she and defendant "was going with each other" and that she knew defendant was married was admissible together with testimony that defendant had asked the witness questions with respect to the victim's habit of cashing checks since the attitude of the witness and her interest in the case had bearing on the weight to be given the testimony by the jury.

APPEAL by defendant from *McConnell, J.*, August 21, 1972 Criminal Session, UNION Superior Court.

In this criminal prosecution the defendant, Craven Turner, Jr., was indicted by a Stanly County Superior Court Grand Jury at the February 22, 1971 Session for the capital felony of murder in the first degree. The indictment charged the killing of James Alexander Howell on January 5, 1971.

The defendant was first tried at the May 31, 1971 Special Criminal Session, Stanly Superior Court. The evidence disclosed that the defendant and one Johnny James Blackmon shot and killed James Alexander Howell in the attempt to rob him. The evidence further disclosed that Blackmon actually did the shooting. The two defendants were tried separately. Blackmon was convicted and received a death sentence. He was awarded a new trial. *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123. Turner was convicted and given a life sentence. He also received a new trial. *State v. Turner,* 281 N.C. 118, 187 S.E. 2d 750. Turner's new trial was based on the ground the record did not affirmatively show that he had waived his right to counsel at the in-custody interrogation. After this Court remanded Turner's case to the Superior Court of Stanly County for another trial, the defendant applied for and was granted a change of venue on account of the unfavorable publicity in his and Blackmon's first trials. The court removed the case to Union County.

The evidence at the trial now under review disclosed that Johnny James Blackmon and the defendant Craven Turner, Jr., pursuant to a common plan, attempted to hold up and rob James Alexander Howell. In the attempt Blackmon shot and killed the intended victim.

The defendant Turner, having been fully advised of his rights, specifically waived his right to remain silent and to have counsel present. He stated to Sheriff McSwain that he wanted to make a full confession "to get it off my brain." He told Sheriff McSwain that he and Blackmon planned to hold up and rob Howell and explained how he and Blackmon drove to Howell's home in the early morning and waited for him to start to work. As he sought to enter his truck, they made an effort forcibly to take his money. Howell resisted and Blackmon shot and killed him. Both fled from the scene in Turner's automobile.

At the new trial the State undertook to introduce Turner's confession. Upon objection, the court conducted a voir dire examination, made detailed findings of fact, and concluded that the defendant was not indigent and that his confession was free and voluntary. Counsel having been waived, the confession was properly admissible in evidence. The defendant excepted when the confession was offered before the jury.

The defendant objected to the confession upon the grounds that he was an indigent not represented by counsel and that he

did not waive *in writing* his right to counsel at the in-custody interrogation. The court overruled the objections and admitted the confession in evidence. The jury returned its verdict finding the defendant guilty of murder in the first degree and again recommended the punishment be life imprisonment. From the court's sentence in accordance with the jury's recommendation, the defendant appealed.

Robert Morgan, Attorney General, by Howard P. Satisky, Assistant Attorney General, for the State.

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

HIGGINS, Justice.

The defendant brings forward two assignments of error on which he relies for a new trial. His first assignment challenges the admission of his confession on these grounds: First, it was not in writing; and second, it was made in the absence of counsel. He cites as authority, *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561, and the decision of this Court on his first appeal. *State v. Turner, supra.*

[1] The requirement that the State furnish counsel to each defendant charged with a criminal offense beyond the class of petty misdemeanor is conditioned upon a showing of indigency and inability to procure counsel for that reason. G.S. 7A-450; *State v. Wright,* 281 N.C. 38, 187 S.E. 2d 761; *State v. Lynch, supra; State v. Green,* 277 N.C. 188, 176 S.E. 2d 756; *State v. McRae,* 276 N.C. 308, 172 S.E. 2d 37.

[2] The evidence before the court disclosed by the defendant's own affidavit that at the time of his arrest and confession, he had jobs which paid him $650.00 per month; that he had $400.00 "coming to him"; that his wife's income was $480.00 per month; that he owned two automobiles (a 1965 Mustang and a 1970 Chevrolet) on which one payment of $179.00 was due. In addition to his other household furnishings, he had a stereo of the value of $300.00 and a color television set worth $1500.00. On his own showing, he was not an indigent. Hence, he was in a position to waive counsel and actually did so. A written waiver was not required. *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602.

[3] The defendant's second assignment of error challenged the evidence of the State's witness Katrina Tyson who testified that on and prior to January 5, 1971, she worked for Almond Brothers Poultry near Albemarle. She knew James Alexander Howell and that he cashed checks on Tuesday of each week. Shortly before January 5, 1971, she had a conversation with the defendant, Craven Turner, Jr., who asked her if James Alexander Howell "still cashed checks on Tuesday, and I told him 'yes.' . . . I knew James Alexander Howell from the time I started my employment at Almond Brothers Poultry. I knew that he cashed checks on Tuesday of each week regularly when we got paid off."

Prior to the above testimony, the witness in answer to the questions of the solicitor, testified giving her age as nineteen and that she and the defendant "was going with each other. . . . We were out one night and he asked me whether the man still cashed checks on Tuesday and I told him 'yes.' " The witness testified she knew the defendant was married. The foregoing testimony was given in reply to certain questions by the solicitor. Actually, the answers went beyond the scope of the questions. The defendant did not move to strike and did not cross-examine except as to Howell's habit of cashing checks on each Tuesday.

The defendant argues here that the State by the above testimony offered proof of the defendant's bad character and inasmuch as he did not testify, his character was not in issue. Hence, the evidence related thereto should have been excluded on his objection.

Miss Tyson, when interviewed by Sheriff McSwain, reported that shortly before Tuesday, January 5, 1971, the defendant Turner asked her if the man (Howell) still cashed checks on each Tuesday. She replied "yes." This evidence was material on the question of motive for the robbery and tended to buttress Turner's confession. The intimate relationship between the witness and the defendant was properly before the jury whose duty it was to weigh the evidence. The attitude of the witness, interest or lack of it, has bearing on the weight of the testimony. Incriminating evidence from a friend ordinarily should outweigh the same evidence from a stranger or an enemy. The defendant's objection to Miss Tyson's testimony is not sustained.

Two juries have heard the evidence and on each occasion has found the appellant guilty of murder in the first degree, but made the recommendation that his life be spared.

After careful review we conclude that prejudicial error in the second trial is not disclosed.

No error.

STATE OF NORTH CAROLINA v. THOMAS A. McEACHERN

No. 45

(Filed 14 March 1973)

1. **Criminal Law § 99— question by court referring to rape — expression of opinion**

In a rape prosecution wherein defendant contended that he engaged in intercourse with the prosecutrix with her consent, the trial court expressed an opinion in violation of G.S. 1-180 when he asked the prosecutrix "You were in the car when you were raped?" since the question assumed that defendant had raped the prosecutrix.

2. **Criminal Law §§ 85, 89; Witnesses § 5— character evidence — reputation in community outside of residence — competency**

Evidence of good or bad character will no longer be confined to a person's reputation in the neighborhood or community in which he lives but may relate to such person's reputation in any community or society in which he has a well-known or established reputation; such reputation must be his general reputation held by an appreciable group of people who have an adequate basis upon which to form their opinion, and the testifying witness must have sufficient contact with that community or society to qualify him as knowing the general reputation of the person sought to be attacked or supported.

3. **Criminal Law § 86— general reputation of victim in Fayetteville — exclusion as prejudicial error**

In this prosecution for rape and robbery, the trial court committed prejudicial error in the exclusion of testimony as to the victim's general reputation in the community of Fayetteville on the ground that the witness did not know what persons who resided in the victim's particular community in Fayetteville said about her character.

Justice HUSKINS dissenting.

Justice LAKE joins in dissenting opinion.

APPEAL by defendant from *Clark, J.*, August 22, 1972 Session of CUMBERLAND Superior Court.

This case was docketed and argued as No. 93 at the Fall Term, 1972.

Defendant was charged in separate bills of indictment with rape and common law robbery. The charges were consolidated for trial, and defendant entered a plea of not guilty to each charge.

The State's evidence tended to show that on the afternoon of the 13th of November, 1971, Nellie Sanderson went to the home of Mary Blue at 118 Teachers Drive in Fayetteville, North Carolina. She had formerly employed Mary Blue as a maid. Her visit on this day was for the purpose of obtaining some pecans. Mary Blue's son James, defendant, and his sister assisted in gathering the pecans, after which they all returned to the house. Mary Blue departed shortly thereafter, and Nellie Sanderson went to her automobile. When she started the motor, defendant ran to the automobile and struck her across the face with a pistol. She testified: "When I opened my eyes, I seen my bloody panties going out the window, and then is when I saw his black body. At that time Thomas McEachern was getting off my body. I don't know how much later that was after I had been struck."

Defendant forcibly pulled Nellie Sanderson's rings from her fingers and removed the watch from her wrist. He dragged her from the automobile and carried her back to Mary Blue's house. At that time she was bleeding from the face and from the vagina. She did not know how many times defendant hit her. On cross-examination Mrs. Sanderson denied that she consented to have intercourse with defendant.

Dr. Fernandez Rocha testified that he saw Nellie Sanderson, a 50-year-old white woman, on 13 November 1971, at about 8:50 p.m. His examination revealed multiple face and body bruises and profuse bleeding from a laceration in the vaginal canal. He could not testify from his examination that Mrs. Sanderson had had intercourse, but stated she told him that a Negro man beat her into unconsciousness, and that when she awoke she was being sexually assaulted.

Dr. Allen Merzi testified he saw Mrs. Sanderson at a later date. He described her injuries and concluded that normal intercourse would not have caused the injuries to her vaginal area.

Defendant offered evidence to the effect that he did have intercourse with Mrs. Sanderson, but that it was with her con-

sent and at her suggestion. He stated that while they were in the act of intercourse she started to bleed, and that they then started back to Mary Blue's house but had to stop because of a flat tire. He walked her back and, because of her drunken condition, she fell several times before they reached the Blue house. He did not rob or beat Mrs. Sanderson.

The jury returned verdicts of guilty as to each of the charges. The trial judge imposed a judgment of life imprisonment on the rape charge and a sentence of ten years imprisonment on the robbery charge. Defendant appealed and petitioned this Court for certiorari prior to determination by the Court of Appeals on the robbery charge. The petition was allowed on 27 November 1972.

Robert Morgan, Attorney General, by James E. Magner, Jr., Assistant Attorney General, attorneys for the State.

Sol G. Cherry, attorney for defendant.

BRANCH, Justice.

[1] Defendant contends that the trial judge violated the provisions of G.S. 1-180 by expressing an opinion as to his guilt.

During the prosecuting witness's direct testimony the trial judge asked the following question: "COURT: Let me ask you a question of clarification before you go any further, you were in the car when you were raped? A. Yes, sir."

This question was posed after Mrs. Sanderson had testified she had been rendered unconscious by defendant's blow, and after she stated she "saw this black man's body and my bloody pants going out the window."

On occasion, it is the duty of the trial judge to ask questions in order to clarify testimony or to elicit overlooked, pertinent facts. *Greer v. Whittington*, 251 N.C. 630, 111 S.E. 2d 912; *State v. Harvey*, 214 N.C. 9, 197 S.E. 620. However, the judge must be careful not to offend the provisions of G.S. 1-180. The terms of that statute are not confined to formal instructions to the jury, but prohibit expressions of opinion by the trial judge at any time during the trial. The statute is designed to guarantee to every litigant the right to have his cause considered with "the cold neutrality of the impartial judge and the unbiased mind of a properly instructed jury." Whether the

judge's language amounts to an expression of opinion is determined by its probable meaning to the jury, not by the judge's motive. *State v. Williamson,* 250 N.C. 204, 108 S.E. 2d 443; *State v. Canipe,* 240 N.C. 60, 81 S.E. 2d 173; *State v. Bryant,* 189 N.C. 112, 126 S.E. 107. Ordinarily, such expression of opinion cannot be cured by instructing the jury to disregard it. *State v. Cantrell,* 230 N.C. 46, 51 S.E. 2d 887; *State v. Winckler,* 210 N.C. 556, 187 S.E. 792.

One of the ways in which the trial judge may violate the statute is by posing questions which convey to the jury his opinion as to what has or has not been shown by the testimony of a witness. *Galloway v. Lawrence,* 266 N.C. 245, 145 S.E. 2d 861; *State v. Perry,* 231 N.C. 467, 57 S.E. 2d 774; *State v. Cantrell, supra.*

State v. Oakley, 210 N.C. 206, 186 S.E. 244, presents a situation analogous to instant case. There the State sought to identify the defendant as the person who had committed a burglary by offering testimony that tracks in newly-fallen snow were followed from the scene of the crime to defendant's dwelling, where he was later arrested. The officer did not compare the snow tracks with defendant's shoes. During the officer's testimony the court inquired: "You tracked the defendant to whose house?" The court immediately thereafter told the jury that he had not meant to say defendant.

This Court, holding this to be an expression of opinion requiring a new trial, in part stated:

> "The expression of the court below, 'You tracked the defendant to whose house?' we think prejudicial, and especially so as the evidence of the State was circumstantial. Although inadvertently made by the learned and able judge, yet we think the expression, even when followed by 'I didn't mean to say the defendant,' would make a lasting impression on the jury, who alone were the triers of the facts. Then, again, the defendant was on trial for his life, and this *lapsus linguae* may have determined his fate."

An opposite result concerning an asserted judicial statement of opinion was reached in the case of *State v. Cureton,* 215 N.C. 778, 3 S.E. 2d 343. In that case a witness testified that defendant had shot the deceased four times, and then shot him the fifth time. The witness testified that when deceased was

going down defendant shot him again. The trial judge asked the witness:

> " 'When did he (defendant) shoot him (deceased) the last time,' to which the witness replied: 'I don't know.' "

This Court, finding no prejudicial error, stated:

> ". . . The question propounded was tantamount to asking the witness where did you say the defendant shot the deceased the last time, and did not tend to lead the jury to believe that the judge had formed the opinion that the defendant did the shooting. And again, while up to this time the defendant by his plea of not guilty had denied that he was the person who shot the deceased, he later, as witness in his own behalf, admitted that he fired the fatal shots, but contended he did so in self defense. So, if there was error in the question propounded, it was rendered harmless by the subsequent admission by the defendant."

These two cases are distinguishable. In *Oakley* the court's question expressed an opinion that the tracks were made by defendant. This crucial proof had not been shown by other evidence. In *Cureton* the fact that defendant had shot the deceased was supported by ample evidence, and the judge's question only sought clarification as to when and where the shooting took place. The defendant did not deny that he shot the deceased and in fact later testified that he fired the fatal shots, but that he did so in self defense.

In instant case there was evidence which would support a reasonable inference that the defendant raped the prosecuting witness. However, the prosecutrix did not ever actually testify that she had been raped. Neither of the two medical experts subsequently offered by the State could testify that Mrs. Sanderson had been raped. Throughout the case defendant contended that he had not raped Mrs. Sanderson.

It is generally recognized that a trial judge wields a strong influence over the trial jury. "The trial judge occupies an exalted station. Jurors entertain great respect for his opinion, and are easily influenced by any suggestion coming from him." *State v. Carter,* 233 N.C. 581, 65 S.E. 2d 9. See also *State v. Frazier,* 278 N.C. 458, 180 S.E. 2d 128; *State v. Belk,* 268 N.C. 320, 150 S.E. 2d 481.

The question by the able and fair trial judge, although clearly inadvertent, *assumed* that defendant had raped Mrs. Sanderson. This expression of opinion might well have affected the verdict of the jury.

[3] Defendant also contended that the trial judge erred in sustaining the State's objection to evidence relating to the character of the prosecuting witness. Apparently the objection was sustained because the witness, Elaine Williams, did not know what Mrs. Sanderson's "neighbors" or those who resided in Mrs. Sanderson's particular "community" in Fayetteville said or knew about her character.

We quote relevant portions of Elaine Williams' testimony:

"Q. Do you know Mrs. Sanderson's general character and reputation in the community—

MR. GRANNIS: Objection.

COURT: What community?

Q. Community of Fayetteville, your Honor.

MR. GRANNIS: I request a voir dire, your Honor.

THE JURY RETIRES.

Q. Do you know Mrs. Sanderson's general character and reputation in and around the community of Fayetteville?

A. Yes, I do.

Q. What is it?

A. I know that she likes colored men.

Q. What is her general character and reputation, is it good or bad?

A. It's bad as far as I know.

Q. I have no further questions."

* * *

REDIRECT EXAMINATION By Defendant's Attorney:

Q. Have you ever heard other persons in the community discuss Mrs. Sanderson's reputation?

A. Lots of people have.

Q. Have you heard other people make comments about her reputation?

A. I have.

Q. And about how many have you heard make comments?

A. A lot of them.

Q. A lot of them?

A. Yes.

Q. And have those people given her a bad reputation?

A. Some of them talks, yes, plenty of people.

* * *

EXAMINATION By Mr. Cherry:

Q. Do you know her general character and reputation in the community in which you live?

A. Which I was living at the time.

Q. What time?

A. In '67, Ray Avenue and Teachers Drive.

Q. Do you know her general character and reputation in the community and the area where Mary Blue lives?

A. Yes, that is the same.

COURT: Same as what?

A. Ray Avenue where I was living.

COURT: Do you know what her general character and reputation is down there?

A. Bad.

COURT: All right.

EXAMINATION By Mr. Grannis:

Q. Was this the reputation that she had in 1967?

A. Yes.

Q. That is what you are basing it on, isn't it?

A. It's not only 1967, it's been bad since.

Judge Clark sustained the State's objection and refused to allow the witness to testify as to Mrs. Sanderson's general reputation.

The general rule in North Carolina is that a person's character is proven by evidence of the general reputation he bears in the community or neighborhood in which he resides or has resided. *Johnson v. Massengill,* 280 N.C. 376, 186 S.E. 2d 168; *State v. Ellis,* 243 N.C. 142, 90 S.E. 2d 225; *State v. Bowen,* 226 N.C. 601, 39 S.E. 2d 740; *State v. Steen,* 185 N.C. 768, 117 S.E. 793. See 1 Brandis, Stansbury's North Carolina Evidence § 110 (Rev. ed. 1973). It appears this rule was first fully announced in the case of *State v. Steen, supra:* "In North Carolina the testimony of a character witness is confined to the general reputation of the person whose character is attacked, or supported, in the community in which he lives."

Prior to *Steen* many decisions had approved a qualifying question showing the witness to be acquainted with a person's general reputation without use of the geographic limitation "in his community" or "in his neighborhood." *State v. Mills,* 184 N.C. 694, 114 S.E. 314; *Edwards v. Price,* 162 N.C. 243, 78 S.E. 145; *State v. Ussery,* 118 N.C. 1177, 24 S.E. 414; *State v. Coley,* 114 N.C. 879, 19 S.E. 705; *State v. Wheeler,* 104 N.C. 893, 10 S.E. 491; *State v. Gee,* 92 N.C. 756; *State v. Laxton,* 76 N.C. 216; *State v. Speight,* 69 N.C. 72; *State v. Boswell,* 13 N.C. 209. See also, *State v. Parks,* 25 N.C. 296; *State v. Stallings,* 3 N.C. 300.

The Court in *State v. Smoak,* 213 N.C. 79, 195 S.E. 72, emphasized the qualifying phrase "in the community in which he lives" to reach the conclusion that evidence of the general character of a person among the employees of a railroad company was incompetent. See also, *State v. Hodgin,* 210 N.C. 371, 186 S.E. 495; 1 Brandis, Stansbury's North Carolina Evidence § 110, at 337 n. 98 (Rev. ed. 1973).

Subsequent decisions have created some confusion as to the meaning of "community" or "neighborhood" in determining whether a witness was qualified to offer proof of character by general reputation. Difficulties in interpreting and defining

those geographical limitations are highlighted in the cases of *State v. Bowen, supra,* and *State v. Ellis, supra.*

In *Bowen* a witness for the State was asked whether he knew the general reputation of the defendant "around in the Farmville community." The witness answered in the affirmative, and the court allowed him to testify that the defendant's reputation was bad. It was later shown on cross-examination that the defendant did not live in Farmville but lived six or seven miles from there and came to Farmville two or three times a week.

Defendant appealed and, relying on *Steen,* contended that since he did not reside in Farmville the witness was not properly qualified to testify as to his general reputation in the Farmville community. In finding no error the Supreme Court stated: "[W]e think the word 'around in the community' is comprehensive enough to include the neighboring rural regions in which defendant lives. The Court will take judicial notice of the size and location of the town of Farmville."

It seems the Court departed from the reasoning adopted in *Bowen* when it decided the case of *State v. Ellis, supra.* There the witness for the State attempted to testify as to defendant's character. When asked if he knew the defendant the witness stated that he knew him only when he saw him and did not know his general character. Upon being asked if he knew defendant's general character "from the esteem in which he is held in the community in which he lives, what the people generally say about him" the witness affirmatively replied and stated that defendant's character was bad. On cross-examination the witness said: "I don't know what [defendant's] reputation is in his community. I am not talking about just the Young community, but in my own immediate community. Yes, that is the Young community. I don't know what it is in the community in which he lives."

This Court held that this testimony was erroneously admitted and stated:

> "Thus, this witness was permitted to testify that the defendant's character is bad, based not on his general reputation and character in the community in which he lives, but on what people generally say about him in the Young community where the homicide occurred. The witness, with-

out any limitation as to the community in which defendant lived or otherwise testified on direct examination that he did not know his general character."

The Court cited with approval the following:

"It is said in Greenleaf on Evidence, Sec. 461, 'It is not enough that the impeaching witness professes merely to state what he has heard "others say"; for those others may be but few. He must be able to state what is *generally said* of the person, by those among whom he dwells, or with whom he is chiefly conversant; for it is this only that constitutes his general reputation or character. And, ordinarily, the witness ought himself to come from the neighborhood of the person whose character is in question.' "

Urbanization and technological advances in communication and transportation have so affected modern living conditions that the viability of the strict neighborhood rule must be questioned.

"In a community where the ordinary person's home is under the same roof as his store or workshop, or where the stores, workshops, offices, and homes are all collected within a small village or town group, and one's working associates are equally the neighbors of one's home, there is but one community for the purpose of forming public opinion, and there is but a single capacity in which the ordinary person can exhibit his character to the community. In other words, he can there have but one reputation. But in the conditions of life today, especially in large cities, a man may have one reputation in the suburb of his residence and another in the commercial or industrial circles of his place of work; or he may have one reputation in his place of technical domicil in New York and another in the region of the mines of Michigan or the steel mills of Ohio where his investments call him for supervision for portions of time. There may be distinct circles of persons, each circle having no relation to the other, and yet each having a reputation based on constant and intimate personal observation of the man. There is no reason why the law should not recognize this. The traditional phrase about 'neighborhood' reputation was appropriate to the conditions of the time; but it should not be taken as imposing arbitrary limitations not appropriate in other times. 'Alia tempora, alii mores.'

> What the law, then as now, desired, was a trustworthy reputation; if that is to be found among a circle of persons other than the circle of dwellers about a sleeping place, it should be received."

5 Wigmore on Evidence § 1616, at 488 (3rd ed. 1940). See Annot., 112 A.L.R. 1020; McCormick, Law of Evidence § 44, at 92, 93 (Cleary ed. 1972).

In 29 Am. Jur. 2d, Evidence, § 347, we find the following:

> "The rule is broadly stated that evidence of the good or bad character of a party must relate and be confined to his general reputation in the community or neighborhood in which he resides or has resided. However, the term 'community' or 'neighborhood' is not susceptible of exact geographical definition, but means, in a general way, where the person is well known and has established a reputation, so that the inquiry is not necessarily confined to the domicil or residence of the party whose reputation is in question, but may extend to any community or society in which he has a well-known or established reputation."

[2] We are convinced that inquiry into reputation should not be necessarily confined to the residence of the party whose reputation is in question, but should be extended to any community or society in which the person has a well-known or established reputation. Such reputation must be his *general* reputation, held by an appreciable group of people who have had adequate basis upon which to form their opinion. Of course, the testifying witness must have sufficient contact with that community or society to qualify him as knowing the general reputation of the person sought to be attacked or supported.

[3] Elaine Williams answered the preliminary and qualifying question in the affirmative. The cross-examination on voir dire did not elicit such facts as would disqualify her from testifying.

In the case of *State v. Hicks,* 200 N.C. 539, 157 S.E. 851, the defendant was charged with violation of the prohibition laws. The State offered as a witness one Roy Pearson who was arrested at a whiskey still, and who testified that defendant had been with him and had employed him to operate the still. Defendant offered testimony regarding Pearson's bad character. As pertaining to defendant's witness, one Mims, the record shows the following:

"Amos Mims testified: 'I have heard some people discuss the character of Roy Pearson. Q. If they discussed his character, did they say what it was, good or bad? (State objects; objection sustained.) Q. Do you know what people in that community who discussed his character say about it? A. Yes. Q. Well, what is it?' State objects; objection sustained; defendant excepts. Witness would have testified that Roy Pearson's character was bad."

Holding it to be prejudicial error for the trial judge to sustain the State's objection to the testimony of the witness, Mims, the Court stated:

"The rule is, that when an impeaching or sustaining character witness is called, he should first be asked whether he knows the general reputation and character of the witness or party about which he proposed to testify. This is a preliminary qualifying question which should be answered yes or no. If the witness answer it in the negative, he should be stood aside without further examination. If he reply in the affirmative, thus qualifying himself to speak on the subject of general reputation and character, counsel may then ask him to state what it is. This he may do categorically, *i.e.*, simply saying that it is good or bad, without more, or he may, of his own volition, but without suggestion from counsel offering the witness, amplify or qualify his testimony, by adding that it is good for certain virtues or bad for certain vices. *S. v. Colson,* 193 N.C., 236, 136 S.E. 730; *S. v. Nance,* 195 N.C., 47, 141 S.E. 468. These requirements were met by the witness Mims, . . .

"But it is urged the defendant's guilt is so overwhelmingly established by the record, that an inadvertence in excluding the testimony of a character witness ought not to be regarded as capitally important. There are two answers to this position. In the first place, it is not conceded that the guilt of the defendant is conclusively established by the record. . . . Suffice it to say, the evidence is in conflict. In the second place, the credibility of witnesses is peculiarly a matter for the jury and not for the court. *S. v. Beal,* 199 N.C. 278, 154 S.E. 604."

Here, it was proper for defendant to offer evidence of the bad character of the prosecuting witness by showing her general reputation. Such evidence would be relevant to both charges. The

evidence was sharply conflicting as to the robbery charge and the question of consent in the rape charge. Since the jury is the sole judge of a witness's credibility, it was entitled to hear testimony concerning the prosecuting witness's general reputation.

Further, under the facts of this particular case, the evidence as to the charge of rape and as to the charge of common law robbery was so interrelated that error affecting the verdict in the rape case would, in all probability, affect the verdict in the robbery case.

For reasons stated defendant is entitled to a new trial on both the charge of rape and the charge of common law robbery.

New trial.

HUSKINS, Justice, dissenting.

I respectfully dissent from the majority view that the trial judge expressed an opinion prejudicial to defendant when he asked the prosecuting witness the following question: "Let me ask you a question of clarification before you go any further, you were in the car when you were raped? A. Yes, sir." It is obvious to me that the judge's question, as phrased, simply meant: "Are you saying you were in the car when you were raped?" In my judgment the jury so understood it. The trial judge was merely clarifying the testimony of the prosecutrix in regard to the *place* where the intercourse, whether by consent or by force, took place.

This interpretation is strengthened by the fact that defendant himself later testified that he had sexual relations with the prosecutrix with her consent and at her suggestion, thus admitting the act but denying the use of force to accomplish it. He also denied robbing or beating her and, seeking to explain her multiple facial and body bruises, said she fell several times due to her drunken condition while walking back to Mary Blue's house. Thus, on the rape charge, the only question really controverted before the jury was the question of force. The bruises, wounds and lacerations found on this woman's face and body by Doctor Rocha when he examined her strongly support the victim's testimony that she was beaten into unconsciousness and was being sexually assaulted when she awakened. Profuse vaginal bleeding, which no one denies, is further evidence of

force. In light of the undisputed physical facts, it is quite understandable that the jury did not accept defendant's version.

State v. Oakley, 210 N.C. 206, 186 S.E. 244 (1936), relied upon by the majority, is factually distinguishable. There, defendant was charged with burglary. In order to establish the identity of the burglar the State relied upon testimony that tracks at the scene of the crime were followed in newly fallen snow to the room of defendant where he was apprehended. While an officer was testifying regarding the tracks, the court asked the witness: "You tracked the defendant to whose house?" Defendant was awarded a new trial on the ground that the court inadvertently expressed an opinion that the State had proven the tracks to be those of the defendant. It is most significant that the defendant Oakley denied that he was at the burglarized home, said he went to his own sleeping quarters about 11 p.m. and had been in bed about four hours when the officer came and woke him up. Thus, the court's question assumes a special significance on the question of identity.

Here, defendant admits he was with Mrs. Sanderson, admits he had sexual relations with her, and admits that while they were in the act she began bleeding profusely. He simply denies the use of force, denies that he took her rings and watch, and denies that he beat her—notwithstanding all the physical evidence to the contrary. *State v. Oakley, supra,* does not fit these facts. Rather, I think *State v. Cureton,* 215 N.C. 778, 3 S.E. 2d 343 (1939), cited by the majority, should control.

The evidence in this case depicts a horrible assault by a nineteen-year-old black man on a fifty-year-old white woman. On contradictory evidence the jury convicted defendant of rape and common law robbery. It has been said that a defendant is "entitled to a fair trial but not a perfect one." *Lutwak v. United States,* 344 U.S. 604, 97 L.Ed. 593, 73 S.Ct. 481 (1953). In my view defendant's trial, although not perfect, was fair and free from prejudicial error. I vote to uphold the results of that trial.

Justice LAKE joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. RESTONEY ROBINSON

No. 1

(Filed 14 March 1973)

1. **Criminal Law § 91— motion to continue — discretionary with trial judge**

Except where a motion for continuance is based upon a right guaranteed by the Federal or the State Constitution, it is addressed to the sound discretion of the trial court and the ruling of that court is not subject to review in the absence of an abuse of discretion.

2. **Criminal Law § 91— denial of continuance — requisites for new trial**

A new trial will not be awarded because of the denial of a motion for continuance in the absence of a showing both that there was error in the denial and that the defendant was prejudiced thereby.

3. **Criminal Law § 91— same judge at second trial of defendant — insufficient ground for continuance**

A defendant is not entitled, as a matter of law, to a continuance of his trial on a criminal charge for the sole reason that the judge, regularly presiding at the term for which the case is calendared, also presided at an earlier session of the court at which the defendant was tried and convicted upon a different criminal charge.

4. **Witnesses § 1— mental capacity of witness to testify — sufficiency of findings on voir dire**

The trial court did not err in failing to find that a State's witness lacked sufficient mental capacity to testify where the judge conducted a *voir dire* at which he considered the witness's transcript from an earlier trial and certain other documents, among them a physician's report as to the witness's ability to plead to an indictment then pending against him and to consult with counsel in preparing his defense, and where the judge, having presided at the earlier trial, had observed the witness as he testified in that action.

5. **Criminal Law §§ 43, 95— photographs of deceased — admissibility for illustrative purposes**

In a first degree murder case the trial court did not err in admitting into evidence certain photographic slides where it was determined on *voir dire* that the slides illustrated and explained testimony of the doctor who testified as to cause of death and where the court instructed the jury that the slides were admitted solely for illustrative purposes.

6. **Criminal Law § 84; Searches and Seizures § 1— Selective Service card — seizure incident to lawful arrest — admissibility**

The trial court in a first degree murder prosecution did not err in admitting into evidence a Selective Service Card taken from defendant during a search of his person incident to his lawful arrest where the card was identified by the seller of the gun used in the murder as similar to the one presented by defendant for purpose of identification when he purchased the gun.

7. **Criminal Law § 166— assignments of error abandoned**

Assignments of error set forth in defendant's case on appeal but not brought forward or argued in his brief are deemed abandoned.

8. **Homicide § 21— first degree murder — sufficiency of evidence**

In a first degree murder case evidence of the State was sufficient to withstand motion for judgment of nonsuit where it was ample to show that defendant procured, if he did not compel, one Tinsley to do the actual shooting of deceased and that the defendant was present, aiding and abetting in the execution of the plan.

APPEAL by defendant from *Seay, J.*, at the 28 February 1972 Criminal Session of GUILFORD.

Under an indictment, proper in form, the defendant was found guilty of murder in the first degree and was sentenced to imprisonment for life in the State prison, the jury having so recommended at the time of returning its verdict. From the judgment imposing this sentence, the defendant appeals.

Prior to trial, upon motion by the defendant, the court conducted a voir dire to determine the mental competency of Tommy Lee Tinsley, a witness for the State, to testify. The court found Tinsley competent. The evidence on this voir dire is not set out in the record upon this appeal but apparently consisted of certain documents relied upon by the defendant, including a transcript of Tinsley's testimony at a previous trial, and reports to the court of the staff of Cherry Hospital in Goldsboro, North Carolina, concerning examinations of Tinsley at the hospital. Quotations from this report, set forth in the order of the court finding Tinsley a competent witness, support such finding.

The defendant offered no evidence. That offered by the State was to the following effect:

Just prior to daylight on 30 December 1969, Walter Hubert Mills, 94 years of age, was found lying in the doorway of a bedroom just inside the front entrance to his home in Greensboro. He had been shot in the abdomen and hip. There were bullet holes through the glass of the window of the bedroom and through the glass of a window beside the front door of the house. The telephone wire leading to the house had been cut. Mills died shortly after the shooting, the cause of death being shock and cardiac arrest resulting from these gunshot wounds.

Prior to the shooting of Mills, Tommy Lee Tinsley worked for the defendant at the latter's laundromat and at his place of business known as the Do-Drop Inn. The defendant told Tinsley that Mills had some boxes of money which the defendant wanted and that he wanted Tinsley to shoot Mills. Prior to the shooting of Mills, the defendant took Tinsley to South Carolina where the defendant purchased a pistol. After returning from this trip, the defendant taught Tinsley how to use the pistol and had Tinsley do target practice with it.

About midnight, some six hours prior to the shooting of Mills, the defendant carried Tinsley to Mills' home in the defendant's automobile. Leaving Tinsley in the car the defendant, carrying a flashlight, went up to the Mills house, remained there for an interval of time and then returned to the car. At the defendant's direction, Tinsley went up to the Mills house and rang the doorbell but got no response.

The defendant and Tinsley then drove away, stopping at a phone booth from which the defendant made a telephone call. Thereafter, they drove back to the Mills house. The defendant, armed with another pistol, took his stand behind some rose bushes in the yard of a house across the street. He instructed Tinsley to go to the Mills house and ring the doorbell. Thereupon Mills was aroused and turned on a light in the house and then the porch light. As Mills was getting ready to come to the front door, the defendant told Tinsley, "Go ahead, what are you waiting on?" Tinsley then shot through the window four times and Mills fell.

The defendant and Tinsley then left the scene in the defendant's automobile. When they got back to the defendant's home, the defendant remarked that he had to go back because he had left a cigar. The defendant and Tinsley then returned to the Mills home in the defendant's truck but were unable to search for the cigar butt due to the fact that police officers had arrived at the Mills home. A cigar butt of the brand habitually smoked by the defendant was found by the police behind the shrubbery in which Tinsley testified that the defendant had stationed himself prior to the shooting. Later in the morning the defendant again went to the Mills home and, upon arrival, asked police officers then at the scene, "Is the old man dead?"

Following the shooting, the defendant and Tinsley drove out into the country and buried the pistol with which Tinsley

had shot Mills. Subsequently, the police, accompanied by Tinsley, endeavored unsuccessfully to find the pistol.

Tinsley did not know Mills and "had nothing against him." The defendant told Tinsley that if Tinsley did not do as he instructed him to do, the defendant would kill him. After Tinsley had shot Mills the first time, the defendant told him to shoot again and Tinsley did so. Throughout the shooting the defendant had his gun on Tinsley.

The pistol, purchased by the defendant in South Carolina, was a .32 caliber Arminius, a German made revolver. Bullets removed from the body of Mills were .32 caliber and had been fired from a weapon with ten lands and grooves twisting to the right, a characteristic of an Arminius.

Mills did keep a considerable amount of money in a box or boxes in his home.

The defendant became dissatisfied with his trial counsel following the conclusion of the trial and was represented by different counsel on appeal. Both the trial and the appellate counsel were privately employed.

Attorney General Morgan and Associate Attorney Maddox for the State.

James W. Smith for defendant.

LAKE, Justice.

[1, 2] The defendant's first contention in this Court is that the trial court erred in denying his motion for a continuance, thus depriving him and his counsel of adequate time in which to prepare his defense. Except where such motion is based upon a right guaranteed by the Federal or the State Constitution, it is addressed to the sound discretion of the trial court and the ruling of that court is not subject to review in the absence of an abuse of discretion. *State v. Stepney,* 280 N.C. 306, 312, 185 S.E. 2d 844; *State v. Baldwin,* 276 N.C. 690, 174 S.E. 2d 526; *State v. Moses,* 272 N.C. 509, 158 S.E. 2d 617; *State v. Stinson,* 267 N.C. 661, 148 S.E. 2d 593. A new trial will not be awarded because of the denial of a motion for continuance in the absence of a showing both that there was error in the denial and that the defendant was prejudiced thereby. *State v. Moses, supra.*

Continuances should not be granted unless the reasons therefor are fully established. *State v. Stepney, supra.*

In the present case the defendant offered no evidence. There is nothing whatever in the record to suggest that he desired to call any witness who was not available to him at the trial. There is nothing in the record, or in his brief in this Court, to support his contention that, in the cross-examination of witnesses for the State, the presentation of evidence in his own behalf or in the preparation for trial, he or his counsel was handicapped by the denial of his motion for a continuance. The defendant was arrested on 20 August 1971 and the indictment was returned by the grand jury on 6 September 1971. The trial was commenced on 6 March 1972 and continued to 10 March 1972, when the jury returned its verdict and sentence was imposed.

The motion for a continuance shows upon its face that the defendant was previously tried on the charge of conspiracy to commit murder at the 3 January 1972 session of the superior court and thereafter made a motion before Judge Seay for a speedy trial in this case. Thereupon the judge directed the solicitor to try this case at the earliest possible time. It was docketed for trial on 21 February 1972 and the defendant then stated he was ready for trial, but a continuance was granted upon the motion of the State. Clearly, nothing in this sequence of events indicates an abuse of discretion in denying the defendant's motion for a continuance filed at the commencement of the trial on 6 March 1972.

[3] The motion for continuance did not assert the defendant's need for additional time in order to prepare for trial. It states, as its sole ground, that Judge Seay, having presided at the above mentioned trial of the defendant on the charge of conspiracy to commit murder, "the defendant feels that it will be prejudicial to his cause to have this case tried before the same trial judge." A defendant is not entitled, as a matter of law, to a continuance of his trial on a criminal charge for the sole reason that the judge, regularly presiding at the term for which the case is calendared, also presided at an earlier session of the court at which the defendant was tried and convicted upon a different criminal charge. This assignment of error is without merit.

[4] The defendant's next contention in this Court is that the trial court erred in failing to find that the State's witness,

Tinsley, lacked sufficient mental capacity to be permitted to testify. It is quite clearly established in this jurisdiction that a challenge to the competency of a witness on the ground of lack of mental capacity is addressed to the discretion of the trial judge. As Justice Sharp, speaking for this Court in *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793, said: "Unsoundness of mind does not per se render a witness incompetent, the general rule being that a lunatic or weak-minded person is admissible as a witness if he has sufficient understanding to apprehend the obligation of an oath and is capable of giving a correct account of the matters which he has seen or heard with respect to the questions at issue. The decision as to the competency of such a person to testify rests largely within the discretion of the trial court." Accord: *State v. Squires*, 265 N.C. 388, 144 S.E. 2d 49; *State v. Cade*, 215 N.C. 393, 2 S.E. 2d 7; Stansbury, North Carolina Evidence, 2d Ed, § 55; 97 C.J.S., Witnesses, § 57(b).

The defendant's motion that Tinsley be found incompetent to testify was filed on 6 March 1972 at the opening of the trial. The trial court conducted a voir dire at which defendant's counsel simply stated that Tinsley had been sent to a mental hospital by order of a judge of the district court and that he desired to offer no evidence as to Tinsley's mental capacity, except a transcript of Tinsley's testimony at the above mentioned trial on the charge of conspiracy and certain other documents. These documents included the report of the assistant superintendent of the hospital, at which the examination of Tinsley was conducted and the report of another of the examining physicians at the hospital. The order of Judge Seay denying the motion recites that the court considered all of these documents. The reports of the examining physicians were to the effect that Tinsley was able to plead to the indictment then pending against him and to consult with his counsel in the preparation of his defense. It further appears from the present record that Judge Seay, having presided at the earlier trial, had observed Tinsley as he testified in that action. Under these circumstances, there was no necessity for Judge Seay to interrogate Tinsley again in order to determine his mental capacity to testify. There is no merit in this assignment of error.

[5] The defendant's third contention in this Court is that there was error in admitting into evidence, as exhibits for the State, certain photographic slides, exhibited to the jury by projection

upon a screen after the court overruled the defendant's objection. The doctor who performed the autopsy upon the body of Mills testified that he, himself, took the pictures during the course of the autopsy and that they fairly and accurately represented what they purported to show. The court conducted a voir dire at which it inspected projections of the slides in the absence of the jury. They portrayed the entrance wounds and the courses of the bullets into and through the abdominal area, which formed the basis for the opinion of the doctor as to the cause of death.

Having ruled that the photographs were admissible, the court properly instructed the jury that they were admitted solely for the purpose of illustrating and explaining the testimony of this witness and not as substantive evidence. There was no error in this ruling. The number of photographs was not excessive and each was revelant upon the question of the cause of death. Under such circumstances, the fact that photographs depict a gruesome or gory spectacle does not render them inadmissible. *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652; *State v. Chance,* 279 N.C. 643, 185 S.E. 2d 227; *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241; *State v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824; Stansbury, North Carolina Evidence, 2d Ed, § 34.

[6] The defendant's fourth and final contention in this Court is that there was error in admitting into evidence a Selective Service Card taken from the person of the defendant at the time of his arrest on 20 August 1971. The arresting officer had a warrant for the defendant's arrest on the charge of murder, the validity of which warrant is not contested by the defendant. The search was incident to the arrest and the card, showing the defendant's residence to be in Florence, South Carolina, was identified by the seller of the gun used by Tinsley as similar to the one presented to him by Robinson for purposes of identification when Robinson purchased the weapon. Under these circumstances, there was no error in admitting the card into evidence. *State v. Jackson,* 280 N.C. 122, 185 S.E. 2d 202; *State v. Roberts,* 276 N.C. 98, 171 S.E. 2d 440; *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269. In any event, this evidence related to a minor incident of the State's case and it is inconceivable that the jury would have returned a different verdict had this evidence not been introduced. Thus, even if erroneous, this ruling of the trial court would not be ground for a new trial. *State v. Fletcher,* 279 N.C. 85, 100, 181 S.E. 2d 405.

[7] The five remaining assignments of error set forth in the defendant's case on appeal are not brought forward in his brief and no authorities are cited or argument made therein in support thereof. They are, therefore, deemed abandoned. Strong, N. C. Index 2d, Criminal Law, § 166, and cases there cited. Due, however, to the serious nature of the case, we have examined each of them and find no merit therein. They relate to the denial of a motion to strike the entire testimony of the doctor who performed the autopsy, the admission in evidence of testimony that the deceased kept a considerable amount of money in a box in his home, the denial of a motion to suppress, as evidence, bullets removed from the body and identified positively by the doctor making the autopsy, the denial of a motion for nonsuit, and a portion of the charge to the jury.

[8] As to the motion for judgment of nonsuit, the evidence introduced by the State is ample, if true as the jury believed it to be, to show that the defendant procured, if he did not compel, Tinsley to do the actual shooting of Mills and that the defendant was present, aiding and abetting in the execution of the plan. As said by Justice Sharp in *State v. Benton, supra:*

> "Parties involved in the commission of a murder are either principals or accessories. 'A principal in the first degree is the person who actually perpetrates the deed either by his own hand *or through an innocent agent.*' Any other who is actually or constructively present at the place of the crime either aiding, abetting, assisting, or advising in its commission, or is present for that purpose, is a principal in the second degree. In our law, however, 'the distinction between principals in the first and second degrees is a distinction without a difference.' Both are principals and equally guilty." (Citations omitted throughout.)

The defendant, found guilty of first degree murder, was sentenced to imprisonment for life, pursuant to the recommendation of the jury made at the time it returned its verdict, such verdict and recommendation being permitted by the instructions of the trial court. It will be observed that the murder of which the defendant has been found guilty was committed and that he was convicted and sentenced prior to the decision of the Supreme Court of the United States in *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346, and prior to our de-

cision in *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19. The sentence to imprisonment for life will, therefore, not be disturbed.

No error.

DULAN P. SELLERS AND GRACE W. SELLERS v. FRIEDRICH REFRIGERATORS, INC., AND J. L. NICHOLS AND CECIL WALLACE, PARTNERS, T/A COMMERCIAL EQUIPMENT COMPANY

No. 17

(Filed 14 March 1973)

1. **Limitation of Actions § 4— defective design and installation of heating system — accrual of action**

A cause of action to recover damages for the destruction of plaintiffs' home by fire allegedly caused by the negligent manufacture and installation of a heating and cooling system in the home accrued and the statute of limitations began to run on the day the delivery of the defective equipment was completed.

2. **Limitation of Actions § 4— owners in possession — action for negligent manufacture and installation of heat pumps — statute of limitations**

Where plaintiffs were in possession of a home when heat pumps were installed therein and continued in possession and control as owners until the date of a fire in the home, plaintiffs' action against a manufacturer and a contractor to recover fire damages allegedly caused by the negligent manufacture and installation of the heat pumps was governed by the three-year statute of limitations, G.S. 1-52(5), and not by the six-year statute of limitations, G.S. 1-50(5).

ON *certiorari* to the Court of Appeals to review its decision reported in 15 N.C. App. 723, 190 S.E. 2d 680 (1972), which reversed summary judgment in favor of the defendants by *Hubbard, J.*, at the 27 September 1971 Session of DUPLIN Superior Court.

Plaintiffs were the owners of a home in the town of Wallace, North Carolina. In May 1964 plaintiffs orally contracted with defendant Commercial Equipment Company for the installation of a heating system in this home. The installation was completed in the summer of 1965. On 25 January 1967 the home was destroyed by fire. This action was instituted on 8 October 1968. Plaintiffs allege that the fire which destroyed their home was proximately caused by defendant Friedrich

Refrigerators, Inc., in negligently designing and constructing the heating system, and by the concurring negligence of defendant Commercial Equipment Company in negligently installing it, thereby damaging plaintiffs in the amount of $64,800.

Defendants answered, denied negligence, and pleaded the three-year statute of limitations in bar of plaintiffs' action. On 15 September 1971 defendants filed motion for summary judgment on the ground that plaintiffs' cause of action accrued, if at all, more than three years prior to the institution of this action and therefore is barred by the three-year statute of limitations, G.S. 1-52. On 27 September 1971 all parties stipulated that the installation of the heat pumps was completed more than three years prior to the filing of this action. Defendants' motion for summary judgment on the ground that plaintiffs' action was barred by the three-year statute of limitations was allowed, and summary judgment for all defendants was entered on 30 September 1971.

Plaintiffs appealed and the Court of Appeals in an opinion by Judge Vaughn, concurred in by Judges Morris and Graham, reversed. We allowed *certiorari* on 8 November 1972.

Marshall, Williams, Gorham & Brawley by Lonnie B. Williams for Friedrich Refrigerators, Inc., defendant appellant.

Charles E. Nichols; Blossom & Burrows by William C. Blossom for Commercial Equipment Company, defendant appellant.

Crossley & Johnson by Robert White Johnson for plaintiff appellees.

MOORE, Justice.

The determinative question is: Is an action by plaintiffs, owners in possession of real property, against manufacturer and contractor for negligent manufacture and installation of heating and cooling equipment on the real property governed by G.S. 1-52(5), the three-year statute of limitations, or by G.S. 1-50(5), the six-year statute?

G.S. 1-52(5) provides a three-year statute of limitations "for criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated." The parties have stipulated that the instal-

lation of the heat pumps was completed more than three years prior to the filing of this action. In view of this stipulation, if G.S. 1-52(5) is the controlling statute of limitations, plaintiffs' action is barred.

In *Matthieu v. Gas Co.*, 269 N.C. 212, 152 S.E. 2d 336 (1966), plaintiff purchased a forced air furnace from defendant in August 1960. Four to six weeks after installation, plaintiff began to notice dirt and dust coming out of the register of the furnace. This condition continued to exist for four years with intermittent complaints by plaintiff. The furnace was repaired in December 1964, and the action was commenced in March 1965. This Court held that under G.S. 1-52 the statute of limitations of three years had run. Justice Branch stated:

> "A cause of action accrues and the statute of limitations begins to run whenever a party becomes liable to an action, if at such time the demanding party is under no disability. This rule is subject to certain exceptions, such as torts grounded on fraud or mistake, none of which are applicable to the instant case. However, the more difficult question is to determine when the cause of action accrues. In the case of *Mast v. Sapp*, 140 N.C. 533, 53 S.E. 350, this Court said: 'Where there is a breach of an agreement or the invasion of an agreement or the invasion of a right, the law infers some damage. . . . The losses thereafter resulting from the injury, at least where they flow from it proximately and in continuous sequence, are considered in aggravation of damages. . . . The accrual of the cause of action must therefore be reckoned from the time when the first injury was sustained. . . . When the right of the party is once violated, even in ever so small a degree, the injury, in the technical acceptation of that term, at once springs into existence and the cause of action is complete.' "

Jewell v. Price, 264 N.C. 459, 142 S.E. 2d 1 (1965), involves facts substantially similar to those in the instant case. In *Jewell*, pursuant to a written contract including plans and specifications, defendant, a general contractor, built for plaintiffs a residence which he delivered to them on 15 November 1958. The house was heated by a forced air furnace. On 18 January 1959 the house and all of its contents were destroyed by fire. On 12 January 1962 plaintiffs brought an action to recover the fire loss from the defendant. Evidence was offered which tended

to show that the fire resulted from a defect in the furnace. The Court held that G.S. 1-52 barred plaintiffs' action. Justice Sharp said:

> ". . . The accrual of the cause of action must therefore be reckoned from the time the first injury, however slight, was sustained. *Mast v. Sapp,* 140 N.C. 533, 53 S.E. 350. It is unimportant that the actual or the substantial damage does not occur until later if the whole injury results from the original tortious act. . . . "

Any act of negligence or breach of contractual duty which results in injury to the plaintiff, even a nominal injury, commences the statutory period within which the action must be brought. *Matthieu v. Gas Co., supra; Jewell v. Price, supra; Motor Lines v. General Motors Corp.,* 258 N.C. 323, 128 S.E. 2d 413 (1962); *Shearin v. Lloyd,* 246 N.C. 363, 98 S.E. 2d 508 (1957); *Connor v. Schenck,* 240 N.C. 794, 84 S.E. 2d 175 (1954); *Lewis v. Shaver,* 236 N.C. 510, 73 S.E. 2d 320 (1952).

[1] In the present case, if the heat pumps contained a defect, plaintiffs sustained an injury on the day the delivery of the defective equipment was completed and the statute of limitations began to run. Any subsequent damage was only in aggravation of that injury. Therefore, if the three-year statute of limitations provided in G.S. 1-52 is applicable, the action is now barred.

Chapter 1157 of the Session Laws of 1971, now codified as G.S. 1-15(b), apparently sought to change the rule as to the time when the cause of action accrued, as well as the time limitation. It provides that in cases other than for wrongful death, having as an essential element bodily injury to the person or a defect in or damage to property which originated under circumstances making the injury, defect or damage not readily apparent to the claimant at the time of its origin, the cause of action is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, whichever event occurs first. It further provides that in such cases the period shall not exceed ten years from the last act of the defendant giving rise to the claim for relief. This Act became effective on 21 July 1971, but stated that it shall not affect pending litigation. The present action was instituted on 8 October 1968. Hence, Chapter 1157 is not applica-

ble, and this case must be decided under the statutes then existing.

[2] Plaintiffs contend that G.S. 1-52(5), the three-year statute, is not applicable and that G.S. 1-50(5), the six-year statute, is controlling. Defendants contend, however, that the second sentence in G.S. 1-50(5) plainly states that the six-year statute does not apply to plaintiffs as they were the owners in actual control and possession of the premises at the time of the improvements and the subsequent damages, and that plaintiffs' action is barred by the three-year statute. G.S. 1-50(5) states:

> "No action to recover damages for any injury to property, real or personal, or for an injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property, more than six (6) years after the performance or furnishing of such services and construction. This limitation shall not apply to any person in actual possession and control as owner, tenant or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury for which it is proposed to bring an action."

In a law review article discussing this statute, 7 Wake Forest Law Review 101, 105-106 (1970), the author states:

> "It is interesting to speculate, however, upon the effect of the second sentence, which requires that a plaintiff not have been in possession and control at the time the condition of the improvement caused the actionable injury. Undoubtedly, this requirement will restrict the application of the statute to a relatively few factual situations, such as those involving a transfer of the property after the improvement is made to a subsequent owner or tenant, or those involving an injury to the person or property of a third person, neither an owner nor tenant. Presumably, a person in both possession and control of the improvement when it is made, or when the negligent act or breach of warranty occurs, must still bring his action within the

limitation prescribed by G.S. 1-52. The statutory language, '. . . at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury . . . ' must be read in the light of the established rule that subsequent substantial damage is but an aggravation of the perhaps nominal damages which are inferred from the original breach of warranty or tortious invasion of a right."

Henry C. Lauerman, Professor of Law at Wake Forest University, in an article in 8 Wake Forest Law Review 309, 344 (1972), in discussing this question says:

"G.S. 1-50(5) applies only to plaintiffs *not* in actual possession and control, as owner, tenant or otherwise, of the improvement at the time a defective or unsafe condition of such improvement to realty 'constitutes the proximate cause of the injury for which it is proposed to bring an action.' In such a situation, when the defendant (1) has performed or furnished the design, or (2) has supervised construction, or (3) has constructed the improvement, the action shall accrue on 'the performance or furnishing of such services and construction.'

* * *

"If the owner himself occupied the building at the time the latent defect in the building proximately caused substantial damage, G.S. 1-50(5) would *not* apply."

Four states have statutes employing substantially the same language as G.S. 1-50(5). New Hampshire Rev. Stat. § 508:4-b; New Jersey Stat. Ann., 2A:14-1.1; Utah Code Ann. § 78-12-25.5; Wisconsin Stat. Ann. § 893.155. Many other states have statutes dealing with the same subject matter. Only the New Jersey statute has at present been interpreted by an appellate court. In *Gilliam v. Admiral Corporation,* 111 N.J. Super. 370, 268 A. 2d 338 (1970), defendants, while owners of the subject premises, installed a ladder to the top of the second floor in July or August of 1957. On 26 March 1962 defendants conveyed the land to plaintiffs' decedents. On 31 October 1968 the subject premises burned causing the death of plaintiffs' decedents, current owners of the property. On 26 September 1969 plaintiffs, as administrators of decedents' estates, brought an action against the defendants alleging that the ladder installed in 1957 was defective and was the proximate cause of decedents' death. New Jersey

Stat. Ann., 2A:14-1.1 contains the same language as the North Carolina statute except that it provides a ten-year rather than a six-year statute of limitations. The Court held that the statute was applicable under the facts in *Gilliam* and barred plaintiffs' action since it was brought more than ten years from the date of completion of the improvement. However, the Court said:

> "It is apparent however, that the legislature intended by this limitation to preserve the common law principle of liability in the case of any person in actual possession and control as owner, tenant, or otherwise of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought."

The case is distinguishable from the instant case since in *Gilliam* plaintiffs were not in control of the premises when the improvement was installed. Indeed, the above quoted language in *Gilliam* implies that had that Court been faced with the fact situation in the instant case, it would have held that the statute did not apply.

This Court has not construed G.S. 1-50(5). To do so we rely on established rules of statutory construction. The intent of the legislature controls the interpretation of a statute. *Galligan v. Town of Chapel Hill,* 276 N.C. 172, 171 S.E. 2d 427 (1970). "In construing a statute, it will be presumed that the legislature comprehended the import of the words employed by it to express its intent. Accordingly, technical terms must ordinarily be given their technical connotation in the interpretation of a statute. But where the words of a statute have not acquired a technical meaning, they must be construed in accordance with their common and ordinary meaning unless a different meaning is apparent or definitely indicated by the context." 7 Strong, N. C. Index 2d, Statutes § 5, p. 72; *Cemetery, Inc. v. Rockingham County,* 273 N.C. 467, 160 S.E. 2d 293 (1968); *Seminary, Inc. v. Wake County,* 251 N.C. 775, 112 S.E. 2d 528 (1959); *State v. Baker,* 229 N.C. 73, 48 S.E. 2d 61 (1948).

Plaintiff Dulan P. Sellers helped plan and supervise the installation of the heat pumps in question and he and his wife were in possession of the premises when the heat pumps were installed and continued in actual possession and control as owners until the date of the fire. G.S. 1-50(5) specifically provides: "This limitation shall *not* apply to any person in *actual posses-*

sion and *control as owner,* tenant or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury for which it is proposed to bring an action." (Emphasis added.) Giving these words their "common and ordinary meaning," the restrictive sentence is clearly applicable to the plaintiffs. The rationale of excluding owners in possession and control is understandable. The owner in possession and control is in the best position in the exercise of diligence to acquire accurate and precise knowledge of any defective improvement to his real property. It is apparent that the legislature intended to benefit only those persons who were not in possession and control of the real property at the time of the defective or unsafe condition of such improvement constituted the proximate cause of the injury or damage for which the action is brought.

We hold that G.S. 1-50(5) is not applicable to plaintiffs and that their cause of action is barred by the three-year statute of limitations.

The installation of the heat pumps was completed in the summer of 1965. The fire occurred in January 1967. Plaintiffs had more than eighteen months in which to bring their action. This is not, therefore, a hardship case in which plaintiffs had a very short period of time in which to act. Even so, as said by Justice Bobbitt (now Chief Justice) in *Shearin v. Lloyd,* 246 N.C. 363, 98 S.E. 2d 508 (1957) : "Statutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action. They are statutes of repose, intended to require that litigation be initiated within the prescribed time or not at all."

Defendant Friedrich Refrigerators, Inc., further contends that G.S. 1-50(5) concerns only actions " . . . against any person performing or furnishing the design, planning, supervision of construction or construction of such improvement," and that this statute does not apply in an action against a manufacturer of equipment which ultimately becomes a part of the building. However, in view of our decision that the plaintiffs' cause of action against all the defendants is barred by the three-year statute, it is not necessary to pass upon this contention.

For the reasons stated we hold that G.S. 1-50(5) is not applicable and that plaintiffs' cause of action is barred by G.S.

1-52, the three-year statute of limitations. The decision of the Court of Appeals is therefore reversed, and the case is remanded to the Court of Appeals with direction that it remand the case to the Superior Court of Duplin for entry of judgment affirming the order of Judge Hubbard dismissing the action.

Reversed and remanded.

NATIONWIDE MUTUAL INSURANCE COMPANY v. AETNA LIFE AND CASUALTY COMPANY

No. 24

(Filed 14 March 1973)

1. **Insurance § 3— statute as part of policy**

The provisions of a statute applicable to insurance policies are a part of the policy to the same extent as if written therein, and when the terms of the policy conflict with statutory provisions favorable to the insured, the provisions of the statute will prevail.

2. **Insurance § 88— automobile liability policy — exclusion of automobile used in automobile business — invalidity**

Provision of an owner's automobile liability policy excluding from coverage an owned automobile while used "in the automobile business" by any person other than the named insured and certain other persons is repugnant to the mandatory requirements of the Motor Vehicle and Financial Responsibility Act and is, therefore, invalid. G.S. 20-279.21.

3. **Insurance § 85— automobile liability policy — other automobiles — exclusion of use in automobile sales agency or service station —validity**

Provision of an owner's automobile liability policy excluding from coverage the use by the named insured of an automobile other than that described in the policy upon the occurrence of any accident arising out of the operation of "an automobile sales agency" or a "service station" is valid since the coverage furnished insured as to the use of "other" vehicles is in addition to the mandatory requirements of the Vehicle and Financial Responsibility Act and is therefore voluntary.

APPEAL by plaintiff from *Gambill, J.*, 31 July 1972, Civil Session of FORSYTH Superior Court.

This is a declaratory judgment action in which Nationwide Mutual Insurance Company (Nationwide) seeks determination of the respective coverages and liabilities of Nationwide, as insurer of Donald Ray Alexander (Alexander), and Aetna Life and Casualty Company (Aetna), as insurer of Gorrell Dean

Murphy (Murphy), arising out of injuries sustained by Joseph Scott Miller, a minor, on 21 November 1969.

Murphy, who was employed by Alexander, gave Alexander permission to use Murphy's 1965 Mercury automobile to pick up a school teacher so that she might obtain her car which was being serviced at the service station operated by Alexander. Alexander parked the Murphy automobile and left it unattended. The automobile rolled down the street onto a sidewalk, striking and injuring Joseph Scott Miller. Both the minor's father and the minor, by his next friend, instituted actions to recover damages growing out of the accident. Prior to trial, plaintiff and defendant settled the pending actions, each bearing one-half of the total cost of the settlement. Thereafter Nationwide instituted this action.

The policy issued by Aetna to Murphy, in effect at the time of the accident, provided coverage on the 1965 Mercury automobile owned by Murphy in part as follows:

> " 'Persons Insured
>
> The following are Insureds under Part I:
>
> (a) With respect to the owned automobile:
>
> (1) The named Insured and any resident of the same household.
>
> (2) Any other person using such automobile with permission of the named Insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, and
>
> (3) . . . ' "

The policy also contained this exclusion:

> " '(g) to an owned automobile while used by any person while such person is employed or otherwise engaged in the automobile business, but this exclusion does not apply to the named Insured, a resident of the same household as the named Insured, a partnership in which the named Insured or such resident is a partner, or any partner, agent or employee of the named Insured, such resident or partnership,' "

At the time of the accident there was in effect an automobile liability policy issued by Nationwide to Alexander on a described automobile owned by him. This policy restricted coverage when Alexander was driving an automobile other than the vehicle described in the policy in the following manner:

> " 'This insuring agreement does not apply: . . . to any accident arising out of the operation of an automobile sales agency, repair shop, service station, storage garage, or public parking place;' "

At the time of the accident G.S. 20-279.21 provided:

> "§ 20-279.21. 'Motor vehicle liability policy' defined.—
>
> (a) A 'motor vehicle liability policy' as said term is used in this article shall mean an owner's or an operator's policy of liability insurance, certified as provided in § 20-279.19 or § 20-279.20 as proof of financial responsibility, and issued, except as otherwise provided in § 20-279.20, by an insurance carrier duly authorized to transact business in this State, to or for the benefit of the person named therein as insured.
>
> (b) Such owner's policy of liability insurance:
>
> (1) Shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted;
>
> (2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, or any other persons in lawful possession, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles within the United States of America or the Dominion of Canada, subject to limits exclusive of interest and costs, with respect to each such motor vehicle, as follows: Ten thousand dollars ($10,000.00) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, twenty thousand dollars ($20,000.00) because of bodily injury to or death of two or more persons in any one accident, and five thousand dollars ($5,000.00)

because of injury to or destruction of property of others in any one accident; and

(3) . . .

* * * *

(g) Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provisions of this article. With respect to a policy which grants such excess or additional coverage the term 'motor vehicle liability policy' shall apply only to that part of the coverage which is required by this section."

Judge Gambill, sitting without a jury, heard the case on stipulated facts. After finding facts and reaching conclusions of law, he entered judgment in favor of defendant, Aetna. Plaintiff appealed to the North Carolina Court of Appeals, and on 16 January 1973 this Court allowed plaintiff's petition for writ of certiorari to the North Carolina Court of Appeals prior to determination.

Hudson, Petree, Stockton, Stockton & Robinson by J. Robert Elster and James H. Kelly, Jr., Attorneys for plaintiff-appellant.

Robert R. Gardner, Attorney for plaintiff-appellant.

Womble, Carlyle, Sandridge & Rice by Grady Barnhill, Jr., attorney for defendant-appellee.

BRANCH, Justice.

The primary purpose of the Motor Vehicle and Financial Responsibility Act of 1953, Article 9A, Chapter 20 of the General Statutes is to compensate the innocent victims of financially irresponsible motorists. The victim's right to recover against the insurer is not derived through the insured, as in cases of voluntary insurance, but under this Act his right to recover is statutory and becomes absolute upon occurrence of an injury covered by the policy. G.S. 20-279.21(f)(1); *Jones v. Insurance Co.*, 270 N.C. 454, 155 S.E. 2d 118; *Insurance Co. v. Roberts*, 261 N.C. 285, 134 S.E. 2d 654.

One of the ways in which the Act attempts to accomplish its purpose is by requiring every owner or operator of a motor vehicle to prove his financial responsibility by acquiring an owner's insurance policy or an operator's insurance policy providing coverage in accordance with the statutory provisions. G.S. 20-279.19, 21.

An owner's policy protects the named insured and any person using the designated insured vehicle with the owner's permission. Such policy offers no protection for liability arising from the use of a vehicle not described in the policy. An operator's policy protects the named insured from liability arising out of the use of any vehicle. G.S. 20-279.21(c); *Lofquist v. Insurance Company*, 263 N.C. 615, 140 S.E. 2d 12.

The policy issued by Aetna to Murphy was an owner's policy. Since the automobile described in the policy was being used by Alexander with Murphy's permission, the policy afforded protection to both Murphy and Alexander unless the exclusion relating to use of the automobile while engaged in the automobile business was valid.

Thus, determination of Aetna's liability rests upon the validity of the exclusion contained in its policy.

[1] It is well recognized in North Carolina that the provisions of a statute applicable to insurance policies are a part of the policy to the same extent as if therein written, and when the terms of the policy conflict with statutory provisions favorable to the insured, the provisions of the statute will prevail. *Insurance Company v. Insurance Company*, 269 N.C. 341, 152 S.E. 2d 436; *Insurance Company v. Roberts, supra; Howell v. Indemnity Company*, 237 N.C. 227, 74 S.E. 2d 610; *Eckard v. Insurance Company*, 210 N.C. 130, 185 S.E. 671.

G.S. 20-279.21(b)(2) provides that an owner's policy "*Shall* insure the person named therein and any other person, as insured, using any such motor vehicle . . . with the . . . permission of such named insured, . . . " (Emphasis ours.)

Defendant relies on *Insurance Company v. McAbee*, 268 N.C. 326, 150 S.E. 2d 496, as authority for its contention that the exclusionary provision in its policy is valid. In that case, James A. Queen (Queen) arranged to have his automobile repaired by Aubrey McAbee, trading as McAbee's Pine Grove Service Station. McAbee sent his agent, Ira Beach (Beach), to

bring the Queen automobile to McAbee's place of business to be repaired. The automobile was repaired and on the return trip an accident occurred which resulted in personal injuries to Emily Jean Perkins. Emily Jean Perkins, by her next friend, instituted an action for damages against Queen, Beach and McAbee. At the time of the accident, Nationwide Mutual Insurance Company (Nationwide) had issued a policy of insurance, which was in full force and effect, to Queen providing owner coverage against liability arising out of the use of the vehicle. The policy excluded coverage "to an owned automobile while used in the automobile business." At the time of the accident, there was also in effect a garage liability policy which was issued to McAbee's Pine Grove Service Station by Federated Mutual Implement and Hardware Insurance Company (Federated).

Nationwide refused to defend Beach and McAbee in the pending action, contending that it had no liability to Beach and McAbee because of the exclusion contained in its policy. The trial court held that both Nationwide and Federated were liable within the limits of their respective policies for the injuries resulting from the operation of the Queen automobile by Beach. Nationwide appealed.

This Court reversed the trial court and held that Nationwide had incurred no liability. The basis of the Court's holding was that the employee, Beach, was operating the vehicle in the automobile business and that the exclusion in Nationwide's policy operated to relieve Nationwide of liability.

Examination of the record and briefs in *McAbee* reveals that the declaratory action sought an interpretation of the language contained in Nationwide's exclusion. Nowhere do we find any mention of Article 9A of Chapter 20 of the General Statutes of North Carolina. The question of the validity of the exclusion in light of the Financial Responsibility Act was not raised by the parties and was not considered by the Court in reaching its decision. We, therefore, hold that *McAbee* is not authoritative as to the specific question here presented.

[2] The exclusion in the Aetna policy purported to limit the coverage made mandatory by G.S. 20-279.21. This exclusion, being in derogation of the mandatory requirements of the statute, as well as unfavorable to the insured and contrary to the primary purpose of the Motor Vehicle Safety and Responsibility

Act, is invalid. Thus, the Aetna policy issued to Murphy affords coverage both to Alexander and Murphy.

[3] We next consider the liability of Nationwide arising out of the accident by virtue of the policy issued to Alexander. This policy was also an owner's policy on a described automobile. It afforded protection against liability "arising out of the ownership, maintenance and use of *the* automobile." (Emphasis ours.)

The policy also provided coverage to the named insured while he was driving an automobile *other* than that described in the policy. However, it excluded protection as to the use of such other automobile upon the occurrence of "any accident arising out of the operation of an automobile sales agency, . . . service station . . . "

> "Freedom of contract, unless contrary to public policy or prohibited by statute, is a fundamental right included in our constitutional guaranties. Constitution, Art. I, sec. 17; *Alford v. Insurance Co.*, 248 N.C. 224, 103 S.E. 2d 8; 12 Am. Jur. 641, 642."

Muncie v. Insurance Co., 253 N.C. 74, 116 S.E. 2d 474.

The provisions of the Nationwide policy which insured against loss arising out of the ownership, maintenance or use of the described vehicle met the mandatory requirements of G.S. 20-279.21. The coverage furnished its insured as to the use of *other* automobiles was *in addition to* the mandatory statutory requirements and was therefore voluntary. *Woodruff v. Insurance Company*, 260 N.C. 723, 133 S.E. 2d 704; *Insurance Company v. Roberts, supra; Swain v. Insurance Company*, 253 N.C. 120, 116 S.E. 2d 482; *Howell v. Indemnity Company, supra.* Since this coverage was additional, or voluntary, the exclusion relating thereto is not subject to the requirements of G.S. 20-279.21. G.S. 20-279.21(g).

The exclusion in the Nationwide policy issued to Alexander does not violate public policy and is not invalidated by the provisions of the Motor Vehicle and Financial Responsibility Act. Nationwide's exclusion, therefore, relieves it from liability under its policy issued to Alexander.

The judgment entered by the trial judge is vacated, and this cause is remanded to the Superior Court of Forsyth County for entry of judgment consistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. HOMER MACK GUFFEY

No. 10

(Filed 14 March 1973)

1. **Criminal Law § 18— trial upon warrant in superior court — prerequisites**

A defendant may be tried in superior court upon a warrant only if there has been a trial and appeal from a conviction by an inferior court having jurisdiction. G.S. 15-137; G.S. 15-140.

2. **Criminal Law §§ 16, 18—misdemeanor — jurisdiction of superior court derivative**

The jurisdiction of the superior court in a case involving the operation of a motor vehicle on a public street while the operator's license issued a defendant was permanently revoked is derivative, and the trial in superior court for that charge upon the original warrant is a nullity where the record does not disclose that defendant was convicted and sentenced in district court for the offense; therefore, judgment of the court against defendant for violation of G.S. 20-28(b) is arrested.

3. **Automobiles § 125; Indictment and Warrant § 12— warrant charging driving under the influence, fourth offense — trial in superior court for first offense — no error**

Though defendant was tried and convicted in district court for driving under the influence, fourth offense, upon his appeal to superior court, he could be tried for driving under the influence, first offense, since the warrant charging him with a subsequent offense of driving under the influence would support a verdict of driving under the influence and since the change did not affect the nature of the charge against him but related only to punishment.

ON *certiorari* to the Court of Appeals to review its decision reported in 16 N.C. App. 444, 191 S.E. 2d 760 (1972), which found no error in defendant's trial before *Bailey, J.*, at the February 28, 1972 Session of ORANGE Superior Court.

On 18 September 1971 Magistrate H. W. Phelps, pursuant to an affidavit by Sergeant Wesley M. Boykin of the North Carolina Highway Patrol, issued a warrant charging defendant with operating a motor vehicle on a public street or highway while under the influence of intoxicating liquor, fourth offense, and operating a motor vehicle on a public street or highway while the operator's license issued to him was permanently revoked. The following endorsement appeared on the warrant: "Plea: (x) Not Guilty. Verdict: (x) Guilty." Neither the plea nor the verdict refers to any specific offense.

State v. Guffey

On 20 September 1971 defendant was tried before District Judge C. C. Cates, Jr., in Orange County. The judgment and commitment in District Court states in pertinent part:

> "In open court, the defendant appeared for trial upon the charge or charges of Driving under influence 4th offense and thereupon entered a plea of not guilty.
>
> "Having been adjudged guilty of the offense of Driving under influence 4th offense which is a violation of .....and of the grade of misdemeanor
>
> "It is ADJUDGED that the defendant be imprisoned for the term of twelve months in the county jail assigned to work under the supervision of the Department of Correction."

The judgment and commitment do not refer to the disposition of the count of driving with a permanently revoked operator's license.

From this judgment defendant appealed to the Superior Court. At the 28 February 1972 Session of Orange Superior Court, defendant was tried on the warrant for both offenses charged therein. The solicitor elected not to attempt to establish prior offenses of driving under the influence of intoxicating liquor but tried defendant as for a first offense. The State offered ample evidence to sustain a verdict of guilty on each count in the warrant.

The jury returned a verdict of guilty on each count. The court sentenced defendant to six months' imprisonment for driving under the influence and to two years' imprisonment on the charge of driving while his operator's license was revoked. Defendant appealed to the Court of Appeals, and that court in an opinion by Judge Graham, concurred in by Judges Vaughn and Hedrick, found no error. On 13 December 1972 we allowed defendant's petition for a writ of *certiorari.*

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

Charles Lawrence James for defendant appellant.

MOORE, Justice.

[1] "Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal

charge but by indictment, presentment, or impeachment." Constitution of North Carolina, Article I, Section 22. A defendant may be tried in superior court upon a warrant only if there has been a trial and appeal from a conviction by an inferior court having jurisdiction. G.S. 15-137; G.S. 15-140; *State v. Evans,* 262 N.C. 492, 137 S.E. 2d 811 (1964).

In *State v. Hall,* 240 N.C. 109, 81 S.E. 2d 189 (1954), this Court said that Sections 12 and 13 (now Sections 22 and 23) of Article I of the State Constitution provide, "in essence, that the Superior Court has no jurisdiction to try an accused for *a specific misdemeanor* on the warrant of an inferior court unless he is first tried and convicted for *such misdemeanor* in the inferior court and appeals to the Superior Court from the sentence pronounced against him by the inferior court on his conviction for *such misdemeanor.*" *State v. Cofield,* 247 N.C. 185, 100 S.E. 2d 355 (1957); *State v. Morgan,* 246 N.C. 596, 99 S.E. 2d 764 (1957); *State v. Thomas,* 236 N.C. 454, 73 S.E. 2d 283 (1952).

The district court has exclusive original jurisdiction for the trial of misdemeanors. G.S. 7A-272. The warrant in this case charges a violation of G.S. 20-138 and of G.S. 20-28(b); both are misdemeanors. There are no jury trials on criminal charges in district court, but upon appeal trial *de novo* in superior court is by jury. G.S. 7A-196(b); G.S. 15-177.1.

[2] The record in this case fails to disclose that defendant was tried, convicted and sentenced in the district court for operating a motor vehicle on a public street or highway while the operator's license issued to him was permanently revoked, a violation of G.S. 20-28(b). To the contrary, the judgment in district court recited only that defendant pled not guilty to a charge of driving under the influence, fourth offense, and was convicted and sentenced for that offense.

The Superior Court of Orange County has no original jurisdiction in a case involving a violation of G.S. 20-28(b), one of the offenses for which defendant was convicted in that court. The jurisdiction of the superior court in such cases is derivative, and since the record does not disclose that defendant was convicted and sentenced in district court for this offense, the Superior Court of Orange County was without jurisdiction to try him, and the trial in the superior court for that charge upon the original warrant is a nullity. *State v. Evans, supra.*

"In this Court where the lack of jurisdiction is apparent, the Court may, and will, on plea, suggestion, motion or *ex mero motu,* stop the proceeding." *State v. King,* 222 N.C. 137, 22 S.E. 2d 241 (1942).

It should be noted that this jurisdictional question was not raised before the able trial judge in the superior court, nor was it raised in the Court of Appeals. Hence, neither of those courts passed upon this question.

It is possible, of course, that defendant was regularly tried in the district court and was convicted on each count in the warrant but was only sentenced on the driving while intoxicated charge, in which event the district court could still impose sentence on the count charging a violation of G.S. 20-28(b). It is also possible that he was only tried upon the driving while intoxicated count, in which event he could still be tried for a violation of G.S. 20-28(b). We cannot speculate, however, as to what occurred in district court, but must base our decision upon the record as we find it. *State v. Patterson,* 222 N.C. 179, 22 S.E. 2d 267 (1942).

The record in this case is another example of the improper use of forms and the consequent failure to keep a full and complete record of the trial. Due to this failure, we are unable to determine that the superior court tried this defendant for a violation of G.S. 20-28(b) under jurisdiction derived by appeal from the district court—the only way in which such jurisdiction could have been acquired on that charge. Therefore, the judgment of the court on this count must be and is arrested.

[3] The warrant in this case also charges defendant with operating a motor vehicle on a public street or public highway "while under the influence of intoxicating liquor, this being his fourth offense as the defendant was convicted of the third offense in the Superior Court Div., Rutherford County, on 7-3-1962." Defendant was convicted and sentenced in district court for a fourth offense. In superior court defendant was tried and convicted for a first offense of driving under the influence. Defendant now contends that upon his appeal to the superior court from the conviction and judgment pronounced by the district court for driving under the influence, fourth offense, that the trial in superior court had to be for the offense on which defendant had been convicted and that the superior court had no right to amend the warrant and try the defendant on the

offense of driving under the influence, first offense. This contention is without merit. The trial court did not amend the warrant. Even if amended, the amendment would not have changed the nature of the offense—driving an automobile upon a public highway while under the influence of intoxicating liquor—and would have related only to punishment. *State v. Broome,* 269 N.C. 661, 153 S.E. 2d 384 (1967); *State v. White,* 246 N.C. 587, 99 S.E. 2d 772 (1957); *State v. Stone,* 245 N.C. 42, 95 S.E. 2d 77 (1956); G.S. 20-179. A warrant charging defendant with a second or subsequent offense of driving under the influence would support a verdict of driving under the influence. *State v. Stone, supra.* The fact that the State did not introduce evidence of prior convictions went only to the question of punishment, enured to the benefit of defendant and was not prejudicial to him.

In addition to the questions discussed above, defendant in his petition for *certiorari* states: "That the defendant asks the Court to review the assignments of error brought forward by his counsel in the Court of Appeals and contends that there is merit therein." Defendant does not allege wherein the Court of Appeals erred in connection with other assignments of error brought forward by his counsel in that court. Therefore, there is nothing for us to review. *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353 (1968). Even so, we have examined these assignments and find them to be without merit.

For the reasons stated the decision of the Court of Appeals finding no error on the charge of operating a motor vehicle upon a public highway or street while under the influence of intoxicating liquor is affirmed.

The judgment on the charge of operating a motor vehicle on a public street or public highway while the operator's license issued to him was permanently revoked is arrested.

Modified and affirmed.

STATE OF NORTH CAROLINA v. JOHNNIE FRAZIER

No. 12

(Filed 14 March 1973)

Homicide § 31; Criminal Law § 135— first degree murder — death sentence — remand for sentence of life imprisonment

Pursuant to a mandate of the Supreme Court of the United States vacating the death penalty imposed upon defendant for first degree murder, the case is remanded to the superior court for imposition of a sentence of life imprisonment.

ON remand from the Supreme Court of the United States.

LAKE, Justice.

At the 13 April 1971 Session of the Superior Court of MECKLENBURG County, defendant was tried and convicted of: (1) The murder in the first degree of Carla Jean Underwood; (2) the kidnapping of Rose Collins; and (3) the armed robbery of Rose Collins. Pursuant to the verdicts, the court sentenced the defendant to imprisonment for 30 years for the crime of robbery and to imprisonment for life for the crime of kidnapping, this sentence to commence at the expiration of the sentence for armed robbery, and sentenced him to death for the crime of murder in the first degree. Upon defendant's appeal this Court found no error in the trial or in the judgment of the superior court. *State v. Frazier*, 280 N.C. 181, 185 S.E. 2d 652. Defendant then filed a petition for writ of certiorari to the Supreme Court of the United States, and on 18 December 1972 this Court received from the Supreme Court of the United States the following mandate:

"UNITED STATES OF AMERICA, SS:

"THE PRESIDENT OF THE UNITED STATES OF AMERICA

"To the Honorable the Judges of the Supreme Court of the State of North Carolina,

"GREETINGS:

"WHEREAS, lately in the Supreme Court of the State of North Carolina, ... there came before you a cause between the State of North Carolina and Johnnie Frazier, No. 114, wherein the judgment of the said Supreme

Court was duly entered on the fourteenth day of January A.D. 1972, as appears by an inspection of the petition for writ of certiorari to the said Supreme Court and the response thereto.

"AND WHEREAS, in the 1972 Term, the said cause having been submitted to the SUPREME COURT OF THE UNITED STATES on the said petition for writ of certiorari and response thereto, and the Court having granted the said petition:

"ON CONSIDERATION WHEREOF, it was ordered and adjudged on November 13, 1972, by this Court that the judgment of the Supreme Court of North Carolina in this cause be vacated, and that this cause be remanded to the Supreme Court of the State of North Carolina for further consideration in light of *Stewart v. Massachusetts,* 408 U.S. 845 (1972).

"NOW, THEREFORE, THE CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above stated, as accord with right and justice, and the Constitution and laws of the United States, the said writ of certiorari notwithstanding.

"Witness the Honorable WARREN E. BURGER, Chief Justice of the United States, the twelfth ..... day of December ..... in the year of our Lord one thousand nine hundred and seventy-two.

MICHAEL RODAK, JR.
Clerk of the Supreme Court of the United States

By Julian S. Garza, Jr.
Deputy

No. 72-5317

Johnnie Frazier
v.
North Carolina"

The opinion in *Stewart v. Massachusetts,* referred to in the foregoing mandate, is as follows:

"PER CURIAM.

"The appellant in this case was sentenced to death. The imposition and carrying out of that death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Furman v. Georgia,* 408 U.S. 238 (1972). The motion for leave to proceed *in forma pauperis* is granted. The judgment is therefore vacated insofar as it leaves undisturbed the death penalty imposed, and the case is remanded for further proceedings."

Pursuant to the foregoing mandate of the Supreme Court of the United States vacating the death penalty imposed upon defendant, this cause is remanded to the Superior Court of Mecklenburg County with directions to proceed as follows:

(1) The presiding judge of the Superior Court of Mecklenburg County will cause to be served on the defendant, Johnnie Frazier, and on his attorney of record, notice to appear during a session of said superior court at a designated time, not less than ten days from the date of the order, at which time, in open court, the defendant, being present in person and being represented by his attorney, the presiding judge, based on the verdict of guilty of murder in the first degree returned by the jury at the trial at the 13 April 1971 Session, will pronounce judgment that the defendant be imprisoned for life in the State's prison for the crime of murder in the first degree, this sentence to commence at the expiration of the sentence to imprisonment for life imposed upon the defendant at the 13 April 1971 Session for the crime of kidnapping.

(2) The presiding judge of the Superior Court of Mecklenburg County will issue a writ of habeas corpus to the official having custody of the defendant, Johnnie Frazier, to produce him in open court at the time and for the purpose of being present when the judgment imposing life imprisonment is pronounced.

The foregoing accords with our previous orders entered in the following cases: *State v. Doss,* 281 N.C. 751, 191 S.E. 2d 70; *State v. Westbrook,* 281 N.C. 748, 191 S.E. 2d 68; *State v. Chance,* 281 N.C. 746, 191 S.E. 2d 65; *State v. Hamby* and *State v. Chandler,* 281 N.C. 743, 191 S.E. 2d 66; *State v. Miller,*

281 N.C. 740, 190 S.E. 2d 841; *State v. Childs,* 280 N.C. 576, 187 S.E. 2d 78; *State v. Roseboro,* 279 N.C. 391, 183 S.E. 2d 108; *State v. Sanders,* 279 N.C. 389, 183 S.E. 2d 107; *State v. Williams,* 279 N.C. 388, 183 S.E. 2d 106; *State v. Atkinson,* 279 N.C. 386, 183 S.E. 2d 106; *State v. Atkinson,* 279 N.C. 385; 183 S.E. 2d 105; *State v. Hill,* 279 N.C. 371, 183 S.E. 2d 97.

Nothing in this opinion shall be deemed to affect the sentences imposed upon this defendant by the Superior Court of Mecklenburg County at its 13 April 1971 Session for the crimes of robbery and kidnapping, hereinabove mentioned, the said sentences to remain in full force and effect, this Court having found no error therein. See *State v. Frazier, supra.*

Remanded for judgment.

STATE OF NORTH CAROLINA v. DANNY CHANCE

No. 9

(Filed 14 March 1973)

Criminal Law § 135— imposition of life sentence pursuant to Supreme Court order

Judgment of life imprisonment imposed on defendant by the superior court pursuant to and in accordance with an order of the Supreme Court of North Carolina is affirmed.

APPEAL by defendant, Danny Chance, from a sentence of life imprisonment imposed by *Clark, Judge,* at the September 18, 1972 Session, CUMBERLAND Superior Court.

Robert Morgan, Attorney General, by Millard R. Rich, Jr., Assistant Attorney General, for the State.

Sol G. Cherry, Public Defender, for the defendant.

HIGGINS, Justice.

At the March 29, 1971 Session, Cumberland Superior Court, the defendant, Danny Chance, was tried and found guilty by the jury on four felony charges: (1) The kidnapping of James Earl Buckner; (2) the kidnapping of Gwen Davis; (3) the first degree murder of James Earl Buckner; and (4) the rape of Gwen

Davis. The jury recommended life imprisonment on the murder charge, but failed to make any recommendation on the charge of rape.

The court imposed life imprisonment sentences on the charges of kidnapping and murder. The jury having failed to make a recommendation as to punishment on the charge of rape, the court, as authorized by G.S. 14-21, imposed a death sentence. On appeal, this Court found no error in the trial, verdicts, and judgments entered. *State v. Chance,* 279 N.C. 643, 185 S.E. 2d 227.

The Supreme Court of the United States allowed certiorari, vacated the death sentence on the charge of rape, and remanded the case to this Court for further proceedings. Obedient to the mandate, this Court directed that the presiding judge of the Cumberland County Superior Court, by proper writ, bring the defendant and his counsel of record before the court and "pronounce [in the rape case] judgment that defendant [Danny Chance] be imprisoned for life in the State's prison."

At the September 18, 1972 Session, Cumberland Superior Court, defendant Danny Chance and his counsel being before the court, Judge Clark, as directed, imposed a sentence of life imprisonment on the charge of rape. The defendant by appeal now seeks to have the judgment reviewed.

The sentence of life imprisonment was entered in strict compliance with the order of this Court. The procedure is in accordance with our decided cases. *State v. Childs,* 280 N.C. 576, 187 S.E. 2d 78; *State v. Hill,* 279 N.C. 371, 183 S.E. 2d 97; *State v. Atkinson,* 279 N.C. 385, 183 S.E. 2d 105; *State v. Atkinson,* 279 N.C. 386, 183 S.E. 2d 106; *State v. Williams,* 279 N.C. 388, 183 S.E. 2d 106; *State v. Sanders,* 279 N.C. 389, 183 S.E. 2d 107; *State v. Roseboro,* 279 N.C. 391, 183 S.E. 2d 108.

The sentence of life imprisonment is

Affirmed.

STATE OF NORTH CAROLINA EX REL UTILITIES COMMISSION AND KENOSHA AUTO TRANSPORT CORPORATION v. J. D. McCOTTER, INC.

No. 13

(Filed 14 March 1973)

Utilities Commission § 9— application for contract carrier authority — review on appeal

Evidence was sufficient to permit and sustain the Utilities Commission's finding of fact, conclusions and decision based thereon in a hearing granting Kenosha Auto Transport Corporation contract carrier authority.

APPEAL by protestant, J. D. McCotter, Inc., under G.S. 7A-30(2) from a decision of the Court of Appeals which affirmed an order of the North Carolina Utilities Commission.

On 6 October 1971 Kenosha Auto Transport Corporation (Kenosha) applied to the North Carolina Utilities Commission (Commission) for a certificate of public convenience and necessity authorizing it to operate as a common carrier by motor vehicle to transport boats and attachments, accessories and parts when moving with mixed loads with boats, from High Point, North Carolina, to New Bern and to Morehead City, North Carolina. Kenosha then held Interstate Common Carrier Certificate No. 30837 but had no Intrastate Common Carrier Certificate or Intrastate Contract Carrier Permit. J. D. McCotter, Inc., protestant, intervened and opposed the granting of Kenosha's application.

On 6 December 1971, after conducting an evidentiary hearing on the application and protest, Examiner E. A. Hughes, Jr., issued a "Recommended Order" denying Kenosha's application and ordering Kenosha to cease and desist from unauthorized transportation of boats in intrastate commerce within the State of North Carolina. Kenosha filed exceptions to the Examiner's findings of fact, conclusions and "Recommended Order." A hearing on Kenosha's exceptions was held by the Commission on 14 January 1972. In its order of 15 February 1972, the Commission sustained Kenosha's exceptions. Based upon its own findings of fact and conclusions, the Commission, modifying the "Recommended Order," granted Kenosha "contract carrier authority" for the "[t]ransportation of boats and attachments, accessories and parts when moving with mixed load with boats, from the North American Rockwell Corporation (Hatteras Yacht Divi-

sion) plant in High Point, North Carolina, to New Bern and Morehead City, North Carolina, under contract with the said North American Rockwell Corporation (Hatteras Yacht Division)."

Protestant filed exceptions to the Commission's findings of fact, conclusions and order, and filed a petition for a rehearing. On 21 March 1972, protestant's petition for a rehearing was denied. Protestant excepted and appealed to the Court of Appeals. The case is before the Supreme Court on protestant's appeal from the affirmance by the Court of Appeals of the Commission's order.

Edward B. Hipp, Commission Attorney, and William E. Anderson, Assistant Commission Attorney, for North Carolina Utilities Commission, appellee.

York, Boyd & Flynn by A. W. Flynn, Jr., for Kenosha Auto Transport Corporation, applicant appellee.

Vaughan S. Winborne for protestant appellant.

PER CURIAM.

The question before us is whether the Court of Appeals committed *an error of law.* We consider the proceedings before the Commission only to the extent necessary to determine this question.

G.S. 62-94(e) contains this provision: "Upon any appeal, the rates fixed or any rule, regulation, *finding, determination,* or *order* made by the Commission under the provisions of this chapter shall be prima facie just and reasonable." (Our italics.) Moreover, the evidence was sufficient to permit and sustain the Commission's findings of fact, conclusions and the decision based thereon.

We approve and adopt without repetition the statement of facts and the legal bases for affirmance of the Commission's order set forth fully and accurately in Judge Graham's opinion for the Court of Appeals. 16 N.C. App. 475, 192 S.E. 2d 629. Accordingly, the decision of the Court of Appeals is affirmed.

Affirmed.

BEACHBOARD v. RAILWAY CO.

No. 137 PC.

Case below: 16 N.C. App. 671.

Petition for writ of certiorari to North Carolina Court of of Appeals denied 6 March 1973.

BORDEN, INC. v. BROWER

No. 7 PC.

Case below: 17 N.C. App. 249.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 6 March 1973.

McARVER v. POUND & MOORE, INC.

No. 141 PC.

Case below: 17 N.C. App. 87.

Petition for writ of certiorari to North Carolina Court of of Appeals denied 6 March 1973.

STATE v. ALL

No. 14 PC.

Case below: 17 N.C. App. 284.

Petition for writ of certiorari to North Carolina Court of of Appeals denied 6 March 1973.

STATE v. BARNWELL

No. 11 PC.

Case below: 17 N.C. App. 299.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 March 1973.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. CARTER

No. 1 PC.

Case below: 17 N.C. App. 234.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 March 1973.

STATE v. DIAZ

No. 154 PC.

Case below: 14 N.C. App. 730.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 March 1973.

STATE v. DOVER

No. 146 PC.

Case below: 17 N.C. App. 150.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 March 1973.

STATE v. FOREHAND

No. 17 PC.

Case below: 17 N.C. App. 287.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 March 1973.

STATE v. HARDY

No. 151 PC.

Case below: 17 N.C. App. 169.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 March 1973.

STATE v. HARRINGTON

No. 135 PC.

Case below: 17 N.C. App. 221.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 6 March 1973.

STATE v. MASON

No. 139 PC.

Case below: 17 N.C. App. 44.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 March 1973. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 March 1973.

STATE v. PARROTT

No. 19 PC.

Case below: 17 N.C. App. 332.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 March 1973.

STATE v. PHIFER

No. 8 PC.

Case below: 17 N.C. App. 101.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 March 1973.

STATE v. SHADDING

No. 10 PC.

Case below: 17 N.C. App. 279.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 March 1973.

STATE v. SMITH

No. 138 PC.

Case below: 16 N.C. App. 736.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 March 1973.

STATE v. THORNTON

No. 3 PC.

Case below: 17 N.C. App. 225.

Petition by the Attorney General for writ of certiorari to North Carolina Court of Appeals allowed 6 March 1973.

STATE v. WOODCOCK

No. 9 PC.

Case below: 17 N.C. App. 242.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 March 1973.

TODD v. INSURANCE CO.

No. 16 PC.

Case below: 17 N.C. App. 274.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 March 1973.

MARION J. FOSTER v. THE NORTH CAROLINA MEDICAL CARE COMMISSION; DR. LENNOX D. BAKER, SECRETARY OF THE DEPARTMENT OF HUMAN RESOURCES; I. O. WILKERSON, JR., ACTING DIRECTOR OF THE NORTH CAROLINA MEDICAL CARE COMMISSION; W. L. TURNER, DIRECTOR OF THE DEPARTMENT OF ADMINISTRATION OF THE STATE OF NORTH CAROLINA; FRANK R. JUSTICE, ACTING STATE BUDGET OFFICER OF THE STATE OF NORTH CAROLINA; FRANK A. TOMCZAK, ACTING STATE DISBURSING OFFICER OF THE STATE OF NORTH CAROLINA

No. 20

(Filed 11 April 1973)

1. **Constitutional Law § 7; Hospitals § 2— Hospital Facilities Finance Act — no delegation of legislative authority**

The North Carolina Medical Care Commission Hospital Facilities Finance Act, G.S. 131-138 *et seq.*, does not unlawfully delegate legislative authority to the Medical Care Commission in violation of Article I, § 6 of the Constitution of North Carolina, since in such Act the Legislature has declared the policy of the State, has established the broad framework of law within which it is to be accomplished and has established standards and requirements which the Commission is to observe in determining the eligibility of each proposed project for the contemplated financial aid.

2. **Administrative Law § 5— administrative agency — conditions precedent to exercise of statutory authority — judicial review**

The determination by an administrative body that in a specific instance it has complied with conditions precedent to the exercise of its statutory authority is its determination of a question of law and is subject to judicial review.

3. **Hospitals § 2; Taxation §§ 4, 6— Medical Care Commission revenue bonds — no debt of State — no lending of faith and credit of State**

The Act authorizing the Medical Care Commission to issue revenue bonds to finance the construction of hospital facilities to be leased and ultimately conveyed to a public or private nonprofit agency does not authorize the contracting of a debt by the State, or its agency, or lending of the faith and credit of the State, or its agency, in violation of Article V, §§ 3(1) and 3(2), respectively, of the Constitution of North Carolina.

4. **Hospitals § 2; Taxation § 4— Hospital Facilities Finance Act — unconstitutionality — increase of local government debt without vote**

Provisions of the North Carolina Medical Care Commission Hospital Facilities Finance Act which authorize local government units to enter into lease agreements with the Medical Care Commission and which make obligations of any such governmental unit under a lease agreement payable not only from revenues derived from the leased facility but also from revenues derived from other hospital facilities owned by the lessee and related to the leased facility *are held* unconstitutional in that they authorize local government units to contract a debt without a vote of the people in excess of the amount specified in Article V, § 4, of the Constitution of North Carolina.

5. **Hospitals § 2; Taxation § 21— property owned by Medical Care Commission — exemption from taxation**

The statute exempting from taxation property and income from property owned by the Medical Care Commission pursuant to the provisions of the North Carolina Medical Care Commission Hospital Facilities Finance Act, G.S. 131-158, is constitutional since such property is owned by the State within the meaning of Article V, § 2(3), of the Constitution of North Carolina.

6. **Hospitals § 2; Taxation § 7— public purpose — private nonprofit hospital**

The circumstance that a privately owned hospital is not operated for profit is not determinative of whether the construction and operation of such hospital is for a public purpose within the meaning of the constitutional limitation upon the use of tax funds.

7. **Hospitals § 2; Taxation § 7— public purpose — use of tax funds for construction of private hospital — unconstitutionality**

The expenditure of public funds raised by taxation to finance or facilitate the financing of the construction pursuant to G.S. 131-138 *et seq.* of a hospital facility to be privately operated, managed and controlled is not an expenditure for a public purpose and is prohibited by Article V, § 2(1), of the Constitution of North Carolina.

APPEAL by plaintiff from *Bailey, J.*, in Chambers of the Superior Court of WAKE on 8 December 1972, heard prior to determination by the Court of Appeals.

Pending the appeal, David T. Flaherty and William L. Bondurant were, by consent, substituted as parties defendant for Dr. Lenox D. Baker and W. L. Turner, respectively.

The plaintiff, as taxpayer, on behalf of himself and other taxpayers of North Carolina, instituted this action to enjoin the defendants against taking contemplated steps to implement and carry out the North Carolina Medical Care Commission Hospital Facilities Finance Act, hereinafter called the Act, enacted in 1971 and found in G.S. 131-138 to G.S. 131-162. The complaint alleges:

The Act violates the Constitution of North Carolina and the Constitution of the United States in that: (a) It authorizes the use of public funds for other than a public purpose, in violation of Article V, § 2(1), of the Constitution of North Carolina and of the due process clauses contained in Article I, § 19, of the Constitution of North Carolina and in the Fourteenth Amendment to the Constitution of the United States; (b) it authorizes the giving or lending of the credit of the State, through an agency of the State, to aid persons, associations or corporations

without a vote of the people, in violation of Article V, § 3(2), of the Constitution of North Carolina; (c) it unlawfully delegates legislative authority to the Medical Care Commission, in violation of Article I, § 6, and Article II, § 1, of the Constitution of North Carolina; (d) it authorizes the issuance of bonds, constituting an indebtedness of the State, in violation of Article V, § 3, of the Constitution of North Carolina; (e) it authorizes the creation of a debt of a county, city, town or other unit of local government, without submission to the voters thereof, in violation of Article V, §§ 2(5) and 4, of the Constitution of North Carolina; (f) it exempts from taxation property owned by the Commission, in violation of Article V, § 2(3), of the Constitution of North Carolina; and (g) it authorizes financing of hospital facilities for lease to a church related institution, in violation of Article I, § 13, of the Constitution of North Carolina and of the First and Fourteenth Amendments to the Constitution of the United States.

The matter was heard in the Superior Court upon an agreed statement of facts, a jury trial being waived. The court concluded that the Act of the General Assembly does not violate either the State or the Federal Constitution in any of the respects alleged in the complaint. The court thereupon adjudged that the Commission is lawfully authorized and empowered to do all of the things set forth in the said Act of the General Assembly, in the manner in which it proposes to do them, and to perform all of the acts and functions which it has performed or proposes to perform, as set forth in such agreed statement of facts. The court further adjudged that the relief sought by the plaintiff be denied, that the plaintiff be nonsuited and the action be dismissed.

The following is a summary of the stipulated facts:

The plaintiff is a taxpayer of the State, Wake County and the City of Raleigh. The Commission is an agency of the State. The Act undertakes to vest in the Commission authority to effectuate a plan to issue revenue bonds to finance construction of public and private hospital facilities. Fifteen thousand dollars of public funds, derived from State tax collections, has been allotted by the Council of State from the Contingency and Emergency Appropriation for the use of the Commission in the implementation of this program. The Commission proposes to spend these funds in its administration of the Act. It also proposes to use the proceeds of such revenue bonds to finance

and construct hospital facilities on land conveyed to the Commission. Upon construction, each such facility will be leased by the Commission to a public agency or to a nonprofit organization, which may or may not be church related, for its operation for a term extending to the date on which all bonds and other obligations of the Commission are paid. When the bonds are paid, the Commission will convey title to such facility to the lessee. The Commission proposes to enter into such leases with counties, cities, towns and other units of local government, without submitting the same to the approval of the voters therein. Under the terms of such leases the revenues generated by the leased facility will be applied to the payment of the revenue bonds, prior to the payment of the operating and maintenance costs.

A study made by the Commission of hospital needs indicates that approximately 3,200 new general hospital beds and beds for extended care will be required in North Carolina by 1977 and that there are now 4,883 hospital beds in the State in varying degrees of obsolescence. To meet this need for new beds and for modernization will require approximately $300,000,000. Funds available from private donors now cover only a minor portion of such capital costs. Approximately 50 per cent of the general hospitals in North Carolina are owned by local governments, which have the option of obtaining capital funds through the issuance of general obligation bonds, but the increasing demand on local governments for schools and other services has been so great that there is substantial resistance to bond issues for hospital construction. Funds available from Federal grants under the Hill-Burton program are now substantially less than in former years. The Federal loan program for supplying capital for hospital construction is subject to conditions making such loans unattractive to hospitals.

Attorney General Morgan by Deputy Attorney General McGalliard and Assistant Attorney General Denson for defendants.

Bailey, Dixon, Wooten & McDonald by Kenneth Wooten, Jr. for plaintiff.

LAKE, Justice.

The Act, G.S. 131-138 through G.S. 131-162, sets forth the following findings and declaration of policy by the General Assembly:

G.S. 131-139: "Legislative findings.— It is hereby declared to be the policy of the State of North Carolina to promote the public health and welfare by providing means for the financing, acquiring, constructing, equipping and providing of hospital facilities to serve the people of the State and to make accessible to them modern and efficient hospital facilities.

"The General Assembly hereby finds and declares that:

"(1) There is a need to overcome existing and anticipated physical and technical obsolescence of existing hospital facilities and to provide additional, modern and efficient hospital facilities in the State; and * * *

"(3) In order to meet such shortage and thereby promote the public health and welfare of the people of the State, it is necessary for the State to assist in the providing of adequate, modern and efficient hospital facilities in the State so that health and hospital care and services may be expanded, improved and fostered to the fullest extent practicable.

"The General Assembly hereby further finds and declares that the financing, acquiring, constructing, equipping and providing of hospital facilities and such other facilities as may be incidental or appurtenant thereto are public uses and public purposes for which public money may be expended and that enactment of this Article is necessary and proper for effectuating the purposes hereof."

The Act provides, G.S. 131-161, that it shall be liberally construed to effect the said purposes. Powers conferred upon the Commission, G.S. 131-141, include the power:

"(8) To finance, acquire, construct, equip, provide, operate, own, repair, maintain, extend, improve, rehabilitate, renovate and furnish any hospital facilities * * * ;

"(9) To fix, revise, charge and collect or cause to be fixed, revised, charged and collected rents, fees and charges for the use of, or services rendered by, any hospital facilities; * * *

"(12) To apply for, accept, receive and agree to and comply with the terms and conditions governing grants,

loans, advances, contributions, interest subsidies and other aid with respect to hospital facilities from federal and State agencies or instrumentalities and to accept, receive, and agree to and comply with the terms and conditions governing payments under any health insurance programs."

G.S. 131-143 confers upon public agencies (defined in the Act to mean any county, city, town, hospital district or other political subdivision of the State authorized to acquire, operate and maintain hospital facilities) authority to enter into contracts, including lease agreements, with the Commission and, pursuant thereto, to operate, repair and maintain hospital facilities and to pay the cost thereof and the rent therefor "from any funds available for such purposes," subject, however, to the provisions of G.S. 131-145. The latter section provides that all obligations payable by such public agency under any such lease agreement, including its obligation to pay rent and the cost of operating, repairing and maintaining such hospital facilities, "shall be payable solely from the revenues of the hospital facilities being leased or other hospital facilities of the public agency related thereto," except that such public agency may "submit to its qualified voters a hospital facility maintenance tax."

The foregoing authorities of the Commission extend also to hospital facilities to be leased to and operated by private, nonprofit agencies, whether or not such agencies are church related. G.S. 131-141(1); G.S. 131-144.

G.S. 131-145 provides that all such hospital facilities, whether operated by a public agency or by a private nonprofit agency, shall be operated to serve the general public without discrimination "against any person based on race, creed, color or national origin." This section authorizes the Commission to lease any hospital facility for operation and maintenance by such public or private, nonprofit agency and provides that such lease agreement "may include" provisions to the following effect:

(1) The lessee shall operate, repair and maintain such facilities at its own expense;

(2) The rental to be paid by the lessee shall not be less than an amount sufficient to pay the interest, principal and any redemption premium upon bonds issued by the Commission to finance the cost of such leased facilities;

(3) The lessee shall pay all other costs incurred by the Commission in connection with providing such leased facilities;

(4) The lease shall terminate "not earlier than" the date on which all such bonds and other obligations incurred by the Commission in connection with the leased facilities shall be paid in full, or adequate funds for such payment shall be deposited in trust; and

(5) The lessee's obligation to pay rent shall not be subject to cancellation by the lessee until such bonds have been paid or sufficient funds therefor have been made available for their payment.

G.S. 131-145 further provides that in cases wherein the site for the hospital facilities has been conveyed by the lessee, whether a public or private nonprofit agency, to the Commission without the payment of any consideration therefor, or where the cost of such acquisition has been paid from proceeds of such bonds, and such bonds have been paid, the Commission shall promptly convey or reconvey the title to the property to the lessee.

G.S. 131-148 authorizes the Commission to issue bonds to carry out its corporate purposes. The principal of and interest on such bonds are payable solely from funds provided therefor by the Act.

G.S. 131-147 provide that such bonds "shall not be deemed to constitute a debt, liability or obligation of the State or of any political subdivision thereof or a pledge of the faith and credit of the State or of any such political subdivision, but shall be payable solely from the revenues and other funds provided therefor," and each bond shall contain upon its face a statement to this effect. By G.S. 131-149 the Commission may enter into a trust agreement for the security of such bonds, which agreement may pledge "all or any part of the revenues of the Commission received pursuant to this Article, including, without limitation, fees, rents, charges, insurance proceeds, condemnation awards and any other revenues and funds received in connection with any hospital facilities," but the Commission "shall not mortgage any hospital facilities."

By G.S. 131-150 the Commission is authorized "to fix and to collect fees, rents and charges for the use of any hospital

facility," and may require the lessee of such facility to "operate, repair and maintain" the same, subject to the above mentioned limitation in G.S. 131-145 concerning the liability therefor of a public agency. This section of the Act also provides that "fees, rents and charges shall be fixed so as to provide a fund" sufficient to pay the cost of operating, repairing and maintaining the facility, to pay the principal of and interest on all bonds and to create and maintain any reserve provided for in the resolution authorizing or the trust agreement securing such bonds.

G.S. 131-158 provides that the Commission "shall not be required to pay any tax or assessment on any property owned by the Commission" under the provisions of the Act or upon the income therefrom. This section also provides that any bonds or notes issued by the Commission under the provisions of the Act, their transfer and the income therefrom, "shall at all times be free from taxation by the State or any local unit or political subdivision or other instrumentality of the State, excepting inheritance or gift taxes."

G.S. 131-142 sets forth the criteria or standards to be observed by the Commission in the exercise of its authorities under this Act. It provides:

> "*Criteria and requirements.*—In undertaking any hospital facilities pursuant to this Article, the Commission shall be guided by and shall observe the following criteria and requirements; *provided that the determination of the Commission as to its compliance with such criteria and requirements shall be final and conclusive:* [Emphasis added.]
>
> "(1) There is a need for the hospital facilities in the area in which the hospital facilities are to be located;
>
> "(2) No hospital facility shall be leased to any public or nonprofit agency which is not financially responsible and capable of fulfilling its obligations under the agreement of lease, including the obligations to pay rent, to operate, repair and maintain at its own expense the hospital facilities leased and to discharge such other responsibilities as may be imposed under the lease;
>
> "(3) Adequate provision shall be made for the payment of the principal of and interest on the bonds and any necessary reserves therefor and for the operation, repair

and maintenance of the hospital facilities at the expense of the lessee; and

"(4) The public facilities, including utilities, and public services necessary for the hospital facilities will be made available."

With reference to the administrative expenses of the Commission, G.S. 131-147 provides:

"Expenses incurred by the Commission in carrying out the provisions of this Article may be made payable from funds provided pursuant to, or made available for use under, this Article and no liability shall be incurred by the Commission hereunder beyond the extent to which moneys have been so provided."

G.S. 131-154 provides that bonds issued under the provisions of this Act are "hereby made securities in which all public officers and public bodies of the State and its political subdivisions, all insurance companies, trust companies, banking associations, investment companies, executors, administrators, trustees and other fiduciaries may properly and legally invest funds, including capital in their control or belonging to them." Thus, the Act makes it lawful for guardians of and trustees for minor children and incompetents, executors and administrators of estates and trustees of charities to invest the capital held in trust for such wards and beneficiaries in these bonds, for which no one is personally liable and which are unsecured except by a pledge of revenues to be produced in the future by such hospital facilities.

We first consider the plaintiff's contention that the Act unlawfully delegates legislative authority to the Commission.

Article I, § 6, of the Constitution of North Carolina, provides, "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other," and Article II, § 1, thereof, provides, "The legislative powers of the State shall be vested in the General Assembly * * *."

This Court has repeatedly held that the General Assembly may neither abdicate its authority to make laws nor delegate that authority to other departments of the Government or to subordinate administrative agencies. *Turnpike Authority v. Pine*

Island, 265 N.C. 109, 143 S.E. 2d 319; *In re Annexation Ordinances,* 253 N.C. 637, 117 S.E. 2d 795; *Redevelopment Commission v. Bank,* 252 N.C. 595, 114 S.E. 2d 688; *Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 74 S.E. 2d 310; *Cox v. Kinston,* 217 N.C. 391, 8 S.E. 2d 252. It is, however, also established by these decisions that the General Assembly, having itself declared the policy to be effectuated and having established the broad framework of law within which it is to be accomplished and standards for the guidance of the administrative agency, may delegate to such agency the authority to make determinations of fact upon which the application of a statute to particular situations will depend. The distinction is thus stated in *Coastal Highway v. Turnpike Authority, supra:*

> "Since legislation must often be adapted to complex conditions involving numerous details with which the Legislature cannot deal directly, the constitutional inhibition against delegating legislative authority does not deny to the Legislature the necessary flexibility of enabling it to lay down policies and establish standards, while leaving to designated governmental agencies and administrative boards the determination of facts to which the policy as declared by the Legislature shall apply. * * *
>
> "[T]he legislative body must declare the policy of the law, fix legal principles which are to control in given cases, and provide adequate standards for the guidance of the administrative body or officer empowered to execute the law. * * *
>
> "In short, while the Legislature may delegate the power to find facts or determine the existence or nonexistence of a factual situation or condition on which the operation of a law is made to depend, or another agency of the government is to come into existence, it cannot vest in a subordinate agency the power to apply or withhold the application of the law in its absolute or unguided discretion."

[1] In the Act here in question, the Legislature has declared the policy of the State and has established the broad framework of law within which it is to be accomplished. In G.S. 131-142 it has etablished standards and requirements which the Commission is to observe in determining the eligibility of each proposed project for the contemplated financial aid. We do not find in

this Act a delegation of legislative power such as would require the conclusion that the Act, in its entirety, is unconstitutional.

[2] Our decision in this respect is not to be understood, however, as a recognition of validity in the proviso in G.S. 131-142, reading: "[P]roviding that the determination of the Commission as to its compliance with such criteria and requirements shall be final and conclusive." The determination by an administrative body, such as the Commission, that, in a specific instance, it has complied with conditions precedent to the exercise of its statutory authority, is its determination of a question of law and is subject to judicial review.

Our decision herein is also not to be construed as a recognition of the validity of any agreement or contract made by the Commission with an agency of the Federal government, or other agency or instrumentality, under the authority ostensibly granted to the Commission by G.S. 131-141(12). This provision of the Act purports to grant to the Commission power to "agree to and comply with" whatever terms and conditions may be imposed by such agency upon grants, loans and the like, to the Commission with respect to hospital facilities and also to "agree to and comply with" conditions governing payments under any health insurance programs. In its broadest aspects, this provision of the Act might be deemed to grant to the Commission authority to enter into an agreement with such other agency obligating the Commission to take actions beyond the scope of the Act before us. See *Vance County v. Royster*, 271 N.C. 53, 155 S.E. 2d 790. It does not appear from the record before us that any such contract has been made by the Commission. Consequently, the interpretation and validity of this provision in the Act are not before us for determination in this action.

[3] We next consider the contention of the plaintiff that the Act authorizes an unconstitutional lending of the credit of the State, and an unconstitutional authorization of the creation of an indebtedness of the State, in violation of Article V, §§ 3(2) and 3(1), respectively, of the Constitution of North Carolina.

The Act specifically provides that bonds or notes issued by the Commission under the provisions of this Act shall not be deemed to constitute a debt, liability or obligation of the State or of any political subdivision thereof, or a pledge of the faith and credit of the State or of any such political subdivision, but "shall be payable solely from the revenues and other funds pro-

vided therefor." Each such bond or note must contain upon its face a statement to the effect that neither the faith and credit nor the taxing power of the State or of any of its political subdivisions is pledged for the payment of either the principal of or the interest upon such bond or note.

The Commission is a State agency. G.S. 131-117. Any bond or note which it may issue, pursuant to this Act, will be an undertaking by it to pay the specified sum out of revenues received by it in accordance with the provisions of this Act only, and is declared by the Act, G.S. 131-153, to be a negotiable instrument. Nevertheless, this Court has held in numerous decisions that such bonds or notes are not debts of the State, or of a State agency, within the meaning of the constitutional provisions relied upon by the plaintiff. *Martin v. Housing Corp.*, 277 N.C. 29, 175 S.E. 2d 665; *Vance County v. Royster, supra; Turnpike Authority v. Pine Island, supra; Keeter v. Town of Lake Lure*, 264 N.C. 252, 141 S.E. 2d 634; *Ports Authority v. Trust Co.*, 242 N.C. 416, 88 S.E. 2d 109; *Britt v. Wilmington*, 236 N.C. 446, 73 S.E. 2d 289; *Williamson v. High Point*, 213 N.C. 96, 195 S.E. 90; *Brockenbrough v. Commissioners*, 134 N.C. 1, 46 S.E. 28.

The issuance of such bonds does not constitute a giving or lending of the credit of the State, or of its agency, within the meaning of the constitutional provisions relied upon by the plaintiff. *Keeter v. Town of Lake Lure, supra; Ports Authority v. Trust Co., supra.* The State of Florida has a similar provision in its Constitution. In *Nohrr v. Brevard County Educational Facilities Authority (Fla.)*, 247 So. 2d 304, the Florida Court said: "The word 'credit' * * * implies the imposition of some new financial liability upon the State or a political subdivision which in effect results in the creation of a State or political subdivision debt for the benefit of private enterprises. In order to have a gift, loan or use of public credit, the public must be either directly or contingently liable to pay something to somebody." The Supreme Courts of Massachusetts and New Jersey have also held that the issuance of such revenue bonds does not constitute a lending of the credit of the State within the meaning of such a constitutional provision. Opinion of the Justices, 354 Mass. 779, 236 N.E. 2d 523; *Clayton v. Kervick*, 52 N.J. 138, 244 A 2d 281.

We hold, therefore, that the Act does not authorize the contracting of a debt by the State, or its agency, or the pledg-

ing, giving, or lending of the faith and credit of the State, or of its agency, in violation of the constitutional provisions relied upon by the plaintiff.

[4] We turn next to the plaintiff's contention that the Act authorizes counties, cities, towns and other political subdivisions of the State to incur debts, in violation of Article V, § 4, of the Constitution of North Carolina, which provides: "For any purpose other than these enumerated (which do not extend to the purposes of the present Act), the General Assembly shall have no power to authorize counties, cities and towns, and other units of local government to contract debts, and counties, cities and towns, and other units of local government shall not contract debts, during any fiscal year, to an amount exceeding two-thirds of the amount by which the outstanding indebtedness of the particular county, city or town, or other unit of local government shall have been reduced during the next preceding fiscal year, unless the subject is submitted to a vote of the people of the particular county, city or town, or other unit of local government and is approved by a majority of the qualified voters who vote thereon."

The Act provides that such units of local government are authorized to enter into contracts and agreements, including agreements of lease, with the Commission and therein to agree to pay rent sufficient to retire the bonds issued for the construction of the leased hospital facility and also to agree to operate, repair and maintain such facility. G.S. 131-143 and G.S. 131-145. The undertaking of such obligation would clearly create a debt of the lessee within the meaning of the constitutional provision, nothing else appearing.

G.S. 131-145 provides that all obligations payable by any such governmental unit under a lease agreement "shall be payable solely from the revenues of the hospital facilities being leased *or other hospital facilities of the public agency related thereto*" (emphasis added), unless a hospital facility maintenance tax is submitted to the qualified voters of such governmental unit. Had this provision of the Act made such obligation of the lessee payable only from revenues derived from the leased facilities, the above cited decisions relating to what constitutes a debt of the State would be applicable. However, such is not the case. The Act expressly provides that revenues derived from other hospital facilities owned by the lessee, and related to the leased

facility, shall or may be liable for the payment of such obligation.

In a particular instance, it could well be true that the leased facility, constructed by the Commission with the use of proceeds of its bonds, will be an addition to a previously existing hospital of such a nature that it will, of itself, not produce enough revenues to retire the bonds. In that event, the lease authorized by the Act would require the use of revenues derived from the preexisting hospital facility. Conceivably, this could endanger the continued operation of the entire hospital.

On the authority of *Vance County v. Royster, supra,* we hold that such a lease agreement would constitute a debt of such governmental unit, within the meaning of Article V, § 4, of the Constitution of North Carolina, and that by authorizing counties, cities, towns and other units of local government to contract such a debt beyond the amount specified in the Constitution, without submitting the subject to a vote of the people, the General Assembly exceeded its constitutional authority.

This provision of our State Constitution does not deprive any county, city, town or other political subdivision of the State of the power to enter into such lease agreement. It merely declares that the people residing in such governmental unit, not its board of commissioners, shall have the power of decision. If it be true, as stated in the affidavit of William F. Henderson, made part of the agreed statement of facts submitted to the Superior Court, that "the increasing demand on local government for schools and other services has been so overwhelming that there is a great resistance to bond issues for hospital construction," so that the people of such political subdivision might not approve the assumption of the obligations contained in the lease agreement, that circumstance is not a reason for depriving them of the right of decision conferred upon them by the Constitution. See *Vance County v. Royster, supra.*

[5] We consider next the contention of the plaintiff that the Act is unconstitutional for the reason that it exempts from taxation property owned by the North Carolina Medical Care Commission, pursuant to the provisions of the Act, which would include hospital facilities constructed and leased by it, and income from such property.

The plaintiff does not attack the validity of the portion of G.S. 131-158 which exempts from taxation, other than in-

heritance or gift taxes, the bonds or notes issued by the Commission, their transfer and the income therefrom. In *Martin v. Housing Corp., supra,* and in *Educational Assistance Authority v. Bank,* 276 N.C. 576, 174 S.E. 2d 551, this Court held that the General Assembly may grant such tax exemption to similar bonds issued by the North Carolina Housing Corporation and the State Educational Assistance Authority.

Article V, § 2(3), of the Constitution of North Carolina, provides: "Property belonging to the State, counties, and municipal corporations shall be exempt from taxation. The General Assembly may exempt cemeteries and property held for educational, scientific, literary, cultural, charitable, or religious purposes * * *."

As above noted, the Commission is an agency of the State. The property owned by it, including hospital facilities leased to private nonprofit associations for operation, is property owned by the State within the meaning of this constitutional provision, making the exemption of such property from taxation mandatory. The tax exemption to which the plaintiff objects is an exemption of the Commission, not the lessee. However, the constitutional provision relied upon by the plaintiff expressly authorizes the General Assembly to exempt property held for charitable purposes, even though not owned by the State, a county or a municipal corporation. Thus, there is no merit in this contention of the plaintiff. *Martin v. Housing Corp., supra; Wells v. Housing Authority,* 213 N.C. 744, 197 S.E. 693.

We come now to the plaintiff's most serious attack upon the validity of the Act, which is that the construction of hospital facilities for lease to, and ultimate conveyance to, a private agency, though a nonprofit agency, is not a public purpose and, therefore, public funds, raised by taxation, may not lawfully be appropriated or expended for such purpose or to implement the administration of the Act.

Article V, § 2(1), of the Constitution of North Carolina, provides, "The power of taxation shall be exercised * * * for public purposes only * * *."

As we said in *Mitchell v. Financing Authority,* 273 N.C. 137, 159 S.E. 2d 745: "The power to appropriate money from the public treasury is no greater than the power to levy the tax

which put the money in the treasury. Both powers are subject to the constitutional proscription that the tax revenues may not be used for private individuals or corporations, *no matter how benevolent.*" (Emphasis added.) Accord: *Horner v. Chamber of Commerce,* 231 N.C. 440, 57 S.E. 2d 789. The immediate question for our decision here, as in the Mitchell case, is whether the $15,000, allotted by the Council of State from the Contingency and Emergency Fund for use of the Commission in implementing the revenue bond program authorized by the Act, was lawfully appropriated and may lawfully be expended by the Commission for such purpose.

The General Assembly has declared in the Act that the financing and construction of hospital facilities is a public purpose for which public money may be expended and that the enactment of this Act is necessary and proper for effectuating the purposes therein set forth. Such an expression of opinion by the General Assembly is entitled to, and is always given, great weight by this Court, but it is not conclusive. It is the duty and prerogative of this Court to determine whether an appropriation of tax funds is for a purpose forbidden by the Constitution of the State when, as here, that question is properly raised. *Mitchell v. Financing Authority, supra; Keeter v. Town of Lake Lure, supra; Redevelopment Commission v. Bank,* 252 N.C. 595, 114 S.E. 2d 688; *Nash v. Tarboro,* 227 N.C. 283, 42 S.E. 2d 209; *Wells v. Housing Authority, supra; Briggs v. Raleigh,* 195 N.C. 223, 141 S.E. 597.

It is well settled that the expenditure of tax funds for the construction of a hospital, to be owned and operated by the State, a county, a city, town or other political subdivision of the State, is an expenditure for a public purpose. *Rex Hospital v. Commissioners of Wake,* 239 N.C. 312, 79 S.E. 2d 892; *Hospital v. Commissioners of Durham,* 231 N.C. 604, 58 S.E. 2d 696. Obviously, the primary purpose of a nonprofit privately owned hospital is the same as that of a publicly owned hospital for the treatment of like diseases and injuries. It does not necessarily follow, however, that the construction and operation of the privately owned hospital is for a public purpose, within the meaning of the constitutional limitation upon the use of tax funds.

[6] The circumstance that the privately owned hospital is not operated for profit is not determinative. "[T]ax revenues may not be used for private individuals or corporations, no matter

how benevolent." *Mitchell v. Financing Authority, supra.* "Many objects may be public in the general sense that their attainment will confer a public benefit or promote the public convenience but not be public in the sense that the taxing power of the State may be used to accomplish them." Cooley on Taxation, page 383, quoted with approval in *Nash v. Tarboro, supra,* and in *Briggs v. Raleigh, supra.*

It is elementary that the promotion and protection of the public health is a proper subject for exercise of the police power of the State and, obviously, hospitals, whether publicly or privately owned, are operated for that purpose and subject to State regulation. The power of the State to regulate privately owned institutions under its police power is, however, more extensive than the authority of the Legislature to expend tax money for the accomplishment of the same purpose. Article V, § 2(1), is a limitation upon the legislative power, separate and apart from the limitation contained in the Law of the Land Clause in Article I, § 19, of the Constitution of North Carolina, and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. Nor does the authority of the State to expend tax funds to construct and operate a hospital of its own necessarily carry with it the authority to expend such funds to subsidize a privately owned hospital.

"For the most part, the term 'public purposes' is employed in the same sense in the law of taxation and in the law of eminent domain." Cooley on Taxation, 4th Ed., § 176, quoted with approval in *Mitchell v. Financing Authority, supra.* Thus, if the General Assembly may authorize a State agency to expend public money for the purpose of aiding in the construction of a hospital facility to be leased to and ultimately conveyed to a private agency, it may also authorize the acquisition of a site for such facility by exercise of the power of eminent domain. See *Mitchell v. Financing Authority, supra.*

The present case is distinguishable from *Redevelopment Commission v. Bank, supra,* and *Wells v. Housing Authority, supra.* In those cases the primary purpose of the legislation was to protect the public health by eliminating existing slums, replacing them with safe and sanitary housing or other buildings and assuring that the blighted condition would not return. The fact that such project would benefit individuals permitted to rent the new housing units or other new buildings or to purchase, own and use them, after the accomplishment of the

primary purpose of the law, was deemed incidental thereto. Thus, the authorization in the statute for such rental or sale was not deemed sufficient to change the purpose of the law from a public purpose to one private in nature. While the Act now before us provides for ownership of the acquired property by a public agency until the bonds issued to finance the contemplated construction are retired, the Act has no purpose separate and apart from the operation by and ultimate conveyance of the hospital facility to the lessee thereof.

In *Mitchell v. Financing Authority, supra,* we said: "Often public and private interests are so co-mingled that it is difficult to determine which predominates. It is clear, however, that for a use to be public its benefits must be in common and not for particular persons, interests, or estates; the ultimate net gain or advantage must be the public's as contradistinguished from that of an individual or private entity." A private entity does not cease to be such merely because it is a nonprofit association or corporation engaged in a meritorious, charitable activity in which the State, itself, may lawfully engage. Notwithstanding the provision in G.S. 131-145 that all hospital facilities (which we construe to mean facilities constructed, owned and leased by the Commission pursuant to this Act) shall be operated to serve and benefit the general public without discrimination against any person based on race, creed, color or national origin, such facility leased to and operated by a private, nonprofit agency remains a private facility. It is privately managed and controlled.

[7] We hold that the expenditure of public funds raised by taxation to finance, or facilitate the financing of, the construction of a hospital facility to be privately operated, managed and controlled is not an expenditure for a public purpose and is prohibited by Article V, § 2(1), of the Constitution of North Carolina. We have carefully considered the following decisions to the contrary by courts of our sister states: *Fort Sanders Presbyterian Hospital v. Health & Education Facilities Board of the County of Knox,* 453 S.W. 2d 771 (Tenn. 1970); *Truitt v. Board of Public Works of Maryland,* 243 Md. 375, 221 A. 2d 370 (1966); *Lien v. City of Katchikan,* 383 P. 2d 721 (Alaska, 1963); *In re Opinion of the Justices,* 99 N.H. 536, 114 A. 2d 801; Opinion of the Justices (Mass.), *supra.* Notwithstanding our great respect for the opinions of those courts, we do not find their reasoning persuasive in this instance.

Since we hold that public funds raised by taxation may not lawfully be expended to finance, or facilitate the financing of, the construction of any hospital facility which is to be privately operated, managed and controlled, we do not reach, and express no opinion concerning, the plaintiff's contention that such an expenditure in connection with construction of a facility to be leased to a church related hospital is also an encroachment upon rights of conscience, in violation of Article I, § 13, of the Constitution of North Carolina, and of the First and Fourteenth Amendments to the Constitution of the United States.

We, therefore, hold that the Superior Court erred in its Conclusion No. 1, to the effect that the Act is not unconstitutional in authorizing the Commission to use public funds raised by taxation to construct hospital facilities to be leased and ultimately conveyed to private, nonprofit agencies, and in its Conclusion No. 5, to the effect that the Act is not unconstitutional in that it authorizes the creation of a debt by a county, city, town, or other unit of local government without the approval of the voters thereof. The unconstitutional portions of the Act, noted herein above, are not separable from the remainder of the Act. The Superior Court, therefore, erred in denying the relief sought by the plaintiff and in dismissing the action.

The judgment of the Superior Court of Wake County is, therefore, reversed and this matter is remanded to that court for the entry by it of a judgment restraining and enjoining the defendants from expending the funds allocated to it by the Council of State from the Contingency and Emergency Fund for the implementation of the Act and from the expenditure for such purpose of any other public funds raised by taxation, and further enjoining the Commission from entering into any lease agreement with any public agency, as defined in the Act, by which agreement any revenues of the lessee, other than revenues produced solely by the operation of the leased facility, are made liable or usable for the payment of any obligation of such lessee under such agreement, in excess of the amount specified in Article V, § 4(1), of the Constitution of North Carolina, unless and until such proposed agreement is submitted to and approved by the qualified voters of such lessee in an election held pursuant to law.

Reversed and remanded.

MARILYN S. KOOB v. WILLIAM M. KOOB, JOSEPH P. SHORE, ADDITIONAL DEFENDANT

No. 7

(Filed 11 April 1973)

1. **Divorce and Alimony § 21— action for alimony without divorce — surplus proceeds from sale of entirety property — authority of court**

In an action to obtain alimony without divorce and child custody and support, the trial court, at the time it entered orders, had authority with respect to entirety property owned by plaintiff and defendant only to award plaintiff wife the actual possession thereof or the rents and profits therefrom, and orders purporting to determine the respective rights of plaintiff and defendant in the surplus, if any, which might be available for them upon completion of foreclosure on the entirety property were invalid because in excess of the court's authority.

2. **Mortgages and Deeds of Trust § 33— surplus proceeds from sale of entirety property — payment to superior court clerk**

Trustee, upon completion of foreclosure on entirety property, was authorized by G.S. 45-21.31(b)(3) to pay the surplus to the clerk of superior court, and the clerk held the money for safekeeping only, having no interest therein other than to protect himself from liability on his official bond.

3. **Husband and Wife § 17; Divorce and Alimony § 21— surplus from foreclosure on entirety property — distribution — right of defendant to notice**

Where the surplus from foreclosure on property owned by plaintiff and defendant by the entireties was within the legal custody of the court and the respective rights of the parties depended in large measure upon whether the fund was to be considered as real property and subject to the law applicable to an estate by the entirety or as personal property, defendant was entitled to specific notice of plaintiff's claim with respect to the fund before determination of that issue.

4. **Courts § 2; Rules of Civil Procedure § 4; Divorce and Alimony § 21— alimony without divorce action — distribution of surplus from foreclosure sale — sufficiency of notice to defendant to confer jurisdiction on trial court**

In an action for alimony without divorce, child custody and support, process served on defendant was insufficient to confer jurisdiction on the court to adjudge the respective rights of plaintiff and defendant in regard to the surplus from foreclosure on their entirety property where (1) the fund was not in existence when the action was instituted or when the original complaint or the amendment to the complaint was filed, (2) institution of the alimony action did not give defendant notice that plaintiff was seeking a determination of the parties' rights in a surplus that might result in the event of a foreclosure by the trustee, and (3) the only notice given defendant was by newspaper publication insufficient to confer jurisdiction over the matter; prerequisite to a determination of the parties' rights

in the fund, a notice must be served on defendant setting forth with particularity plaintiff's claim with reference thereto and requiring defendant to appear at a designated time and place to show cause, if any he has, why the relief sought by plaintiff should not be granted.

ON *certiorari*, granted on motion of plaintiff, to review the decision of the Court of Appeals, 16 N.C. App. 326, 192 S.E. 2d 40, which vacated in part orders entered by *Judge Alexander* in GUILFORD County District Court.

This cause was heard in the Court of Appeals on the appeal of Joseph P. Shore, Clerk of the Superior Court of Guilford County, North Carolina, hereafter called the Clerk, from the orders referred to below. It involves directly a fund of $25,853.23 paid to the Clerk on 19 April 1972 by R. D. Douglas, Jr., Trustee, hereafter called Douglas, Trustee. This fund is the surplus, after payment of the secured debt and foreclosure costs, resulting from the foreclosure by Douglas, Trustee, of a deed of trust dated 21 December 1964, executed by Harry J. Hill and wife, Mary H. Hill. This deed of trust had been assumed by William M. Koob and wife, Marilyn S. Koob, on or about 29 January 1969, when they acquired ownership of the property as tenants by the entirety. The foreclosure proceedings consisted of the original sale on 17 January 1972 and subsequent resales. The final resale was completed at the price of $50,200.

The controversy now before us is between plaintiff and the Clerk. The Clerk contends that the $25,853.23 should be considered as having been paid to him by Douglas, Trustee, under G.S. 45-21.31(b)(4), and that the ownership and disposition thereof must be determined in a special proceeding in accordance with G.S. 45-21.32. He contends also that this fund should be considered real property and therefore subject to disposition in accordance with the law applicable to tenancies by the entirety. He asserts no interest in the subject fund. He seeks to protect himself from liability on his official bond if it should be determined, as he contends, that the orders of Judge Alexander referred to below were void in certain respects for lack of jurisdiction.

The facts narrated below are necessary to an understanding of the questions presented by this appeal.

William M. Koob, defendant, and Marilyn S. Koob, plaintiff, were married 31 May 1944. They are the parents of three

children, to wit, Richard M. Koob, born 26 April 1949; Joanna E. Koob, born 25 September 1952; and Martin D. Koob, born 30 June 1957.

Richard M. Koob does not reside with either parent. Joanna E. Koob is a student at Guilford College, Guilford County, North Carolina. Martin D. Koob resides with his mother in California.

Prior to their separation, plaintiff and defendant resided at 3210 West Market Street, Greensboro, North Carolina, this being the property owned by them as tenants by the entirety subject to the deed of trust to Douglas, Trustee.

On 17 August 1971, when this action was commenced, summons issued and plaintiff applied for and obtained an order extending the time for filing complaint. In her application she asserted that the action was for "alimony without divorce" on the ground that "supporting spouse by cruel and barbarous treatment ha[d] endangered the life of the dependent spouse and ha[d] offered such indignities to her person as to render her condition intolerable and her life burdensome."

The summons, application and order were personally served on defendant, William M. Koob, in Guilford County, North Carolina, on 17 August 1971. None of the pleadings, motions, orders, etc., referred to below, were personally served on defendant. No answer or other pleading has been filed by defendant. He has not appeared herein personally or by counsel.

In apt time, plaintiff filed a verified complaint in which she set out in detail incidents which she alleged had occurred throughout the years of the marriage without fault on her part and which constituted such indignities to her person as to render her condition intolerable and life burdensome. These included allegations as to the circumstances which caused her to leave their home in Greensboro for California. Specifically, she alleged that she left because of incidents and threats which caused her to fear death or great bodily harm at the hands of defendant; and that on 14 September 1970, accompanied by her son, Martin D. Koob, she arrived in California where she and Martin have since resided.

On 12 October 1971 plaintiff filed an "amendment" to her complaint. Included therein are allegations that defendant had fled the jurisdiction; that his whereabouts were unknown; and

that plaintiff's efforts to obtain personal service of the complaint on defendant had been futile. Also included therein are allegations that defendant had failed to make the August, September and October payments on the indebtedness secured by a deed of trust on their real property; that plaintiff "ha[d] been obliged to pay approximately $1,400.00 on delinquent taxes and payments previously during the past year"; that defendant had made no payment "for the support of his minor son, Martin, since June, 1971"; that she was "in acute need of financial support for herself and Martin"; that on 24 September 1971 "the greater and more valuable part of the furniture" was removed from the West Market Street residence, and on 4 October 1971, the residence had been broken into and vandalized; that the West Market Street residence was "in serious danger of . . . being damaged or destroyed in its exposed and vulnerable condition"; and that the West Market Street residence was "subject to immediate foreclosure by Home Federal Savings & Loan Association, unless the arrears in payment [were] caught up. . . ."

The "amended complaint" concluded with these additional prayers for relief: (1) That an order be entered attaching and awarding to plaintiff the use and possession of the real property at 3210 West Market Street; (2) that defendant be required to convey his interest in this real estate to plaintiff or to a trustee for plaintiff's benefit; and (3) that "R. D. Douglas, Jr., Trustee, for Home Federal Savings and Loan Association, be made a party to this proceeding, to the end that said Trustee may be ordered, in event of foreclosure of its lien against said real property at 3210 West Market Street, to pay the surplus after satisfaction of its lien, into the hands of the trustee for the plaintiff or to the Clerk of this Court, to be held in trust for the payment of alimony pendente lite, permanent alimony, child support, counsel fees, *and other specific financial obligations of the defendant to the plaintiff herein complained of*, as such payments shall be and become due. . . . " (Our italics.)

Commencing on the 4th day of November 1971, there was published in The Greensboro Times, "successively, for the period of three (3) weeks," a notice addressed to defendant which, after stating the title of the action and designating the court in which it had been commenced, provided:

"TAKE NOTICE that a pleading seeking relief against you has been filed in the above entitled civil action. The nature of

the relief being sought is as follows: Permanent alimony without divorce, child custody and support, alimony pendente lite, and counsel fees: attachment of real property at 3210 West Market Street in Greensboro, and sale thereof to secure payment of support obligations; attachment of proceeds of any foreclosure sale of said real property.

"You are required to make defense to such pleading not later than the 15th day of December, 1971, and upon your failure to do so, the party seeking service against you will apply to the Court for the relief sought."

The cause was heard by Judge Alexander on plaintiff's motion for temporary support and counsel fees. An order entered 4 January 1972 recites the facts with reference to plaintiff's efforts and inability to obtain personal service of the complaint on defendant and states that "plaintiff then served defendant with notice of service of process by publication." Whereupon, Judge Alexander ruled as a matter of law that the court then had personal jurisdiction of the defendant.

Thereafter, based upon findings of fact set forth with particularity, Judge Alexander entered the following order:

"WHEREFORE, it is now ordered:

"1. Plaintiff is hereby awarded custody of Martin Koob, pendente lite.

"2. For support of Martin Koob, pendente lite, the defendant is ordered to pay into the offices of the Clerk of this Court for the use of the plaintiff, the sum of Two Hundred Dollars ($200.00) on the 15th day of January, 1972, and a like sum on the first day of each month thereafter.

"3. For support of the plaintiff, pendente lite, the defendant is ordered to pay into the offices of the Clerk of this Court the sum of Five Hundred Dollars ($500.00) on the 15th day of January, 1972, and a like amount on the first day of each month thereafter.

"4. In addition to the foregoing provisions regarding current support of the plaintiff and the minor child of the parties, defendant shall pay into the offices of the Clerk of this Court, on or before January 17, 1972, the sum of $450.00, representing arrears of child support; *the sum of $1,380.00, representing reimbursement for expenses necessarily incurred by the plaintiff*

for the preservation of the real property of the parties upon default by defendant in payment of obligations secured by lien thereon; the sum of $1,500.00, representing one-half of the proceeds from sale of bonds owned by the parties jointly, which defendant sold without accounting to the plaintiff for her portion of the proceeds; and the sum of $3,000.00 representing one-half of the value of household furniture and appliances which defendant removed from the parties' home without plaintiff's consent and without accounting to her or compensating her for any part of the value thereof; said payments shall be made in a lump sum, totalling $6,330.00, in lieu of support for the plaintiff, since September 4, 1970. If said lump sum has not been paid to plaintiff by defendant on or before January 17, 1972, said sum shall constitute a lien on defendant's one-half interest in the net proceeds, if any, of a foreclosure sale of the parties' house, and shall be paid by the Clerk to the plaintiff immediately upon receipt of such net proceeds, subject to the other provisions of this order.

"5. R. D. Douglas, Jr., Trustee, under loan no. 19939 from Home Federal Savings & Loan Association in Greensboro, is hereby made a party to this action, and shall be served with appropriate documents, including a copy of this order. He is hereby ordered to deliver one-half of the net proceeds from any foreclosure sale of the realty of the parties, located at 3210 West Market Street, in Greensboro, North Carolina, to the plaintiff; the other half of the proceeds, if any there be, shall be paid by the said Trustee to the Clerk of this Court, to be disbursed in accordance with the foregoing order, and any balance remaining shall be held by said Clerk as security for the payment of defendant's future support obligations to the plaintiff and his minor child, pending further orders of this Court. Defendant is hereby enjoined from redeeming said property from foreclosure by payment of any less than the entire balance due on the loan, plus expenses, and Home Federal Savings and Loan Association is requested to exercise its legal prerogative of refusing to accept from defendant or any other person less than the full sum of this obligation as redemption from foreclosure, as defendant's default is found to be wilful, and redemption for less would irreparably injure the plaintiff.

"6. On or before January 17, 1972, defendant shall pay the sum of $3500.00 (Three Thousand Five Hundred) into the offices of the Clerk of this Court, to be disbursed to Turner,

Rollins & Rollins, attorneys, as compensation for their services to the plaintiff in this action, pendente lite. In default of such payment by defendant, said fee shall constitute a first lien upon the defendant's portion of the net proceeds of foreclosure sale of the parties' realty aforesaid, to be paid by the Clerk prior to the other disbursements provided for herein." (Our italics.)

On 26 January 1972, Douglas, Trustee, moved that Judge Alexander vacate the portion of her order of 4 January 1972, which directed the disbursement by him of "the surplus remaining following the sale by foreclosure of any real property owned by the parties," and that he be directed "to pay into the Clerk of Court any surplus following any foreclosure sale . . . pursuant to N.C.G.S. 45-21.31(b), said action to release him from further liability for the surplus."

On 10 March 1972, after a hearing, Judge Alexander ordered that Douglas, Trustee, upon his receipt thereof, pay over the surplus from the foreclosure sale to the Clerk; that the Clerk be made a party defendant for the purpose of determining the disposition of the surplus; and that, unless he shows cause why he should not be required to do so, the Clerk disburse the surplus in the manner in which Douglas, Trustee, had been directed to do so in the order of 4 January 1972.

In a "Response" filed 20 March 1972, the Clerk of the superior court asserted that G.S. 45-21.31(b)(4) required that "the surplus remaining after foreclosure in all cases where adverse claims to the funds are asserted" be paid by the trustee to the Clerk and that the ownership and right to the funds so deposited be determined by a proceeding in accordance with G.S. 45-21.32. Accordingly, he moved that Judge Alexander vacate the portion of her order of 10 March 1972 which directed him to disburse the fund, and that he be directed to determine ownership of said fund in accordance with G.S. 45-21.32.

On 13 April 1972, after a hearing, Judge Alexander rejected the Clerk's contention that the ownership and disposition of the fund be determined in accordance with G.S. 45-21.32 and, with a modification not pertinent to this appeal, adjudged that the order of 10 March 1972 remain in full force.

On 14 April 1972, Judge Alexander entered an order which, with a modification not pertinent to this appeal, "reissued" the prior orders of 4 January 1972, and of 10 March 1972, and

provided that the substance of each of these prior orders was incorporated by reference as if fully set forth therein.

The Clerk filed "exceptions to the findings of fact, mixed findings of fact and conclusions of law, conclusions of law, and to the Orders entered . . . on March 10, 1972, and on April 13, 1972, and on April 14, 1972."

The Court of Appeals vacated "[t]he several orders of the trial court as entered to date, insofar as they adjudicate ownership of, or otherwise affect the surplus proceeds from the foreclosure sale, or the duties and obligations of the trustee with respect thereto, or the duties and obligations of the Clerk of Superior Court with respect thereto," and remanded the cause "for such further proceedings as may be appropriate."

Turner, Rollins & Rollins by Elizabeth O. Rollins for plaintiff appellant.

Attorney General Robert Morgan and Assistant Attorney General Mrs. Christine Y. Denson for additional defendant Joseph P. Shore, appellee.

BOBBITT, Chief Justice.

The summons, and the application and order for extending the time for filing complaint, constitute the only process and pleading served personally on defendant. The only service of the complaint and amendment thereto was made by publication of the notice set forth in our preliminary statement. Assuming this service met all the requirements of G.S. 1A-1, Rule 4(j) (9)c, the court acquired jurisdiction to award the plaintiff whatever relief she was entitled to obtain in an action for "alimony without divorce" under G.S. 50-16.2.

The order of 4 January 1972 discloses that the court made the findings of fact set forth therein after "reading the plaintiff's verified complaint, offered as an affidavit in support of her motion, and hearing witnesses presented in open Court on behalf of the plaintiff. . . . " The record does not contain the testimony of the witnesses or disclose their identity. For present purposes, we assume the sufficiency of the evidence to support the court's findings of fact. Moreover, we accept the findings of fact as sufficient to support the *pendente lite* allowances for plaintiff's support and for the support of Martin. We pass, without discussion, whether those portions of the order

of 4 January 1972 which relate to the alleged appropriation by defendant of certain bonds and the alleged removal by defendant of certain household furniture and appliances without plaintiff's consent are within the purview of an action for "alimony without divorce." On this appeal, we are concerned solely with the portions of the order of 4 January 1972 which relate to the jointly owned real estate then being foreclosed by Douglas, Trustee, and to the portions thereof and of the subsequent orders of 10 March 1972, 13 April 1972 and 14 April 1972 which relate to the disposition of the surplus arising from the foreclosure by Douglas, Trustee, of the jointly owned real property.

On 4 January 1972 the real property at 3210 West Market Street, Greensboro, North Carolina, referred to hereafter as the subject realty, was owned by William M. Koob and wife, Marilyn S. Koob, as tenants by the entirety, subject to the deed of trust executed by the Hills to Douglas, Trustee. Prior to 4 January 1972 Douglas, Trustee, had advertised that a foreclosure sale of the subject realty under the Hill deed of trust would be conducted on 17 January 1972. A resale on 13 March 1972 became final when no upset bid was submitted within ten days and an order of confirmation was entered on 27 March 1972.

The "properties and incidents of an estate by the entirety" *in real property* are summarized by Justice (later Chief Justice) Stacy in the oft-cited case of *Davis v. Bass*, 188 N.C. 200, 124 S.E. 566 (1924).

"[T]he husband is entitled during the coverture to the full possession, control and use of the estate, and to the rents and profits arising therefrom to the exclusion of the wife." *Nesbitt v. Fairview Farms, Inc.*, 239 N.C. 481, 486, 80 S.E. 2d 472, 477 (1954). However, "the rents and profits therefrom, which belong to the husband, may be charged with the support of his wife." *Porter v. Bank*, 251 N.C. 573, 577, 111 S.E. 2d 904, 908 (1960), and cases there cited. In this respect, such rents and profits have the same status as other income and assets owned exclusively by the husband. *In re Estate of Perry*, 256 N.C. 65, 70, 123 S.E. 2d 99, 102 (1961).

Although the rents and profits therefrom and the actual possession thereof may be made available for the support of the wife, the court does not have the power to order the sale of

land owned by husband and wife as tenants by the entirety in order to procure funds to pay alimony to the wife or to pay her counsel fees. *Holton v. Holton,* 186 N.C. 355, 119 S.E. 751 (1923); *Porter v. Bank, supra.*

[1] Under the legal principles stated above, those provisions of the orders of 4 January 1972 and 10 March 1972 which purport to determine the respective rights of plaintiff and defendant in the surplus, if any, which might be available for them upon completion of the foreclosure by Douglas, Trustee, were invalid because in excess of the court's authority. As of 4 January 1972, and as of 10 March 1972, the court's only authority in respect of the subject realty was to award to plaintiff the actual possession thereof or the rents and profits therefrom.

[2] Moreover, in accord with the Court of Appeals, we hold that G.S. 45-21.31(b)(3) authorized Douglas, Trustee, upon completion of the foreclosure, to pay the surplus to the Clerk. The surplus of $25,853.23 was paid by Douglas, Trustee, to the Clerk on or prior to 19 April 1972. We hold that this fund was received and is held by the Clerk as having been paid to him under G.S. 45-21.31(b)(3). With reference thereto, "The clerk is liable on his official bond for the safekeeping of money so received until it is paid to the party or parties entitled thereto, or until it is paid out under the order of a court of competent jurisdiction." G.S. 45-21.31(e).

Plaintiff and defendant are the owners of the fund of $25,853.23. The Clerk is simply a stakeholder, having no interest therein other than to protect himself from liability on his official bond.

[3] The Clerk contends that this fund of $25,853.23 represents real property owned by plaintiff and defendant as tenants by the entirety and is subject to the law applicable to an estate by the entirety. He cites *Highway Commission v. Myers,* 270 N.C. 258, 154 S.E. 2d 87 (1967), where, with reference to compensation paid into the clerk's office in a condemnation proceeding, the court said: "Unless otherwise provided by their joint and voluntary agreement, and in the absence of an absolute divorce, we are of the opinion and so decide that such involuntary transfer of title does not destroy or dissolve the estate by the entirety . . . and that the compensation paid by the Commission therefor has the status of real property owned by hus-

band and wife as tenants by the entirety." *Id.* at 262, 154 S.E. 2d at 90. Cf. *Perry v. Jolly,* 259 N.C. 305, 130 S.E. 2d 654 (1963). If real property, the authority of the court would extend no further than to provide for the investment of the fund and the application of the income therefrom to the payment of an alimony award.

Plaintiff contends, and Judge Alexander ruled, that the $25,853.23 is personal property, owned in equal shares by plaintiff and defendant; that plaintiff is entitled to one-half as owner; and that defendant's one-half is subject to impoundment and payment of alimony until exhausted. Plaintiff relies largely on *Porter v. Bank, supra,* which involved conflicting rights in a fund of $9,382.34 deposited by Frank Banzet, Trustee, with the Clerk of the Superior Court of Warren County, under G.S. 45-21.31. In *Porter,* the plaintiff-wife had obtained an award of alimony *pendente lite* and counsel fees prior to completion of the foreclosure by Frank Banzet, Trustee. It was held that a creditor of defendant-husband who had levied on the husband's interest in the surplus had priority over the wife's claim under the order providing for the payment of alimony to her. The plaintiff-wife, the judgment creditor of the defendant-husband and the court proceeded on the assumption that the $9,382.34 was personalty rather than realty. It being to the interest of the plaintiff-wife and of the judgment creditor of the defendant-husband that the fund be regarded as personalty, no question was raised or argument presented with reference to whether it was personalty or realty.

Without appraising the legal significance thereof, we note this factual difference between *Porter v. Bank, supra,* and the present case: *In Porter v. Bank,* the surplus fund of $9,382.34 was the result of the foreclosure by Frank Banzet, Trustee, of a deed of trust which had been executed by the defendant-husband and the plaintiff-wife. In the present case, the surplus fund of $25,853.23 resulted from the foreclosure by Douglas, Trustee, of a deed of trust which had been executed by Harry J. Hill and wife, Mary H. Hill, prior owners of the subject realty, and not by William M. Koob and wife, Marilyn S. Koob.

North Carolina does not recognize an estate by the entirety *in personal property. Wilson v. Ervin,* 227 N.C. 396, 399, 42 S.E. 2d 468, 470 (1947), and cases cited therein. Also, see cases cited in Anno. 64 A.L.R. 2d 8, 28.

"An absolute divorce . . . converts an estate by the entirety into a tenancy in common." *Davis v. Bass, supra* at 207, 124 S.E. at 570; *Smith v. Smith,* 249 N.C. 669, 107 S.E. 2d 530 (1959); *Lanier v. Dawes,* 255 N.C. 458, 121 S.E. 2d 857 (1961). Also, see *Carter v. Insurance Co.,* 242 N.C. 578, 89 S.E. 2d 122 (1955).

An estate by the entirety can be destroyed and dissolved by the voluntary joint acts of the husband and wife. *Wilson v. Ervin, supra.* Hence, where husband and wife sell and convey real property owned by them as tenants by the entirety, the proceeds of sale, including a balance purchase-money note and security therefor, are considered personal property, and the husband and wife are tenants in common in respect of the ownership thereof. *Shores v. Rabon,* 251 N.C. 790, 793, 112 S.E. 2d 556, 559 (1960), and cases there cited. Decisions in other jurisdictions relating to the effect of such sales are cited in Anno. 64 A.L.R. 2d 8, 47 *et seq.*

A critical question is whether the foreclosure by Douglas, Trustee, is to be considered as having effected the destruction and dissolution of the estate by the entirety by the voluntary joint acts of husband and wife. Defendant is entitled to specific notice of plaintiff's claim with reference thereto before this question is decided.

The purpose of attachment is to bring the property of a defendant within the legal custody of the court. G.S. 1-440.1. The fund of $25,853.23 is now within the legal custody of the court and is subject to the court's orders in respect of its ownership and disposition. As far as the record discloses, no person other than plaintiff and defendant has or claims any interest therein. The respective rights of plaintiff and defendant depend in large measure upon whether the fund is to be considered as real property and subject to the law applicable to an estate by the entirety or as personal property. The Clerk's only concern is that the adjudication of this question be made by a court of competent jurisdiction.

[4] In our opinion, the process served on defendant was insufficient to confer jurisdiction on the court to adjudge the respective rights of plaintiff and defendant in the $25,853.23 fund. This fund was not in existence when the action was instituted or when the original complaint was filed. Nor was it in existence when the amendment to complaint was filed. More-

over, the fact that an action for "alimony without divorce" had been instituted did not constitute notice that plaintiff was seeking a determination of the respective rights of plaintiff and defendant in a surplus that might result in the event of a foreclosure by Douglas, Trustee. Nor do we consider that the publication in November 1971 of the notice quoted in our preliminary statement was sufficient notice to confer jurisdiction for such determination. We note that this notice to defendant was published prior to the first advertisement by Douglas, Trustee, of a foreclosure sale.

Prerequisite to a determination of the respective rights of plaintiff and defendant in the fund of $25,853.23, a notice must be served on defendant setting forth with particularity plaintiff's claim with reference thereto and requiring defendant to appear at a designated time and place to show cause, if any he has, why the relief sought by plaintiff should not be granted. When service by publication is permissible, the procedure therefor is prescribed in Rule 4(j)(9)c. We note that Rule 4(k) provides: "In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for the exercise of jurisdiction in rem or quasi in rem as provided in G.S. 1-75.8, the manner of service of process shall be as follows: (1) Defendant known.—If the defendant is known, he may be served in the appropriate manner prescribed for service of process in section (j)." G.S. 1-75.8 in part provides: "A court of this State having jurisdiction of the subject matter may exercise jurisdiction in rem or quasi in rem on the grounds stated in this section. A judgment in rem or quasi in rem may affect the interests of a defendant in a status, property or thing acted upon only if process has been served upon the defendant pursuant to Rule 4(k) of the Rules of Civil Procedure. Jurisdiction in rem or quasi in rem may be invoked in any of the following cases: (1) When the subject of the action is real or personal property in this State and the defendant has or claims any lien or interest therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest or lien therein. . . . (5) In any other action in which in rem or quasi in rem jurisdiction may be constitutionally exercised." Obviously, jurisdiction in rem may be constitutionally exercised in respect of property which is in the legal custody of the court.

The Clerk does not except to the awards made to plaintiff as alimony *pendente lite* or otherwise. Nor does he challenge

the award made *pendente lite* for the benefit of Martin. However, we note that only *pendente lite* allowances have been awarded. The factors for consideration in making *pendente lite* allowances are discussed in *Rickert v. Rickert,* 282 N.C. 373, 193 S.E. 2d 79 (1972).

There has been no trial in respect of the allegations upon which plaintiff bases her claim for alimony. In *Hicks v. Hicks,* 275 N.C. 370, 375, 167 S.E. 2d 761, 764 (1969), the Court, in an opinion by Justice Branch, said: "This Court has held that suits for alimony without divorce are within the analogy of divorce laws, *Rector v. Rector,* 186 N.C. 618, 120 S.E. 195, and that an action under N. C. General Stat. § 50-16 was a divorce action within the purview of that portion of N. C. Gen. Stat. § 50-10 which controverted all material facts in every divorce action. *Rouse v. Rouse,* 258 N.C. 520, 128 S.E. 2d 865; *Blankenship v. Blankenship,* 256 N.C. 638, 124 S.E. 2d 857; *Schlagel v. Schlagel,* 253 N.C. 787, 117 S.E. 2d 790."

The foregoing leads to this conclusion: The portions of the orders of 4 January 1972, 10 March 1972, 13 April 1972 and 14 April 1972, which purport to adjudge the respective rights of plaintiff and defendant in the fund of $25,853.23, are vacated and stricken therefrom. The cause is remanded to the Court of Appeals for remand to the District Court with direction that it defer adjudication of the respective rights of plaintiff and defendant in the fund of $25,853.23 until explicit notice in respect of plaintiff's claim has been served on defendant as set forth herein. Except as modified herein, the decision of the Court of Appeals is affirmed.

Modified and affirmed.

DWIGHT E. AVIS AND WIFE, MARGARET C. AVIS v. THE HARTFORD FIRE INSURANCE COMPANY, A CORPORATION

No. 27

(Filed 11 April 1973)

1. **Insurance § 143— "all risks" policy — prerequisites for coverage**

Coverage under a policy insuring against "all risks of physical loss" extends only when the following conditions are met: (1) the loss must be caused by a fortuitous event; (2) the loss or damage

must not result wholly from an inherent quality or defect in the subject matter; (3) the loss or damage must not result from the intentional misconduct or fraud of the insured; and (4) the risk must be lawful.

2. **Insurance § 143— "all risks" policy — multiple causes of loss**

Generally, coverage under an "all risks" policy will extend when damage results from more than one cause even though one of the causes is specifically excluded.

3. **Insurance § 143— "all risks" policy — inherent deficiencies — activation by peril insured against**

Insurers are not liable under an "all risks" policy for property destroyed by the effect of its own inherent deficiencies or tendencies unless these tendencies are made active and destructive by a peril insured against.

4. **Insurance § 144— "all risks" policy — failure of wood to hold paint — fortuitous event**

Loss occasioned when paint applied to woodwork and paneling in plaintiffs' home began to blister and peel, the painter attempted to remove the paint with commercial solvents but all the paint couldn't be removed, and the painter attempted to repaint but the paint wouldn't stick where the solvents had been used, leaving the wood stained and mottled, *is held* within the coverage of a policy insuring against "all risks of physical loss," since the loss was caused by a fortuitous event and was not solely the product of the inherent qualities of the wood but was caused partly by actions of the painter.

5. **Insurance § 137— action on "all risks" policy — time limitation — time of loss**

Where paint applied to woodwork and paneling in plaintiffs' home began to blister and peel in November 1965 and began "popping" off the walls and woodwork in December 1965, and a painter unsuccessfully attempted in January 1966 to remove the paint and to repaint the unsatisfactory areas, plaintiffs' action instituted in December 1966 to recover under an "all risks" policy for the pecuniary injury resulting from the attempted removal of paint and the attempted repainting was commenced within twelve months of the "inception of the loss" since plaintiffs first suffered the loss complained of at the time of the occurrences in January 1966.

6. **Insurance § 130— "all risks" policy — no formal notice of proof of loss**

An action under an "all risks" insurance policy was not barred because of the failure of plaintiffs to file a formal proof of loss within the required 60-day period where the insured gave notice of loss and the insurer failed to furnish a blank for the purpose of providing written proof of loss, and plaintiffs within the time fixed by the policy for filing proof of loss gave written proof covering the occurrence, character and extent of the loss. G.S. 58-31.1.

ON *certiorari* to review the decision of the Court of Appeals reported in 16 N.C. App. 588, 92 S.E. 2d 595, which

reversed the judgment of *Winner, J.*, at 24 April 1972 Session of District Court of BUNCOMBE County.

This civil action for recovery on a policy of insurance issued by defendant, The Hartford Fire Insurance Company, to plaintiffs, homeowners, was instituted on 3 May 1971. Action was originally instituted by the same parties against the same defendant on the same claim on 28 December 1966. Plaintiffs gave notice of voluntary dismissal on 19 May 1970 pursuant to Rule 41 (a) (1) of the North Caroina Rules of Civil Procedure.

The policy, in part, provided: "This policy with respect to Coverage A and B under Section I [the home of the plaintiffs] insures against all risks of physical loss . . . except as excluded or limited herein."

In October, 1965 plaintiffs Dwight E. Avis and wife, Margaret C. Avis, employed R. A. Ingle to paint certain woodwork and paneling in three upstairs bedrooms and two baths of their home. Approximately one month after the painting was begun, the paint began to "blister and peel." The painter, during January of 1966, attempted to remove the paint by using paint solvents and by other means, but all the paint could not be removed. He then attempted to repaint the area, but the paint would not stick where the paint remover had been used. The paneling became stained and mottled and acquired a glossy, slick finish.

On 21 January 1966 plaintiffs notified defendant of the condition of the walls, and defendant thereafter employed the General Adjustment Bureau as its agent to investigate and adjust plaintiffs' claim. At the request of the said adjuster, plaintiffs secured an estimate of the cost of repairs from a contractor and furnished this information to the adjuster. Defendant's adjuster also had its contractor make an estimate of damages and cost of repairs. In February of 1966 an employee of the General Adjustment Bureau told plaintiffs to go ahead with repairs. Plaintiffs proceeded to have the repairs made at a cost of $1,625.92.

On 7 September 1966 defendant, through its adjuster, advised plaintiffs that it would not pay the claim because the damage was not an accident within the terms of its policy.

District Judge Winner heard the case without a jury and after finding facts substantially the same as above set forth concluded:

> "2. That the diminution in market value of the wood paneling, molding, baseboards, frames around windows and doors and closet doors in January of 1966, resulting from the fact that all of the paint on the wood paneling and woodwork herein could not be removed and that the areas from which paint had been removed could not be painted and from the staining and mottling of the said wood paneling and woodwork was a fortuitous event and happening occurring in January of 1966 without intentional or fraudulent acts on the part of the plaintiffs and is within the coverage of the 'all risks' provision of the policy upon which suit has been instituted, and that said loss and damage is within the terms and meaning of the policy provision quoted in Paragraph 2 of the findings of fact, and said loss and diminution in market value was not within the terms of any of the pleaded conditions, exclusions or exceptions to coverage under said policy."

Judgment was entered for plaintiffs in the amount of $1,625.92 with interest from 25 March 1966. The Court of Appeals reversed.

We allowed plaintiffs' petition for writ of certiorari on 18 January 1973.

Bennett, Kelly & Long, P.A., by Robert B. Long, Jr. for plaintiff appellees.

Williams, Morris and Golding, by William C. Morris, Jr. for defendant appellant.

BRANCH, Justice.

Plaintiffs contend the Court of Appeals erred in holding that their loss was not within the coverage afforded by the "all risks" policy issued to plaintiffs by defendant.

The Court of Appeals concluded that coverage did not extend because the loss was not the result of a fortuitous event, but was "the product of inherent qualities of the property insured."

Recovery will be allowed under a policy affording "all risks" coverage for all losses of a fortuitous nature not resulting from misconduct or fraud, unless the policy contains a specific provision expressly excluding loss from coverage. The term "all risks" is not to be given a restrictive meaning. *Egan v. Washington General Ins. Corp.*, 240 So. 2d 875 (Fla. App. 1970); *Miller v. Boston Insurance Co.*, 420 Pa. 566, 218 A. 2d 275; *Fidelity Southern Fire Insurance Co. v. Crow*, 390 S.W. 2d 788 (Tex. Civ. App. 1965); *Bryant v. Continental Insurance Co.*, 2 Wash. App. 37, 466 P. 2d 201; Annot., 88 A.L.R. 2d 1124; 44 Am. Jur. 2d Insurance § 1433; 13 Couch on Insurance, 2nd Ed. § 48:138. However, the cases and commentaries are unanimous in holding that "all losses" are not included in the term "all risks." See e.g., *British & Foreign Marine Ins. Co. v. Gaunt*, 2 A.C. 41 (1921); *Finkelstein v. Central Mutual Insurance Co.*, 8 Misc. 2d 261, 166 N.Y.S. 2d 989; 5 Appleman, Insurance Law and Practice, § 3092.

In the case of *British & Foreign Marine Ins. Co. v. Gaunt, supra,* plaintiff sued upon an "all risks" policy for water damage to bales of wool. Although the evidence did not disclose how the cargo was damaged, it was proved at trial that the damage arose while the ship carrying the wool was in transit. In dismissing the Insurance Company's appeal, the Court stated:

> "In construing these policies it is important to bear in mind that they cover 'all risk.' These words cannot, of course, be held to cover all damage however caused, for such damage as is inevitable from ordinary wear and tear and inevitable depreciation is not within the policies. . . . Damage, in other words, if it is to be covered by policies such as these, must be due to some fortuitous circumstance or casualty.
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> 'All risks' has the same effect as if all insurance risks were separately enumerated; for example, it includes the risk that when it happens to be raining the men who ought to use the tarpaulins to protect the wool may happen to be neglecting their duty. This concurrence is fortuitous; it is also the cause of the loss by wetting. It appears to be what happened. For wool to get wet in the rain is a casualty, though not a grave one; it is not a thing intended but is accidental; it is something which injures the wool

from without; it does not develop from within. It would not happen at all if the men employed attended to their duty.

There are, of course, limits to 'all risks.' They are risks and risks insured against. Accordingly the expression does not cover inherent vice or mere wear and tear or British capture. It covers a risk, not a certainty; it is something, which happens to the subject-matter from without, not the natural behavior of that subject-matter, being what it is, in the circumstances under which it is carried. Nor is it a loss which the assured brings about by his own act, for then he has not merely exposed the goods to the chance of injury, he has injured them himself. Finally the description 'all risks' does not alter the general law; only risks are covered which it is lawful to cover, and the onus of proof remains where it would have been on a policy against ordinary sea perils."

The court in *Finkelstein v. Central Mutual Insurance Co., supra,* considered a question similar to the one here presented. The court held that discoloration caused by the excessive cleaning of carpet with an ammonia solution was an accident and a fortuitous loss within the coverage of an "all risks" policy. The court said:

"As these all-risk policies are generally available to householders and as their sale is not limited to specialists, the run-of-the-mill notion of what constitutes an accident is pertinent. The scientist's or technician's understanding in depth is not relevant. From the viewpoint of this plaintiff there was an accident here and a fortuitous loss, for clearly the carpeting was not deliberately exposed to damage."

In *Chute v. North River Ins. Co.,* 172 Minn. 13, 214 N.W. 473, the plaintiff sought recovery under an "all risks" policy for a fire opal which became cracked. The plaintiff averred in his complaint that damage to the opal was not caused by any outside force but was due to an "inherent vice" in the gem. Holding that the plaintiff could not recover under the policy, the court stated:

"The diligence of counsel has failed to furnish us any case in point or even of much help except those arising on policies of marine insurance. But they furnish, we think, a

fair analogy. The contract is an 'all risk' policy, and of a kind which characterizes marine insurance more than any other. The rule of marine insurance is that, under such a policy, the insurer is not liable 'for losses resulting from inherent vice, defect, or infirmity in the subject-matter insured.' 38 C.J. 1097. In Arnould on Marine Insurance (11th Ed.) § 778, it is put thus:

> ' * * * The underwriter is not liable for that loss or deterioration which arises solely from a principle of decay or corruption inherent in the subject insured, or, as the phrase is, from its proper vice; as when fruit becomes rotten, or flour heats, or wine turns sour, not from external damage but entirely from internal decomposition.'
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> . . . Because the policy must be considered as one against damage from fortuitous and extraneous risks, it is not permissible to resort to an ultraliteral interpretation which will convert it into a contract or warranty against loss resulting *wholly* from inherent susceptibility to dissolution." (Emphasis added.)

[1] Consideration of these cases and other authorities leads us to conclude that coverage under a policy insuring against "all risks of physical loss" extends only when the following conditions are met:

(1) The loss must be fortuitous; i.e., caused by a fortuitous event. See generally, Annot., 88 A.L.R. 2d 1124; 44 Am. Jur. 2d, Insurance, § 1433.

The word "fortuitous" means "occurring by chance without evident causal need or relation or without deliberate intention." Webster's Third New International Dictionary, p. 895 (1961). See also, *Kirkley v. Insurance Company,* 232 N.C. 292, 59 S.E. 2d 629; Ballentine's Law Dictionary, 3rd Ed., p. 492 (1969); Black's Law Dictionary, 4th Ed., p. 783 (1968). A fortuitous event may be said to be one not certain to occur. *British & Foreign Marine Ins. Co. v. Gaunt, supra.*

(2) The loss or damage must not result wholly from an inherent quality or defect in the subject matter. *Greene v. Cheetham,* 293 F. 2d 933 (2nd Cir. 1961); *Mellon v. Federal*

Insurance Co., 14 F. 2d 997 (S.D.N.Y. 1926); *Chute v. North River Ins. Co., supra; Harvey v. Switzerland General Ins. Co.*, 260 S.W. 2d 342 (Mo. App. 1953); *Glassner v. Detroit Fire and Marine Insurance Co.*, 23 Wis. 2d 532, 127 N.W. 2d 761; 43 Am. Jur. 2d Insurance § 2; 5A Appleman, Insurance Law and Practice, § 3272. In other words, the damage must result from at least one extraneous cause. See *British & Foreign Marine Ins. Co. v. Gaunt, supra; Chute v. North River Ins. Co., supra.*

(3) The loss or damage must not result from the intentional misconduct or fraud of the insured. *Sun Insurance Office, Ltd. v. Clay*, 133 So. 2d 735 (Fla. 1961); Annot., 88 A.L.R. 2d 1124. See also, *Western Horse & Cattle Ins. Co. v. O'Neill*, 21 Neb. 548, 32 N.W. 581.

(4) The risk must be lawful. *British & Foreign Marine Ins. Co. v. Gaunt, supra.*

See *Gorman, All Risks of Loss v. All Loss:* An Examination of Broad Form Insurance Coverages, 34 Notre Dame Law. 346 (1959), for an excellent discussion of coverage under "all risks" policies and the principles set forth above.

In instant case there is no evidence or contention of intentional misconduct, fraud or unlawfulness of risk. Manifestly, plaintiffs did not know of the peril and did not intend to cause the harm that befell them. At most plaintiffs may have been negligent; without more, however, such conduct would not operate to deny coverage on the basis of intentional misconduct. For cases allowing recovery where one's negligence constituted the fortuitous event, see *C. H. Leavell & Co. v. Fireman's Fund Insurance Co.*, 372 F. 2d 784 (9th Cir. 1967); *Carter Tug Service, Inc. v. Home Insurance Company*, 345 F. Supp. 1193 (S.D. Ill. 1971); *General American Transp. Corp. v. Sun Insurance Office, Ltd.*, 239 F. Supp. 844 (E.D. Tenn. 1965), affirmed 369 F. 2d 906 (6th Cir. 1966); *Redna Marine Corp. v. Poland*, 46 F.R.D. 81 (D.C.N.Y. 1969) (citing many cases); *Egan v. Washington General Ins. Corp., supra; Finkelstein v. Central Mutual Insurance Co., supra*, and cases cited therein. See also, 5 Appleman, Insurance Law and Practice, § 3092.

Defendant does not deny coverage because of a specific exclusion contained in the policy. Therefore, if the loss suffered by plaintiffs was caused by a fortuitous event and was not solely the product of the inherent qualities of the insured prop-

erty, the trial judge correctly concluded that the loss suffered by plaintiffs was within the coverage of the policy.

Had plaintiffs sought recovery because the walls had decayed, deteriorated, faded or disintegrated after a period of time without the action of external forces, there could have been no recovery. This is so because such damage inevitably occurs with the passage of time. The loss here, however, was not inevitable; it was fortuitous in that it was caused by extraneous events not certain to occur.

Plaintiffs sought recovery for loss or damage caused not only by the peculiar nature of the paneling and woodwork to reject paint, but by other extraneous circumstances. The actions of the reputable painter employed by plaintiffs in applying the paint to the the walls, attempting to remove it with commercial solvents, and in attempting to repaint the walls were extraneous forces without which the loss would not have occurred. The loss, therefore, came about as a result of a combination of forces; the loss did not result *solely* from the fact that paint would not adhere to the wood.

[2, 3] As a general rule, coverage will extend when damage results from more than one cause even though one of the causes is specifically excluded. *General American Transp. Corp. v. Sun Insurance Office, Ltd., supra; Firemen's Fund Ins. Co. of San Francisco v. Hanley,* 252 F. 2d 780 (6th Cir. 1958); *Pearl Assur. Co. v. Stacey Bros. Gas Const. Co.,* 114 F. 2d 702 (6th Cir. 1940). Similarly, "insurers are not liable for property destroyed by the effect of its own inherent deficiencies or tendencies, *unless these tendencies are made active and destructive, by a peril insured against.*" (Emphasis added.) *Providence Washington Ins. Co. v. Adler,* 65 Md. 162, 4 A. 121.

[4] Plaintiffs' loss, then, being fortuitous and not caused solely by an inherent defect, is within the coverage of the "all risks" insurance policy issued to them by defendant.

[5] Defendant contends that plaintiffs' action is barred because it was not instituted within "twelve months next after inception of the loss" as required by a provision in the policy, and because plaintiffs did not file written proof of loss within the required 60-day period.

Due to the nature of these contentions, a brief recapitulation of the facts is necessary.

Painting began in October, 1965. In November of that year the paint started blistering and peeling. Paint began "popping" off the walls and woodwork in December, whereupon the painter assured plaintiffs that he would "make it satisfactory" by removing the paint and repainting the unsatisfactory structures. This undertaking commenced in January of 1966 but was entirely abandoned during that month because no paint would adhere to the surface of the wood. At that time the surfaces became "slick as glass," streaked and mottled.

Defendant was notified of this condition on 21 January 1966 and employed an adjuster to handle the claim. The adjuster obtained a statement from Mrs. Avis on 25 January 1966 which gave full information concerning the occurrence, character and extent of the loss. Defendant denied coverage on 7 September 1966, and plaintiffs instituted action on 28 December 1966.

A provision in an insurance policy providing that action must be instituted within twelve months after loss has been recognized by this Court as a reasonable and lawful contractual limitation, even though it is a lesser time than provided by statutory limitations. Failure to bring action within the time specified bars recovery unless the contractual time limitation is waived by the insurers. *Boyd v. Insurance Co.*, 245 N.C. 503, 96 S.E. 2d 703; *Heilig v. Aetna Life Insurance Co.*, 152 N.C. 358, 67 S.E. 927; *Lowe v. Accident Association*, 115 N.C. 18, 20 S.E. 169; *Muse v. Assurance Co.*, 108 N.C. 240, 13 S.E. 94.

The provision contained in property insurance policies requiring action to be instituted within "twelve months next after inception of the loss" has been construed by the majority of jurisdictions to mean that the policy limitation runs from the date of the occurrence of the destructive event giving rise to the claim of liability against the insurer. *Sager Glove Corp. v. Aetna Ins. Co.*, 317 F. 2d 439 (7th Cir. 1963), cert. den. 375 U.S. 921, 84 S.Ct. 266, 11 L.Ed. 2d 165; *Naghten v. Maryland Casualty Co.*, 47 Ill. App. 2d 74, 197 N.E. 2d 489, 24 A.L.R. 3d 1001; *McAlpin v. Day & Meyer*, 68 Misc. 2d 559, 327 N.Y.S. 2d 387, aff'd 336 N.Y.S. 2d 980; *Johns v. New Hampshire Ins. Co.*, 66 Misc. 2d 799, 322 N.Y.S. 2d 324; *Margulies v. Quaker City Fire & Marine Ins. Co.*, 276 App. Div. 695, 97 N.Y.S. 2d 100; *Boyd v. Insurance Co., supra;* Annot., 24 A.L.R. 3d 1007; 18 Couch on Insurance, 2d Ed. § 75:86.

Most of these cases involved fire, explosion or other like casualty and therefore presented little difficulty in fixing the date of occurrence of the destructive event. Cf. *Johns v. New Hampshire Ins. Co., supra.* The cases, however, furnish meager aid in determining the exact time of loss where there is a progressive loss or one involving a series of contributing destructive or extraneous events.

In the case of *Naghten v. Maryland Casualty Co., supra,* the plaintiff brought action under a homeowner's policy for damage to his home caused by underground water. On 31 May 1959 the floors in a room in his dwelling had become warped, the walls and doors cracked and distorted, and the room completely unusable. The insured became aware of the cause of the loss and the fact that he had a claim under the policy on 31 December 1959. In October, 1960 (within one year after he had learned the cause of damage but more than one year after the defective conditions were fully developed) suit was instituted. The court, holding that there could be no recovery, stated:

> "'. . . It is our conclusion that the meaning of the phrase [twelve months next after inception of the loss] is quite clear. It has nothing to do with the state of mind of the insured. It deals with an objective fact which in the context of this case is a specific act of vandalism or malicious mischief. The loss occurs and has its "inception" whether or not the insured knows of it.'
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> We readily agree with the plaintiff that if we were to apply the inception of the loss rule to the progressive loss in this case a harsh result would follow. That question is not involved here, however. The plaintiff did not even bring suit within a year of the time he alleged that the defective floor condition was fully developed.
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> . . . [T]he plaintiff takes the position that on May 31, 1959, the room was unusable because of the shifting of floor and walls. And yet he allowed this condition to exist for over five months without caring to discover whether the damage was covered and not even attempting to fix it. . . . "

In *Western Ins. Co. v. First Presbyterian Church,* 165 Colo. 34, 437 P. 2d 52, plaintiff brought suit under a policy containing an "all risks" endorsement for loss caused by seep-

age and infiltration of gasoline under and around the insured building. The insurance policy became effective between the time gasoline started to collect and the time the building was rendered uninhabitable.

In affirming the trial court's holding that coverage existed under the policy, the court recognized that the chain of events culminating in the loss commenced prior to the inception of the policy, but held there was no *actual* "loss" until the gasoline had accumulated and been built up to such an extent that the building was uninhabitable and too dangerous for continued use.

We find the following definition of loss as related to insurance in Black's Law Dictionary, 4th Ed., p. 1094 (1968):

> *Insurance:* ". . . decrease in value of resources or increase in liabilities; depletion or depreciation or destruction or shrinkage of value; injury, damage, etc. to property or persons injured; injury or damage sustained by insured in consequence of happening of one or more of the accidents or misfortunes against which insurer has undertaken to indemnify the insured; pecuniary injury resulting from the occurrence of the contingency insured against; word 'loss' implies that property is no longer in existence." (Citations omitted.)

In instant case, plaintiffs do not seek recovery for the chipping and flaking of the paint which was discovered in November. This action seeks recovery for the pecuniary injury resulting from the attempted removal of the paint and the attempted repainting of the wood surfaces. The occurrences of these acts in January, 1966 were the events which marked the loss sustained by plaintiffs and gave rise to plaintiffs' claim against defendant. The policy limitation ran from the date of the occurrences of these acts, for they represented the time when plaintiffs first suffered *the* loss complained of. Thus plaintiff's action was commenced within twelve months of the "inception of the loss."

[6] Finally, we consider whether plaintiffs' claim was barred by the fact that no formal proof of loss was filed as required by the policy.

G.S. 58-31.1 provides:

> "When any company under any insurance policy requires a written proof of loss after notice of such loss

has been given by the insured or beneficiary, the company or its representative shall furnish a blank to be used for that purpose. If such forms are not so furnished within fifteen days after the receipt of such notice the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss, upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character, and extent of the loss for which claim is made."

There is ample evidence that the insured gave notice of loss and that the company failed to furnish a blank for the purpose of providing written proof of loss. There is also plenary evidence showing that plaintiffs "within the time fixed by the policy for filing proof of loss gave written proof covering the occurrence, character, and extent of the loss for which claim is made." This assignment of error is overruled.

The decision of the Court of Appeals is

Reversed.

STATE OF NORTH CAROLINA v. WILLIAM LEE UNDERWOOD AND DENNIS HARKEY

No. 39

(Filed 11 April 1973)

1. **Indictment and Warrant § 14— grounds for quashing warrant**

A warrant may be quashed only for its failure to charge a crime or a lack of jurisdiction of the court to try the case—defects which appear on the face of the record.

2. **Indictment and Warrant § 14— motion to quash warrant — question of law — extraneous evidence not permitted**

In ruling upon a motion to quash a warrant the judge rules only upon a question of law and is not permitted to consider extraneous evidence, that is, the testimony of witnesses or documents other than the specific statutes or ordinances involved.

3. **Indictment and Warrant § 14— motion to quash — unconstitutionality of ordinance**

When the defense is that the warrant or indictment charges the violation of an unconstitutional ordinance or statute, the motion to quash is appropriate provided the constitutional infirmity appears upon the face of the record.

4. **Indictment and Warrant § 14— motion to quash — evidence of unconstitutional enforcement of ordinance**

Upon a motion to quash, the judge may not hear evidence tending to show that the ordinance, valid on its face, it being enforced in a manner which deprives the defendant of his constitutional rights, find the facts and determine the constitutional question upon his findings.

5. **Criminal Law § 125— constitutionality of ordinance — grounds not on face of record — special verdict**

When a defendant undertakes to contest the constitutionality of an ordinance in a criminal proceeding upon grounds which do not appear upon the face of the record, the question may be determined by a special verdict.

6. **Criminal Law § 125— special verdict — sufficiency**

A special verdict is defective if any material finding is omitted and will not support a judgment.

7. **Criminal Law § 125; Indictment and Warrant § 14— Sunday observance ordinance — constitutionality — motion to quash — error in making findings of fact — special verdict required**

The trial judge exceeded his jurisdiction in finding facts on the motion of the operators of convenience stores charged with selling groceries after 6:00 p.m. in violation of the Monroe Sunday Closing Ordinance to quash the warrants on the ground that the convenience stores sell substantially the same items as newsstands, tobacco stores, filling stations and garages which are allowed to remain open all day and that such classification is unreasonable and has no substantial relation to the purpose of the ordinance, since the facts with reference to overlapping items of merchandise offered for sale by the various businesses could have been found only by the jury in a special verdict.

8. **Constitutional Law § 14— Sunday observance ordinances — constitutionality**

Ordinances prohibiting the exercise of all occupations generally on Sunday except those rendering essential services and providing products necessary to health or contributing to the recreational aspects of Sunday are valid when the exceptions are reasonable and do not discriminate within a class between competitors similarly situated.

9. **Constitutional Law § 14; Indictment and Warrant § 14— violation of Sunday observance ordinance — motion to quash warrant**

The trial court erred in allowing a motion to quash warrants charging that convenience store managers sold groceries after 6:00 p.m. in violation of the Monroe Sunday Observance Ordinance where the acts charged are violations of the ordinance, and the ordinance on its face does not discriminate against convenience stores insofar as it applies to other grocery stores, for all are required to remain closed on Sunday except between 1:00 p.m. and 6:00 p.m.

APPEAL by the State from *Collier, S.J.*, May 1972 Session of UNION, certified pursuant to G.S. 7A-31(a) for initial appel-

late review by the Supreme Court before determination in the Court of Appeals, docketed and argued at the Fall Term as Case No. 56.

Prosecution for the violation of a Sunday Closing Ordinance. Defendants were convicted by the District Court and appealed to the Superior Court, which allowed their motion to quash the warrants.

Defendants are employees of Thrifty Supermarkets, Inc., which operates in the City of Monroe a supermarket and a number of "convenience stores" denominated Thrif-T-Marts (Marts). Defendant Underwood operated the Mart on Lancaster Avenue; defendant Harkey operated another at Five Points. Separate warrants charge that each defendant did unlawfully expose for sale and did sell at the Mart which he operated "various items of groceries after 6:00 p.m. Sunday, April 9th, 1972," a violation of Monroe City Ordinance 15-36.

The declared purpose of Ordinance 15-36 is "to provide for the due observance of Sunday as a day of rest, to protect and promote the general welfare, safety, and morals of the citizens" by restricting business activities on Sunday in the City of Monroe. To that end, under G.S. 160-52, G.S. 160-200(6), (7), and (10) (now superseded by G.S. 160A-174, 181, 191 (1971)), the City Council enacted the following ordinance:

Section 15-36.

"(a) It shall be unlawful for any person to sell, offer or expose for sale any goods, wares, or merchandise in the city on Sunday (nor shall any store, shop, warehouse, or any other place of business in which goods, wares, or merchandise are kept for sale, be kept open between 12:00 midnight Saturday and 12:00 midnight Sunday), unless such store, shop, warehouse, or other place of business is expressly allowed to open and sell goods under the provisions of this chapter; provided, however, that notwithstanding any other provisions of this chapter, on Sunday no such store, shop, warehouse or other place of business shall sell, offer or expose for sale to the general public any of the following except during the hours of 1:00 p.m. to 6:00 p.m.:

(1) Clothing and wearing apparel;

(2) Clothing accessories;

(3) Furniture, housewares, home, business, or office furnishings;

(4) Household, business or office appliances;

(5) Hardware, tools, paints, building and lumber supply materials;

(6) Jewelry, silverware, watches, clocks, luggage, musical instruments or recordings.

(7) Sporting goods and toys.

"(b) Each separate sale or offer to sell shall constitute a separate offense.

"(c) Bootblacks. Bootblack stands may keep open on Sundays.

"(d) Sale of Christmas greenery. During the month of December of each year, Christmas greenery may be sold on Sunday within the city.

"(e) Cigar and tobacco stores and newsstands. Cigar and tobacco stores or stands and newsstands may keep open on Sunday for the sale of tobacco, tobacco products, papers and periodicals and accessories, together with soft drinks, ice cream, candy and cakes.

"(f) Drug Stores. Drug Stores having a licensed pharmacist may keep open on Sunday from 1:00 p.m. to 6 o'clock p.m., for all purposes including the operation of soda fountains located therein. Notwithstanding the foregoing provision emergency sales of drugs and medicines may be made at any time.

"(g) Exhibition of games, sports, moving pictures, etc.

(1) Except as otherwise provided in this section, it shall be unlawful for any person to engage in or present on Sunday any exhibition of play, game, sport or any moving picture or theatrical exhibition for which any admission is charged the witnessing public.

(2) It shall be lawful for any person to engage in or present any exhibition of moving pictures, baseball, football, basketball, golf, tennis, or dog and horse shows on Sundays, between the hours of 12:00 noon and 12:00 midnight for which any admission is charged the witnessing public. It shall also be lawful to continue to its conclusion a sports event or motion

picture commenced before twelve midnight on Saturday night. No tickets shall be sold or taken up on Sunday during the prohibited hours for any such exhibition.

(3) Peanuts, popcorn, chewing gum, soft drinks, ice cream, candy, cakes, wrapped sandwiches and tobacco may be sold on Sundays at all lawful exhibitions allowed by Subsection (2) immediately above.

"(h) Sale of fruits and melons. Stands for the sale of fruits and melons may remain open on Sundays during the hours of 1:00 p.m. to 6 p.m. and such establishments shall remain closed on Sunday except during these hours.

"(i) Garages and filling stations. Public garages and filling stations may be kept open for the hiring and storage of automobiles and for the sale of gasoline, oils, parts and accessories, soft drinks, ice cream, candy, cakes, and tobacco at all hours.

"(j) Grocery stores and curb markets. Grocery stores and curb markets may remain open on Sunday during the hours of 1:00 p.m. to 6:00 p.m. for the sale of any items not otherwise prohibited by law. All such establishments, including those selling confectionery items, shall remain closed on Sunday except during these hours.

"(k) Hotels, boardinghouses, restaurants, etc.

(1) Hotels, boardinghouses, cafes, restaurants, confectioneries and wiener stands are permitted to keep open on Sundays for their usual business, including the sale of food, cigars, cigarettes, tobacco and soft drinks.

(2) It shall be unlawful for any person to conduct or keep any restaurant or cafe within the City on Sunday, except such as are also conducted as restaurants or cafes on other days of the week.

(3) A confectionery, as used in this section, shall mean a place where sweets are sold, such as ice cream, candies, cakes, soft drinks, doughnuts and wrapped sandwiches.

"(l) Ice manufacturers and dealers.

(1) Manufacturers and dealers of ice alone may keep open for the sale of ice at all times, but delivery of ice other than at the plant or premises of such manufacturer or dealer is hereby forbidden, except as hereinafter stated.

(2) Ice may be delivered to any hospital at any time or to ice refrigerated railroad cars containing perishable fruits or other perishable products.

"(m) Ice Cream Manufacturers, dairies and creameries. Manufacturers of ice cream, dairies and creameries may keep open on Sunday and at all times for the sale of ice cream, milk, butter and frozen dairy products.

"(n) Newspapers and magazines. Nothing in this chapter shall be construed to prohibit the publication of newspapers or the sale of newspapers or magazines by newsstands or newsboys in and about the streets.

"(o) The sale of live bait, such as worms, minnows, crickets and shrimp may be sold on Sunday.

"(p) Barbershops. It shall be unlawful for any barbershop in the city to open for business on Sunday.

"(q) Beer and Wine. The sale of beer and/or wine from 11:45 o'clock p.m. on each Saturday until 7:30 o'clock a.m. on the following Monday shall be prohibited.

"(r) If any section, subsection, sentence, clause, or phrase of this ordinance is, for any reason, held to be invalid, such decision shall not affect the validity of the remaining portions of this ordinance. The City Council hereby declares that it would have passed this ordinance and each section, subsection, clause, and phrase thereof, irrespective of the fact that any one (1) or more sections, subsections, sentences, clauses, or phrases be declared invalid."

This ordinance became effective on 8 October 1970.

When defendants' cases were called for trial each moved to quash the warrant against him on the ground that Ordinance 15-36 is unconstitutional in that it arbitrarily discriminates between persons and classes, and that it bears no reasonable relation to "The City Council's legitimate objective."

In support of the motion to quash, Judge Collier heard evidence offered by defendants and found facts substantially as detailed below:

For approximately two years Thrifty Supermarkets, Inc., has operated seven "convenience stores" in Monroe. Each store has four gasoline pumps, two for regular gasoline and two

for high test. Gasoline, motor oil, and auto products are among the principal items sold. The stores also carry health and beauty aids, tobacco products, popcorn, bag ice, soft drinks, candy, cakes, wrapped sandwiches, general grocery products, magazines and newspapers, children's books, coloring books, beer, wine, bread, dairy products, and ice cream. The stores do not have a produce market.

Prior to the opening of the Marts no store in Monroe offered the same combination of goods. The convenience stores are "a relatively new concept in merchandising." The Marts buy the same licenses as do service stations, newsstands, and tobacco stores on the same products.

The local newsstands and cigar stores, which are permitted to remain open all day Sunday, sell tobacco products, popcorn, newspapers, periodicals, sandwiches, doughnuts, bread, milk, ice cream, potato chips, and records as their principal items. The Marts do not sell as full a line of merchandise as a supermarket. However, they sell substantially the same items as filling stations, tobacco stores, and newsstands.

During the month of April 1972, including the period said stores were open seven days a week, gasoline sales amounted to 16.8% of total sales. Of the Marts' total Sunday sales during April 1972, 23.4% were of gasoline. Except on the day of the arrests the stores were open only from 1:00 p.m. to 6:00 p.m. each Sunday. Estimated sales of tobacco and tobacco products, papers and periodicals, ice, soft drinks, ice cream, candy and cakes, motor oils and related products, doughnuts and wrapped sandwiches, milk, butter, and frozen dairy products, during a seven-day week amounted to 20-25% of gross sales. During Sunday hours the sale of these items, together with the sale of gasoline, amounted to 80-85% of gross sales. The percentage of sales of those items is higher on Sunday because the sale of beer and wine is prohibited on that day.

Upon the foregoing findings of fact Judge Collier concluded that the ordinance violates the equal protection clauses of the State and Federal Constitutions and has no reasonable relationship to the accomplishment of the declared purpose of the ordinance. Whereupon he adjudicated the ordinance unconstitutional and allowed defendants' motion to quash the warrants. The State appealed.

Attorney General Morgan; Associate Attorney Earnhardt; and Associate Attorney Ann Reed for the State.

Griffin and Clark for defendant appellees.

SHARP, Justice.

[1, 2] In this jurisdiction the rule is well established that a warrant may be quashed only for its failure to charge a crime or a lack of jurisdiction of the court to try the case—defects which appear on the face of the record. In ruling upon a motion to quash the judge rules only upon a question of law. He is not permitted to consider "extraneous evidence," that is, the testimony of witnesses or documents other than the specific statutes or ordinances involved. "Therefore, when the defect must be established by evidence *aliunde* the record, the motion must be denied." *State v. Cochran,* 230 N.C. 523, 525, 53 S.E. 2d 663, 665 (1949). *See also State v. Vestal,* 281 N.C. 517, 189 S.E. 2d 152 (1972); *State v. Lee,* 277 N.C. 242, 176 S.E. 2d 772 (1970); *State v. McBane,* 276 N.C. 60, 170 S.E. 2d 913 (1969); *State v. Cooke,* 248 N.C. 485, 103 S.E. 2d 846 (1958), *appeal dismissed,* 359 U.S. 951, 3 L.Ed. 2d 759, 79 S.Ct. 737 (1959); *State v. Andrews,* 246 N.C. 561, 99 S.E. 2d 745 (1957).

With one exception, the same rule applies to a motion to quash a bill of indictment. *See State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384 (1972) (authorities collected at 450-51, 186 S.E. 2d at 395); *State v. Allen,* 279 N.C. 492, 183 S.E. 2d 659 (1971); *State v. Wilkes,* 233 N.C. 645, 65 S.E. 2d 129 (1951). The exception relates to conditions precedent to the finding of a valid bill of indictment by the grand jury. G.S. 9-23 (1969) provides that defects or irregularities in the drawing or organization of the grand jury must be challenged by a motion to quash the indictment, made before the petit jury is sworn and impaneled to try the issue. Upon such a challenge the judge hears evidence and finds the facts upon which he bases his conclusions of law. *State v. Wright,* 274 N.C. 380, 163 S.E. 2d 897 (1968); *Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513, *cert. denied,* 345 U.S. 930, 97 L.Ed. 1360, 73 S.Ct. 792 (1953).

[3] When the defense is that the warrant or indictment charges the violation of an unconstitutional ordinance or statute, the motion to quash is appropriate *provided* the constitutional infirmity appears upon the face of the record. "In passing upon such motion, the court treats the allegations of fact

in the warrant, or indictment, as true and considers only the record proper and the provisions of the statute or ordinance." *State v. Vestal, supra* at 520-21, 189 S.E. 2d at 155; *State v. Anderson,* 275 N.C. 168, 166 S.E. 2d 49 (1969); *State v. Furio,* 267 N.C. 353, 148 S.E. 2d 275 (1966). *See also State v. Greenwood,* 280 N.C. 651, 187 S.E. 2d 8 (1972); *State v. Brewer,* 258 N.C. 533, 129 S.E. 2d 262, *appeal dismissed,* 375 U.S. 9, 11 L.Ed. 2d 40, 84 S.Ct. 72 (1963); *State v. Hales,* 256 N.C. 27, 122 S.E. 2d 768 (1961).

[4] If an ordinance or statute upon which a warrant or indictment is based "is generally constitutional and for some circumstance peculiar to the situation of accused is unconstitutional that is a matter which is properly triable under the general issue or a plea of not guilty." 16 C.J.S. *Constitutional Law* § 96(b), at 344 (1956). Upon a motion to quash the judge may not hear evidence tending to show that the ordinance, valid on its face, is being enforced in a manner which deprives the defendant of his constitutional rights, find the facts, and determine the constitutional question upon his findings. In a criminal prosecution in which the defendant contests his guilt he may not "waive his constitutional right of trial by jury. . . . [T]he determinative facts cannot be referred to the decision of the court even by consent—they must be found by the jury." *State v. Muse,* 219 N.C. 226, 227, 13 S.E. 2d 229 (1941) (citations omitted). *See also State v. Hill,* 209 N.C. 53, 182 S.E. 716 (1935). If the judge, on a motion to quash the warrant or indictment, were to hear evidence, find the facts against the defendant, and overrule his motion, upon trial of the issue before the jury, the defendant would not be bound by the facts which the judge had found.

State v. Dobbins, 277 N.C. 484, 178 S.E. 2d 449 (1971), a case in which defendant was prosecuted for the unlawful possession of a shotgun in an area in which a declared emergency existed and for being on a public street in violation of an emergency curfew ordinance, does not indicate a departure from the foregoing rule. In *Dobbins,* at the defendant's instance and without any objection by the solicitor, the judge heard evidence upon a motion to quash the warrant upon the grounds (1) that the statutes and ordinances under which the mayor of Asheville had issued a public proclamation declaring a state of emergency were unconstitutional; and (2) no actual state of emergency existed at the time one was proclaimed. Upon findings of fact,

fully supported by all the evidence, the court found that an actual state of emergency had existed and that the statutes and ordinances under which the mayor had acted were constitutional. He denied the motion to quash upon all the grounds asserted, and the case proceeded to trial upon the warrant. The jury found defendant guilty upon both counts. Upon appeal, defendant did not assign as error the court's finding that an actual state of emergency had existed. The battleground was whether the statutory scheme of Article 36A (Riots and Civil Disorders) of Chapter 14 of the General Statutes of North Carolina contravened the First, Fourth, Ninth, and Fourteenth Amendments to the United States Constitution and Article I, Section 17, of the North Carolina Constitution—questions of law properly determined upon a motion to quash.

[5, 6] When a defendant undertakes to contest the constitutionality of an ordinance or statute in a criminal proceeding upon grounds which do not appear upon the face of the record, the question may be determined by a special verdict. "[S]pecial verdicts are permissible in criminal cases, but when such procedure is had, all the essential facts must be found by a jury." *State v. Straughn,* 197 N.C. 691, 692, 150 S.E. 330 (1929). A special verdict is defective if any material finding is omitted and will not support a judgment. *State v. Ellis,* 262 N.C. 446, 137 S.E. 2d 840 (1964) (authorities collected at 451, 137 S.E. 2d at 845); *State v. High,* 222 N.C. 434, 23 S.E. 2d 343 (1942); *State v. McIver,* 216 N.C. 734, 6 S.E. 2d 493 (1940); *State v. Gulledge,* 207 N.C. 374, 177 S.E. 128 (1934); *State v. Hanner,* 143 N.C. 632, 57 S.E. 154 (1907). Special verdicts are attended with many hazards. *See State v. Lueders,* 214 N.C. 558, 200 S.E. 22 (1938); *State v. Allen,* 166 N.C. 265, 80 S.E. 1075 (1914); 3 Strong, N. C. Index 2d, *Criminal Law* § 125 (1967); Comment, *Criminal Law—The Right of the State to Appeal in Criminal Cases,* 42 N.C.L. Rev. 887, 891-94 (1964); Note, 13 N.C.L. Rev. 321 (1935). To avoid the pitfalls which lie in wait for even the most circumspect, the constitutionality of a Sunday ordinance is usually tested in a civil action to enjoin the enforcement of the ordinance under the well-established exception which permits such actions upon the allegation that injunctive relief is essential to the protection of property rights and the rights of persons against injuries otherwise irremediable. *Whitney Stores v. Clark,* 277 N.C. 322, 177 S.E. 2d 418 (1970); *Mobile Homes Sales v. Tomlinson,* 276 N.C. 661, 174 S.E. 2d 542 (1970); *Kresge Co. v. Tomlinson,* 275 N.C. 1, 165 S.E. 2d

236 (1969); *Surplus Co. v. Pleasants,* 264 N.C. 650, 142 S.E. 2d 697 (1965); *Charles Stores v. Tucker,* 263 N.C. 710, 140 S.E. 2d 370 (1965); *Clark's Charlotte, Inc. v. Hunter,* 261 N.C. 222, 134 S.E. 2d 364 (1964); *Surplus Store, Inc. v. Hunter,* 257 N.C. 206, 125 S.E. 2d 764 (1962).

[7] In this case defendants are charged with selling groceries after 6:00 p.m., a time when the ordinance requires *all* grocery stores in Monroe to be closed. They defend upon two grounds: (1) The Marts, in addition to other things, sell substantially the same items as newsstands and tobacco stores, filling stations, and garages. (2) A classification which permits the latter to remain open all day and requires the former to be closed except between the hours of 1:00 p.m. and 6:00 p.m. is unreasonable and has no substantial relation to the evil the ordinance seeks to eliminate. Judge Collier, treating this criminal case as if it were a civil action, found facts from which he drew legal conclusions in accordance with defendants' contentions and quashed the warrants. In finding facts on the motion to quash the warrants the trial judge exceeded his jurisdiction. In this case facts with reference to overlapping items of merchandise offered for sale by the Marts and by newsstands, filling stations and other businesses permitted to remain open all day could have been found only by the jury in a special verdict.

[8] This Court has held many times that Sunday Observance laws have a reasonable relationship to the public welfare and are, therefore, a proper exercise of the police power. Ordinances prohibiting the exercise of all occupations generally on Sunday except those rendering essential services and providing products necessary to health or contributing to the recreational aspects of Sunday have been upheld when the exceptions are reasonable and do not discriminate within a class between competitors similarly situated. *Kresge Co. v. Tomlinson, supra; Charles Stores v. Tucker, supra; Clark's Charlotte, Inc. v. Hunter, supra.*

[9] The Monroe Ordinance on its face does not discriminate against the Marts insofar as it applies to other grocery stores, for all are required to remain closed except between 1:00 p.m. and 6:00 p.m. *See Charles Stores v. Tucker, supra* at 715, 140 S.E. 2d at 374. The acts with which defendants are charged in the warrants are violations of the ordinance. *Prima facie,* no constitutional infirmity in the ordinance bars this prosecution. The motion to quash, therefore, should have been overruled. *State v. Chestnutt,* 241 N.C. 401, 85 S.E. 2d 297 (1955).

The judgment quashing the warrants is reversed, and this cause is remanded to the Superior Court of Union County for trial.

Reversed.

STATE OF NORTH CAROLINA v. FRANK ATLAS, RAYMOND L. RIDGE, AND GERTRUDE HUARD

No. 21

(Filed 11 April 1973)

1. **Constitutional Law § 14; Sundays and Holidays— validity of Cumberland County Sunday Observance Ordinance — evidence that obscene magazines are permitted to be sold in Fayetteville**

Evidence that obscene magazines were permitted to be sold "in Fayetteville" on Sundays was irrelevant and incompetent on the question of the validity of the Cumberland County Sunday Observance Ordinance since (1) such circumstance does not show or tend to show the invalidity of an otherwise valid ordinance requiring the cessation of business activities in general on the day designated by the legislative body as a day of rest and (2) the ordinance does not apply within the city limits of Fayetteville and activities permitted in Fayetteville could not, therefore, tend to show that the county ordinance is arbitrary or discriminatory.

2. **Indictment and Warrant § 14— motion to quash — constitutionality of statute or ordinance**

A defendant charged with the violation of a statute or ordinance may challenge the constitutionality of such statute or ordinance by a motion to quash the warrant or indictment, since there can be no sufficient statement of criminal offense in a charge of violation of an unconstitutional statute or ordinance.

3. **Indictment and Warrant § 14— motion to quash — failure to charge criminal offense — question of law — extraneous evidence not considered**

When the ground for a motion to quash is that the warrant or indictment fails to charge a criminal offense, whether this be due to a deficiency in the allegations of the warrant or indictment or due to the unconstitutionality of the statute or ordinance, the violation of which is charged, the motion to quash presents a question of law only which must be determined solely from consideration of the allegations in the warrant or indictment and the provisions of the statute or ordinance, and extraneous evidence may not be considered.

4. **Constitutional Law § 14— Cumberland County Sunday Observance Ordinance — constitutionality**

The Cumberland County Sunday Observance Ordinance is constitutional, and the motion of defendants to quash warrants charging

that they sold clothing on Sunday in violation of that ordinance was properly denied.

5. **Constitutional Law § 14— Sunday observance ordinance — failure of ordinances of other municipalities to contain identical exemptions**

Unconstitutional discrimination in a county ordinance requiring businesses generally to be closed on a specified day of the week, designated by the legislative body as a day of rest, and exempting from such requirement certain types of business is not shown by the fact that the ordinance of some other county or municipality does not contain identical exemptions from its general closing requirement.

6. **Constitutional Law § 14— Sunday observance ordinance — exemptions of certain businesses**

There is no closed category of businesses which the legislative body may exempt from a general closing requirement, it being sufficient that there is reasonable basis for belief that the operation on the day of rest of the excepted businesses is necessary or conducive to the enjoyment by the public of the designated day as a day of rest, and that the activities of the defendant are not.

APPEAL by defendants from the Court of Appeals, which found no error in the judgment of *Godwin, S.J.*, at the 17 July 1972 Criminal Session of CUMBERLAND.

The defendants were tried and found guilty in the District Court of Cumberland County upon warrants charging them, respectively, with selling on Sunday articles of clothing in violation of an ordinance of Cumberland County entitled, "An Ordinance Concerning the Observance of Sunday as a Uniform Day of Rest in Cumberland County." Upon appeal to the Superior Court, the cases were heard de novo, the three warrants being consolidated for trial without objection by the defendants. Prior to the entry of a plea, each defendant moved to quash the warrant on the ground that the ordinance is unconstitutional in that it denies the defendant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States and of Article I, § 19, of the Constitution of North Carolina.

Upon the hearing of the motions to quash, the defendants, in support of their motions, introduced the testimony of a member of the Cumberland County Sheriff's staff to the effect that during the year 1972 moving picture theaters, cigar and tobacco stores, newsstands, drug stores, grocery stores, fruit, vegetable and melon stands, manufacturing and industrial operations, and places of business of realtors and dealers in mobile

homes operated on Sunday in Cumberland County in compliance with the ordinance. The record does not make clear whether these were or were not within the limits of an incorporated municipality, within which the ordinance, by its terms, has no application.

At the hearing upon the motions to quash, the defendant Atlas also testified that he purchased on Sunday, 16 July 1972, certain periodicals at a theater and bookstand located *in Fayetteville.* The magazines so purchased were then offered by the defendants in evidence. The objection of the State thereto was sustained. Thereupon, the motions to quash were denied. Each defendant then entered a plea of not guilty. In each case the jury found the defendant guilty as charged and the Superior Court sentenced the defendant to imprisonment in the county jail for two days, the sentence to be suspended upon payment of a fine of $25.00 and the costs of the action.

Each defendant appealed to the Court of Appeals, assigning as error: (1) The refusal of the Superior Court to admit the above mentioned magazines in evidence at the hearing of the motion to quash; (2) the denial of the motion to quash; and (3) the entry of the judgment above mentioned. The Court of Appeals found no error, Campbell, J., dissenting.

The three warrants, except for the names of the defendants, the descriptions of the articles sold, and other matters not material to this appeal, were identical. The warrant against the defendant Atlas was issued upon a duly sworn complaint charging as follows:

> "The undersigned, John DeCarter, upon information and belief, being duly sworn, complains and says that at and in the County named above and on or about the 5th day of March, 1972, the defendant named above did unlawfully, wilfully, while employed as the manager for Whitney Stores Incorporated, a corporation, doing business as Treasure City, Raeford Road, Fayetteville, North Carolina, said business premises being located in the County of Cumberland and outside the corporate limits and jurisdiction of any municipality, and at the said premises described above did sell clothing, wearing apparel and clothing accessories, to wit: one (1) pair of men's cotton socks and one (1) man's snap-on necktie at 1:15 p.m., March 5, 1972, which is Sunday.

"The offense charged here was committed against the peace and dignity of the State and in violation of law G.S. 153-9(55) and Sec. 1A(1) Ordinance on the Observation of Sunday as a Uniform Day of Rest in Cumberland County, N. C."

The defendant Ridge is similarly charged with selling one man's shirt and the defendant Huard is similarly charged with selling one pair of men's cotton socks and one man's snap-on necktie.

It was stipulated (1) that the business premises at which the sales are alleged to have occurred were located outside the corporate limits and jurisdiction of any municipality, and (2) that at the time of the alleged sales the ordinance in question had been duly enacted and was in full force and effect.

The provisions of the ordinance are also stipulated. The preamble recites that the power to enact ordinances requiring the observance of Sunday as a day of rest has been delegated to the county by G.S. 153-9(55), that the Board of Commissioners finds and declares that the carrying on of unrestricted business activities on Sunday in the county does not result in the due observance of Sunday as a day of rest and is contrary to the public health, general welfare, safety and morals of the citizens, and that the board finds and declares that there exists a clear and present need to restrict the carrying on of business activities on Sunday in the county in order to provide for the due observance of Sunday as a day of rest, and to protect and promote the public health, the general welfare, safety and morals of the citizens. The ordinance then provides:

"It shall be unlawful for any person to sell * * * any goods, wares or merchandise in the County of Cumberland on Sunday, nor shall any store * * * or any other place of business in which goods, wares, or merchandise are kept for sale, be kept open between 12:00 o'clock midnight Saturday and 12:00 o'clock midnight Sunday, unless such store * * * or other place of business is expressly allowed to open and sell goods under the provision of this article; provided, however, that notwithstanding any other provisions of this chapter, no such store * * * or other place of business shall sell, offer or expose for sale to the general public any of the following:

(1) Clothing and wearing apparel;

(2) Clothing accessories;

(3) Furniture, housewares * * * or office furnishings;

(4) Household, business or office appliances;

(5) Hardware * * * building and lumber supply materials;

(6) Jewelry * * * musical instruments and recordings;

(7) Sporting goods and toys."

The ordinance then provides that certain specified types of business establishments may remain open on Sunday for the sale of specified types of merchandise; certain types of business establishments may remain open on Sunday during specified hours for the sale of articles other than those specifically prohibited by the above quoted provision of the ordinance and others may remain open for the rendition of specified services. The establishments so permitted to remain open for business on Sundays are shoeshine parlors, sellers of Christmas greenery (during December), cigar and tobacco stores and newsstands (for the sale of specified types of merchandise), drug stores (except for the sale of articles of types enumerated in the above quoted provision of the ordinance), theaters and places of exhibition of games, plays and sports (including the sale thereat of beverages and confections), fruit, vegetable and melon stands (from noon to midnight), garages and filling stations (including the sale of gasoline and oils, parts and accessories, beverages, confections and tobacco), grocery stores and curb markets (from noon to midnight for the sale of any items not otherwise prohibited by law), hotels, restaurants, etc., (for their usual business, including the sale of food, beverages, tobacco, newspapers and periodicals), ice, coal and fuel oil manufacturers and dealers (for the sale of these products), ice cream manufacturers, dairies and creameries (for the sale of these products), newspapers and magazines (including sales by newsstands or newsboys), sellers of live bait, manufacturers of bakery products (for the manufacture, sale and distribution of such products for consumption off the premises), hospitals, etc., establishments and offices rendering personal services, emergency repair services (including the sale of parts incident thereto), public utility services, athletic courts, swimming pools and like places of amusement, manufacturing and industrial operations, funeral services, florists, dispensation of services or

merchandise by automatic coin operated vending machines, and places of business selling mobile homes.

The ordinance provides that it does not apply within the corporate limits or jurisdiction of any municipality in the county unless the governing body thereof shall, by resolution, agree to such ordinance.

The defendants' motions to quash the warrants allege the ordinance is unconstitutional for that: (1) It discriminates unreasonably between persons or classes; (2) there is no reasonable relation between the ordinance and the legitimate objectives set forth in the preamble thereof; (3) it does not in fact provide for or require a uniform day of rest in the county; (4) it does not in fact protect and promote the public health, the general welfare, safety and morals of the citizens; (5) the sale on Sunday of a man's shirt, necktie and socks is not detrimental to the public health, the general welfare, the safety or the morals of the citizens of the county; and (6) the ordinance is vague and indefinite.

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

Ervin, Horack & McCartha by C. Eugene McCartha and J. Duane Gilliam for defendants.

LAKE, Justice.

[1] The defendants' first assignment of error is to the refusal of the trial court to admit in evidence at the hearing on the motion to quash the warrants certain magazines which the defendant Atlas testified he purchased on a Sunday at a newsstand "in Fayetteville." The defendants' contention is that these magazines are obscene and, since, under the ordinance, publications of this nature can be sold at newsstands on Sunday, it cannot be said that the ordinance has a reasonable relation to its stated objective, which is "to provide for the due observance of Sunday as a day of rest, and to protect and promote the public health, the general welfare, safety and morals of the citizens."

Quite obviously, the defendants' characterization of these magazines as obscene is correct. Their sale on Sunday, or on any other day of the week, does nothing to promote the morals of the citizens of Cumberland County. It is equally obvious, upon

the face of the ordinance, without any evidence of actual sales, that this ordinance expressly permits the sale on Sunday at newsstands of "papers and periodicals and accessories" without regard to the nature or quality of their contents. The contention that, since this is true, the county cannot promote the observance of Sunday as a general day of rest by requiring the closing on Sunday of stores and other places of business generally and forbidding the sale on Sunday of articles of clothing and other specified types of merchandise is, however, a *non sequitur*.

The clear purpose of the ordinance in question is to promote the public health and welfare by requiring the observance of Sunday as a day of rest from business activities generally. Newsstands and other specified types of business establishments are permitted by the ordinance to open and operate on Sunday, not because the merchandise sold in the excepted businesses is more or less conducive to good morals than clothing, furniture or building materials, but because, in the opinion of the Board of County Commissioners, access to reading material and the other excepted merchandise or activity is necessary to or, at least, conducive to the public's enjoyment of Sunday as a day of rest from normal business activities. In order for such an ordinance to withstand an attack upon its constitutionality as arbitrary or discriminatory, it is not necessary that the legislative body, in the same ordinance, prohibit everything which is detrimental to the public morals, health or safety.

For aught that appears in this record Cumberland County may have another ordinance which prohibits the sale of magazines of the type offered in evidence by the defendants, assuming for the sake of argument that the general state statute dealing with the dissemination of obscenity does not do so. This Court does not take judicial notice of the existence or the nonexistence of county or municipal ordinances. *Surplus Co. v. Pleasants*, 263 N.C. 587, 591, 139 S.E. 2d 892; *State v. Clyburn*, 247 N.C. 455, 461, 101 S.E. 2d 295; Stansbury, North Carolina Evidence, 2d Ed., § 12.

Assuming, however, that there is no other county ordinance or state law which prohibits a newsstand in Cumberland County from selling on Sunday filth masquerading as art or literature, such circumstance does not show or tend to show the invalidity of an otherwise valid ordinance requiring the cessation of business activities in general on the day designated by the legisla-

tive body as a day of rest. The evidence offered by the defendants was as irrelevant to the issue before the court as would have been testimony that, on a given Sunday, a specified restaurant in the county served the witness food which was indigestible or otherwise unfit for human consumption.

Furthermore, the testimony of the defendant Atlas was that he purchased these publications at a newsstand "in Fayetteville." The ordinance, by its expressed terms, does not apply within the city limits of Fayetteville unless the governing body of the city, by resolution, has agreed thereto and nothing in the record suggests such action by the governing body of the City of Fayetteville. G.S. 153-9(55), the source of the authority of the Board of County Commissioners to enact such ordinance, provides that such county ordinance shall not apply within the limits or jurisdiction of such municipality unless its governing body agrees thereto. The Board of County Commissioners having no legislative authority, with respect to this matter, over the territory within the city limits of Fayetteville, evidence of activities permitted on Sunday within the city does not show or tend to show that the county ordinance is arbitrary or discriminatory. The evidence offered by the defendants was, therefore, irrelevant and incompetent for this reason also.

[2] A motion to quash is a method for testing the sufficiency of the warrant or indictment to charge a criminal offense, not a means for determining the guilt or innocence of the defendant with respect to the charge therein made. *State v. Cooke,* 248 N.C. 485, 103 S.E. 2d 846. A defendant charged with the violation of a statute or ordinance may challenge the constitutionality of such statute or ordinance by a motion to quash the warrant or indictment, since there can be no sufficient statement of criminal offense in a charge of violation of an unconstitutional statute or ordinance. *State v. Brewer,* 258 N.C. 533, 129 S.E. 2d 262; *State v. Hales,* 256 N.C. 27, 122 S.E. 2d 768.

[3] When the ground for the motion to quash is that the warrant or indictment fails to charge a criminal offense, whether this be due to a deficiency in the allegations of the warrant or indictment or due to the unconstitutionality of the statute or ordinance, the violation of which is charged, the motion to quash presents a question of law only and must be determined from consideration of the allegations in the warrant or indictment and the provisions of the statute or ordinance.

State v. McBane, 276 N.C. 60, 170 S.E. 2d 913. In such case the court is not permitted to consider extraneous evidence. *State v. Vestal,* 281 N.C. 517, 189 S.E. 2d 152; *State v. Lee,* 277 N.C. 242, 176 S.E. 2d 772; *State v. Cooke, supra; State v. Andrews,* 246 N.C. 561, 99 S.E. 2d 745; *State v. Cochran,* 230 N.C. 523, 53 S.E. 2d 663. Such cases are distinguishable from those in which the basis for the motion to quash is that the indictment was returned by an improperly constituted grand jury, or by a grand jury which proceeded unlawfully in considering the indictment against the defendant, in which cases evidence is properly received for the purpose of establishing or refuting the allegation of such irregularity. See: *State v. Wright,* 274 N.C. 380, 163 S.E. 2d 897; *State v. Yoes,* 271 N.C. 616, 157 S.E. 2d 386; *State v. Colson,* 262 N.C. 506, 516, 138 S.E. 2d 121; *State v. Wilson,* 262 N.C. 419, 137 S.E. 2d 109; *State v. Inman,* 260 N.C. 311, 132 S.E. 2d 613; *State v. Covington,* 258 N.C. 495, 128 S.E. 2d 822; *State v. Linney,* 212 N.C. 739, 194 S.E. 470.

In the present case we do not reach the question of whether a motion to quash lies where the contention is that a statute or ordinance, valid on its face, cannot be a proper basis for a criminal charge because it has been enforced or applied in a discriminatory manner or, if so, whether evidence may properly be received upon the hearing of such a motion. In *State v. Underwood and Harkey,* 283 N.C. 154, 195 S.E. 2d 489, decided this day, these questions are considered and determined. In the present instance it is not contended that the ordinance of Cumberland County has been applied or enforced in a discriminatory manner in the territory to which it applies. The contention is that the ordinance in question is unconstitutional on its face because it permits certain business activities on Sunday while prohibiting the sale of clothing on Sunday. Consequently, the motion to quash presented a question of law only and the evidence offered by the defendants was not competent.

For each of the above reasons, the defendants' Assignment of Error No. 1 is without merit.

The second assignment of error is to the overruling of the motion to quash the warrant. We find no merit in this contention.

[4] The constitutionality of this identical ordinance was before this Court in *Whitney Stores v. Clark,* 277 N.C. 322, 177

S.E. 2d 418, the plaintiff there being the employer of the present defendants. We there held that the authority to enact such ordinance was conferred upon the boards of commissioners of the respective counties by G.S. 153-9(55). We there rejected the contention that the ordinance is invalid in that it has no relationship to public health, general welfare, safety and morals, and discriminates unreasonably in its classifications of businesses and of the articles which may and those which may not be lawfully sold on Sunday. As we there noted, the provisions of this ordinance are essentially the same as those of the ordinance of the City of Raleigh, similarly attacked, and held valid in *Kresge Co. v. Tomlinson* and *Arlan's Department Store v. Tomlinson,* 275 N.C. 1, 165 S.E. 2d 236, the ordinance of the City of Greenville, held valid in *Clark's v. West,* 268 N.C. 527, 151 S.E. 2d 5, and the ordinance of the City of Winston-Salem, similarly attacked, and held valid in *Charles Stores v. Tucker,* 263 N.C. 710, 140 S.E. 2d 370. It is also identical in all material respects with the ordinance of the City of Charlotte, similarly attacked, and held valid in *Clark's Charlotte, Inc. v. Hunter,* 261 N.C. 222, 134 S.E. 2d 364. We find nothing in the contentions of the defendants in this case which was not fully considered and decided adversely to them by this Court in the foregoing cases.

[5, 6] Unconstitutional discrimination in a county ordinance requiring businesses generally to be closed on a specified day of the week, designated by the legislative body as a day of rest, and exempting from such requirement certain types of business is not shown by the fact that the ordinance of some other county or municipality does not contain identical exemptions from its general closing requirement. There is no closed category of businesses which the legislative body may exempt from such general closing requirement. It is sufficient that there is reasonable basis for belief that the operation on the day of rest of the excepted businesses is necessary or conducive to the enjoyment by the public of the designated day as a day of rest, and that the activities of the defendant are not. "Abstract symmetry" and "mathematical nicety" are not required of the legislative body in the making of such classifications of business activities. *Clark's Charlotte, Inc. v. Hunter, supra; Patsone v. Commonwealth of Pennsylvania,* 232 U.S. 138, 144, 34 S.Ct. 281, 58 L.Ed. 539; *People v. Friedman,* 302 N.Y. 75, 96 N.E. 2d 184. In the present case the defendants do not contend that any other person, firm or corporation, is permitted to sell clothing in Cumberland County on Sunday or that the defendants are for-

bidden to sell or are charged with selling on Sunday any article which any other person is permitted to sell under the terms of the ordinance or through the policies of those charged with its enforcement.

The motion to quash was properly denied.

Affirmed.

STATE OF NORTH CAROLINA v. JUNIOR LEE WASHINGTON

No. 46

(Filed 11 April 1973)

1. **Rape § 7; Criminal Law § 135— instructions as to death penalty upon guilty verdict — death sentence vacated — remand for sentence of life imprisonment**

In a prosecution for rape allegedly committed after *Furman v. Georgia* but before *State v. Waddell*, the trial court erred in submitting the issue of rape to the jury and then instructing that a verdict of guilty would require imposition of the death penalty; hence, even if defendant has failed to show prejudicial error in respect of guilt, the death sentence in the rape case must be vacated and the cause remanded for proper judgment.

2. **Criminal Law §§ 120, 168— rape case — erroneous instruction as to mandatory death sentence — guilty verdict allowed to stand**

The trial judge in a prosecution for rape which occurred prior to 18 January 1973 should have submitted the case for jury determination solely with respect to whether defendant was guilty or not guilty of rape without referring to the punishment in the event of conviction, and if convicted, defendant should have been sentenced to life imprisonment; however, the court's erroneous instruction that a verdict of guilty would require imposition of the death sentence does not require that defendant's conviction of rape be set aside since jurors would certainly be more reluctant to return a verdict of guilty if advised the punishment upon conviction would be death, and the fact that defendant ostensibly was being tried for his life rather than life imprisonment did not tend to emphasize or aggravate the seriousness of the crime.

3. **Criminal Law § 34; Rape § 3— charge of rape — evidence of subsequent rape — sufficiency of indictment to support conviction for either or both**

The general rule that in a prosecution for a particular crime the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense was inapplicable to testimony by the prosecuting witness as to a second

rape committed by defendant in the woods where the indictment, which charged that defendant raped the witness on 2 August 1972, was sufficient to support a conviction for rape committed in the witness's home or in the woods or in the home and in the woods.

4. **Rape § 4— statements made by defendant to victim — competency to show intent and motivation**

The trial court in a rape, kidnapping and felonious breaking and entering case properly admitted testimony of the white prosecuting witness as to highly racial and anti-white statements made to her by the black defendant, even though the statements may have been prejudicial to defendant, since the statements had a significant bearing upon the intent with which defendant entered the witness's home and upon his motivation in selecting an utter stranger as his victim.

5. **Criminal Law § 29— mental capacity to plead — denial of petition for psychiatric examination — no abuse of discretion**

Defendant was not entitled to an order of commitment to a State hospital for psychiatric examination as a matter of right, and he failed to show that the failure to grant his belated motion for such order was an abuse of discretion; moreover, the record does not show an exception duly taken to the denial of his motion, and upon arraignment he pleaded not guilty, not insufficiency of mental capacity to plead to the indictment and conduct a rational defense.

6. **Constitutional Law § 29; Criminal Law § 135; Jury § 7— prospective jurors opposed to capital punishment — challenge for cause proper**

The trial court in a rape case properly allowed the State to challenge certain jurors for cause where each prospective juror testified unequivocally on *voir dire* that, because of moral or religious scruples against capital punishment, he could not return a verdict of guilty of rape, knowing the penalty therefor was death, even if the State proved to him by the evidence beyond a reasonable doubt that the defendant was in fact guilty of rape.

7. **Jury § 6— jury examination — questions with respect to death penalty, evidence about defendant — limitation proper**

The trial court in a rape case did not err in refusing to allow defendant to ask prospective jurors whether they would consider evidence that "some others convicted of rape had been executed and some had not," evidence that "there was or was not any rational basis for separating those who died from those who were allowed to live for a conviction of the same crime," and evidence of "how often members of defendant's race . . . have been executed, as compared to those convicted and executed in other racial and ethnic groups," since such evidence would have been inadmissible; nor did the court err in refusing to allow defendant to ask prospective jurors whether they would consider "evidence about the defendant, either good or bad, other than that arising from the incident here," since such evidence might or might not be admissible for jury consideration.

8. **Jury §§ 5, 7— rape case — selection of jury — no prejudicial error**

The defendant in a rape case showed no prejudice in the jury selection process where the record did not show what several prospec-

tive jurors would have said if they had been permitted to answer defendant's questions, where there was nothing in the *voir dire* examination of two prospective jurors to support defendant's contention that they were prejudiced racially against him or that defendant's race was a factor for consideration in return of the verdict, and where the record did not show that defendant had exhausted his peremptory challenges.

APPEAL by defendant under G.S. 7A-27(a) from *Brewer, J.*, at the 13 November 1972 Criminal Session of HOKE County Superior Court.

In separate indictments by the Hoke County grand jury at the 14 August 1972 Session, defendant was charged with (1) feloniously breaking into and entering the dwelling house of Patricia H. Adams with intent to rape her, (2) with raping Patricia H. Adams, and (3) with kidnapping Patricia H. Adams.

The indictments charged that these felonies were committed in Hoke County on 2 August 1972. Upon arraignment, defendant pleaded not guilty to each indictment. In accordance with his request, the trial jury was selected from special venires of jurors from Cumberland County. The cases were consolidated for trial.

The State's evidence, summarized except when quoted, tends to show the facts narrated below. Unless otherwise indicated, this narration is based on the testimony of Mrs. Patricia H. Adams.

Shortly before noon on 1 August 1972, the driver of a green Mustang stopped at the Adams residence in Raeford, N. C., and "blew the horn." Mrs. Adams was then in the kitchen. The children, her daughter (age 10 months) and her stepdaughter (age 8 years), were playing in the carport. Mrs. Adams went out into the yard and observed that the driver of the car was a black male she "had never seen before." He was later identified as Junior Lee Washington, defendant. He first asked whether her husband was at home. She thought he used her husband's name, "George." In response to his inquiry, she told defendant that "George came home for lunch at twelve." Defendant asked several questions concerning the grass and landscaping. When given permission to look at the grass, defendant went into the backyard out of the sight of Mrs. Adams. During this time, Mrs. Adams picked up her little girl and took her inside the house. Upon defendant's return he remarked that the grass felt

like a carpet. When asked if he knew her husband, defendant answered, "No, I don't think so." Defendant asked if he could come back about the same time the next day to see George. Defendant gave his name as "Junior" and some other name Mrs. Adams did not remember. After stating that he worked in Burlington, defendant got in his car and left. In about five minutes, George Adams came home and was told by Mrs. Adams and the eight-year-old girl "about the visitor."

There are only two doors to the Adams home, a "front door" and a door "at the carport." On the morning of 2 August 1972, about 10:00 a.m., Mrs. Adams saw defendant come from the back of her house. He stopped at the carport door and knocked. The eight-year-old girl opened the door and reported to Mrs. Adams that "the man was back." Defendant was standing "in front of [her] back carport door." When asked if George was at home, Mrs. Adams reminded defendant that she had told him the previous day that George did not come home until twelve. After further inquiries concerning landscaping and grass, defendant asked for a glass of water. He was "sweating" and said he had "walked from uptown." Mrs. Adams got him a glass of water, opened the screen door and handed it to him. After he had taken a few drinks from it, she opened the screen door again, took the glass and closed the door. When she tried to latch it, defendant opened the door, came right in fast, pulled out a knife with a blade two or three inches long, put the knife in front of her and backed her into the dining room area of the home.

The children were in the room of the eight-year-old girl. Defendant told the eight-year-old "to stay in there and not come out . . . no matter what happened," and closed the door.

"[Defendant] still had the knife." He got Mrs. Adams by the arm and took her into her bedroom. There, after forcing her to take off all of her clothes and to lie on the bed, defendant had sexual intercourse with her by force, intimidation and against her will. When this act of sexual intercourse had been completed, Mrs. Adams requested and was permitted to clean up and put on her clothes.

Defendant then forced Mrs. Adams to get the keys to her Ford Torino car and to drive it as he directed. As she drove, defendant was seated directly behind her with a knife against

her neck. He forced her to drive from Raeford and then from a paved rural road into the woods. When she stopped the car as directed, defendant got out and went around to the car door. He told Mrs. Adams to get out and to take off all of her clothes. When she had done so, he made her get in the back seat of the car and lie down. He attempted to have sexual intercourse with her there but was unable to do so because "it was too cramped." He then took her clothes and laid them down on the ground and made her lie on them. He then proceeded to have intercourse with her again by force, intimidation and against her will.

After this second act of sexual intercourse, Mrs. Adams was permitted to put on her clothes. As directed by defendant, she got back in the driver's seat. Defendant got into the front passenger's seat. As directed, Mrs. Adams drove "up the road there a little piece to a clearing" and there "cut the motor off." At that time she noticed that defendant had opened the blade of his knife and "was fiddling with it." She thought defendant was going to kill her and she "started begging him not to kill [her], to let [her] go home." Although he told her he was not going to kill her, she didn't believe him. He then started talking to her "about the race problem and that the whites were always thinking they were superior to blacks and that he wished he had stayed up north." He said "the whites were friendlier up there and a white woman would let a black lay them." When Mrs. Adams asked why he had picked her, defendant told her "he thought because [she] was an uppity white chick." All during this period of from fifteen to thirty minutes, Mrs. Adams was crying off and on.

Upon leaving the location where they had parked, defendant made her drive back and stop in the wooded area where the second act of sexual intercourse had occurred. There defendant made Mrs. Adams get in the back seat and take off all of her clothes again. Defendant took her car keys and all of her clothes except her panties and went up the road. He told her he was leaving but would be back. Soon thereafter he did come back, looked in the back seat of her car and then "took off running again." Mrs. Adams then left her car and walked up to a house which she later learned was the home of Mrs. Nannie Green, where she telephoned Sheriff Barrington, told him she had been raped and asked him to get her husband and to get somebody to look after her little girls.

After receiving Mrs. Adams's call, Sheriff Barrington went to the Green residence, took Mrs. Adams to her home in Raeford for her to put on some clothes, and then took her to the office of Dr. Riley M. Jordan. After being examined by Dr. Jordan, Mrs. Adams went home, took a bath and remained at home until after defendant was taken into custody. Later, she took the officers out to her car.

Mrs. Adams gave Sheriff Barrington a description of the defendant and of his car. During the afternoon of 2 August 1972 Mrs. Adams identified defendant by photograph and in person in a lineup.

Dr. Jordan testified that he examined Mrs. Adams at his office at 12:30 p.m. on 2 August 1972; that the examination disclosed that she had mobile sperm cells in her vagina; and that in his opinion she recently had had sexual intercourse with some male.

Ernest Leverne Parker testified that about 11:00 a.m. on 2 August 1972 he saw defendant coming up the road towards Mrs. Green's house; that defendant wanted a ride to Hoke High School to get his car, stating that he had left it there because "it ran hot"; that, driving his father's truck, he took defendant to Hoke High School where defendant's green sixty-six Mustang was parked; and that defendant got in his car, started without any trouble and drove away. Mrs. Adams had testified that "the school [was] directly in front of [her] house."

Mrs. Green testified to the circumstances under which Mrs. Adams arrived at her house, asking for help, and to Mrs. Adams's call to Sheriff Barrington.

The testimony of George S. Adams, husband of Mrs. Patricia H. Adams, concerning what his wife had told him concerning defendant's visit on 1 August 1972 was offered and admitted only as corroborative evidence.

The testimony of Sheriff Barrington as to what Mrs. Adams told him was offered and admitted only as corroborative evidence. Sheriff Barrington testified to the telephone conversation from Mrs. Adams, his trip to Mrs. Green's house, taking Mrs. Adams to her home and thereafter to the office of Dr. Jordan, and to the identification by Mrs. Adams of defendant as the man who had feloniously broken into and entered her home, raped her, kidnapped her, and raped her again in the

woods. Sheriff Barrington also testified that he arranged with George S. Adams to go to the Adams home and look after the two little girls.

There was other evidence corroborating Mrs. Adams's identification of defendant as the man who committed the crimes charged. However, further review of the evidence is unnecessary.

Defendant did not testify or offer evidence.

The jury found defendant (1) guilty of rape, (2) guilty of kidnapping, and (3) guilty of felonious breaking and entering, as charged in the indictments.

In No. 72CR2182, upon the verdict of guilty of rape as charged in the indictment, the judgment of the court pronounced a sentence of death.

In No. 72CR2183, upon the verdict of guilty of kidnapping as charged in the indictment, the judgment of the court sentenced defendant to imprisonment for life, "said term of imprisonment to commence at the expiration of the term of imprisonment or penalty imposed this date in case Number 72CR2182."

In No. 72CR2212, upon the verdict of guilty of felonious breaking and entering, the judgment of the court sentenced defendant to imprisonment for a term of ten years, "to commence at the expiration of term of imprisonment or penalty imposed in the cases Number 72CR2182 and 72CR2183."

Defendant excepted and appealed.

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

Barrington, Smith & Jones, P.A., by Carl A. Barrington, Jr.; and Henry W. Witcover for defendant appellant.

BOBBITT, Chief Justice.

[1] Defendant was convicted at the 13 November 1972 Session of felonies committed on 2 August 1972. Both events occurred *after* 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 (29 June 1972), and *before* the decision of this Court in *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (18 January 1973).

With reference to the indictment for rape, the court instructed the jury: "You may find the defendant guilty of rape or not guilty," and "if you return a verdict of guilty of rape, the law provides that the defendant will be put to death in the gas chamber." The jury was not instructed in accordance with this portion of G.S. 14-21: "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." Presumably, it was Judge Brewer's opinion that *Furman* had invalidated the proviso in G. S. 14-21 and that, absent the proviso, G.S. 14-21 made the death sentence mandatory upon a conviction of rape. It was so held by this Court in *Waddell* in respect of rapes committed *after* the date (18 January 1973) of that decision but that "North Carolina's mandatory death sentence for rape . . . may not be constitutionally applied to any offense committed prior to the date" of the decision in *Waddell.* Hence, even if defendant has failed to show prejudicial error in respect of guilt, the death sentence in the rape case must be vacated and the cause remanded for proper judgment(s).

[2] Assignments of Error Nos. 1, 2 and 3 may be considered together. Based thereon, defendant contends that (1) the constitutional right to due process was violated by the court's submission of the rape charge to the jury "as a capital issue"; (2) that the court erroneously failed to instruct the jury that life imprisonment was the maximum punishment for rape; and (3) that the court erroneously failed to instruct the jury that if they found defendant guilty of rape they could in their sole discretion return a verdict of "guilty, with the recommendation of life imprisonment."

In the light of *Waddell,* Judge Brewer should have submitted this case for jury determination solely in respect of whether defendant was guilty or not guilty of rape without referring to the punishment in the event of conviction; and, if convicted, defendant should have been sentenced to imprisonment for life. This is the appropriate procedure in respect of trials for the crimes of murder in the first degree, rape, burglary in the first degree and arson committed *prior to* 18 Jan-

uary 1973. However, the indicated errors were not prejudicial to the defendant. Certainly jurors would be more reluctant to return a verdict of guilty if advised that the punishment upon conviction would be death rather than life imprisonment. Moreover, we find no merit in the suggestion that the fact that defendant ostensibly was being tried for his life rather than for life imprisonment tended to emphasize or aggravate the seriousness of the crime. In either event, the seriousness of the crime depended upon the evidence as to what happened, not on whether the punishment therefor would be death or life imprisonment. Either of these punishments would suffice to indicate the seriousness of the crime of rape.

The jurors were selected under instructions that a verdict of guilty of rape would require the imposition of a death sentence. In *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969), this Court rejected the idea that jurors are biased in favor of conviction simply because they do not have conscientious or religious scruples against capital punishment. Our decision in *Williams* was based largely on the decisions of the Supreme Court of the United States in *Witherspoon v. Illinois,* 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968), and in *Bumper v. North Carolina,* 391 U.S. 543, 20 L.Ed. 2d 797, 88 S.Ct. 1788 (1968), and in our prior decision of *State v. Peele,* 274 N.C. 106, 113-114, 161 S.E. 2d 568, 573-574 (1968), *cert. den.* 393 U.S. 1042, 21 L.Ed. 2d 590, 89 S.Ct. 669 (1969).

Nothing in the record before us indicates that any member of the jury which tried defendant was biased in favor of conviction or otherwise prejudiced against defendant on account of his views on capital punishment or otherwise. Nor does it appear that the jury included any juror who was challenged by defendant.

[3] In Assignment of Error No. 6 defendant asserts that the court erroneously admitted the portion of Mrs. Adams's testimony which relates to what defendant calls "an alleged second, uncharged, rape of the prosecuting witness by the defendant outside the car in the woods some time after the alleged first charged rape in the home." He bases this contention on the general rule that "in a prosecution for a particular crime the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense." *State v. Long,* 280 N.C. 633, 641, 187 S.E. 2d 47, 51 (1972). This general rule does not apply to the testimony challenged by defendant.

The indictment charged that defendant raped Mrs. Adams on 2 August 1972. It was sufficient to support a conviction for rape committed in the home or in the woods or in the home and in the woods. The evidence is to the effect that from defendant's initial assault on Mrs. Adams in her home until he left her in the woods (clothed only in her panties), Mrs. Adams was defendant's captive. Defendant's actions constituted one continuous course of conduct. It makes no difference that the second act of rape took place in the woods rather than in Mrs. Adams's home.

[4] In Assignment of Error No. 7 defendant asserts that the court erroneously admitted testimony of Mrs. Adams which included statements by defendant that up north "a white woman would let a black lay them" and that he had picked Mrs. Adams as his victim because she was "an uppity white chick." Mrs. Adams testified that the quoted statements were made by defendant after the second act of rape had been completed and while she and defendant were in the woods. Defendant asserts that this testimony "gratuitously injected into the proceeding tones of racial conflict"; that it was "highly racial and anti-white in tone"; and that it "was irrelevant, immaterial and highly prejudicial to the defendant in its effect upon the jury." True, the statements made by defendant were "highly racial and anti-white in tone." But they were injected into the case gratuitously by defendant, not by Mrs. Adams. We hold that the evidence was competent and properly admitted notwithstanding prejudice, if any, to the defendant. The testimony refers to statements made by defendant to a woman whom he had forcibly removed from her home and children, whom he had raped twice, and whose ultimate fate as his captive victim was unknown when the statements were made. Moreover, the quoted statements bear significantly upon the intent with which defendant entered the Adams home and upon his motivation in selecting an utter stranger as the object of his lust.

[5] In Assignment of Error No. 13 defendant asserts that the court erred "in failing to grant the defendant's pre-trial motion for psychiatric examination on November 3, 1972."

Defendant was arrested 2 August 1972. He was indicted at the 14 August 1972 Session. We take judicial notice that a special (Criminal) session was held 2 October 1972. On 27 October 1972 a petition was filed which prayed that defendant be committed to the Dorothea Dix Hospital, Raleigh, North Carolina,

for observation, evaluation and treatment as provided in G.S. 122-91. Petition was signed and verified by Carl A. Barrington, Jr., defendant's retained private counsel. A hearing on the petition was conducted by Judge Brewer, the presiding Judge of the Twelfth Judicial District. By order dated 1 November 1972, Judge Brewer denied the petition. Apparently, no evidence was presented other than the verified petition. Judge Brewer based his order upon findings of fact that "the defendant ha[d] been confined in the Hoke County Jail since August 2nd, 1972"; that the cases were "scheduled for trial on Monday, November 13, 1972"; that "the information provided to the court is not sufficient grounds for a commitment to Dorothea Dix Hospital"; and that "no reasonable grounds for the defendant being committed to Dorothea Dix Hospital has been shown by competent evidence, affidavits or otherwise."

Although defendant assigns as error the denial of this petition, the record does not show that an exception thereto was noted. "The Rules of Practice (1921) of both this Court and the Court of Appeals require any error asserted on appeal to be supported by an exception duly taken and shown in the record." *State v. Jacobs,* 278 N.C. 693, 696, 180 S.E. 2d 832, 834 (1971). We note that G.S. 122-91 provides that commitment to a State hospital for a period of not exceeding sixty days for observation and treatment *may* be entered. Defendant was not entitled to such order as a matter of right and has failed to show that the failure to grant his belated motion was an abuse of discretion. We note further that, upon arraignment at the 13 November 1972 Session, he pleaded not guilty, not insufficiency of mental capacity to plead to the indictment and conduct a rational defense. See *State v. Propst,* 274 N.C. 62, 68, 161 S.E. 2d 560, 565 (1968).

Defendant's brief states no reason or argument and cites no authority in support of his Assignments of Error Nos. 4, 5, 8, 9, 10, 11 and 12. Hence, these assignments are deemed abandoned under Rule 28, Rules of Practice in the Supreme Court. *State v. Strickland,* 254 N.C. 658, 660, 119 S.E. 2d 781, 782 (1961). Notwithstanding, defendant's counsel urges that we consider Assignments of Error Nos. 4 and 5. He asserts that these assignments have merit in the light of the decision of the Supreme Court of the United States in *Ham v. South Carolina,* 409 U.S. 524, 35 L.Ed. 2d 46, 93 S.Ct. 848 (1973), which was not available to him when he prepared his brief.

In *Ham,* under circumstances markedly different from those here under consideration, the Supreme Court of the United States held that refusal of the trial judge to make or permit any inquiry of the jurors as to *racial bias* denied defendant a fair trial in violation of the Due Process Clause of the Fourteenth Amendment. In our opinion, the decision in *Ham* is not relevant to the present case. Notwithstanding, we have elected to consider defendant's Assignments of Error Nos. 4 and 5 as if they had been properly brought forward and presented in defendant's brief.

[6] We first consider Assignment of Error No. 5 in which defendant asserts that "[t]he court erred in allowing the State to challenge certain jurors for cause." Each of these prospective jurors testified unequivocally on *voir dire* that, because of moral or religious scruples against capital punishment, he (she) could not return a verdict of guilty of rape, knowing the penalty therefor was death, even if the State proved to him (her) by the evidence beyond a reasonable doubt that the defendant was in fact guilty of rape. Even if a death sentence were mandatory upon a conviction of rape, the challenges of these prospective jurors for cause would have been properly allowed under Federal and State decisions. *Witherspoon v. Illinois,* 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968); *State v. Doss,* 279 N.C. 413, 421, 183 S.E. 2d 671, 676 (1971).

[7] In Assignment of Error No. 4 defendant asserts that "[t]he court erred by its restrictions placed upon appellant in his *voir dire* of the prospective jury panel by its refusal to allow appellant to freely question the prospective jury members." This assignment is based on Exceptions Nos. 15-20, inclusive. The facts relating to these exceptions are set out below.

In conference at the bench, defendant's counsel stated to the court that he proposed to ask each prospective juror a series of questions with reference to circumstances in which he would vote to impose the death penalty, to wit:

"1. Would you consider evidence that some others convicted of rape had been executed and some had not?

"2. Would you consider evidence that there was or was not any rational basis for separating those who died from those who were allowed to live for a conviction of the same crime?

"3. Would you consider, if you had the opportunity, evidence about this defendant, either good or bad, other than that arising from the incident here?

"4. Would your decision to impose or not to impose the death penalty be influenced either way by evidence of how often members of the defendant's race, in this case that of a Negro, have been convicted of rape and have been executed, as compared to those convicted and executed in other racial and ethnic groups?"

The record shows that, upon objection by the State, the court disallowed these questions. They were "read into the record for the purpose of appeal only," but were not asked in the hearing of the jury. Defendant's Exception No. 15 is directed towards the court's ruling in respect of this series of questions.

Evidence that "some others convicted of rape had been executed and some had not," and evidence that "there was or was not any rational basis for separating those who died from those who were allowed to live for a conviction of the same crime," was not admissible. Hence, whether the prospective juror would consider such evidence was not relevant to his qualifications for service on the trial jury. This fact alone was sufficient ground for disallowing the first and second of the above questions.

While the fourth question does not use the phrase, "would you consider evidence," it presents a similar inquiry. It could not be answered by a prospective juror absent evidence of "how often members of the defendant's race . . . ha[d] been convicted of rape and ha[d] been executed, as compared to those convicted and executed in other racial and ethnic groups." Such evidence would have been inadmissible.

We note that the first, second and fourth questions relate solely to factors bearing upon whether the penalty of death should be imposed upon defendant in the event of his conviction of rape. Since the death penalty is to be vacated, defendant was not prejudiced by the inability of his counsel to obtain answers to these questions.

The third question was properly disallowed because "evidence about the defendant, either good or bad, other than that arising from the incident here," might or might not be admissible for jury consideration. To illustrate: If defendant had

testified, evidence relating to his general reputation would have been admissible with reference to his credibility; and, if defendant had offered evidence of his good character, such evidence would have been admissible in respect of credibility and as substantive evidence of guilt or innocence. *State v. Wortham*, 240 N.C. 132, 81 S.E. 2d 254 (1954). Without knowledge of the nature of the evidence referred to in the question, and without knowledge of its admissibility, no prospective juror should have been required to answer a question of such scope and generality.

[8] The record does not disclose how many prospective jurors were questioned before the jury selection procedure was completed. The exceptions on which defendant bases Assignment of Error No. 4 refer only to the prospective jurors referred to below.

We note first that Exceptions Nos. 16, 18 and 20 are directed to rulings in which the court sustained the State's objections to questions asked by defendant's counsel to prospective jurors Sanders, Goforth and Burr, respectively. The record fails to show what any of these prospective jurors would have said if permitted to answer. Such failure renders these rulings nonprejudicial. *Eubanks v. Eubanks*, 273 N.C. 189, 197, 159 S.E. 2d 562, 568-69 (1968).

Exception No. 17 relates to the prospective juror identified only as Mrs. Lewis. Mrs. Lewis was asked: "Could you, under your religious and moral scruples, as they exist now, impose the death penalty for rape?" She answered: "I don't know." She was then asked: "In your opinion there is some distinction between that crime and other crimes?" The State's objection was sustained and defendant's Exception No. 17 was noted. The record does not show what Mrs. Lewis would have said if permitted to answer. Mrs. Lewis was then asked: "Could you, after hearing all of the evidence, the argument of counsel and charge of the court, and within the framework of your moral or religious scruples, impose or could you find the defendant guilty of rape, or a defendant guilty of rape, this defendant guilty of rape, knowing that it would mean mandatory imposition of the death penalty?" The solicitor's objection was overruled and Mrs. Lewis answered: "I do not, I just don't know."

Exception No. 19 relates to the prospective juror identified only as Mr. Smith. After Mr. Smith had testified that he had

no moral or religious scruples with reference to the imposition of the death penalty under certain circumstances, he was asked this question: "Would you consider among those circumstances, the race of the defendant as compared to the race of the prosecuting witness?" The State's objection was overruled and Mr. Smith answered, "No, sir." Thereafter, the record shows the following:

"ATTORNEY BARRINGTON: Would you consider among those circumstances, the personal injury, if any, of a physical nature, done to the prosecuting witness?

"SOLICITOR THOMPSON: Objection—

"JUROR: Yes, sir.

"SOLICITOR THOMPSON: —to this line of questions.

"COURT: Objection to the last question is sustained. I instruct the jury, if the question is asked and an objection is made, do not answer until such time as the court has an opportunity to rule on the objection.

"EXCEPTION NO. 19."

With reference to Exception No. 19, we first note that Mr. Smith's testimony was explicit and unequivocal to the effect that he would not consider "the race of the defendant as compared to the race of the prosecuting witness" as a circumstance in his determination of whether he would return a verdict that would result in the death penalty for rape. Before the solicitor had finished his objection to the question, Mr. Smith stated that "personal injury, if any, of a physical nature, done to the prosecuting witness," was one of the circumstances he would consider in determining whether he would return a verdict which would result in the death penalty for rape. Be that as it may, it is clear that all of these questions were directed to circumstances bearing upon whether the juror could or would return a verdict which would result in the imposition of *the death penalty*. We find nothing in the *voir dire* examination of these witnesses to support the contention that they were prejudiced racially against the defendant or that the fact of defendant's race was a factor for consideration in the return of the verdict.

Whether defendant undertook to challenge either Mrs. Lewis or Mr. Smith for cause or peremptorily does not appear.

Indeed, the record is unclear as to whether either of them served on the jury which found defendant guilty of the crimes charged. "A party's right is not to select a juror prejudiced in his favor, but to reject one prejudiced against him." *State v. Peele,* 274 N.C. 106, 113, 161 S.E. 2d 568, 573 (1968). We further note that the record does not show that defendant had exhausted his peremptory challenges.

In No. 72CR2182, in which defendant was convicted of rape, the trial was free of prejudicial error and the verdict of guilty of rape stands. However, for the reasons stated above, the judgment, insofar as it imposed the death penalty, is reversed. Accordingly, case No. 72CR2182 is remanded to the Superior Court of Hoke County with directions to proceed as follows:

1. The presiding judge of the Superior Court of Hoke County shall cause to be served on defendant, Junior Lee Washington, 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, Junior Lee Washington, 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 13 November 1972 Criminal Session, will pronounce judgment that the defendant, Junior Lee Washington, be imprisoned for life in the State's prison.

2. The presiding judge of the Superior Court of Hoke County will issue a writ of habeas corpus to the official having custody of the defendant, Junior Lee Washington, to produce him in open court at the time and for the purpose of being present when the judgment imposing life imprisonment is pronounced.

In No. 72CR2183 and in No. 72CR2212, the trials were free of prejudicial error and the verdicts and judgments are affirmed. However, these cases are remanded to the Superior Court of Hoke County with direction to proceed as follows: *After* the sentence of life imprisonment has been pronounced in No. 72CR2182 as set out above, the judgment in No. 72CR2183 is to be modified so as to provide that the term of imprisonment imposed therein commence at the expiration of the sentence of life imprisonment imposed in No. 72CR2182, and the judgment in No. 72CR2212 is to be modified so as to provide

that the term of imprisonment imposed therein commence at the expiration of the sentence imposed in No. 72CR2183.

Death sentence in No. 72CR2182 reversed and cause remanded with instructions.

STATE OF NORTH CAROLINA v. WILLIAM FRED CAMERON

No. 32

(Filed 11 April 1973)

1. **Constitutional Law § 31— identity of confidential informer — disclosure not required**

In a prosecution for possession and sale of heroin the trial court properly denied defendant's motion for disclosure of the identity of a confidential informer where the evidence which established the guilt of defendant was independent and did not rely on any facts provided by the informer, evidence on voir dire tended to show that defendant and the informer who accompanied the officer to defendant's home at the time of the sale were acquainted, and the informer was not present at the time of the actual sale of heroin.

2. **Indictment and Warrant § 13— bill of particulars properly denied**

Where all the information surrounding the commission of the crime was contained in the bills of indictment or could have been obtained by the defendant from an examination of State's witnesses, whose names had been given defendant, defendant failed to show any abuse of discretion in denial of his motion for a bill of particulars.

3. **Criminal Law § 91— publicity concerning additional bills of indictment — no prejudice — continuance properly denied**

Defendant failed to show abuse of discretion in the denial of his motion for continuance because of radio, television and newspaper publicity with respect to indictments returned against him for subsequent offenses while the trial for the present offense was in progress where it did not appear that any juror read or heard about the other charges against defendant or that any juror was influenced or prejudiced by this publicity; nor was defendant entitled to mistrial for the alleged prejudice resulting from the publicity.

4. **Narcotics § 4— possession and sale of heroin — sufficiency of evidence**

Where an officer testified that defendant had in his possession 15 bindles of a substance later determined to be heroin and that defendant sold these 15 bindles containing heroin to the officer for $60, evidence was sufficent to be submitted to the jury and to support verdicts of guilty of possession and sale of heroin.

5. **Narcotics § 1— possession and sale of heroin — separate and distinct offenses**

Unlawful possession and unlawful sale of heroin are illegal, and while possession may be a part of the sale, the possession may be

legal and the sale illegal; therefore, possession and sale of heroin are separate and distinct offenses.

6. **Criminal Law § 26; Narcotics § 5— conviction of possession and sale of heroin — no double jeopardy**

Since possession and sale of heroin are separate offenses, defendant was not subjected to double jeopardy where he was tried for both offenses arising out of the same transaction, found guilty of each and given consecutive sentences.

APPEAL by defendant from decision of the North Carolina Court of Appeals, reported in 17 N. C. App. 229, 193 S.E. 2d 485 (1972), finding no error in the trial before *Cooper, J.*, at the 17 April 1972 Session of DURHAM Superior Court.

Defendant, William Fred Cameron, known as Babe Cameron, was charged in separate bills of indictment with unlawful possession of a narcotic drug; to wit, 15 bags of heroin, and the unlawful sale of 15 bags of heroin to S. H. Conant, a Durham police officer, for $60, on 25 February 1971 in Durham County.

At defendant's trial only the State offered evidence. This evidence tended to show: On 25 February 1971 around 8:30 p.m., Officer Conant and an unnamed individual went to the residence of defendant at 1130 Elmo Street in Durham. The two men knocked on the door and were let in by a small child. They asked the child if Babe was at home, and the child answered, "Yes, come on it, he is in the back bedroom." They went through the kitchen, down a hallway to the back bedroom, and there saw defendant lying on a double bed watching television. After a short conversation, Conant asked defendant if he had any heroin and, if so, could he buy a half or 15 bindles. Defendant answered that he did have some heroin, then left the room, went up the hallway and out the front door. He was gone approximately a minute and when he returned he asked Conant if he had the money. Conant handed defendant six ten-dollar bills, and defendant then handed Conant 15 small packs of white powder, later found to contain heroin. During the time the money and the packs were being exchanged, the individual who accompanied Conant to defendant's home was not present in the room.

The jury returned a verdict of guilty of both the possession and sale of a narcotic drug, heroin. Defendant was sentenced to five years' imprisonment on each charge, the sentences to run consecutively. He appealed to the Court of Appeals, and

that court in an opinion by Judge Hedrick, concurred in by Chief Judge Mallard and Judge Morris, found no error. Defendant appealed to this Court pursuant to G.S. 7A-30(1).

Attorney General Robert Morgan, Assistant Attorney General Charles M. Hensey, and Associate Attorney Henry E. Poole for the State.

William H. Murdock, Edward G. Johnson, and Norman E. Williams for defendant appellant.

MOORE, Justice.

[1] Defendant first assigns as error the failure of the trial court to require the solicitor to disclose the name of the confidential informer who accompanied Officer Conant to defendant's home.

"It is the general rule, subject to certain exceptions and limitations . . . that the prosecution is privileged to withhold from an accused disclosure of the identity of an informer." Annot., 76 A.L.R. 2d 262, 271. "The privilege is founded upon public policy, and seeks to further and protect the public interest in effective law enforcement. It recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officers, and by preserving their anonymity, encourages them to perform that obligation. The privilege is designed to protect the public interest, and not to protect the informer." *Id.* at 275. *Roviaro v. United States,* 353 U.S. 53, 1 L.Ed. 2d 639, 77 S.Ct. 623 (1957). The propriety of disclosing the identity of an informer depends on the circumstances of the case. *Roviaro v. United States, supra; State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53 (1969); *State v. Boles,* 246 N.C. 83, 97 S.E. 2d 476 (1957).

We find in 76 A.L.R. 2d, at p. 283:

> " . . . [T]he privilege of nondisclosure will be upheld where disclosure of the identity of an informer does not aid the defendant in regard to his defense, and is not essential nor relevant (material) for that purpose or for the fair disposition of the case. Important factors in this connection are that the accused admits or does not deny guilt, or makes no defense on the merits, or that there is independent evidence of accused's guilt."

See *State v. Fletcher* and *State v. St. Arnold,* 279 N.C. 85, 181 S.E. 2d 405 (1971); *State v. Swaney,* 277 N.C. 602, 178 S.E. 2d 399 (1970).

In the present case, defendant made no defense on the merits. The evidence which established the guilt of defendant was independent and did not rely on any facts provided by the informer. Furthermore, the trial court found as a fact on evidence offered on *voir dire* that, in the opinion of Officer Conant, defendant and the person with the officer were acquainted. Based on this finding and the further finding that the unknown person was not present at the time of the actual sale of the heroin, the court concluded that the name of this person was not necessary to the defense of defendant's case. We hold that the trial judge properly denied defendant's motion to disclose the identity of the informer.

[2] Defendant next assigns as error the denial of his motion for a bill of particulars. G.S. 15-143 provides that when further information not required to be set out in the bill of indictment is desirable for the better defense of the accused, the court upon motion may in its discretion require the solicitor to furnish a bill of particulars. The function of a bill of particulars is to inform the defendant of the nature of the evidence which the State proposes to offer. *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44 (1967). The granting or denial of motions for a bill of particulars is within the discretion of the court and not subject to review except for palpable and gross abuse thereof. *State v. Spence,* 271 N.C. 23, 155 S.E. 2d 802 (1967); *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10 (1966); *State v. Overman, supra; State v. Lippard,* 223 N.C. 167, 25 S.E. 2d 594 (1943).

The indictments in this case contained the following information: (1) the name of the defendant, (2) the date on which the offenses occurred, (3) the type of illegal drug possessed and sold, (4) the name of the person to whom the illegal drug was sold, (5) the quantity sold, (6) the amount charged for the illegal drug, and (7) the county in which the illegal acts took place. Defendant was also furnished a list of the State's witnesses who might be called in the case. All the information surrounding the commission of the crime was contained in the bills of indictment or could have been obtained by the defendant from an examination of the State's witnesses. Under these circumstances, defendant has failed to show any abuse of discretion. This assignment is overruled.

[3] On 12 April 1972, the date on which the present cases were calendared for trial, a special Durham County grand jury returned two bills of indictment against defendant, one charging him with possession of 700 bindles of heroin and the other for continuing criminal enterprise. The bills were returned just prior to the noon recess. Defendant was in the courtroom and was immediately arrested. The court then set bond in the amount of $200,000. The Durham Sun that afternoon carried a front page story concerning the two new bills of indictment against defendant. That same afternoon defendant moved for a continuance of the present cases on account of this adverse publicity. The motion was denied and defendant assigns this denial as error.

The trial judge, before the jury was selected, made the following statement to the jurors:

> "Now, ladies and gentlemen of the jury, mostly ladies looks like, I mentioned to you yesterday afternoon before court closed that there was some publicity in the paper concerning Mr. Cameron about another matter, not the matter that is being tried here, and requested that you not read any newspaper so that it would not influence you. I asked you also not to listen to any radio reports or television matters.
>
> * * *
>
> "Now, as I told you yesterday, ladies and gentlemen, all we are interested in and the only reason for any of us being here is to see that people get a fair trial. That fair trial presupposes a jury that will base its verdict solely and entirely on two things, and two things alone: The first is the sworn testimony that comes from the witness stand; the second the instructions as to the law which the Court will give you in its charge.
>
> * * *
>
> "I do want to ask, however, if any of you heard or read anything concerning Mr. Cameron that would in any way influence or affect your verdict in this case. If any of you have, I wish you would please tell me now.
>
> (No response)

"Do any of you know of any reason whatsoever whether you have been asked the question by the attorneys or by the Court, do any of you have any doubt in your mind at this point that you can give Mr. Cameron a completely fair and impartial trial on these charges which allegedly occurred last February, or February a year ago? Do any of you have any reservation at all?

(No response.)"

The presiding judge throughout the trial clearly and explicitly instructed the jurors that they were not to read any newspaper accounts or listen to television or radio comments concerning defendant. There is nothing to suggest that these instructions were not complied with by the jurors. In addition, and just before submitting the case to the jury, the trial judge inquired of the jurors if they had read or heard anything about defendant and, if so, had they been in any manner influenced by it. None indicated that he had.

"A motion for continuance is ordinarily addressed to the discretion of the trial judge and his ruling thereon is not subject to review absent abuse of discretion." *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1971); *State v. Stinson,* 267 N.C. 661, 148 S.E. 2d 593 (1966). In the present case, it does not appear that any juror read or heard about the other charges against defendant or that any juror was influenced or prejudiced by this publicity. Therefore, no abuse of discretion is shown, and defendant's assignment of error to the denial of his motion to continue is overruled.

Defendant further contends, however, that his motion for a mistrial made during the trial, based upon this same adverse publicity, should have been granted.

"As a general rule the allowance or refusal of a motion for mistrial in a criminal case less than capital rests largely in the discretion of the trial court." 3 Strong, N. C. Index 2d, Criminal Law § 128, p. 49, and cases therein cited. "In the absence of any showing of prejudice, no abuse of discretion is shown." *State v. McVay* and *State v. Simmons,* 279 N.C. 428, 183 S.E. 2d 652 (1971). *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269 (1967). Error will not be presumed. *State v. Partlow,* 272 N.C. 60, 157 S.E. 2d 688 (1967); *State v. Shepherd,* 230 N.C. 605, 55 S.E. 2d 79 (1949); 3 Strong, N. C. Index 2d,

Criminal Law § 167, p. 127. In the present case no prejudice or abuse of discretion is shown. For the same reasons that the motion for continuance was denied, this assignment is overruled.

[4] Defendant next assigns as error the denial of his motions for nonsuit at the close of the State's evidence and at the close of all the evidence.

Officer Conant testified that defendant had in his possession 15 bindles of a substance later determined to be heroin and that defendant sold these 15 bindles containing heroin to Officer Conant for $60. This evidence is sufficient to be submitted to the jury and to support a verdict of guilty on both charges. Therefore, the motions for judgment as of nonsuit were properly denied. *State v. Roseman,* 279 N.C. 573, 184 S.E. 2d 289 (1971); *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971); *State v. Miller,* 268 N.C. 532, 151 S.E. 2d 47 (1966).

[5, 6] Finally, defendant contends that possession of a narcotic drug is a lesser included offense of the sale of a narcotic drug and that consecutive sentences for separate convictions for possession and for sale constitute former jeopardy under both the North Carolina and United States Constitutions. Defendant contends that it is necessary to possess a drug in order to sell it and that possession and sale constitute a single criminal offense and permit only a single punishment.

In *State v. Ballard,* 280 N.C. 479, 482, 186 S.E. 2d 372, 373 (1972) Chief Justice Bobbitt speaking for the Court stated:

> " 'It is a fundamental and sacred principle of the common law, deeply imbedded in our criminal jurisprudence, that no person can be twice put in jeopardy of life or limb for the same offense. [Citations omitted.] It was incorporated in the Bill of Rights of the Federal Constitution. (United States Constitution, Amendment V.) While the principle is not stated in express terms in the North Carolina Constitution, it has been regarded as an integral part of the "law of the land" within the meaning of Art. I, sec. 17 [now sec. 19]. [Citation omitted.]' *State v. Crocker,* 239 N.C. 446, 449, 80 S.E. 2d 243, 245 (1954).
>
> "Overruling prior decisions, the Supreme Court of the United States held in *Benton v. Maryland,* 395 U.S. 784, 23

> L.Ed. 2d 707, 89 S.Ct. 2056 (1969), that the double-jeopardy clause of the Fifth Admendment is applicable to the states through the Fourteenth Amendment. . . ."

Therefore, in this case Federal as well as State double jeopardy standards control the decision. The constitutional guarantee against former jeopardy also protects a defendant from multiple punishment for the same offense. *State v. Summrell,* 282 N.C. 157, 192 S.E. 2d 569 (1972). As was aptly stated in *North Carolina v. Pearce,* 395 U.S. 711, 23 L.Ed. 2d 656, 89 S.Ct. 2072 (1969):

> " . . . That guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense. . . . "

The basic rule in North Carolina concerning former jeopardy is set out in 2 Strong, N. C. Index 2d, Criminal Law § 26, pp. 517-18:

> "The test of former jeopardy is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. Hence, the plea of former jeopardy, to be good, must be grounded on the 'same offense,' both in law and in fact, and it is not sufficient that the two offenses grew out of the same transaction. If evidence in support of the facts alleged in the second indictment would be sufficient to sustain a conviction under the first indictment, jeopardy attaches, otherwise not. However, if proof of an additional fact is required in the one prosecution, which is not required in the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same, and the plea of former jeopardy cannot be sustained. . . . "

These principles have been applied by this Court in a series of decisions to a set of factual situations so analogous to the instant case that they cannot be distinguished. Non-taxpaid liquor is a contraband, the possession, transportation and sale of which are unlawful. Similarly, narcotic drugs are contraband, the possession and sale of which are unlawful. The only difference is the nature of the contraband. This is a difference totally

without distinction for the purpose of analyzing the question presented in this case.

In *State v. Moschoures,* 214 N.C. 321, 199 S.E. 92 (1938), the defendant was charged in two counts in a bill of indictment with unlawful possession of liquor for the purpose of sale and unlawful sale of liquor. He entered a general plea of guilty and the trial judge imposed an active sentence on the first count and a suspended sentence on the second count. The defendant on appeal contended that the warrant only charged one offense and supported only one sentence. This Court, in a *per curiam* opinion, rejected the contention stating:

> " . . . The first count clearly contains a charge of unlawful possession of intoxicating liquors for the purpose of sale and the second count a charge of unlawful sale of intoxicating liquors. C.S., 3411(b). These are distinct charges of separate offenses, and support the separate sentences imposed."

In *State v. Chavis,* 232 N.C. 83, 59 S.E. 2d 348 (1950), the defendant was convicted of (1) unlawfully possessing a quantity of non-taxpaid intoxicating liquors and (2) unlawfully transporting a quantity of non-taxpaid intoxicating liquors. It was asserted on appeal "that it is not competent to find the defendant guilty of two offenses and fix separate punishments therefor when the facts constituting the two purported crimes are identical, the possession being physically necessary to the act of transportation." This Court, in an opinion by Justice Seawell, rejected this contention and affirmed both convictions, stating:

> "Two things will help us in our thinking: we are not dealing with common law crimes but with statutory offenses; and not with a single *act* with two criminal labels but with *component transactions* violative of distinct statutory provisions denouncing them as crimes. Neither in fact nor law are they the same. *State v. Midgett,* 214 N.C. 107, 198 S.E. 613. They are not related as different degrees or major and minor parts of the same crime and the doctrine of merger does not apply. The incidental fact that possession goes with the transportation is not significant in law as defeating the legislative right to ban both or either. When the distinction between the offenses is considered in the light of their purpose, vastly different social

> implications are involved and the impact of the crime of greater magnitude on the attempted suppression of the liquor traffic is sufficient to preserve the legislative distinction and intent in denouncing each as a separate punishable offense."

Chavis was reaffirmed in *State v. Stonestreet,* 243 N.C. 28, 89 S.E. 2d 734 (1955), in which Justice Bobbitt (now Chief Justice) said: "When an indictment charges separately the unlawful possession and unlawful transportation of intoxicating liquor, a separate judgment may be pronounced on each count."

To like effect, in *Albrecht v. United States,* 273 U.S. 1, 71 L.Ed. 505, 47 S.Ct. 250 (1926), Mr. Justice Brandeis, writing for the Court, said:

> " . . . The contention is that there was double punishment because the liquor which the defendants were convicted for having sold is the same that they were convicted for having possessed. But possessing and selling are distinct offenses . . . . There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction. . . . "

The same rule was articulated in a recent Federal case concerning the violation of narcotic drug laws. Defendant had been convicted of illegally transporting narcotic drugs and of illegally possessing narcotic drugs. He received separate sentences for each conviction. In *Vincent v. Mosely,* 327 F. Supp. 975 (E.D. Mo. 1971), affirmed 453 F. 2d 1218 (8th Cir. 1972), he instituted a collateral attack on the separate sentences on the ground that there was one act of allegedly transporting a quantity of narcotic drugs from one state to another. He contended if the government proved transporting the drug, it would necessitate proving possession, and this would be one act, one offense, and should permit only one sentence. The court refused to disturb the sentence for possession stating:

> "This argument is without tenable basis under the decision in *Gore v. United States,* 357 U.S. 386, 389, 78 S.Ct. 1280, 1283, 2 L.Ed. 2d 1405 (1958), which stated that 'The fact that an offender violates by a single transaction several regulatory controls devised by Congress as means for dealing with a social evil as deleterious as it is

difficult to combat does not make the several different regulatory controls single and identic.' . . . "

In 72 C.J.S. Poisons § 8, p. 181, the rule is stated: "Illegal sale and illegal possession constitute two different crimes under statutes prohibiting sale and possession of poisons or drugs." *Cf. Kelley v. United States,* 275 F. 2d 10 (D.C. Cir. 1960); *Torres Martinez v. United States,* 220 F. 2d 740 (1st Cir. 1955).

Both New Jersey and Georgia have adopted a similar rule. In *State v. Booker,* 86 N.J. Super. 175, 206 A. 2d 365 (1965), the defendant had the narcotics on his person when he approached the buyer and made the sale. The Court held that these facts constituted two punishable offenses: possession and sale of narcotic drugs.

In *Gee v. State,* 225 Ga. 669, 171 S.E. 2d 291 (1969), defendant was convicted of the possession and the sale of the same quantity of amphetamine. Defendant challenged the conviction for possession on the ground of multiple punishment. The Court rejected this contention stating:

> "There are different elements present in the two crimes of selling and possessing the prohibited drugs. Proof of the illegal sale of the drugs would not prove the illegal possession of the drugs, since persons might legally possess the drugs who could not legally sell them. Proof of the illegal possession of the drugs would not prove the illegal sale of the drugs. Neither offense is a necessary element in, and constitutes an essential part of, the other offense. . . . "

In North Carolina, G.S. 90-88 prohibits the possession and sale of narcotic drugs "except as authorized in this article." Subsequent sections of the Narcotic Drug Act authorize certain individuals to lawfully possess narcotic drugs. However, these same persons are not always authorized to sell the drugs which they lawfully possess. Consequently, one may be guilty of the illegal sale of a narcotic drug in violation of G.S. 90-88 even though he is in possession lawfully. Illegal possession is not, then, a necessary element of the offense of unlawful sale of a narcotic drug. Certainly, a sale involves an additional fact not required for possession. In *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44 (1967), Justice Lake stated:

> "If each of two criminal offenses, as a matter of law, requires proof of some fact, proof of which fact is not required for conviction of the other offense, the two offenses are not the same and a former jeopardy with reference to the one does not bar a subsequent prosecution for and conviction for the other . . . . "

See also *State v. Richardson*, 279 N.C. 621, 185 S.E. 2d 102 (1971).

A violation of G.S. 90-88 is a felony and is punishable by a maximum of five years' imprisonment. By setting out both the possession and sale as separate offenses in the statute and by prescribing the same punishment for possession and for sale, it is apparent that the General Assembly intended possession and sale to be treated as distinct crimes of equal degree, to be separately punished rather than providing that one should be a lesser included offense in the other.

The unlawful sale of a narcotic drug is a specific act and a given sale occurs only at one specific time. Unlawful possession, however, is a continuing violation of the law. It begins as soon as an individual first unlawfully obtains possession of the drug, whatever the purpose of that possession might be, and does not end until he divests himself of it. In this case defendant was violating the law in that he was possessing the heroin not only when he was in his house on the evening of the sale but from the time that he originally came into possession of it. This could have been one hour, one day, one week, or one month prior to the sale. The length of time makes no difference. He had been violating the law from the time he first took possession and control of the heroin. This was a continuing offense and was not a single act which occurred at the time of the sale. *State v. Roberts*, 276 N.C. 98, 171 S.E. 2d 440 (1969).

Defendant relies upon the case of *State v. Thornton*, 17 N.C. App. 225, 193 S.E. 2d 373 (1972). There the defendant was indicted for the possession and the sale of heroin. The Court of Appeals specifically held that the defendant could not be tried, convicted, and punished under both indictments, stating: "Upon the legal principles discussed in *State v. Summrell, supra* [282 N.C. 157, 192 S.E. 2d 569 (1972)], we hold that in the instant case two separate, distinct, and punishable crimes were not established." In *Summrell* defendant was charged in one warrant with resisting an officer and in another warrant he was

charged with assaulting an officer, each warrant specifying the same conduct of the defendant in resisting and in assaulting the officer. Justice Sharp, speaking for the Court, stated: "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." The Court then held that there was no error in the defendant's conviction for resisting an officer but that defendant's conviction for assaulting an officer should be vacated and the judgment arrested since defendant had been twice convicted and sentenced for the same criminal offense. Neither in the instant case nor in *Thornton* did each indictment include all the elements of the offense charged in the other, as was the situation in *Summrell.* The North Carolina Court of Appeals, therefore, erred in applying *Summrell* in the *Thornton* case and in holding that punishment of two consecutive terms for conviction of both possession and sale was unconstitutional as double jeopardy.

The North Carolina General Assembly has determined that the unlawful possession of heroin is illegal. The General Assembly has also determined that the unlawful sale of heroin is illegal. While possession may be a part of the sale, the possession may be legal and the sale illegal; therefore, they are separate and distinct offenses. Neither in fact nor law are they the same. We hold, then, that in the instant case two separate, distinct, and punishable crimes were established, and that the court did not err in imposing consecutive sentences.

For the reasons stated, the decision of the Court of Appeals is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. GEORGE STREETER

No. 22

(Filed 11 April 1973)

1. Arrest and Bail § 3— probable cause to arrest

An arrest is constitutionally valid when the officers have probable cause to make it; whether probable cause exists depends upon

whether at that moment the facts and circumstances within their knowledge and of which they have reasonably trustworthy information are sufficient to warrant a prudent man in believing that the suspect has committed or is committing an offense.

2. **Searches and Seizures § 1— search incident to arrest**

When a person is lawfully arrested a search of his person may be made without a search warrant.

3. **Arrest and Bail § 3; Criminal Law § 84; Searches and Seizures § 1— arrest without warrant — probable cause — search incident to arrest**

Police officers had probable cause to believe that defendant was carrying a concealed weapon in their presence, and thus had authority to arrest defendant without a warrant, when the officers observed defendant walking beside a deserted street near a doctor's office and other business establishments at 2:45 a.m., the officers stopped to learn defendant's identity and destination, the officers observed defendant's shirttail hanging outside his trousers and a bulge under his shirt on the right side where a holster and revolver would ordinarily be located, and one officer touched the bulging object and it felt like metal; and when the officer, believing defendant possessed a gun, reached under defendant's shirttail and discovered burglary tools, such search was incident to a lawful arrest and the fruits of the search were lawfully admitted in evidence.

4. **Searches and Seizures § 1— stop and frisk — absence of statute**

The absence of a stop and frisk statute is not fatal to the authority of law enforcement officers in North Carolina to stop suspicious persons for questioning (field interrogation) and to search those persons for dangerous weapons (frisking), since those practices are valid under the common law.

5. **Searches and Seizures § 1— authority of officer to stop and frisk**

If the totality of circumstances affords an officer reasonable grounds to believe that criminal activity may be afoot, he may temporarily detain the suspect; if, after the detention, his personal observations confirm his apprehension that criminal activity may be afoot and indicate that the person may be armed, he may then frisk him as a matter of self protection.

6. **Searches and Seizures § 1— limited weapons search — discovery of burglary tools**

When law officers stopped to learn defendant's identity and his reason for being on a deserted street near a doctor's office and other business establishments at 2:45 a.m., and the officers saw a bulge protruding from beneath defendant's shirt which appeared to be a gun, it was reasonable by Fourth Amendment standards for the officers to conduct a limited protective search for weapons immediately, even if the officers had no probable cause to arrest defendant, and burglary tools necessarily exposed by the limited weapons search were lawfully obtained and are not excluded by either the Fourth Amendment or G.S. 15-27(a).

Justice SHARP concurs in result.

JUSTICE HIGGINS dissenting.

Chief Justice BOBBITT joins in the dissenting opinion.

DEFENDANT appeals from decision of the Court of Appeals, 17 N.C. App. 48, upholding judgment of *Rouse, J.*, 6 December 1971 Criminal Session, PITT Superior Court.

Defendant was charged in a bill of indictment, proper in form, with the felonious possession of implements of housebreaking, to wit: one pair of gloves, one flashlight, one hammer, one prybar, one screwdriver, and one green bag.

The State's evidence tends to show that while on routine patrol Sergeant David R. Bullock and Officer R. M. Nichols of the Greenville Police Department observed defendant walking beside North Carolina Highway No. 43 approximately four hundred feet from Dr. Graves' office at 2:45 a.m. on 26 October 1971. Defendant, whom the officers did not know, was wearing a long-sleeved blue shirt with the shirttail outside his trousers and hanging below his waist. In view of the hour and defendant's proximity to business offices, Sergeant Bullock stopped to learn defendant's identity and why he was in the area at that hour of the morning. He alighted from the police cruiser, approached defendant, who had stopped a short distance from the paved portion of the highway, and engaged him in conversation. While talking to him, Sergeant Bullock "saw something bulging from under his shirt" on the right side where a holster and revolver would ordinarily be located. The officer then told him "not to move," and, thinking the bulging object was a revolver, touched it. It felt like metal. Believing defendant possessed a gun, the officer reached under defendant's shirttail and found one pair of gloves, one screwdriver, one hammer, one prybar, a flashlight, and one green Wachovia money bag. The officers took possession of this assortment and placed defendant under arrest for possession of burglary tools.

Sergeant Bullock's testimony was admitted in evidence over defense objections following a voir dire examination and findings of fact by the trial judge. The items taken from defendant's person by the officer were also admitted into evidence over objection.

Defendant testified that he was walking along the side of the street when the police car stopped; that he then stopped

and the officers asked his name and where he was going and he told them; that when the officer got out of the car and walked around "to where I was he patted . . . my back pocket really and then he pulled out this screwdriver"; that he asked the officer if the search was legal and the officer said yes; that he obeyed instructions to put his hands up against the car at which time the officer searched him and removed the other articles.

On cross-examination defendant denied he was a dope addict but admitted that certain holes in his arm were needle marks. He said he had been hospitalized in the Veterans' Hospital in Salem, Virginia, for drug addiction and now receives medication from Dr. Best. When arrested, he asked the officers to call Dr. Best, and the doctor told the officers to take him to the hospital. He stated that he had not used unauthorized narcotics since August and was using legal narcotics prescribed by Dr. Best "while I am in jail." He asserted that on the night of his arrest he had been at home prior to 2:45 a.m. and arose at that hour of the morning to go to Samuel Dixon's house to meet with friends and do some carpentry work Mr. Dixon had requested him to do that night. He explained the tools under his shirt in the following language: "I had the objects underneath the shirt because I had on a shirt that has tails and when I am not wearing a coat I normally wear a shirt on the outside and I had the objects in my pocket. The shirt wasn't a means of concealing; just a way of wearing the shirt."

The jury convicted defendant of possession of burglary tools, a violation of G.S. 14-55, and he was sentenced to a prison term of not less than eighteen months nor more than six years. The Court of Appeals upheld the judgment and defendant appealed to the Supreme Court, allegedly as of right pursuant to G.S. 7A-30(1), asserting a violation of his Fourth Amendment rights against unlawful searches and seizures.

Robert Morgan, Attorney General; Christine Y. Denson, Assistant Attorney General, for the State of North Carolina.

William E. Grantmyre, Attorney for defendant appellant.

HUSKINS, Justice.

This case involves the admissibility of evidence obtained by officers as a result of defendant's on-the-street arrest and the

accompanying search of his person. Defendant contends his warrantless arrest was without probable cause, the search of his person illegal, and the fruits of the search inadmissible in evidence against him.

We first determine whether the facts afforded the officers probable cause to arrest defendant and whether the search of his person was incident to that arrest.

"Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. * * * To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith." 5 Am. Jur. 2d *Arrests* § 44 (1962). "The existence of 'probable cause,' justifying an arrest without a warrant, is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. It is a pragmatic question to be determined in each case in the light of the particular circumstances and the particular offense involved." 5 Am. Jur. 2d *Arrests* § 48. *Accord, Brinegar v. United States,* 338 U.S. 160, 93 L.Ed. 1879, 69 S.Ct. 1302 (1949); *State v. Roberts,* 276 N.C. 98, 171 S.E. 2d 440 (1970).

[1] An arrest is constitutionally valid when the officers have probable cause to make it. Whether probable cause exists depends upon "whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Beck v. Ohio,* 379 U.S. 89, 13 L.Ed. 2d 142, 85 S.Ct. 223 (1964).

It is provided by statute that a peace officer may make an arrest without a warrant: "(1) When the person to be arrested has committed a felony or misdemeanor in the presence of the officer, or when the officer has reasonable ground to believe that the person to be arrested has committed a felony or misdemeanor in his presence; . . . " G.S. 15-41.

[2] When a person is lawfully arrested a search of his person may be made without a search warrant. "Unquestionably, when a person is lawfully arrested, the police have the right, without

a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime." *Preston v. United States*, 376 U.S. 364, 11 L.Ed. 2d 777, 84 S.Ct. 881 (1964). *Accord, State v. Harris*, 279 N.C. 307, 182 S.E. 2d 364 (1971).

[3] What were the factual and practical grounds in this case which actuated Officers Bullock and Nichols to arrest defendant and search him? They may be enumerated as follows: (1) Defendant cast furtive glances toward the police car as it approached him; (2) the hour was 2:45 a.m., the streets of Greenville were deserted save for defendant alone, and he was walking or standing beside the road a few hundred feet from a doctor's office and other business establishments; (3) the officers did not recognize defendant but observed his shirttail outside his trousers and hanging below his waist; (4) the officers stopped to learn defendant's identity and make inquiry concerning his destination; (5) when Sergeant Bullock approached defendant and engaged him in conversation he "saw something bulging from under his shirt" on the right side where a holster and revolver would ordinarily be located; (6) thinking the bulging object was a revolver, the officer told defendant "not to move," touched the bulge and it felt like metal, and then reached under defendant's shirttail and discovered the burglary tools.

In our opinion these facts would actuate any reasonably prudent man acting in good faith to believe that defendant was carrying a concealed weapon in the presence of the officer, a violation of G.S. 14-269. Thus there was probable cause for the arrest which ensued.

Such probable cause arose when, in the nocturnal setting depicted by the evidence, Officer Bullock saw the bulge. Defendant was not under arrest prior to that time—no arrest was effected by merely stopping the police car beside defendant and getting out to talk to him. *Accord, Knight v. State*, 502 P. 2d 347 (Okla. Crim. App. 1972). "No one is protected by the Constitution against the mere approach of police officers in a public place." *United States v. Hill*, 340 F. Supp. 344 (E.D. Pa. 1972). Nor is there anything in the Constitution which prevents a policeman from addressing questions to anyone on the streets. See concurring opinion of Mr. Jusice White in *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1968).

It follows that the search of defendant's person was incident to a lawful arrest and the fruits of the search were properly admitted in evidence. Neither his seizure under the circumstances revealed by this record nor the search of his person was unlawful by Fourth Amendment standards.

The Court of Appeals held, and properly so, that even in the absence of probable cause to arrest these officers had a right, upon the facts here, to search defendant for dangerous weapons for their own self-protection.

[4] Crimes of violence are on the increase, and officers are becoming the victims of such crimes in increasing numbers. As a result the necessity for officers to protect themselves and others in situations where probable cause for an arrest may be lacking is now recognized and permitted. Of course, North Carolina has no "stop and frisk" statute although many states do. See Raphael, "Stop and Frisk" in a Nutshell: Some Last Editorial Thrusts and Parries Before It All Becomes History, 20 Ala. L. Rev. 294 (1968). The lack of such statute, however, is not fatal to the authority of law enforcement officers in North Carolina to stop suspicious persons for questioning (field interrogation) and to search those persons for dangerous weapons (frisking). These practices have been a time-honored police procedure and have been recognized as valid at common law "as a reasonable and necessary police authority for the prevention of crime and the preservation of public order." *People v. Rivera,* 14 N.Y. 2d 441, 252 N.Y.S. 2d 458, 201 N.E. 2d 32 (1964), and authorities cited. *See also, United States v. Vita,* 294 F. 2d 524 (2d cir. 1961); Cook, Detention and the Fourth Amendment, 23 Ala. L. Rev. 387 (1970-71); LaFave, "Street Encounters" and the Constitution: Terry, Sibron, Peters and Beyond, 67 Mich. L. Rev. 40 (1968). Since the common law, unless abrogated or repealed by statute, is in full force and effect in this State, G.S. 4-1, the absence of statutory authority to stop and frisk does not render these common law practices illegal in our State.

Nor does the Federal Constitution prohibit them when they are reasonably employed. In *Terry v. Ohio,* 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1968), the Court held, among other things, that "the central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal liberty. * * *

[W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm."

The Court then recognized that it is not always unreasonable to seize a person and subject him to a limited search for weapons where there is no probable cause for an arrest, stating: "[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such person in an attempt to discover weapons which might to be used to assault him." *Terry v. Ohio, supra.*

[5] Thus, if the totality of circumstances affords an officer reasonable grounds to believe that criminal activity may be afoot, he may temporarily detain the suspect, If, after the detention, his personal observations confirm his apprehension that criminal activity may be afoot and indicate that the person may be armed, he may then frisk him as a matter of self-protection. *Terry v. Ohio, supra. See Adams v. Williams,* 407 U.S. 143, 32 L.Ed. 2d 612, 92 S.Ct. 1921 (1972).

[6] When the foregoing principles are applied to the facts in this case, it is apparent that when Officer Bullock saw the bulge protruding beneath defendant's shirt under suspicious circumstances at 2:45 a.m. on a deserted street, it was entirely reasonable by Fourth Amendment standards to conduct a limited protective search for weapons immediately. Contraband evidence of crime necessarily exposed by the limited weapons search is evidence lawfully obtained, and neither the Fourth Amendment nor G.S. 15-27(a) excludes it.

For the reasons herein stated the decision of the Court of Appeals upholding the verdict and judgment is

Affirmed.

Justice SHARP concurs in result.

Justice HIGGINS dissenting.

Certain parts of the evidence which I deem material are not referred to in the Court's opinion.

At the time here involved, 2:45 in the morning, Officer Bullock and a companion were on routine patrol, not investigating any particular offense and not in search of any suspect for any offense. Officer Bullock testified: "When I first observed the defendant he was on West Fifth Street. He was approximately five feet from the road pavement. . . . I stopped the defendant because he turned around and looked at me and looked back. I didn't see who it was and at that time of the morning I thought it was my job to see who it was. I did not ask permission to search the defendant before I touched that object. The shirt came down over the object and I could not see anything. The bulge was on the right hand side on his hip. . . . I thought the object underneath the defendant's shirt was a gun. I thought it was a gun by instinct."

The officer further testified that the first object he removed from the defendant's pocket was a glove. He testified that the object he touched was a screwdriver. After finding the object in the defendant's pocket was not a pistol, he continued the search and removed another glove, a pry bar, a flashlight, and a money bag from the defendant's pocket. These objects were offered in evidence over the defendant's objection. Their admissibility, of course, depended on the legal validity of the search which produced them.

Every citizen has a constitutional right to be free from unreasonable search and seizure. Neither the lawmaking body, nor the Court can take the right away. A seizure of the person takes place when the law enforcement officer by physical force or show of authority curtails the liberty of the citizen to go and come as he pleases. Before the officer places a hand on the person of a citizen in search of anything, he must have constitutionally adequate ground for doing so. *Terry v. Ohio,* 392

U.S. 1. A lawful search of the person may be made in two instances: (1) Where the officer has a valid warrant; (2) where a protective search is made incident to a lawful arrest without a warrant. In a later case the Supreme Court of the United States in *Sibron v. New York,* 392 U.S. 40, states the rule: "In the case of the self-protective search for weapons, he [officer] must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous."

In the case now before us, the hour was 2:45 a.m. The defendant was on a public street in Greenville. There was no curfew in effect. The defendant looked at the officers as they approached. This fact the officer cites as one of the reasons why he became suspicious and considered it his duty to investigate further. Obviously, at the time and under the circumstances it would have been more suspicious if the defendant had refused to look in the direction of the officers. When the officers stopped and interrogated the defendant, Officer Bullock saw a bulge in the defendant's hip pocket. Without permission he placed his hand on the object, found it was metal, and proceeded to search, ascertaining that the metal object was a screwdriver. At this juncture it would seem that the officer should have been satisfied that his instinct had misled him. However, instead he proceeded to continue the search, emptying the defendant's pockets. This sort of search is described by the Supreme Court of the United States in these words: "A general exploratory rummaging." *Coolidge v. New Hampshire,* 403 U.S. 443, 29 L.Ed. 2d 564.

Nowhere have I been able to find where a court has approved a search with so little factual background. The cases where the court has approved a search have been connected with recent violations of the law and the persons searched were in close proximity thereto. In *Robinson v. Commonwealth,* 207 Ky. 53, the arresting officer could see the outlines of a pistol and identified it as such on the person of the defendant. In *Banks v. Commonwealth,* 202 Ky. 762, the officer heard shots, thereafter saw a bulge in the defendant's pocket, arrested him, and obtained the pistol. In *U. S. v. Lee,* 271 A. 2d 566, the defendant was observed outside a store which had been robbed. The police asked for his identification and when he reached for his wallet, they noticed a bulge under his shirt, frisked him, and found the pistol. In *Williams v. State,* 253 A. 2d 786, officers

stopped a suspect who was leaving the scene of a homicide. He matched the description given and when the officer noticed a bulge, he searched and found a pistol.

Though not raised in the record or discussed in the briefs is the question whether the objects found on the defendant are within the proper definition of burglary tools or implements of housebreaking and whether the defendant possessed them without lawful excuse. The defendant testified he was on his way to Samuel Dixon's house. All the tools are suitable to legitimate use. *State v. Morgan,* 268 N.C. 214, 150 S.E. 2d 377; *State v. Garrett,* 263 N.C. 773, 140 S.E. 2d 315. A small pry bar is in general use in practically every home as a bottle or can opener. If we concede the implements may be within the contained classification, their discovery cannot be used to authorize a search for a pistol. "Such unlawful search is not made lawful because of resulting discoveries." *State v. McCloud,* 276 N.C. 518, 173 S.E. 2d 753. See also *Mapp v. Ohio,* 367 U.S. 643, 6 L.Ed. 2d 1081.

I vote to reverse the decision of the Court of Appeals.

Chief Justice BOBBITT joins in this dissenting opinion.

GRAYBAR ELECTRIC COMPANY v. HAROLD E. SHOOK, TRADING AND DOING BUSINESS AS MID-SOUTH CONTRACTING COMPANY

No. 48

(Filed 11 April 1973)

Sales § 10; Uniform Commercial Code §§ 19, 22— nonconforming goods — notice of rejection — storage by buyer — goods stolen — liability for loss

In this action to recover the sales price of aerial cable which was rejected by defendant because the order was for burial cable and which was stolen from defendant's storage space some three months after defendant gave plaintiff notice of rejection, the evidence was sufficient to support findings by the trial court that defendant gave prompt notice to plaintiff that he was rejecting the nonconforming cable, that defendant did not contract with plaintiff to return the cable and that defendant was not negligent in storing the cable in his regular storage space where plaintiff had delivered it next to a grocery store and near the store owner's dwelling, and the court properly concluded that defendant was not liable for loss of the cable. G.S. 25-2-510(1); G.S. 25-2-602(2)(b).

ON *certiorari* to the Court of Appeals to review its decision filed December 20, 1972, affirming a judgment of the Superior Court of BUNCOMBE County denying recovery and dismissing the plaintiff's action.

The record discloses that Judge Thornburg, without a jury, tried the case upon the pleadings, stipulations, and interrogatories. He made detailed findings of fact, stated his conclusions of applicable law, and dismissed the action at the plaintiff's cost. The Court of Appeals affirmed the judgment. We allowed certiorari.

The plaintiff, Graybar Electric Company, is a New York corporation doing business in North Carolina with State headquarters at Asheville. The defendant, Harold E. Shook, trading and doing business as Mid-South Contracting Company, is engaged in the business of installing underground telephone lines. In April, 1970, the defendant placed with the plaintiff an order for three reels of burial (underground) cable to be delivered on its construction job at Six Run Grocery Store in a rural section of Sampson County. The plaintiff delivered to the defendant three reels of cable all marked "burial." Examination disclosed that one of the reels complied with the order. Two reels were aerial cable, totally unsuited to defendant's needs. The defendant promptly notified the plaintiff of its mistake, paid for the one reel, and notified the plaintiff to repossess the two for which the defendant had no need.

The plaintiff requested that the nonconforming reels be returned. In an effort to comply with the plaintiff's wishes, the defendant contacted three different trucking concerns, but was unable to have the reels accepted by a carrier because of a strike in the trucking industry. The defendant gave this information to the plaintiff.

As its project continued beyond Six Run, the defendant placed the two reels of cable in the defendant's regular storage space directly beside the store and near the store owner's dwelling. This rented storage space "was well lighted at all times."

On July 20, 1970, the defendant discovered that one of the reels had been stolen. After this discovery, the defendant contacted a garage operator and made arrangements to have the remaining reel transferred to his garage some distance from Six Run. Before the operator actually made the transfer, the

second reel was stolen. The defendant gave the plaintiff prompt notice of the theft of both reels.

On January 29, 1971, the plaintiff brought this action seeking to recover from the defendant the sum of $9,989.85, on account of the stolen cable. The plaintiff based its action on the defendant's failure to return the two reels which the defendant had refused to accept. The plaintiff claimed the defendant promised to make the return. This the defendant denied. The defendant promised the plaintiff that he would endeavor to have a trucking company pick up and return the unacceptable shipment. The foregoing is the substance of the evidence material to this controversy.

The court found facts, of which the above is a summary, and based thereon concluded as a matter of law:

"1. The two reels of aerial cable delivered by the plaintiff did not conform to the contract.

"2. The defendant was entitled to inspect the goods after their arrival at the delivery site.

"3. Since the goods delivered failed to conform to the contract, the defendant was entitled to reject the goods delivered.

"4. The defendant notified the plaintiff within a reasonable time after delivery of the aerial cable that he was rejecting the non-conforming delivery.

"5. After rejection of the delivered goods, the defendant held the goods with reasonable care at the plaintiff's disposition for a time sufficient to permit the plaintiff to remove them. The defendant had no further obligation with regard to the rejected goods.

"6. In the alternative, if the defendant was a bailee of the aerial cable delivered by the plaintiff, the defendant was not liable for the loss of said cable because the plaintiff was duly notified that the cable was being held and that part of the cable had been taken. The plaintiff had sufficient notice and opportunity to take the necessary steps to protect its property. This the plaintiff did not do and cannot, therefore, hold the defendant liable for its loss."

The court entered judgment dismissing the plaintiff's action. The plaintiff appealed to the Court of Appeals which affirmed

the judgment of the superior court. Certiorari brought the case here for further review.

Bennett, Kelly & Long, P.A., by Robert B. Long, Jr., for plaintiff appellant.

Bruce A. Elmore by George W. Moore for defendant appellee.

HIGGINS, Justice.

The parties admitted the following: (1) The defendant placed an order with the plaintiff for three reels of burial (underground) cable to be delivered at Six Run Grocery Store, a rural community sixteen miles south of Clinton. (2) On April 6 the plaintiff delivered one reel of burial cable and, by mistake, delivered two reels of aerial cable. The aerial cable was totally unsuited to the defendant's use. Defendant notified the plaintiff of the mistake and received a request that the nonconforming reels be returned. Here the parties disagree. The plaintiff contends the defendant contracted to make the return. The defendant contends he agreed to contact a trucking company and request that it pick up and return the nonconforming reels. The defendant's request was turned down by three different trucking concerns on account of a strike in the trucking industry.

As the defendant's underground cable work progressed beyond the Six Run Grocery Store, the defendant left the nonconforming cable at the store and so notified the plaintiff. The evidence discloses that the cable was stored directly beside the grocery store building near the owner's dwelling in a space which the defendant rented for storage purposes. "The area where the cable was stored was well lighted at all times."

On July 20, 1970, the defendant discovered that one of the reels had been stolen and the following day notified the plaintiff. On that day, also, the defendant contacted a garage operator who promised to pick up the remaining reel and store it in his garage some distance from Six Run. However, before the transfer, the second reel was stolen. The defendant so notified the plaintiff.

The court, upon the disputed facts, found the defendant had not entered into a contract to return the nonconforming cable. A finding supported by evidence "must be accepted as final truth upon the appeal to the Supreme Court." *Mitchell v. Bar-*

field, 232 N.C. 325, 59 S.E. 2d 810. When findings of fact sufficient to determine the entire controversy are made by the court, failure to find other facts is not error. *Insurance Company v. Insurance Company,* 266 N.C. 430, 146 S.E. 2d 410. The plaintiff's claim, therefore, that it was prejudiced by the court's failure to make requested findings is not error. The court's actual findings determined the entire controversy.

The plaintiff, having made the error of delivering the nonforming goods on a moving job in the country, was entitled to notice of the nonconformity sufficient to enable it to repossess the nonconforming goods. The plaintiff was given prompt notice but delayed action for more than three months. The cable was stolen from the defendant's regular storage space where the plaintiff had delivered it. Evidence is lacking that a safer storage space was available. The defendant's workmen moved on, leaving the cable and the responsibility for its safety on the owner.

The plaintiff, failing in its efforts to establish a contract on the part of the defendant to return the shipment, however, contends in the alternative that G.S. 25-2-602(2)(b) (Uniform Commercial Code) required the defendant to exercise reasonable care in holding the rejected goods pending the plaintiff's repossession and removal and that the defendant failed to exercise the required care in storage.

Actually, the plaintiff made an on the spot delivery at a store and dwelling in the country. The defendant's work force was stringing underground cable along the highway and the crew was in continual movement. Obviously the crew could not be expected to carry with it two thousand pounds of useless cable and was within its rights placing the cable in its regular storage space and notifying the plaintiff of the place of storage. Both parties realized that cable weighing almost a ton would require men and a truck to remove it. Also both parties assumed that the danger of theft from a well lighted store area was a minimal risk. The property itself was a poor candidate for larceny. The cable was permitted to remain where the plaintiff knew it was located for more than three months. The plaintiff, therefore, had ample opportunity to repossess its property.

The Uniform Commercial Code emphasizes promptness and good faith. The prospective purchaser may exercise a valid right to reject and even if he takes possession, responsibility expires

after a reasonable time in which the owner has opportunity to repossess. "Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance." G.S. 25-2-510(1). The defendant did not accept the aerial cable. According to the evidence and the court's findings, the defendant acted in accordance with the request of the owner in attempting to facilitate the return of that which the defendant rejected. The plaintiff with full notice of the place of storage which was at the place of delivery did nothing but sleep on its rights for more than three months.

The superior court was fully justified in the findings of fact, conclusions of law, and in the judgment dismissing the action. The judgment of the Court of Appeals affirming the superior court was correct and is now

Affirmed.

STATE OF NORTH CAROLINA v. JOHN HENRY ANDERSON

No. 33

(Filed 11 April 1973)

1. **Criminal Law § 90— rule that party may not impeach his own witness**

The solicitor is precluded from discrediting a State's witness by evidence that his general character is bad or that the witness has made prior statements inconsistent with or contradictory of his testimony; however, the trial judge has the discretion to permit the solicitor to cross-examine either a hostile or an unwilling witness for the purpose of refreshing his recollection and enabling him to testify correctly, but the trial judge offends the rule that a witness may not be impeached by the party calling him and so commits error if he allows a party to cross-examine his own witness solely for the purpose of proving him to be unworthy of belief.

2. **Criminal Law §§ 90, 102— State's witness — impeachment by solicitor — improper questioning**

The solicitor's questioning of a State's witness with reference to a statement given by her to officers at the time of the homicide, but repudiated by her before trial violated the rule of law which forbids a prosecuting attorney to place before the jury by argument, insinuating questions, or other means, incompetent and prejudicial matters not legally admissible in evidence.

3. **Criminal Law § 90— rule that party may not impeach his own witness — inadmissibility of prior inconsistent statements**

The rule that the State could not impeach its own witness by showing that she had made prior statements contradictory of her

testimony at the trial made a statement given by her to officers immediately after the homicide in question incompetent as evidence; therefore, it was improper for the solicitor to ask the witness questions which clearly suggested the existence and text of such prior inconsistent statements.

4. **Criminal Law § 90— rule that party may not impeach his own witness — questions with respect to prior inconsistent statement — prejudicial error**

Where a State's witness repudiated before trial a statement made by her to officers immediately after the homicide in question, the trial judge erred in allowing the solicitor to cross-examine the witness before the jury with respect to the existence and contents of the statement, and such prejudicial error required that the verdict and judgment be vacated and a new trial be ordered.

APPEAL by defendant from *Brewer, J.*, 11 September 1972 Criminal Session of CUMBERLAND.

Defendant was tried upon an indictment which charged him with the murder of William Junior Archie on 17 June 1972.

The State's evidence tended to show:

The deceased, Archie, roomed at the home of Mrs. Dora Campbell, who lived at 416 Chase Street in Fayetteville. Defendant lived across the street in the home of Mrs. Campbell's sister, Daisy McCleary. Ordinarily the two men were the best of friends. On the evening of 16 June 1972 they had been drinking beer. At the Red Rooster Lounge they got into an argument over a pistol and, about 9:00 p.m., the manager ordered them outside. Later, however, Archie returned alone and remained until 1:00 a.m., when he left with a pistol stuck under his belt.

About 1:38 a.m. on 17 June 1972, in response to a call, Police Officer L. D. McNair went to the home of Dora Campbell. He was the first to arrive but officers John B. Wemys and Alfred Post soon joined him. In the street outside McNair saw defendant and Mrs. Campbell's son, Bubba. Archie's dead body was lying just inside the door; the feet were forward; the head inside the door of the bedroom immediately to the right of the front room. On the left side of the head there was a big hole. In the upper part of the screen door and above the front door were "a lot of small pellet holes."

Observing the presence of Dora Campbell, Officer McNair asked her the name of the dead man and who had shot him.

McNair testified, without objection, that Mrs. Campbell told him John Henry Anderson had shot Archie and then added, "The s.o.b. is out there; go get him." She was "cursing and hollering real loud about Mr. Anderson." She had been drinking but was not intoxicated. McNair went out into the street and asked Bubba, whom he knew, "Who was John Anderson?" Bubba did not answer, but defendant did. Before the officers had directed any questions whatever to him, defendant told them that he was Anderson; that he had shot Archie; and that the gun (a 410-gauge shotgun) was leaning against the McCleary house across the street.

On the basis of defendant's statement McNair arrested him and removed from his pockets one loaded and one spent 410-gauge shotgun shell.

When Officer Wemys arrived at the scene he saw defendant in a group of people in the street. As he approached the group he heard a woman say that defendant had shot Archie twice and heard defendant reply that he had shot only once.

As soon as defendant was arrested and placed in the patrol car, Officer McNair gave him the Miranda warning. Thereafter defendant told McNair that Archie had cut him earlier in the evening and that he shot Archie after returning from the hospital. Defendant said nothing to the officers with reference to self-defense nor did he say deceased had a pistol. Officer Post took Mrs. Campbell to the police department where a statement was obtained from her.

Defendant's death, in the opinion of the pathologist who performed an autopsy, was the result of a shotgun blast which caused massive injury to the entire brain system. The base of the skull "was virtually absent due to the injury." There were multiple fractures of the skull over the left side of the head and the wadding of a shotgun shell along with several lead shots was within the brain.

Before calling Dora Campbell as a witness, in the absence of the jury, the solicitor asked the court to hear evidence and to declare Mrs. Campbell "a hostile witness and allow the State to examine her." On *voir dire,* Mrs. Campbell testified that she was 65 years old; that she had not been drinking on the night of 16 June 1972; that she had retired early and had slept until she was awakened by a gunshot right at her outside door; that

she "was frightened sick" and recalls nothing further; that she does not remember talking to Officers McNair, Wemys or Post, and she did not remember giving the police a signed statement with reference to the shooting.

The solicitor then (still in the absence of the jury) offered the testimony of Officers Alfred Post, L. D. McNair, and John B. Wemys, which tended to show that when they arrived at Mrs. Campbell's home she was cursing defendant "for everything she could lay her mouth to about killing her man Archie"; that she had been drinking; that she accompanied the officers to the police station and there made a statement (State's Exhibit 2) which was transcribed and signed by her about 3:30 a.m. In brief summary, in the statement, Mrs. Campbell said that she was awakened by a knock on the door and told Archie, who was lying on the couch in her bedroom, to answer the door; that he did so and she heard a gun fire twice; that Archie fell back and defendant entered her room, stepped over Archie's body and said that if Archie was not dead he would kill him; that defendant then left, saying that he was going to call the law because he knew they would get him.

The court found Dora Campbell to be a hostile witness and granted the solicitor permission "to ask her leading questions" relative to Archie's death.

The jury returned and, in response to the solicitor's questions, Mrs. Campbell testified that she did not recall telling the officer defendant shot Archie and she did not recall seeing or speaking to any particular police officer on the morning of 17 June 1972. She did recall going to the police station and being questioned but remembers nothing she said. The solicitor then showed her State's Exhibit 2. In answer to his questions she said she did not say any part of what was on that paper and if her mark was on it "somebody must have held [her] hand and made [her] mark it." The solicitor then proceeded to ask Mrs. Campbell, with specific reference to each sentence in Exhibit 2, if she made that particular statement.

The following questions, and Mrs. Campbell's answers thereto, typify the solicitor's "leading questions":

"Q. I ask you if you did not, in fact, tell Officer Post and Officer Brissom that you were asleep in your room and that you

heard a knock on the door and William Archie was on a cot in the bedroom you were in?

"A. No, sir.

"Q. Do you recall telling Officers Brissom and Post that you told William Archie that someone was at the door?

"A. No, I never did tell him nothing.

"Q. Do you recall telling the officers that Archie got up and walked to the door and that you heard a gunshot blast?

"A. No, sir.

"Q. Do you recall telling the officers that Archie fell backwards and that you got up and walked to the door and saw Archie lying there with blood on his face?

"A. No, sir.

"Q. Do you remember telling the officers that John Henry Anderson came in the house with a shotgun and said that if he was not dead he would kill him?

"A. I don't remember saying that.

"Q. Do you recall telling the officers that at that point Anderson stepped over the body and then said, 'If he isn't dead, I will kill him?'

"A. I don't recall that."

As a witness for defendant, Daisy McCleary testified, in substance, as follows:

About 10:30 on the night he was shot, Archie came to the McCleary house and asked for defendant. When Daisy McCleary told him defendant was not there he said he was going to stay there until defendant came home. In reply to her question whether he had cut defendant, Archie said, "I definitely did, and the so-and-so needed a cutting a long time. I give it to him, I knocked John down." Daisy McCleary then tried to get Archie to let her keep his pistol for him until the next day "when he would feel better." Archie declined, saying, "I definitely will not give it to you. I will give it to John and the way I give it to him, he won't like." Archie then stuck the pistol back in his belt and staggered across the street about 12:30 a.m. Daisy McCleary waited for defendant so that she

could warn him. When he came home about twenty-five minutes after Archie had left he asked her if she had seen Archie. Defendant then went into the house and came back out and she heard a gun fire. She "didn't tell John anything when he left because [she] was afraid to tell him that Archie had a gun for him."

Defendant's own testimony tended to show:

On 17 June 1973, Archie owed defendant around $140.00 and he was wearing defendant's shoes. At the Red Rooster Lounge the two were arguing about money and, after they were put out, Archie grabbed defendant, hit him "upside the head" and threw him down. Defendant's jaw was bruised and his mouth cut. A fight ensued and Archie cut defendant on the arm with a razor. A girl took defendant to the hospital where he was "sewed up and charged $29.50." After defendant got home he had no money and thought he would try to get some from Mrs. Campbell by pawning a shotgun. Considerably after midnight he walked across the street and knocked on the door which opened into "Miss Dora's bedroom." Someone, whom he did not see, opened the door and he observed Miss Dora sitting on the side of her bed. He also saw Bubba in the house. As he started toward Miss Dora's bed, Archie jumped up and snatched his .22 pistol from his belt. Defendant shot him and Archie fell back toward the other door. Defendant "really don't know if Archie fired a shot but he did point the gun at [him]." After defendant called the police, "several more people went into the house and came back and said they didn't find any gun."

Defendant did not know Archie was at Miss Dora's when he went there; he did not go over there to kill him. He was not mad at Archie; they were good friends and he feels like they would have made up later on. He did not say a word to Archie, and Archie said nothing to him before he fired the gun. He didn't tell the police he shot in self-defense because they did not ask him, and he did not care to make a statement without a lawyer. Defendant has previously been convicted "of misdemeanor, assault with a deadly weapon, and then larceny and all the rest were misdemeanors except one; that was manslaughter back in 1964."

The State did not ask for the death penalty and the jury found defendant "guilty of murder in the first degree with a recommendation of life imprisonment." From the judgment that

he be imprisoned for the term of his natural life, defendant appealed.

Attorney General Morgan; Associate Attorney Haskell for the State.

Donald W. Grimes, Assistant Public Defender for defendant appellant.

SHARP, Justice.

Defendant states the one question he seeks to raise on the appeal as follows: "Did the court err in its finding that the witness for the State Dora Campbell was a hostile witness and in permitting the Solicitor for the State to cross-examine the witness relative to the shooting of the deceased William Archie on the night of 17 June 1972?"

The foregoing question is based upon defendant's assignment of error and exception No. 4, which challenge the court's ruling which declared Dora Campbell "a hostile witness" and allowed the solicitor "to ask her *leading questions* relative to . . . the killing of the deceased, William Archie, on the night of June 17, 1972" at her home.

Defendant's contentions are that the solicitor's "leading questions" constituted cross-examination of Mrs. Campbell, a State's witness, for the purpose of discrediting her statement that she knew nothing about the actual killing of Archie; that the production of Exhibit 2 before the jury, and the solicitor's seriatim questions with reference to it, were highly prejudicial because the questions implied that Mrs. Campbell had previously answered them orally and in writing in a manner tending to support the charge of murder in the first degree.

[1] Until changed by statute applicable to civil cases (G.S. 1A-1, Rule 43(b) (1969)), it was established law in this State that a party could not impeach his own witness in either a civil or a criminal case. 1 Stansbury, *North Carolina Evidence* § 40 (Brandis rev. 1973). *See also* McCormick, *Evidence* § 38 (Cleary Ed., 2d ed. 1972); 3A Wigmore, *Evidence* §§ 896-905 (Chadbourn rev. 1970). This rule, unchanged as to criminal cases, still precludes the solicitor from discrediting a State's witness by evidence that his general character is bad or that the witness had made prior statements inconsistent with or contradictory of his testimony. However, the trial judge has the discretion to

permit the solicitor to cross-examine either a hostile or an unwilling witness for the purpose of refreshing his recollection and enabling him to testify correctly. "In so doing, the trial judge may permit the party to call the attention of the witness directly to statements made by the witness on other occasions. *S. v. Noland,* [204 N.C. 329, 168 S.E. 413 (1933)]; *S. v. Taylor,* [88 N.C. 694 (1883)]. But the trial judge offends the rule that a witness may not be impeached by the party calling him and so commits error if he allows a party to cross-examine his own witness solely for the purpose of proving him to be unworthy of belief." *State v. Tilley,* 239 N.C. 245, 251, 79 S.E. 2d 473, 477-78 (1954).

In this case it is quite clear that the solicitor, by his "leading questions," was not only undertaking to prove Mrs. Campbell testified falsely when she said she did not make the statements contained in Exhibit 2 and all she knew about the homicide was that she heard a shotgun blast. He was also attempting to induce her to give the jury the same account of events she had given the police immediately after Archie was killed. Failing in this, he wanted to indicate to the jury what she had told the investigating officers at that time.

We note that this case does not present a situation in which the solicitor was surprised by a witness whose testimony in court was contrary to what he had a right to expect. In such an event the court may permit a party to cross-examine his own witness "as to what he had stated in regard to the matter on former occasions, either in court or otherwise, and thus refresh the memory of the witness and give him full opportunity to set the matter right, if he will, and at all events to set [the party] right before the jury. But you cannot do this for the mere purpose of discrediting the witness; nor can you be allowed to prove the contradictory statements of the witness on other occasions, but must be restricted to proving the facts by other evidence." *State v. Taylor, supra* at 697-98.

When the solicitor called Mrs. Campbell to testify before the jury he was well aware that she had either suffered a loss of memory or had decided to disassociate herself entirely from the State's prosecution of defendant. That same day, only a very short time before, he had tried without success to "awaken her conscience" on *voir dire.* At that time, in the absence of the jury, he had asked her the same questions he asked her in the pres-

ence of the jury, and he received the same answers. His request for the *voir dire* prior to calling Mrs. Campbell as a witness before the jury makes it obvious that, before the trial, he had learned that she had repudiated Exhibit 2.

A question asked and unanswered is not evidence of any fact. Likewise, a question in which counsel assumes or insinuates a fact not in evidence, and which receives a negative answer, is not evidence of any kind. *State v. Trimble,* 327 Mo. 773, 39 S.W. 2d 372 (1931). The jury, however, cannot be counted on to understand this.

[2, 3] The solicitor's questioning of Mrs. Campbell with reference to Exhibit 2 violated the "rule of law which forbids a prosecuting attorney to place before the jury by argument, insinuating questions, or other means, incompetent and prejudicial matters not legally admissible in evidence." *State v. Phillips,* 240 N.C. 516, 527, 82 S.E. 2d 762, 770 (1954). *See State v. Wyatt,* 254 N.C. 220, 222, 118 S.E. 2d 420, 421 (1961). The rule that the State could not impeach its own witness, Mrs. Campbell, by showing that she had made prior statements contradictory of her testimony at the trial made Exhibit 2 incompetent as evidence. It was therefore improper for the solicitor to ask her questions which clearly suggested the existence and text of such prior inconsistent statements.

[4] Defendant was tried for first-degree murder and convicted of it. His defense was self-defense. No eyewitness to the homicide testified for the State. Obviously Mrs. Campbell's statement in Exhibit 2 that, after she heard a shotgun blast, defendant came into her house, stepped over Archie's dead body and said, "If he isn't dead, I will kill him," was highly prejudicial to defendant. After Mrs. Campbell had testified and been cross-examined upon *voir dire* her repudiation of the statement she had made to the officers had been definitely established. The solicitor should have then "marked her off" of the list of State witnesses, and the trial judge erred in permitting him to cross-examine her again before the jury. This error requires that the verdict and judgment be vacated, and a new trial ordered.

New trial.

STATE OF NORTH CAROLINA v. LEVON BRYANT

No. 47

(Filed 11 April 1973)

1. **Criminal Law § 21— preliminary hearing — probable cause of second degree murder — trial thereafter for first degree murder**

A finding of probable cause of second degree murder only by a district judge sitting as a committing magistrate did not amount to a dismissal of the first degree murder charge contained in the warrant or limit the State to second degree murder as the maximum charge for which defendant could be tried, and defendant was properly tried for first degree murder upon an indictment thereafter returned by the grand jury.

2. **Criminal Law §§ 73, 77— conversation with defendant — hearsay rule — competency to show motive**

In this first degree murder case, testimony by a witness that he asked defendant about a rumor that deceased had been going with defendant's wife and that defendant replied that it wasn't that but that "it was about some money and other things" was not hearsay and was properly admitted to show defendant's state of mind and his motive.

3. **Criminal Law § 112— instructions on reasonable doubt — possibility of innocence**

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

4. **Criminal Law § 116— charge on defendant's failure to testify — no prejudice**

Although it is the better practice to give no instruction concerning the failure of defendant to testify unless he requests it, the trial court's instruction in this first degree murder case to the effect that defendant's failure to testify should not be considered by the jury was not prejudicial to defendant.

DEFENDANT appeals from judgment of *Webb, J.*, 23 October 1972 Criminal Session, LENOIR Superior Court.

Defendant was charged in a warrant with the first degree murder of Charles Graham on 30 September 1972. A preliminary hearing was conducted before a district judge on 12 October 1972. The district judge, sitting as a committing magistrate, found probable cause of murder in the second degree and bound defendant over to the next term of superior court for trial with appearance bond fixed at $10,000.

At the 23 October 1972 Session the Grand Jury of Lenoir County returned a true bill of indictment charging defendant with murder in the first degree. Before pleading to the bill of indictment, defendant moved that the State be limited to murder in the second degree as the maximum charge against him. The motion was denied, defendant entered a plea of not guilty and was placed on trial for first degree murder.

The State's evidence—defendant offered none—tends to show that on and prior to 30 September 1972 the defendant, the deceased Charles Graham, and Freddie Marshall were operating a poker game in the back room of Charles Graham's shoeshine parlor in the 400 block of East Bright Street in Kinston. The cut from the poker game was to be split among the three, share and share alike.

About 8:30 p.m. on 30 September 1972 while Freddie Marshall was talking to Charles Graham in the front area of the shoeshine parlor, defendant called Marshall outside and told him to get out of the place. He asserted that Charles Graham owed him eleven dollars and had told him he would pay him Monday, but that he wanted the money now. The eleven dollars represented defendant's cut from the poker game the preceding night. Freddie Marshall offered to pay the debt but defendant declined the money saying he wanted to get it from Charles Graham. Defendant then went toward his car and returned with a .22 rifle in his hand. Charles Graham was sitting in the shoeshine stand on the inside of the building. Defendant ran up to the front of the building, fired through the window, then moved toward the door and fired two more shots toward the shoeshine stand. The deceased was found lying facedown in front of the shoeshine stand with blood under his head. Three spent .22 shells were found in front of the shoeshine parlor, and there was a bullet hole in the middle windowpane. "There is approximately eight inches to a foot from the windowpane to the chair. The bullet hole is approximately two inches above the chair arms." The deceased had three wounds—two on the head, one nicking the lower portion of the ear and entering the left mastoid process and the other above the right eye. The third wound was in the left front flank along the belt line area. Death resulted from the gunshot wounds in the head.

Prior to the shooting defendant expressed ill will toward the deceased for not paying defendant his cut from the poker

game; and the morning after the shooting defendant stated the reason he shot Charles Graham was "money and some other things."

The jury returned a verdict of guilty of murder in the first degree, and defendant was sentenced to prison for the remainder of his natural life. From the judgment imposed defendant appealed to the Supreme Court assigning errors discussed in the opinion.

Gerrans & Spence by C. E. Gerrans for defendant appellant.

Robert Morgan, Attorney General; William W. Melvin and William B. Ray, Assistant Attorneys General, for the State of North Carolina.

HUSKINS, Justice.

[1] For his first assignment of error defendant says the court erred in denying his motion to quash the first degree murder charge. He argues that the action of the committing magistrate, who found "probable cause" of second degree murder only, amounted to a dismissal of the first degree murder charge and limited the State to second degree murder as the maximum charge for which defendant could be tried.

A district judge sitting as a committing magistrate in a preliminary hearing has no authority *to dismiss* a first degree murder charge. G.S. 7A-272(b) confers jurisdiction on the judges of the district court "to conduct preliminary examinations and to bind the accused over for trial . . . upon a finding of probable cause, making appropriate orders as to bail or commitment." When performing these duties in felony cases, the district judge sits only as an examining magistrate. The trial and dismissal of felonies is beyond the jurisdiction of the district court.

"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. Cradle,* 281 N.C. 198, 188 S.E. 2d 296 (1972).

Chief Justice Bobbitt in *State v. Foster,* 282 N.C. 189, 192 S.E. 2d 320 (1972), said: "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." It has been repeatedly held that a preliminary hearing is not an essential prerequisite to the finding of a bill of indictment and that it is proper to try the accused upon a bill of indictment without a preliminary hearing. *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44 (1967); *State v. Hargett,* 255 N.C. 412, 121 S.E. 2d 589 (1961); *State v. Hackney,* 240 N.C. 230, 81 S.E. 2d 778 (1954); 21 Am. Jur. 2d *Criminal Law* § 442 (1965).

It necessarily follows that an accused may be tried upon a bill of indictment which charges a felony different from the crime for which he was bound over. "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." *State v. Mack,* 282 N.C. 334, 193 S.E. 2d 71 (1972). To hold otherwise would constitute a committing magistrate the most powerful judicial officer in the State, endowed with infallibility and immune to appellate review. *Price v. Georgia,* 398 U.S. 323, 26 L.Ed. 2d 300, 90 S.Ct. 1757 (1970), cited and relied on by defendant, is not in point. This assignment has no merit and is overruled.

[2] A State's witness, Willie James Gardner, testified that he visited defendant in jail, asked him why he killed the deceased, and defendant "just shook his head." Then, over objection, the witness was permitted to testify that he told defendant: "Well, I heard a rumor that Charles [the deceased] was going with your wife. Is that true?" The witness continued: "And he said no; that it won't that. He said it was about some money and some other things. . . . " Defendant contends that the quoted testimony "amounted to nothing more than hearsay and should have been stricken." This constitutes defendant's second assignment of error.

The hearsay rule has often 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 (Brandis Rev. 1973).

Here, the testimony of Willie James Gardner concerning his conversation with defendant was not offered to prove the truth of rumors that the deceased was going with the defendant's wife. Its probative force did not depend on the competency and credibility of some person other than Willie James Gardner. Accordingly, the evidence was not hearsay and the hearsay rule is inapplicable. *State v. Miller,* 282 N.C. 633, 194 S.E. 2d 353 (1973). The evidence was relevant to defendant's state of mind and tended to show motive, and was properly admitted. *State v. Robbins,* 275 N.C. 537, 169 S.E. 2d 858 (1969). This assignment is overruled.

[3] Defendant next contends that the trial judge improperly defined "reasonable doubt" as "a possibility of innocence." The portion of the charge assigned as error is almost verbatim the charge quoted and discussed in *State v. Bryant,* 282 N.C. 92, 191 S.E. 2d 745 (1972), where this Court, while not approving the innovative portion of the charge, said: "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." *Accord, State v. Wright,* 282 N.C. 364, 192 S.E. 2d 818 (1972). Prejudicial error is not shown here; hence, there is no merit in this assignment.

[4] Finally, defendant assigns as error the following portion of the charge:

> "Now ladies and gentlemen, I do want to charge you that in this case the defendant did not testify. Now, one of the most precious rights that we have under the United States Constitution and under the common law of North Carolina, without regard to the U. S. Constitution is that no person is required to testify against himself in a criminal case, and the only way that this right can be fully protected is that when a person accused of a crime does not

testify, that the jury must not consider his failure to testify one way or the other in reaching a decision in the case; so don't consider in your deliberations the fact that the defendant did not testify in this case."

We must decide whether the court committed prejudicial error by charging the jury in this fashion, no request for such charge having been made by defendant.

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.*" (Emphasis ours.)

Under the foregoing statute the judge is not required to instruct the jury that a defendant's failure to testify creates no presumption against him *unless defendant so requests. 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. Chief Justice Bobbitt, speaking for the Court in *State v. Barbour,* 278 N.C. 449, 180 S.E. 2d 115 (1971), said: "Defendant assigns as error the court's instructions to the effect that defendant's failure to testify was not to be considered against him. Although the instruction is meager and is not commended, we are constrained to hold that it meets minimum requirements. Ordinarily, it would seem better to give no instruction concerning a defendant's failure to testify unless such an instruction is requested by defendant." It is noted that the defendant Barbour made no request for such an instruction.

In *State v. Rankin,* 282 N.C. 572, 193 S.E. 2d 740 (1973), a case in which defendant did not request an instruction concerning his failure to testify but insisted the court erred in failing to give same, we said: "Since defendant did not request the instruction he now insists the court should have given, the trial court properly omitted any mention of it."

In *State v. Horne,* 209 N.C. 725, 184 S.E. 470 (1936), the trial judge, without any request, instructed the jury with respect to defendant's failure to testify, saying defendant had a right to sit mute and say nothing and it should not be consid-

ered against him. The Court said: "We find no error in this instruction of which the defendant can complain."

In *State v. McNeill,* 229 N.C. 377, 49 S.E. 2d 733 (1948), the trial judge, without request, called the jury's attention to the fact that the defendant offered no evidence and did not testify in his own behalf and instructed the jury that defendant had the right to elect whether he would testify or not and his failure to do so "shall not be considered against him prejudicially by the jury." Since a new trial was awarded on other grounds, the Court commented on this part of the charge as follows: " . . . [W]e wish to call attention to the fact that the failure of a defendant to go upon the witness stand and testify in his own behalf should not be made the subject of comment, except to inform the jury that a defendant may or may not testify in his own behalf as he may see fit, and his failure to testify 'shall not create any presumption against him.' G.S. 8-54."

Some jurisdictions hold that unless the defendant so requests, such an instruction tends to accentuate the significance of his silence and thus impinges upon defendant's unfettered right to testify or not to testify at his option. *See* Annot., 18 A.L.R. 3d 1335.

In *Griffin v. California,* 380 U.S. 609, 14 L.Ed. 2d 106, 85 S.Ct. 1229 (1965), the failure of the accused to testify was commented upon by the prosecuting attorney and, in its instructions, by the court. Both the prosecutor and the court acted under Article I, section 13, of the California Constitution which provides that " . . . in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." The Supreme Court of the United States held that the California comment rule violates the self-incrimination clause of the Fifth Amendment. The Court said: "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another." It should be noted that in *Griffin* the trial judge instructed the jury, in effect, that defendant's silence is evidence of guilt, a permissible instruction under the California comment rule.

Here, under our law, the trial judge specifically instructed the jury to the contrary. While we do not approve the language

chosen, and reemphasize that it is better to give *no instruction* concerning failure of defendant to testify unless he requests it, *State v. Barbour, supra,* we hold that the instruction given was not prejudicial. Even if it be conceded *arguendo* that the charge was technically erroneous, in our opinion it was harmless error beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967); *Harrington v. California,* 395 U.S. 250, 23 L.Ed. 2d 284, 89 S.Ct. 1726 (1969); *State v. Fletcher and Arnold,* 279 N.C. 85, 181 S.E. 2d 405 (1971). A different result would not have ensued had the portion of the charge complained of been omitted. Therefore, the charge was not prejudicial, and this assignment of error is overruled.

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

No error.

CATHERINE H. DAVENPORT v. THE TRAVELERS INDEMNITY COMPANY, (A FOREIGN INSURANCE CORPORATION)

No. 29

(Filed 11 April 1973)

1. **Appeal and Error § 28— broadside exception to findings and judgment — review of record proper**

Broadside exception to the findings of fact, conclusions of law and judgment does not bring up for review the findings of fact or the evidence on which they are based but presents only the record proper for review upon the question of whether error of law appears on the face of the record.

2. **Appeal and Error § 40— parts of record proper**

The pleadings, issues and judgment are necessary parts of the record proper.

3. **Insurance § 103— garage liability policy — forwarding suit papers to insurer — validity of policy requirement**

Provision of a garage policy requiring the insured to forward immediately to the insurer any demand, notice, summons or other process received by him or his representative is a valid stipulation, and unless the insured or his judgment creditor can show compliance with the requirement, the insurer is relieved of liability.

4. Insurance § 103— garage liability policy — failure to forward suit papers to insurer — waiver

Failure to give notice or immediately forward summons or other process received by the insured may be waived by the insured's denial of liability on other grounds, but the insurer must have notice that a claim of loss is being asserted against it in order to waive such requirement by denial of liability.

5. Insurance § 103— garage liability policy — denial of coverage to uninsured defendant — amendment of complaint — no waiver of failure to notify insurer of suit

Where insurer issued a garage liability policy to Thomas Mills and Ralph Mills, d/b/a Mills Motor Company, plaintiff instituted an action against Thomas Mills, t/a Mills Grocery, the suit papers were turned over to the insurer, the insurer employed counsel to defend the suit but such counsel was allowed to withdraw because the insurer had issued no policy to the named defendant, and plaintiff subsequently amended the caption of her complaint to name "Thomas Mills and Ralph Mills, t/a Mills Motor Company" as additional defendants but the insurer received no notice that the complaint had been amended to include the named insureds as defendants, it was *held* that the insurer did not waive the condition of the policy that all summonses and other suit papers be forwarded to it when it denied coverage of the defendant Thomas Mill, t/a Mills Grocery, and that the insurer was not liable under the policy for a judgment by default and inquiry obtained against Thomas Mills, d/b/a Mills Motor Company, since it received no notice of a suit against such insured.

ON *certiorari* to review decision of the Court of Appeals reported in 16 N.C. App. 572, affirming judgment of *Winner, District Judge,* at 29 May 1972 Session of District Court in MECKLENBURG County.

Plaintiff instituted this action in the District Court Division of the General Court of Justice of Mecklenburg County for recovery from defendant of a certain monetary award which had been allowed plaintiff by two judgments of default and inquiry. The case was heard by Judge Winner without a jury. At the conclusion of all of the evidence, Judge Winner found facts, reached conclusions of law and entered judgment for the plaintiff in the sum of $5,000 with interest from 11 September 1967.

The trial judge's findings of fact accurately reflect the pertinent facts. We quote from his judgment:

"1. That the plaintiff was bodily injured at the place of business of Thomas Mills and Ralph Mills, d/b/a Mills Motor Company; that prior thereto the said Thomas Mills

and Ralph Mills had contracted with the Travelers Indemnity Company to provide a policy of insurance and insurance coverage enumerated and included in their Garage Policy No. QGG-796134; that the Court by reference includes all of the terms and provisions of the said policy in these findings of fact, a copy of the said policy being attached to the stipulations of facts presented by the parties.

2. That the policy was in full force and effect on the date of the injury to the plaintiff.

3. That the plaintiff brought suit against Thomas Mills, t/a Mills Grocery; that said Thomas Mills turned over all of the suit papers to his attorney who then transmitted them to the defendant insurance company; that the defendant insurance company employed counsel; that the counsel filed certain motions; that thereafter the defendant insurance company determined that it had not issued a policy of insurance providing coverage for Thomas Mills, t/a Mills Grocery; that their counsel moved to withdraw as counsel for Thomas Mills, t/a Mills Grocery and that the said motion was allowed; that subsequent to that time the plaintiff amended her Complaint by amending the caption to read 'Catherine H. Davenport v. Thomas Mills, t/a Mills Grocery and Thomas Mills and Ralph Mills, t/a Mills Motor Company, a partnership.'

4. That the defendant insurance company never received any notice of the Amendment to the Complaint; that no Answer was ever filed and that there was a Judgment entered by Default and Inquiry; that Inquiry was made as to Judgment against each defendant separately and that on May 3rd, 1966 a Judgment was entered against Ralph Mills and Mills Motor Company for four thousand dollars ($4,000.00) and on September 11, 1967, a Judgment was entered against the defendant Thomas Mills, t/a Mills Motor Company for the sum of five thousand dollars ($5,000.00) and the costs.

5. That subsequent thereto the plaintiff filed this lawsuit seeking recovery against the defendant insurance company under the insurance policy.

6. That among the provisions and conditions of the policy there is a condition that provided, 'If Claim is made

or suit is brought against the insured he shall immediately forward to the company every demand, notice, summons, or other process received by him or his representative.'

7. That when the Complaint in the first lawsuit was amended a new summons was issued as to Ralph Mills and served on him but that that summons and Amended Complaint nor any other notice was ever sent to the defendant insurance company.

From the foregoing findings of fact the Court concludes as a matter of law:

1. That when the insurance company denied coverage of the defendant Thomas Mills they waived the condition of the policy that all summonses and other papers be forwarded to them.

2. That at no time did the defendant insurance company waive any provision as to the defendant in the prior lawsuit, Ralph Mills, and that the defendant insurance company is not liable for the Judgment against him.

3. That since the defendant insurance company waived the sending of further papers by Thomas Mills, the Judgment against him is covered by the policy and the defendant insurance company is liable therefor."

Defendant appealed.

We granted defendant's petition for certiorari on 18 January 1973.

Don Davis for plaintiff appellee.

Boyle, Alexander and Hord by Robert C. Hord, Jr. for defendant appellant.

BRANCH, Justice.

[1] The Court of Appeals held that defendant's "broadside exceptions to the findings of fact, conclusions of law and judgment entered thereon" would not bring up for review the findings of fact or the evidence on which they were based, but presented the record proper for review upon the question of whether error of law appears on the face of the record. We agree. Such a review presents the question of whether the facts found support the judgment and whether the judgment is reg-

ular in form. *Fishing Pier v. Town of Carolina Beach*, 274 N.C. 362, 163 S.E. 2d 363; *In re Appeal of Broadcasting Corp.*, 273 N.C. 571, 160 S.E. 2d 728.

[2] The pleadings, issues and judgment are necessary parts of the record proper. *Williams v. Contracting Company*, 259 N.C. 232, 130 S.E. 2d 340; *Campbell v. Campbell*, 226 N.C. 653, 39 S.E. 2d 812; 1 Strong's N. C. Index 2d, Appeal and Error § 40.

The judgment here is regular in form; we must, therefore, consider whether the Court of Appeals erred in holding that the "facts found by the court support the conclusions of law in the judgment." The crucial question is whether the facts found support the conclusion that defendant waived the contract provision pleaded by defendant.

[3] The policy provision that "If claim is made or suit is brought against the insured he shall immediately forward to the company every demand, notice, summons or other process received by him or his representative" is a valid stipulation, and unless the insured or his judgment creditor can show compliance with the requirement, the insurer is relieved of liability. Moreover, an injured party who obtains judgment against the insured has no greater rights against the insurer than the insured. *Clemmons v. Insurance Co.*, 267 N.C. 495, 148 S.E. 2d 640; *Woodruff v. Insurance Co.*, 260 N.C. 723, 133 S.E. 2d 704; *Henderson v. Insurance Co.*, 254 N.C. 329, 118 S.E. 2d 885; *Muncie v. Insurance Co.*, 253 N.C. 74, 116 S.E. 2d 474.

[4] However, failure to give notice or immediately forward summons or other process received by the insured may be waived by denial of liability on other grounds. The rationale of this rule is that denial of liability on other grounds is generally regarded as saying that payment would not have been made had the policy provisions been complied with, and that the law will not require a vain thing. *Gardner v. Insurance Co.*, 230 N.C. 750, 55 S.E. 2d 694; *Felts v. Insurance Co.*, 221 N.C. 148, 19 S.E. 2d 259; *Gorham v. Insurance Co.*, 214 N.C. 526, 200 S.E. 5; *Gerringer v. Insurance Co.*, 133 N.C. 407, 45 S.E. 773.

Consistent with this rule is the rule recognized in most jurisdictions that the unjustified refusal of the insurer to defend an action against the insured on the ground that the claim on which the action is based is outside the policy coverage deprives the insurer of its right to insist upon compliance with a policy

provision requiring forwarding of summons or other process received by the insured. *Clemmons v. Insurance Co., supra; Lowe v. Fidelity and Casualty Co.*, 170 N.C. 445, 87 S.E. 250; Annot., 49 A.L.R. 2d 694, § 30; 8 Appleman, Insurance Law and Practice § 4731, et seq. See *Nixon v. Insurance Co.*, 255 N.C. 106, 120 S.E. 2d 430.

[4] The *sine qua non* of the rule of waiver by denial of liability, however, is that the insurer has notice that a claim of loss is being asserted against it. *Turpentine & Rosin Factors v. Travelers Ins. Co.*, 45 F. Supp. 310 (D.C.S.D. Ga. 1942); *Peeler v. Casualty Company*, 197 N.C. 286, 148 S.E. 261; Annot., 6 A.L.R. 2d 661; 8 Appleman, Insurance Law and Practice §§ 4732, 4740.

The courts have noted different rules in determining liability between insurers who refuse to defend and those who commence a defense and abandon it. See 14 Couch on Insurance 2d §§ 51, 124; 44 Am. Jur. 2d Insurance §§ 1544-1546, 1557-1559. However, the facts of this case do not require consideration of this question.

In *Clemmons v. Insurance Co., supra*, Bobbitt, J. (now C.J.), in discussing waiver of an insurance contract provision, stated:

> "Ordinarily, waiver is defined as a voluntary and intentional relinquishment of a known right. In *Hospital v. Stancil, supra*, waiver is defined as 'the intentional surrender of a known right or privilege, which surrender modifies other existing rights or privileges or varies the terms of a contract.' In *Fetner v. Granite Works*, 251 N.C. 296, 302, 111 S.E. 2d 324, Moore, J., in accord with 56 Am. Jur., Waiver § 12, stated: 'The essential elements of a waiver are: (1) the existence, at the time of the alleged waiver, of a right, advantage or benefit; (2) the knowledge, actual or constructive, of the existence thereof; and (3) an intention to relinquish such right, advantage or benefit."

We think that *Campbell v. Continental Casualty Co. of Chicago*, 170 F. 2d 669, 6 A.L.R. 2d 655 (8th Cir. 1948), sheds light upon the question before us. We quote from the decision of the 8th Circuit Court of Appeals:

> "The insured's principal contention here is that he was not required to forward his summons and copy of

petition to the insurer, because, he says, his truck driver, who under the omnibus coverage clause in the policy also was an insured, had previously delivered his summons and copy of petition to an employee in the insurer's office and this constituted a sufficient compliance as to both of them.

* * *

. . . The driver's suit papers might have informed the insurer that the insured had been named as a defendant in the action, but as we have stated they would not advise it that the insured had been brought into court. And neither the language of the policy, nor the construction made by any court of such provisions as it contains, has imposed on the insurer, merely because it knows that an insured has been named as a defendant in an action, the sentry duty of tracking back and forth to the court house to keep a check on if or when he may be served with process.

Under the trial court's finding, which the evidence clearly sustains, the insurer never knew, until after the default judgment was entered, that the insured had been brought into court by the service of process. The prejudice to the insurer's right from the failure to have forwarded the summons, or otherwise to have given adequate notice that such service had been made, is in the situation indisputable. . . .

* * *

. . . Without an estoppel or waiver (which does not here exist), there is no decision in Missouri or elsewhere, so far as we have been able to discover, which permits an insurer to be held liable to an insured on a standard policy of liability insurance for a default judgment against the insured, where the insured has failed to forward to the insurer the process served upon him in the action and the insurer never has had any notice that such service has been made, so as to have afforded it the opportunity to defend."

Cf. Kershaw v. Maryland Casualty Co., 172 Cal. App. 2d 248, 342 P. 2d 72; *Jameson v. Farmers Mutual Automobile Ins. Co.*, 181 Kan. 120, 309 P. 2d 394; *General Ins. Corp. v. Harris*, 327 S.W. 2d 651 (Tex. Civ. App. 1959).

[5] The only action in which defendant denied coverage was the action seeking to enforce a claim against Thomas Mills, t/a Mills Grocery. Manifestly, the terms of the policy issued by defendant to Thomas and Ralph Mills, d/b/a Mills Motor Company afforded no coverage to Thomas Mills, t/a Mills Grocery; defendant's refusal to defend the action against Mills Grocery was therefore justified.

The written contract is conclusively presumed to express the agreement between the parties until it is reformed or set aside because of fraud or mutual mistake. *Peirson v. Insurance Co.*, 248 N.C. 215, 102 S.E. 2d 800; *Floars v. Insurance Co.*, 144 N.C. 232, 56 S.E. 915. See *Clark v. Ice Cream Co.*, 261 N.C. 234, 134 S.E. 2d 354. Here plaintiff did not seek to reform the insurance contract or offer any evidence to show coverage of Thomas Mills, t/a Mills Grocery but elected to amend so as to add defendant's named insured as a party to this action.

There was no claim asserted against the named insured in the policy issued by defendant until the court allowed the amendment on 18 November 1965 making Thomas Mills and Ralph Mills, d/b/a Mills Motor Company an additional party to the action. Defendant had no notice of the claim of loss against its named insured and could not have knowingly and intentionally waived the policy provision upon which it now relies.

We hold that the facts found by the trial judge do not support his conclusions of law that "when the insurance company denied coverage of the defendant Thomas Mills they waived the condition of the policy that all summonses and other papers be forwarded to them."

The decision of the Court of Appeals is reversed and this cause is remanded to the Court of Appeals with direction that it be certified to the District Court Division of the General Court of Justice of Mecklenburg County for entry of judgment in accordance with this opinion.

Reversed.

STATE OF NORTH CAROLINA v. BILLIE JOYCE FREDELL

No. 30

(Filed 11 April 1973)

1. **Indictment and Warrant § 14— constitutionality of statute — challenge by motion to quash warrant**

A motion to quash the warrant may challenge the constitutionality of the statute under which it was drawn.

2. **Infants § 11— child abuse statute — conduct made punishable**

G.S. 14-318.2(a) provides for three separate offenses: If the parent by other than accidental means (1) inflicts physical injury upon the child, (2) allows physical injury to be inflicted upon the child, or (3) creates or allows to be created a substantial risk of physical injury.

3. **Infants § 11— provisions of child abuse statute — severability**

By the enactment of G.S. 14-318.2 the General Assembly intended to provide for three separate and independent offenses, none dependent on the other; therefore, the first section of the statute making infliction of injury upon the child by the parent himself a punishable offense is divisible and separable from the remainder of the statute.

4. **Constitutional Law § 4— standing to question constitutionality of statute**

Where defendant was not tried under that section of the child abuse statute which she contended was unconstitutional, she was in no position to assert the invalidity of that portion.

5. **Constitutional Law § 30; Infants § 11— child abuse statute — constitutionality**

The first part of G.S. 14-318.2(a), which the warrant charged defendant violated and for which violation she was convicted, is a reasonable and proper exercise of the police power of the State and defines the proscribed acts with sufficient definiteness to apprise a person of ordinary intelligence of the conduct forbidden; therefore, it is not repugnant to the due process clause of the Fourteenth Amendment of the U. S. Constitution or to the law of the land clause of Article I, § 19, of the N. C. Constitution, and defendant's motion to quash the warrant was properly overruled.

APPEAL by defendant under G.S. 7A-30(1) from decision of the North Carolina Court of Appeals, reported in 17 N.C. App. 205, 193 S.E. 2d 587 (1972), which found no error in her trial before *Exum, J.*, at the 1 May 1972 Criminal Session of GUILFORD Superior Court.

Defendant appealed to the Court of Appeals from conviction and sentence imposed in Superior Court under a warrant

charging her with inflicting serious injuries on her two-year-old son, in violation of G.S. 14-318.2(a).

Only the State offered evidence. This evidence tends to show: On 4 October 1971 Kelly Joe Fredell, a male child approximately two years old, was brought to the emergency room of Cone Hospital in Greensboro, North Carolina, by his parents, the defendant and her husband. At the time the child entered the hospital, he was suffering from circulatory collapse and was moribund, a state near death. The child remained in the hospital for approximately two months.

Four doctors gave testimony related to the child's physical condition at the time of admission. Their testimony discloses: There were a number of bruises about the child's abdomen, head, and extremities. The arms were swollen and the abdomen was distended. The child was suffering from multiple fractures of the skull and arms which were in different stages in the healing process. Additionally, there was a fracture of the eleventh rib. The older fractures had received no medical attention before the child was admitted to the hospital on 4 October 1971. Fractures of this nature could not have resulted from the normal activity and play of the child.

The condition of the child was diagnosed as that of a "battered child," a term meaning the most extreme form of child abuse, characterized by multiple injuries in different stages of healing.

On 8 October 1971 defendant, after being duly informed of her constitutional rights and after having signed a waiver of those rights, was questioned by Carolyn Hinson, a detective assigned to the Youth Division of the Greensboro Police Department. Defendant stated that she had a temper and quite often got mad with her child. When she became angry, she would beat him with a woman's plastic belt, and that these beatings began when the child was one year old. Defendant further stated that neither her husband nor any of the child's baby sitters had beaten him, and that on one occasion her mother-in-law warned her about her conduct towards the child.

The Court of Appeals in an opinion by Judge Graham, concurred in by Judges Campbell and Brock, found no error. Defendant appeals to this Court pursuant to G.S. 7A-30(1) alleging a substantial constitutional question.

Attorney General Robert Morgan and Assistant Attorney General Charles M. Hensey for the State.

Wallace C. Harrelson, Public Defender, and Vaiden P. Kendrick, Assistant Public Defender, for defendant appellant.

MOORE, Justice.

The sole question presented by this appeal is: Did the trial court err in denying defendant's motion to quash the warrant on the ground that the statute under which the defendant is charged is unconstitutionally vague and indefinite?

[1] A motion to quash may challenge the constitutionality of the statute. *State v. Vestal,* 281 N.C. 517, 189 S.E. 2d 152 (1972); *State v. Brewer,* 258 N.C. 533, 129 S.E. 2d 262 (1962); *State v. Glidden Co.,* 228 N.C. 664, 46 S.E. 2d 860 (1948).

[2] Defendant was charged with a violation of G.S. 14-318.2(a), which provides:

> "Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the misdemeanor of child abuse."

This statute provides for three separate offenses: If the parent by other than accidental means (1) inflicts physical injury upon the child, (2) allows physical injury to be inflicted upon the child, or (3) creates or allows to be created a substantial risk of physical injury.

Defendant was only tried for actually inflicting injuries upon her child. The jury was fully instructed that if they failed to find beyond a reasonable doubt that defendant inflicted the injuries, they should find defendant not guilty.

Defendant does not attack the constitutionality of that part of G.S. 14-318.2 under which she was tried, but attacks only that portion of the statute which makes it unlawful to create or allow to be created a substantial risk of physical injury. She contends that the phrase "a substantial risk of physical injury" is so vague, indefinite, and uncertain that she is not adequately apprised of the prohibited conduct and is therefore

denied due process of law, contrary to Article I, section 19, of the North Carolina Constitution and the due process clause of the Fourteenth Amendment to the United States Constitution. She further contends that if the term "substantial risk" is unconstitutionally vague, no part of the statute can stand and that the entire statute is void.

In this connection it is stated in 16 Am. Jur. 2d, Constitutional Law §§ 181-182:

> ". . . [I]t is a fundamental principle that a statute may be constitutional in one part and unconstitutional in another and that if the invalid part is severable from the rest, the portion which is constitutional may stand while that which is unconstitutional is stricken out and rejected. . . .
>
> * * *
>
> "In line with the rule of severability, the courts will decline to consider the constitutionality of a particular statutory provision where (1) that provision is not necessarily involved in the litigation before the court, and (2) that provision may be severed from the provisions which are necessarily before the court.
>
> * * *
>
> "The question whether the rule of severability shall be applied to save partially unconstitutional legislation from being struck down in toto involves, fundamentally, a determination of and conformity with the intent of the legislative body which enacted the legislation. However, in determining what was (or must be deemed to have been) the intention of the legislature, certain tests of severability have been developed. Thus, it is held that if after eliminating the invalid portions, the remaining provisions are operative and sufficient to accomplish their proper purpose, it does not necessarily follow that the whole act is void; and effect may be given to the remaining portions. . . ."

G.S. 14-318.2 was rewritten in its present form by Chapter 710, Session Laws of 1971. As an indication that the General Assembly intended for the different offenses created therein to be independent, divisible and severable, in the same chapter the General Assembly, in defining an abused child, divided the defi-

nition to conform to the offenses created by G.S. 14-318.2, and provided:

> " 'Abused child' means a child less than 16 years of age whose parent or other person responsible for his care:
>
> "a. inflicts or allows to be inflicted upon such child a physical injury by other than accidental means which causes or creates a substantial risk of death or disfigurement or impairment of physical health or loss or impairment of function of any bodily organ, or
>
> "b. creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death or disfigurement or impairment of physical health or loss or impairment of the function of any bodily organ."

In *State v. Brewer, supra,* the defendant was charged with a violation of G.S. 14-353. That statute was divisible into four parts. The defendant was charged with a violation of the first two parts. Justice Parker (later Chief Justice) stated: "We are concerned here with the first two parts of G.S. 14-353 which are divisible and separable from the remainder of the statute." The Court then proceeded to uphold the constitutionality of those two parts without reference to the other sections of the statute.

In *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973), this Court stated:

> "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)."

[3] Clearly, by the enactment of G.S. 14-318.2 the General Assembly intended to provide for three separate and independent offenses, none dependent on the other. We hold, therefore, that the first section of G.S. 14-318.2 is divisible and separable from the remainder of the statute.

[4] Defendant was not tried under that section of the statute which she now attacks as being unconstitutional. For that reason, she is not in position to assert the invalidity of that portion.

> "Courts are reluctant to hold invalid any Act of the General Assembly. Before deciding any Act unconstitutional the question must be squarely presented by a party whose rights are directly involved. 'Courts will not declare void an Act of the Legislature unless the question of its constitutionality is presently presented and it is found necessary to do so in order to protect rights guaranteed by the Constitution.' *Fox v. Commissioners,* 244 N.C. 497, 94 S.E. 2d 482. . . ." *Carringer v. Alverson,* 254 N.C. 204, 118 S.E. 2d 408 (1961).

". . . A party who is not personally injured by a statute is not permitted to assail its validity. . . ." *Yarborough v. Park Commission,* 196 N.C. 284, 288, 145 S.E. 563, 567 (1928). See also *Nicholson v. Education Assistance Authority,* 275 N.C. 439, 447, 168 S.E. 2d 401, 406 (1969).

The question of defendant's standing to challenge the constitutionality of a criminal statute has arisen on numerous occasions in the federal courts. Uniformly, the accused has been permitted to assert the invalidity of the law only upon a showing that his rights were adversely affected by the particular feature of the statute alleged to be in conflict with the Constitution. In *Mauk v. United States,* 88 F. 2d 557 (9th Cir. 1937), the defendant was convicted and sentenced on each of thirteen counts of an indictment charging violations of Section 2 of the Harrison Narcotic Act (26 USCA § 1044). On appeal the defendant attacked the constitutionality of 26 USCA 1044(g), another subsection. The Court said, "Since appellant is not indicted under or accused of violating this provision, he has no interest or standing to question its validity. That question is not before us and will not be considered." To like effect see: *United States v. Fiore,* 434 F. 2d 966 (1st Cir. 1970); *Weldon v. United States,* 183 F. 2d 832 (D. C. Cir. 1950); *Richter v. United States,* 181 F. 2d 591 (9th Cir. 1950).

In *United States v. Raines*, 362 U.S. 17, 4 L.Ed. 2d 524, 80 S.Ct. 519 (1960), after stating the rule that the Supreme Court and other federal courts do not rule on constitutional questions in the abstract or when narrower grounds are possible, Mr. Justice Brennan speaking for the Court said:

> ". . . Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. . . ."

[5] In our opinion, and we so hold, the first part of G.S. 14-318.2, which the warrant charged defendant violated and for which violation she was convicted, is a reasonable and proper exercise of the police power of the State and defines the proscribed acts with sufficient definiteness to apprise a person of ordinary intelligence of the conduct forbidden. *In re Burrus*, 275 N.C. 517, 169 S.E. 2d 879 (1969); *State v. Brewer, supra; State v. Hales*, 256 N.C. 27, 122 S.E. 2d 768 (1961). Therefore, it is not repugnant to the "due process of law" clause of Section 1 of the Fourteenth Amendment to the United States Constitution and to the "law of the land" clause of Article I, section 19, of the North Carolina Constitution. Defendant's motion to quash was properly overruled.

Since defendant is not charged with a violation of that section which she attacks as being unconstitutional for vagueness, she is in no position to question its validity. That question is not before us and will not be considered.

For the reasons stated, the decision of the Court of Appeals is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. GLOYD A. VESTAL

No. 5

(Filed 11 April 1973)

Homicide § 31— no evidence to support manslaughter — verdict of manslaughter — error in submission of lesser included offense favorable to defendant

The fact that defendant had incurred a large indebtedness to deceased and deceased desired to collect immediately, the number and seriousness of deceased's wounds, the transportation of the body to a distant lake and weighting it down with log chains, and the effort to conceal the fact that defendant did not make his planned business trip to Delaware with the deceased, disclosed a higher degree of homicide than manslaughter; however, the verdict finding the defendant guilty of manslaughter and the judgment thereon may be sustained on the basis of the rule that, if the court charges on a lesser included offense when all the evidence tends to support a greater offense, the error is favorable to the defendant and he is without standing to challenge the verdict.

APPEAL by defendant from *Copeland, J.*, May 29, 1972 Session, CASWELL Superior Court.

This criminal prosecution originated by Guilford County Grand Jury indictment which charged Gloyd A. Vestal with the first degree murder of Angelo S. Pennisi. The indictment alleged the offense occurred on June 15, 1969.

The defendant was first brought to trial in Guilford County Superior Court on May 4, 1970. At the conclusion of a long trial, at which fifty-three witnesses testified for the State, the jury returned a verdict finding the defendant guilty of murder in the second degree. The court imposed a prison sentence of twenty-five years from which the defendant appealed. On review, this Court ordered a new trial for errors in the admission of certain evidence offered by the State.

On defendant's motion alleging unfavorable publicity, the court ordered the case removed to the adjoining County of Caswell.

At the new trial in Caswell County the State again offered evidence, the same in substance as that which this Court had held competent on the first appeal. Defendant concedes the competent evidence offered at the first trial was in substance repeated at the second trial. This concession permits the court to

include that evidence herein by reference to the prior record. That evidence is accurately summarized in paragraphs numbered 1 through 18, pages 568-571, *State v. Vestal*, 278 N.C. 561-599, 180 S.E. 2d 755. In addition, the State offered the following new evidence:

1. Mrs. Everage, an employee of an insurance agency, testified that at ten or eleven a.m. on the morning of June 16, 1969, the defendant came to the office where she worked. "I said, 'What are you doing here, I thought that you were in Wilmington, Delaware, with Mr. Pennisi.'" Mr. Vestal replied: "Sssh, I am supposed to be but I did not go, but please don't tell Rose [Mrs. Pennisi]."

2. Between the time of Mr. Pennisi's disappearance and the time his body was discovered in Lake Gaston, Officer Jenkins questioned the defendant who made the statement: "[T]hat the only business interest that he had with Mr. Pennisi was that he did owe Mr. Pennisi six thousand dollars for a Lincoln Continental automobile, but that this was a small sum compared to what he owed Mr. Pennisi in the past. That he had borrowed fifty thousand dollars at a time from Mr. Pennisi, but at the present time that he only owed him six thousand dollars."

3. The State introduced in evidence as Exhibits 10 and 11 two notes due by the defendant to Pennisi. One was for $70,000.00 and the other was for $40,879.37. Mr. Pennisi had placed these notes in the hands of Kenneth Lewis for safekeeping. Other evidence tended to show that the defendant was indebted to the deceased in a sum in excess of two hundred thousand dollars.

At the close of the evidence, the court, overruling the defendant's motion to dismiss, instructed the jury to render one of three verdicts: (1) guilty of murder in the second degree, (2) guilty of manslaughter, or (3) not guilty. The jury found the defendant guilty of manslaughter. From the court's judgment that the defendant be imprisoned for not less than eighteen nor more than twenty years he appealed, assigning errors.

Robert Morgan, Attorney General, by Howard O. Satisky, Assistant Attorney General, for the State.

Robert Blackwell and Cahoon & Swisher by Robert S. Cahoon and James L. Swisher for defendant appellant.

HIGGINS, Justice.

The court properly overruled the defense counsel's challenge to the sufficiency of the evidence to go to the jury on any degree of homicide. However, counsel makes these further contentions: (1) On the first trial the verdict finding the defendant guilty of murder in the second degree was an acquittal of the charge of murder in the first degree; (2) on the second trial the verdict finding the defendant guilty of manslaughter was an acquittal of the charge of murder in the second degree; (3) the evidence before the court was insufficient to support the verdict of manslaughter; (4) the court committed error in submitting manslaughter; hence, the verdict should be set aside, the sentence vacated, and the defendant discharged.

True, the verdict finding the defendant guilty of murder in the second degree eliminated murder in the first degree from the charge. For the same reason, the verdict finding the defendant guilty of manslaughter eliminated murder in the second degree from the charge.

The legal question before us now is whether the verdict finding the defendant guilty of manslaughter and the judgment thereon may be sustained. In this connection, we concede the new evidence did not tend to reduce to manslaughter the degree of guilt of the person who had killed Mr. Pennisi. The motive, the number and seriousness of the wounds, the transportation of the body to a distant lake weighted down with log chains, and the effort to conceal the fact the defendant did not make his planned trip to Delaware with the deceased, disclose a higher degree of homicide than manslaughter.

Examination of the record on the first trial shows the court instructed the jury to return one of four verdicts: (1) guilty of murder in the first degree; (2) guilty of murder in the first degree with a recommendation that the punishment be imprisonment for life in the State's prison; (3) murder in the second degree; (4) not guilty. Here quoted is defendant's Exception No. 348 to the charge: "The defendant excepts to the court's limiting the jury's verdict to exclude a verdict of manslaughter."

In all probability Judge Copeland had before him the record and the briefs as well as this Court's opinion on the first appeal. However, the fact the defendant objected to the failure of Judge Johnston to submit manslaughter on the first trial,

may have induced Judge Copeland to submit manslaughter, even though evidence of manslaughter is lacking.

In short, the defendant contends the evidence was insufficient to raise an issue of manslaughter, the court committed error in submitting that issue to the jury, and the verdict, being without evidentiary support, should be set aside, the judgment vacated, and the defendant discharged. On the question thus presented, our decided cases follow the majority rule and hold that if the court charges on a lesser included offense when all the evidence tends to support a greater offense, the error is favorable to the defendant and he is without standing to challenge the verdict.

> "Suppose the court erroneously submitted to the jury a view of the case not supported by evidence, whereby the jury were permitted, if they saw fit, to convict of manslaughter instead of murder, what right has the defendant to complain? It is an error prejudicial to the State, and not to him." *State v. Quick,* 150 N.C. 820, 64 S.E. 168.
>
> "The jury discarded defendant's plea, and if, as now argued by him, there was nothing in the evidence to warrant a verdict of manslaughter, it was the duty of the jury to convict of murder in second degree.
>
> "It necessarily follows that, under such circumstances, the defendant cannot complain of a verdict for manslaughter, a lesser degree of homicide. An error on the side of mercy is not reversible." *State v. Fowler,* 151 N.C. 731, 66 S.E. 567.

In *State v. Chase,* 231 N.C. 589, 58 S.E. 2d 364, the Court citing *State v. Quick, supra,* said that a conviction of a lesser included offense of which there is no evidence is prejudicial to the State and the defendant has no just complaint. To like effect the Court cites *State v. Matthews,* 142 N.C. 621, 55 S.E. 342; *State v. Fowler, supra; State v. Rowe,* 155 N.C. 436, 71 S.E. 332; *State v. Casey,* 159 N.C. 474, 74 S.E. 625; *State v. Blackwell,* 162 N.C. 672, 78 S.E. 316.

In *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431, the defendant was tried for murder. The jury returned a verdict finding the defendant guilty of manslaughter. The Court said:

> "Evidence of manslaughter is lacking. The defendant, however, cannot complain that 'the jury, by an act of

grace,' has found him guilty of a lesser offense. 'Such verdicts occur now and then, despite the efforts of the courts to discourage them. When they do . . . since they are favorable to the accused, it is settled law that they will not be disturbed.' *State v. Bentley,* 223 N.C. 563, 27 S.E. 2d 738; *State v. Roy,* 233 N.C. 558, 64 S.E. 2d 840; *State v. Matthews,* 231 N.C. 617, 58 S.E. 2d 625; . . . *State v. Robertson,* 210 N.C. 266, 186 S.E. 247." See also *State v. Mitchner,* 256 N.C. 620, 124 S.E. 2d 831.

The defendant contends he is entitled to an acquittal if the jury, with or without instruction from the trial judge, convicts of a lesser included offense when all the evidence tended to support a major offense. This proposition fails of its own weight. The defendant gains a new trial if the court fails to charge on a lesser offense of which there is evidence. The judge, therefore, must be alert to the danger of a new trial if he fails to charge on the lesser offense. In borderline cases, prudence dictates submission of the lesser offenses. To give the defendant absolution if the judge makes a mistake in his favor, would tend to put the judge on trial. Such is not the purpose of the law.

The evidence, though circumstantial, was amply sufficient to sustain the jury's finding that the defendant was responsible for the killing of Angelo S. Pennisi. While Judge Copeland's definition of manslaughter leaves something to be desired, nevertheless the definition placed upon the State a heavier burden than the customary and usual definition. The deviation, therefore, was non-prejudicial.

Other questions of law or legal inference not herein discussed are fully decided and the decision documented by this Court in passing on the first appeal.

The defendant's objections to the trial are not sustained. In the judgment we find

No error.

STATE OF NORTH CAROLINA v. FRED MABERY

No. 31

(Filed 11 April 1973)

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

A trial judge is not required to define the phrase "beyond a reasonable doubt" unless specifically requested to do so; however, when he undertakes to do so the definition should be substantially in accord with definitions approved by the Supreme Court.

2. **Criminal Law § 112— instruction on reasonable doubt — approval of definition**

Trial judge's instruction that reasonable doubt is "a doubt based upon reason, arising from a thorough and impartial consideration of all the evidence in the case, or lack of evidence as the case may be" and that it is a state of mind in which one does "not feel an abiding conviction amounting to a moral certainty of the truth of the charge" is substantially in accord with definitions of reasonable doubt approved by the Supreme Court.

APPEAL by defendant from *Cohoon, J.*, 2 October 1972 Session of PITT Superior Court.

Defendant was tried upon bills of indictment charging him with rape and kidnapping. The cases were consolidated for trial, and defendant entered a plea of not guilty to each charge.

The State offered evidence tending to show that on 14 August 1972, at about 9:00 p.m. Gwendolyn Hooks, the 15-year-old prosecuting witness, and a female companion of the same age were walking home from a cafe located in Ayden, North Carolina. Defendant came up behind Gwendolyn and placed a knife upon the back of her neck, forced her into the back seat of his car, and drove to a field. He was ordered away by a person who lived adjacent to the field. Defendant then drove to a nearby tobacco field where he forcibly and against her will had intercourse with Gwendolyn Hooks. Thereafter defendant started back toward Ayden and met Gwendolyn's uncle, Wilbur Hooks, who pursued defendant's automobile at high speed to a place beyond Winterville, North Carolina, where defendant jumped out of the car and ran into the woods. Gwendolyn was found in the back seat of defendant's car and carried home. Defendant was taken into custody on the same night.

Defendant offered no evidence.

The jury returned verdicts of guilty as charged in each case.

Defendant appealed from judgments entered on the verdicts.

Attorney General Morgan; Assistant Attorney General Robert G. Webb and Assistant Attorney General Charles M. Hensey for the State.

Richard Powell for defendant.

Samuel S. Mitchell for defendant.

PER CURIAM.

The sole question presented for decision is whether there is prejudicial error in the trial judge's additional instructions on reasonable doubt.

Counsel for defendant correctly concedes that the court's original instructions were ample and free from error. *State v. Phillip*, 261 N.C. 263, 134 S.E. 2d 386; *State v. Hammonds*, 241 N.C. 226, 85 S.E. 2d 133.

After the case had been submitted to the jury, the foreman of the jury requested additional instructions on reasonable doubt. In answer to this request Judge Cohoon additionally charged:

> "I will preface that instruction by saying that the defendant is presumed to be innocent until the contrary, that is, his guilt is proved to your satisfaction beyond a reasonable doubt. If you have a reasonable doubt as to whether or not the guilt of the defendant has been proven, he is entitled to be acquitted. The State does not have to prove the charge beyond all possible doubt before a conviction can be had. But the State must prove the defendant guilty beyond a reasonable doubt before you can convict. The phrase reasonable doubt means just what the words imply. It is a doubt based upon reason, arising from a thorough and impartial consideration of all the evidence in the case, or lack of evidence as the case may be. It is that state of mind in which you do not feel an abiding conviction amounting to a moral certainty of the truth of the charge. While you cannot convict the defendant on mere surmise or conjecture, neither should you go outside the evidence to imagine doubt to justify an acquittal. If, after careful deliberation, you are

convinced to a moral certainty that the defendant is guilty of the crime charged, then you are satisfied beyond a reasonable doubt; otherwise, not. . . ."

[1] A trial judge is not required to define the phrase "beyond a reasonable doubt" unless specifically requested to do so. However, when he undertakes to do so the definition should be substantially in accord with definitions approved by this Court. *State v. Flippin,* 280 N.C. 682, 186 S.E. 2d 917; *State v. Hammonds, supra.*

[2] Judge Cohoon's additional charge on reasonable doubt is substantially in accord with definitions heretofore approved by this Court. *State v. Bryant,* 282 N.C. 92, 191 S.E. 2d 745; *State v. Flippin, supra; State v. Hammond, supra; State v. Brackett,* 218 N.C. 369, 11 S.E. 2d 146; *State v. Schoolfield,* 184 N.C. 721, 114 S.E. 466.

There was no error in the trial judge's additional instructions on reasonable doubt.

We have carefully examined this entire record and find no prejudicial error.

No error.

AUSBAND v. TRUST CO.

No. 21 PC.

Case below: 17 N.C. App. 325.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1973.

HUFFMAN v. INSURANCE CO.

No. 24 PC.

Case below: 17 N.C. App. 292.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1973.

KANOY v. KANOY

No. 27 PC.

Case below: 17 N.C. App. 344.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1973.

KISER v. SNYDER

No. 32 PC.

Case below: 17 App. 445.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1973.

MARTIN v. SERVICE CO.

No. 31 PC.

Case below: 17 N.C. App. 359.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1973.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. BRICE

No. 20 PC.

Case below: 17 N.C. App. 189.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1973.

STATE v. COLEY

No. 43 PC.

Case below: 17 N.C. App. 443.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1973.

STATE v. FAISON

No. 34 PC.

Case below: 17 N.C. App. 200.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1973.

STATE v. GRISSOM

No. 33 PC.

Case below: 17 N.C. App. 374.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1973.

STATE v. LEWIS

No. 5 PC.

Case below: 17 N.C. App. 117.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1973.

STATE v. LEWIS

No. 5 PC.

Case below: 17 N.C. App. 159.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1973.

STATE v. MARTIN

No. 23 PC.

Case below: 17 N.C. App. 317.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1973.

STATE v. MITCHELL

No. 42 PC.

Case below: 15 N.C. App. 431.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1973.

STATE v. MITCHUM

No. 25 PC.

Case below: 17 N.C. App. 372.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1973.

STATE v. SALEM

No. 18 PC.

Case below: 17 N.C. App. 269.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1973.

STATE v. SATCHELL

No. 26 PC.

Case below: 17 N.C. App. 312.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1973.

STATE OF NORTH CAROLINA v. NEIL DOUGLAS BEACH

No. 71

(Filed 9 May 1973)

1. **Criminal Law § 9; Assault and Battery § 14— aiders and abettors — sufficiency of evidence**

In a prosecution charging defendant with aiding and abetting in assault with a firearm with intent to kill and aiding and abetting in the discharge of a firearm into an occupied vehicle, evidence was sufficient to withstand motion for nonsuit where it tended to show that defendant was present when the crime was committed, operated flashing lights on his automobile and blinked his headlights from bright to dim numerous times while driving close behind the victim's automobile, thus causing that automobile to stop on the side of the road, pulled alongside the victim's automobile so that the gunman's window was flush with the driver's seat, moved slowly along after the first shot was fired while the gunman fired five additional shots into the victim's automobile, left the scene of the crime, attempted to escape recognition, pursued the victim's automobile at high rates of speed, denied to police officers that he had been at the scene of the crime and later admitted being present.

2. **Criminal Law § 9— aider and abettor — acquittal of principal**

It is not necessary that the person who actually perpetrated a crime be tried and convicted before the one who aided and abetted in the crime can be tried and convicted, but there must be proof that the offense has in fact been committed.

3. **Criminal Law § 9; Indictment and Warrant § 9— aider and abettor — acquittal of principal — sufficiency of indictment against defendant**

Where indictments charged that an unknown person discharged a firearm into an occupied vehicle and committed an assault with a firearm with intent to kill and that defendant was present, aiding and abetting in the deed, acquittal of one Johnny Smith as the actual perpetrator did not constitute a sufficient basis for dismissal of the charges against defendant.

4. **Criminal Law § 172— failure to submit lesser offense — acquittal — error cured**

Jury verdict of not guilty of aiding and abetting in assault with a firearm with intent to kill was tantamount to a verdict of not guilty of all lesser included offenses; therefore, the jury verdict rendered nonprejudicial the failure of the trial judge to submit the lesser included offense of aiding and abetting in an assault with a deadly weapon.

5. **Criminal Law § 9; Indictment and Warrant § 9— defendant as aider and abettor — sufficiency of indictments**

An indictment must charge every essential element of the crime, but it need not set forth the specific facts or means by which an accused aided and abetted in the commission of a crime; therefore,

the trial court in a case charging defendant with aiding and abetting in an assault with a firearm with intent to kill and with aiding and abetting in the discharge of a firearm into an occupied vehicle properly refused to quash the indictments against defendant, particularly since the allegations of the indictments stated facts showing that defendant was present as the driver of the vehicle from which the shots were fired.

6. **Criminal Law §§ 112, 119— requested instruction — incorrect statement of law — refusal to instruct proper**

Defendant's requested instruction that "Circumstantial evidence which raises mere suspicion or conjecture of guilt is insufficient for conviction" was not a correct statement of the law as to the intensity of proof required when the State relies upon circumstantial evidence, and the trial court therefore properly refused to give the instruction.

7. **Criminal Law § 119— requested instructions given in substance — no error**

There was no prejudicial error in the trial court's refusal to give instructions as to aiders and abettors in the exact words of defendant's tendered request where the charge actually given was substantially in accord with defendant's request.

8. **Constitutional Law § 34; Criminal Law § 26— two charges based on one offense — acquittal on one charge — no double jeopardy**

In a prosecution charging defendant with aiding and abetting in an assault with a firearm with intent to kill and aiding and abetting in the discharge of a firearm into an occupied vehicle where defendant was acquitted of the assault charge, he was neither convicted nor punished twice for the same offense and did not suffer infringement of his constitutional guaranty against double jeopardy by the imposition of multiple punishment, even if he was twice tried for the same offense at the same time.

9. **Criminal Law § 142— suspended sentence upon conditions — consent of defendant — effect of appeal on judgment**

Where the judgment of the trial court contained a recital that the actual sentence was suspended with defendant's consent upon the condition that he surrender his license to practice law to the N. C. State Bar and there is no indication in the record that defendant excepted to the judgment or withdrew his consent, the question of whether defendant's appeal stayed the order of disbarment by the trial court is not presented on appeal.

APPEAL by defendant from *Fountain, J.*, 18 September 1972 Session of BURKE Superior Court, transferred for initial appellate review by the Supreme Court by Order dated 26 March 1973 pursuant to G.S. 7A-31 (b) (4).

Indictment No. 71 Cr 7002 charged:

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Neil Douglas Beach late of the County of Burke

on the 24th day of August, 1971, with force and arms, at and in the county aforesaid, did unlawfully, wilfully, and feloniously aid and abet an unknown party who unlawfully, wilfully and feloniously discharged a pistol, a firearm, into an automobile located on Highway No. 181 North of Morganton, North Carolina between Morganton and Oak Hill School, Burke County, North Carolina, while Robert H. Deaton, his wife, Revonda Gail Deaton, and their children, Bobby Lynn Deaton, age nine (9) years, and James Robert Deaton, age eight (8) years, were in actual occupation of the said automobile. Neil Douglas Beach was the driver of the automobile from the rear seat of which said shots were fired. After the shooting said automobile was driven away at a high rate of speed by the defendant against the form of the statute in such case made and provided and against the peace and dignity of the State.

s/ DONALD E. GREENE

Solicitor"

Indictment No. 71 CrD 6918 charged:

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Neil Douglas Beach, late of the County of Burke on the 24th day of August, 1971, with force and arms, at and in the county aforesaid, did unlawfully, wilfully and feloniously aid and abet an unknown party who unlawfully, wilfully and feloniously assaulted Robert H. Deaton and his wife, Revonda Gail Deaton, and their children, Bobby Lynn Deaton, age nine (9) years, and James Robert Deaton, age eight (8) years, with a certain deadly weapon, to wit: a Pistol, with the felonious intent to kill and murder the said Robert H. Deaton, his wife, Revonda Gail Deaton, and their children, Bobby Lynn Deaton, age nine (9) years, and James Robert Deaton, age eight (8) years, in that said unknown party fired said pistol six (6) times into an automobile which Robert H. Deaton, his wife, Revonda Gail Deaton, and their children, Bobby Lynn Deaton, age nine (9) years, and James Robert Deaton, age eight (8) years, were occupying, one shot going through the car and passing near the head of Robert H. Deaton, and the other five (5) shots striking said automobile which Robert H. Deaton, his wife, and children were occupying. Neil Douglas Beach was the driver of the automobile from

the rear seat of which said shots were fired. After the shots were fired, said automobile was driven away at a high rate of speed by the defendant, against the form of the statute in such case made and provided and against the peace and dignity of the State.

s/ DONALD E. GREENE

Solicitor"

Prior to pleading defendant moved to dismiss on the ground that Johnny Smith was tried and acquitted as the principal in both charges of which defendant allegedly aided and abetted. In support of his motion, defendant handed up the transcript in the Johnny Smith case. He also introduced the record proper in the cases charging Johnny Smith with assault with a firearm with intent to kill and discharging a firearm into a vehicle. The trial judge denied defendant's motion to dismiss. The indictments were consolidated for trial and defendant entered pleas of not guilty.

The State offered evidence which tended to show that on the night of 24 August 1971, or the early morning of August 25, 1971, the Robert H. Deaton family was going toward Morganton on Highway 181 in their 1969 Chevelle automobile. Mr. Deaton was driving, Mrs. Deaton was in the front passenger seat, and their young sons Robert and James were asleep in the back seat. After the Deatons had passed two vehicles and a driveway leading to the home of a man named Biggerstaff, the vehicle driven by defendant approached from the rear blinking its lights from high to low and operating its flashing lights. Mr. Deaton thereupon pulled his automobile to the shoulder of the road, and defendant drove his Oldsmobile automobile beside the Deaton car so that the right rear window of defendant's car was opposite the driver's window of the Deaton automobile. A woman was in the front seat beside defendant, and a man was sitting in the front seat next to the door. Two men were in the back seat. When defendant's automobile came to a stop, a man sitting in the right rear seat of defendant's automobile inquired, "Are you having any trouble, buddy?" Mr. Deaton answered "No." The man making the inquiry then extended his arm out the window and shot toward Mr. Deaton. Deaton fell back in his wife's lap. He was not hit by a bullet but received powder burns about his face. Defendant then slowly drove forward, and five other shots were rapidly fired.

Four of these shots hit the front part of the Deaton vehicle, and one shot hit the radio aerial. Defendant's vehicle then moved off at a normal rate of speed, and Mr. Deaton followed. The license number on the Oldsmobile was blurred with mud, and as Deaton came closer to get a better view of the license plate defendant suddenly applied brakes, forcing Deaton to swerve his automobile and pass. The Deatons were able to obtain the license number of the Oldsmobile automobile. After passing the Oldsmobile Mr. Deaton accelerated his automobile to speeds of approximately 100 mph with the Oldsmobile following closely behind. The Oldsmobile began to slow down and disappeared from the Deatons' view near the road leading to Lenoir, North Carolina.

The Deatons proceeded to the police station at Morganton, reported the incident, and furnished the police with the license number which they had taken from the Oldsmobile automobile. The police apprehended defendant in Lenoir, North Carolina, and he agreed to return to Burke County.

Mr. and Mrs. Deaton had not previously known any of the occupants of the Oldsmobile automobile but identified defendant as the operator of the Oldsmobile and Mary Max Berry as the woman who was sitting in the front seat. They were unable to identify the remaining occupants of the automobile. Mrs. Deaton later saw Johnny Smith and stated positively that he was not the man who shot into their automobile.

Defendant offered evidence which tended to show that he was a practicing attorney with offices in Lenoir, North Carolina, and that on the night of 24 August 1971 he went to Burke County to see a client by the name of Biggerstaff. At the time he encountered the Deatons he was accompanied by Mrs. Mary Max Berry, who was riding in the front seat, Leroy Nelson, who was sitting in the left rear seat and Johnny Smith, who was occupying the right rear seat. As he drove down Highway 181 toward Morganton, the Deatons' automobile came up behind him with its lights blinking, passed him, and after slowing down came to a stop on the shoulder of the road. Defendant Beach testified:

> "When he pulled off the road, I thought he was in trouble. But he pulled all the way off the highway onto the shoulder of the road there. I pulled up beside of him and just slowly—just well, I think Mrs. Deaton was yes—

I took my foot off the gas and the car just idled up beside, when I got up even—about well, just about, just like they said, about my back window was even with Mrs. Deaton's front window. Johnny Smith rolled the window down, and said, "What's the trouble, and I didn't hear anything said, but I heard a shot, and then just—everything just happened fast—six shots or five shots and just bang, bang, bang, bang, and the first shot—No, sir, I didn't see who fired those shots, I didn't see a gun until later. I was on down the road when I saw a gun."

Defendant further stated that he drove away after the shooting occurred because he was frightened, and that he carried Johnny Smith and Leroy Nelson to Smith's automobile. He admitted that he had first stated to police officers that he had not been in Burke County on the night of the shooting.

Defendant offered witnesses who gave testimony tending to corroborate the defendant. He also offered numerous witnesses who testified as to his good reputation and character.

The jury returned a verdict finding defendant not guilty of aiding and abetting in assault with a firearm with intent to kill. The jury returned a verdict finding defendant guilty of aiding and abetting in the discharge of a firearm into an occupied vehicle. Defendant appealed.

Simpson, Martin and Baker, by Dan R. Simpson and Gene Baker for defendant appellant.

Attorney General Morgan; Assistant Attorney General R. S. Weathers for the State.

BRANCH, Justice.

[1] Defendant assigns as error the failure of the trial judge to grant his motions as of nonsuit.

The following principles of law control decision of this assignment of error:

One who advises, counsels, procures, encourages or assists another in the commission of a crime is an aider and abettor. *State v. Benton,* 276 N.C. 641, 174 S.E. 2d 793; *State v. Johnson,* 220 N.C. 773, 18 S.E. 2d 358; *State v. Lambert,* 196 N.C. 524, 146 S.E. 139; *State v. Hart,* 186 N.C. 582, 120 S.E. 345.

"A person aids and abets when he has 'that kind of connection with the commission of a crime which, at common law, rendered the person guilty as a principal in the second degree. It consisted in being present at the time and place, and in doing some act to render aid to the actual perpetrator of the crime, though without taking a direct share in its commission.' "

State v. Davenport, 156 N.C. 596, 72 S.E. 7; *State v. Epps,* 213 N.C. 709, 197 S.E. 580. See also *State v. Oliver,* 268 N.C. 280, 150 S.E. 2d 445; *State v. Bruton,* 264 N.C. 488, 142 S.E. 2d 169; *State v. Gaines,* 260 N.C. 228, 132 S.E. 2d 485.

This Court in the case of *State v. Price,* 280 N.C. 154, 184 S.E. 2d 866, has defined an aider and abettor, or a principal in the second degree, as follows:

" . . . One who procures or commands another to commit a felony, accompanies the actual perpetrator to the vicinity of the offense and, with the knowledge of the actual perpetrator, remains in that vicinity for the purpose of aiding and abetting in the offense and sufficiently close to the scene of the offense to render aid in its commission, if needed, or to provide a means by which the actual perpetrator may get away from the scene upon the completion of the offense, is a principal in the second degree and equally liable with the actual perpetrator. . . . "

In *State v. Hargett,* 255 N.C. 412, 121 S.E. 2d 589, the definition is stated thusly:

" ' A person aids when, being present at the time and place, he does some act to render aid to the actual perpetrator of the crime though he takes no direct share in its commission; and an abettor is one who gives aid and comfort, or either commands, advises, instigates or encourages another to commit a crime.' *State v. Holland,* 234 N.C. 354, 358, 67 S.E. 2d 272; *State v. Johnson,* 220 N.C. 773, 776, 18 S.E. 2d 358. ' . . . Mere presence, even with the intention of assisting in the commission of a crime cannot be said to have incited, encouraged or aided the perpetration thereof, unless the intention to assist was in some way communicated to him (the perpetrator) . . . . ' *State v. Hoffman,* 199 N.C. 328, 333, 154 S.E. 314. However, there is an exception. ' . . . when the bystander is a friend of

the perpetrator, and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement, and in contemplation of law this was aiding and abetting.' *State v. Holland, supra.*"

Defendant relies upon the cases of *State v. Ham,* 238 N.C. 94, 76 S.E. 2d 346, *State v. Hargett, supra,* and *State v. Gaines, supra,* to support his contention that the trial judge should have allowed his motions as of nonsuit. These cases are factually distinguishable from this case in that the State in each was only able to show that defendant was present at the scene of the crime. There was no evidence that the defendants in any of these cases rendered aid to the perpetrator of the deed, or that any one of the defendants gave encouragement or made it known that he was present to lend aid to the perpetrator of the deed if it were needed.

In instant case, the State offered evidence tending to show that defendant (1) was present when the crime was committed, (2) operated the flashing lights on his automobile and blinked his headlights from bright to dim numerous times while driving close behind the Deaton automobile, thus causing that automobile to stop on the side of the road, (3) pulled alongside the Deaton automobile so that the gunman's window was flush with the driver's seat, (4) moved slowly along after the first shot was fired while the gunman fired five additional shots into the Deaton motor vehicle, (5) left the scene of the crime, (6) attempted to escape recognition, (7) pursued the Deaton automobile at high rates of speed, (8) denied to police officers that he had been in Burke County and later admitted being present.

We conclude that when taken in the light most favorable to the State there was sufficient evidence to allow the jury to find that defendant was present at the time the crime was committed, and that he rendered aid to the actual perpetrator of the crime.

We hold that there was sufficient evidence to repel defendant's motion as of nonsuit.

Defendant next contends that the trial court erred in placing him on trial as an aider and abettor to discharging a firearm into an occupied vehicle and as an aider and abettor

to an assault with a firearm with intent to kill, because the State had previously tried Johnny Smith as the actual perpetrator of these crimes, and the said Johnny Smith was found to be not guilty of either charge.

[2] It is not necessary that the person who actually perpetrated the deed be tried and convicted before the one who aided and abetted in the crime can be tried and convicted. *State v. Jarrell,* 141 N.C. 722, 53 S.E. 127. Indeed, this Court has held that where one principal has been acquitted at a former trial it was no bar to the trial of the others who were indicted as principals. *State v. Whitt,* 113 N.C. 716, 18 S.E. 715. See Annot., 24 A.L.R. 603; 21 Am. Jur. 2d Criminal Law § 101. Obviously there must be proof that the offense has in fact been committed before one may be convicted of aiding and abetting in its commission. *Cf. State v. Gainey,* 273 N.C. 620, 160 S.E. 2d 685; *State v. Spruill,* 214 N.C. 123, 198 S.E. 611.

We find the following statement in 21 Am. Jur. 2d Criminal Law § 128, n. 15, to wit: "The fact that one mistakenly supposed to have committed a crime was tried therefor and acquitted does not affect the guilt of one proven to have been present aiding and abetting, so long as it is established that the crime was committed by someone."

This Court has recognized that an indictment may properly allege unknown conspirators in charging a criminal conspiracy. *State v. Gallimore,* 272 N.C. 528, 158 S.E. 2d 505; *State v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686; *State v. Abernethy,* 220 N.C. 226, 17 S.E. 2d 25; *State v. Lewis,* 142 N.C. 626, 55 S.E. 600. It rationally follows that an indictment is valid which alleges the existence of an unknown co-principal in charging a crime.

[3] Here the bills of indictment do not allege that Johnny Smith was the person who actually perpetrated the offenses. The indictments charged that a crime was committed by an unknown person and that defendant was present, aiding and abetting in the deed. Thus the acquittal of Johnny Smith was not a sufficient basis for dismissal of the charges.

[4] Defendant assigns as error the failure of the trial judge to submit to the jury the misdemeanor charge of assault with a deadly weapon.

Assault with a deadly weapon is a lesser included offense of assault with a firearm with intent to kill.

When there is evidence of a lesser included offense of the crime, the court must charge upon the milder offense even when there is no specific prayer for such charge. *State v. Riera,* 276 N.C. 361, 172 S.E. 2d 535; *State v. Wagoner,* 249 N.C. 637, 107 S.E. 2d 83.

Here, the jury returned a verdict of not guilty of the greater offense which was tantamount to a verdict of not guilty of all lesser included offenses. 5 Am. Jur. 2d Appeal and Error § 792. Therefore, the jury verdict rendered nonprejudicial the failure of the trial judge to submit the lesser included offense of aiding and abetting in an assault with a deadly weapon.

[5] Defendant contends his motions to quash the indictments were erroneously denied because each failed to allege how defendant aided and abetted.

The requirements for a valid indictment are stated in *State v. Greer,* 238 N.C. 325, 77 S.E. 2d 917, as follows:

> " . . . (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case. *S. v. Cole,* 202 N.C. 592, 163 S.E. 594; *S. v. Gregory,* 223 N.C. 415, 27 S.E. 2d 140; *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166; *S. v. Miller,* 231 N.C. 419, 57 S.E. 2d 392; *S. v. Biggs,* 234 N.C. 259, 66 S.E. 2d 883."
>
> G.S. 15-153 provides:
>
> "Every criminal proceeding by warrant, indictment, information, or impeachment is sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment."

This statute has been liberally construed by our Court, *State v. Greer, supra;* nevertheless, the statute does not dispense with the requirement that the essential elements of the offense must be charged. *State v. McBane,* 276 N.C. 60, 170 S.E. 2d 913.

Defendant relies on this passage from *State v. Greer, supra:*

> "The general rule in this State and elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words. *S. v. Gregory, supra; S. v. Miller, supra; S. v. Randolph,* 228 N.C. 228, 45 S.E. 2d 132. This rule does not apply where the words of the statute do not, without uncertainty or ambiguity, set forth all the essential elements necessary to constitute the offense sought to be charged in the indictment, so as to inform the defendant of the exact charge of which he is accused to enable him to prepare his defense, to plead his conviction or acquittal as a bar to further prosecution for the same offense, and upon conviction to enable the court to pronounce sentence. In such a situation the statutory words must be supplemented in the indictment by other allegations which explicitly and accurately set forth every essential element of the offense with such exactitude as to leave no doubt in the minds of the accused and the court as to the specific offense intended to be charged. . . . "

It should be noted that defendant omitted the final sentence of the paragraph, which reads as follows: "However, it is neither necessary to state particulars of the crime in the meticulous manner prescribed by common law, nor to allege matters in the nature of evidence."

An indictment for a statutory offense is sufficient when it charges the offense in the language of the statute. *State v. Penley,* 277 N.C. 704, 178 S.E. 2d 490; *State v. Hord,* 264 N.C. 149, 141 S.E. 2d 241. Moreover, it is generally recognized that an indictment need not set forth the specific facts or means by which an accused aided and abetted in the commission of a crime. Annot., 116 A.L.R. 1104. Even so, the allegations of the indictments here challenged stated facts showing that defendant was present as the driver of the vehicle from which the shots were fired. Had defendant desired further information, he could have moved for a bill of particulars.

[6] Defendant also assigns as error the trial judge's denial of requested instructions on circumstantial evidence.

In apt time defendant requested this instruction: "Circumstantial evidence which raises mere suspicion or conjecture of guilt is insufficient for conviction."

A general and correct charge as to the intensity or quantum of proof when the State relies wholly or partly on circumstantial evidence is adequate unless the defendant tenders request for a charge on the intensity of proof required for such evidence. *State v. Stevens,* 244 N.C. 40, 92 S.E. 2d 409; *State v. Shoup,* 226 N.C. 69, 36 S.E. 2d 697. When such request is aptly tendered, the trial judge should charge that circumstantial evidence must point unerringly to defendant's guilt and exclude every other reasonable hypothesis. *State v. Lowther,* 265 N.C. 315, 144 S.E. 2d 64; *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431; *State v. Warren,* 228 N.C. 22, 44 S.E. 2d 207.

In instant case the requested instruction was not a correct statement of the law as to the intensity of proof required when the State relies upon circumstantial evidence, and the court therefore properly refused to give the instruction. 3 Strong's N. C. Index 2d Criminal Law § 119. The court is under no duty to modify or qualify the requested instruction so as to remedy defects therein. 7 Strong's N. C. Index 2d Trial § 38.

We believe the court's charge placing the burden upon the State to prove defendant's guilt beyond a reasonable doubt was sufficient. *State v. Shoup, supra; State v. Shook,* 224 N.C. 728, 32 S.E. 2d 329.

[7] Defendant also avers that the trial court erred in refusing to give the following requested instruction:

> "TO RENDER ONE WHO DOES NOT ACTUALLY PARTICIPATE IN THE COMMISSION OF A CRIME GUILTY OF THE OFFENSE COMMITTED, THERE MUST BE SOME EVIDENCE TENDING TO SHOW THAT HE, BY WORD OR DEED, GAVE ACTIVE ENCOURAGEMENT TO THE PERPETRATOR OF THE CRIME OR BY HIS CONDUCT MADE IT KNOWN TO SUCH PERPETRATOR THAT HE WAS STANDING BY TO LEND ASSISTANCE WHEN AND IF IT SHOULD BECOME NECESSARY."

Judge Fountain, in part, charged:

> " . . . it is settled law that all who are present at the place of a crime and are either aiding and abetting, assisting or advising in its commission, or are present for such

purpose to the knowledge of the actual perpetrator are principals and are equally guilty. A person aids when being present at the time and place, he does some act to render aid to the actual perpetrator of the crime, though he takes no direct share in its commission.

An abettor is one who gives aid and comfort or either commands, advises, instigates, or encourages another to commit a crime.

Further, the mere presence of a person at the scene of a crime at the time of its commission does not make him a principal in the second degree; that is, does not make him an aider and abettor, . . . While mere presence cannot constitute aiding and abetting, a bystander does become an aider and abettor by his presence at the time and place of a crime where he is present to the knowledge of the actual perpetrator of the crime for the purpose of assisting, if necessary, in the commission of the crime, and his presence and purpose do in fact encourage the actual perpetrator to commit the crime."

The court's charge was substantially in accord with defendant's request. The law does not require that the charge be given exactly in the words of the tendered request or instructions. *State v. Howard,* 274 N.C. 186, 162 S.E. 2d 495; *State v. Bailey,* 254 N.C. 380, 119 S.E. 2d 165.

There was no prejudicial error in the court's refusal to give the instructions as tendered by defendant.

[8] Defendant's assignment of error No. 9 is as follows:

"WAS THE DEFENDANT PLACED IN DOUBLE JEOPARDY WHEN THE COURT ORDERED THAT HE BE TRIED FOR TWO SEPARATE CRIMES ARISING OUT OF ONE SINGLE INDEPENDENT CRIMINAL OFFENSE, THUS SUBJECTING HIM TO MULTIPLE PUNISHMENT FOR THE SAME OFFENSE?"

This Court stated in *State v. Summrell,* 282 N.C. 157, 192 S.E. 2d 569, that "The constitutional guarantee against double jeopardy protects a defendant from multiple punishment for the same offense, . . . " In finding that the defendant has been twice convicted and sentenced for the same criminal offense, we said that "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."

The difference between instant case and *Summrell,* assuming that this defendant was twice tried for the same offense at the same time, is that defendant was acquitted of one of the offenses—aiding and abetting assault with a firearm with intent to kill. Therefore, he was neither convicted nor punished twice for the same offense and did not suffer infringement of his constitutional guaranty against double jeopardy by the imposition of multiple punishment.

"If a person is convicted simultaneously of armed robbery and of the lesser included offense of assault with a deadly weapon, and both offenses arise out of the same conduct, as in *State v. Parker,* 262 N.C. 679, 138 S.E. 2d 496 (1964), and *State v. Hatcher,* 277 N.C. 380, 177 S.E. 2d 892 (1970), and separate judgments are pronounced, the judgment on the separate verdict of guilty of assault with a deadly weapon must be arrested." *State v. Richardson,* 279 N.C. 621, 185 S.E. 2d 102 (1971). Even if defendant had been tried for an offense and a lesser included offense thereof, the remedy, as suggested in *Richardson,* would be of no avail in that there is no separate verdict of guilty to be arrested.

We find no prejudicial error in this assignment of error.

[9] Finally, defendant assigns as error the action of the trial judge in disbarring him after his conviction of a felony and after he had given notice of appeal.

Article 4 of Chapter 84 of the General Statutes provides for the creation of the North Carolina State Bar as an agency of the State and in part provides for the discipline and disbarment of its members. It does not, however, purport to fetter the inherent power of the courts to disbar attorneys. G.S. 84-36; *In re Burton,* 257 N.C. 534, 126 S.E. 2d 581.

When an attorney is convicted of a felony, the court conducting the criminal trial, in the exercise of its inherent powers, may summarily and without further proceedings order his name stricken from the rolls of attorneys and order his license surrendered to the North Carolina State Bar, Inc. Such order is entered as protection to the public against an unworthy practitioner. *In re Burton, supra; In re Brittain,* 214 N.C. 95, 197

S.E. 705; *State v. Spivey*, 213 N.C. 45, 195 S.E. 1; *In the matter of Ebbs*, 150 N.C. 44, 63 S.E. 190.

The narrow question of whether defendant's appeal stays the order of disbarment is not posed by the facts of this case since defendant consented to the surrender of his license as one of the conditions of the suspension of the active sentence imposed.

The judgment provides:

"It is ADJUDGED that the defendant be imprisoned for the term not less than 18 nor more than 24 months in the common jail of Burke County to be assigned to work under the supervision of the State Department of Correction;

The execution of this sentence is suspended, however, for three years upon compliance with the following conditions, *to which the defendant gave assent:* that he be placed on probation for three years under the usual statutory terms and conditions, and upon these special conditions of probation: (1) that he pay the costs in this action; (2) that he pay into the office of the clerk the sum of $1184.60 for the use and benefit of Robert H. Deaton; (3) that he pay into the office of the clerk the sum of $650.00 for the use and benefit of Mrs. Robert H. Deaton; (4) that he surrender his law license to the North Carolina State Bar, Inc., and not engage in the practice of law until and unless the North Carolina Bar, Inc. determines that his law license be reissued.

This, the 22nd day of September, 1972.

s/ GEORGE M. FOUNTAIN

Judge Presiding

Attorneys for Defendant: Dan R. Simpson,
C. E. Baker

Attorneys for the State: Donald E. Greene,
Joe K. Byrd, Robert
B. Byrd" (Emphasis ours)

In *State v. Cole*, 241 N.C. 576, 86 S.E. 2d 203, it is stated:

"True, courts having jurisdiction may pronounce judgment as by law provided; and then, *with the defendant's*

consent, express or implied, suspend execution thereof upon prescribed conditions. Long recognized as an inherent power of the court, such authority is now recognized expressly by statute. *S. v. Miller,* 225 N.C. 213, 34 S.E. 2d 143, and cases cited; G.S. 15-197."

The case of *State v. Warren,* 252 N.C. 690, 114 S.E. 2d 660, contains the following pertinent statement:

"Appellant finally contends that he did not consent to the suspension of the prison sentence, that his exception to the judgment and notice of appeal therefrom negatives consent, and that the judgment below should be stricken and the cause remanded for proper sentence, should the Act be declared constitutional. *State v. Moore,* 245 N.C. 158, 95 S.E. 2d 548. Chapter 1017, Session Laws of 1959 (G.S. 15-180.1) provides that a defendant may appeal from a suspended sentence. It further provides 'that by giving notice of appeal the defendant does not waive his acceptance of the terms of suspension of a sentence.' The judgment below recites that the sentence was suspended by and with the consent of the defendant. There was no specific exception to this portion of the judgment; there is only an exception to the judgment generally. In the absence of anything to indicate withdrawal of consent, the recital by the court is accepted as correct and true."

The judgment in this case contains a recital that the actual sentence was suspended with defendant's assent. Nothing appears showing withdrawal of this assent. There was no specific exception to the portion of the judgment imposing the conditions of the suspended sentence.

In any event, defendant could at most have won a "pyrrhic victory" had we sustained this assignment of error since we have been unable to find prejudicial error in the trial of the case.

No error.

INVESTMENT PROPERTIES OF ASHEVILLE, INC., AND BAXTER H. TAYLOR v. MARTHA NORBURN MEAD ALLEN

No. 38

(Filed 9 May 1973)

1. Principal and Agent § 5— contract made by agent — liability of principal

A principal is liable upon a contract duly made by his agent with a third person (1) when the agent acts within the scope of his actual authority; (2) when the contract, although unauthorized, has been ratified; (3) when the agent acts within the scope of his apparent authority, unless the third person has notice that the agent is exceeding his actual authority.

2. Principal and Agent § 4— insufficiency of evidence of agency

The evidence was insufficient to show that defendant or anyone purporting to act for her promised to pay for grading work performed on her land under a contract with plaintiffs where it tended to show that defendant's brother had procured defendant's signature on a 50-year lease of her property to plaintiffs, plaintiffs informed defendant's brother that it would be necessary for defendant to execute a new lease subordinating her interest in the premises in order for them to finance construction of a motel on the site, defendant's brother refused to try to persuade defendant to subordinate her interest unless plaintiffs guaranteed to save her harmless if the construction loan was not paid, plaintiffs and defendant's brother engaged in extended negotiations concerning a new lease but plaintiffs were never willing to give a guarantee satisfactory to defendant's brother and no proposals were ever submitted to defendant, defendant's brother agreed that if plaintiffs would personally put up one-third of the cost of the motel he would "stand personally liable" for the cost of grading in the event defendant failed to sign a new lease of the property, plaintiffs forfeited their rights under the 50-year lease and defendant's brother thereafter negotiated a lease with a motel company which defendant signed.

3. Principal and Agent § 5— contract on agent's credit — principal not liable

When a party contracts with a known agent personally on his own credit alone, he will not thereafter be allowed to charge the principal on the ground that the agent acted within the scope of his apparent authority.

4. Principal and Agent § 6— unauthorized contract — ratification

The question of ratification of an unauthorized contract does not arise where the person making the contract did not purport to act as the agent of the person claimed to be the principal.

Justices HUSKINS and MOORE dissent.

ON defendant's petition for a rehearing of her appeal from *Judge Harry C. Martin* at the 1 March 1972 Session of BUN-

COMBE and for a reconsideration of the decision reported in 281 N.C. 174, 188 S.E. 2d 441. The petition was allowed and the appeal docketed as Case No. 29 at the Fall Term 1972.

Plaintiffs seek to recover from defendant Allen the sum of $19,456.88 with interest from 1 October 1965. They allege that during negotiations for a long-term lease of defendant's "Acton property" they spent the principal sum in preparing it as a site for a proposed motel, and that defendant, by and through her agent, Dr. Charles S. Norburn, agreed that she would pay this cost. Defendant denied both allegations and plead a counterclaim, which is not involved in this rehearing.

Upon the trial the jury answered the issues in accordance with plaintiffs' contentions and the court entered judgment upon the verdict that plaintiffs recover of defendant the sum of $19,456.88, the actual cost of the grading done, with interest. From this judgment defendant appealed to the Court of Appeals, which held that plaintiffs had offered sufficient evidence for the jury to find that Dr. Norburn was acting as defendant's agent and that there was no error in the trial. Defendant appealed to this Court as a matter of right under G.S. 7A-30(2). By a four-to-three decision this Court affirmed the Court of Appeals. Defendant, in compliance with our Rule 44, petitioned for a rehearing. Under Section (3) of the Rule, she addressed her petition to a single Justice, who allowed it.

Bennett, Kelly & Long and Hendon & Carson for plaintiff appellees.

Williams, Morris and Golding by James F. Blue III for defendant appellant.

SHARP, Justice.

In the light of the petition to rehear, the Court has reconsidered the record and reviewed all briefs which have been filed. The question which we re-examine is the sufficiency of the evidence to withstand defendant Allen's motions, made in accordance with G.S. 1A-1, Rule 50, for a directed verdict and for judgment notwithstanding the verdict.

At the outset we note that at the same time plaintiffs filed this action against defendant Allen they also filed a separate suit against her alleged agent, Dr. Charles S. Norburn, to recover from him the cost of the grading which they had done on

Allen's Acton property. In that action plaintiffs alleged that on 17 June 1965 Norburn gave them his written agreement to "stand personally liable" for the actual cost of conduit grading and preparing the Acton property owned by Martha Mead Allen, "in case the lease is not continued after June 1, 1966," and promised "to pay in cash for this" or by the conveyance of "the 734-acre tract in Ashe County."

By consent of all the parties, Judge Martin consolidated the two cases for trial, and this case against Allen comes to us on the transcript of the consolidated trials.

In the Norburn case, the jury found that Dr. Norburn had received no consideration for his promise to pay the cost of grading Mrs. Allen's property in the event she refused to lease the lands to plaintiffs, and Judge Martin entered judgment that plaintiffs recover nothing of the defendant Norburn. Plaintiffs appealed as a matter of right, under G.S. 7A-30(2), and we ordered a new trial because of an error in the judge's charge. *See Investment Properties v. Norburn,* 281 N.C. 191, 188 S.E. 2d 342 (1972).

Upon the consolidation of the Allen and Norburn cases for trial, it was inevitable that plaintiffs would offer much evidence which was competent against Norburn but not against Allen. For instance, at the time the written agreement upon which plaintiffs sued Norburn was introduced in evidence as plaintiffs' Exhibit 10 (P-10), it was admitted only as against Norburn. When an "objection by Allen" was interposed to the admission of any evidence the ruling was either "sustained," "sustained as to Allen," or "overruled." Whatever the ruling, ordinarily the witness proceeded to answer the question, and the court gave no instruction limiting the jury's consideration of the testimony. However, we doubt whether the confusion inherent in this situation could have been avoided in any event. We now find that in our first consideration of this defendant's appeal we considered evidence which had been admitted only against defendant Norburn.

Our re-examination of the record discloses that plaintiffs' evidence applicable to defendant Allen tends to show:

Dr. Charles Norburn and Mrs. Allen are brother and sister. At the time of the trial he was 80 years old, and she admitted to being "older than Charles." In 1965 she owned their parents' old homeplace, sometimes referred to as the Acton

property; at others, as the Norburn property. Plaintiffs, Investment Properties, Inc., and Baxter H. Taylor, as co-venturers and partners, desired to acquire this property by a long-term lease as the site of a motel complex. Dr. Logan Robertson, then vice-president of Investment Properties, undertook the task of procuring the lease. He was related to the Norburn family by marriage; his son was married to Dr. Charles Norburn's daughter and his sister, to Dr. Norburn's brother. Several months prior to 10 May 1965, Dr. Robertson requested Dr. Norburn to persuade Mrs. Allen (Martha) to lease the Acton property to plaintiffs.

In a deposition introduced by plaintiffs, Dr. Norburn testified that in his negotiations with his sister he was representing Dr. Robertson "more than Martha," but he "wasn't going to see her cheated." Mrs. Allen, in her deposition introduced by plaintiffs, testified that Dr. Norburn was "certainly not acting as [her] agent" in connection with the lease of this property to plaintiffs; that she was renting the home and did not want to see the old homeplace destroyed and the hill removed. She wanted to keep the property as it was and continue to collect the rent. However, Dr. Norburn eventually convinced her that she should lease the property to plaintiffs.

On 10 May 1965 Mrs. Allen and Investment Properties, Inc., by its vice-president, Dr. Robertson, executed a contract whereby she leased "the old Norburn homeplace" to the plaintiff corporation for a period of fifty years from that date at a rental of $1,000.00 per month, the first payment to be due 10 May 1966, or sooner if lessee began to receive income from the property before that date. Lessor retained the right to re-enter whenever any installment of rent became ten days in arrears. Upon re-entry, should the value of improvements made upon the property be less than $60,000.00 lessee bound itself to pay lessor the difference between that amount and the value of improvements actually made. Lessee assumed complete responsibility for the property, including the payment of all taxes and assessments, and acquired "unrestricted control in grading, reshaping and development of this property."

Dr. Robertson testified that about a month after the execution of the lease of 10 May 1965 (plaintiffs' Exhibit 7), he "found out it was not a satisfactory loan instrument" and plaintiffs would not be able to finance the construction of the proposed motel complex, which the parties had contemplated

plaintiffs would build upon the property, because the lease contained no clause subordinating Mrs. Allen's rights in the land to those of the lending institution; that prior to May 1965 he had not discussed with Dr. Norburn the matter of a subordination clause because he knew Dr. Norburn did not want to subordinate; that Dr. Norburn had told him "he didn't want Martha to be in any jeopardy at all"; that upon learning subordination would be required for a construction loan, Dr. Robertson reported this situation to Dr. Norburn, and the two then conferred with an attorney about the matter; that Dr. Norburn wanted to convert the property to commercial use and "felt" that they could work out "a satisfactory lease."

Thereafter Dr. Norburn consulted several attorneys and, after ascertaining that a "subordination clause" would permit the lessees to finance the construction of the proposed motel by a first mortgage on the leased premises, he became "so afraid of the whole business" that he demanded a guarantee which would protect Mrs. Allen from any loss.

In defendant's deposition, which plaintiffs offered in evidence, Mrs. Allen testified that she told Dr. Norburn positively she would not execute a new lease "to these people" (plaintiffs); that she knew Dr. Norburn "wanted to do something with the property but [she] told him not to lease it to Logan [(Dr. Robertson)]." In July 1965 Mrs. Allen had an operation which was followed by a lengthy convalescence.

Dr. Norburn, in his deposition which plaintiffs introduced, testified that Dr. Robertson "came to [his] house day after day, with one proposition after another, trying to get [him] to get Martha to give [plaintiffs] another lease that would subordinate her property"; that plaintiffs proposed various "guarantees" for Mrs. Allen's protection and they had a number of "new leases" prepared; that Dr. Robertson "promised a guarantee of the return of the property at the end of the lease, free and clear of debt" and that is what he told Dr. Norburn to tell Martha; that the lease Dr. Robertson later tendered merely provided that her property would revert to her at the end of any month the rent was not paid; that at one time Dr. Robertson proposed that plaintiffs themselves would put up one-third of the cost of the motel, but thereafter he withdrew this proposition. Dr. Norburn never agreed that any of plaintiffs' proposals were adequate to protect Mrs. Allen and none

was ever shown to her. She knew nothing about any of them and at no time did Dr. Robertson or Mr. Taylor ever have any conversation with her about her property. She never executed any contract with plaintiffs except the lease of 10 May 1965.

On 5 June 1965, under a contract with plaintiffs, the Asheville Contracting Company (of which plaintiff Taylor was president) started grading defendant's property for the construction of the proposed motel. At that time Asheville Contracting Company also had a contract to do about three miles of grading and filling on Interstate Highway No. 40 near defendant's property. It was agreed between plaintiffs and Asheville Contracting Company that Asheville Contracting Company would use all surplus dirt from defendant's property on its I-40 project and that plaintiffs would not be charged for moving any surplus material so used. Before any grading began Dr. Robertson's son cleared the timber from the land and disposed of it as sawlogs and pulpwood.

Plaintiff Taylor testified that grading was begun on defendant's property on 5 June 1965 and continued for about two weeks. At that time, culverts and drainage pipes were put in and filling was done on the western part of the property. Except for some seeding this was the only work for which Dr. Norburn was billed, and all this was done before or during the week ending 12 June 1965. Thereafter Taylor's crew moved off temporarily but came back on two occasions to grade the back part of the property. On these two occasions they removed surplus material, that is, material not needed for fills on defendant's property, to fills on I-40. No charge was made for the removal of this surplus dirt. In all 25,000 cubic yards of dirt was moved, and about half of this dirt was used on defendant's property. The actual cost of moving this dirt, installing pipe, and seeding was $19,456.88, and Dr. Norburn was billed for this amount. Plaintiffs "had a guarantee for the work from a person [they] thought would pay." Dr. Robertson and Mr. Taylor had given Asheville Contracting Company their note for $19,456.88, but they have not received this amount from Dr. Norburn or anyone else.

At the time plaintiffs were grading her property, Mrs. Allen was quite sick, and Dr. Norburn did not keep her informed about his negotiations on the grading. At some undisclosed time he took her to the property and showed her what had been done.

Dr. Robertson testified that after July 1965 he regarded the lease to be null and void; that on 12 December 1966, at Dr. Norburn's request, he made the following entry upon it and returned it to Dr. Norburn: "Lease forfeited and returned this date. Settlement in accordance with the provisions of the lease and its associated papers is to follow. Investment Properties of Asheville, Inc., by Logan T. Robertson, Vice-President"; that notwithstanding this entry he did not regard the motel project as abandoned; that he continued to think they were still attempting to work out a "mutually agreeable lease" until he heard that defendant had signed a lease with West Side Motel Company on 13 October 1967.

The only communication which Mrs. Allen herself ever received from either of the plaintiffs with reference to a lease was a letter written by Dr. Robertson to her on 29 September 1965. Therein he told her that Dr. Norburn had told him she was worried about plaintiffs' request for a change in the lease and that this had bothered him too; that when he had proposed the lessees put up one-third of the cost of constructing the motel he had not cleared this with his associate; that their money was "well invested" and "it would entail considerable loss to carry out [that proposal]." Dr. Robertson enclosed a "new lease" which he thought to be "a fine offer" for her property and "a far safer guarantee." He also promised to grade the entire area of the property. Mrs. Allen did not answer this letter, and she never signed the new lease which was enclosed.

In her deposition, which plaintiffs introduced in evidence, Mrs. Allen testified that after plaintiffs forfeited the lease of 10 May 1965 she knew then that "something would have to be done with the property" and, following her brother's advice, she later executed a lease to the West Side Motel Company for the purpose of building and operating a Holiday Inn on it. Plaintiffs offered this lease, dated 13 October 1967, in evidence, but the court admitted only one sentence in it: "Lessee acknowledges that certain grading, excavating, and laying pipes and building manholes have heretofore been done on the leased premises."

At the close of plaintiffs' evidence defendant's motion for a directed verdict that plaintiffs were entitled to recover nothing from her was denied.

The unrestricted testimony of Dr. Norburn as a witness for the defense in the consolidated trials tended to show:

Prior to 17 June 1965 he had told Dr. Robertson "that Martha had flatly refused to mortgage her place." On the night of 17 June 1965 Dr. Robertson came to his home with the proposition that if Mrs. Allen would "mortgage her place" for one-third of the cost of a 150-room motel, costing about one and a quarter million dollars, he and Mr. Taylor and their two associates (Britt and McCullagh) would put up one-third of the money. This proposition seemed reasonable to Dr. Norburn and he told Dr. Robertson he believed his sister "would sign that," but she would not do it "right off the bat"; that it would take a little time, but if he kept talking to her he thought he could get her to sign it. Dr. Robertson's reply to this was, "There isn't any time, if she doesn't sign it now we are going to take the machines away and we don't know when we will do anything more and the Holiday Inn people instead of building there will build at Hendersonville, North Carolina, and they won't want this place." Upon hearing this Dr. Norburn said, "Well, go ahead and do it, I feel certain she will sign it." Dr. Robertson said, "Suppose she doesn't?" Dr. Norburn's answer was, "Well, I know she will and if you will put up that much money [(one third)] and grade that property for a motel site I will guarantee that she will sign it. If she does not I will pay for it myself." Dr. Robertson responded to this offer by saying, "Put it in writing." Dr. Norburn immediately wrote and signed the document introduced in evidence against him as P-10. (On defendant's cross-examination, Dr. Robertson, when he testified as a witness for plaintiffs, denied that he had secured Dr. Norburn's promise to pay (P-10) in the manner detailed by Dr. Norburn. Dr. Robertson's version of the transaction was not admitted as against Allen.)

Prior to 17 June 1965 there had been no discussion between Dr. Norburn and either of the plaintiffs about taking dirt from defendant's property over to the I-40 fill and neither Dr. Norburn nor Mrs. Allen knew of this plan.

After Dr. Norburn agreed to pay the cost of grading if the lease of 10 May 1965 was not continued after 1 June 1966, plaintiffs declined to put up one-third of the cost of constructing the motel, and they never presented a proposed lease incorporating such a provision. They continued, however, to grade defendant's lot and began to remove dirt from the property to the

I-40 fill. Sometime during September, after observing that defendant's property had been striped of its soil, Dr. Norburn went to his sister's attorney, Mr. James Howell, who caused "Taylor's men" to stop taking the earth. When Mrs. Allen saw that her place "was in ruins" she blamed Dr. Norburn for it, and he then "tried to get something out there that would be profitable for her."

On 12 December 1966, Dr. Norburn told Dr. Robertson that Mrs. Allen was demanding that plaintiffs surrender the lease of 10 May 1965 and pay her the amounts due under it. When Dr. Robertson said that plaintiff's didn't have the money Dr. Norburn said, "Well, give the lease up and let her rent it to somebody else." It was then that Dr. Robertson made the entry of forfeiture upon the lease as previously quoted herein and returned the lease to Dr. Norburn.

Dr. Norburn testified that, as he saw it, when plaintiffs failed to fulfill Dr. Robertson's promise that they would personally put up one-third of the cost of the motel they breached the promise which caused him to guarantee the cost of grading and thereby released him from the agreement.

Dr. Norburn began negotiations for a lease of defendant's property to the West Side Motel Company for the construction of a Holiday Inn after Dr. Robertson surrendered the lease of 10 May 1965 to him. When this lease was prepared Dr. Norburn gave it to his brother, Dr. Russell Norburn, who was acting for Mrs. Allen. Dr. Russell Norburn took the lease to her and, after she went over it with him and her lawyer, she signed it.

Plaintiffs seek to hold Mrs. Allen liable for the cost of the grading they engaged Asheville Contracting Company to do upon the theory that Dr. Norburn, acting within the scope of his authority as her agent, authorized the work and agreed to pay for it. 3 Am. Jur. 2d *Agency* § 261 (1962). Defendant's motion for a directed verdict presents the question whether the evidence, viewed in the light most favorable to plaintiffs, is legally sufficient to establish this premise. *Adler v. Insurance Co.*, 280 N.C. 146, 185 S.E. 2d 144 (1971); *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971).

[1] A principal is liable upon a contract duly made by his agent with a third person (1) when the agent acts within the scope of his actual authority; (2) when the contract, although

unauthorized, has been ratified; (3) when the agent acts within the scope of his apparent authority, unless the third person has notice that the agent is exceeding his actual authority. *Research Corporation v. Hardware Co.*, 263 N.C. 718, 721, 140 S.E. 2d 416, 418-19 (1965); *Hooper v. Trust Co.*, 190 N.C. 423, 130 S.E. 49 (1925). "One dealing with an agent or representative with known limited authority can acquire no rights against the principal when the agent or representative acts beyond his authority or exceeds the apparent scope thereof." *Texas Co. v. Stone*, 232 N.C. 489, 491, 61 S.E. 2d 348, 349 (1950).

[2] When plaintiffs rested their case against Mrs. Allen the evidence tended to show: At plaintiffs' request on 10 May 1965 Dr. Norburn had procured Mrs. Allen's signature to a contract in which she leased her Acton property to Investment Properties, Inc., for a term of 50 years at a specified monthly rental to begin not later than 10 May 1966, or earlier if plaintiffs began to receive any income from the property. The contract gave plaintiffs carte blanche in grading, reshaping, and developing the property, but it contained no agreement that defendant would subject her land to the lien of a construction loan if plaintiffs required borrowed money to develop the premises. Dr. Norburn had previously made it quite clear to Dr. Robertson, who was acting for plaintiffs, that he was not interested in subordinating his sister's interest in the land, and plaintiffs had accepted the lease with that understanding. Shortly thereafter, however, Dr. Robertson told Dr. Norburn that plaintiffs would not be able to finance construction of the motel complex they had planned to put on the property unless they could give the lender a first lien on the premises.

After consulting counsel and learning the possible consequences of such a concession Dr. Norburn told Dr. Robertson that he would not try to persuade his sister to subordinate her interest in the leased premises unless plaintiffs gave her a guarantee which would save her harmless in the event the construction loan was not paid. Subsequently Dr. Robertson came to Dr. Norburn's home "day after day with one proposition after another, trying to get [him] to get Martha to give [Dr. Robertson] another lease that would subordinate her property." When informed of the situation Mrs. Allen told Dr. Norburn flatly that she would not execute a new lease to "these people," and told him pointedly not to lease the premises to Dr. Robertson.

Notwithstanding defendant's instructions, Dr. Norburn continued to regard the proposed construction of a motel on her premises as a good business proposition for his sister *if* she could be secured against loss, and he continued to negotiate with Dr. Robertson for a guarantee which would protect her in the belief that they could agree upon one. However, plaintiffs were never willing to give a guarantee satisfactory to Dr. Norburn, and he never approved any proposition which they presented to him. Neither he nor they ever submitted any of these proposals to Mrs. Allen. She never agreed to subordinate her property, and she never signed another contract of any kind with plaintiffs.

The fact that Dr. Norburn, at plaintiffs' instance had obtained his sister's signature to the lease dated 10 May 1965 did not clothe him with apparent authority to re-negotiate the lease, and all the evidence tends to show he had no actual authority to do so. Further, the evidence tends to show that throughout their negotiations with Dr. Norburn plaintiffs were fully aware (1) that they could not secure a construction loan for their motel project unless Mrs. Allen executed a new contract in which she agreed to give the lending institution a first lien on the leased premises; (2) that without a new contract they expended funds and graded her property at their own risk; (3) that until they could agree with Dr. Norburn upon a guarantee which he believed would protect Mrs. Allen he would not attempt to get her signature on a new lease; and (4) that even if they satisfied Dr. Norburn, he might not be able to procure her signature. Notwithstanding, plaintiffs continued to go forward with preparations to construct the motel. They cleared defendant's property of all growth and did extensive grading on it as a site for a motel. The portion of this work for which plaintiffs seek to recover from defendant was completed by 12 June 1965 except for seeding.

The only explanation of plaintiffs' course of conduct is the testimony of plaintiff Taylor that, "we had a guarantee for the work from a person we thought would pay." This person was certainly not Mrs. Allen. She never agreed to pay plaintiffs anything and the record contains no suggestion that she knew anyone else had done so.

Plaintiff Taylor testified that "they" charged the work done on Mrs. Allen's property to Dr. Norburn and, sometime

later, he billed him for the $19,456.88—the bill for which they have sued both Dr. Norburn and Mrs. Allen.

It is in evidence from Dr. Norburn's unrestricted testimony as a witness for the defense that, on 17 June 1965, when Dr. Robertson threatened to abandon the motel project unless plaintiffs got a new lease, Dr. Norburn told him if plaintiffs would put up one-third of the cost of the construction he felt certain his sister would execute a new contract; that, if she did not, he would pay for the grading done in the meantime. It was then that Dr. Norburn wrote out and signed plaintiffs' Exhibit 10, which is not in evidence against Allen.

[3] Without Dr. Norburn's testimony there is no evidence in the Allen case from which the jury could find that either she or he ever promised to pay for the grading. This testimony, however, does not help plaintiffs' case for it shows (1) that Dr. Norburn made the promise upon a condition which was not met and (2) that he made the agreement with plaintiffs in his personal capacity and not as the agent of Allen. In making his promise of 17 June 1965 to Dr. Robertson, Dr. Norburn did not profess to be acting for Mrs. Allen. He acted in his own name and pledged his credit only. Dr. Robertson understood this and was then satisfied to have it so. Plaintiffs did no grading on Mrs. Allen's property in reliance upon any obligations on her part to pay for it. *See Rounsaville v. Insurance Co.*, 138 N.C. 191, 50 S.E. 619 (1905). When a party contracts with a known agent personally on his own credit alone, he will not be allowed afterwards to charge the principal. Having dealt with the agent as a principal he cannot set up an agent's apparent authority, on which he did not rely, so as to establish rights against a principal. 3 Am. Jur. 2d *Agency* §§ 75, 271 (1962). *See also* Mechem, *Outlines of the Law of Agency* § 297 (4th ed. 1952).

[4] We now hold, therefore, that the evidence admitted against Mrs. Allen is insufficient to establish that she or anyone purporting to act for her promised to pay for the work done on her property by Asheville Contracting Company. That being so, no question of ratification arises since "ratification is not possible unless the person making the contract, in doing so, purported to act as the agent of the person . . . claimed to be the principal. *Air Conditioning Co. v. Douglass*, 241 N.C. 170, 84 S.E. 2d 828; *Flowe v. Hartwick*, 167 N.C. 448, 83 S.E. 841." *Patterson*

v. Lynch, Inc., 266 N.C. 489, 492-93, 146 S.E. 2d 390, 393 (1966). *See also Annot.*, 124 A.L.R. 893 (1940).

Upon reconsideration on rehearing, the Court now determines: (1) Its former decision reported in this case, in 281 N.C. 174, 188 S.E. 2d 441, affirming the decision of the Court of Appeals (13 N.C. App. 406, 185 S.E. 2d 711), was not sustained by the record and is no longer authoritative. (2) The trial court erred in overruling defendant's motion for a directed verdict and for judgment notwithstanding the verdict. (3) The order affirming the Court of Appeals is vacated. (4) This opinion becomes the law of the case.

The decision of the Court of Appeals is reversed with directions that it remand the case to the Superior Court of Buncombe County for the entry of judgment dismissing the action with prejudice.

Reversed.

Justices HUSKINS and MOORE dissent.

STATE OF NORTH CAROLINA v. LESTER SAWYER

No. 76

(Filed 9 May 1973)

1. **Assault and Battery § 14; Burglary and Unlawful Breakings § 5— felonious breaking and entering of home — felonious assault — sufficiency of evidence**

Evidence in a felonious breaking and entering and felonious assault case was sufficient to withstand motion for nonsuit where it tended to show that defendant gained entry to a home while none of the occupants were there by ripping a lock off the door and that defendant struck an employee of the homeowner several times with a bicycle pump when the employee arrived at the home to investigate defendant's presence there.

2. **Criminal Law § 163— jury charge — sufficiency of assignment of error**

Defendant did not comply with Rule 19(3), Rules of Practice in the Supreme Court, where he failed to indicate in what particular portions of the judge's charge to the jury were erroneous.

3. **Criminal Law § 95— corroborative evidence — admissibility**

Testimony of three witnesses as to statements made to them by the victim of an assault tended to corroborate the testimony of the victim himself and was properly admitted for that purpose.

4. **Burglary and Unlawful Breakings § 7— verdict of guilty of felonious breaking and entering — necessity for guilty verdict on felonious larceny count**

A verdict of not guilty in the larceny count against defendant did not require that judgment be arrested in the felonious breaking and entering count as a defendant need not successfully complete a larceny to be guilty of felonious breaking and entering.

5. **Assault and Battery § 17— verdict of guilty of assault with a deadly weapon — modification of sentence**

The verdict returned by the jury which did not incorporate all of the elements of felonious assault must be treated as a verdict of guilty of assault with a deadly weapon with maximum punishment being imprisonment for two years.

APPEAL by defendant from *Thornburg, J.*, 30 October 1972 Criminal Session of BUNCOMBE Superior Court, transferred for initial appellate review by the Supreme Court by order dated 26 March 1973 entered pursuant to G.S. 7A-31(b)(4).

At 17 October 1972 Criminal Session the grand jury returned two bills of indictment which charged defendant with criminal offenses alleged to have been committed on 18 July 1972.

In the first count of a two-count bill defendant was charged with feloniously breaking and entering the described dwelling house of one J. B. Roberts; and, in the second count, defendant was charged with the felonious larceny of described firearms of J. B. Roberts.

In a separate bill containing a single count defendant was charged with feloniously assaulting one Chester Ward.

Evidence was offered by the State and by defendant.

Uncontradicted evidence tends to show the facts narrated below.

J. B. Roberts (Roberts) owned a farm on Hamburg Mountain Road—off Reems Creek Road—in or near Weaverville. He had lived there since 1943. Chester Ward (Ward), who ran Roberts's farm, lived in a house some 500-600 feet above the Roberts residence.

A single lane gravel driveway led from Hamburg Mountain Road to the Roberts residence. There were some pines along this driveway. When leaving the Hamburg Mountain Road, you "go around a curve, and go up to the house."

Jerry Russell (Russell), a school principal, lived "just off" Hamburg Mountain Road. His house (mobile home) was approximately 500 yards northeast of the Roberts house. Both houses were up on hills. The Roberts house and all or most of the Roberts driveway could be seen from the Russell house.

Roberts had enclosed what had been a two-car garage and made it into a den or rumpus room. A carport immediately adjoined this room. The articles in the rumpus room included a gun rack, a bear hide and a pool table. Roberts had a collection of sixteen firearms, consisting of pistols, rifles and shotguns. Three were on the rack in the rumpus room. The others were on a rack in the hall near a bedroom.

Both Roberts and Ward had known defendant for ten years or more. About three years before 18 July 1972, defendant had painted the kitchen, bathroom and outside trim of the Roberts house. Mrs. Roberts had been at home when that painting was done. With this exception, Roberts had never given defendant permission to enter his home.

On Tuesday, 18 July 1972, Roberts left home about 9:15 a.m. His wife and children "had already gone that morning." During the past two years, Roberts's wife had been working with him at Roberts's place of business "on Tunnell Road next to the Highway Patrol." Roberts's guns were in the racks when he left that morning. Before leaving, Roberts locked the door to his house and talked with Ward about Ward's work for that day. Ward had been with Roberts for fifteen years and had a key to his house.

Nobody was at home at his house after Roberts left. Ward worked on the farm all day. He was using "a bush-hog behind a tractor" in the pasture above Ward's house. He was "on the other side of the tobacco barn" and "couldn't see the [Roberts] house all day" until late afternoon when he went there with Russell.

Russell returned from school about 7:15 p.m. He went directly to the Roberts house and parked his truck in Roberts's driveway. No one else was there. The door "leading into the house off of the carport" was closed. Russell was looking for Ward. He heard a tractor "running" and walked to a point 200-300 yards above the Roberts house where he found Ward operating "the tractor and bush-hog unit."

Ward left the field with Russell. They went to Roberts's yard, got "in the Jeep," and drove to Russell's house to enable Russell to change his clothes. Roberts had a calf for Russell and Ward was going to help Russell move it from Roberts's barn to Russell's house. They got out of the Jeep at Russell's house. Before Russell could change his clothes, Ward and Russell saw an Oldsmobile car go up the Roberts driveway. Ward said, "I better go see who that is," got in his Jeep and went straight to the Roberts house. While waiting for Ward's return, Russell had fed his dog and had started toward the barn to feed his cow when he heard Ward coming back in the Jeep hollering, "Help, emergency," and saw that Ward "was bloody as a hog."

With reference to what occurred when he returned to the Roberts house, Ward's testimony, summarized except when quoted, is set forth below.

Defendant's Oldsmobile was parked, "headed right in towards [Roberts's] carport." After parking the Jeep, Ward went into the carport. When walking past defendant's car he noticed "painting outfit stuff" and old throw cloths on the back seat. The lock on the door from the carport to the rumpus room had been torn off. There were two holes in the door, right above the location of the lock. The lock itself had been prized off and was lying on the floor of the carport. Upon entering, Ward found defendant standing in the rumpus room. Three guns on the rack in the rumpus were gone. When Ward exclaimed, "His guns is gone," defendant said, "Don't you accuse me of that." Ward then asked, "What in the dickens are you doing here then?" Ward then went into the hall and defendant walked along with him. All the guns were gone from Roberts's main gun rack. When Ward said that he had to get a telephone and call Roberts, defendant knocked him down, "grabbed [him] by the throat . . . just like he was a'choking a chicken," and beat Ward over the head with a bicycle pump which had been lying on the pool table in the rumpus room. In addition to bruises, Ward's injuries included a split or "busted" ear and a "knot" on his forehead "as big as a goose egg." After beating Ward, defendant put the bicycle pump back on the table and went outside. Then he started calling to Ward to give him the keys to the Jeep. He did not get them. Soon thereafter defendant jumped in his car and drove away. When defendant left, Ward got into his Jeep and went back to Russell's house. Ward did not see defendant again until two or three days later.

Ward made no effort to look inside of defendant's car after he had been beaten. He "wasn't in much shape to do anything." Defendant did not offer to give Ward defendant's car keys or suggest that Ward search defendant's car. Instead, defendant gave him "no chance to look in."

Testimony of Russell, summarized except when quoted, includes the following: Ward's ear was cut and bleeding when he returned from the Roberts house. Referring to a knot on the front of Ward's head, Russell testified: "I have never seen a knot that big on a man before." There was "another pretty bad place . . . that was bleeding in the back of his head," and "a cut place . . . about an inch long around his neck. . . . " Russell and Ward went back to the Roberts house. Russell telephoned Roberts's place of business and was advised that Roberts was on his way home. There were no guns on the racks. A bent bicycle pump was on the pool table. There was a spot of blood on the floor. No chrome-looking or other pistol was under the pool table. Russell and Ward were leaving when Roberts arrived. There was other testimony by Russell as to statements made to him by Ward as to what had occurred in the Roberts house.

Testimony of Roberts, summarized except when quoted, includes the following: While on his way home, he passed defendant at the Reems Creek bridge. Defendant was driving an Oldsmobile. As they passed, Roberts "threw [his] hand up at him; [defendant] throwed his back." After meeting Ward and Russell, Roberts went back to the house and called the sheriff's department. With reference to Ward's condition, Roberts testified: "He . . . was bleeding all over. He had a big knot on his head. His ear was cut in two . . . and blood was running down his shirt." There was blood on the floor in the rumpus room. The bicycle pump was bent. The gun racks were empty. The value of the missing guns was $1,260.00. The knobs had been "knocked plumb off" of the door from the carport into the rumpus room. There were two holes the size of "a big screwdriver spike" above the place where the lock "had been yanked off." He had given no one permission to go into his home or to borrow or to use any of his guns. He did not recover any of his guns. Ward did not own or possess a gun. Roberts had never seen him with a gun. Roberts also testified to statements made to him by Ward as to what had occurred inside the Roberts house.

Maurice C. Ramsey, of the Buncombe County Sheriff's Department, answered Roberts's call. He arrived at the Roberts home about 7:45 p.m. He described the physical appearance of Ward, the condition of the door, the empty gun racks, and the bicycle pump. He also testified to statements made to him on that occasion by Ward.

Other evidence offered by the State included the following: Roberts and Ward testified that they had not seen defendant at the Roberts house since he worked on the painting job there three years or so prior to 18 July 1972. Roberts testified defendant had not done any work for him other than the painting job; that he had no recollection of any incident involving help by defendant "in baling some six or seven hundred bales of hay there on [his] property, in exchange for [Roberts] helping him and his daddy up there at Beech"; and that he recalled that Ward had "baled some hay for [defendant's] daddy." Ward testified that defendant "never did help us bale no hay" but that he [Ward] had "baled hay at [defendant's] daddy's house." Ward testified that he was fifty-eight years old; that he was something like "five foot seven and a half" tall; and that he guessed he did not "weigh over a hundred and twenty-five pounds soaking wet." Ward testified there was no pistol in the rumpus room when defendant attacked him; that he had not owned a pistol since he had been on the Roberts place; that he did not carry a pistol; and that he did not have a pistol in his possession on 18 July 1972.

Defendant's evidence consists solely of his own testimony which, summarized except when quoted, is set out below.

He had known both Roberts and Ward for ten or twelve years. On 18 July 1972 he drove to Roberts's house in his '63 blue and white Oldsmobile. He went there to see if he could arrange for Roberts to bale some hay for his [defendant's] father. Roberts had baled hay for the defendant's father in the past. On one occasion defendant had helped Roberts "put up about seven hundred bales in order to get [Roberts] to bale some for [defendant]." He drove up to the carport and parked. The windows were rolled down. He saw no one in or about the house. He had his painting equipment in his car. According to habit, he took his car keys with him when he got out of the car. He first went to the side door on the upper side of the house and knocked. This was not the door to the rumpus room. After he had knocked three or four times, he heard "a police radio"

which would "come on and then go off." After this happened "three or four times," he figured there was somebody there and went to the bedroom window at the far end (from the rumpus room) of the house and knocked. He then walked around the house and hollered four or five times for Ward. He did not see Ward or anyone else.

As he started to leave the lower side of the house, he heard the Jeep pull up and saw Ward get out and go into the house. Just as defendant got to the corner of the house, Ward came out and said, "Lester, somebody stole all of J. B.'s guns." Defendant then went with Ward through the door from the carport to the rumpus room. It looked like somebody had prized the lock off of this door. Ward said that he would have to try to get in touch with Roberts. Defendant volunteered to help him. Defendant followed Ward to the telephone at the end of the hall. When Ward could not find the phone number, defendant suggested that he call information and get it. Then Ward accused defendant twice "of stealing J. B.'s guns." Whereupon, defendant reached in his pocket and got his car keys and offered them to Ward and told him to go search his car. As defendant turned around and started out the door, Ward said: "Wait a minute, I think I'll just blow your head off." When defendant turned around Ward had "a pistol right between [defendant's] eyes." It looked like "a chrome-plated .22 or .32 pistol." Ward and defendant were standing on opposite sides of the pool table. Defendant thought of running but decided against it. Instead, he again offered Ward his car keys and invited him to search his car. Whereupon, Ward said: "I ain't going to do that, I'm going to kill you." Defendant then "reached and grabbed that piece of pipe right there and knocked the gun out of his hand and kicked it up under the pool table . . . [and] hit him three times." Defendant then got in his car and left. He did not remember seeing Roberts "down near the mill wheel as [he] was going down."

Defendant testified that he was arrested on 20 July 1972. He testified that he was forty-one years old and weighed 229 pounds.

With reference to the first count in the two-count bill, which charged felonious breaking and entering, the jury returned a verdict of guilty as charged; and, based on this verdict, the court pronounced judgment imposing a prison sentence of ten years.

With reference to the second count in the two-count bill, which charged felonious larceny, the jury returned a verdict of not guilty.

With reference to the separate bill which contained the single count charging felonious assault, the record shows the following occurred when the verdict was returned:

"THE COURT: Now you will have to listen to this and let me finish the question before you answer. As to the bill of indictment charging the defendant with the felonious crime of assault with a deadly weapon with intent to kill inflicting serious injury, do you find the defendant guilty as charged, guilty of assault with a deadly weapon inflicting serious injury, guilty of assault with a deadly weapon, guilty of assault inflicting serious injury, guilty of assault involving an attempt to inflict serious injury, guilty of simple assault, or not guilty.

"FOREMAN: Guilty of assault with a deadly weapon with the intent to inflict serious bodily harm.

"THE COURT: Members of the Jury, as your verdict you find the defendant guilty of assault with a deadly weapon inflicting serious injury. This is your verdict so say you all. (Affirmative response from Jury.)

"THE COURT: All right. You may have a seat."

Based upon this verdict, the court pronounced judgment which imposed a prison sentence of five years but provided that this sentence was to run concurrently with the ten-year sentence imposed by the judgment based on defendant's conviction of feloniously breaking and entering.

Defendant excepted and appealed.

Attorney General Robert Morgan, Assistant Attorney General Roy A. Giles, Jr., and Associate Attorney John M. Silverstein for the State.

S. Thomas Walton for defendant appellant.

BOBBITT, Chief Justice.

[1] Assignments of Error Nos. 10 and 11 relate to the denial of defendant's motions for judgments as in case of nonsuit. The rules applicable when testing the sufficiency of the evi-

dence to withstand a motion for judgment as in case of nonsuit have been often stated and need not be repeated. See *State v. Vestal,* 278 N.C. 561, 567, 180 S.E. 2d 755, 759-60 (1971), and cases cited. When considered in the light most favorable to the State, the direct and circumstantial evidence was sufficient to require that it be submitted to the jury in respect of the felonious breaking and entering and the felonious assault charges and to support the verdicts of the jury.

[2] In Assignments of Error Nos. 14, 15, 16, 17 and 18, defendant quotes excerpts from the charge and asserts the court erred in so charging the jury. In these assignments, defendant does not indicate in what particular any of the quoted excerpts is erroneous. He ignores the requirement of Rule 19(3), Rules of Practice in the Supreme Court, 254 N.C. 783, 797, as interpreted in numerous decisions of this Court, that "always the very error relied upon shall be definitely and clearly presented, and the Court not compelled to go beyond the assignment itself to learn what the question is." *State v. Mills,* 244 N.C. 487, 94 S.E. 2d 324 (1956). Moreover, we perceive no error prejudicial to defendant in any of these excerpts.

[3] Assignments of Error Nos. 4, 5, 6, 8 and 9 refer to the admission over defendant's general objection of testimony of Roberts, Russell and Ramsey as to statements made to them by Ward shortly after Ward was injured. "The general admission of evidence competent for a restricted purpose will not be held reversible error in the absence of a request at the time that its admission be restricted." 7 Strong N. C. Index 2d, Trial § 17. See also Rule 21, Rules of Practice in the Supreme Court, 254 N.C. 783, 803. Obviously, the testimony to which these assignments refer was offered as tending to corroborate the testimony of Ward. Undoubtedly, if defendant had so requested, the trial judge would have given an explicit instruction to the effect that this evidence was competent for consideration only as corroborative testimony.

[4] Assignment of Error No. 20 is based on defendant's exception to the denial of his motions after verdict for the arrest of judgment in each of the two cases in which verdicts of guilty were returned. Defendant did not then state any ground on which he based these motions. On appeal, he refers only to his motion to arrest judgment in the case in which defendant was found guilty of felonious breaking and entering. He asserts that the verdict of not guilty in the larceny count requires that judg-

ment be arrested in the felonious breaking and entering count. This contention is without merit. Pertinent legal principles include the following: "Under G.S. 14-54, if a person breaks or enters one of the buildings described therein with intent to commit the crime of larceny, he does so with intent to commit a felony, without reference to whether he is completely frustrated before he accomplishes his felonious intent. . . . [H]is criminal conduct is not determinable on the basis of the success of his felonious venture." *State v. Smith,* 266 N.C. 747, 147 S.E. 2d 165 (1966); *State v. Nichols,* 268 N.C. 152, 150 S.E. 2d 21 (1966).

Defendant's brief states no reason or argument and cites no authority in support of Assignments of Error Nos. 1, 2, 3, 7, 12, 13 and 19. Hence, they are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, 810.

[5] Assignment of Error No. 18 is based on defendant's exception to the court's failure to pronounce judgment on the verdict as stated in the words of the foreman. The record pertinent to this assignment quoted in our preliminary statement indicates that the presiding judge failed to hear or fully comprehend what the foreman had said. Under the circumstances, we think the judgment in the felonious assault case must be based on the verdict as stated in the words of the foreman.

The verdict as returned by the jury did not incorporate all of the elements of felonious assault. It must be treated as a verdict of guilty of assault with a deadly weapon. Hence, the maximum punishment was imprisonment for a term of two years.

Although the sentence pronounced in the two judgments are to run concurrently, the judgment in the felonious assault case is modified to provide for a sentence of two years in lieu of a sentence of five years; and, upon certification of this opinion to the superior court, a new commitment will be issued to reflect this modification of the judgment. As heretofore the sentences pronounced in the judgment for felonious breaking and entering and in the modified judgment for assault with a deadly weapon are to run concurrently.

The conclusion reached is as follows: There was no error in the trial or judgment in the felonious breaking and entering case. There was no error in the trial and verdict of guilty of

assault with a deadly weapon in the felonious assault case; however, the judgment in the assault case is modified so as to reduce the sentence from five years to two years and, as so modified, is affirmed.

Felonious breaking and entering case: No error.

Assault case: No error in trial; judgment modified and affirmed.

ROBERT H. MACPHERSON, JOSEPH D. LEWIS, HARRY HEWITT, LEONARD R. ORDERS, JR., FOR THEMSELVES AND FOR AND ON BEHALF OF THE CITIZENS, RESIDENTS, AND PROPERTY OWNERS IN WARD 8 OF THE CITY OF ASHEVILLE, NORTH CAROLINA v. THE CITY OF ASHEVILLE AND THE KINGSTON CORPORATION AND THE ERVIN COMPANY

No. 28

(Filed 9 May 1973)

1. **Parties § 3; Rules of Civil Procedure §§ 19, 25— motion to add necessary party defendant — movant not a party to the action — absence of prejudice**

Where plaintiffs sought to restrain a municipality from issuing a building permit for construction of an apartment complex to corporate defendant or its successors or assigns, and corporate defendant's parent corporation became the owner of the legal title to the land upon which the apartments were to be constructed, the trial court had full authority, on its own motion, to bring the parent corporation in as a necessary party, and plaintiffs were not prejudiced by the irregularity, if any, in the court's allowance of a motion by the parent corporation, which was not a party to the action, that it be made a party defendant pursuant to G.S. 1A-1, Rule 25(d). G.S. 1A-1, Rules 19(a) and (b).

2. **Municipal Corporations § 30— applicant for building permit — when status attaches**

Under the Asheville Zoning Ordinance, one does not become an "applicant" for a building permit relating to a group development until he submits his site plan to the City Council; therefore, the fact that a corporation owned no interest in the land to be developed at the time it submitted its site plan to the Planning and Zoning Commission was of no significance where the corporation was the owner of the property when it thereafter formally tendered its plan to the City Council.

3. **Statutes § 5— construction — administrative interpretation**

Where an issue of statutory construction arises, the construction adopted by those who execute and administer the law in question is relevant and may be considered.

4. Municipal Corporations § 30— building permit — owner of property — prospective vendee under executory contract of sale

An applicant for a building permit for construction of an apartment complex was an "owner" of the land to be developed within the meaning of a municipal zoning ordinance where it was the prospective vendee under an executory contract of sale executed by the record owners.

APPEAL by plaintiffs from judgment of *Thornburg, J.*, 4 September 1972 Session, BUNCOMBE Superior Court.

By this action plaintiffs seek to enjoin The Kingston Corporation from applying for or obtaining a building permit for a proposed apartment complex and to enjoin the City of Asheville from issuing such permit to The Kingston Corporation, its successors or assigns. None of the parties having requested a jury trial, the matter came on for hearing before Judge Thornburg who heard the evidence, found the facts and entered the judgment from which plaintiffs appeal.

The facts necessary to an understanding of the questions presented on this appeal appear in the following numbered paragraphs:

1. The plaintiffs are citizens and residents of Asheville, North Carolina, residing in Ward 8 of said City where they own residential real estate.

2. The Kingston Corporation is incorporated under the laws of North Carolina and is a wholly owned subsidiary of The Ervin Company, incorporated under the laws of Delaware with its principal office in Charlotte, North Carolina.

3. Section 9C of Ordinance number 322 of the City of Asheville deals with "group developments" as defined in Section 19 of said ordinance. Section 9C reads as follows:

> "C. GROUP DEVELOPMENTS. Group Developments as defined in Section 19 of this Ordinance, planned as a single unit may be approved by the City Council. The following procedure is set forth to permit diversification in the location of structures and to improve circulation and other site qualities while insuring adequate standards relating to public health, safety, welfare, and convenience in the arrangement of structures and facilities in planned group developments such as shopping centers, industrial parks,

large retail establishments, drive-in theaters, public Housing Developments, leased or conventional, etc.

1. Prior to the issuance of building permits for the construction of building in any group development, a site plan shall be submitted to and approved by City Council. Prior to such approval, the City Council shall obtain the recommendations of the Asheville Planning and Zoning Commission on any site plan for a group development and hold a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. A Notice of such public hearing shall be given once a week for two successive calendar weeks in a newspaper published in the City of Asheville. Said notice shall be published the first time not less than fifteen (15) days prior to the date fixed for said hearing.

2. The applicant must be the owner of the land considered for the group development, or the owner's duly and legally authorized agent. In cases of public housing developer or housing authority or its successor shall be permitted to make direct application hereunder."

4. On 15 May 1971 Lillian S. Roberson, acting by and through her attorney-in-fact, Sarah Virginia Roberson, executed a written agreement whereby she gave The Kingston Corporation, its successors and assigns, the right to purchase a tract of land consisting of approximately twenty acres, said land being a portion of Lot 19, Sheet 29, Ward 8, as shown on the tax maps of the City of Asheville. This agreement provided that The Kingston Corporation could give written notice of its intention to purchase the property any time to and including 15 September 1971, and that the agreement could be extended for an additional period of sixty days if necessary to obtain the Federal Housing Administration's approval of a project The Kingston Corporation proposed to build on the land described in the option. The name and type of the project was not specified in the option agreement but it was stated therein that the seller would cooperate with The Kingston Corporation "for any reasonable request, which may be necessary to complete the project, as to zoning, City and County Ordinances, and the City and County Planning Commission." By a paper-writing dated 11 November 1971 the period of time in which The Kingston Corporation or its assigns had a right to purchase the property of Lillian S.

Roberson was extended for a period of sixty days from 14 November 1971.

5. The real property owned by the plaintiffs and the Lillian S. Roberson property (a portion of Lot 19, Sheet 29, Ward 8 on City of Asheville tax maps) was at all times pertinent to this case and is presently zoned as RA-6 residential. Section 4 of Ordinance number 322 of the City of Asheville provides that multiple family dwellings or apartment houses may be constructed upon property zoned under the classification RA-6 residential.

6. On 9 November 1971 The Kingston Corporation submitted to the Planning and Zoning Commission of the City of Asheville a site plan for an apartment complex known as Spruce Hill Apartments. This site plan proposed an apartment complex for a tract of land consisting of approximately eighteen acres, being a portion of Lot 19, Sheet 29, Ward 8 of the City of Asheville. On 15 May 1971 and thereafter until her death on 9 December 1971, Mrs. Lillian S. Roberson was the record owner of the fee simple title to the real estate known as Lot 19, Sheet 29, Ward 8 of the City of Asheville.

7. On 12 January 1972 the Planning and Zoning Commission voted not to recommend the approval of the site plan for Spruce Hill Apartments submitted by The Kingston Corporation and notified the Asheville City Council accordingly.

8. On 13 January 1972, Sarah V. Roberson, as Executrix of the Will of Lillian S. Roberson and individually as a beneficiary thereunder, and Ernest Mark Smith, Jr., a beneficiary under said will, and his wife Jane Smith, entered into a written contract to sell to The Kingston Corporation or its assigns the eighteen acres of land upon which the proposed Spruce Hill Apartment project was to be built. The recited consideration for the land was One Hundred and Twenty-two Thousand ($122,000.00) Dollars. This contract recited that it was understood and agreed and acknowledged by the seller that The Kingston Corporation was entering into the agreement as a land developer and intended to use the property for the construction thereon of multiple family dwellings, and that in the event The Kingston Corporation or its assigns were not able to obtain the required building permit by 15 March 1972 then it could elect to terminate the contract.

9. On 17 February 1972 a public hearing was duly conducted by the Asheville City Council after written request by

The Kingston Corporation and after notice thereof was duly published as required by Zoning Ordinance number 322. At the conclusion of the public hearing, which lasted approximately two hours and forty-six minutes during which all matters concerning the Spruce Hill Apartment project were presented and discussed, including the question of ownership or authority of The Kingston Corporation to present the site plan, the Asheville City Council voted four (4) in favor and two (2) against approval of the site plan submitted by The Kingston Corporation "contingent upon the applicant filing within five (5) days such additional evidence of authority as the applicant, The Kingston Corporation, desires to file." Within five days The Kingston Corporation filed with the Asheville City Council a copy of the contract dated 13 January 1972 between Sarah V. Roberson, Ernest Mark Smith, Jr. and wife Jane Smith, and The Kingston Corporation.

10. The Spruce Hill Apartment project is a group development within the meaning of Section 19 of the Zoning Ordinance number 322.

11. On 6 March 1972 the Board of Directors of The Kingston Corporation voted to have its parent company, The Ervin Company, take the legal title to the property and complete the project known as the Spruce Hill Apartments. By deeds dated March 8 and 15, 1972, legal title to the eighteen-acre tract of land was duly conveyed to The Ervin Company.

12. On 15 March 1972 plaintiffs instituted this action and a temporary restraining order was issued, restraining the City of Asheville from issuing a building permit and The Kingston Corporation or its assigns from applying for such a permit or proceeding with construction until a show cause hearing. The temporary order was continued pending final hearing on the merits.

13. When the matter came on for trial The Ervin Company, pursuant to Rule 25(d) of the Rules of Civil Procedure, moved to be made a party defendant.

Upon the foregoing facts Judge Thornburg concluded, among other things: That The Ervin Company is a necessary party and its motion to be made a party defendant should be allowed; that from 15 May 1971 to 15 March 1972 during which the Spruce Hill Apartments site plan was being considered by

the Asheville Planning and Zoning Commission and the Asheville City Council, Mrs. Lillian S. Roberson, or her estate and beneficiaries under her will, were the record title owners in fee simple of the property in question but were legally bound to convey title to said property to The Kingston Corporation or its assigns; that, as used in Section 9C of Zoning Ordinance 322, the word "owner" embraces more than the owner of the *record title* to land; and The Kingston Corporation, at the time it applied for an approval of its site plan for the Spruce Hill Apartments project, had a sufficient interest in the land to qualify as "owner" within the purposes and intent of Section 9C of the Zoning Ordinance; that plaintiffs have not shown themselves entitled to the relief sought and this action should be dismissed.

It was accordingly adjudged that The Ervin Company be made a party defendant, the temporary injunction dissolved, and the action dismissed. Plaintiffs appealed to the Court of Appeals. On petition by defendants in which plaintiffs acquiesced we allowed certiorari to the Court of Appeals prior to determination, and the case is now before this Court for initial appellate review. Errors assigned are discussed in the opinion.

Roberts & Cogburn by Max O. Cogburn for plaintiff appellants.

Patla, Straus, Robinson & Moore, P.A., by Robert J. Robinson, for The City of Asheville, defendant appellee.

Shuford, Frue & Sluder by Gary A. Sluder, for The Kingston Corporation and The Ervin Company, defendant appellees.

HUSKINS, Justice.

[1] Rule 25(d) of the Rules of Civil Procedure provides: "In case of any transfer of interest other than by death, the action shall be continued in the name of the original party; but, *upon motion of any party,* the court may allow the person to whom the transfer is made to be joined with the original party." (Emphasis added.) The Ervin Company moved that it be made a party defendant pursuant to Rule 25(d). Since the movant was not a party to the action, plaintiffs contend it could not properly make such motion and that the court erred in allowing it. This is the basis for plaintiffs' first assignment of error.

Plaintiffs sought a permanent order restraining the City of Asheville from issuing The Kingston Corporation or *its successors or assigns* a building permit for the construction of the Spruce Hill Apartments. A temporary restraining order to that effect was issued by Judge Anglin. When The Ervin Company as parent corporation of The Kingston Corporation became the owner of the legal title to the land upon which the Spruce Hill Apartments were to be constructed, it became, by virtue of that transfer, the "successor" against whom injunctive relief was sought. In our view, The Ervin Company was then a necessary party to a complete determination of this action and, aside from Rule 25(d), the court had full authority, *on its own motion,* to bring The Ervin Company in as a necessary party. Whether the court acted on its own motion or in response to motion of The Ervin Company is of no legal significance under the facts of this case. When a complete determination of a claim cannot be made without the presence of other parties, the court is required to bring them in. Rule 19(a) and (b), Rules of Civil Procedure; *Strickland v. Hughes,* 273 N.C. 481, 160 S.E. 2d 313 (1968); *Garrett v. Rose,* 236 N.C. 299, 72 S.E. 2d 843 (1952). Plaintiffs' sole objection is that the motion was made by The Ervin Company. We fail to see how this irregularity, if such it be, could have prejudiced plaintiffs. The record shows that The Ervin Company became the owner of the legal title to the land in question on 15 March 1972, prior to service of plaintiffs' complaint upon The Kingston Corporation. The Ervin Company thus became the party plaintiffs really needed to enjoin. It would seem, therefore, that plaintiffs' cause was aided, not injured, by making The Ervin Company a party defendant, thus binding it to obey the court's decree. This assignment is overruled.

Plaintiffs contend the trial court erred in concluding as a matter of law that The Kingston Corporation, at the time it applied for approval of its site plan for the Spruce Hill Apartments project, had a sufficient interest in the land to qualify as "owner" within the purpose and intent of Section 9C of the Zoning Ordinance. We now examine the soundness of this contention.

The ordinance in question does not specify at what point in time one becomes an "applicant" for approval of a site plan. Plaintiffs contend that The Kingston Corporation became an applicant when it submitted its site plan to the Asheville Plan-

ning and Zoning Commission on 9 November 1971. From this, plaintiffs argue that since Kingston then had no interest whatsoever in the land to be developed (its option of 15 May 1971 having expired on 15 September 1971 and not having been renewed until 14 November 1971), it was not an owner when it became an applicant. Hence, plaintiffs argue, an essential condition precedent to the issuance of a building permit has not been met.

In the alternative, plaintiffs contend that even if The Kingston Corporation did not become an applicant until the public hearing on the site plan was held by the Asheville City Council on 17 February 1972, nevertheless it was not then an "owner" of the land to be developed since it was at that point only the prospective vendee under an executory contract of sale executed on 13 January 1972 by those who were then the record owners.

While we do not think it necessary to reach these contentions of plaintiffs in order to dispose of the case, we shall discuss them, assuming *arguendo* but not deciding, that (1) if The Kingston Corporation were not an owner at the time it became an applicant this would in fact vitiate all subsequent proceedings involving the application, and (2) plaintiffs "as citizens and residents of the City of Asheville residing in and owning residential real property in Ward 8" have standing to assert Kingston's non-ownership in bar of the issuance of a building permit. We express no opinion on either of these arguable questions but merely assume them to be true in order to reach plaintiffs' contentions.

[2] The ordinance requires that before a building permit may issue, a site plan must be "submitted to and approved by City Council. Prior to such approval, the City Council shall obtain the recommendations of the Asheville Planning and Zoning Commission. . . . " Nothing in this language requires the applicant to submit his site plan to the Planning and Zoning Commission, and the fact that defendant did so on 9 November 1971 did not make it an "applicant." Instead, the quoted language makes it apparent that one does not become an "applicant" until he submits his site plan to the City Council itself. This occurred in this case on 17 February 1972 when Kingston formally tendered its plan for the Council's approval. Accordingly, plaintiffs' first argument is without merit. The fact that Kingston had no interest in the land on 9 November 1971 is immaterial.

By 17 February 1972 The Kingston Corporation was the prospective vendee of the land to be developed under a binding executory contract of sale. As such, it was regarded by the Asheville City Council as an "owner" within the meaning of the ordinance.

[3] Where an issue of statutory construction arises, the construction adopted by those who execute and administer the law in question is relevant and may be considered. Such construction is entitled to "great consideration," *Gill v. Commissioners,* 160 N.C. 176, 76 S.E. 203 (1912); or to "due consideration," *Faizan v. Insurance Co.,* 254 N.C. 47, 118 S.E. 2d 303 (1961). It is said to be "strongly persuasive," *Shealy v. Associated Transport,* 252 N.C. 738, 114 S.E. 2d 702 (1960), or even "*prima facie* correct," *In re Vanderbilt University,* 252 N.C. 743, 114 S.E. 2d 655 (1960). Moreover, the construction given a statute by the legislature, while not binding on the courts, is entitled to "great weight." *Kornegay v. Goldsboro,* 180 N.C. 441, 105 S.E. 187 (1920); *Sash Co. v. Parker,* 153 N.C. 130, 69 S.E. 1 (1910).

Generally, " . . . the rules to be applied in construing municipal ordinances are the same as those applied in the construction of statutes enacted by the legislature. Ordinances must receive a reasonable construction and application, and the primary rule for their interpretation and construction is that the intention of the municipal legislative body is to be ascertained and given effect." 56 Am. Jur. 2d *Municipal Corporations, Etc.* § 398 (1971). Such is the rule with us. "The rules applicable to the construction of statutes are equally applicable to the construction of municipal ordinances." *Cogdell v. Taylor,* 264 N.C. 424, 142 S.E. 2d 36 (1965). As stated by Justice Sharp in *Bryan v. Wilson,* 259 N.C. 107, 130 S.E. 2d 68 (1963): "The basic rule for the construction of ordinances is to ascertain and effectuate the intention of the municipal legislative body."

[4] Applying the foregoing principles to the construction of Section 9C of the Zoning Ordinance in question, we conclude that the intent of the Asheville City Council when it adopted said ordinance is accurately reflected by its own interpretation thereof, to wit: The term "owner" connotes not only the absolute owner of the property but also the equitable owner, or prospective vendee.

This interpretation accords with decisions elsewhere construing the term "owner" with respect to applications for building permits. In *Scheer v. Weis*, 13 Wis. 2d 408, 108 N. W. 2d 523 (1961), the applicant for a building permit to construct a dwelling on certain lots had entered into a contract to purchase the lots in question. The plaintiff owned land across the street and sought an injunction to restrain the issuance of the permit. The ordinance required the application to be made "by the owner or his agent." Held: "The vendee under a contract to purchase land is the equitable owner and is the 'owner' for many purposes. We think that the vendee is the owner for the purpose of applying for a building permit under the village ordinance." See also 62 C.J.S. *Municipal Corporations* § 227(3)c (1949): "Only a person having a right to erect the structure for which a building permit is sought is entitled thereto, but the application need not be made by the absolute owner of the property. . . . In a proper case it may be made by a person having only a contract to purchase the property if he has the consent and approval of the owner. . . ."

For the reasons stated we think the trial judge's conclusion that the word "owner" was not intended by the Asheville City Council to be restricted to the absolute owner of the property and that The Kingston Corporation legally qualified as "owner" within the meaning and intent of Section 9C of the Zoning Ordinance, was correct and should be upheld.

Lee v. Board of Adjustment, 226 N.C. 107, 37 S.E. 2d 128 (1946), strongly relied on by plaintiffs, is factually distinguishable. There, a municipal board of adjustment granted a variance permit on the ground that to reject the permit would work a great hardship on the applicant. It was held that the board of adjustment had, in effect, amended the zoning ordinance, thereby exceeding its authority. As an alternative ground for decision the court stated that an optionee cannot successfully apply for a variance permit since he "possesses no present right to erect a building on the lot described in his contract. To withhold from him a permit to do what he has no present right to do cannot, in law, impose an 'undue and unnecessary' hardship upon him." Plaintiffs rely on this portion of the decision, but to no avail. The applicant in *Lee* was *not required* to be the "owner" of the land. In addition, the applicant there was merely an optionee, not a prospective vendee under a binding contract of sale. Plaintiffs' second assignment of error is overruled.

Plaintiffs having failed to show facts entitling them to the relief sought, the action was properly dismissed.

Affirmed.

IOWA NATIONAL MUTUAL INSURANCE COMPANY v. EDNA CHRISTINE BROUGHTON; CARL W. BROUGHTON; JOHNNY LEE BROUGHTON, A MINOR; KENNETH ELMOND STONE; MARGARET STONE; RANDY STONE, A MINOR; FRED DOUGLAS VAN HOOK, JR., A MINOR; AND ELIJAH Z. MASSEY

No. 25

(Filed 9 May 1973)

1. **Insurance § 87— lessor of vehicle insured — lessee insured — unauthorized third person not insured**

Where insured owner (Budget Rent A Car) surrendered possession of its vehicle to one Carraway on written condition that Carraway not permit possession to pass to a person under 21 years of age or to an unlicensed driver, the owner obligated itself to be responsible for Carraway's negligence but Carraway could not, in violation of his own agreement, make the owner responsible for the negligence of one Massey, a 19-year-old to whom Carraway surrendered the vehicle; therefore, defendants who were injured in a collision with the insured's vehicle driven by Massey could not recover under the insurance policy issued to the owner of the vehicle.

2. **Insurance § 87— automobile insurance — drivers insured — owner's permission to drive lacking — no coverage**

Where insured owner rented its vehicle to one Carraway on condition that Carraway not permit possession to pass to a person under 21 years of age, G.S. 20-279.21 would not extend insurance coverage to one Massey, a 19-year-old to whom Carraway surrendered the vehicle, since that statute does not provide for owner's liability until lawful possession is first established, and such possession was not established in this case as, ordinarily, one permittee does not have authority to select another permittee without specific authorization from the named insured.

3. **Insurance § 87— automobile insurance — no coverage of driver**

G.S. 20-281 did not extend insurance coverage to the driver of a rented vehicle where there was neither evidence nor a finding that the driver at any time was a rentee or a lessee or an agent or employee of the owner of the vehicle.

Justice BRANCH concurring in result.

APPEAL by defendants from *Seay, J.*, October 23, 1972 Civil Session, GUILFORD Superior Court. On petition of all parties,

this Court ordered the cause certified here for review prior to determination in the Court of Appeals.

The plaintiff, Iowa National Mutual Insurance Company, instituted this civil action pursuant to the provisions of the Uniform Declaratory Judgment Act for the purpose of having the court determine the legal question whether the plaintiff's automobile insurance policy issued to Bobby Murray Leasing, Inc., doing business as Budget Rent A Car, afforded coverage for injuries to defendants resulting from an accident which occurred on June 6, 1971, while Elijah Z. Massey was operating the insured vehicle.

All parties, by stipulation, waived a jury trial, consented that the judge without a jury hear the evidence, find facts and render judgment. The parties filed a written stipulation of facts which the court adopted as its findings.

According to the stipulation, the plaintiff, Iowa National Mutual Insurance Company, on April 8, 1971, issued to Budget Rent A Car a policy of automobile accident insurance No. FCA 10-389-011 providing that the plaintiff will pay "all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . . sustained by any person, caused by accident and arising out of the . . . use of the automobile." The policy contained this definition of the insured: "(a) [T]he unqualified word 'insured' includes the named insured . . . and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured . . . or with the permission of [the named insured]." Bobby Murray Leasing, Inc., doing business as Budget Rent A Car, was the owner and the only named insured.

On June 6, 1971, the named insured, by written agreement, rented the insured automobile (a 1971 Chevrolet, License No. 1666-C) to Victor Barlow Carraway, a qualified licensed driver who agreed to be bound by all provisions of the lease. The lease contained the following: "NOTICE ALL AUTHORIZED DRIVERS MUST BE 21 OR OLDER & LICENSED. . . . 4. The operation, use, or driving of vehicle is prohibited, and Renter [Carraway] agrees that vehicle shall not be used, operated or driven: . . . (f) By any person except Renter, an Additional Driver shown on the reverse side hereof, or if a qualified licensed driver over the age of 21, and provided Renter's permission be first obtained. . . ."

The policy contained the following:

"III. Definition of Insured: (a) With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'insured' includes the named insured . . . and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured . . . or with the permission of [the named insured]."

The parties further stipulated on June 6, 1971, Victor Barlow Carraway after signing the rental contract with Budget Rent A Car took possession of the rented vehicle.

". . . Thereafter, he stopped at a service station some distance down the highway and away from the business premises of Budget Rent A Car, and relinquished the custody, control and operation of the rented 1971 Chevrolet automobile to the defendant Elijah Z. Massey. Victor Barlow Carraway then proceeded to operate his own automobile, which the defendant Elijah Z. Massey had been operating, and the defendant Elijah Z. Massey proceeded to operate the rented 1971 Chevrolet automobile.

"On June 6, 1971, the defendant Elijah Z. Massey was 19 years old. The defendant Elijah Z. Massey was not designated as an additional driver on the rental contract executed by Victor Barlow Carraway, nor was he a person over the age of 21 who was a member of Victor Barlow Carraway's immediate family, an employer, employee, fellow employee, or partner or executive officer of Victor Barlow Carraway, . . . Massey, while operating the aforementioned rented 1971 Chevrolet automobile, was involved in an automobile collision with an automobile being operated by the defendant Kenneth Elmond Stone on U. S. Highway No. 401, three miles north of the Town of Lillington, North Carolina."

The individual defendants sustained injuries as a result of the collision.

The court concluded the insurance policy issued by the plaintiff insuring Bobby Murray Leasing, Inc., doing business as Budget Rent A Car, complied with the provisions of G.S. 20-279.21 and G.S. 20-281 and does not afford Elijah Z. Massey

coverage because he was not operating the insured vehicle with the express or implied permission of the named insured and was not in legal possession of the insured vehicle.

The court entered judgment here quoted:

"NOW, THEREFORE, based upon the foregoing findings of fact and conclusions of law, IT IS ORDERED, ADJUDGED AND DECREED that the policy of automobile liability insurance issued by the plaintiff to Bobby Murray Leasing, Inc., doing business as Budget Rent A Car, affords no insurance coverage to Elijah Z. Massey, and that the plaintiff shall not be obligated to pay on behalf of Elijah Z. Massey any sums which Elijah Z. Massey shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the 1971 Chevrolet automobile which was being operated by Elijah Z. Massey on June 6, 1971, and which was involved in an automobile collision with an automobile being operated by Kenneth Elmond Stone: it is further ORDERED, ADJUDGED AND DECREED that the plaintiff is not obligated to defend any suit against Elijah Z. Massey, nor is the plaintiff obligated to pay any costs taxed against Elijah Z. Massey in any suit that is presently pending or which hereafter may be instituted against Elijah Z. Massey; and it is further ORDERED that the costs of this action be taxed against the defendants."

The defendants appealed.

Perry C. Henson and Joseph E. Elrod III, for plaintiff Appellee.

Bryant, Lipton, Bryant & Battle, by Victor S. Bryant, Jr.; Stewart and Hayes, P. A., by Gerald W. Hayes, Jr.; Anderson, Nimocks & Broadfoot, by Henry L. Anderson, for defendant appellants.

HIGGINS, Justice.

The appeal presents this question: Does the plaintiff's automobile liability insurance policy No. FCA 10-389-011 issued to Budget Rent A Car, which leased the insured vehicle to Victor Barlow Carraway, afford coverage to Elijah Z. Massey to whom

Carraway surrendered it in violation of his leasing agreement with the owner?

By the stipulations of the parties and the findings of Judge Seay, who tried the case without a jury, these pertinent facts were established: (1) The plaintiff issued its policy of automobile liability insurance on a 1971 Chevrolet owned and operated in the lessor's rental business. (2) The coverage extended to the named insured, Budget Rent A Car, and any person or organization legally responsible for the use of the Chevrolet provided the actual use is by named insured or with the permission of the named insured. (3) By written agreement the lessor rented the insured vehicle to Carraway. The written leasing agreement provided that Carraway would not surrender possession to any person unless over twenty-one and a licensed driver. (4) Carraway, in violation of the agreement and without the knowledge or consent of the lessor, surrendered the vehicle to Massey. (5) While operating the vehicle on the highway, Massey inflicted injuries and damages.

The written rental contract between the owner and Carraway provided: "All authorized drivers must be 21 or older and licensed." A sound legal reason existed for the limitation. At the date of the policy, the date of the leasing agreement, and the date of the accident, age twenty-one was fixed by law as the age at which one became legally responsible for his contractual obligations. The lessor, therefore, might hope to recoup any damages resulting from a breach of the rental contract. The purpose of requiring that the permittee be a licensed driver is obvious.

In violation of the agreement and without the knowledge or consent of the lessor, Carraway surreptitiously surrendered the insured vehicle to Elijah Z. Massey, age nineteen. The defendants contend that the terms of the policy afford coverage for injuries inflicted by Massey and in the alternative if the policy does not provide such coverage, the North Carolina Statutes, G.S. 20-279.21 and G.S. 20-281, when construed together, became parts of the insurance contract and extended coverage to any driver who was in lawful possession at the time of the injuries. They contend that Massey was not shown to be in unlawful possession.

Actually, G. S. 20-279.21 applies to the operation of motor vehicles generally and requires coverage for "[T]he person named therein and any other person, as insured, using any such

motor vehicle . . . with the express or implied permission of such named insured. . . ." By Chapter 1162, Session Laws of 1967, the General Assembly amended G. S. 20-279.21(b)(2) by adding as insured "or any other persons in lawful possession." In the preamble to the amendment the General Assembly declared: "[T]he owner of every motor vehicle has the absolute authority under the law to allow or not to allow anyone else to operate his vehicle. . . ." But when lawful possession is shown, further proof is not required that the operator had the owner's permission "to drive on the very trip and occasion of the collision." Section 2 of the amendment provides: "It shall be a defense to any action that the operator of a motor vehicle was not in lawful possession on the occasion complained of."

[1, 2] In this case the owner (Budget Rent A Car) surrendered possession of its vehicle to Carraway on written condition that Carraway not permit possession to pass to a person under twenty-one years of age or an unlicensed driver. The owner obligated itself to be responsible for Carraway's negligence but Carraway could not, in violation of his own agreement, make the owner responsible for Massey's negligence. No provision is made for owner's liability either by the policy or by G.S. 20-279.21, as amended, until lawful possession is first established. This may be done by express or implied permission of the owner.

The rule is stated in *Bailey v. Insurance Company,* 265 N.C. 675, 144 S.E. 2d 898: " 'Where express permission is relied upon it must be of an affirmative character, directly and distinctly stated, clear and outspoken, and not merely implied or left to inference. On the other hand, implied permission involves an inference arising from a course of conduct or relationship between the parties, in which there is mutual acquiescence or lack of objection under circumstances signifying assent.' . . . Ordinarily, one permittee does not have authority to select another permittee without specific authorization from the named insured." *Torres v. Smith,* 269 N.C. 546, 153 S.E. 2d 129; *Wilson v. Indemnity Co.,* 272 N.C. 183, 158 S.E. 2d 1; *Rhiner v. Insurance Co.,* 272 N.C. 737, 158 S.E. 2d 891; *Insurance Co. v. Insurance Co.,* 276 N.C. 243, 172 S.E. 2d 55.

[3] The trial court concluded as a matter of law that Elijah Z. Massey was not a person in lawful possession of the rented 1971 Chevrolet automobile and was not insured by the terms of the policy. Likewise, Massey was not within the coverage required

by G.S. 20-281. G.S. 20-281 required coverage for the owner, rentee, lessee and their agents and employees while in the performance of their duties. There is neither evidence nor finding that Massey at any time was a rentee or lessee or an agent or employee and hence was not performing duties as such. The coverage required by this section extended coverage to Carraway, but not to Massey.

Judge Seay was correct in adjudging that neither the plaintiff's insurance policy nor the requirements of State law provided coverage for personal injuries and property damage caused by Massey's operation of the 1971 Chevrolet automobile No. 0912, License No. 1666-C. The judgment in the Superior Court of Guilford County is

Affirmed.

Justice BRANCH concurring in result.

I agree with the conclusion of the majority that plaintiff's policy did not provide coverage for the personal injuries and property damages caused by Massey's operation of the leased automobile. However, I think the sole basis for this conclusion should be that the vehicle was being operated without the insured's permission.

G. S. 20-279.21 applies to motor vehicles generally and defines a "motor vehicle liability policy." Referring to such policy, the statute in part provides that it "Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, or any other persons in lawful possession, against loss . . ." G.S. 20-279.21 is found in Article 9A.

G.S. 20-281 is a statute found in Article 11 which specifically applies to persons engaged in the renting of automobiles. It requires that "Each such motor vehicle leased or rented must be covered by a policy of liability insurance insuring the owner and rentee or lessee and their agents and employees while in the performance of their duties against loss . . ."

One of the recognized rules of statutory construction is that "Where one statute deals with the subject matter in detail with reference to a particular situation and another statute

deals with the same subject matter in general and comprehensive terms, the particular statute will be construed as controlling in the particular situation unless it clearly appears that the General Assembly intended to make the general act controlling in regard thereto, especially when the particular statute is later enacted." 7 Strong's N. C. Index 2d Statutes § 5; *Food Stores v. Board of Alcoholic Control,* 268 N.C. 624, 151 S.E. 2d 582.

It should be noted that G.S. 20-281 does not include as an insured "any other persons in lawful possession."

Plaintiff's policy, in excess of the statutory requirements of G.S. 20-281, defined an insured to include the named insured and any person using the automobile or legally responsible for the use, provided that the use of the automobile be with the permission of the named insured.

I am of the opinion that only G.S. 20-281 is applicable to the facts of this case and that it was not necessary or proper that we consider whether Massey was in "lawful possession" at the time of the collision.

THE CITY OF KINGS MOUNTAIN, A MUNICIPAL CORPORATION v. COLEMAN GOFORTH AND WIFE, MARY B. GOFORTH, C. A. HORN, TRUSTEE, FIRST CITIZENS BANK AND TRUST COMPANY, KINGS MOUNTAIN, J. HAROLD McKIETHEN, PRUDENTIAL LIFE INSURANCE COMPANY, AND THE COUNTY OF CLEVELAND

No. 81

(Filed 9 May 1973)

1. **Eminent Domain § 15— condemnation proceeding — right to possession — passage of title**

In a condemnation proceeding under G.S. 40-11 *et seq.*, the condemnor acquires no right to possession until it pays into court the value of the subject property as determined by appraisers; it acquires no title to the property until it obtains a final judgment and pays to the landowner the amount of compensation fixed by such judgment.

2. **Eminent Domain § 15— condemnation proceeding — right to possession — growing crops on land**

Absent unusual circumstances, the landowner may continue to use his property from the commencement of a condemnation proceeding under G.S. 40-11 *et seq.* until the payment into court by the condemnor of the value of the property as determined by commissioners to the same extent and in the same manner in which he had

been using it prior to the commencement of the condemnation proceeding; consequently, if the owners of land subject to such a proceeding had planted crops on the land in the years prior to commencement of the proceeding, they had a right to plant, cultivate and harvest crops on such land until their right to possession was terminated by the condemnor's payment into court of the amount of value of the property as determined by commissioners.

3. **Water and Watercourses § 1— obstruction of surface stream — flooding of upper lands — liability for damages**

If a lower landowner obstructs a surface stream of water so as to prevent the water from flowing as it naturally would and thereby flood the lands above him, he incurs liability for the damage caused by such flooding; since the respective rights of the upper and lower proprietors are property rights, the invasion thereof, not negligence, affords the basis for recovery.

4. **Eminent Domain § 13; Water and Watercourses § 1— obstruction of surface stream — trespass — right to condemn — inverse condemnation**

Ordinarily, the invasion of a property right of the upper proprietor by the lower proprietor would constitute a trespass which would entitle the aggrieved party to damages or injunctive relief or both; however, if a property right of the upper proprietor is invaded by a party that has authority to condemn this property right, such invasion constitutes a "taking" of the landowner's property and the action becomes in effect an action for "inverse condemnation."

5. **Water and Watercourses § 4— flooding caused by dam construction — damage to crops — sufficiency of evidence for jury**

Defendants' evidence was sufficient for the jury in their cross-action for damages to their crops from flooding allegedly caused by plaintiff municipality's construction of a dam on a creek where it tended to show that the municipality had installed a pipe having a diameter of five feet which provided the only means for flow of the creek waters through the dam under construction, that the creek twice overflowed during heavy rains while the dam was under construction and flooded defendants' 40-acre tract above the dam, that crops on the 40 acres were completely under water for two to three weeks on each occasion and were totally destroyed, and that when the 40 acres were flooded on two occasions prior to construction of the dam the water subsided within a few hours and caused no material damage to crops.

6. **Pleadings § 2; Rules of Civil Procedure § 50— motion for directed verdict — erroneous label of ground for relief**

If defendants are entitled to relief under their allegations and evidence, plaintiff is not entitled to a directed verdict because defendants erroneously named "negligence" rather than "trespass" or "inverse condemnation" as the ground on which they are entitled to recover.

APPEAL by defendants Goforth from judgment of *Judge Harry C. Martin* entered at 18 September 1972 Session of

CLEVELAND Superior Court, transferred for initial appellate review by the Supreme Court by order dated 26 March 1973 entered pursuant to G.S. 7A-31(b)(4).

The record before us shows that, on 3 September 1969, Kings Mountain, a Municipal Corporation, filed its petition in this condemnation proceeding. Although this petition was not included therein, the record before us implies that the proceeding was to condemn described Goforth land in connection with the construction and maintenance of a new water system. This was confirmed on oral argument by statements of counsel for plaintiff and for defendants Goforth. Counsel also stated that the land which is the subject of the Goforth cross-action is a part of the Goforth land involved in the Kings Mountain condemnation proceeding.

The first pleading in the record before us is the answer and cross-complaint filed by defendants Goforth on 24 February 1971. This pleading contains a denial of the essential allegations in Kings Mountain's petition; it alleges further answers and defenses to Kings Mountain's asserted right to condemn; and it alleges a cross-action for damages. On 20 September 1972, Kings Mountain filed an answer to the Goforth cross-complaint.

In their cross-complaint, the Goforths alleged that their property included bottom land on Buffalo Creek; that, in August 1970 and in February 1971, the dam constructed by Kings Mountain caused the waters of Buffalo Creek to flood and completely destroy their crops; that, in constructing the dam, Kings Mountain only allowed drainage by a pipe five (5) feet in diameter when it knew or should have known that this pipe would not provide adequate drainage; that the loss of their crops was caused solely by the negligence of Kings Mountain; and that they had been damaged to the extent of $10,000.

Kings Mountain's reply, in addition to general denials, alleged as a further defense the following: Buffalo Creek had overflowed on numerous occasions and the Goforths knew or should have known that their bottom land was subject to flood conditions during heavy rainfall. The Goforths also had full knowledge that the dam was under construction. Kings Mountain had taken precautions against ordinary flood conditions. The flood conditions which caused damage to the Goforths' crops were caused by an extraordinary and unprecedented rainfall which Kings Mountain did not and could not reasonably antici-

pate. Too, the accumulation of water on the Goforth lands was caused in part by the bursting of a dam of upper landowners.

In addition, Kings Mountain alleged that the flooded Goforth land was part of the lands which had been condemned and valued as of 3 September 1969, prior to the planting of the crops referred to in the Goforth cross-action; and that the Goforths planted these crops with full knowledge that these lands were to be taken by Kings Mountain as of 3 September 1969.

The record contains this statement: "Cross-action severed by the Honorable Lacy H. Thornburg on September 28, 1971."

It was stipulated that defendants Goforth were the owners of the land upon which the crops referred to in this action were growing; also, that Kings Mountain had installed a pipe having a diameter of five feet which provided the only means for the flow of Buffalo Creek waters "through the dam which was under construction."

The only evidence was that offered by defendants Goforth. It consists of the testimony of defendant Coleman Goforth, of Buford Cline, the owner of bottom lands across the creek from those of the Goforths, and of W. K. Dickson, an engineer, who had been employed by Kings Mountain in connection with the Kings Mountain Buffalo Creek Water Project Reservoir. Their evidence tended to show the facts narrated below.

The Goforths' bottom land consisted of 40 acres on Buffalo Creek which had been used in "grain farming" for over twenty-one years. This bottom land was within the area from one-half mile to three miles north of the dam built by Kings Mountain.

In August 1970 the Goforths had "a fine looking crop [of milo] in the heading stage" on the 40 acres. For about three weeks in early August, this crop was completely covered by water. When the water subsided the crop was entirely lost. In early February 1971, the Goforths had a crop of Blueboy wheat "12 inches high" on the 40 acres. On 7 February 1971, and for two weeks thereafter, this crop was flooded and was "of no value after the water subsided."

Prior to August 1970, the creek had been out of its banks on only two occasions, once in 1951 and again "several years later." On these occasions the creek overflowed its banks during the night but had subsided by the next morning and was never

out of its banks "over a few hours." "On neither occasion were the crops hurt." At the time of the August flooding, the portion of Buffalo Creek south of the dam "looked as though it had not rained" except for the fact that the water was muddy. The water immediately north of the dam "was a lake-looking situation. . . ." The five-foot drainpipe immediately south of the dam "was running full."

Dickson, the engineer, testified that the rain "on August 9 and 10, 1970, was a very unusual and very high rainfall"; that a dam at the Dover Mill, "not very large," located four or five miles upstream from the Goforth property "broke during this particular time"; that the five-foot pipe was "to protect the dam during construction and with very little consideration of what would happen to the land above the dam"; that it was expected when the plans were drawn that Kings Mountain would be the owner of the land above the dam when construction started; that the construction had been delayed for about three years; and that when the floodings occurred the dam "was over half built."

There was other evidence bearing upon the amount of damages suffered by the Goforths on account of the loss of their crops. This evidence is not pertinent to decision on this appeal.

At the conclusion of the evidence of defendants Goforth, Kings Mountain moved for a directed verdict of dismissal of the cross-action under Rule 50, Rules of Civil Procedure, G.S. 1A-1. The court allowed this motion on the stated ground that defendants Goforth had failed to show that their property was damaged by the negligence of Kings Mountain. Judgment dismissing the cross-action and taxing defendants Goforth with the costs was entered.

Defendants Goforth excepted and appealed.

Jack White and Verne E. Shive for plaintiff appellee.

Horn, West, Horn and Wray by C. A. Horn for defendant appellants.

BOBBITT, Chief Justice.

Municipal corporations have the right of eminent domain for the purpose of acquiring private property to construct and maintain a municipal water system. G.S. 40-2(2). The procedure

applicable to the condemnation proceeding now under consideration is that prescribed by G.S. Chapter 40, "Eminent Domain," Article 2, "Condemnation Proceedings," G.S. 40-11 *et seq.* Under this procedure, after the filing of the petition and answer, commissioners are appointed to appraise the subject property. G.S. 40-12; G.S. 40-16; G.S. 40-17. If the condemnor, "at the time of the appraisal, shall pay into court the sum appraised by the commissioners, then and in that event the said [condemnor] may enter, take possession of, and hold said lands, notwithstanding the pendency of the appeal, and until the final judgment rendered on said appeal." G.S. 40-19. "The title of the landowner is not divested unless and until the condemnor obtains *a final judgment* in his favor *and* pays to the landowner *the amount of the damages fixed by such final judgment.* G.S. 40-19; *Light Co. v. Manufacturing Co.*, 209 N.C. 560, 184 S.E. 48." *Topping v. Board of Education*, 249 N.C. 291, 299, 106 S.E. 2d 502, 508 (1959). [Note: The alternative provisions for condemnation by municipal corporations enacted by Chapter 698, Session Laws of 1971, now G.S. 160A-240 *et seq.*, are not applicable to proceedings pending on 1 January 1972.]

The procedure prescribed by G.S. 40-11 *et seq.* was applicable to condemnation proceedings instituted by the State Highway Commission *prior to 1 July 1960.* The procedure presently applicable to condemnation proceedings *by the State Highway Commission* is prescribed by the 1959 statutes now codified in G.S. Chapter 136, "Roads and Highways," Article 9, "Condemnation," G.S. 136-103 *et seq.* Under these statutes, title and immediate right to possession are vested in the State Highway Commission upon the filing of the complaint, the declaration of taking, and the deposit in court of the amount of the estimated compensation stated in the declaration. G.S. 136-104. *Highway Commission v. Industrial Center*, 263 N.C. 230, 139 S.E. 2d 253 (1964). This change in the law must be kept in mind when considering decisions involving the exercise of the right of eminent domain by the State Highway Commission.

When the Highway Commission exercises its right of eminent domain in accordance with G.S. 136-103 *et seq.*, "the right to compensation rests in the person who owned the land immediately prior to the filing of the complaint and declaration of taking. He has nothing he can sell pending ascertainment of fair compensation. Formerly, since his title was not divested until compensation was paid, he could sell, G.S. 40-26. The per-

son who owned when the award was confirmed was the person to be compensated. *Liverman v. R. R.*, 109 N.C. 52, 13 S.E. 734. The Highway Commission, when it files its complaint, must file a memorandum of its action with the register of deeds where the land lies, G.S. 136-104. This has the same effect as a conveyance of the property." *Highway Commission v. Industrial Center, supra,* at 232, 139 S.E. 2d at 255.

In a condemnation proceeding under G.S. 40-11 *et seq.*, ordinarily, "for the purpose of determining the sum to be paid as compensation for land taken under the right of eminent domain, the value of the land taken should be ascertained as of the date of the taking, and . . . the land is taken within the meaning of this principle when the proceeding is begun." *Power Co. v. Hayes,* 193 N.C. 104, 107, 136 S.E. 353, 354 (1927); *Ayden v. Lancaster,* 197 N.C. 556, 559, 150 S.E. 40, 42 (1929); *Charlotte v. Spratt,* 263 N.C. 656, 662, 140 S.E. 2d 341, 345 (1965).

[1] Although the value of the land is to be determined as of the date the condemnation proceeding is commenced, much time may elapse from this date until the condemnor obtains the right to possession and a final judgment. The condemnor acquires no right to possession until it pays into court the value of the subject property as determined by the appraisers; it acquires no title to the property until it obtains a final judgment and pays to the landowner the amount of compensation fixed by such judgment. The principal amount of the judgment is the value of the subject property as of the date the special proceeding is commenced *as finally determined* by jury verdict or otherwise, whether more or less than the valuation placed thereon by the commissioners, with interest thereon from the date the condemnor acquired the right to possession thereof by payment into court of the amount of the valuation as fixed by the appraisers. *Winston-Salem v. Wells,* 249 N.C. 148, 105 S.E. 2d 435 (1958); *Light Co. v. Briggs,* 268 N.C. 158, 150 S.E. 2d 16 (1966).

In *Winston-Salem v. Wells, supra,* the proceeding was instituted on 8 February 1956; the amount fixed by the appraisers was paid into court on 30 March 1956; and the court held that the landowner was entitled to interest from 30 March 1956 on the value of the property as determined in the superior court. In *Light Co. v. Briggs, supra,* the condemnation proceeding was instituted on 2 April 1962; the amount of the damages

assessed by the commissioners was paid into court on 8 June 1962; and the landowners were held entitled to interest from 8 June 1962 on the value of the property as determined in the superior court.

[2] The cited decisions recognize the landowner's right to continue in possession of his property from the commencement of the special proceeding until the payment into court by the condemnor of the value of the property as determined by the commissioners. Until such payment is made, the landowner may sell the subject property; however, the special proceeding constitutes a *lis pendens,* giving notice to the purchaser that he succeeds to the status of the seller in the pending proceeding. G.S. 40-26; *Caveness v. R. R.,* 172 N.C. 305, 90 S.E. 244 (1916); *Hughes v. Hwy. Comm. & Oil Co. v. Hwy. Comm. & Equip. Co. v. Hwy. Comm.,* 275 N.C. 121, 165 S.E. 2d 321 (1969). Too, when the date for the attachment of the lien for taxes falls within this period, the landowner is obligated to list the subject property and pay the taxes thereon for such year or years. *Lumber Co. v. Graham County,* 214 N.C. 167, 198 S.E. 843 (1938). Without undertaking to define the limits upon the landowner's right to use the subject property during this period, it is clear that, absent unusual circumstances, he may continue to use it to the same extent and in the same manner in which he had been using it prior to the commencement of the condemnation proceeding. Hence, if the Goforths had planted crops on bottom lands referred to in the cross-complaint in the years prior to the commencement of the condemnation proceeding, they had the right to plant, cultivate and harvest crops on the bottom land until such time as their right to possession was terminated by the payment into court by Kings Mountain of the amount of the value of the subject property as determined by the commissioners.

The record contains *a notation* that the petition in the condemnation proceeding was filed 3 September 1969. It is silent as to all subsequent events in that proceeding except the portion of the Goforth pleading which relates solely to the allegations of the petition. Thus, the record does not disclose (1) when commissioners were appointed; (2) when Kings Mountain paid into court the amount of the commissioners' appraisal; (3) the value of the subject property as of 3 September 1969 as determined by the jury, and the court's instructions with reference thereto; and (4) the date and amount of the judgment

in the condemnation proceeding, including the date from which it provides for interest on the principal sum.

From the record, and from statements on oral argument, we infer that the crops referred to in the Goforth cross-complaint were planted and flooded during the period between the filing of the petition and the payment of the value of the Goforth property as determined by the commissioners. If so, the Goforths then had possession as a matter of right. Of course, absent special circumstances, the Goforths would not be entitled to recover if the crops were planted and flooded at a time when they had no legal right to the possession of the land.

Further consideration is upon the assumption that the Goforths had the legal right to the possession of the lands when the crops were planted and flooded, and that they have not been compensated by interest from the date the proceeding was instituted or otherwise for the period preceding the payment into court of the value of their property as fixed by the commissioners.

The burden of proof rests upon the Goforths to establish the liability of Kings Mountain and the amount of their damages. The question before us is whether the evidence, when considered in the light most favorable to the Goforths, was sufficient to withstand Kings Mountain's motion for a directed verdict. *Kelly v. Harvester Co.*, 278 N.C. 153, 157, 179 S.E. 2d 396, 397 (1971).

The applicable legal principles are as follows:

[3] "[A] lower owner cannot obstruct a surface stream of water, so as to prevent the water from flowing as it naturally would, and thereby flood the lands and buildings above him, and if he does so, he incurs liability for the damage done by such flooding." *Jones v. Loan Association,* 252 N.C. 626, 636, 114 S.E. 2d 638, 645 (1960), and cases cited.

"The surface of the earth is naturally uneven, with inequality of elevation. The upper and lower holdings are taken with a knowledge of these natural conditions, and the privilege or easement of the upper tenant to carry off the surface water in its natural course, under reasonable limitations, and the subserviency of the lower tenant to this easement are the natural incidents to the ownership of the soil. The lower surface is doomed by nature to bear this servitude to the superior and must receive the water that falls on and flows from the latter." *Miz-*

ell v. McGowan, 120 N.C. 134, 137, 26 S.E. 783, 784 (1897). The servient tenant "cannot set up a barrier to the flow of the water in its natural or accustomed channel if it will result in injury to his neighbors." *Clark v. Guano Co.,* 144 N.C. 64, 77, 56 S.E. 858, 863 (1907). Since the respective rights of the upper and lower proprietors are property rights, the invasion thereof, not negligence, affords the basis for recovery. *Braswell v. Highway Commission,* 250 N.C. 508, 108 S.E. 2d 912 (1959).

[4] Ordinarily, the invasion of a property right of the upper proprietor by the lower proprietor would constitute a trespass which would entitle the aggrieved party to damages or injunctive relief or both. However, if a property right of the upper proprietor is invaded by a party that has authority to condemn this property right in the exercise of its power of eminent domain such invasion constitutes a "taking" of the landowner's property and the action becomes in effect an action for "inverse condemnation." See *Charlotte v. Spratt, supra,* and cases cited.

[5] The evidence offered by defendants Goforth was sufficient to permit the following findings: In the two instances prior to August 1970 when the 40 acres were flooded, the water subsided within a few hours and caused no material damage. Both in August 1970 and in February 1971 the crops on the 40 acres were completely under water for periods of two or three weeks. The evidence is silent as to the impact of the breaking of the Dover Mill dam four or five miles upstream from the Goforth property. In any event, the breaking of the Dover Mill dam referred only to what occurred in August 1970. There was no material difference between the extent to which the Goforth land was flooded in August 1970 and the extent to which it was flooded in February 1971. The lands along Buffalo Creek south of the dam were not flooded.

Assuming, as the record before us implies, that the Goforths were the owners and entitled to the possession of the 40 acres when the crops were planted and flooded, we hold the evidence was sufficient for submission to the jury and to withstand the motion for a directed verdict in favor of defendant.

The decisions cited in Kings Mountain's brief are not pertinent to the present factual situation. Both *Bruton v. Light Co.,* 217 N.C. 1, 6 S.E. 2d 822 (1940), and *Bowling v. Oxford,* 267 N.C. 552, 148 S.E. 2d 624 (1966), involved actions by *lower* riparian owners against upper riparian owners for damages on account of negligence in the construction, maintenance or

operation of a dam. The other cited decision, *Letterman v. Mica Company,* 249 N.C. 769, 107 S.E. 2d 753 (1959), involved an action by an upper riparian owner on account of flooding allegedly caused by a dam maintained by a lower riparian owner. The demurrer of defendant English Mica Company was sustained on the ground that the complaint disclosed that the flooding of the plaintiff's land had not resulted from the construction or operation of the dam but because defendant Harris Clay Company, in its mining operations upstream from plaintiff, had put excessive amounts of dirt in the stream which came down and settled in the still water impounded by the dam and thereby caused the water to back upon the land and roadway of the plaintiff.

[6] Although the Goforths in their cross-complaint assert a right to recover on the ground of negligence, the claim which they allege is "sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief. . . ." Rule 8, Rules of Civil Procedure, G.S. 1A-1. Their evidence tends to support their allegations. If defendants Goforth are entitled to relief under their allegations and evidence, Kings Mountain was not entitled to a directed verdict because defendants Goforth named "negligence" rather than "trespass" or "inverse condemnation" as the ground on which they were entitled to recover. *Paris v. Aggregates, Inc.,* 271 N.C. 471, 482, 157 S.E. 2d 131, 139-40 (1967). Of course, defendants Goforth would be entitled to recover damages only to the extent the flooding of the 40 acres and the damage to their crops was proximately caused by the dam then under construction by Kings Mountain.

Upon the record before us, the judgment of the court below must be and is reversed. The cause is remanded for trial consistent with legal principles stated herein. However, upon retrial the presiding judge may take into consideration pertinent facts, if any, which do not appear in the record before us, bearing upon whether (1) plaintiff was in rightful possession when the crops were planted and the land flooded, and (2) whether defendants Goforth have been compensated by interest or otherwise for the period from the date of the commencement of the condemnation proceeding until the payment into court by Kings Mountain of the valuation as determined by the commissioners.

Reversed.

Baxter v. Jones

JESSIE BAXTER, ELLEN B. BEAM, MADELINE B. MINCEY, G. BLAINE BAXTER, F. HERMAN BAXTER AND BLANCHE B. DUVAL

— v. —

EFFIE LEAH MURRELL JONES, JOE MURRELL, RILEY MURRELL, MRS. JOE WALTER, MRS. CLIFFORD WOODLEY, MRS. GEORGE SCHENOLAL, MRS. WALLY ARROWSMITH, MRS. GEORGE REITER, MRS. LEONA MOWATT, MRS. DENNIS BOKTIN, MRS. MARY BOYD PEARSON, PAUL B. COSTNER AND WIFE, SALLIE A. COSTNER, MILDRED C. CARDWELL, RUTH C. DODENHOFF, DURWARD W. COSTNER AND WIFE, MARJORIE COSTNER, MRS. MARY DELMA B. SEAGLE, ROSA BLACKBURN McDONALD AND HUSBAND, GENE McDONALD, ESSIE PARKS BLACKBURN, MARY L. BLACKBURN GARDNER AND HUSBAND, WILLIAM GARDNER, REV. L. E. BLACKBURN, FRED J. BLACKBURN, SR., AND WIFE, SARA WILFONG BLACKBURN, SAMUEL W. BLACKBURN, EMILY BLACKBURN DAVIDSON, CHARLES E. BLACKBURN, MRS. BLANCHE BLACKBURN PRINCE, HUGH WOODROW BLACKBURN, CHESTER BLACKBURN, SHUFORD W. BLACKBURN AND WIFE, OVETA WHITE BLACKBURN, MRS. PHOEBE BLACKBURN WILFONG, DOCIA LEDFORD BOYD, S. J. BOYD AND WIFE, PEARL BOYD, INA B. MIXON AND HUSBAND, M. O. MIXON, JOHN F. BOYD AND WIFE, KATHERINE BOYD, MARY B. HOYLE AND HUSBAND, GUY L. HOYLE, W. G. BOYD AND WIFE, MAE BOYD, BESSIE B. SCHRUM AND HUSBAND, E. E. SCHRUM, BEVERLY B. BOYD AND WIFE, OLA BOYD, ETHEL BOYD, W. EUGENE BOYD, JAMES EDWARD BOYD AND WIFE, NINA BOYD, EARL B. BOYD AND WIFE, PATRICIA BOYD, BEVERLY RICHARD BOYD AND WIFE, BETTY BOYD, RALPH AUGUSTUS BOYD AND WIFE, GLORIA BOYD, ANNIE BOYD STARNES, RUTH BOYD BARKLEY AND HUSBAND, ERNEST FRANKLIN BARKLEY, MARY BOYD SIMMONS AND HUSBAND, W. D. SIMMONS, ETHEL BOYD CREEL AND HUSBAND, ROBERT CREEL, JOHN R. BOYD, RALPH G. BOYD AND WIFE, HELEN BOYD, MARY A. CROWDER AND HUSBAND, R. B. CROWDER, EDITH A. TOMPSON AND HUSBAND, A. A. TOMPSON, THELMA A. OWENS AND HUSBAND, W. J. OWENS, MOZELLE A. WHITE AND HUSBAND, DONALD E. WHITE, MARIDELL B. BANDY AND HUSBAND, ROBERT B. BANDY, CAROLYN B. CARTER, WOODROW BOYD AND WIFE, DOROTHY BOYD, C. C. BOYD AND WIFE, CORINNE BOYD, PEARL B. THORNTON, MAE B. RITCHIE AND HUSBAND, GUY RITCHIE, D. R. BOYD AND WIFE, ILA T. BOYD, IDA B. RUDISILL AND HUSBAND, JASON RUDISILL, ROBERT W. BOYD AND WIFE, JOYCE J. BOYD, IVA S. BOYD, JOE BOYD, HUBERT BOYD, EDWARD BOYD, J. BEN MORROW, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF PEARL BOYD BAXTER, DECEASED, AND ALL UNKNOWN HEIRS OF PEARL BOYD BAXTER, DECEASED, WHOSE NAMES AND RESIDENCES ARE UNKNOWN.

No. 84

(Filed 9 May 1973)

Attorney and Client § 7; Costs § 3; Judgments § 5— insufficiency of writing to create trust — taxing of counsel fees against estate — anticipatory order

In a declaratory judgment action in which it was correctly determined that the paper writing in question was insufficient as a trust instrument and was not executed as a will, the trial judge erred in ordering that plaintiffs' counsel fees should be taxed against decedent's estate upon the completion of all appeals in the action since (1) the action did not involve a caveat or the construction of a trust instrument within the purview of G.S. 6-21 and (2) the trial judge was without authority to enter an anticipatory order that would be binding upon another judge.

APPEAL by defendants from the order entered by *McLean, J.* at the September 11, 1972 Session, GASTON Superior Court. Pursuant to G.S. 7A-31(b)(4) this case was transferred to the Supreme Court by order of March 20, 1973, for the original review prior to determination by the Court of Appeals.

The plaintiffs on September 8, 1970, instituted this proceeding under the Declaratory Judgment Act requesting the court to declare a paper writing dated December 22, 1968, signed by Pearl Boyd Baxter to be a valid trust agreement by which the plaintiffs became the beneficial owners of the properties, both real and personal, belonging to Mrs. Pearl Boyd Baxter.

The plaintiffs are the stepchildren of Mrs. Pearl Boyd Baxter—the children of her deceased husband by his prior marriage. The defendants are the heirs at law and the next of kin of Mrs. Pearl Boyd Baxter. Many of the defendants filed answers denying the material allegations of the complaint. Defendants S. J. Boyd and wife, Pearl Boyd, filed an answer admitting the allegations of the complaint and asked that the court enter judgment "awarding all of the property and estate of Pearl Boyd Baxter, deceased, to the plaintiffs." Certain other defendants failed to appear or to answer.

The cause came on for hearing before Thornburg, J. at the September 13, 1971 Session, Gaston Superior Court. The court entered judgment by default against the defendants who failed to answer and against the Boyds declaring their interest was to be forfeited to the plaintiffs. Judge Thornburg adjudged: (1) The paper writing, Exhibit A, is not sufficient to constitute a trust agreement; (2) the answering defendants are entitled to the estate of Mrs. Baxter; (3) but if the ruling of this court is reversed on appeal, then the court is of the opinion that the motion for summary judgment lodged by the plaintiffs should

be allowed and this court will grant said motion at that time. The judgment included the following: "(e) That the costs of this action including reasonable attorneys' fees to the attorneys for the plaintiffs and the defendants, shall be taxed against the estate of Pearl Boyd Baxter, deceased; said attorneys' fees shall be assessed by the Court upon the completion of all appeals in this action, in such amount as to this Court seems proper." Both parties excepted and appealed from the judgment.

The North Carolina Court of Appeals heard and passed on the appeal. The opinion by Chief Judge Mallard is reported in 14 N.C. App. 296, 188 S.E. 2d 622. The full legal history of the proceeding is contained in that opinion. The Court of Appeals, after striking certain parts of Thornburg's judgment, with respect to other parts, stated: "Although such a ruling is erroneous and is irregular, in this case it is not now prejudicial to the answering defendants because this court has affirmed Judge Thornburg's ruling that 'Exhibit A' did not create a trust. But it should be noted that though a superior court judge is vested with great power, he does not have the power to deny a motion and also to allow it in the same judgment, *or to bind another judge by such a premature anticipatory and conditional ruling.*" (Emphasis added.)

After the decision of the Court of Appeals was certified to the Superior Court of Gaston County, counsel for the plaintiffs filed a petition alleging that they were entitled to $4,000.00 attorneys' fees and to $697.08 expenses incurred in connection with this proceeding. Judge McLean entered an order over defendants' objections awarding fees and expenses as prayed for by the petitioners citing Judge Thornburg's order as his authority. From Judge McLean's judgment awarding counsel fees to plaintiffs' attorneys to be paid by the administrator d.b.n. of Mrs. Baxter's estate, the defendants appealed.

Basil L. Whitener and Anne M. Lamm for plaintiff appellees.

Whitesides and Robinson by Henry M. Whitesides for defendant appellants.

HIGGINS, Justice.

The case after transfer was called for argument at an hour earlier than that previously fixed for the hearing in the Court of

Appeals. Hence plaintiffs' counsel, through no fault of their own, were not present to participate in the argument before this Court. In order that their rights may not be prejudiced by failure to participate in the oral argument, we have endeavored to conduct a most detailed review of their brief and of the record to the end that facts favorable to the petitioners may not be overlooked.

The record indicates that Mrs. Pearl Boyd Baxter preferred that her property should go to the children of her deceased husband, rather than to her own heirs and distributees. However, beyond legal question, her preference was not carried out in the manner required by law. Exhibit A, a part of the plaintiffs' complaint, and copied in the decision of the Court of Appeals, was not executed as a will and it was not a trust instrument. Such was the hesitating conclusion of Judge Thornburg. It was the emphatic conclusion of the Court of Appeals and is the conclusion of this Court. Exhibit A failed to qualify as a trust instrument.

The foregoing is the background out of which the question now before us arose. Did Judge McLean commit error in awarding plaintiffs counsel fees and directing payment out of Mrs. Baxter's estate? The order of Judge Thornburg directed that the costs, including plaintiffs' attorneys' fees, "[S]hall be taxed against the estate of Pearl Boyd Baxter, deceased; said attorneys' fees shall be assessed by the Court upon the completion of all appeals in this action. . . ." Judge Thornburg did not tax fees; he undertook to direct that a later judge perform that function. The authority of the court to award fees to the attorneys for the losing parties and directing their payment out of the recovery of the winning parties is purely statutory. G.S. 6-21 provides: "Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court; . . . (2) Caveats to wills and any action or proceeding which may require the construction of any will or trust agreement, or fix the rights and duties of parties thereunder; . . ." There follows a provision dealing with attorneys' fees in a caveat proceeding not pertinent here. In a caveat proceeding the question is whether the writing is a will. The proceeding is *in rem*. An *in rem* proceeding is one in which, strictly speaking, there are no parties. *In re Will of Cox,* 254 N.C. 90, 118 S.E. 2d 17. Except as so provided by statute, attorneys' fees are not allowable. *Trust Company v. Schneider,* 235 N.C. 446,

70 S.E. 2d 578. This proceeding is not a caveat. It cannot be said to be a proceeding for the construction of a trust agreement. Unless there is a trust instrument, there is no basis for construction. There must be a trust instrument before any proceeding to construe it may be maintained. All courts—superior, appeals, and this Court—agree that the letter described as Exhibit A is neither a will nor a trust instrument.

Chief Judge Mallard in the opinion of the Court of Appeals properly concluded that Judge Thornburg's judgment was erroneous and irregular and undertook to decree the future right of the parties. Judge Mallard observed that: "[T]hough a superior court judge is vested with great power, he does not have the power to deny a motion and also to allow it in the same judgment, or to bind another judge by such a premature anticipatory and conditional ruling." Observing further, he said: "[A]nd therefore it is improper for such judge to include in his judgment how he would rule on a hypothetical state of facts if presented to him at some future date." Hence, when Judge Thornburg ordered that costs and fees shall be taxed against the estate of Mrs. Baxter upon the completion of all appeals, he was attempting to bind the future judge. The attempt was contrary to both law and rules of practice.

The usual practice in awarding attorneys' fees is to make the award at the end of the litigation when all the work has been done and all the results are known. The petitioners contend the defendants' failure to except to that part of Judge Thornburg's judgment concerning attorneys' fees, became the law of the case and required the future judge at the end of the litigation to award the fees. The contention is not supported by the record. The defendants gave notice and perfected an appeal. The notice of appeal was an exception to the judgment. "An appeal is itself an exception to the judgment and to any matter appearing on the face of the record proper. A sole exception to the judgment or to the signing of the judgment likewise presents the face of the record proper for review." 1 Strong's N. C. Index 2d, Appeal and Error, § 26, citing 24 cases. "Where there is error on the face of the record an appeal presents the matter for review, and the judgment may be modified to conform to legal requirements." *In re Burrus*, 275 N.C. 517, 169 S.E. 2d 879. The anticipatory order of Judge Thornburg was challenged by the appeal and did not become the law of the case,

and did not authorize Judge McLean to order fees paid to plaintiffs' attorneys from Mrs. Baxter's estate.

Judge Clifton L. Moore for this Court in *Little v. Trust Company*, 252 N.C. 229, 113 S.E. 2d 689, stated the rule: "The courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter rise, or give abstract opinions." Judge Thornburg attempted to tie the hands of the judge presiding at the appropriate time (when all the appeals have been heard) for fixing attorneys' fees. This anticipatory action was beyond his power and not binding on the judge confronted with the question at the time of decision—that is at the end of the trial. That part of the order of Judge Thornburg fixing the fees was interlocutory and entered at a time prior to the decision that Exhibit A was not a trust instrument. At all times the provisions of G.S. 6-21 stood in the way of the right of the court to decree that plaintiffs' counsel should be paid out of the estate for legal services not involving a caveat and not involving the construction of a trust instrument.

Judge McLean was under a misapprehension of the law when he ruled that he was bound by the order of Judge Thornburg. Judge McLean's order was neither required by Judge Thornburg's anticipatory decision nor authorized by G.S. 6-21.

The cause is remanded to the Superior Court of Gaston County with direction that Judge McLean's order be

Reversed.

STATE OF NORTH CAROLINA v. TOMMY RAY BRASWELL

No. 66

(Filed 9 May 1973)

1. Criminal Law §§ 143, 145.1— revocation of probation — jurisdiction for proceedings

Under G.S. 15-200 the resident judge of a judicial district, the judge holding the courts of a judicial district, or any judge commis-

sioned at the time to hold court in a judicial district is clothed with jurisdiction to conduct a revocation hearing with respect to all probationers who reside in the district or who were placed on probation in any county in the district or who violated the conditions of probation in any county in the district; therefore, the judge in this case could properly hold revocation proceedings in superior court of Lincoln County, though defendant was placed on probation in proceedings in superior court in Gaston County, since both those counties are in the same judicial district and since the judge presiding over the revocation proceedings was duly commissioned to hold the courts of that district at that time.

2. **Constitutional Law § 29; Criminal Law §§ 143, 145.1— revocation of probation proceedings — no denial of constitutional rights**

G.S. 15-200 providing procedures for revocation of probation does not involve defendant's Sixth Amendment rights since a hearing to determine whether the terms of a suspended sentence have been violated is not a criminal prosecution and is not a jury matter.

3. **Criminal Law § 143, 145.1— suspended sentence upon conditions — violation — activation of sentence**

Where defendant's sentence was suspended upon the usual conditions including (1) that he pay court costs, (2) that he work faithfully at suitable, gainful employment and (3) that he neither own, possess nor be involved with any drugs except as may be prescribed by a physician, the conditions were reasonable, and defendant's breach of all three supported an order activating the sentence.

4. **Criminal Law § 169— statement made by defendant without counsel — no prejudicial error**

Admission of a probation officer's testimony concerning defendant's statement made to a judge at a time when defendant was not represented by counsel that he had been taking Methadone in violation of his probation conditions, if erroneous, was harmless beyond a reasonable doubt where there was plenary evidence that defendant had committed violations of all three of the conditions of his probation, any one of which sufficed to invoke the suspended sentence.

APPEAL by defendant from judgment of *Martin, J.*, 9 October 1972 Session of LINCOLN Superior Court.

On 8 June 1972 in the Superior Court of Gaston County defendant entered a plea of guilty to the possession of eight hypodermic syringes and thirty-three needles in violation of G.S. 90-108 (now G.S. 90-113.4). Defendant was sentenced to prison for not less than two nor more than three years, suspended for a period of five years and defendant placed on probation upon conditions named in the judgment. These conditions included (1) payment of the costs, (2) faithfully working at gainful employment, and (3) that he not have, possess, or be in-

volved with any alcoholic beverages or drugs except as prescribed by a physician.

On 11 October 1972 defendant's probation officer served a bill of particulars on defendant pursuant to G.S. 15-200.1 advising him that the officer intended to submit to the judge presiding over the Superior Court of Lincoln County at the 12 October 1972 Session a report of alleged violations of the terms and conditions of probation which, if found true by the judge, would constitute authority for the judge to revoke probation and put the suspended prison sentence into effect. A copy of the verified report of alleged violations was furnished defendant. The probation officer alleged, and testified under oath at the hearing before Judge Martin in Lincoln Superior Court on 12 October 1972, that defendant had violated the terms of his probation by failing to pay the costs, failing to work faithfully at suitable, gainful employment and save his earnings above reasonable, necessary expenses, and that at the 3 October 1972 Session of Gaston Superior Court defendant advised Judge Martin, then presiding, in open court that he had been using Methadone during the period of probation in violation of the probation judgment.

Defendant was not represented by counsel on 3 October 1972 when he talked to Judge Martin in Gaston Superior Court. However, counsel was appointed to represent him at the revocation hearing before Judge Martin in the Superior Court of Lincoln County. At the conclusion of said hearing, Judge Martin found facts substantially as hereinabove recited and concluded that defendant had willfully and without lawful excuse violated the terms and conditions of the probation judgment by (a) failing to pay the costs, (b) failing to work faithfully at gainful employment, and (c) using Methadone during the period of probation. Judge Martin thereupon, in his discretion, revoked the probation and ordered the prison sentence of not less than two nor more than three years into immediate effect. Defendant appealed to the Court of Appeals, and the case was transferred to the Supreme Court before determination pursuant to the provisions of G.S. 7A-31(b)(4). Errors assigned will be noted in the opinion.

Garland & Alala by Richard L. Voorhees, for defendant appellant.

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

HUSKINS, Justice.

Defendant's first assignment of error is based on the contention that Judge Martin was without jurisdiction to hear and determine the prayer for revocation of probation in *Lincoln County.* Defendant argues that jurisdiction lies only in the county where the probationer (1) resides, (2) was placed on probation, or (3) violated the probation. If the statute is construed to require only that the revocation hearing be held in the *judicial district,* rather than in the county, in which the probationer resides, was placed on probation, or violated his probation, then defendant contends the statute violates the Sixth Amendment to the Federal Constitution.

G.S. 15-200, dealing with termination of probation, arrests, and subsequent disposition of probationary judgments, contains the following language: "Such probation officer shall forthwith report such arrest [of probationer] . . . in superior court cases to the judge holding the courts of the district, or the resident judge, or any judge commissioned at the time to hold court in said district, and submit in writing a report showing in what manner the probationer has violated probation. Upon such arrest, with or without warrant, the court shall cause the defendant to be brought before it in or out of term and may revoke the probation or suspension of sentence, and shall proceed to deal with the case as if there had been no probation or suspension of sentence."

This statute further provides that where a probationer resides in, or violates the terms of his probation in, *a county and judicial district* other than that in which the probationer was placed on probation, "concurrent jurisdiction is hereby vested in the resident judge of superior court of the district in which said probationer resides or in which he violates the terms of his probation, or the judge of superior court holding the courts of such district, or a judge of the superior court commissioned to hold court in such district, . . . to revoke probation and enter judgment or put into effect suspended sentences of probation judgment, for breach of the conditions of probation, as fully as same might be done by the courts of the county and district in which such probationer was placed on probation, when such probationer was originally placed on probation by a superior court judge; provided, that the court may, in its discretion, for good cause shown, and shall on request of the probationer, return such probationer for hearing and disposition to the county

or judicial district in which such probationer was originally placed on probation; provided, that in cases where the probation is revoked in a county other than the county of original conviction, the clerk in such county revoking probation may record the order of revocation in the judge's minute docket, which shall constitute sufficient permanent record of the proceedings in that court, . . . and shall send the original order revoking probation and all other papers pertaining thereto, to the county of original conviction to be filed with the original records. . . ."

The Twenty-seventh Judicial District of North Carolina is composed of the counties of Cleveland, Gaston and Lincoln. G.S. 7A-41. We take judicial notice of the fact that Judge Harry C. Martin was commissioned to hold the courts of that district in October 1972.

[1] We hold that under G.S. 15-200 the resident judge of a judicial district, the judge holding the courts of a judicial district, or any judge commissioned at the time to hold court in a judicial district, is clothed with jurisdiction to conduct a revocation hearing with respect to all probationers who reside in the district or who were placed on probation in any county in the district or who violated the conditions of probation in any county in the district. Where, as here, such hearing is conducted after notice to the probationer with a bill of particulars as required by G.S. 15-200.1 and G.S. 15-200.2, the judge may revoke probation for breach of the conditions and enter judgment putting into effect a prison sentence theretofore suspended. The action taken by Judge Martin in this case is fully authorized by G.S. 15-200.

We find nothing in the record to indicate that the constitutionality of G.S. 15-200 was raised or passed upon in the court below. Ordinarily, appellate courts will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court. *State v. Jones,* 242 N.C. 563, 89 S.E. 2d 129 (1955); *State v. Grundler,* 251 N.C. 177, 111 S.E. 2d 1 (1959); *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376 (1968); *State v. Cumber,* 280 N.C. 127, 185 S.E. 2d 141 (1971); *State v. Hudson,* 281 N.C. 100, 187 S.E. 2d 756 (1972). This accords with decisions of the Supreme Court of the United States. *Edelman v. California,* 344 U.S. 357, 97 L.Ed. 387, 73 S.Ct. 293 (1953).

[2] Even so, consideration of the constitutional question on its merits would lead to the same result. The Sixth Amendment, which guarantees to the accused "in all criminal prosecutions" a speedy and public trial "by an impartial jury of the state and district wherein the crime shall have been committed," is inapposite here. A hearing to determine whether the terms of a suspended sentence have been violated is not a "criminal prosecution," *State v. Hewett,* 270 N.C. 348, 154 S.E. 2d 476 (1967), and is not a jury matter. *State v. Coffey,* 255 N.C. 293, 121 S.E. 2d 736 (1961). Thus, Sixth Amendment rights of this defendant are not involved.

Defendant's first assignment of error requires no further discussion. For lack of merit it is overruled.

[3] Defendant next contends the conditions contained in the original probation judgment upon which the prison sentence was suspended were unreasonable in view of his known status as a drug addict. He argues that since he had been medically determined to be a drug dependent it was an unreasonable condition of probation to require that he refrain from the use of drugs other than those prescribed by a physician.

It suffices to say that the prison sentence here was suspended upon the usual conditions of probation which included the following: (1) That he pay the costs amounting to $51.00, (2) that he work faithfully at suitable, gainful employment and save his earnings above his reasonably necessary expenses, and (3) that he neither own, possess nor be involved with any drugs except as may be prescribed by a physician. Evidence adduced at the revocation hearing shows that the costs were not paid; that defendant voluntarily quit his employment at Rex Mill on 30 June 1972, after having worked only ten days, and was not thereafter employed anywhere else although he was able to work; and that he had been using Methadone during the period of probation, obtaining said drug "off the streets" and not by a physician's prescription. Defendant offered no evidence in denial or contradiction.

Thus all three of the conditions were breached and Judge Martin so found. The breach of any single valid condition upon which the sentence was suspended will support an order activating the sentence. *State v. Seagraves,* 266 N.C. 112, 145 S.E. 2d 327 (1965). Further discussion of this assignment to demonstrate its lack of merit is unnecessary. For cases discussing

conditions of suspension and probation considered "unreasonable" in a legal or constitutional sense, see *State v. Caudle,* 276 N.C. 550, 173 S.E. 2d 778 (1970); *State v. Rhinehart,* 267 N.C. 470, 148 S.E. 2d 651 (1966); *State v. Doughtie,* 237 N.C. 368, 74 S.E. 2d 922 (1953). Defendant's second assignment of error is overruled.

[4] Finally, defendant contends his prior statements to Judge Martin in Gaston Superior Court on 3 October 1972, at a time when he was not represented by counsel, were erroneously taken into consideration by Judge Martin at the revocation hearing and resulted in revocation of his probation.

The record does not disclose the circumstances under which defendant told Judge Martin in Gaston Superior Court on 3 October 1972 that he had been using Methadone while on probation. He may or may not have been entitled to counsel at that time—a question we need not decide. In our view the occurrence was harmless. At the revocation hearing the probation officer testified in detail regarding other violations of the conditions of probation, any one of which sufficed to invoke the suspended sentence. Defendant's statement to Judge Martin in the probation officer's presence on 3 October 1972 that he had been taking Methadone was merely cumulative and simply added one more violation to others already established. Admission of the probation officer's testimony concerning defendant's statement, even if erroneous which is not conceded, was harmless beyond a reasonable doubt. *Harrington v. California,* 395 U.S. 250, 23 L.Ed. 2d 284, 89 S.Ct. 1726 (1969); *Chapman v. California,* 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967); *State v. Fletcher and Arnold,* 279 N.C. 85, 181 S.E. 2d 405 (1971). This assignment of error is overruled.

Judge Martin had before him the verified report of the probation officer detailing the alleged violations of the conditions of probation. The probation officer took the witness stand and testified under oath concerning each alleged violation. Defendant was represented by counsel who cross-examined the probation officer. Defendant neither testified nor offered evidence to contradict or refute the alleged violations. "The basic purpose of a trial is the determination of truth. . . . " *Tehan v. Shott,* 382 U.S. 406, 15 L.Ed. 2d 453, 86 S.Ct. 459 (1966). The truth in this matter is that defendant breached the conditions upon which his prison sentence was suspended in that, without lawful excuse, he failed to pay the costs, he voluntarily quit

his job without notice after working only ten days and thereafter spent his time in idleness while pursuing his vicious drug habit. Judge Martin's order revoking probation and placing the prison sentence into immediate effect is

Affirmed.

STATE OF NORTH CAROLINA v. HELEN LOUISE MARTIN PHILLIPS

No. 69

(Filed 9 May 1973)

1. **Criminal Law § 38— evidence of prior acts — admissibility**

Evidence of prior acts or declarations, to be admissible, must be related to and tend to shed light on the acts complained of.

2. **Criminal Law §§ 80, 169— letter written by defendant — improper use by prosecution — prejudicial error**

Where defendant addressed a letter to "the Director of Prisons" one year prior to the homicide with which she was charged asking for information on a day in the life of a woman serving time for manslaughter, as defendant was compiling information for a short story she was writing, the trial court committed error requiring a new trial in that it allowed the letter to be represented by the prosecution as an attempt by defendant to find out what would happen to her when she killed her husband and was convicted therefor.

Justices LAKE and BRANCH dissent.

APPEAL by defendant from *Webb, S. J.*, August 21, 1972 Session, CALDWELL Superior Court. By order dated March 26, 1973, the appeal was docketed in the Supreme Court prior to review by the Court of Appeals.

The defendant, Helen Louise Martin Phillips, was indicted for the first degree murder of her husband, Garvey Willie Phillips. The evidence disclosed that the deceased and the defendant had been married for twenty-nine years. Their married life had not been harmonious. They had separated on at least three different occasions. The deceased was six feet tall and weighed two hundred pounds. He was addicted to drinking. The defendant had been under doctor's care for some time. She had a medical history of nervous tension and emotional instability. She kept a light in a window which she used at night

as a signal that she and her husband were having trouble. When the light flashed on it was a call for help.

At about 5 o'clock on the afternoon of February 23, 1972, a female voice called for an ambulance. The caller had difficulty in giving directions. However, through the telephone operator, the ambulance corps was able to locate the source of the call and went directly to the Phillips' home. When the crew entered the house, they found the defendant with a pistol in her hand standing in the floor. Her husband was lying on the floor of the living room, apparently unconscious. He was taken to the hospital where examination disclosed two bullet wounds from a pistol. When he revived, he was angry, belligerent and appeared to be intoxicated. He later died as a result of the wounds.

Captain Hagaman of the Lenoir Police Department followed the ambulance to the home, found the pistol on the floor of the living room, and Mrs. Phillips lying on the couch. Captain Hagaman testified: "[S]he was in a semi-conscious state. I did not get any response from Mrs. Phillips. . . . I called an ambulance for her to go to the hospital."

A daughter-in-law of the parties testified as a witness for the State and said that about eighteen months before the trial, approximately one year before the shooting, she typed a letter for the defendant which the defendant had written in longhand and brought to her for transcription. The State obtained the original letter from defense counsel by court order requiring its production. The letter was addressed to the Director of Prisons and is here quoted:

"Dear Sir:

I would like some information on a day in the life of a woman serving time for manslaughter.

I am compiling a outline on a story.

I want the woman to serve not more than two years, not less than one.

Do you place the woman in categories. Do they work in the sewing or laundry departments? What hours do they work? Are they paid any fee at all? How many to a cell block? And what are the visiting rights. Anything you could tell me would be very helpful.

I want this woman to be of good character. Also to be a model prisoner.

If this isn't asking too much of your time, I will be forever grateful.

Thank you very much

Mrs. Helen Phillips
116 Locust Drive
Lenoir, N. C."

On cross-examination the witness testified:

" . . . I typed a number of letters and stories for Mrs. Phillips. This is a short story of some 45 pages that she wrote and I typed it. She wrote a number of short stories and submitted those stories to magazines for publication. . . .

"Mrs. Phillips discussed her stories with me from time to time during the course of my doing the typing for her. I was generally familiar with the theme of the story when I discussed them with her.

" . . . When I wrote the letter she discussed with me about a story she anticipated writing and was gathering the proper background and details about a woman that was sent to prison."

When the letter was offered by the State and objected to by the defendant, it was admitted before the jury as State's Exhibit Eight. This was the basis of defendant's Exception No. 28 and is listed as Assignment of Error No. 1.

The defendant testified in her own defense. She detailed the difficulties she and her husband had had and instances of assaults and acts of violence. She testified that on the afternoon of February 23, 1972, he came home from the farm intoxicated and started a fuss, threatened and struck at her and pulled her hair. She was afraid of him. She picked up the garbage can under the pretense of taking it outside so she could leave the house, but he prevented her from going. He had threatened to go out and get the axe and use it on the television set. During the difficulty he ordered her to take the garbage can back in the kitchen. When she did, she noticed the pistol lying on the hot water heater by the kitchen door. When he went for the axe, she got the gun and took it back to the living room

and concealed it behind her leg. He came back without the axe, but still in a rage, struck at her but hit the back of her chair, then grabbed her hair and when he swung around, she shot. She did not know whether she fired one or more shots.

The defendant offered a number of witnesses who testified to her good character. She offered evidence that her husband was violent and dangerous when he was intoxicated.

The jury returned a verdict of guilty of voluntary manslaughter. From the court's judgment that the defendant serve from eight to ten years in the State's prison, she appealed.

Robert Morgan, Attorney General by E. Thomas Maddox, Jr., Associate Attorney for the State.

West & Groome by H. Houston Groome, Jr. and Ted G. West for defendant appellant.

HIGGINS, Justice.

Ordinarily when it becomes necessary to order a new trial on the ground the prosecution in a criminal case was permitted, over objection, to introduce incompetent and prejudicial evidence, this Court confines the discussion to the assignment of error which challenges the admissibility of the evidence. In this instance, Assignment of Error No. 1, based on Exception No. 28, challenged the admissibility of State's Exhibit Eight—the defendant's letter to the warden of the State's prison.

The State's witness who identified the letter stated on cross-examination it was written one year prior to the homicide. The witness was in the habit of transcribing stories which the defendant wrote for publication. She testified:

> " . . . I typed a number of letters and stories for Mrs. Phillips.
>
> "Mrs. Phillips discussed her stories with me. . . .
>
> "When I wrote the letter she discussed with me about a story she anticipated writing and was gathering the proper background and details about a woman that was sent to prison."

The letter itself stated the writer wanted the information for a story. The witness at the time she typed the letter knew of the defendant's plans and preparations for the story.

In this case, not only the solicitor for the State and his staff, but privately employed counsel appeared for the prosecution. The defendant offered evidence, hence the State had the right to open and conclude the argument to the jury. After the argument, the court in reviewing the evidence, charged the jury:

> ". . . That on one occasion about eighteen months ago that the defendant in this case brought her a letter to be typed and that she typed the letter for the defendant. The letter was introduced into evidence and as I recall it but you take your own recollection of the letter, that it was to the Warden of the State Prison or some official in the State Department of Correction asking for information as to what *would happen to a woman that was in prison . . . serving a sentence for manslaughter.*" (Emphasis added.)

The court interpreted the letter "as asking for information as to what would happen to a woman that was in prison . . . serving a sentence for manslaughter."

Research has failed to disclose a court decision which is of much value as authority on the question before us. The cases deal largely with remoteness in time rather than with remoteness in purpose or mental attitude. With respect to remoteness in time, the rule is stated in 1 Wharton's Criminal Evidence, 13th Ed., § 152:

> "No rigid rule can be stated to determine when the time interval is so great that a given fact has no probative value. . . . Flexibility, then, is necessary in verbalizing a workable standard. . . . There being no fixed standard for determining remoteness, it is necessary to consider all the attendant circumstances, the nature of the evidence offered, and the nature of the crime."

[1] Evidence of prior acts or declarations, to be admissible must be related to and tend to shed light on the acts complained of. *State v. Kelly,* 227 N.C. 62, 40 S.E. 2d 454; *Barnes v. Teer,* 218 N.C. 122, 10 S.E. 2d 614.

The legitimate purpose of the defendant's letter is explained by the State's witness as well as by the letter itself. The purpose was to obtain information for use in a story.

[2] To those familiar with criminal trials, it is not difficult to visualize the prejudicial effect the private counsel for the

prosecution and the solicitor were able to generate by waving this letter before the jury and picturing it as an attempt on the part of this woman to find out what would happen to her when she executed her plan and thereafter was convicted of killing her husband. In the court's recapitulation of the State's evidence, the court characterized the letter as "asking for *information* as to what would happen to a woman that was in prison . . . serving a sentence for manslaughter." (Emphasis added.) The recapitulation magnified the error.

In view of the explanation the State's witness gave for the defendant's letter, none of which was contradicted in the evidence, the use the court permitted the State to make of it was so prejudicial the defendant is entitled to go before another jury.

The cause is remanded to the Superior Court of Caldwell County for a

New trial.

Justices LAKE and BRANCH dissent.

STATE OF NORTH CAROLINA v. BOBBY RAY BLACK

No. 65

(Filed 9 May 1973)

1. **Criminal Law § 86— impeachment of defendant — collateral matters — no error**

There was no prejudicial error in questioning by the solicitor for the purpose of impeachment with respect to the collateral matters of defendant's involvement in a knifing, a beating and threats made to someone at a carpet company where defendant admitted the knifing and gave his version of the incident but denied the beating and the threats.

2. **Criminal Law § 86— impeachment of defendant — improper conduct — no error**

It is permissible for the purpose of impeachment to cross-examine a defendant in a criminal case by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct, since such questions relate to matters within the knowledge of the witness.

3. **Criminal Law § 163— misstatement of contention in charge — failure to object — no prejudice**

The trial judge's instruction on "heat of passion," even if it was a misstatement of defendant's contention, was not so prejudicial as to warrant a new trial where defendant did not object to the instruction at the time it was given and where the charge was otherwise free from error.

4. **Criminal Law § 161— failure to object to form of sentence — consideration on appeal**

Though defendant did not object to the form of the sentence, his appeal itself constitutes an exception to the judgment and presents the case for review for error appearing on the face of the record.

5. **Criminal Law § 139— sentence of imprisonment — failure to specify minimum term — error**

Where the record shows that judgment of imprisonment was entered by the trial court for a term not to exceed seven years, the case is remanded for imposition of a minimum sentence. G.S. 148-42.

APPEAL by defendant from *McLean, J.*, at the 4 September 1972 Session of GASTON Superior Court, transferred for initial appellate review by the Supreme Court by order dated 26 March 1973, entered pursuant to G.S. 7A-31(b)(4).

Defendant was charged in a bill of indictment, proper in form, with the murder of William Hayes Wilson. Defendant entered a plea of not guilty, and the solicitor announced in open court that he would seek a verdict of guilty of murder in the second degree or manslaughter as the evidence might warrant.

The State offered evidence which tended to show: At approximately 4 a.m. on Sunday, 20 February 1972, the defendant, Bobby Ray Black, came into the West End Grill, a restaurant owned by Elmore Bryant and the deceased, William H. Wilson, in Gastonia, North Carolina. The deceased had been drinking heavily and after defendant arrived, deceased sent Bryant and an individual named Charlie Brown to purchase a pint of vodka for the defendant. When they returned, defendant sat with Bryant and Brown drinking and talking for approximately forty-five minutes. Around 5 a.m. the deceased, who had been shooting pool with his son, announced that he was closing up. At that point defendant fired a shot into the ceiling from a .38 caliber pistol which he brought with him to the Grill. The deceased told him to stop shooting because he was scaring his customers away.

Defendant then put the gun behind his coat. About two minutes later, defendant pulled the gun out and shot the deceased twice, once in the right forearm and once in the chest. The deceased fell shattering a pool cue which he was leaning on at the time he was shot. Following the shooting, Bryant, deceased's partner, and Donald Bridges, a friend of the deceased, grabbed defendant and took his gun away from him. While doing so, Bridges struck defendant with a stool and hit him several times on the ribs and arms. Bridges took the gun outside the building and threw it in the direction of Biggerstaff Furniture Store located nearby. Defendant then ran out of the Grill.

A medical expert testified that William H. Wilson died as a result of a gunshot wound which ruptured the innominate vein, a large blood vessel near the lung. A firearms identification expert testified that a bullet recovered from the scene of the incident was fired by the .38 caliber Colt special which was found near Biggerstaff Furniture Store.

Defendant testified in his own behalf and offered other evidence, including the testimony of several witnesses, which tended to show: On the night in question the defendant received a telephone call from the deceased requesting that he come to the West End Grill to discuss some business. Defendant, who operated a private club across the highway from deceased's place of business, closed his club and went to deceased's Grill. Defendant had some five hundred dollars in cash and was carrying a .38 caliber Colt special pistol for protection. When he arrived at the Grill, deceased offered him a drink but the defendant said that he did not drink bourbon, which was all the deceased had at the time. The deceased then sent Bryant out to get some gin or vodka. After Bryant returned with some vodka, defendant, deceased, and some other individuals sat in a booth drinking and talking. Sometime later the deceased said, "I believe I will get up and shoot pool with my boy." For about ten or fifteen minutes the defendant continued to sit and talk. Then he went up to the area where the pool table was located. About thirty minutes later the deceased asked the defendant to back his son financially in a pool game. The defendant said, "I'm not backing anybody. Just shoot for fun." He started to turn away when the deceased struck the defendant on the head and neck with the large end of a pool cue. The force of the blow was such that the pool cue shattered and slid

across the floor. Defendant was knocked to the floor and fired one shot at the deceased who was only a few feet away. After the defendant fired the shot, he was badly beaten by friends of the deceased. Finally he escaped, ran from the building, and hid until the police arrived.

The defendant also offered evidence that the deceased was a large, strong man with the reputation of being a dangerous and violent man when drinking. Additionally, there was evidence of uncommunicated threats by the deceased against the defendant. In fact deceased told one witness if he ever got defendant in "my place of business, there'll be some slow riding and sad singing."

The jury returned a verdict of guilty of voluntary manslaughter. Defendant was sentenced to a term of imprisonment not to exceed seven years. From this sentence the defendant appealed to the North Carolina Court of Appeals.

Attorney General Robert Morgan and Assistant Attorney General Raymond W. Dew, Jr., for the State.

Frank Patton Cooke for defendant appellant.

MOORE, Justice.

Defendant brings forward two assignments of error. The first raises the question whether the trial judge committed prejudicial error in permitting the solicitor, over the defendant's objections and motions for mistrial, to propound questions to the defendant relating to his alleged assaults on other persons on other occasions not related to this case.

This assignment is based upon the following questions asked by Solicitor Morris while cross-examining defendant:

"Q. And you didn't tell Bill Wilson you had a pistol loaded back there did you?

A. No.

Q. You stayed in his business a couple of hours with that pistol, didn't you?

A. No.

Q. And you went there to kill him?

A. No.

Q. Just like Ross Brackett—you cut him. . .

OBJECTION

. . . from ear to ear, didn't you?

A. No, sir.

OVERRULED

MR. COOKE: Motion for a mistrial, if the court please.

Q. Do you deny that on December 16, 1951, you took a pocket knife and cut Ross Brackett?

OBJECTION AND MOTION FOR MISTRIAL

COURT: Do you want to be heard?

MR. COOKE: Yes, sir.

COURT: Members of the jury, step out to your room.

JURY OUT

MR. COOKE: [Argument on motion.]

COURT: OVERRULED; MOTION FOR MISTRIAL DENIED. Bring the jury back in.

MR. COOKE: Judge, he asked him if he cut him from ear to ear.

COURT: OBJECTION OVERRULED.

JURY IN

Q. I'll ask you again, didn't you on December 16, 1951, cut Ross Brackett with a knife in a violent manner?

OBJECTION AND MOTION FOR MISTRIAL.

COURT: OVERRULED; MOTION DENIED.

A. I jobbed him. He had me down on the floor—there was three of them had me down and I stuck it right in there and that was it.

MOTION FOR MISTRIAL; DENIED.

Q. I'll ask you if you didn't beat Mr. Ted Brady of 29 Maple Street in Banlo down to the floor?

OBJECTION AND MOTION FOR MISTRIAL; OVERRULED.

A. No, sir. I don't know anything about that.

Q. I'll ask you if your place of business out on West Franklin Boulevard is not next to Ellis-Bowen Carpet Company?

A. Yes, it is.

Q. And I'll ask you if the two people that run that are not Don Ellis and Bobby Bowen?

A. Yes, it is.

Q. I'll ask you if within the last month you haven't been over there with them and threatened to put a cap in them?

OBJECTION SUSTAINED.

A. No, I haven't.

MOTION FOR MISTRIAL: DENIED; EXCEPTION."

Defendant contends that the questions asked were more in the nature of testimony and arguments, were designed solely to paint the defendant as the aggressor and to damage his character by insinuation, and that such questions under *State v. Phillips*, 240 N.C. 516, 82 S.E. 2d 762 (1954), were improper. In *Phillips* the solicitor asked seventeen questions insinuating various wrongdoings of the defendant. Objections to only three questions were sustained, and the defendant answered the remaining fourteen. Furthermore, while the solicitor was asking the defendant in that case questions pertaining to his service as a policeman in Lowell, counsel for the defense appealed to the presiding judge to protect their client against the cross-examination on the ground that it was tantamount to the solicitor's testifying. The solicitor made this instant retort in the presence of the jury: "I'm a pretty good witness. You know I lived at Lowell." Under these circumstances this Court held that the solicitor had violated the rules of practice governing cross-examination to such an extent as to deprive the defendant of a fair trial.

[1] The present case is factually distinguishable from *Phillips*. Here the solicitor's questions relate to only three occurrences. The first related to defendant's cutting Ross Brackett with a

knife. Defendant answered this question to the effect that he did indeed stab Ross Brackett and then gave his version as to how and why he did so. The next referred to the fact that defendant beat Ted Brady. Defendant denied that he knew anything about this. The last instance referred to threats to someone at Ellis-Bowen Carpet Company. The court sustained defendant's objection to this question, but after the objection was sustained defendant voluntarily answered that he had not threatened anyone. Thus, one question was answered in the affirmative, and the other two were answered in the negative. These questions involved collateral matters. Defendant's negative answers were conclusive and rendered the questions harmless. *State v. Ross,* 275 N.C. 550, 169 S.E. 2d 875 (1969); *State v. King,* 224 N.C. 329, 30 S.E. 2d 230 (1944); 7 Strong, N. C. Index 2d, Witnesses § 8, p. 701 *et seq.*

[2] It is permissible for the purpose of impeachment to cross-examine a defendant in a criminal case by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct, since such questions relate to matters within the knowledge of the witness. Such questions may cover a wide range and are permissible within the discretion of the court. *State v. Mack,* 282 N.C. 334, 193 S.E. 2d 71 (1972); *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174 (1971).

As stated by Justice Higgins in *State v. Ross, supra:*

> " . . . The trial judge hears all witnesses and observes their demeanor as they testify. He knows the background of the case and is thus in a favorable position to control the scope of the cross-examination. The appellate court reviews a cold record. For this reason, the trial court, because of its favored position, should have wide discretion in the control of the trial. Its rulings should not be disturbed except when prejudicial error is disclosed. *State v. Sheffield,* 251 N.C. 309, 111 S.E. 2d 195; *State v. Stone,* 226 N.C. 97, 36 S.E. 2d 704; *State v. Wray,* 217 N.C. 167, 7 S.E. 2d 468; *State v. Beal,* 199 N.C. 278, 154 S.E. 604; *State v. Davidson,* 67 N.C. 119; *State v. Patterson,* 24 N.C. 346; Wigmore on Evidence, 3d Ed., 495. . . ."

Here, no prejudicial error is disclosed. This assignment is overruled.

[3] Defendant's other assignment of error relates to a portion of the judge's charge. The presiding judge charged the jury

that it could return one of three verdicts: Guilty of murder in the second degree, guilty of manslaughter, or not guilty of either offense. The judge correctly defined second degree murder and manslaughter and fully explained defendant's right of self-defense. Defendant did not object to any of the charge except the following.

> "The court instructs you, members of the jury, if a person kills in the heat of passion, that may reduce the crime from murder in the second degree to manslaughter. Now, the defendant in this case, members of the jury, has offered evidence tending to show and contends that it does show that he was struck across the shoulder and head with a cue stick and that that produced in him a sudden passion; and the court instructs you that to strike a man across the shoulder with a cue stick would be sufficient provocation to produce in the mind of a man of fair average disposition a sudden passion, and the law so recognizes it, which amounts to an assault upon the defendant and that that produced in his mind a sudden passion and that while this was on him and before he had time to cool, that he pulled the gun and fired the shot. The court instructs you that under those circumstances, if you are so satisfied, the defendant could be guilty of no more than manslaughter, if guilty at all. Under such cases, passion or anger so aroused is held to displace malice.
>
> * * *
>
> "The defendant contends, however, members of the jury, that he is not guilty of manslaughter. He says that while he may have satisfied you that he was struck with the cue stick and became in a passionate mood, that he was actually fighting in his own proper self-defense. He says and contends that when Wilson struck him with the cue stick that he then was on the defensive to protect himself from death or serious bodily harm and that whatever you may determine that took place and what he did was done in his own proper self-defense."

Defendant contends that the presiding judge violated G.S. 1-180 by erroneously instructing the jury that it was the defendant's contention that he was struck about the shoulder and head with a cue stick, that this produced in him a sudden passion, and before he had time to cool he pulled his gun and

fired the shot. Defendant says that he made no such contention. To the contrary, he contends that immediately upon being struck by the cue stick he pulled his gun and fired, not because of anger or passion suddenly aroused but to save his own life and prevent Wilson from beating him to death or severely injuring him.

Defendant did not object to the statement of this contention at the time. Since the argument of the attorney for defendant is not brought forward in the record, we do not know what contention might have been made by defendant's attorney to the jury. Moreover, an examination of the record discloses evidence from which inferences related by the court as a contention of defendant could fairly and logically be drawn by the jury. A statement of a valid contention based on competent evidence is not error. *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28 (1969); *State v. Ford,* 266 N.C. 743, 147 S.E. 2d 198 (1966).

> " . . . Furthermore, it is the general rule that objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires so as to afford the trial judge an opportunity for correction; otherwise they are deemed to have been waived and will not be considered on appeal. *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469; *State v. Butler,* 269 N.C. 733, 153 S.E. 2d 477; *State v. Case,* 253 N.C. 130, 116 S.E. 2d 429; *State v. Rhodes,* 252 N.C. 438, 113 S.E. 2d 917; *State v. Holder,* 252 N.C. 121, 113 S.E. 2d 15; *State v. Shumaker,* 251 N.C. 678, 111 S.E. 2d 878; *State v. Grundler,* 251 N.C. 177, 111 S.E. 2d 1; *State v. Moore,* 247 N.C. 368, 101 S.E. 2d 26; *State v. Saunders,* 245 N.C. 338, 95 S.E. 2d 876." *State v. Virgil, supra.*

Conceding *arguendo* that the statement as to this contention was error, we fail to see how defendant could be prejudiced thereby.

The court's instruction on "heat of passion" gave the jury a theory on which they could reduce defendant's offense from second degree murder to manslaughter, a result favorable to defendant. In addition, the concluding paragraph of the charge clearly stated that even if the jury found that the defendant fired the fatal shot while in the heat of passion, they should acquit the defendant if they found he shot the deceased in his own self-defense.

In a charge otherwise free from error, the misstatement of a contention, to which defendant did not object at the time, is not such prejudicial error as to warrant a new trial.

[4] After the jury returned the verdict, the judge imposed the following sentence:

> "It is the judgment of the court that the defendant be confined in the common jail of Gaston County *not to exceed seven years* to be assigned to work under the supervision of the State Department of Corrections as provided by law." (Emphasis added.)

Defendant did not object to the form of the sentence. However, the appeal itself constitutes an exception to the judgment and presents the case for review for error appearing on the face of the record, even in the absence of any proper exception or assignment of error. *State v. Elliott,* 269 N.C. 683, 153 S.E. 2d 330 (1967); 3 Strong, N. C. Index 2d, Criminal Law § 161, p. 112.

[5] The learned judge apparently intended to enter an indeterminate sentence under G.S. 148-42, which provides in part:

> "The several judges of the superior court are authorized in their discretion in sentencing prisoners to imprisonment to commit the prisoner to the custody of the Commissioner of Correction for a minimum and maximum term."

As stated in 21 Am. Jur. 2d, Criminal Law § 540, p. 519:

> "[U]nder an indeterminate sentence law, a sentence cannot be for a definite term of imprisonment. It must be for not less than a specified minimum period and not more than a specified maximum period. There must be a difference between the periods, and a sentence fixing identical minimum and maximum terms of imprisonment is invalid."

G.S. 148-42 further provides in part:

> "At any time after the prisoner has served the minimum term less earned allowances for good behavior, the Commissioner is authorized to discharge such person unconditionally or release him from confinement under conditions prescribed by the Commissioner."

Consequently, it is important to defendant that the judgment fix a minimum as well as a maximum sentence. It may well be that the trial judge in imposing sentence fixed a minimum as well as a maximum of seven years. However, the record does not so show, and we are bound by the record. *Rogers v. Rogers,* 265 N.C. 386, 144 S.E. 2d 48 (1965); *Redd v. Mecklenburg Nurseries,* 241 N.C. 385, 85 S.E. 2d 311 (1954).

We find no error in the trial but remand the case to the Superior Court of Gaston County for entry of a proper judgment on the verdict.

Remanded for judgment.

STATE OF NORTH CAROLINA v. EARL STEWART ALLEN

No. 70

(Filed 9 May 1973)

1. **Criminal Law § 99— explanation by judge to witness — no expression of opinion**

Where the solicitor asked a witness to describe the demeanor of one Allen, the witness replied that Allen had an odor of some intoxicants and defendant objected to the witness's answer as not being responsive, the trial court expressed no opinion in explaining to the witness what the word "demeanor" meant.

2. **Criminal Law § 99— instruction to witness to speak up — no error**

Where the trial court was having difficulty in getting an eyewitness to speak out so he could be understood, the court's instruction to "Talk like you did that night, Mr. Witness. Maybe they can hear you," while not as circumspect as it might have been, was not so objectionable as to constitute prejudicial error.

3. **Criminal Law § 99— witnesses' contact with jurors — instruction against not prejudicial**

Instruction of the trial court to the sheriff not to let any of the witnesses contact any of the jurors did not constitute error.

4. **Criminal Law § 158— failure to state evidence in narrative form — no error shown**

Where the record on appeal does not contain a narrative statement of the evidence for defendant, no error is shown in the trial judge's recapitulation of the evidence in the charge to the jury. Rule 19(4), Rules of Practice in the Supreme Court.

5. **Assault and Battery § 15— intent to kill — proper instruction**

In a prosecution charging defendant with assault with a deadly weapon with intent to kill, inflicting serious injuries not resulting

in death, the trial court's charge as to intent to kill which included the statements that "intent is a state of mind of the person charged, and is seldom capable of direct or positive proof. You just arrive at it from the conduct of the party, the type of weapon, and the place where it was inflicted, if you find that it was" was substantially in accord with those charges approved by the Supreme Court.

6. **Criminal Law § 154— case on appeal settled — omissions not before court on appeal**

Where it was necessary for the presiding judge to settle the case on appeal, defendant was not prejudiced in any manner by the omission from the record on appeal of three incidents occurring during the trial which had no bearing on defendant's defense; furthermore, these assignments of error could be brought up only upon motion for *certiorari*, which defendant failed to make.

APPEAL by defendant from *Falls, J.*, at the 14 August 1972 Session of Cleveland Superior Court, transferred for initial appellate review by the Supreme Court by order dated 26 March 1973 entered pursuant to G.S. 7A-31(b)(4).

Defendant was charged in a bill of indictment, proper in form, with an assault on L. D. Wagner with a deadly weapon with intent to kill, inflicting serious injuries not resulting in death. Defendant entered a plea of not guilty.

The State offered evidence tending to show: On 18 June 1972 around 8:30 p.m., L. D. Wagner, an officer of the State Highway Patrol, was in the process of arresting Harold Dayberry for operating a motor vehicle while under the influence of intoxicating liquor. Wagner's car was parked on the shoulder of a rural paved road near Casar, North Carolina. Defendant drove up near Wagner's car, got out of his car, walked up to the left side of Wagner's car, and asked if the truck which Dayberry had been driving could be driven away. Wagner noticed a strong odor of alcohol about the person of defendant and told him that the truck could be moved but if he drove it away he would be arrested for driving under the influence of alcohol. At this point defendant reached toward the door of Wagner's car. Wagner immediately got out of his car and informed defendant that unless he left he would be arrested for public drunkenness. As Wagner was walking toward defendant, defendant rushed at him and stabbed him in the back with a knife. Wagner then radioed Officer Bennett, another member of the State Highway Patrol, who arrived at the scene within a few minutes and arrested defendant. Prior to the arrival of Bennett, Wagner observed defendant holding a knife in his

hand. The knife was taken from defendant by Bennett. It had blood on it at that time. This knife was introduced into evidence. Wagner's injuries required six days of hospitalization and necessitated his being absent from work for approximately three weeks.

Defendant did not testify but his wife, his father, and several other witnesses testified in his behalf, and their testimony is summarized in the record as follows: "Officer Wagner had come across the road toward defendant and struck him with the blackjack without reason, that defendant had never run at or cut Trooper Wagner, and that in the course of taking defendant into custody the troopers had beaten him, choked him and hit him with a pistol several times, to his injury, without defendant having resisted them."

The jury returned a verdict of guilty of assault with a deadly weapon inflicting serious injury. From judgment imposing a prison sentence of five years, defendant appealed to the North Carolina Court of Appeals.

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

George S. Daly, Jr., and Walter H. Bennett, Jr., for defendant appellant.

MOORE, Justice.

Defendant's assignments of error all relate to matters wherein defendant claims the presiding judge unfairly commented on the evidence or otherwise made prejudicial remarks, contrary to the provisions of G.S. 1-180.

In considering these assignments, we apply the following general principles. This statute imposes on the trial judge the duty of absolute impartiality. *Nowell v. Neal,* 249 N.C. 516, 107 S.E. 2d 107 (1959). It forbids the judge to intimate his opinion in any form whatever, "it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury." *State v. Owenby,* 226 N.C. 521, 39 S.E. 2d 378 (1946). It has been construed to include any opinion or intimation of the judge at anytime during the trial which is calculated to prejudice either of the parties in the eyes of the jury. *State v. Douglas,* 268 N.C. 267, 150 S.E. 2d 412 (1966); *Everette v. Lumber Co.,* 250 N.C. 688, 110 S.E. 2d 288 (1959). "The trial

judge occupies an exalted station. Jurors entertain great respect for his opinion, and are easily influenced by any suggestion coming from him. As a consequence, he must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury. G.S. 1-180." *State v. Carter*, 233 N.C. 581, 65 S.E. 2d 9 (1951). See also *State v. Belk* and *State v. Pearson* and *State v. Berry*, 268 N.C. 320, 150 S.E. 2d 481 (1966).

Defendant assigns as error the following specific incidents which occurred during the trial.

[1] First, when Officer Wagner was testifying for the State, he was asked by the solicitor:

> "Q. I'll direct your attention now, back to the time when Mr. Allen first came to your patrol car at point 'C' on this diagram and ask you to describe his demeanor at that time.
>
> "A. He had an odor of some intoxicants.
>
> "OBJECTION as not responsive.
>
> "COURT: Demeanor means how he acted, Mr. Witness, not how he smelled."

Defendant contends that the court intimated that a defense witness had an odor of alcohol about him at the time to which he testified. This contention is obviously without merit. Defendant objected to the answer given by the witness as not being responsive. The court, as a result of this objection, simply explained the meaning of the word "demeanor." Wagner had already testified, without objection, that defendant had a strong odor of alcohol on his breath at the time of the alleged assault.

[2] Defendant next contends that the court erred when it stated to defendant's witness Harold Dayberry: "Talk like you did that night, Mr. Witness. Maybe they can hear you." Before this statement was made, the following occurred:

> "Q. (By Mr. Daly) State your name, please.
>
> "A. Harold Ray Dayberry.
>
> "COURT: You're going to have to speak up so the jury can hear you.

"Q. Were you out at this store in Casar we have been talking about, sitting in Officer Wagner's patrol car under arrest for operating under the influence?

"A. Yes, sir.

"Q. Did you see the defendant Stewart Allen come up?

"A. Yes, sir.

"Q. Would you tell us what you observed happen between Stewart Allen and Officer Wagner and Officer Bennett? Just what you observed.

"A. Well, Mr. Allen walked up—

"COURT: Raise your voice, please. The jury must hear you.

"A. Mr. Allen walked up and asked Mr. Bennett—I mean, Mr. Wagner, if the truck I had been driving could be moved.

"SOLICITOR: I can't hear.

"Q. Harold, if you would, face the jury, maybe it would help."

After the defendant objected, the court stated:

"COURT: I'm pleading with this witness to talk loud enough for the jury to hear him. The jury must pass on the evidence in this case, and they can't do it if they can't hear it. Do you understand that?

"A. Yes, sir.

"COURT: Well, talk out loud."

Obviously, the court was having difficulty with this witness in getting him to speak out so he could be understood. The statement made by the court to which the defendant objected was clearly an effort to get the witness to speak louder. Since the record does not contain the testimony of defendant's witnesses, we do not know what the testimony disclosed as to the tone Dayberry used on the night in question. The language used by the court, while not as circumspect as it might have been, was not so objectional as to constitute prejudicial error.

" . . . Technical errors which are not substantial and which could not have affected the result will not be held

prejudicial. *State v. Norris,* 242 N.C. 47, 86 S.E. 2d 916. It is not sufficient to show that a critical examination of the judge's words, detached from the context and the incidents of the trial, are capable of an interpretation from which an expression of opinion may be inferred. *State v. Jones,* 67 N.C. 285." *State v. Gatling,* 275 N.C. 625, 170 S.E. 2d 593 (1969).

See also *State v. Alexander,* 279 N.C. 527, 184 S.E. 2d 274 (1971); *State v. McWilliams,* 277 N.C. 680, 178 S.E. 2d 476 (1970).

[3] The defendant next contends that the court erred in making this statement: "Mr. Sheriff, don't let any of those witnesses contact any of these jurors at all." Defendant contends that by this statement the court intimated that defense witnesses might attempt to speak with the jurors. There is nothing in the record to indicate that the judge was speaking any more to defense witnesses than he was to the State's witnesses. Moreover, this sentence was only a part of a statement made by the judge to the jury when the court recessed for the day. The full statement is as follows:

"Members of the jury, don't discuss this case or make up your minds about it. Should anything be in the newspaper, I ask you on your honor not to read it. Whatever you arrive at must be limited entirely to what takes place here in the courtroom, not what is on the radio or in the newspapers, or anything. Nobody's going home to look over your shoulder to see if you're going to abide by that instruction, but on your honor, try this case based on this evidence, and nothing else except what takes place in this courtroom, including the instructions of the judge, the arguments of counsel and the evidence. Upon that, base the verdict that you arrive at in the final analysis. You go and come back at 9:30 in the morning, take the seats you now have in the jury box. Everyone else keep your seats until the jurors get out of the building. Mr. Sheriff, don't let any of those witnesses contact any of these jurors at all."

Patently, that assignment is without merit.

[4] Defendant next contends that the court in its charge to the jury implied that the State had proved that the prosecuting witness had been stabbed or cut. When recounting the evidence, the court stated that Sheila Owens, a witness for defendant,

testified that she did not see the defendant stab or cut the patrolman and that neither did other witnesses for the defendant—naming part of them—and then stated: "Now, you may have a different recollection. If you do, you take your recollection. That the patrolman Wagner is the only one who testified that this defendant Allen stabbed him or cut him with a knife. I don't recall any of the defendant's witnesses seeing the patrolman cut or stabbed." This is apparently a correct statement of the testimony. In the case on appeal, the testimony for the defendant is not brought forward but is only summarized in a brief statement. Nowhere in the record do we find anything that approximates a narrative statement of the evidence for the defendant. Under Rule 19(4), Rules of Practice in the Supreme Court, this is not sufficient. *State v. Prince,* 270 N.C. 769, 154 S.E. 2d 897 (1967); *State v. Powell,* 238 N.C. 550, 78 S.E. 2d 343 (1953). Hence, no error is shown.

[5] Defendant in this same connection further contends that the court implied that the defendant had used a weapon to cut the prosecuting witness when the court stated: "You just arrive at it [intent] from the conduct of the party, the type of weapon, and the place where it was inflicted, if you find that it was." The full charge as to intent to kill as given by the court was as follows:

> "Thirdly, the State must prove that the defendant had the specific intent to kill. That is, Allen had the specific intent to kill Patrolman Wagner. And in that respect, members of the jury, an intent in a criminal act is a state of mind which is seldom, if ever, capable of direct or positive proof, but it is arrived at by the circumstances of just such acts and circumstances as a reasonably prudent person would draw therefrom.
>
> "An intent to kill may be inferred from the nature of the assault, the manner in which it is made, the conduct of the parties and other relevant circumstances.
>
> "As I said, an intent is a state of the mind of the person charged, and is seldom capable of direct or positive proof. You just arrive at it from the conduct of the party, the type of weapon, and the place where it was inflicted, if you find that it was."

This charge is substantially as approved by this Court in many well-considered opinions. *State v. Ferguson,* 261 N.C. 558, 135

S.E. 2d 626 (1964); *State v. Cauley,* 244 N.C. 701, 94 S.E. 2d 915 (1956); *State v. Murdock,* 225 N.C. 224, 34 S.E. 2d 69 (1945); *State v. Oxendine,* 224 N.C. 825, 32 S.E. 2d 648 (1944).

[6] The solicitor and the attorney for the defendant were unable to agree, and it was necessary for the presiding judge to settle the case on appeal. G.S. 1-283. Defendant contends that the court erred in refusing to include in the case on appeal reference to three incidents which occurred during the trial. These are as follows:

> "a. After selection and impanelling of the jury, the Court welcomed a group of visiting children to the courtroom, and expressed the hope that they would return to court from time to time, but not as defendants.
>
> "b. The Court next thereafter inquired of defendant's counsel how many witnesses defendant would present.
>
> "c. During the morning of the second day of the trial, it was interrupted for a time and the plea of one Max Edward Hamrick was heard, in the presence of the defendant's jury. During the course of his plea it developed that defendant Hamrick's driver's license was needed, but was then at the Spindale Prison Unit. The Presiding Judge then asked the witness State Highway Patrolman Bennett in the hearing of the jury to go to Spindale and retrieve the license. Mr. Bennett then left the courtroom. A few minutes thereafter, he returned to the courtroom and conferred briefly with the Presiding Judge at the bench, and then resumed his seat. The Presiding Judge then explained to the jury that he had instructed the Highway Patrolman to go to the prison unit in Spindale to get defendant Hamrick's license, but that it had proved not necessary."

Defendant contends that the court should not intimate that the status of being a defendant is unfortunate or that defendant is required or expected to have witnesses, and that the court should not make an errand boy of a chief prosecuting witness.

It is difficult to see how defendant could have been prejudiced by the omission of these three incidents from the case on appeal. The first incident referred to a group of children visiting the court, and the presiding judge welcomed them and quite properly stated that he hoped they would return to court from time to time but that they would not return as defendants.

The inquiry as to the number of witnesses which the defendant would call—and the defendant did in fact offer the testimony of 13 witnesses—was only to give the presiding judge some idea as to the length of time the trial would require. Patrolman Bennett was the arresting officer in the case in which Hamrick had previously entered a plea of guilty of driving while intoxicated, and it was the duty of this officer after the plea of guilty to pick up defendant Hamrick's operator's license. None of these incidents had any bearing on defendant's defense or tended to prejudice him in any manner. Had the judge seen fit to include these three incidents in the case on appeal, defendant's case would have been in no wise strengthened. Be that as it may, these assignments are not properly before us.

> "G.S. 1-284 requires the Clerk of the Superior Court to prepare a transcript of the judgment roll or record proper which is sent up on appeal. Under G.S. 1-283, the judge is given power to settle the case on appeal. Ordinarily, the only supervision which may be exercised over the judge charged with this duty is to see that it is performed. *S. v. Gooch,* 94 N.C. 982. Errors and omissions in the case on appeal are corrected upon *certiorari* and cannot be brought up on exception taken at the time the case is settled. Appellant has made no motion for *certiorari,* and the matter is not reviewable on the present record." *Lindsay v. Brawley,* 226 N.C. 468, 38 S.E. 2d 528 (1946).

Defendant's exceptions taken at the time the case on appeal was settled are not reviewable on this record.

In the trial we find no error.

No error.

ARTHUR BUSTER RAYFIELD, ADMINISTRATOR OF THE ESTATE OF MACK L. RAYFIELD, DECEASED v. LAURA EDNA CLARK AND MRS. ANNIE ETHEL CLARK

No. 82

(Filed 9 May 1973)

1. Automobiles § 62— striking pedestrian — sufficiency of evidence for jury — credibility of witness

In this wrongful death action growing out of a pedestrian-automobile collision, the trial court properly denied defendants' motion

for a directed verdict at the close of all the evidence where the jury could have found from the evidence that defendant driver, without keeping a proper lookout, and traveling at a greater speed than was reasonable and prudent after she had seen on the east shoulder a group of pedestrians who appeared to her to be about to cross the highway, drove off the pavement and collided with decedent on the west shoulder, notwithstanding there was evidence that the only witness for plaintiff who purported to have seen the collision was intoxicated and extraordinary acuteness and range of vision would have been required to see what he said he saw, and notwithstanding the absence of any testimony from the other three persons who were on the highway with decedent at the time of the accident, since the jurors are the sole judges of the credibility of a witness.

2. **Rules of Civil Procedure § 50— motion to set aside verdict — credibility of witness — duty of trial judge**

In passing upon a motion to set aside a verdict as being against the greater weight of the evidence, the trial judge is not required to take the testimony of any witness at face value; at any time he is convinced that the jury has been misled by unreliable testimony into returning an erroneous verdict his is the responsibility for awarding a new trial for that reason.

3. **Appeal and Error § 24; Trial § 50— failure to move for mistrial — contention not considered on appeal**

Contention that the trial judge erred in failing to declare a mistrial when the jury submitted a written question to the judge relating to insurance will not be considered on appeal where defendants did not move for a mistrial in the trial court.

APPEAL by defendants from *Anglin, J.*, 16 October 1972 Civil Session of AVERY, transferred for initial appellate review by the Supreme Court in consequence of its order dated 26 March 1973 entered pursuant to G.S. 7A-31(b)(4).

Action for wrongful death growing out of a pedestrian-automobile collision.

The accident, which resulted in the death of plaintiff's intestate (Rayfield) on 2 July 1971, occurred about 9:30 p.m. on 30 June 1971 at a point approximately one-fourth of a mile south of Newland on State Highway No. 194. The two-lane highway runs generally north and south. The hard-surfaced portion is approximately twenty-one feet in width; the shoulders on each side, three feet.

At the time of his death Rayfield was 47 years old and unmarried. His occupation was digging and loading shrubbery; his earnings, not over $18.00 a day and expenses. He was struck by a 1968 Volkswagen, owned by defendant Annie Ethel

Clark as a family-purpose car, and driven by her daughter, Laura Edna Clark, aged 18. On the night of 30 June 1971 the road was dry. Deputy Sheriff Thomas, testifying as a witness for plaintiff, said that the night was clear and "you could see"; that "it is a straight stretch of road for a half mile" and, "going south," you could see over a quarter of a mile straight to the scene; and that "there was no curve to the left."

The only witness for plaintiff who purported to have seen the collision was Earl Franklin. His testimony tended to show: Just before the accident Franklin and Rayfield had been at the Bruce Banner home on the east side of No. 194. Banner and Frank Buchanan left the house to push Banner's car out of a ditch down the road on the west side, and shortly thereafter Franklin and Rayfield followed. Rayfield was wearing a dark blue shirt. As they walked south on the east shoulder of the road, at a point about 50 yards south of a curve to the left for southbound traffic, Rayfield "angled across the road" to the west shoulder. Franklin remained on the east shoulder with Banner and Buchanan, and he saw Rayfield cross the road and walk south about 10 steps along the west shoulder. Franklin then started to cross the highway but, seeing the lights of a vehicle in the curve, he stopped and watched the car from the curve until it hit Rayfield.

The vehicle which Franklin saw was the Volkswagen driven by Miss Clark. In Franklin's opinion, it was going 55-60 MPH. As it came down the highway the automobile remained on the hard-surface until it was alongside Rayfield. Then "it made a little bobble—kind of a twist . . . like it hit right off the pavement and back on, just that fast. . . . [I]t was off and back on the hardtop." Franklin saw Rayfield fly up in the air. He said, "I saw Mack's body shoot over and right straight toward the front of the car on the righthand side. The front of the car hit him. I seen him go up in the air and straight out toward the gravel. I saw this over the car. I saw the car hit him. The car was between me and Mack at the time being." The Volkswagen then went about 170 feet and pulled off on the side of the road. The car in the ditch was beyond where the Volkswagen stopped.

Franklin was the first person to reach Rayfield after the accident. He found him lying in the center of the shoulder, his body parallel to the pavement. Franklin talked with Miss Clark seconds after the accident. She asked him what she had

done, and he told her she might have killed a man. In reply to that she said, "I was looking at you fellows on the left side of the road. I did not see nobody on the right side of the road."

Later Franklin saw the investigating officer, Highway Patrolman L. R. Barnes, at the home of Bruce Banner, but he did not tell him he had witnessed the accident.

Defendants' evidence tended to show:

About 9:00 p.m. on 30 June 1971 Miss Clark, accompanied by her 18-year-old friend, Linda Lou Arnold, was driving a 1968 Volkswagen at 30-40 MPH on Highway 194 just south of Newland. The two girls were en route to Spruce Pine. When she was about 50 feet away from them, Miss Clark observed to the left of the road a group of pedestrians who looked as if they were about to cross the highway. These persons were Sam Banner, Bruce Banner, Earl Franklin, and Ella Buchanan. Just after she had passed them she felt a bump. At that time she was in the west lane of the highway, almost at the center line and at least two feet from the shoulder. Her car was never on the shoulder of the road. After she felt the bump she traveled about 100 feet and stopped near the place were Bruce Banner's Mustang was backed off in the ditch. She walked back to the spot where Rayfield was lying on the shoulder. He was trying to get up and was "almost on the highway."

Neither Miss Clark nor her companion ever saw Rayfield before she stopped the car. Miss Clark testified that if he had been in the highway she would have seen him. Only the right front fender and right headlight of the Volkswagen was damaged. Miss Clark's father came to the scene and talked to Sam Banner, Bruce Banner, Ella Buchanan, and Earl Franklin. In his opinion Earl Franklin was under the influence of alcohol.

When Police Officer Cook arrived at the scene about 9:35 p.m. he found Rayfield lying partly on and partly off the pavement. His head and shoulders "were on the hardtop." As soon as Cook arrived Earl Franklin "started cussing—just hollering." He was intoxicated, upset, and "using his mouth." The officer made him leave the scene and go to the house across the road.

Trooper Barnes arrived just as the ambulance left the scene with Rayfield. He found a red, 1968 Volkswagen in the southbound lane approximately 120 feet from what appeared to be

the point of impact. There was dry debris in the center of the southbound lane 120 feet north of the Volkswagen.

At the conclusion of all the evidence the court overruled defendants' motion for a directed verdict and submitted the case to the jury on issues of negligence, contributory negligence, and damages. The jury answered the issues of negligence and contributory negligence in favor of plaintiff and awarded damages in the sum of $15,000.00. From judgment in accordance with the verdict defendants appealed.

Byrd, Byrd, Ervin & Blanton for plaintiff appellee.

Clarence N. Gilbert for defendant appellants.

SHARP, Justice.

Defendants assign as error the court's refusal (1) to grant their motion for a directed verdict at the close of all the evidence and (2) to set aside the jury's verdict and enter judgment in accordance with their motion for a directed verdict. G.S. 1A-1, Rule 50(a), (b)(1) (1969). These motions raise the question whether the evidence, considered in the light most favorable to the plaintiff, will justify a verdict in his favor. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971).

[1] Thus viewed, the jury could have found from the evidence that Miss Clark, without keeping a proper lookout, and traveling at a greater speed than was reasonable and prudent after she had seen on the east shoulder a group of pedestrians who appeared to her to be about to cross the highway, drove off the pavement and collided with Rayfield on the west shoulder. From the evidence the jury could also have found that Miss Clark, driving at a reasonable rate of speed entirely in the lane for southbound traffic, collided with Rayfield when he suddenly stepped from the west shoulder onto the pavement and directly into the path of her oncoming car, which he should have seen approaching had he exercised proper care for his own safety.

The jury accepted Franklin's version of events and found for plaintiff. Defendants contend, however, that Franklin's testimony is inherently incredible and disproved by the physical evidence at the scene. Concededly, the absence of any testimony from the other three persons who were on the highway with Franklin at the time of the accident raises unanswered ques-

tions. In addition the evidence of Franklin's intoxication, plus the extraordinary acuteness and range of vision which would have been required to see what he said he saw, cast some doubt on the accuracy of his observations. Yet the jurors are the sole judges of the credibility of a witness, and the weight to be given Franklin's testimony was a matter for them. The jury may believe all of the testimony of a witness, or part of it, or none of it. *Brown v. Brown,* 264 N.C. 485, 488, 141 S.E. 2d 875, 877 (1965). In passing upon a motion for a directed verdict and the subsequent motion for a judgment notwithstanding the verdict based upon it, we must accept the testimony of plaintiff's witnesses at face value. *Cockman v. Powers,* 248 N.C. 403, 407, 103 S.E. 2d 710, 713 (1958). We hold therefore that plaintiff's evidence was sufficient to survive the motion for a directed verdict.

[2] Defendants' next assignment is that the court erred in not allowing their motion to set aside the verdict as being against the greater weight of the evidence. This motion, of course, was addressed to the sound, judicial discretion of the trial judge, and his refusal to grant the motion is not appealable in the absence of manifest abuse of discretion. *Williams v. Boulerice,* 269 N.C. 499, 153 S.E. 2d 95 (1967). The reason for this rule is that the trial judge sees the witness and hears his testimony; the appellate court merely reads it. In passing upon a motion to set aside a verdict as being against the greater weight of the evidence, the trial judge is not required to take the testimony of any witness at face value. At any time he is convinced that the jury has been misled by unreliable testimony into returning an erroneous verdict his is the responsibility for awarding a new trial for that reason. Judge Anglin denied the motion to set aside the verdict and abuse of discretion has not been shown. This assignment of error is overruled.

[3] Defendants' final contention is that the court erred in failing to declare a mistrial when, while deliberating upon its verdict, the jury returned into the court and handed the following written question to the judge: "We, the jury, would like to know if the car was insured, and if there has been any money paid on said expenses incurred by the deceased by any insurance company?"

After instructing the jury that the matters involved in their question were of no concern whatever to them and that they would not consider those matters in any respect in arriving

at their verdict, the judge directed them to retire and resume their deliberations. Neither at that time, nor at any other, did defendants move for a mistrial, and this contention was first made on appeal. An assignment of error must be based on an exception timely noted, and exceptions which appear nowhere in the record except under the purported assignment of error will not be considered. *Barnette v. Woody,* 242 N.C. 424, 88 S.E. 2d 223 (1955); Strong, 1 N. C. Index 2d *Appeal and Error* § 24 (1967).

In the trial below we find no reversible error.

No error.

STATE OF NORTH CAROLINA v. DAVID FELTON

No. 52

(Filed 9 May 1973)

1. **Criminal Law § 166— assignments of error not in brief — abandonment**

Assignments of error not brought forward in defendant's brief or argued on appeal are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court.

2. **Criminal Law § 101— sequestration of witnesses — denial — no abuse of discretion**

The trial court's denial of defendant's motion, made prior to the commencement of trial, to sequester the witnesses is not reviewable on appeal except in case of abuse of discretion, of which there is no indication in the present record.

3. **Criminal Law § 134— sentence — expression of opinion by judge — no error**

Statement by the trial judge at the time of imposing sentence that he "with a great deal of pleasure" sentenced the defendant to life imprisonment, though unwise, was not ground for a new trial, since the verdict had already been rendered and accepted at the time of the statement.

4. **Criminal Law § 169— exclusion of testimony — no prejudicial error shown**

Where the record does not show what the witness's answer would have been, defendant in a rape case has shown no prejudice in the court's sustaining an objection by the State to defendant's question to the arresting officer on cross-examination as to whether he explained to the prosecuting witness what could happen to her if she did not press charges.

5. **Criminal Law § 34— defendant's guilt of another offense — admissibility**

Testimony by the victim in a rape case that defendant told her it did not matter if he killed her since he had tried to rape another woman that night and she was going to tell on him was properly admitted since the testimony was clearly relevant on the material question of whether the prosecuting witness's will to resist was overcome by fear due to the threat of the defendant to kill her if she did not submit.

6. **Criminal Law § 42; Rape § 4— rape case — victim's clothing — admissibility**

Articles of clothing worn by the victim in a rape case were admissible in evidence as they were relevant to the question of defendant's use of force to overcome the resistance of the victim of the assault.

7. **Rape § 5— sufficiency of evidence**

Evidence in a rape case was sufficient to withstand defendant's motion for nonsuit where it tended to show sexual penetration of the prosecuting witness by the defendant by force and without the consent of the prosecuting witness and where it tended to show that the victim resisted and such limitation upon her resistance as there may have been was due to her fear for her life as the result of the defendant's choking her and threatening to kill her.

APPEAL by defendant from *Bailey, J.*, at the 18 September 1972 Session of DURHAM.

Upon an indictment, proper in form, the defendant was tried on the charge of rape, the date of the offense being 18 June 1972. He was found guilty and was sentenced to imprisonment for life. The following is a summary of the evidence for the State, the defendant offering no evidence:

At approximately 7 a.m. on 18 June 1972, two Duke University campus security officers were patrolling the East Campus of the university on foot. Near the library they observed the defendant, a Negro male, on the ground and in the act of sexual intercourse with a white female, the prosecuting witness. The officers approached to within three or four feet before the defendant observed them, desisted and stood up. The officers observed the penetration of the prosecuting witness by the defendant and observed nothing in her actions indicating that this was with her consent. She told the officers that the defendant had seized her, pushed her to the ground and threatened to kill her if she did not submit to his wishes. Her white nurse's uniform was soiled and disarranged and a button, missing from it, was found at the scene. She appeared to the officers to be "in

a daze." She told the officers that the defendant had raped her and she wanted to press charges against him. The officers arrested the defendant and both, in the courtroom, identified him as the man they had so observed and arrested.

The prosecuting witness testified that at the time of this occurrence she was 19 years of age, a sophomore at Duke University, and working, during the summer, as a nurse's aide at the nearby Hillcrest Nursing Home on the night shift. On the morning in question, she left the nursing home at 6:30 a.m. and was walking through the university campus to her residence. The defendant, whom she identified in the courtroom but whom she had never seen or heard of before this occurrence, approached her, said, "Good night," and then grabbed her and knocked her down, stating in vulgar terms that he wanted to have intercourse with her and if she did not do what he wanted he would kill her. She resisted by repeatedly trying to push him away. Each time she did so, he placed his hands around her throat and choked her. As he did so, he said that it did not matter whether he killed her or not because he had already tried to rape another woman that night who was "going to tell on him." She identified the clothing she was wearing when this occurred and some, or all, of the articles were introduced in evidence. The defendant had intercourse with her without her consent, actually penetrating her. She did not cry out or scream because there was no one in the vicinity and she thought that if she screamed it would increase her danger.

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

Jerry B. Clayton for defendant.

LAKE, Justice.

[1] The defendant's statement of his case on appeal includes seven assignments of error. Assignments 1 and 7 are not brought forward into his brief and no argument or citation of authorities was made in support of either. These assignments are, therefore, deemed abandoned. Rule 28, Rules of Practice in the Supreme Court of North Carolina; *State v. Boyd,* 278 N.C. 682, 180 S.E. 2d 794; *State v. Greene,* 278 N.C. 649, 180 S.E. 2d 789; *State v. Dawson,* 278 N.C. 351, 180 S.E. 2d 140; *State v. Benton,* 276 N.C. 641, 174 S.E. 2d 793.

[2, 3] In any event, these two assignments have no merit. Assignment No. 1 was that the trial court denied the defendant's motion, prior to the commencement of trial, to sequester the witnesses. This motion is directed to the discretion of the trial court and his ruling thereon is not reviewable on appeal except in cases of abuse of discretion, of which there is no indication in the present record. *State v. Cook,* 280 N.C. 642, 187 S.E. 2d 104; *State v. Manuel,* 64 N.C. 601; Stansbury, North Carolina Evidence, 2d Ed., § 20. Assignment No. 7 is directed to the statement by the trial judge, at the time of imposing sentence, which, of course, was after the verdict was rendered and accepted, that he "with a great deal of pleasure" sentenced the defendant to imprisonment for life. While this remark was unwise, it is not ground for a new trial and the defendant was well advised to abandon this assignment of error. The question for the appellate court, upon an appeal from a judgment sentencing a defendant to prison, is not whether the trial judge approves or disapproves of the law declaring certain conduct a criminal offense and prescribing the punishment therefor, but whether he has followed it and correctly applied it and other applicable rules of law in the trial of the defendant.

[4] Assignment of Error No. 2 is directed to the court's sustaining an objection by the State to the defendant's question to the arresting officer on cross-examination, "Did you explain to her [the prosecuting witness] what could happen to her if she did not press charges?" The record does not show what the answer of the witness would have been had he been permitted to answer. We have repeatedly held that the sustaining of an objection to a question directed to a witness will not be held prejudicial when the record does not show what the answer would have been had the objection not been sustained. *State v. Kirby,* 276 N.C. 123, 133, 171 S.E. 2d 416, and cases there cited.

[5] The defendant's Assignment of Error No. 3 is to the overruling of the defendant's objection to the testimony of the prosecuting witness concerning the statement by the defendant to her, while he was in the process of overcoming her resistance, to the effect that it did not matter if he killed her since he had tried to rape another woman that night and she was going to tell on him. It is well settled in this State that in the trial of a defendant upon a criminal charge, he not having testified as a witness, evidence that he has committed another distinct, independent, separate offense is not admissible when such evi-

dence has no relevancy to the matter on trial other than to show the bad character of the defendant or his disposition to commit an offense of the nature of the one for which he is presently on trial. *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364; Stansbury, North Carolina Evidence, 2d Ed., § 91. If, however, the evidence in question tends to prove any fact relevant to the charge on which the defendant is presently on trial, it is not inadmissible merely because it also shows him to have been guilty of another, independent crime. *State v. McClain, supra,* at page 177; Stansbury, North Carolina Evidence, 2d Ed., § 92. As was said by Chief Justice Stacy, speaking for the Court in *State v. Fowler,* 230 N.C. 470, 53 S.E. 2d 853, "The touchstone is logical relevancy as distinguished from certain distraction." The evidence here in question was clearly relevant on the material question of whether the prosecuting witness' will to resist was overcome by fear due to the threat of the defendant to kill her if she did not submit. In this ruling of the trial court there was no error.

[6] The defendant's Assignment of Error No. 4 is to the admission in evidence over his objection of Exhibits 3, 4, 5 and 6 introduced by the State. The record shows that Exhibits 5 and 6 were articles of clothing worn by the prosecuting witness at the time of the occurrence. Exhibits 3 and 4 are not described in the record but it appears likely that they also were articles of clothing worn by her at that time. Torn and soiled clothing of the victim, such as Exhibits 5 and 6, are clearly admissible in evidence in a case of this nature, being relevant to the question of the use of force to overcome the resistance of the victim of the assault. "So far as the North Carolina decisions go, any object which has a relevant connection with the case is admissible in evidence, in both civil and criminal trials. * * * In cases of homicide or other crimes against the person, clothing worn by the defendant or by the victim is admissible if its appearance throws any light on the circumstances of the crime * * * . " Stansbury, North Carolina Evidence, 2d Ed., § 118; *State v. Rogers,* 275 N.C. 411, 430, 168 S.E. 2d 345; *State v. Atkinson,* 275 N.C. 288, 310, 167 S.E. 2d 241; *State v. Speller,* 230 N.C. 345, 53 S.E. 2d 294; *State v. Petry,* 226 N.C. 78, 36 S.E. 2d 653.

[7] The defendant's Assignments of Error 5 and 6 are to the denial of his motion for judgment of nonsuit and to the denial of his motion to set aside the verdict as being contrary to the

greater weight of the evidence. In support of each of these assignments of error, it is the defendant's contention that the evidence for the State was not sufficient to establish the use of force by the defendant and the absence of consent by the prosecuting witness. It is perfectly apparent that the evidence for the State shows sexual penetration of the prosecuting witness by the defendant and is ample to support the finding that this was by force and without the consent of the prosecuting witness. The evidence is sufficient to support a finding that she resisted and that such limitation upon her resistance as there may have been was due to her fear for her life as the result of the defendant's choking her and threatening to kill her. Thus, the evidence is ample to support a finding of each element of the crime of rape. *State v. Flippin,* 280 N.C. 682, 186 S.E. 2d 917; *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225; *State v. Carter,* 265 N.C. 626, 144 S.E. 2d 826. It is elementary that upon a motion for judgment of nonsuit in a criminal action the Court must consider the evidence offered by the State as true and give the State the benefit of every reasonable inference to be drawn therefrom. *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469. The credibility of the evidence and its sufficiency to remove any reasonable doubt of guilt are for the consideration of the jury. *State v. Jenerett,* 281 N.C. 81, 187 S.E. 2d 735; *State v. Vestal,* 278 N.C. 561, 567, 180 S.E. 2d 755; *State v. Primes, supra.* The evidence in the record before us is ample to sustain the verdict.

No error.

SMOKY MOUNTAIN ENTERPRISES, INC. v. JESSE ROSE

No. 80

(Filed 9 May 1973)

1. Judgments § 36— plea of res judicata — parties concluded — corporation and president individually

Smoky Mountain Enterprises, Inc., plaintiff in this action, is bound by the judgment entered in an earlier action instituted by W. F. Burbank, president and sole stockholder of Smoky Mountain Enterprises, Inc., which involved the same paper writing purporting to be a contract of sale, involved the same defendant and was personally controlled, as was the present action, by Burbank who had the same proprietary interest or financial interest in the judgment in both

cases; therefore, the trial court erred in denying defendant's motion to dismiss plaintiff's cause of action on the ground of *res judicata.*

2. **Judgments § 37— res judicata — relief that could have been demanded but was not**

Where plaintiff individually brought an action for breach of contract and issues were determined adversely to him, he may not subsequently bring an action in the name of the corporation of which he is sole stockholder based on the same alleged contract asking for money judgment or, in the alternative, that defendant be ordered to relinquish all rights to the business establishment that was the subject of the sale, since relief sought in the subsequent action was available to plaintiff and could have been determined in the earlier action.

APPEAL by defendant from *Winner, District Judge,* at the 28 August 1972 Non-Jury Session of BUNCOMBE County District Court, transferred for initial appellate review by the Supreme Court by order dated 26 March 1973, pursuant to G.S. 7A-31(b)(4).

On 26 June 1969 W. F. Burbank and Jesse Rose signed a paper writing purporting to be a sales contract. W. F. Burbank is president and sole stockholder in Smoky Mountain Enterprises, Inc., plaintiff in this case. However, his signature on the contract did not denote his corporate capacity and was not attested to by any other officer of the company. The instrument provides for the sale of all the assets of Smoky Mountain Enterprises, Inc. Consideration for this sale included the payment of all the outstanding accounts of the corporation, weekly payments of $137.50 for a fifty-two week period, and $700 in cash. The instrument provided, "If, during this period Mr. Rose should default in any of the above mentioned conditions, this agreement will immediately be null and void and all assets shall remain the property of Smoky Mountain Enterprises, Inc., and Mr. Rose will relinquish all rights to said establishment."

The major assets of plaintiff were a bar named "The Hideaway" and certain furniture and equipment contained in that bar. The corporation had a lease on the property which housed "The Hideaway" and a license for the sale of beer and wine on the premises. Rose partially fulfilled his obligation under the instrument. He paid all the outstanding debts of the corporation and made a $700 cash payment. Additionally, he made weekly payments totaling $2,475.18. Thereafter, apparently because the corporation's beer and wine license was revoked and the corpo-

ration's lease on "The Hideaway" property expired, Rose ceased making the weekly payments. On 15 December 1969 defendant's attorney wrote Burbank that Rose would make no further payments; that he was moving the furniture and fixtures from "The Hideaway" to a safe storage at 48 North Market Street in Asheville, North Carolina; that he had paid the storage for a month in advance; and that at any time during the next month Burbank could obtain the furniture and fixtures by calling Mr. Rose. After receiving this letter, Burbank sold for $800 forty sets of tables and chairs which Rose had stored. Burbank kept the $800.

On 27 February 1970 W. F. Burbank individually instituted an action in the Superior Court of Buncombe County against the defendant in the instant case, Jesse Rose, for breach of the contract of 26 June 1969. On 12 February 1971 Judge Harry Martin granted defendant's motion for summary judgment and dismissed that action with prejudice.

On 7 October 1971 the present action was instituted by Smoky Mountain Enterprises, Inc., as plaintiff, against Jesse Rose. The complaint alleged a breach of this same 26 June 1969 contract and sought a money judgment or specific performance of the contract, or, in the alternative, relinquishment by defendant of all rights to "The Hideaway." Defendant filed an answer, denied plaintiff's allegations, and as a second further defense alleged:

> "That the matters in controversy in this cause, as alleged in the complaint, were tried and answered in favor of the defendant in the case of *W. F. Burbank v. Jesse Rose,* heard in the Superior Court of Buncombe County, North Carolina, by the Honorable Harry C. Martin, Judge presiding; a copy of the judgment entered in that case is attached hereto as defendant's Exhibit 'A' and is pleaded as a bar to plaintiff's right to recover in this action for that said judgment finds as a fact that the alleged contract upon which the present action is based is not executed by or on behalf of Smoky Mountain Enterprises, Inc., and defendant pleads said finding and other findings in said judgment as *res judicata* in this action."

On 17 August 1972 defendant filed a motion for judgment on the pleadings and for summary judgment, pleading in bar of plaintiff's right to recover the judgment in favor of defendant

entered by Judge Martin on 12 February 1971. This motion was not passed upon at the time, but was denied on 21 September 1972. On 21 September 1972, after the case was tried, plaintiff filed a motion to amend the complaint to ask for injunctive relief, which motion was allowed by the court on that same date.

The case was tried on 1 September 1972 without a jury. At the close of plaintiff's evidence, defendant moved the court, pursuant to Rule 41 of the Rules of Civil Procedure, for dismissal. The motion was denied. Defendant offered no evidence but renewed his motion for dismissal. This motion was also denied. The trial judge then, after finding facts and stating conclusions of law, entered judgment for plaintiff. The judgment required defendant to deliver to plaintiff all articles sold by plaintiff to defendant under the 26 June 1969 contract, listing among other articles the tables and chairs which plaintiff had already sold, and additionally enjoined the defendant from using the name "The Hideaway" in any manner. From this judgment, defendant appealed to the North Carolina Court of Appeals.

Clarence N. Gilbert for defendant appellant.

Hendon & Carson by George Ward Hendon for plaintiff appellee.

MOORE, Justice.

[1] Defendant contends that the court erred in denying defendant's motion to dismiss plaintiff's cause of action on the ground of *res judicata.*

There had been no jury trial in the prior action before Judge Martin. Hence, the plea was determinable on the facts disclosed by the judgment roll in that case. No question was raised as to the authenticity of the judgment entered by Judge Martin. It is incorporated in the agreed case on appeal. Burbank did not object to the findings of fact made by Judge Martin and did not appeal from the judgment dismissing that action. See 1 Strong, N. C. Index 2d, Appeal and Error § 42, p. 185, and cases therein cited. Also, W. F. Burbank, the plaintiff in that case, testified in the present case as follows: "On June 26, 1969, I was President of Smoky Mountain Enterprises, Inc., a corporation in which I owned all the stock." With reference to the action heard by Judge Martin in Superior Court, Burbank further testified:

> "I brought an action in the superior court in my own name individually asking for the same relief I am asking

for now. That action was based on this paper writing that I have introduced to this court. In the superior court action, I contended that that paper writing was a contract between Smoky Mountain Enterprises and Jesse Rose. I was President at the time the paper writing was signed. The corporation had a secretary but I don't remember who it was. I don't have a copy of the Corporate Charter here with me. I don't have anything at all from Smoky Mountain."

Judge Martin's judgment, together with Burbank's testimony in this case, was sufficient to present defendant's plea of *res judicata. Jones v. Mathis,* 254 N.C. 421, 119 S.E. 2d 200 (1961); *Current v. Webb,* 220 N.C. 425, 17 S.E. 2d 614 (1941).

Ordinarily the plea of *res judicata* may be sustained only when there is an identity of parties, of subject matter, and of issues. *Leary v. Land Bank,* 215 N.C. 501, 2 S.E. 2d 570 (1939).

". . . Even so, there is a well established exception to this general rule. This Court, in the case of *Light Co. v. Insurance Co.,* 238 N.C. 679, 79 S.E. 2d 167, speaking through Devin, C.J., said: 'The principle invoked is stated in Restatement of Judgments, sec. 84, as follows: "A person who is not a party but who controls an action, individually or in cooperation with others, is bound by the adjudications of litigated matters as if he were a party if he has a proprietary interest or financial interest in the judgment or *in the determination of a question of act or a question of law with reference to the same subject matter, or transactions;* if the other party has notice of his participation, the other party is equally bound." ' " *Thompson v. Lassiter,* 246 N.C. 34, 97 S.E. 2d 492 (1957).

In the former action Burbank individually was plaintiff. In this action Smoky Mountain Enterprises, Inc., is plaintiff. Burbank is the president and owns all the stock of Smoky Mountain Enterprises, Inc. Notice to the president is notice to the corporation. *Patterson v. Henrietta Mills,* 219 N.C. 7, 12 S.E. 2d 686 (1940). Hence, Smoky Mountain Enterprises, Inc., had notice of the prior action instituted by its president. Burbank was personally in control of the action before Judge Martin in Superior Court and the present action. He had the same proprietary interest or financial interest in the judgment in both cases, and was equally concerned with the determination of questions of fact or questions of law pertaining to the contract which was involved in both actions.

We hold, therefore, that for the purpose of the plea of *res judicata,* Smoky Mountain Enterprises, Inc., is bound by the judgment of Judge Martin.

[2] Under the complaint as originally filed in this action, the plaintiff asked for money judgment in the amount of $4,939, or, in the alternative, that the defendant be ordered to relinquish all rights to the establishment known as "The Hideaway." By amendment to the complaint, plaintiff also seeks injunctive relief. Plaintiff in the previous action could have asked for any remedy available under the contract. Plaintiff cannot in this action seek relief which, in the exercise of reasonable diligence, could have been presented for determination in the prior action.

As stated in *Gaither Corp. v. Skinner,* 241 N.C. 532, 85 S.E. 2d 909 (1955):

> ". . . The general rule is that the whole cause of action must be determined in one action, and where an action is brought for a part of a claim, a judgment obtained in the action ordinarily precludes the owner thereof from bringing a second action for the residue of the claim. *Bruton v. Light Co.,* 217 N.C. 1, 6 S.E. 2d 822; *Allison v. Steele,* 220 N.C. 318, 17 S.E. 2d 339; 1 Am. Jur., Actions, section 96; 30 Am. Jur., Judgments, section 173.
>
> "It is to be noted that the phase of the doctrine of *res judicata* which precludes relitigation of the same cause of action is broader in its application than a mere determination of the questions involved in the prior action. The bar of the judgment in such cases extends not only to matters actually determined but also to other matters which in the exercise of due diligence could have been presented for determination in the prior action. *Bruton v. Light Co., supra; Moore v. Harkins,* 179 N.C. 167, 169, 101 S.E. 564; *Wagon Co. v. Byrd,* 119 N.C. 460, 26 S.E. 144; 1 Am. Jur., Actions, section 96; 30 Am. Jur., Judgments, sections 179 and 180."

Accord, Garner v. Garner, 268 N.C. 664, 151 S.E. 2d 553 (1966); *Wilson v. Hoyle,* 263 N.C. 194, 139 S.E. 2d 206 (1964).

Final judgment adverse to plaintiff was entered in the first action. That judgment is *res judicata* and constitutes a bar to the present action. It is not necessary to consider other assignments of error.

The cause is remanded to the District Court of Buncombe County for the entry of judgment dismissing the action. The judgment entered in the District Court of Buncombe County is reversed.

Reversed.

STATE OF NORTH CAROLINA v. HENRY JOHN GLOVER

No. 75

(Filed 9 May 1973)

1. **Burglary and Unlawful Breakings § 3; Indictment and Warrant § 7— grammatical errors in indictment — sufficiency of indictment**

Count in an indictment charging defendant with felonious breaking and entering, though grammatically incorrect and phrased in archaic language, was sufficient to inform defendant of the charge against him and supported the judgment entered upon defendant's guilty plea.

2. **Constitutional Law § 28— failure of solicitor to sign information — invalidity of guilty plea**

Where defendant and his counsel signed a written waiver of the finding of a bill of indictment on a felonious larceny charge, judgment of imprisonment must be arrested, though entered upon defendant's guilty plea, since the solicitor did not sign the information containing the accusation against defendant. G.S. 15-140.1.

APPEAL by defendant from *Judge Harry C. Martin,* 30 May 1972 Session of GASTON, transferred for initial appellate review by the Supreme Court by its blanket order of 26 March 1973, pursuant to G.S. 7A-31(b)(4).

At the 8 May 1972 Session of Lincoln the grand jury returned a bill of indictment charging defendant with felonious breaking and entering and felonious larceny. The first count alleged "That *Henry John Glover* late of the County of Lincoln *on the 17th day of March 1972,* with force and arms at and in the County aforesaid, *a certain dwelling house occupied by one A. D. Shidal, located at Route 2, Vale, North Carolina, wherein merchandise, chattels, money, valuable securities and other personal property were being well kept, unlawfully, wilfully, and feloniously did break and enter with intent to steal, take and carry away* the merchandise, chattels, money, valuable securities and other *personal property of the said, A. D. Shidal* against the

form and Statute in such case made and provided and against the peace and dignity of the State." (Emphasis added.)

The charge in the second count was that on 17 March 1972, *A. D. Shidal,* after having feloniously broken into and entered a certain dwelling house occupied by *A. D. Shidal,* located at Route 2, Vale, North Carolina, with the intent to steal and carry away personal property located therein, did feloniously steal, take and carry away specified personal property belonging to *A. D. Shidal* of the value of more than two hundred dollars ($200.00).

On 19 May 1972 Honorable Harry C. Martin, the judge presiding in the twenty-seventh judicial district, with the consent of defendant and his counsel, transferred the case to Gaston County.

When the case came on for trial there on 30 May 1972 defendant, who was represented by Attorneys Clayton Selvey and Steve Dolly, Jr., entered a plea of guilty to both counts in the bill of indictment. When it was discovered that the second count in the bill was defective because it named as defendant the owner of the property alleged to have been feloniously stolen, defendant and his counsel agreed to waive the finding of a bill. Whereupon the solicitor prepared a writing in the form of an information which contained the accusation that defendant had committed the larceny referred to in the defective second count of the bill of the indictment. Upon this information defendant and his counsel signed a written waiver of the finding of a bill of indictment and a plea of guilty to "the felony of felonious larceny as set out in the within information as upon a true bill found charging the defendant with felonious larceny as aforesaid." The solicitor, however, failed to sign the information.

After examining defendant in open court with reference to his plea, Judge Martin adjudicated that defendant's plea of guilty to both charges was voluntarily and understandingly made after his counsel had fully advised him of his constitutional rights as well as the possible consequences of his plea. The judge also found that the State had substantial evidence to support the charges against defendant.

On the charge of felonious breaking and entering, Judge Martin sentenced defendant to not less than eight years nor more than ten years in the State's prison; on the count of felonious larceny, not less than six nor more than ten years, this sen-

tence to begin at the expiration of the sentence imposed upon the charge of felonious breaking and entering. Commitment was issued on 30 May 1972.

On 5 July 1972 defendant, as "petitioner pro se," filed a petition with the resident or presiding judge of the twenty-seventh judicial district in which he prayed that his pleas of guilty to both the charge of felonious breaking and entering and felonious larceny be stricken. He asserted, *inter alia,* (1) that the archaic wording in the first count of the bill of indictment was so vague and indefinite that it charged no offense; and (2) that the solicitor had failed to sign the information charging him with felonious larceny as required by G.S. 15-140.1.

Judge W. K. McLean heard defendant's petition on 18 September 1972. At that time he permitted the solicitor to sign the information *nunc pro tunc* as of 30 May 1972, and he denied defendant's petition. Thereafter the Court of Appeals allowed defendant's petition for certiorari and directed the Superior Court to appoint counsel to perfect his appeal if it found him to be an indigent. Thereafter Judge Friday appointed Attorney T. Lamar Robinson, Jr., to perfect this appeal.

Attorney General Morgan; Associate Attorney Wall for the State.

Whitesides and Robinson for defendant appellant.

SHARP, Justice.

We review this case as upon a petition for certiorari to bring up a delayed appeal from the judgments of *Martin, J.,* the theory upon which the record indicates defendant applied to the Court of Appeals for certiorari.

[1] Defendant's first contention, based on his first assignment of error, is that the syntax of "the purported housebreaking and entering count" is so awry that "it fails to aver who did what" and will not, therefore, support the judgment entered upon his plea. Defendant, who personally regards this contention as irrefutable, has insisted that his less-sanguine counsel not abandon it on appeal.

We concede that any pupil who submitted Count One in a composition to any teacher of English grammar would be flunked promptly. Nevertheless, we are constrained to hold that it receives a passing grade in a court of law. Albeit the phraseology

of Count One is archaic, the words which we have italicized in the statement of facts are "grown reverend by age." Yet they still suffice to inform defendant of the accusation against him. The essential elements of the crime of felonious housebreaking are set forth with such certainty as to identify the offense with which defendant is sought to be charged, to protect him from being twice put in jeopardy for the same offense, to enable him to prepare for trial, and to enable the court, on conviction or plea of guilty or *nolo contendere* to pronounce sentence. *State v. Greer,* 238 N.C. 325, 77 S.E. 2d 917 (1953). *See also State v. Sellers,* 273 N.C. 641, 642, 161 S.E. 2d 15, 16 (1968). Defendant's first assignment of error is not sustained.

[2] Defendant's second contention is that the court erred in pronouncing judgment upon his plea to the charge of felonious larceny contained in an information which the solicitor had not signed. This contention must be sustained.

G.S. 15-140.1 (1965) permits a defendant charged with a non-capital felony to waive the finding and return into court of a bill of indictment when both he and his counsel sign a written waiver. When this is done the statute provides that *"the prosecution shall be on an information signed by the solicitor."* (Emphasis added.) This requirement is mandatory.

In *State v. Bethea,* 272 N.C. 521, 158 S.E. 2d 591 (1968), the solicitor attempted to use as an information a warrant which charged felonious breaking and entering and larceny. The defendant and his counsel, by a notation upon the warrant, waived the finding of a bill of indictment and thereafter the defendant pled guilty to felonious breaking and entering and nonfelonious larceny. Upon the defendant's appeal from the sentences imposed, this Court disapproved the use of a warrant as an information and said, "In any event, the solicitor's failure to affix his signature to the statement of accusation to which defendant pled guilty rendered the plea void. The solicitor may yet, however, try the defendant on a bill of indictment or upon a valid information." *Id.* at 522, 158 S.E. 2d at 592. *See also State v. Thomas,* 236 N.C. 454, 73 S.E. 2d 283 (1952). *Cf. State v. Sellers, supra* at 651, 161 S.E. 2d at 22.

As to the judgment imposed upon the first count in the bill of indictment, which charged felonious breaking and entering,

No error.

As to the judgment imposed upon the charge of felonious larceny contained in the information,

Judgment arrested.

STATE OF NORTH CAROLINA v. BOBBY LEWIS WATSON

No. 74

(Filed 9 May 1973)

1. **Robbery § 1— common law robbery — violence or putting in fear — proof of either necessary**

Common law robbery is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear, and proof of either violence or putting in fear is sufficient.

2. **Robbery § 4— common law robbery — force used — sufficiency of evidence**

Where the evidence tended to show that defendant snatched the victim's purse with such force that the strap of the purse was broken, the victim was thrown to the ground and her arm was dislocated, the trial court properly submitted the issue of guilt of common law robbery to the jury.

3. **Robbery § 5— common law robbery — failure to submit lesser included offenses — no error**

The trial court in a common law robbery case properly failed to submit to the jury lesser included offenses of the crime charged where there was no evidence of such offenses.

APPEAL by defendant from *Martin (H. C.), J.*, October 30, 1972 Criminal Session, GASTON Superior Court. By order of March 26, 1973, the appeal was heard by the Supreme Court prior to review by the Court of Appeals.

The defendant, Bobby Lewis Watson, was charged by grand jury indictment, proper in form, with common law robbery in the felonious taking of a pocketbook, $61.00 in money, and other articles from the person of Mrs. Elsie Smith Eckerd.

After arraignment, the defendant through his court-appointed counsel entered a plea of not guilty. The State offered evidence in material substance as follows:

As Mrs. Elsie Smith Eckerd was leaving the shopping center in Gastonia at about eight o'clock on the evening of Decem-

ber 16, 1971, some person whom she could not identify snatched the pocketbook attached to her arm by a strap. The taking was with such force that the strap was broken and Mrs. Eckerd thrown to the ground dislocating her arm. Thereafter, the officers returned her empty pocketbook.

On cross-examination, defense counsel asked Mrs. Eckerd this question: "Now, were you in fear for your life?" Answer: "No, not really. I'm a Christian."

Haywood Hardin testified that he, Clifford Williams, Emmitt Burch, Elijah Rippey, and the defendant, Bobby Lewis Watson, left the home of the witness on the evening of December 16, 1971, at about seven-thirty. All had been drinking. They arrived at the Gastonia shopping center in Burch's automobile. Burch remained in the automobile while the other members left. Within a few minutes a commotion developed in the parking lot and all members of the party immediately ran to Burch's automobile and returned to the home of the witness. Some member of the party produced a black pocketbook containing $61.00 and other articles. Rippey divided the money among the members of the party and later threw the pocketbook into a manhole. All agreed that they would say nothing about it, but when interrogated by officers the witness directed them to the place where they recovered the pocketbook which Mrs. Eckerd identified as hers.

Clifford Williams testified he was a member of the party about which the witness Hardin had testified. When the members of the gang reassembled at Burch's automobile the defendant, Bobby Lewis Watson, had the black pocketbook. The defendant neither testified nor offered evidence.

The jury returned a verdict finding the defendant guilty of common law robbery. From a sentence of three years in prison, he appealed.

Robert Morgan, Attorney General, by Roy A. Giles, Jr., Assistant Attorney General, for the State.

Whitesides and Robinson by Henry M. Whitesides for defendant appellant.

HIGGINS, Justice.

The court correctly defined the crime of common law robbery, recapitulated the evidence, and directed the jury to ren-

der one of these verdicts: (1) Guilty of common law robbery; (2) not guilty. Defendant's counsel by proper exceptions challenged the court's failure to submit to the jury the offenses of: (1) Larceny from the person; and (2) assault on a female.

[1, 2] Counsel stressfully contends that Mrs. Eckerd testified she was not in fear for her life, hence the offense could be only larceny from the person. The complete answer is found in an opinion by the present Chief Justice in *State v. Moore,* 279 N.C. 455, 183 S.E. 2d 546. "Robbery at common law is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear. *State v. Lawrence,* 262 N.C. 162, . . . It is not necessary to prove both violence and putting in fear—proof of *either* is sufficient." The taking in this instance was sufficiently violent to effect a dislocation of the victim's arm.

[3] The indictment charges all the essential elements of common law robbery. The evidence fully supports the charge. However, evidence of lesser included offenses is not to be found in the record before us. This Court has repeatedly held that the trial court does not commit error by failure to submit to the jury lesser included offenses of which there is no supporting evidence. *State v. Bynum* and *Coley,* 282 N.C. 552, 193 S.E. 2d 725; *State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664; *State v. Bryant,* 280 N.C. 551, 187 S.E. 2d 111; *State v. Murry,* 277 N.C. 197, 176 S.E. 2d 738; *State v. McNeil,* 277 N.C. 162, 176 S.E. 2d 732; *State v. Smith,* 268 N.C. 167, 150 S.E. 2d 194.

The defendant complained that the officers had made a deal with some of the defendant's companions in return for their in-court testimony. The complaint does not constitute a defense. There are certain conditions under which "[J]ust men get their due."

No error.

STATE OF NORTH CAROLINA v. DAVID LAWRENCE WILLIAMS

No. 54

(Filed 9 May 1973)

1. **Rape § 1— constitutionality of rape statute**

Though G.S. 14-21 provides that death shall be the punishment for rape except in those cases where the jury recommends life imprisonment, the holdings of *Furman v. Georgia* and *State v. Waddell* do not affect the constitutionality of that portion of the statute which defines the elements of the crime of rape.

2. **Constitutional Law § 36; Criminal Law § 135— sentence of life imprisonment — standing to question death penalty**

Defendant in a rape case who did not receive a sentence of death has no standing to raise the constitutionality of the death penalty or of G.S. 14-21 because it provides for that punishment.

APPEAL by defendant from *Blount, J.*, November 1972 Criminal Session of PITT County Superior Court.

This is a criminal prosecution upon a bill of indictment charging defendant with the rape of Deborah Ann Price on 25 September 1972.

Before pleading defendant moved to quash the bill of indictment on the ground that G.S. 14-21 is unconstitutional. The trial judge denied defendant's motion to quash, and defendant entered a plea of not guilty.

The State offered evidence which tended to show that on 25 September 1972 Deborah Ann Price, a 19-year-old student at East Carolina University, left a class at about 10:40 a.m. and started to her dormitory along a railroad track. She was overtaken by a young colored male who knocked her down, beat her and dragged her into a wooded area where he forcibly and against her will had intercourse with her. Her assailant told her that he belonged to a black organization and would have her killed if she said anything. He then walked away, and Miss Price went to a nearby house where she received aid. She was carried to the University Infirmary and was then transferred to Pitt Memorial Hospital where she was examined by Dr. G. H. Satterfield, Jr.

Miss Price unequivocally identified defendant as her assailant from photographs, at a lineup and in court.

Dr. Satterfield testified that when he examined Miss Price on 25 September 1972 she had a severe black eye and scratches and abrasions on her cheek, elbows, abdomen, legs and just below her collarbone. He found evidence of acid phosphatase in the vaginal area. He described acid phosphatase as an enzyme from the prostate gland of a male person.

The State also offered evidence that defendant was enrolled as a student at Rose High School in Greenville, and that he was absent from a second period history class which met from 10:15 to 11:00 a.m. on 25 September 1972. He was also absent from the third, fourth, fifth and sixth periods on the same date.

Defendant offered evidence in the nature of an alibi.

The jury returned a verdict of guilty of rape with recommendation of life imprisonment. Defendant appealed from judgment imposing a sentence of life imprisonment.

Attorney General Morgan; Ralph Moody, Special Council for the State.

Owens, Browning & Haigwood by Robert R. Browning, for defendant appellant.

PER CURIAM.

The sole question presented by this appeal is whether the trial judge erred in denying defendant's motion to quash the bill of indictment. Defendant contends that the bill of indictment should be quashed because G.S. 14-21 is unconstitutional.

G.S. 14-21 provides:

> "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."

In support of his contentions, defendant relies upon *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726, and *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19.

[1] The holdings in *Furman v. Georgia, supra,* and *State v. Waddell, supra,* do not affect the constitutionality of that portion of G.S. 14-21 which defines the elements of the crime of rape.

Furman v. Georgia, supra, stands for the proposition that the imposition of the death penalty under certain state statutes (such as G.S. 14-21) is unconstitutional. *State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664.

Even if *State v. Waddell, supra,* supported defendant's contentions, and we do not think it does, its holdings as to the death penalty are not effective as to offenses committed prior to 18 January 1973. Defendant is charged with raping Deborah Ann Price on 25 September 1972.

[2] Defendant did not receive a sentence of death and, therefore, has no standing to raise the constitutionality of the death penalty or of the statute G.S. 14-21 because it provides for that punishment. *State v. Duncan,* 282 N.C. 412, 193 S.E. 2d 65; *State v. Wright,* 282 N.C. 364, 192 S.E. 2d 818; *State v. Davis, supra.*

We have carefully examined the entire record and find it to be free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. MICHAEL W. BUMGARNER

No. 68

(Filed 9 May 1973)

Criminal Law §§ 161, 166— assignments of error abandoned — review of record — no error

Assignments of error not brought forward and discussed in the brief are deemed abandoned; however, the record proper is examined for error and none appears.

APPEAL by defendant from judgment of *Webb, S. J.,* at the 21 August 1972 Session of CALDWELL Superior Court. The appeal was transferred from the Court of Appeals to the Supreme Court by order of this Court dated 26 March 1973, entered pursuant to G.S. 7A-31(b)(4).

State v. Bumgarner

Defendant was charged in a bill of indictment, proper in form, with felonious breaking and entering the dwelling house of George Shell. To this charge defendant, through his attorney, entered a plea of guilty. Defendant was then sworn and in open court answered all the questions contained in and signed a transcript of plea of guilty. Judge Webb examined defendant as to the voluntary nature of his plea and found that defendant entered the plea of guilty freely, understandingly, and voluntarily, without undue influence, compulsion or duress, and without promise of leniency, and ordered the plea accepted.

The State offered evidence tending to show that George Shell had been working in the backyard of his residence in Hudson, North Carolina. When he returned to the house, he found a strange young man in the hallway. He heard a noise and realized that someone else was in the house. He asked the other individual to come out. This person came into the hall and was identified as the defendant. Both young men gave Mr. Shell false names when he asked them to identify themselves. Mr. Shell ordered the two men to leave his house. When they reached the yard, he procured a rifle and demanded that they stop. A neighbor called the police and both men were arrested.

When Mr. Shell left to work in the yard, the door to the house had been closed but not locked. When he returned, the door was open. Nothing had been taken from the house, although some twenty dollars in Lincoln pennies had been moved and some other money had been carried from the hall to the bedroom and placed in a jacket which was found there. Mr. Shell had never seen these two men before and had not given either permission to go into his house on the day in question.

The defendant did not offer evidence.

From sentence imposed, defendant appealed.

Attorney General Robert Morgan and Special Counsel Ralph Moody for the State.

Ted S. Douglas for defendant appellant.

PER CURIAM.

The record reveals that the defendant made three assignments of error; however, none of these were brought forward and argued by defendant in his brief. Assignments of error

which are not brought forward and discussed in the brief are deemed abandoned. *State v. McLean,* 282 N.C. 147, 191 S.E. 2d 598 (1972); *State v. Wilson,* 280 N.C. 674, 187 S.E. 2d 22 (1972); *Branch v. State,* 269 N.C. 642, 153 S.E. 2d 343 (1967); *State v. Spears,* 268 N.C. 303, 150 S.E. 2d 499 (1966); *State v. Stafford,* 267 N.C. 201, 147 S.E. 2d 925 (1966).

When the case on appeal contains no assignments of error, the judgment must be sustained unless error appears on the face of the record proper. *State v. Higgs,* 270 N.C. 111, 153 S.E. 2d 781 (1967); *State v. Williams,* 268 N.C. 295, 150 S.E. 2d 447 (1966). The defendant's counsel candidly states: "The defendant's counsel on appeal after thoroughly reviewing the record's transcript of proceedings and the indictment herein is unable to detect any error in the defendant's trial and respectfully requests the Court of Appeals to review same in order to assure that the defendant was given a fair trial free from prejudicial error."

We have carefully reviewed the entire record and find no error.

No error.

STATE OF NORTH CAROLINA v. BILLY RAY MOSES

No. 73

(Filed 9 May 1973)

Criminal Law § 23— voluntariness of guilty plea

The defendant's sworn statements fully supported the trial court's adjudication that defendant's plea of guilty was freely, understandingly and voluntarily made.

APPEAL by defendant from *Wood, S. J.,* 23 October 1972 Session of BURKE Superior Court, transferred for initial appellate review by the Supreme Court by order dated 26 March 1973 entered pursuant to G.S. 7A-31(b)(4).

This criminal prosecution is based on a warrant which charges that defendant on or about 11 February 1972 unlawfully and wilfully possessed taxpaid liquor for the purpose of sale in violation of G.S. 18A-7.

In the District Court, after trial on his plea of not guilty, defendant was found guilty. Judgment was pronounced. Defendant appealed.

In the superior court, "[d]efendant, by and through his attorney of record, John H. McMurray, and individually, entered a plea of guilty."

Before accepting defendant's plea, the presiding judge examined defendant in open court to determine whether defendant had entered the plea voluntarily with full understanding of his rights and the consequences of his plea. Based upon defendant's sworn statements, orally and in writing, the court adjudged "that the plea of guilty by the defendant [was] freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency," and ordered that defendant's plea and the court's adjudication be entered in the record. Thereupon, based on defendant's plea of guilty, the court pronounced judgment.

Three days after judgment had been pronounced, defendant, by informal letter to the clerk of the superior court, gave notice of appeal. Upon a finding that defendant was an indigent, the court appointed counsel to perfect defendant's appeal.

Attorney General Robert Morgan and Assistant Attorney General Robert G. Webb for the State.

John H. McMurray for defendant appellant.

PER CURIAM.

Defendant's sworn statements fully support the court's adjudication that defendant's plea of guilty was freely, understandingly and voluntarily made. Indeed, defendant's answers include his sworn statement that he was in fact guilty of the criminal offense charged in the warrant.

On appeal, defendant contends that a new trial should be granted on the ground the warrant fails to charge a criminal offense. Obviously, there is no merit in this contention.

Affirmed.

BANKING COMM. v. BANK

No. 47 PC.

Case below: 17 N.C. App. 557.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 April, 1973.

BENFIELD v. TROUTMAN

No. 58 PC.

Case below: 17 N.C. App. 572.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 April, 1973.

BODENHEIMER v. BODENHEIMER

No. 39 PC.

Case below: 17 N.C. App. 434.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 April, 1973.

CRUTCHER v. NOEL

No. 53 PC.

Case below: 17 N.C. App. 540.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 30 April 1973.

DICKENS v. EVERHART

No. 30 PC.

Case below: 17 N.C. App. 362.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 30 April 1973.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

GILLISPIE v. BOTTLING CO.

No. 62 PC.

Case below: 17 N.C. App. 545.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 April 1973.

HOUSING AUTHORITY v. FARABEE

No. 38 PC.

Case below: 17 N.C. App. 431.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 30 April 1973.

IN RE HAWKINS

No. 40 PC.

Case below: 17 N.C. App. 378.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 April 1973. Appeal dismissed *ex mero motu* for lack of substantial constitutional question 30 April 1973.

LEE v. HENDERSON & ASSOCIATES

No. 50 PC.

Case below: 17 N.C. App. 475.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 30 April 1973.

MILLER v. ENZOR

No. 55 PC.

Case below: 17 N.C. App. 510.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 April 1973.

STATE v. DeGRAFFENREIDT

No. 63 PC.

Case below: 17 N.C. App. 550.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 April 1973.

STATE v. REED

No. 46 PC.

Case below: 17 N.C. App. 580.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 April 1973.

STATE v. SMITH

No. 57 PC.

Case below: 17 N.C. App. 694.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 April 1973.

UTILITIES COMM. v. TOWN OF PINEVILLE

No. 61 PC.

Case below: 17 N.C. App. 522.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 April 1973.

YANCEY v. WATKINS

No. 56 PC.

Case below: 17 N.C. App. 515.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 April 1973.

HOWARD G. BOWEN, SR., ADMINISTRATOR OF ESTATE OF HOWARD GIBSON BOWEN, JR., DECEASED v. CONSTRUCTORS EQUIPMENT RENTAL COMPANY, A NORTH CAROLINA CORPORATION, AND JAMES STEPHEN WILSON

No. 43

(Filed 1 June 1973)

1. **Electricity § 8; Negligence § 35; Rules of Civil Procedure § 26— crane cable striking power line — electrocution — contributory negligence**

In an action to recover for the wrongful death of plaintiff's intestate who was electrocuted when the cable of a crane, which the intestate had the task of attaching to sections of concrete pipe, struck a power line, defendant's allegation that deceased was contributorily negligent in causing the cable to make contact with the power line was supported solely by the testimony of the defendant crane operator contained in the record of his adverse examination offered in evidence by plaintiff; however, plaintiff could impeach as well as contradict defendant's testimony, since, under G.S. 1A-1, Rule 26(e), the introduction in evidence by plaintiff of the adverse examination of defendant did not make defendant a witness for plaintiff.

2. **Electricity § 8; Negligence § 35— crane cable striking power line — duty of deceased to exercise reasonable care for his own safety — contributory negligence**

Evidence did not disclose that plaintiff's intestate who was electrocuted when a crane cable came in contact with a power line failed to exercise reasonable care for his own safety and was contributorily negligent as a matter of law where it tended to show that deceased had been given only general warnings of the danger of working in the vicinity of power lines, his place of duty at the time of the accident was directly under the power lines, no request had been made that the power be cut off and twelve sections of pipe had already been removed from under the power lines with no incident suggestive of danger.

3. **Death § 7— wrongful death — instructions — life expectancy of recipients of damages**

Trial court in a wrongful death action properly set aside that portion of the jury's verdict awarding plaintiff damages where the court failed to instruct the jury to take into consideration the life expectancy of the parents who were entitled to receive the damages recovered, rather than the life expectancy of deceased in determining the value of services, protection, care and assistance, society, companionship, comfort, guidance, and kindly offices and advice of deceased. G.S. 28-173; G.S. 28-174.

4. **Appeal and Error § 62— new trial on damages only — no abuse of discretion**

The court will generally order a partial new trial in its discretion when the error or reason for the new trial is confined to one issue

which is entirely separable from the others and it is perfectly clear that there is no danger of complication; trial court in this wrongful death action properly granted new trial limited solely to the issue of damages.

ON defendants' appeal from, and on *certiorari* granted on plaintiff's petition to review, the decision of the Court of Appeals reported in 16 N.C. App. 70, 191 S.E. 2d 419, docketed and argued in this Court as No. 85 at Fall Term 1972.

Howard G. Bowen, Sr., as plaintiff-administrator, instituted this action against Constructors Equipment Rental Company (Rental Company) and James Stephen Wilson (Wilson) to recover damages on account of the alleged wrongful death of his intestate, Howard Gibson Bowen, Jr. (Howard).

Howard was killed instantly by electrocution on 26 June 1969 while working as an employee of Samet Construction Company (Construction Company). The fatal accident occurred when the cable of a crane owned by Rental Company and operated by Wilson came in contact with a high tension line. Howard was seventeen years old, had graduated from high school in June of 1969, and was temporarily employed as a laborer pending his admission to college in the fall of 1969.

Plaintiff alleged Howard's death was proximately caused by the negligence of Rental Company and Wilson and prayed that he recover $351,691.82 for damages sustained on account of Howard's wrongful death.

In a joint answer, Rental Company and Wilson denied actionable negligence on their part. As a further defense, they asserted that plaintiff's action was barred by Howard's contributory negligence. They also alleged that negligence on the part of Construction Company was a proximate cause of Howard's death and a bar to recovery to the extent of the payments made by Construction Company and its compensation carrier pursuant to the provisions of the Workmen's Compensation Act.

The only evidence was introduced by plaintiff. Summarized, except when quoted, it is set forth below.

Construction Company, as general contractor, was engaged in the construction of a building for Visual Presentations, Inc., on Kettering Road in High Point. Kettering Road ran generally east and west and had been paved, curbed and guttered. There was no sidewalk.

On 26 June 1969 the building was in "the finishing stages." The front was 50 feet south of the property line and approximately 60 feet back from the south curb of Kettering Road.

The natural flow of water was toward the north. Water had been caught in a manhole located thirty-six feet and four inches north of the newly constructed building and twenty-one feet and eight inches back from the south curb. From this manhole, the water flowed under Kettering Road into the city's storm sewer system. The interference with the natural flow caused by the project required that catch basins be constructed and that storm sewer lines be installed to carry the water from the catch basins to the manhole. A catch basin was located east of the building and southeast of the manhole.

Prior to 26 June 1969, a ditch, about one hundred feet long and "probably ten feet deep at its deepest point," had been dug by a backhoe. This ditch extended from the manhole diagonally across the front of the property to the catch basin to the east of the building. The storm sewer was to consist of reinforced concrete pipe.

It had been raining prior to the time the pipe was delivered. The delivery truck could not "get in there [next to the ditch] because it was so muddy. They put the pipe right down under the power lines." Except for two or three sections of forty-two inch pipe, each section was thirty inches in diameter, was three or four feet long, and "weighed 1400 or 1500 pounds."

In order to lay the pipe it was necessary to use a crane. Construction Company did not own a crane but arranged to rent one, along with an operator, from Rental Company.

"[A]bout two days prior" to the accident, Odell Couch, the job foreman, called Rental Company to make arrangements for renting a crane. Shortly thereafter, a Mr. Tucker of Rental Company visited the job site. Later Wilson (the crane operator) arrived with "a large stationary boom crane." Tucker and Wilson decided this crane was not suitable for the job and advised Couch that they would send out a smaller crane the next day.

Wilson testified: "[W]hen we had the other crane over there, Mr. Tucker mentioned that the reason we had to take the other one back was because this crane was too big to maneuver on the job, and that because of the wires we would need . . . a smaller crane. . . . The [larger] crane had a sixty-foot station-

ary boom, and the Groves TM 120 hydraulic crane had about a twenty-foot boom that could be extended sixty feet."

On the day of the accident the weather was good. Wilson arrived just before noon with the smaller hydraulic crane. Couch asked either Tucker or Wilson "if he would like us to move the pipe [out from under the power lines], and he said that he could do it from there." He initially positioned the crane "four or five feet [south] of the curb line of Kettering Road" on the west side of the manhole. Couch warned Wilson about the wires which were directly over the stack of pipe and also warned the employees of Construction Company to be careful around the power lines. He did not ask the power company to cut off the power while the crane was being operated.

In order to lift the pipe, a "finger or hairpin or hook" type of device furnished by Construction Company was attached to the crane cable. According to Norman Samet, president of Construction Company, this device weighed "a hundred pounds, or close to it." However, Wilson thought that the "approximate weight of the finger itself would probably be 20 pounds." Howard's job, at the time of the accident, was to insert the "hook" into the "female end of the pipe." As each section of pipe was removed from the stack and placed in the ditch other employees of Construction Company would join and interlock the pipe in tongue and groove fashion. Twelve sections had been so removed and located prior to the accident.

From the initial location Wilson moved about four or five sections of pipe. Describing how the crane moved these pipes, Couch testified that Wilson "extended the boom out and of course the cable will pick up real close to the boom, and it was out to an angle enough to get under the wires and not do nothing"; and that "[a]t no time in the operation of the crane and in the installation of this pipe when it was located on the west side of the ditch [it was on the east side when the accident occurred] did Mr. Wilson ever extend the boom up to the height of the wires."

After these four or five sections were placed in the ditch, Wilson moved the crane to a location east of the manhole. To do this "he had to fold the crane back in . . . the outlets and boom and all, and he went out into the street and came back in on the southeast side of the ditch" to a position about thirty feet from the curb of Kettering Road and aligned slightly to the

east of the northeast corner of the building. It was at this location when the accident occurred.

Couch testified that he had "stood out there for almost two hours or so watching the crane in operation." During this time from "three or four feet" was as close as the crane got to the power lines. He further testified: "As to whether at any time during the operation of the crane when I observed it at the second site at that time, did he ever extend the boom up to the height of the wires, not to my knowledge, not until I saw the accident. I didn't actually see the accident." Samet testified that the weight of the pipe "was very, very light compared to the capacity of the crane so that it would have the capacity to lift this small weight at a very low angle."

Just before the accident, Couch had to leave the construction site for about ten minutes. When he returned he went into the shack on the job site to make a telephone call. During Couch's absence Samet arrived on the premises.

When Samet arrived the crane was in operation at the location east of the manhole and in the process of laying a section of pipe in the ditch. As Samet was standing near the crane Wilson swung the crane back to get the next piece of pipe which was on the ground "right near the curb on Kettering Road." Samet testified: "I looked up and saw that the boom of the crane was up very high and . . . was moving very close to the power lines, and almost at the same instant as he was swinging around there seemed to be only a slight hesitation as it got very near the power line and then it moved closer to the power line, and the next thing I knew there was an electrical buzzing and arcing noise. . . . "

Samet further testified: "After I heard this electrical sound and at the time I looked at Howard . . . he was probably five feet south of the south curb line of Kettering Road. . . . The top of the boom was above the power lines. At that time, the cable was against the power lines" touching the line "only a few feet off of the pole. . . ." With reference to how high the boom extended above the wires at that time, Samet was of the opinion that there was "maybe 18 inches of the cable hanging down from the roller of the sheave" to the point of contact with the power line.

Samet further testified: "I looked up and saw the wire in contact with the cable from the crane, in contact with the elec-

trical wires—and I looked down and saw [Howard] . . . standing very close to this fork or finger that was hanging from the cable. At that time, I couldn't tell for sure if he was touching this piece of metal or not because of the angle and the distance. . . . I screamed his name, I believe, and ran around the crane, and he started moving away from this piece of metal, the fork, and appeared to be running from it."

Under cross-examination, Samet testified that he did not see Howard with his hand on the hook or see him pull the hook over under the power line in order to put it into the pipe; that although he had a clear vision, he was not looking at the "hook" at that time; and that he did not see Howard until after he saw the sparks and could not tell whether he had pulled the hook over toward the pipes. With reference to his previous testimony under oath that it appeared to him that Howard had his hand on the "hook," it did so appear to him but he could not be real sure; that Howard was erect, standing still, and appeared to have his hand on it, but he was not sure that Howard was touching it. At that time, Howard "was standing just about right under the wires, approximately." As far as Samet could tell, there was not anything that would have obstructed Howard's view of the crane and the wires. Too, he could have observed the sign [warning of danger in operating near power lines] on the side of the crane.

Meanwhile, Couch had completed his telephone call. Just as he walked out of the office he heard the "buzzing noise" and saw the boom which was "right straight up over the wire" moving back away from the wires. He was unable to see Howard at this time because a truck obstructed his view.

Couch further testified: "As to whether I had seen [Howard] holding onto this metal piece guiding it toward the pieces of pipe earlier, yes. As to whether he would hold onto this fork or hook and would guide it over to a piece of pipe, well, not necessarily. The crane would put the fork over there and he would push it inside. As to whether I just said that I had seen [Howard] with his hand on this fork or finger guiding it or moving it toward the pipe, placing it into the pipe, yes, sir. As to whether I saw him guiding or moving it toward the pipe on occasions, well, I really don't know whether he was moving it or whether the crane was. I couldn't say that, but he was guiding the fork. I saw him with his hand on it as it was moving. As to whether the cable which was attached to this hook was

such that the cable could swing from side to side, yes, sir, I assume it could swing from one way or the other. At the time of the accident, there was nothing in the area that would prevent [Howard] if he looked from seeing the crane, the cable and the wire. I had specifically warned him about the dangers of those wires."

On redirect examination, Couch emphasized that the closest he "saw it [the crane] get to the wire was actually about three or four feet" and that at no time did he "ever see the boom ever extend up to the height of these wires."

In his testimony in the adverse examination introduced by plaintiff, Wilson, the crane operator, described the accident as follows:

"After we had set the last piece of pipe, I was swinging around to where the other pipe was laying, and I had the hook about a foot or so off the ground, and [Howard] was steadying it, and just walking along beside it, more or less, and when I got close to the other pipe, he started to pull this finger thing toward a piece of pipe, and when I seen him doing this I stopped swinging, but it was too late. The cable was in the line, so I swung back the other way, and [Howard] started to run, and he ran about 6 foot and fell to the ground." [This conflicts with Samet's testimony that as the crane moved toward the wire there was a slight hesitation and then the boom moved *closer* to the wire.]

Wilson further testified: "As to what height I was booming at that time, the tip of the boom was approximately 40 feet from the ground. The tip of the boom then would be a distance of approximately 8 to 10 feet above those high-voltage wires. [Samet testified that the boom was about 18 inches above the wires.] . . . I had an unobstructed vision of the pipe and [Howard] and of the high-voltage wires, and I swung my boom within some 12 to 18 inches of those high-voltage wires and a distance of some 8 to 10 feet over and above the high-voltage wires."

Wilson further testified that it was necessary to boom at that height; that, when Couch said something to him about watching out for the wires, Howard and two or three others were standing behind Couch within hearing distance; and that he [Wilson] on several occasions had warned Howard "about being careful of the wires."

Wilson further testified: "Prior to the time that the accident occurred, [Howard] had not at any time pulled the finger over to any of the pipe. That was the first time he had done that. When he pulled the finger toward the pipe on the occasion when the accident occurred, it pulled the cable to an angle out from under the boom and into the wires. When he first started to pull the finger, the crane was moving, but as he started pulling, I stopped. When I stopped, I was about 12 to 18 inches away from the wire. There was no way to get that pipe out from under the wires where it was located without moving the crane over fairly close to the wires. When I warned [Howard] about the wires, he acknowledged what I told him. He would say 'Okay.' On another occasion, he looked toward the wires, or just nodded his head. The reason I warned him more than once was that I just wanted to keep reminding him that the wires were up there."

Leslie Preston, a district engineer with Duke Power Company, visited the job site the day after the accident and made certain measurements with regard to the power lines. He testified that the utility pole was about 18 inches from the curb of Kettering Road; that the height of the wire at the point of contact was 32 feet 8 inches; and that the point on the ground directly under the point of contact was "about 5½ feet" from the curb of Kettering Road.

Howard G. Bowen, Sr., who is vice president and general superintendent of Construction Company, testified that, although he was not present when the crane was being operated, he had warned his son of the general dangers of construction and mentioned the wires to him but had not requested that the power be cut off.

Testimony relating to the issue of damages will be set forth in the opinion.

Rental Company and Wilson, the original defendants, brought Construction Company into this action as a third-party defendant for indemnification based on an agreement in the rental contract between Construction Company and Rental Company. However, the trial court ordered severance and separate trials of the issues between plaintiff and defendants Rental Company and Wilson, and the issue of indemnification between defendants Rental Company and Wilson, as third-party plaintiffs, and Construction Company, as third-party defendant.

The separate trial of the issues between plaintiff and defendants Rental Company and Wilson was before Judge Exum and a jury at 3 January 1972, Two-Week Regular Civil Session, of Guilford Superior Court (High Point). It was stipulated that at the time of the accident defendant Wilson was acting as agent of defendant Rental Company.

The issues submitted, and the jury's answers, are as follows:

"1. Was the death of plaintiff's intestate, Howard Gibson Bowen, Jr., proximately caused by the negligence of the defendants, James Stephen Wilson and Constructors Equipment Rental Company?

"ANSWER: YES.

"2. If so, did the negligence of plaintiff's intestate, Howard Gibson Bowen, Jr., contribute to his death?

"ANSWER: NO.

"3. What amount, if any, is the plaintiff entitled to recover?

"ANSWER: $115,000.00.

"4. Was Samet Construction Company negligent on the occasion in question, and if so was such negligence a proximate cause of the death of plaintiff's intestate?

"ANSWER: YES."

After the verdict, Rental Company and Wilson, pursuant to Rule 50(b)(1) of the Rules of Civil Procedure, G.S. 1A-1, moved for judgment notwithstanding the verdict on the first, second and third issues, and in the alternative for a new trial for various "errors which may have arisen." Their motions were denied and they excepted. The court also denied their alternative motion for a new trial on the first and second issues. However, the court allowed their motion to set aside the verdict on the third issue but solely on the ground that the court had committed error in its instructions to the jury in the specific respect discussed in the opinion.

Construction Company, and its compensation carrier, moved that the court set aside the jury's answer to the fourth issue on the grounds that (1) there was no evidence to support the an-

swer; and (2) there was "probably some error in the Charge with respect to that Issue." This motion was denied and Construction Company and its compensation carrier excepted.

Plaintiff excepted to the ruling of the court which set aside the jury's answer to the third issue and granted a new trial with reference thereto and appealed to the Court of Appeals.

Defendants Rental Company and Wilson excepted to the ruling of the court which denied their motion for judgment notwithstanding the verdict on issues one and two and appealed to the Court of Appeals.

On defendants' appeal the Court of Appeals affirmed the ruling which denied their motion for judgment notwithstanding the verdict as to the first and second issues. One member of the hearing panel having dissented, they appealed this decision to the Supreme Court.

On plaintiff's appeal, the Court of Appeals (without dissent) affirmed the ruling of the court which set aside the answer to the third issue and awarded a new trial with reference thereto on account of error in the charge. Plaintiff's petition for *certiorari* to review this portion of the decision was allowed by this Court.

This appeal does not involve any of the issues in the conditional cross-action by defendants Rental Company and Wilson against Construction Company for indemnification. Too, Construction Company and its compensation carrier have not brought forward their exception to the court's denial of their motion to set aside the jury's answer to the fourth issue.

Morgan, Byerly, Post & Herring by W. B. Byerly, Jr., for plaintiff.

Smith, Moore, Smith, Schell & Hunter by Bynum M. Hunter and David M. Moore II for defendants.

BOBBITT, Chief Justice.

Defendants' Appeal—Part I

Defendants' Assignment of Error No. 1 is based on exceptions to the denial of their motions for a directed verdict and for judgment notwithstanding the verdict. It presents a question

of law, namely, whether the evidence was sufficient to require submission to the jury. *Kelly v. Harvester Co.*, 278 N.C. 153, 157, 179 S.E. 2d 396, 397 (1971). In the consideration thereof the evidence is to be taken in the light most favorable to the plaintiff. *Cutts v. Casey*, 278 N.C. 390, 411, 180 S.E. 2d 297, 307 (1971).

There was ample evidence to require submission of the first (negligence) issue and to support the jury's affirmative answer. Defendants do not contend otherwise. They base this assignment solely on their contention that *plaintiff's evidence* establishes the contributory negligence of his intestate *as a matter of law.*

We note that "[a] party asserting the defense of contributory negligence has the burden of proof of such defense." G.S. 1-139.

In an action for wrongful death, a directed verdict for the defendant(s) on the ground of contributory negligence should be granted when, and only when, the evidence, taken in the light most favorable to plaintiff, establishes the contributory negligence of plaintiff's intestate so clearly that no other reasonable inference or conclusion may be drawn therefrom. Discrepancies and contradictions in the evidence, even though such occur in the evidence offered on behalf of plaintiff, are to be resolved by the jury, not by the court. *Stathopoulos v. Shook*, 251 N.C. 33, 36, 110 S.E. 2d 452, 455 (1959), and cases cited.

Defendants base their contention that Howard was contributorily negligent *as a matter of law* on two propositions: (1) That Howard, by pulling the "finger" or "hook" toward another section of pipe, *caused* the *cable* to make contact with the power line; and (2) that, notwithstanding he had been fully warned of the danger, Howard took hold of the "finger" or "hook" without exercising due care to ascertain that he could do so with safety.

[1] Defendants' allegation that Howard *caused* the *cable* to make contact with the power line is supported solely by the testimony of Wilson contained in the record of his adverse examination offered in evidence by plaintiff.

Prior to the adoption of the Rules of Civil Procedure, G.S. 1A-1, decisions of this Court had held that a plaintiff, by offering the adverse examination of a defendant, made the deponent

his (plaintiff's) witness and thereby represented that he was worthy of belief. *Cline v. Atwood,* 267 N.C. 182, 186, 147 S.E. 2d 885, 888 (1966), and cases cited. Under these decisions, the plaintiff was not allowed to impeach defendant by attacking his credibility but was permitted to offer contradictory testimony of other witnesses.

Rule 26(e), which supersedes prior rules in respect of the introduction by a party of the deposition (adverse examination) of *an adverse party,* provides:

"(e) *Effect of taking or using depositions.*—A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, *but this shall not apply to the use by an adverse party of a deposition as described in section (d)(1).* At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party." (Our italics.)

Under Rule 26(e) the introduction in evidence by a plaintiff of the adverse examination of the defendant no longer makes the defendant a witness for the plaintiff. Plaintiff does not thereby represent the defendant as being worthy of belief as to each and every aspect of his testimony. He may *impeach* him as well as *contradict* him.

Rule 43(b), the counterpart of Rule 26(e), applies when a plaintiff, instead of introducing the adverse examination of the defendant, calls the defendant as an adverse witness to testify at trial. In such case, Rule 43(b) permits the plaintiff to "interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party." In marking the distinction between the introduction and use of the testimony of *an adverse party,* whether obtained by adverse examination prior to trial or at trial, and the introduction and use of the testimony of *a witness other than a party,* whether obtained by deposition or at trial, both Rule 26(e) and Rule 43(b) recognize that the self-interest of the adverse party bears upon the credibility of that portion of his testimony which tends to exculpate him and to place blame upon another.

Both Rule 26(e) and Rule 43(b) are in accord with this forceful statement by Dean Wigmore: "If there is any situation in which any semblance of reason disappears for the application of the rule against impeaching one's own witness, it is when the *opposing party is himself called by the first party,* and is sought to be compelled to disclose under oath that truth which he knows but is naturally unwilling to make known. To say that the first party guarantees the opponent's credibility is to mock him with a false formula; he *hopes* that the opponent will speak truly, but he equally perceives the possibilities of the contrary, and he no more guarantees the other's credibility than he guarantees the truth of the other's case and the falsity of his own." IIIA Wigmore on Evidence, § 916, Chadburn Revision (1970).

Under Rule 26(e) and also by reason of the contradictory evidence of other witnesses, we hold that the credibility and weight of Wilson's testimony were matters for jury determination.

In 32A C.J.S., Evidence, § 1040(2), pp. 774-75, this statement appears: "In recent years statutes and rules of procedure have been enacted in many jurisdictions permitting a party to call his adversary or the latter's employee as a witness without vouching for the credibility of the witness or loss of the right of impeachment. Under such statutes and rules, it has been held that a party calling his adversary as a witness *is not concluded by his uncontradicted testimony,* and that the party so eliciting evidence of the adverse party may rely on such portion of his testimony as is favorable to him, and *is not bound by adverse testimony.*" (Our italics.)

The italicized portions of the quoted statement are directly supported in respect of Rule 43(b), Federal Rules of Civil Procedure, which is substantially the same as our Rule 43(b) in respect of the matter now under consideration, in the following cases: *Moran v. Pittsburgh-Des Moines Steel Company,* 183 F. 2d 467 (3rd Cir. 1950); *Nuelsen v. Sorensen,* 293 F. 2d 454 (9th Cir. 1961); *Feller v. McGrath,* 106 F. Supp. 147, 150 n. 4 (W.D. Pa. 1952). The opinion in *Moran* contains this statement: "Rule 43(b), we think, is utterly inconsistent with any notion about being bound by his testimony. It seems to us that any statement to the effect that a party is bound by the testimony of a witness whom he is free to contradict and impeach is inherently anomalous." State decisions in accord

include the following: *Phillips v. Phillips,* 29 Mich. App. 127, 185 N.W. 2d 168 (1970); *Best v. Huber,* 3 Utah 2d 177, 281 P. 2d 208 (1955); *Miller v. Dussault,* 26 Cal. App. 3d 311, 103 Cal. Rptr. 147 (1972); *Isaacs v. National Bank of Commerce of Seattle,* 50 Wash. 2d 548, 313 P. 2d 684 (1957). *Cf. P. & N. Investment Corporation v. Rea,* 153 So. 2d 865 (Fla. App. 1963); *Bogle v. Conway,* 198 Kan. 166, 422 P. 2d 971 (1967); *Herbert v. Sandia Savings & Loan Association,* 82 N.M. 656, 486 P. 2d 65 (1971). *See also Schmitt v. Jenkins Truck Lines, Inc.,* 170 N.W. 2d 632 (Iowa 1969), where *Moran* was cited to support the same holding under an Iowa rule substantially in accord with our Rule 26(e) and relating specifically to the introduction of the adverse examination of the testimony of an adversary taken before trial. In accord with *Schmitt,* we hold that the rule applicable to the testimony at trial of an adverse party under Rule 43(b) is equally applicable to the adverse party's testimony under adverse examination under Rule 26(e).

State decisions which hold, subject to certain exceptions, that a party offering the testimony of an adverse party, whether in the form of an adverse examination prior to trial or as a witness at trial, is bound by his adversary's testimony except to the extent it is contradicted or impeached, include the following: *Dominick v. Behrends,* 130 Ill. App. 2d 726, 264 N.E. 2d 297 (1970); *Williams v. Wheeler,* 252 Md. 75, 249 A. 2d 104 (1969); *Vokroy v. Johnson,* 233 Md. 269, 196 A. 2d 451 (1964). [*But see P. Flanigan & Sons v. Childs,* 251 Md. 646, 248 A. 2d 473 (1968), and *Proctor Electric Co. v. Zink,* 217 Md. 22, 141 A. 2d 721 (1958).] *Readshaw v. Montgomery,* 313 Pa. 206, 169 A. 135 (1933). [*But see Argo v. Goodstein,* 438 Pa. 468, 265 A. 2d 783 (1970), and *Duffy v. National Janitorial Services, Inc.,* 429 Pa. 334, 240 A. 2d 527 (1968).]

There being independent evidence of the negligence of defendants, we hold that plaintiff is not bound by the testimony of Wilson on adverse examination which relates directly to the issue of contributory negligence, an issue on which defendants have the burden of proof. With reference thereto, we hold that the credibility and weight of Wilson's testimony were for determination by the jury. Even so, in the present case, Wilson's testimony on adverse examination was substantially contradicted and impeached by other evidence offered by plaintiff. The conflicts include those narrated below.

Wilson testified that, when swinging the boom, he *stopped* when he was about 12 to 18 inches from the wires; that Howard pulled the cable into the power line; and that, after he had stopped, the cable "was in the line, so [he] swung back the other way." On the other hand, Samet testified that, as he was watching the movement of the boom, "there seemed to be only a slight hesitation as it got very near the power line and then it moved closer to the power line and the next thing [he] knew there was an electrical buzzing and arcing noise. . . . " Too, Couch testified that when he came out of the shack he heard the "buzzing noise" and saw the boom "right straight up over the wire."

Wilson testified that he "considered it necessary to boom at a distance of approximately 40 feet above the ground level"; that he was booming at that height when the accident occurred; and that the tip of the boom was then "approximately 8 to 10 feet above those high-voltage wires." On the other hand, Samet testified that the boom was then about 18 inches above the point of contact with the power line. And Couch, who, except for a brief interval, had witnessed the manner in which the sections of pipe were being removed, testified that until after the accident he had never seen the boom higher than the power line.

If the tip of the boom were 8 or 10 feet higher than the power line, unless it were directly above the power line, it may be inferred that this would require that the "fork" at the end of the cable be drawn under the power line in order to reach another section of pipe. Nothing in the evidence indicates that the section of pipe which was to be removed was in a more hazardous location than any of the sections which had been previously removed. The fact that twelve sections of pipe had been removed without incident permits the inference that the tip of the boom had not been higher than the power lines.

The evidence is unclear as to when Howard made contact with some electrified portion of the cable or finger. Evidence tending to show that the crane and cable swung toward the power line and then swung away and that Howard ran a short distance before collapsing leaves open for speculation whether contact was made when the boom and cable were swinging toward the power line or when they were swinging from the power line.

Samet testified that the capacity of this crane was such that these pipes could have been removed when the tip of the boom was below the power line. The Groves hydraulic crane was used because of its maneuverability. Its boom could be extended to sixty feet or retracted to twenty feet. It could be adjusted so that the boom would be at a very low angle. In moving to its first location, the crane had to pass under the power line; and, in moving from this location on the west side of the ditch to its second location on the east side of the ditch, the crane had to pass under the power lines twice, first when it went out into the street and again when it came back onto the job site.

The jurors were instructed to answer the second (contributory negligence) issue "Yes" if the defendants had satisfied them from the evidence and by its greater weight that Howard "knew or should have known of the location of the energized electrical transmission wires on the occasion in question and the boom and the cable on the crane, and that he pulled on the finger or fork at the end of the cable so as to cause the cable to come into contact with the transmission wires when, in the exercise of reasonable care commensurate with the circumstances, he could and should have avoided pulling on the cable when he knew or should have known that such a pull would likely result in his injury or death . . . and that such action on his part was a proximate cause of his death."

[2] Without reference to whether Howard caused the fatal accident in the manner indicated by Wilson's testimony, defendants contend the evidence discloses that Howard failed to exercise reasonable care for his own safety and was contributorily negligent as a matter of law. In support of this contention, defendants stress evidence that Howard had been warned of the danger of working in the vicinity of the power lines. However, the warnings were general in nature. His place of duty was directly under the power lines. No request had been made that the power be cut off. Couch had been advised that the pipe could be moved from under the power lines by means of the crane. No incident suggestive of danger had occurred during the removal of twelve sections of pipe. Absent notice to the contrary, whether the assumption by Howard that Wilson would continue to operate the crane in the same manner was consistent with the exercise of reasonable care, was for determination by the jury. *Weavil v. Myers,* 243 N.C. 386, 391, 90 S.E. 2d 733,

737-38 (1956); *Lewis v. Barnhill,* 267 N.C. 457, 464, 148 S.E. 2d 536, 542 (1966). Each of the cases cited by defendants has received careful consideration. In our view, the factual situation in each is distinguishable from that presently under consideration.

The jurors were instructed to answer the second (contributory negligence) issue "Yes" if the defendants had satisfied them from the evidence and by its greater weight that Howard, "on the occasion in question failed to observe the location of the boom and cable on the crane with reference to their proximity to the electrical transmission wires when, in the exercise of reasonable care commensurate with the circumstances then existing, he could and should have made such an observation . . . and that such action on his part was a proximate cause of his death."

The jury, having failed to find that Howard was contributorily negligent in either of the respects alleged, answered the second issue "No."

For the reasons stated above, the court properly denied defendants' motions for a directed verdict and for judgment notwithstanding the verdict. Defendants' Assignment of Error No. 1 is overruled. Discussion of their remaining assignments of error is deferred pending consideration of questions presented by plaintiff's appeal.

Plaintiff's Appeal

Plaintiff assigns as error the action of the trial judge in setting aside the verdict and in ordering a new trial as to the (third) issue of damages on the ground that he had erroneously instructed the jury with reference thereto. The record contains no formal order as to the ground on which the ruling now challenged by plaintiff was based. However, in explanation of his ruling, the trial judge made the following statement:

"I am going to ALLOW your motion to set aside the verdict on the Third Issue, on the grounds that the Court feels it committed error in its instructions to the Jury, inasmuch as the Court should have instructed the Jury that on the value, the monetary value of the services, protection, care and assistance, society, companionship, comfort, guidance, and kindly offices and advice, the Jury should have taken into account the life expectancy of the parents of the decedent, they being those

persons who are entitled to these things under the evidence, the Court being of the opinion that the age of the parents having been offered and the Court should have instructed the Jury on what the Mortuary Tables showed as to their life expectancy so as to give the Jury the opportunity to consider the fact that their life expectancy may have been shorter than the life expectancy of the deceased, and on that ground and on that ground only the Court is going to allow the defendants' motion to set aside the verdict on the Third Issue only."

To answer the specific question presented by plaintiff's appeal requires consideration of Chapter 215, Session Laws of 1969 (1969 Act), entitled "An Act to Rewrite G.S. 28-174, Relating to Damages Recoverable for Death by Wrongful Act," which became effective upon its ratification on 14 April 1969.

Prior to the effective date of the 1969 Act, when a person was injured and later died as a result of the negligence of another, his personal representative had two causes of action, namely, (1) a cause of action to recover, *as general assets of the estate,* damages on account of the decedent's pain and suffering and on account of his hospital and medical expenses, and (2) a cause of action to recover, for the benefit of his next of kin, damages on account of the *pecuniary loss* resulting from his death. *Stetson v. Easterling,* 274 N.C. 152, 156, 161 S.E. 2d 531, 534 (1968), and cases cited.

In *Hoke v. Greyhound Corp.,* 226 N.C. 332, 38 S.E. 2d 105 (1946), it was held that, under the statutes now codified as G.S. 28-172 and G.S. 28-175, an injured person's common law right of action to recover damages for hospital and medical expenses and for pain and suffering caused by the negligence of another survived to the injured party's personal representative. *Accord: Hinson v. Dawson,* 241 N.C. 714, 718, 86 S.E. 2d 585, 588, 50 A.L.R. 2d 333, 338 (1955); *Sharpe v. Pugh,* 270 N.C. 598, 601, 155 S.E. 2d 108, 111 (1967). In such action, as held in *Hinson v. Dawson* (second appeal), 244 N.C. 23, 92 S.E. 2d 393 (1956), this Court recognized that, upon sufficient allegations and evidence that the injury was inflicted by the wilful or wanton conduct of the defendant, the plaintiff was entitled to have submitted an issue as to punitive damages. We note that G.S. 44-49 creates a lien on the recovery *in such personal injury action* in favor of those who render hospital, medical, nursing, and other specified services, in connection with the injuries on which the action is based. *In re Peacock,* 261

N.C. 749, 136 S.E. 2d 91 (1964). Apart from this statutory lien, the recovery is subject to the debts of the decedent and to any disposition within the terms of the decedent's will. Unless modified *by implication* by some provision of the 1969 Act, an injured person's common law right of action in respect of damages he sustained during the interval between injury and death now survives to his personal representative.

The right of action to recover damages for wrongful death was created by and is based on the statute codified as G.S. 28-173. The 1969 Act, which rewrote G.S. 28-174, relates solely to the elements of damages recoverable in a wrongful death action. It does not refer to or purport to modify G.S. 28-173.

G.S. 28-173 provides:

"§ 28-173. *Death by wrongful act; recovery not assets; dying declarations.*—When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors shall be liable to an action for damages, to be brought by the executor, administrator or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding five hundred dollars ($500.00) incident to the injury resulting in death; provided that all claims filed for such services shall be approved by the clerk of the superior court and any party adversely affected by any decision of said clerk as to said claim may appeal to the superior court in term time, but shall be disposed of as provided in the Intestate Succession Act.

"In all actions brought under this section the dying declarations of the deceased as to the cause of his death shall be admissible in evidence in like manner and under the same rules as dying declarations of the deceased in criminal actions for homicide are now received in evidence."

G.S. 28-173 brings forward through successive codifications the basic provisions of Section 70, Chapter 113, Public Laws of

1868-'69. The 1868-'69 Act has been amended as follows: (1) Chapter 29, Public Laws of 1919, inserted the provision relating to the competency of dying declarations; (2) Chapter 113, Public Laws of 1933, inserted the words, "except as to burial expenses of the deceased"; (3) Chapter 246, Session Laws of 1951, deleted the provision requiring that the action be commenced "within one year after such death"; (4) Chapter 879, Session Laws of 1959, substituted the words "the Intestate Succession Act" for the words "this chapter for the distribution of personal property in case of intestacy"; and (5) Chapter 1136, Session Laws of 1959, inserted the present provisions relating to hospital and medical expenses.

Prior to the effective date of the 1969 Act, G.S. 28-174, which brought forward through successive codifications *without amendment* the provisions of Section 71, Chapter 113, Public Laws of 1868-'69, provided:

"§ 28-174. *Damages recoverable for death by wrongful act.* —The plaintiff in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such death."

With reference to the origin and import of the statutes quoted above, see *Lamm v. Lorbacher,* 235 N.C. 728, 71 S.E. 2d 49 (1952); *Armentrout v. Hughes,* 247 N.C. 631, 101 S.E. 2d 793 (1958); *Bryant v. Woodlief,* 252 N.C. 488, 114 S.E. 2d 241, 81 A.L.R. 2d 939 (1960).

Except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding $500.00, G.S. 28-173 provides that the only persons entitled to receive the damages recovered in a wrongful death action are those entitled to the decedent's personal estate under the Intestate Succession Act. The persons so entitled are to be determined as of the date of the decedent's death. *Bank v. Hackney,* 266 N.C. 17, 20, 145 S.E. 2d 352, 355 (1965); *Cox v. Shaw,* 263 N.C. 361, 368, 139 S.E. 2d 676, 681 (1965); *Davenport v. Patrick,* 227 N.C. 686, 689, 44 S.E. 2d 203, 205 (1947); *Neill v. Wilson,* 146 N.C. 242, 245, 59 S.E. 674, 675 (1907).

We note that the recovery in an action for wrongful death created by and based on G.S. 28-173 is not a general asset of the decedent's estate. It is not subject to the payment of his debts. Nor could the decedent by will or otherwise have diverted

any portion of such recovery from the persons who would be entitled thereto under the Intestate Succession Act.

We note further that neither burial expenses nor hospital and medical expenses up to a maximum of $500.00 *were* recoverable as elements of damage within the purview of G.S. 28-174 but were payable out of "[t]he amount recovered in such action. . . . " *Davenport v. Patrick, supra,* at 691, 44 S.E. 2d at 206-07.

Prior to the 1969 Act, this Court, in numerous decisions, held that the measure of damages recoverable under G.S. 28-174 for the loss of a human life was the *present value* of the *net pecuniary worth* of the deceased based on his life expectancy. *Bryant v. Woodlief, supra,* and cases cited. The successive steps by which the jury was to arrive at the amount of its award are set forth in *Caudle v. Railroad,* 242 N.C. 466, 469, 88 S.E. 2d 138, 140 (1955). G.S. 28-174 "[did] not provide for the assessment of punitive damages, nor the allowance of nominal damages in the absence of pecuniary loss." *Armentrout v. Hughes, supra,* at 632, 101 S.E. 2d at 794. G.S. 28-174 left no room for sentiment. It conferred a right to compensation only for pecuniary loss. *Scriben v. McDonald,* 264 N.C. 727, 732, 142 S.E. 2d 585, 588 (1965). As succinctly stated in *Gay v. Thompson,* 266 N.C. 394, 398, 146 S.E. 2d 425, 428, 15 A.L.R. 3d 983, 987 (1966): "Negligence alone, without 'pecuniary injury resulting from such death,' does not create a cause of action."

We note that the wrongful death action created by and based on G.S. 28-173 may be brought only "by the executor, administrator, or collector of the decedent." *Graves v. Welborn,* 260 N.C. 688, 690, 133 S.E. 2d 761, 762 (1963), and cases cited. However, the persons entitled to the recovery under the Intestate Succession Act are *the real parties in interest. In re Estate of Ives,* 248 N.C. 176, 181, 102 S.E. 2d 807, 811 (1958). Prior to the 1969 Act, whether the relationship between such persons and the decedent was one of closeness, estrangement or indifference had no bearing upon the amount of the recovery.

G.S. 28-174, as rewritten by the 1969 Act, itemizes elements of damages recoverable in a wrongful death action, but does not purport to identify the persons who are to be the beneficiaries of the recovery. As heretofore, the nature and distribution of whatever recovery is obtained is governed by the provisions of G.S. 28-173.

The 1969 Act, being Chapter 215, Session Laws of 1969, is quoted in full below:

"AN ACT TO REWRITE G.S. 28-174, RELATING TO DAMAGES RECOVERABLE FOR DEATH BY WRONGFUL ACT.

"WHEREAS, human life is inherently valuable; and

"WHEREAS, the present statute is so written and construed that damages recoverable from a person who has caused death by a wrongful act are effectually limited to such figure as can be calculated from the expected earnings of the deceased, which is far from an adequate measure of the value of human life; Now, therefore,

"The General Assembly of North Carolina do enact:

"Section 1. G.S. 28-174 is hereby rewritten to read as follows:

" 'Sec. 28-174. *Damages recoverable for death by wrongful act; evidence of damages.* (a) Damages recoverable for death by wrongful act include:

(1) Expenses for care, treatment and hospitalization incident to the injury resulting in death.

(2) Compensation for pain and suffering of the decedent.

(3) The reasonable funeral expenses of the decedent.

(4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected:

(i) Net income of the decedent,

(ii) Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,

(iii) Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered.

(5) Such punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilfull or wanton injury, or gross negligence.

(6) Nominal damages when the jury so finds.

(b) All evidence which reasonably tends to establish any of the elements of damages included in subsection (a), or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act.'

"Sec. 2. All laws and clauses of laws in conflict with this Act are hereby repealed.

"Sec. 3. This Act shall not apply to litigation pending on its effective date.

"Sec. 4. This Act shall become effective upon ratification."

The 1969 Act was ratified on 14 April 1969.

In a comprehensive Comment entitled "Wrongful Death Damages in North Carolina," 44 N.C.L. Rev. 402-441 (1966), after examining the wrongful death statutes in all fifty states, the author states: "There are two generally accepted methods of measuring damages caused by wrongful death. The measure used by forty-three jurisdictions is that of loss to the survivors or beneficiaries caused by the death of the decedent. Six states compute damages according to the loss to the estate of the deceased only. Of the jurisdictions using neither of these methods, two states base recovery solely on the culpability of the defendant in causing the wrongful death; one state attempts to measure the damages according to the loss to the decedent himself; and two states use a combination of the loss-to-beneficiaries and loss-to-estate measures." *Id.* at 405-07.

The difficulty encountered when interpreting the 1969 Act is aggravated by the fact that distribution of the recovery in accordance with G.S. 28-173, although appropriate when the recovery is computed on the basis of the loss *to the estate* as under G.S. 28-174 prior to the 1969 Act, *is not appropriate* when as under the 1969 Act the recovery is based largely on losses suffered by particular beneficiaries.

In *Smith v. Mercer,* 276 N.C. 329, 172 S.E. 2d 489 (1970), it was held that the 1969 Act did not apply retroactively to deaths which occurred prior to 14 April 1969. Questions relating to the interpretation of the 1969 Act were deferred until directly presented in subsequent litigation.

The 1969 Act itemizes in paragraphs (1), (2), (3), (4), (5) and (6) the elements of damages recoverable for death by wrongful act.

Although not presently involved, we note that paragraph (6) provides for the recovery of nominal damages "when the jury so finds." This provision supplies a statutory basis which was lacking when *Armentrout v. Hughes, supra,* was decided. Nominal damages and costs may now be recovered if the jury finds that the decedent's death was caused by the defendant's wrongful act but fails to find that such death caused pecuniary loss.

In the present case, the damages which plaintiff seeks to recover are the funeral expenses and items of damages recoverable under paragraph (4).

Paragraph (3) provides for the recovery of "[t]he reasonable funeral expenses of the decedent." Under G.S. 28-173 the "burial expenses of the deceased" are to be paid "out of the recovery." Paragraph (3) appropriately provides that the amount thereof is to be considered an element of damages in determining the amount of the recovery.

Paragraph (4) provides for the recovery of "[t]he present monetary value of the decedent to the persons entitled to receive the damages recovered," including compensation for reasonably expected losses on account of the matters set forth in subparagraphs (i), (ii) and (iii).

The first step to determine the damages recoverable under paragraph (4) is to identify the particular persons who are entitled to receive the damages recovered. Although the exact date of Howard's birth does not appear, the evidence is that he was seventeen years old and unmarried when fatally injured on 26 June 1969. His father, Howard G. Bowen, Sr., who was born 28 September 1925, and his mother, Hazel A. Bowen, who was born 3 December 1927, are the persons who, by virtue of the Intestate Succession Act, are entitled to receive the damages recoverable in the action for his wrongful death. G.S. 29-15(3).

As set forth above, decisions of this Court based on G.S. 28-174 prior to the 1969 Act denied recovery when the evidence failed to show any pecuniary loss under the rule stated in *Bryant v. Woodlief, supra,* and cases cited. Too, often satisfac-

tory evidence of such pecuniary loss was unobtainable, notably in cases involving the death of minor chidren, elderly or handicapped persons, or a married woman whose service as wife and mother consisted of making a home. When the 1969 Act was under consideration, the virtues and value of a wife and mother were rightly extolled and the limitation of the value of her services to out-of-pocket pecuniary loss was decried. This emphasis caused the 1969 Act to bear the legislative nickname of "The Wife Bill." Comment, "The New North Carolina Wrongful Death Statute," 48 N.C.L. Rev. 594, 598 (1970).

Under the express provisions of the 1969 Act, the present monetary value of Howard to his parents by reason of their losses in the respects set forth in subparagraphs (i), (ii) and (iii) of paragraph (4) is recoverable in the wrongful death action. Since the evidence was to the effect that Howard was in good health, there was ample basis for a jury finding that Howard's life expectancy on 26 June 1969, the date of his fatal injury, was substantially greater than the life expectancy of his parents. If the jury so found, recovery for these items necessarily would be limited to the life expectancy of his last surviving parent.

Paragraph (4) provides for the recovery of *the present monetary value* of the decedent *to the persons entitled to receive the damages recovered.* Their recovery is for the loss of their *reasonably expected* (i) net income of the decedent, (ii) services, protection, care and assistance of the decedent, and (iii) society, companionship, comfort, guidance, kindly offices and advice of the decedent.

No rule is prescribed for the measurement or ascertainment of the damages recoverable under paragraph (4). It would be difficult, if not impossible, to formulate a rule of general application for the measurement of such damages. Recovery for these items will vary from case to case according to the age of the deceased and the age of the person entitled to receive the damages recovered and their relationship with the deceased. Since the persons entitled to the damages recovered may have suffered substantial losses on account of these items of damage, we cannot say there can be no recovery for these items of damages because no yardstick for ascertaining the amount thereof has been provided. Damages recoverable under paragraph (4) would be as capable of exact ascertainment as damages for pain and suffering and mental anguish in a personal

injury action. In recent years, "[i]t has been recognized that even pecuniary loss may extend beyond mere contributions of food, shelter, money or property; and there is now a decided tendency to find that the society, care and attention of the deceased are 'services' to the survivor with a financial value, which may be compensated." Prosser, Law of Torts ¶ 127, p. 908 (4th ed. 1971).

In the present factual situation, Howard may have made no financial contribution to the support of his parents during their active years. It may be that the persons who would receive his net income if he had survived would be a wife and a child or children. During his years in college, and during the earlier years of his career and possible marriage, it may be more likely that financial aid would flow from his parents to Howard rather than from Howard to his parents. Even so, the loss of a son may be a grievous loss and substantially deprive the parents of services such as those described in subparagraphs (ii) and (iii) of paragraph (4).

If the persons entitled to receive the damages recovered were a wife and a child or children, obviously the present value of their monetary loss would involve different considerations. If the persons entitled to the damages recovered were collateral relatives whose contacts with the decedent were casual and infrequent, there may be no basis for the recovery of any significant amount under paragraph (4).

[3] After verdict, Judge Exum was of the opinion, and rightly so, that his instructions with reference to damages recoverable under paragraph (4) were erroneous in that they predicated recovery for these items *solely* on the life expectancy of Howard. As stated above, whatever Howard's life expectancy, there can be no recovery for any of the items in paragraph (4) beyond the life expectancy of his last surviving parent. Hence, Judge Exum's order setting aside, as a matter of law, the jury's answer to the third issue, was correct. Plaintiff's exception thereto is without merit.

Questions relating to paragraphs (1), (2) and (5) will arise only when there is an appreciable interval between the time of injury and the time of death. Such questions are not presented now because electrocution caused Howard's instant death and no issue as to punitive damages was submitted or tendered. Even so, the following observations seem appropriate.

We note that, prior to the effective date of the 1969 Act, the elements of damages set forth in paragraphs (1), (2) and (5) were recoverable *only* in the injured party's right of action; that this right of action survived to his personal representative; that, in such action, the recovery constituted general assets of the estate; and that the applicable statute of limitations was three years, G.S. 1-52(5), while the applicable statute of limitations in a wrongful death action is two years, G.S. 1-53(4).

Paragraph (1) of the 1969 Act provides for the recovery of "[e]xpenses for care, treatment and hospitalization incident to the injury resulting in death," without limitation as to the amount thereof. However, under G.S. 28-173, any amount recovered therefor in excess of five hundred dollars *in a wrongful death action* would not be subject to the debts of the decedent.

Paragraph (2) provides for the recovery of "[c]ompensation for pain and suffering of the decedent." However, under G.S. 28-173, recovery therefor *in a wrongful death action* would not be subject to the debts of the decedent.

Paragraph (5) provides for the recovery of punitive damages. However, under G.S. 28-173, recovery therefor *in a wrongful death action* would not be subject to the debts of the decedent.

Manifestly, a defendant may not be required to pay these elements of damage twice. If the two causes of action are joined in one complaint, each should be stated separately; if separate actions are instituted, they should be consolidated for trial. Unless rendered unnecessary by stipulation, separate issues should be submitted (1) as to whether the decedent was injured by the wrongful act of the defendant, and (2) as to whether the decedent's death was caused by the wrongful act of the defendant. *See Hinson v. Dawson,* 241 N.C. 714, 86 S.E. 2d 585, 15 A.L.R. 2d 333. In a case involving any or all of the items of damages within paragraphs (1), (2) and (5), it would be advisable to submit a separate issue with reference to each of these items. This would provide a basis for subsequent decision as to whether the recovery for these items would constitute general assets of the estate. Although it would seem improbable that the General Assembly intended that recovery for these items should be exempt from liability for the payment of the debts and legacies of the decedent, we defer definitive decision until the subject is further explored in a case in which the question is directly presented.

Questions relating to paragraphs (1), (2) and (5) are not the only difficult questions which will be presented in subsequent cases. Suppose, for example, that under the Intestate Succession Act ten nephews and nieces are the persons entitled to receive the damages recovered in a wrongful death action; and that *one* is the devoted friend and companion of the deceased and suffers loss of support, services, guidance, etc., as the result of his death. While this may be considered in determining the amount of the recovery, under G.S. 28-173 each of the ten would be entitled to share equally in the distribution thereof.

In the context of the present factual situation, we hold that G.S. 28-173 and G.S. 28-174, as rewritten by the 1969 Act, can be reconciled and implemented. However, we cannot say that this can be done in the context of all factual situations that may come before us. We are not at liberty to amend or otherwise rewrite these statutes. In light of the multiple questions and difficulties they engender, it would seem that legislative reconsideration is urgent.

Defendants' Appeal — Part II

Judge Exum denied defendants' alternative motion for a new trial on the first and second issues. They bring forward for consideration, in the event their Assignment of Error No. 1 should be overruled, assignments of error relating to the first and second issues. After consideration of each of these assignments, we are of the opinion and hold that none discloses prejudicial error.

As applied to the present factual situation, we hold that subparagraphs (ii) and (iii) of paragraph (4) of G.S. 28-174(a) are not unconstitutionally vague and therefore violative of Article I, Section 19, of the Constitution of North Carolina, and the Fourteenth Amendment to the Constitution of the United States, as asserted by defendants.

[4] Even so, defendants contend that this Court, in its discretion, should order a new trial as to all issues. As pointed out by Justice Walker in *Lumber Co. v. Branch,* 158 N.C. 251, 253, 73 S.E. 164, 165 (1911): "It is settled beyond controversy that it is entirely discretionary with the Court, Superior or Supreme, whether it will grant a partial new trial. It will generally do so when the error, or reason for the new trial, is confined to one issue, which is entirely separable from the others and it is perfectly clear that there is no danger of

complication." *Accord, Johnson v. Lewis,* 251 N.C. 797, 804, 112 S.E. 2d 512, 517 (1960), and cases there cited. Being of opinion that this case falls within the general rule, this Court, in the exercise of its discretion, approves the ruling of the trial court which limits the new trial to the (third) issue of damages.

Defendants have also asserted numerous errors in respect of evidence rulings and instructions relating to the (third) issue of damages. In view of the nature of the error for which the verdict on this issue was set aside, we deem it inadvisable to undertake to discuss defendants' assignments relating to their additional asserted errors on the present record.

Based upon the foregoing, we affirm the decision of the Court of Appeals in respect of plaintiff's appeal and in respect of defendants' appeal.

On plaintiff's appeal: Affirmed.

On defendants' appeal: Affirmed.

TENNESSEE CAROLINA TRANSPORTATION, INC. v. STRICK CORPORATION

No. 11

(Filed 1 June 1973)

1. **Sales § 6; Uniform Commercial Code § 15— implied warranty of fitness — Pennsylvania law**

In Pennsylvania the implied warranty of fitness for a particular purpose, Pa. Stat. Ann. tit. 12A, § 2-315 (1970), not only protects a buyer who purchases goods with the intention of using them in a "particular" manner, meaning a manner in which they would not normally be expected to be used, but also protects a buyer when his particular purpose is the general or ordinary purpose; consequently, the warranty of fitness applied to trailers purchased for the general or ordinary purpose of hauling cargo.

2. **Sales § 6; Uniform Commercial Code § 15— implied warranty of fitness — implied warranty of merchantability — Pennsylvania law**

Under Pennsylvania law both the implied warranty of merchantability and the implied warranty of fitness would exist where the seller is a merchant with respect to goods of that kind, the buyer is buying the goods for the ordinary purpose, and the requirements of Pa. Stat. Ann. tit. 12A, § 2-315 (1970) are met.

3. **Sales § 6; Uniform Commercial Code § 15— disclaimer of warranties previously created — Pennsylvania law**

Under Pennsylvania law a disclaimer in a purchase money security agreement could not as a matter of law disclaim the implied warranties previously created in the written sales arrangement. Pa. Stat. Ann. tit. 12A, § 9-206(2) (1970).

4. **Sales § 18; Uniform Commercial Code § 20— warranty of fitness — exclusion by course of dealing or performance — insufficiency of evidence**

In an action to recover damages for breach of an implied warranty of fitness of trailers purchased from defendant, the evidence did not require submission of an issue to the jury as to whether implied warranties had been excluded "by course of dealing or course of performance" within the purview of Pa. Stat. Ann. tit. 12A, § 2-316(3)(c) (1970).

5. **Sales § 19; Uniform Commercial Code § 20— breach of warranty — buyer retains goods — measure of damages — Pennsylvania law**

Under Pennsylvania law the measure of damages for breach of warranty, when the buyer retains the goods and sues for the loss of bargain occasioned by the failure of the goods to conform to the warranty, is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted. Pa. Stat. Ann. tit. 12A, § 2-714(2) (1970).

6. **Courts § 21— contract made in another state — admission of evidence — what law governs**

Questions of the admission and exclusion of evidence are generally considered procedural and governed by the *lex fori.*

7. **Evidence § 19— value of personal property — value at another time**

Where the value of personal property at a given point in time is in issue, evidence of its value within a reasonable time before or after such point is competent as bearing upon its value at the time in issue, but evidence of the property's value beyond a reasonable time before or after that point lacks probative value and is incompetent.

8. **Sales § 14; Uniform Commercial Code § 20— breach of warranty — cost of repairs**

While the cost of repairs may be competent as tending to show the difference between the value of goods as warranted and as delivered, such evidence must be confined to a point in time reasonably proximate to the date of delivery.

9. **Sales § 14; Uniform Commercial Code § 20— breach of warranty of fitness — evidence of value at time after acceptance — evidence of cost of repairs — prejudicial error**

In this action to recover damages for breach of the implied warranty of fitness of trailers purchased from defendant, the trial court committed prejudicial error in the admission of opinion testimony of the value of the trailers more than two and a half and more than five years after the time of acceptance and in the admission of

testimony as to what it would cost to repair the trailers at an unspecified time more than two years after the acceptance, and defendant is entitled to a new trial on the issue of damages.

10. **Sales § 19; Uniform Commercial Code § 20— breach of warranty — damages — effect of repairs by seller**

In an action for breach of an implied warranty of trailers which is governed by Pennsylvania law, the measure of damages established by Pennyslvania statute should be reduced by the amount, if any, by which repairs made by the seller enhanced the value of the trailers.

11. **Sales § 14— breach of warranty — new trial on damages issue — new trial on breach of warranty issue**

In an action for breach of warranty of fitness of 150 trailers, a new trial on the issue of damages also requires a new trial on the issue as to breach of warranty because the jury that assesses the damages should be the same jury that determines whether and to what extent the fitness warranty was breached.

12. **Sales § 17; Uniform Commercial Code § 21— breach of warranty — entire order**

It is not necessary that each and every commercial unit in an order of goods manufactured under the same specifications be shown to have become totally unusable before recovery may be had for breach of warranty with respect to the entire order.

13. **Sales § 17; Uniform Commercial Code § 20— breach of warranty — entire order of trailers — sufficiency of evidence**

Plaintiff's evidence was sufficient to go to the jury on the issue of breach of warranty of fitness with respect to all 150 trailers purchased from defendant, although 141 trailers are still in service, where it tended to show that the 150 trailers constituted one order and were manufactured under the same specifications, one trailer collapsed eight days after it was put in service while carrying a normal load under normal conditions and another collapsed five months later, defendant thereafter reinforced the top rails of the trailers with an additional rail 20 feet long, two years later seven more trailers collapsed within a short period of time by breaking in two at the end of such 20-foot section, and the trailers were thereafter used as much as possible to haul light-type freight.

14. **Courts § 21; Sales § 19; Uniform Commercial Code § 20— breach of warranty — pre-judgment interest — what law governs**

Where an action for breach of warranty was governed by the substantive law of Pennsylvania, the place where the parties contracted, the question of pre-judgment interest was governed by Pennsylvania law.

15. **Interest § 1— breach of contract actions — recovery of interest — Pennsylvania law**

Under Pennsylvania law interest is recoverable as a matter of right in actions for breach of contract only in cases falling within the provisions of Restatement of Contracts § 337(a), which provides for the recovery of interest as a matter of right only where non-

performance, not defective performance, constitutes the breach of contract sued on.

16. **Interest § 1; Sales § 19— breach of warranty — Pennsylvania law — damages for delay in compensation**

Under Pennsylvania law the jury in an action for breach of warranty has the discretion to award "damages for delay in compensation" in the amount of six percent per annum on any damages awarded for breach of warranty, calculated from the date of the breach to the date of the judgment on the verdict.

DEFENDANT appeals from decision of the Court of Appeals, 16 N.C. App. 498, upholding judgment of *McLean, J.*, 14 February 1972 Session, MECKLENBURG Superior Court.

Civil action to recover damages for breach of contract with respect to the sale and purchase of 150 trailers. When the case was called for trial "the plaintiff stipulated it would proceed on the theory of breach of implied warranty of fitness and for damages for said breach."

Allegations of the complaint pertinent to an understanding of the case appear in the following paragraphs (numbering ours):

1. Plaintiff is a Tennessee corporation with its home office in Nashville, Tennessee. It is engaged in the trucking industry as a common cargo carrier and operates in several states, including North Carolina, under its interstate Commerce Commission franchise.

2. Defendant is a trailer manufacturer incorporated in the State of Pennsylvania where its home offices are located. It has a place of business in Charlotte where it operates a sales, service and trailer repair shop. It has a factory in Chicago, Illinois.

3. On 10 July 1967 in the State of Pennsylvania, plaintiff entered into a contract with defendant to purchase 150 trailers, forty-two feet in length, at the agreed price of $5,695.00 each, for a total purchase price of $854,250.00. At the time the contract was entered into, the trailers were not in existence and were to be built by defendant and delivered to plaintiff f.o.b. Chicago factory in groups of fifty each on or about September 1, October 10, and October 25, 1967.

4. The trailers were received by plaintiff and placed in service. Soon thereafter as a result of gross weakness of the

structure of said vehicles, "they commenced breaking in-two when in use." Defendant acknowledged that the breaking was due to improper design and manufacture, requested plaintiff to deliver each of the 150 vehicles to defendant's repair facilities in St. Louis, Missouri, and Charlotte, North Carolina, "so that defendant could add further structural strength to said vehicles, which defendant claimed would remedy the structural defects in the vehicles." Plaintiff delivered the vehicles as requested, at great cost and inconvenience to plaintiff in addition to the loss suffered from loss of use of the trailers while they were being repaired.

5. The repairs made by defendant did not remedy the defect and some of the trailers continued to break in two, four being broken down and out of service when the complaint was filed on 21 July 1970.

6. Defendant refuses to make any further effort to eliminate the defects.

7. Plaintiff relied on defendant's skill and experience in the manufacture of the trailers, used them in a careful and prudent manner, and the damages plaintiff has suffered were proximately caused by defendant's breach of its implied contract.

8. Plaintiff has been damaged in the sum of $670,000.00.

Defendant denied all material allegations of the complaint, especially denying that there was an implied warranty or that there was any breach of warranty, or that the vehicles commenced breaking in two when in use, or that there was any gross weakness in the structure of the vehicles. Defendant averred and affirmatively pled that plaintiff had executed six Time Sale Contracts and Security Agreements, each of which contained a disclaimer of all warranties, express or implied. Based thereon, defendant alleges that there is no warranty of fitness for purpose or with respect to any other matter pertaining to the construction or design of the 150 trailers in question.

Plaintiff's evidence tends to show that on 20 October 1967 one of the trailers collapsed eight days after it was put in service while carrying a load of approximately 40,000 pounds and traveling at approximately forty-five miles per hour on an average two-lane road about five miles east of Ashley, Illinois.

The top of the trailer "more or less buckled out, rivets had burst out and the floor of it had swayed in." On 14 March 1968 another trailer collapsed. Defendant was notified of these failures and recalled all 150 trailers "to modify them." The trailers were returned and defendant, in the belief that the top rails were soft, reinforced them with an additional rail twenty feet long. Thereafter plaintiff used the trailers with no further major problems until the spring of 1970 when the trailers began collapsing or breaking in two again "right at the end of this twenty-foot section." Seven more collapsed in this fashion. Defendant was notified but declined to do anything further to correct the defects.

Plaintiff then offered evidence from its terminal manager in St. Louis, Missouri, and others that since the spring of 1970, pursuant to instructions from plaintiff's operations manager, the Strick trailers were used as much as possible for the light-type freight such as shoe accounts and bulky miscellaneous freight. Anything that has a concentrated weight "we normally try to keep off of these trailers."

In 1969, after installation of the twenty-foot reinforcement rails, defendant's representative, Mr. Lechette, told plaintiff he was familiar with the problems necessitating the reinforcement rails; that his opinion was "that the trailer had been built on 28-foot specifications in Chicago on double trailers instead of 42-foot specifications, which caused the problem."

Charles Youree, president of plaintiff corporation, testified that the value of each of the 150 Strick trailers at the time of their delivery in 1967 was approximately $3400 to $3500 per trailer. Mr. Youree further stated that, although his company usually depreciates trailers over a period of six years, trailers have a life expectancy of around eight years. He stated that the Strick trailers had been in service only two years and seven months when the rash of failures began in March 1970.

Defendant's evidence tends to show that beginning in August 1967 and continuing through 31 October 1967 defendant delivered to plaintiff the 150 trailers in lots of twenty-five. Upon each delivery plaintiff signed a "Time Sale Contract and Security Agreement" covering the twenty-five trailers delivered. Six such security agreements, all identical, were executed by plaintiff. No express warranties were contained in either the Purchase Order Contract or the Security Agreements. The

Security Agreements, however, each contained in Paragraph (h) thereof the following language: "There are no promises, understandings, agreements, representations, or warranties (except the warranties set forth in the Sales Order if the goods covered hereby are new), express or implied, respecting the Equipment which are not specified herein. This instrument contains the entire agreement between the parties, is made and accepted in Pennsylvania, and shall be governed and interpreted according to the laws of Pennsylvania."

Defendant's evidence further tends to show that the top rail reinforcement work on the 150 trailers was carried out between 16 February and 19 July, 1968, with most of the trailers entering and leaving the shop the same day; that many of the side posts were either totally destroyed or seriously damaged by forklifts, hand trucks, loading crates and general freight cargo; that when the posts are knocked out or severely damaged the structural integrity of the unit is destroyed, causing failure in either the top rail or the bottom rail or both.

Ronald Lewis Zubko, defendant's chief engineer at the Chicago plant, responsible for the production engineering of the trailers in question, testified that these 42-foot trailers were not built on so-called 28-foot trailer frames; that Strick has never built a 28-foot double trailer; that the top rail specified for 42-foot trailers is completely different from the top rail specified for 27- or 28-foot doubles; that each of the 150 trailers in question was designed for a 55,000 pound payload, uniformly distributed, and the strength of the materials used was calculated to support 110,000 pounds dead weight, sitting on the ground without moving, and the materials in the trailers had been used for approximately twenty years.

Mr. Zubko further testified that he was familiar "with the soft top rail on these trailers"; that there are specific industry charts "which show the relationship between hardness in aluminum and its strength"; that tests to measure softness or hardness revealed that "this rail was something like 10 points under what we would expect it to be. This is about 15% reduction in the overall physical properties of this material. This is not a 15% off the weight carrying of the 110,000 pounds that I spoke of. . . . The reading of the test hardness meter could be almost down to half of the accepted level and the rail would still be strong enough to carry the load at the rated capacity."

Issues were submitted to and answered by the jury as follows:

"1. Did the defendant impliedly warrant to the plaintiff that the trailers sold by the defendant to the plaintiff were fit for the particular purpose for which the plaintiff purchased them?

ANSWER: Yes.

2. Did the defendant breach its contract with the plaintiff as alleged in the Complaint?

ANSWER: Yes.

3. In what amount, if any, is the defendant indebted to the plaintiff?

ANSWER: $215,600.00."

The trial judge signed judgment for the amount of the verdict and added interest thereon from 31 October 1967, the date on which the last twenty-five trailers were delivered to plaintiff. The defendant, having moved in apt time for a directed verdict, which was denied, filed a written motion for judgment notwithstanding the verdict or, in the alternative, to set the verdict aside and award defendant a new trial. This motion was denied and defendant appealed. The Court of Appeals found no error with Britt, J., dissenting, and defendant appealed to the Supreme Court as of right under G.S. 7A-30(2). Errors assigned will be discussed in the opinion.

Welling & Miller by George J. Miller and Charles M. Welling; Schnader, Harrison, Segal & Lewis by W. P. Sandridge of Womble, Carlyle, Sandridge & Rice, for defendant appellant.

Wallace S. Osborne and Waggoner, Hasty & Kratt by William J. Waggoner, for plaintiff appellee.

HUSKINS, Justice.

The sales contract here involved was executed in Pennsylvania but was to be performed, apparently, in Illinois. Although the applicable law is clear where a contract is made and is to be performed in the same foreign state, *Motor Co. v. Wood*, 238 N.C. 468, 78 S.E. 2d 391 (1953); *Price v. Goodman*, 226 N.C. 223, 37 S.E. 2d 592 (1946), no North Carolina case has determined what law applies where the place of performance *differs*

from the place of contracting. *See Arnold v. Charles Enterprises,* 264 N.C. 92, 141 S.E. 2d 14 (1965); Wurfel, Choice of Law Rules in North Carolina, 48 N.C. L. Rev. 243 (1970). In such a situation the traditional rule appears to be that matters of performance and damages for nonperformance are governed by the law of the place of performance. Restatement (First) of Conflict of Laws, §§ 358, 372, 413 (1934); 3 Williston, *Sales* § 589(d) (1948). *But see* Restatement (Second) of Conflict of Laws, §§ 188, 205, 207 (1971); G.S. 25-1-105.

However, in the case before us the parties have not contended that any law other than the law of Pennsylvania shall govern. We proceed accordingly, noting only that the contract of sale did not attempt to choose the applicable law, but each of the six security agreements provided: "This instrument . . . is made and accepted in Pennsylvania, and shall be governed and interpreted according to the laws of Pennsylvania."

Therefore, the substantive issues in the case before us are to be resolved under the law of Pennsylvania, of which we are required to take judicial notice by G.S. 8-4. With respect to procedural matters, the law of North Carolina governs. *Arnold v. Charles Enterprises, supra.* "In the trial of an action whatever relates merely to the remedy and constitutes a part of the procedure, is determined by the law of the forum; but whatever goes to the substance of the controversy and affects the rights of the parties is governed by the *lex loci.*" *Wise v. Hollowell,* 205 N.C. 286, 171 S.E. 82 (1933). *Accord, Knight v. Associated Transport,* 255 N.C. 462, 122 S.E. 2d 64 (1961); *Clodfelter v. Wells,* 212 N.C. 823, 195 S.E. 11 (1937).

[1] At trial, plaintiff stipulated that it was not relying on the implied warranty of merchantability, Pa. Stat. Ann. tit. 12A, § 2-314 (1970). Therefore, the suit was only for breach of the implied warranty of fitness for a particular purpose, Pa. Stat. Ann. tit. 12A, § 2-315 (1970). Defendant now contends that such a suit is tenable only where the goods were purchased for a *particular* purpose. It further contends that this term does not embrace purchases of goods for the *general* purpose for which goods of that kind are used. Thus, defendant urges that plaintiff has failed to make out a case for the jury since it bought the trailers not for a particular purpose but rather for the general or ordinary purpose of hauling cargo. For this reason defendant assigns as error the overruling of its motion for directed verdict.

We find no merit in this assignment. Although the primary purpose of Pa. Stat. Ann. tit. 12A, § 2-315 (1970) is indeed to protect a buyer who purchases goods with the intention of using them in a "particular" manner, meaning a manner in which they would not normally be expected to be used, we do not think that section is limited exclusively to purchases of such a nature. That warranty also protects a buyer when his particular purpose *is* the general or ordinary purpose.

Although no cases have been found either expressly adopting or rejecting this construction of "particular purpose," Professor Nordstrom so construes that term. See Nordstrom *Sales* § 78 (1970): "[I]f the buyer's use of the goods is the ordinary use of those goods, . . . the buyer's particular purpose coincides with the ordinary use of the goods, and *either section 2-314 or section 2-315* will give the buyer the protection he needs." (Emphasis added.) Such was also the rule at common law. See 46 Am. Jur. *Sales* § 346 (1943).

Despite the lack of authority expressly adopting this interpretation of "particular purpose," several cases have done so impliedly, without discussion of the issue. *See* Annot. 17 A.L.R. 3d 1010, 1071 (1968). Among these is *Adams v. Scheib,* 408 Pa. 452, 184 A. 2d 700 (1962). There, the Pennsylvania Supreme Court held that where plaintiff bought pork sausage for the purpose of consumption—obviously the ordinary purpose—an implied warranty arose, citing *both* Pa. Stat. Ann. tit. 12A, § 2-314 *and* § 2-315. See also *L & N Sales Co. v. Stuski,* 188 Pa. Super. 117, 146 A. 2d 154 (1958), where whiskey pourers were bought for the ordinary purpose of pouring drinks, and the Pennsylvania Superior Court, assuming that a warranty of fitness for a particular purpose arose under Pa. Stat. Ann. tit. 12A, § 2-315, held that such warranty was not excluded by an express warranty of merchantability or by a disclaimer contained in the purchase money security agreement executed after the sale.

Therefore, we think it beyond dispute that in Pennsylvania the warranty of fitness, Pa. Stat. Ann. tit. 12A, § 2-315 (1970), does protect a buyer whose particular purpose *is* the general or ordinary one.

[2] Under this construction *both* implied warranties would exist where the seller is a merchant with respect to goods of that kind, the buyer is buying the goods for the ordinary pur-

pose, and the requirements of Pa. Stat. Ann. tit. 12A, § 2-315 (1970) are met. Nothing in the Code prohibits such a double warranty. See Comment 2, Pa. Stat. Ann. tit. 12A, § 2-315 (1970): "A contract may of course include both a warranty of merchantability and one of fitness for a particular purpose." Of course, in such a situation, the warranty of fitness will not normally be needed since there will also be a warranty of merchantability. However, in the case before us the warranty of fitness is needed since plaintiff stipulated away his warranty of merchantability.

Thus, plaintiff has chosen, for reasons obscure, to rely solely on the implied warranty of fitness—a warranty that is more difficult to prove than the implied warranty of merchantability. In so doing, he has made an inexplicable choice, but one not, as a matter of law, fatal to his claim for damages. Therefore, plaintiff's choice did not entitle defendant to a directed verdict.

The contract of sale was executed on 10 July 1967. Thereafter, plaintiff executed six separate security agreements, each covering twenty-five trailers. The first of these security agreements was dated 30 August 1967; the last, 31 October 1967. Each security agreement contains in Paragraph (h) thereof the following language: "There are no promises, understandings, agreements, representations, or warranties . . . , express or implied, respecting the Equipment which are not specified herein." Paragraph (h) is on page 2 of the security agreement, printed in the same color as the other printing and in the smallest print used on that page. On page 3 immediately preceding the signature lines, the words "NOTICE TO BUYER" are printed in block letters. Under these words in small print is this message: "This contract was prepared by Strick Corporation (seller). Do not sign this contract before you read it or if it contains any blank spaces."

Defendant contends the quoted portions of the security agreement exclude all implied warranties, and for this reason the overruling of its motions for directed verdict is assigned as error. Plaintiff contends the attempted exclusion is ineffective under the laws of Pennsylvania, and the trial judge and the Court of Appeals so held.

The Court of Appeals grounded its decision on the conclusion that the disclaimer, not being "conspicuous" within the

meaning of Pa. Stat. Ann. tit. 12A, §§ 2-316(2) and 1-201(10) (1970), was therefore ineffective as a matter of law. Many cases have adopted a like approach in applying the Code, refusing to give effect to a disclaimer where it is inconspicuous without further inquiry as to whether the buyer was protected from the surprise of an unexpected and unbargained disclaimer by factors other than the physical conspicuousness of the clause itself. *Eg. Entron Inc. v. General Cablevision of Palatka,* 435 F. 2d 995 (5th Cir. 1970); *Boeing Airplane Co. v. O'Malley,* 329 F. 2d 585 (8th Cir. 1964).

However, the purpose of the "conspicuous" requirement, despite its unqualified language, is, as stated in Comment 1, Pa. Stat. Ann. tit. 12A, § 2-316 (1970), to "protect a buyer from unexpected and unbargained language of disclaimer by . . . permitting the exclusion of implied warranties only by conspicuous language or *other circumstances which protect the buyer from surprise.*" (Emphasis added.) Although the emphasized language might refer only to Pa. Stat. Ann. tit. 12A, § 2-316(3) (1970), certainly *actual awareness of the disclaimer* is another circumstance which protects the buyer from the surprise of unexpected and unbargained language of disclaimer. Perhaps an additional circumstance of this sort arises where, as here, the buyer is a non-consumer with bargaining power substantially equivalent to the seller's.

Where both of these circumstances are shown—the buyer is a non-consumer on substantially equal bargaining terms with the seller and is actually aware of the disclaimer prior to entering the sales contract—possibly the disclaimer should be enforced despite its inconspicuousness, in the absence of a showing of unconscionability, since the purpose of the "conspicuous" requirement has been satisfied.

[3] However, we have found no authoritative Pennsylvania decision applying Pa. Stat. Ann. tit. 12A, § 2-316(2) (1970) in such fashion. Nor have we found an authoritative Pennsylvania decision applying that statute in the rigid fashion employed by the Court of Appeals. In this case, however, it is unnecessary for us to decide whether the "conspicuous" requirement has been satisfied by "other circumstances which protect the buyer from surprise" because the disclaimer here is inoperative by reason of Pa. Stat. Ann. tit. 12A, § 9-206(2) (1970).

That section reads as follows: "When a seller retains a purchase money security interest in goods the Article on Sales

(Article 2) governs the sale and any disclaimer . . . of the seller's warranties." Comment (3) says that this section "prevents a buyer from inadvertently abandoning his warranties by a 'no warranties' term in the security agreement when warranties have already been created under the sales arrangement. Where the sales arrangement and the purchase money security transaction are evidenced by only one writing, that writing may disclaim . . . warranties to the extent permitted by Article 2."

Thus, it appears that this section gives no effect to a disclaimer contained in a purchase money security agreement when express or implied warranties have already been created in the written sales arrangement. In such circumstances it is Article 2 of the Uniform Commercial Code, and not the terms of the security agreement, which governs the question of disclaimer.

The Pennsylvania Superior Court has recognized this principle in the form in which it existed in the Original Draft of the Uniform Commercial Code, adopted in Pennsylvania in 1953. See *L & N Sales Co. v. Stuski, supra* (188 Pa. Super. 117, 146 A. 2d 154), where the court, applying Pa. Stat. Ann. tit. 12A, § 9-206(3) (1954), which has since been repealed and its principle incorporated into the present § 9-206(2), said:

> "[T]he conditional sales contract, regardless of language contained therein, under the present circumstances cannot be considered as limiting or releasing plaintiff from liability on any warranty made by the seller at the time the sales contract was executed, since the security agreement was executed subsequent thereto for the purpose of securing the credit extended to the defendant."

Accordingly, the disclaimer, being in the purchase money security agreement, could not as a matter of law disclaim the implied warranties previously created in the written sales arrangement. This assignment of error is overruled.

[4] Defendant also contends that although the issue of "conspicuousness" was properly an issue for the court, Pa. Stat. Ann. tit. 12A, § 1-201(10), still there remained a question for the jury with respect to the validity of the disclaimer. It assigns as error the trial court's failure to submit an issue thereon. Under Pa. Stat. Ann. tit. 12A, § 2-316(3)(c) (1970) an implied warranty can be excluded "by course of dealing or course of

performance," and defendant asserts that the jury should have been allowed to determine if such occurred here.

However, there was only slight evidence of *any* "course of dealing" between the parties. See Pa. Stat. Ann. tit. 12A, § 1-205(1) (1970). And there was no evidence whatsoever showing the exclusion of warranties by the course of such dealing. Nor did the evidence with respect to "course of performance" raise an issue regarding exclusion of implied warranties. Instead, the evidence tends to show that both parties believed there was a warranty throughout the entire course of performance under the contract and acted accordingly. Therefore, no question for the jury existed with respect to the disclaimer; and the failure to submit an issue thereon was not error.

We have already discussed the ineffectiveness of the disclaimer. And since plaintiff has in addition made a factual showing, sufficient to go to the jury, of the existence of an implied warranty of fitness for a particular purpose under Pa. Stat. Ann. tit. 12A, § 2-315 (1970), its breach, the giving of notice of such breach within a reasonable time thereafter as required by Pa. Stat. Ann. tit. 12A, § 2-607(3)(a) (1970), and of the proper measure of damages for such breach under Pa. Stat. Ann. tit. 12A, § 2-714(2) (1970), it follows that defendant's motions for directed verdict were properly denied.

[9] Defendant contends that plaintiff's witness Guinn was improperly allowed to give evidence concerning the fair market value of the trailers in June 1970; that the same error was committed with respect to the testimony of plaintiff's witness Lentz concerning fair market value in January 1972; and that it was also error to permit plaintiff's witness Berry to testify with respect to what it would cost to repair the trailers at some unspecified time in 1970.

[5] The measure of damages for breach of warranty, when the buyer retains the goods and sues for the loss of bargain occasioned by the failure of the goods to conform to the warranty, is "the difference *at the time and place of acceptance* between the value of the goods accepted and the value they would have had if they had been as warranted. . . . " Pa. Stat. Ann. tit. 12A, § 2-714(2) (1970). (Emphasis added.)

Here, the contract of sale provided that delivery was to be "F.O.B. Chicago plant, 30 New/wk. begin. wk. of Aug. 7

& 14th. Thereafter 15-20/wk. until balance of order completed." The first delivery was made "toward the end of August . . . it was close to the first of September, 1967." Apparently, the actual date was 30 August 1967, the date of the first of the six security agreements. The entire order was completed within "two or three months"—apparently on 31 October 1967, the date of the last of the six security agreements.

Thus, the *proper* time for a determination of the value of the trailers under Pa. Stat. Ann. tit. 12A, § 2-714(2) was the period from 30 August 1967 through 31 October 1967, the time during which delivery and acceptance of the trailers occurred. However, the opinions of witnesses Guinn and Lentz were, respectively, opinions of the value of the trailers more than two and one half and five years after the time of acceptance.

[6] With respect to the admissibility of this testimony, we look to our own law, since questions of the admission and exclusion of evidence are generally considered procedural and governed by the *lex fori. Howard v. Howard,* 200 N.C. 574, 158 S.E. 101 (1931); Restatement (Second) of Conflict of Laws § 138 (1971); Leflar, *American Conflicts Law* § 123 (1968).

[7] Where the value of personal property at a given point in time is in issue, evidence of its value within a reasonable time before or after such point is competent as bearing upon its value at the time in issue. *Newsome v. Cothrane,* 185 N.C. 161, 116 S.E. 415 (1923). Evidence of the property's value beyond a reasonable time before or after that point lacks probative force and is incompetent. *Highway Comm'n v. Hartley,* 218 N.C. 438, 11 S.E. 2d 314 (1940) (real property). See 31A C.J.S. Evidence § 183(5) (1964): "[E]vidence of value is relevant only when directed to value at the time in question, or at a time so near thereto that it may reasonably be expected to throw some light on the value at such time. Evidence of value a considerable time . . . after the time in question is not admissible, in the absence of further evidence showing either that the value remained the same, or the comparative values on the two occasions."

[9] The testimony of Guinn and Lentz was thus improperly admitted, since "[t]here is a fundamental postulate of evidence that circumstances which are irrelevant to the existence or nonexistence of the disputed facts are not admissible." *Godfrey v. Power Co.,* 190 N.C. 24, 128 S.E. 485 (1925).

Although the admission of irrelevant evidence is not grounds for reversal unless it would tend to mislead or confuse the jury or prejudice the party against whom it is offered, *Deming v. Gainey*, 95 N.C. 528 (1886), we think such was the likely impact of this evidence upon the jury here. This is especially so in light of the judge's erroneous instruction that "you may consider this evidence as bearing upon the fair market value of the trailers at the time they were delivered to plaintiff."

[8, 9] The above discussion applies with equal force to the testimony of plaintiff's witness Berry with respect to the cost of repairing the trailers as of some unspecified time in 1970. Although the cost of repairs may be competent as tending to show the difference between the value of the goods as warranted and as delivered, *Wagner Tractor Inc. v. Shields*, 381 F. 2d 441 (9th Cir. 1967); *Meyers v. Antone*, 227 A. 2d 56 (D.C. Ct. App. 1967), such evidence must likewise be confined to a point in time reasonably proximate to the date of delivery.

Accordingly, this assignment of error is sustained. Defendant is entitled to a new trial on the issue of damages.

[10] We note that at the first trial, defendant introduced no evidence tending to show the amount, if any, by which its repairs increased the value of the trailers above their value at delivery. Plaintiff introduced no evidence tending to show incidental or consequential damages resulting from the seller's breach of warranty. Should either party offer evidence on these matters on retrial, it will be the duty of the court to instruct the jury with respect to the significance of such evidence. Regarding the repairs made by defendant, the jury should be instructed that the measure of damages established by Pa. Stat. Ann. tit. 12A, § 2-714(a) (1971) (that is, the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted) should be reduced by the amount, if any, by which the repairs enhanced the value of the trailers. *See Marsh v. McPherson*, 105 U.S. 709, 26 L.Ed. 1139 (1881). With respect to incidental and consequential damages, the jury should be instructed in accordance with Pa. Stat. Ann. tit. 12A, § 2-715 (1971).

[11] Of necessity, a new trial on the issue of damages also requires a new trial on the issue as to breach of warranty because the jury that assesses the damages should be the same

jury that determines whether, *and to what extent,* the fitness warranty was breached.

In regard to this issue, defendant contends that plaintiff's evidence shows, at best, that the fitness warranty was breached with respect to only nine of the 150 trailers since 141 trailers were still in service. From this, defendant argues that it was error to permit the jury to find that *more* than nine trailers failed to conform to the warranty and to award damages therefor.

[12] In essence, this argument appears to be that *each and every* commercial unit in an order of goods manufactured under the same specifications must be shown to have become totally unusable before recovery may be had for breach of warranty with respect to the entire order. As such, this argument is untenable.

[13] In the first place, it need not be shown that any given unit is totally unusable before a breach of warranty occurs. It is enough that the unit is unfit for use in the manner warranted by the seller. In addition, the evidence shows that the 150 trailers constituted one order and were manufactured under the same specifications. One of the trailers collapsed eight days after it was put in service while carrying a normal load under normal conditions. About five months later a second trailer collapsed. Defendant thereupon recalled all 150 trailers "to modify them," in the belief that the top rails were soft, and did so by reinforcing the top rails with an additional rail twenty feet long. The trailers were then used without further major problems for about two years when they again commenced breaking in two "right at the end of this 20-foot section." Seven more collapsed in this fashion in a relatively short period of time. Thereafter, the trailers were used as much as possible to haul light-type freight. Each driver of the nine trailers which collapsed testified that he had never before experienced a similar failure with any kind of trailer. We hold that this evidence entitles plaintiff to go to the jury on the breach of warranty issue with respect to all 150 trailers. It is for the jury to determine, under proper instructions, whether the fitness warranty was breached as to all, part or none of the 150 trailers, and assess the damages accordingly.

Finally, defendant contends that the trial court improperly added pre-judgment interest from 31 October 1967 to the $215,600.00 verdict rendered by the jury. This covered a period

of about four years and four months and amounted to almost $56,000.00 in interest.

We must first decide what law is applicable. On questions of damages, the majority view seems to be that the law of the forum does not apply since the measure of recovery is a substantive matter. *See* 22 Am. Jur. 2d *Damages* § 3 (1965). Instead, where the action is for breach of contract, damages will usually be controlled by the law of the place of performance. Leflar, *American Conflicts Law* § 151 (1968); Restatement (First) of Conflict of Laws § 413 (1934). *But see* Restatement (Second) of Conflict of Laws §§ 188, 207 (1971).

[14] However, in the case before us we are proceeding under the substantive law of Pennsylvania, the place where the contract was made. And since the question of pre-judgment interest, like damages generally, is a substantive matter, we apply Pennsylvania law. *Cf. Davenport v. Webb*, 11 N.Y. 2d 392, 230 N.Y.S. 2d 17, 183 N.E. 2d 902 (1962), holding that the question of pre-judgment interest on a claim for wrongful death is a substantive matter governed not by the law of the forum but by the *lex loci. See also* Annot., 68 A.L.R. 2d 1337 (1959).

The law of Pennsylvania with respect to pre-judgment interest is unclear. Indeed, where the suit is in equity, all attempts to formulate rules have been abandoned and the matter is left to the sound discretion of the Chancellor: he is to "allow interest in accordance with principles of equity, in order to accomplish justice in each particular case." *Murray Hill Estates v. Bastin*, 442 Pa. 405, 276 A. 2d 542 (1971).

However, where the suit is at law, confusion abounds. *See* Comment, Allowance of "Interest" on Unliquidated Tort Damages in Pennsylvania, 75 Dick. L. Rev. 79 (1970). As best we can ascertain, the rule appears to be that interest proper is allowed as a matter of right, but only in a small class of cases. In order to alleviate the harshness of this narrow rule, something called "damages for delay in payment" or "compensation for detention" of money owed, computed at the legal rate of interest, may be awarded in the discretion of the trier of fact in practically any case where true interest is not allowable. Following is an excellent statement of this "damages for delay" rule:

> "Interest as such is recoverable only where there is a failure to pay a liquidated sum due at a fixed day, and the

> debtor is in absolute default. It cannot, therefore, be recovered in . . . actions of any kind where the damages are not in their nature capable of exact computations, both as to time and amount. . . . But there are cases . . . of unliquidated damages, where not only the principle on which the recovery is to be had is compensation, but where also the compensation can be measured by market value, or other definite standards. Such are cases of the unintentional conversion or destruction of property, etc. Into these cases the element of time may enter as an important factor, and the plaintiff will not be fully compensated unless he receive, not only the value of his property, but receive it, as nearly as may be, as of the date of his loss. Hence it is that the jury may allow additional damages, in the nature of interest, for the lapse of time. It is never interest as such, nor as a matter of right, but compensation for the delay, of which the rate of interest affords the fair legal measure." *Richards v. Citizens Natural Gas Co.,* 130 Pa. 37, 18 A. 600 (1889).

The rule of *Richards* limiting true interest strictly to liquidated claims appears to have been followed in tort actions for damage to property. *Marrazzo v. Scranton Nehi Bottling Co.,* 438 Pa. 72, 263 A. 2d 336 (1970) (holding that interest is not proper on unliquidated tort claims but that damages for delay are awardable in the discretion of the trier of the facts). This "damages for delay" rule has also been followed in eminent domain proceedings. *Rednor & Kline Inc. v. Dept. of Highways,* 413 Pa. 119, 196 A. 2d 355 (1964); *Wolf v. Commonwealth,* 403 Pa. 499, 170 A. 2d 557 (1961). In each of these cases the damages were ascertainable by computation with reference to market value, but were not strictly "liquidated."

However, the rule of *Richards* has not been consistently followed in actions for breach of contract. The rule was followed in *Babayan v. Reed,* 257 Pa. 206, 101 A. 339 (1917), where suit on an unliquidated claim for breach of contract, the damages being easily ascertainable by computation, was held a proper case for award of "damages for delay in compensation."

Yet, in *Palmgreen v. Palmer's Garage,* 383 Pa. 105, 117 A. 2d 721 (1955), the court upheld an award of true interest as of right in an action for breach of contract, since the damages, though not liquidated, were "ascertainable by computation." The court cited neither *Babayan* nor *Richards* and did not mention

"damages for delay in compensation." Instead, it relied upon *West Republic Mining Co. v. Jones & Laughlins*, 108 Pa. 55 (1884), in which interest was held proper upon a claim for breach of contract that was unliquidated, but "ascertainable by computation." However, that case was decided prior to the *Richards* case, and also prior to what was apparently the first case to make the distinction between true interest and "damages for delay in compensation," *Township of Plymouth v. Graver*, 125 Pa. 24, 17 A. 249 (1889).

Then in *Penneys v. Pennsylvania R. R. Co.*, 408 Pa. 276, 183 A. 2d 544 (1962), the court again failed to adhere to its distinction between true interest and "damages for delay in compensation." There, the damages were unliquidated but "ascertainable by computation." It was contended that since the damages were unliquidated, the award of *interest* was improper. The court rejected this contention without discussion, adopted the rule of the Restatement of Contracts § 337(a) as determinative of the question as to when interest may be recovered, and awarded interest thereunder. Again, no mention was made of "damages for delay in compensation." In addition, the *Babayan* case was cited for the proposition that interest is allowable on unliquidated contract claims, though that case in fact appears to say that "damages for delay in compensation" are proper in such circumstances.

[15] From the foregoing discussion we can only conclude that in actions for breach of contract interest as such, under Pennsylvania law, is recoverable as a matter of right in cases falling within the provisions of Restatement of Contracts § 337(a) (1932). *But see Ben Construction Co. v. Sanitary Authority*, 424 Pa. 40, 225 A. 2d 886 (1967). We further conclude that nothing in Pennsylvania law permits the trial judge, in his discretion, to add interest to the jury's verdict. The Restatement of Contracts § 337(b), permitting such a discretionary award by the court, has never been adopted in Pennsylvania.

So, with a dim light for guidance, we first determine whether this case fits the rule of Restatement § 337(a). If so, interest is recoverable as of right. If not, we must then decide whether "damages for delay in compensation," calculated at six percent per annum on the sum awarded as damages for breach of warranty, may be awarded by the jury in its discretion under Pennsylvania law.

Restatement of Contracts § 337 reads as follows:

"§ 337. WHEN INTEREST IS RECOVERABLE AS DAMAGES.

"If the parties have not by contract determined otherwise, simple interest at the statutory legal rate is recoverable as damages for breach of contract as follows:

"(a) Where the defendant commits a breach of a contract to pay a definite sum of money, or to render a performance the value of which in money is stated in the contract or is ascertainable by mathematical calculation from a standard fixed in the contract or from established market prices of the subject matter, interest is allowed on the amount of the debt of money value from the time performance was due, after making all the deductions to which the defendant may be entitled.

"(b) Where the contract that is broken is of a kind not specified in Clause (a), interest may be allowed in the discretion of the court, if justice requires it, on the amount that would have been just compensation if it had been paid when performance was due."

As heretofore noted, Subsection (b) has not been adopted in Pennsylvania so there can be no award of interest "in the discretion of the court" under Subsection (b).

Plaintiff is not entitled to recover interest *as a matter of right* under Subsection (a) because the evidence does not bring this case within its provisions. We hold that Subsection (a) was intended to provide for the recovery of interest as a matter of right only where *nonperformance,* not *defective performance,* constitutes the breach of contract sued upon. Here, the established market price of each trailer as warranted was $5,695.00. That figure represents the value of the promised performance. Had defendant delivered no trailers whatsoever, then it would have committed a breach of contract "to render a performance the value of which in money . . . is ascertainable . . . from established market prices of the subject matter." In such event $5,695.00 per trailer would constitute the measure of damages and interest thereon would be recoverable as a matter of right under Section 337(a). This is justified on the theory that where the damages are ascertainable the defendant can tender that amount and avoid the accrual of interest. But such is not our case. Here, a defective, faulty performance constitutes the breach

of contract sued upon. Since the established market price is not the measure of damages in such case, and no other formula contained in Section 337(a) is applicable, plaintiff therefore cannot recover interest as a matter of right under Section 337(a).

[16] It is our opinion, and we so hold, that under the case law of Pennsylvania the jury in its discretion may award "damages for delay in compensation" in this case. *Richards v. Citizens Natural Gas Co., supra; Babayan v. Reed, supra.* Upon retrial the judge should instruct the jury that it may, in its discretion, award as "damages for delay in compensation" six percent per annum on any damages awarded for breach of warranty, calculated from the date of the breach to the date of the judgment on the verdict.

That defendant impliedly warranted that the 150 trailers were fit for the particular purpose for which the plaintiff purchased them has been established by the verdict of the jury in the trial below. The verdict on that issue stands. On retrial appropriate issues shall be submitted to the jury as to whether and to what extent defendant breached the implied warranty of fitness and what amount, if any, plaintiff is entitled to recover for breach of warranty. The question of interest as "damages for delay in compensation" shall be left to the jury's discretion under appropriate instructions.

For the reasons stated the decision of the Court of Appeals upholding the judgment of the trial court is erroneous. Let the case be remanded to the Superior Court of Mecklenburg County for retrial in accordance with this opinion on appropriate issues relating to breach of warranty and damages.

Error and remanded.

STATE OF NORTH CAROLINA v. JOSEPH PERRY BUNN

No. 36

(Filed 1 June 1973)

1. Criminal Law § 6— voluntary drunkenness

Voluntary drunkenness is not a legal excuse for crime.

2. **Criminal Law § 6— involuntary intoxication**

It is only when alcohol has been introduced into a person's system without his knowledge or by force majeure that his intoxication will be regarded as involuntary.

3. **Criminal Law § 6— intoxication — specific intent**

Where a specific intent is an essential element of the offense charged, the fact of intoxication may negate the existence of that intent.

4. **Homicide § 8— intoxication — reduction of grade of homicide**

If it is shown that a person on trial for murder in the first degree was so drunk at the time he committed the homicide charged in the indictment that he was utterly incapable of forming a deliberate and premeditated purpose to kill, an essential element of murder in the first degree is absent and the grade of the offense is reduced to murder in the second degree.

5. **Criminal Law § 6; Homicide § 30— evidence of intoxication — failure to submit manslaughter**

In a prosecution for first degree murder, evidence of defendant's intoxication at the time of the killing did not require the trial court to submit manslaughter as a possible verdict; furthermore, since the jury, under proper instructions, found defendant guilty of murder in the first degree, he was not prejudiced by the court's failure to submit manslaughter.

6. **Automobiles § 126; Criminal Law §§ 6, 64; Homicide § 8— breathalyzer results — statutory presumption — inapplicability to homicide and assault cases**

Although there was evidence in a homicide and assault case that a breathalyzer test administered to defendant some four hours after he was placed in jail showed his blood-alcohol content to be .10%, the trial court did not err in refusing to instruct the jury on the presumption created by G.S. 20-139.1(a)(1) that a person with a breathalyzer reading of .10% or more is under the influence of alcohol, since that statute relates only to criminal actions arising out of the operation of a motor vehicle and has no application to the effect of voluntary intoxication upon criminal responsibility for assault and homicide.

APPEAL by defendant from *Cohoon, J.*, 25 January 1971 Session of WAYNE, heard on defendant's petitions for certiorari and initial appellate review by the Supreme Court, docketed and argued as case No. 1 at the Fall Term 1972.

At the 7 December 1970 Session, in the form prescribed by G.S. 15-144, defendant was indicted for the murder of Thomas Vernon Stevens on 13 October 1970. At the same session he was indicted under G.S. 14-33(a) for a felonious assault on 13 October 1970 upon Mrs. Mabel Louise Smith. Without objection the two charges were consolidated for trial.

At the trial evidence for the State tended to show the following facts:

At about 10:30 on the morning of 13 October 1970 as Mrs. Mabel Louise (Bootsie) Smith and eight other women knelt in prayer at the altar of the Oak Street Pentecostal Holiness Church in Goldsboro, defendant came through the swinging doors into the sanctuary. Several women who were sitting in the pews observed him walk straight down the center aisle "at a regular pace." One woman, who watched his approach from behind the communion table, said, "He looked calm and collected . . . as normal as anybody." At the altar he looked down upon the supplicants "like he was looking for someone," and then took a position about one step back of Mrs. Smith. He pulled a gun from his pocket, pointed it at Mrs. Smith's back, and fired four shots into her. At that time, Mrs. Lena Jones Price, who had "felt impressed to go pray with [Mrs. Smith]," was kneeling beside her with her left hand on Mrs. Smith's shoulder. Both women were "deep in prayer" when the bullets struck; one went through Mrs. Price's little finger.

When she was shot Mrs. Smith fell backward on the floor. Defendant stood over her with the pistol and said, "Now say Jesus one more time!" Mrs. Lorayne Furlin, who had also been praying at the altar, walked by defendant on her way to the pew where her 81-year-old mother was sitting. She had started down the aisle with her mother when defendant overtook them and brushed Mrs. Furlin's arm as he passed. He was walking slowly and calmly as he left the church. Mrs. Furlin smelled no alcohol about his person, and she thought she was close enough to have smelled it if there had been any alcohol. She said, "In my opinion if he did not know what he was doing when he came in there that he would have shot more than Bootsie. So, in my opinion he did know what he was doing. In my opinion he was sober when I saw him."

Two of the ladies called the rescue squad and the police while others comforted Mrs. Smith at the altar and joined hands in prayer for her.

About 10:50 a.m. on 13 October 1970 defendant drove into the Gulf Service Center from the direction of the Pentecostal Church, which was about a block away. He was a friend of the proprietor, William Garris, and had been his regular customer for 18-20 years. Defendant drove in "just as normal as he ever

did." He made a circle around the wash bay where Garris and Thomas Vernon (Tommie) Stevens were standing. Assuming that defendant wanted him to service his car Garris started to the car. However, when defendant said, "Tommie," Garris realized he wanted Tommie and stepped back. Defendant appeared entirely normal to Garris. Tommie greeted defendant by asking why he was not working that day, and defendant said to him, "Do you want to see me?" Tommie was then 3-4 feet from the car, holding a service rag in his hand. At that moment Garris saw that defendant "had a gun in his hand, a pistol, and he laid it right on the door and shot straight at Tommie twice." Tommie said, "Ough!" and fell forward on his face. Defendant then drove away from the Service Center "just as normal as anybody could drive."

Defendant and Tommie were friends and, whenever defendant came to the station, they usually talked, joked, and engaged in horseplay if there was time. On this occasion, when he approached defendant, Tommie was happy, laughing, and inquired in a carefree manner why defendant "was laying out of work." Tommie was dead when he was brought to the emergency room of the Wayne County Memorial Hospital. One of defendant's bullets had perforated his aorta; the other passed downward through the right ventricle of his heart.

The rescue squad delivered Mrs. Price and Mrs. Smith at the emergency room at 11:20 a.m. Dr. Wayne Stockdale, who first attended Mrs. Smith, testified: "She looked as if she should have been dead but she wasn't. . . . Her blood pressure was zero over zero. . . . Mrs. Smith never lost consciousness—clinically she should have been unconscious. . . . [S]he should have been dead, but she was still conscious and talking." Three bullets had entered the back of her chest. One had gone straight through the right lung and out the front chest. Two other bullets had gone through the lung and downward through the liver. One of these had gone through the stomach making two big holes; the other went beneath the stomach and out the left side above the kidney. The fourth bullet had gone through her right elbow, breaking the arm. Mrs. Smith was "in absolute shock," in no condition to be moved or to undergo surgery.

Until her blood type could be determined and cross-matched Mrs. Smith was given blood replacements. Then she was given multiple blood transfusions in both arms. She bled continuously and Dr. Winfield Thompson, the surgeon who later operated on

her, removed at least half a gallon of blood from her right chest. During all this Mrs. Smith was never unconscious or incoherent. Dr. Thompson testified, "[S]he never once complained of pain or discomfort, which is another unusual thing about such an injured patient—they usually are frightened and complaining, etc. Mrs. Smith was one of the most quiet people I have ever witnessed under such circumstances. I think this had a great deal to do with her survival. . . . [T]here is no doubt that [her] composure . . . in the emergency room . . . had a great deal to do with her living." At 1:30 p.m. Dr. Thompson, assisted by Dr. Bland, began a three and one-half hour operation, and Mrs. Smith survived the shooting.

In concluding his testimony Dr. Thompson said: "I would like to say this: I take very little credit in saving this woman's life. . . . [I]f Mrs. Smith had not received immediate medical attention in the emergency room, she would have died from the wounds inflicted on her body. Practically speaking, she was risen from the dead. I've never witnessed anyone in my years of surgery survive such injuries." Mrs. Smith testified that at no time did she feel that she "would possibly die" from the wounds she had received. She said, "The Lord had told me that morning of the shooting that I would live and I took Him at His word."

After the shootings, about 11:10 a.m., police officers Kennedy and Jones arrived at defendant's home as he was backing out of his driveway. When defendant saw the police car he drove back in and the police pulled in behind him. Officer Kennedy, armed with a 12-gauge shotgun, got out of the car. Defendant told him that he would not need a weapon, that he was on his way to the city hall to give himself up. Defendant was then arrested for an assault with a deadly weapon, handcuffed, and placed in the police car.

Neither Kennedy nor Jones detected any odor of an intoxicant on or about defendant. He walked normally to the police car and entered it at the officers' request. He also walked into the jail in a perfectly normal manner. He appeared to the officers to be in complete control of both his mental and physical faculties. He did not appear to be drunk, and both officers were of the opinion that he knew right from wrong at that time. Jones had known defendant for four years.

Immediately after he was placed in the police car defendant was given the Miranda warning. He said he understood

it, and it appeared to the officers that he did. (The record states that defendant does not question the court's findings and conclusion that defendant's statement to the officers is competent evidence.) En route to the police station Officer Kennedy asked defendant, "Why did you shoot this woman?" His reply was "I felt like doing it. Have you ever felt like doing something and just wanted to do it? People always said to do what you felt like doing, and this was what I felt like doing, so I did it." He told Kennedy he used a .38 special light-weight model Colt pistol and had thrown it away on the street. He said he did not remember which street, and the officers never did find the gun.

Jailer C. R. Cobb, who had known defendant 10-12 years "booked him in" about 11:30 a.m. and, from then until 3:00 p.m., he observed him from time to time. In his opinion, defendant was not under the influence of any intoxicant and was able to distinguish between right and wrong. About 2:00 p.m. Sergeant Stocks and Captain Floars of the Goldsboro police served upon defendant a warrant charging him with the murder of Tommie Stevens. When Stocks began to read the Miranda warning to him defendant said, "There is no need to read that to me; I have heard that before and I understand my rights." Captain Floars explained that the warning was "required reading" and that defendant "had to have the card read to him." The reading finished, defendant told the officers "that he did not want a lawyer; that he didn't need one"; and that "he did not want to make any statement." To Stocks, who knew defendant, he appeared to be normal, not to be drunk, and to be in control of his mental and physical faculties. In his opinion, defendant knew the difference between right and wrong.

At the time of the shooting defendant was 44 years old and employed as a heavy equipment operator on construction jobs. He had been married about 26 years and was the father of three children. At that time Mrs. Mabel Louise Smith was 33 years old. She had been married since 6 September 1953 and lived with her husband and two children. Both defendant and Mrs. Smith lived in Goldsboro.

The testimony of Mrs. Smith tended to show: She and defendant first met in 1952 when she was 14 and he was 25. She was single; he was married and the father of two children. She "went with" defendant for eight months before learning of his marital status, but she continued to go with him until she herself married. Thereafter she saw him only a few times "to begin

with"; for several years she did not see him at all. Since 1960 they had "maintained an on and off relationship . . . with periods of cessation of about three or four weeks. There would be periods when [they] would see [each other] almost every day for a few minutes . . . and there were periods when [they] would have sexual relations . . . day after day after day. . . . During this time [they] . . . had a very strong attraction and infatuation for one another."

Defendant and Mrs. Smith arranged their rendezvous in various ways and with the help of several people. Defendant spent considerable time at the service stations of both William Garris and C. R. West. Mrs. Smith often called defendant at each of these stations, and both West and Garris took her messages for defendant. Among their trysting places were C. R. West's cabin, E. R. Robbins' house, Ray Jinnette's house, and—on occasions—Mrs. Smith's own home and that of her mother.

Mrs. Smith had been a member of the Pentecostal Holiness Church for about 15 years. There would be revivals at the church and from time to time she "would become a Christian for three or four weeks and stay away from [defendant]." Each time, however, she "would abandon with a guilty conscience the Christian life [she] had been living for three weeks" and resume relations with defendant. Although she had begun to fear him earlier, until a year prior to 13 October 1970 she had a strong desire to be with defendant all the time. During the preceding year they had been intimate many times, and she had been with him a week before the shooting, but she had done so only out of fear and because of his threats. He had become jealous of her husband and began to spy upon her. On several occasions he had told her he was going to kill her, and she continued to call and meet him only "to keep killing off his mind because he talked about it so much." A few weeks before 13 October 1970 he had pulled a gun on her and threatened to shoot her because she had gone to a skating rink alone after telling him she was going there with her husband.

During the year preceding 13 October 1970 defendant would go on "sprees" and drink heavily for weeks. On some of these occasions he would be with Mrs. Smith constantly. If she was not able to see him they would talk on the telephone. "He could carry his liquor pretty good," but she could always tell when she saw him whether he had been drinking. He had to be drinking a lot, however, for her to tell it on the telephone.

On the Saturday before the shooting, Mrs. Smith "had promised the Lord to give up defendant." She "had made a firm stand," and she meant to stick to it. On Monday, when she informed defendant of this decision, he said he did not want to talk about that and he would see her Tuesday. On Monday defendant's wife called Mrs. Smith and threatened to tell her preacher, her husband, and her mother about her association with defendant.

On Tuesday, the morning of the shooting, defendant called Mrs. Smith at 8:15 from the home of Bob Robbins and told her he had not gone to work that day because "they caught his car last night." When he asked her to meet him at the Robbins home she began to cry. He told her she had "better shut up crying and talk to him." From then until 10:00 they talked intermittently. She told him she was going to prayer meeting with Mrs. Turnage at 10:30, and he said she had better quit that church or it would be her ruination and that if Pauline Turnage did not quit talking to his wife he was going to kill her too. In their final conversation that morning Mrs. Smith said to him, "J. P., I cannot see you. I want to live a Christian life. I want to serve the Lord and I cannot do this as long as I have any contact with you." He said, "You had better think it over good or you will be sorry. I am leaving here right now and you will be sorry."

Frightened and crying, Mrs. Smith left the house. She picked up Mrs. Turnage, and they went to the Pentecostal Holiness Church where the prayer service had already begun. She found a place at the altar and began to pray. Mrs. Price came over to her, put her hand on her shoulder, and began to pray for her. Shortly thereafter she felt something hit her back and she knew what was happening. She fell backwards on the floor. Defendant stepped over her, bent down and "hollered real loud, 'Say Jesus one more time,' and [she] said, 'I love you, Jesus.' "

Mrs. Smith did not know Tommie Stevens personally; defendant had introduced him to her on one occasion when she had encountered them together. During August 1970 defendant had said to her, "I think Tommie squealed on me, and if I knew it to be the truth, I would kill him right this minute." He said "he believed Tommie told on him about his being at the place where the whiskey was and there was nobody else who could have told on him and it must have been Tommie."

In large part defendant corroborated Mrs. Smith's story of their relationship. His testimony tended to show: Although he started going with Mrs. Smith in 1952 he first told her he loved her in 1964. He continued to love her until 13 October 1970 and had told her so many times. He had never threatened to kill her or to injure her in any way whatsoever. During the past three years she had told him several times that she could not go with him any more, and each time he had told her he would always do anything he could to help her. These separations usually lasted about ten days, when Mrs. Smith would call to say that she loved him more than the Lord, and she could not stay away any longer. During the seven weeks preceding 13 October 1970 they had met many times and she had repeatedly declared her love for him.

On Saturday morning, 10 October 1970, defendant purchased seven pints of liquor and started drinking. By 2:00 p.m. he was drunk. That afternoon his wife overheard a telephone conversation between him and Mrs. Smith in which they agreed to meet at the "Wayne Insurance and Realty Company's place" that night after the revival at her church. He kept the appointment and his wife saw him and Mrs. Smith as they sat in his car talking. He went home, took another drink of liquor and a nerve pill, and went to bed. The next day (Sunday) he was working. During the day he drank the pint of liquor he put in his lunch box. That afternoon when he called Mrs. Smith from Garris' Gulf Service Center she told him that his wife had called her two or three times that day. Defendant went home and continued drinking liquor. After a conversation with his wife, he took another pill and went to bed.

On Monday, October 12th, defendant again took a drink of liquor and a nerve pill before going to his work at Fayetteville. That afternoon, when he called Mrs. Smith at 4:30, she started crying and told him his wife had called and "cussed her out." She had also threatened to tell Mrs. Smith's mother and her husband about their relationship. After mutual declarations of love they terminated the conversation, and he went home to open another pint of liquor. That night he drank liquor with C. R. West and took the bottle, which contained about two drinks, home with him. There he took a nerve pill and a drink out of the bottle and went to bed.

On Tuesday morning he started to work but changed his mind and went to Robbins' house instead. He did this because

he was "worried to death" about his wife hearing the telephone conversation; he was upset about Mrs. Smith; and he was "about drunk." When he drove into the Robbins front yard he got the pistol he was accustomed to carrying from the glove compartment as protection against the Robbins dog and took his last pint of liquor from the trunk of the automobile. He told Robbins he had come to see if he couldn't straighten things out with Mrs. Smith but he couldn't call her until 8:00. When he called her she told him she couldn't be with him that morning, and he hung up and took another drink. He then called her back and apologized for hanging up. She assured him of her love and they "talked back and forth" until both "got to crying." She said she would call him back and they hung up. He then finished his pint of whiskey and started on some of Mr. Robbins'. When Mrs. Smith called him back she told him that she couldn't go with him that morning and he said to her, "If you don't meet me this morning you'll be sorry as long as you live." She asked him if he was threatening her, and he told her "no." She told him not to do anything to himself and he assured her he would not. She then asked him what he meant when he said she would be sorry as long as she lived. He told her to forget it and hung up. He then went back into the kitchen and "turned the bottle up" for a "right good size drink." He then called her back and when no one answered he decided to go to the church and tell her "not to go to church, to shout and pray and talk to the Lord, and expect to call [him] back anymore. . . . "

At this point he had no idea of shooting or hurting anybody. He hadn't even thought of Tommie Stevens and he had no ill will of any kind toward him. After getting into his automobile he remembers nothing else until he was within a block of his home. Then, he said, "[E]verything was coming into my mind like a cloud floating. . . . It appeared to me that I had shot Tommie and Bootsie. I could not remember where or under what circumstances I shot Mrs. Smith. The only thing that hit my mind was that I had shot them. I did not remember as to where or under what circumstances I had shot Tommie Stevens. I do not now have any recollection of going into the church and shooting Mrs. Smith. I do not now have any recollection of going to Garris' station and shooting Tommie Stevens. I do not have any recollection of going to Mr. West's station at any time on the morning of October 13th. . . . [T]he gun crossed my mind, and I looked down on the seat and it was gone; I

looked in the glove compartment and it was gone; I got out and looked under the seat for the gun and then it appeared to me that I could remember throwing that gun somewhere but I didn't know where." He remembers being arrested at his home and also telling the officer that he would not need a shotgun; that he was on his way to give himself up. He recalls that after having started to the city hall he returned to get his wife to go with him to bring the car back; that she was standing under the carport crying. He does not remember the ride to the jail or any conversation with the police. He is not aware now of any reason for shooting Mrs. Smith or Tommie Stevens. He loves his wife and at that time he loved Mrs. Smith. He never told Mrs. Smith about three weeks before the shooting that if he knew Tommie Stevens had squealed on him he would kill him.

In 1948 defendant was convicted of transporting fifty gallons of liquor; in 1953, of the possession of several hundred gallons of nontaxpaid liquor; in 1962, of assault on a female; in 1970, of forcible trespass; and he has been convicted for numerous motor vehicle violations over the years. He has never been convicted of driving under the influence of liquor.

Defendant's wife testified that the morning of the shooting he left home about 5:30 after having taken two nerve pills and a drink of whiskey out of the bottle; that he had been drunk the preceding Sunday and Monday nights; and that when he returned home about 11:00 a.m. Tuesday he was drunk. "[H]e was crying, upset, and he looked frightened in his eyes, different from any time [she] had seen him before." She had seen her husband drunk many times and always he had walked very straight and never wobbled. Defendant could hold his liquor well, walk perfectly straight, and deceive anybody who did not know him. She had never seen him stagger and he could be "dog drunk and drive the car fine." At 2:00 p.m., when she saw him in jail, he was still drunk and, in her opinion, "he was not able to know right from wrong." This was also the opinion of defendant's daughter, Linda Wise.

Bob Kevin Robbins, who saw defendant at the home of his father on the morning of 13 October 1970, testified that the defendant was more intoxicated than he had ever seen him before; that he "acted like he was mad—something wrong with him" as he talked on the telephone; and that defendant made a precipitous departure from his father's home. Although de-

fendant "drove all right," in Robbins' opinion, defendant lacked the mental capacity to know right from wrong at that time. This opinion was shared by his wife and stepmother. Mrs. Estelle Robbins testified that before he left, defendant was walking around the kitchen crying and drinking.

C. R. West, who saw defendant on the morning of the shooting between 8:00 and 8:30, testified that defendant went through his station, "stomped his foot like a horse," and wouldn't take a drink when invited to do so. In his opinion defendant was then "a man between being drunk and crazy," and did not know the difference between right and wrong or what he was doing.

At 4:06 p.m. on 13 October 1970, Sergeant Wilson of the Goldsboro police gave defendant the breathalyzer test. The results of the test showed ten hundredths of one percent (0.10%) as the ratio of alcohol in his blood. In Wilson's opinion, at the time he ran the test, the defendant was not drunk and he could distinguish right from wrong.

Defendant was admitted to the forensic unit at Cherry Hospital on 14 October 1970 for a 30-day pretrial psychiatric evaluation. After being evaluated by a forensic team defendant was returned to Wayne County authorities on 17 November 1970 as competent to stand trial.

In the opinion of Dr. Indulis Ritenus, the physician in charge of the forensic unit at Cherry Hospital, on 13 October 1970 defendant was able to distinguish right from wrong. In support of that opinion Dr. Ritenus said: "Psychotic alcoholism has to be distinguished from simple drunkenness. . . . [P]sychotic drunkenness is a break with reality. . . . On the day of the incident the defendant had been drinking but he was not psychotically drunk. . . . [H]e knew the difference between right [and] wrong. In my opinion he was perfectly oriented as to the place because he knew where the church was; he knew where his home was. He was perfectly orientated as to the approximate time because he knew where to find Mrs. Smith at that time. Then he was perfectly orientated as to the person; he knew where Mrs. Smith was, who she was; he knew who his wife was. . . . Of course there as some impairment of judgment . . . caused by his alcoholic intoxication. But, at the same time, he knew how to go to his home; he drove home; he knew where the gas station was; he knew where his friend, Mr.

Tommie Stevens, was working. . . . [H]e was in touch with reality in spite of his alcoholic intoxication. . . . [T]here is no history of previous black-outs in this particular case. . . . On October 13th Mr. Bunn was taking . . . two milligrams of valium. It is a very mild tranquilizer. . . . An adult dose would be between five and ten milligrams three or four times a day. . . . Two milligrams of valium . . . before he drank some alcohol was not of great importance."

In conclusion Dr. Ritenus said: "Well, in my opinion Mr. Bunn on October 13th, 1970, did have no blackout, there was no break with reality, and he knew what he was doing. In my opinion he was suffering from emotional disturbance but at the same time in my opinion, he knew the difference between right and wrong on the 13th of October 1970."

Dr. M. M. Vitols, the superintendent of Cherry Hospital from 1949 until October 1968 and now an associate professor of psychiatry at Virginia Commonwealth University and a physician on the staff of Westbrook Psychiatric Hospital in Richmond, Virginia, examined defendant. On 30 December 1970, he saw him in jail at Goldsboro for an hour and ten minutes, and he saw him again for fifty minutes during the trial of this action.

Dr. Vitols testified as follows: "My opinion is that it is highly possible that at the time Mr. Bunn shot Tommie Stevens he didn't know what was right and what was wrong; that he acted automatically." He based his opinion upon his "examination of Mr. Bunn as a person, his history of drinking, his level of intelligence, and emotional state, his relation with Mrs. Smith as well as Tommie Stevens." On cross-examination, Dr. Vitols was asked this question, "And wouldn't you say, doctor, that one who observed a person over a period of time, to be more specific, say 30 days, would know more about the individual?" In reply, the doctor said, "My answer is actually yes and no. Quantity cannot always surpass quality. . . . Generally in human affairs a conference or consultation is considered a check against error."

Defendant was convicted of both felonious assault and murder in the first degree. From sentences of ten years' imprisonment for felonious assault and life imprisonment for murder, the latter sentence to begin at the expiration of the first, defendant appealed.

Attorney General Morgan; Assistant Attorney General O'Connell for the State.

Herbert B. Hulse and George F. Taylor for defendant appellant.

SHARP, Justice.

Defendant's defense to the charges of murder and felonious assault of which he was convicted is that at the time he shot both Mrs. Smith and Tommie Stevens he was so drunk he was utterly incapable of forming a deliberate and premeditated purpose to kill or to form any criminal intent whatever; and that he did not know the nature and quality of his acts and the difference between right and wrong in relation to them.

[1] It is settled law "that voluntary drunkenness is not a legal excuse for crime." *State v. Propst,* 274 N.C. 62, 71, 161 S.E. 2d 560, 567 (1968). *See State v. Potts,* 100 N.C. 457, 6 S.E. 657 (1888). "[I]nvoluntary intoxication is a very rare thing, and can never exist where the person intoxicated knows what he is drinking, and drinks the intoxicant voluntarily, and without being made to do so by force or coercion." *Perryman v. State,* 12 Okla. Cr. 500, 502, 159 P. 937-38 (1916). In *People v. Morrow,* 268 Cal. App. 2d 939, 948-49, 74 Cal. Rptr., 551, 558 (1969), it is said that the law does not permit a person who commits a crime in a state of intoxication "to use his own vice or weakness as a shelter against the normal legal consequences of his conduct. . . . When, on a given occasion, a person takes his first drink by choice and afterwards drinks successively and finally gets drunk, that is voluntary intoxication, even though he may be an alcoholic." *See also State v. Potts, supra.* With reference to the defense of drunkenness Sir Matthew Hale said, "[I]f a person by the unskilfulness of his physician or by the contrivance of his enemies, eat or drink such a thing as causeth such a temporary or permanent phrensy, as *aconitum* or *nux vomica,* this puts him into the same condition, in reference to crimes as any other phrensy, and equally excuseth him." In his view, these were the "two allays to be allow'd" in the case of drunkenness. 1 Hale, *History of the Pleas of the Crown* 32 (1778).

[2] Thus it is only when alcohol has been introduced into a person's system without his knowledge or by force majeure that his intoxication will be regarded as involuntary. *See*

Annots., 8 A.L.R. 3d 1236 (1966) and 30 A.L.R. 761 (1924). In this case there is no evidence tending to show that defendant, if he was drunk at the time of the shootings, was involuntarily drunk, or that he had become chronically or permanently insane in consequence of his excessive use of alcohol.

[3] Although voluntary intoxication is no excuse for crime, where a specific intent is an essential element of the offense charged, the fact of intoxication may negate the existence of that intent. *State v. Propst, supra.* "A specific intent *to kill,* while a necessary constituent of the elements of premeditation and deliberation in first degree murder, is not an element of second degree murder or manslaughter." *State v. Gordon,* 241 N.C. 356, 358, 85 S.E. 2d 322, 324 (1955).

[4] If it is shown that a person on trial for murder in the first degree was so drunk at the time he committed the homicide charged in the indictment that he was utterly incapable of forming a deliberate and premeditated purpose to kill, an essential element of murder in the first degree is absent. *State v. Propst, supra.* In such a situation it is said that "the grade of the offense is reduced to murder in the second degree." *State v. English,* 164 N.C. 498, 511, 80 S.E. 72, 77 (1913). *See also State v. Alston,* 210 N.C. 258, 262, 186 S.E. 354, 356 (1936); *State v. Foster,* 172 N.C. 960, 966, 90 S.E. 785, 788 (1916); *State v. Shelton,* 164 N.C. 513, 517, 79 S.E. 883, 885 (1913); *State v. Murphy,* 157 N.C. 614, 618, 72 S.E. 1075, 1077 (1911); Annot., 8 A.L.R. 1052 (1920).

In this case the judge instructed the jury that it might return one of three verdicts: murder in the first degree, murder in the second degree, or not guilty. He correctly charged that in order to convict defendant of murder in the first degree the State was required to satisfy the jury beyond a reasonable doubt that defendant unlawfully killed Tommie Stevens with malice and in the execution of an actual specific intent to kill, previously formed after premeditation and deliberation; and that if they found defendant was so drunk at the time of the killing as to be utterly incapable of forming a deliberate and premeditated design to kill Stevens he could not be guilty of murder in the first degree, for the essential element of premeditation and deliberation would be lacking.

[5] Defendant assigns as error the court's refusal to submit manslaughter as a permissible verdict and "to instruct the jury

as to the crime of manslaughter as it applies to the facts, circumstances, evidence and defense presented in this case."

Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. *State v. Downey,* 253 N.C. 348, 117 S.E. 2d 39 (1960). Defendant's argument is that the evidence of his intoxication tended to prove not only that he was incapable of forming a deliberate purpose to kill but also that he could not have intentionally used the gun as a weapon; that therefore the presumption of malice which arises from a killing by the intentional use of a deadly weapon as a weapon was not present. He contends that he was not guilty of either first or second degree murder and that it was error for the court to refuse an instruction on manslaughter. This assignment of error is overruled.

"[T]he great weight of authority is that intoxication will not reduce a homicide from murder to manslaughter." Annot., 12 A.L.R. 861, 888 (1921). *See also* Annots., 8 A.L.R. 3d 1236 (1966), 79 A.L.R. 897, 904 (1932). Our decisions contain statements in accord with the majority rule. *See State v. Alston, supra; State v. Foster, supra; State v. Shelton, supra; State v. Murphy, supra.*

We also note that when the jury found defendant guilty of murder in the *first* degree it found (1) that he specifically *intended to kill* Tommie Stevens and (2) that he intentionally used the pistol with which he shot and killed Stevens as a weapon. Since, under proper instructions, defendant was found guilty of murder in the *first* degree, he was not prejudiced by the court's failure to submit manslaughter. *See State v. Freeman,* 275 N.C. 662, 170 S.E. 2d 461 (1969).

[6] Defendant's next assignment is that the court erred in refusing to instruct the jury as follows:

"Under the provisions of General Statutes 20-139.1(a)(1) in criminal actions arising out of actions alleged to have been committed by any person while driving a motor vehicle under the influence of alcoholic liquor, the following presumption arises: If there is at that time 0.10% or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of intoxicating liquor at the time the test was given.

"A person is under the influence of intoxicating liquor within the meaning of the law with respect to driving under the

influence when he has drunk a sufficient quantity of intoxicating beverage to cause him to lose the normal control of his bodily or mental faculties to such an extent that there is an appreciable impairment of either one or both of those faculties."

Sergeant Wilson testified that he gave defendant the breathalyzer test approximately four hours after he was put in jail and defendant's blood-alcohol content then registered 0.10%. At the conclusion of Wilson's testimony defendant requested the court to take judicial notice of G.S. 20-139.1(a)(1) (Supp. 1971). The request was refused upon the ground "that defendant was not under arrest for driving under the influence."

Defendant's contention is, that by enacting G.S. 20-139.1(a)(1), the legislature "has decided as a matter of public policy that a breathalyzer reading of 0.10% or more raises a presumption that a person is under the influence of alcohol"; that this presumption is pertinent upon the issue of a defendant's guilt or innocence of any crime; that its application is not restricted to charges involving the operation of a motor vehicle; and that the court prejudiced his defense by refusing to instruct the jury as requested. This contention is untenable.

The tendered instructions state the correct rule of law for determining whether one is guilty of operating a motor vehicle "under the influence of an intoxicating beverage," a violation of G.S. 20-138, but they do not state the law with respect to the effect of voluntary intoxication upon criminal responsibility for homicide and assault.

A person is under the influence of an intoxicant within the meaning of G.S. 20-138 (Supp. 1971) whenever he has consumed sufficient alcohol to appreciably impair his mental *or* bodily faculties or both. *State v. Carroll,* 226 N.C. 237, 37 S.E. 2d 688 (1946).

Certainly one too drunk to form and carry out an intent to kill is under the influence of an intoxicant. However, one may be "under the influence" as that term is defined in *State v. Carroll, supra,* and yet be quite capable of forming and carrying out a specific intent to kill. We note that defendant's breathalyzer test showed his blood-alcohol content to be only 0.10%, the lowest percentage which gives rise to the statutory presumption. "[W]hether intoxication and premeditation can coexist depends upon the degree of inebriety and its effect upon the mind and passions. . . . 'A person may be excited, intoxicated

and emotionally upset, and still have the capability to formulate the necessary plan, design, or intention to commit murder in the first degree.' " *State v. Hamby,* 276 N.C. 674, 678, 174 S.E. 2d 385, 387 (1970).

Our decisions establish that "[n]o 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 the degree and its effect upon the mind and passion. For it to constitute a defense it must appear that defendant was not able, by reason of drunkenness, to think out beforehand what he intended to do and to weigh it and understand the nature and consequence of his act." *State v. Cureton,* 218 N.C. 491, 494, 11 S.E. 2d 469, 470-71 (1940). *See State v. Duncan,* 282 N.C. 412, 193 S.E. 2d 65 (1972); *State v. Wilson,* 280 N.C. 674, 187 S.E. 2d 22 (1972).

By its express terms, G.S. 20-139.1(a) (1) is applicable only to criminal actions arising out of the operation of a motor vehicle. We may not extend its application and, were we to do so, confusion could be the only result.

Defendant's other assignments of error require no discussion. The court explicitly and repeatedly put the burden upon the State to satisfy the jury beyond a reasonable doubt of defendant's guilt of the crimes charged. We think it impossible that the jury, at any time during the charge, could have been confused about this requirement. Defendant's motion in arrest of judgment was properly overruled. This court has repeatedly held that an indictment in the words of G.S. 15-144 (1965) charges the essentials of murder and is sufficient. For recent decisions see *State v. Talbert,* 282 N.C. 718, 194 S.E. 2d 822 (1973); *State v. Duncan, supra.*

After a careful consideration of each of defendant's assignments of error, in his trial we find

No error.

STATE OF NORTH CAROLINA v. JAMES LOUIS MITCHELL

No. 87

(Filed 1 June 1973)

1. **Criminal Law § 15— newspaper publicity — motion for change of venue denied — no error**

Defendant failed to show an abuse of discretion by the trial judge in denying his motion for a change of venue or for a special venire from another county based on publicity from three newspaper articles reporting what transpired at defendant's first trial where his motion for mistrial was granted, since defendant did not show that any prospective juror had read the newspaper articles or had seen or heard any other news releases pertaining to the cases which would influence him against defendant.

2. **Criminal Law § 43— photographs — method of jury observation proper**

Where the State introduced into evidence eleven photographs including one of defendant which had been submitted to the victim in a rape and kidnapping case, there was no error in allowing the jury to examine defendant's photograph alone before seeing the other ten photographs, particularly where the court gave the jurors an opportunity to view all eleven photographs at once, but no juror took advantage of the opportunity.

3. **Criminal Law § 51— opinion testimony — test for determining admissibility**

The essential question in determining the admissibility of opinion evidence is whether the witness, through study or experience, has acquired such skill that he is better qualified than the jury to form an opinion on the subject matter to which his testimony applies.

4. **Criminal Law § 51— opinion testimony as to fingerprints — qualifications of witness**

Trial court did not err in allowing a State's witness to testify as to his opinion respecting fingerprint comparisons, though the witness had neither been tendered as nor found to be an expert, where there was evidence tending to show that the witness had 22 years of experience in police identification work, including fingerprint identification, had supervised five other identification technicians, had attended training sessions and had read identification manuals, had compared over ten thousand fingerprints and had testified on numerous occasions as an expert witness in fingerprint identification.

5. **Criminal Law § 78— stipulation — proof of facts unnecessary**

Trial court's instruction that facts in a stipulation between solicitor and defense counsel were to be taken as true and were not to be debated by the jury was proper.

6. **Criminal Law § 122— recall of jury for further instruction — application of law to facts — no error**

Where the jury in a rape case requested further instructions with respect to a stipulation entered by the solicitor and defense counsel,

received them and retired, but the court on its own initiative thereafter sent for the jury to return for an instruction that the stipulated fact, the presence of sperm in the vagina of the prosecuting witness, was not an element of proof in the crime alleged to have been committed, the court was correctly stating the law relating to a fact relevant to the case about which the jury had expressed a need for clarification.

7. **Criminal Law §§ 138, 140; Constitutional Law § 36— two consecutive life sentences — no cruel and unusual punishment.**

Imposition of a life sentence on a rape charge, a life sentence on a kidnapping charge, a ten-year sentence on a common law robbery charge and a ten-year sentence on a crime against nature charge, all the sentences to run consecutively, did not constitute cruel and unusual punishment since each sentence was within statutory limits and consecutive life sentences have been specifically approved by the Supreme Court.

APPEAL from *Godwin, S.J.*, at the 27 November 1972 Criminal Session of WAKE Superior Court.

On 3 September 1972 the defendant, James Louis Mitchell, was indicted in separate bills of indictment, proper in form, for four offenses: (1) rape, (2) kidnapping, (3) common law robbery, and (4) crime against nature. On 24 October 1972 trial was begun on these indictments before Judge Canaday and a jury in Wake Superior Court. During the trial Judge Canaday, on motion of defendant, ordered a mistrial because of improper statements made by the solicitor in the presence of the jury.

On 6 November 1972 the defendant filed a motion for a change of venue for the reason that publicity during the first trial made a fair trial in Wake County impossible. On 6 November 1972 Judge Brewer found as a fact that the defendant could receive a fair trial in Wake County and denied this motion.

Defendant was tried at the 27 November 1972 Criminal Session of Wake Superior Court for the four offenses charged in the 3 September 1972 bills of indictment. The evidence for the State tends to show: On 13 July 1972 Mrs. Cynthia Y. Wortham was working as a nursing assistant at Wake Memorial Hospital. At 11:20 p.m. Mrs. Wortham got off from work and started walking to her car parked near the hospital. While going to her car, she noticed someone walking beside her but assumed he was another employee leaving work. When she

reached her car, the man who had been walking beside her ran up and grabbed her. Mrs. Wortham identified this man as the defendant, James Mitchell. Defendant then forced Mrs. Wortham to get into her car and lie down on the passenger side while he drove the car. Coming out of the hospital parking lot, she attempted to grab the steering wheel. The defendant struck her in the face, pulled her hair and told her that if she did not cooperate, he would kill her.

Defendant drove Mrs. Wortham's car into a dirt road adjacent to a construction site and parked the car. Defendant then had intercourse with Mrs. Wortham by force and without her consent. Upon completion of the first act of intercourse, defendant compelled her to engage in an act of sexual intercourse *per anum*. After this act was concluded, defendant drove back to the hospital where he forced Mrs. Wortham to get into the trunk of the car. Defendant left, got his own car and drove it to a point close to Mrs. Wortham's car. He then let her out of the trunk and demanded that she give him any money that she had. She gave him $7 and he left.

Mrs. Wortham immediately went to her parents' home and called the police. She was taken to Wake Memorial Hospital and examined by Dr. D. L. Jones. Her clothing was disheveled and soiled, she had a redness of her right cheek, three separate abrasions of her left elbow, a small cut on her lower lip, a bruise on her medial left breast, and a small cut at the opening of the female genitalia.

A latent fingerprint and a palm print taken from the inside of Mrs. Wortham's car matched defendant's finger and palm prints.

Defendant offered the testimony of his wife and mother-in-law who saw defendant on the night in question prior to the commission of the alleged crimes. Their testimony tends to contradict Mrs. Wortham concerning the clothing worn by defendant on that night. Defendant did not testify.

The jury returned verdicts of guilty of rape, kidnapping, common law robbery and crime against nature. From judgments imposing prison sentences, defendant appealed. Pursuant to G.S. 7A-31(a), we allowed defendant's motion to certify the common law robbery and the crime against nature cases for review by this Court prior to determination by the Court of Appeals.

Attorney General Robert Morgan and Assistant Attorneys General Eugene Hafer and Donald A. Davis for the State.

Roger W. Smith of Tharrington, Smith & Hargrove for defendant appellant.

MOORE, Justice.

[1] Defendant first assigns as error the trial court's failure to allow defendant's motion for a change in venue or, in the alternative, for a special venire from another county. G.S. 1-84; G.S. 9-12.

The motion is supported by an affidavit of defendant's attorney which states that because of publicity received as a result of the mistrial granted in the first trial defendant could not receive a fair and impartial trial. In addition, defendant offered as exhibits three newspaper articles, two of which were published in the News and Observer on page 5 and on page 50 on October 26 and October 27, 1972, respectively, and the other of which appeared in the Raleigh Times on October 27, 1972. These articles were a factual report of what transpired at the first trial when the motion for mistrial was allowed. The record does not indicate that any prospective juror had read the newspaper articles or had seen or heard any other news releases pertaining to these cases. Nothing in the record shows that any juror had been influenced in any manner by this publicity.

In *State v. Allen,* 222 N.C. 145, 22 S.E. 2d 233 (1942), a murder case in which this Court held that the defendant's motion for a change of venue based upon newspaper articles was in the discretion of the trial court, Justice Denny (later Chief Justice) said:

> " . . . A motion for change of venue or for a special venire, may be granted or denied in the discretion of the trial judge, and his decision in the exercise of such discretion is not reviewable here unless gross abuse is shown. . . . "

To prevail on this assignment, defendant would have to show an abuse of discretion. *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971); *State v. Brinson,* 277 N.C. 286, 177 S.E. 2d 398 (1970); *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10 (1966); *State v. Scales,* 242 N.C. 400, 87 S.E. 2d 916 (1955). No such abuse of discretion has been shown. This assignment is overruled.

[2] The prosecuting witness Cynthia Wortham testified that at the request of Detective R. B. Tant she viewed ten or fifteen photographs and from those she selected the photograph of the person who assaulted her. Detective Tant testified that the group of eleven pictures marked as State's Exhibit 4 were the photographs from which Mrs. Wortham selected the photograph of the person who assaulted her. All the photographs, including that of defendant, were introduced in evidence. The solicitor then requested permission of the court to hand defendant's photograph to the jury. Defendant objected and requested that all the photographs be passed at one time. This objection was overruled, and the photograph which had been identified as that of defendant was given to the jury; thereafter the remaining ten photographs were passed to the jury.

Defendant in his brief, citing *State v. Miller,* 219 N.C. 514, 14 S.E. 2d 522 (1941), admits it was proper to allow the jury to see the photographs, but contends that all the photographs should have been passed to the jury at the same time so the jurors could get an accurate view of the appearance of the photograph selected as being that of the defendant as compared to the appearance of the other photographs. As a result of defendant's objection, the trial judge stated to the jury:

> "You have been permitted to see these photographs because they have been introduced in evidence by the State in order that you may see the entire eleven photographs which were exhibited or which the evidence now tends to show were exhibited to Mrs. Wortham. If any one of you would like to look at all eleven photographs at the same time you may do so. If you will just hold up your hands, I will have all eleven of them handed back to you so you may view all of them at the same time."

No juror requested to see all the photographs at one time. This assignment is without merit.

Defendant next contends that the court erred when, over objection, the witness W. M. Parker was allowed to testify as to his opinion respecting fingerprint comparisons when the witness had been neither tendered as nor found to be an expert.

In *State v. Perry,* 275 N.C. 565, 169 S.E. 2d 839 (1969), there was an assignment of error based on the failure of the trial court to make a finding that a doctor was an expert and qualified to give an opinion regarding recent sexual intercourse

by the prosecuting witness in a rape trial. In the opinion Justice Lake pointed out that the better practice is for the solicitor to formally tender the witness as an expert and for the trial judge so to rule in a formal manner. However, the assignment of error was overruled, and Justice Lake stated:

> "In the absence of a request by the appellant for a finding by the trial court as to the qualification of a witness as an expert, it is not essential that the record show an express finding on this matter, the finding, one way or the other, being deemed implicit in the ruling admitting or rejecting the opinion testimony of the witness. . . . "

Accord, State v. DeMai, 227 N.C. 657, 44 S.E. 2d 218 (1947).

[3, 4] In the present case Parker had just testified that he had twenty-two years' experience in police identification work, including fingerprint identification; had supervised five other identification technicians; had attended training sessions and had read identification manuals; had compared over ten thousand fingerprints; and had testified on numerous occasions as an expert witness in fingerprint identification. As in *State v. Perry, supra,* defendant did not request a finding by the trial court concerning Parker's qualifications as an expert. The essential question in determining the admissibility of opinion evidence is whether the witness, through study or experience, has acquired such skill that he is better qualified than the jury to form an opinion on the subject matter to which his testimony applies. *State v. Hairston* and *State v. Howard* and *State v. McIntyre,* 280 N.C. 220, 185 S.E. 2d 633 (1972); *Cogdill v. Highway Commission* and *Westfeldt v. Highway Commission,* 279 N.C. 313, 182 S.E. 2d 373 (1971); *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971); 1 Stansbury, North Carolina Evidence (Brandis Rev.) § 133, p. 431. The evidence in the present case clearly indicates that the witness Parker through both study and experience had acquired such skill. This assignment is overruled.

[5] At the close of the State's evidence the court informed the jury that the solicitor for the State and counsel for defendant had entered into a stipulation:

> "They have stipulated that Dr. Dewey Pate examined the slides of smears taken by Dr. Jones from the vagina of Cynthia Wortham on July 14, 1972, and that the examina-

tion revealed the presence of sperm, but Dr. Pate could not tell when the sperm were deposited in her vagina. They could have been deposited there at anytime between one hour and two weeks earlier."

After the jury retired and deliberated for some period of time, they returned and the following occurred:

"FOREMAN: Your Honor, we have a couple of questions on some of the testimony. We are somewhat in doubt of the results of the pathologist test on the lab smears and we wonder if we could have that area re-read, and did the consentment between the prosecutor and defense —

"COURT: The what?

"FOREMAN: The consentment between the two gentlemen have any relation —

"COURT: I think I know what you are talking about. I told you the solicitor for the State and counsel for the defendant had made a stipulation and an agreement and that you should accept that for the truth.

"You are required to accept that stipulation as the truth. You may not debate about it.

EXCEPTION

EXCEPTION No. 15.

"I will read it to you.

"FOREMAN: Yes, sir.

"COURT: The solicitor for the State and the defendant through his attorney have agreed that it is true and you will therefore accord to their agreement the characteristics of truth.

"You must accept as true this statement: That Dr. Dewey Pate examined the slides of smears taken by Dr. Jones from the vagina of Cynthia Wortham on July 14, 1972, and that the examination revealed the presence of sperm, but that Dr. Pate could not tell when the sperm were deposited in her vagina. They could have been deposited there at any time between an hour and two weeks earlier than the time the smears were taken.

EXCEPTION

EXCEPTION No. 16.

"Now, that is a matter you may not debate about.

EXCEPTION

EXCEPTION No. 17

"If any person on the jury would like me to read it over to you again, I will be glad to do so."

Defendant contends the court erred in instructing the jury that they must accept that stipulation as the truth and that they could not debate about it.

No proof of stipulated facts is required. The stipulation is substituted for proof and dispenses with the need for evidence. In *State v. McWilliams,* 277 N.C. 680, 178 S.E. 2d 476 (1970), the defendant had stipulated the death of Bloss Manning was caused by a blow to the head. Evidence at the trial indicated that defendant struck a blow upon Manning's head. Justice Huskins for the Court stated:

> " . . . A stipulation of fact is an adequate substitute for proof in both criminal and civil cases. *State v. Powell,* 254 N.C. 231, 118 S.E. 2d 617 (1961). 'Such an admission is not evidence, but rather removes the admitted fact from the field of evidence by formally conceding its existence. It is binding in every sense, preventing the party who makes it from introducing evidence to dispute it, and relieving the opponent of the necessity of producing evidence to establish the admitted fact. In short the subject matter of the admission ceases to be an issue in the case. . . .' Stansbury, North Carolina Evidence (2d Ed. 1963), § 166."

See 2 Stansbury, North Carolina Evidence (Brandis Rev.) § 166, p. 1, and cases therein cited; 83 C.J.S. Stipulations § 12, p. 30. The facts stipulated in the present case ceased to be an issue, and the court correctly stated that they were to be taken as true. This assignment is overruled.

[6] After the court had explained to the jury the effect of the stipulation, the jury retired but soon thereafter the court sent for the jury to return, apologized for the interruption, and explained:

"The questions that you raised and wanted answers to and which the court has undertaken to answer causes the court to wonder whether you have been sufficiently instructed with regard to the reason why a stipulation has been entered into by the parties and also with regard to whether there may be some question in the minds of some of you regarding what sexual intercourse is at law."

The court then proceeded to explain that the stipulation had been entered into by the parties in order to avoid the necessity of bringing the doctor into court to testify. He further explained that the law does not require ejaculation in order to find that there had been, in fact, sexual intercourse. Defendant contends that it was error for the court to volunteer the additional instruction and in so doing the court expressed an opinion with respect to the evidence, which is prohibited by G.S. 1-180.

Upon the trial of any indictment for the offense of rape, it is not necessary to prove emission of seed in order to constitute the offense, but the offense is complete upon proof of penetration only. G.S. 14-23. Thus, when the jury was told that the stipulated fact, the presence of sperm in the vagina of the prosecuting witness, was not an element of proof in the crime alleged to have been committed, the court was correctly stating the law relating to a fact relevant to the case about which the jury had expressed a need for clarification. This assignment is without merit.

[7] The court imposed a life sentence on the rape charge, a life sentence on the kidnapping charge, a ten-year sentence on the common law robbery charge, and a ten-year sentence on the crime against nature charge, all the sentences to run consecutively. Defendant contends that the court has sentenced him to a term of years which is humanly impossible to fulfill, and that these consecutive sentences constitute cruel and unusual punishment.

In *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1972), the Court held that the only permissible punishment for a rape which occurred after the decision in *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726 (1972), and prior to 18 January 1973, the date of the *Waddell* decision, was life imprisonment. The rape for which defendant was convicted in this case occurred on 13 July 1972, after the *Furman* decision

and before the *Waddell* decision. Hence, the sentence of life imprisonment for rape was proper.

Kidnapping under G.S. 14-39 may be punishable by life imprisonment. *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216 (1966); *State v. Barbour,* 278 N.C. 449, 180 S.E. 2d 115 (1971).

Common law robbery may be punishable by ten years' imprisonment. G.S. 14-2; *State v. Stewart,* 255 N.C. 571, 122 S.E. 2d 355 (1961). Crime against nature may be punishable by ten years' imprisonment. G.S. 14-177; *State v. Thompson,* 268 N.C. 447, 150 S.E. 2d 781 (1966).

Therefore, the punishment imposed in each of the present cases was within statutory limits. This Court has consistently held that a sentence of imprisonment which is within the maximum authorized by statute is not cruel or unusual punishment unless the punishment provisions of the statute itself are unconstitutional. *State v. Cradle,* 281 N.C. 198, 188 S.E. 2d 296 (1972); *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345 (1969); *State v. Robinson,* 271 N.C. 448, 156 S.E. 2d 854 (1967); *State v. Hilton,* 271 N.C. 456, 156 S.E. 2d 833 (1967); *State v. Bruce, supra.* The Federal rule coincides with the North Carolina rule. In *Martin v. United States,* 317 F. 2d 753 (9th Cir. 1963), defendant was convicted of wilfully failing to file a tax return. Defendant contested the sentence which he received on the ground that it constituted cruel and unusual punishment. The Court said:

> ". . . Since it is well settled that a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment, appellant's contention is without merit. Further, it is clear that this court has no control over a sentence which is within the limits allowed by statute. . . ."

Accord, Page v. United States, 462 F. 2d 932 (3d Cir. 1972); *Lindsey v. United States,* 332 F. 2d 688 (9th Cir. 1964); *Gallego v. United States,* 276 F. 2d 914 (9th Cir. 1960); *Black v. United States,* 269 F. 2d 38 (9th Cir. 1959).

Consecutive life sentences have been specifically approved by this Court. In *State v. Bruce, supra,* as in the instant case, the defendant was sentenced to life imprisonment for kidnapping to begin at the expiration of a prior life sentence imposed

for the rape of the prosecuting witness during the alleged kidnapping. Chief Justice Parker stated:

> ". . . The objection here is to the sentence of life imprisonment to run consecutively with a sentence of life imprisonment for rape, and not to the statute of kidnapping under which the sentence in the instant case was imposed. The sentence of life imprisonment for rape before Judge Stevens and the sentence of life imprisonment in the instant case [for kidnapping] to run consecutively with the sentence of life imprisonment for rape do not exceed the limits fixed by the statutes, and the sentence in the instant case is not cruel and unusual punishment in a constitutional sense. . . ."

This assignment of error is overruled.

We have carefully examined each assignment of error brought forward and discussed in defendant's brief and find them to be without merit.

Evidence of defendant's guilt is overwhelming. The jury has returned a verdict of guilty in each case. The sentences imposed do not exceed the limits fixed by the statutes. In the trial, verdicts and judgments we find no error.

No error.

STATE OF NORTH CAROLINA v. ALVIN THOMAS BELL

No. 60

(Filed 1 June 1973)

Rape § 5— sufficiency of evidence to withstand nonsuit

Evidence in a rape case was sufficient to withstand defendant's motion for nonsuit where it tended to show that the victim identified defendant as her assailant, tracks leading from the victim's backdoor to the home of defendant's parents were made by defendant's shoes which he was wearing at the time of his arrest one day after the alleged offense, defendant admitted having had intercourse with the victim on the day in question but claimed that the victim had consented, and the victim's appearance immediately after the alleged offense supported her testimony that defendant had tied her to a bed, put a gag around her face, ripped off her clothing and had intercourse with her.

State v. Bell

APPEAL by defendant under G.S. 7A-27(a) from *Tillery, J.*, October 1972 Session of SAMPSON Superior Court.

Defendant was indicted in separate bills, (1) for the rape of Mrs. Rosa Mae Rominger, and (2) for the armed robbery of Mrs. Rominger, on 21 June 1972. He entered pleas of not guilty and the indictments were consolidated for trial.

The State's evidence, summarized except when quoted, tends to show the facts narrated below.

Mrs. Rominger, age 71, was a widow. She lived in a house on the White Lake Road (Highway 701) about three miles from Clinton.

On 21 June 1972 about 5:00 p.m., while in her living room sewing, Mrs. Rominger's attention was attracted by the sound of rocks thrown against her house. After an investigation at the front of the house, she returned to the living room and picked up her sewing. A brickbat, thrown through a windowpane, shattered glass upon the living room floor. On her way to shut the back (kitchen) door, Mrs. Rominger was confronted by a man (later identified as defendant) who was standing at the corner of the kitchen table. The man threw his left arm around her neck, cupped his hands over her mouth, and said, "Don't move." Loosening his hand, he said, "If you holler, I'll kill you." He had an open switchblade knife in his hand. A green rag was over his nose and mouth and was tied behind his head.

The intruder grabbed Mrs. Rominger from behind, tied her wrists and pulled her backwards into the back bedroom. There he picked her up and laid her on the bed. He then "tied ropes to the bed railings and . . . tied some around [her] ankles and tied them to the bed." Loosening the gag he had tied around her mouth, the intruder said: "Now, tell me where your money is, if you don't I will kill you. I've killed before and I'll do it again." Mrs. Rominger told him that what money she had was in a white purse behind the big easy chair in the corner of *her* (the other of the two bedrooms) bedroom. The intruder then went into *her* bedroom, stayed about five minutes, and upon his return stated he had found the money.

The intruder then untied Mrs. Rominger's feet, whirled her over on her face, and ripped off all her clothing from her belt down. Her clothes included "a pair of red britches." Then he threw her over on the bed and had sexual intercourse with her notwithstanding her protest and pleading. During this time,

the intruder's only comment was that he would cut Mrs. Rominger's throat if she did not "go along with him." Upon the completion of the act of sexual intercourse, he loosened the rope on Mrs. Rominger's right hand and left. Her left hand was still tied to the bed and the gag was around her face. As soon as she could get loose, she put on her clothes, and crossed the road to the house of neighbors. They called the sheriff's office.

Mrs. Rominger testified that, although the intruder never took off his mask, she observed his hair and the upper portion of his face when "he turned [her] around and tied the ropes around [her] arms"; that, although she had seen him pass up and down the road, he had never been in her house; and that she did not know his name and had never spoken to him. In reporting to the officers, she described her assailant as "an Indian male, medium to short length curly hair, approximately five nine or five ten, weighing from a hundred and seventy to a hundred eighty pounds, wearing a greenish colored trouser, greenish to brown . . . had a three cornered piece of cloth tied around the lower portion of his face . . . [and] definitely [had] black hair."

There was evidence tending to show that before and after the officers arrived Mrs. Rominger "was highly emotional and excited"; that her hair was "all messed up"; that she was barefooted, this being the only time a neighbor had ever seen her barefooted; and that the red pants or slacks she was wearing were inside out and on backwards.

There was evidence tending to show that an examination made by Dr. John W. Nance on the evening of 21 June 1972 disclosed that she had been penetrated in recent sexual intercourse; that there was a small recent tear at the back of the vagina and slight bleeding of the lining of the vagina; that sperm was found in her vagina; and that positive red marks circled her right wrist and partially circled her left wrist.

There was testimony, offered for consideration only as corroborative evidence, tending to show that statements made by Mrs. Rominger to Dr. Nance and to officers were substantially in accord with her testimony at trial.

Upon his arrival at Mrs. Rominger's house about 6:15 p.m., Sheriff James Tew attempted "to rope off or seal off the area" by posting men to keep people from running in and out. He undertook particularly to save a footprint he observed at the back

door. Mrs. Rominger was at the house across the road but returned with Sheriff Tew to her own house. They were met there by S.B.I. Agent William Edward Hunt, Deputy Sheriff George Chase and other officers. Chase entered the front door after Mrs. Rominger unlocked it. About the same time the sheriff entered the back door. They found no one in the house. The immediate area was searched and arrangements were made for plaster of paris to be poured into tracks leading from the back of Mrs. Rominger's house.

Mrs. Rominger was then taken to the hospital for examination by Dr. Nance. After this examination, which lasted an hour or more, the officers took Mrs. Rominger home from the hospital. Upon arrival, they made "a crime scene investigation at the house and the nearby area." They found the bed in the back bedroom "was disarranged, messed up, [and saw] a rope tied to the right corner post on the right-hand side [and] another rope lying upon the bed which was tied to the railing on the left-hand side." Both ropes were tied at the head of the bed. The pieces of rope on the bed and the brick in the living room were identified by Mrs. Rominger.

Tracks led from the back of Mrs. Rominger's house through fields and woods to the vicinity of the home of defendant's parents. This house was under continuous surveillance and officers patrolled the highways in the area. The next day, 22 June 1972, about 7:00 p.m., defendant was arrested about 50 yards from his parents' house as he "was coming from a wooded area" in back of it.

The shoes defendant was wearing when arrested were taken by the sheriff and other shoes were obtained for defendant. Defendant's shoes were identified and offered in evidence. Plaster of paris casts made of the tracks the officers had followed were identified and offered in evidence.

On 22 June 1972, after he had been advised of his constitutional rights and had signed a waiver, defendant stated that he had not been to Mrs. Rominger's house on 21 June 1972 and had never been to her house; that he did not know her; and that he had not raped or robbed her. Defendant further stated that, during the afternoon of 21 June 1972, when walking on Highway No. 701, he got scared when he saw police cars and heard the sirens; and that he ran into the woods, slept there and stayed until the occasion of his arrest.

On 26 June 1972 defendant's shoes and the plaster of paris casts were taken to the Identification Division of the State Bureau of Investigation at Raleigh, N. C. Steven Randolph Jones, the supervisor of the Identification Division, who was found by the court upon ample evidence to be an expert in footprint comparison and identification, examined and compared the shoes and the numerous plaster of paris casts. Based thereupon, he reached and expressed the opinion that the footprints lifted by the plaster of paris casts were made by these shoes.

Thereafter, on 26 June 1972, about 7:30 p.m., S.B.I. Agent Hunt talked with defendant again. He was again advised of his constitutional rights and defendant signed a waiver. Defendant stated at that time that he had known Mrs. Rominger for many years; that he had often been to her house; and that he went to her house on the afternoon of 21 June 1972. He further stated that he left his home at approximately 2:30 p.m. and as "always" he used the back way to go to her house. When he knocked on the back door, Mrs. Rominger invited him in "as usual." He further stated that after they had talked in the kitchen and in the den they went into the bedroom where he had sexual intercourse with her with her consent. He further stated that this was the first time that he had had sexual relations with her. He further stated that he did not tie her in any manner; that he had never seen the pieces of rope offered in evidence; that he knew nothing of burns or marks on Mrs. Rominger's wrists; that he knew nothing of a brick in Mrs. Rominger's living room; and that he did not at any time wear a mask when he was in Mrs. Rominger's house. He further stated that he became frightened when he saw the sheriff's cars on the highway and heard the sirens; and that he went into the woods and stayed there until the time of his arrest.

Deputy Sheriff Ray Moore testified that he had known Mrs. Rominger around fifteen years, having lived in the same community where she lived during most of that period, and that her general reputation in the community was good.

The State offered in evidence the pieces of rope and the brick which had been identified and also photographs of the bedroom made when the officers were there, the photographs being offered to illustrate and explain the testimony of the witnesses who testified concerning what they found in the bedroom.

With specific reference to the armed robbery charge: Mrs. Rominger testified that her purse contained a billfold in which

she was keeping two ten dollar bills and also a five dollar bill; that the purse also contained a one dollar bill and "a little bit of change"; that after defendant left and after the officers arrived she looked in her purse and found the one dollar bill and the change but the bills were "gone from [her] billfold." No fingerprints suitable for identification were found on the purse. At the time of his arrest, defendant was searched. He had a dime, three pennies and an empty billfold.

Evidence offered by defendant consisted of his own testimony and the testimony of his parents. The testimony of defendant's parents tends to show they lived on Highway 701, about a half mile from where Mrs. Rominger lived; that, when going from their house to Clinton, they passed Mrs. Rominger's house; that they had known Mrs. Rominger and her husband for twelve or fourteen years; that their contacts had been infrequent; and that they had not visited in the homes of one another. They testified that defendant had been away from home for a number of years but had returned in December of 1971.

Defendant testified that he was twenty-six years old; that he went to his parents' home on Christmas, 1971, having been paroled in Maryland on 21 December 1971; and that from 1961, when he stole his father's car, until his parole in Maryland in December 1971, he had been convicted and from time to time had served sentences both in North Carolina and in Maryland for various criminal offenses.

Defendant testified that he had been "having an affair with [Mrs. Rominger] for the last nine or ten years"; that he had visited her house fifteen or twenty times, including three or four times since Christmas 1971; that he had had sexual intercourse with her "seven or eight times" before 21 June 1972; that she was the first woman with whom he had sexual relations and this occurred when he was 16 or 17 years old; that when visiting her he always used the back door; that on 21 June 1972, Mrs. Rominger let him in when he went to the back door and knocked; that there were two dogs on the back porch who knew him and so did not bark; that he and Mrs. Rominger talked in the kitchen and then in the den; and that, at Mrs. Rominger's suggestion, they went into the bedroom and had sexual intercourse. He further testified that he did not leave until half an hour after they had had sexual intercourse; that he told Mrs. Rominger that he was not going to come up to see her anymore;

that they argued about the matter; and that, when he started out the door, she told him that she was going to have him "locked up for rape." He further testified that when she made this remark he just laughed at her and went on out the back door, but that when he saw the sheriff's cars and heard the sirens he became frightened because he feared Mrs. Rominger had carried out her threat. Apart from the foregoing, his testimony at trial was substantially in accord with statements he had made to S.B.I. Agent Hunt on 26 June 1972 with this exception: He testified he told Hunt that his sexual intercourse with Mrs. Rominger on 21 June 1972 was the first time he had had sexual intercourse with her *since he came back on Christmas 1971.*

With reference to the armed robbery indictment, the jury returned a verdict of not guilty.

With reference to the rape indictment, the jury returned a verdict of guilty of rape. Upon this verdict, the court pronounced judgment that defendant "be confined in the State prison for the rest of his natural life."

Defendant excepted and appealed.

Attorney General Robert Morgan and Assistant Attorney General William F. Briley for the State.

David J. Turlington, Jr., for defendant appellant.

BOBBITT, Chief Justice.

Defendant's assignments of error relate solely to the court's refusal to grant his motions for judgment to dismiss as in case of nonsuit. G.S. 1-173. Defendant having offered evidence, the only question is whether the court erred in denying the motion made at the close of all the evidence. *State v. Meadows,* 272 N.C. 327, 333, 158 S.E. 2d 638, 642 (1968).

The evidence set forth in our preliminary statement shows clearly its sufficiency to withstand defendant's motion and to support the verdict of guilty of rape. Mrs. Rominger's testimony as to what occurred in respect of rape was unequivocal, explicit and corroborative. Her testimony with reference to the identity of her assailant was strongly supported by circumstantial evidence developed by the prompt, diligent and skillful work of the officers. Moreover, all doubt as to the identity of her assail-

ant was completely removed by defendant's *second* statement to the officers and by defendant's testimony that he was the person who had sexual intercourse with Mrs. Rominger in her home on 21 June 1972.

There is no substance in the contention that the verdict in the rape case is in conflict with the verdict in the armed robbery case. Assuming, *arguendo,* that the evidence was sufficient to warrant submission of the armed robbery charge to the jury, the probative force of the evidence with reference to the robbery indictment was minuscule as compared with the probative force of the evidence supporting the indictment for rape.

Upon being polled, each juror stated that his verdict was guilty of rape and that he still assented thereto.

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

No error.

JAMES PORTER v. SUBURBAN SANITATION SERVICE, INCORPORATED, AND J. B. McBRYDE

— AND —

SANITATION SERVICE, INC. v. SUBURBAN SANITATION SERVICE, INC.; LAFAYETTE TRANSPORTATION SERVICE, INC., AND COOPER LOGAN D/B/A LOGAN DISPOSAL SERVICE AND J. B. McBRYDE

No 49

(Filed 1 June 1973)

1. **Counties § 2— franchise for collection of "garbage" — authority granted to counties**

In construing the authority conferred upon counties by G.S. 153-272 to grant an exclusive franchise to collect and dispose of "garbage," the trial court did not err in adopting the definitions of "garbage," "refuse" and "solid waste" contained in G.S. 130-166.16(1), (2) and (3), respectively; nor did the court err in concluding that G.S. 153-272 does not authorize the board of county commissioners to grant an exclusive franchise for the collection and disposal of "trash" not substantially and inseparably commingled with "garbage."

2. **Counties § 2— regulation of garbage disposal — statute inapplicable to landfill**

The statute giving county commissioners authority to regulate the "disposal of garbage," G.S. 153-272, does not authorize county

commissioners to grant an exclusive franchise for the operation of a landfill.

3. Counties § 2— collection of "garbage" — putrescible material commingled with other waste

The trial court did not err in its conclusion that defendants were engaged in the collection and disposal of "garbage" within the meaning of G.S. 153-272 where it found that putrescible material constitutes 10% of the waste collected by defendants and that such material is inseparable from other solid waste collected and disposed of by defendants.

4. Counties § 2— franchise to collect "garbage" — separability from invalid provisions

The trial court did not err in concluding that franchises granted to plaintiffs by a county are severable so that the invalidity of those portions of each purporting to grant an exclusive franchise for the collection and disposal of "trash" and for the operation of landfills does not, *per se*, compel the conclusion that the grant of the exclusive right to collect and dispose of "garbage" is also invalid.

5. Counties § 2— statute authorizing counties to grant franchises for garbage collection — no unconstitutional grant of legislative authority

The statute giving the boards of county commissioners authority to grant exclusive franchises to collect and dispose of garbage for compensation, G.S. 153-272, is not an unconstitutional delegation of legislative power but comes within the exception permitting the delegation to municipal corporations and to counties of power to legislate concerning local problems.

APPEAL both by plaintiffs and by defendants from *McKinnon, J.*, at the 11 September 1972 non-jury Session of ROBESON, heard prior to determination by the Court of Appeals.

These two actions for injunctive relief and for damages were, by consent, consolidated for trial in the Superior Court, the material facts being the same in both. By consent, the action in each case against the defendant McBryde was dismissed. The defendant Lafayette Transportation Service, Inc., was not a party to the suit by Porter. The judgment of the Superior Court in the suit by Sanitation Service, Inc., granted no injunctive relief against this defendant and the question of its liability for damages was reserved.

The Superior Court granted injunctive relief in favor of each plaintiff against Suburban Sanitation Service, Inc., hereinafter called Suburban, and in favor of Sanitation Service, Inc., against Logan. It also adjudged that both plaintiffs recover damages of Suburban and that Sanitation Service, Inc., recover damages of Logan, all such damages to be assessed after further hearing.

In each action the plaintiff alleged that on 6 December 1971 Robeson County, pursuant to authority conferred upon it by G.S. 153-272, granted to the plaintiff an exclusive franchise, for a period of five years, "to pick up, collect, transport and dispose of trash, garbage and refuse" in a designated area of the county, the two such franchises, together, covering the entire county outside of the incorporated cities and towns therein. Each plaintiff alleged that the defendants sued by him or it are engaged in the business of picking up, collecting, transporting and disposing of garbage and refuse for a fee within the area described in such plaintiff's franchise and prays that such defendants be permanently enjoined from so doing.

Each such franchise agreement also purported to grant an exclusive right "to operate and maintain landfills and dispose of trash and garbage" in the described area. In each the grantee agreed to "render reasonably acceptable service to persons, firms and corporations located in [the] franchised area and at a reasonable price for services rendered," the price not to be less than that prevailing for like services in adjoining North Carolina counties. Each franchise agreement further provided that nothing therein "shall prevent any person, firm or corporation from personally disposing of its own trash, garbage or refuse * * * in a legal and lawful manner," that the grantee's landfill "shall be open to the general public" upon payment of a reasonable fee and that the grantee agreed to commence service on 1 January 1972 and to serve the entire area within twelve months thereafter. The two franchises are identical except as to territory and except that the one issued to Sanitation Service, Inc., is for the collection and disposal of "trash and garbage," whereas that issued to Porter is for the collection and disposal of "trash, garbage and refuse."

In their answers Suburban and Logan each admits that it or he "has been engaged in the said business of picking up, collecting and transporting, not only garbage and refuse, but also rubbish, trash and other discarded solid materials under the rules and regulations of the North Carolina State Board of Health as they pertain to the disposal of solid waste." Each alleged that the exclusive franchise relied upon by the plaintiff is illegal and void, being both in excess of the authority conferred upon the county by statute and a deprivation of the defendant's contractual and property rights, in violation of provisions of the State and Federal Constitutions.

A jury trial being waived, the matters were heard by the Superior Court. It was stipulated that Suburban, as of the date of the hearing, continued to pick up and dispose of garbage, refuse and trash within the area described in each of the franchise agreements, serving one business customer and 39 residents of the area covered by the Porter franchise and four business customers and 206 residents of the area covered by the franchise issued to Sanitation Service, Inc., and that Logan, likewise, continued to pick up and dispose of garbage, refuse and trash within the area covered by the franchise agreement issued to Sanitation Service, Inc., serving five business customers and 250 residents of that area.

It was further stipulated that Suburban applied to the County Tax Collector for a license, tendering the proper fee therefor, but was refused such license because of the existence of the above mentioned franchises; that both Suburban and Logan sought from the County Commissioners an approval letter, required by the State Board of Health before it will inspect a solid waste disposal facility, which approval letter was refused because of the existence of the said franchises; and that each of these defendants has permission to dispose of its collections of waste materials in the landfill operated by the City of Fayetteville.

For the purpose of its judgment, the Superior Court adopted, as applicable to these actions, the definitions of "garbage," "refuse" and "solid waste" contained in G.S. 130-166.16(1), (2) and (3), respectively. The plaintiffs assign this as error.

The Superior Court's findings of fact material to this appeal are here summarized, except as direct quotation is indicated:

> On 6 December 1971 the County Board of Commissioners adopted resolutions set forth in its minutes and thereafter entered into the above mentioned franchise agreement with Sanitation Service, Inc., granting it "an exclusive franchise and right to pick up, collect, transport and dispose of trash and garbage."
>
> Porter is and has been engaged in the business of solid waste disposal. Prior to 21 April 1971, he was granted an exclusive privilege "to collect waste" in the area covered by the franchise agreement here in question.

"4. Pursuant to the actions of the Board of Commissioners on December 6, 1971, the County of Robeson entered into an Exclusive Franchise and Agreement dated December 6, 1971, with James Porter granting to him an 'Exclusive Franchise and Right to pick up, collect, transport and dispose of trash, garbage and refuse outside of the incorporated cities and towns of Robeson County' in a specifically described area which was the same territory for which he had previously been granted an exclusive privilege to collect waste. [To this finding the defendants excepted.]

"5. Suburban Sanitation Service, Inc., is a North Carolina corporation incorporated in April 1971, and Wayne L. Raybon is its president and sole stockholder. Wayne L. Raybon has been engaged in the business of solid waste disposal since 1967, and has continued the same business through Suburban Sanitation Service, Inc., since its incorporation. Suburban Sanitation Service, Inc., as of the date of the hearing was serving approximately 206 residences and 4 businesses in the territory described in the exclusive franchise and agreement to Sanitation Service, Inc., and approximately 39 residences and one business in the territory described in the exclusive franchise and agreement to James Porter. Suburban Sanitation Service, Inc., holds a permit from the Robeson County Health Director and maintains a truck approved by the Robeson County Health Director for the operation of its business.

"6. Cooper Logan is a citizen and resident of Robeson County, doing business as Logan's Disposal Service, and has been for more than two years prior to the date of the hearing engaged in the business of solid waste disposal, and at the date of the hearing was serving approximately 250 residences and 5 businesses in the territory described in the 'Exclusive Franchise and Agreement' to Sanitation Service, Inc. He holds a permit from the Robeson County Health Director and maintains a truck approved by the Robeson County Health Director."

Wayne L. Raybon and the defendant Logan had notice of and participated in a meeting of the County Board of Commissioners on 21 April 1971 at which a public hearing was held on the question of providing garbage and trash service in the county on a franchise basis. Each of them

also had notice of the continuing deliberations of the Board of Commissioners on the subject, and Wayne Raybon attended the meeting of the Board on 6 December 1971.

"10. The defendant, Suburban Sanitation Service, Inc., and the defendant, Cooper Logan, are engaged in essentially the same type of operation, each serving primarily residences outside of the municipalities in Robeson County and picking up on a regular schedule all household solid waste that may be put out for collection by their customers. Such solid wastes include, among other things, paper, bottles, cans, tree limbs, food scraps, rotten fruit, and food wrappers, and are the types of solid wastes normally found at residences. Each defendant estimates that the vegetable and animal food scraps and matter approximates 10% or less of the material collected. Such putrescible material is inseparable from the other solid waste put out for collection, and it is collected and disposed of by these defendants by transportation in their respective trucks to the landfill of the City of Fayetteville.

"11. That because of its inseparable nature and because it contains putrescible material, including animal and vegetable food scraps, containers and wrappers which have contained food and other putrescible material and which have not been cleaned, and milk cartons and soft drink cans, the solid waste collected by these defendants constitutes 'garbage' as defined in this Judgment and within the meaning of G.S. 153-272. [To this finding the defendants excepted.]

"12. Suburban Sanitation Service, Inc., is engaging in the business of picking up, collecting, transporting and disposing of garbage within the territory described in the Exclusive Franchise and Agreement of Sanitation Service, Inc., and within the territory described in the Exclusive Franchise and Agreement to James Porter, and its continued operation results in damage to each of the plaintiffs. [To this finding the defendants excepted.]

"13. Cooper Logan, doing business as Logan's Disposal Service, is engaging in the business of picking up, collecting, transporting and disposing of garbage within the territory described in the Exclusive Franchise and Agreement to Sanitation Service, Inc., and his continued

operation results in damage to Sanitation Service, Inc. There has been no evidence that Logan has engaged in this business in this territory franchised to James Porter, and he was not sued by Porter. [To this finding the defendants excepted.]"

Upon the foregoing stipulations and findings of fact, the Superior Court reached the following conclusions of law:

CONCLUSIONS OF LAW

"1. That G.S. 153-272 is a valid enactment of authority to County Commissioners to regulate the collection and disposal of garbage, and that the statute is not unconstitutional on any ground alleged by the defendants. [To this conclusion the defendants excepted.]

"2. The Court is of the opinion that G.S. 153-272 validly authorizes the Robeson County Board of Commissioners to regulate the collection of and disposal of garbage in the interest of public health, and that the inclusion of garbage or putrescible material in waste collected and disposed of creates a valid danger to the public health which is a proper subject of regulation. [To this conclusion the defendants excepted.]

"3. That the actions of the Robeson County Board of Commissioners in granting exclusive franchises for the collection and disposal of garbage, after notice and hearing as described in the minutes of the Board of Commissioners, was a valid exercise by the Robeson County Board of Commissioners of the authority granted to it by statute. [To this conclusion the defendants excepted.]

"4. The Court is of the opinion that insofar as the resolutions of the Robeson County Board of Commissioners and the exclusive franchises and agreements to Sanitation Service, Inc., and to James Porter, purport to grant an exclusive franchise and right to pick up, collect, transport and dispose of trash, the Court finds the term 'trash' to be synonymous with 'refuse' or nonputrescible wastes, and the court finds this to be beyond the authority granted by G.S. 153-272 and ultra vires, and the court is of the opinion that the purported inclusion of the term 'trash' is surplusage insofar as the grant of an exclusive franchise is concerned and does not invalidate the valid grant of such

franchises as to garbage. [To this conclusion both plaintiffs and defendants excepted.]

"5. The Court is of the opinion that insofar as the exclusive franchise and agreements might be interpreted as an exclusive franchise to maintain landfills that this is beyond the authority granted by G.S. 153-272 and beyond the authority of the resolutions adopted by the Board of Commissioners of Robeson County on December 6, 1971, but this does not invalidate the valid portions of the exclusive franchises and agreements. [To this conclusion both plaintiffs and defendants excepted.]

"6. The Court is of the opinion that the enactment of Article 13B of Chapter 130 of the General Statutes in 1969 did not affect the authority of the Board of Commissioners to act under G.S. 153-272, but that the operations of persons engaged in the business of solid waste disposal are subject to the valid regulations made pursuant to that article. [To this conclusion the defendants excepted.]

"7. That the operations of the defendants, Suburban Sanitation Service, Inc., and Cooper Logan, doing business as Logan Disposal Service, in the collection of solid waste material which includes garbage, is in violation of the Exclusive Franchises and Agreements as validly granted to the plaintiffs by the Robeson County Board of Commissioners and is causing the respective plaintiffs irreparable harm for which no adequate remedy at law exists, and the respective plaintiffs are entitled to injunctive relief. [To this conclusion the defendants excepted.]

"8. For the purposes of interpreting this Judgment and the injunctive relief herein granted, the Court is of the opinion that the collection and disposal of residential, commercial and industrial solid wastes which do not include garbage, or putrescible material, is not in violation of the Exclusive Franchises and Agreements validly granted to the respective plaintiffs. [To this conclusion both plaintiffs and defendants excepted.]

"9. The defendants have offered no evidence of the unreasonableness of fees charged by Sanitation Service, Inc., or James Porter, and the Court is of the opinion that the defendants have no standing to complain about the

portions of the Exclusive Franchises and Agreements which state that under no circumstances shall the prices charged be less than the prevailing prices for like services rendered in adjoining counties in the state, and the Court makes no determination as to the validity of that provision of the franchises and agreements. [To this conclusion the defendants excepted.]"

The court thereupon adjudged that Suburban be enjoined from "picking up, collecting, transporting and disposing of solid waste material which includes garbage" within the area covered by the franchise of Sanitation Service, Inc., and within the area covered by the franchise of Porter so long as those franchise agreements remain in force and effect, and that the defendant Logan be enjoined from "picking up, collecting, transporting and disposing of solid waste material which includes garbage" in the area covered by the franchise of Sanitation Service, Inc., so long as it remains in force and effect, and that Sanitation Service, Inc., recover damages of each defendant and Porter recover damages of Suburban, all such damages to be assessed after further hearing by the court upon motion of any party concerned.

Boyce, Mitchell, Burns & Smith by Eugene Boyce for Sanitation Service, Inc.

Ellis Page for Robeson County.

W. Earl Britt for James Porter.

Nye & Mitchell by Charles B. Nye and John E. Bugg; and L. J. Britt & Son by Luther J. Britt, Jr., for defendants.

LAKE, Justice.

THE PLAINTIFFS' APPEALS

The plaintiffs contend that authority to issue exclusive franchises to pick up, collect, transport and dispose of trash and other refuse, as well as garbage, was conferred upon the Board by G.S. 153-272. The Superior Court concluded: (a) This statute authorizes the Board to grant an exclusive franchise for the collection and disposal of "garbage"; (b) this statute does not authorize the Board to grant an exclusive franchise for the collection and disposal of "trash"; (c) solid waste material in which "garbage" is inseparably commingled is "garbage";

and (d) this statute does not authorize the Board to grant an exclusive franchise to maintain a landfill. The appeal of the plaintiffs relates to (b) and (d) of these conclusions.

[1] For the reasons set forth in our opinion in *Transportation Service v. County of Robeson,* 283 N.C. 494, 196 S.E. 2d 770, we find no error in the adoption by the Superior Court, for the purposes of these cases, of the definitions of "garbage," "refuse" and "solid waste" contained in G.S. 130-166.16, or in its conclusion that G.S. 153-272 does not authorize the Board of County Commissioners to grant an exclusive franchise for the collection and disposal of "trash," so defined and not substantially and inseparably commingled with "garbage," so defined.

[2] The authority conferred by G.S. 153-272 upon the Board of County Commissioners to regulate the "disposal of garbage" would, of necessity, extend to the disposal of garbage by the operation of a landfill. However, since a landfill is also a method for disposal of wastes which are not "garbage," within the above definition and so within the meaning of G.S. 153-272, there was no error in the conclusion of the Superior Court that this statute does not authorize the Board of County Commissioners to grant an exclusive franchise for the operation of a landfill.

We find, therefore, no merit in the plaintiffs' assignments of error and, with reference to the plaintiffs' appeals, the judgment of the Superior Court is affirmed.

THE DEFENDANTS' APPEALS

[3] The Superior Court found as a fact that the waste picked up by each defendant, pursuant to its regular schedule of service to its customers, includes "paper, bottles, cans, tree limbs, food scraps, rotten fruit, and food wrappers," that each defendant estimates that the vegetable and animal food scraps and matter approximates 10% or less of the material collected and "such putrescible material is inseparable from the other solid waste" collected and disposed of by these defendants. To this finding there was no exception. It is followed in the judgment of the court by a paragraph designated "Finding of Fact No. 11," to which the defendants did except. In it the court "found" that because of the inseparability of the entire mass of waste collected by each defendant into its putrescible and non-putrescible components, the entire collection constitutes "gar-

bage," within the meaning of G.S. 153-272. This paragraph is, in reality, a conclusion of law. It is supported by the above mentioned finding of fact to which no exception was taken.

Obviously, a scrap of bread, a chicken bone, a watermelon rind or a half-filled carton of soured milk thrown into a truckload of yard trash and discarded newspapers would not convert the entire mass into "garbage." Where, however, there is a substantial commingling of "garbage" and "trash" into an inseparable mass, the whole becomes "garbage," attractive to rats and dangerous to the public health. The drawing of the line between trivial and substantial commingling of the two types of material is a question for the exercise of sound judgment in each case, but we are not prepared to say that a "garbage" component amounting to 10% of the total mass is not sufficient to warrant the conclusion that the entire mixture is "garbage," within the meaning of the statute. Thus, we find no error in the conclusion of the Superior Court that each defendant is presently engaged in the collection and disposal of "garbage," and the defendants' Assignment of Error No. 1 is overruled.

[4] We also find no merit in the defendants' Assignments of Error 2 and 3 relating to the conclusion of the Superior Court that the franchises granted by the county to the plaintiffs are severable, so that the invalidity of those portions of each purporting to grant an exclusive franchise for the collection and disposal of "trash" and for the operation of landfills does not, per se, compel the conclusion that the grant of the exclusive right to collect and dispose of "garbage" is also invalid.

[5] We are thus brought to the defendants' fourth assignment of error. This is directed to the Superior Court's conclusion that G.S. 153-272 is a valid enactment of authority to county commissioners to regulate the collection and disposal of garbage and is not unconstitutional "on any ground alleged by the defendants." The defendants' assignment of error asserts that this conclusion is erroneous "because General Statute 153-272 is an illegal and unconstitutional delegation of power to the county commissioners by our legislators * * * . " The only argument made in support of this assignment of error in the brief of the defendants is that G.S. 153-272 "does not lay down or point to any standards for the guidance of counties in the exercise of their discretion in granting exclusive franchises for the

removal and disposal of garbage within said county," and for that reason is a violation of Article II, § 1, of the Constitution of North Carolina.

The general rule that legislative power, vested in the General Assembly by Article II, § 1, of the Constitution of North Carolina, may not be delegated is subject to an exception permitting the delegation to municipal corporations and to counties of power to legislate concerning local problems. *Jackson v. Board of Adjustment,* 275 N.C. 155, 162, 166 S.E. 2d 78; *Efird v. Comrs. of Forsyth,* 219 N.C. 96, 12 S.E. 2d 889; *Tyrrell County v. Holloway,* 182 N.C. 64, 108 S.E. 337. There is no merit in this assignment of error.

One who seeks a judicial determination that a statute, or governmental action pursuant thereto, is unconstitutional must raise the question at the earliest possible stage of the proceeding, usually in his pleadings in the trial court, must point out the specific constitutional provision upon which he relies and must preserve the question for consideration by the appellate court through an assignment of error specifically directing attention to such constitutional provision and by argument in his brief directed thereto. *Martin v. Housing Corporation,* 277 N.C. 29, 41, 175 S.E. 2d 665; *Rice v. Rigsby* and *Davis v. Rigsby,* 259 N.C. 506, 131 S.E. 2d 469. As Justice Parker, later Chief Justice, said in the case last cited, "Constitutional questions are of great importance and should not be presented in uncertain form." In *United States v. Spector,* 343 U.S. 169, 72 S.Ct. 591, 96 L.Ed. 863, the Supreme Court of the United States said, "But when a single, naked question of constitutionality is presented, we do not search for new and different constitutional questions."

The franchise granted to each plaintiff provides: (1) The grantee will obtain and maintain its equipment and other facilities in conformity to the requirements of the State Board of Health and to applicable laws of the State; (2) it will render "reasonably acceptable service" to persons, firms and corporations in its area, the County Board of Commissioners reserving the right to determine any controversy arising as to "reasonable acceptable service"; (3) the grantee will furnish such service at a "reasonable price," the County Commissioners reserving the right to determine any controversy which may arise as to such price, but in no event shall the price be *less* than the prevailing price for like services rendered in adjoining counties of this State; (4) the grantee will furnish its own landfill; and (5)

such landfill may be used by "the general public" upon payment of a "reasonable fee" for such use.

Each franchise provides that nothing therein shall be construed to prevent any person, firm or corporation from "personally disposing of its own * * * garbage * * * in a legal and lawful manner and in compliance with the laws, rules and regulations of the North Carolina Health Department." The provision as to the use of the grantee's landfill by the general public would seem to mean that the above mentioned right of any person, firm or corporation "personally" to dispose of his or its own garbage would include transporting it to such landfill.

It will be observed the franchise agreement: (1) Does not expressly forbid discrimination either in service or in price; (2) provides no minimum frequency of pick up of garbage; (3) provides no maximum price or standard for determining a "reasonable price"; (4) apparently leaves both service and price to individual negotiation, subject to complaint to the Board of Commissioners; (5) does not require the grantee to remove garbage from the premises of any person, firm or corporation with whom it has no contract or with whom any controversy arises pending the determination of such controversy by the Board of Commissioners; and (6) does not require the grantee to pick up garbage heretofore or hereafter thrown or deposited on or near the roadside or any other public place.

These and other circumstances appearing in the record seem to distinguish the present case from many of the decisions of other courts cited by text writers in support of general statements that the grant by a city of an exclusive contract for the removal of garbage constitutes a proper exercise of the police power. See McQuillin, The Law of Municipal Corporations, 3rd Ed., § 24.251; 56 AM. JUR. 2d, Municipal Corporations, § 462; Annot., 83 A.L.R. 2d 799. Numerous cases from other jurisdictions, cited by these writers, support the proposition that a city, in the exercise of the police power delegated to it by the State, may prohibit anyone other than the city itself, or an independent contractor with whom it contracts for the removal of garbage, to transport garbage over its streets. This is deemed a reasonable exercise of the police power for the protection of the public health. Many decisions cited by these writers hold, and we think it cannot be doubted, that the police power extends to reasonable regulations of the equipment used, the manner

of collecting and transporting, the method and place of disposition of garbage by a scavenger and the requirement that he obtain a license. This, obviously, is a different question from that presented by the grant of an exclusive franchise.

The most widely accepted, and we think the most plausible, basis for the decisions sustaining the validity of ordinances prohibiting anyone other than the city itself, or its independent contractor, from transporting garbage is that the public health can best be protected if the city authorities have but one scavenger to supervise. See: *City of Indianapolis v. Ryan,* 212 Ind. 447, 7 N.E. 2d 974; *O'Neal v. Harrison,* 96 Kansas 339, 150 P. 551; *Wheeler v. Boston,* 233 Mass. 275, 123 N.E. 684; *Board of Health of Grand Rapids v. Vink,* 184 Mich. 688, 151 N.W. 672; *Valley Spring Hog Ranch Co. v. Plagmann,* 282 Mo. 1, 220 S.W. 1; *Smiley v. MacDonald,* 42 Neb. 5, 60 N.W. 355; *Atlantic City v. Abbott,* 73 N.J.L. 281, 62 A. 999; *Spencer v. Medford,* 129 Ore. 333, 276 P. 1114; *Smith v. City of Spokane,* 55 Wash. 219, 104 P. 249. It may be seriously questioned whether this reason applies to the grant of an exclusive franchise to collect and dispose of garbage *for compensation,* leaving, as does the franchise in the present case, every person, firm or corporation free "personally" to transport and dispose of his or its own garbage. G.S. 153-272 expressly authorizes the issuance of such a franchise.

The myriad cases cited by the above mentioned text writers disclose that in many areas, especially large cities, the right to collect garbage for use as hog feed or other commercial purposes is much sought after and not without substantial value. See: *Jansen Farms v. City of Indianapolis,* 202 Ind. 138, 171 N.E. 199; *Wheeler v. Boston, supra; People v. Gardner,* 136 Mich. 693, 100 N.W. 126, aff'd, 199 U.S. 325, 26 S.Ct. 106, 50 L.Ed. 212; *Atlantic City v. Abbott, supra; State ex rel. Moock v. City of Cincinnati,* 120 Ohio State 500, 166 S.E. 583; *Cornelius v. Seattle,* 123 Wash. 550, 213 P. 17. We are not concerned here with a business of minimal importance, either in value or in relation to the public health. Whether a person who contracts with a restaurant operator, householder, or industrial plant to purchase garbage produced on the premises of such vendor is to be deemed a person transporting and disposing of his or its "own" garbage, within the meaning of the franchise in the record before us, presents another interesting question, not now before us for decision.

The police power is not unlimited. To survive a well aimed constitutional attack, the governmental activity must have not only a good purpose but also a reasonable relation to the promotion of the public health, safety, morals or welfare. See, in relation to the regulation of garbage collection and disposal: *Wheeler v. Boston, supra; Valley Spring Hog Ranch Co. v. Plagmann, supra; In re VanDine,* 23 Mass. 187; *State v. Fisher,* 2 Mo. 174; *Coombs v. MacDonald,* 43 Neb. 632, 62 N.W. 41; *Atlantic City v. Abbott, supra.* As we have noted, the franchises before us permit any corporation "personally" to transport and dispose of its own garbage. The only way that a corporation can "personally" do so is through its employees. The relation to the promotion or preservation of the public health of a distinction between transporting and disposing of corporate garbage by employees and by an independent contractor is not too clear for question.

On 6 December 1971, each of the defendants, pursuant to contracts with his or its customers, was engaged in a lawful business, which business was conducive to the maintenance of the public health, sanitation and welfare. Nothing in the record suggests that either of the defendants did not have the proper equipment or was not qualified to operate such business in a safe and lawful manner, that any customer was dissatisfied with his or its services or that the manner in which the business was operated endangered the public health, safety or welfare. On that date the Board of County Commissioners by official action, procedurally correct, undertook to deprive each of these defendants of his or its right to continue so to serve his or its customers and to confer that right upon another by granting to such favored person an exclusive franchise to carry on such business. This is drastic governmental action which can be supported only by reasonable basis for the belief that there is a substantial public need therefor.

Counsel have not cited and our research has not disclosed any decision of this Court determining the validity of such governmental action. The nearest approach thereto in our reports appears to be *State v. Hill,* 126 N.C. 1139, 36 S.E. 326. That case, however, is not squarely in point. G.S. 153-272 purports to confer upon the Board of County Commissioners authority to grant licensed persons the exclusive right to collect and dispose of garbage *for compensation.* The reasonableness of the distinction made in these franchises between transpor-

tation and disposition of garbage by the producer thereof "personally" in the transportation and disposition of identical garbage under identical circumstances by an independent contractor other than the grantee of the franchise is not before us in this appeal. It is not shown by this record to have been before the Superior Court. In affirming the judgment of the Superior Court, we do not determine this question. It may or may not be presented to the Superior Court in the further hearings provided for in its judgment on the question of the recovery of damages by the plaintiffs from these defendants.

Affirmed.

LAFAYETTE TRANSPORTATION SERVICE, INC. v. THE COUNTY OF ROBESON, SAM R. NOBLES, COMMISSIONER OF ROBESON COUNTY, HOWARD M. COOPER, COMMISSIONER OF ROBESON COUNTY, HERMAN DIAL, COMMISSIONER OF ROBESON COUNTY, CARL L. BRITT, COMMISSIONER OF ROBESON COUNTY, J. A. SINGLETON, JR., COMMISSIONER OF ROBESON COUNTY, GEORGE R. PATE, COMMISSIONER OF ROBESON COUNTY, AND W. D. WELLINGTON, COMMISSIONER OF ROBESON COUNTY, SANITATION SERVICE, INC., AND JAMES PORTER

No. 26

(Filed 1 June 1973)

1. **Counties § 2— power to adopt ordinances regulating waste disposal**

A county has no inherent power to adopt ordinances relating to the collection and disposal of garbage and other waste material, having only those legislative powers which the General Assembly has seen fit to confer upon it.

2. **Statutes § 5— statutory construction**

Unless the contrary appears, it is presumed that the Legislature intended the words of a statute to be given the ordinary meaning which they had in ordinary speech at the time the statute was enacted and that no word of any statute is a mere redundant expression.

3. **Counties § 2— authority to grant franchise to collect garbage — statutes**

The grant of powers to boards of county commissioners by G.S. 153-10.1 is, by virtue of G.S. 153-275, supplementary to the grant made by G.S. 153-272 and the two statutes must be construed together.

4. **Counties § 2— franchise to collect garbage — definition of garbage**

The trial court did not err in limiting the definition of "garbage" as used in G.S. 153-272, the statute authorizing counties to grant

exclusive franchises for the collection and disposal of "garbage," to "all putrescible solid wastes, including vegetable matter, animal offal and carcasses of small animals (100 pounds or less), but excluding human body wastes, animal manure, and recognizable industrial by-products," and the court properly concluded that county commissioners have no authority to grant an exclusive franchise to collect and dispose of wastes not falling within such definition of "garbage." G.S. 153-10.1; G.S. 130-166.16; G.S. 160A-192.

APPEAL by defendants from the Court of Appeals, which affirmed the judgment of *McKinnon, J.*, at the 19 July 1972 nonjury Session of ROBESON, reported in 17 N.C. App. 210, 193 S.E. 2d 464.

The plaintiff corporation is engaged in the business of collecting and disposing of solid waste pursuant to contracts with its customers. It brought this action to have declared null and void the action of the Board of Commissioners of Robeson County purporting to grant to the defendants Porter and Sanitation Service, Inc., exclusive franchises for the collection of trash in those parts of the county outside of incorporated cities and towns, and to compel the Board to issue to plaintiff a letter of approval, which letter is a prerequisite to inspection by the State Board of Health of the plaintiff's solid waste disposal facility. The matter was heard in the Superior Court without a jury. The court made findings of fact to which no exception is taken. These findings, summarized and renumbered, are:

1. The plaintiff, a North Carolina corporation with its principal office in Cumberland County, has been engaged in the business of solid waste collection and disposal for several years.

2. Pursuant to its contracts with B. F. Goodrich Company and with TexFi Industries, a textile manufacturer, the plaintiff collects from the plants of those companies waste, including industrial scrap, cardboard cartons, paper and waste from lunchroom facilities, the latter including food containers. The Goodrich plant lies in the portion of Robeson County covered by the franchise granted to Porter. The TexFi plant lies in the portion of the county covered by the franchise granted to Sanitation Service, Inc.

3. The plaintiff is the owner of land in Robeson County on which it has prepared a landfill for the disposal of solid waste. It has made a substantial investment in such land and in equipment for use in its operations.

4. Having received complaints from various groups in the county concerning the dumping of waste on highways and on private property and having determined that for the county to engage in the operation of landfills for the disposal of such waste would necessitate additional taxes, the Board of Commissioners, on 6 December 1971, granted to the defendant Porter an exclusive franchise to collect "trash and garbage" in approximately one-fourth of the county and to the defendant Sanitation Service, Inc., an exclusive franchise for the collection and disposal of "trash and garbage" in the remainder of the county, outside of incorporated cities and towns. (The court's findings do not suggest that any action of the plaintiff contributed to the conditions to which the complaints related.)

5. The defendant Porter and the defendant Sanitation Service, Inc., have made substantial investments in equipment and property for the purpose of carrying on the services to which their respective franchises relate. Sanitation Service, Inc., has established a landfill for the disposition of materials collected pursuant to its franchise and by contract permits Porter to use it. Porter is able and willing to serve the Goodrich Company but has no agreement with it for such service. Sanitation Service, Inc., is ready and able to provide service to all in the territory described in its franchise.

6. The plaintiff applied to the County Tax Collector for a license, required by the county ordinance of one engaged in the business of collecting waste. It was denied such license because of the granting of the exclusive franchises to Porter and Sanitation Service, Inc. The plaintiff also applied to the County Commisioners for an approval letter pursuant to the rules and regulations of the State Board of Health, which application was denied because of the existence of the said exclusive franchise agreements.

7. Rules and regulations providing standards for solid waste disposal were adopted by the State Board of Health on 11 March 1971 and have been in effect since that date. Rules and regulations governing the storage, collection, transportation and disposal of refuse were adopted by the Robeson County Board of Health on 28 January 1971 and have been in effect since 1 May 1971.

8. The plaintiff has not shown that it has engaged in or plans to engage in garbage collection in Robeson County other

than as such collection is involved in the collection of industrial waste from the Goodrich Company and TexFi Industries.

9. There has been no showing of other than good faith on the part of the Board of Commissioners of the county.

The Superior Court thereupon made the following conclusions of law, to each of which, except Conclusion No. 5, the defendants except:

CONCLUSIONS OF LAW

"1. The Court is of the opinion that under the authority of G.S. 153-272 and the Resolutions and Ordinance adopted by the Board of Commissioners of Robeson County the power of the Board to issue licenses to collect and/or dispose of garbage; to prohibit the collection and/or disposal of garbage by unlicensed persons; and to grant to licensed persons the exclusive right to collect and/or dispose of garbage within a specified area, is limited to 'garbage' as given its ordinary and accepted meaning.

"2. For the purposes of this action, the Court adopts as the ordinary and accepted meaning of the words 'garbage' and 'rubbish' the definitions contained in 'The Rules and Regulations Governing the Storage, Collection, Transportation and Disposal of Refuse in Robeson County, North Carolina' adopted by the Robeson County Board of Health on January 28, 1971, as follows:

> 'B. The word "garbage" means all putrescible solid wastes, including vegetable matter, animal offal, and carcasses of small animals (100 pounds or less), but excluding human body wastes, animal manure, and recognizable industrial by-products. Used milk cartons, or other discarded food containers that are not dry and clean shall be included in this definition.
>
> 'C. The word "rubbish" means non-putrescible solid wastes.'

"3. That the industrial solid wastes shown to have been removed and disposed of by plaintiff from the B. F. Goodrich Company and from TexFi Industries, do not constitute 'garbage,' with the exception of discarded food scraps, used milk cartons and other discarded food containers which are not dry and clean, but such industrial wastes

constitute 'rubbish' as above defined, and the Court finds the word 'trash' as used in the Resolutions, Ordinance and 'Exclusive Franchises and Agreements' is synonymous with 'rubbish.'

"4. That as against the plaintiff the purported grant of an Exclusive Right or Franchise to pick up, collect, transport and dispose of trash or 'rubbish' within a specified area is ultra vires and void.

"5. That as against the plaintiff the grant of an exclusive right to pick up, collect, transport and dispose of 'garbage' within the respective areas described in the Resolution and the 'Exclusive Franchises and Agreements' is a valid exercise of authority pursuant to G.S. 153-272.

"6. That Robeson County may not withhold the granting of a license to plaintiff to collect, pick up, or dispose of industrial solid wastes which do not contain 'garbage' by reason of the existence of the 'Exclusive Franchises and Agreements' entered into with defendants, Sanitation Service, Inc., and James Porter, and the resolutions of December 6, 1971, and May 27, 1972.

"7. That Robeson County may not withhold the granting of an 'approval letter' to plaintiff as may be required by the Rules and Regulations of the State Board of Health for Solid Waste Disposal Facilities by reason of the existence of those 'Exclusive Franchises and Agreements.' "

Upon these findings and conclusions the Superior Court enjoined the county and its Board of Commissioners from withholding, by reason of the existence of the franchises granted to Porter and to Sanitation Service, Inc., a license to the plaintiff to collect, pick up or dispose of solid wastes which do not contain "garbage" and from withholding, by reason of such franchise agreements, the granting of an approval letter required by the rules and regulations of the State Board of Health.

The franchises granted to Sanitation Service, Inc., and to Porter expressly provide that nothing therein shall prevent any person, firm or corporation, from personally disposing of his or its own trash or garbage in a lawful manner, and further provide that any landfill operated by Sanitation Service, Inc., shall be open to the public upon the payment of a reasonable fee for its use.

The Court of Appeals affirmed the judgment of the Superior Court, Vaughn, J., dissenting.

Musselwhite & Musselwhite by Fred L. Musselwhite and Charlie S. McIntyre, Jr., for Lafayette Transportation Service, Inc.

Ellis E. Page for County of Robeson.

Earl Britt for James Porter.

Boyce, Mitchell, Burns & Smith by Eugene Boyce for Sanitation Service, Inc.

LAKE, Justice.

The plaintiff did not appeal. The appellants take no exception to the conclusion of the Superior Court that, as against the plaintiff, the grants to Sanitation Service, Inc., and to Porter of exclusive franchises to pick up, collect, transport and dispose of "garbage," as defined in the judgment of the Superior Court, are valid. Thus, the correctness of that conclusion is not before us on this appeal.

The sole question before us on this appeal is the correctness of the conclusions of the Superior Court that the county is not authorized by G.S. 153-272 to grant an exclusive franchise to pick up, collect, transport and dispose of "trash" or "rubbish" and that the county may not, because of its issuance of the franchises to Sanitation Service, Inc., and to Porter, deny the plaintiff a license to pick up, collect, transport and dispose of industrial solid wastes which do not contain "garbage," or withhold from the plaintiff the approval letter required by the regulations of the State Board of Health as a prerequisite to an inspection of the plaintiff's solid waste disposal facility.

[1, 2] A county has no inherent power to adopt ordinances relating to the collection and disposal of garbage and other waste material, having only those legislative powers which the General Assembly has seen fit to confer upon it. *Harris v. Board of Commissioners,* 274 N.C. 343, 163 S.E. 2d 387; *Surplus Co. v. Pleasants, Sheriff,* 264 N.C. 650, 142 S.E. 2d 697; *Ramsey v. Commissioners of Cleveland,* 246 N.C. 647, 100 S.E. 2d 55. In the construction of a statute conferring such powers upon the county, as in other cases of statutory construction, the function of the court is to discover the intent of the Legislature and to give

to the words of the statute the meaning which the Legislature had in mind. *Hobbs v. Moore County,* 267 N.C. 665, 149 S.E. 2d 1; *Telephone Co. v. Clayton, Commissioner of Revenue,* 266 N.C. 687, 147 S.E. 2d 195. Unless the contrary appears, it is presumed that the Legislature intended the words of the statute to be given the meaning which they had in ordinary speech at the time the statute was enacted. *Supply Co. v. Motor Lodge,* 277 N.C. 312, 117 S.E. 2d 392; *Telephone Co. v. Clayton, supra; Seminary, Inc. v. Wake County,* 251 N.C. 775, 112 S.E. 2d 528; *Greensboro v. Smith,* 241 N.C. 363, 85 S.E. 2d 292. However, the context of the statute must also be considered. *Greensboro v. Smith, supra;* Strong, N. C. Index 2d, Statutes, § 5. In the absence of contrary indication, it is presumed that no word of any statute is a mere redundant expression. Each word is to be construed upon the supposition that the Legislature intended thereby to add something to the meaning of the statute. *In re Watson,* 273 N.C. 629, 161 S.E. 2d 1; *Jones v. Board of Education,* 185 N.C. 303, 117 S.E. 37.

G.S. 153-272, upon which the defendants rely as the source of their asserted authority to deny to the plaintiff a license to continue to carry on its established business, provides:

> "*Control of private collectors.*—The board of county commissioners of any county is hereby empowered to regulate the collection and disposal of *garbage* by private persons, firms or corporations outside of the incorporated cities and towns of the county for the purpose of encouraging and attempting to insure an adequate and continuing service of *garbage* collection and disposal where the board deems it to be desirable. In the exercise of such power, the board may issue a license to any private person, firm, or corporation to collect and/or dispose of *garbage;* may prohibit the collection and/or disposal of *garbage* by unlicensed persons, firms, or corporations; *may grant to licensed persons, firms, or corporations the exclusive right to collect and/or dispose of garbage for compensation within a specified area* and prohibit unauthorized persons, firms, or corporations from collecting and/or disposing of *garbage* within said area; and may regulate the fees charged by licensed persons, firms, and corporations for the collection and/or disposal of *garbage* to the end that reasonable compensation may be provided for such services. * * * " (Emphasis added.)

This statute was enacted in 1961. G.S. 153-275, which was part of the same Act (Chapter 514 of the Session Laws of 1961) provides:

> *"Powers granted herein supplementary.*—The powers granted to counties by this article shall be deemed supplementary to any powers *heretofore or hereafter* granted by any other law, either general, special, or local, for the same or similar purpose, and in any case where the provisions of this article conflict with or are different from the provisions of such other law, the board of county commissioners may in its discretion proceed in accordance with the provisions of such other law, or, as an alternative method, in accordance with the provisions of this article." (Emphasis added.)

Thus, the Legislature clearly intended that the authority conferred upon counties by G.S. 153-272 to grant an exclusive franchise to collect and dispose of "garbage" be construed in conjunction with other statutes granting authority to boards of county commissioners to deal with the matter of garbage collection and similar matters, including those subsequently enacted.

[3] In 1955 (Chapter 1050 of the Session Laws of 1955) the General Assembly enacted G.S. 153-10.1. The caption of this section, as printed in the current compilation of the General Statutes, reads, *"Local: Removal and disposal of trash, garbage, etc."* When originally enacted, G.S. 153-10.1 was made applicable to certain named counties only. By numerous amendments in subsequent years, other counties were added. Robeson County was not included in the list of counties to which the statute originally applied or to which it was extended by these amendments. However, in 1969 (Chapter 1003 of the Session Laws of 1969) the paragraph limiting the application of this statute to certain named counties was repealed, thereby giving G.S. 153-10.1 statewide application. Thus, the word "local," still appearing in the caption of this section, is misleading and no longer applicable. G.S. 153-10.1, in effect as a statewide law at the time of the action of the Board of Commissioners here in question, is a grant of powers to the Board, which, by virtue of G.S. 153-275, is supplementary to the grant made by G.S.

153-272 and the two statutes must be construed together. G.S. 153-10.1 provides:

> "*Local: Removal and disposal of trash, garbage, etc.*— The board of county commissioners is hereby authorized and empowered, in its discretion, to issue, pass and promulgate ordinances, rules and regulations governing the removal, method or manner of disposal, depositing or dumping of any *trash, debris, garbage, litter, discarded cans or receptacles or any waste matter whatsoever* within the rural areas of the county and outside and beyond the corporate limits of any municipality of said county. * * *" (Emphasis added.)

Obviously, the word "garbage," as used in G.S. 153-10.1, has a meaning different from the meaning of "trash," "debris," "litter" and "waste matter," as used in that statute. Otherwise, the latter terms are meaningless redundancies, which cannot be presumed to have been the legislative intent.

Since the one statute is expressly declared by the Legislature to be supplementary to the other, the word "garbage" must be given the same meaning in both. While the word "garbage," standing alone, is loosely used in common speech to include a wide variety of waste, especially household waste, including, for example, waste papers and containers, this would seem to be the result of the common practice of householders to dispose of all types of kitchen and household wastes by putting them together in the same container for ultimate removal from the premises. Where there is a substantial, physical commingling of materials of different kinds, so that it is not thereafter practicable to separate them, the commingled mass tends to take on the character of the lowest grade of material.

Webster's New International Dictionary, 2d Ed., unabridged, defines garbage as "Offal, as the entrails of an animal or fish; refuse animal or vegetable matter from a kitchen, market, or store; often, loosely, offal mixed with other refuse, as ashes, paper, tin cans, etc.; hence, anything worthless or filthy; refuse." To the same effect, see: 38 C.J.S., Garbage, p. 189; McQuillin, The Law of Municipal Corporations, 3rd Ed., § 24.247.

The 1969 Legislature, which converted G.S. 153-10.1 into a statewide law, also enacted Article 13B of Chapter 130 of the General Statutes, authorizing the State Board of Health to

establish a statewide "Solid Waste Disposal Program." This Act, in G.S. 130-166.16, contains the following definitions:

> "(1) 'Garbage'—All putrescible wastes, including animal and vegetable matter, animal offal and carcasses, and recognizable industrial by-products, but excluding sewage and human waste.
>
> "(2) 'Refuse'—All nonputrescible wastes.
>
> "(3) 'Solid waste'—Garbage, refuse, rubbish, trash and other discarded solid materials * * * "

While these definitions, as such, apply only to the defined terms as used in the Act of which they are a part, this statute is also part of the context in which G.S. 153-272 appears. It clearly shows the Legislature distinguished "garbage" from "trash" and "rubbish."

Again, in a much older statute, G.S. 160-233, adopted in 1917 and superseded in 1971 by G.S. 160A-192, the Legislature authorized municipal corporations to provide by ordinances for the removal of "garbage, slops, and trash." This statute, enacted long before G.S. 153-272, is also part of its context. It is another indication that, in the contemplation of the Legislature, "garbage" and "trash" have never been synonymous.

[4] Since the Legislature has used the words "trash," "debris," "litter" and "waste matter" to bring within the scope of G.S. 153-10.1, the companion, supplementary statute to G.S. 153-272, materials distinguishable, in its contemplation, from "garbage," and, in other related statutes, has also indicated its use of "garbage," "trash" and "solid waste" as distinguishable materials, we conclude that the word "garbage," standing alone in G.S. 153-272, must be given a restricted meaning such as that suggested in the above quoted dictionary definition.

We, therefore, find no error in the limitation by the Superior Court of the word "garbage," as used in G.S. 153-272, to the definition of that term stated in its Conclusion No. 2. Since, by the express terms of G.S. 153-272, the authority thereby conferred by the Board of County Commissioners to grant an exclusive franchise extends only to the collection and disposal of "garbage," it follows that there was no error in the conclusion of the Superior Court that the defendants do not have authority to grant an exclusive franchise "to pick up, collect, transport

and dispose of" wastes not falling within such definition of "garbage."

Consequently, there was no error in the conclusions of the Superior Court to which the defendants have excepted or in its judgment entered thereon.

Affirmed.

STATE OF NORTH CAROLINA v. HAROLD LEGUSTA WATKINS

No. 53

(Filed 1 June 1973)

1. **Criminal Law §§ 120, 135, 138— imposition of punishment — role of judge and jury**

The rule that the presiding judge fixes the punishment for a convicted defendant within the limits provided by the applicable statute and therefore the amount of punishment which a verdict of guilty will empower the judge to impose is totally irrelevant to the issue of a defendant's guilt and of no concern to the jurors is now applicable in all cases without exception, including capital cases because juries in this State no longer have the discretionary power to reduce the penalty in capital cases from death to life imprisonment.

2. **Criminal Law § 87— leading questions allowed — no error**

The trial court did not abuse its discretion in allowing the solicitor to ask leading questions where the four questions involved did not necessarily suggest the answer desired although all of them could have been answered yes or no.

3. **Homicide § 28— failure to instruct on self-defense — no error**

Defendant was not entitled to an instruction on self-defense where his evidence tended to show that he approached the unarmed deceased with a shotgun, deceased lunged at him and defendant "throwed the gun up . . . and it shot"; nor did the State's evidence require such an instruction where it tended to show that defendant walked up to the deceased, said "Say what you said before," then raised the gun and shot him before deceased could say anything else.

4. **Constitutional Law § 35; Criminal Law § 135— first degree murder — mandatory death penalty not applicable**

The mandatory death penalty for murder in the first degree, rape, burglary in the first degree and arson may not be constitutionally applied to any offense committed prior to 18 January 1973, the date *State v. Waddell* was handed down; therefore, since the murder for which defendant was convicted occurred on 24 February 1972, the mandatory death penalty cannot be applied and the case is remanded for imposition of sentence of life imprisonment.

State v. Watkins

DEFENDANT appeals from judgment of *Martin, J.*, 13 November 1972 Session, RICHMOND Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging him with the murder of Lee Edward Ingram on 24 February 1972.

The State's evidence tends to show that defendant worked in Aberdeen on 24 February 1972 and returned to Rockingham about 5:30 p.m. Around 9 p.m. he left Potts' Pool Room on East Washington Street in Rockingham in company with James Malloy and Alfred Steele. They drove to the Philadelphia section which is about five miles from East Washington Street. There defendant redeemed a 12-gauge single-barreled shotgun which he and his uncle had previously pawned to Mrs. Maude Dennis. Defendant and his companions then returned to East Washington Street. Defendant alighted and his companions drove on about fifty feet to park the car. "About a minute after we let the defendant out of the car, I heard a shot. At that time we were getting out of the truck. . . . When I got out of the truck, I saw somebody laying in the street, but I did not know who it was. He was about 50 or 60 feet away."

Cassie Belle Staton testified that she was in the vicinity of East Washington Street around 10 p.m. and had seen Lee Edward Ingram, the deceased, come out of the pool room about 9:30 p.m. and get in a car occupied by Mrs. Imogene McDonald. He stayed in the car awhile and was getting out of it when defendant approached with a shotgun in his hand and said, "I got you now." With gun in hand, defendant kept repeating, "Say what you said before; say it now." Ingram replied, "Man, what are you talking about?" Defendant said, "Come on now; why don't you say it now?" Before Ingram said anything else defendant threw up the gun and shot him in the face. Ingram died on the spot. Defendant went into Potts' Pool Room, reloading the gun as he went.

Policeman Jasper Christmas arrived on the scene within five minutes and found Ingram lying on the street five or six feet from Potts' Pool Hall. He examined the body, found part of the head blown off, and determined that Lee Edward Ingram was dead.

Defendant testified as a witness in his own behalf. He said he was twenty-one years of age, married but not living with his wife. He was casually acquainted with Lee Edward

Ingram and knew he went by the name of "Mule" Ingram. He first heard about Ingram in September 1971. At that time Ingram was with defendant's wife, and as she left to go with defendant Mule Ingram "told me I had better not hit her." He saw Ingram again in December 1971 in company with one Herman Baldwin when Baldwin fired a gun toward defendant's house. Defendant testified he had been informed by his brother that Mule Ingram, Herman Baldwin and Bo Didley were looking for him; that Mule was "cursing and going on" and had a gun; "that Mule was the one that wanted to fight, and that Mule was pushing [putting] Herman up to fight me."

Defendant testified that he weighs 133 pounds and is 5 feet 9 inches tall, and that Mule Ingram weighed about twenty pounds more and was about two inches taller. On 24 February 1972 defendant worked in Aberdeen, returned to Rockingham after getting off work, and went to Quick's Grill where he drank some beer and wine. He then went to the pool room where he saw several people including Mule Ingram. He heard Mule Ingram say, "Damn—that damn ass is here now." After hearing this, defendant left the pool room and got James Malloy to take him to get the shotgun, intending to talk to Ingram. "I figured that was the only way I could talk to him to keep him away from me, to leave me alone." Defendant further testified that he had given Ingram no reason to call him a damn ass. He went to Maudie's Place and got a shotgun his uncle had pawned there and returned, figuring that "if they seen me with the gun . . . I would have a better chance to talk with him and tell him to leave me alone." When he got back to the East Washington Street area defendant got out of the truck and crossed the street to the sidewalk with the gun in his right hand, the barrel pointed downward. He saw Ingram standing facing the McDonald car, walked toward him, stopped five or six feet from him, and called his name. When Ingram turned to face him, defendant said, "Mule, why do you and Herman want to fight me, man?" Ingram threw his arms up and said, "Man, I don't mean no harm—we don't mean no harm," but was coming toward defendant while making that statement; "and right after he said that he just made a jump, a lunge at me." When Ingram made the lunge he was about an arm's length away, and defendant "throwed the gun up and it shot."

Defendant said he did not recall pulling the trigger and meant only to scare Ingram to keep him off. He testified that

he entered the pool room and a man named Rush told him he had better run, whereupon he threw the gun down and ran. He said he never ejected the spent shell from the chamber and never reloaded the gun. He stated that he believed Ingram had a knife at the time but that he did not intend to kill Ingram. He denied saying to Ingram: "Say again what you said before, say it now, man."

Numerous witnesses testified that they had known defendant all of his life and that his general reputation was good.

Albert McDonald, a rebuttal witness for the State, testified that he was in Potts' Pool Room about ten o'clock when he heard the shot; that defendant came in and asked for Herman Baldwin "and said he was going to kill that son-of-a-bitch too"; that somebody said "Here comes the police," and defendant ran toward the back door, threw the shotgun in the bathroom, and ran out.

Mrs. Imogene McDonald testified that she talked with Lee Edward Ingram, the deceased, while her husband was in the pool room; that Ingram was sitting in her car, and when he opened the door to get out the defendant approached and said, "Say it now what you said before"; that Ingram then got out of the car and was turning around as he put his hand up and said, "Hold it, man, hold it," and defendant shot him; that they were three to six feet apart; that defendant then went into the pool room; that Mule Ingram was her first cousin.

Defendant's motion for judgment of nonsuit at the close of all the evidence was denied. The jury convicted defendant of murder in the first degree and recommended mercy. Defendant appeals from a sentence of death by asphyxiation, assigning errors discussed in the opinion.

Joseph G. Davis, Jr., Attorney for defendant appellant.

Robert Morgan, Attorney General, and Howard P. Satisky, Assistant Attorney General, for the State of North Carolina.

HUSKINS, Justice.

The failure of the trial judge to inform the jury that a conviction of murder in the first degree would result in a mandatory sentence of death constitutes defendant's first assignment of error.

The jury returned a verdict of guilty of murder in the first degree with recommendation of mercy. Defendant contends that had the jury known a sentence of death would be pronounced notwithstanding the mercy recommendation it would not have convicted him of murder in the first degree.

For reasons hereinafter stated, the death sentence pronounced in this case must be vacated and a life sentence pronounced in lieu thereof. In light of that fact, this assignment is overruled without discussion.

[1] The propriety of informing the jury of the amount of punishment which a verdict of guilty will empower or require the judge to impose was explored in depth by Justice Sharp, writing for the Court, in *State v. Rhodes*, 275 N.C. 584, 169 S.E. 2d 846 (1969). The rule is stated in the following quotation from that case:

> "In this jurisdiction, except in one class of cases, the presiding judge fixes the punishment for a convicted defendant within the limits provided by the applicable statute. The exception is capital cases in which the jury may reduce the penalty from death to life imprisonment. G.S. 14-17 (murder in the first degree); G.S. 14-21 (rape); G.S. 14-52 (burglary in the first degree); G.S. 14-58 (arson). In all other instances, the jury has performed its function and discharged its duty when it returns its verdict of guilty or not guilty. [Citations omitted.]
>
> "The amount of punishment which a verdict of guilty will empower the judge to impose is totally irrelevant to the issue of a defendant's guilt. It is, therefore, no concern of the jurors."

Since 18 January 1973, the law enunciated in *Rhodes* has become, and is now, applicable in all cases without exception, including capital cases, because juries in this State no longer have the discretionary power to reduce the penalty in capital cases from death to life imprisonment. *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19 (decided 18 January 1973).

[2] Defendant contends the court erred in allowing the solicitor to propound leading questions. His second assignment is based on exceptions to the following questions:

1. "Did you see the defendant, Harold Legusta Watkins, about that time?"

2. "Was Ingram doing anything at all to Watkins at this time?"

3. "At the time he shot Lee Edward Ingram, was Lee Edward Ingram doing anything at all to Watkins?"

4. "Did you see him load it again?"

These questions do not necessarily suggest the answer desired although all of them could be answered yes or no. Be that as it may, "[t]he allowance of leading questions is a matter entirely within the discretion of the trial judge, and his rulings will not be reviewed on appeal, at least in the absence of a showing of abuse of discretion." Stansbury, *N. C. Evidence* § 31 (2d ed. 1963); *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652 (1972); *State v. Harris,* 222 N.C. 157, 22 S.E. 2d 229 (1942); *State v. Buck,* 191 N.C. 528, 132 S.E. 151 (1926). No abuse of discretion is shown and no prejudice to defendant is discernible. Defendant's second assignment is therefore overruled.

Defendant's third assignment of error is grounded on the failure of the court to instruct the jury on the right of self-defense.

Where the evidence is insufficient to invoke the doctrine of self-defense, the trial judge is not required to instruct the jury thereon. *State v. Freeman,* 275 N.C. 662, 170 S.E. 2d 461 (1969); *State v. McLawhorn,* 270 N.C. 622, 155 S.E. 2d 198 (1967); *State v. Chavis,* 80 N.C. 353 (1879). Indeed, it would be error to do so. *State v. Johnson,* 278 N.C. 252, 179 S.E. 2d 429 (1971).

On the other hand, where defendant's evidence is sufficient to warrant a charge on self-defense, the instruction must be given even though the State's evidence is contradictory. *State v. Hipp,* 245 N.C. 205, 95 S.E. 2d 452 (1956); *State v. Greer,* 218 N.C. 660, 12 S.E. 2d 238 (1940). In resolving this question the facts are to be interpreted in the light most favorable to defendant. *State v. Finch,* 177 N.C. 599, 99 S.E. 409 (1919). No special prayer for the instruction need be given. *State v. Todd,* 264 N.C. 524, 142 S.E. 2d 154 (1965); *State v. Wagoner,* 249 N.C. 637, 107 S.E. 2d 83 (1959).

[3] Applying the foregoing principles, we hold that the evidence when considered in the light most favorable to defendant did not warrant an instruction on self-defense. In essence,

defendant testified that he went after the shotgun so he could discuss the apparent enmity of deceased toward him on an equal basis and without fearing for his own safety. "I figured if I had a gun, I would have a better chance to talk with him and tell him to leave me alone, than without it." He alighted from the truck with gun in hand and crossed the street to the sidewalk on the other side with the gun pointed toward the ground. He saw deceased, walked toward him, stopped five or six feet from him, and called his name. Deceased turned and faced defendant. Defendant said, "Mule, why do you and Herman want to fight me, man?" Deceased then started walking toward defendant with his hands in his back pockets. He threw up his arms and said, "Man I don't mean no harm—we don't mean no harm." Immediately after making that statement he lunged at defendant with arms outstretched. At that moment the shotgun was still pointed toward the ground, but after the lunge, "I throwed the gun up . . . and it shot. I don't know for sure if I pulled the trigger, I didn't mean to pull the trigger, I meant to scare him to keep him back off of me." Defendant saw no weapon in possession of the deceased and none was found upon his body.

At most, defendant's testimony makes out a non-felonious assault upon defendant by deceased. Assuming the truth of such evidence, it afforded defendant no legal basis for the intentional use of deadly force under the guise of self-defense. The law does not sanction the use of deadly force to repel simple assaults. *State v. Ellerbe*, 223 N.C. 770, 28 S.E. 2d 519 (1944); *State v. Dills*, 196 N.C. 457, 146 S.E. 1 (1929).

Nor does the State's evidence show self-defense. The State's witness Staton testified that defendant walked up to the deceased, said "Say what you said before," then raised the gun and shot him before Ingram said anything else. The State's witness Mrs. McDonald testified that "the defendant came up. Ingram was getting ready to turn around when the defendant says, 'Say it now what you said before,' and Ingram got out of the car, and he was turning around; and he put his hand up and said, 'Hold it, man, hold it,' and the defendant shot him."

Thus, the State's evidence shows defendant shot deceased in cold blood, without provocation, under circumstances in which no reasonable man would have felt any apprehension of great bodily harm. Such evidence affords no basis whatsoever

for an instruction on self-defense. *See State v. Johnson, supra* (278 N.C. 252, 179 S.E. 2d 429).

One who is an aggressor, or one who enters a fight voluntarily without lawful excuse, may not plead self-defense when he slays his adversary. *State v. Randolph,* 228 N.C. 228, 45 S.E. 2d 132 (1947). "The right of self-defense is available only to a person who is without fault, and if a person voluntarily, that is, aggressively and willingly, without legal provocation or excuse, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight and withdraws from it and gives notice to his adversary that he has done so." *State v. Davis,* 225 N.C. 117, 33 S.E. 2d 623 (1945). *Accord, State v. Johnson, supra* (278 N.C. 252, 179 S.E. 2d 429); *State v. Church,* 229 N.C. 718, 51 S.E. 2d 345 (1949). Thus the trial court correctly refrained from charging on self-defense. The evidence was sufficient to invoke the theory of accident, and the court properly presented that phase of the matter to the jury. Defendant's third assignment of error is overruled.

Defendant's fourth and fifth assignments of error relating to the failure of the court to charge on voluntary manslaughter and relating to acceptance of an allegedly improper verdict are overruled without discussion. See *State v. Freeman,* 275 N.C. 662, 170 S.E. 2d 461 (1969); *State v. Baldwin,* 276 N.C. 690, 174 S.E. 2d 526 (1970).

Finally, defendant assigns as error the death sentence pronounced in this case. For the reasons which follow, this assignment is good.

[4] The decision of this Court in *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (decided 18 January 1973), judicially severed the unconstitutional discretionary proviso from G.S. 14-17 (and other statutes relating to capital crimes) and left standing the remainder of each statute as the only valid expression of the legislative intent, with death as the mandatory punishment for murder in the first degree, rape, burglary in the first degree and arson. The effect of that severance was to change the penalty for first degree murder, and the other capital crimes, from *death or life imprisonment in the discretion of the jury* to *mandatory death.* We regarded the change as an unforeseeable judicial enlargement of the penalty for the four capital crimes in this State and held that the enlarged penalty, *i.e.,* mandatory death, could not be constitutionally applied *ex post facto.* For

that reason, *Waddell* specifically holds that the mandatory death penalty for murder in the first degree, rape, burglary in the first degree and arson may not be constitutionally applied to any offense committed prior to 18 January 1973, the date *Waddell* was handed down. Therefore, since the murder of Lee Edward Ingram, for which defendant was convicted, occurred on 24 February 1972, the mandatory death penalty cannot be applied.

Accordingly, the judgment of the Superior Court of Richmond County insofar as it imposed the death penalty upon this defendant is reversed. The case is remanded to the Superior Court of Richmond County with directions to proceed as follows:

1. The presiding judge of the Superior Court of Richmond County will cause to be served on the defendant, Harold Legusta Watkins, 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, Harold Legusta Watkins, being present in person and being represented by his counsel, the presiding judge, based on the verdict of guilty of murder in the first degree with recommendation of mercy returned by the jury at the trial of this case at the November 13, 1972 Session, will pronounce judgment that the defendant, Harold Legusta Watkins, be imprisoned for life in the State's prison.

2. The presiding judge of the Superior Court of Richmond County will issue a writ of habeas corpus to the official having custody of the defendant, Harold Legusta Watkins, 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.

STATE OF NORTH CAROLINA v. DOUGLAS THORNTON

No. 56

(Filed 1 June 1973)

1. **Criminal Law § 21— trial without preliminary hearing**

The accused may be tried upon a bill of indictment without a preliminary hearing.

2. **Criminal Law § 26; Narcotics § 5— conviction of possession and distribution of heroin — no double jeopardy**

Possession of heroin and distribution of heroin are separate and distinct crimes, and each may be punished as provided by law; therefore, defendant was not subjected to double jeopardy when he was placed on trial for the two offenses and consecutive sentences were imposed for two convictions.

3. **Criminal Law §§ 78, 163— jury charge — assignment of error to enlargement of stipulation — necessity for objection**

The general rule that objections to the charge in stating the contentions of the parties or in recapitulating the evidence must be called to the court's attention in apt time to afford the opportunity for correction was not applicable in this case where defendant's assignment of error was addressed to the court's enlargement of a stipulation between the State and defendant which had been entered into evidence.

4. **Narcotics § 4.5— stipulation of chemist's testimony — instruction assuming substance obtained from defendant was heroin**

Where the State and defendant stipulated that a named SBI chemist analyzed one of three glassine envelopes turned over to him by Police Officer Fuller and the chemist was prepared to testify that the envelope contained heroin, but the trial court instructed that it was stipulated that the chemist analyzed the contents of one of the very envelopes bought from defendant by Officer Thompson and turned over to Officer Fuller, the trial court removed all doubt concerning a material fact the State was required to prove, i.e., whether the material eventually analyzed by the SBI chemist was part of the material defendant sold to Officer Thompson; therefore, defendant is entitled to a new trial based on the court's error in assuming the existence of a material fact in issue.

ON *certiorari* to the Court of Appeals to review its decision, 17 N. C. App. 225.

Defendant was tried on separate bills of indictment charging two violations of the North Carolina Controlled Substances Act on 18 March 1972: (1) distribution of heroin in violation of G.S. 90-95(a)(1), and (2) possession of heroin in violation of G.S. 90-95(a)(3).

After the jury was selected, sworn and empaneled, the following colloquy occurred among the solicitor, defense counsel, and the court:

"MR. BRANNON [the Solicitor]: Before we begin the evidence, it is my understanding that the State and the defendant in the trial of this case will stipulate that this item of paper which I would now like to mark for identification as Court's Exhibit One, or State's Ex. No. 1, as your Honor sees fit, is the laboratory report in this case from the State Bureau of Investigation Crime Lab, Raleigh, North Carolina, and that Mr. Neal C. Evans, a chemist in the field of forensic chemistry of the S.B.I. lab, analyzed one of the three glassine envelopes turned over to Mr. N. C. Evans by Mr. J. C. Fuller, and that this lab report reflects the examination of the first and the only one of the three glassine envelopes turned over and examined by Mr. N. C. Evans, and if he were called to testify he would testify that the one glassine envelope that he examined contained the schedule one substance heroin; is that correct?

"MR. LOFLIN [Defense Counsel]: That is correct.

"COURT: Is there any contention as to the credentials of Mr. Evans?

"MR. LOFLIN: No sir, there is not.

"COURT: Then it is stipulated by the State and the defendant that Mr. Evans is a chemist and qualified to testify as an expert in the field of chemistry, and if present would testify that he examined the contents of one of the three bags turned over to him as will appear from the chain of evidence, and that that bag contained a Category one substance, to wit: heroin."

The State's evidence tends to show that on 18 March 1972 at about 4:55 p.m. defendant sold three bags purporting to contain heroin for $30.00 to C. R. Thompson, a Durham Policeman acting at the time as an undercover agent. Officer Thompson had been introduced to defendant by a man named Willie Linwood Smith whose nickname was "Joe Baby." Joe Baby knew most of the people who were dealing in heroin, and he went from place to place in the City of Durham contacting these people, introducing the officer to them, and the officer would attempt to make purchases.

On 18 March about 4:55 p.m. Joe Baby and Officer Thompson went to an apartment building located at 311 LaSalle Street, known as Duke Manor Apartments. They had been there several times before. They entered an apartment and Joe Baby told defendant that Thompson wanted to buy three bags of heroin. "At this time Joe Baby and Doug Thornton went back in the back room, got out of the view of me, and stayed about two or three minutes, maybe not quite that long, then they came back and Doug had three bags in his hand. I gave him $30 and he gave me three bags of white powder. . . . I put the three bags in by left sock, because I wanted the people to think I was scared the man might try to stop me and search me or something like that. The 'man' is a slang expression for a police officer."

Officer Thompson further testified that he and Joe Baby left after the transaction; that he eventually took Joe Baby home and then went to his own residence and marked the little cellophane bags with his initials, the date and the time and then put the little bags in an envelope which he folded up and put in his billfold. On 21 March he turned the envelope and its contents over to Sergeant Ronald Cooper.

With respect to the three glassine bags of white powder allegedly purchased from defendant, Officer Thompson testified on direct and cross-examination as follows: "This was about 4:55 in the afternoon, and not 9:15 in the morning. I am absolutely sure of the time. I could have purchased some white powder that morning, I am not sure. During this time I was going to a number of places and making a number of purchases. I could have made some more purchases either before or after or both on this very same day, March 18. I am very sure that these white glassine envelopes are the very same the defendant Mr. Thornton gave me in return for some money because I wrote my initials, the date, and the time on this. . . . I can't recall how many little white powder envelopes I may have purchased at various places on March 18. What I would do if I would cop (purchase) heroin from more than one person, I would then initial the envelopes so I wouldn't get them confused with somebody else's. However, I didn't initial them until I got home. . . . I am not sure [which foot I put them in]. I think I put them in my left pocket though. I don't think I put them in my sock. I am not positive." Officer Thompson further said he was not sure he didn't buy more glassine envelopes after leaving defend-

ant's apartment but is "pretty sure" that the three glassine bags (State's Exhibits 2, 3 and 4) are the ones received from defendant in return for $30.00.

Sergeant Ronald Cooper testified that he received from Officer Thompson the three glassine bags, State's Exhibits 2, 3 and 4, in a large envelope (State's Exhibit 5). On March 22 he took the envelope out of his safe and gave it to J. C. Fuller to carry to the SBI lab for analysis.

Officer J. C. Fuller testified that he received from Sergeant Ronald Cooper on March 22 the large white envelope marked Exhibit 5, took it to Raleigh and delivered it to Chemist Neal Evans. He said he later received it back from the SBI lab in a large envelope (State's Exhibit 6) which, when opened, contained State's Exhibits 2, 3, 4 and 5, together with the lab report of the examination of one of the three bindles.

State's Exhibits 1, 2, 3, 4, 5 and 6 were offered and received into evidence without objection.

Defendant testified in his own behalf. He stated that the substance he sold to Officer Thompson was not heroin; that the three bags were "dummies," made up of milk, sugar and quinine; that these dummies were furnished by the police informer (Joe Baby) who accompanied the officer to the apartment; that sale of the dummies was a scheme originated by the informer, not the defendant, to trick Officer Thompson out of his money; that the $30.00 Thompson paid for the dummies was divided between the informer and the defendant.

Defendant admitted that he was a heroin addict of three or four years duration and that he had served time in Central Prison for common law robbery.

In rebuttal on behalf of the State, "Joe Baby" Smith testified that he had known defendant about six years; that he was working with the police department and took Officer Thompson to defendant's apartment on March 18; that Thompson said he wanted three bags of heroin, "so we gave the man three bags. Thompson gave Doug Thornton $30. Then we left."

This witness admitted on cross-examination that he began using heroin in the summer of 1971; that he got his supply from New York and brought large quantities of heroin back to Durham for purpose of sale; that he had pushers working for him

and had been arrested some five or six times on drug related charges; that he stopped using heroin after he started working with Officer Thompson. His testimony is rather equivocal regarding the alleged scheme related by defendant to sell Officer Thompson dummies and trick him out of his money, but he emphatically denied receiving from defendant any part of the $30.00 paid by Officer Thompson.

Defendant was convicted of both crimes charged in the two indictments and sentenced to imprisonment for a term of five years in each case, the sentences to run consecutively. On appeal, the Court of Appeals ordered a new trial for error in the charge and further held that defendant could not be convicted and punished under both bills of indictment because the possession and the distribution in point of time were the same and in law constituted only one crime. We allowed the State's petition for certiorari to review that decision. Errors urged by both the State and the defendant will be treated in the opinion.

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

Loflin, Anderson, Loflin and Goldsmith by Thomas F. Loflin III, Attorneys for defendant appellee.

HUSKINS, Justice.

Before pleading to the charges contained in the bills of indictment, defendant moved that both cases be remanded to the district court for a preliminary hearing. Denial of this motion constitutes defendant's first assignment of error.

[1] Defendant asks this Court to reexamine prior decisions holding that a preliminary hearing is not an essential prerequisite to a valid indictment. He argues that a mandatory preliminary hearing prior to indictment would result in a more realistic evaluation of the case by both prosecution and defense, and thus lead to more effective plea-bargaining and a consequent lessening of the case load. The argument is not persuasive. It is firmly established by a long line of cases that the accused may be tried upon a bill of indictment without a preliminary hearing. We adhere to our former rulings. *See State v. Foster,* 282 N.C. 189, 192 S.E. 2d 320 (1972); *State v. Bryant,* 282 N.C. 92, 191 S.E. 2d 745 (1972); *State v. Hartsell,* 272 N.C. 710, 158 S.E. 2d 785 (1968); *State v. Overman,* 269 N.C. 453, 153 S.E. 2d

44 (1967); *State v. Hargett,* 255 N.C. 412, 121 S.E. 2d 589 (1961); *State v. Hackney,* 240 N.C. 230, 81 S.E. 2d 778 (1954).

[2] Defendant moved for judgment of nonsuit on the indictment charging illegal *possession* of heroin on the ground that any possession shown by the evidence was incidental to the transaction involving the alleged sale of the heroin and that it constitutes double jeopardy under both State and Federal Constitutions to place him on trial for two offenses and impose consecutive sentences for two convictions. We expressly held to the contrary in *State v. Cameron,* 283 N.C. 191, 195 S.E. 2d 481 (1973), and we reaffirm that ruling here. *Possession* of heroin and *distribution* of heroin are separate and distinct crimes and each may be punished as provided by law. The decision of the Court of Appeals is erroneous insofar as it sustains this contention.

After the jury was empaneled and before the introduction of evidence, the stipulation appearing in the statement of facts was agreed upon and entered of record. The trial judge in his charge, while recapitulating the State's evidence, characterized the stipulation as follows: " . . . Mr. Thornton went to the back room; . . . when he returned he had with him three bags of heroin, or three bags of some substance; . . . Thompson took the bags and paid to Mr. Thornton the sum of $30 and left. Now, it was stipulated at the outset of this trial that *that material,* or some of it, was analyzed by the State Bureau of Investigation, and that the chemist who is a duly qualified expert in the field of qualitative analysis, would testify if he were here that upon analysis of this material he found it to be the narcotic drug known as heroin. Now, what his findings would be is not in contest, so if I refer to the contents of the bags as heroin, I do so simply because there is no argument that that is what the analysis would show. We do that simply to avoid the necessity of bringing the chemist over here to say what he has written in a letter." (Emphasis added.) Defendant did not call this portion of the charge to the court's attention to afford the opportunity for correction but now assigns same as error.

[3] "The general rule is that objections to the charge in stating the contentions of the parties or in recapitulating the evidence must be called to the court's attention in apt time to afford the opportunity for correction, in order that an exception thereto will be considered on appeal." 3 Strong N. C. Index 2d, Criminal

Law § 163 (1967); *State v. Gaines*, 283 N.C. 33, 194 S.E. 2d 839 (1973). However, the general rule does not apply here since defendant's assignment of error is not addressed to the court's recapitulation of evidence; rather, it is addressed to the court's enlargement of the stipulation. The stipulation itself "is not evidence, but rather removes the admitted fact from the field of evidence by formally conceding its existence." *State v. McWilliams*, 277 N.C. 680, 178 S.E. 2d 476 (1971), quoting Stansbury, *N. C. Evidence* § 166 (2d ed. 1963).

The stipulation in question, when stripped of unnecessary verbiage, simply states that Neal C. Evans, an expert in the field of forensic chemistry and employed by the SBI laboratory, analyzed one of the three glassine envelopes turned over to him by J. C. Fuller, which analysis showed that the envelope contained heroin; and that Mr. Evans would so testify if called as a witness. The stipulation does not state that any of the envelopes *bought from defendant* by Officer Thompson were among the glassine envelopes turned over to Mr. Evans by J. C. Fuller. It was left to the State to prove that fact, and the State offered ample evidence to show that the envelopes purchased from defendant were marked by Thompson with his initials, the date and the time and then turned over to Sergeant Ronald Cooper who delivered them to J. C. Fuller.

Notwithstanding such evidence, however, defendant elicited testimony tending to show that the glassine envelopes initially marked by Thompson were *not* those purchased from defendant. By cross-examination of Officer Thompson, defendant produced evidence tending to show the possibility of a "mix-up" resulting in a mislabeling of purchased glassine envelopes. On direct examination Officer Thompson testified that he put the envelopes purchased from defendant into his left sock; on cross-examination he said, "I think I put them in my left pocket." Thompson further testified on cross-examination that he did not mark the envelopes in question as being those purchased from defendant until "after I got home," and that "I can't recall how many little white powder envelopes I may have purchased at various places on March 18 . . . I didn't initial them until I got home." In addition, defendant testified that the envelopes he sold Officer Thompson were "dummies" containing only milk, sugar and quinine.

[4] Thus, defendant not only failed to concede that the envelope later found by the chemist to contain heroin was one of the en-

velopes purchased from him, he also affirmatively challenged the State's evidence that such was the case. In instructing the jury that it was stipulated that the chemist analyzed the contents of one of the very envelopes bought from defendant and found it to be heroin, the court removed all doubt concerning a material fact the State was required to prove. Such inadvertence on the part of the court effectively negated the paramount issue raised, *i.e.*, whether the material eventually analyzed by the SBI chemist was part of the material defendant sold to Officer Thompson. This unintentional expression by the court, which assumed the existence of a material fact in issue, was prejudicial error and entitles defendant to a new trial. The Court of Appeals correctly so held.

Other assignments concern matters not likely to arise again and, for that reason, they will not be discussed.

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.

STATE OF NORTH CAROLINA v. ROBERT JEROME LAMPKINS

No. 94

(Filed 1 June 1973)

1. **Criminal Law § 46— flight of defendant — sufficiency of evidence to support instructions**

Trial court's instruction with respect to the flight of defendant was supported by the evidence where it tended to show that numerous attempts were made by an officer to locate defendant but four months elapsed after commission of the offense before defendant was apprehended.

2. **Criminal Law § 118— misstatement of contention — no prejudice**

The trial judge may have overstated the State's contentions with respect to the flight of defendant by saying that defendant left the county and town where the alleged offense took place; however, error in stating where defendant fled was not material and that slight inaccuracy in the statement of contentions is not reversible error since the misstatement was not called to the court's attention in apt time to allow correction.

3. Criminal Law §§ 88, 169— cross-examination as to collateral matter — instruction to disregard testimony — no error

The general rule that answers made by a witness to collateral questions on cross-examination are conclusive does not preclude the examiner from pressing or sifting the witness by further cross-examination; therefore, there was no error in the cross-examination of defendant in a first degree burglary case with respect to his involvement as defendant in a nonsupport case, particularly where there were no objections to the questions asked or motions to strike the answers given and where the trial court subsequently explained the solicitor's reasons for the cross-examination and unequivocally withdrew the testimony from the jury's consideration.

4. Burglary and Unlawful Breakings § 5— first degree burglary — sufficiency of evidence

In a first degree burglary case, testimony of a witness, standing alone, was sufficient to carry the case to the jury where that testimony tended to show that defendant entered the witness's apartment and started hitting her, pushed her on the bed and verbally indicated his intention to have intercourse with her; the witness fled from the apartment while defendant was removing his trousers; defendant overtook the witness and continued the assault until a neighbor yelled at him, whereupon defendant fled; and the witness had previously known defendant and recognized him when he passed the lighted bathroom.

APPEAL by defendant from *Collier, J.*, 4 December 1972 Session of FORSYTH Superior Court.

Defendant was tried upon a bill of indictment charging him with first degree burglary. He entered a plea of not guilty.

The State's evidence tended to show that Miss Linda Faye Crockett lived alone in a two-bedroom apartment in Winston-Salem, North Carolina. On the night of 28 July 1972, she retired around midnight and left the light on in her bathroom with the door partially open. About 30 minutes later Miss Crockett heard someone at her front room window. After trying without success to call a neighbor, she went to her bedroom door where she encountered a man who came through the window and started hitting her. Miss Crockett's assailant pushed her on the bed, tore her clothes off and verbally indicated his intentions to have intercourse with her. She managed to flee out the back door of the apartment while her assailant was removing his trousers. He overtook her and continued the assault until a neighbor "yelled" at him. Her assailant then fled. Miss Crockett had previously known defendant and testified that she recognized him when he passed the lighted bathroom.

Defendant and his several witnesses testified that defendant left Winston-Salem with his girl friend on or about the 21st day of July 1972 and that he did not return to Winston-Salem until on or after 1 August 1972. Defendant positively testified that he was in Gastonia on the night of 28 July 1972 and that he did not rape Miss Crockett.

The jury returned a verdict of guilty of first degree burglary.

Attorney General Morgan; Assistant Attorney General H. A. Cole, Jr., and Assistant Attorney General Walter E. Ricks III for the State.

Legal Aid Society of Forsyth County by David B. Hough, attorney for defendant.

BRANCH, Justice.

[1] Defendant contends that the trial judge erred by instructing the jury as to flight by defendant because there was no evidence in the record to support such instruction.

The challenged portion of the charge reads as follows:

> "Now the State contends that the defendant in this case left Forsyth County and Winston-Salem sometime shortly after this alleged burglary took place, and he remained gone for some period of time thereafter.
>
> Now evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient, in itself, to establish the defendant's guilt."

The evidence relating to defendant's flight after the alleged crime was the statement of Officer Kenneth Ray Cook of the Winston-Salem Police Department, viz:

> "I made numerous checks at locations throughout the east side in an attempt to locate the defendant, and it was approximately four months later that I finally talked with him. I had a warrant with me and I placed the defendant under arrest for first degree burglary."

Authority is somewhat meager and diverse on the precise question here presented.

Some jurisdictions hold that flight before arrest raises a legal presumption of guilt. Annot., 25 A.L.R. 886, at 890; 29 Am. Jur. 2d Evidence § 280.

The rule in North Carolina is that flight of an accused may be admitted as some evidence of guilt. However, such evidence does not create a presumption of guilt, but may be considered with other facts and circumstances in determining whether all the circumstances amount to an admission of guilt or reflect a consciousness of guilt. Proof of flight, standing alone, is not sufficient to amount to an admission of guilt. An accused may explain admitted evidence of flight by showing other reasons for his departure or that there, in fact, had been no departure. *State v. Self,* 280 N.C. 665, 187 S.E. 2d 93; *State v. Gaines,* 260 N.C. 228, 132 S.E. 2d 485; *State v. Downey,* 253 N.C. 348, 117 S.E. 2d 39; *State v. Godwin,* 216 N.C. 49, 3 S.E. 2d 347; *State v. Payne,* 213 N.C. 719, 197 S.E. 573; *State v. Lewis,* 209 N.C. 191, 183 S.E. 357; *State v. Hairston,* 182 N.C. 851, 109 S.E. 45; *State v. Malonee,* 154 N.C. 200, 69 S.E. 786; 2 Stansbury North Carolina Evidence § 178 (Brandis rev. 1973).

This Court, in accord with earlier decisions, has recently approved an instruction nearly identical to the one here challenged. *State v. Self, supra.* However, we must consider defendant's contention that there is no evidence in the record warranting such instruction.

Defendant did not object to the introduction of the evidence as to flight and, therefore, the *compentency* of the evidence is not challenged. *State v. Camp,* 266 N.C. 626, 146 S.E. 2d 643; *State v. Gaskill,* 256 N.C. 652, 124 S.E. 2d 873. Moreover, most jurisdictions recognize that testimony of a law enforcement officer to the effect that he searched for the accused without success after the commission of the crime is competent. See cases collected in Annot., 25 A.L.R. 886; Wharton's Criminal Evidence § 214 (1972). See also *State v. Wallace,* 162 N.C. 622, 78 S.E. 1; *State v. Jones,* 93 N.C. 611.

A trial judge should never give instructions to a jury which are not based upon a state of facts presented by some reasonable view of the evidence. When such instructions are prejudicial to the accused he would be entitled to a new trial. *State v. McClain,* 282 N.C. 396, 193 S.E. 2d 113; *State v. McCoy,* 236

N.C. 121, 71 S.E. 2d 921; *State v. Wilson,* 104 N.C. 868, 10 S.E. 315. This rule is consistent with the statement of the Court in *State v. Gaskins,* 252 N.C. 46, 112 S.E. 2d 745:

> "' . . . (E)vidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict, and should not be left to the jury.' *State v. Vinson,* 63 N.C. 335, 338. ' . . . (S)uch facts and circumstances as raise only a conjecture or suspicion ought not to be allowed to distract the attention of juries from material matters . . . ' *Pettiford v. Mayo,* 117 N.C. 27, 28, 23 S.E. 252, 253."

The defendant's flight was submitted to the jury as a circumstance showing some evidence of guilt in the case of *State v. Beard,* 207 N.C. 673, 178 S.E. 242. We quote the pertinent portion of that case:

> "The evidence tending to show that the defendant was not at his father's home in Lenoir when the officers went there, after the arrest of Alvin Eller, in search of the defendant, was at least not prejudicial to the defendant, whose evidence tended to show that his absence from his father's home, where he was living at the date of the homicide, had no connection with the charge against him in this case. The evidence for the defendant tended to show that he left his father's home several days after the homicide and before he was accused of the murder of the deceased, and went to a distant state, in compliance with the terms of a judgment against the defendant in a criminal action pending in the Superior Court of Caldwell County. This evidence was properly submitted to the jury as tending to rebut any presumption against the defendant in this case, from his absence from his home after the murder of Augustus Bounos."

The Supreme Court of Missouri considered a question similar to the one here presented in *State v. Davis,* 237 Mo. 237, 140 S.W. 902. There the Court said:

> "The instruction as to flight was in approved form and the evidence of the city marshal, who testified as to his search for appellant from the 3d to the 7th of February and his subsequent capture in another county, justified the court in giving it."

We conclude that the judge's charge as to flight was based on evidence reasonably supporting the theory that defendant had fled after commission of the crime.

[2] Perhaps the trial judge inadvertently overstated the State's contentions by saying that defendant left Forsyth County and Winston-Salem; however, error in stating contentions as to where defendant had fled is not material, and this slight inaccuracy in the statement of contentions will not be held reversible error since the misstatement was not called to the court's attention in apt time to allow correction. *State v. McClain, supra; State v. Butler,* 269 N.C. 733, 153 S.E. 2d 477; *State v. Shumaker,* 251 N.C. 678, 111 S.E. 2d 878.

Defendant's defense of alibi was properly and fairly presented to the jury by the trial judge, and defendant was given full opportunty to cross-examine witnesses and to explain his departure.

This assignment of error is overruled.

[3] Defendant next contends that the trial judge erred by allowing the Solicitor to cross-examine him concerning a crime for which he has not been convicted.

Defendant was asked if he had been arrested and convicted of nonsupport on 9 May 1972. He admitted the arrest but denied having been convicted, explaining that the warrant had actually been issued for his brother. The Solicitor continued to cross-examine in this vein:

"Q. Do you deny having a child by Beverly McDowell?

A. Yes, I deny. I did not. I went to court for it yesterday. They said they couldn't try me if I am the wrong one, so they issued a capias on my brother.

Q. Didn't they find you guilty?

A. No, they didn't.

Q. And give you six months assigned to the North Carolina Department of Corrections?

A. No, they didn't.

Q. In jail?

A. No.

Q. And to pay the costs?

A. No.

Q. And to pay $15 a week to Artemia McDowell, born August 1, 1971?

A. I don't know when the baby was born. It is not mine.

Q. And you are not paying anything on it?

A. No, I am not because my name is not Roger Lampkins, and I went to court for it. (R pp 40-41)."

After a brief recess, the court stated to the jury:

"3. 'COURT: Members of the jury, due to the apparent misunderstanding or conflict regarding the nonsupport charge about which questions were asked this morning pertaining to the defendant, we made an investigation during the noon hour, the State and defendant's attorney, and they agreed that I could explain to you that that pertains to his brother, the defendant's brother, and not the defendant, because of the similarity of the names that was causing a great deal of confusion. So for the record and for everyone's benefit, for what benefit it might be, that did not pertain to this defendant, that nonsupport business that took place earlier in the week in the lower court.' "

Ordinarily, there must be timely objection when the evidence is offered in order to present on appeal a contention that evidence is incompetent. *State v. Mitchell,* 276 N.C. 404, 172 S.E. 2d 527; *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353; *State v. Camp, supra.* And exceptions which appear nowhere in the record except in the assignments of error will not be considered on appeal. *State v. Washington,* 283 N.C. 175, 195 S.E. 2d 534; *Bunn v. Bunn,* 262 N.C. 67, 136 S.E. 2d 240; *Cratch v. Taylor,* 256 N.C. 462, 124 S.E. 2d 124; Rule 21 of the Supreme Court Rules of Practice.

An examination of that portion of the record here challenged reveals no objections to the questions asked or motions to strike the answers given. Nor does the record show exceptions except within the assignment of error. However, because of the gravity of the crime charged, we elect to consider the contention here presented. *State v. Gaskill, supra.*

The general rule that answers made by a witness to collateral questions on cross-examination are conclusive does not

preclude the examiner from pressing or "sifting" the witness by further cross-examination. The extent of the cross-examination rests largely in the discretion of the trial judge. *State v. Fountain,* 282 N.C. 58, 191 S.E. 2d 674; *State v. Robinson,* 272 N.C. 271, 158 S.E. 2d 23. Abuse of discretion on the part of the trial judge does not appear.

Further, any error which may have resulted from the cross-examination by the Solicitor was cured when the trial judge clearly explained the Solicitor's reasons for the cross-examination and unequivocally withdrew the testimony from the jury's consideration.

Defendant's final assignment of error is that the trial judge erred by denying his motions for judgment as of nonsuit.

[4] We do not deem it necessary to here repeat the well known rules concerning sufficiency of evidence to repel motions for judgment as of nonsuit. These rules are fully stated in the cases of *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679; *State v. Bruton,* 264 N.C. 488, 142 S.E. 2d 169, *State v. Virgil,* 263 N.C. 73, 138 S.E. 2d 777, and *State v. Bass,* 255 N.C. 42, 120 S.E. 2d 580. We think it sufficient to state that when tested by these rules the testimony of the witness Linda Faye Crockett, standing alone, was sufficient to carry the case to the jury.

Careful examination of this entire record discloses no error prejudicial to defendant.

No error.

STATE OF NORTH CAROLINA v. CLARENCE HARRINGTON

No. 58

(Filed 1 June 1973)

1. **Criminal Law § 21— no right to preliminary hearing**

A defendant is not entitled to a preliminary hearing as a matter of right before trial in the superior court upon an indictment.

2. **Arrest and Bail § 3; Criminal Law § 84; Searches and Seizures § 1— probable cause to arrest without warrant — information from informant — seizure of discarded heroin — search of automobile**

Where a reliable informant reported to officers that a person driving a specifically described automobile would arrive later that day at a certain dinette with 36 bindles of heroin in his possession,

defendant arrived at the dinette driving an automobile fitting the informant's description, defendant and a companion voluntarily accompanied officers outside the dinette at their request and defendant fled when directed to remove his hand from his pocket, it was *held* (1) the officers had probable cause to arrest defendant without a warrant, (2) officers lawfully seized 36 bindles of heroin which defendant removed from his pocket and threw away while fleeing whether or not defendant was under arrest when he fled, and (3) after defendant's capture officers lawfully searched his vehicle in the dinette parking lot as an incident of his lawful arrest.

3. **Criminal Law § 26; Narcotics § 5— conviction of possession and transportation of heroin — no double jeopardy**

Defendant was not subjected to double jeopardy when he was convicted and separately sentenced for both felonious possession and felonious transportation of the same package of heroin since the felonious transportation involves acts not necessarily a part of, nor a requisite to, felonious possession.

ON *certiorari* to the Court of Appeals to review its decision filed December 29, 1972, finding no error in the trial of Clarence Harrington in the Superior Court of DURHAM County at the May 22, 1972 Criminal Session, on two charges of violating the North Carolina Narcotic Drug Act. The cases were consolidated for trial.

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

Loflin, Anderson, Loflin & Goldsmith by Thomas F. Loflin, III for defendant appellant.

HIGGINS, Justice.

The defendant was tried on two bills of indictment, proper in form, charging violations of the Uniform Narcotic Drug Act. The indictment in No. 71 CR 22626 charged the felonious possession of 36 bindles of heroin in violation of G.S. 90-88. In No. 71 CR 22627 the indictment charged the felonious transportation of 36 bindles of heroin in a 1969 Oldsmobile bearing North Carolina License # DL 3288, in violation of G.S. 90-111.2(a)(1). The offenses were committed on October 31, 1971. The indictments were returned on November 1, 1971, after the passage of the North Carolina Controlled Substances Act, but before it became effective on January 1, 1972. The trial court properly applied the law in effect at the time the offenses were committed.

At the time the petition to review the decision of the Court of Appeals was allowed, this Court had not determined whether the unlawful possession and the unlawful transportation or sale of the same drug was a single or were separate offenses.

Upon arraignment, the defendant filed objections to the trial on these grounds: (1) He had not been given a preliminary hearing; (2) he was unlawfully arrested without a warrant and without probable cause and the 36 bindles of heroin were unlawfully obtained as the fruits of an illegal search and their introduction in evidence should have been suppressed; (3) the State was permitted to prosecute him for felonious possession and for felonious transportation of the same drug in violation of the double jeopardy provision of the Constitution.

The offenses involved in the indictments grew out of the following factual background: On October 31, 1971, Officer Gooch of the State Bureau of Investigation received a report from a known informer that during the day the driver of a black over yellow Oldsmobile, 1969 model, bearing North Carolina License # DL 3288, had left Thomasville, North Carolina, and would arrive at the Dunkin Donut Dinette on Roxboro Road in Durham later that day. The described driver would have in his possession 36 bindles of heroin. The officer was well acquainted with the informer, whom he knew to be reliable, and on whose information theretofore he had relied and had made approximately 50 arrests for violation of the Narcotic Drug Act, in consequence of which 35 of those reported had been convicted in court.

After receiving the report, Officer Gooch, S.B.I. Officer Cahoon, and Officer Hunter of the Durham Police Department "staked out" the Dinette. In due time, a black over yellow Oldsmobile, 1969 model, with North Carolina License # DL 3288 stopped at the Dinette. The defendant driver and a companion left the vehicle and entered the building. Officers Gooch and Hunter followed. They identified themselves as officers and Gooch stated to the defendant that he and Hunter would like to talk to him on the outside. The defendant agreed and accompanied the officers as requested.

Outside the building, Officer Gooch observed that the defendant had one hand in his pocket. When ordered to remove his hand, the defendant ran. The officers gave chase. After about fifty yards, the defendant took from his pocket an alumi-

num wrapper and threw it away. One of the officers continued the chase, overtook, and captured the defendant. The other officer retrieved the discarded aluminum wrapper which, upon examination, was found to contain 36 bindles of a substance which subsequent analysis disclosed to be heroin. After the defendant's arrest, the officers searched the Oldsmobile, found inside a pistol and "measuring spoons and other paraphernalia used in the preparing of narcotics for street use." Upon the foregoing disclosure the court overruled the motion to suppress the evidence and permitted the officers to testify before the jury in substance as above stated.

The chemist who analyzed the powder was permitted to testify that the substance was heroin.

The jury returned a verdict finding the defendant guilty on both charges. The court imposed consecutive sentences. On review, the Court of Appeals found no error in the trial.

[1] The defendant argues that the decision of the Court of Appeals should be reversed on several grounds. First, he was denied a preliminary hearing, citing as authority *Coleman v. Alabama*, 399 U.S. 1, 26 L.Ed. 2d 387, and other cases holding a preliminary hearing is a critical stage of a criminal prosecution at which the defendant is entitled to counsel. The cases, however, do not hold that a defendant, as a matter of right, is entitled to a preliminary hearing. True, if such hearing is held, the defendant is entitled to counsel. A preliminary hearing, however, is not a prerequisite to a grand jury indictment. *Gasque v. State*, 271 N.C. 323, 156 S.E. 2d 740, cert. denied 390 U.S. 1030, 20 L.Ed. 2d 288; *State v. Hairston*, 280 N.C. 220, 185 S.E. 2d 633; *State v. Foster*, 282 N.C. 189, 192 S.E. 2d 320.

After arrest on warrant or on probable cause without a warrant in felony cases (G.S. 15-41(2)) the usual procedure is a preliminary hearing before a committing magistrate at which both the State and the accused may be heard on the issue of probable cause. If probable cause is found and the offense is bailable, the amount of bond is fixed. If the arrest is on a capias after indictment, the issue of probable cause has been determined against the accused as a condition precedent to the return of the indictment. However, only the State's witnesses were heard by the grand jury and the proceeding was ex parte. If the accused desires to challenge the issue of probable cause or the amount of bail fixed, he may apply to the court for the preroga-

tive writ of habeas corpus. The hearing on the writ is adversary in which both the State and the accused may be heard and the legality of the restraint determined. The objection to the trial on the ground the defendant was not given a preliminary hearing is not sustained.

[2] The defendant next contends the superior court committed error by permitting the State to introduce into evidence over his objection the 36 bindles of heroin which the defendant removed from his pocket and threw away while he was fleeing from the officers.

We need spend little time debating the question whether the defendant was, or was not, under arrest at the time he fled. In any event, the officers were in possession of facts sufficient to justify the arrest without a warrant. The informant had given the exact description of the vehicle—color, make, license number, and the place where the driver, with 36 bindles of heroin, would stop in Durham. The immediate arrest without warrant was amply justified under North Carolina procedure. G.S. 15-41 provides that, "A peace officer may without warrant arrest. . . . (2) When the officer has reasonable ground to believe that the person to be arrested has committed a felony and will evade arrest if not immediately taken into custody." *State v. Alexander*, 279 N.C. 527, 184 S.E. 2d 274; *State v. Harris*, 279 N.C. 307, 182 S.E. 2d 364; *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889; *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed. 2d 1081. The contraband drug was properly introduced in evidence by the State.

The defendant and his companion voluntarily accompanied the officers outside and when Officer Gooch directed the defendant to remove his hand from his pocket, the defendant took flight. During the chase, he removed the drug from its place of concealment in his pocket and threw it away. When the officer retrieved the package, it contained the described 36 bindles of heroin. The officers came into possession of the drug after it was discarded by the defendant. Even had he kept possession, the discovery would have been lawful and the drug would have been admissible evidence as having been obtained as the result of a lawful arrest. Likewise the officers were fully authorized to search the automobile which the defendant had driven to Durham and parked at the Dinette. *Chambers v. Maroney*, 399 U.S. 42, 26 L.Ed. 2d 419; *U. S. v. Drew*, 436 F. 2d 529, cert. denied, 402 U.S. 977; *State v. Ratliff*, 281 N.C. 397, 189 S.E.

2d 179; *State v. Roberts,* 276 N.C. 98, 171 S.E. 2d 440. The defendant's motion to suppress the evidence obtained from the automobile was properly denied.

[3] The defendant stressfully contends that the two indictments involving a single package of heroin, subjected him to two prosecutions for a single offense in violation of his Fifth Amendment rights. Our decision in *State v. Cameron,* 283 N.C. 191, 195 S.E. 2d 481, filed April 11, 1973, is a complete answer to the double jeopardy contention. The decision is amply sustained by the highest authority. In *Albrecht v. United States,* 273 U.S. 1, 71 L.Ed. 505, Justice Brandeis used this language: "There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction. . . ." In *Gore v. United States,* 357 U.S. 386, 2 L.Ed. 2d 1405, the Court said: "The fact that an offender violates by a single transaction several regulatory controls devised by Congress as means for dealing with a social evil as deleterious as it is difficult to combat does not make the several different regulatory controls single and identic." In *State v. Stonestreet,* 243 N.C. 28, 89 S.E. 2d 734, this Court said: "When an indictment charges separately the unlawful possession and unlawful transportation of intoxicating liquor, a separate judgment may be pronounced on each count."

The decision in the Cameron case contains the following, quoting from 2 Strong, N. C. Index 2d, Criminal Law § 26, pp. 517-518:

> "The test of former jeopardy is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. Hence, the plea of former jeopardy, to be good, must be grounded on the 'same offense,' both in law and in fact, and it is not sufficient that the two offenses grew out of the same transaction. If evidence in support of the facts alleged in the second indictment would be sufficient to sustain a conviction under the first indictment, jeopardy attaches, otherwise not. However, if proof of an additional fact is required in the one prosecution, which is not required in the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same, and the plea of former jeopardy cannot be sustained."

The charge of unlawful transportation requires the movement of the contraband "by means of any vehicle, vessel or air-

craft." Obviously, the felonious transportation involves acts not necessarily a part of, nor a requisite to, felonious possession. The defendant's objection to his conviction for both possession and transportation of narcotics and the separate sentences thereon are not sustained.

The defendant makes other objections to his trial. These were correctly decided by the Court of Appeals. The decision is

Affirmed.

STATE OF NORTH CAROLINA v. EUGENE EDMONDSON

No. 88

(Filed 1 June 1973)

1. **Criminal Law § 92— consolidation of assault and murder charges**

The trial court did not err in the consolidation for trial of two charges against defendant of felonious assault and one charge of homicide where the shootings of the assault victims were directly connected with and contemporaneous with the shooting of the homicide victim.

2. **Homicide § 21— first degree murder — sufficiency of evidence**

The evidence was sufficient for the jury in a prosecution for first degree murder where defendant, himself, testified he shot the victim, a doctor testified this was the cause of death, and an eyewitness testified that the shooting was deliberate, premeditated and unprovoked.

3. **Criminal Law § 169; Homicide § 19— statement over telephone by defendant — testimony that deceased overheard — exclusion as harmless error**

In this homicide prosecution, defendant was not prejudiced by error, if any, when the court sustained objections to defendant's testimony as to whether deceased overheard defendant's statement by telephone to a third person as to the reason why defendant did not like to ride around with deceased, where the objections were sustained after the witness had answered and the jury was not instructed to disregard the testimony, and defendant subsequently testified without objection that, in response to an inquiry by deceased, he stated to deceased at the scene of the shooting exactly the same reason for not wanting to ride around with him.

4. **Homicide § 19— threats to third person — inadmissibility**

In this homicide prosecution, the trial court did not err in the exclusion of testimony that deceased had threatened to blow the witness's head off where there was no contention that defendant knew

of such episode and no other evidence indicating that deceased was a violent man or had such a reputation, known to defendant.

5. **Homicide § 28— instructions on duty of aggressor to retreat**

In a homicide prosecution wherein defendant contended he shot deceased in self-defense, defendant's own testimony supported the court's charge to the jury with reference to the duty of an aggressor to retreat.

6. **Criminal Law § 113; Homicide § 28— instructions on self-defense and intoxication**

Where the court charged the jury in full detail upon self-defense and upon intoxication as a defense, the court did not err in failing to refer to defendant's plea of self-defense and his defense of intoxication in portions of the charge stating what the jury must find in order to return a verdict of guilty of first degree murder or second degree murder of one victim or a verdict of guilty of felonious assault of another victim.

7. **Criminal Law § 6; Homicide § 28— instructions — bearing of intoxication on intent — second degree murder and manslaughter**

The trial court did not err in instructing the jury that the law does not require any "specific intent for the defendant to be guilty of the crimes of second degree murder or manslaughter" and, therefore, the defendant's intoxication could have no bearing upon the jury's determination of his guilt or innocence of those crimes if the jury should come to consider either of them.

8. **Assault and Battery § 17— verdict — assault with deadly weapon — sentence for assault with firearm**

Although the indictment charged and the evidence showed that the deadly weapon used in an assault was a firearm, the jury's verdict of guilty of "assault with a deadly weapon with intent to kill" will not support a sentence of five years for assault with a firearm with intent to kill pursuant to G.S. 14-32(c) but will support a maximum sentence of two years under G.S. 14-33(c).

APPEAL by defendant from *Tillery, J.*, at the December 1972 Session of MARTIN.

Under separate indictments, each proper in form, consolidated for trial, the defendant was convicted of: (1) Assault upon Ronnie Gurganus with a deadly weapon with intent to kill, (2) assault upon Gary Tyson with a deadly weapon with intent to kill, inflicting serious injury, and (3) murder in the first degree of Dallas Ward Jones. For these offenses, and in that order, he was sentenced to imprisonment for five years, to imprisonment for 10 years to begin after the expiration of the five year sentence, and to imprisonment for life to begin at the expiration of the 10 year sentence.

The evidence for the State is to the following effect:

On the afternoon of Sunday, 27 August 1972, the defendant, his nephew, Ricky Scott, and Dallas Ward Jones, all young men, were riding about in the automobile of Jones, laughing and joking together. They purchased and drank two pints of wine, most of it being consumed by the defendant. Jones had his rifle in the car. Scott got out and shot the rifle for amusement a few times.

Jones and the defendant got into a conversation concerning the possibility of Jones getting a job at the plant where the defendant worked and the defendant said he would talk to his boss the next day. Subsequently, he suggested that they go immediately to his boss' home to talk to him but Jones preferred that this be delayed until the next day.

The three then returned to the defendant's home to get some clothes which the defendant had previously promised to give to his nephew, Scott. The defendant and Scott went into the house and got the clothes. While therein, the defendant filled his pocket with shotgun shells and told Scott he was going to kill Jones for the reason that he just didn't like him. After further conversation, the defendant said that he was not going to kill Jones but was going to scare him.

The defendant and Scott then left the house and got back into the car with Jones, the defendant carrying his shotgun. All agreed to go to Ballard's bridge and there do some target practice.

Arriving at the bridge, Jones stopped the car and started to take out his rifle, which was on the back seat. At that time the defendant, was was already out of the car, pointed the shotgun at Jones, told him not to take the rifle out and ordered him to walk around the car with his hands up. Jones said, "Wait a minute, man, what's going on?" The defendant directed Jones to stand near the bushes. When Jones asked if the defendant wanted the keys to his car, the defendant made no reply but shot Jones in the back. He then directed Scott to cover Jones with brush and briers, which Scott did. The defendant and Scott then got back in the car but, finding that the keys were still in Jones' pocket, the defendant ordered Scott to get them, which he did.

The defendant and Scott then drove away but returned almost immediately and saw that Jones had crawled out from

under the covering of brush so that he could be seen from the road. The defendant ordered Scott to pull into a side road or path nearby, to get out and cover Jones again and "to get down in his ear and talk to him" to see what Jones "had to say about it." Scott called Jones by name several times but Jones did not answer other than groaning. Scott again covered Jones with brush. He and the defendant again started to leave in the automobile. As they were coming out of the side road or path, they observed Gary Tyson and Ronnie Gurganus pass in another car, stop and look at the body of Jones lying in the brush. Thereupon, the defendant ordered Scott to drive back to their car, saying he was going to have to kill them too.

When the defendant and Scott drove up behind the other car, Gary Tyson said to the defendant, "Somebody's been shot and needs help bad." The defendant, making no reply except to call out Gary Tyson's name, got out of the automobile with his shotgun. Tyson said, "Don't shoot me, Eugene," and turned to run. Thereupon, the defendant shot Tyson in the chest. By that time, Ronnie Gurganus was running away. The defendant shot at him, one or two pellets striking him, inflicting no injury. Gurganus fled into the woods and the defendant was unsuccessful in his effort to follow and find him. Meanwhile, Tyson also fled from the scene. He was taken to the hospital and received treatment there for his wound.

The defendant and Scott then continued to drive through Martin and Pitt Counties until after dark. Finally, they ran the car into a ditch and abandoned it. After trying, unsuccessfully, to find another automobile which they could steal, they were arrested while walking along the road.

Jones was dead when found by the officers summonsed to the scene as the result of the shooting of Tyson. The shotgun wound in his back was the cause of death.

The defendant testified as a witness in his own behalf, Scott having testified as a witness for the State. The defendant's testimony was to the following effect:

When Scott first telephoned the defendant to suggest that he join Scott and Jones in riding about, the defendant said that he would do so but did not really want to ride with Jones "because he messes around with a lot of girls under age."

The record shows that, in response to his attorney's questions, the defendant said that the telephone in the Scott home had an extension and the defendant found out from Jones that Jones was listening to the conversation between the defendant and Scott when the defendant made the above statement concerning Jones. The record shows that after the defendant answered the questions in this manner the court sustained objections by the State but the record does not show that the court instructed the jury to disregard the answers.

Thereupon, the defendant continued to testify to the following effect:

When the three arrived at Ballard's bridge for the contemplated target shooting, Jones asked the defendant why he did not want to ride around with Jones, and the defendant gave Jones the same explanation, namely, "Because he messed around with a lot of young girls."

As the three were getting out of the car, the defendant reached around to get his shotgun and observed that Jones had his rifle pointed in the defendant's face. Falling on his knees outside the car, the defendant crawled along his side of the car toward the front and watched Jones' feet as Jones walked toward the back. The defendant then raised up and shot Jones. Not knowing what to do, he told Scott to get Jones out of the road. He and Scott started to town to report the shooting. Looking out of the back window, the defendant saw that Jones was crawling toward the road so he instructed Scott to pull into a side path and go back to help him. While they were turning around, Tyson and Gurganus passed them and when they reached the place where Jones lay, Tyson and Gurganus were already there standing outside their car. When the defendant got out of the car, he was carrying his shotgun and Tyson jumped for Jones' rifle which was lying on the ground. Thereupon, the defendant shot Tyson in the chest. He did not shoot Gurganus.

Scott had previously testified as a witness for the State to the effect that Jones' rifle was still in the back seat of the car after Jones was shot and that the defendant threw the rifle in the woods after shooting Jones.

Attorney General Robert Morgan and Special Counsel Ralph Moody for the State.

Elbert S. Peel for defendant.

LAKE, Justice.

[1] The defendant's first assignment of error is to the consolidation of the three cases for trial over his objection. G.S. 15-152 expressly permits the consolidation for trial of two or more indictments against a person for "two or more acts or transactions connected together." The shootings of Tyson and Gurganus were directly connected with and, for all practical purposes, contemporaneous with the shooting and killing of Jones. There was no error in the consolidation of these charges for trial. *State v. Overman,* 269 N.C. 453, 466, 153 S.E. 2d 44; *State v. White,* 256 N.C. 244, 123 S.E. 2d 483.

[2] The second assignment is to the denial of the defendant's motion for judgment of nonsuit. There is obviously no merit in this assignment. *State v. Cooke,* 278 N.C. 288, 179 S.E. 2d 365; *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225. The defendant, himself, testified that he shot Jones. The doctor who performed the autopsy testified that in his opinion this was the cause of death. Scott, the only surviving eyewitness other than the defendant, testified that the shooting was deliberate, premeditated and unprovoked, and that the rifle of the deceased was still in the back seat of the car after the shooting of the deceased. The testimony of the defendant concerning his contention that the shooting was in self defense raised a question for the jury, not for the consideration of the court on the motion for judgment of nonsuit. *State v. Price,* 280 N.C. 154, 184 S.E. 2d 866.

[3] The third assignment of error is to the court's sustaining objections to the defendant's testimony as to whether Jones overheard the defendant's statement by telephone to Scott as to the reason why the defendant did not like to ride around with Jones. It appears from the record that the solicitor's objections were sustained after the witness had answered in the presence of the jury and the jury was not instructed to disregard the testimony. Thus, as a practical matter, the defendant had the benefit of the evidence. Furthermore, without objection, the defendant subsequently testified that when he and his companions arrived at the scene of the shooting, in response to an inquiry by the deceased, the defendant stated to the deceased exactly the same reason for not wanting to ride around with him. This cured any error which there may have been in the ruling of the court now assigned as error. "The exclusion of testimony cannot be held prejudicial when the same witness is thereafter allowed

to testify to the same import, or the evidence is thereafter admitted, or the party offering the evidence has the full benefit of the fact sought to be established thereby by other evidence." Strong, N. C. Index 2d, Appeal and Error, § 49, and numerous cases there cited.

[4] The fourth assignment of error is to the sustaining of the solicitor's objection to the question to the defendant's witness Cherry as to whether the deceased ever made any threats against Cherry. Had Cherry been permitted to answer the question, he would have said that the deceased at one time said to Cherry, "I will blow your head off." There is no contention that the defendant knew of this episode. There was no other evidence indicating that Jones was a violent man or had such a reputation, known to the defendant. The excluded testimony had no relevancy to the reasonableness of the defendant's asserted fear that Jones was about to kill him. There is no merit in this assignment of error.

[5] The fifth assignment of error is to the court's charging the jury with reference to the duty of an aggressor to retreat. This was part of the court's charge concerning self defense. The defendant contends this was error because "there was no evidence of any fight or any altercation or dispute." On the contrary, the defendant testified, in direct contrast to the testimony of Scott, that as he was preparing to get out of the car at the scene of the shooting, he suddenly observed Jones pointing his rifle in the defendant's face and thereupon he fell to his knees outside the car and the two men crept around the car on opposite sides of it, each armed with a gun and that his shooting of Jones "was self defense." We find no error in this portion of the charge of the trial judge.

[6] Assignments of Error 6, 7 and 8 assert that, in the portions of the charge wherein the court was stating what the jury must find in order to return a verdict of guilty of first degree murder, a verdict of second degree murder, and a verdict of guilty of assault with a deadly weapon, inflicting serious injury (in connection with the shooting of Gary Tyson), the court failed to refer to the defendant's plea of self defense and to his contention that he was not guilty by reason of intoxication. The court charged the jury in full detail both upon the matter of self defense and also upon the matter of intoxication as a defense, and the defendant does not contend that these instructions were incorrect in any respect. The trial judge is not re-

quired to include in each sentence of his charge every relevant principle of law. "A charge will be construed contextually as a whole, and when, so construed, it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed, an exception thereto will not be sustained, even though the instruction might have been more aptly given in different form." Strong, N. C. Index 2d, Trial, § 33. So considered, we find no error in the instructions given to the jury concerning self defense and intoxication.

[7] The defendant's Assignment of Error No. 10 is to the court's instruction that the law does not require any "specific intent for the defendant to be guilty of the crimes of second degree murder or manslaughter" and, therefore, the defendant's intoxication could have no bearing upon the jury's determination of his guilt or innocence of those crimes if the jury should come to consider either of them. The jury found the defendant guilty of first degree murder and so did not come to a consideration of his guilt of the lesser charges. The judge instructed the jury that to return a verdict of guilty of first degree murder, it must be satisfied beyond a reasonable doubt "that the defendant intended to kill Dallas Jones." As above noted, he charged correctly and in detail as to the bearing of intoxication upon the presence or absence of the "specific intent required for conviction of first degree murder." He likewise charged the jury with reference to intent as an element of the assault charges and concerning the relevance of intoxication thereto. There is no merit in this assignment of error.

The charge of the court with reference to self defense fully incorporated the principles governing this defense as laid down in *State v. Marshall,* 208 N.C. 127, 179 S.E. 427. We have carefully considered the charge in its entirety and find therein no error prejudicial to the defendant.

[8] In Case No. 72CR3490 the indictment charged that the defendant "did unlawfully, wilfully and feloniously assault Ronnie Gurganus with a certain *deadly weapon, to wit: a 12 gauge shot gun, a firearm* with the felonious intent to kill and murder the said Ronnie Gurganus inflicting serious injuries, not resulting in death * * *" (Emphasis added.) The verdict was, "Guilty of the charge of Assault with a *deadly weapon* with intent to kill." (Emphasis added.) The judgment is that the defendant, "having been found guilty of the offense of Assault with a *firearm* with intent to kill which is a violation of G.S. 14-32(c)

and of the grade of Felony" (emphasis added), be imprisoned for a term of five years. The verdict, as shown in the record, does not support the judgment, though it is clear from the evidence that the deadly weapon used was a firearm. Upon this verdict, G.S. 14-32(c) does not apply and the maximum sentence is two years. G.S. 14-33(c). See, *State v. Bentley,* 223 N.C. 563, 27 S.E. 2d 738. For this reason, the judgment in Case No. 72CR3490 is arrested and Case No. 72CR3490 is remanded to the Superior Court of Martin County for the entry of a judgment therein in accordance with the verdict. See, Strong, N. C. Index 2d, Criminal Law, § 127.

Case No. 72CR3490—Judgment Arrested and Remanded for Judgment.

Case No. 72CR3488—No error.

Case No. 72CR3489—No error.

STATE OF NORTH CAROLINA v. JOHNNIE LEE GURLEY

No. 8

(Filed 1 June 1973)

1. **Criminal Law § 162— failure to object to evidence**

With the exception of evidence precluded by statute in furtherance of public policy, the failure to object to the introduction of evidence is a waiver of the right to do so, and its admission, even if incompetent, is not a proper basis for appeal.

2. **Criminal Law § 87— allowance of leading questions**

The trial court did not abuse its discretion in the allowance of leading questions where one such question was never answered and the two remaining questions merely elicited repetition of the same witness's earlier testimony.

3. **Criminal Law §§ 50, 169— admission of alleged conclusions — no prejudicial error**

The trial court in a rape and kidnapping case did not commit prejudicial error (1) in the admission of a conclusion of the victim that she found out her assailant had moved her car around to the back of the apartment where she subsequently testified that when she left defendant's apartment he told her he had parked her car behind the apartment and that she found it there and drove away in it; (2) in the admission of an alleged conclusion by a deputy sheriff that an exhibit was a blank check belonging to the victim and her husband

with a note written on the back of it where the victim had previously identified the exhibit as a note she had written to her husband at defendant's direction on a check taken from the checkbook of the witness and her husband, or (3) in the admission of an alleged conclusion of the deputy sheriff that stains on an exhibit appeared to be bloodstains where the victim had testified that blows to her head by her assailant with a pistol caused bleeding and the victim had identified the exhibit as a blindfold placed over her eyes by her assailant.

4. **Criminal Law § 89— cross-examination about pornographic magazines — impeachment**

Although pornographic magazines were excluded when offered in evidence by the State in a rape case, defendant was properly cross-examined about his possession of, familiarity with and interest in this type of literature for the purpose of impeachment.

5. **Criminal Law § 86— impeachment of defendant — particular acts**

The trial court in a rape and kidnapping case did not err in the admission of cross-examination of defendant by the solicitor concerning defendant's involvement in other criminal activities and the reason for defendant's departure from Charlotte and his move therefrom to another city, since defendant may be questioned as to particular acts impeaching his character.

6. **Criminal Law § 84; Searches and Seizures § 4— search under warrant — lapse of time between arrest and search**

Search of defendant's apartment under a warrant was not improper for the reason that defendant was removed from his apartment and taken into custody shortly after midnight on Friday and the search was not made until the following Monday morning, the arresting officer having testified that the apartment was locked when he left the apartment with defendant on Friday night and that it was locked when he returned on Monday morning with the search warrant.

7. **Kidnapping § 1; Rape § 5— sufficiency of evidence for jury**

The State's evidence, including the victim's in-court identification of defendant, was sufficient for the jury in a prosecution for kidnapping and rape.

8. **Criminal Law § 102— solicitor's argument supported by evidence**

Portions of the solicitor's jury argument of which defendant complains were amply supported by defendant's own testimony on cross-examination.

APPEAL by defendant from *Peel, J.*, at the 14 August 1972 Criminal Session of ONSLOW.

The defendant appeals from two concurrent sentences to imprisonment for life for the offenses of kidnapping and rape, he having been found guilty of each at a trial under an indictment, proper in form. The evidence for the State is to the following effect:

In the early morning of Friday, 16 June 1972, the prosecuting witness, after taking her husband to his duty as a member of the United States Marine Corps stationed at Camp Lejeune, returned to her locked apartment in Jacksonville. Entering the apartment, she was confronted in the bathroom by a man, then unknown to her but whom she positively identified in court as the defendant. At the time of the first confrontation, his face was partially concealed with an article of her underclothing. Immediately, and intermittently thereafter, the prosecuting witness was blindfolded with a strip torn from one of her towels, but later, for approximately two hours, she had ample opportunity to observe her assailant in the defendant's apartment to which he took her, it being in the same apartment complex as her own.

When first confronted by her assailant, the prosecuting witness screamed. He struck her twice upon the head with a pistol, drawing blood, and forced her against the wall where, with a knife at her throat, he threatened to kill her if she did not stop screaming. He then blindfolded her and took her into the bedroom, compelled her to disrobe and had sexual intercourse with her against her will.

Thereafter, the assailant compelled the prosecuting witness to write a note to her husband giving a fictitious account of her departure. Then, having directed her to resume her outer garments, he compelled her to get into her automobile with him by holding a knife at her back and forced her to drive approximately a mile to the end of a dirt road in a secluded wooded area.

There the assailant again compelled the prosecuting witness to disrobe and had intercourse with her against her will. After she again resumed her clothing, he compelled her to crouch down on the floor of the car while he drove back to the apartment complex and directed her into the defendant's apartment, the door of which he opened with a key. There they stayed for approximately two and a half hours, during which time he raped her on several other occasions, threatening to kill her and her husband if she reported the occurrence to anyone. He exhibited to her a number of pornographic magazines and finally permitted her to leave after exacting a promise that she would return on other occasions after taking her husband to work.

The prosecuting witness promptly went to her husband's post of duty and reported to him what had occurred. After she

was taken to the hospital for a medical examination and reported the matter to the police, including a full description of her assailant, of the cloth used as a blindfold, of guns, of bed covers and of pornographic magazines observed by her in the apartment to which she was taken, a deputy sheriff went to the defendant's apartment about midnight and found him there. He took the defendant to the police station where he was formally arrested in the early morning hours of Saturday, the next day.

On Monday morning, the arresting officer procured from a magistrate a search warrant authorizing a search of the defendant's apartment for the purpose of searching for articles described by the prosecuting witness as having been observed therein by her. At the time the officer and the defendant left the defendant's apartment, the apartment was locked. It was locked when the officer returned with the search warrant on Monday morning, after serving it upon the defendant. Searching the apartment, the officer found articles answering the descriptions given by the prosecuting witness, who identified each of them in court as the articles which she had observed in the apartment to which her assailant took her. The articles so found and identified were offered in evidence and, with the exception of the pornographic magazines, were admitted and exhibited to the jury.

The defendant, testifying in his own behalf, denied that he had ever seen the prosecuting witness prior to the preliminary hearing upon these charges and denied guilt of either offense. On cross-examination he acknowledged that the pornographic magazines had been in his apartment and that he was familiar with them. He described their contents in some detail.

Other witnesses for the defendant testified that he was in an automobile wreck approximately six hours before the prosecuting witness was first confronted by her assailant, at which time he had been drinking, and that he continued to drink after his return to his apartment with his companions, until they left him at approximately 3 a.m. The defendant's father testified that he went to the defendant's apartment after the officers had searched it and, in moving the defendant's clothing from the closet, found a torn towel which the police had not discovered in their search. This towel was identified by the prosecuting witness, called in rebuttal, as her towel from which the material used as a blindfold had been torn. It was the de-

fendant's contention that some other person had access to his apartment and put the towel there.

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

J. Reid Potter for defendant.

LAKE, Justice.

The rape of which the defendant was convicted having been committed prior to our decision in *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19, the imposition of the sentence to imprisonment for life therefor was not error insofar as the nature of the punishment imposed is concerned.

At the trial the defendant was represented by court-appointed counsel who gave notice of appeal in due time. Before the appeal was perfected, the trial counsel was relieved by order of the court, pursuant to the motion of the defendant, and the defendant was represented in this Court by counsel employed by his family. Due to the change in counsel, we extended the time for the docketing of the appeal and the filing of the defendant's brief.

[1] The defendant's Assignments of Error 1, 2, 5, 6 and 7 are directed to the admission in evidence of testimony to which no objection was made. It is elementary that, with the exception of evidence precluded by statute in furtherance of public policy, which exception is not applicable to these assignments of error, the failure to object to the introduction of the evidence is a waiver of the right to do so, and its admission, even if incompetent, is not a proper basis for appeal. *State v. McKethan*, 269 N.C. 81, 152 S.E. 2d 341; *State v. Howell*, 239 N.C. 78, 79 S.E. 2d 235; *Lambros v. Zrakas*, 234 N.C. 287, 66 S.E. 2d 895; *State v. Fuqua*, 234 N.C. 168, 66 S.E. 2d 667; *State v. Hunt*, 223 N.C. 173, 25 S.E. 2d 598; Stansbury, North Carolina Evidence, 2d Ed. § 27; Wigmore on Evidence, 3rd Ed. § 18. As said by Justice Parker, later Chief Justice, in *State v. Howell, supra*, "It is too late after the trial to make exceptions to the evidence." Due to the serious nature of the charges against the defendant and the extent of the sentences imposed, we have, nevertheless, carefully reviewed the entire record, including the admission of the evidence to which these assignments of error relate, and find therein no basis for the granting of a new trial.

[2] Assignment of Error No. 1 is to the allowance of leading questions, which "is a matter entirely within the discretion of the trial judge, and his rulings will not be reviewed on appeal, at least in the absence of a showing of abuse of discretion." *State v. Cranfield,* 238 N.C. 110, 76 S.E. 2d 353; Stansbury, North Carolina Evidence, 2d Ed. § 31. The record shows no such abuse of discretion even if we were to assume that objections had been duly interposed and overruled. The record does not show that one of the alleged leading questions was ever answered. For this further reason, no error is shown by the exception now taken to it. *State v. Fountain,* 282 N.C. 58, 66, 191 S.E. 2d 674. Two others merely elicited repetition of the same witness' earlier testimony. One of these was a mere introductory reference, on the morning of the second day of the trial, to the testimony of the same witness on the preceding day so as to furnish a starting point for the resumption of the examination. The remaining question to which this assignment of error relates was as to whether there were any stains upon the strip of towel used as a blindfold, the exhibit, itself, being before the jury and the presence of stains thereon obvious. The prosecuting witness had previously testified that the blows on her head with the pistol drew blood.

[3] The defendant's Assignment of Error No. 2 is directed to the admission, without objection, of three alleged conclusions of witnesses. The first was the statement by the prosecuting witness that she found out her assailant had moved her car around to the back of the apartment. In the first place, this is not, on its face, a conclusion. In any event, the same witness subsequently testified that, when she left the defendant's apartment, he told her that he had parked her car "around behind the apartment" and she went there, found it and drove away in it. Thus, had there been error in admitting the alleged conclusion, it was cured by this subsequent testimony. The second of the alleged conclusions was the testimony of the deputy sheriff that the State's Exhibit No. 1 was a blank check belonging to the prosecuting witness and her husband with a note written on the back of it. The prosecuting witness, herself, had previously identified this exhibit as a note she had written to her husband, pursuant to the dictation of her assailant, upon a check torn from the checkbook of the witness and her husband. The third of the alleged conclusions was the statement by the deputy sheriff that the stains on the blindfold appeared to be blood stains. The prosecuting witness had previously testified that

the blows upon her head by the pistol in the hand of her assailant caused bleeding and had identified the exhibit as the blindfold placed over her eyes by the assailant. This testimony of the deputy sheriff would not have been ground for a new trial even had an objection been interposed in due time and overruled.

The defendant's Assignment of Error No. 5 is to testimony elicited on cross-examination of a highway patrolman called as a witness for the defendant and of the deputy sheriff recalled as his witness by the defendant. No objection was interposed to any part of the examinations to which this assignment relates. The defendant now contends the questions asked were not within the proper scope of cross-examination. Had objection been interposed, there would have been no error in overruling such objection. There is no merit in this assignment of error.

[4] Assignment of Error No. 6 is to the admission of cross-examination of the defendant by the solicitor, without objection, concerning the contents of the pornographic magazines taken from his apartment pursuant to the search warrant. The defendant contends that this cross-examination relates to "evidence previously excluded." It appears from the record that this group of magazines was excluded, upon the defendant's objection, when offered in evidence by the State. It does not follow that, for this reason, the defendant, having subsequently testified as a witness in his own behalf, could not be cross-examined about his possession of, familiarity with and interest in this type of literature for the purpose of impeachment.

[5] The defendant's Assignment of Error No. 7 is directed to the admission in evidence, without objection, of certain cross-examination of the defendant by the solicitor concerning the defendant's involvement in other criminal activities and the reason for the defendant's departure from the City of Charlotte and his move therefrom to Jacksonville. The defendant, having testified as a witness in his own behalf, was subject to cross-examination for the purpose of impeachment. *State v. Fountain, supra,* at p. 68. For that purpose he may be questioned as to particular acts impeaching his character. *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174; *State v. Cureton,* 215 N.C. 778, 3 S.E. 2d 343; *State v. Sims,* 213 N.C. 590, 197 S.E. 176. The questions by the solicitor of which the defendant now complains did not inquire as to the nature of any indictments, arrests or other charges brought against him but were directed to the defend-

ant's own conduct. The first was as to the reason for the defendant's leaving Charlotte. The second was as to what the defendant had been "involved in" in the criminal courts. The record shows no answer to this question. See, *State v. Fountain, supra.* At this point, upon the request of the defendant's trial counsel, the court instructed the jury that any "prior *convictions* the defendant may testify to" (emphasis added) were admissible solely for the purpose of impeaching his testimony if they tended to do so and should be considered by the jury in that connection only. The remaining questions were as to whether the defendant had not been "involved in narcotics" and "involved with assault on a female." The defendant himself asked if the solicitor meant had he ever been convicted and thereupon the solicitor replied in the affirmative. The defendant's testimony was that he had not been convicted of these offenses. Had objections been interposed seasonably to these questions, the overrulings of such objections would not have been basis for a new trial.

In fairness to the defendant's trial counsel, the record shows that in the course of the trial he made numerous objections to evidence offered by the State and to questions propounded to the defendant on cross-examination. Some of these were sustained, some overruled. The record does not disclose, as the defendant seeks to imply on appeal, that his trial counsel, an experienced attorney, sat idly by and permitted the solicitor to introduce incompetent evidence at will. The advisability of objecting to questions propounded to a witness always calls for an exercise of counsel's judgment as to the competency and as to the effect of the probable answer. We find nothing in the record to indicate that the convictions of the defendant upon these two major criminal charges were the result of the failure of his assigned counsel to object to the evidence of which the defendant now complains on appeal.

In view of the overwhelming evidence presented by the State of unquestioned competence, any error in the admission of the evidence of which he now complains, assuming timely objection had been made, would clearly have been harmless error.

[6] The defendant's Assignment of Error No. 3 is to the admission in evidence, over objection, of articles taken from the defendant's apartment pursuant to a search thereof by the arresting officer. The search was conducted pursuant to a search warrant, proper in form and issued upon a sufficient affidavit. Upon objection to the evidence by the defendant, the court con-

ducted a voir dire and at the conclusion thereof made full findings of fact which were supported by the evidence on the voir dire. On the basis of these findings, the objection was overruled. The defendant's contention is that the search was improper for the reason that the defendant was removed from his apartment and taken into custody shortly after midnight on Friday and the search was not made until the following Monday morning. The testimony of the arresting officer, who also made the search of the apartment, is that when he left the apartment with the defendant on Friday night the apartment was locked and when he returned on Monday morning with the search warrant the apartment was locked. The defendant cites no authority in support of his contention that, under the circumstances, the lapse of time between the arrest and the search made the search unreasonable. We find no merit in this assignment of error.

[7] The defendant's fourth assignment of error is to the denial of his motion for judgment of nonsuit. The evidence of the State is ample, if true, to show each element of each offense. The evidence offered by the defendant to contradict that offered by the State is not considered in the determination of the motion for judgment of nonsuit. Upon consideration of such motion, the evidence of the State is taken to be true and is to be considered in the light most favorable to the State's contention. *State v. Peele,* 281 N.C. 253, 188 S.E. 2d 326; *State v. McNeil,* 280 N.C. 159, 185 S.E. 2d 156. There is no merit in this assignment of error.

[8] Assignment of Error No. 8 is to the solicitor's argument to the jury. The defendant contends that the solicitor therein made repeated references to evidence which had been excluded by the court. An examination of the solicitor's argument, which is set forth in the record, discloses first that the references by the solicitor of which the defendant now complains are amply supported by the defendant's own testimony on cross-examination and also discloses that no objection was made to this portion of the solicitor's argument. The only objection made to any portion of the solicitor's argument was sustained by the trial court. It had no relation to the defendant's eighth assignment of error. We find no merit in this assignment. The argument of counsel, especially in absence of objection at the time, must be left largely to the control and discretion of the trial judge. *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572. The record discloses no abuse of the privilege by the solicitor.

No error.

STATE OF NORTH CAROLINA v. MICHAEL ROSS WILLIAMS AND WILLIAM EARL CORNELIUS

No. 63

(Filed 1 June 1973)

1. **Municipal Corporations §§ 4, 8— city ordinance inconsistent with State law**

A city ordinance is not consistent with State law when the ordinance makes unlawful an act, omission or condition which is expressly made lawful by the State or federal law or when the ordinance purports to regulate a field for which a State statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation. G.S. 160A-174(b).

2. **Municipal Corporations §§ 4, 8— general laws prevail over city ordinances**

General laws of the State must prevail over ordinances and by-laws of municipalities.

3. **Intoxicating Liquor § 3— definition of beer**

Beer is an intoxicating liquor, but it is not an alcoholic beverage; rather, it is a malt beverage, transportation and possession of which are regulated by G.S. 18A-35(a). G.S. 18A-2(4); G.S. 18A-2(1); G.S. 18A-2(5).

4. **Intoxicating Liquor § 9; Municipal Corporations §§ 4, 8— invalid ordinance restricting possession of beer — quashal of warrants proper**

A municipal ordinance providing that "No person shall have open and in his possession, . . . beer, . . . on or in the public streets of the Town of Mt. Airy . . ." conflicts with G.S. 18A-35(a) providing that "Except as otherwise provided in this Chapter, the purchase, transportation, and possession of malt beverages and unfortified wine by individuals 18 years of age or older for their own use are permitted without restriction or regulation"; therefore, the municipal ordinance is invalid, and warrants drawn thereunder charging defendants with the possession of open beer on North Main Street in Mt. Airy were properly quashed.

Justice HUSKINS dissenting.

Justice LAKE joins in the dissenting opinion.

APPEAL by the State from *Wood, J.*, at the 30 October 1972 Session of SURRY Superior Court.

On 25 June 1972 defendants were arrested by officers of the town of Mount Airy and charged in separate warrants with the possession of an open beer on North Main Street in Mount Airy, in violation of Chapter 11-16, Section A of Mount Airy city ordinances. On 29 June 1972 the motions of defendants to

quash the warrants were allowed by Judge Frank Freeman in District Court. The State appealed to Superior Court pursuant to G.S. 15-179(3).

By consent Judge Wood heard defendants' motions to quash the warrants out of term and out of the district. On 27 December 1972 Judge Wood found that Chapter 11-16, Section A of the Code of Ordinances of Mount Airy was in conflict with the general laws of North Carolina, was invalid and allowed defendants' motions. The State appealed to the North Carolina Court of Appeals. On 26 March 1973, pursuant to G.S. 7A-31(a), we allowed defendants' motion to certify the case for review by this Court prior to determination by the Court of Appeals.

Attorney General Robert Morgan and Associate Attorney Howard A. Kramer for the State, appellant.

White and Crumpler by Michael J. Lewis for defendant appellees.

MOORE, Justice.

The sole question presented by this appeal is whether the trial court correctly quashed the warrants on the grounds that they charged violations of an ordinance which was invalid for the reason that it was "a local ordinance which purports to override a statute applicable to the entire State."

Defendants' motions to quash raise the question of the sufficiency of the warrants to charge the commission of a criminal offense. *State v. Vestal,* 281 N.C. 517, 189 S.E. 2d 152 (1972); *State v. Brewer,* 258 N.C. 533, 129 S.E. 2d 262 (1962). It is essential to jurisdiction that a criminal offense be charged in the warrants upon which the State brings defendants to trial. *State v. Vestal, supra; State v. Guffey,* 265 N.C. 331, 144 S.E. 2d 14 (1965). If defendants are charged with violating a statute which is invalid, the motion to quash must be allowed. In passing upon such motions, the court treats the allegations of fact in the warrant as true and considers only the record proper and the provisions of the statute or ordinance. *State v. Lee,* 277 N.C. 242, 176 S.E. 2d 772 (1970); *State v. McBane,* 276 N.C. 60, 170 S.E. 2d 913 (1969).

[1] No constitutional question is raised by this appeal, but the determinative issue is whether Chapter 11-16, Section A of the

Code of Ordinances of Mount Airy is consistent with the general laws of North Carolina.

G.S. 160A-174(b) provides:

> "A city ordinance shall be consistent with the . . . laws of North Carolina. . . . An ordinance is not consistent with State . . . law when:
>
> * * *
>
> "(2) The ordinance makes unlawful an act, omission or condition which is expressly made lawful by a State or federal law;
>
> * * *
>
> "(5) The ordinance purports to regulate a field for which a State . . . statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation."

[2] The rule that general laws should prevail over ordinances was established early in North Carolina in *Town of Washington v. Hammond,* 76 N.C. 33, 36 (1877):

> "The true principle is that municipal by-laws and ordinances must be in harmony with the general laws of the State, and whenever they come in conflict with the general laws the by-laws and ordinances must give way. . . ."

Davis v. Charlotte, 242 N.C. 670, 89 S.E. 2d 406 (1955), was a civil action seeking an injunction to prohibit enforcement of a municipal ordinance. The ordinance prohibited the sale of beer or wine by curb service or by a "car hop." The trial court held that this ordinance was in conflict with State law and declared it invalid. This Court affirmed holding that the State law did not distinguish "car hops" from other individuals permitted to sell or deliver beer, and that in the absence of a more restrictive definition the term "on premises" included the entire private property area designed for use by patrons while being served. Justice Bobbitt (now Chief Justice) stated:

> "It may be conceded that the City of Charlotte, under its charter provisions and under G.S. 160-52 and G.S. 160-200 (6) (7) (10), had implied authority to adopt the ordinance in controversy *in the absence* of legislation enacted by the General Assembly dealing directly with the subject. *Bailey*

v. Raleigh, 130 N.C. 209, 41 S.E. 281; *Paul v. Washington,* 134 N.C. 363, 47 S.E. 793. But it is quite plain that the City of Charlotte cannot, by ordinance, make criminal or illegal any conduct that is legalized and sanctioned by the General Assembly. The ordinance, to the extent it conflicts with the general State law, is invalid. *Lee v. Chemical Corp.,* 229 N.C. 447, 50 S.E. 2d 181; *Eldridge v. Mangum,* 216 N.C. 532, 5 S.E. 2d 721; *S. v. Prevo,* 178 N.C. 740, 101 S.E. 370."

Accord, Staley v. Winston-Salem, 258 N.C. 244, 128 S.E. 2d 604 (1962); *State v. Langston,* 88 N.C. 692 (1883); 56 Am. Jur. 2d, Municipal Corporations § 374.

The Mount Airy ordinance in question provides:

"Chapter 11-16, Section A. Drinking in Public Places. No person shall have open and in his possession, or consume, serve or drink wine, beer, whiskey or any alcoholic beverages of any kind on or in the public streets of the Town of Mount Airy or upon the grounds of premises of any service stations, drive-in theaters, supermarkets, stores, restaurants, or office building, or any other business or municipal establishment providing parking space for customers, patrons, or the public within the Town of Mount Airy."

[3] To determine whether this ordinance is contrary to the general laws of the State, we must consider the provisions of G.S. 18A-1, G.S. 18A-2, and G.S. 18A-35. G.S. 18A-1 plainly states: "The purpose and intent of this Chapter is to establish a uniform system of control over the sale, purchase, transportation, manufacture, and possession of intoxicating liquors in North Carolina, and to provide administrative procedures to insure, as far as possible, the proper administration of this Chapter under a uniform system throughout the State." Beer, by virtue of G.S. 18A-2(4), is included in the definition of intoxicating liquors.

Beer, however, is not an alcoholic beverage as defined by G.S. 18A-2(1), but is a malt beverage defined by G.S. 18A-2(5) as a brewed beverage "containing one half of one percent (½ of 1%) of alcohol by volume but not more than five percent (5%) of alcohol by weight." The possession, consumption, and transportation of alcoholic beverages are regulated by G.S. 18A-26 through G.S. 18A-32. The transportation and possession

of malt beverages, however, are regulated by G.S. 18A-35(a), which states: "Except as otherwise provided in this Chapter, the purchase, transportation, and possession of malt beverages and unfortified wine by individuals 18 years of age or older for their own use are permitted without restriction or regulation."

[4] The Attorney General has not cited and we have found no provision in Chapter 18A which further restricts or regulates the possession of beer for personal use. Hence, its possession by defendants in this case for their own use is permitted without restriction or regulation. The Town of Mount Airy by its ordinance seeks to impose an additional restriction contrary to the terms of G.S. 18A-35, thereby making the possession of open beer unlawful. This it cannot do. *Davis v. Charlotte, supra.*

The General Assembly clearly intended to pre-empt the regulation of malt beverages in order to prevent local governments from enacting ordinances such as the one in question. Allowing local governments to regulate malt beverages contrary to State law would result in an intolerable situation whereby citizens lawfully possessing beer in one county would be violating a criminal law in another. The Legislature pre-empted the field in order to avoid such confusion.

The ordinance in question is not consistent with the general law in that (1) it makes unlawful an act which is made lawful by State law, and (2) the ordinance purports to regulate a field in which a State statute has provided a complete and integrated regulatory scheme to the exclusion of local regulations. Therefore, under G.S. 160A-174(b) the ordinance is invalid.

The warrants were properly quashed. The judgment of the Superior Court is affirmed.

Affirmed.

Justice HUSKINS dissenting.

I respectfully dissent from the result reached by the majority for reasons which follow.

The stated purpose of Chapter 18A of the General Statutes is to establish a uniform system of control over the sale, purchase, transportation, manufacture, and possession of intoxicating liquors in North Carolina and to provide administrative

procedures to carry out that purpose. G.S. 18A-1 states the purpose and then provides: "This Chapter shall be liberally construed to the end that the sale, purchase, transportation, manufacture, and possession of intoxicating liquors *shall be prohibited except as authorized in this Chapter.*" (Emphasis added.)

G.S. 18A-2(4) provides in pertinent part: "The word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include . . . beer, . . . " G.S. 18A-2(5) provides in pertinent part: "The term 'malt beverages' shall mean beer, . . . " Thus, as used in Chapter 18A of the General Statutes, beer is both an *intoxicating liquor* and a *malt beverage.*

G.S. 18A-3(a) provides: "No person shall . . . possess any intoxicating liquor except as authorized in this Chapter." This of course means that no person shall possess beer except as authorized in this Chapter.

G.S. 18A-35(a) provides: "Except as otherwise provided in this Chapter, the . . . possession of malt beverages . . . [is] permitted without restriction or regulation."

In essence, the foregoing provisions produce the following state of affairs with respect to the possession of beer: G.S. 18A-3(a) is the only provision in Chapter 18A *prohibiting* the possession of beer and it says that possession of beer is prohibited "except as authorized in this Chapter." G.S. 18A-35(a) is the only provision in Chapter 18A *permitting* the possession of beer and it says that possession of beer is permitted "except as otherwise provided in this Chapter." Thus, the possession of beer is prohibited except where permitted and permitted except where prohibited. Neither area is defined nor otherwise identified in Chapter 18A. Therefore, following the mandate in G.S. 18A-1 that Chapter 18A "shall be liberally construed to the end that the . . . possession of intoxicating liquors [meaning beer] shall be prohibited except as authorized in this Chapter," I conclude that the possession of beer in open cans on the streets of Mount Airy is prohibited under State law; and the ordinance in question, prohibiting the possession of open beer in the streets, is not in conflict therewith. In my view the validity of the ordinance should be upheld.

Putting aside the superlative draftsmanship, it is my view that the General Assembly never intended to authorize possession of beer in open cans, or its consumption, on the public

streets and highways of the State. In my opinion the beer industry will be surprised to learn that its lobbyists have accomplished that result. If, as the majority holds, the law permits the possession of beer in open cans on the public streets, then the law must also permit its consumption there. After all, there is no point in opening a can of beer if one doesn't intend to drink it. I do not believe the beer industry sought or desires, or that the Legislature intended to legalize, such practice.

For the reasons stated I vote to uphold the validity of the ordinance in question.

Justice LAKE joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. JERRY DEAN EUBANKS

No. 67

(Filed 1 June 1973)

1. **Arrest and Bail § 3— illegal arrest — constitutional arrest**

Where defendant did not operate his vehicle on a public street or highway in the presence of an officer but the officer arrested him for driving under the influence without first obtaining a warrant, the arrest was illegal under State law; however, the arrest was not unconstitutional since the officer had probable cause to make it.

2. **Automobiles § 126; Criminal Law § 64— illegal arrest admissibility of resulting evidence**

Nothing in North Carolina law requires the exclusion of evidence obtained following an arrest which is constitutionally valid but illegal for failure first to obtain an arrest warrant; therefore, breathalyzer test results were properly admitted into evidence in defendant's trial for driving under the influence, though defendant's arrest for the offense was illegal.

3. **Arrest and Bail § 3; Automobiles § 126— basis for giving breathalyzer test — effect of illegal arrest**

G.S. 20-16.2(a) provides that administration of the breathalyzer test hinges solely upon the law enforcement officer having reasonable grounds to believe the person to have been driving or operating a motor vehicle on the highway while under the influence of intoxicating liquor, and not upon the legality of defendant's arrest for that offense.

4. **Automobiles § 126— instructions as to consequences for refusal to take breathalyzer test — admissibility of results**

Breathalyzer test results were not rendered inadmissible in defendant's trial for driving under the influence where a police officer

instructed defendant that his driver's license could be suspended for sixty days if he refused to take the test, since that instruction was correct and did not constitute coercion. G.S. 20-16.2(c).

5. **Arrest and Bail § 3; Automobiles § 126— illegal arrest — coercion to take breathalyzer test — admissibility of results**

Defendant's contention that his consent to take the breathalyzer test was coerced by the illegality of his arrest is without merit, since an illegal arrest, unaccompanied by violent or oppressive circumstances, is no more coercive than a legal arrest.

6. **Automobiles § 126— breathalyzer test results — requirements for admissibility**

Evidence was sufficient to establish the admissibility of breathalyzer test results under the requirements of G.S. 20-139.1(b) where that evidence tended to show that the administering officer had attended breathalyzer operators' school, received a license issued by the State Board of Health and followed certain rules and regulations set by the Board for administering the test.

Chief Justice BOBBITT dissents.

APPEAL by defendant from judgment of *Martin, J.*, 28 August 1972 Session, GASTON Superior Court.

Defendant was tried upon the original warrant, sufficient in form, charging him with operating a motor vehicle on a public street or highway on 22 November 1971 while under the influence of intoxicating liquor.

The State's evidence tends to show that Mrs. Coanne Gillespie, after giving a right turn signal, prepared to turn her 1968 Buick from Armstrong Park Drive and enter Club Drive to her right. Her Buick was struck from behind by a Chevrolet driven by defendant Jerry Dean Eubanks. Defendant got out of his vehicle and said it was his fault. While he and Mrs. Gillespie were waiting for the arrival of the police, Mrs. Gillespie noticed "a strong smell of alcohol about Mr. Eubanks," and two of her passengers commented on it. Defendant said the sun had been in his eyes prior to the collision; but Mrs. Gillespie, who was traveling in the same direction, testified that she "did not have a bit of trouble with the sun." Other evidence indicated that at 3:30 p.m., the approximate time of the collision, the sun was to the west and on the left of drivers proceeding in the direction defendant and Mrs. Gillespie were driving.

When Officer J. R. Deaton arrived at the scene he observed defendant "bent over looking into his car." In response to the officer's inquiry defendant said he was driving the Chevrolet.

While producing his driver's license for the officer's inspection, defendant "was very hesitant and stumbled through his pocket book, and finally got his license out, and after he got his license, I noticed he had to lean against the car to keep steady. He was very unsteady on his feet, and at all times, he was leaning next to his vehicle to keep straight, and I noticed a strong odor of alcohol on his breath. I placed him under arrest for D.U.I., and after I had talked to him and made sure he was the driver, and he was, in my opinion—he was under the influence of some alcoholic beverage." Defendant was placed under arrest there at the scene and taken to the police station. A warrant was thereafter obtained and served upon him.

At the police station Officer J. R. Carter advised defendant of his rights concerning the breathalyzer. Officer Carter told him that "he had the choice of either taking the test or refusing the test; that if he refused the test, none would be given . . . that his license could be suspended for sixty days if he refused . . . that he had a right to call an attorney and have him present during the test, or he had a right to call any other witness for the test that he wanted." Twenty minutes later the officer asked defendant if he would submit to the breathalyzer test. "He said he would take the test," and it was accordingly administered by Officer Carter who recorded the reading of .27 on a breathalyzer operation check list.

Defendant testified that he got off work at 2 p.m. on 22 November 1971. He bought two six-packs of beer, drank one beer on the way to the home of his friend, Miles Oscar Huffstickler where he ate dinner and drank another beer. He then left for his own home. "I started up this slight incline and the sun was right in my face, and I reached up to pull the sun visor down, and as I did, I looked back down, and this lady was sort of sitting in the road and I hit my brakes and I hit her." According to defendant, at the time of the collision there were ten full cans of beer in his car. He testified that he was not under the influence of intoxicants when the collision occurred. However, he said he "was still shook up the next day, and didn't feel good, and had a headache."

Miles Oscar Huffstickler corroborated defendant's testimony with respect to the two beers consumed by defendant while in Huffstickler's presence on the afternoon of 22 November 1971. This witness stated that he last saw defendant at approximately 3 p.m. and the witness had no knowledge as to the

amount of intoxicants, if any, defendant drank after he left and before the collision.

The jury found defendant guilty as charged and from judgment imposing a suspended sentence upon the conditions therein named, defendant appealed to the Court of Appeals. The case was duly docketed there and certified to the Supreme Court for initial appellate review pursuant to the provisions of G.S. 7A-31(b)(4). Errors assigned will be noted in the opinion.

Harris and Bumgardner by Don H. Bumgardner, Attorneys for defendant appellant.

Robert Morgan, Attorney General; William W. Melvin, Assistant Attorney General; and William B. Ray, Assistant Attorney General, for the State of North Carolina.

HUSKINS, Justice.

Before pleading to the charge contained in the warrant defendant moved to suppress the results of the breathalyzer test "and the officer's observations of this defendant," contending such evidence was rendered inadmissible by the illegality of defendant's arrest without a warrant. Denial of the motion is assigned as error.

It is provided by G.S. 15-41 that a peace officer may make an arrest without a warrant: "(1) When the person to be arrested has committed a felony or misdemeanor in the presence of the officer, or when the officer has reasonable ground to believe that the person to be arrested has committed a felony or misdemeanor in his presence; . . . "

[1] Since this defendant did not operate his motor vehicle on a public street or highway "in the presence of the officer," and since the officer had no reasonable ground to believe defendant had done so, defendant's arrest without a warrant was illegal. *State v. Hill,* 277 N.C. 547, 178 S.E. 2d 462 (1971). Even so, the words "illegal" and "unconstitutional" are not synonymous. An arrest is constitutionally valid when the officers have probable cause to make it. Whether probable cause exists depends upon "whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Beck v. Ohio,* 379 U.S. 89, 13 L.Ed. 2d 142,

85 S.Ct. 223 (1964); 5 Am. Jur. 2d *Arrest* §§ 44, 48; *State v. Harris,* 279 N.C. 307, 182 S.E. 2d 364 (1971); *State v. Streeter,* 283 N.C. 203, 195 S.E. 2d 502 (1973). Thus an arrest may be constitutionally valid and yet "illegal" under state law. Such is the case here.

There was probable cause to arrest defendant for operating a motor vehicle upon a public highway while under the influence of intoxicants, but G.S. 15-41 required the officer to obtain a warrant before making the arrest since the offense was not committed in his presence. Given probable cause, the federal constitutional exclusionary rule first enunciated in *Weeks v. United States,* 232 U.S. 383, 58 L.Ed. 652, 34 S.Ct. 341 (1914), and made applicable to the States in *Mapp v. Ohio,* 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961), has no application. The fact that a warrant was not obtained before defendant was arrested is, in a constitutional sense, immaterial. The Constitution does not dictate the circumstances under which arrest warrants are required. *United States v. Bazinet,* 462 F. 2d 982 (8th Cir. 1972). Whether an arrest warrant must be obtained is determined by state law alone. Likewise, state law alone determines the sanction to be applied for failure to obtain an arrest warrant where one is required.

[2] The issue then is this: When an arrest is constitutionally valid but illegal under the law of North Carolina, must the facts discovered or the evidence obtained as a result of the arrest be excluded as evidence in the trial of the action? The answer is no. An unlawful arrest may not be equated, as defendant seeks to do, to an unlawful search and seizure. All evidence obtained by searches and seizures in violation of the Federal Constitution is inadmissible in a state court. *Mapp v. Ohio, supra.* Such evidence is also inadmissible by statute in North Carolina. G.S. 15-27(a). But there is no such rule and no such statute in this State with respect to facts discovered or evidence obtained following an illegal arrest. Neither reason nor logic supports the suggestion.

We hold that nothing in our law requires the exclusion of evidence obtained following an arrest which is constitutionally valid but illegal for failure to first obtain an arrest warrant. Defendant may, if so advised, redress his grievance for the warrantless arrest by a civil action for damages. *Eg. Perry v. Hurdle,* 229 N.C. 216, 49 S.E. 2d 400 (1948); *Hicks v. Nivens,*

210 N.C. 44, 185 S.E. 469 (1936). But the competency of the evidence obtained following his illegal arrest remains unimpaired.

[3] Nothing in G.S. 20-16.2(a) is to the contrary. That section reads as follows:

> "(a) Any person who drives or operates a motor vehicle upon any highway or any public vehicular area shall be deemed to have given consent, subject to the provisions of G.S. 20-139.1, to a chemical test or tests of his breath or blood for the purpose of determining the alcoholic content of his blood if arrested for any offense arising out of acts alleged to have been committed while the person was driving or operating a motor vehicle while under the influence of intoxicating liquor. *The test or tests shall be administered at the request of a law-enforcement officer having reasonable grounds to believe the person to have been driving or operating a motor vehicle on a highway or public vehicular area while under the influence of intoxicating liquor.* The law-enforcement officer shall designate which of the aforesaid tests shall be administered. Before any of the tests shall be administered, the accused person shall be permitted to call an attorney and to select a witness to view for him the testing procedures; providing, however, that the testing procedures shall not be delayed for these purposes for a period of time of over thirty minutes from the time the accused person is notified of these rights." (Emphasis added.)

It is apparent from the emphasized portion of the statute that administration of the breathalyzer test is not dependent upon the legality of the arrest but hinges solely upon "the . . . law-enforcement officer having reasonable grounds to believe the person to have been driving or operating a motor vehicle on a highway or public vehicular area while under the influence of intoxicating liquor." It follows that defendant's motion to suppress was properly denied.

[4] Defendant further contends that his consent to take the breathalyzer test was not voluntary but coerced "by being told by the officer that he could lose his driver's license for sixty (60) days if he refused to take the test." From this, defendant argues that the results of the test were inadmissible.

In *State v. Mobley,* 273 N.C. 471, 160 S.E. 2d 334 (1968), the officers erroneously told defendant that if he refused to

submit to the breathalyzer test "it will be used as an assumption of guilt in court." It was held that the coerciveness of the misstatement required the exclusion of the test results.

Here, Officer Carter told defendant that his license "could be suspended for sixty days if he refused" to take the test. This statement is correct. G.S. 20-16.2(c) provides that if a person under arrest willfully refuses to take a breathalyzer test, none shall be given, but the Department of Motor Vehicles upon receipt of a sworn report to that effect "shall revoke his driving privilege for a period of 60 days." Hence no coercive misstatement was made in this case.

[5] Defendant additionally contends that his consent to take the breathalyzer was coerced by the illegality of the arrest. There is no merit in this contention. We hold that an illegal arrest, unaccompanied by violent or oppressive circumstances, is no more coercive than a legal arrest. By analogy, the language of Justice Branch, speaking for the Court in *State v. Moore*, 275 N.C. 141, 166 S.E. 2d 53 (1969), where a voluntary confession following an illegal arrest was held admissible, is appropriate here:

> "We condemn any illegal act by police officers. However, when viewed in the narrow field of voluntary confession, we fail to see why an illegal arrest—unaccompanied by violent or oppressive circumstances—would be more coercive than a legal arrest.
>
> "Both reason and weight of authority lead us to hold that every statement made by a person in custody as a result of an illegal arrest is not *ipso facto* involuntary and inadmissible, but the facts and circumstances surrounding such arrest and the in-custody statement should be considered in determining whether the statement is voluntary and admissible. Voluntariness remains as the test of admissibility."

On this point defendant is saying, in effect, that had he known his arrest was illegal he would not have voluntarily consented to take the breathalyzer test. Even so, the fact remains that he did voluntarily consent to take it, and voluntariness is the test of admissibility. This contention fails for lack of merit.

[6] Finally, defendant contends the results of the breathalyzer were inadmissible because the State failed to prove that the test

was performed according to methods approved by the State Board of Health as required by G.S. 20-139.1(b).

In *State v. Powell,* 279 N.C. 608, 184 S.E. 2d 243 (1971), we said:

> "G.S. 20-139.1(b) requires two things before a chemical analysis of a person's breath or blood can be considered valid under that section. First, that such analysis shall be performed according to methods approved by the State Board of Health, and second, that such analysis be made by a person possessing a valid permit issued by the State Board of Health for this purpose. Officer Pegram had a valid permit issued by the Board to conduct such analysis and testified that he made the analysis in this case according to methods approved by that Board. We hold this sufficient to meet the requirements of G.S. 20-139.1(b)."

Here, Officer Carter testified that he attended the breathalyzer operators' school conducted by the Department of Community Colleges at Gaston College; that he received a certificate issued by the North Carolina State Board of Health licensing him to perform chemical analyses of the breath to determine the blood alcohol level; that when he received the certification, "they gave me certain rules and regulations to follow. I did follow them on this occasion." We hold this evidence sufficient to establish the admissibility of the breathalyzer test results under the requirements of G.S. 20-139.1(b). There is no merit in this contention.

Since .10 percent by weight of alcohol in the blood gives rise to the presumption that a person is under the influence of intoxicants, G.S. 20-139.1(a)(1), defendant's strenuous effort to exclude the .27 percent reading is quite understandable. It loudly corroborates the testimony of the arresting officer and other witnesses and leaves little room for doubt that the jury reached the correct result. Defendant's testimony that he had consumed only two bottles of beer suggests perjury rather than sobriety.

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

No error.

Chief Justice BOBBITT dissents.

STATE OF NORTH CAROLINA v. LARRY TINSLEY

No. 86

(Filed 1 June 1973)

1. **Criminal Law § 99— questions propounded by trial court — no expression of opinion**

Where the testimony of the State's principal witnesses was often inaudible, confusing and contradictory, questions posed by the trial court which helped to clarify and develop relevant evidence were proper and did not constitute an expression of opinion by the judge.

2. **Criminal Law § 112— jury instructions — requirement of unanimity in reaching verdict — no error**

Trial court's instruction to the jury that "all twelve of you must agree in order to bring in a lawful verdict. I don't mean to say that you have to agree as such, but I mean to tell you that you cannot bring in a lawful verdict unless it is unanimous under our law" was proper and did not mislead the jury with respect to reasonable doubt, particularly since the trial judge on at least six occasions correctly placed the burden upon the State to prove each element of the crime beyond a reasonable doubt in order for the jury to return a verdict of guilty.

3. **Criminal Law § 90— impeachment of own witness**

A party in a criminal case may not impeach his own witness, nor may he circumvent the rule by introducing the contradictory or inconsistent statements of the witness under the guise of corroborating evidence.

4. **Criminal Law §§ 89, 90— corroborative statement — slight variance — admissibility of statement**

Where the State called a witness and examined him and then introduced a prior statement made by the witness for the purpose of corroboration, an alleged variance between the testimony and the statement with respect to defendant's whereabouts and posture in relation to a rifle was too slight to render the statement inadmissible; moreover, defendant's general objection to the statement without a motion to exclude or strike the portion alleged to be incompetent was ineffective.

5. **Criminal Law §§ 90, 169— impeachment of its own witness by State — no prejudicial error**

The trial court erred in allowing the solicitor to elicit testimony from a State's witness to the effect that the witness was related to defendant and had been subpoenaed by defendant, since that evidence tended to show that the witness was unworthy of belief because of bias; however, the testimony of the witness was merely cumulative and its admission was not so prejudicial to defendant as to warrant a new trial.

State v. Tinsley

APPEAL by defendant from *Copeland, S. J.*, 2 January 1973 Special Criminal Session of JOHNSTON Superior Court.

Criminal prosecution on an indictment charging that "Larry Tinsley . . . on the 27th day of August . . . feloniously, wilfully, and of his malice aforethought, did kill and murder Eugene Whitley, . . . " The State proceeded on the theory of the felony murder rule, relying on a violation of G.S. 14-34.1.

The State's evidence tended to show that on 27 August 1972 defendant and Jesse Snead went to the home of Pat Simms where defendant obtained a .22 bolt action rifle. He left this weapon in the yard of a house located near the "Soul Strut," a restaurant and dance hall. Snead had previously left his automatic rifle at the same place.

Defendant and Snead visited the "Soul Strut" for a short time before going to the home of defendant's uncle, Frank Tinsley, where they consumed some wine. The two then returned to the dance hall and separated. Snead later heard some shooting from without the building, and upon going outside he saw defendant and John Merritt, the operator of the establishment, engaged in an argument. At that time defendant was carrying the .22 bolt action rifle.

Defendant was next seen by several witnesses armed with a rifle lying near a barrel about 40 feet from the side of the "Soul Strut." These witnesses testified that many shots were fired from this area into the building. The witness Snead also testified that he saw defendant lying in the bushes shooting. Gary Barber testified that he saw defendant shoot a gun while it was pointed toward the "Soul Strut."

The State also offered evidence tending to show that Eugene Whitley, aged 15, was in the "Soul Strut" on the night of 27 August 1972, and that he was killed by a .22 caliber bullet.

State's Exhibit # 1 was the bolt action rifle allegedly in the possession of defendant on the night in question. Expert testimony tended to show that the deceased was killed by a bullet fired from this rifle. The expert testimony also indicated that other bullets removed from the inside of the building had been fired from the same rifle.

Defendant's evidence, offered through his aunt, Betty Jean Tinsley, tended to show that he was highly intoxicated on the night of 27 August 1972.

The State did not seek the death penalty, and the jury returned a verdict finding defendant "guilty of murder in the first degree as charged in the bill of indictment with the recommendation that he be imprisoned for life." Defendant appealed.

Attorney General Morgan; Assistant Attorney General Thomas B. Wood for the State.

Corbett & Corbett, by Albert A. Corbett, Jr. for defendant appellant.

BRANCH, Justice.

[1] Defendant states his first assignment of error as follows: "Was the defendant, Larry Tinsley's, right to a fair and impartial trial prejudiced by the opinions expressed and the questions asked or objections sustained or overruled by the court in the presence of the jury?"

Defendant sets forth in his brief numerous excerpts from the record. It would be repetitious and unrewarding to set forth and consider each of the portions of the record challenged by this assignment of error. We think it sufficient to set forth representative portions which defendant contends were prejudicial.

"COURT: You say you heard some shooting outside?

A. I said I went in the place and there was some shooting going on on the outside. There were some people out there fussing.

COURT: Did you say you heard some shooting outside?

A. Yes sir.

COURT: Is that what you said?

A. Yes sir.

* * *

Q. Awhile ago you said you didn't see any guns except the first time when you saw the guns.

STATE OBJECTS.

COURT: You are making a statement. OBJECTION SUSTAINED.

QUESTIONS continued by Mr. Corbett:

The first time I went over there back to Frank's house I saw Larry Tinsley, Jesse Snead and Billy Ray, all three of them, standing there. Jesse Snead had both guns in his hands. I saw Larry Tinsley laying down by the barrel or something like that.

COURT: Did you say you did or didn't?

A. Yes sir."

The bulk of defendant's exceptions under this assignment of error involves questions directed to the State's principal witnesses—three teenagers present at the "Soul Strut" on the night of the shooting. It is manifest from a reading of the record that the testimony of these witnesses was often inaudible, confusing and contradictory.

In *State v. Kirby,* 273 N.C. 306, 160 S.E. 2d 24, this Court stated: "The presiding judge is entirely justified in propounding competent questions to a witness in order to clarify what a witness has said or to develop some relevant fact which has been overlooked. However, care must be exercised to avoid indirect expression of opinion on the facts, and it is improper for the trial judge to ask questions which are reasonably calculated to impeach or discredit the witness or his testimony. *State v. Kimrey,* 236 N.C. 313, 72 S.E. 2d 677."

Careful examination of the trial record reveals no comment by the trial judge which might reasonably be interpreted as tending to impeach or discredit any of the witnesses. To the contrary, it appears that the trial judge exercised remarkable patience and impartiality in posing questions which clarified and developed relevant evidence.

[2] Defendant also contends the following portion of the trial judge's instructions to the jury constituted prejudicial error.

"Now a verdict does not become a verdict unless it is unanimous, and all twelve of you must agree in order to bring in a lawful verdict.

I don't mean to say that you have to agree as such, but I mean to tell you that you cannot bring in a lawful verdict unless it is unanimous under our law.

DEFENDANT'S EXCEPTION NO. 19"

Defendant argues that this portion of the charge might have led the jury to believe that they could reach an agreement even though they had a reasonable doubt concerning defendant's guilt. We do not agree. In the first sentence of this portion of the charge, the judge correctly instructed the jury that their verdict must be unanimous. The second sentence seems to emphasize that the court was not mandating a unanimous verdict if any juror had reasonable doubt as to defendant's guilt. In any event, if there was any ambiguity in this portion of the charge, it was cured by the fact that the trial judge on at least six occasions (including his final mandate to the jury) correctly placed the burden upon the State to prove each element of the crime beyond a reasonable doubt in order for the jury to return a verdict of guilty.

This assignment of error is overruled.

In his last assignment of error defendant contends the trial judge committed prejudicial error by allowing the State to impeach its own witness.

Billy Ray, a tenth-grade student at Smithfield-Selma High School, testified in substance that on the night of 27 August 1972 he saw defendant and Jesse Snead in the vicinity of the "Soul Strut" loading their rifles, and that Snead handed him a rifle to "hold for a minute." He later "laid the gun on the ground and went in the Soul Strut." On cross-examination the witness said: "I did not see Larry Tinsley (defendant) laying down by any barrel."

The State subsequently offered a written statement previously given to Sergeant Leaman Jones of the Selma Police Department by Billy Ray. This statement corroborated Ray's in-court testimony concerning the events of the night in question, except that it was more detailed and contained the following statement: "Jesse told me to hold his gun and *I laid it down beside Larry* and went in the place so I would not get in trouble." (Our emphasis.)

Defendant contends that the written statement so materially varies from Billy Ray's testimony that it impeached rather than corroborated the witness.

[3] It is true that a party in a criminal case may not impeach his own witness. *State. v. Anderson,* 283 N.C. 218, 195 S.E. 2d 561. Nor may a party circumvent the rule by introducing the contradictory or inconsistent statements of the witness under the guise of corroborating evidence. *State v. Bagley,* 229 N.C. 723, 51 S.E. 2d 298. Nevertheless, "slight variances in the corroborative testimony do not render it inadmissible." *State v. Bryant,* 282 N.C. 92, 191 S.E. 2d 745; *State v. Case,* 253 N.C. 130, 116 S.E. 2d 429.

[4] The portion of the written statement allegedly presenting a variance relates to defendant's whereabouts and posture in relation to the rifle. Whether defendant was in a sitting, standing or prostrate position, or whether defendant was stationed near a barrel is of minor significance. The variance, if any, was too slight to render the written statement inadmissible.

Further, when the written statement was offered, defendant's counsel lodged a general objection to the whole statement. Portions of the statement tended to corroborate the witness. Defendant's general objection without moving to exclude or strike the portion alleged to be incompetent was ineffective. *State v. Brooks,* 260 N.C. 186, 132 S.E. 2d 354; *State v. Litteral,* 227 N.C. 527, 43 S.E. 2d 84.

[5] Under this assignment of error defendant also argues that the trial judge improperly permitted the Solicitor to elicit from his witness, Billy Ray, the fact that he was related to defendant and that he had been subpoenaed by defendant. There is merit in this argument since this testimony appears to have been drawn from the witness for the purpose of showing him to be unworthy of belief because of bias. *State v. Anderson, supra.* However, the testimony of the witness Ray was merely cumulative and the admission of the challenged evidence does not appear to have so prejudiced defendant as to warrant a new trial. *State v. Fletcher and St. Arnold,* 279 N.C. 85, 181 S.E. 2d 405; *State v. Temple,* 269 N.C. 57, 152 S.E. 2d 206.

This assignment of error is overruled.

Our review of this entire record reveals no reversible error.

No error.

STATE OF NORTH CAROLINA v. PRESTON GLENN HUMPHREY

No. 59

(Filed 1 June 1973)

1. **Criminal Law § 34; Rape § 4— evidence of defendant's guilt of a subsequent offense — admissibility to show quo animo**

Trial court in a rape prosecution did not err in admitting evidence concerning the commission of an offense involving indecent exposure which allegedly occurred a short time after the commission of the charged crime where that evidence was competent to show defendant's *quo animo*, or state of mind; moreover, in the light of the overwhelming evidence, including defendant's confession, there was no reasonable probability that the admission of the evidence in question might have contributed to defendant's conviction.

2. **Criminal Law §§ 5, 63— criminal responsibility — right and wrong test — irresistible impulse doctrine**

The test of criminal responsibility is not the "irresistible impulse doctrine," rather, it is the capacity to distinguish between right and wrong at the time and in respect of the matter under investigation; therefore, the trial judge in a rape case properly refused to allow psychiatric testimony with respect to an "uncontrollable urge" under which defendant allegedly committed the offense, and he correctly refused to give the special instructions tendered by defendant.

APPEAL by defendant from *Godwin, S. J.*, 6 November 1972 Special Criminal Session of WAKE Superior Court.

Defendant was tried on a bill of indictment charging the crime of rape. Upon his arraignment he entered a plea of not guilty.

The State's evidence tended to show that on the night of 15 July 1972 Miss Donna Jo Connally, who was director of religious life for Youth Camps, Inc., was in Faircloth Dormitory at Meredith College checking rooms to see if they were ready to accommodate girls who were arriving on the following day. As she walked along the first floor hall, she observed a man approaching and asked if she could help him. He continued to walk toward her, saying that he was looking for a girl named Diane. As he came closer Miss Connally observed that his private parts were exposed, and she thereupon tried to lock herself in a room. He caught her, and in the ensuing struggle she fell to the floor. He began ripping off her clothes and then took her into a room, where he finished taking off her clothes. He took off his own clothes and despite her pleas, screams and struggles had intercourse with her against her

will. He left the dormitory, and Miss Connally sought help and was thereafter carried to Rex Hospital.

The State offered medical testimony which disclosed that the doctors observed bruises and lacerations on the body of Miss Connally. The examination further disclosed a laceration of the hymen. Dr. Davis, a pathologist, testified that intercourse had definitely taken place.

Defendant was picked up by police officers at a parking lot at approximately 2:15 a.m. He voluntarily accompanied the officers to the police station where he later prepared and signed a statement. The statement admitted the raping of Donna Jo Connally and also related that in the early morning hours of 16 July he followed a woman home and while completely naked walked up into the next yard. He left when she turned on the lights and started the motor of her automobile.

At trial defendant testified and admitted that he had raped Miss Connally. He stated: "I didn't want to do it to her. I just had to. I mean it just—I couldn't control it. I couldn't stop it."

Defendant also offered as a witness Dr. Robert N. Harper, a medical expert in psychiatry.

The trial judge conducted a voir dire hearing on the State's objection to Dr. Harper's testimony concerning defendant's mental condition. At the close of the voir dire hearing, the judge indicated that he would sustain the State's objection to any testimony by the witness to the effect "that the defendant was caught up in an uncontrollable urge to have sexual intercourse with Miss Connally which he could not control, and that the act of rape charged in the bill of indictment probably would not have occurred but for said uncontrollable urge." Thereafter Dr. Harper testified before the jury that in his opinion defendant understood and appreciated the nature and quality of his act and that defendant was aware of its wrongful nature. The trial judge refused to allow the witness to express an opinion as to whether defendant possessed sufficient power to prevent himself from committing the act or from stating his opinion that the act would not have occurred but for mental disease or defect afflicting defendant at the time it was committed.

The jury returned a verdict of guilty, and defendant appealed from judgment imposing a sentence of life imprisonment.

Attorney General Morgan; Assistant Attorney General Millard R. Rich, Jr. and Assistant Attorney General Richard B. Conely for the State.

Carlos W. Murray, Jr. for appellant.

BRANCH, Justice.

[1] Defendant first assigns as error the admission of evidence concerning the commission of an offense involving indecent exposure which allegedly occurred a short time after the commission of the charged crime.

The general rule in North Carolina is that the State may not offer proof of another crime independent of and distinct from the crime for which defendant is being prosecuted even though the separate offense is of the same nature as the charged crime. *State v. Long,* 280 N.C. 633, 187 S.E. 2d 47; *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364; 1 Stansbury North Carolina Evidence § 91 (Brandis rev. 1973). However, such evidence is competent to show "the *quo animo,* intent, design, guilty knowledge, or scienter, or to make out the *res gestae,* or to exhibit a chain of circumstances in respect of the matter on trial, when such crimes are so connected with the offense charged as to throw light upon one or more of these questions." *State v. Jenerett,* 281 N.C. 81, 187 S.E. 2d 735; *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241.

The evidence here challenged was competent to show defendant's *quo animo,* or state of mind.

Further, in light of the overwhelming evidence, including defendant's confession, we do not believe there is a reasonable probability that the admission of this evidence might have contributed to defendant's conviction. *State v. Thacker,* 281 N.C. 447, 189 S.E. 2d 145; *State v. Taylor,* 280 N.C. 273, 185 S.E. 2d 677.

This assignment of error is overruled.

[2] Defendant's remaining assignments of error relate to the rulings of the trial judge sustaining the State's objections to psychiatric testimony concerning defendant's mental state as affecting his criminal responsibility and intent, and the refusal of the trial judge to give special instructions which would mandate an acquittal if the jury found that defendant's actions resulted from an irresistible, uncontrollable impulse.

Defendant sought to elicit from Dr. Robert N. Harper an opinion as to whether "defendant possessed sufficient power to prevent himself from committing the act." The trial judge sustained the State's objection to this line of questioning.

For more than 100 years this Court has recognized the test of criminal responsibility to be the ability of the accused at the time he committed the act to realize and appreciate the nature and quality thereof—his ability to distinguish between right and wrong. *State v. Mercer,* 275 N.C. 108, 165 S.E. 2d 328; *State v. Spence,* 271 N.C. 23, 155 S.E. 2d 802, rev'd on other grounds 392 U.S. 649, 20 L.Ed. 2d 1350, 88 S.Ct. 2290; *State v. Creech,* 229 N.C. 662, 51 S.E. 2d 348; *State v. Potts,* 100 N.C. 457, 6 S.E. 657; *State v. Brandon,* 53 N.C. 463. North Carolina, as well as many other jurisdictions, has steadfastly refused to recognize the "irresistible impulse doctrine" as a test of criminal responsibility. *State v. Spence, supra; State v. Creech, supra; State v. Brandon, supra;* Annot., 173 A.L.R. 391. See generally, Annot., 22 A.L.R. 3d 1228; Annot., 45 A.L.R. 2d 1447; Annot., 70 A.L.R. 659.

In *State v. Spence, supra,* former Chief Justice Parker, quoting respectively from *State v. Creech, supra,* and *Leland v. Oregon,* 343 U.S. 790, 96 L.Ed. 1302, 72 S.Ct. 1002, reh. den. 344 U.S. 848, 97 L.Ed. 659, 73 S.Ct. 4 stated:

> " 'The test of responsibility is the capacity to distinguish between right and wrong at the time and in respect of the matter under investigation. *S. v. Potts,* 100 N.C. 457, 6 S.E. 657; *S. v. Brandon,* 53 N.C. 463. He who knows the right and still the wrong pursues is amenable to the criminal law. *S. v. Jenkins,* 208 N.C. 740, 182 S.E. 324. On the other hand, if "the accused should be in such a state of mental disease as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing wrong," the law does not hold him accountable for his acts, for guilt arises from volition, and not from a diseased mind. *S. v. Haywood,* 61 N.C. 376.
>
> 'We are aware of the criticism of this standard by some psychiatrists and others. Still, the critics have offered nothing better. It has the merit of being well established, practical and so plain "that he may run that readeth it." Hab. 2:2. Moreover, it should be remembered that the criminal law applies equally to all sorts and conditions of

people. It ought to be sufficiently clear to be understood by the ordinary citizen.'

* * *

' . . . Knowledge of right and wrong is the exclusive test of criminal responsibility in a majority of American jurisdictions. The science of psychiatry has made tremendous strides since that test was laid down in *M'Naghten's* Case, but the progress of science has not reached a point where its learning would compel us to require the states to eliminate the right and wrong test from their criminal law. . . . ' "

Defendant's counsel ably presented arguments for adoption of the "irresistible impulse doctrine." However, neither defendant's arguments nor our research disclose reasons sufficiently persuasive to warrant modification or abrogation of the long recognized "right and wrong" test of criminal responsibility.

The trial judge's rulings on the psychiatric testimony offered by defendant was without error, and he correctly refused to give the special instructions tendered by defendant.

We have carefully examined the entire record of this case and find no prejudicial error.

No error.

STATE OF NORTH CAROLINA v. EUGENE WOOD

No. 14

(Filed 1 June 1973)

Rape § 7— appeal from rape conviction — no prejudicial error

The record discloses no prejudicial error in this appeal from defendant's conviction of rape.

APPEAL by defendant from *Exum, J.*, July 24, 1972 Criminal Session (High Point Division), GUILFORD Superior Court. By grand jury indictment, proper in form, the defendant, Eugene Wood, was charged with the crime of rape upon the body of Frances Ella Oldham. The offense occurred on the early morning of October 2, 1971.

The State's evidence disclosed that Frances Ella Oldham lived alone at 1202 East Green Street in High Point. Shortly after midnight on October 2, 1971, she was asleep in bed and was awakened "by the cover being jerked from me." She observed a man in her room. There was sufficient light from the outside through the windows to enable her to identify the intruder. The man choked her until she was barely able to regain her breath and by threats that he would kill her, completed the act of sexual intercourse by force and against her will.

As soon as the intruder left she went to the house of a neighbor for help in notifying the officers. The neighbor, Mrs. Tessie Parker, testified that Mrs. Oldham was in great distress and emotionally very upset. When the officers came, she told them that she could identify her assailant and that he was the garbage man who had been picking up the garbage in her neighborhood for about six months. She did not know his name. The officers ascertained the name of the garbage man, obtained his picture, and submitted it with twelve others to Mrs. Oldham as a test of her ability to identify her assailant. The twelve photographs submitted by the officers were of persons of the same color, age group, and general appearance as the garbage collector. The prosecuting witness identified the photograph of the defendant in a flash. The officers then proceeded to arrest the defendant.

At the trial the solicitor asked the witness to identify her assailant. Defense counsel objected and the court conducted a voir dire at which the officers gave the testimony with respect to the examination of the photographs. The court concluded the proper procedures were followed in the photographic identification and permitted Mrs. Oldham to say that Eugene Wood was the man who broke into her room and assaulted her.

The State offered the testimony of Dr. Lewis who testified that he examined Mrs. Oldham in the hospital on the morning of October 2, 1971, found the presence of sperm, and some fresh blood and abrasions, from which he concluded that the result of the vaginal examination was "consistent with forcible intercourse."

The prosecuting witness stated that she could identify the defendant by his general size and appearance, the difference in his eyes, and by his voice. She had seen him before and heard him speak on a few occasions when he was picking up her garbage.

After the State rested, the defendant testified that on October 1 and 2, 1971, he worked, came home, and proceeded to do rather heavy drinking. At no time did he go to Mrs. Oldham's apartment. His wife testified that he was so drunk he staggered and fell as he left the place where she lived to go to his room in another house. His daughter testified that after he went to his room, she checked on him and found that he and Lee Cunningham were sitting up talking. She thought it was between twelve and twelve-thirty, but she did not know for sure. The next time she saw him he was in jail.

Lee Cunningham testified that he and Wood were together from twelve until about two-thirty. They had different rooms in the house where they both lived. When the officers came to arrest the defendant, he asked one of the officers what time it was and the officer said it was four o'clock. Cunningham did not see a timepiece and was indefinite about the time he last saw the defendant before the officers came to make the arrest.

At the conclusion of the evidence the judge charged the jury, correctly defining all essential elements of the crime of rape. He explained fully the presumption of innocence in favor of the defendant and that the presumption entitled the defendant to an acquittal unless the jury found guilt from the evidence beyond a reasonable doubt. The court instructed the jury to return one of two verdicts: guilty, or not guilty. The jury returned a verdict finding the defendant guilty as charged. The court imposed a sentence of life imprisonment and the defendant appealed.

Robert Morgan, Attorney General by Edwin M. Speas, Jr., Associate Attorney for the State.

Richard S. Towers, Assistant Public Defender for defendant appellant.

HIGGINS, Justice.

The offense here involved was committed on October 2, 1971. The indictment was found on October 25, 1971. The trial was concluded, the verdict was returned, and the judgment was pronounced on July 25, 1972. Defense counsel, during the course of the trial, entered timely objections and exceptions to the failure of the court to grant defense counsel's motions to dismiss at the conclusion of the State's evidence and again at

the conclusion of all the evidence. Counsel likewise entered objection to the court's failure to charge the jury that, in the event of a finding of guilt, it had the right to recommend that the punishment be imprisonment for life in the State's prison.

By brief, defense counsel listed the assignments above indicated, and presented them for examination and consideration by the court. The brief, however, states: "Counsel for the Defendant Appellant has carefully searched the record proper and has carefully considered all of the Exceptions and Assignments of Error as well as all proceedings in the trial of this capital case. Counsel is frank to admit that after a careful examination of the entire record, including, but not limited to, the charge of the court, he is unable to find any error prejudicial to the defendant."

The record of the trial fully justifies the defense counsel's statement that prejudicial error is not disclosed by the record. Judge Exum's rulings and his charge clearly disclose that the court, at great pains, has seen to it that the defendant's rights were protected throughout the trial. The evidence of guilt required its resolution by the fact finding body. The jury, under proper instructions, resolved the issue of guilt against the defendant. In the trial and judgment, we find

No error.

TRAVELERS INSURANCE COMPANY v. GORMAN Z. KEITH AND NORFOLK SOUTHERN RAILWAY COMPANY

No. 42

(Filed 1 June 1973)

1. **Rules of Civil Procedure § 22— interpleader action — burden on each defendant — propriety of summary judgment**

In an interpleader action under Rule 22 of the N. C. Rules of Civil Procedure, each defendant is the adversary of the other and occupies the position of a plaintiff, each having the burden of establishing his right to the fund by the greater weight of the evidence, and summary judgment may be granted as in any other case.

2. **Insurance § 67— FELA judgment for employee — effect on recovery for medical expenses under accident policy**

Where defendant employee previously instituted an FELA action for permanent injury and disability, lost wages and medical costs, the jury's verdict established the negligence of defendant employer and

the contributory negligence of employee, but did not indicate the percentage of causal negligence attributed to employer, judgment was entered against employer for approximately one-third of the amount alleged as damages by employee but the jury did not itemize its award of damages, employer paid the amount of the judgment and employee paid his remaining medical bills out of the proceeds, employee was entitled to an amount paid into court in this interpleader action by plaintiff insurance company for employee's medical expenses, since employer failed to prove that its payment of the amount of the judgment in the FELA action included payment, either in whole or in part, of the medical expenses upon which the insurance payment made by plaintiff was based.

3. Insurance § 67— FELA judgment for employee — effect on recovery for medical expenses under accident policy

While G.S. 44-49 and G.S. 44-50 make any plaintiff's unpaid medical expenses a lien upon his recovery in a personal injury action, the statutes impose no obligation with reference to the expenses upon the defendant against whom judgment has been rendered; therefore, payment of judgment by railway employer to employee in an FELA action out of which judgment medical expenses were paid did not entitle employer to an amount paid into court in this interpleader action by plaintiff insurance company for employee's medical expenses.

ON *certiorari* to review the decision of the Court of Appeals reported in 15 N. C. App. 551, 190 S.E. 2d 428 (1972). The appeal was docketed and argued in the Supreme Court as No. 80 at the Fall Term 1972.

Plaintiff Travelers Insurance Company (Travelers) instituted this action pursuant to G.S. 1A-1, Rule 22, to determine to which of the two defendants, Gorman Z. Keith (Keith) or Norfolk Southern Railway Company (Norfolk Southern), it should pay the sum of $3,584.25, which has been deposited with the court.

Travelers did not participate in the trial. The following facts which are not in dispute are established by stipulations, admissions in the pleadings, or record evidence:

Prior to 25 July 1966 Travelers issued to Norfolk Southern a group insurance policy (No. GA-23000) making the railroad's employees (subject to provisions inapplicable here) "eligible for employee benefits as provided in Article VII hereof with respect to bodily injuries occurring or sickness commencing while [they are] insured." Article VII provides: "All benefits provided under this Article are payable to or on behalf of the employee, provided that benefits based on expenses paid by the employer or other person or organization (or which an employer shall be

obligated to pay) may be paid by the Insurer to such employer or other person or organization."

Norfolk Southern paid the insurance premiums, and this policy was in full force and effect on 25 July 1966 when Keith, an employee of Norfolk Southern, was injured in a collision on its tracks while acting in the scope of his employment. Keith required hospitalization and incurred medical expenses in the amount of $4,530.15. Of this sum Travelers has reimbursed Keith in the amount of $256.45 and, under the policy, it is obligated to pay his medical expenses in the additional amount of $3,584.25.

Prior to the filing of this action Keith sued Norfolk Southern under the provisions of the Federal Employers Liability Act. He alleged damages in the amount of $109,030.15—$100,000.00 for permanent injury and disability, $4,500.00 for lost wages, and $4,530.15 for medical costs. When the case was tried at the December 1969 Session of Wake all of Keith's medical expenses "were proven as items of damages." The jury's verdict established Norfolk Southern's negligence and Keith's contributory negligence. The issue, "What amount of damages if any is the plaintiff [Keith] entitled to recover of the defendant [Norfolk Southern] for his injuries," was answered, "$33,-240.00." Upon the verdict judgment was entered that Keith recover $33,240.00 from Norfolk Southern. (The judgment was introduced in evidence in this case as Keith's Exhibit 7.) On 11 August 1970, Norfolk Southern paid the judgment, and out of the proceeds Keith paid his remaining unpaid medical bills in the amount of $4,272.15.

When both Keith and Norfolk Southern claimed the balance of $3,584.25, which Travelers was obligated to pay for Keith's medical expenses, Travelers instituted this action. Judge Preston heard the case without a jury upon the stipulations, admissions in the pleadings, Keith's Exhibit 7, and the testimony of Keith. Except for his statement that Travelers' policy was "set up" in negotiations between the Norfolk Southern and the railroad employees' Brotherhood, the labor union of which Keith was a member, Keith's testimony added nothing to the stipulations. Upon the evidence Judge Preston made thirteen findings of fact which are substantially detailed above. His fourteenth "finding" is quoted:

"14. The medical expenses represented by the sum of $3,584.25 involved in this action were expenses paid by Norfolk

Southern Railway Company and which Norfolk Southern Railway Company was obligated to pay."

Upon "the foregoing findings of fact," Judge Preston made the following conclusions of law:

"1. The medical expenses represented by the sum of $3,584.25 involved in this action were expenses paid by Norfolk Southern Railway Company and which Norfolk Southern Railway Company was obligated to pay.

"2. Norfolk Southern Railway Company is entitled to recover said sum of $3,584.25 from the plaintiff under the above-mentioned policy."

Keith, excepting to Finding No. 14 and Conclusions of Law 1 and 2, appealed to the Court of Appeals. In an opinion, reported in 15 N. C. App. 551, 190 S.E. 2d 428 (1972), the court held that "the trial judge committed prejudicial error in finding and concluding that the employer paid or was obligated to pay the employee's medical expenses," and that "Keith is entitled to a new trial." We allowed Norfolk Southern's petition for certiorari.

R. Mayne Albright for Gorman Z. Keith, defendant appellee.

Young, Moore & Henderson by J. Clark Brewer and Charles H. Young for Norfolk Southern Railway Company, defendant appellant.

SHARP, Justice.

[1] Plaintiff Travelers has invoked the remedy of interpleader provided by G.S. 1A-1, Rule 22, by paying its liability under Group Policy No. GA-23000 into court in a proceeding to which all to whom it might be obligated under the policy are parties. *See* Phillips, 1970 Supplement to 1 McIntosh, *North Carolina Practice and Procedure* § 728. Thus each defendant is the adversary of the other and occupies the position of a plaintiff. Each has the burden of establishing his right to the fund by the greater weight of the evidence. If, upon the stipulations and evidence no genuine issue of material fact arises, summary judgment may be granted in favor of one claimant against the other as in any other case. 3A Moore, *Federal Practice* § 22.14[2] (2d ed. 1970); 19 Anderson, *Couch on Insurance* § 79:317 (2d ed. 1968).

Both Keith and Norfolk Southern agree that the decisive question in this case is whether Norfolk Southern has paid on behalf of Keith the medical expenses represented by the disputed sum of $3,584.54. Whether Finding No. 14 be denominated a finding of fact, a conclusion of law, or a combination of both is immaterial. Keith has challenged the sufficiency of the evidence and the stipulations to support either a finding of fact or conclusion of law that Norfolk Southern paid these expenses. However, in our view, Finding No. 14 and Conclusion 1, both of which are identically worded, are both legal conclusions. The essential facts being uncontroverted, whether Norfolk Southern has shown it paid Keith's medical bills is a question of law.

Benefits due a railway employee under Article VII of Travelers Insurance Company group policy GA-23000 were the subject of litigation in *Hall v. Minnesota Transfer Ry.*, 322 F. Supp. 92 (D. Minn. 1971). In that case, the court considered the identical provision of policy No. GA-23000 which we consider here. With reference to it District Judge Neville said:

"Maintenance of this policy, 100% of the premiums of which are paid by the defendant, is required by a contract between defendant and the employees' collective bargaining representative. The policy is written to cover hospital and medical expenses of certain employees and their dependents. Coverage is not limited to amounts for which the defendant would be liable under the Federal Employers' Liability Act, but extends to all bills for health care incurred by or for the beneficiaries. By the terms of the contract between the insurer and the employer and employee groups, the employer may elect to serve as a conduit between the insurer and the beneficiary by paying any expenses which are covered by the policy and receiving the proceeds of the policy by way of reimbursement directly from the insurer." *Id.* at 93-4.

By the terms of the policy, nothing else appearing, as the injured employee, Keith is entitled to the disputed fund. To establish its entitlement to the money Norfolk Southern must prove that it—not Keith—has paid the medical expenses upon which the insurance payment is based. *See Lockhart v. Insurance Co.*, 193 N.C. 8, 136 S.E. 243 (1927). Obviously, at the time the medical services were rendered, it was Keith's obligation to pay his own bills; no liability on the part of Norfork Southern had then been established. Had the issue of the railroad's negligence been answered against Keith in his action against Nor-

folk Southern it would have had no obligation to him whatever in consequence of his accident. Travelers' liability to him on account of medical expenses, however, would have been unaffected since its policy covers medical expenses and not the employer's liability.

[2] To hold that Norfolk Southern has paid Keith's medical bills, or any part of them, we would have to conclude that the payments were incorporated in Keith's recovery in the FELA action and that, when Keith paid the bills out of the proceeds from the judgment, Norfolk Southern was, in fact, paying them. This is the contention which Norfolk Southern makes. The facts, however, will not support this contention.

[3] Nor will the facts support Norfolk Southern's assertion that it "had no choice but to pay the money [for Keith's bills] to the Clerk of the Court," and that G.S. 44-50 "served as [a] conduit for their payment." It might be argued with almost as much logic that any obligation which a successful plaintiff discharged with funds derived from the judgment had been paid by the defendant who paid the judgment. G.S. 44-50 does not bear upon the question presented. While G.S. 44-49 and G.S. 44-50 make any plaintiff's unpaid medical expenses a lien upon his recovery in a personal injury action they impose no obligation with reference to them upon the defendant against whom judgment has been rendered.

[2] The judge's "finding" that all of Keith's "medical expenses were proven as items of damages" in his FELA action against Norfolk Southern means only that in that suit Keith had offered evidence tending to show that in consequence of his accident he had incurred medical expenses totaling $4,272.15. What expenses the jury accepted as proven, if any, we do not know. "True, the jury could have accepted plaintiff's testimony with respect to his expenditures, but it was not compelled to do so." *Brown v. Griffin,* 263 N.C. 61, 64, 138 S.E. 2d 823, 825 (1964). Keith had sued for damages in the amount of $109,030.15. The jury did not itemize its award of damages, which was the lump sum of $33,240.00. Presumably, in addition to Keith's pain and suffering, loss of wages, permanent injuries and disability, this sum took into account whatever medical expenses the jury found he had proven. What this amount was we do not know.

Were we to assume that the jury found expenses in the amount of $4,272.15 to have been proven, an insurmountable

uncertainty would still remain. Keith's judgment for personal injuries against Norfolk Southern was obtained in an action under the Federal Employers Liability Act. This Act abrogated the common law rule that if any negligence on the part of the employee contributed to his injuries, the employer was exonerated from any liability to him for its own causal negligence. In substitution the Act provided that the injured employee's "damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." 45 U.S.C. § 53 (1970). *See Graham v. R. R.*, 240 N.C. 338, 82 S.E. 2d 346 (1954).

Since the jury found that Keith's own negligence contributed to his injury and damage, he did not recover the full amount of his proven medical expenses, "but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both. . . ." *Norfolk & Western Ry. v. Earnest,* 229 U.S. 114, 122, 57 L.Ed. 1096, 1101, 33 S.Ct. 654, 657 (1913). What was the percentage of causal negligence which the jury attributed to Norfolk Southern? Again we cannot tell.

Since Norfolk Southern has been unable to make out a prima facie case of payment, it necessarily follows that it is not entitled to recover any part of the fund in dispute. Judge Preston's legal conclusions, stated in Finding 14 and Conclusion 1, are reversed.

This holding eliminates consideration of Norfolk Southern's contention that, because it paid the premiums, it owned plaintiff's policy No. GA-23000 and that to permit Keith to recover the fund would compel Norfolk Southern to pay his medical expenses twice. As supporting this contention it cites *Tart v. Register,* 257 N.C. 161, 125 S.E. 2d 754 (1962). Keith's contention is that the policy is "a collateral source," a fringe benefit negotiated by the employees' union in collective bargaining with Norfolk Southern, which constitutes a part of the consideration for the employees' services. He would invoke the rule that a tortfeasor cannot reduce the amount of his judgment liability to an injured plaintiff by reason of compensation or insurance paid to the plaintiff from a collateral source independent of the tortfeasor. *See Young v. R. R.*, 266 N.C. 458, 146 S.E. 2d 441 (1966); *Brown v. Griffin,* 263 N.C. 61, 138 S.E. 2d 823 (1964); *Hall v. Minnesota Transfer Ry., supra;* 22 Am. Jur. 2d *Damages* §§ 206, 210 (1965); Dobbs, *Law of Remedies* § 3.6, at 185,

§ 8.10 (1973). Although Keith's testimony tends to establish his contention that the policy is a fringe benefit, the stipulations and findings do not cover this point—now immaterial to decision.

Upon the stipulations and admitted facts Keith is entitled to recover the proceeds of Policy GA-23000 in the amount of $3,584.25, which is presently held by the Clerk of the Superior Court of Wake County.

This cause is remanded to the Court of Appeals with direction that it be returned to District Court for the entry of judgment in accordance with this opinion.

Modified and affirmed.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

COMR. OF INSURANCE v. ATTORNEY GENERAL

No. 77 PC.

Case below: 18 N.C. App. 23.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 June 1973.

GADDY v. KEARN

No. 72 PC.

Case below: 17 N.C. App. 680.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 June 1973.

IN RE COX

No. 71 PC.

Case below: 17 N.C. App. 687.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 June 1973.

KING v. GRINDSTAFF

No. 66 PC.

Case below: 17 N.C. App. 613.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 1 June 1973.

LANGDON v. HURDLE

No. 60 PC.

Case below: 17 N.C. App. 530.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 June 1973.

REFINING CO. v. BOARD OF ALDERMEN

No. 70 PC.

Case below: 17 N.C. App. 624.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 1 June 1973.

STATE v. BROWN

No. 89 C.

Case below: 18 N.C. App. 35.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 June 1973.

STATE v. BYNUM

No. 76 PC.

Case below: 16 N.C. App. 637.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 June 1973.

STATE v. DENTON

No. 73 PC.

Case below: 17 N.C. App. 684.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 June 1973.

STATE v. DOBY

No. 90 PC.

Case below: 18 N.C. App. 123.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 June 1973.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. GREEN

No. 65 PC.

Case below: 17 N.C. App. 595.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 June 1973.

STATE v. O'NEAL

No. 67 PC.

Case below: 17 N.C. App. 644.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 June 1973.

STATE v. WHITE

No. 17

Case below: 18 N.C. App. 31.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 June 1973. Appeal dismissed ex mero motu for lack of substantial constitutional question 1 June 1973.

STATE v. WHITE

No. 54 PC.

Case below: 16 N.C. App. 652.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 June 1973.

PETITIONS TO REHEAR

PEASELEY v. COKE CO.

No. 89.

Reported: 282 N.C. 585.

Petition by Coke Company to rehear denied 1 June 1973.

STATE v. WADDELL

No. 5.

Reported: 282 N.C. 431.

Petition by Waddell to rehear denied 30 March 1973.

STATE OF NORTH CAROLINA v. CELESTE H. VAN LANDINGHAM

No. 55

(Filed 12 July 1973)

1. **Homicide § 21— first degree murder — sufficiency of evidence**

The State's evidence was sufficient for submission to the jury on the issue of defendant's guilt of first degree murder where it tended to show that defendant had lived on the victim's farm for some seven years, the victim had asked defendant to leave the farm a short time before her death, on the date of her death the victim was alive at 2:05 p.m. and in the tack room of her barn with defendant, between 2:00 and 2:10 p.m. defendant twice refused admission to the tack room to persons who had legitimate business there, the unarmed victim was shot at four times with a .38 caliber pistol and three of the bullets penetrated her vital organs and caused her death, defendant went to a neighbor's house at 2:30 and told the neighbor that the victim had been shot and that she should go to her at once, defendant was then upset and sometimes incoherent, defendant stated that she wanted to kill herself, the neighbor went straight to the tack room and found the victim's body, defendant went to a married couple's nearby home and asked the wife to call defendant's attorney and told the couple that the victim was dead and the police were coming to arrest her, the pistol used in the killing had previously disappeared from the victim's automobile, and the pistol was discovered in a pond between the barn and the nearby house to which defendant first went after the victim had been shot.

2. **Homicide § 18— premeditation and deliberation — circumstances to consider**

Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are: want of provocation on the part of the deceased; the conduct of defendant before and after the killing; the use of grossly excessive force, or the dealing of lethal blows after the deceased had been felled.

3. **Homicide § 21— sufficiency of evidence of premeditation and deliberation**

In this first degree murder prosecution, premeditation and deliberation were established by evidence that while defendant and the victim were alone in the tack room of a barn shortly before the victim was killed in the tack room, defendant twice refused admission thereto to persons who had legitimate business there, and that the victim, unarmed and helpless to defend herself against an assailant with a deadly weapon, was shot at four times with a .38 caliber pistol and three of the bullets penetrated her vital organs.

4. **Homicide § 17— evidence of motive**

While motive is not an essential element of murder and an accused may be convicted when no motive is proven, evidence of motive is relevant as a circumstance to identify an accused as the perpetrator of an offense.

5. **Evidence § 13— attorney-client privilege**

When the relation of attorney and client exists all confidential communications made by the latter to his attorney on the faith of such relation are privileged and the attorney will not be permitted to disclose them.

6. **Evidence § 13— attorney-client privilege — unlicensed attorney — presence of third person**

In this homicide prosecution, testimony that defendant by telephone asked the witness to come home and stated that the victim was dead and the police were coming to arrest her did not violate the attorney-client privilege where (1) the relationship of attorney and client did not exist because the statements were not made upon the understanding that such relationship existed and because the witness, although having passed the State Bar examination, had not been issued a license to practice, and (2) the statements were not private and confidential because the witness's wife was present during defendant's conversation with the witness.

7. **Criminal Law §§ 73, 169— admission of hearsay — error cured by similar testimony and by cross-examination**

In this homicide prosecution, the trial court erred in the admission of hearsay testimony by a police officer that some three months before her death the victim reported to him the loss or theft from her automobile of the pistol used in the killing; however, such error was cured when testimony of like import was admitted thereafter without objection and when defendant on cross-examination had the officer repeat the same testimony in detail in response to questions propounded for the sole purpose of amplifying the information the officer gave on direct examination and not for the purpose of impeaching his testimony or establishing its incompetency.

APPEAL by defendant from *Hall, J.*, 3 October 1972 Criminal Session of WAKE.

Defendant was tried upon a bill of indictment, couched in the words of G.S. 15-144, which charged her with the murder of Dr. Alice Pugh McInnis on 10 August 1972. Judge Hall charged the jury that it might return a verdict of guilty of murder in the first degree, murder in the second degree, manslaughter, or not guilty. The verdict was "guilty of murder in the first degree." From the judgment that she be imprisoned for the term of her natural life in the State's prison in quarters provided for women prisoners, defendant appeals.

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

Tharrington, Smith & Hargrove for defendant appellant.

SHARP, Justice.

[1] Defendant's first two assignments of error are that the court erred in denying her motion for nonsuit as to the charge of first degree murder and each of the lesser degrees of homicide included in that charge. Defendant offered no evidence. The State's evidence tended to show:

Dr. McInnis, a Raleigh pediatrician who raised horses, lived on her farm a short distance north of Raleigh. Her residence, directly across Six Forks Road from the Bayleaf Baptist Church, was in a grove about 100 feet from the west side of the road. Since 1965 defendant, Mrs. Van Landingham, had lived on this farm in a house just back of Dr. McInnis'. A driveway from Six Forks Road served both residences and continued past defendant's house for 420 feet to a horse barn and tool shed. After passing between these two buildings the drive became a bridle path leading to and across the dam of a pond southwest of the barn. Beyond the dam it was one of a number of horse trails around the lake and in the wooded area adjacent to it.

During the summer of 1972 Dr. McInnis employed John Simpson (John), a 17-year-old high school boy, to work on the farm. On 10 August 1972 John observed defendant leaving the premises as he came to work at 8:30 a.m. He saw her again about noon as she walked from her house toward the carport. About 10:30 a.m. Dr. McInnis came home, changed into her working clothes, and helped John in the yard until about 12:45 p.m. when she drove to a nearby store to get food for lunch. She returned about 1:00, delivered her purchases to the maid, and walked toward the horse barn.

While waiting for lunch to be prepared John went to the tool shed, procured hand tools, and repaired a broken chain on a trailer. During the performance of this task, which took about five minutes, he observed the Bolda children, Sue, aged 17; Cheryl, aged 11; and Don, aged 15, coming across the dam with a horse. After repairing the chain John returned to the house to wait for Dr. McInnis. She did not return and the maid persuaded him to eat his lunch while it was hot. At two o'clock the maid had gone and Dr. McInnis had still not come for lunch; so John went back to the barn area. He saw the three Bolda children grazing a horse while they ate their lunch on a stump between the barn and the pond. This stump was 87 feet from the barn and 120 feet from the pond. After asking

the children where Dr. McInnis was he went into the barn looking for her. The door of the tack room, which is immediately to the left of the barn entrance, was closed. This door opened to the left inside the room.

John "grabbed hold of the latch," which slips over a U-shaped ring designed for a padlock, and "started opening the door." Before he had moved the door two feet it was stopped from the inside. However, he observed Dr. McInnis sitting on a feed can facing the door. She was wearing sun glasses and had a cigarette in her hand. "She looked casually." There were no weapons in sight. He did not see Mrs. Van Landingham, but he heard her voice from behind the door. She told him "not to come in now, to go back up to the house." A second time she said, "Don't come in now John. We will be up in a minute." The door was then closed. The time was about 2:05 p.m.

The Bolda children had arrived at the McInnis farm about 11:15 a.m. on 10 August 1972 to ride and brush their horse and clean out its stall. They parked their car, which they had to get home by 2:30 p.m., in the churchyard across the road and walked down the drive between the two houses to the barn and the lake. About five minutes after John Simpson had left the barn after inquiring of them as to Dr. McInnis' whereabouts, Cheryl went to the tack room for a brush. As she started to pull the latch back it hit the door. Mrs. Van Landingham then opened the door just enough to stick her head out and said she was busy. Cheryl said, "O. K." and went back to the stump. Ten or fifteen minutes thereafter, at 2:20 p.m., the children left the barnyard by the same route they had come. During their stay at the farm they had heard no shots fired or any other unusual noise.

After John Simpson's conversation with Mrs. Van Landingham at the tack room door he returned to the house to await Dr. McInnis' return. While waiting he fell asleep in the den. At 3:30 p.m. he was awakened by Carol Caniford (Caniford), a neighbor, and Mrs. V. Watson Pugh, Dr. McInnis' sister-in-law. At no time that day had he heard any gun shots fired.

Carol Caniford, an operating room nurse who taught riding at her residence, lived in a house which she rented from defendant. This house, located on the west side of Six Forks Road, is two-tenths of a mile south of the drive leading into the McInnis farm. The distance from the Caniford house to the

McInnis barn is about four-tenths of a mile by way of Six Forks Road and the McInnis drive. It is 679 steps from the McInnis barn to the Caniford house by way of the path across the pond dam and through the woods and pasture—a fast six minutes' walk. The McInnis barn is located straight across the field and woods to the north of the Caniford barn, which is 50-100 feet behind the Caniford house.

The land and barns which Caniford used for her horses were rented from both Dr. McInnis and defendant. Caniford paid low rent because she did a lot of work on the McInnis farm. She had keys to the gates and buildings.

On the morning of 10 August 1972 Caniford, who had been on duty all night at the hospital, got home at 7:30. During the morning she gave riding lessons until noon. Sometime thereafter defendant came to her house to deliver feed which she had purchased that morning at Caniford's request. After the two women unloaded the feed at her barn Caniford returned to the house and went to bed between 1:30 and 2:00 p.m. A pounding on the door awakened her about 2:30 p.m. She went to the door to find defendant standing there, "terribly upset." Defendant said a lot of things "awfully fast"; some were "sort of incoherent" and "a lot of it didn't make any sense." Caniford testified, "A few of the things I know, a few of the things I am not sure about."

Defendant told Caniford that "Alice had been hurt, or Alice had been shot." In answer to Caniford's question whether "she was sure of how badly [Dr. McInnis] was hurt or if she was dead" defendant said she was not sure and that Caniford "must go down there . . . and hurry and just go right now, go." Defendant said either, "I wanted to kill myself," or "I want to kill myself."

Caniford dressed and told defendant she thought she should stay at her (Caniford's) house or go next door and remain with Mrs. John Willardson. As Caniford backed her car out of the driveway defendant was headed across the yard toward the Willardson house.

The Willardsons, who had lived next door to Caniford for two or three weeks, were also defendant's tenants. Mr. Willardson had passed the North Carolina State Bar examination. However, his license had not been issued to him and he had not taken his oath as an attorney. On 10 August 1972 he was

employed as a law clerk by one of the judges of the North Carolina Court of Appeals. On that day, between 2:45 and 3:00 p.m., defendant walked into the Willardson residence without knocking and told Mrs. Willardson that "something is very wrong . . . Dr. McInnis is dead." Mrs. Willardson, who was "really stunned," asked whether she should call the police or an ambulance. Defendant said that Caniford was taking care of that and suggested that she call defendant's attorney, Mr. Al Lloyd. She gave Mrs. Willardson his telephone number from memory. The Willardsons' telephone not having been installed, they went to Caniford's house to make the call.

After trying unsuccessfully to reach Mr. Lloyd, Mrs. Willardson telephoned her husband and said to him, "John, will you please come home and will you please talk to Mrs. Van Landingham, and he did [talk to her over the telephone]." Over defendant's objection Mrs. Willardson testified that she heard defendant's conversation with her husband but she "didn't remember this as clearly because [she] was really nervous." However, she did remember defendant asking her husband "if he could come home because of his job situation" and saying to him, "They are coming to arrest me." John Willardson testified, also over objection, that defendant said to him over the telephone, "John, is there any way you can come home . . . something terrible has happened. Dr. McInnis is dead and the police are coming to arrest me."

Willardson was at home in about 35 minutes after his conversation with defendant. He walked in and told her immediately that he was not in any position to give her legal advice because he was not yet an attorney; that the only thing he could say to her was not to say anything to him or to any other person until she had spoken to an attorney; that since she could not reach Mr. Lloyd he suggested that she call Attorney E. E. Hollowell. Defendant called Hollowell and he came.

When defendant came into the Willardsons' house Mrs. Willardson saw no blood and no signs of injury on her. Deputy Sheriff Covert likewise observed no physical injury to defendant when he saw her at 7:00 p.m. on 10 August 1972.

When Caniford arrived at the McInnis place after having left defendant en route to the Willardson house, she unlocked the front gate, left her car there, and went to the barn. Defendant had not driven her car to Caniford's home and she observed

it in the carport at Dr. McInnis' house. At the barn Caniford found the tack room door padlocked, and unlocked the door with her key. Inside, the dead body of Dr. McInnis was lying on the floor on the right side of the room next to a row of 20-gallon garbage cans used as feed containers. The shoulders and the left hip were flat on the floor; the knees were together and the legs drawn up toward her face, which was turned to the right toward the feed cans. The feet were toward the door. Dr. McInnis' right arm was drawn up across her chest, and there was blood on her fingers. A faded blue towel was lying across her throat. Caniford also noticed a hole all the way through the last feed can which was directly behind her head. She saw no weapon of any description in the tack room.

Caniford tried to telephone from the tack room but all she could get from that telephone was a dial tone. She then ran to defendant's house "because it was the closest" and called Mrs. Pugh. After talking to her and asking her to send an ambulance, Caniford ran back to the barn where the situation remained unchanged. There was no one but her on the premises and, while waiting for the ambulance and the officers to come, she ran back and forth from the barn to the front gate, "hoping [she] was wrong." The ambulance and Mrs. Pugh arrived before the officers. Deputy Sheriff Chalk, who received the word about 2:58 p.m., arrived 12-15 minutes later. Other officers arrived shortly thereafter. Their testimony corroborated in every detail the observations made by Caniford and, in addition, tended to show:

The tack room is 15 feet, 10 inches by 11 feet, 10 inches. Facing the door, along the right wall, were five metal garbage cans on a wooden pallet about an inch off the floor. Beyond the end of the pallet was a plastic garbage can. A bullet which was never recovered had gone through the last can on the pallet and into the wall beyond. A string run from the hole in the wall through the two holes in the garbage can so that it did not touch the sides of the holes, when extended seven feet and one inch from the can, was 51 inches above the floor and behind the door when it was open. Sixteen to eighteen inches from the fifth can from the door were three cigarette butts which had been mashed into the floor. The body of Dr. McInnis, doubled up almost in a sitting position, was on the floor beside the metal cans. Beneath the body was a bullet (State's Exhibit 7). Behind the tack room door a holster (State's Exhibit 6) lay on

top of a bag "containing a horse brush, a rag, towel." The "screen door handle" on the inside of the door had blood on it. There was also a spot of blood on the outside of the door.

On the evening of 10 August 1972 Dr. Arthur Davis, a pathologist, performed an autopsy on the body of Dr. McInnis. It revealed that her death resulted from bullet wounds which caused massive bleeding into both chest cavities. Three bullets had entered her body. One entered the neck, shattered the clavicle, went through the upper part of the right lung, and out the back by the shoulder blade. Dr. Davis found this bullet (State's Exhibit 5) in her clothing over the exit wound. Another bullet went in the breast, through the right lung and the right side of the heart, through the left lung, fractured ribs, and came out the lower left back. The third bullet went through the abdomen, put a large hole in the hip bone, and lodged in the gluteus maximus. Dr. Davis removed this bullet (State's Exhibit 4). An examination of the vital organs showed Dr. McInnis to have been in perfect health.

Looking for the weapon which fired these bullets, on 10 August the officers searched the area on both sides of the drive from the McInnis barn to Six Forks Road. From there they searched both sides of the highway to Caniford's home. Then they searched the area from the Caniford house back through the pasture and woods by the pond and back to the barn. Extensive searches of the premises, including the pond, continued for eight days. No weapon was found until August 18th when a .38 special Smith & Wesson revolver, model 36, serial number J 30245 (State's Exhibit 11) was recovered from the pond at a point 327 feet from the barn. It was in six feet of water about 10 feet from the edge of the dam and 22 feet from the middle of the road across the dam. In the chamber of the pistol were four empty cartridges and one loaded cartridge.

The revolver (State's Exhibit 11) and the bullets (State's Exhibits 4, 5 and 7) were duly delivered to the State Bureau of Investigation where they were examined by ballistics expert E. B. Pearce. He testified that in his opinion these bullets had been fired in the revolver.

Dr. McInnis had purchased this revolver on 4 September 1970 from the Village Sports Shop. On 6 July 1972 she had purchased another pistol from the same shop.

Raleigh Police Officer E. D. Whitley testified that on 15 May 1972 he had "some police business" with Dr. McInnis and, in consequence, he filed a report with the police department. Over defendant's objection he testified that on that date she had reported a pistol and holster missing from her car. The pistol was a Smith & Wesson, model 36, serial number J 30245. Whitley said, "The weapon was reported lost or stolen. That is what she explained to me. She said it was in her automobile. . . . She said the last time she saw it was in the automobile . . . in a holster; that the items were missing . . . and she wanted to report it to the police department so that there would be a file . . . in case the gun turned up somewhere."

Without objection Dr. McInnis' 19-year-old son, Kirk, testified that he was familiar with the revolver (State's Exhibit 11) which his mother had owned and which she was accustomed to keeping under the front seat of her car, although infrequently she would take it into the house with her at night; that he had shot "a couple hundred rounds out of it"; that at Christmas 1971 he had given his mother a holster for this pistol; that the holster he had given her was the one (State's Exhibit 6) which was found behind the door in the tack room; and that he knew "the pistol became missing, and after that [he] never saw it again until after the death of [his] mother."

Kirk's testimony further tended to show that when defendant came to the farm in 1965 he was enrolled in a preparatory school in Virginia, from which he graduated in May 1971. During a Christmas holiday when he was a freshman or sophomore he had an argument with defendant. In the summer of 1971 he had an argument with her when she said he was making too much noise and scaring the horses and ordered him to stop shooting a rifle into the dam. Another argument occurred during the fall after he had become a student at North Carolina State University. He was talking to his mother in the family room. Defendant came in during the conversation and when he asked her to leave she refused. A heated exchange resulted, and defendant "finally left." After that confrontation Kirk left the farm. He lived with his grandmother until Christmas when he "moved back home because the defendant was not spending as much time out there and [he] felt a little better about being out there." However, in January he left the farm and did not return except for occasional visits which never lasted more than two hours. Defendant and Kirk "just never got along" during the entire time she was living out there, and, when she

would say something to him which his mother did not like, his mother "would ask the defendant to be quiet in a rather firm tone of voice." Kirk and his mother "had a real good relationship." Defendant had one key to the premises which would fit the front gate, the outside doors to Dr. McInnis' house, her house, the tool shed, and the tack room.

Mrs. Pugh, Dr. McInnis' sister-in-law, testified that two or three days prior to 10 August 1972, defendant came to her house and asked her if she knew that Dr. McInnis had asked her to leave the farm. Her reply was, "No." Mrs. Pugh had known defendant since 1965, and their relationship during those years was pleasant.

Defendant's motion for judgment as of nonsuit raises the question whether the foregoing evidence, taken as true and considered in the light most favorable to the State, is sufficient to permit the jury to make a legitimate inference and finding that the defendant, after premeditation and deliberation, formed a fixed purpose to kill Dr. McInnis and thereafter carried out that purpose. *State v. Perry,* 276 N.C. 339, 346-7, 172 S.E. 2d 541, 547 (1970). The State's evidence is circumstantial, but the test of the sufficiency of the evidence to withstand a motion for nonsuit is the same whether it be circumstantial, direct, or both. *State v. McKnight,* 279 N.C. 148, 181 S.E. 2d 415 (1971). As Justice Higgins said in *State v. Stephens,* 244 N.C. 380, 383, 93 S.E. 2d 431, 433 (1956):

"We think the correct rule is given in *S. v. Simmons,* 240 N.C. 780, 83 S.E. 2d 904, quoting from *S. v. Johnson,* 199 N.C. 429, 154 S.E. 730: 'If there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.' The above is another way of saying there must be substantial evidence of all material elements of the offense to withstand the motion to dismiss. It is immaterial whether the substantial evidence is circumstantial or direct, or both." *Accord, State v. McKnight, supra; State v. Morgan,* 268 N.C. 214, 150 S.E. 2d 377 (1966).

Defendant argues that the evidence is insufficient to support a finding by the jury either (1) that defendant fired the shots which killed Dr. McInnis; or (2) that, if she did, the killing was done with premeditation and deliberation.

[2] Ordinarily it is not possible to prove premeditation and deliberation by direct evidence. These facts must be established by proof of circumstances from which they may be inferred. Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are: want of provocation on the part of the deceased; the conduct of defendant before and after the killing; the use of grossly excessive force, or the dealing of lethal blows after the deceased has been felled. *See State v. Walters* and cases cited, 275 N.C. 615, 623-24, 170 S.E. 2d 484, 490 (1969). *See also State v. Johnson,* 278 N.C. 252, 179 S.E. 2d 429 (1971).

In our view the State's evidence is sufficient to support the following findings:

On the day of her death, at 2:05 p.m., Dr. McInnis was alive and in the tack room of her barn with defendant. Sometime between 2:10 p.m. and 2:30 p.m. defendant, standing behind the tack room door (had it been opened), intentionally shot and killed Dr. McInnis with a .38 Smith & Wesson revolver, model 36, serial number J 30245. This pistol had belonged to Dr. McInnis, but it had been missing for some time. Dr. McInnis, who was unarmed, was not expecting the onslaught. Defendant fired three shots at close range into Dr. McInnis' body. As Dr. McInnis slumped to the floor, or after she was on the floor, defendant fired a fourth shot which missed Dr. McInnis, passed through the last metal feed can, and entered the wall. After the shooting defendant laid a towel across Dr. McInnis' throat, padlocked the tack room door, and walked across the pond dam, through the woods and pasture, to Caniford's house. As she passed over the dam the defendant threw the pistol with which she had shot Dr. McInnis into the pond, from which it was retrieved eight days later. The holster for this pistol was left behind the door of the tack room. It was the one which Kirk McInnis had given his mother the preceding Christmas.

After awakening Caniford by pounding on her door, defendant, "terribly upset" and sometimes incoherent, told the shocked Caniford that Dr. McInnis had been shot and that she should go to her at once. Defendant did not say who had shot Dr. McInnis, but she did say, "I wanted to kill myself" or "I want to kill myself."

As Caniford left for the McInnis barn—where she went straight to the tack room and found Dr. McInnis' body after

unlocking the door—defendant went next door to the Willardson home. There she requested Mrs. Willardson to call her attorney, Mr. Lloyd. When Mrs. Willardson was unable to reach Mr. Lloyd defendant talked to Mr. Willardson on the telephone. She asked him to come home because "Dr. McInnis is dead and the police are coming to arrest me." She did not tell either Mr. or Mrs. Willardson who had shot Dr. McInnis.

Had defendant not been the killer it is beyond belief that she would have failed to identfiy Dr. McInnis' assassin or to have related the circumstances under which she learned of Dr. McInnis' death to both Caniford and the Willardsons. Since Caniford went directly to the tack room it is a legitimate inference that defendant had told her where the body was. Although she told Caniford she was not sure whether Dr. McInnis was dead, defendant told Mr. and Mrs. Willardson she was dead and the police were coming to arrest her. This latter declaration, together with defendant's request that Mrs. Willardson call defendant's lawyer, clearly manifested defendant's knowledge that she would soon be charged with unlawful homicide.

[3] The following facts are sufficient to establish premeditation and deliberation: (1) Between 2:00 and 2:10 p.m. defendant had twice refused admission to the tack room to persons who had legitimate business there; and (2) Dr. McInnis, unarmed and helpless to defend herself against an assailant with a deadly weapon, was shot at four times with a .38 caliber pistol, and three of the bullets penetrated her vital organs.

[4] Motive is not an essential element of murder, and an accused may be convicted when no motive at all is proven. *State v. King,* 226 N.C. 241, 37 S.E. 2d 684 (1946); Miller, *Criminal Law* § 15 (1934). However, "[e]vidence of motive is relevant as a circumstance to identify an accused as the perpetrator of an offense." *State v. Palmer,* 230 N.C. 205, 213, 52 S.E. 2d 908, 913 (1949). Unless it was defendant's attitude toward Kirk McInnis, the record contains no suggestion why, after seven years, Dr. McInnis had asked defendant to leave the farm. Presumably, however, the reason was an occurrence, or an accumulation of events, which Dr. McInnis regarded as significant. Defendant's violent and tragic conduct tends to prove that presumption.

[1] We hold that the judge properly overruled defendant's motions for nonsuit.

Assignments of error Nos. 3 and 4 raise the question whether the trial judge erred (1) in permitting the witness Ann Willardson to testify as to statements which defendant made during her telephone conversation with John Willardson, and (2) in permitting John Willardson to testify as to the statements which defendant made to him during that call. Defendant contends that her statements to Willardson were privileged communications between attorney and client and that the presence of his wife when the statements were made did not destroy the privilege.

[5] The long-established rule is that when the relation of attorney and client exists all confidential communications made by the latter to his attorney on the faith of such relation are privileged, and the attorney will not be permitted to disclose them. *See Dobias v. White,* 240 N.C. 680, 83 S.E. 2d 785 (1954); *State v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686 (1947); *Guy v. Bank,* 206 N.C. 322, 173 S.E. 600 (1934); *Carey v. Carey,* 108 N.C. 267, 12 S.E. 1038 (1891); *Hughes v. Boone,* 102 N.C. 137, 9 S.E. 286 (1889); *Setzar v. Wilson,* 26 N.C. 501 (1844). For an elaboration of the rule see 1 Stansbury, *North Carolina Evidence* § 62 (Brandis rev. 1973). This rule prevented neither John Willardson nor his wife from disclosing defendant's telephone conversation with Willardson.

[6] First, the relationship of attorney and client did not exist between defendant and Willardson at the time of the conversation; nor could such a relationship have been established since he was not then an attorney. *State v. Smith,* 138 N.C. 700, 50 S.E. 859 (1905). "The rule extends only to such confidential communications as are made to the attorney by virtue of his *professional* relation to the client." It has no application to an adviser who "had no legal right to appear as prisoner's attorney in any court in this State. . . . " *Id.* at 703, 50 S.E. at 860. Defendant's spontaneous exclamation to Willardson, "John can you come home . . . something terrible has happened. Dr. McInnis is dead and the police are coming to arrest me." was clearly not made upon the understanding that the relation of attorney and client had been established between them. There had been no time for that. Indeed the evidence is devoid of any suggestion that defendant thought Willardson was a licensed attorney. Since she was a lieutenant colonel in the Army Reserve unit in which he was a staff sergeant, as his landlord, neighbor and friend she doubtlessly knew he was not yet an attorney. The

implication is that, at Mrs. Willardson's instance, defendant was talking to Willardson as a friend and neighbor. Certainly that was the capacity in which he came home to advise defendant to make no statements to him or any other person until she was able to consult with a duly licensed attorney.

Second, had Willardson been an attorney the challenged communication was not private and confidential as between him and defendant. One of the requisites of the attorney-client privilege is that the communication must have been made in confidence. *Michael v. Foil,* 100 N.C. 178, 6 S.E. 264 (1888). "Communications between attorney and client are not privileged where made in the presence of a third person, not the agent of either party. . . . " 97 C.J.S. *Witnesses* § 290 (1957). *See also* McCormick, *Evidence* § 91 (Cleary Ed., 2d ed. 1972). Mrs. Willardson was present during defendant's entire conversation with her husband. She was an outsider with respect to the subject of defendant's disclosure and her presence was not essential to the transmission of the communication.

Since Willardson was a competent witness, *a fortiori,* Mrs. Willardson was a competent witness to relate the challenged conversation to the jury. "A member of an attorney's family who is present during communications between the attorney and a client is not by reason of the attorney-client privilege an incompetent witness to testify to such communications." Annot., 96 A.L.R. 2d 125, 132 (1964). *Compare State v. McKinney,* 175 N.C. 784, 95 S.E. 162 (1918).

We hold that assignments Nos. 3 and 4 are without merit.

Defendant did not bring forward her assignments of error Nos. 5 and 6. They are therefore deemed abandoned. 1 Strong, N. C. Index 2d *Appeal and Error* § 45 (1967).

[7] Assignment of error No. 7 relates to the admission of Police Officer Whitley's testimony that on 15 May 1972 Dr. McInnis reported to him the loss or theft from her automobile of a Smith & Wesson pistol, model 36, serial number J 30245, and that he "filed a report in the Raleigh Police Department." Defendant asserts that this testimony was incompetent hearsay and that "the prejudicial effect of this evidence is clear" because it suggests defendant stole Dr. McInnis' pistol approximately three months before it was used to slay her. The State's argument is, "Whitley was merely testifying from an official record of a transaction which he personally had with the decedent, a

copy of which he was authorized to keep" and that "testimony based upon such record was admissible in evidence."

Dr. McInnis' statement to the officer was clearly hearsay which falls within no exception to the rule excluding hearsay evidence. *See State v. Oakes*, 249 N.C. 282, 106 S.E. 2d 206 (1958); *Gurganus v. Trust Co.*, 246 N.C. 655, 100 S.E. 2d 81 (1957); *United States v. Graham*, 391 F. 2d 439 (6th Cir.), *cert. denied*, 393 U.S. 941 (1968). Since the State did not offer in evidence the report which Whitley filed, any discussion of police reports as entries made in the course of business is neither necessary nor appropriate. *See*, however, *United States v. Burruss*, 418 F. 2d 677 (4th Cir. 1969); *United States v. Shiver*, 414 F. 2d 461 (5th Cir. 1969); McCormick, *Evidence* § 310, at 725-26 (Cleary Ed., 2d ed. 1972); Baker, *Admissibility of Investigational Reports Under Business Records Statutes*, 33 Albany L. Rev. 251 (1969).

The admission of Officer Whitley's testimony was error, but the error was cured when testimony of like import was admitted thereafter without objection. The well established rule in this State is that "when incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost, but, as stated . . . in *Shelton v. R. R.*, . . . 'The rule does not mean that the adverse party may not, on cross-examination, explain the evidence, or destroy its probative value, or even contradict it with other evidence, upon peril of losing the benefit of his exception.'" *State v. Godwin*, 224 N.C. 846, 847-8, 32 S.E. 2d 609, 610 (1945). *See also State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972); *State v. Williams*, 274 N.C. 328, 163 S.E. 2d 353 (1968); *State v. Brown*, 272 N.C. 512, 158 S.E. 2d 354 (1968); 1 Stansbury, *N. C. Evidence* § 30 (Brandis rev. 1973); 1 Strong, N. C. Index 2d *Appeal and Error* § 48, at 196-7 (1967).

Kirk McInnis testified without objection that he was aware that the pistol (State's Exhibit 11) "became missing" and that he never saw it thereafter until after his mother's death. Dr. McInnis' purchase of a similar gun on 6 July 1972 tends to corroborate this testimony. The crux of Whitley's testimony was that the pistol was missing, not that Dr. McInnis had reported its disappearance. Further, on cross-examination, defendant had Whitley repeat, in clarifying detail, the same

testimony to which objection had been made on direct examination. The evidence before us is in narrative form. It seems clear, however, that the cross-examiner's questions were general ones, propounded for the sole purpose of amplifying the information Whitley had given on direct examination and not for the purpose of impeaching his testimony or establishing its incompetency. We think the cross-examination exceeded the bounds of the rule stated in *Shelton v. R. R.*, 193 N.C. 670, 139 S.E. 232 (1927). *See also State v. Tew*, 234 N.C. 612, 68 S.E. 2d 291 (1951); *Cf. State v. Aldridge*, 254 N.C. 297, 118 S.E. 2d 766 (1961).

We hold that the admission of Whitley's testimony to which objection was erroneously overruled on his direct examination was not prejudicial error. *See* 3 Strong, N. C. Index 2d *Criminal Law* § 169 (1967). Assignment of error No. 8 is formal and requires no discussion. In defendant's trial we find

No error.

RICKY CLYDE BROWN, BY HIS NEXT FRIEND, LUCILLE P. McNAIR v. JERRY EVON NEAL, MARTIN L. HANCOCK, JR., AND SMITH CHEVROLET COMPANY, INC.

No. 83

(Filed 12 July 1973)

1. **Appeal and Error § 45— assignments of error abandoned**

Assignments of error not brought forward in defendants' brief are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court.

2. **Automobiles § 46; Trial § 15— opinion evidence as to speed of vehicle — objection too late**

In an action to recover for personal injuries and property damage sustained by plaintiff in a collision between his motorcycle and and automobile, the trial court properly refused to strike plaintiff's testimony that defendant's car "was approaching very fast" where plaintiff had ample opportunity to observe the speed of the vehicle and where defendant did not make any objection until after the question, "Will you describe the movement of the car?" had been answered.

3. **Automobiles § 45— automobile collision case — evidence as to posted speed limit**

In an automobile collision case the trial court did not err in excluding testimony of defendant designed to rebut plaintiff's tes-

timony that the posted speed limit in the area where the collision occurred was 20 m.p.h.

4. **Damages § 15— personal injury in automobile collision — subsequent back strain — evidence of causal relation required**

Evidence of back strain suffered by plaintiff while engaged in calisthenics as part of his army training could not properly be considered by the jury in determining the amount of damages to be awarded for an injury which occurred two years earlier in an automobile collision in the absence of expert medical testimony or other competent and substantial evidence as to a causal relation between the two; nevertheless, it was not error to permit the plaintiff first to testify as to the pain he experienced and thereafter to introduce evidence as to its causal relation to the injury for which he sued.

5. **Automobiles § 45— automobile collision case — evidence of defendant's solicitude for injured plaintiff**

Defendant is not entitled to a new trial in an automobile collision case where the court struck part of defendant's answer to a question designed to show his solicitude for the injured plaintiff at the scene of the collision.

6. **Damages §§ 3, 16— damages for future pain — instruction unsupported by evidence**

Where there was no evidence whatever that the plaintiff, as of the time of the trial, would suffer any pain or disability in the future, and none affording any reasonable basis for a finding of a causal connection between the injury for which he sued and any pain or disability which he might experience after trial, it was error to instruct the jury that they might award damages for pain or disability likely to occur in the future.

7. **Appeal and Error § 62— erroneous instruction on damages — partial new trial awarded**

Since the only error in the trial court related to the jury charge on the measure of damages recoverable by the plaintiff and had no bearing upon the jury's determination of the negligence of defendant as the proximate cause of plaintiff's injury, the Supreme Court, in its discretion, awards a partial new trial limited solely to the issue of damages.

APPEAL by defendants Neal and Smith Chevrolet Company, Inc., from *McLean, J.*, at the 10 July 1972 Session of GASTON, heard prior to determination by the Court of Appeals.

This is a suit for personal injuries and property damage alleged to have been sustained by the plaintiff in a collision between his motorcycle and a Chevrolet automobile owned by Hancock and driven by Neal, an employee of Smith Chevrolet Company, Inc., a bailee of the automobile for repair. Prior to trial the plaintiff voluntarily dismissed his action against the defendant Hancock. Neal and Smith Chevrolet Company, Inc.,

filed answer admitting that Neal was driving the automobile in the course of his employment. The jury found the plaintiff was injured and damaged by the negligence of these defendants, that he was not guilty of contributory negligence and that he sustained damages in the amount of $10,000 by reason of his personal injuries and $400.00 by reason of damage to his motorcycle. From a judgment in accordance with the verdict, the defendants Neal and Smith Chevrolet Company, Inc., appeal.

The following facts are not in dispute: The collision occurred at 3:20 p.m. on 11 January 1967, at the intersection of North Chester Street and Airline Avenue, in the business district of Gastonia. As a result, the plaintiff's motorcycle was damaged and the plaintiff was thrown to the pavement and sustained some personal injury. Both vehicles were traveling on North Chester Street, a four lane street. The plaintiff, on his motorcycle, was proceeding southwardly; Neal, in the automobile, was proceeding northwardly. The traffic light was green for both of them. To the north of this intersection, the direction from which the plaintiff came, three of these lanes are designated for southbound vehicles, the left, or innermost, being designated for use only by vehicles making a left turn. To the south of the intersection, the side from which Neal approached, two lanes are designated for northbound vehicles, the left, or innermost, being designated for use only by vehicles making a left turn. Thus, the two lanes designated for left turning vehicles abut each other across Airline Avenue. Airline Avenue runs along the top of a ridge so that vehicles, approaching the intersection from either side along North Chester Street, are proceeding uphill and their operators do not have a full view of an oncoming vehicle approaching the intersection from the other side of Airline Avenue. At the time of the collision the plaintiff was 17 years of age. Thereafter, he entered the United States Army and served in Vietnam, which contributed to the delay in bringing this action to trial.

The plaintiff alleged in his complaint that both he and Neal approached the intersection in the respective lanes marked for left turning vehicles only, that before the plaintiff reached the intersection Neal negligently drove through the intersection, struck the motorcycle, damaging it and throwing the plaintiff to the pavement, and that the plaintiff thereby sustained painful and permanent injuries, including a fractured pelvis, dislocated vertebrae and a fractured thumb, of which injuries and damage the negligence of Neal was the proximate cause.

The defendants answered, denying negligence by Neal and pleading contributory negligence by the plaintiff as an affirmative defense. They allege that Neal approached the intersection in the proper lane for through northbound traffic, his extreme right hand lane, and proceeded through the intersection in that lane. They allege that immediately prior to the collision the plaintiff, who had been approaching the intersection in his proper lane for a left turn, suddenly, and without warning of his intent to do so, turned sharply to his left and into the lane for northbound traffic, directly into the path of the automobile.

The plaintiff's testimony as to the cause of the accident was to this effect: Heading south and uphill, he approached the intersection, moved over into his left turn lane, signalled for a left turn and slowed down to about 10 miles per hour. He observed the automobile in the lane directly in front of him; that is, in the lane for northbound vehicles intending to turn left on Airline Avenue. The collision occurred before he entered the intersection. At no time did he get into the lane for through northbound traffic. When he saw the automobile coming through the intersection, he applied his brakes and was almost stopped at the time of the collision. The automobile struck the left side of his motorcycle and knocked him to the pavement. Both vehicles came to rest north of the plaintiff as he lay on the pavement, the automobile stopping slightly less than 80 feet north of the intersection, partly in the lane for through northbound traffic and partly in the lane for left turning southbound traffic, the plaintiff's lane.

As to his injuries, the plaintiff's testimony was to the following effect: He was hospitalized for a month and was confined to his bed at home for two additional weeks. He sustained a broken thumb, several bad cuts on his feet and legs and a large bruise inside his thigh. In the hospital he was kept in restraining straps about his pelvis to keep him from moving. Upon his admission to the hospital he was given a blood transfusion and was given glucose for two weeks. Two weeks after his admission to the hospital he was having headaches. Following his discharge from the hospital, he was unable to stand and move about without developing a severe headache. After taking pain relievers, prescribed by his family physician, for some time, he consulted and received a series of treatments from a chiropractor. He missed six weeks of school but finished his high school education and entered the University of North Carolina

at Chapel Hill the following fall. There, he again suffered from headaches. He wore a neck brace prescribed by the chiropractor but experienced no improvement in the headaches. After a year and a half at the University, he withdrew and entered the United States Army as a volunteer. He served in Vietnam as a helicopter pilot. While in Vietnam he experienced difficulty with his back on several occasions. On one of these he was grounded for four days while receiving medical treatment for pain in his back. Concerning his continuing disabilities at the time of the trial, more than five years after the accident, he testified: "It tends to get stiff when I sit or something, it pops, my neck and back both. It kind of cracks and hurts. It pops. It hurts when it pops and also if it pops too often. If I do it too much, I develop a headache. * * * I have several scars on my lower feet and lower legs and bruises from this accident —a numb place on the inside of my left thigh. It stays that way." His doctor and hospital bills, introduced in evidence without objection, totaled $1,352.50. His motorcycle was damaged in value to the extent of $650. At the time of the trial the plaintiff was still in service, his rank being Chief Warrant Officer. He is not restricted in his military duties but has to sleep with a plywood board on his bed and cannot use a pillow without developing a severe headache.

Dr. Roberts, an orthopedic specialist who attended the plaintiff in the hospital, was subpoenaed as a witness but was unable to attend the trial. By agreement, his report and that of Dr. Miller, also an attending physician while the plaintiff was hospitalized, were read to the jury. Dr. Roberts' report showed the plaintiff's injuries were a fracture-dislocation of the pelvis and a fracture of the left thumb, that an X-ray in the doctor's office on 23 February 1967 showed definite improvement in the separation of the symphysis and sacroiliac joints and that the plaintiff was expected to return after one month but did not do so. Dr. Miller's report showed his final diagnosis was, "Fracture of the sacrum, separation of the symphysis pubis and left sacroiliac," and that on the plaintiff's discharge from the hospital on 6 February 1967 his condition was "Improved."

Dr. Gillman, the attending chiropractor, testified that he gave the plaintiff 58 treatments from February through October, that the plaintiff was suffering from headaches and that there was a large amount of rotation of the cervical vertebrae indicating severe nerve pressure, the third cervical vertebra

being "extremely out of position." When he discharged the plaintiff in October following the collision, it was his opinion that the plaintiff was well and all vertebrae had been realigned.

The defendant's evidence related entirely to the circumstances of the accident. It consisted of the testimony of Neal and his companion, a fellow employee who was riding in the car to assist Neal in locating a "wind noise" in the car. The substance of their testimony was: Neal was at all times driving within the lane for through northbound traffic at a speed of about 30 miles per hour. As he approached the intersection, going uphill, he noticed the oncoming motorcycle approaching the intersection in its left turn lane. He thought it was stopping. Instead, it turned straight into Neal's lane and struck the front of the automobile about midway of the intersection in the lane for through northbound traffic. He observed no signal by the plaintiff indicating his intent to turn left. There was no other vehicle in front of Neal as he approached the intersection. At the time of the collision he was driving about 20 miles per hour. He was not listening for the wind noise as he had to get out of the city in order to drive fast enough for it to become audible. As soon as he realized the motorcycle was turning to its left, he applied the brakes of the automobile, but did not have time to swerve to avoid the collision. The motorcycle entered the intersection first. After the impact the front end of the automobile went approximately five feet beyond a telephone pole in the northeast corner of the intersection. Immediately after the collision the plaintiff told Neal he did not see the automobile. (The plaintiff on rebuttal denied making this statement.)

The police officer who investigated the collision died prior to the trial.

Childers & Fowler by Henry L. Fowler, Jr., for plaintiff.

Mullen, Holland & Harrell, P.A., by Philip V. Harrell for defendants.

LAKE, Justice.

[1] Of the defendants' twenty assignments of error only Numbers 1, 3, 5, 7 and 20 are brought forward into their brief. The remainder are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court; *State v. Greene,* 278 N.C. 649, 180 S.E. 2d 789; *State v. Baldwin,* 276 N.C. 690, 174 S.E. 2d 526. Of those

brought forward and preserved for our consideration, all save No. 20 relate to rulings of the trial judge on the admissibility of evidence. Of these only Assignments 3 and 7 relate to the issue of negligence.

[2] Assignment of Error No. 3 is that the court erred in denying the defendants' motion to strike the plaintiff's testimony that the car "was approaching very fast." The plaintiff had previously testified that he first observed the car on the other side of the intersection, in the left turn lane, about 80 feet from the plaintiff and that it came directly at him. There is no suggestion of any intervening traffic or other obstruction. The plaintiff had ample opportunity to observe whether the oncoming vehicle was approaching slowly, fast or very fast. *Murchison v. Powell,* 269 N.C. 656, 153 S.E. 2d 352; Strong, N. C. Index 2d, Automobiles, § 46. Furthermore, the record shows no objection until after the answer to the question, "Will you describe the movement of the car?" It came too late. Stansbury, North Carolina Evidence, 2d Ed., § 27. There is no merit in this assignment of error.

[3] In his Assignment of Error No. 7, the defendant complains of the court's excluding testimony of the defendant Neal designed to rebut the plaintiff's testimony that "the posted speed limit" in the area where the collision occurred was 20 miles per hour. The defendant was asked, "What is the closest traffic control sign that you know of between Main and Chester Streets and the scene of the accident?" Had the witness been permitted to answer, he would have testified, "None." He had previously testified that the intersection of Main and Chester Streets, at which point he entered Chester Street, was only 175 feet from the point of collision and his testimony immediately preceding this question was, "A traffic light is the only speed control signs [sic] or devices [sic] between Main Street and Chester and Chester and Airline." There is no merit in this assignment of error.

The remaining exceptions brought forward into the appellant's brief relate solely to the issue of damages. "The law is well settled in this jurisdiction that in cases of personal injuries resulting from defendant's negligence, the plaintiff is entitled to recover the present worth of all damages naturally and proximately resulting from defendant's tort. The plaintiff, *inter alia,* is to have a reasonable satisfaction for actual suffering, physical and mental, which are [sic] the immediate and necessary con-

sequences of the injury. The award is to be made on the basis of a cash settlement of the plaintiff's injuries, past, present, and prospective." *King v. Britt,* 267 N.C. 594, 148 S.E. 2d 594. However, "[t]he doctrine of proximate cause which determines the existence of liability for negligence is equally applicable to liability for particular items of damage. To hold a defendant responsible for a plaintiff's injuries, defendant's negligence must have been a substantial factor, that is, a proximate cause of the *particular* injuries for which plaintiff seeks recovery." *Gillikin v. Burbage,* 263 N.C. 317, 139 S.E. 2d 753.

[4] The defendants' Assignment of Error No. 1 is that the court erred in permitting the plaintiff, over objection, to testify to certain pains and difficulties experienced in his lower back while taking calisthenics in the course of his army training and while he was in military service in Vietnam, more than two years after the injury for which he sues. He described these pains and difficulties as being in the same general area as the injury received in the collision. His testimony did not disclose any like difficulties with his lower back between his discharge from the hospital and his induction into the army.

The burden is upon the plaintiff to prove not only that he experienced the pain and difficulty with his back but also that the proximate cause of these was the injury sustained in the collision for which he sues. McCormick on Damages, 25A, § 14; C.J.S., Damages, § 162(6). A mere possibility of a causal relation between the two is not sufficient to permit the jury to consider the pain and difficulty experienced two years later in determining the amount of damages to be awarded for the earlier injury. *Lee v. Stevens,* 251 N.C. 429, 111 S.E. 2d 623. It is a matter of common knowledge that one engaged in strenuous activity, such as calisthenics or military combat flying duty, may experience sudden, severe back strain and discomfort, followed by stiffness lasting several days, with no history of previous back injury. The mere proof of such back strain, without more, gives the jury no basis for knowledge as to whether it resulted from an injury sustained in an automobile collision two years earlier. Such evidence may not properly be considered by the jury in determining the amount of damages to be awarded for the earlier injury in absence of expert medical testimony, or other competent and substantial evidence, as to a causal relation between the two. *Gillikin v. Burbage, supra;* Strong, N. C. Index 2d, Damages, § 15.

Nevertheless, it was not error to permit the plaintiff first to testify as to the pain he experienced and thereafter to introduce evidence as to its causal relation to the injury for which he sues. In overruling the objection by the defendants to this testimony as to the pain and difficulty experienced in Vietnam, the court said, "If it doesn't connect, I will strike it." Almost immediately thereafter, there was a motion by the defendants to strike, which was denied, but this motion appears to have been directed at other, intervening testimony by the plaintiff concerning the nature of the calisthenic exercises he took in the army. If this motion to strike related to the evidence of which the defendants now complain, it was premature. Assignment of Error No. 1 affords no basis for a new trial.

[5] Assignment of Error No. 5 is directed to the striking of part of the defendant Neal's answer to a question designed to show his solicitude for the injured plaintiff at the scene of the collision. The plaintiff testified, without objection, that when Neal got out of the car, immediately after the collision, he walked around the car and looked at it before going over to where the plaintiff lay on the pavement. In rebuttal Neal testified, without objection, "After my vehicle came to rest, I got out of the car and rushed to Mr. Brown immediately." He was then asked by his attorney, "Prior to rushing over to Mr. Brown as he was located to the left of your car, did you examine your car in any way?" He replied, "No, sir. The car didn't matter to me at all." Thereupon, the plaintiff objected and moved to strike, which motion was allowed, the court saying, "Members of the jury, you will not consider his attitude towards the car." The defendant now assigns this as error, contending that the plaintiff's testimony had a tendency to show callous disregard for the plaintiff on the part of Neal and that the stricken statement by Neal was admissible to rebut such inference. This assignment does not afford a basis for a new trial.

[6] The defendants' Assignment of Error No. 20 is directed to the following statement in the charge of the court on the issue of damages:

> "The sum fixed by the jury should be such as to fairly compensate the plaintiff for injuries sustained in the past and those likely to occur in the future. The award is to be made on the basis of a cash settlement of the plaintiff's injuries, past, present, and prospective."

That this is a proper statement of the rule as to the measure of damages for personal injuries where there is sufficient evidence of pain, disability or other injury continuing into the future to justify consideration thereof by the jury, is well settled. *King v. Britt, supra; Mintz v. R. R.*, 233 N.C. 607, 65 S.E. 2d 120; Strong, N. C. Index 2d, Damages, § 3. In the present instance, however, the trial judge inadvertently overlooked the fact that there was no evidence whatever that the plaintiff, as of the time of the trial, would suffer any pain or disability in the future, and none affording any reasonable basis for a finding of a causal connection between the injury for which he sues and any pain or disability which he might experience after the trial. Under these circumstances, it was error to instruct the jury that they might award damages for pain or disability "likely to occur in the future." By so doing, the court inadvertently invited the jury to speculate as to whether the plaintiff would experience pain or disability in the future, and if so, how much, and as to whether, if such pain or disability should occur, it would have a causal connection with the injury sustained in the collision which is the subject of this action.

As Justice Sharp, speaking for the Court in *Gillikin v. Burbage, supra,* observed:

> "The jurors were left to speculate about a matter which frequently troubles even orthopedic specialists. * * * There can be no recovery for a permanent injury unless there is some evidence tending to establish one with reasonable certainty. * * * Where, however, the injury is *subjective* and of such a nature that laymen cannot, with reasonable certainty, know whether there will be future pain and suffering, it is necessary, in order to warrant an instruction which will authorize the jury to award damages for permanent injury, that there 'be offered evidence by expert witnesses, learned in human anatomy, who can testify, either from a personal examination or knowledge of the history of the case, or from a hypothetical question based on the facts, that the plaintiff, with reasonable certainty, may be expected to experience future pain and suffering as a result of the injury proven.' *Shawnee-Tecumseh Traction Co. v. Griggs,* 50 Okla. 566, 568, 151 Pac. 230, 231; Annot., * * * 115 A.L.R. 1149."

The testimony of Dr. Gillman, the chiropractor who treated the plaintiff, was:

> "During the time I was treating him, I did not at any time become concerned about his condition to the point that I felt like he should go to an orthopaedist or any other type of doctor. It was my opinion that he was doing nicely and making progress as I proceeded in treatment. *In my opinion when I discharged him, he was well.*" (Emphasis added.)

The reports of Dr. Roberts and Dr. Miller, both of whom attended the plaintiff while he was in the hospital, do not suggest any apprehension of permanent disability. Both anticipated that the plaintiff would return for further observation, which he did not do. Nothing in the plaintiff's testimony indicates that the difficulties he experienced with his back while in military service in Vietnam continued over any extended period of time or substantially impaired the performance of his military duties. He is still on active duty.

The plaintiff's own testimony in relation to his condition at the time of trial is as follows:

> "It [his back] tends to get stiff when I sit or something, it pops, my neck and back both. It kind of cracks and hurts. It pops. It hurts when it pops and also if it pops too often. If I do it too much, I develop a headache. * * * I have several scars on my lower feet and lower legs [not otherwise described and not shown in the record to have been exhibited to the jury] and bruises from this accident—a numb place on the inside of my left thigh. It stays that way * * * [for any pain experienced as of the time of the trial he simply took aspirin, or something like aspirin]. I can't sleep with a pillow. If I sleep with my head raised at all at night, I have a real bad headache. I have to sleep perfectly flat. I am not restricted in any way with my military duties as a result of being physically disabled. I just try to be careful. * * * I have been sleeping on this plywood board with no pillow ever since the wreck. I have to put a board under my mattress to make it firm and comfortable."

To permit the jury, on this evidence, to award damages for "injuries * * * likely to occur in the future" is to inject pure speculation into the award. In *Short v. Chapman,* 261 N.C. 674,

682, 136 S.E. 2d 40, Justice Parker, later Chief Justice, speaking for the Court, said:

> "Where there is evidence from which a conclusion of permanent injury proximately resulting from the wrongful act may properly be drawn, the court should charge the jury so as to permit its inclusion in an award of damages. On the other hand, where there is not sufficient evidence of the permanency of an injury proximately resulting from the wrongful act, the court should not give an instruction allowing the jury to assess damages for permanent injuries. To warrant an instruction permitting an award for permanent injuries, the evidence must show the permanency of the injury and that it proximately resulted from the wrongful act with reasonable certainty. While absolute certainty of the permanency of the injury and that it proximately resulted from the wrongful act need not be shown to support an instruction thereon, no such instruction should be given where the evidence respecting permanency and that it proximately resulted from the wrongful act is purely speculative or conjectural."

In the Short case the defendant, in support of her counterclaim, testified that at the time of the trial her leg still hurt, had never gotten better, and had a numbness. Her doctor expressed no opinion that her injuries were permanent and no opinion as to the cause of the pain and numbness in her leg. He was not called as a witness. Upon that evidence, this Court said:

> "Is this condition permanent, and was it proximately caused by the wrongful act of the plaintiff? Is this numbness in her left leg caused or contributed to by the injuries she sustained in the collision, or is it caused or contributed to by poor circulation or arthritis? Defendant's evidence gives no answer; it is left in the realm of conjecture and speculation. The record has no evidence that would permit a jury to find with reasonable certainty that she sustained any permanent injury as a proximate result of the collision. The instruction permitting the jury to award damages for permanent injury was highly prejudicial to plaintiff, because it is apparent from the evidence in the record of defendant's injuries, and of her continuing complaints of pain, which complaints of pain are subjective in character, and from the size of the verdict that the jury awarded

defendant damages on the theory she had sustained permanent injuries proximately resulting from the collision."

In this respect there is no distinction between recovery for "permanent" disability and recovery for "prospective" pain and suffering. Obviously, *Short v. Chapman, supra,* is squarely in point upon the question here presented to us and this assignment of error by the present defendant must be sustained.

[7] The remaining question is as to the extent of the new trial to be granted. There was no error in the trial below upon the question of liability of the defendants to the plaintiff for damages. The conflict in the evidence of the plaintiff and that of the defendants on that question was for the jury, which resolved it in favor of the plaintiff. The error in the charge of the court related only to the measure of damages recoverable by the plaintiff and had no bearing upon the jury's determination of the negligence of the defendant Neal as the proximate cause of the plaintiff's injury.

In *Godwin v. Vinson,* 254 N.C. 582, 587, 119 S.E. 2d 616, Justice Parker, later Chief Justice, having found an error in the instruction of the trial judge on the measure of damages, speaking for the Court, said:

> "The statement of *Walker, J.,* for the Court in *Lumber Co. v. Branch,* 158 N.C. 251, 73 S.E. 164, has been quoted many times with approval: 'It is settled beyond controversy that it is entirely discretionary with the Court, Superior or Supreme, whether it will grant a partial new trial. It will generally do so when the error, or reason for the new trial, is confined to one issue, which is entirely separable from the others and it is perfectly clear that there is no danger of complication.'
>
> "This case comes within the rule stated by *Justice Walker* as to when a partial new trial will be ordered. We perceive no good reason why attachment defendant should again be put to trial on the first, second and third issues. In awarding a partial new trial upon the fourth issue [damages] alone, we find precedents in our following decisions: *Lieb v. Mayer,* 244 N.C. 613, 94 S.E. 2d 658; *Hinson v. Dawson,* 241 N.C. 714, 86 S.E. 2d 585; *Journigan v. Ice Co.,* 233 N.C. 180, 63 S.E. 2d 183; *Pinnix v. Griffin,* 221 N.C. 348, 20 S.E. 2d 366; *Jackson v. Parks,* 220 N.C. 680, 18 S.E. 2d 138; *Messick v. Hickory,* 211 N.C. 531, 191 S.E.

43; *Gossett v. Metropolitan Life Ins. Co.*, 208 N.C. 152, 179 S.E. 438; *Johnson v. R.R.*, 163 N.C. 431, 79 S.E. 690; Ann. Cas. 1915B 598; *Rushing v. R. R.*, 149 N.C. 158, 62 S.E. 890."

In *Johnson v. Lewis*, 251 N.C. 797, 112 S.E. 2d 512, Justice Parker, again speaking for the Court, in an action for personal injuries caused by the negligence of the defendant, found error in the charge as to the measure of damages recoverable by one of the plaintiffs. He said, "We perceive no good reason why the infant Efird Johnson should again be put to trial on the first and second issues." Thereupon, relying upon the same authorities cited by him in *Godwin v. Vinson, supra*, this Court awarded the defendant a new trial "limited, however, to the issue of damages." We are of the opinion that the same rule should apply in the present case and, therefore, order a new trial, limited to the issue of damages.

Partial new trial.

STATE OF NORTH CAROLINA v. ADNELL HUNT

No. 92

(Filed 12 July 1973)

Criminal Law §§ 113, 119— evidence of alibi — specific request for instruction required

Where defendant presented evidence that he was elsewhere at the time the crimes charged were committed and this evidence was reviewed fully by the court, but no specific instruction was given the jury as to the legal principles applicable in their consideration of this alibi evidence, defendant was entitled to such instruction notwithstanding his failure to request it; however, as of the date of this opinion, the trial court is not required to give an instruction as to the legal effect of alibi evidence unless defendant specifically requests such an instruction.

Justice HIGGINS dissenting.

APPEAL by defendant from *Exum, J.*, 27 November 1972 Regular Criminal Session, GUILFORD Superior Court, Greensboro Division.

In separate bills, defendant was indicted (1) for the rape of Linda Pendergrass on 5 August 1972, and (2) for first de-

gree burglary involving breaking and entering the occupied dwelling house of Linda Pendergrass in the nighttime with intent to rape her.

Evidence was offered by the State and by defendant.

In each case, the jury returned a verdict of guilty as charged in the bill of indictment and a sentence of life imprisonment was pronounced, the two life sentences to run concurrently. Defendant excepted and appealed.

Attorney General Robert Morgan and Associate Attorney E. Thomas Maddox, Jr., for the State.

Public Defender Wallace C. Harrelson for defendant appellant.

BOBBITT, Chief Justice.

The evidence offered by the State was sufficient to require submission to the jury in each of the two cases and to support the verdicts.

The evidence offered by defendant included his own testimony and testimony of other witnesses tending to show he was elsewhere when, according to the State's evidence, the crimes charged in the indictments were committed. Although this evidence was reviewed fully by the court, no specific instruction was given the jury as to the legal principles applicable in their consideration of this alibi evidence. Defendant contends he was entitled to such instruction notwithstanding his failure to request it. Authoritative decisions of this Court support defendant's position. *State v. Vance,* 277 N.C. 345, 347-48, 177 S.E. 2d 389, 390-91 (1970); *State v. Leach,* 263 N.C. 242, 139 S.E. 2d 257 (1964); *State v. Gammons,* 258 N.C. 522, 524, 128 S.E. 2d 860, 862 (1963); *State v. Spencer,* 256 N.C. 487, 488-89, 124 S.E. 2d 175, 176-77 (1962); *State v. Melton,* 187 N.C. 481, 122 S.E. 17 (1924). On account of the court's failure to so charge, defendant must be and is awarded a new trial.

Although we recognize defendant's right to rely upon the cited authoritative decisions, we have reached the conclusion that reason and authority support a different rule, namely, that the court *is not required* to give such an instruction unless it is requested by the defendant. Hence, the cited decisions, in respect of the rule stated above, are overruled. The rule stated

herein will be applicable in trials commenced after the filing of this opinion, including the retrial of the present case.

An alibi is simply a defendant's plea or assertion that at the time the crime charged was perpetrated he was at another place and therefore could not have committed the crime. *State v. Malpass,* 266 N.C. 753, 147 S.E. 2d 180 (1966); *State v. Green,* 268 N.C. 690, 151 S.E. 2d 606 (1966). *Hereafter,* when a defendant offers evidence of alibi, he is entitled, *upon request,* to a charge substantially as follows: "An accused, who relies on an alibi, does not have the burden of proving it. It is incumbent upon the State to satisfy the jury beyond a reasonable doubt on the whole evidence that such accused is guilty. If the evidence of alibi, in connection with all the other testimony in the case, leaves the jury with a reasonable doubt of the guilt of the accused, the State fails to carry the burden of proof imposed upon it by law, and the accused is entitled to an acquittal." *State v. Minton,* 234 N.C. 716, 726-27, 68 S.E. 2d 844, 851 (1952); *State v. Spencer, supra,* at 489, 124 S.E. 2d at 177. When an instruction as to the legal effect of alibi evidence is given, whether by the court of its own motion or in response to request, such statement must be correct. The decision herein does not call for further discussion of the content of such an instruction.

In cases involving alibi instructions prior to *Melton,* the question presented was whether the instructions as to alibi actually given by the court were correct or erroneous. *State v. Josey,* 64 N.C. 56 (1870); *State v. Jaynes,* 78 N.C. 504 (1878); *State v. Byers,* 80 N.C. 426 (1879); *State v. Reitz,* 83 N.C. 634 (1880); *State v. Starnes,* 94 N.C. 973 (1886); *State v. Freeman,* 100 N.C. 429, 5 S.E. 921 (1888); *State v. Rochelle,* 156 N.C. 641, 72 S.E. 481 (1911); *State v. Bryant,* 178 N.C. 702, 100 S.E. 430 (1919).

A discussion of *Melton* and decisions based thereon seems appropriate.

In *Melton,* two questions were considered. The Court (one Justice dissenting) overruled the defendant's primary contention, namely, that the State's evidence was insufficient to withstand the defendant's motion for judgment as in case of nonsuit. However, all members of the Court agreed that a new trial should be awarded on account of the court's failure to instruct the jury as to the legal principles applicable to alibi evidence.

The opinion stated that when a judge, in compliance with the mandate of the statute now codified as G.S. 1-180, instructs the jury upon the essential features of a case he is not required to give additional instructions upon its subordinate features or to explain more fully a particular phase of the evidence unless there be a prayer for such instruction. However, the Court concluded that "[t]he defendant's evidence of an alibi was substantive . . . and without tendering a special prayer he was entitled to an instruction as to the legal effect of his evidence if it should be accepted by the jury." No authority was cited. Nor did the Court set forth the reasoning upon which it reached the stated conclusion.

The record in *Melton* discloses that the trial judge in reviewing the evidence and in stating the contentions failed completely to make *any reference* to the explicit alibi evidence the defendant had offered.

Melton was cited in *State v. Steadman,* 200 N.C. 768, 769, 158 S.E. 478, 479 (1931); *State v. Casey,* 201 N.C. 185, 209, 159 S.E. 337, 350 (1931); and *State v. Sheffield,* 206 N.C. 374, 386, 174 S.E. 105, 111 (1934).

The record in *Steadman* shows that the defendant assigned as error the court's failure "to define and explain the law arising on the evidence relating to the alibi set up by the defendants in the case. . . ." This assignment was disposed of as follows: "The court below fully set forth the facts and contentions in the charge as to the alibi set up by defendants. *S. v. Melton,* 187 N.C. 481." *State v. Steadman, supra,* at 769, 158 S.E. at 479. The court had reviewed the defendant's alibi evidence and had set forth his contentions thereon. The Attorney General's brief stated: "This distinguishes the instant case from *State v. Melton,* 187 N.C. 481,—where the court below did not call the attention of the jury, in any manner, to the evidence of an alibi." Although no instruction had been given the jury as to the legal principles applicable to alibi evidence, the Court found "No Error."

In *Casey* as in *Steadman,* the trial judge reviewed the alibi evidence and stated the defendant's contentions with reference thereto. However, no instruction was given the jury as to the legal principles applicable to alibi evidence. The Court found "No Error" in a trial in which a sentence of death was pronounced.

In *Sheffield,* the question related to the accuracy of the instruction actually given by the court with reference to the law of alibi. The instruction was upheld on the authority of *State v. Jaynes, supra,* and *State v. Bryant, supra.* Although the assignment of error in *Sheffield* relates to the asserted inaccuracy of the alibi instruction, we note that the opinion contains the following: "A defendant is entitled to instruction on alibi without special prayer. *S. v. Melton,* 187 N.C. 481; C.S., 564; *S. v. Steadman,* 200 N.C. 768 (769)."

In *State v. Sutton,* 230 N.C. 244, 52 S.E. 2d 921 (1949), a new trial was awarded because of the failure of the trial judge to comply with the requirements of G.S. 1-180. No assignment of error related specifically to the court's failure to instruct the jury with reference to the law of alibi. However, near the end of the opinion, we find the following: "Evidence of an alibi is substantive and the defendant was entitled to an instruction as to the legal effect of his evidence of alibi, if believed and accepted by the jury. *S. v. Melton,* 187 N.C. 481, 122 S.E. 17." *Id.* at 247, 52 S.E. 2d at 924.

In *Spencer,* the trial judge recapitulated all of defendants' alibi evidence and gave the defendants' contentions thereon. In this respect, the factual situation was analogous to the factual situations in *Steadman* and *Casey* rather than that considered in *Melton.* On authority of *Melton,* this Court awarded a new trial because "the trial court did not instruct the jury as to the legal effect of their evidence as to an alibi," even though there had been no request for such an instruction. 256 N.C. at 488-89, 124 S.E. 2d at 176. (Note: Two Justices dissented and one did not participate.)

Gammons, Leach and *Vance* are based directly on *Spencer* and indirectly on *Melton.*

It is first noted that the rule announced in *Melton* and applied in *Spencer* and subsequent decisions is contrary to the great weight of authority.

The annotation, "Duty of Court to Instruct on the Subject of Alibi," 118 A.L.R. 1303 (1939), contains this statement: "It is the rule in most jurisdictions that, in the absence of a requested instruction, there is no duty upon the trial court to instruct specifically upon the subject of alibi; and while it appears that some cases are irreconcilable with this rule, those cases which require specific alibi instructions, even in the

absence of a request therefor, for the most part involve special circumstances. See II. b, infra." *Id.* at 1304. This statement is fully supported by decisions there cited and by supplemental decisions. We note that *Melton* was cited in "II. b" as based on a North Carolina statute which required that the trial judge state in a plain and correct manner the evidence given in the case and declare the law arising thereon. As noted above, the instructions of the trial judge in *Melton* contained no reference to the explicit alibi evidence the defendant had offered or to defendant's contentions thereon.

The weight of authority supports the following statement: "In the absence of a requested instruction, there is no duty upon the trial court to instruct specifically upon the subject of alibi. Conversely, when there has been sufficient evidence in the case to raise an issue as to alibi and the defendant has specifically requested the trial court to charge the jury in accordance with proper instructions submitted by him on this subject, it has been held to be the duty of the court so to instruct, and the failure, or refusal, to instruct as to alibi under such circumstances has generally been held to constitute prejudicial and reversible error." 5 R. Anderson, Wharton's Criminal Law and Procedure § 2098, p. 267 (1957). *Accord,* 53 Am. Jur., Trial § 652, pp. 502-503 (1945); 23A C.J.S., Criminal Law § 1325(4), pp. 839-40 (1961).

Rule 30 of the Federal Rules of Criminal Procedure, entitled "Instructions," contains this provision: "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." 383 U.S. at 1107.

Prior to the adoption of the Federal Rules of Criminal Procedure, the Supreme Court of the United States had held in *Goldsby v. U. S.*, 160 U.S. 70, 40 L.Ed. 343, 16 S.Ct. 216 (1895), that if a defendant "wished specific charges as to the weight in law to be attached to testimony introduced to establish an alibi," he must make a request therefor. This rule has been followed consistently in the Federal courts. *See Lewis v. U. S.*, 373 F. 2d 576, 579 (9th Cir. 1967), and cases cited.

The stated premise upon which *Melton* was based is that an instruction with reference to the legal effect of defendant's alibi evidence was a substantive and essential feature of the

case as distinguished from a subordinate feature thereof. Further consideration leads to the conclusion that this premise is unsound.

G.S. 1-180 requires the trial judge in a criminal action to instruct the jury as to "every substantial and essential feature of the case embraced within the issue and arising on the evidence, and this without any special prayer for instructions to that effect." *State v. Merrick,* 171 N.C. 788, 795, 88 S.E. 501, 505 (1916); *State v. Ardrey,* 232 N.C. 721, 723, 62 S.E. 2d 53, 55 (1950). "Failure to charge on a subordinate—not a substantive—feature of a trial is not reversible error in the absence of request for such instruction." *State v. Pitt,* 248 N.C. 57, 60, 102 S.E. 2d 410, 412 (1958).

"Where the charge fully instructs the jury on all substantive features of the case, defines and applies the law thereto, and states the contention of the parties, it complies with G.S. 1-180, and a party desiring further elaboration on a particular point, or of his contentions, or a charge on a subordinate feature of the case, must aptly tender request for special instruction." 3 Strong, N. C. Index, Criminal Law § 113, pp. 12-13 (1967); *State v. Guffey,* 265 N.C. 331, 332, 144 S.E. 2d 14, 16 (1965).

On the ground that they were *subordinate* and not substantive features of the case, we have held that, *in the absence of a special request,* the trial judge *is not required* to instruct the jury as to these matters: (1) That the jury should scrutinize the testimony of an accomplice, *State v. Brinson,* 277 N.C. 286, 296-97, 177 S.E. 2d 398, 405 (1970); (2) that the defendant's failure to testify in his own behalf raises no presumption against him and should not be considered to his prejudice, *State v. Jordan,* 216 N.C. 356, 364-66, 5 S.E. 2d 156, 160-61 (1939); (3) as to the law applicable in the consideration of evidence tending to show that defendant was a person of good character, *State v. Sims,* 213 N.C. 590, 593-94, 197 S.E. 176, 178-79 (1938); (4) that testimony of a dying declaration should be received with caution, *State v. Winecoff,* 280 N.C. 420, 422-23, 186 S.E. 2d 6, 7-8 (1972); (5) that evidence of unrelated prior criminal offenses is not competent as substantive evidence but only for consideration as bearing upon defendant's credibility as a witness, *State v. Goodson,* 273 N.C. 128, 129, 159 S.E. 2d 310, 311-12 (1968); and (6) that the interest of a State's witness should be considered in passing upon the credibility of his testimony, *State v. Vance, supra,* at 346-47, 177 S.E. 2d at 390.

These instances suffice to show that instructions as to the significance of evidence which do not relate to the elements of the crime itself or defendant's criminal responsibility therefor have been considered subordinate features of the case.

The burden of proof is upon the State to satisfy the jury from the evidence beyond a reasonale doubt that the crime for which the defendant is indicted was committed and that it was committed by the defendant. Obviously, in respect of a crime requiring *personal presence* at the scene of its commission, evidence tending to show that defendant was elsewhere when, according to the State's evidence, the alleged crime occurred, is in direct conflict with the State's evidence that defendant was present when the crime was committed.

It is inexact to refer to alibi as a special defense. It has nothing to do with the elements of or criminal responsibility for the crime for which the defendant is indicted. It is simply evidence contradictory of the State's evidence that defendant committed the alleged crime. Alibi is not of the nature of a defense of confession and avoidance such as excusable or justifiable homicide, self-defense, entrapment and insanity. "If there is evidence adduced in a given case that the defendant was at another place or at a place so removed that he could not have been present to commit the crime, and if presence is necessary for conviction, then that evidence, if it raised a reasonable doubt to be considered and acted upon by men of common sense and good judgment, would result in an acquittal under the reasonable doubt instruction." *State v. Hess,* 9 Ariz. App. 29, 33, 449 P. 2d 46, 50 (1969).

Notwithstanding the court's instruction that the burden of proof is on the State to satisfy the jury from the evidence beyond a reasonable doubt that the defendant was present and that he committed the crime, if a particular defendant is apprehensive that the jury will be misled unless the court gives an instruction substantially like that approved in *Minton* and *Spencer* he will be entitled to such instruction *upon special request therefor.* Under this rule, defendant and his counsel may determine for themselves whether they would like for the court to give such an instruction. Under certain circumstances, it may be that the giving of such an instruction will so concentrate attention upon the subject of alibi as to divert attention from unrelated weaknesses in the State's case. As noted by Chief Justice Weintraub in *State v. Garvin,* 44 N.J. 268, 273, 208

A. 2d 402, 404 (1965): "Indeed the very discussion of alibi as something apart from a direct denial of the truth of the State's case tends to obscure its role and to suggest a defendant has some special responsibility with respect to it."

The opinion of Chief Justice Weintraub further states: "There is no need to speak of alibi in such separate terms, and indeed to do so will more likely obscure the case than clarify it. The important thing is to make it plain to jurors that to convict they must be satisfied upon a consideration of all of the evidence that guilt has been established beyond a reasonable doubt. If a defendant's factual claim is laid beside the State's and the jury understands that a reasonable doubt may arise out of the defense testimony as well as the State's, the jury has the issue in plain, unconfusing terms. If events at the trial should be thought to suggest to the jury that the defendant has the burden of proving he could not physically have committed the crime, then of course the trial court should dissipate that danger by telling the jury that the defendant does not have the burden of proving where he was at the critical time and that evidence offered on that score is to be considered with all the proof in deciding whether there is a reasonable doubt as to guilt." *Id.* at 274, 208 A. 2d at 405.

The overruling of *Melton* and *Spencer* and decisions based thereon does not require discussion of the doctrine of prospective operation of overruling decisions in the context of factual situations different from that here considered. For such full discussion, see *State v. Lewis*, 274 N.C. 438, 446-451, 164 S.E. 2d 177, 182-86 (1968). *See also Rabon v. Hospital*, 269 N.C. 1, 20-21, 152 S.E. 2d 485, 498-99 (1967).

The present defendant sought and is awarded a new trial because of the court's failure, without request, to give an instruction as to the legal effect of alibi evidence. Although entitled thereto without request under our prior decisions, it seems improbable that the court's failure to give such instruction affected the verdicts of the jury. This overruling decision does not deprive this defendant or any other defendant of any substantive right. As in *Griffin v. California*, 380 U.S. 609, 14 L.Ed. 2d 106, 85 S.Ct. 1229 (1965), and in *Howell v. Ohio*, 381 U.S. 275, 14 L.Ed. 2d 430, 85 S.Ct. 1457 (1965) [for subsequent decision, see *State v. Howell*, 4 Ohio St. 2d 11, 211 N.E. 2d 56 (1965)], the present overruling decision relates to *an incident* which occurred *during* the trial. Neither the prosecution nor

defense will be prejudiced on account thereof upon retrial. In the retrial of the present case and in the trial of other cases subsequent to the filing of this decision, the court *is required* to give an approved instruction as to the legal effect of such alibi evidence upon the defendant's special request that such instruction be given.

It seems appropriate that notice of this decision be communicated as quickly as possible to all trial judges, solicitors and defense attorneys.

For the reasons stated, in each case defendant is awarded a new trial.

New trial.

Justice HIGGINS dissenting.

In my opinion, prejudicial error is not disclosed by the record in this case. The court now overrules former decisions that the court must charge the jury as to "the legal principles applicable in their consideration of alibi evidence, whether requested or not."

According to sound principles of criminal practice, upon arraignment a defendant may plead "Not Guilty," "Guilty," or "Nolo Contendere" or he may "Stand mute." In the latter event the trial judge must enter a plea of "Not Guilty." There is no such plea as "Alibi."

Following a plea of Not Guilty, a defendant is entitled to challenge the sufficiency of the State's evidence. He may introduce evidence of his innocence, and as part of that evidence he may offer evidence that he not only did not commit the offense charged, but that he could not have committed it because at the time of its commission he was elsewhere.

In reviewing the defendant's evidence, the court must charge the jury to take into account all the defendant's evidence including the evidence that he was not at the scene of the crime, but was elsewhere at the time of its commission. Mention of the word "Alibi" is not required. The word means elsewhere. It has no "sacramental" meaning. When the court correctly charges the jury with respect to a defendant's evidence that he was elsewhere at the time the offense was

committed, as Judge Exum did in this case, the court gives the defendant full benefit of the evidence that he was elsewhere.

The view now expressed by the court conforms to the view held by Justice Rodman and myself when we dissented in *State v. Spencer*, 256 N.C. 487. The decision in that case and in other cases like it, were in my opinion, erroneous as the court now holds. The present defendant obtained no vested rights in this erroneous decision. I vote no error in this case.

STATE OF NORTH CAROLINA v. FRANK THOMAS SPRINGER, JR.

No. 72

(Filed 12 July 1973)

1. **Indictment and Warrant § 9; Larceny § 4— theft of credit card — sufficiency of card description in indictment**

In a prosecution for theft of a credit card, the trial court properly denied defendant's motion to quash the bill of indictment where the credit card allegedly withheld was sufficiently described to inform the accused with certainty as to the crime he allegedly committed even though the card was not specifically identified by its number.

2. **Criminal Law § 80— computer printout of business records — requisites for admissibility**

Printout cards or sheets of business records stored on electronic computing equipment are admissible in evidence, if otherwise relevant and material, if: (1) the computerized entries were made in the regular course of business, (2) at or near the time of the transaction involved, and (3) a proper foundation for such evidence is laid by testimony of a witness who is familiar with the computerized records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy.

3. **Criminal Law §§ 80, 81— evidence of contents of computer printout — failure to lay foundation — violation of best evidence rule**

In a prosecution for theft of a credit card, the trial court erred in admitting into evidence testimony of a witness as to the contents of a computer printout pertaining to the credit card in question without first laying a foundation for such testimony; furthermore, admission of the witness's testimony, rather than the printout itself, violated the best evidence rule.

4. **Larceny § 6— theft of credit card — evidence of possession of other credit cards competent**

In a prosecution for theft of a BankAmericard credit card, evidence that defendant had three other credit cards in his possession which had been issued in the names of persons other than defendant

or members of his immediate family was competent (1) to make out a *prima facie* case as provided in G.S. 14-113.10 that defendant had obtained all credit cards in his possession in violation of G.S. 14-113.9(a); (2) to establish a common plan or scheme; and (3) to show criminal intent and guilty knowledge.

5. **Indictment and Warrant § 17— issue date of credit card — variance between allegation and proof not fatal**

Issue date of a credit card was not a material fact which the State must allege and prove in a prosecution for theft of the card; therefore, allegation in the bill of indictment that the card was issued on 20 September 1971, but proof that the card was issued on 15 September 1971 did not constitute a fatal variance requiring nonsuit.

6. **Larceny § 8— theft of credit card — instruction on possession of other credit cards**

The trial court in a prosecution for theft of a credit card properly instructed the jury regarding the legal significance of the State's evidence tending to show that defendant had in his possession and under his control credit cards issued in the names of two or more persons other than defendant and members of his immediate family.

Justice HIGGINS dissenting.

APPEAL by defendant from judgment of *Collier, J.*, 13 November 1972 Session, CATAWBA Superior Court, docketed in the Court of Appeals and transferred to the Supreme Court for initial appellate review by order entered pursuant to G.S. 7A-31(b)(4).

The bill of indictment charges that on 28 March 1972 the defendant "did unlawfully, wilfully, and feloniously withhold a BankAmericard Credit Card from the control and possession of Mabel L. Long, the person named on the face of such Credit Card and to whom the Credit Card had been issued. This withholding was done without the consent of the above named Cardholder, to whom such Credit Card had been issued by North Carolina National Bank on September 20, 1971 and which Card was in effect at the time of such withholding, against the form of the statute in such case made and provided and against the peace and dignity of the State."

The State offered in evidence the following exhibits and elicited the following testimony relating thereto:

State's Exhibit No. 1—A BankAmericard with the name Mabel L. Long embossed on it and bearing the number 434 215 027 2369. This card bears the signature of Mrs. Long and she testified she placed it thereon. She testified that she had never

given defendant or anyone else permission to use or withhold this card; that she discovered it was missing on 4 February 1972 and reported its loss to North Carolina National Bank the same day. At the time it was lost the balance she owed North Carolina National Bank for use of the card was approximately $7.92. She identified the card by number and by her signature thereon.

State's Exhibit No. 2—A Citgo credit card with the name of Neil E. Bohn embossed on it and bearing the number 190 392 456. Mr. Bohn testified that he used this credit card for four or five months and discovered it missing about the middle of March 1972. He stated that he did not give defendant or any other person permission to have or to use it.

State's Exhibit No. 3—A BP credit card bearing the name Edward Carriker and a number which is not shown in the record. Edward Carriker testified that he and defendant had previously been in business together in the early part of 1971 selling burglar alarms; that he allowed defendant to use his credit cards during that period of time, one of which was a BP credit card, and defendant made arrangements to pay the bill through the oil company; that he does not remember this particular BP card—"I never received this card." Mr. Carriker further testified that defendant "gave me my cards back and I mailed mine back to BP. There is no issue date on that card. I do know that for a period of time he made payments on the BP credit card. . . . To my knowledge I was never issued this card." This witness further stated that during the month of March 1972 he did not give defendant permission to use any BP credit card that previously may have been issued to him.

State's Exhibit No. 4—A Humble Oil and Refining Company credit card bearing the name Richard B. Young and the number 361 113 4580. Mr. Young testified that he held and used this credit card until September or October 1971 at which time he put it away in a large briefcase; that he never knew the card was missing until Humble Oil and Refining advised him that "they had found the credit card"; that he never gave defendant or anyone else permission to use or hold it.

The State's evidence further tends to show that on 29 March 1972 defendant and another man purchased some gas and three cans of Sta-power Oil Cushion from an Esso Service Station in Hickory, totaling $12.50 plus tax, and paid for the

purchase with S-4, the Humble Oil and Refining Company credit card issued to Richard Young. Mildred Brittain, one of the station operators, identified S-4 as the card used and testified: "A credit card was handed to the short man which was later known as Lou Kirk or some Kirk. A credit card was handed to him. . . and the signature on the credit card was made by Mr. Kirk. I looked at the signature because the name was in Richard Young and the signature was written R. Young. Mr. Kirk said something about taking some more oil with them because they had just purchased a car that day and it was drinking the oil, and I said, well, I will need to call in. Mr. Springer said, no, we won't need any more oil. . . . I became suspicious and called Humble and they advised me that there was a reward out on the card and not to issue any type of purchase on it and to immediately turn it over so I went ahead and called the police station." Mrs. Brittain further testified that at the time she saw defendant hand this credit card to Kirk "I saw cards. I did not look close enough to see which was any type of cards. I did see more than one. . . . Mr. Springer handed Mr. Kirk one of these cards." Mrs. Brittain identified a can of Sta-power Oil Cushion (S-5) as one of the cans sold to defendant and Kirk on the date in question.

Lt. Hugh Hunt of the Hickory Police Department testified that on 29 March 1972 he was on the lookout for a 1959 Chevrolet, white over blue, Tennessee license number D 1564; that he spotted the car on U. S. 321 Bypass in Hickory and stopped it; that defendant was the operator and, upon request, presented a valid driver's license but was unable to present a registration card; that a man named Louie Kirk was a passenger in the car; that both men were placed in the back seat of the patrol car and taken to the police station; that on the way he glanced at his rear view mirror and saw Louie Kirk passing cards to defendant and saw defendant "put them down between his legs and the next time they were under the seat where Thomas Springer was sitting. Springer didn't take the cards and hold onto them, he put them under the seat of the patrol car. All I could see were that they were credit cards. I couldn't read the number or the names on them." When defendant and Louie Kirk were removed from the patrol car at the police station, the officer looked under the seat and found State's Exhibits 1, 2 and 4. State's Exhibit 3 was taken from defendant's billfold at the police department.

Lt. Hunt searched defendant's car with his permission and found ninety-three quarts of motor oil of various brands, a can of oil softener and a little hand drill.

Fred Holt, a special investigator with BankAmericard, North Carolina National Bank, in Greensboro, testified that when a credit card has been reported lost or stolen he checks to see when it was issued, where it was issued and how many were issued; that this checking is done through North Carolina National Bank's IBM computer and the computer printout shows the official record pertaining to each and every credit card. Over objection, he was permitted to testify that the official computer printout with regard to credit card No. 434 215 027 2369, issued to Mabel L. Long, showed that said card was issued on 15 September 1971; that as of 4 February 1972, the date the card was reported missing, the balance Mrs. Long owed by reason of using said card was $7.12; that the computer printout showed that since 4 February 1972 the Mabel L. Long card had been used seventy-three times in twenty-two North Carolina cities for purchases totaling $1,209.63; that the printout showed the last date the card was used to be 30 March 1972 in connection with a purchase from Shamrock Hardware in Charlotte—at which time defendant was in jail in Hickory, having been arrested and jailed on 29 March 1972 in connection with this case.

Defendant offered no evidence. Defendant's motion for nonsuit was denied. The jury returned a verdict of guilty as charged and defendant was sentenced to a prison term of not less than two nor more than three years. His assignments of error on appeal will be noted in the opinion.

John H. McMurray, Attorney for defendant appellant.

Robert Morgan, Attorney General; C. Diederich Heidgerd, Associate Attorney, for the State of North Carolina.

HUSKINS, Justice.

Defendant is charged with unlawfully, willfully and feloniously withholding a credit card from Mabel L. Long, the card-

holder, in violation of G.S. 14-113.9(a)(1). That subsection reads as follows:

> "§ 14-113.9. *Credit card theft.*—(a) A person is guilty of credit card theft when:
>
> (1) He takes, obtains or withholds a credit card from the person, possession, custody or control of another without the cardholder's consent or who, with knowledge that it has been so taken, obtained or withheld, receives the credit card with intent to use it or to sell it, or to transfer it to a person other than the issuer or the cardholder."

Acts dealing with credit card crimes have been enacted in nearly all states in recent years. In defining credit card theft, the majority of these acts have been drafted with much greater clarity than ours. Georgia and Virginia have followed our statute almost verbatim. See Georgia Code Ann. § 26-1705.2 (1972); Virginia Code Ann. § 18.1-125.3 (Supp. 1972). The better drafted version enacted in many other states is illustrated by Arizona Stat. Ann. § 13-1073A (Supp. 1972).

Our statute almost defies analysis. Apparently, an accused may violate G.S. 14-113.9(a)(1) in four distinct ways. *Compare State v. Albarty*, 238 N.C. 130, 76 S.E. 2d 381 (1953). He may (1) *take*, (2) *obtain*, or (3) *withhold* a credit card from the person, possession, custody or control of another without the cardholder's consent; or (4) he may receive a credit card with intent to use it or sell it or transfer it to some person other than the issuer or cardholder, knowing at the time that the card had been so taken, obtained or withheld. A person violating G.S. 14-113.9(a)(1) in any of the four enumerated ways is guilty of credit card theft. Of course, a person who commits the acts proscribed by G.S. 14-113.9(a)(2), (3) and (4) is also guilty of credit card theft.

[1] Before pleading, defendant moved to quash the bill of indictment on the ground that it is fatally defective in failing to describe the BankAmericard by number. Denial of his motion is assigned as error.

The bill alleges that the card was issued to Mabel L. Long on 20 September 1971, while the State's evidence tends to show that it was issued to her on 15 September 1971. Defendant argues that this discrepancy together with absence of a credit card

number renders the bill of indictment fatally defective and subject to quashal.

While a motion to quash is an appropriate method of testing the sufficiency of the bill of indictment to charge a criminal offense, it lies only for a defect appearing on the face of the warrant or indictment. *State v. McBane,* 276 N.C. 60, 170 S.E. 2d 913 (1969); *State v. Turner,* 170 N.C. 701, 86 S.E. 1019 (1915). "The court, in ruling on the motion, is not permitted to consider extraneous evidence. Therefore, when the defect must be established by evidence *aliunde* the record, the motion must be denied." *State v. Cochran,* 230 N.C. 523, 53 S.E. 2d 663 (1949); *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384 (1972). The sole exception to this rule is noted in *State v. Underwood,* 283 N.C. 154, 195 S.E. 2d 489 (1973).

When these principles are applied to the bill of indictment under attack, it is quite apparent that defendant's motion to quash was properly denied. No defect appears on the face of the indictment. The credit card allegedly withheld is sufficiently described to inform the accused with certainty as to the crime he allegedly committed. Had there been any additional information necessary to the preparation of his defense, he could have requested a bill of particulars prior to the trial. Defendant's first assignment is overruled.

Fred Holt, a special investigator with BankAmericard, North Carolina National Bank, in Greensboro, testified that the bank's IBM computer printout is the official record pertaining to credit cards. Over objection, he was permitted to testify that the official computer printout regarding credit card 434 215 027 2369, issued to Mabel L. Long, showed: (1) That said card was issued on 15 September 1971; (2) that as of 4 February 1972 when the card was reported missing Mrs. Long's balance owed was $7.12; (3) that since 4 February 1972 the card had been used seventy-three times in twenty-two North Carolina cities for purchases totaling $1,209.63, which amount is currently due according to the printout; and (4) that said card was last used on 30 March 1972 in connection with a purchase from Shamrock Hardware in Charlotte. Admission of this testimony constitutes defendant's second assignment of error.

Modern business conditions and methods have long since required revision of the rule of evidence formerly observed by the courts limiting proof of business transactions to matters

within the personal knowledge of the witness. *See Insurance Co. v. R. R.*, 138 N.C. 42, 50 S.E. 452 (1905); *Flowers v. Spears*, 190 N.C. 747, 130 S.E. 710 (1925). "The impossibility of producing in court all the persons who observed, reported and recorded each individual transaction gave rise to the modification which permits the introduction of recorded entries, made in the regular course of business, at or near the time of the transaction involved, and authenticated by a witness who is familiar with them and the method under which they are made. This rule applies to original entries made in books of account in regular course by those engaged in business, when properly identified, though the witness may not have made the entries and may have had no personal knowledge of the transactions." *Supply Co. v. Ice Cream Co.*, 232 N.C. 684, 61 S.E. 2d 895 (1950).

Few courts have dealt with the use in evidence of business records stored on computers. In *King v. State ex rel. Murdock Acceptance Corp.*, 222 So. 2d 393 (Miss. 1969), it was held that printout sheets of business records stored on electronic computing equipment "are admissible in evidence, if relevant and material, without the necessity of identifying, locating and producing as witnesses the individuals who made the entries in the regular course of business if it is shown (1) that the electronic computing equipment is recognized as standard equipment, (2) the entries are made in the regular course of business at or reasonably near the time of the happening of the event recorded, and (3) the foundation testimony satisfes [sic] the court that the sources of information, method and time of preparation were such as to indicate its trustworthiness and justify its admission." *See also Transport Indemnity Co. v. Seib*, 178 Neb. 253, 132 N.W. 2d 871 (1965); *Railroad Commission v. Southern Pacific Co.*, 468 S.W. 2d 125 (Tex. Civ. App. 1971); *Arnold D. Kamen & Co. v. Young*, 466 S.W. 2d 381 (Tex. Civ. App. 1971); McCormick, *Evidence* § 314 (2d ed. 1972); Comment, *Admissibility of Computer Business Records as an Exception to the Hearsay Rule*, 48 N. C. L. Rev. 687 (1970); Note, *Admissibility of Computer Kept Business Records*, 55 Cornell L. Rev. 1033 (1970); Annot., 11 A.L.R. 3d 1368 (1967).

The General Assembly of North Carolina has enacted the following statutes, almost identical, dealing with the subject:

> "§ 55-37.1. *Form of records.*—Any records maintained by a corporation in the regular course of its business, including its stock ledger, books of account, and minute

books, may be kept on, or be in the form of, punch cards, magnetic tape, photographs, microphotographs, or any other information storage device; provided that the records so kept can be converted into clearly legible form within a reasonable time. Any corporation shall so convert any records so kept upon the request of any person entitled to inspect the same. Where records are kept in such manner, the cards, tapes, photographs, microphotographs or other information storage device together with a duly authenticated print-out or translation shall be admissible in evidence, and shall be accepted for all other purposes, to the same extent as an original written record of the same information would have been." Session Laws 1969, c. 751, s. 14.

"§ 55A-27.1. *Form of records.*—Any records maintained by a corporation in the regular course of its business, including its books of account and minute books, may be kept on, or be in the form of, punch cards, magnetic tape, photographs, microphotographs, or any other information storage device; provided that the records so kept can be converted into clearly legible form within a reasonable time. Any corporation shall so convert any records so kept upon the request of any person entitled to inspect the same. Where records are kept in such manner, the cards, tapes, photographs, microphotographs or other information storage device together with a duly authenticated readout or translation shall be admissible in evidence, and shall be accepted for all other purposes, to the same extent as an original written record of the same information would have been." Session Laws 1969, c. 875, s. 6.

These statutes were designed to give broad legislative approval to the use in evidence of corporate computer records. However, in declaring such computer records admissible in evidence "to the same extent as an original written record of the same information would have been," these statutes do not deal with the special problems of reliability created by the use of computers. *See* Note, supra, 55 Cornell L. Rev. 1033 (1970). We therefore construe them as authorizing the admission of corporate computer records under appropriate safeguards deemed sufficient to render them trustworthy. These statutes do not, and were not designed to, preclude judicial development of workable standards for the admission of computerized business records generally.

[2] The rules of evidence governing the admissibility of computerized business records should be consistent with the reality of current business methods and should be adjusted to accommodate the techniques of a modern business world, with adequate safeguards to insure reliability. We therefore hold that printout cards or sheets of business records stored on electronic computing equipment are admissible in evidence, if otherwise relevant and material, if: (1) the computerized entries were made in the regular course of business, (2) at or near the time of the transaction involved, and (3) a proper foundation for such evidence is laid by testimony of a witness who is familiar with the computerized records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy. Computer printout evidence may be refuted to the same extent as business records made in books of account.

[3] Application of the enunciated rule to the case before us impels the conclusion that the computer printout referred to in the testimony of Fred Holt, the special investigator, was inadmissible since no foundation was laid for its admission. In fact, the printout itself was not offered in evidence. Instead, the witness Fred Holt was permitted to testify as to the contents of the printout, and this evidence was likewise inadmissible under the best evidence rule. Stansbury, N. C. Evidence § 190 (Brandis Rev. 1973). *See Supply Co. v. Ice Cream Co., supra* (232 N.C. 684, 61 S.E. 2d 895); *Harris v. Singletary,* 193 N.C. 583, 137 S.E. 724 (1927). Admission of this testimony constitutes prejudicial error requiring a new trial.

Other assignments likely to arise on retrial will be briefly discussed.

Defendant assigns as error the admission of evidence, over objection, that, in addition to the Mabel L. Long card, defendant had three other credit cards in his possession which had been issued in the names of persons other than defendant or members of his immediate family. He contends that in this prosecution for theft of the Mabel L. Long card the State cannot offer evidence tending to show that he has committed other crimes. This constitutes his third assignment of error.

[4] This assignment is overruled for lack of merit. The evidence was competent (1) to make out a *prima facie* case as pro-

vided in G.S. 14-113.10 that defendant had obtained all credit cards in his possession in violation of G.S. 14-113.9(a); (2) to establish a common plan or scheme to commit credit card crimes so related to each other that proof of one or more tends to prove the crime charged and to connect defendant with its commission; and (3) to show criminal intent and guilty knowledge. *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954). *Accord, State v. McClain,* 282 N.C. 357, 193 S.E. 2d 108 (1972); *State v. Fowler,* 230 N.C. 470, 53 S.E. 2d 853 (1949); *State v. Choate,* 228 N.C. 491, 46 S.E. 2d 476 (1948); *State v. Biggs,* 224 N.C. 722, 32 S.E. 2d 352 (1944); Stansbury, N. C. Evidence §§ 91, 92 (Brandis Rev. 1973).

[5] The bill of indictment alleges the Mabel L. Long credit card was issued on 20 September 1971 while the State's evidence tends to show that it was issued on 15 September 1971. Defendant contends this constitutes a fatal variance requiring nonsuit. His fourth assignment of error is based on denial of his motion for judgment of nonsuit at the close of the State's evidence.

While a fatal variance between the indictment and the proof is properly raised by motion for judgment of nonsuit, *State v. Keziah,* 258 N.C. 52, 127 S.E. 2d 784 (1962); *State v. Nunley,* 224 N.C. 96, 29 S.E. 2d 17 (1944), the date upon which the Mabel L. Long card was issued is not necessary to describe the card, is not an essential element of the offense charged, and therefore is not a material fact which the State must allege and prove. Both the allegation and the proof may be disregarded as surplusage. We note that nothing in the record shows that any of the credit cards in defendant's possession, or any other credit cards, bear on their face the date of issuance.

If there is any evidence which tends to prove guilt as a fairly logical and legitimate deduction, as opposed to merely raising a suspicion or conjecture of guilt, nonsuit is properly denied. *State v. Mabry,* 269 N.C. 293, 152 S.E. 2d 112 (1967); *State v. Bogan,* 266 N.C. 99, 145 S.E. 2d 374 (1965). Considering the evidence in the light most favorable to the State, as we are required to do, it is sufficient to repel the motion for nonsuit and carry the case to the jury. Defendant's fourth assignment is overruled.

[6] In light of the evidence in this case and the provisions of G.S. 14-113.10, it was the duty of the court to instruct the jury regarding the legal significance of the State's evidence tending

to show that defendant had in his possession or under his control credit cards issued in the name of two or more persons other than defendant and members of his immediate family. G.S. 14-113.10 expressly provides that the possession of such cards is *prima facie* evidence that the cards were obtained in violation of G.S. 14-113.9(a). Defendant's fifth assignment of error, based on the contention that this portion of the charge should not have been given, is overruled.

For prejudicial error committed in the admission of incompetent evidence concerning computerized business records, there must be a new trial and it is so ordered.

New trial.

Justice HIGGINS dissenting.

The sufficiency of the indictment in this case is directly challenged by the motion to quash. The prosecution is based on the following indictment:

> "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Frank Thomas Springer, Jr. late of the County of Catawba on the 28th day of March, 1972 with force and arms, at and in the county aforesaid, did unlawfully, wilfully, and feloniously withhold a BankAmericard Credit Card from the control and possession of Mabel L. Long, the person named on the face of such Credit Card and to whom the Credit Card had been issued. This withholding was done without the consent of the above named Cardholder, to whom such Credit Card has been issued by North Carolina National Bank on September 20, 1971 and which Card was in effect at the time of such withholding, against the form of the statute in such case made and provided and against the peace and dignity of the State."

The indictment was drawn to charge an offense under G.S. 14-113.9 which provides:

> "*Credit card theft.*—(a) A person is guilty of credit card theft when:
>
> "(1) He takes, obtains or withholds a credit card from the person, possession, custody or control of another without the cardholder's consent or who, with knowledge that it has been so taken, ob-

tained or withheld, receives the credit card with intent to use it or to sell it, or to transfer it to a person other than the issuer or the cardholder; or

"(2) He receives a credit card that he knows to have been lost, mislaid, or delivered under a mistake as to the identity or address of the cardholder, and who retains possession with intent to use it or to sell it or to transfer it to a person other than the issuer or the cardholder; or

"(3) He, not being the issuer, sells a credit card or buys a credit card from a person other than the issuer; or

"(4) He, not being the issuer, during any 12-month period, receives credit cards issued in the names of two or more persons which he has reason to know were taken or retained under circumstances which constitute a violation of G.S. 14-113.13(a)(3) and subdivision (3) of subsection (a) of this section.

"(b) Taking, obtaining or withholding a credit card without consent is included in conduct defined in G.S. 14-75 as larceny.

"Conviction of credit card theft is punishable as provided in G.S. 14-113.17(b). (1967, c. 1244, s. 2)."

In my opinion, a valid indictment must charge the theft of the credit card. The indictment in this case actually charges that which the statute says will be sufficient evidence to make out a case of theft against the person in possession of the stolen card.

In my opinion, the indictment fails to charge the crime of theft and the motion to quash should have been allowed.

ROBERT F. SUMMEY, JR., PLAINTIFF v. HAZEL ALEXANDER CAUTHEN, JR., DEFENDANT

— AND —

PLYWOOD SALES COMPANY, INC., DEFENDANT AND THIRD-PARTY PLAINTIFF

— AND —

VICTOR CARROLL CAUTHEN, THIRD-PARTY DEFENDANT

No. 78

(Filed 12 July 1973)

1. **Automobiles § 51— striking turning vehicle — sufficiency of evidence of negligence**

In an action by an automobile passenger to recover for injuries sustained in a collision between the automobile and a truck, the evidence was sufficient to be submitted to the jury on the issue of negligence by the automobile driver where it tended to show that the accident occurred while the truck was attempting to make a left turn across the automobile's lane of travel on a four-lane highway, the automobile driver was familiar with the road at the scene of the collision, the speed limit was 45 mph, the automobile driver rounded a blind curve prior to the point of collision in excess of 60 mph, upon rounding the curve he could have seen the truck giving a left turn signal and slowly moving across the center line 300 feet in front of him, and when he applied his brakes his tires smoked and left heavy skid marks on the surface of the road 93 feet before the impact.

2. **Rules of Civil Procedure § 50— judgment n.o.v. — consideration of evidence**

In passing on a motion for judgment n.o.v., the court must view the evidence in the light most favorable to the non-movant.

3. **Rules of Civil Procedure § 50— error in allowing motion for judgment n.o.v.**

The motion for judgment n.o.v. is that judgment be entered in accordance with the movant's earlier motion for a directed verdict; consequently, where the trial court properly denied defendants' motion for directed verdict, it was error for the court thereafter to allow defendants' motion for judgment n.o.v.

4. **Trial § 42— finding of contributory negligence — award of damages — surplusage**

Where the jury found that plaintiff was injured and damaged by the negligence of defendant's agent and that the agent by his own negligence contributed to his own injuries, neither defendant nor his agent is entitled to recover damages from the codefendant, and an-

swers of the jury awarding such damages are surplusage and must be stricken and disregarded in rendering judgment.

APPEAL by defendant Plywood Sales Company, Inc., from *McLean, J.*, at the 11 September 1972 Session of GASTON, heard prior to determination by the Court of Appeals.

On 16 September 1969, Robert F. Summey, Jr., while riding as a passenger in a family purpose automobile, owned by Hazel Alexander Cauthen, Jr., and driven with his permission by his son Victor Cauthen, was severely injured in a collision between the Cauthen automobile and a truck owned by Plywood Sales Company, Inc., hereinafter called Plywood, and driven by its employee, Bobby Earl Roberson, then acting in the course of his employment. The collision occurred at approximately 9:45 a.m. on New Hope Road, a four lane, paved road in Gastonia. The weather was fair and the road was dry.

At the point of collision New Hope Road had four lanes of traffic, two northbound and two southbound. It was not a divided highway. A double yellow line, indicating no passing, ran along the center of the road. To the east a housing project was under construction. At the point of collision an old driveway had been opened up as a new street or road, called Hoffman Road, leading to the housing project. Vehicles moved along it to and from New Hope Road from time to time, though the record does not indicate that it had been opened for general use. To the south of the point of collision New Hope Road rounded a blind curve.

Plywood's truck, heavily loaded with plywood for delivery at the housing project, approached the point of collision from the north in the inside lane for southbound traffic. The driver, Roberson, stopped abreast of Hoffman Road, intending to make a left turn into that road for the delivery of his cargo. After coming to a full stop, Roberson set the truck again in motion toward Hoffman Road. The Cauthen vehicle, headed north, rounded the curve. At the point of collision the Cauthen vehicle was in the outside or easternmost lane for northbound traffic. The front of the truck struck the Cauthen vehicle in its left side from about the front wheel to the driver's door. Both the plaintiff and Victor Cauthen sustained severe personal injuries.

Robert F. Summey, Jr., brought suit for damages against Hazel Alexander Cauthen, Jr., and Plywood, alleging that their respective agents were negligent, in specified particulars, in the

operation of their respective vehicles and that the negligence of each was a concurring proximate cause of the collision and of his injuries. Plywood and Hazel Alexander Cauthen, Jr., filed answers, each denying the negligence by its or his driver and alleging that the sole proximate cause of the collision was the negligence of the driver of the other vehicle, as alleged in the complaint. Each of these defendants filed a cross-claim against the other for contribution and a further cross-claim for damages to its or his own vehicle. Plywood also made Victor Cauthen a third party defendant and filed its complaint against him for contribution in the event that Plywood should be found liable in damages to Robert F. Summey, Jr. Victor Cauthen filed answer to such third party complaint, denying his negligence and his liability to Plywood for contribution, and asserting a cross-claim against Plywood for damages for his own injuries in the collision. Plywood and Hazel Alexander Cauthen, Jr., filed replies to the various cross-claims against them.

At the close of all the evidence Plywood, Hazel Alexander Cauthen, Jr., and Victor Cauthen each moved for a directed verdict in its or his favor on the action of the plaintiff and on the respective cross-claims against it or him. These motions were all denied, except that the motion of each of the Cauthens to dismiss the cross-claim of Plywood for the recovery of its damage was allowed.

The following issues were submitted to the jury and answered as indicated:

1. Was the plaintiff injured and damaged by the negligence of the agent of the defendant Plywood Company, Inc., as alleged in the complaint?

   ANSWER: Yes.

2. Was the plaintiff injured and damaged by the negligence of the agent of Hazel Alexander Cauthen, Jr., as alleged in the complaint?

   ANSWER: Yes.

3. What damages, if any, is the plaintiff entitled to recover?

   ANSWER: $30,000.00.

4. Was the defendant Victor Cauthen injured and damaged by the negligence of the defendant Plywood Sales Company, Inc., as alleged in the Cross-action?

   ANSWER: Yes.

5. Did the defendant, Victor Cauthen, by his own negligence contribute to his injuries and damages as alleged in the Answer of Plywood Sales Company, Inc.?

   ANSWER: Yes.

6. What damages, if any, is the defendant, Victor Cauthen, entitled to recover of and from the Plywood Sales Company, Inc.?

   ANSWER: $15,000.00.

7. What damages, if any, is the defendant, Hazel Alexander Cauthen, Jr., entitled to recover (a) for his property damages; and (b) for the medical expenses of his son, Victor Cauthen?

   ANSWER: (a) $2,650.00.

   (b) $2,800.00.

Following the return of the verdict, Hazel Alexander Cauthen, Jr., and Victor Cauthen each moved to have the verdict and any judgment entered thereon against such moving party set aside and for judgment in favor of such moving party notwithstanding the verdict pursuant to Rule 50(b)(1). Plywood then moved that the court treat as surplusage the answers of the jury to Issues 6 and 7 and for the entry of a judgment in favor of the plaintiff against the defendants in accordance with the jury's answers to the first three issues and dismissing all cross-claims and counterclaims by the defendants against each other for the recovery of their own damages.

The Superior Court entered judgment as follows: (1) It allowed the motions of Hazel Alexander Cauthen, Jr., and Victor Cauthen to set aside the verdict as to Issues 2 and 5; (2) it allowed the motion of Hazel Alexander Cauthen, Jr., and the motion of Victor Cauthen for a judgment notwithstanding the verdict on those two issues; (3) it gave judgment for the plaintiff against Plywood in the amount of $30,000; (4) it gave judgment in favor of both Hazel Alexander Cauthen, Jr., and

Victor Cauthen with respect to the claim of the plaintiff; (5) it gave judgment in favor of Victor Cauthen against Plywood in the amount of $15,000; (6) it gave judgment in favor of Hazel Alexander Cauthen, Jr., against Plywood in the amount of $5,450; (7) in the event that such judgments notwithstanding the verdict are vacated on appeal, it allowed a new trial to the defendant Hazel Alexander Cauthen, Jr., and to Victor Cauthen as to Issues 2 and 5; and (8) it adjudged that Plywood pay the costs of the action.

All of the foregoing matters are undisputed. The following is a summary of the evidence as to the matters in dispute:

The plaintiff, Robert F. Summey, Jr., testified that he does not recall seeing the truck or any of the circumstances of the collision. The speed limit on New Hope Road, at the point of collision and as one approached it from the south, was 45 miles per hour. The Cauthen car was in the outside lane for northbound traffic. Victor Cauthen did not operate the automobile in any way such as to cause Summey to ask him to slow down or to stop.

Sergeant Abernethy of the Gastonia City Police, a witness for the plaintiff, testified that a motorist stopped in the intersection of New Hope Road and Hoffman Road, looking south, would be able to see a northbound vehicle at a distance of approximately 150 feet. He observed debris on the road approximately at the front end of the truck and six feet south of the Cauthen automobile. Skidmarks in the northbound traffic lane extended southward from the debris 93 feet.

Bobby Earl Roberson, driver of Plywood's truck but a witness called by the plaintiff, testified that he was delivering a load of plywood to the housing development and had made similar trips several times previously. Consequently, he was familiar with New Hope Road at the point of collision. Hoffman Road was the proper place for him to turn in to deliver his cargo. Traffic went in and out upon it frequently. The truck had a great deal of pulling power, having dual wheels in the back and two axles. Its cab was over the wheels and, as he sat in it, he was some seven feet above the road. When he arrived at the intersection of New Hope Road and Hoffman Road, he brought his truck to a complete stop and shifted into first (low) gear. The truck had air brakes which were in good condition. He looked to the south. Seeing a pickup truck coming, he waited until it went by. At that time, no part of the wheels were

across the double yellow line. After the pickup truck passed, he again looked south on New Hope Road and saw nothing coming. He proceeded slowly, in first gear, to move out to cross the northbound lanes. The highest speed he attained prior to the collision was about three miles per hour. He saw the Cauthen automobile when it came around the curve about 300 feet away and tried to stop. The heavily loaded truck, then almost across the inner northbound lane, just kept pushing forward. It went about four feet into the outside lane for northbound traffic, having moved about 14 feet from its stopped position. At the impact, the truck stopped and the motor cut off. The truck was moving forward when he first saw the Cauthen automobile approximately 300 feet away. The Cauthen automobile was traveling in excess of 60 miles an hour. Cauthen applied his brakes and Roberson "could see the smoke coming off his tires." As Roberson approached the intersection, he gave a left turn signal with his flashing electric light. When he started across, after having come to a complete stop, he went straight across the highway and when he saw the Cauthen automobile approaching, he cut back to his right to avoid the collision.

Victor Cauthen, a witness for the plaintiff, testified the brakes and tires on the Cauthen car were in good condition. He approached the point of collision in the outermost northbound lane. He approached the curve and the intersection at a speed of 40 to 45 miles per hour. He saw the truck sitting, stopped, in the intersection with the left front of it over the yellow line. He was then traveling at a speed of less than 40 miles per hour. He saw no left turn signal blinker on the truck. Nothing caused him to think the truck would move out in front of him. He had time to "tap his brakes" one or more times before the collision. As he proceeded on in his lane of traffic, the truck came across into that lane and Cauthen then applied his brakes hard. The collision then occurred. He was not exceeding 45 miles per hour. He was about 70 yards (210 feet) from the truck when he first saw it, stopped with a small portion of its left wheel over the yellow line. The Cauthen car traveled about 35 yards (105 feet) before the truck started to move. Cauthen was knocked unconscious by the collision. He had never seen traffic going in or out of Hoffman Road prior to this occasion.

Guy S. Schronce, Jr., a witness for Plywood, testified that he was driving a motor grader south on New Hope Road, overtaking, beside and passing Plywood's truck at the time of the

collision, he being in the outermost of the southbound lanes. The height of the motor grader was such that he was sitting two or three feet higher than the driver of Plywood's truck. The truck stopped in the innermost of the southbound lanes. It was giving a left turn blinker signal. After it stopped, a northbound pickup truck came by. After it passed, Plywood's truck was still stopped. It then began to make the left turn. After the pickup truck passed, Mr. Schronce observed the Cauthen automobile proceeding north on New Hope Road approximately 300 to 350 feet away [he presumably being able to see that distance due to the height of his seat on the motor grader]. There was no other traffic coming north along New Hope Road. He saw the Cauthen automobile coming around the curve after Plywood's truck had started across and had gotten "to about the line in the middle of the two lanes going north." The Cauthen car came around the curve in the middle or innermost northbound lane and then swerved to the outside lane. The Plywood truck driver applied his brakes and tried to make a right hand turn but moved very little to the right. The driver of the Cauthen car applied his brakes and then there was a collision. It was only about two seconds from the time Mr. Schronce saw the Cauthen car come around the curve until the collision occurred. He watched the Cauthen car long enough to form an opinion as to its speed. In his opinion the Cauthen car was "doing over 50 miles per hour." It slowed down only after the driver applied its brakes, and was going approximately 15 to 20 miles an hour at the time of the impact. At the time of impact Plywood's truck had gone approximately a foot into the outermost of the two northbound lanes. The impact caused the front of the truck to be knocked around to its left about one foot and then the truck stopped. Mr. Schronce could not say whether any part of the left front wheel of Plywood's truck was over the yellow line as it stood stopped waiting for the pickup truck to pass, not then having a view of that wheel. He was right beside the truck when it started its left turn after the pickup truck had passed. He himself was traveling southward at 20 to 25 miles an hour. He stood up in the cab of the grader and looked back to his left to see the accident. When he first saw the Cauthen automobile it was 150 to 200 feet from him and in his opinion was traveling "over 50 miles an hour." Plywood's truck moved a foot or a foot and a half after the collision.

Robert F. Summey, Jr., recalled as a witness in his own behalf, testified that when Mr. Roberson, the driver of Ply-

wood's truck, came over to him as he lay on the ground after the collision, he said, "I'm sorry; I didn't see you coming."

Roberson, when testifying as a witness for the plaintiff, said he did not make such a statement to the plaintiff.

Mr. Schronce testified that he immediately stopped and rendered assistance but did not hear Roberson make such a statement.

Frank Patton Cooke for plaintiff.

Hollowell, Stott & Hollowell and Mullen, Holland & Harrell by Grady B. Stott for Hazel Alexander Cauthen, Jr., and Victor Carroll Cauthen.

Carpenter, Golding, Crews & Meekins by James P. Crews for Plywood Sales Company, Inc.

LAKE, Justice.

There was no error in the denial of the motions of the defendants Cauthen, at the conclusion of all the evidence, for a directed verdict in their favor on Issues 2 and 5. The question raised by such a motion is whether there is evidence sufficient to go to the jury. This is substantially the same question as that formerly presented by a motion for judgment of involuntary nonsuit. *Younts v. Insurance Co.*, 281 N.C. 582, 189 S.E. 2d 137; *Investment Properties v. Allen*, 281 N.C. 174, 188 S.E. 2d 441; *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297; *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396. In passing upon such a motion, the court must consider the evidence in the light most favorable to the non-movant. *Investment Properties v. Allen, supra.* That is, the evidence in favor of the non-movant must be deemed true, all conflicts in the evidence must be resolved in his favor and he is entitled to the benefit of every inference reasonably to be drawn in his favor. *Younts v. Insurance Co., supra; Investment Properties v. Allen, supra; Adler v. Insurance Co.*, 280 N.C. 146, 185 S.E. 2d 144; Phillips' Supplement to McIntosh, North Carolina Practice and Procedure, 2d Ed., § 1488.15(1) (2).

[1] So viewed, the evidence is sufficient to show that Victor Cauthen, the driver of the automobile, was familiar with the road at the scene of the collision, that though the speed limit was 45 miles per hour he rounded the curve at a speed in ex-

cess of 60 miles per hour, that upon rounding the curve he could have seen the truck giving a signal for a left turn and slowly moving across the center line in the course of such turn 300 feet in front of him, and that when he applied his brakes, his tires smoked and left heavy skid marks on the surface of the road 93 feet before the impact. If true, as for the purpose of this motion must be assumed, this is ample evidence to support the finding by the jury that Victor Cauthen, and so Hazel Alexander Cauthen, Jr., whose agent he was, was negligent, that such negligence was one of the proximate causes of the collision and resulting injury to the plaintiff and that such negligence contributed to the injuries of Victor Cauthen. *Day v. Davis,* 268 N.C. 643, 151 S.E. 2d 556; *Rogers v. Rogers,* 265 N.C. 386, 144 S.E. 2d 48; *Raper v. Byrum,* 265 N.C. 269, 144 S.E. 2d 38; *Bridges v. Jackson,* 255 N.C. 333, 121 S.E. 2d 542; *Lemons v. Vaughn,* 255 N.C. 186, 120 S.E. 2d 527; 1 Strong, N. C. Index 2d, Automobiles, § 58. Thus, there was ample evidence to require the submission to the jury of Issues 2 and 5.

[2, 3] "The propriety of granting a motion for judgment notwithstanding the verdict is determined by the same considerations as that of a motion for a directed verdict." Sizemore, General Scope and Philosophy of the New Rules, 5 Wake Forest Law Review 1; Phillips' Supplement to McIntosh, North Carolina Practice and Procedure, 2d Ed., § 1488.35. Thus, in passing on a motion for judgment n.o.v., the court must view the evidence in the light most favorable to the non-movant. *Investment Properties v. Allen, supra.* The motion for judgment n.o.v. is that judgment be entered in accordance with the movant's earlier motion for a directed verdict, notwithstanding the contrary verdict actually returned by the jury. Rule 50(b), Rules of Civil Procedure, G.S. Chapter 1A. Consequently, the court below erred in entering judgment for Hazel Alexander Cauthen, Jr., and Victor Cauthen in disregard of the jury's verdict on Issues 2 and 5.

As permitted by Rule 50(c), the Cauthens coupled with their motion for judgment n.o.v. an alternative motion for a new trial "on the grounds that the evidence is insufficient to justify the jury verdict and the verdict is contrary to law." The Superior Court granted this motion conditionally "as to the second and fifth issues" in the event that its judgment n.o.v. be vacated or reversed on appeal, stating as its ground for so doing "that the evidence is insufficient to justify the verdict

on issues two and five and the verdict is contrary to law." In such a situation, as Dean Phillips has said in his supplement to McIntosh, North Carolina Practice and Procedure, 2d Ed., § 1488.45:

> "This is a final judgment. The Appellate Court may reverse the grant of judgment n.o.v. If it does this and nothing more, the new trial proceeds upon remand. But the Appellate Court may also reverse on the grant of new trial, in which event the judgment of the verdict winner must be reinstated."

As above shown, our review of the record leads us to the conclusion that the trial judge was in error in his view that the evidence is insufficient to justify the verdict of the jury on Issues 2 and 5 and we find no error in the record prejudicial to either Hazel Alexander Cauthen, Jr., or to Victor Cauthen. We, therefore, vacate the order of the Superior Court granting a new trial on these issues.

[4] We are thus brought to the question of the judgment to be entered on the verdict returned by the jury. The jury having found in Issue No. 2 that the plaintiff was injured and damaged by the negligence of the agent of Hazel Alexander Cauthen, Jr., as alleged in the complaint, the agency being admitted, and having found in answer to Issue No. 5 that Victor Cauthen by his own negligence contributed to his own injuries, as alleged in the answer of Plywood, it follows, as a matter of law, that neither of the Cauthens is entitled to recover damages from Plywood, and the answers of the jury to Issues 6 and 7 are surplusage which must be stricken and disregarded in rendering judgment. *Swann v. Bigelow,* 243 N.C. 285, 90 S.E. 2d 396; Strong, N. C. Index 2d, Trial, § 42.

We, therefore, reverse the judgment of the Superior Court and remand this matter to it for the entry of a judgment, in accordance with the verdict of the jury upon Issues 1 through 5, inclusive; that is, that the plaintiff have and recover of the defendants Plywood Sales Company, Inc., and Hazel Alexander Cauthen, Jr., $30,000, and that Hazel Alexander Cauthen, Jr., and Victor Cauthen have and recover nothing of the defendant Plywood Sales Company, Inc., on account of their damages and injuries alleged in their respective cross-complaints.

Reversed.

IN THE MATTER OF: APPEAL OF McLEAN TRUCKING COMPANY, WINSTON-SALEM, NORTH CAROLINA, FROM AN ACTION OF THE FORSYTH COUNTY BOARD OF COMMISSIONERS PLACING THE TAXABLE SITUS OF CERTAIN OF THE APPELLANT'S OVER-THE-ROAD VEHICLES IN WINSTON TOWNSHIP (CITY OF WINSTON-SALEM), NORTH CAROLINA, AS OF JANUARY 1, 1969

No. 95

(Filed 12 July 1973)

1. **Taxation § 25— property listed in wrong township — discovered property**

Where a trucking company's tractors and trailers should have been listed for ad valorem taxation for 1970 in the city and township where its principal office was located but were improperly listed in another township, the city had authority to list and collect taxes on such equipment for 1970 as "discovered property" and to assess taxes on the property for any of the preceding five years in which the property escaped taxation by the city. G.S. 105-331.

2. **Taxation § 25— meaning of "discovered property"**

As used in former G.S. 105-332, the phrase "discovered property" means property which the tax authorities have ascertained should have been listed for tax purposes by the owner but which was not so listed.

APPEAL by City of Winston-Salem and Forsyth County from the restraining order entered by *Wood, J.*, upon motion in the above listed cause at the January 22, 1973 Civil Session, FORSYTH Superior Court. All parties stipulated that the original records in Cases Nos. 65 and 66 and reported in 281 N.C. 242, 188 S.E. 2d 452, and 281 N.C. 375, 189 S.E. 2d 194, may be considered by the Court without being reprinted as a part of the record on this appeal.

In short summary, the records in the prior cases disclose the following: McLean Trucking Company for many years prior to 1969 conducted a large interstate transportation business in which it used many tractors and trailers. A part of this equipment has been determined to be taxable in North Carolina. McLean Trucking Company's main office was located in the City of Winston-Salem, Forsyth County.

For a number of years prior to 1969, McLean Trucking Company owned a storage lot in Broadbay Township where it listed its tractors and trailers for county tax purposes. For the tax year 1969, the City of Winston-Salem (coterminous with Winston Township) made an unsuccessful effort to list and tax

the tractors and trailers for city tax purposes at the situs of the Trucking Company's home office.

In Case No. 66, *In re Trucking Company,* reported in 281 N.C. 375, this Court held that all tractors and trailers (taxable in North Carolina) should be listed at the situs of McLean's home office in the City of Winston-Salem (Winston Township) and not in Broadbay Township where McLean attempted to list them. It is obvious, of course, that insofar as concerns the county taxes, it is immaterial whether the listing was in Winston Township or Broadbay Township. The county rate is uniform for all townships. By listing in Broadbay Township, McLean escaped all city taxes on the tractors and trailers.

The City of Winston-Salem claimed the right to list and tax McLean's trucking equipment for that year (1969) as "discovered property" and to exercise its right to subject the property to city taxes for the preceding five years. This Court in *In re Trucking Company,* 281 N.C. 242, held that the city's attempt to make the listing was ineffectual for two reasons: (1) The Board of Equalization and Review had finished its work and had adjourned prior to the city's attempt to make the listing; and (2) the equipment could not be listed as "discovered property."

For the year 1970, McLean again listed its transportation equipment in Broadbay Township. The city listed the equipment on its tax books as "discovered property" for the year 1970, computed the city taxes for that year, and for the preceding five years. McLean obtained the restraining order now challenged. The city and county appealed. Upon stipulation of all parties, this Court certified the record for review here prior to consideration by the Court of Appeals.

Hamrick, Doughton and Newton by Claude M. Hamrick and George E. Doughton, Jr., for appellee.

Womble, Carlyle, Sandridge & Rice by W. F. Womble and Roddey M. Ligon, Jr., for appellant City of Winston-Salem.

P. Eugene Price, Jr., for appellant Forsyth County.

HIGGINS, Justice.

The appeal challenges the validity of the restraining order which prohibits the City of Winston-Salem from collecting city taxes on McLean Trucking Company's equipment for each of

the years 1965-66-67-68-69. All parties concede the city is entitled to collect (and apparently has already collected) the taxes for the year 1970.

Our former decisions establish these propositions of law: (1) The proper situs for the listing of all McLean's rolling stock is, and has been at all times, Winston-Salem which is coterminous with Winston Township, and not in Broadbay Township where the owner had made the listing. The city tax authorities attempted to list and collect taxes for the year 1969. (2) This Court in Case No. 65 (decided May 10, 1972) held the city's attempt was ineffectual for two reasons assigned in the opinion.

For the year 1970 the city authorities listed all of McLean's equipment in Winston-Salem contending that the equipment should have been at all times listed in the city where McLean's home office was located and never at any time should have been listed in Broadbay Township. The city's tax authorities assessed the taxes not only for the year 1970, but for the preceding five years, contending the equipment was "discovered property" within the meaning of the tax laws, and taxable for each of the preceding five years during which the property had escaped taxation. G.S. 105-302 provided:

> *"Place for listing tangible personal property.*—(a) Except as otherwise provided in this section, all tangible personal property and polls shall be listed in the township in which the owner thereof has his residence. . . ."

The law in effect for the taxing years involved was G.S. 105-331 providing for discovery and assessment:

> "(a) . . . It shall be the duty of . . . the list takers to be constantly looking out for property and polls which have not been listed for taxation. . . .
>
> "(b) Procedure upon Discovery.—When property or polls are discovered they shall be listed in the name of the taxpayer. . . .
>
> "(c) Assessment for Previous Years; Penalties.—The county commissioners may assess any such property or list such poll for the preceding years during which it escaped taxation, not exceeding five, in addition to the current year. . . .
>
> When personal property is discovered which should have been listed for the current year, it shall be presumed

that such property should have been listed by the same taxpayer for the preceding five years, unless the taxpayer shall produce satisfactory evidence that such property was not in existence, that it was actually listed for taxation or that it was not his duty to list the same during said years. . . .

"(d) . . . .

"(e) Application to Cities and Towns.—The provisions of this section shall extend to all cities, towns and other municipal corporations having power to tax property or polls. . . . "

The taxpayer has contended that the listing of the rolling stock in Broadbay Township was a sufficient listing to prevent the application of the "discovered property" statute. G.S. 105-332. The contention is not sustained by the facts and the wording of the statute. The section specifies "All property and polls *validly listed for taxation. . . .*" (Emphasis added.) The listing in Broadbay Township was not a valid listing. McLean was not authorized to list its property anywhere except the situs of its home office. *In re Trucking Company,* 281 N.C. 375.

[1] From the foregoing we conclude: (1) McLean's attempt to list its rolling stock in Broadbay Township was in contravention of the requirement that personal property *shall* be listed in the place of the owner's residence, or if a corporation, at the place of its home office. (2) The tax authorities of the City of Winston-Salem had power to list and collect McLean Trucking Company's taxes on its tractors and trailers for the year 1970 as "discovered property." (3) The city has the right to impose taxes for the preceding five years or for any of them in which the property escaped taxation.

[2] This decision requires a re-examination of the tax agent's right to list "discovered property." This Court in Case No. 65 (decided May 10, 1972) discussed the question. However, the Court only defined "discovered" and not the phrase "discovered property." The Court adopted the dictionary's definition of "discovered"—"newly found, not previously known." The definition of "discovered" is unobjectionable, but the conclusion does not follow that "discovered property" means property that was newly found or not previously known. The phrase "discovered property" means property which the tax authorities have ascertained should have been listed for tax purposes by the owner

but which was not so listed, thus the property escaped taxation. This definition, we think, is inescapable when the legislative history of the phrase "discovered property" is taken into account.

The General Assembly in 1939, G.S. 105-331, states:

> *"Discovery and assessment of property not listed during the regular listing period.*—(a) . . . . It shall be the duty of the members of the board of commissioners, the supervisor and the list takers to be constantly looking out for property and polls which have not been listed for taxation. . . .
>
> "(b) Procedure upon Discovery.—When property or polls are discovered they shall be listed in the name of the taxpayer . . . .
>
> "(c) Assessment for Previous Years; Penalties.—The county commissioners may assess any such property or list such poll for the preceding years during which it escaped taxation, not exceeding five, in addition to the current year. . . .
>
> "(d) . . . .
>
> "(e) Application to Cities and Towns.—The provisions of this section shall extend to all cities, towns and other municipal corporations having power to tax property or polls, and the power conferred and the duties imposed . . . shall be exercised and performed by the governing body of the municipal corporation."

Personal property, and polls as well, were objects of discovery if unlisted for tax purposes at the home of the owner. Formerly a poll tax was imposed upon all males between the ages of 21 and 55. Polls being included on the same terms as personal property, it cannot be said that each "poll" a male between 21 and 55 was "newly found, not previously known."

The law in effect at the time pertinent to decision authorized the authorities to list and tax personal property which the owner had failed to list in the proper tax situs. McLean Trucking Company never listed for any of the years involved any of its rolling stock which the city now seeks to tax. This fact alone gave the authorities the right to place the property on the city's tax records as "discovered property."

The foregoing interpretation of "discovered property" as defined by the law in effect at the time of the listing, is supported and confirmed by the General Assembly's recent dealing with the subject.

In 1969 the General Assembly by Resolution No. 92 created a commission for the study of local and ad valorem taxes in the State of North Carolina and to make recommendations to the Governor and to the 1971 General Assembly. The study commission recommended that the phrase "discovered property" shall include not only that which the owner failed to list, *but should include also that which the owner substantially understated the value, quantity, or other measurement.* The commission recommended that the substantial understatement of value or quantity provision should also be treated as "discovered property."

The new Machinery Act, drawn in conformity with the commission's recommendations and passed as Chapter 806, Session Laws of 1971, now G.S. 105-312 provides:

> "(1) The phrase 'discovered property' shall include property that was not listed by the taxpayer or any other person during a regular listing period and also property that was listed but with regard to the value, quantity, or other measurement of which the taxpayer made a substantial understatement in listing.
>
> "(2) . . . .
>
> "(3) The phrase 'to discover property' shall refer to the determination that property has not been listed during a regular listing period and to the identification of the omitted item. For discoveries made after July 1, 1971, and in future years, the phrase shall also refer to the determination that listed property was returned by the taxpayer with a substantial understatement of value, quantity, or other measurement."

Section 3 makes understatement of value or quantity "discovered property" after July 1, 1971. Property which the owner failed to list has been "discovered property" since 1939.

For the reasons above stated we find it necessary to reverse the restraining order entered by Judge Wood and remand the case to the end that the City of Winston-Salem may proceed to levy and collect taxes for any years prior to 1970, not in excess

of five, in which McLean's property escaped taxation, with this one exception: Taxes for the year 1969 were dealt with in our decision in Case No. 65 in which we denied the right of the city to tax the rolling stock for the year 1969. That decision is res judicata as to the year 1969 and is not subject to collateral attack. Therefore, in assessing the property for any of the taxation years preceding 1970, the year 1969 shall not be included. At most, the city can assess only for 1965 through 1968.

The restraining order entered by Judge Wood is vacated and the proceeding remanded for disposition as here directed.

Vacated and remanded.

THOMAS SMITH AND JEANNIE RUTH HEGGINS v. GORDON T. VONCANNON AND KIRK'S TAXI SERVICE, INC.

No. 64

(Filed 12 July 1973)

1. **Rules of Civil Procedure § 50— motion for directed verdict — review by court on appeal**

The question for a reviewing court on an appeal from a judgment on a directed verdict in favor of the defendant is whether the evidence in the record, considered in the light most favorable to the plaintiffs and giving them the benefit of every reasonable inference therefrom, would have been sufficient to support a verdict in their favor.

2. **Negligence § 59; Trespass § 7— automobile striking house — showing of wrongful act or negligence necessary for recovery of damages**

Evidence that the defendant drove an automobile off the public highway and across private property so that it struck a building is not sufficient to entitle the innocent owner of the building to recover damages; rather, there must be proof of some wrongful act or neglect of the defendant which was the proximate cause of the injury.

3. **Negligence § 59; Trespass § 1— trespasser — licensee — definitions**

A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise, while a licensee is a person who is privileged to enter or remain on land only by virtue of the possessor's consent.

4. **Trespass § 6— acts of landowner — local customs — relevancy on issue of consent**

Consent to enter land in the possession of another may be implied, and acts of the possessor as well as customs in the community should be considered in determining whether there has been consent to enter.

5. **Trespass § 7— construction of driveway — implied consent to enter**

The construction of a driveway or walkway leading to the entrance of a residence may, in the absence of notice to the contrary, be reasonably construed, not only by acquaintances of the landowner but also by strangers, as an expression of the landowner's consent to their entry thereon for the purpose of approaching and entering the house on any lawful mission.

6. **Trespass § 7— entry into driveway by taxicab — no trespass — taxi striking house during assault by passenger — directed verdict for taxi driver proper**

Where the evidence tended to show that defendant cabdriver entered plaintiff's driveway either to discharge his passenger or to turn around, the passenger assaulted defendant and, in the process of defending himself, defendant allowed his vehicle to roll into plaintiff's house causing damage, the trial court properly directed verdict for defendant in plaintiff's action to recover for damage to the house since the evidence was insufficient to show a trespass upon plaintiff's property by defendant.

APPEAL by plaintiffs from the decision of the Court of Appeals, reported in 17 N.C. App. 438, 194 S.E. 2d 362, rehearing allowed with no change in result, Brock, J., dissenting. The Court of Appeals found no error in the allowance by *Warren, D. J.*, in the District Court of Rowan County, of the defendants' motions for a directed verdict at the close of the plaintiffs' evidence.

On 27 April 1971, the plaintiffs were the owners of a house and lot in the City of Salisbury, known as 206 York Road, and the plaintiff Heggins was in possession of it. The plaintiffs sue for damage to the house caused by a taxicab, owned by Kirk's Taxi Service, Inc., and driven by VonCannon, running into it. They allege that VonCannon was an employee of the taxi company and was acting in the course of his employment. They further allege that his entry on their land was intentional and unauthorized and, therefore, constituted a trespass. The defendants allege that the damage to the property was proximately caused by the criminal act of a passenger in the taxicab, who directed VonCannon to drive to the house and struck him in an attempt to rob him, in the course of which attempt the taxicab moved forward and struck the house.

At the close of the plaintiffs' evidence, the defendants moved for a directed verdict, pursuant to Rule 50 of the Rules of Civil Procedure, upon the ground that the evidence of the plaintiffs failed to prove a claim upon which relief can be granted. It appearing to the district judge that the evidence

failed to show an unlawful trespass by either of the defendants, or other facts upon which relief could be granted, and that the plaintiffs had failed to show that VonCannon was the agent of Kirk's Taxi Service, Inc., the court granted the motion. Judgment for the defendants was entered accordingly.

The plaintiff Heggins testified that on 27 April 1971 she returned to her home about 9:30 p.m. and found that, in her absence, the house had been severely damaged. The house is in a remote area and is the last house on York Road, which dead ends just beyond the driveway leading to the house of the plaintiffs. She was expecting no caller that evening. Just past her driveway there is "a turn around area" at the end of the road, some 50 to 100 feet past the driveway.

Lieutenant George Peeler of the Salisbury Police Department testified that in response to a radio dispatch from police headquarters, about 9:00 p.m., he went to Kirk's taxi stand where he saw the defendant VonCannon in the outer office. VonCannon told Lieutenant Peeler that he had been in his cab at a cab stand when a Negro man got into it, saying he wanted to go "out on Bringle Ferry Road." VonCannon drove out on the Bringle Ferry Road and his passenger then directed him to go "down York Road," which VonCannon did. When he got to the end of York Road, VonCannon "pulled in to the right" and stopped. Thereupon, his passenger hit him two or three times. VonCannon turned around to grab his assailant, but the assailant jumped from the cab and fled. VonCannon told Lieutenant Peeler that he, VonCannon, then drove back to the cab stand and reported what had happened and "they" called the police. It is a mile or more from York Road to Kirk's taxi stand. VonCannon did not use the radio in his cab to report the occurrence. Lieutenant Peeler observed blood on VonCannon and on the front seat of the cab. He also observed the microphone receiver of the cab radio down on the floor board.

The plaintiffs' house is below the level of the road, so that the driveway runs down hill from the road to the house. The alleged assailant of VonCannon has never been arrested. VonCannon told Lieutenant Peeler that he, VonCannon, never lost consciousness after being struck. At the time of the first interview, VonCannon "forgot" to tell Lieutenant Peeler that the taxicab had hit the house. When subsequently interviewed again in the emergency room of the hospital, VonCannon told Lieutenant Peeler that his assailant jumped out of the car when

VonCannon reached around to grab him, and when VonCannon turned back around, the car "just rolled into the house."

VonCannon's answers to interrogatories were read to the jury. Therein, he described his assailant and stated that he was stopped four to six feet from the house when he was struck. It is 15.5 feet along the driveway from the property line to the wall of the house.

Burke & Donaldson by Arthur J. Donaldson for plaintiffs.

Kluttz & Hamlin by Lewis P. Hamlin, Jr., and Richard R. Reamer for defendants.

LAKE, Justice.

[1] The question for the reviewing court on an appeal from a judgment on a directed verdict in favor of the defendant is the same as that presented by an appeal from a judgment of involuntary nonsuit under our practice prior to the adoption of the Rules of Civil Procedure. *Younts v. Insurance Co.*, 281 N.C. 582, 189 S.E. 2d 137; *Investment Properties v. Allen*, 281 N.C. 174, 188 S.E. 2d 441; *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297; *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396. Thus, the question presented by this appeal is whether the evidence in the record, considered in the light most favorable to the plaintiffs and giving them the benefit of every reasonable inference therefrom, would have been sufficient to support a verdict in their favor.

[2] Evidence that the defendant drove an automobile off the public highway and across private property so that it struck a building is not sufficient to entitle the innocent owner of the building to recover damages. *Schloss v. Hallman*, 255 N.C. 686, 122 S.E. 2d 513; *Smith v. Pate*, 246 N.C. 63, 97 S.E. 2d 457. The right of the owner of the building to recover for such damage to his property must rest on proof of some wrongful act or neglect of the defendant, which was the proximate cause of the injury. *Smith v. Pate, supra; Catoe v. Baker*, 212 N.C. 520, 193 S.E. 735; Restatement, Torts, 2d, § 158, comment e, and § 166.

The plaintiffs do not contend that the cab driver was negligent. Their evidence is that he brought his vehicle to a stop four to six feet from the wall of the house and, thereupon, was suddenly, unexpectedly and violently assaulted by his pas-

senger and, in the ensuing scuffle, the cab rolled down hill and struck the house. This would support an inference that the driver stopped the car, held his foot on the driving brake but did not set the parking brake. In the absence of any evidence that he should have anticipated such an assault by his passenger, this would not constitute negligence. Neither would his removal of his foot from the driving brake in the course of the sudden, unexpected assault upon him constitute negligence. One faced with a sudden emergency, not reasonably to be anticipated, is not held to a standard of care greater than that which a reasonable person would exercise under like circumstances. *Schloss v. Hallman, supra.*

The plaintiffs contend that they are entitled to recover because the cab driver was a trespasser on their property. If so, he would be liable for all damage proximately resulting from his wrongful entry and, at least, for nominal damages. *Lee v. Stewart,* 218 N.C. 287, 10 S.E. 2d 804; *Newsom v. Anderson,* 24 N.C. 42; *Dougherty v. Stepp,* 18 N.C. 371; 7 Strong, N. C. Index 2d, Trespass, § 8. If the plaintiffs are entitled to even nominal damages, the directed verdict in favor of the defendants would be error. *Lee v. Stewart, supra.*

[3] "A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." Restatement, Torts, 2d, § 329. Conversely, "A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor's consent." Restatement, Torts, 2d, § 330. Having such privilege the licensee is not liable in damages for such entry. Dobbs, Trespass to Land in North Carolina, 47 N.C. Law Rev. 31, 50.

The defendants do not contend that the cab driver had a right to enter upon the land of the plaintiffs, except insofar as such right was acquired through their consent. One who enters upon the land of another with the consent of the possessor may, by his subsequent wrongful act in excess or abuse of his authority to enter, become liable in damages as a trespasser. *Freeman v. Acceptance Corporation,* 205 N.C. 257, 171 S.E. 63. In the present case, however, there is no evidence of any voluntary act by the cab driver after he brought his vehicle to a stop following the initial entry onto the property of the plaintiffs.

Had the cab driver originally brought his cab to a stop on the highway and, thereafter, due to the assault upon him by his passenger, the cab had rolled down the driveway and struck the house, this would not have been a trespass rendering the driver liable for such damage. *Schloss v. Hallman, supra.* "Except where the actor is engaged in an abnormally dangerous activity, an unintentional and non-negligent entry on land in possession of another, or causing a thing or third person to enter the land, does not subject the actor to liability to the possessor, even though the entry causes harm to the possessor or to a thing or third person in whose security the possessor has a legally protected interest." Restatement, Torts, 2d, § 166. See also, 52 AM. JUR. Trespass, § 7; 7 Strong, N. C. Index 2d, Trespass, § 1; Dobbs, Trespass to Land in North Carolina, 47 N. C. Law Rev. 31, 32. At least, so far as the liability of the intruder to the landowner is concerned, as the Supreme Court of Massachusetts has said, "The trend of modern authority is that an unintended intrusion upon the land in possession of another does not constitute a trespass." *Edgarton v. H. P. Welch Co.*, 321 Mass. 603, 74 N.E. 2d 674, 174 A.L.R. 462. See, however, annot., 174 A.L.R. 471, criticizing the Massachusetts decision for extending this rule to the matter of the liability of the landowner for injury to such intruder, a point not presently before us. We perceive no basis for a distinction between an involuntary intrusion upon the land of another and an involuntary exceeding of the landowner's assent to the original entry, so far as liability for damage to the land is concerned. Therefore, unless the cab driver's original entry into the driveway of the plaintiffs was a trespass, there is no basis upon which he, and so his employer, can be held liable for the damage to the house.

[4] The plaintiffs' right to recover in this action depends, therefore, upon whether the cab driver entered their driveway with or without their apparent consent. "An entry on land in the possession of another is privileged as against the possessor in so far as it is pursuant to his consent * * * . " Restatement, Torts, § 167. The consent of the person in possession of the land to such entry may be implied. 52 AM. JUR., Trespass, § 39. An apparent consent is sufficient if brought about by acts of the possessor. It need not be an invitation to enter, which carries with it the idea of a desire on the part of the one in possession that such entry be made. It is sufficient that his conduct be such as to indicate that he consents to the entry, if the other

person desires to come upon the land. Restatement, Torts, 2d, § 330, comments b, c, d and e; 52 AM. JUR., Trespass, § 39; 87 C.J.S., Trespass, § 49, b; Dobbs, Trespass to Land in North Carolina, 47 N.C. Law Rev. 31, 52; Prosser on Torts, § 60.

In determining whether one who enters upon the land of another could reasonably have concluded from the conduct of the landowner that he had permission to do so, regard is to be had to customs prevailing in the community. " 'The well-established usages of a civilized and Christian community' entitle everyone to assume that a possessor of land is willing to permit them to enter for certain purposes until a particular possessor expresses unwillingness to admit them. Thus, a traveler who is overtaken by a violent storm or who has lost his way, is entitled to assume that there is no objection to his going to a neighboring house for shelter or direction." Restatement, Torts, 2d, § 330, comment e.

In the present case, there was no communication between the plaintiffs and the cab driver prior to the entry. The consent of the landowners to the entry, if any, must be predicated upon the existence of the driveway leading into their property from the public street. The record shows that the cab entered the driveway and stopped four to six feet from the wall of the house and that the house is 15 and one-half feet from the property line. Thus, the cab was brought to a stop approximately within its own length inside the plaintiffs' property and upon the driveway.

[5] In *Breard v. Alexandria,* 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233, 35 A.L.R. 2d 335, Mr. Justice Reed, speaking for the Court, said, "It is true that the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers for all kinds of salable articles." See also, 52 AM. JUR., Trespass, § 39. Likewise, the construction of a driveway or a walkway leading to the entrance of a residence may, in the absence of notice to the contrary, be reasonably construed, not only by acquaintances of the landowner but also by strangers, as an expression of the landowner's consent to their entry thereon for the purpose of approaching and entering the house on any lawful mission.

[6] The cab driver's right to enter such driveway is as extensive as the apparent right of his passenger. See, *Airport Authority v. Stewart,* 278 N.C. 227, 232, 179 S.E. 2d 424. In the absence of notice to the contrary, a stranger to the occupant of a house is entitled to assume that he may walk to the front door thereof, or drive into the driveway for that purpose, without being sued for trespass. A cab driver carrying his passenger to the house is entitled, in the absence of notice to the contrary, to make the same assumption in assisting his passenger on arrival thereat.

The evidence in the record before us does not show specifically that the passenger in the taxicab directed VonCannon to carry him to the plaintiffs' residence. However, it does show that he directed the driver to carry him down York Road and that this was the last house on that dead-end street. Nothing else appearing, the driver could reasonably conclude that his passenger, not having directed him to stop at any other house on the street, had this, the last one, as his destination.

Assuming that the passenger did not indicate that this house was his destination, there was nothing for the cab driver to do but turn around, York Road coming to a dead-end a few feet beyond this driveway. While the diagram of this location, which is part of the record, indicates that, at the end of York Road some 50 to 100 feet further, there was an area, to the driver's left, used for turning, there is nothing in the record to show that this area, itself, was not on private property. The custom of motorists in such a situation to head into a driveway for the purpose of backing out and turning around is widespread. In the absence of any contrary indication, it was not unreasonable for VonCannon to conclude that he might go upon the plaintiffs' driveway for this purpose without incurring liability to an action for trespass; that is, to construe the presence of the driveway as indicating the plaintiffs had no objection to its use to the extent necessary for this purpose.

Considering the evidence in the record in the light most favorable to the plaintiffs, we conclude that it fails to show a trespass upon their property by VonCannon and, therefore, is not sufficient to support a verdict and judgment against him. The plaintiffs' cause of action against Kirk's Taxi Service, Inc., is based entirely upon the doctrine of *respondeat superior.* Since VonCannon is not liable, his employer is not, even if the

record be deemed sufficient to show that the master-servant relation existed with reference to this occurrence.

There was no error in the granting of the motion for a directed verdict as to each defendant. We, therefore, do not reach the questions argued by the plaintiffs concerning the admissibility of evidence as to damages.

No error.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

DOGGETT v. WELBORN

No. 82 PC.

Case below: 18 N.C. App. 105.

Petition for writ of certiorari to North Carolina Court of Appeals denied 12 July 1973.

HOLLOWELL v. HOLLOWELL
and TAPPAN v. HOLLOWELL

No. 104 PC.

Case below: 18 N.C. App. 279

Petition for writ of certiorari to North Carolina Court of Appeals denied 12 July 1973.

McKINNEY v. MORROW

No. 109 PC.

Case below: 18 N.C. App. 282.

Petition for writ of certiorari to North Carolina Court of Appeals denied 12 July 1973.

MILLER v. BELK

No. 84 PC.

Case below: 18 N.C. App. 70.

Petition of defendant Kirkley for writ of certiorari to North Carolina Court of Appeals denied 12 July 1973.

PARK v. CARROLL

No. 85 PC.

Case below: 18 N.C. App. 53.

Petition for writ of certiorari to North Carolina Court of Appeals denied 12 July 1973.

RECORDS v. TAPE CORP.
and BROADCASTING SYSTEM v. TAPE CORP.

No. 103 PC.

Case below: 18 N.C. App. 183.

Petition for writ of certiorari to North Carolina Court of Appeals denied 12 July 1973.

SCHAFRAN v. HARRIS

No. 87 PC.

Case below: 17 N.C. App. 500.

Petition for writ of certiorari to North Carolina Court of Appeals denied 12 July 1973.

SIMMS v. STORES, INC.

No. 113 PC.

Case below: 18 N.C. App. 188.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 12 July 1973.

STATE v. ALEXANDER

No. 120 PC.

Case below: 18 N.C. App. 460.

Petition for writ of certiorari to North Carolina Court of Appeals denied 12 July 1973.

STATE v. AVERY

No. 110 PC.

Case below: 18 N.C. App. 321.

Petition for writ of certiorari to North Carolina Court of Appeals denied 12 July 1973.

STATE v. BRADY

No. 95 PC.

Case below: 18 N.C. App. 325.

Petition for writ of certiorari to North Carolina Court of Appeals denied 12 July 1973.

STATE v. BRIGGS

No. 106 PC.

Case below: 18 N.C. App. 351.

Petition for writ of certiorari to North Carolina Court of Appeals denied 12 July 1973.

STATE v. BROOKS

No. 108 PC.

Case below: 18 N.C. App. 349.

Petition for writ of certiorari to North Carolina Court of Appeals denied 12 July 1973.

STATE v. FOUST

No. 97 PC.

Case below: 18 N.C. App. 133.

Petition for writ of certiorari to North Carolina Court of Appeals denied 12 July 1973. Motion of Attorney General to dismiss appeal allowed 12 July 1973.

STATE v. FULLERTON

No. 38.

Case below: 18 N.C. App. 303.

Petition for writ of certiorari to North Carolina Court of Appeals denied 12 July 1973. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 12 July 1973.

STATE v. GRIFFIN

No. 83 PC.

Case below: 18 N.C. App. 146.

Petition for writ of certiorari to North Carolina Court of Appeals denied 12 July 1973.

STATE v. GRISSOM

No. 99 PC.

Case below: 18 N.C. App. 332.

Petition for writ of certiorari to North Carolina Court of Appeals denied 12 July 1973.

STATE v. JOHNSON

No. 111 PC.

Case below: 18 N.C. App. 338.

Petition for writ of certiorari to North Carolina Court of Appeals denied 12 July 1973.

STATE v. McILWAIN

No. 101 PC.

Case below: 18 N.C. App. 230.

Petition for writ of certiorari to North Carolina Court of Appeals denied 12 July 1973.

STATE v. McILWAIN

No. 112 PC.

Case below: 18 N.C. App. 335.

Petition for writ of certiorari to North Carolina Court of Appeals denied 12 July 1973.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. MASON

No. 123 PC.

Case below: 18 N.C. App. 433.

Petition for writ of certiorari to North Carolina Court of Appeals denied 12 July 1973.

STATE v. STOKES

No. 86 PC.

Case below: 18 N.C. App. 148.

Petition for writ of certiorari to North Carolina Court of Appeals denied 12 July 1973.

STATE v. TILLEY

No. 102 PC.

Case below: 18 N.C. App. 291.

Petition for writ of certiorari to North Carolina Court of Appeals denied 12 July 1973. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 12 July 1973.

STATE v. TILLEY

No. 96 PC.

Case below: 18 N.C. App. 341.

Petition for writ of certiorari to North Carolina Court of Appeals denied 12 July 1973. Motion of Attorney General to dismiss appeal allowed 12 July 1973.

STATE v. WEST

No. 100 PC.

Case below: 18 N.C. App. 150.

Petition for writ of certiorari to North Carolina Court of Appeals denied 12 July 1973.

STATE v. WISE

No. 93 PC.

Case below: 18 N.C. App. 151.

Petition for writ of certiorari to North Carolina Court of Appeals denied 12 July 1973.

STATE v. WOOTEN

No. 107 PC.

Case below: 18 N.C. App. 269.

Petition for writ of certiorari to North Carolina Court of Appeals denied 12 July 1973. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 12 July 1973.

STATE v. YELVERTON

No. 115 PC.

Case below: 18 N.C. App. 337.

Petition for writ of certiorari to North Carolina Court of Appeals denied 12 July 1973.

SUSAN DURHAM SPENCE v. JAMES ROBERT DURHAM AND WIFE, FAYE MUNDY DURHAM, RONALD KENNETH SPENCE, RICHARD T. SPENCE AND WIFE, FRANCES HAWKINS SPENCE

No. 18

(Filed 31 August 1973)

1. **Constitutional Law § 26— foreign judgment — full faith and credit**

A judgment of a court of one state must be given the same effect in any other state which it has by law or usage in the courts of the state where it was rendered.

2. **Constitutional Law § 26; Divorce and Alimony § 22— foreign custody decree — full faith and credit — modification for changed circumstances**

The courts of this State will accord full faith and credit to the custody decree of a sister state which had jurisdiction of the parties and the cause as long as the circumstances attending its rendition remain unchanged; however, when a child whose custody is in dispute comes into this State our courts have jurisdiction to determine whether or not conditions and circumstances have so changed since the entry of the custody decree that the child's best interests will be served by a change of custody. G.S. 50-13.5(c)(2)a; G.S. 50-13.7(b).

3. **Divorce and Alimony § 22— Georgia custody decree — modification for changed circumstances**

Since a Georgia court could alter its own child custody decree upon a showing of a change in circumstances adversely affecting the child, a North Carolina court may also modify it upon the same ground.

4. **Divorce and Alimony § 22— modification of foreign custody decree — necessity for evidence of conditions when decree entered**

Since a Georgia child custody decree contained no findings of fact, it was necessary for a North Carolina court to hear evidence with reference to conditions existing at the time the Georgia decree was entered before the court could determine whether changed circumstances justified its modification.

5. **Divorce and Alimony § 24— modification of foreign custody decree — emotional stability — sufficiency of evidence and findings**

In a mother's action to modify a Georgia decree which granted custody of minor children to their maternal and paternal grandparents on the basis that both the mother and father were emotionally disturbed and unstable and that their conduct had been such that neither was then a suitable person to have custody of the children, the trial court's award of custody to the mother was supported by findings supported by competent evidence that (1) the mother is now emotionally stable; (2) she is successfully established in her profession as a speech therapist in a North Carolina community and has an income sufficient to support herself and her children in desirable surroundings; (3) her professional reputation and general character are good; (4) for the five months preceding the hearing plaintiff supported and

cared for the children in a home she provided for them in a good neighborhood; (5) the mother is attending to their schooling, religious education, and social life and is able to be with the children when they are not in school; and (6) she is now a fit and proper person to have custody of the children and is better able to respond to their daily needs than the grandparents.

6. **Divorce and Alimony § 22— child custody proceeding — continuing jurisdiction of court**

Jurisdiction of a court in a child custody proceeding continues as long as a minor child whose custody is the subject of a decree remains within its jurisdiction; upon motion of a party or upon its own motion, after due notice, the court may conduct a hearing to determine whether the decree should be modified.

7. **Divorce and Alimony § 24— modification of foreign custody decree — order that trial court review conditions periodically**

In view of the evidence in this case which dictated a Georgia decree awarding custody of minor children to their grandparents because the parents were both then unfit to have custody, the Supreme Court, in the exercise of its supervisory powers, directs the district court in this State which modified the Georgia decree by awarding custody to the mother to ascertain periodically whether conditions have developed which adversely affect the children's welfare.

Justice HIGGINS concurring.

Justice LAKE dissenting.

ON plaintiff's petition for certiorari to review the decision of the Court of Appeals reversing the judgment in her favor entered by *Clifford, District Court Judge,* 13 December 1971 Session of the District Court of FORSYTH.

Action under G.S. 50-13.7(b) (1971 Supp.) for custody of minor children.

Hudson, Petree, Stockton, Stockton & Robinson and White & Crumpler for Susan Durham Spence, plaintiff appellant.

Womble, Carlyle, Sandridge & Rice for Mr. and Mrs. James Robert Durham (parents of plaintiff).

Hatfield, Allman and Hall by Roy G. Hall, Jr., James W. Armentrout and Wetson P. Hatfield for Ronald Kenneth Spence, Richard T. Spence, and Frances Hawkins Spence, defendant appellees.

SHARP, Justice.

Plaintiff, Susan Durham Spence, born 11 June 1935, instituted this action on 24 May 1971 to obtain the custody of her two minor daughters, Fay Frances Spence, born 15 June 1962, and Dianna Jeannene Spence, born 5 June 1964. The defendants are Ronald Kenneth Spence, the children's father (Spence); James Robert Durham and wife, Faye M. Durham, the parents of plaintiff (maternal grandparents or Durhams); and Richard T. Spence and wife, Frances H. Spence, the parents of Ronald K. Spence (paternal grandparents). All parties are properly before the court and participated in the proceeding in which the judgment *sub judice* was rendered.

Plaintiff and her parents are residents of Winston-Salem, Forsyth County, North Carolina. Spence is a resident of the State of Kansas; the paternal grandparents reside in the State of Georgia. The children have been physically present in this State since September 1970.

The following events, stated chronologically insofar as possible, disclose a portion of the background of this controversy:

Plaintiff and Spence met in 1959 at the University of Georgia, from which each obtained a bachelor's degree. Thereafter, on 9 September 1960, they were married in Winston-Salem, North Carolina. In 1961 both enrolled as graduate students at the University of Virginia. There Spence pursued courses in advanced chemistry, and plaintiff studied speech pathology. Spence, who became "disinterested in chemistry," dropped out of school in late 1961 and obtained employment with the Sperry Piedmont Company as an engineering analyst. Plaintiff continued her studies under a scholarship. She obtained the degree of Master of Education in Speech Pathology and Audiology shortly before the birth of her first child, Fay.

In April 1963, after Spence had worked for eighteen months with the Sperry Company, he and plaintiff moved to California. There, for about two years, he was employed by "Lockheed Missiles and Space Company in the field of computers" at Sunnydale. During this period plaintiff's second child was born, and she worked part of the time in a hospital at Mountain View, where the family lived. In May 1965 Spence left Lockheed to work for Univac, a division of Sperry Rand Corporation, in San Diego. In the fall of 1966, with the idea that they might work together, both plaintiff and Spence enrolled in the Uni-

versity of California at San Diego for studies in linguistics. To further his studies Spence gave up his job with Univac in December 1966 and obtained employment at the University of California. Plaintiff worked at the speech and hearing center there from August 1965 until late August 1967, when she left California to teach at the University of Richmond in Virginia.

Plaintiff's move to Richmond was for professional and financial reasons. Her sojourn there was not intended as a separation from Spence, who visited her a number of times in Richmond. At different times between August and December, Spence and the respective grandparents cared for the children. In early December, Spence withdrew from the University of California and went to the home of his parents in Georgia. At that time he delivered the children to plaintiff in Richmond, and they remained with her there until the completion of her contract in June 1968.

From 15 January 1968 until March 1970, when he was "laid off in a mass reduction in force," Spence worked for Lockheed at Smyrna, Georgia. In June 1968 plaintiff and the two children joined Spence in Smyrna, where they shared his one-bedroom "bachelor's apartment," and plaintiff started a private practice in speech therapy. In July 1968 an 18-year-old girl, Linda Preyer, who had kept house for them in San Diego, came to live with plaintiff and Spence in the bachelor's apartment. In the fall plaintiff and the children moved into an adjoining apartment.

On 9 January 1969 Spence brought an action for divorce against plaintiff in the Superior Court of Cobb County, Georgia. On that morning he informed plaintiff that he would vacate his apartment during the day. Plaintiff took the children to school as usual and, at 3:00 p.m., she went for them. She left them in the playroom of her speech and language school, where they were to remain while she saw her last pupil of the day. That task completed she returned to the playroom to find the children gone. It was "days later" before she learned that Spence had taken the children to the home of their paternal grandparents about sixty miles away. Upon inquiry the paternal grandmother had denied that the children were there and that she had any knowledge of their whereabouts.

Plaintiff was not permitted to see the children until after 3 February 1969, when the Georgia court issued a temporary order giving Spence's parents custody of the children *pendente*

lite. That order denied both Spence and plaintiff any access whatever to the children except that each was allowed one two-hour visitation each week in the home of the paternal grandparents.

On 6 February 1969 the maternal grandparents petitioned the court to allow them to intervene in the pending divorce action and were allowed to do so. They prayed that, if the court should conclude neither plaintiff nor Spence was a suitable custodian, the custody of the two children be awarded to them. The paternal grandparents were also permitted to intervene. Thus, the parties to the Georgia proceeding and to this one are the same.

On 2 June 1969, the day the case was scheduled for trial, all parties were present in court and represented by counsel. Plaintiff did not contest Spence's action for divorce, and he obtained an absolute divorce on the grounds of mental cruelty.

On the issue of custody the court heard no evidence. That controversy was determined by a consent judgment, which was signed by the judge and by counsel for all parties. In pertinent part this judgment is summarized below:

1. The court awarded custody of the two children to the paternal grandparents during the months of June, July, and August of each year and to the maternal grandparents during the months of September through May. Plaintiff and Spence were given the right to visit the children in the home of their respective parents without restriction. Each was, however, enjoined from removing the children from the grandparents' homes, and the grandparents were under positive orders to prevent the children's removal. During the school months, when the Durhams had custody, the paternal grandparents had the right to have the children visit in their home during all school holidays. The judgment provided for alternative divisions of custody between the grandparents in the event of the death of one or more grandparents, the final award being to the last surviving grandparent.

2. Both Spence and plaintiff were relieved of all obligation to support their children. Neither maternal nor paternal grandparents were to look to either of them for reimbursement of any sums expended for the maintenance and education of the children. The grandparents having custody were to pay the children's expenses during the time they had them. The Dur-

hams were to send the children to private schools in Winston-Salem, and the grandparents receiving the children at the end of each custody period were to pay the cost of transporting them to their home.

3. Both maternal and paternal grandparents canceled all debts which either plaintiff or Spence owed them.

4. The maternal grandparents were required to give a bond in the sum of $10,000.00 conditioned upon their compliance with the consent judgment and any future orders of the court. The clerk of the Superior Court of Cobb County was appointed process agent for the Durhams in any proceedings regarding the custody of the children and any breach of the terms of the bond.

As directed by the judgment, on 20 June 1969, the Durhams executed and delivered to the Sheriff of Cobb County a compliance bond in the sum of $10,000.00.

Spence testified that within two weeks after he instituted divorce proceedings against plaintiff, on 20 January 1969, he was in touch with Dr. Arlene Gregory, whom he had met in 1955 when she was a premedical student. He had courted her unsuccessfully just before he married plaintiff, "perhaps on the rebound." In July 1969 Spence and Dr. Gregory were married. At that time she had just finished her graduate residency in anesthesiology.

In late August 1969 the Spence children went to the home of the Durhams in Winston-Salem. Except for school holidays, which they spent with the paternal grandparents, the children remained with the Durhams until June 1970 when they returned to Georgia as required by the consent judgment.

In the summer of 1969 plaintiff left Smyrna and went to Rome, Georgia, to become the director of the Northwest Georgia Speech and Hearing Center, a fourteen-county governmental speech pathology and hearing clinic for children and adults. In September 1970 she moved to Winston-Salem to become head of the department of speech pathology at the Medicenter of America's facility there.

In September 1970 the Spence children returned to the home of the Durhams in Winston-Salem for the school year 1970-71.

On 24 May 1971, without the knowledge of her parents, plaintiff brought this action to obtain the custody of her children. On 25 May 1971 she secured from the District Court of Forsyth County an order restraining the removal of the children from Forsyth County pending that court's determination of their custody. In that order the hearing on this question was set for 3 June 1971. Mrs. Durham testified that but for the injunction prohibiting her from doing so she would have returned the children to Georgia as she had previously done. Upon receiving the court's order she immediately informed the paternal grandparents of it and returned the travel tickets they had sent the children.

On 3 June 1971 the paternal grandparents and Spence petitioned the Cobb Superior Court to attach the maternal grandparents for contempt and to forfeit their $10,000.00 bond. In that proceeding the Durhams pled, *inter alia,* the order of the North Carolina court restraining the removal of the children from the State. On 23 August 1971 the Cobb Superior Court held Mr. and Mrs. Durham in contempt, fined them $200.00 each, and forfeited their bond. These orders were affirmed by the Supreme Court of Georgia. *See Durham v. Spence,* 228 Ga. 525, 186 S.E. 2d 723 (1972). Thereafter, on 30 March 1972 the Superior Court of Cobb County ordered the proceeds of the bond paid to the paternal grandparents.

The hearing of the controversy *sub judice,* originally set for 3 June 1971, was continued at Spence's request and rescheduled for July 20th. On that day Spence again requested a continuance, and the cause was continued indefinitely to a date to be set by the court upon motion of any party to the action. At the same time, however, the court signed an order giving plaintiff temporary custody of the children, and the Durhams surrendered the children to her on 20 July 1971. Since that date they have resided with plaintiff.

At the hearing, which was begun on 29 December 1971, all parties offered evidence with reference to the circumstances and conditions which preceded the separation between plaintiff and Spence. This evidence fully explained the consent judgment of 2 June 1969, which divested both plaintiff and Spence of the custody of their children.

Plaintiff and Spence, neither of whom had testified in the Georgia proceeding, both testified at the hearing before

Judge Clifford, and both were extensively cross-examined. The testimony of each with reference to the conduct of the other, and their admissions with reference to their own conduct, disclosed improper behavior on the part of both so extraordinary as to seem incredible. Plaintiff and Spence each denied portions of the other's testimony. However, the admissions of each, together with the corroborative evidence of other witnesses, suffice to establish the existence of a situation in their home *in Smyrna during the five months from August through December 1968,* which was beyond the pale of the most permissive society. To perpetuate this evidence in our reports would not only be a disservice to "two little girls [who] are very exceptional children," but would perhaps put a stumbling block in the way of their mother's continued restoration. For this reason we omit any discussion of it.

It may be that a conceivable explanation of the conduct of plaintiff and Spence is to be found in the fact that in January 1969 both were in such a state that they were consulting psychiatrists. Spence testified that at the time the consent judgment was entered he was unable to care for his children "in terms of residence" and that "the emotional and psychological turmoil during the previous year" had left him "equally unqualified." At the "strong instance" of his father he was seeing a psychiatrist. Plaintiff testified that, at the same time, she too was consulting a psychiatrist.

Spence's explanation of his behavior was that he "was very much subordinated by Susan's personalty"; that she had "a much stronger personality than his in terms of will and ability to persuade." He told the court that he "was acting in response to being dominated by [his] wife," who "was controlling [his] actions to a certain extent," and that "many actions were fully dominated by her." Spence also testified that during the periods in which plaintiff "was not emotionally distressed she was a good mother . . . very concerned for her children's welfare." In his opinion she was disqualified as a custodian only because she was not sufficiently stable over a sufficiently long period of time to guarantee the children "a consistent environment."

Spence's father testified that, in his opinion, in January 1969 neither his son nor plaintiff was a fit person to have control of the children and, for that reason, he had intervened in the custody proceeding; that he thought his son was "showing tremendous improvement" in December 1971, but he still

believed himself to be a better custodian than Spence. However, when pressed on cross-examination, he said "Actually there are no defects in Ronnie now"; he is "now a fit and proper person to have custody of the two daughters." Implicit in the testimony of Mr. Spence was the opinion that plaintiff remained unfit to have the children's custody. Plaintiff's mother testified that, in her opinion, plaintiff was the fit and proper person to have the custody and Spence was not; that she had never believed the charges Spence made against her daughter.

In April 1971 Spence went to work as supervisor of programming in the data processing department of the Retail Credit Company in Atlanta, Georgia. He resigned this position in November 1971 to move with his wife to Parsons, Kansas. He testified that she felt she should go to Parsons to care for her invalid twin sister. At accessible schools in Kansas, Spence said he hoped to continue his education and to obtain a PhD degree in the field of linguistics. At the time of the hearing in Forsyth County both he and his wife were unemployed and living off the accounts receivable from her former practice. These, Spence thought, would be sufficient to support him, his wife, their 18-months-old baby, and his two daughters (should he be awarded their custody) until his wife could re-establish a practice and until he could get a PhD and secure a teaching position. In the meantime Spence had no income from any source whatever. However, unless he gets custody himself he does not "want to pay one penny of support for the girls."

Plaintiff testified that she is now a clinical speech pathologist, certified by the American Speech and Hearing Association; that she continues as head of the speech pathology department at the Medicenter's Winston-Salem facility, where she gives therapy to all types of inpatients with speech afflictions; that she also conducts an outpatient clinic in which she gives speech therapy to both children and adults in the entire Forsyth County area and sees patients from Greensboro, Salisbury, High Point, Statesville, and Lexington; that forty-five percent of the patients are children. Spence testified that plaintiff "was a very talented teacher." She has had dramatic successes with many children.

At the time of the hearing plaintiff was residing with the two children "in a very nice two-bedroom, pool-side apartment" on Country Club Road directly across the street from the children's school and the Trinity Methodist Church of which

she is an active member. She sings in the choir and participates in all church functions. The children regularly attend Sunday School, sing in the children's choir, and take part in all the youth activities. They are Girl Scouts and do superior work in school. Each morning plaintiff "walks them across the street to school" before she goes to work and returns to pick them up at 3:00 p.m.

In July 1971 plaintiff consulted Dr. David Allen Hill, a clinical psychologist on the faculty of Wake Forest University. He had not previously known her. She informed him of the accusations which had been made against her and which would be made again with reference to her fitness as a custodian of her children and requested him to test and examine her fully. Dr. Hill testified that he warned her that his tests might reflect unfavorably upon her and she replied that "if the test suggested something wrong with her, she'd rather know it." After administering a series of eight tests, Dr. Hill concluded that plaintiff was, "in the ordinary sense of the word, a normal individual," showing "normal female interests in work and hobby and relating to people," and that she enjoyed working with children. He found no evidence of a personality pattern consistent with sexual deviancy, prolonged promiscuity, or peculiar behavior. In his opinion she was not lying; that she attempted to present herself in "as positive and as honest a light as she could."

Dr. Richard C. Proctor, head of the department of psychiatry at the Bowman-Gray School of Medicine testified that in March 1971 he examined plaintiff and, in his opinion, she would be a competent and capable mother, able to assume the responsibility of rearing her children in a satisfactory manner; that one could have had a disorder in 1968 which was not present in 1971; and that he could find no indication of abnormal tendencies in her.

Plaintiff also offered evidence that her character and reputation in the community were good. The minister of Trinity Church, the Reverend Mr. George Bumgarner, testified that since June 1970 he had known plaintiff and observed her with her children; that they had a happy normal relationship and the children seemed well adjusted.

Spence testified that, "pursuant to this case," during 1971 he had employed and paid detectives to observe plaintiff, find

out what her circumstances were, and to discover whether she was engaged in any abnormal conduct. These detectives were not tendered as witnesses and did not testify.

The hearing before Judge Clifford lasted for four days. At its conclusion he found facts, the pertinent portions of which, except when quoted, are summarized below:

1. Since 20 July 1971, when plaintiff was awarded temporary custody of the two children, they "have at all times been well, fully, and adequately cared for."

2. Plaintiff is a well educated and intelligent woman who, since moving to Winston-Salem in 1969, has established a successful and growing speech therapy clinic for children and adults. She has rented and furnished an apartment "in one of the better sections of Winston-Salem which is adequate in all respects as a home for herself, Fay and Dianne. Susan Durham Spence is respected in this community by professional people with whom she deals and is a person of high character and reputation. She is an active member of Trinity Methodist Church. . . . She is a person exceptionally well qualified by training and experience to rear children and is in all respects a fit and proper person to have the custody of her two minor children who are subject to this action."

3. Since the two children first came to Winston-Salem in 1969 to live with the Durhams during the school months they "have established excellent associations and records in school." Their best interests require that they live continuously in "their primary environment," and that their custody be awarded to their mother, the plaintiff.

4. Both the maternal and paternal grandparents are fit persons to have custody of the children, but all four grandparents "are of such age that the best interest of the two children will be served by awarding primary custody to their mother."

5. The judge of the Superior Court of Cobb County, Georgia, signed the judgment of 2 June 1969 without having heard any evidence, and he made no findings of fact in support of the court's award of custody to the grandparents.

6. The contention of the defendants Spence, stated in open court, is "that at the time of the entry of the Cobb County judgment Susan Durham Spence was not a fit and proper person to have custody of Fay and Dianne."

7. Irrespective of justification for the Cobb County judgment "there have been substantial changes in the conditions since 2 June 1969 which dictate that the said order be altered." Among these changes are the following:

a. Plaintiff, Susan Durham Spence, is now a fit and proper person to have the custody of her children.

b. On 2 June 1969 plaintiff was highly emotional in consequence of the abduction of her children on 9 January 1969 and deprivation thereafter of the right to see them alone. Today she is "a well-adjusted, emotionally stable individual, fully capable of caring for and rearing Fay and Dianne."

c. The two girls are now older and at an age when they have greater need of a mother's care and attention. The grandparents are not as able to respond to the children's needs as they were in 1969, and the burden and expense of their care and support should no longer be imposed upon them.

d. Spence has become the father of an illegitimate child. He has remarried and fathered a legitimate child, moved with his wife and *their* child to Kansas. He is unemployed and living on the accounts receivable of his present wife, who is also unemployed.

e. Plaintiff has an established profession and home and has made a place for herself in the community where she is able to care for herself and her children adequately. Her routine and schedule is such that she can be with them the greater part of the time they are not in school.

Upon the foregoing findings of fact the court concluded:

(1) The courts of this State are not bound by the Georgia judgment entered in Cobb County on 2 June 1969; and

(2) In the event the Georgia judgment is entitled to full faith and credit, the conditions surrounding the parties have changed so substantially that the best interests of the children require the judgment be altered by awarding their custody to their mother. Whereupon the court awarded the exclusive care, custody, and control of the children to plaintiff, granting Spence and the paternal grandparents the right to visit the children in North Carolina at reasonable intervals.

From this judgment Spence and the paternal grandparents appealed to the Court of Appeals. That court held (1) that

Judge Clifford erred in his ruling that the Georgia judgment was not entitled to full faith and credit, but (2) that he had correctly concluded the courts of this State have jurisdiction to enter orders providing for the custody of minor children physically present in this State and, upon a showing of changed conditions, to modify any order for custody made by the court of another state. G.S. 50-13.5(c)(2)a (1971 Supp.) and G.S. 50-13.7(b). The Court of Appeals then disposed of the case as follows: "It suffices to say that the evidence does not support the findings of fact and that the findings of fact do not support the judgment. The judgment of the Superior Court of Cobb County, Georgia, remains in full force and effect. The judgment and orders of the District Court of Forsyth County purporting to modify the same are reversed." *See Spence v. Durham,* 16 N.C. App. 372, 191 S.E. 2d 908 (1972).

Plaintiff petitioned this Court for certiorari, and we allowed the petition.

[1] The general rule is that, under the full faith and credit clause of the United States Constitution (art. IV, § 1), a judgment of a court of one state must be given the same effect in any other state which it has by law or usage in the courts of the state where it was rendered. *Ford v. Ford,* 371 U.S. 187, 9 L.Ed. 2d 240, 83 S.Ct. 273 (1962); 47 Am. Jur. 2d *Judgments* §§ 1219, 1226 (1969). "The Supreme Court of the United States, however, has not yet declared in positive terms that the provisions of a foreign divorce decree relating to custody are entitled to full faith and credit where the divorce court had jurisdiction in personam of both spouses or of both parties and the child." 24 Am. Jur. 2d *Divorce and Separation* § 998, at 1136 (1966). *See generally Ford v. Ford, supra; Kovacs v. Brewer,* 356 U.S. 604, 2 L.Ed. 2d 1008, 78 S.Ct. 963 (1958); *May v. Anderson,* 345 U.S. 528, 97 L.Ed. 1221, 73 S.Ct. 840 (1953); *Halvey v. Halvey,* 330 U.S. 610, 91 L.Ed. 1133, 57 S.Ct. 903 (1947).

[2] It is widely held by state courts, however, "that child custody awards by courts of sister states are entitled to full faith and credit." Annot., 35 A.L.R. 3d 520, 538 (1971). Our own decisions establish that the courts of this State will accord full faith and credit to the custody decree of a sister state which had jurisdiction of the parties and the cause as long as the circumstances attending its rendition remain unchanged. However, when a child whose custody is in dispute comes into

this State our courts have jurisdiction to determine whether or not conditions and circumstances have so changed since the entry of the custody decree that the child's best interests will be served by a change of custody. G.S. 50-13.5(c)(2)a; G.S. 50-13.7(b). *See In re Marlow,* 268 N.C. 197, 150 S.E. 2d 204 (1966); *In re Craigo,* 266 N.C. 92, 145 S.E. 2d 376 (1965); *Cleeland v. Cleeland,* 249 N.C. 16, 105 S.E. 2d 114 (1958); *Richter v. Harmon,* 243 N.C. 373, 90 S.E. 2d 744 (1956).

In both Georgia and North Carolina a decree awarding the custody of minor children determines only the *present* rights of the parties under the conditions then existing; it is not permanent in its nature and is subject to judicial alteration or modification upon any change of circumstances substantially affecting the welfare of the children. *Shepherd v. Shepherd,* 273 N.C. 71, 159 S.E. 2d 357 (1968); *Wilson v. Wilson,* 269 N.C. 676, 153 S.E. 2d 349 (1967); *Thomas v. Thomas,* 259 N.C. 461, 130 S.E. 2d 871 (1963); *Hardee v. Mitchell,* 230 N.C. 40, 51 S.E. 2d 884 (1949); *Holmes v. Holmes,* 211 Ga. 827, 89 S.E. 2d 194 (1955); *Fortson v. Fortson,* 195 Ga. 750, 25 S.E. 2d 518 (1943). The rule is that the welfare of the child whose custody is in controversy is "the polar star by which the courts must be guided in awarding custody."

[3] The Supreme Court of the United States has specifically held that where the court of one state is empowered to alter its own custody decree upon a showing of a change in circumstances affecting the question, the courts of another state may also modify it upon the same grounds. *Ford v. Ford, supra; Kovacs v. Brewer, supra; Halvey v. Halvey, supra.* Since the Georgia court could alter its decree upon a showing of a change in circumstances adversely affecting the children no question of the right of the North Carolina court to do so can arise.

We do not deem it necessary to consider the question (discussed in the briefs) whether a consent judgment fixing custody, rendered by the court of a sister state which failed to conduct adversary proceedings and inquire into the circumstances affecting the child, is entitled to full faith and credit. *See* Annot., 35 A.L.R. 3d 520, 560 (1971); 24 Am. Jur. 2d *Divorce and Separation* § 819 (1966).

Certainly it is the court's duty to award custody in accordance with the best interests of the child, and no agreement, consent or condition between the parents can interfere with this

duty or bind the court. *In re Burton,* 257 N.C. 534, 126 S.E. 2d 581 (1962); *Thomas v. Thomas,* 248 N.C. 269, 103 S.E. 2d 371 (1958); 3 Strong, N. C. Index 2d, *Divorce and Alimony* §§ 22, 24 (1967). However, an agreement between the parties with reference to custody which is accepted by the court and incorporated in its decrees, is "none the less a judgment of the court, having the usual attribute[s] of conclusiveness." *Fortson v. Fortson,* 195 Ga. 750, 754, 25 S.E. 2d 518, 522 (1943). *See also Bunn v. Bunn,* 262 N.C. 67, 136 S.E. 2d 240 (1964).

[4] We do not assume that the Superior Court of Cobb County, Georgia, entered its judgment in this case "casually, pursuant to an agreement of the parties and without a true, judicial consideration of the facts." 24 Am. Jur. 2d *Divorce and Separation* § 819 (1966). On the contrary, we assume the judge was apprised of the evidence the parties were prepared to offer and agreed with them that the custody decree which he signed was, at that time, in the best interests of the children and their parents. Since the decree contained no findings of fact—purposely omitted, we are certain—it was necessary for the Forsyth District Court to hear evidence with reference to conditions existing at the time the Georgia decree was entered before it could evaluate the controversy and determine whether changed circumstances justified its modification. 24 Am. Jur. 2d *Divorce and Separation* § 819 (1966). *See also* Annot., 35 A.L.R. 3d 520, 560 (1971).

Spence and the paternal grandparents, appellees in this court, concede that the District Court of Forsyth had authority to change the Georgia custody decree upon a showing of changed circumstances. However, they contend, "(1) The plaintiff failed to show a change of circumstances because she did not offer any proof of what the circumstances were at the time the Georgia order was entered. . . . (2) The facts cited as justification for her having custody are irrelevant, insubstantial, and feathery. . . ." Since the greater part of the tesimony covering 359 pages of the record was aimed at establishing the situation which existed at the time the Georgia decree was entered, there is no merit in appellees' first contention. We proceed on the assumption that the Georgia court was of the opinion that both Spence and plaintiff were emotionally disturbed and unstable, *and their conduct had been such that neither was then a suitable person to have custody of the children.* We can think of no other reason for the judgment the court entered.

The crucial question presented by this appeal is whether the Court of Appeals erred in holding that the record contains no evidence sufficient to support Judge Clifford's finding that plaintiff is now a fit and proper person to have the custody of her children and, in their best interest, custody should now be awarded to her. If the facts which the trial judge found are supported by competent evidence they are binding on the appellate division. *Teague v. Teague,* 272 N.C. 134, 157 S.E. 2d 649 (1967); *Hinkle v. Hinkle,* 266 N.C. 189, 146 S.E. 2d 73 (1966); *Griffin v. Griffin,* 237 N.C. 404, 75 S.E. 2d 133 (1953).

[5] We hold that competent evidence supports Judge Clifford's findings that (1) plaintiff is now emotionally stable; (2) she is successfully established in her profession in Forsyth County and surrounding areas and has an income sufficient to support herself and her children in desirable surroundings; (3) her professional reputation and her general character are good; (4) for the five months preceding the hearing plaintiff supported and cared for the children in a home she had provided for them in a good neighborhood; (5) plaintiff is attending to their schooling, religious education, and social life and has arranged her affairs so that she is able to be with the children when they are not in school; (6) she is now a fit and proper person to have the care and custody of her children, better able to respond to their daily needs than the grandparents, and that the children's best interests require that their custody be awarded to her. Certainly these findings are sufficient to support the district court's judgment.

Nothing in this record leads us to believe that the children's best interest requires their custody to be awarded to Spence. Indeed, we are left with the impression that Spence himself is not seriously seeking the custody of his children; that his efforts are in behalf of his parents. Unemployed and living off his present wife's accounts receivable, he has started a new family and he is also under obligation to another child. Although prior to their separation the conduct of both plaintiff and Spence was inexplicable and not to be condoned, plaintiff's ability to complete an undertaking and her record of accomplishment are more impressive than his. Plaintiff has come far since 9 January 1969. Spence also has improved. However, it is plaintiff who has provided a special place for her children and is presently caring for them in the best tradition of a mother.

In 2 Nelson, *Divorce and Annulment* § 15.09, at 226-29 (2d ed. 1961), it is said: "It is universally recognized that the mother is the natural custodian of her young. . . . If she is a fit and proper person to have the custody of the children, other things being equal, the mother should be given their custody, in order that the children may not only receive her attention, care, supervision, and kindly advice, but also may have the advantage and benefit of a mother's love and devotion for which there is no substitute. A mother's care and influence is regarded as particularly important for children of tender age and girls of even more mature years."

[6] The trial judge obviously concluded that plaintiff had overcome her emotional problems since her separation from Spence and that the accusations made against her, if once true, were no longer valid. He found, upon supporting evidence, that she is now a stable, fit, and suitable custodian of her children, and their best interests require that their custody be awarded to her. On this record we affirm his award of custody. However, as Justice Frankfurter noted in his dissenting opinion in *Kovacs v. Brewer, supra,* changes in the fitness of custodians and their ability to provide for the needs of a child may develop rapidly. For that reason the jurisdiction of the court to protect infants is "broad, comprehensive, and plenary." *Latta v. Trustees of the General Assembly of the Presbyterian Church,* 213 N.C. 462, 469, 196 S.E. 862, 866 (1938). It is also continuing as long as a minor child whose custody is the subject of a decree remains within its jurisdiction. Upon motion of a party, or upon its own motion, after due notice the court may conduct a hearing to determine whether the decree should be modified. *In re Morris,* 225 N.C. 48, 33 S.E. 2d 243 (1945); *Godfrey v. Godfrey,* 228 Ore. 228, 364 P. 2d 620 (1961); *Lawson v. Lawson,* 278 Ky. 602, 129 S.W. 2d 135 (1939).

[7] In view of the evidence in this case which dictated the drastic decree by the Georgia court in 1969, we believe that the district court's obligation to these children requires it to ascertain periodically whether conditions adversely affecting their welfare have developed. In the exercise of our supervisory powers, we so direct.

This cause is returned to the Court of Appeals to the end that it be remanded to the District Court of Forsyth County with directions (1) that at least every six months it obtain from the appropriate social service department of the county a report,

made after due investigation, as to the children's condition, surroundings, and progress and also as to the plaintiff's status and condition and the manner in which she is caring for the children; and (2) that it furnish a copy of each of these reports to each party to this proceeding. Except as thus modified the judgment of the district court will be affirmed. The decision of the Court of Appeals is reversed.

Reversed.

Justice HIGGINS concurring.

The sole question before the Court is this: Did the Court of Appeals commit error of law in reversing the decree of the Forsyth County District Court awarding the custody of Fay Frances Spence (age 10) and Dianne Jeannene Spence (age 8) to their mother?

Beyond question, I think, the district court had jurisdiction of the children and all parties necessary to the determination of their custody. The district judge heard evidence, found facts, and based thereon, entered the custody order.

These questions of law were presented to the Court of Appeals for determination: (1) Did the evidence before the trial judge support his findings? and (2) Do the findings support the custody order? If the answer to both questions is "Yes," the decision of the Court of Appeals should be reversed and the custody order should be affirmed. *Byrd v. Thompson*, 243 N.C. 271, 90 S.E. 2d 394.

Article IV, Sec. 12(1), Constitution of North Carolina, provides: "The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference." 1 Strong, N. C. Index 2d, under the heading Appeal and Error, lists many cases supporting the proposition that the jurisdiction of the Supreme Court on appeal is limited to questions of law or legal inference.

The Court of Appeals discussed the Georgia proceeding and the custody order to which the parties gave their consent. The decree established, as of the date of its entry, that the mother was not a suitable custodian. The decree, however, is subject to review upon a showing of material and favorable

changes in conditions. *Griffin v. Griffin,* 237 N.C. 404, 75 S.E. 2d 133. Neither the judgment of the Georgia court nor the agreement of the parties can bind the court and prevent a future hearing on the question of fitness. "No agreement or contract between husband and wife will serve to deprive the court of its inherent as well as statutory authority to protect the interests and provide for the welfare of infants. . . . The child is not a party to such agreement and the parents cannot contract away the jurisdiction of the court which is always alert in the discharge of its duty toward its wards—the children of the State whose personal or property interests require protection. . . . In such case the welfare of the child is the paramount consideration . . . and the court will not suffer its authority in this regard to be either withdrawn or curtailed by any act of the parties." *Story v. Story,* 221 N.C. 114, 19 S.E. 2d 136.

The Georgia decree established as of the date of its rendition the unfitness of the mother for the custody of her children. When a material and favorable change of condition does occur, the courts are open to review former orders and in light of facts existing at the time of the review make such disposition as will be to the best interest of the children. If the court has jurisdiction, and the evidence supports the facts found, which in turn support the judgment, other questions are not presented for decision on appeal. *Bishop v. Bishop,* 245 N.C. 573, 96 S.E. 2d 721. "The findings of fact by the court, there being evidence on both sides, is binding and conclusive on appeal." *Shoaf v. Frost,* 127 N.C. 306, 37 S.E. 271; *In Re Hamilton,* 182 N.C. 44, 108 S.E. 385.

Judge Clifford who heard the witnesses and observed their demeanor as they testified was in a favored position to ascertain the truth. He entered an interlocutory order on July 20, 1971, giving the mother temporary custody. After keeping up with the case until December 20, 1971, he entered the order now under review. The order contains the following:

> "5. The two children, Fay and Dianne, while in the custody of their mother, Mrs. Susan Durham Spence, have at all times been well, fully and adequately cared for.
>
> "6. The plaintiff, Susan Durham Spence, is a well educated and intelligent woman who has, since moving to Winston-Salem in the latter part of 1969, established a successful and growing speech therapy clinic for children and

adults. She has rented and furnished a two bedroom apartment in one of the better sections of Winston-Salem which is adequate in all respects for a home for herself and Fay and Dianne. Susan Durham Spence is respected in this community by professional people with whom she deals and is a person of high character and reputation. She is an active member of Trinity Methodist Church where she participates in religious training for children and sings in the choir. She is a person exceptionally well qualified by training and experience to rear children and is in all respects a fit and proper person to have the custody of her two minor children who are subject to this action.

"7. Fay and Dianne Spence have for more than two years resided in the City of Winston-Salem except for holidays and summer vacations. All of their schooling and maintenance and upkeep while in Winston-Salem have been paid for by their mother and maternal grandparents and their father has contributed nothing to their maintenance or schooling or upkeep since June of 1969. The two children have established excellent associations and records in school since they moved here in 1969 and their best interests will be served by their continuing to live and being schooled in this city. It is against the best interest of the children to be moved for extended periods of time and on their holidays from their primary environment. The best interest of these two minor children shall be served by their custody being awarded to their mother, Susan Durham Spence."

Notwithstanding the above, the Court of Appeals not only declared the evidence did not support the findings, but that the findings did not support the judgment.

Particularly in custody cases the trial judge not only is in a position to observe the witnesses, but in this case he observed the parent and the children in the presence of each other. Appellate courts should be slow to take over the job of re-weighing the evidence.

Under our system, appellate courts are not permitted to enter the fact finding field. They should pass on questions of law or legal inference and leave the facts and the equities to the trial court. After all, the chancellor is not given a seat on courts of appeal.

I join in Justice Sharp's opinion.

Justice LAKE dissenting.

I should affirm the judgment of the Court of Appeals. It reversed the judgment of the District Court of Forsyth County, thereby restoring to full force and effect the judgment of the Georgia Court concerning the custody of these two little girls.

To put this case in proper perspective it is necessary first to see exactly what the Georgia Court did and what it did not do. It must be remembered that, at the time the Georgia Court acted, the children and both parents were residents of Georgia. All parties to the present North Carolina action were before the Georgia Court, represented by counsel. All of them, through their counsel, "approved and consented to" the Georgia judgment. It was not, however, a mere perfunctory approval by the court of an agreement of the parties. It recites that it was entered "upon consideration of this case upon evidence submitted as provided by law." Counsel for the maternal grandparents, who obviously were aligned in interest with her, was her uncle. He participated in drafting the judgment.

The Georgia judgment contains no finding of fact. As the majority opinion of this Court now notes, this was, no doubt, the result of a purposeful attempt to spare the innocent children and the innocent grandparents embarrassment. Be that as it may, it has not been contended before this Court that the Georgia judgment was deficient in any respect under the law of Georgia. As such, it must be given full faith and credit by the courts of North Carolina as a determination of the then rights of the parties. Constitution of the United States, Art. IV, § 1; *Allman v. Register,* 264 N.C. 561, 64 S.E. 2d 861. It would, of course, be subject to modification by the courts of North Carolina on the same basis as in Georgia. *Halvey v. Halvey,* 330 U.S. 610, 67 S.Ct. 903, 91 L.Ed. 1133; *Dees v. McKenna,* 261 N.C. 373, 134 S.E. 2d 644.

The record before us does not leave in doubt the Georgia Court's reason for taking the children from the custody of their mother. In a subsequent order, entered August 23, 1971, adjudging the maternal grandparents in contempt for willful violation of its judgment, the same Georgia Court said:

> "The prior misconduct and unfitness of Susan Spence to have unsupervised visitation of the children was the im-

pelling reason for the court's approval of the parties agreement, without which such approval would not have been entered. It was restrictive and intended by the court to be restrictive so as to prevent the mother from instilling tendencies toward sexual aberrations."

The Georgia judgment, after granting an absolute divorce and in addition to detailed provisions about the property rights of the husband and wife and their debts and obligations, not pertinent to this appeal, made these provisions (summarized) concerning the custody of the two little girls, then aged 7 and 5 years:

1. The paternal grandparents (residents of Georgia) were given full custody during June, July and August of each year;

2. The maternal grandparents (residents of North Carolina) were given full custody during the school months, September through May, of each year;

3. The maternal grandparents were given the right to have the children visit them in their own home one weekend in each of the summer months;

4. The paternal grandparents were given the right to have the children visit them in their own home during school holidays—Thanksgiving, Christmas, Easter, etc.

5. The father was given the right, without restriction, to visit the children *in the home of the paternal grandparents* but he was forbidden to remove them therefrom and the paternal grandparents were ordered to prevent him from doing so;

6. The mother was given the right, without restriction, to visit the children *in the home of the maternal grandparents* but she was forbidden to remove them therefrom and the maternal grandparents were ordered to prevent her from doing so;

7. The paternal grandparents were to pay all expenses of the children while they had the custody and the maternal grandparents were to pay all the expenses of the children, including private school expense, while they had the custody;

8. Both the father and the mother were relieved of all obligation to support the children or to reimburse either set of grandparents for any expense incurred by them;

9. Inasmuch as the maternal grandparents resided in North Carolina, and so would remove the children from Georgia periodically, they were required to give a bond in the amount of $10,000, conditioned upon their complying with the judgment and "submitting themselves and said minor children to the jurisdiction of this court for such further hearings and orders as may be heard and passed * * * as if said grandparents and said children were physically within the jurisdiction of this [Georgia] court."

It will readily be observed that the Georgia judgment did not reflect any prejudice against the North Carolina grandparents. The requirement that they post a bond was reasonable. It was designed solely to assure that the children would be returned to Georgia periodically.

It will also be observed that the Georgia judgment did not deprive the mother of the companionship of and the physical care of the children. It permitted her to be with them at will *in the home of her own parents*. There she could play with them, minister to them, cook for them, teach them, live with them nine months of each year and this she did for substantial periods prior to instituting the present action. The sole restriction was that she could not remove them from the general supervision of her own parents. This was by no means a harsh judgment. The testimony of the plaintiff, herself, in the present record shows there was ample justification for the Georgia Court's conclusion that this restriction was necessary to guard the children against the then clear and present danger of corrupt moral teaching, by example, by the mother and her chosen associates.

The wisdom of the Georgia Court's provision for the custody, care, training and maintenance of the two little girls is attested, inadvertently no doubt, by the finding of the District Court that, after the prescribed arrangement had been followed for two years, the children had "established excellent associations and records in school." Nothing whatsoever in the record suggests any deficiency in their care, training or support while in the home of either set of grandparents.

The majority of this Court, and probably the District Court as well, appears to have been led astray by two red herrings

skillfully drawn through the record: (1) The clearly established unfitness of the father to have the custody of any child, and (2) the order of the Georgia Court directing the proceeds of the forfeited compliance bond to be paid to the paternal grandparents.

Neither of these has the slightest bearing upon the question before us, which is the validity of the judgment of the Court of Appeals reinstating the Georgia judgment.

To affirm the Court of Appeals and thus restore full effect to the Georgia judgment clearly precludes the unworthy father from having custody of these children at any time. The Georgia judgment permits him to visit the children *at the home of his parents.* It expressly provides that he is "prohibited from removing the children from the home and said grandparents shall prevent the same." Nothing whatever in the record suggests that in the more than six months during which the paternal grandparents had custody of the girls they ever once failed to comply with this provision of the judgment, or that they would now do so.

It is not for us to review the Georgia Court's order finding the maternal grandparents in contempt for their failure to be equally obedient to the judgment. Nothing suggests any denial of due process of law or any departure from the applicable law of Georgia in this decree, even if we could properly review it. While it is not in accordance with our practice to punish for contempt by levying a fine or forfeiture payable to the litigant who has been injured by the contemptuous conduct (See, *In Re Rhodes,* 65 N.C. 518; *Morris v. Whitehead,* 65 N.C. 637), such practice has long been followed in the federal courts and in the majority of the states. See: *Cary Mfg. Co. v. Acme Flexible Clasp Co.,* 108 F. 875, app. dism., 187 U.S. 427; *French v. Commercial Nat. Bank,* 79 Ill. App. 110; *Bush v. Chenault,* 13 Ky. L. 249; *Chapel v. Hull,* 60 Mich. 167, 26 N.W. 874; *Archer v. Hesse,* 164 App. Div. 493, 150 N.Y.S. 296; *Lorick v. Motley,* 69 S.C. 567, 48 S.E. 614; *Robins v. Frazier,* 5 Heisk. (Tenn.) 100; *My Laundry v. Schmeling,* 129 Wis. 597, 109 N.W. 540.

It is not for us to refuse to give effect to other judgments of courts of a sister state merely because we think their practice in reference to punishment for contempt is not as wise as our own. Certainly, a court of North Carolina should not be permitted by us to change the custody of two little girls, who have

been admirably cared for by their Georgia grandparents, in reprisal for an order of forfeiture which to us may seem harsh and unwise. Nor is the amount of the forfeiture shocking. Ten thousand dollars is surely not an excessive award when the wrong done is the taking of two cherished granddaughters and the placing of them in the permanent custody of a person morally unfit to rear them.

At the time of the Georgia judgment these were Georgia children, wards of the Georgia Court. The Georgia Court was under no obligation to permit them to be brought to North Carolina. It did so in reliance upon the solemn undertaking of the maternal grandparents, "approved and consented to" by the mother, to bring them back at the appointed time. What the District Court has done, now approved by the majority opinion, invites reprisals by the courts of Georgia, and other courts, against custody decrees of North Carolina courts in comparable cases. Inevitably, it will also make courts of other states reluctant to permit a custodian of children to bring them into this state to visit relatives or for any other purpose.

It is true, as the majority opinion states, that the courts of North Carolina are not without jurisdiction to inquire into the present needs of children within this State and to make appropriate orders concerning their present and future custody. G.S. 50-13.5. North Carolina courts have such power even though the children came here from another state whose courts have previously entered a then valid judgment as to their custody. The most elementary principles of comity, however, dictate that the courts of this State be at least as cautious about modifying the valid judgment of another state's court as they are about modifying a like decree of another North Carolina court. To do otherwise invites parties dissatisfied with the other state's judgment in a custody case to bring the children here for the fraudulent purpose of evading their obligations under it and seeking sanctuary. The Georgia Court's action against the maternal grandparents on their bond was clearly due to its belief that this is what they had done. The record lends support to that view. It shows clearly that the mother, herself, intended from the beginning so to nullify the Georgia judgment.

The guiding principle in custody cases in this State, as in Georgia, is that the welfare of the children—the wards of the court—takes precedence over all else. *Shepherd v. Shepherd,* 273 N.C. 71, 159 S.E. 2d 357; *Brake v. Mills,* 270 N.C. 441, 154 S.E.

2d 526; *Wilson v. Wilson,* 269 N.C. 676, 153 S.E. 2d 349; Lee, North Carolina Family Law, § 224. It takes precedence over the welfare of the mother, over her desire to have her children in her own home, over her resentment against her own parents' court-given power to veto her wishes concerning the children, over her hostility to the paternal grandparents, over the love and concern of either set of grandparents.

When, however, a court of competent jurisdiction in this or another state has adjudged these matters, the District Court of Forsyth County is not authorized to change that adjudication merely because it would originally have entered a different decree. The custody plan previously decreed by the Georgia Court can lawfully be changed by a court of this State only for a substantial change in conditions, not because the North Carolina judge has different sociological or philosophic views from those of the Georgia Court, or because he is more sympathetic to the claimant who resides in his jurisdiction. *Shepherd v. Shepherd, supra; Stanback v. Stanback,* 266 N.C. 72, 145 S.E. 2d 332. There is no such change of condition as will justify a change in the former judgment, unless it can reasonably be believed that, had the present condition existed at the earlier date, the former decree would not have been entered by the court in which it was entered. See: *Neighbors v. Neighbors,* 236 N.C. 531, 73 S.E. 2d 153; Lee, North Carolina Family Law, § 226; 24 AM. JUR. 2d, Divorce and Separation, § 819; Annot., 9 A.L.R. 2d 629, § 3.

It thus becomes necessary to inquire into the conditions prevailing at the time of the Georgia judgment which caused the Georgia Court to reach the drastic conclusion that these two exceptionally promising little girls must never again be in the custody of either their father or their mother. Those conditions were known to the Georgia Court through "evidence submitted as provided by law." They were known to both sets of grandparents and, of course, both the father and the mother. Both parents and all four grandparents "approved and consented to" the determination of the Georgia Court that the mother (like the father) was not a person into whose hands the care and training of young girls could be entrusted, in whose home the girls could be left to reside. The same Georgia Court in 1971 said its reason for its custody order was "the prior misconduct and unfitness of Susan Spence" showing danger that the mother would instill tendencies toward "sexual aberrations" in the girls.

Obviously, the District Court's statement to the contrary notwithstanding, the fact that the children are now 11 and 9 years of age, instead of 7 and 5, as they were then, has not lessened the danger.

The majority opinion says, quite appropriately, that the admissions of each of these parents, and corroborative evidence, establish the existence of "a situation in their home * * * which was beyond the pale of the most permissive society." The majority opinion then says: "We proceed on the *assumption* that the Georgia Court was of the opinion that both [the father] and [the mother] were *emotionally disturbed* and unstable and * * * [w]e can think of no other reason for the judgment the court entered." (Emphasis added.)

This is not correct. The record shows the Georgia Court's drastic order, approved by the plaintiff's parents, was not entered because she was "emotionally disturbed and unstable." It was entered because she was deemed *morally* unfit to be entrusted with the custody of two little girls. There is a great difference between these two conditions which ought not to be obscured by the use of euphemistic terms. Emotional disturbance and instability are not the same thing as moral depravity or utter lack of moral perception and principle. It is a mistake for courts to equate the two and to proceed on the assumption that absence of moral character is a mere sickness curable by psychiatric consultations and treatments.

We are dealing in this case with a subject matter unsurpassed in importance by that of any litigation coming before this Court—the right of children to be reared in a home conducive to the development of their own character. It should not be befogged by euphemisms. It is not desirable to set out in the report of this decision all of the sordid details of the evidence supporting the Georgia judgment. However, in order to determine whether there has been a *showing* of a change of the crucial condition on which that judgment was based, we must state frankly, not euphemistically, what the condition was. It is the plaintiff mother who makes this necessary by instituting this proceeding for the purpose of nullifying the judgment to which she gave her consent and approval, however lacking in good faith that consent may now appear to have been.

There is an abundance of evidence in the record before us to show that for a substantial period of time prior to and culminating in the Georgia judgment:

1. The father habitually committed adultery, maintaining his mistress, a teenage girl, in the home where he and the mother lived with these children;

2. The mother consented to, condoned, encouraged, aided and abetted in this conduct, going so far as to turn over and go to sleep without protest when awakened by the father and his mistress engaging in sexual intercourse while in the same bed with her, and thereafter serving them breakfast in bed; and

3. The mother made homosexual advances to various teenage girls visiting in her home, sometimes in the presence of her two daughters, then mere infants, the general course of these actions being with the knowledge and consent of the father, her husband.

An especially pertinent and revealing statement by the plaintiff mother in her testimony before the District Court, and therefore bearing upon her present ideals and principles, was that she could not throw her husband's mistress out of the house because she tried to treat the mistress *"as a daughter"* and so the situation, in her mind, was "the same as if he had an affair with Dianne [one of the little girls]," in which case she "wouldn't want to throw anybody out." When, to illustrate her continuing affection for her husband's mistress, the plaintiff testifies that she could not force anyone to leave her home in order to break up an incestuous affair with her own little girl, it can hardly be said that there is substantial evidence of a change in the condition on which the Georgia judgment rests.

At the conclusion of the plaintiff's evidence the appellants moved for dismissal on two grounds: (1) The evidence showed no change of condition since the Georgia judgment; (2) this action is the culmination of a fraud on the Georgia Court. The District Court should have allowed the motion on both grounds.

The plaintiff's evidence shows beyond question that at the time she and the maternal grandparents approved and consented to the Georgia judgment and gave the bond to secure their compliance with it, it was the plaintiff's purpose and intent to get the children to North Carolina by this device and to institute an action here, in what she believed would be a more favorable judicial climate, to gain their custody. While the maternal grandparents complied with the provisions of the Geor-

gia judgment prior to the institution of this action in the District Court of Forsyth County, the testimony of the maternal grandmother shows clearly her own sympathy with this fraudulent purpose of the plaintiff. A court of this State may not properly lend itself to the perpetration of such a fraud upon the court of a sister state.

The plaintiff's evidence shows no change in the condition on which the Georgia Court properly rested its judgment. Her testimony in this action is not that she *no longer* has homosexual tendencies. Her testimony is that she *never* had them. This is not evidence of a *change* in condition.

Her psychiatric expert witness testified on the basis of a single one-hour consultation, conducted after this action was instituted, not for treatment but solely to enable him to testify as to her present "fitness as a mother." He did not mention, and obviously could not know, her condition at the time of the Georgia judgment. The plaintiff's testimony shows she had psychological consultations not long prior to the Georgia judgment, but, for reasons not disclosed, the Georgia psychologist was not called to testify. This is not evidence of a *change* of condition.

The plaintiff's psychiatric expert witness gave the startling testimony that in his opinion homosexual tendencies in the plaintiff would have no bearing on her "fitness as a mother" to have the sole custody of two little girls. Passing over other appropriate characterizations of this "expert opinion," it suffices, for the present, to observe that it has no tendency to show any change of condition. Furthermore, the question of the plaintiff's "fitness as a mother" to have sole custody of these children is not a matter for expert opinion testimony. That is the ultimate question to be determined by the court. The Georgia Court determined it adversely to the plaintiff. Its determination is binding on the courts of this State in absence of a clear showing of a *change* in the condition on which its judgment was based. The Full Faith and Credit Clause, Art. IV, § 1, of the Constitution of the United States requires more than lip service by the courts of North Carolina when called upon to disregard and change a judgment rendered by a Georgia court which had jurisdiction both over the subject matter and over the parties.

The District Court's findings of fact, assuming adequate support therefor in the evidence, do not support its judgment

because they do not show any change in condition. Let us examine them, summarized and renumbered:

> (1) The plaintiff is a member of the Methodist Church, participates in its activities, sings in the choir and takes the children regularly to Sunday school.

These are, per se, laudable, but they do not, per se, show she subscribes to or complies with those principles of sexual morality which, notwithstanding her psychiatric expert's contrary opinion, society generally still deems essential to the custodian of little girls. More significant for our purposes, this finding shows *no change* in condition, for the plaintiff, herself, testified in the District Court that while living in Georgia, prior to and at the time of the Georgia judgment, she was a member of the Methodist Church and was as active in its assemblies as the then age of her children permitted.

> (2) The plaintiff keeps the children clean and neat, well fed, supplied with proper toys, in a "nice neighborhood," sees them across the street to and from school and spends time with them.

These too are laudable, per se, but do not, per se, show she subscribes to and complies with the above mentioned principles of morality. Again, these too are not findings of a change of condition, for the plaintiff's own testimony, not challenged by the appellants, is clear and explicit to the effect that all these things she did in Georgia before and at the time of the Georgia judgment.

> (3) The plaintiff is a well educated woman.

So she is and so she was in Georgia. She had a Master's degree when living with her husband and his mistress.

> (4) The plaintiff has professional competence, is well respected by her profession as a competent speech therapist and is financially successful in her practice.

So she is and so she was in Georgia while living with her husband and his mistress, according to her own testimony.

The Georgia Court rendered its judgment on the basis of an opinion, apparently not shared by the plaintiff's psychiatric expert witness, that good personal moral standards are indispenable in a fit custodian for small girls and that professional

competence, superior education, financial success, a residence in a "nice neighborhood," personal cleanliness, a neat apartment and active participation in church work do not guarantee such moral standards. This Court also has recognized the greater importance of intangible attributes of character as compared with material comforts in awarding custody of children to a relative in preference to either parent. *Brake v. Mills, supra.*

This conclusion of the Georgia Court was with the "approval and consent" of all parties before it. Its soundness is a matter of common knowledge and so an appropriate subject of judicial notice. The judgment based thereon is binding on the courts of this State until there is a clear showing of a change in condition. There is no such showing here.

It is not a light thing to take children from the custody of a mother—or of a father. The Georgia Court did not so regard it. It has been customary, when children are small, to regard the mother as the more natural custodian when divorce disrupts the home. In part this is tradition, stemming from the fact that the father is normally the provider of support and so is unable to spend as much time at home, and from the usually greater tenderness of a woman's nature. It is due in part to the ingrained habits of chivalry and to the resulting sheltered protection of women from contact with degrading influences. Now, however, a permissive society has "liberated" women, if so inclined, to inquire into, discuss, experiment with, condone and practice all of the vices which the most depraved of men have practiced since the days of Abraham. Consequently, courts of the present day must put into practice in custody cases the realism on which current society prides itself. In awarding the custody of children we must remember that the process of giving birth does not automatically transform a woman into an exemplification of the 31st Chapter of Proverbs. This is not to negate the great truth of reformation of character, nor is it to equate isolated instances of misconduct, even gross, with lack of moral character, but in absence of evidence of a change in this fundamental condition on which the Georgia Court based its judgment the courts of this State may not properly set it aside.

The District Court, in addition to its findings of fact mentioned above, also included in its judgment the following statements which it denominated findings of fact:

"6. Susan Durham Spence * * * is in all respects a fit and proper person to have the custody of her two minor children * * *;

"7. The best interest of these two minor children shall be served by their custody being awarded to their mother * * *;

"8. The maternal grandparents Durham and the paternal grandparents Spence are all fit persons to have the custody of Fay and Dianne. All four grandparents however are of such age that the best interest of the two children will be served by awarding primary custody to their mother. * * *

"10. * * * [T]here have been substantial changes in conditions since June 2, 1969 * * * including * * *:

"a. * * * Susan Durham Spence is now a fit and proper person to have the custody of her children;

"b. Today Susan Durham Spence is a well adjusted emotionally stable individual fully capable of caring for and rearing Fay and Dianne; * * *

"d. * * * The grandparents Spence and Durham are not as able to respond to the daily needs of two small girls as they were on June 2, 1969. * * *"

Under the caption, "CONCLUSIONS OF LAW," the District Court repeated the statements:

"Susan Durham Spence is a fit and proper person to have the exclusive custody of her two minor children * * *;

"The best interest of Fay and Dianne dictate that their custody be awarded to their mother."

I have found absolutely no evidence in the record to support the finding that the Spence and Durham grandparents are no longer able by reason of age, health, financial condition or any other circumstance "to respond to the daily needs of these little girls." The Spence grandparents, at least, are begging to be allowed to do so. There is no evidence as to their age or health. The only evidence as to Mr. Durham's health is that he was unable to attend the hearing in the District Court due to a temporary illness. Both couples appear to be in as good financial condition as when they all "approved and consented to" the

Georgia judgment. At the time of the Georgia judgment the little girls were 7 and 5 years of age. Now they are 11 and 9. The physical demands and strains of caring for a 5-year-old are immeasurably greater than those of fulfilling the "daily needs" of a 9-year-old. The needs of the maturing child are more in the realm of counselling and less in the realm of physical care and play and physical policing. There is obvious inconsistency in the District Court's saying in one breath that the grandparents are all "fit persons to have the custody" and in the next that they are too old to be permitted to have it. This is a crucial "finding," if it be a finding. As a finding, it lacks support in the evidence. As a conclusion, it is patently erroneous for, of necessity, in view of the absence of evidence bearing thereon, it is a conclusion that no grandparents are as competent custodians as is every mother. We cannot determine to what extent the District Court rested its decree upon this wholly arbitrary and unsupported declaration. For this reason alone, if there were no other, the Court of Appeals was within its authority in reversing the judgment of the District Court.

The declarations "fit and proper person to have the custody," "best interest of these minor children" and "fully capable of caring for and rearing Fay and Dianne" are not findings of fact. As Justice Parker, later Chief Justice, said in the case of *Thomas v. Thomas*, 259 N.C. 461, 130 S.E. 2d 871, and Justice Denny, later Chief Justice, said in the case of *In Re Kimel*, 253 N.C. 508, 512, 117 S.E. 2d 409, these are conclusions of the trial judge upon the ultimate issue. There is no accepted standard of "fitness" to have custody of children. There is no accepted standard for determining the "best interest" of a child with reference to his or her custodian. These are not matters which can be "found." These are matters calling for the exercise of the subjective judgment of the court. Its conclusions thereon are subject to review by the appellate court.

To say, as the majority opinion seems to intimate, that these conclusions on the ultimate, crucial question in the case are findings of fact and, therefore, not subject to review on appeal if there be the slightest competent evidence in the record to support them, makes any District Judge in North Carolina the absolute Czar in determining the custody of children. No more important litigation can come before the courts and, obviously, it is in the District Court that pressures of local social and political influences are strongest.

Furthermore, to say that, if there is *any* competent evidence to support the District Court's "finding" of good character and fitness, no appellate court can reverse a custody award based thereon is not sound in law or in policy. It is inconceivable that there will arise any contested custody case in which there will not be *some* testimony of good character and fitness of each claimant. The claimant, by his or her own testimony, can supply it and few men or women are so depraved as to be completely lacking in attractive attributes or as to be unable to find some relative or acquaintance who will testify to good character and behavior. Testimony as to character is competent in custody hearings, and so is the claimant's own denial of charges of misconduct, but neither is sufficient to put the District Court's conclusion as to "fitness" as custodian of children beyond the reach of an appellate court on review.

Custody hearings are equitable in nature, the child being the ward of the court, even though the procedure is now regulated to some degree by statute. *In Re Custody of Sauls,* 270 N.C. 180, 186, 154 S.E. 2d 327. Lee, North Carolina Family Law, § 226; Clark, Law of Domestic Relations, § 17.1; Pomeroy, Equity Jurisprudence, § 1307; 24 AM. JUR. 2d, Divorce and Separation, § 772. While, in the exercise of this equitable jurisdiction, the trial court has broad discretion and its determinations are not lightly to be set aside on appeal, the appellate court in equity has, and traditionally exercises, much more extensive powers of review than does the appellate court in law over determinations of fact. This greater power of review of the appellate court in equity extends to custody cases and to the determination therein of the fitness of claimants and the best interest of children. See: *In Re Kimel, supra; In Re Turner,* 151 N.C. 479, 66 S.E. 431; Lee, North Carolina Family Law, § 224; McClintock, Handbook on the Principles of Equity, 2d Ed, § 54; Nelson, Divorce and Annulment, 2d Ed, §§ 15.50 and 30.10; 24 AM. JUR. 2d, Divorce and Separation, § 779.

In its so-called Finding of Fact Number 10, purporting to show changes in condition since the Georgia judgment, the District Court injected many conclusions. The actual findings of fact therein are either not supported by the evidence or are unrelated to the condition which was the basis for the Georgia judgment. Thus, the so-called Finding of Fact Number 10 does not constitute a proper finding of a change of condition and does not afford a proper basis for the order of the District Court.

The plaintiff, by virtue of the District Court's interlocutory order awarding her the custody of the children until the hearing, had them in her custody for five months prior to the hearing. The District Court relied heavily on absence of a showing that this five-month period produced a deterimental effect on the children. The plaintiff is quite obviously a woman of intelligence, highly educated, especially adept in the field of psychological tests and measurements. She, far more than the average person, could succeed in making a favorable showing on the tests given by her psychiatric expert witness during his one-hour interview with her. It is hardly surprising that during the five-month test period given her by the District Court, awaiting the hearing of her case and knowing the nature of the charges likely to be made against her, the plaintiff complied with the customary standards of society and of motherhood. Good behavior for so short an interval with so much at stake is not sufficient evidence on which to predicate a finding of a change in moral principles. To take these little girls from the homes of grandparents under whose affectionate and watchful care they have done exceptionally well and to give them into the sole custody of this plaintiff, in view of her established record of behavior, is an abuse of the discretion vested in the District Court even if its conclusions could properly be deemed findings of fact.

We should, therefore, affirm the judgment of the Court of Appeals.

STATE OF NORTH CAROLINA v. W. N. C. PALLET AND FOREST PRODUCTS COMPANY, INC.

No. 34

(Filed 31 August 1973)

1. Indictment and Warrant § 9— requisites for valid indictment or warrant

No indictment or warrant, whether at common law or under a statute, can be good if it does not accurately and clearly allege all of the constituent elements of the crime sought to be charged and also charge the offense with sufficient certainty to apprise the defendant of the specific accusation against him so as to enable him to prepare his defense and to protect himself from a subsequent prosecution for the same offense, and to enable the court to proceed to judgment.

2. **Indictment and Warrant § 9; Nuisance § 3— air pollution — insufficiency of warrant to charge crime**

A warrant charging defendant with a violation of Regulation No. 2 of Section II of Article IV of the Rules and Regulations of the Western North Carolina Regional Air Pollution Agency was insufficient to show that the alleged conduct of defendant was a criminal offense where the warrant did not inform defendant or the court as to when, by whom and under what circumstances the alleged Agency was created or where records disclosing those facts could be found, nor did it allege the contents of Regulation 2 or refer to where the text of the regulation could be found.

3. **Criminal Law § 31— municipal ordinances — no judicial notice**

The courts will take judicial notice of municipalities, counties and other political subdivisions of the State, but they will not take judicial notice of municipal ordinances.

4. **Indictment and Warrant § 9— violation of municipal ordinance — sufficiency of allegation**

A criminal prosecution for violation of a municipal ordinance cannot be maintained if the warrant on which it is based does not set out the ordinance or plead it in a manner permitted by G.S. 160A-79(a).

5. **Criminal Law §§ 31, 146— raising of constitutional question — determination of case on other grounds**

Where the Court could not take judicial notice that a Regional Air Pollution Board known as the Western North Carolina Regional Air Pollution Agency had been created by two or more municipalities or counties by joint resolution or contract nor could it take judicial notice of any rules and regulations of such board, the record did not afford a proper basis for passing upon whether the rules and regulations adopted by such board had constitutional validity; moreover, the case could be decided on other grounds without considering constitutional questions raised in the briefs.

6. **Indictment and Warrant § 9— violation of rule of government board or commission — inclusion of rule in indictment**

In a criminal prosecution for violation of a rule or regulation of a governmental board or commission, the indictment should set forth such rule or regulation or refer specifically to a permanent public record where it is recorded and available for inspection, since no criminal prosecution should be based on a rule or regulation evidenced only by a typed paper in a file or notebook of such board or commission.

Justice LAKE concurs in result.

APPEAL by the State under G.S. 15-179(3) and (6) from *Thornburg, J.*, at 30 October 1972 Session of BUNCOMBE Superior Court, certified for initial appellate review by the Supreme Court pursuant to G.S. 7A-31.

In this criminal action entitled, *"The State of North Carolina v. W. N. C. Pallet & Forest Products Co., Inc.,"* defendant

was arrested on a warrant which charged that on or about the 22nd day of May, 1972, in the County of Buncombe, he "did unlawfully, wilfully, and feloniously cause, suffer, allow and permit emission from an installation, to wit, a tee-pee type sawdust, bark, and wood chip burner, which were [sic] of a shade or density darker than that designated as No. 2 on the Ringelmann Chart for an aggregate of more than 5 minutes in any one hour or more than 20 minutes in any 24-hour period, to wit, for a period of 40 minutes between the hours of 1:20 o'clock p.m. and 2:00 o'clock p.m. on said 22nd day of May, 1972, and did cause, suffer, allow and permit emission from an installation, to wit, a tee-pee type sawdust, bark, and wood chip burner, of such opacity as to obscure an observer's view of a degree greater than does smoke of a shade or density darker than that designated as No. 2 on the Ringelmann Chart, to wit, smoke of a shade or density designated as No. 5 on the Ringelmann Chart and 100% opacity, against the peace and dignity of the State and in violation of Regulation No. 2 of Section II of Article IV of the Rules and Regulations of the Western North Carolina Regional Air Pollution Agency and North Carolina General Statute Section 143-215.3(a) (11) (e) (3)."

On arraignment in the District Court, defendant, in writing, moved to quash the warrant "for that it appears on the face of the warrant that there is no charge of any criminal offense or violation of any valid law. . . ." Defendant asserted "that the alleged 'Regulation No. 2 of Section II of Article IV of the Rules and Regulations of the Western North Carolina Regional Air Pollution Agency' (if any such 'agency' exists) is unlawful and invalid, and such alleged 'Regulation' and N. C. General Statutes 143-215.3(a) (11) (e) (3)" are unconstitutional and void, being in violation of Article II, Section 1, and Article I, Section 6, and Article I, Section 1, of the Constitution of North Carolina.

The District Court judge quashed the warrant and dismissed the action "for the reason that Regulation No. 2 of Section II of Article IV of the Rules and Regulations of the Western North Carolina Regional Air Pollution Agency is in violation of and contrary to Article II, Section 1, of the Constitution of North Carolina in that it was passed and adopted pursuant to an unlawful delegation of legislative power and said Regulation is unconstitutional and void."

On the State's appeal, Judge Thornburg affirmed the order of the District Court. The State excepted to Judge Thornburg's ruling and appealed.

Attorney General Robert Morgan and Assistant Attorney General Henry T. Rosser for the State.

Herbert L. Hyde for defendant appellee.

BOBBITT, Chief Justice.

[1] "No indictment, whether at common law or under a statute, can be good if it does not accurately and clearly allege all of the constituent elements of the crime sought to be charged. It must charge the offense with sufficient certainty to apprise the defendant of the specific accusation against him so as to enable him to prepare his defense and to protect him from a subsequent prosecution for the same offense, and to enable the court to proceed to judgment.

"An indictment or warrant is sufficient if it charges the offense in a plain, intelligible, and explicit manner, and contains averments sufficient to enable the court to proceed to judgment, and to bar a subsequent prosecution for the same offense." 4 Strong, N. C. Index 2d, Indictment and Warrant § 9, pp. 347-48.

The warrant alleges that defendant's conduct as set forth therein is unlawful, wilful and felonious because in violation of Regulation No. 2 of Section II of Article IV of the Rules and Regulations of the Western North Carolina Regional Air Pollution Agency and North Carolina General Statutes 143-215.3(a)(11)e.3. The first question is whether the allegations of this warrant charge a criminal offense.

Prior to 1967, Article 21 of Chapter 143 of the General Statutes (Vol. 3C Replacement 1964), entitled, "State Stream Santitation and Conservation," created a "State Stream Resources Committee" to administer its provisions. Article 21 of Chapter 143 was rewritten by Chapter 892, Session Laws of 1967, which provided that it was to be known and cited as "The North Carolina Water and Air Resources Act." The provisions of Article 21 as rewritten by the 1967 Act were designated G.S. 143-211 through G.S. 143-215.9.

G.S. 143-211 states the public policy which underlies Article 21. G.S. 143-212 creates the Department of Water and Air

Resources. G.S. 143-213 defines certain of the terms used in Article 21. The North Carolina Board of Water and Air Resources (Board) was created by G.S. 143-214 and charged with the duty of administering the provisions of Article 21. Thereafter, the powers and duties of the Board were set forth in detail.

The 1969 and 1971 amendments to the 1967 Act are incorporated in Article 21 of Chapter 143 as set forth in the 1971 Supplement to Volume 3C Replacement 1964 of the General Statutes. Statutory provisions cited below are those set forth in the 1971 Supplement.

G.S. 143-215.3(a)(11)e.1 is entitled "Local air pollution control programs authorized" and, in part, provides: "The governing body of any county, municipality, or group of counties and municipalities within a designated area of the State, as defined in this Article, subject to the approval of the Board of Water and Air Resources, is hereby authorized to establish, administer, and enforce a local air pollution control program for the county, municipality, or designated area of the State which includes but is not limited to:

"i. . . .

"ii. . . .

"iii. . . .

"iv. Adoption, after notice and public hearing, of air quality and emission control standards, or adoption by reference, without public hearing, of any applicable rules, regulations and standards duly adopted by the Board of Water and Air Resources; and administration of such rules, regulations and standards in accordance with provisions of this subdivision.

"v. . . .

"vi. . . ."

G.S. 143-215.3(a)(11)e.2 provides: "Each governing body is authorized to adopt any ordinances, resolutions, rules or regulations which are necessary *to establish and maintain an air pollution control program and to prescribe and enforce air quality and emission control standards,* a copy of which must be filed with the State Board of Water and Air Resources and with the clerk of court of any county affected. . . ." (Our italics.)

G.S. 143-215.3(a)(11)e.3 prescribes the penalty for violation "of any of the requirements contained in such ordinances, resolutions, rules or regulations. . . ."

G.S. 143-215.3(a)(11)g, entitled, "Creation and administration of regional air pollution control programs," provides: "In addition to any other powers provided by law and subject to the provisions of this section, *each governing body of a county or municipality* is hereby authorized and empowered to establish *by contract, joint resolution, or other agreement with any other governing body of a county or municipality,* upon approval by the Board of Water and Air Resources, *an air pollution control region* containing any part or all of the geographical area within the jurisdiction of those boards or governing bodies which are parties to such agreement, provided the counties involved in the region are contiguous or lie in a continuous boundary and comprise the total area contained in any region designated by the Board of Water and Air Resources for an area-wide program. The participating parties are authorized *to appoint a regional air pollution control board* which shall consist of at least five members who shall serve for terms of six years and until their successors are appointed and qualified. Two members shall be appointed for two-year terms, two shall be appointed for four-year terms and the remaining member or members shall be appointed for six-year terms. A participant's representation on the board shall be in relation to its population to the total population of the region based on the latest official United States census with each participant in the region having at least one representative; provided, that where the region is comprised of less than five counties, each participant will be entitled to appoint members in relation to its population to that of the region so as to provide a board of at least five members. Where the term 'governing body' is used, it shall include the governing board of a region. The regional board is hereby authorized to exercise any and all of the powers provided in this section. The regional air pollution control board shall elect a chairman and shall meet at least quarterly or upon the call of the chairman or any two members of the board. In lieu of employing its own staff, the regional air pollution control board is authorized, through appropriate written agreement, to designate a local health department as its administrative agent." (Our italics.)

G.S. 143-215.3(a)(11)g does not expressly confer authority upon Regional Air Pollution Control Boards to determine and

adopt air quality and emission control standards. The authority, if any, must be found in these sentences: "Where the term 'governing body' is used, it shall include the governing board of a region. The regional board is hereby authorized to exercise any and all of the powers provided in this section." Considered in the light most favorable to the State, the word *section* refers to all of G.S. 143-215.3(a)(11). A portion thereof, to wit, G.S. 143-215.3(a)(11)e.2 confers upon the governing body of a municipality or county authority "to establish and maintain an air pollution control program and to prescribe and enforce air quality and emission control standards. . . ."

Whether G.S. Chapter 143, Article 21 (Part 1), purports to delegate to The North Carolina Board of Water and Air Resources legislative authority which is vested exclusively in the General Assembly by Article II, Section 1, of the Constitution of North Carolina, is not presented. Defendant is not charged with the violation of any regulation adopted by that Board. We note that rules and regulations adopted by that Board shall "be printed (or otherwise duplicated), and a duly certified copy thereof shall immediately be filed with the Secretary of State." G.S. 143-215.4.

Whether G.S. Chapter 143, Article 21 (Part 1), purports to delegate to the governing board of a municipality or county legislative authority vested exclusively in the General Assembly by Article II, Section 1, of the Constitution of North Carolina, is not presented. Defendant is not charged with the violation of a regulation adopted by the governing body of any municipality or county.

The warrant charges the violation of Regulation No. 2 of Section II of Article IV of the Rules and Regulations of the Western North Carolina Regional Air Pollution Agency. It is silent as to when, by whom and under what circumstances the alleged Western North Carolina Regional Air Pollution Agency was created.

G.S. 143-215.3(a)(11)g provides that a Regional Air Pollution Control Board may be established "by contract, joint resolution, or other agreement" between the governing boards of counties and municipalities in a designated area. The representation of each of the participating counties and cities on such Regional Air Pollution Control Board is prescribed. If it be assumed that a legal entity called the Western North Carolina Regional Air Pollution Agency was created pursuant to those

provisions, the warrant gives no information as to what counties or municipalities participated in its creation or the terms of the joint resolution or contract which created it. Nor does the warrant contain any reference to where such joint resolution or contract may be found.

Assuming the Western North Carolina Regional Air Pollution Agency was created as a regional air pollution control board pursuant to G.S. 143-215.3(a)(11)g by a joint resolution or contract of two or more municipalities or counties, the provisions of such joint resolution or contract are undisclosed.

The warrant charges a violation of Regulation No. 2 of Section II of Article IV of the Rules and Regulations of the Western North Carolina Regional Air Pollution Agency. It does not allege verbatim or in substance the provisions of the alleged Regulation No. 2 nor does it allege when and under what circumstances the alleged Regulation No. 2 was adopted. Nor does it allege that a copy thereof has been filed with the State Board of Water and Air Resources and with the Clerk of Court of Buncombe County.

[2] We conclude that the allegations of the warrant are insufficient to show that "violation of Regulation No. 2 of Section II of Article IV of the Rules and Regulations of the Western North Carolina Regional Air Pollution Agency" constitutes a criminal offense.

[3] The courts will take judicial notice of municipalities, counties and other political subdivisions of the State. *State v. R. R.*, 141 N.C. 846, 850, 54 S.E. 294, 296 (1906); *Laundry v. Underwood*, 220 N.C. 152, 155, 16 S.E. 2d 703, 705 (1941); *Patterson v. Patterson*, 230 N.C. 481, 484-85, 53 S.E. 2d 658, 661 (1949).

"Judicial notice is not taken of municipal ordinances, and annoying difficulties of proof may be encountered unless the ordinance is printed or published under proper authority." 1 Stansbury's North Carolina Evidence (Brandis Rev. 1973) § 12, p. 29. *Accord, State v. Clyburn, et al*, 247 N.C. 455, 461, 101 S.E. 2d 295, 300 (1958); *Fulghum v. Selma*, 238 N.C. 100, 105, 76 S.E. 2d 368, 371 (1953); *Toler v. Savage*, 226 N.C. 208, 210, 37 S.E. 2d 485, 486 (1946).

[4] A criminal prosecution for violation of a municipal ordinance cannot be maintained if the warrant on which it is based does not set out the ordinance or plead it in a manner permitted by the statute now codified as G.S. 160A-79(a). *State v. Bur-*

ton, 243 N.C. 277, 90 S.E. 2d 390 (1955). Decisions prior to the enactment of the 1917 statute on which G.S. 160A-79(a) is based include the following: *Greensboro v. Shields,* 78 N.C. 417 (1878); *Hendersonville v. McMinn,* 82 N.C. 532 (1880); *State v. Edens,* 85 N.C. 522, 526 (1881).

In *State v. Lunsford,* 150 N.C. 862, 64 S.E. 765 (1909), the warrant charged that defendant "did unlawfully and willfully sell spirituous, vinous and malt liquors to one Zeb. D. Grant, in violation of City Ordinance No. State [sic], contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State." The opinion of Justice (later Chief Justice) Hoke states the ground on which judgment was arrested: "[W]hile the warrant and accompanying affidavit give indication that the offense charged was for the violation of some municipal ordinance, the ordinance is not set forth or described, nor is it referred to in any way sufficient to identify it, and for this reason a prosecution can not be sustained under it as an offense against a municipal regulation." *Id.* at 865, 64 S.E. at 766.

[5] The Court cannot take judicial notice that a Regional Air Pollution Board known as the Western North Carolina Regional Air Pollution Agency *has been created* by two or more municipalities or counties by joint resolution or contract. *A fortiori,* the Court cannot take judicial notice of the contents of any rules and regulations which such a board may have adopted. Hence, the present record does not afford a proper basis for passing upon whether rules and regulations adopted by such a board have constitutional validity.

The warrant is deficient in that it does not inform the defendant or the court as to when, by whom and under what circumstances the alleged Western North Carolina Regional Air Pollution Agency was created; nor does it allege where records disclosing the pertinent facts may be found. Moreover, although it charges the violation of Regulation No. 2 it does not allege the contents thereof; nor does it refer to where the text of such regulation may be found. Assuming the validity of Regulation No. 2, the warrant falls far short of meeting the essentials of a valid criminal pleading.

The following from the opinion of Justice Johnson in *State v. Blackwell,* 246 N.C. 642, 644, 99 S.E. 2d 867, 868-69 (1957), is pertinent here: "The constitutionality of a statute will not be considered and determined by the Court as a hypothetical

question. *S. v. Muse,* 219 N.C. 226, 13 S.E. 2d 229. Nor will the Court anticipate a question of constitutional law before the necessity of deciding it arises. *S. v. Trantham,* 230 N.C. 641, 55 S.E. 2d 198. Moreover, a constitutional question will not be passed on even when properly presented if there is also present some other ground upon which the case may be decided. *S. v. Jones,* 242 N.C. 563, 89 S.E. 2d 129; *S. v. Lueders,* 214 N.C. 558, 200 S.E. 22."

We do not reach the constitutional questions discussed in the briefs but affirm the quashal of the warrant solely on the ground stated herein, namely, the failure of the warrant to allege facts sufficient to identify the crime for which the defendant was to be tried.

[6] The text of "Regulation No. 2" does not appear in the record before us. Nor does the record contain any stipulation which sets forth, verbatim or in substance, the provisions thereof. In a criminal prosecution for violation of a rule or regulation of a government board or commission, the indictment should set forth such rule or regulation or refer specifically to a permanent public record where it is recorded and available for inspection. No criminal prosecution should be based on a rule or regulation evidenced only by a typed paper in a file or notebook of such board or commission.

On the ground stated, the judgment of the court below is affirmed.

Affirmed.

Justice LAKE concurs in result.

BILLIE J. HENSLEY AND WIFE, JOYCE HENSLEY v. CLYDE RAMSEY

No. 77

(Filed 31 August 1973)

1. **Rules of Civil Procedure § 50— motion for directed verdict — requirement of setting forth specific grounds**

Rule 50(a) requires that "[a] motion for a directed verdict shall state the specific grounds therefor," and the better practice is to set forth the specific grounds in a written motion; however, if a movant relies upon an oral statement for such specific grounds, a transcript thereof must be incorporated in the case on appeal.

2. **Rules of Civil Procedure § 50— motion for directed verdict — failure to move for judgment n.o.v. — directed verdict barred in Supreme Court**

Since defendant made no post-verdict motion for judgment notwithstanding the verdict and since the trial judge after verdict did not of his own motion consider whether a directed verdict should have been entered, the Supreme Court could not direct entry of judgment in accordance with defendant's motion for a directed verdict by reason of the express terms of G.S. 1A-1, Rule 50(b)(2).

3. **Easements § 9— title from common source — conveyance of easement — better title in defendant**

In an action to determine whether defendant trespassed upon plaintiffs' property in bulldozing a road thereon or whether he was within his rights in improving the road by virtue of an easement described in the deeds of conveyance comprising his chain of title to his property which adjoined that of plaintiffs, evidence offered by defendant was sufficient to support findings that plaintiffs and defendant obtained their lands from a common source, the source conveyed defendant's property with the easement prior to conveying plaintiffs' property, and therefore defendant, in respect of the easement, had a better title from the common source.

4. **Easements § 2— creation by deed — sufficiency of description of roadway**

No particular words are necessary to grant an easement, but the granting instrument should describe with reasonable certainty the easement created and the dominant and servient tenements; hence, the language "including a right-of-way to a road across said Duncan's lot along said Lankford's Line," in a deed from the parties' common source to a grantee in defendant's chain of title was sufficient to constitute an easement by express grant.

5. **Easements § 9— easement given by predecessor in title — land subsequently taken subject to easement**

The law contemplates that a purchaser of land will examine each recorded deed or other instrument in his chain of title, and charges him with notice of every fact affecting his title which such an examination would disclose; consequently, when plaintiffs purchased the property described in the complaint they were charged with notice of the easement to which their property was subjected by the terms of the prior deed from the parties' common source to a grantee in defendant's chain of title.

6. **Adverse Possession § 25.1; Easements § 6— easement for roadway — termination by adverse possession — trespass — erroneous instructions**

In giving instructions on the issue of whether an easement for a roadway held by defendant was terminated by adverse possession by plaintiffs and on the issue of defendant's trespass on plaintiffs' land, the trial court erred in referring to the route of an undefined course used by the parties' common source of their respective properties prior to a conveyance of land and the easement in question to a grantee in defendant's chain of title; rather, the court should have instructed that the easement related to a strip of land described in the deed from the

common source to the grantee in defendant's chain of title over which the common source had authority to grant an easement.

7. **Adverse Possession §§ 17, 25.1— valid deed — no color of title — no termination of easement by adverse possession**

A valid deed, nothing else appearing, may serve as color of title, but when it is shown that the landowner has a good title based on a connected chain of title to a common source, such landowner will not be permitted to ignore a duly recorded easement granted by his predecessors in title by the fiction of treating his valid deed merely as color of title and thereby defeat an outstanding valid easement by adverse possession for a period of seven years; therefore, the trial court erred in giving an instruction which treated plaintiffs' deed to the land in question solely as color of title where the deed did in fact pass title to plaintiffs.

8. **Easements § 6— easement for roadway — immaterial evidence improperly admitted**

When an easement is created by deed, the existence or nonexistence of other access to the highway does not affect the easement; therefore, in an action to determine the parties' rights with respect to a strip of land over which defendant claimed an easement had been expressly granted his predecessors in title, the trial court erred in allowing evidence of defendant's access to the highway through contiguous land owned by him.

APPEAL by defendant from *Winner, J.*, 14 August 1972 Session of BUNCOMBE County District Court, transferred for initial appellate review by the Supreme Court by order dated 26 March 1973 entered pursuant to G.S. 7A-31(b)(4).

This action was commenced on 21 June 1971.

Plaintiffs alleged they were owners and in possession of a certain parcel of land in Flat Creek Township, Buncombe County, North Carolina, which had been conveyed to them by Frank Chambers (unmarried) by deed dated 17 March 1960, recorded in Book 827, Page 277, in the Office of the Register of Deeds of Buncombe County, North Carolina; and that on 8 May 1971 defendant removed plaintiffs' fence, entered upon plaintiffs' property with a bulldozer and excavated a portion of plaintiffs' yard for use as a road or driveway, thereby trespassing upon and materially impairing the value of plaintiffs' property. Plaintiffs prayed that defendant be enjoined from further trespass upon their property and that plaintiffs recover actual and punitive damages and costs.

Answering, defendant admitted that on 8 May 1971, plaintiffs occupied a residence on the property described in the complaint; otherwise, defendant denied plaintiffs' allegations.

As a further defense, defendant asserted that what he had done was "by authority of and in the exercise of defendant's rights in the easement and right-of-way described in the deeds of conveyance comprising defendant's chain of title in his property, which adjoins plaintiffs' property and derives from common source and by prior right. . . ." Defendant's allegations contain references to the recorded deeds constituting his chain of title.

In accordance with the requests of plaintiffs and of defendant, there was a jury trial, at which both plaintiffs and defendant offered evidence.

As evidence of ownership, plaintiffs offered as Exhibit P-1 the recorded deed dated 17 March 1960 from Frank Chambers (unmarried) to plaintiffs, which purports to convey in fee simple, free and clear of encumbrances, the parcel of land in Flat Creek Township described therein and in the complaint as follows:

"BEGINNING on a stake made from an old automobile axle, said stake being in Pierce Hensley's southeast corner, and being also in the north margin of the Flat Creek-Georgetown Road, and runs thence with said Hensley's line, North 1° West 258 feet to a stake in southeasterly margin of the old Burnsville Road; thence with said margin of said road, North 38° East 132 feet to a stake in Ramsey's line; thence leaving said Road and running with said Ramsey's line three (3) calls: South 76° 30' East 122 feet; South 43° 30' East 69.5 feet and South 47° East 81 feet to a stake in Arnold Garrison's northwest line; thence with said Garrison's line, South 33° 30' West 308 feet to a stake in the north margin of said Flat Creek-Georgetown Road; thence with said margin of said Road two (2) calls: North 84° West 46.2 feet and North 72° 15' West 91.5 feet to the BEGINNING. Containing 1.88 acres as shown by a survey made February, 1960 by J. R. Reagan, Surveyor. Being a part of the second tract described in a deed from Willie Mae Metcalf, et. al., to Frank Chambers, dated October 4, 1950, and recorded in Book 707 at Page 365 in the Buncombe County Registry."

Plaintiffs offered in evidence as Exhibit P-2 a plat based on a survey made by J. R. Reagan in 1960 prior and incident to plaintiffs' purchase of the property. This plat, together with the broken lines we have added to indicate the approximate location of defendant's parcel and of his alleged easement, is reproduced herewith.

p. 2

P-2

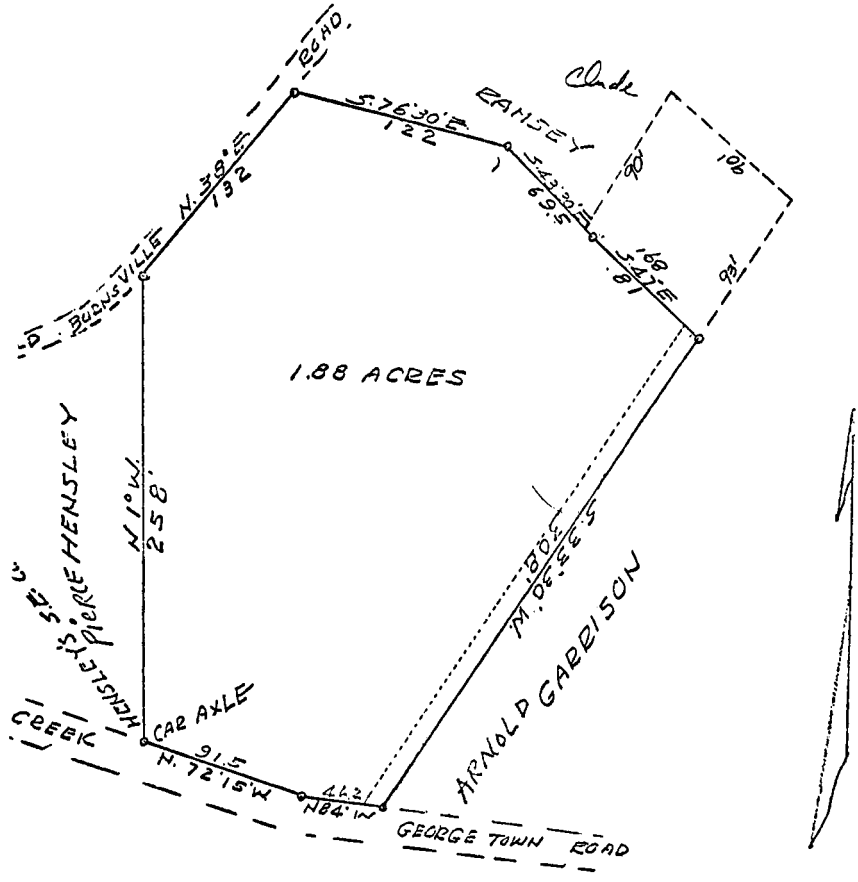
PROPERTY OF

FRANK CHAMBERS

FLAT CREEK TWP

SCALE 1" 60 J. R. REAGAN SURV

FEB 1960



No other documentary evidence was offered by plaintiffs.

The controversy involves a strip of land of undefined width within the boundaries of the 1.88 acres described in P-1 and shown on P-2. This strip extends from the northern boundary of the Flat Creek-Georgetown Road along and immediately west of the Wheeler (formerly Garrison) line 308 feet, more or less, to an adjoining parcel of land owned by defendant.

Evidence offered by plaintiffs and by defendant tends to show that, on 8 May 1971, defendant bulldozed a strip 10 to 11 feet wide at the location and for the distance indicated for use as a road providing access between his adjoining parcel of land and the Flat Creek-Georgetown Road. Prior to 8 May 1971, a controversy had arisen between plaintiffs and defendant as to whether defendant had acquired by grant and was the owner of such easement.

Defendant called as a witness Mrs. Maude Mae Duncan, widow of Harrison C. Duncan. She testified without objection that, prior to and at the time of their deed to W. E. Buckner and Dollie Buckner, referred to below, she and her husband owned a parcel of land in Flat Creek Township they had purchased from George Langford and which consisted of the 1.88 acres now owned by plaintiffs and the adjoining parcel now owned by defendant. She further testified that her husband had built a little cabin in the back, "up on the hill," for his father; that the lot on which the cabin was built was sold to the Buckners; and that the Buckners for a time lived in this cabin.

Defendant offered as his chain of title *to the easement* he asserts the following recorded deeds:

1. Deed (D-5) dated 14 July 1930 from H. C. Duncan and wife, M. M. Duncan, to W. E. Buckner and Dollie Buckner which purports to convey a parcel of land described therein as follows: "Beginning at a cherry-tree on top of a hill, in G. W. Lankford's line, runs with said Lankford's line Ninety-three feet to a stake in Loyd Sprinkle's line; thence with said Loyd Sprinkle's line Ninety feet to a black-pine, said Sprinkle's Corner; thence continuing with said Sprinkle's line Ninty [sic] feet to an iron stake, said Sprinkle's corner; thence leaving said line Eighty-nine feet to the Beginning: *including a right-of-way to a road across said Duncan's lot along said Lankford's Line,* also access to water from said Duncan's well." (Our italics.)

2. Deed (D-4) dated 13 September 1930 from W. E. Buckner and wife, Dollie Buckner, to Arry Brigman and Lillie Brigman, which purports to convey in fee simple, "with all the appurtenances thereunto belonging, or in any wise appertaining," the parcel of land in Flat Creek Township which had been conveyed to the Buckners by the Duncans by the deed dated 14 July 1930, the description in D-4 being in all respects identical with the description in D-5, including the italicized portion thereof.

3. Deed (D-3) dated 21 July 1938 from Arry Brigman and wife, Lillie Brigman, to Lloyd Sprinkle and wife, Lottie Sprinkle, which purports to convey in fee simple, "with all the appurtenances thereunto belonging, or in any wise appertaining," the parcel of land in Flat Creek Township described therein as follows:

"BEGINNING at a Cherry tree on top of a hill, in G. W. Lankford's line, runs with said Lankford's line ninety three feet to a stake in Loyd Sprinkle's line Ninety Feet to a Black Pine, said Sprinkle's corner thence continueing [sic] with said Sprinkle's line Ninety Feet to an iron stake, said Sprinkle's corner; thence leaving line Eighty Nine feet to the BEGINNING: including a right-of-way to a road across said Duncan's lot, along said Lankford's line, also access to water from said Duncan's well."

4. Deed (D-2) dated 29 March 1945 from Loyd Sprinkle and wife, Lottie Sprinkle, to Lillie Ramsey, widow, which purports to convey in fee simple three tracts or parcels of land in Flat Creek Township "with all the appurtenances thereunto belonging or in any wise appertaining." The "Third Tract" is described therein as follows:

"Beginning on a cherry tree on top of the hill, in G. W. Lankford's line, runs with said line 93 feet to a stake in Loyd Sprinkle's line; thence 90 feet to a black pine stump; thence continuing with said line 90 feet to an iron stake; thence leaving said line 89 feet to the Beginning, together with a right-of-way to a road across said Chambers's lot along Mainey's line, also access to water from said Chambers's well; being the same land conveyed to said Sprinkle by Arry Brigman and wife, by deed dated July 21, 1938, as recorded in Book No. 502 on page 517 in said office of Register of Deeds."

5. Deed (D-1) dated 7 October 1959 from Lillie Ramsey Thomas, formerly Lillie Ramsey, and husband, Zeb Thomas, to Clyde Ramsey, which purports to convey in fee simple, "with all the appurtenances thereunto belonging, or in any wise appertaining," two parcels of land in Flat Creek Township. PARCEL TWO is described therein as follows: "Being the same premises described in that certain deed from Loyd Sprinkle and wife, LOTTIE Sprinkle, to Lillie Ramsey, said deed being recorded in the Office of the Register of Deeds for Buncombe County in Deed Book 583 at Page 277, and said deed being dated March 29, 1945, to which deed reference is hereby made for a more particular description of said premises."

Defendant offered as plaintiffs' chain of title to the 1.88 acres described in the complaint the following recorded deeds and testimony:

1. Deed (D-8) dated 10 September 1932 from H. C. Duncan and wife, Maude Duncan, to W. W. Chambers, which purports to convey in fee simple, free and clear of encumbrances, a tract of land described therein as follows:

"BEGINNING at an iron stake on the North bank of Flat Creek-Georgetown Road, J. C. Myers' corner, runs with said Myers' line N 2° 30' W. 15-3/5 poles to a stake in the center of the Old Burnsville Road; thence with said road N 38° E 8 poles to a stake; thence leaving said road S. 76° 30' E. 7-2/5 poles to a pine; thence S. 43° 30' E. 4-1/5 poles to a stake; thence S. 47° E. 4-9/10 poles to a stake; thence S. 33° W 18-1/4 poles to a white oak on the aforesaid north bank of said Flat Creek-Georgetown Road; thence N 81° W. 2-4/5 poles to a stake; thence N 76° 30' W. 6 poles to the BEGINNING."

2. Deed (D-7) dated 4 October 1950 from Willie Mae Metcalf and husband, W. D. Metcalf, and Walter Chambers, unmarried, to Frank Chambers, which purports to convey in fee simple, free and clear of encumbrances, two separately described tracts or parcels of land in Flat Creek Township. The "Second Tract" is described as follows: "Beginning at an iron pin on the north bank of Flat Creek-Georgetown road, Pierce Hensley's corner, runs with said Hensley's line N. 2° 30' W. 257.4 feet to a stake in the middle of the old Bald Mountain road; thence with said road N. 38° E. 132 feet to a stake; thence leaving said road S. 76° 30' E. 122 feet to a pine; thence S. 43° 30' E. 69.3 feet to a stake; thence S. 47° E. 80.8 feet to a stake; thence S. 33°

W. 301 feet to a whit [sic] oak on the north bank of Flat Creek-Georgetown road aforesaid; thence N. 81° W. 44.8 feet; thence N. 76° 30′ W. 99 feet to the Beginning: containing 1.74 acres more or less. For source of title see Book No. 271 page 120; Book No. 372 page 147; Book 451 page 146 in the office of Register of Deeds for Buncombe County, North Carolina."

3. Deed (D-6) dated 17 March 1960 from Frank Chambers, unmarried, to Billie J. Hensley and wife, Joyce Hensley, being the deed previously offered by plaintiffs as P-1.

The deed (D-5) dated 14 July 1930 from the Duncans to the Buckners, to which defendant traces his title to the easement, was filed for registration 15 September 1930, and registered in Book 418, Page 461. The deed (D-8) dated 10 September 1932 from the Duncans to W. W. Chambers was registered 23 December 1932, in Book 451, Page 146.

Mrs. Duncan's testimony, offered by defendant, is to the effect that W. W. Chambers, the grantee in D-8, died, survived by his children, Willie Mae, Walter and Frank. The testimony of Herman Gentry, a witness for plaintiff, is to the same effect.

We note that the east line of plaintiffs' property, referred to in their deed (P-1, D-6) from Frank Chambers as the Garrison line, is referred to by the names of the successive owners of the property lying east of and adjoining plaintiffs' property, to wit, (1) Langford (Lankford), (2) Mainey, (3) Garrison, and (4) Wheeler.

We further note that the Flat Creek-Georgetown Road is referred to as the Salem Church Road.

In reviewing the testimony offered by plaintiffs, the one word "Hensley" will refer to plaintiff Billie J. Hensley. The evidence offered by plaintiffs, summarized except when quoted, is set forth below.

From 1949 until 1960 plaintiffs rented the property now owned by them and resided in a house near the line of the property of Hensley's father which adjoined and was west of the property purchased by plaintiffs from Chambers in 1960. There was a bank three or four feet high about the full length of the frontage on Georgetown Road.

Hensley testified in effect that the route from the Flat Creek-Georgetown Road traveled by defendant and his predeces-

sors in title followed this course: A driveway located approximately twenty-five feet over on the Garrison property provided access to the Garrison property. The route or road continued on the Garrison property and did not cross the Hensley (formerly Chambers) line until it reached the rear of plaintiffs' property. Hensley testified: "I'd say a third of the route was on my property on the back of the line." He further testified that this entrance to the Garrison property had been used by plaintiffs as a means of access to their property when they were tenants of Chambers. He further testified that this driveway and route also provided access to a house north of their property then owned by Herman Gentry and that Garrison used the driveway to go in and out for the purpose of farming his property.

In 1960 plaintiffs dug a basement and put in the foundation for a new house. Hensley testified: "I was about three years or a little more building my house. I moved into it in January, 1964 . . . graded my yard and took all the bank off the front all the way down to the road."

For about three years after they bought the property, plaintiffs continued to use the entrance from the Flat Creek-Georgetown Road to and across the Garrison property as a means of access to their property. Later they built a driveway leading directly from the Flat Creek-Georgetown Road into their property. Hensley testified: "I have a rail fence along the Georgetown Road or Old Salem Church Road front of my property which I put up about a year and a half ago. My driveway intersects this rail fence about two-thirds of the way down the front line of my property from the Arnold Garrison property, being nearer my father's property on the west than it is to the Arnold Garrison property on the east. The rail fence runs from the driveway to the Arnold Garrison property line except that there is a section out of it now which was removed by Mr. Ramsey."

There was no fence or markings along the Chambers-Garrison line in 1960 when plaintiffs bought the property. Hensley testified: "Along the line between my property of 1.88 acres and the Arnold Garrison property there is a fence approximately 2/3 of the way from the front of the lot to the back of it. The rest of it is open. That is a woven fence which has been there I'd say three or four years. Before that time there was just open ground." This fence was built by Vance Boyd Wheeler on

the Hensley-Wheeler line, Wheeler having purchased the Garrison property. Hensley testified: "[T]he fence is directly on the line surveyed between our two properties."

Defendant asserted title to a right-of-way across plaintiffs' property in July of 1970, "approximately one and one half or two years after the fence was built" on the Hensley-Wheeler line. At that time defendant showed his deeds to Hensley and stated his son planned to build a house on defendant's parcel and that the exercise of his right-of-way was necessary to provide access to his property. Hensley testified that he offered to buy from defendant "what it says on this paper" but that defendant was unwilling to sell what he contended was his right-of-way. Hensley further testified: "At that time, the fence was up between me and the Garrison property and . . . the biggest majority of the roadway or ruts that I have previously described across Mr. Garrison's property, had been blocked by this fence." He further testified: "The old road was never a two-vehicle road. It was just a two rut road."

On 14 July 1970 and on 15 July 1970 defendant put sections of pipe in the ditch line, constructing a culvert directly in front of the section of the rail fence which defendant later removed. On 22 August 1970, defendant tried to bring a bulldozer onto plaintiffs' property to cut out his asserted right-of-way along the Garrison or Wheeler line. On that occasion defendant was stopped by plaintiffs.

On 8 May 1971, when plaintiffs were not at home, defendant and his sons entered upon the 1.88-acre parcel of plaintiffs, removed the section of fence where the culvert had been built and had bulldozed from the back of plaintiffs' property almost the full length of it at a width of "about 10 to 11 feet" when plaintiffs returned to their property.

The testimony of Herman Gentry, a neighbor of and witness for the plaintiffs, testified that there was a road or wagon road used to get to and from the property on which Harrison Duncan had built a little house or cabin for his father and the Salem Church Road. He further testified: "There was never no road established—just what I would call a rut wagon road or something like that through there."

Defendant offered the testimony of successive owners and occupants of the parcel of land now owned by defendant. Generally, this evidence tends to show that the route followed by

wagon or car or when walking was in the general area of the unmarked line between the Duncan and Langford properties. A review of the testimony offered by defendant in conflict with that offered by plaintiffs is unnecessary to decision on this appeal.

The issues submitted, and the jury's answers thereto, are quoted below:

"1. Was the easement held by the defendant terminated by adverse possession by the plaintiffs?

"Answer: No.

"2. Did the defendant trespass upon the property of the plaintiffs?

"Answer: Yes.

"3. What amount of damages, if any, are the plaintiffs entitled to recover of the defendant for:

(a) Compensatory Damages: $10.00.

(b) Punitive Damages: No."

The judgment entered by the court, after preliminary recitals and after quoting the issues and answers thereto, concluded as follows:

"It is now, therefore, ORDERED, ADJUDGED and DECREED that the plaintiff have and recover of the defendant the sum of Ten ($10.00) Dollars.

"It is further ORDERED, ADJUDGED and DECREED that the defendant be and he is permanently enjoined from entering upon the lands of the plaintiffs described in the complaint in this cause; provided that the defendant shall be permitted to enter upon said land of the plaintiffs at such place or places as may hereafter be determined by motion made in this cause to have been transversed by the old road leading from the Salem Church Road to the real property of the defendant described in a deed recorded in the Office of the Register of Deeds for Buncombe County in Deed Book 820 at page 360, prior to the 8th day of May, 1971.

"It is further ORDERED and ADJUDGED that the defendant pay the costs of the action to be taxed by the clerk."

The judgment was signed 16 August 1972. Defendant gave notice of appeal and in appeal entries dated 17 August 1972 excepted with particularity to each provision of the judgment.

Lamar Gudger for defendant appellant.

Roberts & Cogburn by Max O. Cogburn for plaintiff appellees.

BOBBITT, Chief Justice.

At the conclusion of plaintiffs' evidence defendant moved for a directed verdict in his favor "for lack of the plaintiffs' evidence to sustain a case against the defendant." The record indicates the court then heard argument by defendant's counsel in support of this motion but is silent as to the content of such argument. Defendant's motion was denied. At the conclusion of all the evidence the record shows simply: "Defendant renews his motion for directed verdict. Motion denied."

Nothing in the record indicates that defendant, subsequent to the return of the verdict, moved for a directed verdict or for judgment notwithstanding the verdict or made any other motion. Nor does the record indicate that the court at that time considered on its own motion whether a directed verdict should have been entered.

Defendant excepted to and assigns as error the denial of his motions for a directed verdict. Plaintiffs contend that defendant's failure to comply with the requirements of Rule 50, Rules of Civil Procedure, G.S. 1A-1, precludes consideration of these assignments on this appeal.

[1] We note first that Rule 50(a) requires that "[a] motion for a directed verdict shall state the specific grounds therefor." Cited decisions based on the identical provision in Rule 50(a) of the Federal Rules [Title 28, U.S.C.A., Federal Rules of Civil Procedure, Rules 43 to 51, pp. 375-76] support the statement that "[t]he requirement that grounds be stated on a motion for a directed verdict is mandatory." 9 Wright & Miller, Federal Practice and Procedure, § 2533, p. 579 (1971). The better practice is to set forth the specific grounds in a written motion. 9 Wright & Miller, op. cit. § 2533, p. 581. If the movant relies upon an oral statement for such specific grounds, a transcript thereof must be incorporated in the case on appeal.

Apart from the failure of the record to disclose the specific grounds urged by defendant in support of his motions for a directed verdict, whether a directed verdict should have been granted is not presented on this appeal.

Rule 50(b), which bears the caption, "Motion for judgment notwithstanding the verdict," is composed of sections (1) and (2).

Rule 50(b) (1) provides:

"Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the submission of the action to the jury shall be deemed to be subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. In either case the motion shall be granted if it appears that the motion for directed verdict could properly have been granted. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the judge may allow the judgment to stand or may set aside the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the judge may direct the entry of judgment as if the requested verdict had been directed or may order a new trial. *Not later than ten (10) days after entry of judgment or the discharge of the jury if a verdict was not returned, the judge on his own motion may, with or without further notice and hearing, grant, deny, or redeny a motion for directed verdict made at the close of all the evidence that was denied or for any reason was not granted.*" (Our italics.)

Rule 50(b) authorizes "a 'reserved directed verdict' motion practice." Phillips Supplement (1970) to the Second Edition of McIntosh, N. C. Practice and Procedure, § 1488.35, p. 29, hereafter cited as Phillips. The reservation of final ruling on a motion for a directed verdict affords the basis for the post-verdict motion for judgment notwithstanding the verdict.

Our Rule 50(b)(2) provides:

"An appellate court, on finding that a trial judge should have granted a motion for directed verdict made at the close of all the evidence, may not direct entry of judgment in accordance with the motion unless the party who made the motion for a directed verdict also moved for judgment in accordance with Rule 50(b)(1) *or the trial judge on his own motion granted, denied or redenied the motion for a directed verdict in accordance with Rule 50(b)(1).*" (Our italics.)

Our Rule 50(b)(2) has no counterpart in Federal Rule 50(b).

In *Cone v. West Virginia Pulp and Paper Co.*, 330 U.S. 212, 91 L.Ed. 849, 67 S.Ct. 752 (1947), the Supreme Court of the United States held that, in the absence of a post-verdict motion for judgment notwithstanding the verdict in accordance with Federal Rule 50(b), the Circuit Court of Appeals had no authority to enter judgment in accordance with the defendant's motion for a directed verdict but was limited to the award of a new trial. *Accord, Globe Liquor Co. v. San Roman,* 332 U.S. 571, 92 L.Ed. 177, 68 S.Ct. 246 (1948). The reasons underlying the decisions in *Cone* and in *Globe Liquor Co.* are set forth in the opinions of Justice Black. *See also,* Comment in Phillips, op. cit., p. 33, n. 14. For criticisms of these decisions, see 5A Moore's Federal Practice, ¶ 50.12, pp. 2367-74 (2d Ed. 1971). Seemingly to free the trial judge from dependence upon the initiative of a litigant after verdict to renew his motion for a directed verdict or for judgment notwithstanding the verdict, the General Assembly amended Rule 50(b) as originally proposed, see Chapter 954, Session Laws of 1967, by substituting therefor Rule 50(b)(1) and (b)(2) as quoted above. Chapter 895, Session Laws of 1969. *See* Elster, Highlights of Legislative Changes to the New Rules of Civil Procedure, 6 Wake Forest Intra. L. Rev. 267, 278-80 (1970).

Now under the italicized portion of Rule 50(b)(1) and under the italicized portion of Rule 50(b)(2), as quoted above, the trial judge on his own motion, within the time prescribed in Rule 50(b)(1), may grant, deny, or redeny the motion for a directed verdict in accordance with Rule 50(b)(1).

We note that Rule 41 and Rule 50(b) were rewritten and enacted by Sections 10 and 11, respectively, of Chapter 895,

Session Laws of 1969. Whether the court, after the entry of judgment and within the time prescribed by Rule 50(b)(1), upon motion or on its own motion *may* set aside the verdict and judgment and order a voluntary dismissal *without prejudice* upon such terms and conditions as justice requires, is not presented on this appeal. *See* Rule 41(a)(2); *also, King v. Lee,* 279 N.C. 100, 181 S.E. 2d 400 (1971).

[2] Since the defendant made no post-verdict motion and since the trial judge after verdict did not of his own motion consider whether a directed verdict should have been entered, this Court "may not direct entry of judgment in accordance with the motion" by reason of the express terms of Rule 50(b)(2).

We consider now whether defendant's other assignments of error entitle him to a new trial.

[3] Evidence offered by defendant was sufficient to support findings that W. W. Chambers, from whom plaintiffs derive their title, acquired the property now owned by plaintiffs subsequent and subject to the easement which the Duncans had previously conveyed to the Buckners, as appurtenant to the property conveyed by the Duncans to the Buckners, that is, "a right-of-way to a road across said Duncan's lot along said Lankford's line."

A deed which conveys a portion of the grantor's property and in addition grants the right of ingress and egress over other lands of the grantor to a highway creates an easement in favor of and appurtenant to the land conveyed and subjects the remaining land of the grantor to the burden of such easement. *Andrews v. Lovejoy,* 247 N.C. 554, 101 S.E. 2d 395 (1958). "An appurtenant easement is one which is attached to and passes with the dominant tenement as an appurtenance thereof. . . ." *Shingleton v. State,* 260 N.C. 451, 454, 133 S.E. 2d 183, 185 (1963).

Evidence offered by defendant was sufficient to support findings that plaintiffs' ownership of the 1.88 acres was based on a connected chain of title to the Duncans. In connection therewith, we note that, upon the death of W. W. Chambers, a presumption arose that he died intestate. *Collins v. Coleman & Co.,* 262 N.C. 478, 480, 137 S.E. 2d 803, 805 (1964), and cases cited; Stansbury, North Carolina Evidence § 250 (2d Ed. 1963).

Evidence offered by defendant was sufficient to support findings that defendant's ownership of the easement over the strip in controversy is based on a connected chain of title to the Duncans and that defendant, in respect of the easement, has a better title from the common source. *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142 (1889).

[4] Defendant relies solely upon an easement created by express grant. "No particular words are necessary to constitute a grant, and any words which clearly show the intention to give an easement, which is by law grantable, are sufficient to effect that purpose, provided the language is certain and definite in its terms. . . . The instrument should describe with reasonable certainty the easement created and the dominant and servient tenements." 28 C.J.S., Easements § 24; *Borders v. Yarbrough,* 237 N.C. 540, 542, 75 S.E. 2d 541, 543 (1953); *Oliver v. Ernul,* 277 N.C. 591, 597, 178 S.E. 2d 393, 396 (1971).

We hold the easement granted by the Duncans to the Buckners sufficient in these respects. The easement granted is a right-of-way *across* the *Duncan* lot. The Flat Creek-Georgetown Road was the only public road accessible to the Buckners by *crossing* the *Duncan* lot. The location of the right-of-way is fixed as *along the Langford (Lankford) line.* Hensley testified that defendant "was claiming 10 foot."

"Grantees take title to lands subject to duly recorded easements which have been granted by their predecessors in title." *Waldrop v. Brevard,* 233 N.C. 26, 30, 62 S.E. 2d 512, 514 (1950); *Borders v. Yarbrough, supra,* at 542, 75 S.E. 2d at 543; *Reed v. Elmore,* 246 N.C. 221, 230, 98 S.E. 2d 360, 366 (1957).

[5] "The law contemplates that a purchaser of land will examine each recorded deed or other instrument in his chain of title, and charges him with notice of every fact affecting his title which such an examination would disclose." *Higdon v. Jaffa,* 231 N.C. 242, 248, 56 S.E. 2d 661, 665 (1949); *Hege v. Sellers,* 241 N.C. 240, 248, 84 S.E. 2d 892, 898 (1954). Consequently, when plaintiffs purchased the property described in the complaint they were charged with notice of the easement to which their property was subjected by the terms of the deed (D-5) from the Duncans to the Buckners.

Defendant excepted to the submission of each of the three issues and to instructions of the court with reference thereto.

[6] The first issue, "Was the easement held by the defendant terminated by adverse possession by the plaintiffs?", was answered "No." The wording of the issue implies that plaintiffs conceded that defendant had an easement but contended it had been terminated by plaintiffs' adverse possession.

An easement by grant as set forth in his chain of title is the only easement claimed by defendant. This involves only a strip of land of undefined width within the boundaries of the 1.88 acres described in P-1 and shown on P-2 extending from the northern boundary of the Flat Creek-Georgetown Road along and immediately west of the Wheeler (formerly Garrison) line 308 feet, more or less, to the adjoining parcel of land owned by defendant.

Since the plaintiffs did not concede defendant owned the easement claimed by defendant, the only explanation of the wording of the first issue is that indicated by the following excerpt from the charge: "[T]here's been some evidence which tends to show . . . that a road was built to the property owned by Clyde Ramsey . . . before Duncan ever deeded it out and before the easement was granted. Now, if you should find that to be the fact, members of the jury, then I instruct you that the easement that was granted to Buckner and later on down the line got into the defendant Ramsey, was to that road that existed at that time and that road only." Defendant's exception to this instruction was well taken. To what extent the route used by the Duncans prior to their deed to the Buckners crossed the remaining Duncan lands or the land of George Langford, Mrs. Duncan's uncle, is immaterial. The Duncans could not grant an easement over any land except that which they then owned.

In connection with the first issue, the court also stated: "[T]he court instructs you . . . that the defendant did come into some easement by these deeds." The impression prevails that the thrust of the court's instructions with reference to adverse possession was directed solely to such portion of the plaintiffs' land as was included within the route used by the Duncans prior to their deed to the Buckners. [Note: The injunction portion of the judgment is in accord with that view.]

The second issue, "Did the defendant trespass upon the property of the plaintiffs?", was answered "Yes." In connection therewith the court instructed the jury: "[I]f you should find that the road was there before the easement was granted by

the Duncans and . . . that this easement referred specifically to that road, that the holder of the easement has no right to move that road to some place else on the property without the permission of the person owning the property." This instruction involves the same error, namely, that the easement granted by the Duncans to the Buckners related to an undefined course partly through Duncan lands and partly through Langford lands to the Flat Creek-Georgetown Road rather than to the strip of land described in the Duncan-Buckner deed over which the Duncans had authority to grant an easement.

Nothing in the evidence suggests that the use of any route or wagon road in whole or in part on the Langford (now Wheeler) land was other than permissive.

[7] The court instructed the jury it would be their duty to answer the first issue, "Yes," if satisfied from the evidence and by its greater weight "that the plaintiff possessed his land under known boundaries *and with color of title,* in actual, open, hostile, exclusive and continuous possession, that such possession was hostile to the use by the defendant of his easement for a continuous period of at least *seven* years. . . ." (Our italics.) Thus, the court treated plaintiffs' recorded deed dated 17 March 1960 from Frank Chambers (unmarried) solely as color of title.

Assuming, but not conceding, that plaintiffs had adverse possession of the controverted strip *for seven years,* such possession would be insufficient to "terminate" defendant's easement. There was evidence to support findings that plaintiffs owned the 1.88 acres by a connected chain of title to the Duncans. If this evidence was accepted, their deed from Frank Chambers constituted a link in a valid chain of title to the 1.88 acres.

"Color of title is generally defined as a written instrument which purports to convey the land described therein but fails to do so because of a want of title in the grantor or some defect in the mode of conveyance." *Price v. Tomrich Corp.,* 275 N.C. 385, 391, 167 S.E. 2d 766, 770 (1969). "Color of title is that which gives the semblance or appearance of title, but is not title in fact—that which, on its face, professes to pass title, but fails to do so because of a want of title in the person from whom it comes or the employment of an ineffective means of conveyance. It is a title in appearance only. If an instrument actually passes the title, it is clear that it is not 'color of title.' The term

implies that a valid title has not passed." 3 Am. Jur. 2d, Adverse Possession § 105, p. 188. *Accord, Justice v. Mitchell,* 238 N.C. 364, 366, 78 S.E. 2d 122, 124-125 (1953), and cases cited.

A valid deed, nothing else appearing, may serve as color of title. *Price v. Tomrich, supra,* at 392, 167 S.E. 2d at 770. However, when it is shown that the landowner has a good title based on a connected chain of title to a common source, such landowner will not be permitted to ignore a duly recorded easement granted by his predecessors in title by the fiction of treating his valid deed merely as color of title and thereby defeat an outstanding valid easement by adverse possession for a period of *seven* years.

The last quoted portion of the charge is erroneous and defendant's exceptive assignment of error thereto is well taken.

[8] On cross-examination of defendant, plaintiffs' counsel was permitted over defendant's objection to elicit testimony from defendant tending to show that defendant had acquired land contiguous to the parcel conveyed by the Duncans to the Buckners and from this after-acquired land had access to the Flat Creek-Georgetown Road. The admission of this testimony was erroneous. When an easement is created by a deed, the existence or nonexistence of other access to the highway does not affect the easement. *Andrews v. Lovejoy, supra,* at 557, 101 S.E. 2d at 398.

It is unnecessary to discuss any of defendant's remaining assignments of error. For the errors indicated, the defendant is awarded a new trial.

New trial.

PERNELL R. MANN v. VIRGINIA DARE TRANSPORTATION COMPANY, INCORPORATED, AND CAROLINA COACH COMPANY

— AND —

SALLIE BAUM TILLETT v. VIRGINIA DARE TRANSPORTATION COMPANY, INCORPORATED, AND CAROLINA COACH COMPANY

No. 35

(Filed 31 August 1973)

1. **Carriers § 19— common carrier — liability for injury to passenger**

While a common carrier is not an insurer of its passengers and is liable only for negligence proximately causing injury to them, such carrier owes to the passengers whom it undertakes to transport the highest degree of care for their safety so far as is consistent with the practical operations and conduct of its business.

2. **Carriers § 19— common carrier — nondelegable duty to passengers**

The high degree of care which a carrier operating under a public franchise owes to its passengers is a nondelegable duty.

3. **Carriers § 19— passenger carrier — inspection of equipment**

A common carrier of passengers has the duty to provide adequate conveyances with sufficiently strong and serviceable equipment for the safe transportation of its passengers, to inspect such conveyances and equipment at proper intervals and to keep them in good repair.

4. **Carriers § 19— passenger carrier — duty to inspect equipment — purchase from reputable source — lease from another carrier**

The purchase of equipment from a reputable source does not relieve the carrier of the further duty to inspect and test the equipment; nor may a carrier relieve itself of the duty to exercise the highest degree of care to provide safe buses by leasing its transportation facilities from another carrier or corporation which has contracted to furnish and keep such equipment in proper condition.

5. **Carriers § 19— lease of bus — pre-existing defect — liability for injury to passenger**

If a bus leased to a common carrier contained a pre-existing defect which could or should have been discovered by proper inspection, and if the defect was the proximate cause or a proximate cause of injuries to passengers on the bus, the common carrier would be liable for such injuries.

6. **Carriers § 19— bus running off highway — negligence by bus company — prima facie case**

Plaintiff bus passengers made out a *prima facie* case of actionable negligence against defendant carrier by the introduction of evidence tending to show that they were injured when the bus in which they were passengers, without a prior collision or other apparent cause, ran off the highway into a ditch and struck a culvert.

7. **Appeal and Error § 42— omission of charge from record — presumptions**

Where the judge's charge is not in the record, it is presumed that he submitted the case to the jury upon every theory which the evidence justified and instructed correctly on every principle of law applicable to the facts.

8. **Evidence § 49— expert opinion testimony as to causation**

When a jury's inquiry relates to cause and effect in a field where special knowledge is required to answer the question, the purpose of expert testimony is likely to be thwarted or perverted unless the expert witness is allowed to express a positive opinion as to causation rather than being confined to testimony as to whether a particular event or condition "could" or "might" have produced the result in question.

9. **Carriers § 19— bus running off road — defect in steering mechanism — sufficiency of evidence**

In an action to recover for injuries received by plaintiff bus passengers when the bus ran off the highway into a ditch and struck a culvert, the evidence was sufficient to support a finding that a defective steering mechanism caused the bus to leave the highway where there was evidence tending to show that as the bus approached the curve in which it left the road and after it left the road the wheels would not respond when the driver turned the steering wheel, and where there was expert testimony that the nuts on two bolts connecting the flanges in the steering mechanism were stripped and, in consequence, the bolts became loose and moved back and forth, that this movement finally severed the cotter pin at the end of each bolt, breaking the connection between the power steering cylinder and the steering arm, and that there would be no steering power available to the wheel upon the separation of the flanges.

10. **Bailment § 5; Carriers § 19— bailor of bus used by common carrier — duty of inspection — liability to carrier and third person**

The owner of a nine-year-old bus leased to a common carrier had the duty to have it inspected carefully by a qualified mechanic before it was delivered to the carrier; this duty was imposed by law as well as by contract with the carrier, and its breach would render the owner liable not only to the carrier but also to a third person injured thereby.

11. **Carriers § 19; Evidence § 54— expert opinion that defects would be visible to competent mechanic — admissibility**

In this action to recover for injuries to passengers on a bus leased by defendant common carrier from the defendant owner, the trial court committed prejudicial error in the exclusion of testimony by defendant carrier's expert mechanic that, based upon his personal examination of the steering mechanism of the bus, it was his opinion that the conditions which he found and described (and upon which he based his conclusion that a defect in the steering mechanism caused the accident in question) would have been visible to a competent mechanic prior to the time the bus was delivered to defendant carrier on the day of the accident, that the condition must have existed during two or three

thousand miles of operation before it could have caused the steering to fail, and that the condition would have been visible to a trained mechanic by the looseness between the two flanges of the steering cylinder and the steering rod and by the cracking of the dirt, dust and road accumulation in the joint.

12. Bailment § 6; Carriers § 19— injuries to passengers on leased bus — liability of bus owner to carrier

In an action to recover for personal injuries received by passengers on a bus leased by defendant common carrier from the defendant owner when the bus ran off the highway and struck a culvert, the owner would not be liable to the carrier in any amount if the jury should find that the bus left the highway solely because of negligence by the carrier's driver or that the bus left the highway because of a defect in the steering mechanism which could not have been discovered by the owner in the exercise of proper care prior to delivery of the bus to the carrier.

13. Bailment § 6; Carriers § 19; Negligence § 11— injury to bus passengers — leased bus — pre-existing defect — indemnity of carrier by owner

In an action to recover for personal injuries received by passengers on a bus leased by defendant common carrier from defendant owner, the common carrier would be entitled to recover indemnity from the owner if the jury should find that the accident was caused by a pre-existing defect in the steering mechanism which a competent mechanic could and should have discovered by a proper inspection of the bus prior to its delivery to the common carrier, since the negligence of the owner was primary and that of the common carrier in failing to provide a safe bus for its passengers was secondary.

14. Bailment § 6; Carriers § 19; Torts § 2— injuries to bus passengers — leased bus — contribution by owner to carrier

In an action to recover for injuries received by passengers on a bus leased by defendant common carrier from defendant owner, the common carrier would be entitled to contribution from the owner if the jury should find that the owner was guilty of actionable negligence in furnishing the carrier with a defective bus, that the carrier's driver was negligent in the manner in which he operated the bus, and that the negligence of both concurred in proximately causing the accident in which plaintiffs were injured. G.S. 1B-1; G.S. 1B-3.

APPEAL by defendant, Virginia Dare Transportation Company, under G.S. 7A-30(2), from the decision of the Court of Appeals affirming the judgment of *Tillery, J.*, entered at the 10 April 1972 Civil Session of DARE.

These two actions for personal injuries arose out of the same occurrence and were consolidated for trial. The following facts are undisputed:

On 17 September 1968, about 1:00 p.m., plaintiffs Mann and Tillett were paying passengers on a bus being operated by Robert L. Gibbs, an employee of defendant Virginia Dare Transportation Company (Transportation Company) on a regularly scheduled trip from Manteo, North Carolina, to Norfolk, Virginia, via Elizabeth City, North Carolina. The day was clear and the highway was dry. At a point on N. C. Highway No. 34 about 4½ miles south of Currituck Courthouse, the asphalt highway curves slightly to the west through flat, open country. The bus entered but failed to follow this curve to the left. Instead, the marks showed the bus went off onto the right shoulder of the road "in the point of curve." The marks led onto the 12-15 foot shoulder, "continued along the shoulder northward," gradually bearing into the ditch. The bus went down the ditch, or partially on the shoulder and partially in the ditch, for 225 feet and struck a culvert. When it hit the culvert the bus "jumped up in the air, and went over [it]"; the force of the impact "popped out" both windshields. Thereafter, completely out of control, it continued down the ditch for 219 feet before coming to a gradual stop.

When the bus came to a stop both plaintiffs had received injuries which required their hospitalization.

The 1959 GMC bus, which was owned by defendant Carolina Coach Company (Coach Company), had been leased to Transportation Company. The lease required Coach Company to furnish Transportation Company "sufficient buses to operate three (3) roundtrip schedules daily between Norfolk, Virginia, and Manteo, North Carolina, said buses to be complete with tires, gas, and oil, or diesel fuel, and complete maintenance including repairs for mechanical road failures." Transportation Company's bus drivers were required to accept the buses which Coach Company delievered to them and to report any mechanical defects to Coach Company.

Each plaintiff sued both Transportation Company and Coach Company, alleging that she was injured by their joint and concurring negligence as specified in her complaint. Each defendant denied plaintiffs' allegations as to its negligence, pled the sole negligence of the other defendant as the cause of the accident, and set up cross actions under G.S. 1A-1, Rule 13(g) against the other for "complete indemnity or for contribution" as the facts might warrant in the event an issue of negligence was answered against it.

Transportation Company alleged that the bus left the highway because of a sudden and totally unexpected failure of its steering mechanism; that Coach Company had negligently failed to inspect, discover, and repair the defective steering mechanism before delivering the bus to Gibbs, thereby breaching its duty to furnish Transportation Company a safe and properly working vehicle. It alleged Coach Company's primary liability to plaintiffs and, in the alternative, Coach Company's liability for contribution in the event negligence on the part of Gibbs was found to be a proximate cause of plaintiffs' injuries.

Coach Company alleged that it had furnished Transportation Company a bus in "excellent condition," and that it had been carefully inspected, maintained, and checked to be certain that it met all safety requirements and had no mechanical defects; that if Gibbs drove the bus into a ditch and over a culvert Transportation Company was solely responsible for his negligence; that Transportation Company had contracted to indemnify Coach Company against any liability on account of its negligent operation of Coach Company's leased buses. In the alternative, Coach Company alleged that, if it should be shown to have been guilty of actionable negligence, Transportation Company was a joint tort-feasor and liable to contribute to plaintiffs' recovery.

Plaintiff Mann's version of the events preceding the accident is as follows: Gibbs stopped the bus at Caleb Poyner's filling station in Barco and procured "a soda and a cake." He ate the cake and drank the soft drink as he was driving "and then he stuck the bottle out the window just like he was going to throw the bottle out, and the bus ran off the road."

On cross-examination she testified, "While the bus was on the shoulder the driver was trying to pull the bus back on the road. He was trying to pull it but the bus wouldn't come. . . . [H]e was turning the steering wheel to his left. But the bus wouldn't go back, and the bus went onto the shoulder and got up there to the place that has been referred to as where there was a culvert and went on to where it stopped. And the driver never was able to get it back on the pavement though he was pulling the wheel to the left. The shoulder was fairly level. The bus went along on the shoulder for a couple of hundred feet or so before it got to the ditch where the culvert was. He was throwing the Coca-Cola out the window with his left hand—and the bus ran off on the right."

Plaintiff Tillett was unable to say how the accident happened, and the third passenger on the bus did not testify.

The investigating officer, Highway Patrolman B. G. Price, as a witness for plaintiff, testified, *inter alia,* that the bus was extensively damaged on its right side, underneath as well as where the body had struck the culvert, and the windshield was out; that he was able to turn the steering wheel all the way around; that it spun around but did not turn the front wheels of the bus; that when he asked Gibbs "what happened to cause the accident" Gibbs' reply was that he did not know—he did not say that the steering mechanism of the bus had failed.

At the conclusion of plaintiffs' evidence, Coach Company moved for a directed verdict in each case because (1) plaintiffs had not shown that there was any mechanical defect in the bus at the time it was delivered to Transportation Company; and (2) Coach Company was not liable for the negligence of the driver of the bus, an employee of Transportation Company. Judge Tillery allowed Coach Company's motions and entered judgments that each plaintiff have and recover nothing of defendant Coach Company.

Transportation Company's motion for a directed verdict, made on the ground that plaintiffs had failed to make out a prima facie showing of actionable negligence, was denied. Transportation Company then offered evidence which tended to show:

At 6:00 a.m. on 17 September 1968, at its garage in Norfolk, Coach Company delivered to Gibbs the bus which was later involved in the accident in suit. It was a substitute bus which Gibbs had not driven before. From Norfolk, he drove his regular 113-mile route to Manteo, a round trip which he made three times a week. On this day he arrived at Manteo at 9:10 a.m. and left there on the return trip to Norfolk at 11:30 a.m. After having made six regularly scheduled stops, the last being at the Coinjock post office to pick up the mail, Gibbs did not stop again until the bus came to rest in the ditch after the accident. He did not stop at Poyner's filling station or at any other place in the Barco community. At no time during the journey did he have in his possession any soda, Coca-Cola, or cake.

The bus approached the "left curve" about 4½ miles from the Currituck Courthouse at a speed of about 55 MPH. When Gibbs turned the steering wheel to the left in order to round the curve the wheels did not respond. The bus continued on a

straight course as he continued to turn the steering wheel to the left. He applied the brakes as soon as he saw the bus was not making the turn as it should and before the bus left the pavement. Then he let up on the brakes and applied them again. The right wheels of the bus went into the ditch, and the bus left brake marks on the shoulder as it traveled approximately 200 feet down the ditch before it hit a culvert. After it struck and went over the culvert, the bus was entirely out of control; it then traveled about 200 feet before coming to a gradual stop with the front end sitting up on the road embankment.

On the trip from Norfolk to Manteo and the 45-mile run from Manteo to the scene of the accident Gibbs experienced no difficulty in driving or steering the bus. Until he arrived at the "left curve," he had suspected no trouble. Gibbs testified that he told Patrolman Price he did not know what happened but that something went wrong with the steering wheel.

Leonard D. Quidley, another bus driver employed by Transportation Company who happened to be in the vicinity at the time of the wreck, arrived at the scene ten minutes before the highway patrolman. In response to his questions Gibbs told him that he did not know what happened; "that the steering wheel made no contact with the wheels." Quidley then turned the steering wheel and ascertained that the front wheels did not turn with it. This bus was equipped with power steering. The bus was damaged on the right front and side with "right much damage" under the right side.

Interrogatories answered by Coach Company's president provided the following information: The bus was removed from the ditch about noon on the day following the accident, 18 September 1968. It was towed to Coach Company's garage in Norfolk where a general inspection was made of all damage to the bus. There two bolts were removed from the booster flange of the steering mechanism. These bolts were steel, 3/8ths of an inch wide and 1⅓ inches long and U.S.S. thread. No repairs were made to the bus until sometime after 1 October 1968 when the bus was removed to Coach Company's garage in Raleigh. Final repairs were completed about 15 December 1968.

Transportation Company examined as a witness John C. Jeffries, whom the court found to be an expert mechanic and a mechanical damage analyst. His testimony, except when quoted, is summarized as follows:

On 23 September 1968 Coach Company's supervisor of maintenance showed Jeffries the two bolts which had been removed from the booster flange of the bus' power steering mechanism. There were no nuts with the bolts at the time Jeffries examined them, and he never saw the nuts. He found "small rings of steel intertwined in the threads of the bolts that made the bolts move on the outside of the thread, and there were several of these small rings of steel intertwined in there that were loosely fitting in the thread. At the time of [his] examination, the small steel rings that were intertwined were not a part of the bolt. The intertwined steel rings in the threads of the bolt, in [his] opinion, were the threads from the nuts that had been on the bolts at one time."

On 11 October 1968 Jeffries examined the bus itself. He found it "heavily damaged on the right front section, and along the right side; the step well and the entrance door opening were badly misaligned. The floor was buckled and the power steering cylinder was disconnected from the extension to the steering arm."

In the power steering mechanism of this bus the booster flange, a three-inch square steel plate on the power steering cylinder, is an integral part of the cylinder. It extends the cylinder to the steering arm, which also has a square flange corresponding exactly with the flange on the power steering cylinder. Holes, three-eights of a inch in diameter, in each of the four corners of both the power steering cylinder's flange and the steering-arm flange permit them to be bolted together. "The purpose in having the two flanges together is so that the power of the manual steering and the hydraulic steering both could be transmitted to the wheel. If the flanges were not together or should become separated then there would be no steering power available to the wheel. . . . [Jeffries] examined the flanges and found no damage except wear in the holes . . . where the bolts went through; there was some evidence of wear in the holes. There was not any visible exterior damage to the power cylinder . . . at the time [he] examined it. There was not any visible exterior damage to the power cylinder. . . ."

In answer to a hypothetical question based (1) upon the assumption that on 17 September 1968 Gibbs had driven the bus 158 miles without any difficulty prior to the time it left the pavement of Highway No. 34 and ran into a ditch when the front wheels failed to respond to the turning of the steering

wheel as the bus entered a slight curve at 55 MPH; and (2) upon his personal examination of the steering system of the bus and the two bolts which had been removed from it, Jeffries testified that he had an opinion as to what could or might have caused the steering system to fail. He said:

"My opinion is that the nuts, when they were placed on the bolts and tightened, were tightened to a point beyond the torque, or the point of pressure to tighten the bolts that is recommended, and that as a result the thread in the nut stripped, leaving the small pieces of the thread in the nut on the bolt, and the nut therefore became loose and would move back and forth to some extent, the cotter pin, which goes through the small hole at the end of the bolt, would have sheared, it is made of a very soft material, the pressure would shear this cotter pin, it is very small and made of very soft material, shear it off, and the connection is broken."

Thereafter, upon Coach Company's objection, the court excluded Jeffries proffered opinion that a reasonable inspection by a competent mechanic would have discovered the loose bolts which connected the flanges prior to the time the bus was delivered to Gibbs.

At the conclusion of Transportation Company's evidence, Coach Company moved for directed verdicts on Transportation Company's cross actions for indemnity or contribution upon the following grounds:

(1) The evidence disclosed no negligence on the part of Coach Company which was the proximate cause of the accident in suit;

(2) The evidence failed to establish that the bus was delivered to Transportation Company in an unsafe condition; or

(3) If the evidence did establish a mechanical defect in the steering mechanism of the bus at the time of delivery, it was a defect which Coach Company could not have discovered by reasonable inspection.

The motion was granted and judgment entered that Transportation Company have and recover nothing of Coach Company. Each plaintiff's case was submitted to the jury on the issues of Transportation Company's negligence and plaintiffs' damages. The jury answered the issues in favor of plaintiffs, and judgments were entered that each plaintiff recover $10,000.00

against Transportation Company. Transportation Company did not appeal from the judgments entered upon these verdicts, but it did appeal from the judgments dismissing its cross actions against Coach Company.

The Court of Appeals held that Transportation Company had offered no competent evidence either that Coach Company knew of any defect in the steering mechanism of the bus when it delivered the bus to Gibbs on 17 September 1968 or that, by the exercise of reasonable care, it could have discovered any such defect prior to the accident. *See Mann v. Transportation Company* and *Tillett v. Transportation Company*, 17 N.C. App. 256, 194 S.E. 2d 164 (1973). One member of the panel having dissented, Transportation Company appealed to this Court as a matter of right.

J. Kenyon Wilson, Jr.; White, Hall & Mullen by Gerald F. White and John H. Hall, Jr., for Virginia Dare Transportation Company, Incorporated, defendant appellant.

James, Speight, Watson and Brewer by W. W. Speight and William C. Brewer, Jr.; Allen, Steed and Pullen by Arch T. Allen III, for Carolina Coach Company, defendant appellee.

SHARP, Justice.

Transportation Company's liability to plaintiffs has been finally determined. It did not appeal from the judgments which plaintiffs recovered against it on account of the injuries they sustained in the bus accident in suit. This appeal presents the questions (1) whether Transportation Company offered any evidence tending to show that negligence on the part of Coach Company caused the bus accident in which plaintiffs were injured; and (2), if so, whether Coach Company's liability to Transportation Company is for indemnity or contribution.

[1] Transportation Company, a common carrier, is not an insurer of its passengers; it is liable only for negligence proximately causing injury to them. However, a carrier owes to the passengers whom it undertakes to transport "the highest degree of care for their safety so far as is consistent with the practical operations and conduct of its business." *White v. Chappell*, 219 N.C. 652, 659, 14 S.E. 2d 843, 847 (1941). *See Harris v. Greyhound Corp.*, 243 N.C. 346, 90 S.E. 2d 710 (1956); *Garvey v. Greyhound Corp.*, 228 N.C. 166, 45 S.E. 2d 58 (1947); 14 Am. Jur. 2d *Carriers* § 918 (1964).

[2] The high degree of care, which a carrier operating under a public franchise owes to its passengers, is a nondelegable duty. *See Pennsylvania Co. v. Roy,* 102 U.S. 451, 26 L.Ed. 141 (1880); *Dixie Stage Lines v. Anderson,* 222 Ala. 673, 134 So. 23 (1931); *Colton v. Ship-by-Truck Co.,* 337 Mo. 280, 85 S.W. 2d 80 (1935); *Simpson v. Gray Line Co.,* 226 Ore. 71, 358 P. 2d 516 (1961). *See also Morgan v. Chesapeake & Ohio Ry. Co.,* 127 Ky. 433, 105 S.W. 961 (1907); *Western Maryland R. R. v. State,* 95 Md. 637, 53 A. 969 (1902); *Virgil v. Riss & Co.,* 241 S.W. 2d 96 (Mo. App. 1951); Prosser, *Law of Torts* 470 (4th ed. 1971); 41 Am. Jur. 2d *Independent Contractors* § 39 (1968). "[A] passenger who sustains an injury by reason of the fact that the obligatory measure of care was not exercised is entitled to hold the carrier responsible, although the conditions or occurrences which caused the injury resulted from the negligence of an independent contractor." Annot., 29 A.L.R. 736, 784 (1924).

[3, 4] "Among the duties falling upon a common carrier of passengers are the important ones of providing adequate conveyances with sufficiently strong and serviceable equipment for the safe transportation of its passengers, and of inspecting such conveyances and equipment at proper intervals and keeping them in good repair." 14 Am. Jur. 2d *Carriers* § 1028 (1964). *See* 13 C.J.S. *Carriers* § 735 (1939). The purchase of equipment from a reputable source "does not relieve the carrier of the further duty to inspect and test the equipment or appliances, and hence where an accident results from a defect which might have been discovered by a proper test made by the carrier, it is liable therefor." 14 Am. Jur. 2d *Carriers* § 1030 (1964). Nor may a carrier relieve itself of the duty to exercise the highest degree of care to provide safe buses by leasing its transportation facilities from another carrier or corporation which has contracted to furnish and keep such equipment in proper condition. "[T]he carrier cannot delegate the performance of this duty and escape liability for its nonperformance." 13 C.J.S. *Carriers* § 741(a) (1939). *See* 14 Am. Jur. 2d *Carriers* § 898 (1964).

[5] Thus, if the bus which Coach Company delivered to Gibbs on the morning of September 17, 1968 contained a pre-existing defect in the steering mechanism which could or should have been discovered by a proper inspection, and if the defect was the proximate cause or a proximate cause of plaintiffs' injuries, Transportation Company would be liable to plaintiffs.

In *Simpson v. Gray Line Co., supra,* the plaintiff passenger was injured in a bus accident which occurred when a tire blew out. The defendant bus company attempted to avoid liability by showing that its tires were rented from a third party. The Oregon Supreme Court said: "[T]his fact [was] immaterial in determining the issue before the court. There is a duty upon the carrier to furnish tires that are fit for the intended use. . . ." *Id.* at 74, 358 P. 2d at 517. "[T]he defendant-carrier could not delegate its duty to a third party, *i.e.,* to a tire company which supplied tires on a rental agreement. *Pennsylvania Co. v. Roy, supra.* . . ." *Id.* at 76, 358 P. 2d at 518.

[6, 7] Plaintiffs in this case made out a prima facie case of actionable negligence against Transportation Company by the introduction of evidence tending to show that they were injured when the bus in which they were passengers, without a prior collision or other apparent cause, ran off the highway into a ditch and struck a culvert. *Greene v. Nichols,* 274 N.C. 18, 161 S.E. 2d 521 (1968); *Simpson v. Gray Line Co., supra;* 2 Stansbury, *North Carolina Evidence* § 227 (Brandis rev. 1973); Annot., 79 A.L.R. 2d §§ 23(b), 31(a) (1961); 14 Am. Jur. 2d *Carriers* § 1161 (1964); 13 C.J.S. *Carriers* § 764(f)(4) (1939). Thus, plaintiffs would have been entitled to go to the jury as against Transportation Company without plaintiff Mann's testimony that the bus driver consumed "soda and cake" while operating the bus and then threw or attempted to throw the bottle out the window just before the bus ran off the highway. The jury, therefore, was not required to accept this testimony in order to answer the issues in favor of plaintiffs. We, of course, cannot know upon what theory the jury answered the issues of negligence in favor of the plaintiffs. The judge's charge is not in the record, but the presumption is that he submitted the case to the jury upon every theory which the evidence justified and "instructed correctly on every principle of law applicable to the facts." *Jones v. Mathis,* 254 N.C. 421, 428, 119 S.E. 2d 200, 205 (1961).

The specific questions which determine this appeal are (1) whether Transportation Company offered evidence sufficient to sustain a finding that a defect in the steering mechanism caused the leased bus to leave the highway; and (2), if so, whether Coach Company, in the exercise of proper care under the circumstances, could have discovered the defect prior to the time it delivered the bus to Gibbs.

On Coach Company's motion for a directed verdict all the evidence which tends to support Transportation Company's case against it must be taken as true and considered in the light most favorable to Transportation Company. Transportation Company is entitled to the benefit of every reasonable inference which may legitimately be drawn from the evidence. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971); *Bowen v. Gardner*, 275 N.C. 363, 168 S.E. 2d 47 (1969); Phillips, 1970 Supplement to 2 McIntosh, *N. C. Practice and Procedure* § 1488.15. Therefore, on this motion, Gibbs' statement that he neither threw nor attempted to throw a bottle from the bus and had no cake or soft drink on the bus at any time during the trip on which plaintiffs were injured must be accepted as true, and plaintiff Mann's testimony that the bus ran off the road just as Gibbs prepared to throw a soda bottle out the window must be disregarded. It follows that, for the purpose of this motion, the only evidence of negligence on the part of Transportation Company is the fact that the bus suddenly left the highway in a curve.

Gibbs' testimony negated any negligence in his manner of operating the bus. His statement that, as he approached the curve in which the bus left the road, he turned the steering wheel as usual but "the wheels did not answer to the steering wheel"; that although he kept turning the wheel to the left and applied his brakes, the bus kept to the right and into the ditch was corroborated by plaintiff Mann. She said that before the bus went into the ditch the driver was trying to pull it back onto the road but it would not come; that "he was turning the steering wheel to his left but the bus wouldn't go back and the bus went on the shoulder. . . ."

The foregoing evidence tends to show that a defect in the steering mechanism caused the bus to go into the ditch and to negate Coach Company's contentions (1) that the steering gear was damaged by its collision with the culvert, and (2) that "there was absolutely no evidence of any defect existing prior to the accident."

The evidence does not show the exact date on which repairs began. Coach Company's president, in answer to interrogatories not specifically directed to this point, said that the repairs were not begun until after 1 October 1968, and they were completed about 15 December 1968. It is a fair inference that repairs had not been begun at the time Transportation Company's expert

damage analyst, Mr. Jeffries, examined the bus on 11 October 1968. At that time the whole right front section and the right side of the body was damaged and misaligned; the floor of the bus was buckled and the power steering cylinder disconnected from the extension of the steering arm. Nothing he saw suggested that any repairs had then been made or attempted.

Interrogatories answered by Coach Company's president on 23 March 1972 disclosed that on the day after the accident the bus was towed from the scene of the accident to Coach Company's garage in Norfolk. Coach Company found no missing parts from the steering mechanism at the scene.

On the day after the accident, in Norfolk, "a general inspection was made of all the damage to the bus, including the steering mechanism." At that time Coach Company removed two bolts from the steering mechanism—two bolts from the booster flange. The record contains no explanation of why Coach Company removed these bolts. On 23 March 1972, at the time the interrogatories were answered, the bolts were in the possession of Coach Company's attorneys. They were in the possession of Coach Company's supervisor of maintenance when Jeffries examined them on 23 September 1968.

Jeffries testified that the function of the two bolts was to unite the booster flange on the power steering cylinder and the flange on the steering arm. The small rings of steel entwined in the threads on these bolts and the wear in the holes in the flanges from which the bolts were removed caused Jeffries to conclude that the steel rings were threads stripped from the nuts which had been on the bolts; that in consequence of the stripping the nuts became loose, worked back and forth, and eventually sheared the cotter pin at the end of the bolt, thereby breaking the connection between the two flanges; and that this severance could or might have caused the steering system to fail when Gibbs attempted to steer the bus around the left curve.

It is apparent that, in phrasing the hypothetical question which elicited the foregoing opinion from Jeffries, counsel was observing the rule stated in 1 Stansbury, *North Carolina Evidence* § 137, at 453 (Brandis rev. 1973), that if the question relates to cause and effect an expert witness "should be asked whether in his opinion a particular event or condition *could* or *might* have produced the result in question, not whether it *did* produce such result." This form of question clearly invited

the argument, which Coach Company makes, that *could* or *might have* in Jeffries' answers amounts to nothing more than his speculation as to possibilities. The situation here produced demonstrates the validity of Professor Henry Brandis' comment that an expert witness should be allowed "to make a positive assertion of causation when that conforms to his true opinion, reserving 'could' and 'might' for occasions when he feels less certainty"; that if the expert witness, "though holding a more positive opinion, is forced to adopt the 'could' or 'might' formula, then the result is patently unjust, unless the more positive opinion may be said to be inherently incredible." 1 Stansbury, *North Carolina Evidence* § 137, at 455 & n. 97 (Brandis rev. 1973). *See also* the comment of Justice Higgins in *Apel v. Coach Co.*, 267 N.C. 25, 30, 147 S.E. 2d 566, 569-70 (1966). *Cf. Service Co. v. Sales Co.*, 259 N.C. 400, 414, 131 S.E. 2d 9, 20 (1963).

[8] When a jury's inquiry relates to cause and effect in a field where special knowledge is required to answer the question, the purpose of expert testimony is likely to be thwarted or perverted unless the expert witness is allowed to express a positive opinion (if he has one) on the subject. Here, however, Jeffries testified without objection that, in his opinion, the nuts on the bolts connecting the flanges in the steering mechanism were stripped and, in consequence, the bolts became loose and moved back and forth, wearing the holes through which the bolts connected the flanges; that this movement in the flanges finally severed the cotter pin at the end of each bolt, breaking the connection between the power steering cylinder and the steering arm. Jeffries had previously testified that should these flanges become separated there would be no steering power available to the wheel.

[9, 10] We hold that sufficient evidence was produced at the trial to support a finding that a defective steering mechanism caused the bus to leave the highway. The remaining question is whether Transportation Company offered any evidence tending to show that Coach Company, by a proper inspection, could have discovered the defect prior to delivering the bus to Gibbs on 17 September 1968. The bus was a nine-year-old substitute bus. Its age and the purpose of its use intensified Coach Company's duty to have it inspected carefully by a qualified mechanic before it was delivered to Transportation Company. This duty was imposed by law as well as by its contract with Transportation Company, and its breach would render Coach Company liable not only to Tranportation Company but also to a third

person injured thereby. *Roberts v. Memorial Park,* 281 N.C. 48, 187 S.E. 2d 721 (1972); *Wilcox v. Motors Co.,* 269 N.C. 473, 153 S.E. 2d 76 (1967); Comment, *Products Liability—Liability of the Bailor for Hire for Personal Injuries Caused by Defective Goods,* 51 N.C.L. Rev. 786 (1973); 1 Strong, N. C. Index 2d *Automobiles* § 23 (1967); 8 Am. Jur. 2d *Automobiles and Highway Traffic* §§ 663, 704 (1963); Annot., 46 A.L.R. 2d 407, 443 (1956).

[11] In response to a series of questions, had Jeffries been permitted to do so, he would have testified in substance as follows: Based upon his personal examination of the entire steering mechanism of the bus, including the bolts from the two separated flanges, in his opinion, the conditions which he found (and upon which he based his conclusion that a defect in the steering mechanism caused the bus to leave the highway) would have been visible to a competent mechanic prior to the time the bus was delivered to Gibbs; that the condition must have existed during two or three thousand miles of operation before it could or might have caused the connection between the flanges to be broken and the steering to fail; that the condition would have been visible to a trained and competent mechanic "by the looseness between the two flanges of the steering cylinder and the steering rod, and the cracking of the dirt, dust and road accumulation in the joint which would signify that the joint was working, that is, moving, when it should be absolutely tight and stationary. The two pieces should not work or move against each other . . . and the nuts and bolt heads would have moved some small amount from their original position, leaving marks of the original position on the flanges."

We hold that the foregoing evidence was competent and its rejection was error entitling Transportation Company to a new trial. Jeffries was an expert mechanic and analyst of damage to mechanical devices. As such his opinion on the matter under investigation could have been helpful to the jury. 1 Stansbury, *North Carolina Evidence* §§ 132-34 (Brandis rev. 1973). To show the nexus between a mechanical defect and an accident "[t]he most convincing evidence is an expert's pinpointing the defect and giving his opinion on the precise cause of the accident after a thorough inspection." *Stewart v. Budget Rent-A-Car Corp.,* 52 Hawaii 71, 76, 470 P. 2d 240, 243 (1970).

[12] Upon the retrial of this case if the jury should find that the bus left the highway *solely* because of the negligent manner

in which Gibbs operated the bus, Coach Company would not be liable to Transportation Company in any amount. *See Anderson v. Robinson,* 275 N.C. 132, 165 S.E. 2d 502 (1969). If the jury should find that the bus left the highway because of a defect in the steering mechanism but that, in the exercise of proper care, Coach Company could not have discovered the defect prior to delivering the bus to Gibbs, Coach Company would have no liability to Transportation Company.

[13] If the jury should find that the bus left the highway because of a pre-existing defect in the steering mechanism which a competent mechanic could and should have discovered by a proper inspection of the bus prior to its delivery to Gibbs, Transportation Company would be entitled to recover indemnity from Coach Company. If this was the situation the two companies were not in equal fault. Coach Company, an independent contractor, had contracted with Transportation Company to furnish it buses for the transportation of passengers and to maintain the buses. However, Transportation Company, a common carrier, could not delegate to Coach Company its duty to use the highest degree of care to provide safe buses for its passengers. Under these circumstances, therefore, if Transportation Company was operating a bus with a pre-existing defect in the steering mechanism which Coach Company should have discovered, the negligence of Coach Company was primary and that of Transportation Company was secondary. *See Hendricks v. Fay, Inc.,* 273 N.C. 59, 159 S.E. 2d 362 (1968); *Edwards v. Hamill,* 262 N.C. 528, 138 S.E. 2d 151 (1964); *Steele v. Hauling Co.,* 260 N.C. 486, 133 S.E. 2d 197 (1963); *Newsom v. Surratt,* 237 N.C. 297, 74 S.E. 2d 732 (1953); *Motor Lines v. Johnson,* 231 N.C. 367, 57 S.E. 2d 888 (1950); Prosser, *Law of Torts* 310-13 (4th ed. 1971). Coach Company concedes that if there was a defect in the bus, Transportation Company had no knowledge of it.

The fact that defendant Coach Company, which plaintiffs alleged to be a joint tort-feasor with defendant Transportation Company, was dismissed from plaintiffs' suits at the close of plaintiffs' evidence was merely an adjudication that plaintiffs had not offered any evidence tending to establish actionable negligence on the part of Coach Company. The dismissal did not adjudicate that, as between Transportation Company and Coach Company, the two companies were not liable to plaintiffs as joint tort-feasors.

[14] If, from evidence adduced at the retrial, the jury should find Coach Company was guilty of actionable negligence in furnishing Transportation Company a defective bus; that Gibbs was negligent in the manner in which he operated the bus; and that the negligence of both concurred in proximately causing the accident in which plaintiffs were injured, Transportation Company would be entitled to contribution from Coach Company. *See* G.S. 1B-1, G.S. 1B-3 (1969); *Pearsall v. Power Co.*, 258 N.C. 639, 129 S.E. 2d 217 (1963).

We are constrained to say that upon the next trial more carefully phrased hypothetical questions and more precise answers will greatly facilitate an understanding of the mechanical problems presented by the evidence.

The decision of the Court of Appeals is reversed with directions that the cause be remanded to the Superior Court of Dare County for a retrial in accordance with the rules of law stated in this opinion.

New trial.

ALLEN v. FOREMAN

No. 126 PC.

Case below: 18 N.C. App. 383

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973.

BLACKLEY v. BLACKLEY

No. 129 PC.

Case below: 18 N.C. App. 535.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 31 August 1973.

FAGGART v. BIGGERS

No. 130 PC.

Case below: 18 N.C. App. 366.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973.

FLOYD v. JARRELL

No. 59 PC.

Case below: 18 N.C. App. 418.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973.

FORSYTH COUNTY v. BARNEYCASTLE

No. 144 PC.

Case below: 18 N.C. App. 513.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973.

IN RE CONFINEMENT OF HAYES

No. 138 PC.

Case below: 18 N.C. App. 560.

Petition by Attorney General for writ of certiorari to North Carolina Court of Appeals denied 1 September 1973. Appeal dismissed 1 September 1973.

IN RE YORK

No. 134 PC.

Case below: 18 N.C. App. 425.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973.

JORDAN v. CAMPBELL

No. 16 PC.

Case below: 19 N.C. App. 97.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973.

KACZALA v. RICHARDSON

No. 124 PC.

Case below: 18 N.C. App. 446.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973.

LIVENGOOD v. RAILWAY CO.

No. 131 PC.

Case below: 18 N.C. App. 352.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973.

PHILPOTT v. KERNS

No. 10 PC.

Case below: 18 N.C. App. 663.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 31 August 1973.

SIMS v. TRAILER SALES CORP.

No. 9 PC.

Case below: 18 N.C. App. 726.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973.

SMITH v. KILBURN

No. 105 PC.

Case below: 18 N.C. App. 204.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973.

STATE v. BAILEY

No. 114 PC and No. 40.

Case below: 18 N.C. App. 313.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 31 August 1973.

STATE v. BRANDON

No. 136 PC and No. 50.

Case below: 18 N.C. App. 483.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 31 August 1973.

STATE v. CAMPBELL

No. 155 PC.

Case below: 18 N.C. App. 586.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973.

STATE v. CAUTHEN

No. 149 PC.

Case below: 18 N.C. App. 591.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973.

STATE v. COBB

No. 156 PC.

Case below: 18 N.C. App. 221.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 31 August 1973.

STATE v. FLOYD

No. 164 PC.

Case below: 18 N.C. App. 677.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973.

STATE v. FOX

No. 139 PC.

Case below: 18 N.C. App. 523.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973.

STATE v. HARRIS

No. 157 PC.

Case below: 19 N.C. App. 48.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973.

STATE v. JONES

No. 133 PC.

Case below: 18 N.C. App. 531.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973.

STATE v. LEE

No. 152 PC.

Case below: 18 N.C. App. 580.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973.

STATE v. LEWIS

No. 162 PC.

Case below: 18 N.C. App. 681.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973. Motion of Attorney General to dismiss appeal allowed 31 August 1973.

STATE v. McDOUGALD

No. 127 PC.

Case below: 18 N.C. App. 407.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. MARTIN and PADGETT

No. 119 PC.

Case below: 18 N.C. App. 398.

Petition by defendant Padgett for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973.

STATE v. MILLER

No. 132 PC.

Case below: 18 N.C. App. 489.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973.

STATE v. PHELPS

No. 158 PC.

Case below: 18 N.C. App. 603.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973.

STATE v. POWELL

No. 168 PC.

Case below: 18 N.C. App. 732.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973.

STATE v. RICE

No. 150 PC.

Case below: 18 N.C. App. 575.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973.

STATE v. ROBERTS

No. 137 PC.

Case below: 18 N.C. App. 388.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973. Motion of Attorney General to dismiss appeal allowed 31 August 1973.

STATE v. SHELTON

No. 148 PC.

Case below: 18 N.C. App. 616.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973.

STATE v. WOOTEN

No. 151 PC.

Case below: 18 N.C. App. 652.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973.

STATE v. WRIGHT

No. 74 PC.

Case below: 18 N.C. App. 76.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973.

STATE v. YOUNG

No. 147 PC.

Case below: 18 N.C. App. 576.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

WRIGHT v. HOLT

No. 161 PC.

Case below: 18 N.C. App. 661.

Petition for writ of certiorari to North Carolina Court of Appeals denied 31 August 1973.

APPENDIXES

RULES OF THE JUDICIAL STANDARDS COMMISSION

NORTH CAROLINA CODE OF JUDICIAL CONDUCT

THE NORTH CAROLINA STATE BAR CODE OF PROFESSIONAL RESPONSIBILITY

RULES OF THE JUDICIAL STANDARDS COMMISSION

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RULE 1

Authority

These rules are promulgated pursuant to the authority contained in G.S. 7A-377, and are effective January 1, 1973.

RULE 2

Organization; Officers; Meetings; Quorum

The Commission shall have a Chairman, who is the Court of Appeals member, and a Vice-Chairman, who shall be elected by the members. The Vice-Chairman shall preside in the absence of the Chairman. The Commission shall also have a Secretary, who shall be elected by the members and perform such duties as the Commission may assign. The Vice-Chairman and Secretary shall serve for one-year terms, and may succeed themselves.

The Commission shall meet on the call of the Chairman or of any four members.

A quorum for the conduct of business shall consist of any four members, except as otherwise provided in these rules.

Each member of the Commission, including the Chairman, Vice-Chairman, Secretary, or other presiding member, shall be a voting member.

The Commission shall ordinarily meet in Raleigh, but may meet anywhere in the State. The Commission's address is P. O. Box 1122, Raleigh, N. C. 27602.

RULE 3

Interested Party

A judge who is a member of the Commission is disqualified from acting in any case in which he is a respondent, except in his own defense.

RULE 4

Confidentiality of Proceedings

(a) ALL papers filed with and proceedings before the Commission are confidential, unless the respondent judge otherwise requests. The recommendations of the Commission to the Supreme Court, and the record filed in support of the recommendations are not confidential.

(b) At the request of the judge involved:

1) when a judge is publicly charged with involvement in proceedings before the Commission and the result of such publicity is substantial unfairness to him, the Commission may issue a short statement of clarification and correction; or

2) when a judge is publicly associated with having engaged in serious reprehensible conduct or having committed a major offense, and after a preliminary investigation or a formal hearing it is determined that there is no basis for further proceedings or recommendations, the Commission may issue a short explanatory statement.

(c) Upon resolution of the Commission:

when a formal hearing has been ordered in a proceeding and the Commission determines that the subject matter is generally known to the public and in which there is broad public interest, and the Commission further determines that confidence in the administration of justice is threatened due to lack of information concerning the status of the proceeding and the requirements of due process, the Commission may, after permitting the judge involved the right of consultation with the Commission, issue one or more short announcements confirming the hearing, clarifying the procedural aspects, and defending the right of the judge to a fair hearing.

(d) All written communications to a judge (counsel, guardian, guardian ad litem) pursuant to these rules shall be enclosed in a securely sealed inner envelope marked "Confidential."

RULE 5

Defamatory Matter

Testimony and other evidence presented to the Commission is privileged in any action for defamation. No other publication of such evidence shall be privileged, except that the record filed by the Commission in the Supreme Court continues to be privileged.

RULE 6

Unfounded or Frivolous Complaints

(a) Upon receipt of a written complaint that is obviously unfounded or frivolous, the Commission shall write a short

letter of explanation to the complainant. The judge involved shall not be notified of these complaints unless otherwise determined.

(b) A determination that a complaint is unfounded or frivolous may be made by two Commission members one of whom must be a judge or attorney. Such determination may be reconsidered by the full Commission at its next meeting.

RULE 7

Preliminary Investigation

(a) The Commission, upon receiving a written complaint, not obviously unfounded or frivolous, alleging facts indicating that a judge may be guilty of wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or alleging that a judge is suffering from a mental or physical incapacity interfering with the performance of his duties, which incapacity is, or is likely to become, permanent, shall make a preliminary investigation to determine whether formal proceedings should be instituted. The Commission may also make a preliminary investigation on its own motion.

(b) The judge shall be notified of the investigation, the nature of the charge, and whether the investigation is on the Commission's own motion or upon written complaint, and afforded a reasonable opportunity to present such relevant matters as he may choose. Such notice shall be in writing, and may be transmitted by a member of the Commission, any person of suitable age and discretion designated by it, or by certified or registered mail.

If the preliminary investigation does not disclose sufficient cause to warrant further proceedings, the judge shall be so notified, and the case closed.

RULE 8

Notice of Formal Proceedings

After the preliminary investigation has been completed, if the Commission concludes that formal proceedings should be instituted, it shall promptly so notify the judge. Such notice shall be entitled "BEFORE THE JUDICIAL STANDARDS COMMIS-

SION, Inquiry Concerning a Judge, No. ....." The notice shall identify the complainant, and shall specify in ordinary and concise language the charge or charges against the judge. The judge shall be advised of alleged facts upon which such charges are based, and a copy of the verified complaint shall be furnished to the judge, and the notice shall advise the judge of his right to file a written, verified answer to the charges against him within 20 days after service of the notice upon him. The notice shall be served upon the judge by personal service by a member of the Commission, or some person of suitable age and discretion designated by it. If, after reasonable efforts to do so, personal service cannot be effected, service by certified or registered mail is authorized. Notice by mail shall be addressed to the judge at his residence of record.

RULE 9

Answer

(a) Within 20 days after service of the complaint and notice of formal proceedings the judge may file with the Commission an original and 8 copies of an answer, which shall be verified.

(b) The notice, complaint and answer constitute the pleadings. No further pleadings may be filed, and no motions may be filed against any of the pleadings.

RULE 10

Formal Proceedings

Upon the filing of an answer, or upon the expiration of the time allowed for its filing, the Commission shall order a formal proceeding before it concerning the charges. The proceeding shall be held no sooner than 10 days after filing of the answer, or after the deadline for filing of the answer, unless the judge consents to an earlier hearing. The notice shall be served in the same manner as the notice of charges under Rule 8.

At the date set for the formal proceeding, the Commission shall proceed whether or not the judge has filed an answer, and whether or not he appears in person or through counsel, but failure of the judge to answer or to appear shall not be taken as evidence of the facts alleged in the charges.

Special counsel (who shall be an attorney) employed by the Commission, or counsel supplied by the Attorney General at the request of the Commission, shall present the evidence in

support of the charges. Counsel shall be sworn to preserve the confidential nature of the proceeding.

The proceeding shall be recorded by a reporter employed by the Commission for this purpose. The reporter shall also be sworn to preserve the confidential nature of the proceeding.

RULE 11

Witnesses; Oaths; Subpoenas; Compensation

Witnesses shall take an oath or affirmation to tell the truth and not to divulge the name of the judge or the existence of the proceeding until the matter is no longer confidential under these rules. The oath to witnesses may be administered by any member of the Commission.

Subpoenas to witnesses shall be issued in the name of the State, and shall be signed by a member of the Commission. They shall be served, without fee, by any officer authorized to serve process of the General Court of Justice.

Witnesses are entitled to the same compensation and reimbursement for travel expenses as witnesses in a civil case in the General Court of Justice. Vouchers authorizing disbursements for Commission witnesses shall be signed by the Chairman or Secretary of the Commission.

RULE 12

Medical Examination

When the mental or physical health of a judge is in issue, the Commission may request the judge to submit to an examination by a licensed physician or physicians of its choosing. If the judge fails to submit to the examination, the Commission may take his failure into account, unless it has good reason to believe that the judge's failure was due to circumstances beyond his control. The judge shall be furnished a copy of the report of any examination conducted under this rule.

The examining physician or physicians shall receive the fee of an expert witness, to be set by the Commission.

RULE 13

Rights of Respondent

In formal proceedings involving his censure, removal, or retirement, a judge shall have the right and opportunity to de-

fend against the charges by introduction of evidence, representation by counsel, and examination and cross-examination of witnesses. He shall also have the right to the issuance of subpoenas for attendance of witnesses to testify or to produce books, papers, and other evidentiary matter.

A copy of the transcript of proceedings prepared for transmission to the Supreme Court shall be furnished to the judge and, if he has objections to it, he may within 10 days present his objections to the Commission, which shall consider his objections and settle the record prior to transmitting it to the Supreme Court.

The judge has the right to have all or any portion of the testimony in the proceedings transcribed at his own expense.

Once the judge has informed the Commission that he has counsel, a copy of any notices, pleadings, or other written communications (other than the transcript) sent to the judge shall be furnished to counsel by any reliable means.

RULE 14

Evidence

At a formal proceeding before the Commission, legal evidence only shall be received, and oral evidence shall be taken only on oath or affirmation.

Rulings on evidentiary matters shall be made by the Chairman, or the Vice-Chairman presiding in his absence.

RULE 15

Amendments to Notice or Answer

The Commission, at any time prior to its recommendation, may allow or require amendments to the notice of formal proceedings, and may allow amendments to the answer. The notice may be amended to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearings. In case such an amendment is made, the judge shall be given reasonable time both to answer the amendment and to prepare and present his defense against the matters charged thereby.

RULE 16

Commission Voting

The affirmative vote of at least five members of the Commission is necessary to recommend to the Supreme Court

censure or removal of a judge. A vote of four (a quorum) is necessary for any other official action, except as specified in Rule 6 for disposing of unfounded or frivolous complaints.

RULE 17

Contempt

The Commission has the same power as a trial court of the General Court of Justice to punish for contempt, or for refusal to obey lawful orders or process issued by the Commission.

RULE 18

Record of Proceedings

The Commission shall keep a record of all preliminary investigations and formal proceedings concerning a judge. In formal proceedings testimony shall be recorded verbatim, and if a recommendation to the Supreme Court for censure or removal is made, a transcript of the evidence and all proceedings therein shall be prepared, and the Commission shall make written findings of fact and conclusions of law in support of its recommendation.

RULE 19

Transmission of Recommendations to Supreme Court

Upon reaching a recommendation to censure or remove a judge, the Commission shall promptly file with the Clerk of the Supreme Court the transcript of proceedings, and its findings of fact, conclusions of law, and recommendation, certified by the Chairman or Secretary. The Commission shall concurrently transmit to the judge a copy of the transcript (if the judge objected to the original transcript, and settlement proceedings resulting in charges in the transcript were had), its findings, conclusions, and recommendation.

RULE 20

Proceedings in the Supreme Court

Proceedings in the Supreme Court shall be as prescribed by Supreme Court Rule. *See* G.S. 7A-33.

NORTH CAROLINA
CODE OF JUDICIAL CONDUCT

Exercising the authority vested in it by the Constitution of North Carolina and by Chapter 89, Session Laws of 1973, the Supreme Court of North Carolina prescribes for the guidance of all justices and judges of the General Court of Justice the following standards of judicial conduct:

CANON 1

A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

CANON 2

A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

CANON 3

A Judge Should Perform the Duties of His Office Impartially and Diligently

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before him.

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

(7) A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;

(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;

(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) the means of recording will not distract participants or impair the dignity of the proceedings;

(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

B. Administrative Responsibilities.

(1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.

(3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

(4) A judge should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism. He should not approve compensation of appointees beyond the fair value of services rendered.

C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed eviden-

tiary facts concerning the proceeding;

(b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system;

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship

as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

D. Remittal of Disqualification.

A judge disqualified by the terms of Canon 3C(1)(c) or Canon 3C(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

CANON 4

A Judge May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice

A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:

A. He may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

B. He may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he may otherwise consult with an executive or legislative body or official.

C. He may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. He may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. He may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

CANON 5

A Judge Should Regulate His Extra-Judicial Activities to Minimize the Risk of Conflict with His Judicial Duties

A. Avocational Activities. A judge may write, lecture, teach, and speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of his office or interfere with the performance of his judicial duties.

B. Civic and Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon his impartiality or interfere with the performance of his judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him or will be regularly engaged in adversary proceedings in any court.

(2) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or

use or permit the use of the prestige of his office for that purpose, but he may be listed as an officer, director, or trustee of such an organization.

(3) A judge should not give investment advice to such an organization, but he may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

C. Financial Activities.

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

(2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should not serve as an officer, director, manager, advisor, or employee of any business.

(3) A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious financial detriment, he should divest himself of investments and other financial interests that might require frequent disqualification.

(4) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone except as follows:

(a) a judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) a judge or a member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are

not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) a judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before him, and, if its value exceeds $100, the judge reports it in the same manner as he reports compensation in Canon 6C.

(5) For the purposes of this section "member of his family residing in his household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of his family, who resides in his household.

(6) A judge is not required by this Code to disclose his income, debts, or investments, except as provided in this Canon and Canons 3 and 6.

(7) Information acquired by a judge in his judicial capacity should not be used or disclosed by him in financial dealings or for any other purpose not related to his judicial duties.

D. Fiduciary Activities. A judge should not serve as the executor, administrator, trustee, guardian, or other fiduciary, except for the estate, trust, or person of a member of his family, and then only if such service will not interfere with the proper performance of his judicial duties. "Member of of his family" includes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. As a family fiduciary a judge is subject to the following restrictions:

(1) He should not serve if it is likely that as a fiduciary he will be engaged in proceedings that would ordinarily come before him, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which he serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to him in his personal capacity.

E. Arbitration. A judge should not act as an arbitrator or mediator.

F. Practice of Law. A judge should not practice law.

G. Extra-judicial Appointments. A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

CANON 6

A Judge Should Regularly File Reports of Compensation Received for Quasi-Judicial and Extra-Judicial Activities

A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge in his judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

A. Compensation. Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.

B. Expense Reimbursement. Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by his spouse. Any payment in excess of such an amount is compensation.

C. Public Reports. A judge should report the date, place, and nature of any activity for which he received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. His report should be made at least annually and should be filed as a public document in the office of the clerk of the court on which he serves or other office designated by rule of court.

CANON 7

A Judge Should Refrain from Political Activity Inappropriate to His Judicial Office

A. Political Conduct in General.

(1) A judge or a candidate for election to judicial office should not:

(a) act as a leader or hold any office in a political organization;

(b) make speeches for a political organization or candidate or publicly endorse a candidate for public office;

(c) solicit funds for a political organization or candidate except as authorized in subsection A(2).

(2) A judge holding an office filled by public election between competing candidates, or a candidate for such office, may, only insofar as permitted by law, attend political gatherings, speak to such gatherings on his own behalf when he is a candidate for election or re-election, identify himself as a member of a political party, and contribute to a political party or organization.

(3) A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so.

B. Campaign Conduct.

(1) A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:

(a) should maintain the dignity appropriate to judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him;

(b) should prohibit public officials or employees subject to his direction or control from doing for him what he is prohibited from doing under this Canon; and except to the extent authorized under subsection B(2) or B(3), he should not allow any other person to do for him what he is prohibited from doing under this Canon;

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his

views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

(2) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit campaign funds, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from lawyers. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.

(3) An incumbent judge who is a candidate for retention in or re-election to office without a competing candidate, and whose candidacy has drawn active opposition, may campaign in response thereto and may obtain publicly stated support and campaign funds in the manner provided in subsection B(2).

EFFECTIVE DATE OF COMPLIANCE

A person to whom this Code becomes applicable should arrange his affairs as soon as reasonably possible to comply with it. If, however, the demands on his time and the possibility of conflicts of interest are not substantial, a person who holds judicial office on the date this Code becomes effective may:

(a) continue to act as an officer, director, or non-legal advisor of a family business;

(b) continue to act as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of his family.

The foregoing Code of Judicial Conduct was adopted by the Supreme Court of North Carolina in conference on 26 September 1973 and becomes effective upon publication thereof in the Advance Sheets of the North Carolina Reports.

For the Court
By MOORE, J.
Associate Justice

THE NORTH CAROLINA STATE BAR CODE OF PROFESSIONAL RESPONSIBILITY

The following amendment to the Rules, Regulations and the Certificate of Organization of The North Carolina State Bar was duly adopted by the Council of The North Carolina State Bar at its quarterly meeting on January 12, 1973.

BE IT RESOLVED by the Council of The North Carolina State Bar, that Article X, Canons of Ethics and Rules of Professional Conduct of the Certificate of Organization of The North Carolina State Bar, as appears in 205 N.C. 865 and as amended in 212 N.C. 840; 216 N.C. 809; 221 N.C. 592; 241 N.C. 750; 243 N.C. 796; 248 N.C. 748; 250 N.C. 734; 251 N.C. 857; 253 N.C. 819; 261 N.C. 784; 275 N.C. 702; and 281 N.C. 770 be and the same is hereby amended by deleting all of the Canons of Ethics and Rules of Professional Conduct 1 through 46 and A through K and inserting in lieu thereof The North Carolina State Bar Code of Professional Responsibility which is as follows:

PREAMBLE AND PRELIMINARY STATEMENT

Preamble

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

In fulfilling his professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation which he may encounter can be foreseen, but fundamental ethical principles are always present to guide him. Within the framework of these principles, a lawyer must with courage and foresight be able and ready to shape the body of the law to the ever-changing relationships of society.

The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor. Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.

Preliminary Statement

In furtherance of the principles stated in the Preamble, the American Bar Association has promulgated this Code of Professional Responsibility, consisting of three separate but interrelated parts: Canons, Ethical Considerations, and Disciplinary Rules. The Code is designed to be adopted by appropriate agencies both as an inspirational guide to the members of the profession and as a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules.

Obviously the Canons, Ethical Considerations, and Disciplinary Rules cannot apply to non-lawyers; however, they do define the type of ethical conduct that the public has a right to expect not only of lawyers but also of their non-professional employees and associates in all matters pertaining to professional employment. A lawyer should ultimately be responsible for the conduct of his employees and associates in the course of the professional representation of the client.

The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived.

The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.

The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of fair trial, the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities. The Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct. The severity of judgment against one found guilty of violating a Disciplinary Rule should be determined by the character of the offense and the attendant circumstances. An enforcing agency, in applying the Disciplinary Rules, may find interpretive guidance in the basic principles embodied in the Canons and in the objectives reflected in the Ethical Considerations.

CANON 1

A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession

ETHICAL CONSIDERATIONS

EC1-1 A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence. Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer.

EC1-2 The public should be protected from those who are not qualified to be lawyers by reason of a deficiency in education or moral standards or of other relevant factors but who nevertheless seek to practice law. To assure the maintenance of high moral and educational standards of the legal profession, lawyers should affirmatively assist courts and other appropriate bodies in promulgating, enforcing, and improving requirements for admission to the bar. In like manner, the bar has a positive obligation to aid in the continued improvement of all phases of pre-admission and post-admission legal education.

EC1-3 Before recommending an applicant for admission, a lawyer should satisfy himself that the applicant is of good moral character. Although a lawyer should not become a self-appointed investigator or judge of applicants for admission,

he should report to proper officials all unfavorable information he possesses relating to the character or other qualifications of an applicant.

EC1-4 The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules. A lawyer should, upon request, serve on and assist committees and boards having responsibility for the administration of the Disciplinary Rules.

EC1-5 A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.

EC1-6 An applicant for admission to the bar or a lawyer may be unqualified, temporarily or permanently, for other than moral and educational reasons, such as mental or emotional instability. Lawyers should be diligent in taking steps to see that during a period of disqualification such person is not granted a license or, if licensed, is not permitted to practice. In like manner, when the disqualification has terminated, members of the bar should assist such person in being licensed, or, if licensed, in being restored to his full right to practice.

DISCIPLINARY RULES

DR1-101 Maintaining Integrity and Competence of the Legal Profession.

(A) A lawyer is subject to discipline if he has made a materially false statement in, or if he has deliberately failed to disclose a material fact requested in connection with, his application for admission to the bar.

(B) A lawyer shall not further the application for admission to the bar of another person known by him to be unqualified in respect to character, education, or other relevant attribute.

DR1-102 Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in professional conduct that is prejudicial to the administration of justice.

(6) Engage in any other professional conduct that adversely reflects on his fitness to practice law.

DR1-103 Disclosure of Information to Authorities.

(A) A lawyer possessing unprivileged knowledge of a clear violation of DR1-102 should report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

CANON 2

A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available

ETHICAL CONSIDERATIONS

EC2-1 The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

Recognition of Legal Problems

EC2-2 The legal profession should assist laymen to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers acting under proper auspices should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. Such educational programs should be motivated by a desire to benefit the public rather than to obtain publicity or employment for particular lawyers. Examples of permissible

activities include preparation of institutional advertisements and professional articles for lay publications and participation in seminars, lectures, and civic programs. But a lawyer who participates in such activities should shun personal publicity.

EC2-3 Whether a lawyer acts properly in volunteering advice to a layman to seek legal services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laymen in recognizing legal problems. The advice is proper only if motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations. Hence, the advice is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause litigation to be brought merely to harass or injure another. Obviously, a lawyer should not contact a nonclient, directly or indirectly, for the purpose of being retained to represent him for compensation.

EC2-4 Since motivation is subjective and often difficult to judge, the motives of a lawyer who volunteers advice likely to produce legal controversy may well be suspect if he receives professional employment or other benefits as a result. A lawyer who volunteers advice that one should obtain the services of a lawyer generally should not himself accept employment, compensation, or other benefit in connection with that matter. However, it is not improper for a lawyer to volunteer such advice and render resulting legal services to close friends, relatives, former clients (in regard to matters germane to former employment), and regular clients.

EC2-5 A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for laymen should caution them not to attempt to solve individual problems upon the basis of the information contained therein.

Selection of a Lawyer: Generally

EC2-6 Formerly a potential client usually knew the reputations of local lawyers for competency and integrity and therefore could select a practitioner in whom he had confidence. This

traditional selection process worked well because it was initiated by the client and the choice was an informed one.

EC2-7 Changed conditions, however, have seriously restricted the effectiveness of the traditional selection process. Often the reputations of lawyers are not sufficiently known to enable laymen to make intelligent choices. The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many laymen have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of limited education or means, and others who have little or no contact with lawyers.

EC2-8 Selection of a lawyer by a layman often is the result of the advice and recommendation of third parties—relatives, friends, acquaintances, business associates or other lawyers. A layman is best served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his employment. A lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations.

Selection of a Lawyer: Professional Notices and Listings

EC2-9 The traditional ban against advertising by lawyers, which is subject to certain limited exceptions, is rooted in the public interest. Competitive advertising would encourage extravagant, artful, self-laudatory brashness in seeking business and thus could mislead the layman. Furthermore, it would inevitably produce unrealistic expectations in particular cases and bring about distrust of the law and lawyers. Thus, public confidence in our legal system would be impaired by such advertisements of professional services. The attorney-client relationship is personal and unique and should not be established as the result of pressures and deceptions. History has demonstrated that public confidence in the legal system is best preserved by strict, self-imposed controls over, rather than by unlimited, advertising.

EC2-10 Methods of advertising that are subject to the objections stated above should be and are prohibited. However, the Disciplinary Rules recognize the value of giving assistance in the selection process through forms of advertising that furnish identification of a lawyer while avoiding such objections. For example, a lawyer may be identified in the classified section of

the telephone directory, in the office building directory, and on his letterhead and professional card. But at all times the permitted notices should be dignified and accurate.

EC2-11 The name under which a lawyer conducts his practice may be a factor in the selection process. The use of a trade name or an assumed name could mislead laymen concerning the identity, responsibility, and status of those practicing thereunder. Accordingly, a lawyer in private practice should practice only under his own name, the name of a lawyer employing him, a partnership name composed of the name of one or more of the lawyers practicing in a partnership, or, if permitted by law, in the name of a professional legal corporation, which should be clearly designated as such. For many years some law firms have used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not misled thereby. However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public.

EC2-12 A lawyer occupying a judicial, legislative, or public executive or administrative position who has the right to practice law concurrently may allow his name to remain in the name of the firm if he actively continues to practice law as a member thereof. Otherwise, his name should be removed from the firm name, and he should not be identified as a past or present member of the firm; and he should not hold himself out as being a practicing lawyer.

EC2-13 In order to avoid the possibility of misleading persons with whom he deals, a lawyer should be scrupulous in the representation of his professional status. He should not hold himself out as being a partner or associate of a law firm if he is not one in fact, and thus should not hold himself out as a partner or associate if he only shares offices with another lawyer.

EC2-14 In some instances a lawyer confines his practice to a particular field of law. In the absence of state controls to insure the existence of special competence, a lawyer should not be permitted to hold himself out as a specialist or as having special training or ability, other than in the historically excepted fields of admiralty, trademark, and patent law.

EC2-15 The legal profession has developed lawyer referral systems designed to aid individuals who are able to pay fees but

need assistance in locating lawyers competent to handle their particular problems. Use of a lawyer referral system enables a layman to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of qualified counsel.

EC2-16 The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them. Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.

Financial Ability to Employ Counsel: Persons Able to Pay Reasonable Fees

EC2-17 The determination of a proper fee requires consideration of the interests of both client and lawyer. A lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession.

EC2-18 The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained. It is a commendable and long-standing tradition of the bar that special consideration is given in the fixing of any fee for services rendered a brother lawyer or a member of his immediate family.

EC2-19 As soon as feasible after a lawyer has been employed, it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made. Such a course will not only prevent later misunderstanding but will also work for good relations between the lawyer and the client. It is usually

beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent. A lawyer should be mindful that many persons who desire to employ him may have had little or no experience with fee charges of lawyers, and for this reason he should explain fully to such persons the reasons for the particular fee arrangement he proposes.

EC2-20 Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a *res* out of which the fee can be paid. Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a *res* with which to pay the fee.

EC2-21 A lawyer should not accept compensation or any thing of value incident to his employment or services from one other than his client without the knowledge and consent of his client after full disclosure.

EC2-22 Without the consent of his client, a lawyer should not associate in a particular matter another lawyer outside his firm. A fee may properly be divided between lawyers properly associated if the division is in proportion to the services performed and the responsibility assumed by each lawyer and if the total fee is reasonable.

EC2-23 A lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject.

Financial Ability to Employ Counsel: Persons Unable to Pay Reasonable Fees

EC2-24 A layman whose financial ability is not sufficient to permit payment of any fee cannot obtain legal services other than in cases where a contingent fee is appropriate, unless the services are provided for him. Even a person of moderate means may be unable to pay a reasonable fee which is large because of the complexity, novelty, or difficulty of the problem or similar factors.

EC2-25 Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid officers, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.

Acceptance and Retention of Employment

EC2-26 A lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client; but in furtherance of the objective of the bar to make legal services fully available, a lawyer should not lightly decline proffered employment. The fulfillment of this objective requires acceptance by a lawyer of his share of tendered employment which may be unattractive both to him and the bar generally.

EC2-27 History is replete with instances of distinguished and sacrificial services by lawyers who have represented unpopular clients and causes. Regardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse.

EC2-28 The personal preference of a lawyer to avoid adversary alignment against judges, other lawyers, public officials, or influential members of the community does not justify his rejection of tendered employment.

EC2-29 When a lawyer is appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he should not seek to be excused from undertaking the representation except for compelling reasons. Compelling reasons do

not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case.

EC2-30 Employment should not be accepted by a lawyer when he is unable to render competent service or when he knows or it is obvious that the person seeking to employ him desires to institute or maintain an action merely for the purpose of harassing or maliciously injuring another. Likewise, a lawyer should decline employment if the intensity of his personal feeling, as distingushed from a community attitude, may impair his effective representation of a prospective client. If a lawyer knows a client has previously obtained counsel, he should not accept employment in the matter unless the other counsel approves or withdraws, or the client terminates the prior employment.

EC2-31 Full availability of legal counsel requires both that persons be able to obtain counsel and that lawyers who undertake representation complete the work involved. Trial counsel for a convicted defendant should continue to represent his client by advising whether to take an appeal and, if the appeal is prosecuted, by representing him through the appeal unless new counsel is substituted or withdrawal is permitted by the appropriate court.

EC2-32 A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding withdrawal. A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client as a result of his withdrawal. Even when he justifiably withdraws, a lawyer should protect the welfare of his client by giving due notice of his withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm. Further, he should refund to the client any compensation not earned during the employment.

DISCIPLINARY RULES

DR2-101 Publicity in General.

(A) A lawyer shall not prepare, cause to be prepared, use, or participate in the use of, any form of public communication that contains professionally self-laudatory statements calculated to attract lay clients; as used herein, "public communication" includes, but is not limited to, communication by means of television, radio, motion picture, newspaper, magazine or book, except as authorized in subparagraph (B).

(B) A lawyer shall not publicize himself, his partner, or associate as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories, or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf except as permitted under DR2-103. This does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

(1) In political advertisements when his professional status is germane to the political campaign or to a political issue.

(2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.

(3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer.

(4) In and on legal documents prepared by him.

(5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.

(6) In an unpaid newsstory in a local paper stating the opening of an office for the practice of law by an attorney or the association by an attorney with an established law firm, together with his photograph and a brief and dignified statement of his background and education.

(C) A lawyer shall not compensate or give any thing of value to representatives of the press, radio, television, or other com-

munication medium in anticipation of or in return for professional publicity in a news item.

DR2-102 Professional Notices, Letterheads, Offices, and Law Lists.

(A) A lawyer or law firm shall not use professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in dignified form:

(1) A professional card of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, and any information permitted under DR2-105. A professional card of a law firm may also give the names of members and associates. Such cards may be used for identification but may not be published in periodicals, magazines, newspapers, or other media.

(2) A brief professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional office of a lawyer or law firm, which may be mailed to lawyers, clients, former clients, personal friends, and relatives. It shall not state biographical data except to the extent reasonably necessary to identify the lawyer or to explain the change in his association, but it may state the immediate past position of the lawyer. It may give the names and dates of predecessor firms in a continuing line of succession. It shall not state the nature of the practice except as permitted under DR2-105.

(3) A sign on or near the door of the office and in the building directory identifying the law office. The sign shall not state the nature of the practice, except as permitted under DR2-105.

(4) A letterhead of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, associates and any information permitted under DR2-105. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer may be designated "Of Counsel" on a letterhead if he has a con-

tinuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if he or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(5) A listing of the office of a lawyer or law firm in the alphabetical and classified sections of the telephone directory or directories for the geographical area or areas in which the lawyer resides or maintains offices and in the city directory of the city in which his or the firm's office is located; but the listing may give only the name of the lawyer or law firm, the fact he is a lawyer, addresses, and telephone numbers. The listing shall not be in distinctive form or type. A law firm may have a listing in the firm name separate from that of its members and associates. The listing in the classified section shall not be under a heading or classification other than "Attorneys" or "Lawyers," except that additional headings or classifications descriptive of the types of practice referred to in DR2-105 are permitted.

(6) A listing in a reputable law list or legal directory giving brief biographical and other informative data. A law list or directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. A law list is conclusively established to be reputable if it is certified by the American Bar Association as being in compliance with its rules and standards. The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates; a statement that practice is limited to one or more fields of law; a statement that the lawyer or law firm specializes in a particular field of law or law practice but only if authorized under DR2-105 (A) (4); date and place of birth; date and place of admission to the bar of state and federal courts;

schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional licenses; memberships in scientific, technical and professional associations and societies; foreign language ability; names and addresses of references, and, with their consent, names of clients regularly represented.

(B) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation or professional association may contain "P.C." or "P.A." or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. A lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which he is not actively and regularly practicing law as a member of the firm, and during such period other members of the firm shall not use his name in the firm name or in professional notices of the firm.

(C) A lawyer shall not hold himself out as having a partnership with one or more other lawyers unless they are in fact partners.

(D) No partnership name, or the name of any professional corporation formed to practice law, or list of firm members or shareholders in a professional corporation or associates of either shall include the name of any person or persons not licensed to practice in North Carolina.

(E) A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on his letterhead, office sign, or professional card, nor shall he identify himself as a lawyer in any publication in connection with his other profession or business.

(F) Nothing contained herein shall prohibit a lawyer from using or permitting the use of, in connection with his name in an approved law list, an earned degree or title derived therefrom indicating his training in the law.

DR2-103 Recommendation of Professional Employment.

(A) A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.

(B) Except as permitted under DR2-103 (C), a lawyer shall not compensate or give any thing of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client.

(C) A lawyer shall not request a person or organization to recommend employment, as a private practitioner, of himself, his partner, or associate, except that he may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists and may pay its fees incident thereto.

(D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:

(1) A legal aid office or public defender office:

(a) Operated or sponsored by a duly accredited law school.

(b) Operated or sponsored by a bona fide non-profit community organization.

(c) Operated or sponsored by a governmental agency.

(d) Operated, sponsored, or approved by a bar association representative of the general bar of the

geographical area in which the association exists.

(2) A military legal assistance office.

(3) A lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists.

(4) A bar association representative of the general bar of the geographical area in which the association exists.

(5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:

(a) The primary purposes of such organization do not include the rendition of legal services.

(b) The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of of such organization.

(c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.

(d) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter.

(e) Such lawyer, his partners or associates prior to the initiation of such legal services activities, and annually in January of each year thereafter, shall disclose to the Secretary of the North Carolina State Bar on forms to be requested of him and furnished by him the identity of and other relevant information concerning such non-profit organization which shall so recommend,

furnish or pay for legal services to its members or beneficiaries.

(E) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this Disciplinary Rule.

DR2-104 Suggestion of Need of Legal Services.

(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

(2) A lawyer may accept employment that results from his participation in activities designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by any of the offices or organizations enumerated in DR2-103 (D) (1) through (5), to the extent and under the conditions prescribed therein.

(3) A lawyer who is furnished or paid by any of the offices or organizations enumerated in DR2-103 (D) (1), (2), or (5) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.

(4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.

(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

DR2-105 Limitation of Practice.

(A) A lawyer shall not hold himself out publicly as a specialist or as limiting his practice, except as permitted under DR2-102 (A) (6) or as follows:

(1) A lawyer admitted to practice before the United States Patent Office may use the designation "Patents," "Patent Attorney," or "Patent Lawyer," or any combination of those terms, on his letterhead and office sign. A lawyer engaged in the trademark practice may use the designation "Trademarks," "Trademark Attorney," or "Trademark Lawyer," or any combination of those terms, on his letterhead and office sign, and a lawyer engaged in the admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or "Admiralty Lawyer," or any combination of those terms, on his letterhead and office sign.

(2) A lawyer may permit his name to be listed in lawyer referral service offices according to the fields of law in which he will accept referrals.

(3) A lawyer available to act as a consultant to or as an associate of other lawyers in a particular branch of law or legal service may distribute to other lawyers and publish in legal journals a dignified announcement of such availability, but the announcement shall not contain a representation of special competence or experience. The announcement shall not be distributed to lawyers more frequently than once in a calendar year, but it may be published periodically in legal journals.

(4) A lawyer who is certified as a specialist in a particular field of law or law practice by the authority having jurisdiction under state law over the subject of specialization by lawyers may hold himself out as such specialist but only in accordance with the rules prescribed by that authority.

DR2-106 Fees for Legal Services.

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence experienced in the area

of the law involved would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

DR2-107 Division of Fees among Lawyers.

(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

(2) The division is made in proportion to the services performed and responsibility assumed by each.

(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.

(B) This Disciplinary Rule does not prohibit payment pursuant to a separation or retirement agreement.

DR2-108 Agreements Restricting the Practice of a Lawyer.

(A) A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.

(B) In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law.

DR2-109 Acceptance of Employment.

(A) A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such person wishes to:

(1) Bring a legal action, conduct a defense, or assert a position in litigation, or otherwise have steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

(2) Present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification, or reversal of existing law.

DR2-110 Withdrawal from Employment.

(A) In general.

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

(B) Mandatory withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment if:

(1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

(2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.

(3) His mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively.

(4) He is discharged by his client.

(C) Permissive withdrawal.

If DR2-110 (B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) His client:

(a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.

(b) Personally seeks to pursue an illegal course of conduct.

(c) Insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules.

(d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively.

(e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the

lawyer but not prohibited under the Disciplinary Rules.

(f) Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.

(2) His continued employment is likely to result in a violation of a Disciplinary Rule.

(3) His inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.

(4) His mental or physical condition renders it difficult for him to carry out the employment effectively.

(5) His client knowingly and freely assents to termination of his employment.

(6) He believes in good faith in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

CANON 3

A Lawyer Should Assist in Preventing the Unauthorized Practice of Law

ETHICAL CONSIDERATIONS

EC3-1 The prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services. Because of the fiduciary and personal character of the lawyer-client relationship and the inherently complex nature of our legal system, the public can better be assured of the requisite responsibility and competence if the practice of law is confined to those who are subject to the requirements and regulations imposed upon members of the legal profession.

EC3-2 The sensitive variations in the considerations that bear on legal determinations often make it difficult even for a lawyer to exercise appropriate professional judgment, and it is therefore essential that the personal nature of the relationship of client and lawyer be preserved. Competent professional judgment is the product of a trained familiarity with law and legal processes, a disciplined, analytical approach to legal problems, and a firm ethical commitment.

EC3-3 A non-lawyer who undertakes to handle legal matters is not governed as to integrity or legal competence by the same rules that govern the conduct of a lawyer. A lawyer is not only subject to that regulation but also is committed to high standards of ethical conduct. The public interest is best served in legal matters by a regulated profession committed to such standards. The Disciplinary Rules protect the public in that they prohibit a lawyer from seeking employment by improper overtures, from acting in cases of divided loyalties, and from submitting to the control of others in the exercise of his judgment. Moreover, a person who entrusts legal matters to a lawyer is protected by the attorney-client privilege and by the duty of the lawyer to hold inviolate the confidences and secrets of his client.

EC3-4 A layman who seeks legal services often is not in a position to judge whether he will receive proper professional attention. The entrustment of a legal matter may well involve the confidences, the reputation, the property, the freedom, or even the life of the client. Proper protection of members of the public demands that no person be permitted to act in the confidential and demanding capacity of a lawyer unless he is subject to the regulations of the legal profession.

EC3-5 It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment. Where this professional judgment is not involved, non-lawyers, such as court clerks, police officers, abstracters, and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas. But the services of a lawyer are essential in the public interest whenever the exercise of professional legal judgment is required.

EC3-6 A lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal service more economically and efficiently.

EC3-7 The prohibition against a non-lawyer practicing law does not prevent a layman from representing himself, for then he is ordinarily exposing only himself to possible injury. The purpose of the legal profession is to make educated legal representation available to the public; but anyone who does not wish to avail himself of such representation is not required to do so. Even so, the legal profession should help members of the public to recognize legal problems and to understand why it may be unwise for them to act for themselves in matters having legal consequences.

EC3-8 Since a lawyer should not aid or encourage a layman to practice law, he should not practice law in association with a layman or otherwise share legal fees with a layman. This does not mean, however, that the pecuniary value of the interest of a deceased lawyer in his firm or practice may not be paid to his estate or specified persons such as his widow or heirs. In like manner, profit-sharing retirement plans of a lawyer or law firm which include non-lawyer office employees are not improper. These limited exceptions to the rule against sharing legal fees with laymen are permissible since they do not aid or encourage laymen to practice law.

EC3-9 Regulation of the practice of law is accomplished principally by the respective states. Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he is not permitted by law or by court order to do so. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters includng the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.

DISCIPLINARY RULES

DR3-101 Aiding Unauthorized Practice of Law.

(A) A lawyer shall not aid a non-lawyer in the unauthorized practice of law.

(B) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

DR3-102 Dividing Legal Fees with a Non-Lawyer.

(A) A lawyer or law firm shall not share legal fees with a non-lawyer, except that:

(1) An agreement by a lawyer with his firm, partner, or associate may provide for the payment of money, over a reasonable period of time after his death, to his estate or to one or more specified persons.

(2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.

(3) A lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

DR3-103 Forming a Partnership with a Non-Lawyer.

(A) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

CANON 4

A Lawyer Should Preserve the Confidences and Secrets of a Client

ETHICAL CONSIDERATIONS

EC4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential

to proper representation of the client but also encourages laymen to seek early legal assistance.

EC4-2 The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure, when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law. Unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved. If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information. A lawyer must always be sensitive to the rights and wishes of his client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in his professional relationship. Thus, in the absence of consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should he, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed to such lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning his clients.

EC4-3 Unless the client otherwise directs, it is not improper for a lawyer to give limited information from his files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided he exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

EC4-4 The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional

discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

EC4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure.

EC4-6 The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment. Thus a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets. A lawyer should also provide for the protection of the confidences and secrets of his client following the termination of the practice of the lawyer, whether termination is due to death, disability, or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to him and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration.

DISCIPLINARY RULES

DR4-101 Preservation of Confidences and Secrets of a Client.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR4-101(C) through an employee.

CANON 5

A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client

ETHICAL CONSIDERATIONS

EC5-1 The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

Interests of a Lawyer That May Affect His Judgment

EC5-2 A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring

a property right or assuming a position that would tend to make his judgment less protective of the interests of his client.

EC5-3 The self-interest of a lawyer resulting from his ownership of property in which his client also has an interest or which may affect property of his client may interfere with the exercise of free judgment on behalf of his client. If such interference would occur with respect to a prospective client, a lawyer should decline employment proffered by him. After accepting employmnt, a lawyer should not acquire property rights that would adversely affect his professional judgment in the representation of his client. Even if the property interests of a lawyer do not presently interfere with the exercise of his independent judgment, but the likelihood of interference can reasonably be foreseen by him, a lawyer should explain the situation to his client and should decline employment or withdraw unless the client consents to the continuance of the relationship after full disclosure. A lawyer should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested.

EC5-4 If, in the course of his representation of a client, a lawyer is permitted to receive from his client a beneficial ownership in publication rights relating to the subject matter of the employment, he may be tempted to subordinate the interests of his client to his own anticipated pecuniary gain. For example, a lawyer in a criminal case who obtains from his client television, radio, motion picture, newspaper, magazine, book, or other publication rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of his publication rights to the prejudice of his client. To prevent these potentially differing interests, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the employment, even though his employment has previously ended.

EC5-5 A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or over-reached the client. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client.

EC5-6 A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In

those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.

EC5-7 The possibility of an adverse effect upon the exercise of free judgment by a lawyer on behalf of his client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of his client or otherwise to become financially interested in the outcome of the litigation. However, it is not improper for a lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens, even though by doing so he may acquire an interest in the outcome of litigation. Although a contingent fee arrangement gives a lawyer a financial interest in the outcome of litigation, a reasonable contingent fee is permissible in civil cases because it may be the only means by which a layman can obtain the services of a lawyer of his choice.

EC5-8 A financial interest in the outcome of litigation also results if monetary advances are made by the lawyer to his client. Although this assistance generally is not encouraged, there are instances when it is not improper to make loans to a client. For example, the advancing or guaranteeing of payment of the costs and expenses of litigation by a lawyer may be the only way a client can enforce his cause of action, but the ultimate liability for such costs and expenses must be that of the client.

EC5-9 Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

EC5-10 Problems incident to the lawyer-witness relationship arise at different stages; they relate either to whether a lawyer should accept employment or should withdraw from employment. Regardless of when the problem arises, his decision is to be governed by the same basic considerations. It is not objectionable for a lawyer who is a potential witness to be an

advocate if it is unlikely that he will be called as a witness because his testimony would be merely cumulative or if his testimony will relate only to an uncontested issue. In the exceptional situation where it will be manifestly unfair to the client for the lawyer to refuse employment or to withdraw when he will likely be a witness on a contested issue, he may serve as advocate even though he may be a witness. In making such decision, he should determine the personal or financial sacrifice of the client that may result from his refusal of employment or withdrawal therefrom, the materiality of his testimony, and the effectiveness of his representation in view of his personal involvement. In weighing these factors, it should be clear that refusal or withdrawal will impose an unreasonable hardship upon the client before the lawyer accepts or continues the employment. Where the question arises, doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate.

EC5-11 A lawyer should not permit his personal interests to influence his advice relative to a suggestion by his client that additional counsel be employed. In like manner, his personal interests should not deter him from suggesting that additional counsel be employed; on the contrary, he should be alert to the desirability of recommending additional counsel when, in his judgment, the proper representation of his client requires it. However, a lawyer should advise his client not to employ additional counsel suggested by the client if the lawyer believes that such employment would be a disservice to the client, and he should disclose the reasons for his belief.

EC5-12 Inability of co-counsel to agree on a matter vital to the representation of their client requires that their disagreement be submitted by them jointly to their client for his resolution, and the decision of the client shall control the action to be taken.

EC5-13 A lawyer should not maintain membership in or be influenced by any organization of employees that undertakes to prescribe, direct, or suggest when or how he should fulfill his professional obligations to a person or organization that employs him as a lawyer. Although it is not necessarily improper for a lawyer employed by a corporation or similar entity to be a member of an organization of employees, he should be vigilant to safeguard his fidelity as a lawyer to his employer, free from outside influences.

Interests of Multiple Clients

EC5-14 Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have conflicting interests.

EC5-15 If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with conflicting interests and there are few situations in which he would be justified in representing in litigation multiple clients with potentially conflicting interests. If a lawyer accepted such employment and the interests did become actually conflicting, he would have to withdraw from employment with the likelihood of resulting hardship on the clients; and for this reason, it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involved in litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become conflicting, withdrawal is less likely to have a disruptive effect upon the causes of his clients.

EC5-16 In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he should also advise all of the clients of those circumstances.

EC5-17 Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal injury case, an insured and his insurer, and beneficiaries of the estate of a decedent. Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case. In certain circumstances, there may exist little chance of the judgment of the lawyer being adversely affected by the slight possibility that the interests will become actually differing; in other circumstances, the chance of adverse effect upon his judgment is not unlikely.

EC5-18 A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

EC5-19 A lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, he should explain any circumstances that might cause a client to question his undivided loyalty. Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client.

EC5-20 A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved.

Desires of Third Persons

EC5-21 The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a

lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to his client, and if he or his client believes that the effectiveness of his representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of his client.

EC5-22 Economic, political, or social pressures by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which he is compensated directly by his client and his professional work is exclusively with his client. On the other hand, if a lawyer is compensated from a source other than his client, he may feel a sense of responsibility to someone other than his client.

EC5-23 A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of the lawyer to his individual client. Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client. On some occasions, decisions on priority of work may be made by the employer rather than the lawyer with the result that prosecution of work already undertaken for clients is postponed to their detriment. Similarly, an employer may seek, consciously or unconsciously, to further its own economic interests through the actions of the lawyers employed by it. Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom.

EC5-24 To assist a lawyer in preserving his professional independence, a number of courses are available to him. For example, a lawyer should not practice with or in the form of a professional legal corporation, even though the corporate form is permitted by law, if any director, officer, or stockholder of it is a non-lawyer. Although a lawyer may be employed by a business corporation with non-lawyers serving as directors or officers, and they necessarily have the right to make decisions or business policy, a lawyer must decline to accept direction

of his professional judgment from any layman. Various types of legal aid officers are administered by boards of directors composed of lawyers and laymen. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client he serves. Where a lawyer is employed by an organization, a written agreement that defines the relationship between him and the organization and provides for his independence is desirable since it may serve to prevent misunderstanding as to their respective roles. Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain his professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer.

DISCIPLINARY RULES

DR5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value

of the lawyer or his firm as counsel in the particular case.

DR5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness.

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR5-101(B) (1) through (4).

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

DR5-103 Avoiding Aquisition of Interest in Litigation.

(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:

(1) Acquire a lien granted by law to secure his fee or expenses.

(2) Contract with a client for a reasonable contingent fee in a civil case.

(B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

DR5-104 Limiting Business Relations with a Client.

(A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

(B) Prior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.

DR5-105 Refusing to Accept or Continue Employment if the the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR5-105(C).

(C) In the situations covered by DR5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under DR5-105, no partner or associate of his or his firm may accept or continue such employment.

DR5-106 Settling Similar Claims of Clients.

(A) A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.

DR5-107 Avoiding Influence by Others Than the Client.

(A) Except with the consent of his client after full disclosure, a lawyer shall not:

(1) Accept compensation for his legal services from one other than his client.

(2) Accept from one other than his client any thing of value related to his representation of or his employment by his client.

(B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

(C) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) A non-lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) A non-lawyer is a corporate director or officer thereof; or

(3) A non-lawyer has the right to direct or control the professional judgment of a lawyer.

CANON 6

A Lawyer Should Represent a Client Competently

ETHICAL CONSIDERATIONS

EC6-1 Because of his vital role in the legal process, a lawyer should act with competence and proper care in representing clients. He should strive to become and remain proficient in his practice and should accept employment only in matters which he is or intends to become competent to handle.

EC6-2 A lawyer is aided in attaining and maintaining his competence by keeping abreast of current legal literature and developments, participating in continuing legal education programs, concentrating in particular areas of the law, and by utilizing other available means. He has the additional ethical obligation to assist in improving the legal profession, and he may do so by participating in bar activities intended to advance the quality and standards of members of the profession. Of particular importance is the careful training of his younger associates and the giving of sound guidance to all lawyers who consult him. In short, a lawyer should strive at all levels to aid

the legal profession in advancing the highest possible standards of integrity and competence and to meet those standards himself.

EC6-3 While the licensing of a lawyer is evidence that he has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which he is not qualified. However, he may accept such employment if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client. Proper preparation and representation may require the association by the lawyer of professionals in other disciplines. A lawyer offered employment in a matter in which he is not and does not expect to become so qualified should either decline the employment or, with the consent of his client, accept the employment and associate a lawyer who is competent in the matter.

EC6-4 Having undertaken representation, a lawyer should use proper care to safeguard the interests of his client. If a lawyer has accepted employment in a matter beyond his competence but in which he expected to become competent, he should diligently undertake the work and study necessary to qualify himself. In addition to being qualified to handle a particular matter, his obligation to his client requires him to prepare adequately for and give appropriate attention to his legal work.

EC6-5 A lawyer should have pride in his professional endeavors. His obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty.

EC6-6 A lawyer should not seek, by contract or other means, to limit his individual liability to his client for his malpractice. A lawyer who handles the affairs of his client properly has no need to attempt to limit his liability for his professional activities and one who does not handle the affairs of his client properly should not be permitted to do so. A lawyer who is a stockholder in or is associated with a professional legal corporation may, however, limit his liability for malpractice of his associates in the corporation, but only to the extent permitted by law.

DISCIPLINARY RULES

DR6-101 Failing to Act Competently.

(A) A lawyer shall not:

(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating

with him a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him.

DR6-102 Limiting Liability to Client.

(A) A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.

CANON 7

A Lawyer Should Represent a Client Zealously Within the Bounds of the Law

ETHICAL CONSIDERATIONS

EC7-1 The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the law, which includes Disciplinary Rules and enforceable professional regulations. The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.

EC7-2 The bounds of the law in a given case are often difficult to ascertain. The language of legislative enactments and judicial opinions may be uncertain as applied to varying factual situations. The limits and specific meaning of apparently relevant law may be made doubtful by changing or developing constitutional interpretations, inadequately expressed statutes or judicial opinions, and changing public and judicial attitudes. Certainty of law ranges from well-settled rules through areas of conflicting authority to areas without precedent.

EC7-3 Where the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different. In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as

he finds them. By contrast, a lawyer serving as adviser primarily assists his client in determining the course of future conduct and relationships. While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law. In serving a client as adviser, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law.

Duty of the Lawyer to a Client.

EC7-4 The advocate may urge any permissable construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.

EC7-5 A lawyer as adviser furthers the interest of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the courts on the matter at hand and by informing his client of the practical effect of such decision. He may continue in the representation of his client even though his client has elected to pursue a course of conduct contrary to the advice of the lawyer so long as he does not thereby knowingly assist the client to engage in illegal conduct or to take a frivolous legal position. A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor.

EC7-6 Whether the proposed action of a lawyer is within the bounds of the law may be a perplexing question when his client is contemplating a course of conduct having legal consequences that vary according to the client's intent, motive, or desires at the time of the action. Often a lawyer is asked to assist his client in developing evidence relevant to the state of mind of the client at a particular time. He may properly assist his client in the development and preservation of evidence of existing motive, intent, or desire; obviously, he may not do anything furthering the creation or preservation of false evidence. In many cases a lawyer may not be certain as to the state of mind of his client, and in those situations he should resolve reasonable doubts in favor of his client.

EC7-7 In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

EC7-8 A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself. In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.

EC7-9 In the exercise of his professional judgment on those decisions which are for his determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his client. However, when an action in the best interest of his client seems to him to be unjust, he may ask his client for permission to forego such action.

EC7-10 The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.

EC7-11 The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. Examples include the representation of an illiterate or an incompetent, service as a public prosecutor or other government lawyer, and appearances before administrative and legislative bodies.

EC7-12 Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent.

EC7-13 The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different

from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused.

EC7-14 A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.

EC7-15 The nature and purpose of proceedings before administrative agencies vary widely. The proceedings may be legislative or quasi-judicial, or a combination of both. They may be *ex parte* in character, in which event they may originate either at the instance of the agency or upon motion of an interested party. The scope of an inquiry may be purely investigative or it may be truly adversary looking toward the adjudication of specific rights of a party or of classes of parties. The foregoing are but examples of some of the types of proceedings conducted by administrative agencies. A lawyer appearing before an administrative agency, regardless of the nature of the proceeding it is conducting, has the continuing duty to advance the cause of his client within the bounds of the law. Where the applicable rules of the agency impose specific obligations upon a lawyer, it is his duty to comply therewith, unless the lawyer has a legitimate basis for challenging the validity thereof. In all appearances before administrative agencies, a lawyer should identify himself, his client if identity of his client is not privileged, and the representative nature of his appearance. It is not improper, however, for a lawyer to seek from an agency information available to the public without identifying his client.

EC7-16 The primary business of a legislative body is to enact laws rather than to adjudicate controversies, although on occasion the activities of a legislative body may take on the characteristics of an adversary proceeding, particularly in

investigative and impeachment matters. The role of a lawyer supporting or opposing proposed legislation normally is quite different from his role in representing a person under investigation or on trial by a legislative body. When a lawyer appears in connection with proposed legislation, he seeks to affect the lawmaking process, but when he appears on behalf of a client in investigatory or impeachment proceedings, he is concerned with the protection of the rights of his client. In either event, he should identify himself and his client, if identity of his client is not privileged, and should comply with applicable laws and legislative rules.

EC7-17 The obligation of loyalty to his client applies only to a lawyer in the discharge of his professional duties and implies no obligation to adopt a personal viewpoint favorable to the interests or desires of his client. While a lawyer must act always with circumspection in order that his conduct will not adversely affect the rights of a client in a matter he is then handling, he may take positions on public issues and espouse legal reforms he favors without regard to the individual views of any client.

EC7-18 The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he has the consent of the lawyer for that person. If one is not represented by counsel, a lawyer representing another may have to deal directly with the unrepresented person; in such an instance, a lawyer should not undertake to give advice to the person who is attempting to represent himself, except that he may advise him to obtain a lawyer.

Duty of the Lawyer to the Adversary System of Justice

EC7-19 Our legal system provides for the adjudication of disputes governed by the rules of substantive, evidentiary, and procedural law. An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known. The advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments. The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.

EC7-20 In order to function properly, our adjudicative process requires an informed, impartial tribunal capable of administering justice, promptly and efficiently according to procedures that command public confidence and respect. Not only must there be competent, adverse presentation of evidence and issues, but a tribunal must be aided by rules appropriate to an effective and dignified process. The procedures under which tribunals operate in our adversary system have been prescribed largely by legislative enactments, court rules and decisions, and administrative rules. Through the years certain concepts of proper professional conduct have become rules of law applicable to the adversary adjudicative process. Many of these concepts are the bases for standards of professional conduct set forth in the Disciplinary Rules.

EC7-21 The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting his legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

EC7-22 Respect for judicial rulings is essential to the proper administration of justice; however, a litigant or his lawyer may, in good faith and within the framework of the law, take steps to test the correctness of a ruling of a tribunal.

EC7-23 The complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client. Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so; but, having made such disclosure, he may challenge its soundness in whole or in part.

EC7-24 In order to bring about just and informed decisions, evidentiary and procedural rules have been established by

tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact. It is improper as to factual matters because admissible evidence possessed by a lawyer should be presented only as sworn testimony. It is improper as to all other matters because, were the rule otherwise, the silence of a lawyer on a given occasion could be construed unfavorably to his client. However, a lawyer may argue, on his analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters.

EC7-25 Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Thus while a lawyer may take steps in good faith and within the framework of the law to test the validity of rules, he is not justified in consciously violating such rules and he should be diligent in his efforts to guard against his unintentional violation of them. As examples, a lawyer should subscribe to or verify only those pleadings that he believes are in compliance with applicable law and rules; a lawyer should not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless he believes that his statement will be supported by admissible evidence; a lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing him; and a lawyer should not by subterfuge put before a jury matters which it cannot properly consider.

EC7-26 The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence. A lawyer who knowingly participates in introduction of such testimony or evidence is subject to discipline. A lawyer should, however, present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured.

EC7-27 Because it interferes with the proper administration of justice, a lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce. In like manner, a lawyer should not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.

EC7-28 Witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise. A lawyer should not pay or agree to pay a non-expert witness an amount in excess of reimbursement for expenses and financial loss incident to his being a witness; however, a lawyer may pay or agree to pay an expert witness a reasonable fee for his services as an expert. But in no event should a lawyer pay or agree to pay a contingent fee to any witness. A lawyer should exercise reasonable diligence to see that his client and lay associates conform to these standards.

EC7-29 To safeguard the impartiality that is essential to the judicial process, veniremen and jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with veniremen prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with or cause another to communicate with a venireman or a juror about the case. After the trial, communication by a lawyer with jurors is permitted so long as he refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected. When an extrajudicial communication by a lawyer with a juror is permitted by law, it should be made considerately and with deference to the personal feelings of the juror.

EC7-30 Vexatious or harassing investigations of veniremen or jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on his behalf who conducts an investigation of veniremen or jurors should act with circumspection and restraint.

EC7-31 Communications with or investigations of members of families of veniremen or jurors by a lawyer or by anyone on his behalf are subject to the restrictions imposed upon the lawyer with respect to his communications with or investigations of veniremen and jurors.

EC7-32 Because of his duty to aid in preserving the integrity of the jury system, a lawyer who learns of improper conduct by or towards a venireman, a juror or a member of the family

of either should make a prompt report to the court regarding such conduct.

EC7-33 A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments may prevent prospective jurors from being impartial at the outset of the trial and may also interfere with the obligation of jurors to base their verdict solely upon the evidence admitted in the trial. The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established.

EC7-34 The impartiality of a public servant in our legal system may be impaired by the receipt of gifts or loans. A lawyer, therefore, is never justified in making a gift or a loan to a judge, a hearing officer, or an official or employee of a tribunal.

EC7-35 All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if he is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client.

EC7-36 Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings. While maintaining his independence, a lawyer should be respectful, courteous, and above-board in his relations with a judge or hearing officer before whom he appears. He should avoid undue

solicitude for the comfort or convenience of judge or jury and should avoid any other conduct calculated to gain special consideration.

EC7-37 In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer in his conduct, attitude and demeanor towards opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

EC7-38 A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of his client. He should follow local customs of courtesy or practice unless he gives timely notice to opposing counsel of his intention not to do so. A lawyer should be punctual in fulfilling all professional commitments.

EC7-39 In the final analysis, proper functioning of the adversary system depends upon cooperation between lawyers and tribunals in utilizing procedures which will preserve the impartiality of tribunals and make their decisional processes prompt and just, without impinging upon the obligation of lawyers to represent their clients zealously within the framework of the law.

DISCIPLINARY RULES

DR7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he

may withdraw as permitted under DR2-110, DR5-102, and DR5-105.

(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR7-102(B).

(B) In his representation of a client, a lawyer may:

(1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.

(2) Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

DR7-102 Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact.

(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if the client refuses or is unable to do so, he shall discontinue his representation of the client in that matter; and if the representation involves litigation, the lawyer shall (if applicable rules require) request the tribunal to permit him to withdraw but without necessarily revealing his reason for wishing to withdraw.

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

DR7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer.

(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.

(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

DR7-104 Communicating With One of Adverse Interest.

(A) During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

DR7-105 Threatening Criminal Prosecution.

(A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

DR7-106 Trial Conduct.

(A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.

(B) In presenting a matter to a tribunal, a lawyer shall disclose:

(1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.

(2) Unless privileged or irrelevant, the identities of the clients he represents and of the persons who employed him.

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

(1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

(2) Ask any question that he has no reasonable basis to believe is revelant to the case and that is intended to degrade a witness or other person.

(3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.

(4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

(5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

(7) Intentionally or habitually violate any established rule of procedure or evidence.

DR7-107 Trial Publicity.

(A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:

(1) Information contained in a public record.

(2) That the investigation is in progress.

(3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.

(4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.

(5) A warning to the public of any dangers.

(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

(5) The identity, testimony, or credibility of a prospective witness.

(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(C) DR7-107(B) does not preclude a lawyer during such period from announcing:

(1) The name, age, residence, occupation, and family status of the accused.

(2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.

(3) A request for assistance in obtaining evidence.

(4) The identity of the victim of the crime.

(5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.

(6) The identity of investigating and arresting officers or agencies and the length of the investigation.

(7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.

(8) The nature, substance, or text of the charge.

(9) Quotations from or references to public records of the court in the case.

(10) The scheduling or result of any step in the judicial proceedings.

(11) That the accused denies the charges made against him.

(D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.

(E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or

defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.

(F) The foregoing provisions of DR7-107 also apply to professional disciplinary proceedings and juvenile disciplinary proceedings when pertinent and consistent with other law applicable to such proceedings.

(G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) Evidence regarding the occurrence or transaction involved.

(2) The character, credibility, or criminal record of a party, witness, or prospective witness.

(3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(5) Any other matter reasonably likely to interfere with a fair trial of the action.

(H) During the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to:

(1) Evidence regarding the occurrence or transaction involved.

(2) The character, credibility, or criminal record of a party, witness, or prospective witness.

(3) Physical evidence or the performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims, defenses, or positions of an interested person.

(5) Any other matter reasonably likely to interfere with a fair hearing.

(I) The foregoing provisions of DR7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(J) A lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR7-107.

DR7-108 Communication with or Investigation of Jurors.

(A) Before the trial of a case a lawyer connected therewith shall not communicate with or cause another to communicate with anyone he knows to be a member of the venire from which the jury will be selected for the trial of the case.

(B) During the trial of a case:

(1) A lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury.

(2) A lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(C) DR7-108(A) and (B) do not prohibit a lawyer from communicating with veniremen or jurors in the course of official proceedings.

(D) After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.

(E) A lawyer shall not conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a venireman or a juror.

(F) All restrictions imposed by DR7-108 upon a lawyer also apply to communications with or investigations of members of a family of a venireman or a juror.

(G) A lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a

venireman or a juror or a member of his family, of which the lawyer has knowledge.

DR7-109 Contact with Witnesses.

(A) A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce.

(B) A lawyer shall not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.

(C) A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) Expenses reasonably incurred by a witness in attending or testifying.

(2) Reasonable compensation to a witness for his loss of time in attending or testifying.

(3) A reasonable fee for the professional services of an expert witness.

DR7-110 Contact with Officials.

(A) A lawyer shall not give or lend anything of substantial value to a judge, official or employee of a tribunal.

(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending except:

(1) In the course of official proceedings in the cause.

(2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.

(3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(4) As otherwise authorized by law.

CANON 8

A Lawyer Should Assist in Improving the Legal System

ETHICAL CONSIDERATIONS

EC8-1 Changes in human affairs and imperfections in human institutions make necessary constant efforts to maintain and

improve our legal system. This system should function in a manner that commands public respect and fosters the use of legal remedies to achieve redress of grievances. By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein. Thus they should participate in proposing and supporting legislation and programs to improve the system, without regard to the general interests or desires of clients or former clients.

EC8-2 Rules of law are deficient if they are not just, understandable, and responsive to the needs of society. If a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, he should endeavor by lawful means to obtain appropriate changes in the law. He should encourage the simplification of laws and the repeal or amendment of laws that are outmoded. Likewise, legal procedures should be improved whenever experience indicates a change is needed.

EC8-3 The fair administration of justice requires the availability of competent lawyers. Members of the public should be educated to recognize the existence of legal problems and the resultant need for legal services, and should be provided methods for intelligent selection of counsel. Those persons unable to pay for legal services should be provided needed services. Clients and lawyers should not be penalized by undue geographical restraints upon representation in legal matters, and the bar should address itself to improvements in licensing, reciprocity, and admission procedures consistent with the needs of modern commerce.

EC8-4 Whenever a lawyer seeks legislative or administrative changes, he should identify the capacity in which he appears, whether on behalf of himself, a client, or the public. A lawyer may advocate such changes on behalf of a client even though he does not agree with them. But when a lawyer purports to act on behalf of the public he should espouse only those changes which he conscientiously believes to be in the public interest.

EC8-5 Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal or legislative body is inconsistent with fair administration of justice, and it should never be participated in or condoned by lawyers. Unless constrained by his obligation to preserve the confidences and secrets of his client, a lawyer should reveal to appropriate authorities any knowledge he may have of such improper conduct.

EC8-6 Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence, and suitable temperament. Generally, lawyers are qualified, by personal observation or investigation, to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified. It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench and should strive to have elected or appointed thereto only those who are willing to forego pursuits, whether of a business, political, or other nature, that may interfere with the free and fair consideration of questions presented for adjudication. Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

EC8-7 Since lawyers are a vital part of the legal system, they should be persons of integrity, of professional skill, and of dedication to the improvement of the system. Thus a lawyer should aid in establishing, as well as enforcing, standards of conduct adequate to protect the public by insuring that those who practice law are qualified to do so.

EC8-8 Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.

EC8-9 The advancement of our legal system is of vital importance in maintaining the rule of law and in facilitating orderly changes; therefore, lawyers should encourage, and should aid in making, needed changes and improvements.

DISCIPLINARY RULES

DR8-101 Action as a Public Official.

(A) A lawyer who holds public office shall not:

(1) Use his public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or for a client under circumstances where he knows or it is obvious that such action is not in the public interest.

(2) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client.

(3) Accept any thing of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing his action as a public official.

DR8-102 Statements Concerning Judges and Other Adjudicatory Officers.

(A) A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.

(B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

CANON 9

A Lawyer Should Avoid Even the Appearance of Professional Impropriety

ETHICAL CONSIDERATIONS

EC9-1 Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our system and in the legal profession.

EC9-2 Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. In order to avoid misunderstanding and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client. While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty

to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism. When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

EC9-3 After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists.

EC9-4 Because the very essence of the legal system is to provide procedures by which matters can be presented in an impartial manner so that they may be decided solely upon the merits, any statement or suggestion by a lawyer that he can or would attempt to circumvent those procedures is detrimental to the legal system and tends to undermine public confidence in it.

EC9-5 Separation of the funds of a client from those of his lawyer not only serves to protect the client but also avoids even the appearance of impropriety, and therefore commingling of such funds should be avoided.

EC9-6 Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

DISCIPLINARY RULES

DR9-101 Avoiding Even the Appearance of Impropriety.

(A) A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.

(B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

(C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.

DR9-102 Preserving Identity of Funds and Property of a Client.

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A lawyer shall:

(1) Promptly notify a client of the receipt of his funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of The North Carolina State Bar has been duly adopted by the Council of The North Carolina State Bar and that said Council did by resolution, at a regular quarterly meeting unanimously adopt said amendment to the Rules and Regulations of The North Carolina State Bar as provided in General Statutes Chapter 84.

Given over my hand and the Seal of The North Carolina State Bar, this the 15th day of February, 1973.

B. E. James, Secretary-Treasurer
The North Carolina State Bar

(SEAL)

After examining the foregoing amendments to the Rules and Regulations of The North Carolina State Bar promulgating The North Carolina State Bar Code of Professional Responsibility by the Council of The North Carolina State Bar on January 12, 1973, as amended by the Council of The North Carolina State Bar on April 13, 1973, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This 30th day of April, 1973.

William H. Bobbitt
Chief Justice
Supreme Court of North Carolina

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of The North Carolina State Bar promulgating The North Carolina State Bar Code of Professional Responsibility by the Council of The North Carolina State Bar on January 12, 1973, as amended by the Council of The North Carolina State Bar on April 13, 1973, 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 30th day of April, 1973.

Moore, J.
For the Court

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WORD AND PHRASE INDEX

ANALYTICAL INDEX

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WATER AND WATER COURSES
WITNESSES

ADVERSE POSSESSION

§ 25.1 Instructions to Jury

Trial court erred in giving an instruction which treated plaintiffs' deed to the land in question solely as color of title where the deed did in fact pass title to plaintiffs. *Hensley v. Ramsey*, 714.

Trial court erred in its instructions on the issue of whether an easement for a roadway held by defendant was terminated by adverse possession by plaintiffs. *Ibid.*

APPEAL AND ERROR

§ 24. Necessity for Objections and Assignments of Error

Contention that trial judge erred in failing to declare a mistrial will not be considered on appeal where defendants did not move for a mistrial in the trial court. *Rayfield v. Clark*, 362.

§ 40. Necessary Parts of Record Proper

The pleadings, issues and judgment are necessary parts of the record proper. *Davenport v. Indemnity Co.*, 234.

§ 62. New Trial and Partial New Trial

Trial court did not err in awarding partial new trial on the issue of damages only. *Bowen v. Rental Co.*, 395.

Court on appeal awarded partial new trial on the issue of damages. *Brown v. Neal*, 604.

ARREST AND BAIL

§ 3. Right of Officers to Arrest Without Warrant

Police officers had probable cause to believe that defendant was carrying a concealed weapon in their presence and thus had authority to arrest defendant without a warrant when they saw a bulge under defendant's shirt that appeared to be a gun when defendant was walking on a deserted street at 2:45 a.m. *S. v. Streeter*, 203.

Officer had probable cause to arrest defendant without a warrant for possession of heroin upon information supplied by a reliable informant. *S. v. Harrington*, 527.

Defendant's warrantless arrest for driving under the influence was illegal but constitutional. *S. v. Eubanks*, 556.

Defendant was not coerced to take the breathalyzer test by the illegality of his arrest. *Ibid.*

ASSAULT AND BATTERY

§ 14. Sufficiency of Evidence and Nonsuit

Evidence was sufficient to withstand nonsuit where it showed that defendant broke into a home while the occupants were away and attacked an employee of the homeowner with a bicycle pump. *S. v. Sawyer*, 289.

Evidence was sufficient to withstand nonsuit in prosecution for aiding and abetting an assault with a firearm and aiding and abetting in discharge of the firearm into an occupied vehicle where it tended to show

ASSAULT AND BATTERY—Continued

that defendant was present at the crime scene and, in the operation of his vehicle, helped the perpetrator commit the crime. *S. v. Beach,* 261.

§ 15. Instructions

Trial court's instructions on intent to kill were proper in prosecution for assault with a deadly weapon with intent to kill inflicting serious injuries not resulting in death. *S. v. Allen,* 354.

§ 17. Verdict and Punishment

Verdict returned by the jury which did not incorporate all elements of felonious assault must be treated as a verdict of guilty of assault with a deadly weapon. *S. v. Sawyer,* 289.

Jury's verdict of guilty of "assault with a deadly weapon with intent to kill" will not support a sentence of five years for assault with a firearm with intent to kill but will support a maximum sentence of two years. *S. v. Edmondson,* 533.

ATTORNEY AND CLIENT

§ 7. Compensation and Fees

In a declaratory judgment action in which it was correctly determined that the paper writing in question was insufficient as a trust instrument and as a will, trial judge erred in ordering that plaintiffs' counsel fees should be taxed against decedent's estate upon completion of all appeals in the action. *Baxter v. Jones,* 327.

AUTOMOBILES

§ 46. Opinion Testimony as to Speed

Trial court properly refused to strike plaintiff's testimony as to the speed of defendant's vehicle. *Brown v. Neal,* 604.

§ 51. Sufficiency of Evidence of Speed

Evidence was sufficient for jury on issue of negligence of automobile driver in striking truck that was attempting to make a left turn across the automobile's lane of travel. *Summey v. Cauthen,* 640.

§ 62. Negligence in Striking Pedestrian

Evidence in action growing out of a pedestrian-automobile collision was sufficient for the jury notwithstanding evidence showed plaintiff's eyewitness was intoxicated and extraordinary acuteness and range of vision would have been required to see what he said he saw. *Rayfield v. Clark,* 362.

§ 125. Warrant for Operating Automobile While Under the Influence of Intoxicants

Defendant was properly tried in superior court for driving under the influence, first offense, though warrant and conviction in district court were for driving under the influence, fourth offense. *S. v. Guffey,* 94.

§ 126. Competency and Relevancy of Evidence in Prosecution Under G.S. 20-138

Statutory presumption that a person with a breathalyzer reading of .10% or more is under the influence of alcohol has no application in an assault and homicide case. *S. v. Bunn,* 444.

AUTOMOBILES—Continued

Defendant was not coerced to take the breathalyzer test by the illegality of his arrest. *S. v. Eubanks*, 556.

Breathalyzer test results were properly admitted into evidence in defendant's trial for driving under the influence though defendant's arrest for the offense was illegal, since administration of the test hinges solely upon the law enforcement officer having reasonable grounds to believe the person to have committed the offense. *Ibid.*

Instruction that driver's license could be revoked for 60 days for refusal to take a breathalyzer test did not amount to coercion rendering results inadmissible. *Ibid.*

BAILMENT

§ 5. Rights in Regard to Third Persons

The owner of a bus leased to a common carrier had the duty to have it inspected by a qualified mechanic before it was delivered to the carrier, and breach of such duty would render the owner liable not only to the carrier but also to a third person injured thereby. *Mann v. Transportation Co.*, 734.

§ 6. Liabilities of Bailor to Bailee

In an action to recover for personal injuries received by passengers on a bus leased by a common carrier from the owner, the carrier would be entitled to recover indemnity from the owner if the accident was caused by a pre-existing defect in the steering mechanism which could have been discovered by inspection prior to delivery of the bus. *Mann v. Transportation Co.*, 734.

BURGLARY AND UNLAWFUL BREAKINGS

§ 3. Indictment

Wording of indictment in felonious breaking and entering case, though grammatically incorrect and archaic, was sufficient. *S. v. Glover*, 379.

§ 5. Sufficiency of Evidence and Nonsuit

Evidence was sufficient to withstand nonsuit where it showed that defendant broke into a home while the occupants were away and attacked an employee of the homeowner with a bicycle pump. *S. v. Sawyer*, 289.

Testimony of one witness standing alone was sufficient to carry the case to the jury in a first degree burglary prosecution. *S. v. Lampkins*, 520.

§ 7. Verdict

Acquittal on a larceny count did not require arrest of judgment in felonious breaking and entering count. *S. v. Sawyer*, 289.

CARRIERS

§ 19. Liability for Injury to Passengers

Plaintiff bus passengers made out a prima facie case of actionable negligence against defendant carrier by introduction of evidence that the bus ran off the highway into a ditch and struck a culvert. *Mann v. Transportation Co.*, 734.

CARRIERS—Continued

A carrier may not relieve itself of the duty to exercise the highest degree of care to provide safe buses by leasing its equipment from another carrier. *Ibid.*

The owner of a bus leased to a common carrier had the duty to have it inspected by a qualified mechanic before it was delivered to the carrier, and breach of such duty would render the owner liable not only to the carrier but also to a third person injured thereby. *Ibid.*

Trial court erred in exclusion of testimony by an expert mechanic that a defect in the steering mechanism on a bus would have been visible to a competent mechanic prior to the time the bus was delivered to defendant carrier by the owner. *Ibid.*

CONSTITUTIONAL LAW

§ 4. Persons Entitled to Raise Constitutional Questions

Defendant could not assert the unconstitutionality of a portion of a statute when she was not tried under that section of the statute. *S. v. Fredell,* 242.

§ 7. Delegation of Powers by General Assembly

The Hospital Facilities Finance Act does not unlawfully delegate legislative authority to the Medical Care Commission. *Foster v. Medical Care Comm.,* 110.

§ 14. Morals and Public Welfare

The trial court erred in allowing a motion to quash warrants charging that convenience store managers sold groceries after 6:00 p.m. in violation of the Monroe Sunday Observance Ordinance. *S. v. Underwood,* 154.

Evidence that obscene magazines were permitted to be sold "in Fayetteville" was irrelevant and incompetent on the question of the validity of the Cumberland County Sunday Observance Ordinance. *S. v. Atlas,* 165.

Unconstitutional discrimination in a county Sunday observance ordinance is not shown by the fact that the ordinance of some other county or municipality does not contain identical exemptions from its general closing requirement. *Ibid.*

The Cumberland County Sunday Observance Ordinance is constitutional. *Ibid.*

§ 26. Full Faith and Credit to Foreign Judgments

While the courts of this State will accord full faith and credit to the custody decree of a sister state, when a child whose custody is in dispute comes to this State our courts have jurisdiction to determine whether conditions and circumstances have so changed that the child's best interests will be served by a change of custody. *Spence v. Durham,* 671.

§ 28. Sufficiency of Indictment

Where the solicitor did not sign the information containing the accusation of felonious larceny against defendant, judgment, though entered upon defendant's guilty plea, must be arrested. *S. v. Glover,* 379.

§ 29. Right to Trial by Duly Constituted Jury

Trial court properly allowed the State to challenge the jurors for cause where each prospective juror testified unequivocally that he would

CONSTITUTIONAL LAW—Continued

not return a verdict requiring imposition of the death penalty. *S. v. Washington*, 175.

G.S. 15-200 providing procedures for revocation of probation does not involve defendant's Sixth Amendment rights since a hearing to determine whether the terms of a suspended sentence have been violated is not a criminal prosecution and is not a jury matter. ***S. v. Braswell*, 332.**

§ 30. Due Process in Trial

That portion of the child abuse statute making it a punishable offense for a parent, other than by accidental means, to inflict injury upon his child does not violate the due process clause. *S. v. Fredell*, 242.

§ 31. Right of Confrontation and Access to Evidence

The trial court did not err in denying defendant's pretrial motion for discovery of "any and all evidence in the possession of or known to the State of North Carolina favorable to or tending to favor the defendant." *S. v. Gaines*, 33.

In a prosecution for possession and sale of heroin, the trial court properly denied defendant's motion for disclosure of the identity of a confidential informer. *S. v. Cameron*, 191.

§ 32. Right to Counsel

The State is required to furnish counsel to a defendant charged with a crime beyond the class of petty misdemeanor only when defendant is indigent. *S. v. Turner*, 53.

Defendant was in a position to waive counsel where his own evidence showed that he was not indigent at the time of his arrest and confession. *Ibid.*

§ 34. Double Jeopardy

Defendant was not subjected to double jeopardy where he was charged with two offenses based on one incident and acquitted of one of the charges. *S. v. Beach*, 261.

§ 35. Ex Post Facto Laws

Case is remanded for imposition of sentence of life imprisonment since the murder for which defendant was convicted occurred prior to State v. Waddell. *S. v. Watkins*, 504.

§ 36. Cruel and Unusual Punishment

Defendant sentenced to life imprisonment had no standing to question the death penalty provided for in G.S. 14-21. *S. v. Williams*, 386.

Imposition of two life and two ten-year sentences, all to run consecutively, did not constitute cruel and unusual punishment. *S. v. Mitchell*, 462.

COSTS

§ 3. Taxing of Costs

In a declaratory judgment action in which it was correctly determined that the paper writing in question was insufficient as a trust instrument and as a will, trial judge erred in ordering that plaintiffs' counsel fees should be taxed against decedent's estate upon completion of all appeals in the action. *Baxter v. Jones*, 327.

COUNTIES

§ 2. Governmental and Private Powers

Trial court properly limited definition of "garbage" as used in the statute authorizing counties to grant exclusive franchises for the collection and disposal of garbage to putrescible solid wastes, and properly concluded that counties have no authorization to grant an exclusive franchise to collect and dispose of wastes not falling within such definition of garbage. *Transportation Service v. County of Robeson*, 494.

Statute giving county commissioners authority to regulate the disposal of garbage does not authorize them to grant an exclusive franchise for the operation of a landfill and is not an unconstitutional delegation of legislative power. *Porter v. Sanitation Service*, 479.

Board of county commissioners had no authority to grant an exclusive franchise for collection and disposal of "trash" not substantially and inseparably commingled with "garbage." *Ibid.*

CRIMINAL LAW

§ 5. Mental Capacity in General

The test of criminal responsibility is defendant's capacity to distinguish between right and wrong and it is not the irresistible impulse doctrine. *S. v. Humphrey*, 570.

§ 6. Mental Capacity as Affected by Intoxicating Liquor

Trial court did not err in instructing the jury that defendant's intoxication could have no bearing upon the jury's determination of his guilt or innocence of second degree murder or manslaughter. *S. v. Edmondson*, 533.

Intoxication will be regarded as involuntary only when alcohol has been introduced into a person's system without his knowledge or by force majeure. *S. v. Bunn*, 444.

Statutory presumption that a person with a breathalyzer reading of .10% or more is under the influence of alcohol has no application in an assault and homicide case. *Ibid.*

Evidence of defendant's intoxication at the time of the killing did not require trial court to submit manslaughter as a possible verdict. *Ibid.*

§ 9. Aiders and Abettors

It is not necessary that the actual perpetrator of a crime be tried and convicted before an aider and abettor can be tried and convicted; hence, acquittal of another as the actual perpetrator of the assault and of the discharge of a firearm into an occupied vehicle did not constitute a sufficient basis for dismissal of the charges against defendant as an aider and abettor. *S. v. Beach*, 261.

Evidence was sufficient to withstand nonsuit in prosecution for aiding and abetting in assault with a firearm and aiding and abetting in discharge of the firearm into an occupied vehicle where it tended to show that defendant was present at the crime scene and, in the operation of his vehicle, helped the perpetrator commit the crime. *Ibid.*

§ 15. Venue

Motion for change of venue based on newspaper publicity was properly denied. *S. v. Mitchell*, 462.

CRIMINAL LAW—Continued

§ 18. Jurisdiction on Appeals to Superior Court

Jurisdiction of superior court in misdemeanor case is derivative, and judgment of superior court against defendant is arrested where the record does not show defendant was properly tried and convicted in district court. *S. v. Guffey*, 94.

§ 21. Preliminary Proceedings

A finding of probable cause of second degree murder by a district judge sitting as a committing magistrate did not amount to a dismissal of first degree murder charge contained in the warrant or limit the State to second degree murder as the maximum charge for which defendant could be tried. *S. v. Bryant*, 227.

A defendant is not entitled to a preliminary hearing as a matter of right before trial in superior court upon an indictment. *S. v. Harrington*, 527; *S. v. Thornton*, 513.

§ 23. Plea of Guilty

Defendant is prohibited from entering plea of guilty to a capital crime. *S. v. Watkins*, 17.

Defendant's guilty plea was entered voluntarily. *S. v. Moses*, 390.

§ 26. Plea of Former Jeopardy

Defendant was not subjected to double jeopardy where he was tried for possession and sale of heroin, convicted of each and given consecutive sentences. *S. v. Cameron*, 191.

Defendant was not subjected to double jeopardy where he was charged with two offenses based on one incident and acquitted of one of the charges. *S. v. Beach*, 261.

Defendant was not subjected to double jeopardy when he was convicted and separately sentenced for both felonious possession and felonious transportation of the same heroin, *S. v. Harrington*, 527; or for possession and distribution of heroin, *S. v. Thornton*, 513.

§ 29. Suggestion of Mental Incapacity to Plead

Defendant was not entitled to an order of commitment to a State hospital for psychiatric examination as a matter of right. *S. v. Washington*, 175.

§ 31. Judicial Notice

The courts do not take judicial notice of municipal ordinances. *S. v. Pallet*, 705.

§ 34. Evidence of Defendant's Guilt of Other Offenses

Indictment charging defendant with rape on 2 August 1972 was sufficient to support conviction for rape committed in witness's home or in the woods or both, and evidence of both rapes was properly admitted. *S. v. Washington*, 175.

In a rape case victim's testimony as to defendant's guilt of another offense was admissible since it was relevant on the material question of whether the prosecuting witness's will to resist was overcome by fear. *S. v. Felton*, 368.

CRIMINAL LAW—Continued

Evidence that defendant in a rape case committed a subsequent offense involving indecent exposure was admissible to show defendant's *quo animo*. *S. v. Humphrey*, 570.

§ 35. Evidence Offense Was Committed by Another

Trial court in a rape and burglary prosecution properly refused to allow defendant to introduce evidence tending to show that the offense was committed by another where that evidence was immaterial and of no probative value. *S. v. Gaines*, 33.

§ 42. Clothing Connected With the Crime

Articles of clothing worn by the victim in a rape case were admissible. *S. v. Felton*, 368.

§ 43. Photographs

Photographs of deceased were admissible in murder case for illustrative purposes. *S. v. Robinson*, 71.

Trial court did not err in the method used for allowing the jury to view photographs of defendant and others. *S. v. Mitchell*, 462.

§ 46. Flight of Defendant as Implied Admission

Evidence was sufficient to support instructions on the flight of defendant. *S. v. Lampkins*, 520.

§ 50. Opinion Testimony

Trial court did not commit prejudicial error in admission of alleged conclusions of witnesses. *S. v. Gurley*, 541.

§ 51. Qualification of Experts

Trial court did not err in allowing opinion testimony as to fingerprint comparisons though the witness had neither been tendered nor specifically found to be an expert. *S. v. Mitchell*, 462.

§ 63. Evidence as to Sanity of Defendant

The test of criminal responsibility is defendant's capacity to distinguish between right and wrong and it is not the irresistible impulse doctrine. *S. v. Humphrey*, 570.

§ 64. Evidence as to Intoxication

Breathalyzer test results were properly admitted into evidence in defendant's trial for driving under the influence though defendant's arrest for the offense was illegal. *S. v. Eubanks*, 556.

§ 66. Evidence of Identity by Sight

A pretrial lineup was lawful and did not violate defendant's rights though he was the only subject in the lineup with voice characteristics peculiar to him alone. *S. v. Gaines*, 33.

§ 73. Hearsay Testimony

Testimony of witness's conversation with defendant was not hearsay and was properly admitted to show defendant's state of mind and his motive. *S. v. Bryant*, 227.

Erroneous admission of hearsay testimony by a police officer that the homicide victim had reported to him the loss from her automobile of the

CRIMINAL LAW—Continued

pistol used in the killing was cured when testimony of like import was admitted without objection and when defendant had the officer repeat the same testimony in detail on cross-examination. *S. v. Van Landingham*, 589.

§ 77. Admissions

Trial judge's instruction on admission of defendant to inmate while in jail was proper. *S. v. Gaines*, 33.

§ 78. Stipulations

Trial court's instruction that facts in a stipulation were to be taken as true was proper. *S. v. Mitchell*, 462.

Defendant could assign error on appeal to trial court's enlargement of a stipulation though no objection was made to that portion of the charge in trial court. *S. v. Thornton*, 513.

§ 80. Records and Private Writings

Letter written by defendant one year prior to commission of the crime was improperly used by the prosecution to show an attempt by defendant to find out what would happen to her when she killed her husband and was convicted therefor. *S. v. Phillips*, 339.

Evidence of contents of a computer printout was erroneously admitted where a foundation had not been laid for such evidence. *S. v. Springer*, 627.

§ 84. Evidence Obtained by Unlawful Means

Selective Service card seized during a search of defendant incident to his lawful arrest was admissible in murder prosecution. *S. v. Robinson*, 71.

Police officers had probable cause to believe defendant was carrying a concealed weapon in their presence and thus had authority to arrest defendant without a warrant, and when an officer reached under defendant's shirttail and discovered burglary tools, such search was incident to a lawful arrest and the fruits of the search were lawfully admitted in evidence. *S. v. Streeter*, 203.

Officers had probable cause to arrest defendant without a warrant at a dinette for possession of heroin, officers lawfully seized heroin which defendant threw away while fleeing from the officers whether or not defendant was under arrest when he fled, and after defendant's capture officers lawfully searched his vehicle in the dinette parking lot as an incident of his lawful arrest. *S. v. Harrington*, 527.

Search of defendant's apartment under a warrant was not improper for the reason that defendant was taken into custody shortly after midnight on Friday and the search was not made until the following Monday morning. *S. v. Gurley*, 541.

§ 86. Credibility of Defendant and Parties Interested

Trial court did not err in allowing testimony of an interested witness with respect to her relationship with defendant in murder case. *S. v. Turner*, 53.

Inquiry as to defendant's involvement in a knifing, a beating and threats made to a carpet company employee were proper for the purpose of impeachment though they involved collateral matters. *S. v. Black*, 344.

CRIMINAL LAW—Continued

Trial court properly allowed solicitor to cross-examine defendant concerning defendant's involvement in other criminal activities and his reason for departure from Charlotte and his move therefrom to another city. *S. v. Gurley*, 541.

§ 87. **Direct Examination of Witness**

Trial court did not abuse its discretion in allowance of leading questions. *S. v. Gurley*, 541; *S. v. Watkins*, 504.

§ 88. **Cross-examination**

Cross-examination of defendant in first degree burglary case with respect to his involvement in nonsupport case did not constitute error. *S. v. Lampkins*, 520.

§ 89. **Credibility of Witness; Corroboration and Impeachment**

Evidence of good or bad character will no longer be confined to a person's reputation in the neighborhood or community in which he lives but may relate to such person's reputation in any community or society in which he has a well-known or established reputation. *S. v. McEachern*, 57.

Testimony of witnesses as to statements made to them by an assault victim were admissible for the purpose of corroboration. *S. v. Sawyer*, 289.

Trial court properly allowed the State to introduce a corroborative statement of its witness though there was a slight variance between the statement and the witness's subsequent testimony. *S. v. Tinsley*, 564.

Although pornographic magazines were excluded when offered in evidence by the State in a rape case, defendant was properly cross-examined about his possession of, familiarity with and interest in this type of literature for the purpose of impeachment. *S. v. Gurley*, 541.

§ 90. **Rule that Party May Not Discredit Own Witness**

The solicitor is bound by testimony of a State's witness and may not impeach that witness. *S. v. Anderson*, 218.

Where a State's witness repudiated before trial a statement made by her to officers immediately after the homicide in question, the trial judge erred in allowing the solicitor to cross-examine the witness before the jury with respect to the existence and contents of the statement. *Ibid.*

Trial court erred in allowing the State to impeach its own witness, but that error was not so prejudicial to defendant as to warrant a new trial. *S. v. Tinsley*, 564.

§ 91. **Continuance**

Defendant was not entitled as a matter of law to continuance of his trial for the sole reason that the judge presiding at the term for which the case was called had also presided at an earlier term at which defendant was tried and convicted upon a different charge. *S. v. Robinson*, 71.

Continuance was properly denied where publicity concerning additional bills of indictment against defendant did not prejudice defendant in this trial. *S. v. Cameron*, 191.

CRIMINAL LAW—Continued

§ 92. Consolidation of Counts

Trial court properly consolidated for trial two charges against defendant of felonious assault and one charge of homicide. *S. v. Edmondson*, 533.

§ 98. Custody of Witnesses

Trial judge did not abuse his discretion in refusing to sequester witnesses. *S. v. Gaines*, 33.

§ 99. Expression of Opinion on Evidence During Trial

Trial court expressed an opinion in violation of G.S. 1-180 when he asked the prosecutrix "You were in the car when you were raped?" *S. v. McEachern*, 57.

Trial court did not express an opinion in defining "demeanor" to a witness, in instructing the witness to speak up, or in instructing the sheriff not to let any of the witnesses contact any of the jurors. *S. v. Allen*, 354.

Questions put by the trial court to a State's witness did not amount to an expression of opinion. *S. v. Tinsley*, 564.

§ 112. Instructions on Burden of Proof and Presumptions

Trial judge's definition of reasonable doubt as a possibility of innocence was more favorable to defendant than was required and did not constitute prejudical error. *S. v. Bryant*, 227.

Trial judge's definition of "reasonable doubt," though not required, was substantially in accord with definitions approved by the Supreme Court. *S. v. Mabery*, 254.

§ 113. Statement of Evidence and Application of Law Thereto

Trial judge's instruction on admission of defendant to inmate while in jail was proper. *S. v. Gaines*, 33.

Trial court did not err in recalling jury and giving further instructions on its own initiative. *S. v. Mitchell*, 462.

The trial court is no longer required to give an instruction as to the legal effect of alibi evidence unless defendant specifically requests such an instruction. *S. v. Hunt*, 617.

§ 116. Charge on Failure of Defendant to Testify

Although it is the better practice to give no instruction concerning the failure of defendant to testify unless he requests it, trial court's instruction in this first degree murder case that defendant's failure to testify should not be considered by the jury was not prejudicial to defendant. *S. v. Bryant*, 227.

§ 117. Charge on Credibility of Witnesses

Trial court's instructions on defendant's credibility were proper. *S. v. Gaines*, 33.

§ 118. Charge on Contentions of the Parties

Slight error in stating contentions with respect to defendant's flight was not prejudicial. *S. v. Lampkins*, 520.

CRIMINAL LAW—Continued

§ 119. Requests for Instructions

Trial court properly refused to give requested instructions with respect to circumstantial evidence where the request contained an incorrect statement of law. *S. v. Beach*, 261.

Trial court did not err in giving requested instructions as to aiding and abetting substantially in accord with defendant's request. *Ibid.*

The trial court is no longer required to give an instruction as to the legal effect of alibi evidence unless defendant specifically requests such an instruction. *S. v. Hunt*, 617.

§ 120. Instructions on Right of Jury to Recommend Life Imprisonment

The amount of punishment which a verdict of guilty will permit the judge to impose is totally irrelevant to the issue of defendant's guilt and is of no concern to jurors, including those in capital cases. *S. v. Watkins*, 504.

§ 125. Special Verdicts

Alleged unconstitutionality of the Monroe Sunday Observance Ordinance prohibiting convenience stores from remaining open after 6:00 p.m. on Sunday and allowing other businesses selling the same items to remain open all day should have been determined by a special verdict, and the trial court erred in finding facts and concluding that the ordinance is unconstitutional in ruling on defendants' motion to quash warrants charging them with the unlawful sale of groceries. *S. v. Underwood*, 154.

§ 126. Unanimity of Verdict

Jury instructions as to the requirement of unanimity to return a verdict were proper. *S. v. Tinsley*, 564.

§ 127. Arrest of Judgment

In order to object to the composition of the grand jury defendant should move to quash the bill of indictment, not to arrest judgment. *S. v. Gaines*, 33.

§ 130. New Trial for Misconduct of Juror

Where defendant's motion for mistrial was based on the single question "Are you still here?" put to a witness by a juror, there was no showing of prejudice to defendant and the motion was properly denied. *S. v. Gaines*, 33.

§ 134. Form and Requisites of Sentence

Trial judge's imposition of sentence "with a great deal of pleasure" was not ground for new trial. *S. v. Felton*, 368.

§ 135. Judgment and Sentence in Capital Case

Defendant's plea of guilty to first degree murder entered after Furman v. Georgia, but before State v. Waddell was not a plea to a capital crime. *S. v. Watkins*, 17.

Pursuant to a mandate of the U. S. Supreme Court vacating the death penalty, first degree murder case is remanded to superior court for imposition of sentence of life imprisonment. *S. v. Frazier*, 99.

Judgment of life imprisonment imposed on defendant in accordance with order of the Supreme Court is affirmed. *S. v. Chance*, 102.

CRIMINAL LAW—Continued

Death sentence for rape committed prior to 18 January 1973 must be vacated and life sentence imposed. *S. v. Washington*, 175.

Trial court properly allowed the State to challenge the jurors for cause where each prospective juror testified unequivocally that he would not return a verdict requiring imposition of the death penalty. *Ibid.*

Defendant sentenced to life imprisonment had no standing to question the death penalty provided for in G.S. 14-21. *S. v. Williams*, 386.

Case is remanded for imposition of sentence of life imprisonment since the murder for which defendant was convicted occurred prior to State v. Waddell. *S. v. Watkins*, 504.

The amount of punishment which a verdict of guilty will permit the judge to impose is totally irrelevant to the issue of defendant's guilt and is of no concern to jurors, including those in capital cases. *Ibid.*

§ 139. Sentence to Minimum Terms

Case is remanded for imposition of a minimum prison sentence. *S. v. Black*, 344.

§ 140. Concurrent and Cumulative Sentences

Imposition of two life and two ten-year sentences, all to run consecutively, did not constitute cruel and unusual punishment. *S. v. Mitchell*, 462.

§ 142. Suspended Sentences

Where sentence was suspended with defendant's consent upon condition that he surrender his license to practice law, the question of whether his appeal from the judgment stayed the order of disbarment by the trial court is not presented on appeal. *S. v. Beach*, 261.

§ 143. Revocation of Suspension of Sentence

Suspension of defendant's sentence upon condition that he pay court costs, work faithfully at suitable employment, and refrain from involvement with drugs was reasonable, and defendant's breach of all three conditions supported order activating his sentence. *S. v. Braswell*, 332.

§ 145.1. Probation

Jurisdiction for revocation of probation proceedings. *S. v. Braswell*, 332.

§ 146. Nature and Grounds of Appellate Jurisdiction of Supreme Court in Criminal Cases

In a prosecution charging defendant with violation of a regulation of the Western N. C. Regional Air Pollution Agency, the constitutionality of the regulation was not properly raised, and the case could be decided on other grounds without considering the constitutional questions. *S. v. Pallet*, 705.

§ 154. Case on Appeal

Incidents occurring during trial omitted from the case on appeal settled by the presiding judge are not before the court on appeal. *S. v. Allen*, 354.

CRIMINAL LAW—Continued

§ 158. Conclusiveness of Record and Presumptions as to Matters Omitted

Where record on appeal does not contain narrative statement of defendant's evidence, no error is shown in trial judge's recapitulation of the evidence. *S. v. Allen*, 354.

§ 161. Necessity for and Requisites of Exceptions

Though defendant did not object to the form of the sentence, his appeal itself constitutes an exception to the judgment and presents the case for review for error appearing on the face of the record. *S. v. Black*, 344.

§ 162. Objections to Evidence

Failure to object to introduction of evidence is a waiver of the right to do so. *S. v. Gurley*, 541.

§ 163. Exceptions and Assignments of Error to Charge

There was no prejudicial error in the trial judge's misstatement of defendant's contentions, particularly where defendant failed to object. *S. v. Black*, 344.

Defendant's assignment of error to the jury charge was insufficient in that he failed to indicate what portions of the charge were erroneous. *S. v. Sawyer*, 289.

Defendant could assign error on appeal to trial court's enlargement of a stipulation though no objection was made to that portion of the charge in trial court. *S. v. Thornton*, 513.

§ 166. The Brief

Assignments of error not brought forward in defendant's brief are deemed abandoned. *S. v. Felton*, 368; *S. v. Bumgarner*, 388.

§ 168. Harmless Error in Instructions

Instructions as to mandatory death sentence in a rape case, though erroneous, would not require that defendant's conviction of rape be set aside. *S. v. Washington*, 175.

§ 169. Harmless and Prejudicial Error in Admission or Exclusion of Evidence

Admission of testimony concerning statement made by defendant when he was without counsel with respect to his violation of probation conditions was not prejudicial where there was plenary evidence that defendant had committed other violations of conditions of his probation. *S. v. Braswell*, 332.

Letter written by defendant one year prior to commission of the crime was improperly used by the prosecution to show an attempt by defendant to find out what would happen to her when she killed her husband and was convicted therefor. *S. v. Phillips*, 339.

Exclusion of testimony was not prejudicial where record does not show what testimony would have been. *S. v. Felton*, 368.

Trial court did not commit prejudicial error in admission of alleged conclusions of witnesses. *S. v. Gurley*, 541.

Cross-examination of defendant in first degree burglary case with respect to his involvement in nonsupport case did not constitute error. *S. v. Lampkins*, 520.

CRIMINAL LAW—Continued

Trial court erred in allowing the State to impeach its own witness, but that error was not so prejudicial to defendant as to warrant a new trial. *S. v. Tinsley*, 564.

Erroneous admission of hearsay testimony by a police officer that the homicide victim had reported to him the loss from her automobile of the pistol used in the killing was cured when testimony of like import was admitted without objection and when defendant had the officer repeat the same testimony in detail on cross-examination. *S. v. Van Landingham*, 589.

§ 172. Whether Error is Cured by Verdict

Any possibility of prejudice in the jury selection procedure created by allowing the State to challenge for cause prospective jurors because of capital punishment views was negated by fact that jury verdict precluded imposition of the death penalty. *S. v. Harris*, 46.

Jury verdict of not guilty of aiding and abetting in assault with a firearm with intent to kill rendered nonprejudicial the failure of the trial judge to submit the lesser included offense of aiding and abetting in assault with a deadly weapon. *S. v. Beach*, 261.

DAMAGES

§ 3. Compensatory Damages for Injury to Person

Trial court committed reversible error in giving instructions on damages for pain likely to occur in the future where there was no evidence to support such instructions. *Brown v. Neal*, 604.

§ 15. Burden of Proof and Sufficiency of Evidence as to Damages

Evidence of back strain could not properly be considered by the jury in determining amount of damages to be awarded for injury which occurred two years earlier in an automobile collision in the absence of evidence as to the causal relationship between the two. *Brown v. Neal*, 604.

§ 16. Instructions on Measure of Damages

Trial court committed reversible error in giving instructions on damages for pain likely to occur in the future where there was no evidence to support such instructions. *Brown v. Neal*, 604.

DEATH

§ 7. Determination of Life Expectancy; Damages

Trial court in wrongful death action properly set aside award of damages where the court erroneously instructed on life expectancy of deceased rather than life expectancy of deceased's parents. *Bowen v. Rental Co.*, 395.

DIVORCE AND ALIMONY

§ 21. Enforcing Alimony Payment

Orders of the trial court in an action for alimony without divorce with respect to surplus proceeds from sale of entirety property were in excess of the court's authority. *Koob v. Koob*, 129.

In an action for distribution of surplus from foreclosure on entirety property, defendant was entitled to specific notice of plaintiff's claim with respect to the fund before determination of that issue. *Ibid.*

DIVORCE AND ALIMONY—Continued

§ 22. Jurisdiction and Procedure in Custody Case

A North Carolina court could modify a Georgia child custody decree upon a showing of change in circumstances adversely affecting the child. *Spence v. Durham*, 671.

Jurisdiction of a court in a child custody proceeding continues as long as a minor child whose custody is the subject of a decree remains within its jurisdiction. *Ibid.*

§ 24. Custody

In a mother's action to modify a Georgia decree which granted custody of minor children to their grandparents on the basis that both the mother and father were emotionally disturbed and unstable and that their conduct had been such that neither was a suitable person to have custody, trial court's modification of the decree by awarding custody to the mother was supported by the evidence and findings. *Spence v. Durham*, 671.

EASEMENTS

§ 2. Creation of Easement by Deed

The language "including a right-of-way to a road across said Duncan's lot along said Lankford's line," in a deed from the parties' common source to a grantee in defendant's chain of title, was sufficient to constitute an easement by express grant. *Hensley v. Ramsey*, 714.

§ 6. Actions to Establish Easement

In an action to determine the parties' rights with respect to a strip of land over which defendant claimed an easement for a roadway, the trial court erred in allowing evidence of defendant's access to the highway through contiguous land owned by him. *Hensley v. Ramsey*, 714.

Trial court erred in its instructions on the issue of whether an easement for a roadway held by defendant was terminated by adverse possession by plaintiffs. *Ibid.*

§ 9. Easements Running With the Land

Where the evidence tended to show that plaintiffs and defendant obtained their lands from a common source and the source conveyed defendant's property with the easement in question prior to conveying plaintiffs' property, defendant, in respect of the easement, had a better title from the common source. *Hensley v. Ramsey*, 714.

When plaintiffs purchased the property described in the complaint, they were charged with notice of the easement to which their property was subjected by the terms of a prior deed from the parties' common source to a grantee in defendant's chain of title. *Ibid.*

ELECTRICITY

§ 8. Contributory Negligence

Evidence did not disclose that plaintiff's intestate who was electrocuted when a crane cable came into contact with a power line failed to exercise reasonable care for his own safety and was contributorily negligent as a matter of law. *Bowen v. Rental Co.*, 395.

EMINENT DOMAIN

§ 15. Time of Passage of Title

Landowner may continue to use his property from commencement of a condemnation proceeding under G.S. 40-11 et seq. until payment into court by the condemnor of the value of the property as determined by commissioners to the same extent and in the same manner in which he had been using it prior to the commencement of the condemnation proceeding. *City of Kings Mountain v. Goforth*, 316.

EVIDENCE

§ 13. Communications Between Attorney and Client

Testimony that defendant by telephone asked the witness to come home and stated that the victim was dead and the police were coming to arrest her did not violate the attorney-client privilege. *S. v. Van Landingham*, 589.

§ 19. Evidence of Similar Facts and Transactions

Evidence of value of personal property within a reasonable time before or after the time in issue is competent as bearing upon the value at that time. *Transportation, Inc. v. Strick Corp.*, 423.

§ 49. Examination of Expert Witness

An expert witness should be allowed to express a positive opinion as to causation rather than being confined to testimony as to whether a particular event "could" or "might" have produced the result in question. *Mann v. Transportation Co.*, 734.

§ 54. Testimony in Regard to Physics

Trial court erred in exclusion of testimony by an expert mechanic that a defect in the steering mechanism on a bus would have been visible to a competent mechanic prior to the time the bus was delivered to defendant carrier by the owner. *Mann v. Transportation Co.*, 734.

GRAND JURY

§ 3. Challenge to Composition of Grand Jury

In order to object to the composition of the grand jury defendant should move to quash the bill of indictment, not to arrest judgment. *S. v. Gaines*, 33.

HOMICIDE

§ 8. Effect of Intoxication Upon Mental Capacity

Statutory presumption that a person with a breathalyzer reading of .10% or more is under the influence of alcohol has no application in an assault and homicide case. *S. v. Bunn*, 444.

§ 13. Pleas

Defendant is prohibited from entering plea of guilty to a capital crime. *S. v. Watkins*, 17.

§ 17. Evidence of Motive

While motive is not an essential element of murder, evidence of motive is relevant as a circumstance to identify an accused as the perpetrator of the crime. *S. v. Van Landingham*, 589.

HOMICIDE—Continued

§ 19. Evidence Competent on Question of Self-Defense

Trial court in homicide case did not err in exclusion of testimony that deceased threatened to blow witness's head off. *S. v. Edmondson*, 533.

§ 21. Sufficiency of Evidence and Nonsuit

Evidence in first degree murder case was sufficient to withstand nonsuit where it was ample to show that defendant procured or compelled another to do the actual shooting and that defendant was present, aiding and abetting in the execution of the plan. *S. v. Robinson*, 71.

State's evidence was sufficient for jury in first degree murder prosecution. *S. v. Van Landingham*, 589.

Premeditation and deliberation were established by evidence that while defendant and victim were alone in a tack room of a barn shortly before victim was killed therein, defendant twice refused admittance thereto to persons who had legitimate business there, and that the victim was shot four times with a .38 caliber pistol. *Ibid.*

§ 28. Instructions on Defenses

Trial court did not err in instructing the jury that defendant's intoxication could have no bearing upon the jury's determination of his guilt or innocence of second degree murder or manslaughter. *S. v. Edmondson*, 533.

Defendant's own testimony supported the court's charge to the jury with reference to the duty of an aggressor to retreat. *Ibid.*

Where the court charged the jury upon self-defense and upon intoxication as a defense, the court did not err in failing to refer to defendant's plea of self-defense and his defense of intoxication in portions of the charge stating what the jury must find in order to return a verdict of guilty of first degree murder or second degree murder or felonious assault. *Ibid.*

Trial court's failure to instruct on self-defense was not erroneous where the evidence of neither defendant nor the State required such instruction. *S. v. Watkins*, 504.

§ 30. Submission of Question of Guilt of Lesser Degrees of the Crime

Evidence of defendant's intoxication at the time of the killing did not require trial court to submit manslaughter as a possible verdict. *S. v. Bunn*, 444.

§ 31. Verdict and Sentence

Defendant's plea of guilty to first degree murder entered after Furman v. Georgia but before State v. Waddell was not a plea to a capital crime. *S. v. Watkins*, 17.

Trial court in first degree murder prosecution erred in submitting the case to the jury upon the issue of punishment alone after defendant pled guilty to the charge. *S. v. Watkins*, 17.

Pursuant to a mandate of the U. S. Supreme Court vacating the death penalty, first degree murder case is remanded to superior court for imposition of sentence of life imprisonment. *S. v. Frazier*, 99.

Though there was no evidence to support manslaughter, verdict of guilty of manslaughter and judgment thereon may be sustained on the basis of the rule that if the court charges on lesser included offenses when all the evidence tends to support a greater offense, the error is favorable

HOMICIDE—Continued

to defendant and he is without standing to challenge the verdict. *S. v. Vestal*, 249.

HOSPITALS

§ 2. Support and Control

Expenditure of public funds raised by taxation to finance or facilitate financing of construction pursuant to the Hospital Facilities Finance Act of a hospital facility to be privately operated is not an expendtiure for a public purpose and is prohibited by the N. C. Constitution. *Foster v. Medical Care Comm.*, 110.

The N. C. Medical Care Commission Hospital Facilities Finance Act is unconstitutional in authorizing local governmental units to contract a debt without a vote of the people in excess of the amount specified in the N. C. Constitution. *Ibid.*

HUSBAND AND WIFE

§ 17. Termination and Survivorship of Estate by the Entireties

In an action for distribution of surplus from foreclosure on entirety property, defendant was entitled to specific notice of plaintiff's claim with respect to the fund before determination of that issue. *Koob v. Koob*, 129.

INDICTMENT AND WARRANT

§ 7. Requisites and Sufficiency of Indictment

Wording of indictment in felonious breaking and entering case, though grammatically incorrect and archaic, was sufficient to charge felonious breaking and entering. *S. v. Glover*, 379.

§ 9. Charge of Crime

Indictments against defendant were sufficient to charge offenses of aiding and abetting in assault with a deadly weapon and aiding and abetting in discharging a firearm into an occupied vehicle. *S. v. Beach*, 261.

Acquittal of another as the actual perpetrator of the assault and of the discharge of a firearm into an occupied vehicle did not constitute a sufficient basis for dismissal of the charges against defendant as an aider and abettor. *Ibid.*

Credit card was sufficiently described in the indictment charging theft of the card though the card was not specifically identified by its number. *S. v. Springer*, 627.

A warrant charging defendant with a violation of Regulation No. 2 of Section II of Article IV of the Rules and Regulations of the Western N. C. Regional Air Pollution Agency was insufficient to charge defendant with a crime. *S. v. Pallet*, 705.

A warrant charging the violation of a municipal ordinance must set out the ordinance or plead it in a manner permitted by G.S. 160A-79(a). *Ibid.*

In a criminal prosecution for violation of a regulation of a governmental board or commission, the indictment should set forth such regulation or refer specifically to a permanent public record where it is recorded. *Ibid.*

INDICTMENT AND WARRANT—Continued

§ 12. Amendment of Indictment

Defendant was properly tried in superior court for driving under the influence, first offense, though warrant and conviction in district court were for driving under the influence, fourth offense. *S. v. Guffey,* 94.

§ 13. Bill of Particulars

Bill of particulars was properly denied where all the information surrounding commission of the crime was contained in bills of indictment or could have been obtained from an examination of the State's witnesses. *S. v. Cameron,* 191.

§ 14. Grounds and Procedure in Motion to Quash

Defendants charged with violation of an ordinance may challenge the constitutionality of the ordinance by a motion to quash the warrant or indictment, but the motion to quash presents a question of law only which must be determined solely from consideration of allegations in the warrant or provisions of the statute or ordinance. *S. v. Underwood,* 154; *S. v. Fredell,* 242; *S. v. Atlas,* 165.

Alleged unconstitutionality of the Monroe Sunday Observance Ordinance prohibiting convenience stores from remaining open after 6:00 p.m. on Sunday and allowing other businesses selling the same items to remain open all day should have been determined by a special verdict, and the trial court erred in finding facts and concluding that the ordinance is unconstitutional in ruling on defendant's motion to quash the warrant charging them with the unlawful sale of groceries. *S. v. Underwood,* 154.

§ 17. Variance Between Allegations and Proof

Variance between allegation and proof of the issue date of a credit card was not fatal in a prosecution for theft of the credit card. *S. v. Springer,* 627.

INFANTS

§ 11. Child Abuse and Neglect

Provisions of the child abuse statute are severable and the first section of the statute making infliction of injury upon the child by the parent himself a punishable offense is constitutional. *S. v. Fredell,* 242.

INJUNCTIONS

§ 16. Liability for Wrongful Injunction

A party who procures a temporary injunction from a court of general jurisdiction will not be permitted to defeat an action for malicious prosecution based on the procurement thereof solely on the ground that the court which issued the restraining order did not have jurisdiction of the subject matter. *Electrical Workers Union v. Country Club East,* 1.

INSURANCE

§ 67. Actions on Accident Policies

Employer was not entitled to proceeds paid into court by plaintiff insurance company for employee's medical expenses though employer had previously paid a judgment in an FELA action for injuries, lost wages and medical expenses of the employee. *Insurance Co. v. Keith,* 577.

INSURANCE—Continued

§ 85. Liability Insurance on Other Vehicles Used by Insured

Provision of owner's automobile liability policy excluding "other" vehicles used in an automobile sales agency or service station is valid. *Insurance Co. v. Casualty Co.*, **87.**

§ 87. Drivers Insured

Where insured rented its vehicle to Carraway and Carraway surrendered the vehicle to an unauthorized third person, defendants who were injured in a collision with the insured's vehicle driven by the third person could not recover under the policy issued to the vehicle owner. *Insurance Co. v. Broughton*, **309.**

G.S. 20-281 did not extend insurance coverage to the driver of a rented vehicle where there was no evidence that the driver was a rentee, lessee, agent or employee of the vehicle owner. *Ibid.*

Where the driver of a vehicle was not authorized by insured owner to operate the vehicle, G.S. 20-279.21 would not extend insurance coverage to the third person since the statute does not provide for owner's liability until lawful possession is first established. *Ibid.*

§ 88. Garage and Dealers' Liability Insurance

The "automobile business" exclusion clause of an automobile liability policy is repugnant to the mandatory requirements of the Motor Vehicle Safety and Financial Responsibility Act and is invalid. *Insurance Co. v. Casualty Co.*, 87.

§ 103. Forwarding Summons or Other Suit Papers to Automobile Liability Insurer

Provision of a garage policy requiring the insured to forward immediately to the insurer any demand, notice, summons or other process received by him or his representative is a valid stipulation, but such requirement may be waived by the insured's denial of liability on other grounds. *Davenport v. Indemnity Co.*, 234.

Insurer did not waive the conditions of a garage liability policy that all summonses and other suit papers be forwarded to him when he denied coverage of defendant Thomas Mills, t/a Mills Grocery, and insurer was not liable under the policy for a judgment by default and inquiry against its insured, Thomas Mills, d/b/a Mills Motor Company, where it received no notice of a suit against such insured. *Ibid.*

§ 130. Notice and Proof of Loss Under Fire Policy

An action under an "all risks" insurance policy was not barred because of the failure of plaintiffs to file a formal proof of loss within the required 60-day period. *Avis v. Insurance Co.*, 142.

§ 137. Time Limitations on Fire Policies

Action instituted to recover under an "all risks" policy for injury resulting from attempted removal of paint from woodwork and attempted repainting was commenced within 12 months of the "inception of the loss." *Avis v. Insurance Co.*, 142.

INSURANCE—Continued

§ 143. Construction of Property Damage Policy

Coverage under an "all risks" policy extends when damage results from more than one cause even though one of the causes is specifically excluded. *Avis v. Insurance Co.*, 142.

§ 144. Actions on Property Damage Policy

Loss occasioned when paint applied to woodwork in plaintiffs' home began to blister and peel, and painters unsuccessfully attempted to remove the paint with solvents and to repaint, leaving the woodwork stained and mottled, is held within the coverage of the policy insuring against "all risks of physical loss." *Avis v. Insurance Co.*, 142.

INTEREST

§ 1. Items Drawing Interest in General

Under Pennsylvania law the jury in an action for breach of warranty has the discretion to award "damages for delay in compensation" in the amount of six percent per annum on any damages awarded for breach of warranty. *Transportation, Inc. v. Strick Corp.*, 423.

INTOXICATING LIQUOR

§ 3. Definitions

Beer is an intoxicating liquor but it is not an alcoholic beverage. *S. v. Williams*, 550.

§ 9. Indictment and Warrant

Warrants drawn under an invalid municipal ordinance charging defendants with possession of open cans of beer on a public street in the municipality were properly quashed. *S. v. Williams*, 550.

JUDGMENTS

§ 5. Interlocutory and Final Judgments

Trial judge was without authority to enter an anticipatory order that plaintiffs' counsel fees should be taxed against an estate upon completion of all appeals in the case. *Baxter v. Jones*, 327.

§ 36. Parties Concluded

Plaintiff corporation is bound by the judgment entered in an earlier action instituted by the president and sole stockholder of the corporation where both cases involved the same purported contract of sale and same defendant. *Enterprises v. Rose*, 373.

§ 37. Matters Concluded

Plaintiff is barred from bringing an action for a money judgment or for relinquishment of all rights to the business establishment in question where that relief was available to plaintiff but not requested in a prior action determined adversely to him. *Enterprises v. Rose*, 373.

JURY

§ 5. Selection Generally

Trial court did not err in allowing re-examination of a prospective juror after she had been passed by defendants but before she had been impaneled. *S. v. Harris*, 46.

JURY—Continued

Defendant in rape case showed no prejudice in the jury selection process. *S. v. Washington*, 175.

§ 6. Examination of Jurors

Trial court did not err in limiting questions with respect to the death penalty put to prospective jurors by defense counsel. *S. v. Washington*, 175.

§ 7. Challenges

Any possibility of prejudice in the jury selection procedure created by allowing the State to challenge for cause prospective jurors because of capital punishment views was negated by fact that jury verdict precluded imposition of the death penalty. *S. v. Harris*, 46.

Trial court properly allowed the State to challenge jurors for cause where each prospective juror testified unequivocally that he would not return a verdict requiring imposition of the death penalty. *S. v. Washington*, 175.

KIDNAPPING

§ 1. Elements of Offense and Prosecution

State's evidence, including the victim's in-court identification of defendant, was sufficient for the jury in a kidnapping case. *S. v. Gurley*, 541.

LARCENY

§ 4. Warrant and Indictment

Credit card was sufficiently described in the indictment charging theft of the card though the card was not specifically identified by its number. *S. v. Springer*, 627.

§ 6. Competency and Relevancy of Evidence

Evidence of defendant's possession of other credit cards at the time of his arrest was competent in a prosecution for theft of a BankAmericard credit card. *S. v. Springer*, 627.

§ 8. Instructions

The trial court in a prosecution for theft of a credit card properly instructed the jury on defendant's possession of other cards at the time of his arrest. *S. v. Springer*, 627.

LIMITATION OF ACTIONS

§ 4. Accrual of Right of Action and Time from Which Statute Begins to Run

Action by owners in possession against a manufacturer and contractor to recover fire damages allegedly caused by the negligent manufacture and installation of heat pumps on the premises was governed by the three-year, not the six-year, statute of limitations. *Sellers v. Refrigerators*, 79.

MALICIOUS PROSECUTION

§ 2. "Prosecutions" Which Will Support Action

A party who procures a temporary injunction from a court of general jurisdiction will not be permitted to defeat an action for malicious prosecution based on the procurement thereof solely on the ground that the court which issued the restraining order did not have jurisdiction of the subject matter. *Electrical Workers Union v. Country Club East*, 1.

§ 3. Valid Process

When a prior criminal prosecution is the subject thereof, an action for malicious prosecution cannot be maintained unless the prior criminal prosecution was based on valid process. *Electrical Workers Union v. Country Club East*, 1.

§ 13. Sufficiency of Evidence

In a malicious prosecution action based upon defendant's procurement of a restraining order preventing a union from picketing a motel construction site, plaintiffs' allegations that they were engaged only in informational picketing and the absence from the restraining order of any reference by name to informational picketing were insufficient as a basis for dismissal of the action on the ground the order did not purport to restrain the pickets from what they were doing. *Electrical Workers Union v. Country Club East*, 1.

MASTER AND SERVANT

§ 17. Strikes and Picketing

In a malicious prosecution action based upon defendant's procurement of a temporary restraining order preventing a union local and its members from picketing defendant's motel construction site, plaintiffs' allegations that they were engaged only in establishing "informational picket lines" and the absence from the restraining order of any reference by name to "informational picket lines" were insufficient as a basis for dismissal of the action on the ground that the order did not purport to restrain the pickets from what they were doing. *Electrical Workers Union v. Country Club East*, 1.

MORTGAGES AND DEEDS OF TRUST

§ 33. Disposition of Proceeds and Surplus

Trustee, upon completion of foreclosure on entirety property, was authorized to pay the surplus to the clerk of superior court. *Koob v. Koob*, 129.

MUNICIPAL CORPORATIONS

§ 8. Validity and Enforcement of, and Attack on, Ordinances

A municipal ordinance prohibiting possession of open cans of beer on the public streets was in conflict with G.S. 18A-35(a) permitting possession of beer without restriction except as otherwise provided in the Chapter. *S. v. Williams*, 550.

Where a municipal ordinance is inconsistent with State law, State law must prevail. *Ibid.*

MUNICIPAL CORPORATIONS—Continued

§ 30. Zoning Ordinances and Building Permits

An applicant for a building permit for construction of an apartment complex was an "owner" of the land to be developed within the meaning of a municipal zoning ordinance where it was the prospective vendee under an executory contract of sale. *MacPherson v. City of Asheville*, 299.

NARCOTICS

§ 1. Elements of Statutory Offenses

Unlawful possession and unlawful sale of heroin are separate and distinct offenses. *S. v. Cameron*, 191.

§ 4. Sufficiency of Evidence and Nonsuit

Evidence was sufficient to be submitted to the jury in a prosecution for possession and sale of heroin where it tended to show that defendant sold 15 bindles of heroin to a police officer. *S. v. Cameron*, 191.

§ 4.5 Instructions

Defendant is entitled to a new trial based on the lower court's erroneous instruction that the substance obtained from defendant was heroin. *S. v. Thornton*, 513.

§ 5. Verdict and Punishment

Defendant was not subjected to double jeopardy when he was convicted and separately sentenced for both felonious possession and felonious transportation of the same heroin, *S. v. Harrington*, 527; or for possession and distribution of heroin, *S. v. Thornton*, 513; *S. v. Cameron*, 191.

NEGLIGENCE

§ 35. Nonsuit for Contributory Negligence

Evidence did not disclose that plaintiff's intestate who was electrocuted when a crane cable came into contact with a power line failed to exercise reasonable care for his own safety and was contributorily negligent as a matter of law. *Bowen v. Rental Co.*, 395.

§ 59. Duties and Liabilities to Licensees

For an innocent owner of a building to recover damages for injuries caused by defendant who drove a vehicle off the highway and into his building, there must be proof of a wrongful act or negligence on the part of defendant which was a proximate cause of the injury. *Smith v. Von-Cannon*, 656.

NUISANCE

§ 3. Pollution of Air

A warrant charging defendant with a violation of Regulation No. 2 of Section II of Article IV of the Rules and Regulations of the Western N. C. Regional Air Pollution Agency was insufficient to charge defendant with a crime. *S. v. Pallet*, 705.

PARTIES

§ 3. Parties Defendant

Trial court had authority on its own motion to bring the parent corporation in as a necessary party and plaintiffs were not prejudiced by the irregularity, if any, in the court's allowance of a motion by the parent corporation, which was not a party to the action, that it be made a party defendant pursuant to Rule 25(d). *MacPherson v. City of Asheville*, 299.

PLEADINGS

§ 2. Statement of Cause of Action

Plaintiff is not entitled to a directed verdict because defendants erroneously named "negligence" rather than "trespass" or "inverse condemnation" as the ground on which they are entitled to recover. *City of Kings Mountain v. Goforth*, 316.

PRINCIPAL AND AGENT

§ 4. Proof of Agency

The evidence was insufficient to show that defendant or anyone purporting to act for her promised to pay for grading work performed on her land under a contract with plaintiffs who were negotiating with defendant's brother to purchase the property. *Investment Properties v. Allen*, 277.

§ 6. Ratification and Estoppel

There may be no ratification of an unauthorized contract unless the person making the contract purported to act as the agent of the person claimed to be the principal. *Investment Properties v. Allen*, 277.

RAPE

§ 1. Elements of the Offense

Furman v. Georgia and State v. Waddell do not affect the constitutionality of that portion of G.S. 14-21 which defines the elements of the crime of rape. *S. v. Williams*, 386.

§ 3. Indictment

Indictment charging defendant with rape on 2 August 1972 was sufficient to support conviction for rape committed in witness's home or in the woods or both, and evidence of both rapes was properly admitted. *S. v. Washington*, 175.

§ 4. Relevancy and Competency of Evidence

Highly racial and anti-white statements made to rape victim by a black defendant were competent to show intent and motivation. *S. v. Washington*, 175.

Articles of clothing worn by the victim in a rape case were admissible. *S. v. Felton*, 368.

Evidence that defendant in a rape case committed a subsequent offense involving indecent exposure was admissible to show defendant's *quo animo*. *S. v. Humphrey*, 570.

RAPE—Continued

§ 5. Sufficiency of Evidence and Nonsuit

Evidence was sufficient to withstand nonsuit where it tended to show sexual penetration of the prosecuting witness by defendant by force and without consent of the witness. *S. v. Felton,* 368.

Evidence in rape case was sufficient to withstand nonsuit where the victim identified defendant as her assailant and defendant admitted having intercourse with the victim but claimed consent of the victim. *S. v. Bell,* 472.

State's evidence, including the victim's in-court identification of defendant, was sufficient for the jury in a rape case. *S. v. Gurley,* 541.

§ 7. Verdict and Judgment

Death sentence for rape committed prior to 18 January 1973 must be vacated and sentence of life imprisonment imposed. *S. v. Washington,* 175.

ROBBERY

§ 1. Nature and Elements of the Offense

In a prosecution for common law robbery, it is necessary to prove a taking either by violence or by putting in fear, one being sufficient. *S. v. Watson,* 383.

§ 4. Sufficiency of Evidence

Evidence in a common law robbery case was sufficient to show a taking by force where the victim's purse was snatched with such force that the strap of her purse broke and defendant was thrown to the ground. *S. v. Watson,* 383.

§ 5. Submission of Lesser Degrees of the Crime

Trial court in a common law robbery case properly failed to submit lesser included offenses of the crime to the jury. *S. v. Watson,* 383.

RULES OF CIVIL PROCEDURE

§ 4. Process

Notice given defendant by newspaper publicity was insufficient to confer jurisdiction on the court to adjudge respective rights of plaintiff and defendant in regard to the surplus from foreclosure of their entirety property. *Koob v. Koob,* 129.

§ 19. Necessary Joinder of Parties

Trial court had authority on its own motion to bring the parent corporation in as a necessary party and plaintiffs were not prejudiced by the irregularity, if any, in the court's allowance of a motion by the parent corporation, which was not a party to the action, that it be made a party defendant pursuant to Rule 25(d). *MacPherson v. City of Asheville,* 299.

§ 26. Depositions in a Pending Action

Though plaintiff took the deposition of defendant's witness and the deposition supported defendant's allegations that plaintiff's intestate was contributorily negligent, plaintiff could impeach as well as contradict the testimony of defendant's witness. *Bowen v. Rental Co.,* 395.

RULES OF CIVIL PROCEDURE—Continued

§ 50. **Motion for Directed Verdict and for Judgment n.o.v.**

In passing on motion to set aside a verdict as being against the greater weight of the evidence, the trial judge is not required to take the testimony of any witness at face value, but has a duty to award a new trial any time he is convinced that the jury is misled by unreliable testimony into returning an erroneous verdict. *Rayfield v. Clark*, 362.

Plaintiff is not entitled to a directed verdict because defendants erroneously named "negligence" rather than "trespass" or "inverse condemnation" as the ground on which they are entitled to recover. *City of Kings Mountain v. Goforth*, 316.

Where trial court properly denied defendants' motions for directed verdict, it was error for the court thereafter to allow defendants' motions for judgment n.o.v. *Summey v. Cauthen*, 640.

A motion for a directed verdict must state specific grounds therefor. *Hensley v. Ramsey*, 714.

Where defendant made no post-verdict motion for judgment n.o.v. and the trial judge did not of his own motion consider entry of a directed verdict, the Supreme Court could not direct entry of judgment in accordance with defendant's earlier motion. *Ibid.*

SALES

§ 6. **Implied Warranties**

Under Pennsylvania law the implied warranty of fitness for a particular purpose applied to trailers purchased for the general or ordinary purpose of hauling cargo, and disclaimer in a purchase money security agreement could not disclaim the implied warranties previously created in the written sales arrangement. *Transportation, Inc. v. Strick Corp.*, 423.

§ 10. **Recovery of Goods or Purchase Price by Seller**

Evidence was sufficient to support findings by trial court that defendant gave proper notice to plaintiff that he was rejecting non-conforming cable, that defendant did not contract with plaintiff to return the cable and that defendant was not negligent in allowing the cable to be stolen from his storage space some three months after defendant gave proper notice of the rejection. *Electric Co. v. Shook*, 213.

§ 14. **Actions for Breach of Warranty**

In an action for breach of an implied warranty of trailers, trial court erred in admitting testimony of the value of the trailers more than two and one-half and more than five years after the time of acceptance and in admission of testimony as to what it would cost to repair the trailers more than two years after the acceptance. *Transportation, Inc. v. Strick Corp.*, 423.

§ 17. **Sufficiency of Evidence in Action for Breach of Warranty**

Plaintiff's evidence was sufficient for the jury on the issue of its breach of warranty of fitness of 150 trailers purchased from defendant although 141 trailers are still in service. *Transportation, Inc. v. Strick Corp.*, 423.

SALES—Continued

§ 19. Measure of Damages for Breach of Warranty

Measure of damages for breach of implied warranty of trailers should be reduced by the amount by which repairs made by the seller enhanced the value of the trailers. *Transportation, Inc. v. Strick Corp.*, 423.

Under Pennsylvania law the jury in an action for breach of warranty has discretion to award damages for delay in compensation. *Ibid.*

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

Selective Service card seized during a search of defendant incident to his lawful arrest was admissible in murder prosecution. *S. v. Robinson*, 71.

Authority of an officer to stop and frisk. *S. v. Streeter*, 203.

Police officers had probable cause to believe defendant was carrying a concealed weapon in their presence and thus had authority to arrest defendant without a warrant, and when an officer reached under defendant's shirttail and discovered burglary tools, such search was incident to a lawful arrest and the fruits of the search were lawfully admitted in evidence. *Ibid.*

It was reasonable by Fourth Amendment standards for officers to conduct a limited protective search of defendant for weapons, even if the officers had no probable cause to arrest defendant, and burglary tools exposed by the limited search were lawfully obtained. *Ibid.*

Officers had probable cause to arrest defendant without a warrant at a dinette for possession of heroin, officers lawfully seized heroin which defendant threw away while fleeing from the officers whether or not defendant was under arrest when he fled, and after defendant's capture officers lawfully searched his vehicle in the dinette parking lot as an incident of his lawful arrest. *S. v. Harrington*, 527.

§ 4. Search Under the Warrant

Search of defendant's apartment under a warrant was not improper for the reason that defendant was removed from his apartment and taken into custody shortly after midnight on Friday and the search was not made until the following Monday morning. *S. v. Gurley*, 541.

SUNDAYS AND HOLIDAYS

Evidence that obscene magazines were permitted to be sold "in Fayetteville" was irrelevant and incompetent on the question of the validity of the Cumberland County Sunday Observance Ordinance. *S. v. Atlas*, 165.

TAXATION

§ 4. Limitation on Increase of Public Debt

The Act authorizing the Medical Care Commission to issue revenue bonds to finance hospital construction does not authorize the contracting of a debt by the State or the lending of the faith and credit of the State; however, the Act is unconstitutional in authorizing local governmental units to contract debts without a vote of the people in excess of the amount specified in the N. C. Constitution. *Foster v. Medical Care Comm.*, 110.

TAXATION—Continued

§ 7. **Public Purpose**

Expenditure of public funds raised by taxation to finance or facilitate financing of construction pursuant to the Hospital Facilities Finance Act of a hospital facility to be privately operated is not an expenditure for a public purpose and is prohibited by the N. C. Constitution. *Foster v. Medical Care Comm.*, 110.

§ 21. **Exemption from Taxation of Property of State or Political Subdivisions**

The statute exempting from taxation property and income from property owned by the Medical Care Commission pursuant to the Hospital Facilities Finance Act is constitutional. *Foster v. Medical Care Comm.*, 110.

§ 25. **Ad Valorem Taxes**

Where trucking company's equipment should have been listed for taxation in city and township where its principal office was located but was improperly listed in another township, city had authority to list such property as "discovered property" and to assess taxes on such property for the preceding five years. *In re Trucking Co.*, 650.

TORTS

§ 2. **Joint Tort-Feasors**

In an action to recover for injuries received by passengers on a bus leased by a carrier from the owner, the carrier would be entitled to contribution from the owner if the owner was guilty of actionable negligence in furnishing the carrier with a defective bus and the carrier's driver was negligent in the manner in which he operated the bus. *Mann v. Transportation Co.*, 734.

TRESPASS

§ 6. **Competency and Relevancy of Evidence of Trespass**

Acts of a landowner and local customs should be considered in determining whether there has been an implied consent of the landowner to enter his property. *Smith v. VonCannon*, 656.

§ 7. **Sufficiency of Evidence of Trespass**

For an innocent owner of a building to recover damages for injuries caused by defendant who drove a vehicle off the highway and into his building, there must be proof of a wrongful act or negligence on the part of defendant which was a proximate cause of the injury. *Smith v. VonCannon*, 656.

A taxi driver whose vehicle struck plaintiff's building while the driver was protecting himself from assault was not guilty of a trespass and liable to plaintiff for damages. *Ibid.*

TRIAL

§ 5. **Conduct of Trial**

Trial judge did not abuse his discretion in refusing to sequester witnesses. *S. v. Gaines*, 33.

TRIAL—Continued

§ 15. Objections to Evidence and Motion to Strike

Defendant's objection to plaintiff's testimony came too late when made after plaintiff had answered the question. *Brown v. Neal*, 604.

§ 42. Form and Sufficiency of Verdict

Where jury answered issues of negligence and contributory negligence in the affirmative, jury's answer awarding damages will be treated as surplusage. *Summey v. Cauthen*, 640.

§ 50. New Trial for Misconduct of or Affecting the Jury

Contention that trial judge erred in failing to declare a mistrial will not be considered on appeal where defendants did not move for a mistrial in the trial court. *Rayfield v. Clark*, 362.

UNIFORM COMMERCIAL CODE

§ 15. Warranties

Under Pennsylvania law the implied warranty of fitness for a particular purpose applied to trailers purchased for the general or ordinary purpose of hauling cargo, and disclaimer in a purchase money security agreement could not disclaim the implied warranties previously created in the written sales arrangement. *Transportation, Inc. v. Strick Corp.*, 423.

§ 20. Breach, Repudiation and Excuse

In an action for breach of an implied warranty of trailers, trial court erred in admitting testimony of the value of the trailers more than two and one-half and more than five years after the time of acceptance and in admission of testimony as to what it would cost to repair the trailers more than two years after acceptance. *Transportation, Inc. v. Strick Corp.*, 423.

Plaintiff's evidence was sufficient for the jury on the issue of its breach of warranty of fitness of 150 trailers purchased from defendant although 141 trailers are still in service. *Ibid.*

Measure of damages for breach of implied warranty of trailers should be reduced by the amount by which repairs made by the seller enhanced the value of the trailers. *Ibid.*

§ 22. Seller's Remedies

Evidence was sufficient to support findings by trial court that defendant gave proper notice to plaintiff that he was rejecting non-conforming cable, that defendant did not contract with plaintiff to return the cable and that defendant was not negligent in allowing the cable to be stolen from his storage space some three months after defendant gave proper notice of the rejection. *Electric Co. v. Shook*, 213.

UTILITIES COMMISSION

§ 9. Appeal and Review

Granting of contract carrier authority to transport corporation by the Utilities Commission is affirmed on appeal. *Utilities Comm. v. McCotter, Inc.*, 104.

WATER AND WATER COURSES

§ 3. Natural Streams

Ordinarily, lower landowner's obstruction of a surface stream of water which causes it to flood the land above him constitutes a trespass entitling the aggrieved party to damages or injunctive relief or both; however, if the lower proprietor has authority to condemn the upper proprietor's property, such invasion constitutes a taking of the landowner's property and the action becomes in effect an action for inverse condemnation. *City of Kings Mountain v. Goforth*, 316.

§ 4. Dams

Defendants' evidence was sufficient for the jury in their cross-action for damages to their crops from flooding allegedly caused by plaintiff municipality's construction of a dam on a creek below defendants' land. *City of Kings Mountain v. Goforth*, 316.

WITNESSES

§ 1. Competency of Witness

Trial court did not err in failing to find that a State's witness lacked sufficient mental capacity to testify. *S. v. Robinson*, 71.

§ 5. Evidence Competent for Purpose of Corroboration

Evidence of good or bad character will no longer be confined to a person's reputation in the neighborhood or community in which he lives but may relate to such person's reputation in any community or society in which he has a well-known or established reputation. *S. v. McEachern*, 57.

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RALEIGH, NORTH CAROLINA