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SUPREME COURT OF NORTH CAROLINA

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CITE THIS VOLUME

284 N.C.

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OF
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[1] Resigned 31 January 1974. Succeeded by Dewey W. Wells, Elizabeth City, 1 February 1974.
[2] Deceased 20 December 1973.

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[1] Appointed Chief Judge effective 7 January 1974.

[2] Appointed effective 11 January 1974 to succeed Harry Horton, deceased 27 December 1973.

[3] Appointed effective 2 January 1974.

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM 1973

STATE OF NORTH CAROLINA v. JOHNNY JAMES BLACKMON

No. 2

(Filed 10 October 1973)

1. **Constitutional law § 32; Criminal Law § 75— right to counsel — acts constituting waiver**

Where defendant was given the Miranda warnings, never requested the presence of counsel but never said he did not want a lawyer, and subsequently made a voluntary statement, defendant did not waive his right to counsel, since failure to request counsel does not constitute a waiver; rather, the record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer.

2. **Criminal Law § 75— defendant in custody — voluntary statements — admissibility**

Where defendant while in custody made a spontaneous and voluntary response to a co-defendant's statement and further narrated events surrounding the homicide in question in response to a neutral question asked by the sheriff, defendant spoke in the voluntary exercise of his own will and without the slightest compulsion of in-custody interrogation procedures; therefore, defendant's statements were properly admitted into evidence as volunteered statements made under circumstances requiring neither warnings nor the presence of counsel.

3. **Constitutional Law § 35; Criminal Law § 135— homicide — mandatory death sentence inapplicable**

Sentence of death given defendant for a homicide committed on 5 January 1971 cannot stand, since the mandatory death penalty for capital offenses may not be constitutionally applied to any offense committed prior to 18 January 1973, the date that *State v. Waddell* was filed.

Justice HIGGINS concurs in result.

Chief Justice BOBBITT and Justice MOORE dissent.

State v. Blackmon

APPEAL by defendant from judgment of *Ervin, J.*, 28 August 1972 Session, UNION Superior Court.

Defendant is charged in a bill of indictment, proper in form, with the first degree murder of James Alexander Howell on 5 January 1971. He was first tried at the 29 March 1971 Session of Stanly Superior Court, convicted by the jury, and sentenced to death. He appealed to the Supreme Court and we awarded a new trial for the reasons stated in that opinion, 280 N.C. 42, 185 S.E. 2d 123 (1971).

Upon motion by defendant, the case was transferred to Union County for retrial. At his retrial, upon a plea of not guilty, defendant was again convicted of murder in the first degree and sentenced to death.

The State's evidence tends to show that on 5 January 1971 James Alexander Howell and his wife lived on Route 4 near Albemarle in Stanly County. Mr. Howell worked six days a week from 6 a.m. until 6 p.m. as manager of a store. On the morning in question he arose about 5 a.m., ate breakfast with his wife, and left the house to go to the store. When Mrs. Howell failed to hear the truck door slam and failed to hear the motor start, she became concerned and went to the front door to investigate. After calling to her husband and receiving no answer, she telephoned a neighbor, Gene Almond. When Mr. Almond arrived at the Howell home they discovered Mr. Howell lying facedown alongside his truck. The truck door on the driver's side was open and Mr. Howell's right foot was inside the truck. He had been shot and died shortly thereafter. An autopsy revealed that death resulted from a shotgun wound in the left chest.

Officers were called and arrived at the Howell home at 6:30 a.m. Their investigation revealed blood on the back of the front seat and inside the cab and shoe tracks in the vicinity and around the house. A Halloween mask was found on an old sawmill road about 145 feet from the house.

Tommy Clinton Peguese, a long-time friend and acquaintance of defendant, testified that on Sunday, 3 January 1971, he saw defendant at defendant's home in Albemarle with Tracy Baucom and Edward Richardson; that they rode around Albemarle in a car during which time defendant said he needed some money and Richardson asked him where he planned to get it; that defendant said "he knew a man who either owned a

chicken place or owned a store and run a chicken place and cashed checks" near the Endy vicinity; that the man would have from $800 to $2,000 and he was going to carry an iron pipe with him and hit him on the head with it; that "he didn't give us an exact date or anything, but said it would be between 5:00 and 6:00 o'clock in the morning"; that he asked defendant if he was serious and if he intended to carry a gun, "and that's when he showed me the sawed-off shotgun."

This witness further testified that several weeks later he saw defendant in Wadesboro in front of the Burmese Lounge and asked him "if he had done what he had told me a few weeks ago and he looked at me and told me to keep my mouth closed and that was all."

Tracy Baucom testified that he was with Tommy Peguese, Edward Richardson and defendant on Sunday in early January 1971 when they rode around Albemarle in Tommy Peguese's car; that defendant "was talking about the deal. Something about some man that had some money or something. I think he worked at that chicken place. He said the man kept some money or had some at his house or somewhere . . . and he leaves home early in the morning going to work and supposed to be some kind of deal pulled off." This witness further testified that he saw defendant two or three weeks later and "defendant said something about that deal or something didn't go right or something. I don't know what he said, he just said it didn't go right. He said something didn't go right and someone had to shoot or something and he didn't call any particular name or who it was. He did not say who had been shot."

Clarence Parsons testified that he managed the Burmese Lounge in Wadesboro; that he bought a sawed-off shotgun from defendant about the middle of January 1971 for $10.00, carried the gun home and kept it until he gave it to the sheriff and the SBI agent. Frank Spencer, an employee at the Burmese Lounge, corroborated this testimony.

The testimony of Ralph McSwain, Sheriff of Stanly County, and SBI Agent Coppley tends to show that they went to the Howell residence at 6:10 a.m. and 6:30 a.m., respectively, on 5 January 1971 where they saw Mr. Howell's body and saw shoe impressions near the porch column and in tracks outside the dining room. On 19 February 1971 at 5:30 a.m. defendant was arrested at his home on a capias incident to a worthless

check charge. The sheriff had obtained the shotgun the evening before, had interviewed the two witnesses in Wadesboro, and had obtained a warrant charging defendant and Craven Turner, Jr. with Mr. Howell's murder.

Following defendant's arrest, he was taken to the Stanly County Jail where the murder warrant was served on him and he was advised of his constitutional rights in full compliance with *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). Defendant said he understood his constitutional rights and denied knowing anything about Mr. Howell's murder. Sheriff McSwain thereupon left and went to the mill where Craven Turner, Jr. worked on the nightshift and arrested him on the murder charge at 8:05 a.m. Turner was fully advised of his constitutional rights, waived counsel, and made a full confession. (See R pp 20-22 in *State v. Craven Turner, Jr.*, Case No. 6, Spring Term 1973.) Thereafter, about 10 a.m., the sheriff returned to the room where defendant was confined, again repeated the *Miranda* warnings and defendant again stated he understood his rights. Defendant was then told that his co-defendant Craven Turner, Jr. would be brought into the room and would make a statement in the presence of defendant and that defendant did not have to say anything during or after Turner's statement. Turner was brought into the room and stated in the presence of the defendant and others that he and defendant Blackmon had gone to the Howell residence on the morning of 5 January 1971 and Blackmon had shot Mr. Howell. Blackmon said to Turner, "You got the gun out of the car. You say I shot him? Well, I say you shot him." Turner was immediately taken from the room and Sheriff McSwain asked defendant Blackmon, "Do you care to make any further statement?" The defendant replied, "Well, I'm just going to tell you how it was."

Defendant Blackmon then made a detailed statement concerning the events which occurred at the Howell home on 5 January 1971. In a continuous narrative he said that about a month before the killing Turner said he knew how to get some money, knew a man who carried money to cash checks on Tuesdays. On the day before the robbery Turner drove the defendant by the Howell house three times. Continuing his statement, defendant said Turner borrowed his shotgun on Saturday before the killing and picked up the defendant about 4:30 a.m. on the morning of 5 January 1971. They drove to a

point near the Howell residence in Turner's Chevelle automobile, parked the car on a secondary road, and Turner put on a Halloween mask while defendant covered his face with a paper bag. They walked across a field to the Howell home where defendant stayed in the edge of some woods while Turner approached the house and returned in a few minutes to state that the Howells were eating breakfast. Turner concealed himself in the shrubbery and very soon Mr. Howell opened the door and came out on the front porch where he poured water out of a container and threw the container on the ground. Shortly thereafter, defendant heard a shot and Turner came running from the house and stated, "The old man went for his pocket and I had to shoot." They both ran across the field to the car, Turner falling in the field where he lost the Halloween mask and defendant falling in the creek "and this is why mud was on the gun." Defendant heard on the radio about noon that Mr. Howell was dead. When he later saw Turner and informed him of that fact, Turner said, "He's just dead. It was either him or me."

Defendant said he sold the sawed-off shotgun to Clarence Parsons in Wadesboro for $10.00. He was shown the shotgun and Halloween mask and stated that the gun was the weapon used at the Howell residence and the mask was the one worn by Turner during the robbery attempt. Defendant also identified the pair of tennis shoes he was wearing on the morning of the shooting.

Thereafter defendant voluntarily accompanied the officers to the scene of the crime, showed them the route he and Turner had followed, where they parked the car, the bush where defendant stood while Turner went around the Howell house, and the places where he and Turner fell while fleeing the scene.

The State offered evidence that Blackmon was twenty-five years old and Turner twenty-eight years old at the time Mr. Howell was killed.

Defendant interposed timely objection to the foregoing testimony of Sheriff McSwain and SBI Agent Coppley whereupon the jury was excused and the court conducted an extensive voir dire. Evidence for the State on the voir dire was in substantial accord with the foregoing narration.

Defendant testified on voir dire that the sheriff and SBI Agent Coppley and a city policeman came to his home on the

morning of 19 February 1971 about 5:30 a.m. and arrested him on a capias for a worthless check; that he was taken downtown to jail where the murder warrant was read to him; that he told the sheriff, "I won't answer nothing until I get a lawyer"; that Sheriff McSwain said, "Ain't no lawyer coming down here this time of morning, they in bed"; that he was not advised of his constitutional rights; that he was shown the shotgun and told the officers he owned it at one time and sold it to Clarence Parsons; that he called his wife about 9:30 a.m. and told her to inform his mother and sister that he needed a lawyer. He denied that Craven Turner, Jr. stated in his presence that he, Blackmon, shot Mr. Howell and asserted that the officers left defendant and Turner in the room together alone for about fifteen minutes. He denied that the sheriff asked him if he cared to make any further statement, denied that he made an incriminating statement, and denied that he volunteered to go with the officers to the scene of the crime. He admitted that he completed the eleventh grade in school, could read and write very well, and was not forced in any way to say anything and was made no promises. He admitted he had served two prison sentences, six months for larceny and fifteen months for breaking probation, and said he was represented on one occasion by Lawyer Pat Taylor who was employed by his mother and on another occasion by Lawyer Avery Hightower, employed by himself. He admitted that he pleaded guilty in Cumberland County on two occasions for escape. He stated that on 19 February 1971 he was employed and earning $100.00 a week. He said he now knows his constitutional rights but did not know them on 19 February 1971.

At the conclusion of the voir dire the trial court made detailed findings of fact. The court found, *inter alia,* that defendant was fully advised of his constitutional rights and said that he understood them; that immediately after defendant was so advised, Sheriff McSwain asked him about Mr. Howell's murder and defendant said he didn't know anything about it; that the sheriff thereupon left about 6:30 a.m. and posed no further questions; that during the sheriff's absence SBI Agent Coppley made one effort to interview defendant on the subject, and defendant said he didn't know anything about the matter; that no further questions were posed by Agent Coppley or any other officer until Sheriff McSwain returned about 10 a.m., again advised defendant of his constitutional rights and told him his co-defendant Craven Turner, Jr. would be brought into

the room and would make a statement in defendant's presence but further advised defendant that he did not have to say anything during or after Turner made said statement; that Turner was brought into the room and said that he and the defendant Blackmon had gone to the Howell residence and that the defendant had shot Howell; that at that point the defendant Blackmon said to his co-defendant Turner, "You say I shot him?" and Craven Turner, Jr. replied, "Yes," and then the defendant Blackmon said, "I say you shot him"; that these words by the defendant Blackmon were made in response to the statement of Craven Turner, Jr. and were not the result of any questions put to him by any officer; that they were spontaneous in character and were made immediately after the statement by Craven Turner, Jr. to the effect that this defendant, Johnny James Blackmon, had shot Mr. Howell.

The trial court further found as a fact that defendant told Craven Turner, Jr., "You got the gun out of the car" and that this statement was not elicited by any questioning by the officers but was made in response to Turner's statement; that after Turner was removed from the room Sheriff McSwain asked the defendant, "Do you care to make any further statement?" and defendant replied, "I'll just tell you how it was." The court then found that defendant made the narrative statement detailed above.

The court found as a fact that the defendant was twenty-five years of age and had finished the eleventh grade in school; that he had held positions as a shipping clerk, as a truck driver, and could read and write very well; that he had been involved in a number of criminal cases, had been convicted of shoplifting, five counts of larceny, two escapes, and several motor vehicle violations, as a result of which he had been represented by competent counsel on at least two occasions prior to 19 February 1971 and had thus had considerable experience with criminal courts and criminal procedure; that at no time did defendant indicate that he wanted an attorney present or request anyone to obtain an attorney for him, and at no time did he affirmatively state that he did not want a lawyer.

Based upon the findings of fact and the totality of the circumstances, the trial court concluded as a matter of law that defendant, after being fully advised of his constitutional rights, made the incriminating statements freely, understandingly and voluntarily without compulsion, duress or promise of

leniency; that defendant by his words and deeds expressly waived his right to counsel and to keep silent by knowingly and intelligently making a free and voluntary confession immediately after he was advised of his rights, "said confession having been spontaneously made in response to a statement made in his presence by co-defendant Craven Turner, Jr."

Defendant's objection to the testimony of Sheriff McSwain and Agent Coppley concerning his incriminating statement was thereupon overruled and said witnesses were permitted to testify before the jury as above narrated.

At the conclusion of the State's evidence, defendant's motion for judgment of nonsuit was denied. The jury was excused and defendant was fully advised of his right to testify and offer evidence in his own behalf. Being so advised, defendant knowingly and understandingly informed the court that he had decided not to testify and that there were no witnesses he desired to call in his behalf. He rested and renewed his motion for judgment of nonsuit which was denied.

The jury convicted defendant of murder in the first degree, and he was sentenced to death. He appealed to the Supreme Court assigning errors discussed in the opinion.

Robert Morgan, Attorney General; Andrew A. Vanore, Jr., Deputy Attorney General; Edwin M. Speas, Jr., Associate Attorney, for the State of North Carolina.

Elton S. Hudson of Hopkins and Hudson, Attorney for defendant appellant.

Norman B. Smith and Daniel H. Pollitt, Attorneys for the North Carolina Civil Liberties Union Legal Foundation, Inc., Amicus Curiae.

HUSKINS, Justice.

Defendant assigns as error the admission of his inculpatory statements made while in custody and without benefit of counsel. He contends the incriminating statements are inadmissible because he was indigent at the time, charged with a capital offense, and had not waived his constitutional right to the presence and assistance of counsel. He relies on G.S. 7A-457(a) as interpreted and applied in *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971), and on *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d

694, 86 S.Ct. 1602 (1966), as interpreted and applied by this Court in *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971).

The trial court found as a fact on voir dire that defendant was twice advised of his constitutional rights as required by *Miranda,* initially about 6 a.m. following his arrest and again at approximately 10 a.m. on 19 February 1971. Each time defendant said he fully understood those rights. The trial court further found that following the second *Miranda* warning at 10 a.m., Sheriff McSwain told defendant that his co-defendant Craven Turner, Jr. would be brought into the room and would make a statement, and advised defendant that he did not have to say anything during or after Turner made his statement. Defendant indicated that he understood. Co-defendant Turner was then brought into the room and in the presence of defendant Blackmon, the sheriff, and two other law enforcement officers, made a statement to Blackmon to the effect that he and Blackmon had gone to the Howell residence and that Blackmon had shot Howell. In response to that statement defendant Blackmon said to Turner, "You say I shot him? I say you shot him. You got the gun out of the car." Co-defendant Turner was then taken from the room and immediately thereafter Sheriff McSwain said to defendant Blackmon, "Do you care to make any further statement?" Defendant then said, "I'll just tell you how it was." Defendant then made a detailed statement concerning the events at the James Howell home on 5 January 1971. This statement was a continuous narration, punctuated only by questions from Sheriff McSwain to help keep matters in chronological order. Based on these findings at the conclusion of an extensive voir dire, and in light of the total circumstances, the court concluded "[t]hat the defendant, Johnny James Blackmon, by his words and by his deeds expressly waived these rights on this occasion; that his waiver thereof was freely, understandingly and voluntarily made and that it was done without undue influence, compulsion, duress and without any promise of leniency."

[1] The findings of fact are supported by competent evidence and are conclusive on appeal. *State v. McRae,* 276 N.C. 308, 172 S.E. 2d 37 (1970); *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966). Consequently, it is established that defendant was fully advised and understood that he had the right to remain silent; that anything he said could and would be used against him in a court of law; that he had the right to have a lawyer

present during interrogation and to confer with counsel before any questioning if he so desired; that if he could not hire his own attorney the State would appoint and pay a lawyer to represent him; and that if he chose to answer questions or make a statement he could stop talking at any time. The findings further establish that defendant never requested the presence of counsel but never said he did not want a lawyer. Finally, the findings establish that his later statement was not coerced but was freely and voluntarily made. These facts, however, are not sufficient to constitute a waiver of counsel. There is neither evidence nor findings of fact to show that defendant expressly waived his right to counsel, either in writing or orally, within the meaning of *Miranda* on which our decision in *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971), is based. "An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given." *Miranda v. Arizona, supra.* Silence and waiver are not synonymous. "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." *Carnley v. Cochran,* 369 U.S. 506, 8 L.Ed. 2d 70, 82 S.Ct. 884 (1962). We said as much on defendant's previous appeal. *State v. Blackmon, supra* [280 N.C. 42, 185 S.E. 2d 123 (1971)].

Although our previous decision in this case negates effective waiver of counsel, other jurisdictions have held somewhat similar factual circumstances to constitute waiver. *See, e.g., Mitchell v. United States,* 434 F. 2d 483 (D.C. Cir.), *cert. denied,* 400 U.S. 867 (1970); *United States v. Hilliker,* 436 F. 2d 101 (9th Cir. 1970), *cert. denied,* 401 U.S. 958 (1971); *United States v. Hayes,* 385 F. 2d 375 (4th Cir. 1967), *cert. denied,* 390 U.S. 1006 (1968); *People v. Johnson,* 70 Cal. 2d 541, 450 P. 2d 865, 75 Cal. Rptr. 401, *cert. denied,* 395 U.S. 969 (1969); *People v. Higgins,* 50 Ill. 2d 221, 278 N.E. 2d 68, *cert. denied,* 409 U.S. 855 (1972); *State v. Kremens,* 52 N.J. 303, 245 A. 2d 313 (1968); *State v. Alewine,* 474 S.W. 2d 848 (Mo. 1971); *see generally Waiver of Rights in Police Interrogations: Miranda in the Lower Courts,* 36 U. Chi. L. Rev. 413, 421-430 (1969).

[2] Even so, *Miranda* warnings and waiver of counsel are only required where defendant is being subjected to custodial interrogation. A volunteered confession is admissible by constitutional standards even in the absence of warning or waiver of rights. *Miranda v. Arizona, supra; State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581 (1968); *State v. Haddock,* 281 N.C. 675, 190 S.E. 2d 208 (1972). While clearly defendant was in custody at the time he made the incriminating statements, his statements were not made in response to police "interrogation," as that word is defined in *Miranda,* but were more in the nature of volunteered assertions and narrations.

The United States Supreme Court said in *Miranda:*

> "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. . . . Any statement given freely and voluntarily without any compelling influence, is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

Measured by *Miranda* standards, we hold that defendant's initial response to co-defendant Turner's statement was spontaneous and volunteered and was not elicited by police interrogation. Defendant's further narrative was in response to a neutral question by Sheriff McSwain. As we said in *State v. Haddock, supra:*

> "Volunteered statements are competent evidence, and their admission is not barred under any theory of the law, state or federal. *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972); *State v. Ratliff,* 281 N.C. 397, 189 S.E. 2d 179 (1972); *State v. Chance,* 279 N.C. 643, 185 S.E. 2d 227 (1971); *Miranda v. Arizona, supra.* And a voluntary in-custody statement does not become the product of an 'in-custody interrogation' simply because an officer, in the course of defendant's narration, asks defendant to explain or clarify something he has already said voluntarily."

In *Howell v. State,* 5 Md. App. 337, 247 A. 2d 291 (1968), *cert. denied,* 396 U.S. 907 (1969), after defendant had been given the *Miranda* warnings, he stated that he did not wish to be questioned. Approximately an hour and a half later, while being "processed" at the police station, he was told in narrative form certain incriminating statements that his accomplice had made about him. Defendant immediately responded with a statement which was offered in evidence at his trial. It was held that the statement did not result from an "interrogation" but was more in the nature of volunteered information.

In *State v. Fletcher* and *State v. St. Arnold,* 279 N.C. 85, 181 S.E. 2d 405 (1971), the police took the robbery victim, Myers, into defendant's jail cell where a conversation ensued. Myers was allowed to testify at trial: "I asked St. Arnold what did they have against me to rob me; he answered, 'We have nothing against you. We were broke and needed some money.' " This Court held that the statement made to Myers by St. Arnold was not the result of police custodial interrogation and was properly admitted in evidence despite the absence of *Miranda* warnings.

So it is here. There is no evidence in this record of any interrogation or other police procedure tending to overbear the will of the accused in a manner condemned by *Miranda.* Defendant spoke in the voluntary exercise of his own will and without the slightest compulsion of in-custody interrogation procedures. His statements were therefore properly admitted into evidence as volunteered statements made under circumstances requiring neither warnings nor the presence of counsel.

Whether the trial judge erred in finding as a fact that defendant, who was earning $100.00 per week, was not indigent on 19 February 1971, we need not now decide. An indigent's right to or waiver of counsel under G.S. 7A-457(a) does not arise and is not involved with respect to volunteered statements. Defendant's first assignment of error is overruled.

Defendant was tried, convicted and sentenced under G.S. 14-17 which provides in pertinent part as follows:

> "A murder which shall be perpetrated . . . by any . . . willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall

be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury."

[3] Upon the trial of this case the judge instructed the jury, among other things, as follows: "Ladies and gentlemen, you may return one of three verdicts: you may find the defendant guilty as charged—guilty of murder in the first degree, or you may find the defendant guilty of murder in the first degree with a recommendation that punishment be life imprisonment, or you may find the defendant not guilty." The jury returned a verdict of guilty of murder in the first degree with no recommendation and defendant was sentenced to death. He assigns as error the denial of his motion to reduce the judgment from death to life imprisonment. This assignment is sustained. The jury was permitted to exercise its discretion and choose between life and death, a procedure held unconstitutional by the Supreme Court of the United States in *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726 (1972). In *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973), we severed the offending discretionary proviso from the remainder of G.S. 14-17 leaving the remainder of the statute intact with death as the mandatory punishment for murder in the first degree. However, for reasons there stated, we held that the mandatory death penalty for capital offenses "may not be constitutionally applied to any offense committed prior to the date of this decision but shall be applied to any offense committed after such date." *State v. Waddell, supra.* The *Waddell* decision was filed on 18 January 1973. This offense was committed on 5 January 1971. Thus defendant's death sentence cannot stand. The case must be remanded to the Superior Court of Union County for imposition of a sentence of life imprisonment in accord with previous decisions. *State v. Waddell, supra; State v. Miller,* 281 N.C. 740, 190 S.E. 2d 841 (1972); *State v. Hamby* and *State v. Chandler,* 281 N.C. 743, 191 S.E. 2d 66 (1972); *State v. Chance,* 281 N.C. 746, 191 S.E. 2d 65 (1972); *State v. Westbrook,* 281 N.C. 748, 191 S.E. 2d 68 (1972); *State v. Doss,* 281 N.C. 751, 191 S.E. 2d 70 (1972).

In an excellent brief for the North Carolina Civil Liberties Union Legal Foundation, Inc., as amicus curiae, the following question is presented for consideration by the Court: "Whether *Furman v. Georgia,* 408 U.S. 238 (1972), requires that life imprisonment be the sole punishment for previously capital crimes

in North Carolina unless and until the Legislature acts to revise the present statutes." For reasons stated in the brief the Court is urged to reconsider that aspect of its decision in *State v. Waddell, supra,* which holds that the penalty for capital crimes in North Carolina after January 18, 1973, is mandatory death. It is skillfully argued that life imprisonment should be declared to be the sole penalty for the four previously capital crimes in this State—murder, arson, burglary and rape—unless and until the Legislature acts to revise the present statutes.

It suffices to say, while the severability of G.S. 14-17 is adequately documented in *Waddell* and no persuasive reason appears why that decision should be disturbed, the defendant in this case is not subject to the death penalty. The Court is therefore not inclined to renew the debate on capital punishment in a case in which that penalty is not involved.

For the reasons stated, the judgment of the Superior Court of Union County insofar as it imposed the death penalty upon this defendant is reversed. The case is remanded to the Superior Court of Union County with directions to proceed as follows:

1. The presiding judge of the Superior Court of Union County will cause to be served on the defendant Johnny James Blackmon, 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 Johnny James Blackmon, 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 returned by the jury at the trial of this case at the 28 August 1972 Session, will pronounce judgment that the defendant Johnny James Blackmon be imprisoned for life in the State's prison.

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

REMANDED FOR JUDGMENT.

Justice HIGGINS concurs in result.

Chief Justice BOBBITT and Justice MOORE dissent.

JOHN H. STANLEY ON BEHALF OF HIMSELF AND ALL OTHERS OF THE SAME OR LIKE CLASS

— V. —

THE DEPARTMENT OF CONSERVATION AND DEVELOPMENT OF THE STATE OF NORTH CAROLINA AND THE NORTHAMPTON COUNTY POLLUTION ABATEMENT AND INDUSTRIAL FACILITIES FINANCING AUTHORITY

CHARLES M. EDWARDS ON BEHALF OF HIMSELF AND ALL OTHERS OF THE SAME OR LIKE CLASS

— V. —

THE DEPARTMENT OF CONSERVATION AND DEVELOPMENT OF THE STATE OF NORTH CAROLINA AND THE HALIFAX COUNTY POLLUTION ABATEMENT AND INDUSTRIAL FACILITIES FINANCING AUTHORITY

CHARLES RAY HENDERSON ON BEHALF OF HIMSELF AND ALL OTHERS OF THE SAME OR LIKE CLASS

— V. —

THE DEPARTMENT OF CONSERVATION AND DEVELOPMENT OF THE STATE OF NORTH CAROLINA AND THE JONES COUNTY POLLUTION ABATEMENT AND INDUSTRIAL FACILITIES FINANCING AUTHORITY

Nos. 80, 81, 82

(Filed 10 October 1973)

1. **Constitutional Law § 4— standing to attack statute — question of law**

When the facts with reference to a party's relation to a controversy are admitted, whether a party has standing to attack the constitutionality of a statute is a question of law which may not be settled by the parties.

2. **Actions § 3; Courts § 2— absence of controversy — dismissal of action**

Whenever it appears that no genuine controversy between the parties exists, the court will dismiss the action *ex mero motu.*

3. **Constitutional Law § 4— standing of taxpayers to attack statute**

Taxpayers have standing to attack the constitutionality of the Pollution Abatement and Industrial Facilities Financing Act, G.S. 159A-1 *et seq.*, where they alleged that the Act unconstitutionally purports to authorize the issuance of bonds which are exempt from all taxes except inheritance and gift taxes.

4. **Appeal and Error § 3; Constitutional Law § 4— consideration of constitutionality of statute — public interest**

The public interest requires that the Supreme Court decide whether the Pollution Abatement and Industrial Facilities Financing Act is con-

stitutional in whole or in part, although no revenue bonds authorized by the Act have been offered for sale.

5. **Municipal Corporations § 1— municipal corporations — public purpose**

If a legislative enactment comprehends a public purpose, the agency created under it may function as a municipal corporation; otherwise, not.

6. **Municipal Corporations § 1— municipal corporations — public purpose**

A municipal corporation, even with legislative sanction, cannot engage in a private enterprise or assume any function which is not in a legal sense public in nature.

7. **Municipal Corporations § 39; Taxation § 21— municipal corporation revenue bonds — exemption from taxation**

The General Assembly may exempt revenue bonds of a municipal corporation from taxation since the tax-exempt feature makes possible a more favorable sale of the bonds and thereby contributes substantially to the accomplishment of the public purpose for which they are issued.

8. **Taxation § 7— public purpose**

An activity cannot be for a public purpose unless it is properly the "business of government," and it is not a function of government either to engage in private business itself or to aid particular business ventures.

9. **Taxation § 7— public purpose — incidental benefit to public**

Aid to a private concern by the use of public money or by tax-exempt revenue-bond financing is not justified by the incidental advantage to the public which results from the promotion and prosperity of private enterprises.

10. **Taxation § 7— public purpose**

In determining what is a public purpose, the courts look not only to the end sought to be attained but also to the means to be used.

11. **Taxation § 7— public purpose — direct assistance to private entity**

Direct assistance to a private entity may not be the means used to effect a public purpose.

12. **Taxation § 7— public purpose — legislative declaration**

While a legislative declaration that an enactment is for a public purpose carries great weight, it is not conclusive upon the courts.

13. **Taxation § 7— public purpose — tax-exempt revenue bonds**

The public purpose requirement determines not only the projects for which the legislature may authorize the expenditure of tax money but also those which it may empower authorities it creates to undertake and to finance by the issuance of tax-exempt revenue bonds.

14. **Constitutional Law § 13; Nuisance § 10 — abatement and control of pollution — police power**

The abatement and control of environmental pollution are immediately necessary to the public health, safety, and general welfare; and,

in the exercise of the State's police power, the legislature has plenary authority to abate and control pollution of all kinds.

15. Constitutional Law § 11; Taxation § 1— regulation of private industries — police power — taxing power

The power of the State to regulate private institutions and industries under its police power is more extensive than the authority to accomplish the same purpose by use of its taxing power.

16. Nuisance § 10; Taxation § 7— Pollution Abatement and Industrial Facilities Financing Act — unconstitutionality

The creation of county authorities pursuant to the Pollution Abatement and Industrial Facilities Financing Act for the purpose of financing pollution control facilities or industrial facilities for private industry by the issuance of tax-exempt revenue bonds is not for a public purpose, and the Act violates Article V, § 2(1) of the North Carolina Constitution.

IN cases Nos. 80 and 81 petitioners alone appeal from *Hobgood, J.*, 12 March 1973, Civil Session of WAKE; in case No. 82 all parties appeal. The appeals were certified under G.S. 7A-31(b)(1) for initial appellate review by the Supreme Court. They were docketed and argued at the Spring Term as cases Nos. 89, 90, and 91.

These three separate proceedings were instituted in Wake County on 30 November 1972 under G.S. 143-309 (1964) and G.S. 159A-21 (1972) by a citizen and taxpayer of the respective counties of Northampton, Halifax, and Jones for judicial review of resolutions of the North Carolina Board of Conservation and Development determining that the creation of the Pollution Abatement and Industrial Facilities Financing Authority of each of the three counties is for a public purpose and approving bond issues by the Halifax and Northampton Authorities for pollution abatement facilities and by the Jones Authority for an industrial facility project. The petitions for review challenge the constitutionality of the North Carolina Pollution Abatement and Industrial Facilities Financing Act, 1971 Session Laws, Chapter 633, codified as N. C. Gen. Stats., Ch. 159A, §§ 159A-1 through 159A-25 (1972) and hereinafter referred to as "the Act."

In its beginning the Act recites the General Assembly's findings and determination (1) that full employment and prosperity in the State is dependent upon the expansion of industry, which is accompanied by increased noise and gaseous, liquid, and solid wastes which pollute the State's air, land, and waters;

(2) that to control environmental pollution, which is menacing the citizens' health, safety, and welfare, the various levels of government must require and coordinate reduction, treatment, and disposal of pollutants; (3) that lack of employment opportunities in certain areas which have not shared in the State's general prosperity threatens the general safety, morals, and welfare; (4) that unemployment can best be eliminated by attracting and retaining private enterprises and stimulating industrial building programs in the depressed areas of the State; and (5) that in providing for the creation of county authorities which shall operate as corporate political subdivisions of the State for the purpose of (a) pollution control financing "and/or" (b) industrial facilities financing in the counties where employment opportunities are absent and wages and per capita income are below average, the General Assembly acts in the public interest and serves a public purpose. G.S. 159A-2.

G.S. 159A-3 defines the significant terms used in the Act. G.S. 159A-4 authorizes each county to create by resolution or ordinance "a political subdivision and body corporate and politic of the State known as 'The ..... County Pollution Abatement and Industrial Facilities Financing Authority,' " and specifies the manner of its establishment.

Acting in strict compliance with the requirements of G.S. 159A-3, by resolution adopted 1 November 1971, the Board of Commissioners of Jones County created the Jones County Pollution Abatement and Industrial Facilities Financing Authority (Jones Authority). On 6 March 1972 the Halifax County and Northampton County Pollution Abatement and Industrial Facilities Financing Authorities (Halifax Authority and Northampton Authority) were similarly created. Each resolution authorized the Authority created to issue its bonds for pollution control purposes and industrial facility financing purposes, pursuant to and in accordance with the provisions of the Act.

Within 120 days after the creation of the three authorities, as required by G.S. 159A-4(f), each Authority, stating the basis for the request, applied to the State Board of Conservation and Development (Board) for a determination that the Authority's proposed operation is for a public purpose. At the Board's quarterly meeting on 13 May 1972, after investigation and advertisement as required by G.S. 159A-4(f), in separate resolutions the Board made the findings of fact and conclusions summarized below:

Jones County. The proposed operation of the Jones Authority is for a public purpose for that (1) substantial stream pollution of the Trent and White Oak rivers now exists within the county; and (2) the county is a *distressed area* within the meaning of G.S. 159A-3 (6a) a, b, c, d, and f, in that (a) during the immediately preceding calendar year with respect to which published reports are available the established rate of unemployment among the labor force of the county was at least 6%; (b) the estimated average manufacturing wage of factory production workers in the county was at least 10% less than the State average for the same period; (c) the estimated average per capita personal income in the county was 10% less than the State average for the same period; (d) the county has suffered a 1% or more loss of population between 1960 and 1970; and (f) the county is eligible for assistance under "Section 401(a) of the Public Works and Economic Development Act of 1965 (Public Laws 89-136, Title IV, 401)."

Halifax County. The proposed operation of the Halifax Authority is for a public purpose for that (1) substantial air, water, and noise pollution now exists within the county, and (2) the county is a distressed area within the meaning of G.S. 159A-3 (6a), c, d, and f.

Northampton County. The proposed operation of the Northampton Authority is for a public purpose for that (1) substantial air, water, and noise pollution now exists within the county; and (2) the county is a distressed area within the meaning of G.S. 159A-3 (6a), a, b, c, d, and f.

No challenge was made to the foregoing findings of fact or conclusions of law as provided in G.S. 159A-4(f) and G.S. 143-309 and the Board's findings of fact are not in controversy now.

Among the powers which G.S. 159A-5 confers upon an authority is the power (1) to acquire, by any means except eminent domain, real and personal property for use as, or in conjunction with, any industrial facility, pollution control or abatement facility, water management or solid waste disposal facility, and research facilities related to manufacturing, processing manufactured, agricultural, mineral, and animal products ("projects" as defined in G.S. 159A-5); (2) to construct, acquire, own, lease, or renovate one or more projects and to sell, lease, exchange, "or otherwise dispose of" projects; (3) to issue

its bonds to provide funds to pay all or part of any project or to refund bonds already issued.

An authority's project must be located within the county for which it was created. G.S. 159A-6. No project financed under the Act may be operated by an authority, the State, or any of its subdivisions. Such projects must be leased for operation and maintenance under a lease in form and substance as provided in G.S. 159A-7.

Before an authority may issue bonds to finance a project G.S. 159A-21 requires it to obtain the Board's approval of the proposed project. To approve a project the Board must find: (1) The conditions upon which it based its original conclusion that the creation of the authority was for a public purpose have not changed materially. (2) The proposed project, according to information available, will (i) alleviate specific pollution conditions or (ii) "will alleviate or tend to alleviate" the conditions of below average manufacturing wage, per capita income, or high unemployment and make a significant contribution to the economic growth of the county and advance the prosperity and public welfare of the county and State; and (3) The proposed project will not cause the abandonment of an industrial or research facility existing elsewhere in the State.

If the Board approves the proposed project G.S. 159A-21 requires that it publish notice of its findings and approval in a newspaper of general circulation in the county for which the authority was created. Within 30 days after such publication G.S. 159A-21 provides that the Board's findings and approval may be reviewed in the Superior Court of Wake County as provided by G.S. 143-309. If no "person who is aggrieved" by such findings and approval petitions for review within the prescribed 30 days, the statute declares that the authority to issue the bonds and the legality thereof "shall be conclusively presumed, and no court shall have authority to inquire into such matters."

In addition to the Board's approval of a bond issue an authority must obtain the approval of the Local Government Commission of North Carolina before it is empowered to issue the bonds. G.S. 159A-12. This statute also prescribes the manner in which the form, terms, rate of interest, execution, and sale of the bonds shall be determined, and it requires the proceeds of each bond issued to be used solely for the purposes for which the bonds were issued.

Any bonds issued under the Act "shall not be deemed to constitute a debt of the State or of any political subdivision or of any agency thereof or a pledge of the faith and credit of the State or of any political subdivision or of any such agency, but shall be payable solely from the revenues, proceeds, and other funds pledged therefor." G.S. 159A-11(a). Further, the expenses of an authority, incurred in carrying out the provisions of the Act, are payable only from project revenues, bond sale proceeds, and contributions made to the authority. G.S. 159A-11(b).

G.S. 159A-8 provides that, except for gift and inheritance taxes, any bonds issued by an authority pursuant to the Act, their transfer, and the income therefrom (including any profit made on a sale thereof) shall be exempt from all taxation by the State or any subdivision or agency thereof. An authority is exempt from both income and property taxes, but the statute requires authority's lessee to list the lease-hold interest for taxation at "the same value as the fee interest in that property."

On 3 October 1972, proceeding under G.S. 159A-21, the Halifax Authority applied to the Board for permission to issue bonds for pollution control purposes in the amount of $13,400,000. On 4 October 1972, the Northampton Authority applied for approval of a bond issue for the same purpose in the amount of $2,500,000. The Jones Authority, on 29 September 1972, applied for approval of a bond issue in the amount of $3,000,000 for the purpose of financing industrial facilities. Thus, in cases Nos. 80 and 81, pollution control bonds only are involved; in case No. 82, industrial bonds only.

The situation which prompted the Halifax and Northampton Authorities to propose the bond issues for which they seek approval is summarized below:

The Albemarle Paper Company (Albemarle), a Delaware corporation, doing business in North Carolina is a wholly owned subsidiary of Hoerner-Waldorf Corporation (Hoerner-Waldorf), also a Delaware corporation doing business in this State. Albemarle is engaged in the manufacture of paper and paper products in Northampton and Halifax counties. Its mill is located on the Roanoke River in Roanoke Rapids, Halifax County, directly across the river from the town of Gaston in Northampton County. The mill, which has been in operation for many years, now employs 700 people on a three-shift, seven-day per week basis, 360 days per year. Each day it produces about 937 tons of unbleached Kraft pulp and paper.

The mill's annual air polution emissions are approximately 6.6 million pounds of particulate matter, 5.6 million pounds of odorous sulphur compounds, and 10.5 million pounds of sulphur dioxide. The particulate includes a fine white ash which corrodes the finish on every automobile and causes the paint to peel from houses and all other structures. These air pollutants have a sharp, disagreeable odor which permeates the air and invades every enclosure for miles around. Albemarle's air pollution control devices provide no control for odors.

Albemarle daily discharges liquid effluent (sewage and waste water containing dissolved and suspended solids) into the river. These water pollution emissions are noxious and deleterious to the health and property of the citizens of Halifax and Northampton counties. This waste, which "flows in million gallons per day," is chemically reduced by natural biological activity. Microorganisms in the river, while consuming this waste, also consume the oxygen dissolved in the river. The uncontrolled discharge of waste into the river reduces dissolved oxygen to the point where aquatic life cannot exist. Such discharges from Albemarle's mill have, from time to time, resulted in massive fish kills in the river, the last recorded one having occurred in April 1972. In April 1963 a discharge by Albemarle killed an estimated 57,200 fish. Wood sugar dissolved in Albemarle's waste water causes slime bacteria to develop in spectacular proportions. Green slime pervades the river and covers the lines of fishermen. Below the mill the river carries the same terrible odors as the mill itself.

On account of both its air and water pollution emissions Albemarle is now and has been conducting its operations in violation of the laws and regulations of the State of North Carolina.

On 30 June 1969 Albemarle's permit (issued 18 September 1964) to discharge effluent into the river expired. Between that date and 26 November 1971, the record indicates that the company continued to discharge pollutants into the river without a permit. On 26 November 1971, in accordance with N. C. Gen. Stats., Ch. 143, art. 21 (1971 Supp.), Albemarle applied to the State Board of Water and Air Resources for a permit to construct an "Effluent and Treatment System," which would meet legal requirements and treat all the liquid waste from Albemarle's mill and for a permit to discharge waste from the proposed treatment plant into the river. The application stated that

"the proposed works," would be completed and in operation on or before 15 September 1973. The estimated cost of this facility, to be constructed partly in Halifax County and partly in Northampton County, was $3,380,000. The cost of the Halifax portion was estimated to be $880,000; the Northampton portion, $2,500,000.

On the basis of the foregoing application, on 2 March 1972, the Water and Air Resources Board issued to Albemarle a conditional permit, effective until 31 December 1976, to construct the proposed waste water treatment facility and to discharge the treated effluent into the river. One of the conditions imposed was that the proposed facility be completed and in operation on or before 15 September 1973. The permit directed that the "existing wastewater treatment facility" be maintained and operated "so as to effect overall reductions in pollution and to produce an effluent of such quality as to protect the receiving stream."

On 3 May 1972 the Board of Water and Air Resources issued a temporary permit to Albemarle "for exact planning" of an air pollution control project for its plant in Roanoke Rapids to be located entirely in Halifax County and to cost $12,520,000. It is to finance this air pollution project and also the $880,000 portion of the Albemarle water treatment system to be constructed in Halifax County that the Halifax Authority proposes to issue revenue bonds in the sum of $13,400,000. It is to finance the construction of that portion of the water treatment system to be located in Northampton County that the Northampton Authority proposes to issue revenue bonds in the amount of $2,500,000.

The construction of the air and water pollution control facilities for which permits have been issued to Albemarle is necessary to bring it in compliance with the applicable statutes, rules, and regulations.

On 1 September 1972 the Halifax and Northampton Authorities, Albemarle, and Hoerner-Waldorf entered into a contract with reference to these facilities under which the respective authority, pursuant to the Act, would acquire the site, finance and construct that portion of the project located in its county and, upon terms consistent with G.S. 159A-7, lease the facilities to Albemarle.

Inter alia, the contract provides that (1) the implementation and legal effectiveness of the agreement are wholly dependent upon the successful resolution of the legal questions with respect to the power of the Authorities to issue revenue bonds; (2) this power and the legality of the bonds having been established, the Authorities will authorize and sell the bonds as soon as practicable; (3) the proceeds from the sale of the bonds will be applied to the acquisition and construction costs of the pollution control facilities, including the reimbursement of Albemarle of moneys expended by it in connection with such acquisition and construction; (4) should the proposed financing arrangement fail for any reason to materialize or to be completed successfully Albemarle will indemnify the Authorities for any expenses incurred up to the time the program is terminated; (5) Hoerner-Waldorf will execute to the trustee for the bondholders an unconditional guaranty that the principal of the bonds, any premium, and the interest thereon will be promptly paid as the same become due.

The prospective lease agreement, attached to the contract as an exhibit, provided, *inter alia,* that Albemarle will (1) maintain the facilities, (2) pay to the Authorities a rental sufficient "to pay the principal of, interest on, and redemption premium, if any, on the bonds" when the same become due and also "all costs, fees, and expenses" incurred by the Authorities in providing the financing of the facilities and performing their obligations under the contract-lease agreements; (3) pay ad valorem taxes lawfully assessed on its leasehold interest; (4) be obligated to purchase the facilities for the sum of $100 at the termination of the lease following full payment of the bonds (or upon specified contingencies not here material); and (5) have the option after ten years from the date the final installment of the first year's rental obligation is payable under the lease, to purchase the facilities for a sum sufficient to redeem the bonds, to pay all expenses incident thereto, and any obligations payable under the agreements with the Authorities, plus $100.

The facts motivating the Jones Authority to seek approval of the industrial facilities bonds which it proposes to issue in the amount of $3,000,000 are summarized below:

Albemarle has proposed to construct and operate in Jones County a lumber plant which will (1) cost approximately

$3,000,000; (2) produce 30,000,000 board feet of air-dried, planed dimension lumber on a 245-day, 3-shift operation; (3) employ 83 people at an average wage of $160 per week; (4) activate 10-15 logging firms in the area which will employ 150 people at "wages probably exceeding the average Jones County wage"; (5) provide "stumpage benefits for landowners"; and (6) provide $30,000 annually in lieu of ad valorem taxes.

The Jones Authority, Albemarle, and Hoerner-Waldorf have entered into an agreement in which the Jones Authority agrees to issue revenue bonds to finance the construction of the lumber plant, which it will own in fee and lease to Albemarle by a lease agreement consistent with G.S. 159A-7. There is no substantial difference between this contract and the lease agreement and the contract and lease agreement which Albemarle and Hoerner-Waldorf made with the Halifax and Northampton Authorities. Hoerner-Waldorf also guarantees Albemarle's performance of its contractual obligations to the Jones Authority.

On 14 October 1972 the Board made the findings required by G.S. 159A-21 and approved the application of each of the three Authorities to issue its revenue bonds for the respective project in aid of Albemarle. Thereafter notice of the Board's findings and approval of the bond issues was duly published.

Within thirty days after the Board published notice of its approval of the bond issues proposed by the Halifax, Northampton, and Jones Authorities, in strict compliance with G.S. 159A-21 and G.S. 143-309, petitioners instituted these three proceedings for judicial review of the Board's findings and conclusions. Each petitioner alleges that he is a person aggrieved by the Board's approval of the bond issue proposed by his county's Authority and that he is entitled to judicial review of the Board's action as provided in G.S. 143-307 (1964). Defendants admit this allegation.

The petitioner in case No. 80, John H. Stanley, is a citizen and resident of Northampton County, where he owns real and personal property upon which he pays both municipal and county ad valorem taxes. To the State of North Carolina he pays income, sales, and intangible taxes and a privilege tax to practice medicine. He engages in farming operations in Northampton County which require him to borrow money from time to time and to execute notes therefor which are not tax exempt. He owns stock and securities in one or more North Carolina

corporations which own real and personal property in the State and which have issued bonds which are not tax exempt.

Petitioner in case No. 81, Charles M. Edwards, is a citizen and resident of Halifax County, where he is engaged in the real estate business and owns a trailer park. Except for his occupation no material difference exists between his situation, status, and holdings and that of petitioner in case No. 80. Petitioner in case No. 82 is Charles Ray Henderson, a citizen and resident of Jones County, a salaried employee and the owner of a farm and vineyard in Jones County. Except for his occupation, his situation is likewise not materially different from that of the other two petitioners.

Each petitioner alleges that the Act is unconstitutional, and any bonds issued under it are invalid in that the Act (1) violates Article V, Section 2(1) of the North Carolina Constitution and the due process and equal protection clauses of the State and Federal Constitutions by authorizing the use of the proceeds of revenue bonds for other than public purposes; (2) violates Article V, Section 3(2) of the Constitution by lending the credit of the State without a vote of the people; (3) violates Article V, Section 2(5) and 4 of the Constitution by creating a debt of the State or a county without a vote of the people; (4) violates Article V, Section 2(3) of the Constitution by exempting from taxation the property of an entity that is not a municipal corporation; (5) violates Article I, Section 6 and Article II, Section 1 of the Constitution by unlawfully delegating legislative authority to the created Authorities, the Department and Board of Conservation and Development, and the Local Government Commission.

In the Superior Court these three cases were consolidated for trial and heard by Judge Hobgood on the pleadings and stipulations. The facts as hereinabove stated are either alleged and admitted in the pleadings or are set out in the stipulations. Additionally, the parties made the following stipulations:

A. Each of the Authorities entered into the agreements with Albemarle and Hoerner-Waldorf without any finding by the Authorities or by the Board of Conservation and Development that Albemarle is unable to finance the proposed projects without the assistance of the Authorities.

B. The revenue bonds which the Authorities propose to issue, the income therefrom, and the transfer and profits from

the sale thereof, "are declared exempt" from all State and Federal taxation except inheritance and gift taxes and tax-exempt bonds carry a lower interest rate than bonds of like quality which are not tax exempt.

C. The issuance of tax-exempt bonds rather than corporate bonds will reduce tax revenues to local, State, and Federal governments; and petitioners, as taxpayers, "are constitutionally entitled to require that the proceeds from tax-exempt bonds be used for a public purpose and to be free from the additional burden placed upon [them] as taxpayers by the granting of tax exemptions other than for a public purpose."

Upon the hearing Judge Hobgood adopted the stipulations in each case. In Nos. 80 and 81 he decreed that the Act violates none of the constitutional provisions upon which petitioners rely and that the tax-exempt bonds which the Halifax and Northampton Authorities propose to issue for pollution abatement purposes are for a public purpose and lawful. In case No. 82 he adjudged (1) that the Act, insofar as it pertains to the financing of industrial facility projects, violates N. C. Const. art. V, § 2(1), the due process and equal protection clauses of N. C. Const. art. I, § 19, and the Fourteenth Amendment of the United States Constitution; and (2) that the issuance of tax-exempt bonds pursuant to the Act for industrial facilities purposes is unlawful.

In this Court the three appeals were consolidated for argument and decision.

Taylor, Brinson & Aycock for petitioners.

Attorney General Morgan; Chief Deputy Attorney General McGalliard for defendant, Department of Conservation and Development.

Felton Turner, Jr., for defendant, Northampton County Pollution Abatement and Industrial Facilities Financing Authority.

Rom B. Parker, Jr., for defendant, Halifax County Pollution Abatement and Industrial Facilities Financing Authority.

James R. Hood for defendant, Jones County Pollution Abatement and Industrial Facilities Financing Authority.

SHARP, Justice.

The first question we consider is whether the petitioners, as taxpayers, have standing to challenge the constitutionality of the Act.

The Halifax, Jones, and Northampton Authorities have not spent—nor do they contemplate spending—any funds derived from taxation. As yet they have issued no bonds. However, they were created solely for the purpose of issuing tax-exempt revenue bonds to finance the projects specified in the Act and, if—and when—there is a "successful resolution" of the constitutional questions with respect to their power to issue such bonds, they propose to issue them immediately.

Under our decisions "[o]nly those persons may call into question the validity of a statute who have been injuriously affected thereby in their persons, property or constitutional rights." *Canteen Service v. Johnson,* 256 N.C. 155, 166, 123 S.E. 2d 582, 589 (1962). *See also Nicholson v. Education Assistance Authority,* 275 N.C. 439, 168 S.E. 2d 401 (1969); *In Re Assessment of Sales Tax,* 259 N.C. 589, 131 S.E. 2d 441 (1963); *Carringer v. Alverson,* 254 N.C. 204, 118 S.E. 2d 408 (1961); *James v. Denny,* 214 N.C. 470, 199 S.E. 617 (1938). The rationale of this rule is that only one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue. "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentations of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Flast v. Cohen,* 392 U.S. 83, 99, 20 L.Ed. 2d 947, 961, 88 S.Ct. 1942, 1952 (1968).

[1, 2] All parties to these proceedings, anxious to have resolved the legal questions which will determine the validity of the bonds, have requested the Court, "in the public interest," to decide the constitutional questions which have been raised. They also stipulate that each petitioner is, within the meaning of G.S. 143-307, a party aggrieved by the Board's action in approving the issuance of the bonds and that each has standing to obtain judicial review of the Board's action. Standing, however, like jurisdiction, cannot be conferred by stipulation. When, as here, the facts with reference to a party's relation to a controversy are admitted, whether the party has standing to attack

the constitutionality of a statute is a question of law, which may not be settled by the parties. *Nicholson v. Education Assistance Authority, supra; Carringer v. Alverson, supra.* Whenever it appears that no genuine controversy between the parties exists, the Court will dismiss the action *ex mero motu. Bizzell v. Insurance Co.*, 248 N.C. 294, 103 S.E. 2d 348 (1958).

[3] In this case, however, we hold that the petitioners have standing to assail the constitutionality of the Act and that a genuine controversy between them is ripe for decision. *See Lide v. Mears*, 231 N.C. 111, 56 S.E. 2d 404 (1949).

Petitioners have alleged, *inter alia*, that in G.S. 159A-8 the Act unconstitutionally purports to authorize the issuance of bonds which are exempt from all taxes except inheritance and gift taxes. If this purported exemption is unconstitutional petitioners will be injured unless its invalidity is judicially declared for the exemption of any property from its fair share of the public burden, to that extent, increases the burden imposed upon all other taxable property. "A taxpayer injuriously affected by a statute may generally attack its validity. Thus, he may attack a statute which . . . exempts persons or property from taxation, or imposes on him in its enforcement an additional financial burden, however slight." 16 C.J.S. *Constitutional Law* § 80, at 247-48 (1956).

In *Price v. Philadelphia Parking Authority*, 422 Pa. 317, 221 A. 2d 138 (1966) it was held that the exemption of property from taxation reduces the tax base and has the same effect upon a taxpayer as the unlawful expenditure of tax funds even though he is unable to establish any injury other than his interest as a taxpayer. *See also Village of Moyie Springs v. Aurora Mfg. Co.*, 82 Idaho 337, 353 P. 2d 767 (1960). In *Martin v. Housing Corp.*, 277 N.C. 29, 175 S.E. 2d 665 (1970), and in *Webb v. Port Commission*, 205 N.C. 663, 172 S.E. 377 (1934), this Court, without discussion, permitted taxpayers, as such, to attack the constitutionality of acts which exempted certain revenue bonds from taxation.

Ordinarily, the interest rate on tax-free revenue bonds of a state agency is appreciably lower than that of the bonds of a private corporation, for their tax-exempt feature makes possible a more favorable sale. *Education Assistance Authority v. Bank*, 276 N.C. 576, 174 S.E. 2d 551 (1970). Indeed, the tax advantage is the primary appeal which such bonds have for investors.

Mitchell v. Financing Authority, 273 N.C. 137, 159 S.E. 2d 745 (1968). If, therefore, the bonds which the Authorities propose to issue cannot constitutionally be made tax exempt the only reason for the method of corporate financing provided by the Act vanishes. In recognition of this fact Albemarle's contract with each of the Authorities provides: "The CORPORATION and the AUTHORITY reiterate and agree that the implementation and legal effectiveness of this Agreement are wholly dependent and conditioned upon the successful resolution of the legal questions hereinbefore mentioned. . . . "

[4] It is quite clear, therefore, that pending a definitive decision from this Court, these Authorities are effectively stymied, for it cannot be known whether they are bodies corporate or, in effect, nonentities. We concur in the view that the public interest requires that we now decide whether the Act is constitutional in whole or in part. *Smith v. County of Mecklenburg,* 280 N.C. 497, 187 S.E. 2d 67 (1972).

The provisions of G.S. 159A-21 also make an immediate decision appropriate. This section provides that if the Board's approval of the bonds is not challenged by the procedure outlined in G.S. 143-309 within thirty days after notice of such approval has been published, an authority's power to issue the bonds and the legality thereof shall be conclusively presumed, "and no court shall have authority to inquire into such matters." Since petitioners instituted this proceeding for judicial review within the prescribed time the question whether they could thereafter have contested the tax exemption which G.S. 159A-8 purported to give these bonds is not before us. Manifestly, however, in the face of the limitation imposed by G.S. 159A-21, any taxpayer who desired to contest the exemption might reasonably apprehend that he would lose his right to do so if he waited until the bonds had been issued and sold, or offered for sale. *Cf. Harper v. Schooler,* 258 S.C. 486, 189 S.E. 2d 284 (1972). For this reason, all other considerations aside, we think it would be inappropriate to hold that the question is not ripe for decision.

Both factual and procedural differences distinguish these three petitions for review of the Board's administrative approval of the Authorities' proposed bond issues from the case of *Nicholson v. Education Authority, supra.* In *Nicholson,* an action for a mandatory injunction, the plaintiff taxpayer sought to nullify all prior transactions between the defendant State

Education Assistance Authority (Education Authority) and all others and to enjoin the issuance of a second series of bonds which it proposed to issue. Its first series of bonds in the amount of $3,000,000 had been sold at a private sale. This Court held that, on the basis of Nicholson's allegations, which showed no threat of immediate irremediable injury to him, he was not entitled to injunctive relief. The opinion did not specifically discuss the question of the plaintiff's right as a taxpayer to contest in that action the constitutionality of the tax exemption which G.S. 116-209.13 (1971 Supp.) conferred upon the bonds of the Education Authority. We note that the act creating the Education Authority contained no such limitation upon a taxpayer's right to contest the legality of the bonds as does G.S. 159A-21. We also note that, in a properly constituted action for a declaratory judgment (G.S. 1-253 *et seq.)*, this Court has since passed upon the constitutionality of the act creating the Education Authority and the validity of its bonds. *Education Assistance Authority v. Bank, supra.*

We proceed, therefore, to the decisive questions raised by petitioner-appellants' assignments of error in cases numbered 80 and 81: (1) Are the Northampton and Halifax Authorities, created under the Act to finance pollution abatement and control facilities for a private industry by the issuance of revenue bonds, established for a public purpose and (2) do the provisions of the Act (G.S. 159A-8) which purport to exempt such bonds from taxation violate N. C. Const. art. V, §§ 2(1) and 2(3)? These questions are, in fact, but one.

[5] Under the Act each of the three Authorities is denominated a "political subdivision and body corporate and politic of the State," that is, a municipal corporation. The term *municipal* refers not only to cities and towns; ". . . when applied to corporations, the words 'political,' 'municipal,' and 'public' are used interchangeably." *Smith v. School Trustees,* 141 N.C. 143, 150, 53 S.E. 524, 527 (1906); *Wells v. Housing Authority,* 213 N.C. 744, 750, 197 S.E. 693, 697 (1938). If a legislative enactment comprehends a public purpose, the agency created under it may function as a municipal corporation; otherwise, not. *Southern Assembly v. Palmer,* 166 N.C. 75, 82 S.E. 18 (1914); *Lee v. Poston,* 233 N.C. 546, 64 S.E. 2d 835 (1951); *Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 74 S.E. 2d 310 (1952); *Powell v. Housing Authority,* 251 N.C. 812, 112 S.E. 2d 386 (1959); *Redevelopment Commission v. Guilford County,*

274 N.C. 585, 164 S.E. 2d 476 (1968); 5 Strong's N. C. Index 2d, *Municipal Corporations* § 1 (1968).

[6] A municipal corporation, however, even with legislative sanction, cannot engage in a private enterprise or assume any function which is not in a legal sense public in nature. *Keeter v. Lake Lure,* 264 N.C. 252, 264, 141 S.E. 2d 634, 643 (1965); *Nash v. Tarboro,* 227 N.C. 283, 285, 42 S.E. 2d 209, 211 (1947). *See Dennis v. Raleigh,* 253 N.C. 400, 116 S.E. 2d 923 (1960). Any authority created under the Act is created for a special purpose and unless that purpose is public it cannot issue tax-exempt revenue bonds. N. C. Const. art. V, §§ 2(1) and 2(3) (1971) (formerly art. V, § 3). *See Martin v. Housing Corp., supra* at 57-58, 175 S.E. 2d at 681-682 (1970); *Education Assistance Authority v. Bank, supra* at 588-589, 174 S.E. 2d at 560; *Mecklenburg County v. Insurance Co.,* 210 N.C. 171, 185 S.E. 654 (1936); *Webb v. Port Commission, supra;* 49 N. C. L. Rev. 830 (1971). *See also Odd Fellows v. Swain,* 217 N.C. 632, 637-638, 9 S.E. 2d 365, 368 (1940). "The reason municipal property is granted immunity from taxation is, that it is supposed to be dedicated to a public use." *Nash v. Tarboro, supra* at 289, 42 S.E. 2d at 214. *See Warrenton v. Warren County,* 215 N.C. 342, 2 S.E. 2d 463 (1939). It is for the same reason that the bonds of a municipal corporation are exempt from taxation.

[7] "Since the tax-exempt feature makes possible a more favorable sale of revenue bonds and thereby contributes substantially to the accomplishment of the public purpose for which they are issued," this Court holds that the General Assembly *may* exempt them from taxation by the State or any of its subdivisions. *Education Assistance Authority v. Bank, supra* at 589, 174 S.E. 2d at 560; *Martin v. Housing Corp., supra* at 57, 175 S.E. 2d at 681. The rationale for this exemption is stated in *Pullen v. Corporation Commission,* 152 N.C. 548, 558, 68 S.E. 155, 159 (1910).

Patently the Act was designed to enable industrial polluters to finance, at the lowest interest rate obtainable, the pollution abatement and control facilities which the law is belatedly requiring of them. As noted earlier, if it be held that the Authorities cannot constitutionally issue tax-free revenue bonds for that purpose the Act fails, for it has no other objective.

We note that since 1 January 1969 the interest on industrial development bonds of a political subdivision of a State is

excluded from gross income under Section 103(a)(1) of the Internal Revenue Code, 26 U.S.C.A. § 103(a)(1) (1967), *only* in the instances specified in Code Section 103(c), 26 U.S.C.A. § 103(c) (1973 supp.). *Prima facie,* however, if the Northampton and Halifax Authorities are held to be municipal corporations, their revenue bonds would be excluded from gross income under Code Section 103(c)(4)(F). Semble, at the election of the Jones Authority, its bonds could also be made tax exempt under Code Section 103(c)(6)(D).

Because the concept of public purpose must expand to meet the necessities of changed times and conditions, this Court has not attempted to confine public purpose by judicial definition but has "left each case to be determined by its own peculiar circumstances as from time to time it arises." *Keeter v. Lake Lure, supra* at 264, 141 S.E. 2d at 643. Our reports contain extensive philosophizing and many decisions on the subject. Most recently we have considered the question whether a purpose was public or private in *Foster v. Medical Care Comm.,* 283 N.C. 110, 195 S.E. 2d 517 (1973); *Martin v. Housing Corp., supra; Redevelopment Comm. v. Guilford County, supra; Mitchell v. Financing Authority, supra.* These decisions, and the cases on which they are based, establish the following principles:

[8] (1) An activity cannot be for a public purpose unless it is properly the "business of government," and it is not a function of government either to engage in private business itself or to aid particular business ventures. *See* Note, 49 N. C. L. Rev. 830, 833 (1971). It is only when private enterprise has demonstrated its inability or unwillingness to meet a public necessity that government is permitted to invade the private sector. In *Martin v. Housing Corp., supra,* and *Wells v. Housing Authority, supra,* revenue bonds issued by two public housing agencies for the purpose of providing housing for low-income tenants were held to be for a public purpose. Governmental activity in that field was not an intrusion upon private enterprise, which had eschewed the field. Further, the primary benefits passed directly from the public agency to the public and not to a private intermediary.

[9] (2) Aid to a private concern by the use of public money or by tax-exempt revenue-bond financing is not justified by the incidental advantage to the public which results from the promotion and prosperity of private enterprises.

[10, 11] (3) In determining what is a public purpose the courts look not only to the end sought to be attained but also "to the means to be used." *Turner v. Reidsville,* 224 N.C. 42, 44, 29 S.E. 2d 211, 213 (1944). *See Wells v. Housing Authority, supra.* Direct assistance to a private entity may not be the means used to effect a public purpose. "It is the essential character of the direct object of the expenditure which must determine its validity, and not the . . . degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion." 63 Am. Jur. 2d *Public Funds* § 59 (1972).

In *Foster v. Medical Care Comm., supra,* it was held that tax funds could not be used to finance a nonprofit hospital albeit "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." The rationale was that such aid would violate the constitutional proscription that "tax revenues may not be used for private individuals or corporations, no matter how benevolent." Also implicit in the *Foster* decision is recognition of the fact that the Medical Care Commission would have had no control over a private hospital and no authority to regulate its rates in the public interest. *See City and County of San Francisco v. Ross,* 270 P. 2d 488 (Cal. 1954).

The Court has not heretofore considered whether the abatement of pollution created by a private industry may be accomplished by means of State aid to the industrial polluter in the form of a tax-free revenue bond financing. However, in *Mitchell v. Financing Authority, supra,* we considered the constitutionality of the Industrial Facilities' Financing Act, Chapter 535, N. C. Sess. Laws (1967) (the Mitchell Enactment), which the legislature enacted for the purpose of attracting industry to the State. Petitioner correctly states that any consideration of the constitutionality of the Pollution Abatement and Industrial Facilities Act (the Act) must begin with *Mitchell v. Financing Authority, supra.*

The Mitchell Enactment created the Industrial Financing Authority and authorized it to issue tax-free revenue bonds in order to provide sites and facilities for lease to private industries. These industries, by rental payments to the Financing Authority, would retire the bonds and thereby acquire the property. After exploring the arguments for and against such State

aid to private industry we held that the Financing Authority's primary function, "to acquire sites and to construct and equip facilities for private industry, is not for a public use or purpose," and that the Financing Authority could not expend the tax funds appropriated for its organization. *Id.* at 159, 159 S.E. 2d at 761.

The defendants in cases Nos. 80 and 81, in support of their contention that *Mitchell* does not control decision in these cases, point to the following differences between the Mitchell Enactment and the Act: (1) The aims of the Act are limited (a) to providing "needed assistance" anywhere in the State for the abatement of pollution, a grave public hazard, and (b) to increasing employment and income in "distressed areas"; (2) the Halifax and Northampton Authorities propose to issue bonds only for pollution abatement, an objective which, they argue, the court should determine to be a public purpose "regardless of the result reached concerning the industrial facilities' portion of the Act"; and (3) no expenditure of tax funds is involved here.

In addition to the foregoing, as petitioners point out for the purpose of attacking the Act, in G.S. 159A-20 the Act specifically provides that no authority created under its provisions "shall have any right or power to acquire any property through the exercise of eminent domain or any proceeding in the nature of eminent domain." The Mitchell Enactment contained no such provision.

We consider these specified differences in reverse order.

In *Mitchell v. Financing Authority,* after noting that the term *public purpose* is generally used in the same sense in the law of taxation and eminent domain, we pointed out (1) that were we to hold the Industrial Facilities Financing Authority served a public purpose when it acquired a site and constructed thereon a manufacturing plant for lease to a private enterprise, we would thereby authorize the legislature to give the Financing Authority the power to condemn private property for any project which it decided to undertake; and (2) that the power of eminent domain could not constitutionally be exercised in behalf of a private interest. *Id.* at 158-159, 159 S.E. 2d at 760. *See Redevelopment Commission v. Bank,* 252 N.C. 595, 603, 114 S.E. 2d 688, 694 (1960). In *Foster v. Medical Care Commission, supra,* we pointed out that "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." *Id.* at 126, 195 S.E. 2d at 528. *See* 49 N. C. L. Rev. 830.

Obviously, if we hold the creation of an authority for the purpose of issuing tax-exempt revenue bonds to provide funds for the construction of pollution control and abatement (or other) facilities for lease and ultimate conveyance to a private industry to be for a public purpose, any subsequent legislature could repeal G.S. 159A-20 at will and authorize the condemnation of private property for such a project. The consequences of such a decision cannot be ignored. *See Mitchell v. Financing Authority, supra* at 158-159, 159 S.E. 2d at 760.

[12] The legislative findings and declarations contained in G.S. 159A-2(b)(1)(2), are that pollution control financing as authorized by the Act is for a public purpose in all areas of the State and that industrial facilities financing to provide job opportunities and better wages in counties which are "distressed areas" as defined by the Act is for a public purpose in these areas. Such a legislative declaration, of course, carries great weight. However, it is not conclusive upon the court. *See Foster v. Medical Care Commission, supra* at 125, 195 S.E. 2d at 527; *Mitchell v. Financing Authority, supra* at 144, 159 S.E. 2d at 750. Petitioners suggest that the General Assembly's positive denial of the right of eminent domain to the authorities indicates a lack of confidence in its own declaration.

[13] That the Act appropriates no public funds for the organization and work of the county pollution control authorities, and that these appeals involve no expenditure of tax funds, does not exempt the cases from the rationale of *Mitchell v. Financing Authority*. The public purpose requirement determines not only the projects for which the legislature may authorize the expenditure of tax money but also those which it may empower the created authorities to undertake and to finance by the issuance of tax-exempt revenue bonds.

[14] Does the State serve a public purpose when it assists a private industry in financing the abatement and control of the pollution the industry creates? Beyond any doubt air and water pollution have become two of modern society's most urgent prob-

lems, and noise pollution is likewise a major modern evil. Such pollution knows no boundaries, for it cannot be contained in the area where it occurs. 61 Am. Jur. 2d, *Pollution Control,* §§ 19-30, 53-60, 100 (1972). Regardless of where it occurs, the abatement and control of environmental pollution are immediately necessary to the public health, safety, and general welfare; and, in the exercise of the State's police power, the legislature has plenary authority to abate and control pollution of all kinds. *Taylor v. Racing Asso.,* 241 N.C. 80, 93, 84 S.E. 2d 390, 400 (1954). *See also Shelby v. Power Co.,* 155 N.C. 196, 71 S.E. 218 (1911); *Durham v. Cotton Mills,* 141 N.C. 615, 54 S.E. 453 (1906); 61 Am. Jur. 2d *Pollution Control,* § 69 (1972). For examples of the legislature's exercise of the State's police power to control pollution see, *inter alia,* the following statutes: N. C. Gen. Stats. ch. 143, Art. 21 (Supp. 3C, 1971); ch. 130, Art. 13 (1964), *as amended,* (Supp. 3B 1971); ch. 113A (Supp. 3A 1971); G.S. 14-382 (1919); G.S. 20-128 (1937); G.S. 20-128.1 (1971); G.S. 75A-6(O) (1971); G.S. 75A-10(c) (1965); G.S. 113-265 (1971); G.S. 160A-185 (1971); G.S. 160A-193 (1971).

[15] The power of the State to regulate private institutions and industries under it police power, however, is more extensive than the authority to accomplish the same purpose by use of its taxing power. *Foster v. Medical Care Comm., supra* at 126, 195 S.E. 2d at 528. It does not follow, therefore, that because the State has power to order an industry to abate a nuisance or cease operations it may constitutionally assist the industry in financing the abatement.

Pulp and paper mills are recognized to be among the major industrial pollutants, 61 Am. Jur. 2d *Pollution Control,* § 20 (1972), and Albemarle is no exception. In their briefs defendants pose this question with reference to the pollution which Albemarle is creating: "Does the public in common benefit from the elimination of the dumping of tons of solid waste every day into the Roanoke River, the reduction of odors emitted into the air, the drastic reduction of suspended solids in the air, the elimination of the necessity to breathe air containing various sulphur compounds, the control of slime bacteria in the Roanoke River, the elimination from the air of chemicals so strong that they cause the paint to come off houses and cars, and the general improvement and cleaning up of the total environment?"

To ask this question is, of course, to answer it. Certainly the elimination of the terrible conditions described above will

benefit all the people. Furthermore, they are entitled to its elimination, and the State is now using its police power to abate the nuisance and halt the damage to the environment which this pollution has caused.

It is stipulated that Albemarle's air and water pollution emissions are and have been in violation of the laws and regulations of the State; that it is and has been operating under temporary, conditional permits; and that if Albemarle is to continue its operations it must reduce its air and water emission to the legal limits. *See* G.S. 143-215.2(b); G.S. 143-215.6 (1967). There is no finding that Albemarle is unable to provide the required facilities at its own expense and without outside assistance. Indeed, upon the argument of these cases, defendants conceded that Albemarle is able to correct the pollution it creates and that construction of the necessary facilities is in progress.

It is recognized that the net result of revenue bond financing such as the Act authorizes "is that the municipality lends its tax-free bond issuing power to the private corporation or organization so that the interest on what would otherwise be a private bond issue becomes free of income tax and a low interest rate on borrowed money is obtained." 64 Am. Jur. 2d, *Public Securities and Obligations* § 109 (1972). *See Mitchell v. Financing Authority, supra* at 146, 159 S.E. 2d at 751-752. Thus the Act would permit the Authorities to do indirectly for Albemarle that which the constitution forbids Albemarle to do for itself, that is, to issue tax-free revenue bonds to finance construction of an integral part of its plant. The cost of such construction is just one of the many expenses which a manufacturing enterprise must take into account in fixing the price of its product.

The conclusion is inescapable that Albemarle is the only direct beneficiary of the tax-exempt revenue bonds which the Halifax and Northampton Authorities propose to issue and that the benefit to the public is only incidental or secondary. It cannot be said that a benefit results to the public when the State assists a private industry in financing facilities the law requires the industry to construct without such aid. *See Price v. Philadelphia Parking Authority, supra.* This is especially true when, as here, the industry is able to do its own financing. Opinion of the Justices, 359 Mass. ....., 268 N.E. 2d 149 (1971).

Were the State to aid Albemarle by tax-free revenue bond financing, to that extent it would subsidize a particular pulp and

paper mill which is in competition with other and unsubsidized pulp and paper mills, a violation of N.C. Const. art. V, § 2(1). We take judicial notice that competing pulp and paper mills are located in different counties in widely separated parts of this State. Under the Act the governing body of a county creates a Pollution Abatement and Industrial Facilities Financing Authority in the exercise of its own discretion. Obviously, therefore, the Act does not purport to give any assurance that all competing private industries (taxpayers in the same classification) would receive the same benefits from the Act. Moreover, once any industrial polluter receives the subsidy provided by tax-free revenue bond financing, all others—chemical producers, iron and steel mills, petroleum refineries, smelters, energy producing utilities, et cetera—would be equally entitled to the same subsidy. Incidentally, it can reasonably be anticipated that, were all their demands to be met, industrial revenue bonds would flood the bond market to the detriment of old fashioned municipal bonds backed by the full faith and credit of the municipality seeking to finance schools, sewerage disposal systems, fire equipment and other public ventures.

Pollution control facilities are single-purpose facilities, useful only to the industry for which they would be acquired and to which they would be leased. If that industry were to become insolvent or, for any reason, default in its rental payments and guarantee of the bonds which an authority had issued to finance the facilities, those bonds would soon be in default. A few such defaults would certainly adversely affect the revenue-bond market and, almost certainly, also the credit rating of the county whose governing body had created the defaulting authority. These economic dangers demonstrate the wisdom of N. C. Const. art. V, § 2(1).

The only benefit which could inure to the public from State aid to an industry under mandate to abate its pollution would be the general benefit to the community's economy from the retention of the industry in the event the industry was unable or unwilling to comply with the State's mandate without State aid, and the alternative was to cease operations. Undeniably the consequences of any wholesale lay-off or substantial unemployment for whatever cause is detrimental to a community.

The arguments for and against State aid to private industry for the purpose of attracting or retaining it in the State, and the question whether such aid was for a public purpose, were

both fully examined and considered in *Mitchell v. Financing Authority, supra.* Notwithstanding its recognition that every legitimate business in a community promotes the public good, this Court held in *Mitchell* that the function of the Industrial Development Financing Authority, to acquire sites and to construct and equip facilities for private industry by the issuance of revenue bonds, was not for a public purpose and the expenditure of tax funds appropriated to enable the Financing Authority to commence operation was not constitutionally permissible. By the same token State aid to a private industry in the form of tax-exempt revenue bond financing is equally unconstitutional.

The basic facts in each of the three cases which we now consider raise the same question of public purpose which we decided in *Mitchell v. Financing Authority.* In cases Nos. 80 and 81, the Halifax and Northampton Authorities seek to aid Albemarle, an established industry, in financing the pollution control and abatement facilities which the law is requiring it to install to continue operations; in case No. 82, the Jones Authority seeks to acquire a new industry by financing for Albemarle the construction of a dimension lumber mill. In these three cases the Halifax, Northampton, and Jones Authorities seek—as did the Financing Authority under the Mitchell Enactment—to promote the economic welfare and increase the resources of their respective areas by direct aid to private industry.

In our view restricting State aid to private industry (1) to financing pollution control facilities in any area and (2) to constructing industrial facilities in counties which are distressed areas as defined by G.S. 159A-3(6a) does not differentiate the purpose of the Act from that of the Industrial Financing Act, which we held unconstitutional in *Mitchell v. Financing Authority.* As heretofore pointed out, the cost of financing pollution abatement and control facilities is merely a part of the expense of plant construction. In *Mitchell v. Financing Authority, supra,* and in *Foster v. Medical Care Comm., supra,* we held (1) that direct State aid to a private enterprise for plant and hospital construction is not for a public purpose, and (2) that the stimulation of a depressed economy cannot be accomplished, or attempted, by direct State aid to a private industry, even though incidental benefits result to the area from such assistance. The Act's specifications for "distressed areas" does not take these cases out of the *Mitchell* rationale. *See Mitchell v. Financing Authority, supra* at 156-157, 159 S.E. 2d at 758-759.

[16] Since the State may not directly aid a private industry by the exemption of its bonds for plant construction from taxation, it may not indirectly accomplish the same purpose by authorizing the creation of an authority to issue its tax-exempt revenue bonds for that same purpose. We hold, therefore, that the creation of the Halifax, Northampton, and Jones County Authorities for the purpose of financing pollution abatement and control facilities or industrial facilities for private industry by the issuance of tax-exempt revenue bonds is not for a public purpose and that the Act which purports to authorize such financing violates N. C. Const. art. V, § 2(1). This ruling makes it unnecessary to decide whether the Act violates any other provisions of the Constitution or to consider petitioners' appeal in case No. 82.

In cases Nos. 80 and 81 the judgments of the court below are reversed, and the cases are remanded to the Superior Court of Wake County for entry of judgment in accordance with plaintiff's prayer for relief. In case No. 82 the judgment of the court is affirmed.

Cases Nos. 80 and 81, reversed and remanded.

Case No. 82, affirmed.

STATE OF NORTH CAROLINA v. CONNIE LEE ARNOLD

No. 9

(Filed 10 October 1973)

1. **Criminal Law § 99— judge's remarks to solicitor and defense counsel — no expression of opinion**

The trial judge in a rape case did not express an opinion in violation of G.S. 1-180 where his remarks, made for the purposes of insuring an orderly trial and conserving the court's time, were clearly addressed to *both* the Solicitor for the State and defendant's counsel.

2. **Criminal Law § 33— relevancy of evidence**

It is not required that evidence bear directly on the question in issue, and evidence is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known, to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact.

3. Rape § 4— evidence of prior abduction by defendant — relevancy — admissibility to show common plan

In a rape case where the ultimate issue for the jury was whether the act of intercourse was with the consent of the victim, evidence that defendant picked up another girl earlier on the day of the alleged crime at the same place he picked up his victim, took her along the same route into a rural area, and used the same language to quell her fears, though tending to show that defendant had committed another independent crime and not bearing directly upon the ultimate question before the jury, did tend to disclose a common plan or scheme by defendant to pick up a female and gratify his sexual desires and did tend to shed some light upon the alleged crime and defendant's conduct and motives; therefore, the evidence was relevant and properly admitted by the trial court.

4. Rape § 4— evidence that defendant was at crime scene — relevancy

In a rape case testimony by one witness that she saw an automobile like that of defendant's parked at the crime scene several hours before the offense allegedly occurred and saw the driver of the vehicle speak to a girl standing nearby, and testimony by another witness that defendant offered her a ride several hours before the offense allegedly occurred was properly admitted, since the testimony presented circumstances not too remote in time to have probative value which tended to aid the jury in understanding the conduct and motives of the parties.

5. Rape § 5— sufficiency of evidence

Evidence in a rape case was sufficient to withstand defendant's motion for nonsuit where it tended to show that defendant offered his victim a ride to her college dormitory, that he took her to a rural area instead where he had intercourse with her, and that the victim resisted defendant but he was physically stronger than she and overpowered her.

6. Rape § 6— failure to instruct on lesser included offense — no error

In a rape prosecution where all of the evidence revealed a completed act or completed acts of sexual intercourse and the factual dispute related only to whether the act or acts were by consent or as a result of force or coercion, the trial court did not err in failing to instruct the jury that they might find defendant guilty of a lesser included offense.

7. Criminal Law § 128— motion to set aside verdict — denial proper

The trial judge in a rape case did not abuse his discretion in denying defendant's motion to set aside the guilty verdict as being against the greater weight of the evidence.

Chief Justice BOBBITT dissenting.

Justice SHARP joins in the dissenting opinion.

APPEAL by defendant from *Cooper, J.*, 4 December 1972 Session of ORANGE Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging him with the rape of Sally Campbell. He entered a plea of not guilty.

The State's evidence tends to show that on the night of 7 September 1972 at about 9:30 p.m., Sally Campbell, a student at Duke University, was waiting for a bus near Gilbert-Adams Dormitory on the Duke East Campus. This point was about a mile from her dormitory on the West Campus of Duke University. A brown 1964 Impala Chevrolet pulled over to the curb, and when the driver opened the door, she entered the car. She asked him to take her to West Campus. She had not previously known defendant, but in court she identified him as the operator of the automobile. He did not take her to the West Campus but drove back to and through the East Campus, to Route 70 and into rural Orange County. She asked him several times to turn around, to stop, or to let her out. Defendant replied "I will, I will" and "It won't cost you a dime." Defendant turned off Route 70 near a farm equipment store, and after traveling less than five minutes over bumpy roads, over a small bridge and between two brick pillars, he parked the car in a grassy area which was wooded on three sides. There were no lights in the area. She was crying and pleading with defendant to take her back. He roughly pulled her toward him, pushed her down on the seat, and removed her blue jeans, shoes and underpants. She stated that she attempted to philosophically convince him that he was doing wrong. He removed his own clothes and by force and against her will had sexual intercourse with her three times.

Thereafter, defendant carried her back to her dormitory, and she kissed him good night. She agreed to kiss him because she thought she could thereby more easily get out of the car.

After leaving defendant's car, she went to her room and told her roommate, Linda Davis, what had happened. She talked with Linda and other friends until about 2:00 a.m. On the following day, she went to her regular classes and worked in the library during the afternoon. She saw Dr. Young, at Duke University, at about 5:30 p.m. on that day. She thereafter saw Dr. Nowlin who sent her to the hospital emergency room where she saw Dr. Curry and Dr. Rock. The latter physicians examined her and took vaginal smears. She later talked to officers of the Duke Public Safety Office, and on a subsequent day she accom-

panied officers to the spot where defendant had parked his car.

On cross-examination, Miss Campbell testified that defendant stopped for at least two stop lights, and she could have opened the door and left the car if she had so desired. Before they stopped at the first light, she knew that defendant was not a student and that he had probably been drinking. She stated that prior to the attack she engaged in a philosophical argument with defendant concerning the reasons she did not "want to make love," and that at this time defendant showed that "his will was stronger than hers." She admitted that defendant never threatened to harm her physically or threatened to use any deadly weapon. After the entire incident was concluded, she was without bruises or cuts, and none of her clothes were torn or damaged. She suffered intense pain because she had never had sexual relations with anyone before.

Miss Campbell did not make the appointment to see the Dean or Dr. Nowlin, and she became aware that someone had made these appointments on the afternoon after the attacks. Although she weighed 220 pounds, she was not able to successfully resist defendant.

Linda K. Davis testified that she roomed with Sally Campbell and that Sally returned to their room at about twenty minutes after midnight on 8 September 1972. Shortly after her return, she began to sob and appeared to be hysterical. Two other girls came to their room, and there was a discussion of the medical aspects of possible infection, pregnancy, and of the legal implications regarding the attack. Miss Davis washed Sally Campbell's clothes and did not observe any blood on or damage to the clothes. Miss Davis made the appointment with Dr. Young for Sally Campbell, and Sally appeared to be very upset when she was informed of the appointment.

James P. Summers, Detective Lieutenant with the Duke Public Safety Office, testified as to statements made to him by Sally Campbell on 8 September 1972. His testimony tended to corroborate Sally Campbell's testimony.

Dr. Steven Leroy Curry, admitted as an expert in the field of gynecology, stated that he examined Miss Campbell on the evening of 8 September 1972 at about 9:00 p.m., and after performing a physical examination (including a smear which revealed the presence of sperm) it was his opinion that Sally Campbell could have been raped. He found no damage to the

hymen or membrane which might have occurred within 24 hours of his examination.

The testimony of the witnesses Holly Hoxeng, Carol Chase and Miriam Kaufman will be hereinafter considered.

The testimony of other State's witnesses is cumulative or not pertinent to decision.

Defendant testified that he was a resident of Mountain City, Tennessee, and he first saw Sally Campbell at about 9:00 p.m. on 7 September 1972 while he was on his way to Duke Hospital to see someone about a job. Miss Campbell was standing in a curve in the road in the act of "hitch-hiking." He stopped and she entered his car. He then asked her if she wanted to ride around for a while and she replied, "Yes, why not?" He drove ahead for a few blocks and turned back in the direction from which he had come. They exchanged names and talked casually about music as they proceeded on Route 70 and then down a rural road to a spot near a pond where he had previously fished. Miss Campbell at no time asked him to turn around or to go back. There, with her consent, he engaged in one act of sexual intercourse with Sally Campbell. They talked for a while, and she then directed him to her dormitory. When they arrived at the dormitory, they kissed good night, and he left. When he saw Sally Campbell at about 9:00 or 9:30 on the night of 7 September 1972, it was the first time he had ever seen her, and it was the first time on that day that he had been by the place where he picked her up. Defendant stated that he went back to Tennessee a day or two after the 7th of September because he had obtained employment there.

Patsy Arnold, defendant's wife, testified that defendant was a good husband who tried his best to support his family. She stated that she had received letters from her husband after his arrest which contained denials of his guilt of the charges pending against him.

Dr. James Ray Dingfelder, admitted as an expert in gynecology, stated that in his opinion ". . . a violent and forceful penetration of the vagina of a female person who is resisting and who had constricted or tight muscles could produce irritation or inflammation. This result is likely but not absolutely necessary."

The jury returned a verdict of guilty of rape. Defendant appealed from judgment sentencing him to life imprisonment.

Attorney General Robert Morgan by Associate Attorney General Thomas Maddox, Jr., for the State.

Michael D. Levine for defendant appellant.

BRANCH, Justice.

[1] Defendant first contends that the trial judge committed reversible error by expressing an opinion prejudicial to defendant in the presence of the jury.

During the cross-examination of Sally Campbell, defendant's counsel introduced several photographs into evidence. At that time the following exchange occurred:

> "COURT: All right, gentlemen. Mr. Levine, have you got any more Exhibits you intend to introduce during this trial, any statements, documents, anything of that nature?
>
> MR. LEVINE: Yes, sir. There may be one or two more things.
>
> COURT: All right. Mr. Pierce, do you have any documents or physical evidence you plan to introduce?
>
> MR. PIERCE: No, sir, your honor.
>
> COURT: All right, I want you both to get together. Show each other everything you want to introduce so we don't have the jury sitting here waiting while you all go over the stuff you should have done beforehand. Let's get on with this."

It is well established that every person charged with a crime has a right to trial before an impartial judge and an unprejudiced jury. G.S. 1-180. *State v. McBryde,* 270 N.C. 776, 155 S.E. 2d 266; *State v. Belk,* 268 N.C. 320, 150 S.E. 2d 481. And any intimation or expressed opinion by the judge at any time during the trial which prejudices the jury against the accused is ground for a new trial. *State v. Frazier,* 278 N.C. 458, 180 S.E. 2d 128; *State v. Douglas,* 268 N.C. 267, 150 S.E. 2d 412. However, whether the accused was deprived of a fair trial by the trial judge's remarks must be determined by the

probable effect upon the jury in light of all attendant circumstances, the burden of showing prejudice being upon the appellant. *State v. Faust,* 254 N.C. 101, 118 S.E. 2d 769; *State v. Gibson,* 233 N.C. 691, 65 S.E. 2d 508. The judge conducting a jury trial is the governor of the trial for the purpose of assuring its proper conduct and it is his right and duty, *inter alia,* to control the course of the trial to the end that the court's time be conserved and the witnesses be protected from overprolonged examination. *State v. Frazier, supra; State v. Mansell,* 192 N.C. 20, 133 S.E. 190.

Here the judge's remarks were clearly addressed to *both* the Solicitor for the State and defendant's counsel for the purposes of insuring an orderly trial and conserving the court's time.

There is no merit in this assignment of error.

Defendant's next assignment of error relates to the admission of testimony of the witnesses Miriam Kaufman, Carol Chase and Holly Hoxeng.

His principal argument is directed to the testimony of Miriam Kaufman, a student at Duke University. Miss Kaufman testified that she was waiting for a bus at the Gilbert-Adams bus stop on 7 September at about 4:40 p.m. when defendant drove up in a beige car and asked her if she wanted a ride. She accepted, but instead of taking her to West Campus he followed a route along Highway 70 into rural Orange County. Although he did not threaten her, he several times said that it was not going to cost her anything. Miss Kaufman became frightened and jumped out of the automobile. She managed to obtain a ride with one of her teachers who lived in the same area, and upon reaching the campus, she reported the incident to the Duke Security authorities.

In determining the admissibility of this evidence, we first consider its relevancy.

[2] Evidence is relevant if it has any logical tendency to prove a fact at issue in a case, Stansbury N. C. Evidence 2d Ed. § 77, and in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible. *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506; *State v. Knight,* 261 N.C. 17, 134 S.E. 2d 101; *State v. Ham,* 224 N.C. 128, 29 S.E. 2d 449. It is not required that evidence bear directly

on the question in issue, and evidence is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known, to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact. *Jones v. Hester,* 260 N.C. 264, 132 S.E. 2d 586; *Redding v. Braddy,* 258 N.C. 154, 128 S.E. 2d 147; and *Bank v. Stack,* 179 N.C. 514, 103 S.E. 6.

[3] All of the evidence in this case shows that defendant and prosecuting witness engaged in sexual intercourse, thus the ultimate issue for the jury was whether the act was with the consent of Sally Campbell. Defendant testified that he had not earlier on that day been near the spot where he picked up Sally Campbell. Whether Miss Campbell voluntarily accompanied the defendant to the secluded spot where the rape allegedly occurred is sharply controverted, as is the question of consent to the act of intercourse. Although the evidence under the attack does not bear directly upon the ultimate question before the jury, it does tend to shed some light upon the alleged crime and defendant's conduct and motives. We, therefore, hold that the evidence was relevant.

Relevant evidence is properly received as substantive evidence unless it is forbidden by some specific rule of law. *State ex. rel. Freeman v. Ponder,* 234 N.C. 294, 67 S.E. 2d 292. Stansbury N. C. Evidence 2d Ed. § 78.

Defendant cites *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364, for the exclusionary 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." However, *McClain* also enumerated several well recognized exceptions to the general rule therein stated. We quote one of the exceptions which we consider pertinent to decision:

> "6. Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission. . . . Evidence of other crimes receivable under this exception is ordinarily admissible under the other exceptions which sanction the use of such evidence to show criminal intent, guilty knowledge, or identity." (Citations omitted.)

In the case of *State v. Fowler,* 230 N.C. 470, 53 S.E. 2d 853, Stacy, C.J., stated: ". . . proof of the commission of other like offenses is competent to show the *quo animo,* intent, design, guilty knowledge or *scienter,* or to make out the *res gestae,* or to exhibit a chain of circumstances in respect of the matter on trial, when such crimes are so connected with the offense charged as to throw light upon one or more of these questions."

Miss Kaufman's testimony and Miss Campbell's testimony reveal striking similarities. The two alleged abductions occurred within a period of a few hours, and from the same location. On both occasions defendant followed approximately the same route into rural Orange County and he used identical language in an attempt to quell their fears.

In our opinion, Miriam Kaufman's testimony clearly disclosed a common plan, scheme and design by defendant to pick up a female person and carry her into rural Orange County in order to gratify his sexual desires.

[4] The remaining testimony challenged by this assignment of error was given by Miss Carol Chase and Miss Holly Hoxeng.

Miss Holly Hoxeng testified that between 3:30 and 4:00 p.m. on the afternoon of 7 September 1972 she saw a light-colored automobile with a Tennessee license plate parked near the Gilbert-Adams bus stop. She saw the driver say something to a girl who was standing near the automobile. She could not identify defendant as being the man sitting in this automobile.

Carol Chase testified that at about 4:30 p.m. on 7 September 1972 a man driving an automobile bearing a Tennessee license plate stopped and asked her if she wanted a ride to the Duke Campus. She refused his offer. Defendant was the operator of this automobile.

Decision as to the admission of the testimony of Miss Hoxeng and Miss Carol Chase is not complicated by the rule of law barring admission of evidence concerning prior criminal offenses. Their testimony presented circumstances, not too remote in time to have probative value, which tended to aid the jury in understanding the conduct and motives of the parties.

We hold that the trial judge correctly admitted the testimony of Miriam Kaufman, Carol Chase and Holly Hoxeng as substantive evidence.

[5] Defendant contends that the trial judge's failure to grant his motions as of nonsuit resulted in reversible error. He argues that the evidence does not warrant an inference that defendant had intercourse with the prosecuting witness by force and against her will.

Rape is the carnal knowledge of a female, by force and against her will. *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44; *State v. Johnson,* 226 N.C. 671, 40 S.E. 2d 113.

A motion for judgment as of nonsuit presents a question of law for the court as to whether there is reasonable basis for the jury to find that the offense charged was committed by accused. In deciding this question, the trial judge must consider the State's evidence in the light most favorable to the State and without considering evidence of the defendant in conflict therewith.

It is for the jury to determine the truth and credibility of the evidence. *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469; *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741.

The testimony of the prosecuting witness is replete with evidence that defendant, by force and against her will, had intercourse with her. We quote portions of this testimony:

> "[S]he was afraid and did not want to be hurt, and that he handled her roughly as he pushed her down on the seat.
>
> * * *
>
> "He held her arms down when they got in the way. Connie Lee Arnold, on this occasion, was stronger than she was, and she was not successfully able to resist him.
>
> * * *
>
> "By way of 'force' she meant that when she would not touch his parts . . . or whatever else he wanted to have her do, he would put her hand or head in that position and would not release the pressure on that part of the body until she complied with what he wanted.
>
> * * *
>
> ". . . [S]he kept resisting because she didn't want to continue but it was of no avail; his drive was stronger than her power to resist him.
>
> * * *

"During each of these three times she did not consent to having intercourse and during each of these three times he forced her in the action.

* * *

"During the time that she and the driver were having sexual intercourse, she struggled at every point and resisted. She told him verbally, she pushed him away. She indicated her intense non-desire for this action to occur. All of the muscles in her body, including those around the vaginal area were at all times constricted and tight and tense.

* * *

"The defendant was physically stronger than she was on the occasion . . . she was not successfully able to fight him that night. . . ."

Admittedly there was testimony from the prosecuting witness which might have raised a reasonable doubt in the mind of a juror. However, the jury believed the State's evidence.

We hold that there was sufficient evidence to withstand defendant's motions as of nonsuit.

[6] Defendant assigns as error the failure of the trial court to instruct the jury that they might find the defendant guilty of a lesser included offense.

In the case of *State v. Bryant,* 280 N.C. 551, 187 S.E. 2d 111, Justice Higgins speaking for the Court (Chief Justice Bobbitt and Justice Sharp dissenting) stated:

"The defendant has objected to the court's failure to submit to the jury the lesser included offense of assault with intent to commit rape. This objection cannot be sustained. All the evidence, including the defendant's testimony, disclosed completed acts of intercourse. The factual dispute was whether the acts were voluntary or as a result of defendant's use of force. Even consent if induced by fear, fright, or coercion, is equivalent to physical force. *State v. Primes,* [275 N.C. 61, 165 S.E. 2d 225]; *State v. Carter,* [265 N.C. 626, 144 S.E. 2d 826]. The court should not submit an issue in the absence of some evidence which tended to support it. The rule is stated in *State v. McNeil,* 277 N.C. 162, 176 S.E. 2d 732. 'The court (trial) charged the jury to return a verdict: (1) guilty of rape; (2) guilty of

rape with a recommendation that punishment be imprisonment for life in the State's prison; or (3) not guilty. Failure to find the defendant guilty of (1) or (2) required a verdict of not guilty. The defendant was not prejudiced by the charge which required the jury to acquit of all included lesser offenses. There was no evidence of the lesser included offenses, and the court was correct in refusing to permit the jury to consider them.' "

Here all of the evidence reveals a completed act or completed acts of sexual intercourse. The factual dispute relates only to whether the act or acts were by consent or as a result of force or coercion. We are unable to distinguish instant case from *State v. Bryant, supra,* and by authority of *Bryant,* this assignment of error is overruled.

[7] Defendant's final assignment of error is that the trial judge erred by denying his motion to set aside the verdict as being against the greater weight of the evidence. This motion was addressed to the trial judge's discretion and was without merit. *State v. Henderson,* 276 N.C. 430, 173 S.E. 2d 291.

Defendant has failed to show prejudicial error which will warrant disturbing the verdict and judgment.

No error.

Chief Justice BOBBITT dissenting.

The testimony of prosecutrix was sufficient to support the verdict of guilty of rape. However, her testimony was contradicted by testimony of defendant on all crucial aspects of the case.

The preliminary statement in the majority opinion summarizes the testimony of prosecutrix and of defendant relating to the circumstances under which prosecutrix entered defendant's car, and to their conversation while riding through the streets of Durham and to the area where, according to both prosecutrix and defendant, the act(s) of sexual intercourse occurred.

Although contradicted at all points, there was ample evidence to support a finding that defendant was guilty of an assault with intent to commit rape. To convict one of the crime of an assault with intent to commit rape, "the State must prove (1) an assault by a male upon a female (2) with intent to commit rape, and the felonious intent is the intent to gratify his

passion on the person of the woman at all events against her will and notwithstanding any resistance she may make." *State v. Overcash,* 226 N.C. 632, 634, 39 S.E. 2d 810, 811 (1946), and cases cited.

Assuming that defendant was guilty of an assault with intent to commit rape, it does not necessarily follow that he was guilty of rape because he succeeded in having sexual intercourse with the prosecutrix. He testified positively that his sexual intercourse with prosecutrix was with her consent. Her testimony referred to their philosophical arguments, concluding with her statement that defendant had shown "his will was stronger than hers." Whether her submission was the result of overpersuasion was for jury consideration.

Of course, "[t]he force necessary to constitute rape need not be actual physical force. Fear, fright, or coercion may take the place of force." *State v. Primes,* 275 N.C. 61, 67, 165 S.E. 2d 225, 229 (1969). Here, the prosecutrix's testimony is that defendant never threatened to harm her physically; that he did not use, display or refer to a weapon of any kind; that he inflicted no bruises; and that her clothes were not torn or damaged. Nothing in her testimony indicated that she attempted any kind of vigorous physical resistance.

I disavow completely any intent to cast doubt upon the credibility of the testimony of the prosecutrix. In all probability, if I had been a juror, I would have returned the verdict of guilty of rape. However, where a defendant's testimony contradicts that of the prosecutrix as to rape and as to assault with intent to commit rape, the jury should not be confined to the single alternative of returning either a verdict of guilty of rape or a verdict of not guilty (of any offense) but should be permitted, if they consider the evidence warrants, to return a verdict of guilty of the lesser included felony of assault with intent to commit rape.

For the reasons fully stated and documented in my dissenting opinion in *State v. Bryant,* 280 N.C. 551, 187 S.E. 2d 111 (1972), I would award a new trial on account of the failure of the court to submit *for jury consideration* whether defendant was guilty of the lesser included felony of an assault with intent to commit rape.

Justice SHARP joins in this dissenting opinion.

BORDEN, INC. v. JAMES C. BROWER, T/A HARVEST MILLING COMPANY

No. 1

(Filed 10 October 1973)

Bills and Notes § 19; Evidence § 32— action on note — parol evidence rule — method of payment — whole contract

In an action to recover on a renewal promissory note given by defendant to plaintiff, the parol evidence rule did not prohibit the admission of evidence offered by defendant to prove that two customers executed notes to plaintiff for merchandise sold to them by plaintiff's agent, that contemporaneously with the signing of defendant's original note defendant and plaintiff's agent agreed that the note would include the amounts of the customers' notes for bookkeeping purposes only but that defendant would not be liable for the payment of such amounts, that those notes have not been paid, and that the amounts of those notes were included in each renewal note given by defendant to plaintiff, including the note in question, since the parol evidence rule is not violated (1) by showing method of payment and discharge contemplated by the parties or (2) by showing the whole of a contract, only a part of which is in writing, when the contract is not required by law to be in writing and the unwritten part does not conflict with the written.

Chief Justice BOBBITT concurring in result.

Justice SHARP joins in the concurring opinion.

ON *certiorari* to review the decision of the Court of Appeals, reported in 17 N.C. App. 249, 193 S.E. 2d 751 (1973), which affirmed summary judgment for plaintiff entered by *Cohoon, J.*, at the 9 August 1971 Session of PASQUOTANK Superior Court.

Plaintiff seeks to recover $7,705.94 with interest, which plaintiff alleges is due on a negotiable promissory note executed by defendant on or about 25 July 1969, payable to the order of plaintiff on 1 December 1969. Plaintiff alleges that the note was in the original principal amount of $11,970, and that defendant's payments of principal and interest on the note have left a past due balance of $7,705.94, plus interest at six percent per annum from 25 July 1970.

Defendant denies that he is indebted to plaintiff in any amount, and by way of an affirmative defense alleges that from 1963 through 1969 he was a salesman for plaintiff and its predecessor corporations (hereinafter referred to simply as plaintiff), and that from 1963 through 1967 Owen Messersmith

served as the sales representative and agent for plaintiff for the purpose of making sales and credit arrangements in North Carolina. In 1963 L. C. Parrish contacted plaintiff about purchasing some fertilizer products, and defendant at that time advised both Parrish and agent Messersmith that he was unable to carry an account the size of Parrish's needs and demands. Messersmith informed defendant that as plaintiff's agent he would make the sales to Parrish, would accept a note and collateral directly from Parrish to plaintiff, and that plaintiff would be solely responsible for the collection of the Parrish account. Pursuant to this agreement, on 12 July 1963 Messersmith made the fertilizer sales on credit to Parrish and secured from Parrish a note in the amount of $5,152.91 with a chattel and agricultural security agreement in favor of plaintiff.

Defendant alleges a similar transaction occurred in 1967. That year, Curtis Scott approached defendant about purchasing some fertilizer products under a credit arrangement. Based on his knowledge of this customer, defendant refused to sell to Scott on credit. Messersmith, however, after making a credit check on Scott, made sales directly to Scott and procured a secured note dated 18 July 1967 in the amount of $1,589.81 from Scott payable to plaintiff. Again, defendant alleges, plaintiff through its agent Messersmith agreed to be solely responsible for the collection of this account.

Defendant's answer further alleges that plaintiff's agent Messersmith requested defendant's permission to run the Parrish and Scott notes under defendant's account for bookkeeping purposes only. Defendant agreed that he could do so, but it was further agreed that Messersmith would be liable for the collection of the Parrish and Scott notes, and that in no event would defendant be liable for the amounts of these notes, and that although the amounts of these notes would be included in the annual settlement notes given by defendant to plaintiff as a part of the same plan of bookkeeping, these amounts would be credited on defendant's account with plaintiff. Defendant further alleges that as a result of this agreement, each year thereafter the amounts of these notes were included in the note executed by defendant to plaintiff, and that defendant "is entitled to an accounting with the plaintiff on all transactions for the years 1963 through 1969 inclusive and is entitled to credits in the amounts of $5,152.91 and $1,589.81, representing the Parrish and Scott accounts."

By way of counterclaim, defendant further alleges that in the event he is indebted to plaintiff in any amount on the note alleged in the complaint, then he is entitled to judgment against plaintiff in the amount of the Parrish and Scott notes, plus interest, first, because of plaintiff's breach of its contract to accept and assume responsibility for the collection of the Parrish and Scott notes without recourse against defendant; and secondly, because of plaintiff's breach of its contract to give defendant's account credit for the merchandise purchased by Parrish and Scott pursuant to plaintiff's agreement with defendant.

Plaintiff replied to defendant's counterclaim, alleging among other things that a written agency contract—dated 16 October 1959 and executed by defendant and by Messersmith for plaintiff under which defendant had been appointed an agent for the sale on commission of plaintiff's fertilizer products—controlled the business practices and procedures between plaintiff and defendant, and that this agency contract was a bar to defendant's counterclaim and defenses; that unless authorized by plaintiff and agreed upon by defendant, all sales by Messersmith to customers in defendant's sales territory were on or for defendant's account, with defendant receiving commissions in connection with such sales; that the amounts representing the Parrish and Scott notes were debited by plaintiff to defendant's account with defendant's full knowledge and consent and that defendant had made payment for such amounts in full; that plaintiff's agent Messersmith was without authority to bind plaintiff to any financial or credit arrangement with defendant not approved by Messersmith's superiors; and that defendant was aware or should have been aware of such limitation on Messersmith's authority; and finally that annual settlements between the parties for each of the ten years prior to the execution of the note in suit were a bar to defendant's counterclaim and defenses. Plaintiff further alleges that annually in July from 1959 to 1969 plaintiff and defendant met for the purpose of settling their account for the previous fiscal year. On each such occasion plaintiff and defendant examined their account records, determined the credits to which each was entitled, and then agreed upon a balance as the amount owing between the parties for the prior fiscal year, together with any amount unpaid from the previous year's settlement. At each such settlement, the balance agreed upon was in plaintiff's favor, and defendant executed under seal and delivered to plaintiff his negotiable promissory note payable to the order of plaintiff in the

amount of such balance. Plaintiff further alleges that the Parrish and Scott notes were debited against defendant's account in at least two such settlements prior to 1969, and that defendant knowingly executed notes to plaintiff encompassing the Parrish and Scott obligations; that defendant had paid plaintiff in full for the Parrish and Scott notes prior to defendant's execution of the 1969 note involved in this suit, and that this 1969 note encompassed only new purchases by defendant from plaintiff since the date of the 1968 settlement.

On the day plaintiff filed its reply, plaintiff also moved for summary judgment, supporting this motion by portions of defendant's deposition and by an affidavit of P. J. Scearce, plaintiff's branch manager. In the portions of defendant's deposition offered in evidence by plaintiff, defendant admits that he executed the note in suit at the time of the 1969 settlement with plaintiff and that the amount of the note, $11,970, reflected the amount that plaintiff's records showed defendant owed at that time after striking a balance between them as they had done in the past. The affidavit of Mr. Scearce fully supports plaintiff's allegations set forth in its reply to defendant's counterclaim with respect to the annual settlements of plaintiff and defendant from 1959 to 1969, and states that there is a balance of $7,705.94 due on defendant's note, with interest from 25 July 1970. Additionally, it specifically states that defendant had paid plaintiff in full for the Parrish and Scott notes before the 25 July 1969 note was executed, the Parrish note having been paid on 20 January 1966 and the Scott note on 5 March 1969.

In opposition to plaintiff's motion for summary judgment, defendant offered his verified answer and counterclaim, two affidavits of plaintiff's agent Messersmith, his own affidavit and portions of his own deposition, and an affidavit of Hassell Hollingsworth, a farmer who had dealt with defendant and Messersmith in the past. The affidavits of Messersmith fully corroborate defendant's allegations with respect to the details involved in the Parrish and Scott transactions. Messersmith's affidavit further states that he asked defendant to list the Parrish and Scott notes in defendant's account with plaintiff—as an indebtedness by defendant to plaintiff—for bookkeeping purposes only, with the distinct understanding that defendant would not be personally liable and responsible for such notes, but to the contrary would receive credit for the notes; that plaintiff accepted full responsibility for the collection of these notes which

were made payable directly to plaintiff; that these arrangements were well-known and approved by plaintiff's company officials—including P. J. Scearce—and that it was only after Messersmith left the employment of plaintiff in March of 1969 that any company official raised any objection to Messersmith's having accepted the Parrish and Scott notes; that defendant signed the settlement notes annually in reliance on his agreement with Messersmith that defendant would receive credit without recourse for the Scott and Parrish notes; that Messersmith represented to defendant that as plaintiff's agent he had authority to accept notes from individual customers; and finally that written agency contracts between plaintiff and defendant were supposed to be executed annually, but that after 1959 no such contracts were executed and instead oral agreements, practice, and procedure determined the parties' agency relations.

Defendant's affidavit states that none of the settlement notes he gave plaintiff were ever fully paid; that defendant continued to make purchases from plaintiff and continued to make payments on merchandise he was currently purchasing; that at no time had defendant "paid in an amount sufficient to pay for all merchandise purchased currently and to date and including the notes which covered the Parrish and Scott indebtedness"; and that the note in suit "executed at the time of the 1969 settlement did not cover entirely new purchases of merchandise after the time of the July, 1968 settlement, but rather covered the indebtedness under the Parrish and Scott notes."

Hollingsworth's affidavit states that he is a farmer in defendant's sales area, that Messersmith had extended credit directly from plaintiff to him and had taken notes from him payable to plaintiff, and that his own dealings with Messersmith had never been questioned or challenged by plaintiff.

After moving for summary judgment, plaintiff moved to strike defendant's evidence on the ground that such evidence was irrelevant, immaterial, and inadmissible because of the parol evidence rule. The court allowed this motion and entered summary judgment for plaintiff, stating in the judgment that the following facts appeared without genuine or substantial controversy: "(1) On or about 25 July 1970, for value received, defendant executed under seal and delivered his negotiable promissory note payable to the order of plaintiff in the sum of $11,970, plus interest. . . . (2) After giving defendant credits to which he is entitled, the balance owing on said note is $7,705.94, plus

interest thereon at 6% per annum from 25 July 1970." The court concluded "as a matter of law that the material evidence in support of defendant's counterclaim and defense is inadmissible; that disregarding such evidence, there is no genuine issue as to any material fact and that plaintiff is entitled to summary judgment as a matter of law."

From the judgment entered, defendant appealed. The Court of Appeals, in an opinion by Judge Parker, affirmed. We allowed *certiorari* on 6 March 1973.

H. Wade Yates for defendant appellant.

Leroy, Wells, Shaw, Hornthal & Riley by L. P. Hornthal, Jr., for plaintiff appellee.

MOORE, Justice.

This appeal poses the sole question: Was defendant's evidence in support of his defenses and counterclaim admissible?

Plaintiff's evidence establishes a *prima facie* case for an unpaid balance on a promissory note under seal. Plaintiff contends that the material facts set forth in defendant's answer, deposition, and affidavits offered by defendant in opposition to plaintiff's motion for summary judgment were inadmissible in evidence because of the parol evidence rule, and that the trial court properly granted plaintiff's motion for summary judgment.

Affidavits filed in opposition to a motion for summary judgment "shall set forth such facts as would be admissible in evidence." G.S. 1A-1, Rule 56(e). If the pleadings, affidavits, and deposition offered by defendant do not set forth facts that would be admissible in evidence because of the parol evidence rule, then such evidence was properly stricken, and since there remained no genuine issue as to any material fact, the court correctly rendered summary judgment for plaintiff. *Singleton v. Stewart,* 280 N.C. 460, 186 S.E. 2d 400 (1972); *Kessing v. Mortgage Corp.,* 278 N.C. 523, 180 S.E. 2d 823 (1971).

The parol evidence rule in North Carolina was stated by Chief Justice Stacy in *Insurance Co. v. Morehead,* 209 N.C. 174, 183 S.E. 606 (1936), as follows:

> "It is well-nigh axiomatic that no verbal agreement between the parties to a written contract, made before or

at the time of the execution of such contract, is admissible to vary its terms or to contradict its provisions. [Citing numerous cases.] . . .

"On the other hand, there are a number of seeming exceptions, more apparent than real perhaps, as well established as the rule itself. *Roebuck v. Carson,* 196 N.C., 672, 146 S.E., 708. . . ."

Chief Justice Stacy then sets out eight exceptions to the rule, citing numerous North Carolina cases for each exception. The third exception is that the parol evidence rule is not violated:

"[B]y showing mode of payment and discharge as contemplated by the parties, other than that specified in the instrument. *Bank v. Rosenstein,* 207 N.C., 529, 177 S.E., 643; *Kindler v. Trust Co.,* 204 N.C., 198, 167 S.E., 811; *Wilson v. Allsbrook,* 203 N.C., 498, 166 S.E., 313; *Stockton v. Lenoir,* 198 N.C., 148, 150 S.E., 886; *Bank v. Winslow,* 193 N.C., 470, 137 S.E., 320."

The sixth exception is:

"[B]y showing the whole of a contract, only a part of which is in writing, provided the contract is not one required by law to be in writing and the unwritten part does not conflict with the written. *Dawson v. Wright, supra* [208 N.C., 418, 181 S.E., 264]; *Henderson v. Forrest,* 184 N.C., 230, 114 S.E. 391; *Evans v. Freeman,* 142 N.C., 61, 54 S.E., 847."

Two excellent law review articles, one by Chadbourn and McCormick entitled "The Parol Evidence Rule in North Carolina," 9 N.C.L. Rev. 151 (1931), and a sequel by Dalzell, "Twenty-five Years of Parol Evidence in North Carolina," 33 N.C.L. Rev. 420 (1955), examine in depth this rule as applied in North Carolina. Chadbourn and McCormick offer the following as a concise and accurate statement of the rule: *"Any or all parts of a transaction prior to or contemporaneous with a writing intended to record them finally are superseded and made legally ineffective by the writing."* 9 N.C.L. Rev. at 152. Professor Stansbury, who is in accord with this statement of the rule, also notes:

". . . The execution of the final writing may be termed the 'integration' of the transaction. By it all prior and contemporaneous negotiations or agreements, whether oral or

written, are 'merged' into the writing, which thus becomes the exclusive source of the parties, rights and obligations with respect to the particular transaction or the part thereof intended to be covered by it.

"The parol evidence rule applies only to writings which relate to a transaction affecting the legal relations between two or more persons, and which are intended wholly or partly to supersede other negotiations and agreements between them. If such a writing is intended to supersede all other agreements relating to the transaction, it may be termed a total or complete integration; if it supersedes only a part, it is a partial integration. In the latter case, those portions of the transaction which were not intended to be superseded are legally effective and therefore may be shown by parol. . . ." 2 Stansbury's N. C. Evidence, Brandis Rev. §§ 251-52 (1973).

Although Professor Dalzell in his law review article is somewhat critical of the North Carolina rule as being too liberal, he does state that while some courts emphasize the protection of the written instrument from invasion, the emphasis in North Carolina is rather in the direction of giving the proponent of the oral agreement a chance to prove that it was made if he can, and that by so doing the North Carolina decisions may sometimes come closer to enforcing the contract that should be enforced than do the more conservative authorities.

Promissory notes are not generally subject to the parol evidence rule to the same extent as other contracts. Parties drawing such instruments tend to follow a rather definitely standardized form. If collateral terms and conditions had been agreed upon, they may be omitted from the note itself to insure its negotiability. Accordingly, it is rather common for a promissory note to be intended as only a partial integration of the agreement in pursuance of which it was given, and parol evidence as between the original parties may well be admissible so far as it is not inconsistent with the express terms of the note. See 3 Corbin on Contracts § 587, at 510 (1960); 2 Stansbury's N. C. Evidence, Brandis Rev. § 256 (1973); Dalzell, Twenty-five Years of Parol Evidence in North Carolina, 33 N.C.L. Rev. at 432-33 (1955).

The North Carolina rule in such cases was stated in *Evans v. Freeman*, 142 N.C. 61, 54 S.E. 847 (1906)—an often-cited

case in which parol evidence was admitted to show that a promissory note was to be paid only to the extent of proceeds received from the sale of patent rights in the maker's stockfeeder—as follows:

> ". . . [The parole evidence rule] applies only when the entire contract has been reduced to writing, for if merely a part has been written, and the other part has been left in parol, it is competent to establish the latter part by oral evidence, provided it does not conflict with what has been written. . . . In such a case there is no violation of the familiar and elementary rule we have before mentioned, because in the sense of that rule the written contract is neither contradicted, added to, nor varied; but leaving it in full force and operation as it has been expressed by the parties in the writing, the other part of the contract is permitted to be shown in order to round it out and present it in its completeness, the same as if all of it had been committed to writing.
>
> "The competency of such evidence for the purpose of establishing the other and unwritten part of the contract, or even of showing a collateral agreement made contemporaneously with the execution of the writing, has been thoroughly settled by the decisions of this Court. . . . Applying the rule we have laid down, it has been adjudged competent to show by oral evidence a collateral agreement as to how an instrument for the payment of money should in fact be paid, though the instrument is necessarily in writing and the promise it contains is to pay so many dollars. . . ."

Other promissory note cases involving the North Carolina method of payment and discharge exception to the parol evidence rule include: *Carroll v. Brown,* 228 N.C. 636, 46 S.E. 2d 715 (1948) (note to be paid out of profits of a partnership in which maker and payee were engaged); *Ripple v. Stevenson,* 223 N.C. 284, 25 S.E. 2d 836 (1943) (note to be paid out of rents and profits from an office building); *Insurance Co. v. Guin,* 215 N.C. 92, 1 S.E. 2d 123 (1939) (note to be paid out of commissions); *Bank v. Rosenstein,* 207 N.C. 529, 177 S.E. 643 (1935) (co-maker's liability on a note limited to the value of land covered by a deed of trust); *Galloway v. Thrash,* 207 N.C. 165, 176 S.E. 303 (1934) (note to be paid by crediting it against payee's anticipated share of maker's estate); *Trust Co. v. Wilder,* 206 N.C. 124, 172 S.E. 884 (1934) (note to be paid

out of proceeds of land when land was sold); *Kindler v. Trust Co.*, 204 N.C. 198, 167 S.E. 811 (1933) (note to be paid out of collateral held by payee and such payment to be credited to an endorser); *Wilson v. Allsbrook*, 203 N.C. 498, 166 S.E. 313 (1932) (note to be paid out of rents collected by maker); *Stack v. Stack*, 202 N.C. 461, 163 S.E. 589 (1932) (note to be paid out of proceeds of land); *Bank v. Winslow*, 193 N.C. 470, 137 S.E. 320 (1927) (note to be paid out of proceeds from sale of goods); *Quin v. Sexton*, 125 N.C. 447, 34 S.E. 542 (1899) (note to be paid out of proceeds of another note); *Kerchner v. McRae*, 80 N.C. 219 (1877) (bond to be credited with the proceeds from sale of cotton). See 12 Am. Jur. 2d, Bills and Notes § 1264 (1964); 30 Am. Jur. 2d, Evidence § 1061 (1967); Annot. 71 A.L.R. 548, 570-75 (1931); 2 Stansbury's N. C. Evidence, Brandis Rev. § 256 (1973); 3 Strong, N. C. Index 2d, Evidence § 32, at 651 (1967).

In the present case, according to defendant's evidence, customers Parrish and Scott executed notes to plaintiff for merchandise sold by plaintiff's agent to them. At the request of plaintiff's agent, a note from defendant to plaintiff included, for bookkeeping purposes only, the amount of these two notes. In no event was defendant to be liable for these amounts. The Parrish and Scott notes were made payable to plaintiff and were never assigned by plaintiff to defendant. Hence, defendant had no legal right to collect from Parrish and Scott.

This action is between the original parties to the note. When such an instrument is in the hands of a holder other than a holder in due course, this Court has permitted variance of its express terms by showing that it was to be enforced only on the happening of certain conditions, or only to the extent necessary to accomplish a certain purpose, or that it was payable only out of a certain fund, or that it was given as evidence of an advancement, or that it might be discharged by a method of payment or performance different from that stated in the writing. *Insurance Co. v. Morehead, supra,* and above cited cases. See also 2 Stansbury's N. C. Evidence, Brandis Rev. § 256 (1973); 3 Strong, N. C. Index 2d, Evidence § 32, at 651 (1967).

The Court of Appeals, in affirming the trial court's exclusion of defendant's evidence, states that although it is making no attempt to reconcile all prior North Carolina decisions, its decision is consistent with the more recent North Carolina cases

on this point. In support of this statement the Court of Appeals cites *Bank v. Slaughter,* 250 N.C. 355, 108 S.E. 2d 594 (1959), and *Vending Co. v. Turner,* 267 N.C. 576, 148 S.E. 2d 531 (1966). In *Bank v. Slaughter* plaintiff bank sought to recover the balance due on a note that had been executed by two individual defendants and a corporation. The controlling interest in the corporation had been purchased by the individual defendants with a portion of the proceeds of the loan from plaintiff bank. At the time of the suit the corporation had been adjudged bankrupt and the individual defendants defended on the ground that, pursuant to an oral agreement with plaintiff, the corporation—rather than they themselves—was liable for the balance due on the note. Defendants' parol evidence concerning this alleged agreement tended to show that prior to the execution of the note, plaintiff agreed that the liability of the two defendants would be limited to that portion of the note that was loaned to defendants individually to purchase the controlling interest of the corporation, and that the corporation alone would be liable for the balance of the loan. This testimony was excluded by the trial court, and this Court affirmed by holding that the promise contained in the note to pay certain amounts "could not be contradicted or destroyed by parol testimony that the makers would not be called upon to pay monies loaned pursuant to the contract." 250 N.C. at 357, 108 S.E. 2d at 596.

Professor Stansbury, after discussing North Carolina's various exceptions to the parol evidence rule noted above, cites *Bank v. Slaughter* for the general proposition that in spite of the liberal approach reflected in many North Carolina parol evidence rule cases, it is not "permissible to show an agreement that the maker should not be liable in any event." 2 Stansbury's N. C. Evidence, Brandis Rev. § 256, at 252 (1973). Notwithstanding Professor Stansbury's suggested distinction between this and prior North Carolina cases, we have some difficulty in distinguishing this case from the long line of North Carolina cases holding that a parol agreement as to mode of payment or discharge is competent as between the parties. At least two writers have observed that although the parol evidence rule in this situation has not always been consistently applied in North Carolina, *Bank v. Slaughter* seems clearly irreconcilable with the rule laid down by this Court in previous cases. Case Law Survey, Inadmissibility of Contemporaneous Parol Agreement to Vary Terms of Loan, 38 N.C.L. Rev. 543 (1960); Case Law Survey, Parol Evidence Rule, 38 N.C.L. Rev. 540 (1960). An-

other writer suggests that the case may possibly indicate a retreat from this Court's previously well-established position. 2 Stansbury's N. C. Evidence, Brandis Rev. § 256, at 252, n. 82. Despite any possible conflict, however, we hold that in the instant case North Carolina's long-established rule admitting parol evidence to show method of payment or discharge is in full force and effect, and *Bank v. Slaughter* is not controlling.

Neither is the second case relied on by the Court of Appeals, *Vending Co. v. Turner, supra,* controlling in the instant case. *Vending Co. v. Turner* primarily involved the principle that payment or the right to a credit upon a note is an affirmative defense that must be pleaded. Although that opinion does contain a general statement to the effect that a promise set forth in the note could not be contradicted or destroyed by parol testimony, the opinion actually affirmed a judgment that embodies the mode of payment or method of discharge exception to the parol evidence rule. In that case plaintiff sued on defendant's promissory note. Defendant defended on the ground that at the time his note was made he and plaintiff orally agreed that certain payments received by plaintiff from third parties in the form of "promotion money" would be credited upon defendant's note as if paid by defendant. The jury found that this oral agreement collateral to the note itself was made, and consequently that defendant was entitled to credits on the principal amount of the note for the amount of "promotion money" received by plaintiff. This Court, in an opinion by Justice Lake, affirmed the jury's findings.

The original note in this case given by defendant to plaintiff was renewed from time to time. Defendant offered evidence, which was stricken, that each renewal contained the amounts of the Parrish and Scott notes. If this is true, the renewals did not operate as a discharge of the original note. Plaintiff would be bound by the parol contemporaneous agreement made with defendant through plaintiff's agent at the time of the original note as to the mode of payment of the liability of defendant. *Bank v. Rosenstein,* 207 N.C. 529, 177 S.E. 643 (1935) ; 1 Strong, N. C. Index 2d, Bills and Notes § 14 (1967).

Applying the more liberal rule generally followed in cases involving promissory notes and the two well-established North Carolina exceptions to the parol evidence rule as set out by Chief Justice Stacy in *Insurance Co. v. Morehead, supra,* we hold that as between the original parties to the note in question

the evidence offered by defendant was admissible to prove that he and plaintiff through plaintiff's agent, contemporaneously with the signing of the original note, agreed that defendant was entitled to credit on his own note for the amounts of the Parrish and Scott notes, that in no event would defendant be liable for the payment of the amounts of these notes, that these notes had not been paid, and that the amounts of these notes were included in each renewal note given by defendant to plaintiff, including the note involved in this action. Such evidence is sufficient to raise a genuine issue as to a material fact to be determined at trial. *Schoolfield v. Collins,* 281 N.C. 604, 189 S.E. 2d 208 (1972).

For the reasons stated, the decision of the Court of Appeals is reversed. The cause is remanded to that court with direction to vacate the summary judgment and to remand the cause to the Superior Court for trial in accordance with this opinion.

Reversed and remanded.

Chief Justice BOBBITT concurring in result.

I agree that the record does not support the entry of summary judgment for plaintiff. However, I do not agree that the cited cases holding that parol evidence is admissible to show an agreement that payment is to be made solely in a specific manner or out of a specific fund constitute authority for holding competent the testimony of Brower and Messersmith. Nor am I prepared to overrule or modify our decision in *Bank v. Slaughter,* 250 N.C. 355, 108 S.E. 2d 594 (1959).

Here, more than one writing is involved. The record shows that the Parrish and Scott notes and agricultural security agreements were made to Smith-Douglass, plaintiff's predecessor; that neither Parrish nor Scott paid any part of these obligations; and that $7,705.94, the amount of the Parrish and Scott notes, was included in the amount of the notes executed from time to time by Brower to plaintiff or its predecessors. The record is silent concerning the efforts, if any, made either by plaintiff or by defendant to collect the Parrish and Scott notes.

There was evidence that the Parrish and Scott documents "stayed in [Brower's] drawer there," as directed by Messersmith. Whether plaintiff or Brower now has physical possession of the Parrish and Scott documents seems unimportant. The

important point is that indebtedness of $7,705.94 is evidenced both by Brower's note to plaintiff and by the notes of Parrish and Scott to plaintiff.

Under these circumstances, I am of the opinion that the testimony of Brower and of Messersmith was admissible on the ground that it was competent to explain the relationship between the Brower note and the Parrish and Scott notes.

Justice SHARP joins in this concurring opinion.

STATE OF NORTH CAROLINA v. DONNIE WILLIAMS

No. 4

(Filed 10 October 1973)

1. **Assault and Battery § 5; Homicide § 21— discharging firearm into occupied building — first degree murder — sufficiency of evidence**

In a prosecution for murder and for unlawfully discharging a firearm into an occupied building, defendant's motions for nonsuit were properly overruled where there was evidence sufficient to permit a jury to find that defendant, in violation of G.S. 14-34.1, discharged a .22 rifle into the building in which deceased operated a poolroom and which was then occupied by deceased and his brother; that he did so wilfully and wantonly; and that the bullet so discharged by defendant proximately caused the death of deceased.

2. **Homicide § 4— felony-murder rule — felony creating risk to human life**

Any unspecified felony is within the purview of the felony-murder statute if the commission or attempted commission thereof creates any substantial foreseeable human risk and actually results in the loss of life. G.S. 14-17.

3. **Assault and Battery § 5— discharge of firearm into occupied building — statute construed**

A person is guilty of the felony created by G.S. 14-34.1 if he intentionally, without legal justification or excuse, discharges a firearm into an occupied building with knowledge that the building is then occupied by one or more persons or when he has reasonable grounds to believe that the building might be occupied by one or more persons.

4. **Assault and Battery § 5; Homicide § 4— discharge of firearm into occupied building — felony-murder rule applicable**

Violation of G.S. 14-34.1 prohibiting the discharge of a firearm into an occupied building is an unspecified felony within the purview of the felony-murder rule.

5. **Assault and Battery § 15; Homicide § 23— discharge of firearm into occupied building — insufficient instructions — new trial**

In a prosecution for murder and for unlawfully discharging a firearm into an occupied building, defendant is entitled to a new trial where the trial court failed to give any instruction whatever applying the law to the facts stated in the testimony of one witness where that testimony, if accepted, (1) disclosed facts sufficient in law to constitute a complete defense to murder committed in the perpetration of the felony created by G.S. 14-34.1, and (2) disclosed that the fatal shooting occurred inside the building, thus rendering defendant guilty of no more than murder in the second degree in the absence of proof that the killing was intentional and with premeditation and deliberation.

6. **Criminal Law § 26; Homicide § 4— felony-murder prosecution — separate punishment for felony and murder**

When a felony within the purview of G.S. 14-34.1 is relied upon as an essential of and the basis for the conviction of a defendant for murder in the first degree under the felony-murder rule, no additional punishment can be imposed for such felony as an independent criminal offense.

Justice HUSKINS dissents.

APPEAL by defendant from *Martin, S.J.*, at June 1972 Session of JOHNSTON Superior Court.

Defendant was indicted in separate bills (1) for the murder of Herman Adams and (2) for "unlawfully, wilfully and feloniously discharg[ing] a firearm to wit: 22 caliber rifle into a building to wit: Adams Pool Room (Cleveland School Community), while said building was occupied by Herman Adams and Carlton Adams. . . ." Each indictment alleged that the criminal offense described therein was committed on 10 April 1971. The cases were consolidated for trial.

The only evidence was that offered by the State.

The State's evidence, *apart from the testimony of Carlton Adams,* tends to show the facts narrated below.

Herman Adams operated a store and poolroom in the Cleveland School community. Sometimes he kept the poolroom open all night. It was open during the early morning hours of 10 April 1971.

About 2:00 a.m. on 10 April 1971 a car containing six occupants arrived at Herman Adams's place of business. Sherrill Bryant, the owner-driver, "shot pool there every day and every night." Bryant was accompanied by his wife, by Purcell

Williams and wife, Shirley Williams, by Robert Williams, and by Donnie Williams.

Herman Adams, his wife, and Carlton Adams, Herman's brother, and "two or three white boys," were in the poolroom when the Bryant party arrived. Bryant and Purcell Williams shot pool for an hour and a half. During this period Donnie was somewhere in the poolroom and Shirley Williams was out in the yard somewhere. After Bryant and Purcell Williams had been shooting pool for about an hour and a half, a fight started between Herman Adams and one Marvin Hamilton (referred to also as Marvin Raines) because Marvin refused to leave when ordered to do so by Herman Adams. Bryant got into this fight, "helping Herman." Although others were in the poolroom, only Herman Adams, Bryant and Marvin were involved in the fighting. While Bryant was so engaged, Carlton Adams shot Bryant in the leg. Thereupon, Bryant left the poolroom, went to his car, got his rifle, went back into the poolroom and there shot Carlton Adams. After Bryant had shot Carlton Adams, Herman Adams walked with Bryant to the door of the poolroom. Herman Adams had not been shot at that time.

Leaving the poolroom, Bryant went to his car which was parked "about ten or fifteen feet from the store." He put his rifle on the floorboard in front of the front seat. Donnie Williams got on the right front seat and picked up the rifle. When Bryant had backed his car to a point approximately thirty or thirty-five feet from the building, Donnie Williams fired the rifle "at the building." The bullet passed through the window where Herman Adams was standing, entered Herman Adams's brain and caused his death.

Investigating officers testified they could not tell whether the hole in the window resulted "from a bullet entering the building or exiting the building."

Bryant testified that, after he had shot Carlton Adams, he told the members of his party, "Let's go, I'm going to the hospital." He further testified that he "left the rifle at [his] brother's house on the way to the hospital." He further testified that Herman Adams "was just like [his] daddy"; that he had known Herman Adams as a friend about all of his (Bryant's) life; and that he had had no trouble with Herman Adams or with Carlton Adams that day.

The testimony of Carlton Adams, as set forth in narrative form in the agreed case on appeal, is quoted in full below:

"My name is Joseph Carlton Adams, and I live in Woodbridge, Virginia. I was living there in April, 1971 and came to Johnston County on April 10, 1971, to visit my brother. I had been in my brother's store about 30 minutes when Donnie Williams and the others came in. Herman told them to get out and he said they weren't going out and he threw up and went to shooting. One shot hit me and I went down and when I came to there won't anybody there and Herman was lying at my feet dead. I could hear glass and stuff breaking, the window; shooting. Herman had not had any trouble with Donnie Williams or Sherrill Bryant that I know of. When they took me to the hospital, Herman Adams was lying right at the end of the counter right flat on his face with his head turned down. Herman was lying right at the end of the counter; the big window right at the end of the counter facing the road. I saw blood running from the side of Herman's face and head as I was leaving."

As to the first (murder) indictment, the jury returned a verdict of guilty of murder in the first degree with recommendation of life imprisonment; and judgment, which imposed a sentence of life imprisonment, was pronounced.

As to the second (discharging firearm into occupied building) indictment, the jury returned a verdict of guilty as charged; and the court pronounced judgment imposing a prison sentence of ten years.

On 6 March 1973 this Court entered an order allowing defendant's motion that he be allowed to file a delayed appeal in the murder case and to have his appeal in the other case (discharging firearm into occupied building) heard by the Supreme Court without prior determination in the Court of Appeals.

Attorney General Robert Morgan and Associate Attorneys Russell G. Sherrill III and Ralf F. Haskell for the State.

Barringer, Howard & Gruber by Thomas L. Barringer for defendant appellant.

BOBBITT, Chief Justice.

[1] Defendant excepted to and assigns as error the court's denial of his motions for judgments as in case of nonsuit.

When considered in the light most favorable to the State, there was evidence sufficient to permit a jury to find that defendant, in violation of G.S. 14-34.1, discharged Sherrill Bryant's .22 rifle into the building in which Adams's poolroom was operated and which was then occupied by Herman Adams and by Carlton Adams; that he did so wilfully and wantonly; and that the bullet so discharged by defendant proximately caused the death of Herman Adams. Defendant's motions for nonsuit were properly overruled.

G.S. 14-34.1 provides: "*Discharging firearm into occupied property.*—Any person who wilfully or wantonly discharges a firearm into or attempts to discharge a firearm into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a felony punishable as provided in § 14-2."

The issue submitted to the jury was whether defendant was guilty of murder in the first degree on the ground that he was guilty of committing the felony defined in G.S. 14-34.1 and in the perpetration thereof shot and killed Herman Adams.

G.S. 14-17 defines murder in the first degree as follows: "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary *or other felony,* shall be deemed to be murder in the first degree. . . ." (Our italics.) A murder committed in the perpetration or attempt to perpetrate any felony within the purview of G.S. 14-17 is murder in the first degree without proof of an intentional killing with malice after premeditation and deliberation. *State v. Maynard,* 247 N.C. 462, 469, 101 S.E. 2d 340, 345 (1958), and cases cited.

Is the criminal offense created by G.S. 14-34.1 a felony within the purview of G.S. 14-17?

There are many decisions of this Court which hold that homicides committed in the perpetration or attempt to perpetrate the *specified* felonies of arson, burglary, rape and robbery constitute murder in the first degree. *State v. Thompson,* 280 N.C. 202, 209-10, 185 S.E. 2d 666, 671 (1972), and cases cited. Too, we have held that homicides constitute murder in the first degree when committed in the perpetration or attempt to perpetrate the following *unspecified* felonies: kidnapping, *State v.*

Streeton, 231 N.C. 301, 56 S.E. 2d 649 (1949); felonious escape, *State v. Lee,* 277 N.C. 205, 176 S.E. 2d 765 (1970); sodomy, *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671 (1971); feloniously breaking into a store or dwelling with intent to commit larceny, *State v. Covington,* 117 N.C. 834, 23 S.E. 337 (1895); *State v. Kelly,* 216 N.C. 627, 6 S.E. 2d 533 (1940); *State v. Thompson, supra.*

[2] In *State v. Thompson, supra,* at 211, 185 S.E. 2d at 672, the opinion states: "In our view, and we so hold, any unspecified felony is within the purview of G.S. 14-17 if the commission or attempted commission thereof creates any substantial foreseeable human risk and actually results in the loss of life. This includes, but is not limited to, felonies which are inherently dangerous to life. Under this rule, any unspecified felony which is inherently dangerous to human life, or foreseeably dangerous to human life due to the circumstances of its commission, is within the purview of G.S. 14-17."

G.S. 14-34.1 refers to the wilful or wanton discharge or attempt to discharge the firearm "into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied." In a factual situation involving the actual discharge of a firearm into an occupied building, we must decide (1) what conduct constitutes the felony created by G.S. 14-34.1, and (2) whether such felony is an unspecified felony within the purview of G.S. 14-17. In making these determinations, we are mindful (1) that criminal statutes are to be construed strictly, and (2) that application of the felony-murder rule supplants the necessity for proof of an intentional killing with malice after premeditation and deliberation.

The protection of the occupant(s) of the building was the primary concern and objective of the General Assembly when it enacted G.S. 14-34.1. This statute is not violated unless the accused discharges or attempts to discharge the firearm into a building *while it is occupied.*

In our view, the words "wilful" and "wanton" refer to elements of a single crime. Ordinarily, " '[w]ilful' as used in criminal statutes means the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law." *State v. Arnold,* 264 N.C. 348, 141 S.E. 2d 473 (1965). "Wantonness . . . connotes inten-

tional wrongdoing. . . . Conduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others." *Hinson v. Dawson,* 244 N.C. 23, 28, 92 S.E. 2d 393, 396-97 (1956). The attempt to draw a sharp line between a "wilful" act and a "wanton" act in the context of G.S. 14-34.1 would be futile. The elements of each are substantially the same.

[3] We hold that a person is guilty of the felony created by G.S. 14-34.1 if he intentionally, without legal justification or excuse, discharges a firearm into *an occupied building* with knowledge that the building is then occupied by one or more persons or when he has reasonable grounds to believe that the building might be occupied by one or more persons.

[4] When G.S. 14-34.1 is so construed, we are of opinion, and so hold, that the violation thereof is an unspecified felony within the purview of G.S. 14-17.

We note that prior to the enactment of G.S. 14-34.1, a killing caused by conduct which now constitutes a violation of this statute would not have been more than murder in the second degree in the absence of proof that *the killing* was intentional and with premeditation and deliberation. *State v. Capps,* 134 N.C. 622, 46 S.E. 730 (1904).

Since the question now decided is one of first impression, it is understandable that the trial judge failed to instruct the jury in accordance with the interpretation of G.S. 14-34.1 set forth above.

Defendant excepted to and assigns as error this excerpt from the charge: "[T]here are three possible verdicts which you might return. You may find the defendant guilty of first degree murder with no recommendation; guilty of first degree murder with recommendation of life imprisonment; or not guilty." (Note: This case was tried prior to the decision on 29 June 1972 of *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726.)

The quoted excerpt must be considered in relation to the portion of the charge which preceded it, to wit: "[I]f you find from the evidence beyond a reasonable doubt that on or about the 10th day of April, 1971, Donnie Williams shot Herman Adams with a .22 caliber rifle and thus proximately caused his death and that he, Donnie Williams, did this while com-

mitting or attempting to commit the felony of discharging a firearm into occupied property, as this has been defined for you, it would be your duty to return a verdict of guilty of murder in the first degree. If you do not so find or have a reasonable doubt as to one or both of these things, it would be your duty to return a verdict of not guilty."

No portion of Carlton Adams's testimony is referred to in the charge either in the court's review of the evidence or in the statement of contentions.

[5] The theory of the State's case, felony-murder, was based on the testimony of Sherrill Bryant, Purcell Williams and Shirley Williams. Their testimony is sharply contradicted by the testimony of Carlton Adams. Carlton Adams testified that "When Donnie Williams and the others came in" Herman Adams's store, "Herman told them to get out and *he* said they weren't going out and *he* threw up and went to shooting." (Our italics.) Carlton Adams further testified that "[o]ne shot hit [him] and [he] went down and when [he] came to there won't anybody there and Herman was lying at [his] feet dead."

Based on Carlton Adams's testimony, a jury would be permitted to find that any shooting done by defendant was done *inside* the poolroom in the course of a quarrel with Herman Adams concerning whether the party brought there by Bryant would have to leave the poolroom. When considered in context, the italicized word *he* seems to refer to Donnie Williams. It certainly refers to one of the group which included Bryant, Purcell Williams and Donnie Williams, which entered Herman Adams's poolroom about 2:00 a.m. Carlton Adams's testimony also tends to show that the shooting occurred immediately upon the arrival of these men, and that they were arrayed *against* Herman Adams and Carlton Adams and shot both of them. This testimony completely contradicts the testimony of Bryant and of Purcell Williams to the effect that they shot pool for an hour and half after their arrival before any altercation developed. It also completely contradicts the testimony of Bryant to the effect that he undertook to assist Herman Adams while Herman Adams was attempting to make one Marvin Hamilton (or Raines) leave his place of business and that he was shot by Carlton Adams when he (Bryant) was helping Herman Adams. Carlton Adams's testimony also tends to show that when Bryant's party left the poolroom to drive away both

Herman Adams and Carlton Adams were *inside* the poolroom, Herman fatally wounded and Carlton wounded and later taken to the hospital.

G.S. 1-180 requires a trial judge 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); *State v. Mercer,* 275 N.C. 108, 116, 165 S.E. 2d 328, 334 (1969).

Although defendant did not testify or offer evidence, he was entitled to an instruction applying the law to the facts stated in the testimony of Carlton Adams. Carlton Adams's testimony, if accepted, disclosed facts sufficient in law to constitute a complete defense to murder committed in the perpetration of the felony created by G.S. 14-34.1. Too, if the fatal shooting of Herman Adams occurred inside of his poolroom, and if the jury found beyond a reasonable doubt that defendant fired the shot that killed Herman Adams, the defendant would not be guilty of more than murder in the second degree in the absence of proof that *the killing* was intentional and with premeditation and deliberation. The court's failure to instruct as to the applicable law arising on the evidence of Carlton Adams applies equally to both indictments. For error in this respect, the verdicts and judgments are vacated and defendant is awarded a new trial in each case.

[6] In view of the fact that the court pronounced separate judgments as set out in our preliminary statement, we deem it appropriate to note that when a felony within the purview of G.S. 14-34.1 is relied upon as an essential of and the basis for the conviction of a defendant for murder in the first degree under the felony-murder rule, no additional punishment can be imposed for such felony as an independent criminal offense. *State v. Thompson, supra,* at 217, 185 S.E. 2d at 676; *State v. Peele,* 281 N.C. 253, 260, 188 S.E. 2d 326, 331-32 (1972); *State v. Carroll,* 282 N.C. 326, 333, 193 S.E. 2d 85, 89 (1972).

New trial.

Justice HUSKINS dissents.

STATE OF NORTH CAROLINA v. JOHN LEE EDWARDS

No. 20

(Filed 10 October 1973)

Criminal Law § 75— involuntary written confession — subsequent oral confession — presumption of involuntariness

Where the written confession of a retarded eighteen-year-old defendant given on September 25 was involuntary, defendant's oral confession given to the same officers on December 2 after he had spent 63 days in a State Hospital for the purpose of determining his mental competency is likewise presumed to be involuntary in the absence of a showing by the State that defendant was advised before he made the oral confession that the prior written confession was invalid or that it could not be used against him.

THE defendant, John Lee Edwards, was charged by grand jury indictments, proper in form, with having committed two capital felonies: burglary in the first degree and murder in the first degree. The indictments charged: (1) That the defendant on September 5, 1971, in the nighttime, broke into and entered the dwelling house of Mrs. Dora Lloyd for the purpose of committing a designated felony; (2) that the defendant on September 5, 1971, feloniously and of his malice aforethought, killed and murdered Mrs. Lloyd. The murder indictment was drawn in accordance with G.S. 15-144.

The State's evidence disclosed that on the morning of September 5, 1971, a neighbor found the dead body of Mrs. Dora Lloyd in the home where she lived alone. The evidence disclosed she died as a result of strangulation.

The investigating officers interrogated the defendant, a boy eighteen years of age, who lived in the community. When he denied any knowledge of or implication in the offenses and gave an account of his whereabouts and his companions, the officers released him. He was under bond to appear in court to answer a minor infraction of the criminal law and his bondsman surrendered him to the officers who were investigating the death of Mrs. Lloyd. The officers also questioned the persons named by the defendant as his companions on the night of September 4-5. Their accounts differed in some important details from the story told by the defendant. After the bondsman had surrendered the defendant, the officers began an extended interrogation, with no one present except the officers

and the defendant. Finally, the defendant broke down and tearfully admitted he went to the home of Mrs. Lloyd on the night of September 4-5, 1971, for the purpose of stealing money. He entered the house by opening an unlocked door. As he went from one room to another, he overturned a chair. The noise awoke Mrs. Lloyd who began screaming. He then choked her until she stopped screaming, disconnected the telephone, and left. After the admissions thus obtained, the officers wrote out the confession and read it to the defendant who said it was correct.

Although the time was well after midnight, the officers called the district judge who, at their request, appointed Mr. Noell attorney for the defendant and instructed him to meet the officers at the jail in Hillsborough immediately. (On the way the officers obtained from the defendant a promise that he would sign the confession in the presence of counsel.)

At the courthouse in Hillsborough Mr. Noell conferred briefly with the defendant and advised him not to sign any paper and not to make any admissions. Officer Cohoon told the defendant he would like for him to sign the confession and that he need not follow the advice of the attorney. The defendant disregarded the advice of counsel, kept the promise previously made when he was unrepresented, and signed the confession.

The officers immediately obtained warrants charging the offenses of burglary and murder. The court committed the defendant to Cherry Hospital for psychiatric evaluation. After sixty-three days the prisoner was returned to the Hillsborough jail with the finding that he knew right from wrong and was competent to stand trial.

On the day of his return, December 2, 1971, Officer Cohoon and others who had conducted the original interrogation, appeared at the jail, had Mr. Noell called, and obtained from the defendant oral admissions in substance the same as those made on September 24-25, 1971.

At the first trial, the State offered over objection, the defendant's admissions made in Chapel Hill and Hillsborough on September 24-25, 1971. The jury returned verdicts finding the defendant guilty of burglary in the first degree and guilty of murder "as charged." The jury having failed to make any

recommendation as to punishment, the court imposed a death sentence in each case.

On appeal, this Court awarded a new trial on account of the erroneous admission of the defendant's confession made on September 25, 1971. *State v. Edwards,* 282 N.C. 201, 192 S.E. 2d 304.

At the new trial now under review, the State introduced evidence in substance the same as that offered in the first trial, except the State did not undertake to offer the confession made on September 25, 1971. The State, however, after a voir dire hearing and over objection, offered the confession made to Officer Cohoon on December 2, 1971. Judge Webb concluded that the lapse of time between September 25th and December 2nd and the defendant's stay in the hospital were sufficient to remove the taint which vitiated the September confession and rendered the December repeat admissible. Over objection, Officer Cohoon was permitted to tell the jury what the defendant had said on December 2nd. The defendant excepted.

On the burglary indictment the jury returned a verdict finding the defendant guilty of "felonious breaking and entering;" on the murder indictment the jury's verdict was "guilty as charged."

The court imposed a prison sentence of ten years for breaking and entering and a life sentence for murder. The defendant excepted and appealed.

Robert Morgan, Attorney General, by Ralph Moody, Special Counsel, for the State.

F. Lloyd Noell and Robert L. Satterfield for the defendant.

HIGGINS, Justice.

The critical question of law presented on this appeal is the legal admissibility of the defendant's oral confession made to Officer Cohoon in the courthouse in Hillsborough on December 2, 1971. The State contends the court was correct in holding that "[T]he two months and some few days which the defendant was away from Orange County and in Cherry Hospital had washed out the effects of the first two confessions [at Chapel Hill and at Hillsborough] and that the last confession the defendant made [December 2, 1971] was voluntary and proper." The argument

is the defendant was away from the investigating officers and their influence over him had dissipated.

The State's argument would have more weight if different officers had conducted the December 2nd interrogation. But the same officers who obtained the midnight confession in Chapel Hill and a verification in the presence of Mr. Noell in Hillsborough, again confronted him on the first day of his return. Even a retarded eighteen year old had mind enough to know Mr. Cohoon still had his written confession. It seems fair to assume from the officers' rush to get another confession that the prosecution had misgivings about the validity of those previously made. Otherwise, there would be no necessity for an oral confession since the officers already had a written one. Actually, the December interrogation and its results were but a continuation of the State's investigatory procedures which took place before the first trial. The officers neither surrendered the written confession, nor informed the defendant that it would not be used against him. The foregoing, or something like it, seems to be necessary in order to remove the taint from the results of any follow-up interrogation.

The vice in this December 2nd confession is the utter failure of the officers to disclose to this "middle degree" retarded defendant that his prior written confession was illegally obtained, could not be offered in evidence, and that they were endeavoring to obtain additional admissions which could be used against him in court. Judge Webb concluded that the time interval of sixty-three days away from Orange County was sufficient to remove the illegality which tainted the results of the prior interrogations.

In *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492, this Court held: "Where a confession has been obtained under circumstances rendering it involuntary, presumption arises which imputes the same prior influence to any subsequent confession, and this presumption must be overcome before the subsequent confession can be received in evidence." To the same effect are a number of cases. *State v. Stevenson,* 212 N.C. 648, 194 S.E. 81; *State v. Moore,* 210 N.C. 686, 188 S.E. 421.

In *State v. Hamer,* 240 N.C. 85, 81 S.E. 2d 193, Justice Ervin used this language: "Where a confession has been obtained under circumstances rendering it involuntary, any subsequent confession is presumed to proceed from the same

vitiating influence, and the burden is on the State to establish the voluntary character of the subsequent confession before it can be received in evidence."

In *State v. Gibson,* 216 N.C. 535, 5 S.E. 2d 717, Chief Justice Stacy stated the rule: "It is established by numerous decisions that where a confession has been obtained under such circumstances or by such methods as to render it involuntary, a presumption arises which imputes the same prior influence to any subsequent confession of the same or similar facts, and this presumption must be overcome before the subsequent confession can be received in evidence. . . . Especially is this so, when the court is then cognizant of the fact that the accused has made a prior involuntary confession."

2 Wharton, Criminal Evidence, 63, Sec. 359 (12th Ed. 1955), states the rule: "It has also been held, generally, that the influence of the improper inducement is removed when the accused is properly cautioned before the subsequent confession. The warning so given, however, should be explicit and it ought to be full enough to apprise the accused (1) that anything he may say after such warning can be used against him; and (2) that his previous confession, made under improper inducement, cannot be used against him." Citing many cases including: *State v. Gregory,* 50 N.C. 315; *State v. Scates,* 50 N.C. 420; *People v. Jones,* 24 Cal. 2d 601, 150 P. 2d 801; *Williams v. U. S.,* 328 Fed. 2d 669 (5th Cir. 1964).

The presumption of continuing taint is not conclusive, but the admissibility of the later confession must be established by evidence. In this connection, the language of the Court in *Williams v. U. S., supra,* is pertinent: "[T]he most important fact touching on the validity of the oral admissions made after the men had been returned to Fort Worth, was their knowledge that they had already signed a written confession in full, and their lack of knowledge that this confession could not be used against them. . . . We have no doubt that under the circumstances here present there was a burden on the government, before the acceptance of further oral admission or confession from the accused, to inform them that the original written confessions would not be offered or used against them."

The defendant in this case made the oral confession to the officers who had taken the prior invalid written one and the record does not contain a suggestion that the defendant was

advised that the written confession was invalid or that it could not be used against him. The officers evidently suspected the invalidity, otherwise there would appear to be no need for further questioning.

Under the circumstances disclosed by this record, we are forced to conclude that the evidence before Judge Webb was insufficient to warrant the admission of the December 2, 1971 confession. Its admission constituted prejudicial error entitling the defendant to go before another jury.

The Court has heretofore held invalid the written confession signed in Hillsborough on September 25, 1971, and now invalidates the oral repeat made to the same officers on December 2, 1971.

The exclusion of these confessions may present a problem to the prosecution. The admission of incompetent evidence, however, is not the proper solution of the problem.

New trial.

STATE OF NORTH CAROLINA v. JIMMY L. EVERETTE

No. 23

(Filed 10 October 1973)

1. **Criminal Law § 164— failure to move for nonsuit in trial court — consideration on appeal**

Though it was not clear from the record whether defendant actually made a motion to dismiss or a motion for judgment as in the case of nonsuit, the court reviewed the sufficiency of the State's evidence under the provisions of G.S. 15-173.1 as if the proper motion had been made in the trial court.

2. **Homicide § 21— first degree murder — death by shooting — sufficiency of evidence**

In passing upon the sufficiency of the State's evidence to carry the case to the jury, the trial court in a murder prosecution was not required to consider defendant's testimony concerning self-defense, but properly submitted the case to the jury where the State's evidence tended to show that defendant entered an eating establishment with a pistol in his hand, that he told deceased to stand up and that he was going to kill him, that he shot deceased twice, walked over to him and said "I hope you dead," that deceased died as a result of the bullet wounds, and that on several occasions prior to the shooting defendant said he was going "to get" the deceased.

3. **Criminal Law § 99— questioning of witness by court — no error**

The trial court in a murder case did not express an opinion in questioning defendant and one of defendant's witnesses in an effort to clarify their testimony, nor did the court err in instructing a witness to speak louder.

4. **Criminal Law § 162— failure to object to evidence — failure to move to strike — consideration on appeal**

Though defendant made no objections to the admission of documents introduced by the State or to questions asked by the State, made no motions to strike answers to those questions, but did bring forward on appeal assignments of error based on admission of the documents in the trial court, the Supreme Court considered the assignments of error and found them to be without merit.

5. **Criminal Law § 163— objection to instructions — made for first time on appeal**

Where the trial court correctly and adequately defined murder in the first degree, murder in the second degree and voluntary manslaughter, fully instructed the jury on defendant's right of self-defense, applied the law to the facts, and finally inquired if defendant desired any further instructions, defendant could not complain on appeal that an insufficient amount of time was devoted to the instructions on second degree murder and manslaughter, since he did not request additional instructions; furthermore, defendant's assignment of error to the charge was broadside and ineffectual.

APPEAL by defendant from *Hall, J.*, at the 22 January 1973 Session of DURHAM Superior Court.

On an indictment proper in form, defendant was tried and convicted of murder in the first degree of Norwood T. Bass, alias Pumpkin Bass. Defendant appeals from a judgment imposing a sentence of life imprisonment.

The State presented three witnesses who testified that on 27 March 1972 around 5 p.m. they were in a food establishment known as the Red Hen in Durham, North Carolina. Their testimony tends to show that the deceased and Herbert Blue were seated in a booth in the Red Hen when defendant walked in with a pistol in his hand, told the deceased to stand up, and told him he was going to kill him. As the deceased stood up, defendant shot him twice. Defendant also shot Blue once. Deceased then ran to the back of the Red Hen and fell. Defendant walked over to him and said "I hope you dead," and then ran out of the Red Hen.

These three eyewitnesses also testified that prior to the shooting the deceased did not reach into his coat as if to get a

gun, and that the only thing he had in his hand when he was shot was a grape soda drink.

B. W. Burch, the investigating officer of the Durham Police Department, found no weapon on the deceased's person. Another police officer, W. Y. Poole, testified that he had known both the deceased and defendant for some time prior to 27 March 1972, and that the deceased shot defendant in the arm about a year before the alleged shooting in the Red Hen. Officer Poole further testified that on several occasions—the latest being about a week before the date of the alleged shooting in the Red Hen—defendant said that he was going "to get" the deceased.

Dr. John T. Daly, admitted by defendant's counsel to be a medical expert, testified that the deceased died as a result of two bullet wounds, one in the chest and one in the abdomen, either of which could have been fatal.

Defendant, testifying in his own behalf, stated that about a year prior to the shooting in the Red Hen the deceased shot defendant in the arm. He further testified that two days before the shooting in the Red Hen someone took a shot at him, and the next morning the deceased called defendant on the telephone and said he would not miss him the next time. As a result of these alleged shootings, defendant was afraid of the deceased and started carrying a pistol. On 27 March 1972, the day following the alleged telephone call from the deceased to defendant, defendant went into the Red Hen not knowing that the deceased was inside. Defendant saw deceased start reaching into his coat as if to get a gun. Without waiting to see if the deceased actually had a gun or "was just going through the motion," defendant started shooting. Deceased immediately pulled Blue in front of him, and defendant accidentally shot Blue. Defendant denied that he said "I hope you dead," or that he told Officer Poole that he was going "to get" the deceased.

Blue, testifying for the defendant, stated that he did not see a gun in the deceased's hand, but that deceased had "reached for his side." Blue also testified that after defendant had fired one shot, the deceased grabbed Blue and used him "as a shield," and that this was how he was shot.

Attorney General Robert Morgan and Associate Attorney Ann Reed for the State.

Felix B. Clayton and Raymond Sitar for defendant appellant.

MOORE, Justice.

Defendant first assigns as error the failure of the trial court to direct a verdict for defendant at the close of the State's evidence, at the close of defendant's evidence, and at the close of all the evidence. In support of this assignment, defendant summarizes a portion of the evidence that stresses his plea of self-defense and contends that because of this evidence the State did not meet the burden of proof required for submission of the case to the jury.

[1] In a criminal case the proper motion to test the sufficiency of the State's evidence to carry the case to the jury is a motion to dismiss the action or a motion for judgment as in the case of nonsuit, pursuant to G.S. 15-173. *State v. Evans,* 279 N.C. 447, 183 S.E. 2d 540 (1971); *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679 (1967). The sufficiency of the evidence for the State in a criminal case is reviewable upon appeal without regard to whether a motion has been made pursuant to G.S. 15-173 in the trial court. G.S. 15-173.1. From the record in this case it is not clear whether defendant actually made any motion. However, we review the sufficiency of the State's evidence under the provisions of G.S. 15-173.1 as if the proper motion had been made under G.S. 15-173. On such motion the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable intendment thereon and every reasonable inference therefrom. Contradictions and discrepancies, even in the State's evidence, are for the jury to resolve and do not warrant nonsuit. Only the evidence favorable to the State is considered, and defendant's evidence relating to matters of defense or defendant's evidence in conflict with that of the State is not considered. *State v. Henderson,* 276 N.C. 430, 173 S.E. 2d 291 (1970); 2 Strong, N.C. Index 2d, Criminal Law § 104 (1967). To withstand a judgment as of nonsuit there must be substantial evidence of all material elements of the offense charged. Whether the State has offered such substantial evidence presents a question of law for the trial court. *State v. Evans,* 279 N.C. 447, 183 S.E. 2d 540 (1971); *State v. Allred,* 279 N.C. 398, 183 S.E. 2d 553 (1971).

The essential elements of murder in the first degree are premeditation, deliberation, and malice. *State v. Moore,* 275 N.C. 198, 166 S.E. 2d 652 (1969).

[2] In this case the State offered evidence which tends to show that defendant entered the establishment known as the Red Hen on 27 March 1972 with a pistol in his hand, told deceased to stand up, and told him he was going to kill him. He then shot deceased twice, and deceased died as a result of these bullet wounds. The State's evidence further tends to show that after deceased fell, defendant walked over to him and said "I hope you dead," and that on several occasions prior to the shooting defendant said he was going "to get" the deceased. From this evidence the jury could reasonably infer that defendant killed the deceased and that the killing was committed with premeditation, deliberation, and malice.

In passing upon the sufficiency of the State's evidence to carry the case to the jury, the trial court in the present case was not required to consider defendant's testimony concerning self-defense. Therefore, the court properly refused to enter judgment as of nonsuit for defendant.

[3] Defendant next contends that the court violated G.S. 1-180 by asking defendant certain questions. On direct examination defendant testified: "When I walked into the Red Hen, Blue and Bass were sitting together. When he seen me he started getting up and both of us were reaching—he pulled Blue in front of him and I just started shooting, that is how I hit him and that is how I hit Blue." The court then asked defendant: "Who was holding Blue in front of him?" Defendant answered: "The deceased. I didn't intend to hit Blue. When I walked in our eyes met and he got up and began reaching under his coat. I didn't wait to see if he had a gun or not, but he was just going through the motion." The court then asked: "The deceased is alleged to be Bass, isn't it?" At another point during the trial defendant's witness Blue testified: "Bass grabbed me after the first shot trying to use me as a shield I guess." The court asked Blue: "Who was it that grabbed you?" Obviously, in asking these questions the court simply meant to clarify the facts. Nothing in the questions would indicate to the jury that the judge had any opinion as to the guilt or innocence of defendant. If the court questions a witness only to clarify the witness's testimony or to promote a proper understanding of the case, such questions do not amount to an expression of

opinion. *State v. Freeman,* 280 N.C. 622, 187 S.E. 2d 59 (1972); *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376 (1968). Defendant also contends that the court erred in telling the witness Blue: "Speak out. She has to record your answer." This statement was simply an effort by the court to get the witness to speak louder. *State v. Allen,* 283 N.C. 354, 196 S.E. 2d 256 (1973). These contentions are without merit.

[4] Defendant brings forward four assignments of error based on the admission of certain documents introduced by the State and the answers to certain questions asked by the solicitor. An examination of the record discloses that defendant did not object to the admission of the documents or to the questions that defendant now contends were improper, and that defendant made no motions to strike any of the answers. Ordinarily, failure to object in apt time to incompetent testimony is regarded as a waiver of the objection, and its admission is not assignable as error unless the evidence is forbidden by statute. If the testimony is incompetent, objection thereto should be imposed at the time the question is asked, and if no objection was made to the question when asked, a motion to strike the answer should be made. *State v. Lewis,* 281 N.C. 564, 189 S.E. 2d 216 (1972); *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534 (1970); 1 Stansbury's N. C. Evidence, Brandis Rev. § 27 (1973); 7 Strong, N. C. Index 2d, Trial § 15 (1968).

Even though no objections were made to the admission of the documents or to the questions asked by the State, and no motions were made to strike the answers to such questions, in view of the serious nature of this case we have carefully examined each assignment and find them to be without merit.

[5] Defendant finally contends that the court erred in its charge to the jury in that "little explanation was devoted to the lesser included charges of second degree murder and manslaughter." Defendant does not contend that the court failed to charge the jury on the lesser included offenses of second degree murder and manslaughter, nor does he contend that the instructions as given were incorrect. Rather he simply contends that the "shortness of the time" devoted to the instructions on the lesser included offenses could have caused the jury to forget those portions of the charge when deliberations began. The court in the charge correctly and adequately defined murder in the first degree, murder in the second degree, and voluntary manslaughter, and fully instructed the jury on defendant's

right of self-defense. In the final mandate to the jury, the court applied the law to the facts in the case and instructed the jury that it could return one of four verdicts: Guilty of murder in the first degree, guilty of murder in the second degree, guilty of voluntary manslaughter, or not guilty. The court then inquired if defendant desired any further instructions. Defendant's counsel replied: "No, your Honor. I think that it was a very fine charge." The presiding judge in his charge to the jury must declare and explain the law arising on the evidence relating to each substantial feature of the case. *State v. Brady,* 236 N.C. 295, 72 S.E. 2d 675 (1952); G.S. 1-180. When the trial judge has instructed the jury correctly and adequately on the essential features of the case but defendant desires more elaboration on any point or a more detailed explanation of the law, then he should request further instructions. Otherwise, he cannot complain. *State v. Brooks,* 228 N.C. 68, 44 S.E. 2d 482 (1947); *State v. Gordon,* 224 N.C. 304, 30 S.E. 2d 43 (1944); *State v. Hendricks,* 207 N.C. 873, 178 S.E. 557 (1935); 7 Strong, N. C. Index 2d, Trial §§ 33, 38 (1968). Neither the exception, nor the assignment of error, nor the brief, calls attention to any particular statements or omissions in the charge. All are broadside and are not sufficient to draw into focus any assigned error of law. *State v. Wilson,* 263 N.C. 533, 139 S.E. 2d 736 (1965); *Clifton v. Turner,* 257 N.C. 92, 125 S.E. 2d 339 (1962); *State v. Stantliff,* 240 N.C. 332, 82 S.E. 2d 84 (1954); 1 Strong, N. C. Index 2d, Appeal and Error § 31 (1967). This assignment is without merit.

Defendant has had a fair trial, free from prejudicial error. The verdict of the jury is fully supported by the evidence. In the record we find no basis for a new trial.

No error.

STATE OF NORTH CAROLINA v. LARRY SAMUEL ALEXANDER

No. 5

(Filed 10 October 1973)

1. **Criminal Law § 26; Homicide § 4— murder in perpetration of robbery — robbery of second person — conviction of both crimes**

Defendant could be convicted of the murder of one person in the perpetration of an armed robbery and of the armed robbery and

felonious assault of a second person, although both robberies were committed simultaneously, since the two robberies were separate and distinct crimes.

2. **Assault and Battery § 5; Criminal Law § 26; Robbery § 6— armed robbery — felonious assault — continuous course of conduct — conviction of both crimes**

Defendant was properly convicted simultaneously of armed robbery and of felonious assault of one victim arising out of one continuous course of conduct since neither the infliction of serious injury nor an intent to kill, essential elements of felonious assault, is an essential element of armed robbery.

3. **Constitutional Law § 36; Criminal Law § 135; Homicide § 31— first degree murder — sentence of life imprisonment**

Under *Furman v. Georgia*, 408 U.S. 238, life imprisonment was the only sentence that could be imposed upon defendant's conviction of first degree murder committed prior to 18 January 1973, the date of the decision of *State v. Waddell*, 282 N.C. 431, although the jury did not recommend such a sentence at the time it rendered its verdict.

4. **Constitutional Law § 36; Homicide § 31— murder statute — constitutionality**

The murder statute, G.S. 14-17, is not unconstitutional.

APPEAL by defendant from *Friday, J.*, 4 December 1972 Schedule "C" Criminal Session of MECKLENBURG.

Defendant was tried upon three bills of indictment which were consolidated for trial. Bill No. 37019, drawn under G.S. 15-144, charged that on 7 June 1972 defendant "did kill and murder Bobby Taylor." Bill No. 37020, drawn under G.S. 14-32(a), charged that on 7 June 1972 defendant feloniously assaulted Robert Michael Martin with a pistol. Bill No. 37021, drawn under G.S. 14-87, charged that on 7 June 1972 defendant by means of a pistol feloniously robbed Robert Michael Martin of $6.00.

The State's evidence tended to show the following facts:

On 7 June 1972 Robert Michael Martin (Martin) and Bobby Taylor, employees of the Charlotte Park and Recreation Commission, went to the Bonnie Brae Golf Course in Charlotte to play golf. At approximately 12:04 p.m. they began play on the No. 1 hole. After playing the first three holes, they arrived at the fourth hole at about 12:45 p.m. There Martin observed two black men sitting on a bench five-to-six yards to the right of the tee. From the fourth tee Martin drove a 200-yard shot which landed on the left side of the fairway. Bobby Taylor's

drive landed on the extreme right toward the woods. The two men walked off the tee together for about 100 yards and then separated, each going toward his own ball.

As Martin waited for Taylor to hit his second shot a black male, later identified as defendant, came up behind Martin, pointed a gun at him, and demanded his money. Martin reached for his wallet but defendant said, "No, walk in the woods." Martin looked across the fairway and observed another black man behind Taylor with a golf club in his hand. As defendant walked Martin across the fairway he called to Taylor, telling him not to move or he would shoot and kill Martin. Taylor froze and did not move until Martin and defendant approached. Then, Martin and Taylor marched single file into the woods with defendant, gun in hand, following two or three feet behind. The other man entered the woods with them.

The group walked about 75 yards down a slope into the woods. At that point defendant ordered Martin and Taylor to lie on the ground, face down with their heads pointing up the hill. While the other man tied their feet defendant stood in front of the two men, about four feet from their heads. He was cursing, waving the gun in their faces, and saying he wanted their money. As Martin got out his wallet, which contained only six or seven dollars, the unidentified man grabbed it from his hand. Taylor had no wallet with him. The only money on his person was a little pocket change which he gave to defendant.

Infuriated because Martin and Taylor had no more money, defendant said he was going to kill them both so that they could not go to the police. Taylor offered to give him his car keys and to write him a check. These offers infuriated defendant further, and he walked back and forth from Martin's feet to Taylor's head saying, "I'm going to shoot you, shoot you." After kicking Taylor twice in the face and once in the ribs defendant announced that he was going to kill him first. During this time Martin was lying beside Taylor, propped up on his elbows, watching all that went on. Taylor was in the same position. All the while the unidentified man was standing directly behind them, a raised golf club in his hand.

Ignoring the pleas of both men to leave them alone, defendant put his gun to Taylor's neck and fired. He then "walked around to the front" and shot Taylor in the head. Stepping to

the right he shot Martin twice in the head, backed up, and shot Taylor again. After that he stepped backwards and once more pointed the pistol at Martin, but it did not go off. Defendant then ran away; the other man left when defendant fired the first shot.

Martin, who was still conscious, untied his feet. After determining that Taylor was dead he ran out of the woods. His cries attracted the attention of several golfers who carried him to the clubhouse where they called the police and an ambulance. At the hospital, doctors removed from Martin's head two bullets which were "lodged right on the bone of the skull through the meaty part of the scalp." Martin was hospitalized for six or seven days.

An autopsy revealed that Taylor had been shot once in the neck at point-blank range and twice in the head. The medical examiner testified that any one of the three wounds could have been fatal.

A firearms identification specialist testified that two of the bullets removed from Taylor and one from Martin were fired from the same gun. The other bullets which were removed were too mutilated for a positive identification.

While Martin was in the hospital, on five or six occasions, he was shown a total of 85-100 photographs of black men. From these he identified defendant as the man who had shot him and Taylor. On June 10th, Martin was taken to the police station on a stretcher to observe a lineup. In it he identified defendant as the man who had shot him.

After conducting an extensive *voir dire,* Judge Friday found that Martin's in-court identification of defendant was based solely on his observation of his assailant at the time of the "alleged robbery" at the Bonnie Brae Golf Course; that his in-court identification was not influenced by any out-of-court confrontation, lineup, or suggestive use of photographs; and that there was no evidence of any illegal or suggestive pretrial procedures conducive to a mistaken identification. Upon this finding he permitted Martin to identify defendant as one of the two men who had robbed him on the golf course.

In court Martin positively identified defendant as the man who shot him and Taylor and who robbed them both. He testified that he was unable to identify the man who tied his and

Taylor's feet and, so far as the record discloses, this man remains unidentified. Martin testified that he was in defendant's presence for a total of ten minutes, and that he looked at him directly for six or seven of those minutes while defendant faced him holding "that gun" in his face.

Willie Taylor, a black who was playing golf at the Bonnie Brae Golf Course on the morning of 7 June 1972, teed off from hole No. 4 at approximately 11:45 a.m. At that time he saw two men sitting on a bench to the left of that tee. Thinking that he knew one of them he looked at him a good while and ascertained that the man was not the person he thought he was. He testified that he was positive defendant was the man he observed on the seat at the fourth tee about quarter of twelve on 7 June 1972. He had never seen defendant before that date, and he has not seen the other man since.

Defendant offered the testimony of six witnesses which tended to show that on 7 June 1972 defendant was in their presence on or in the vicinity of South Tryon Street (and therefore not at the golf course) from 9:00 a.m. to about 11:00 a.m. and between noon and 12:30 to 1:00 p.m. Defendant himself did not testify.

The jury found defendant "guilty of the offense of murder of Bobby Taylor in the perpetration of a felony," "guilty of the offense of assaulting Robert M. Martin with a deadly weapon with intent to kill resulting in serious bodily injury," and "guilty of the offense of robbing Robert M. Martin with a firearm." The judgment of the court was that defendant be imprisoned for thirty years for robbery with a firearm; that he be imprisoned for ten years for felonious assault; and that he be imprisoned for the remainder of his natural life for first-degree murder, this sentence to begin at the expiration of the sentence imposed for felonious assault. From these judgments defendant gave notice of appeal.

Defendant appeals to this Court as a matter of right under G.S. 7A-27(a) in case No. 37019. Upon defendant's motion, in our discretion, under G.S. 7A-31(a), we certified cases Nos. 37020 and 37021 for review by this Court prior to their determination by the Court of Appeals.

Attorney General Morgan; Deputy Attorney General Vanore; and Associate Attorney General Speas for the State.

T. O. Stennett for defendant appellant.

SHARP, Justice.

[1] Defendant does not challenge the sufficiency of the State's evidence to sustian his conviction of felony-murder, that is, a murder committed in the perpetration of an armed robbery. However, his first assignment of error is that the trial judge erred in refusing to nonsuit the charges of felonious assault and armed robbery in cases Nos. 37020 and 37021. Defendant contends that these two charges were proven as essential elements of the felony-murder for which he was convicted and sentenced to life imprisonment and that, therefore, separate judgments imposing punishment for felonious assault and armed robbery in addition to the life sentence imposed for first-degree murder cannot stand.

In support of his first contention defendant cites, *inter alia, State v. Carroll,* 282 N.C. 326, 193 S.E. 2d 85 (1972) ; *State v. Peele,* 281 N.C. 253, 188 S.E. 2d 326 (1972) ; *State v. Thompson,* 280 N.C. 202, 185 S.E. 2d 666 (1972) ; *State v. Hatcher,* 277 N.C. 380, 177 S.E. 2d 892 (1970). These cases, among others, clearly hold that when an accused is tried for a greater offense, he cannot be tried either simultaneously or thereafter for a lesser offense necessarily involved in, and a part of, the greater offense. This rule, however, has no application to the facts of of this case.

The application of the foregoing rule to felony-murder is lucidly explained in *State v. Thompson, supra.* Thompson was indicted under G.S. 14-17 for the first-degree murder of Ernest Mackey. At the same time, in a second bill, he was charged with feloniously breaking and entering a certain dwelling occupied by Mackey. Defendant was convicted of both first-degree murder and felonious breaking and entering. The State's evidence showed that the defendant killed Mackey in the perpetration of the felonious breaking and entering with which he was charged in the second bill. In arresting the judgment upon the second charge Chief Justice Bobbitt, speaking for the Court, pointed out that proof that the defendant feloniously broke into and entered the Mackey dwelling was an essential and indispensable element in the State's proof of murder committed in the perpetration of feloniously breaking and entering *that particular dwelling.* "The conviction of defendant for felony-murder, that is, murder in the first degree without proof of malice, premeditation or deliberation, was based on a finding by the jury that the murder was committed in the perpetration

of the felonious breaking and entering. In this sense, the felonious breaking and entering was a lesser included offense of the felony-murder. Hence, the separate verdict of guilty of felonious breaking and entering affords no basis for additional punishment. If defendant had been acquitted in a prior trial of the separate charge of felonious breaking and entering, a plea of former jeopardy would have precluded subsequent prosecution on the theory of felony-murder. *State v. Bell,* 205 N.C. 225, 171 S.E. 50 (1933)." *Id.* at 215-216, 185 S.E. 2d at 675.

In the present case, under the trial judge's charge, defendant's conviction of felony-murder could only have been based upon a finding by the jury that defendant murdered Taylor in the course of unlawfully taking money from his person by the use of a pistol whereby he threatened and endangered Taylor's life (an armed robbery). Defendant was not charged either with the armed robbery of Taylor or with feloniously assaulting Taylor. Had he been convicted and sentenced upon either of such charges, *State v. Thompson, supra,* and the other cited cases would have required that the judgment be arrested. However, the armed robbery and the felonious assault for which defendant was convicted and sentenced were crimes against Martin. They were, therefore, extraneous to the first-degree murder of Taylor. Although the two robberies were committed contemporaneously, they were two separate and distinct crimes.

[2] Likewise, the felonious assault upon Martin and the armed robbery of Martin of which defendant was convicted were two separate crimes. A conviction of armed robbery does not establish a defendant's guilt of felonious assault. In *State v. Richardson,* 279 N.C. 621, 185 S.E. 2d 102 (1971), a case involving a factual situation analogous to this one, it is said: "The crime of robbery includes an assault on the person. . . . The crime of armed robbery defined in G.S. 14-87 includes an assault on the person with a deadly weapon. The crime of felonious assault defined in G.S. 14-32(a) is an assault with a deadly weapon which is made with intent to kill and which inflicts serious injury. These additional elements of the crime of felonious assault are not elements of the crime of armed robbery defined in G.S. 14-87." *Id.* at 628, 185 S.E. 2d at 107.

Thus, if a person is convicted simultaneously of armed robbery and the lesser included offense of assault with a deadly weapon, and both offenses arise out of the same conduct, separate judgments may not be pronounced. "In such case, the

armed robbery is accomplished by the assault with a deadly weapon and *all* essentials of this assault charge are essentials of the armed robbery charge. However, if a defendant is convicted simultaneously of armed robbery and of *felonious* assault under G.S. 14-32(a), neither the infliction of serious injury nor an intent to kill is an essential of the armed robbery charge." *Id.* at 628, 185 S.E. 2d at 108.

Defendant's first assignment of error is without merit.

[3] Defendant's second contention, based on assignments of error 2 and 3, is that he is entitled to a new trial because the trial judge imposed upon him the sentence of life imprisonment in the absence of such a recommendation from the jury at the time it rendered its verdict that defendant was guilty of murder in the first degree.

Defendant assigns no error in the trial on the charge of murder in the first degree, and we perceive no logic in his contention that he is entitled to a new trial upon the issue of his guilt because of the sentence imposed. We hold, however, that the life sentence imposed was the only permissible judgment.

In *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726 (decided 29 June 1972), the Supreme Court held unconstitutional the imposition of the death sentence under statutes such as G.S. 14-17 which permitted court or jury, in its discretion, to determine whether the punishment for first-degree murder should be life or death. *Furman,* however, did not affect the validity of a defendant's conviction of a capital crime; it merely deprived the Court of the power to impose the death sentence. *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973); *State v. Foster,* 282 N.C. 189, 192 S.E. 2d 320 (1972); *State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664 (1972).

On 18 January 1973 in *State v. Waddell, supra,* this Court held that the effect of *Furman v. Georgia, supra,* upon G.S. 14-17 was (1) to invalidate its proviso which permitted the jury, in its discretion, to substitute life imprisonment for the death penalty as the punishment for first-degree murder and (2) to make death the only permissible punishment. The Court further held, however, that because of the *ex post facto* nature of the *Waddell* decision, "North Carolina's mandatory death penalty for . . . murder in the first degree . . . may not be constitutionally applied to any offense committed prior to the date

of this decision but shall be applied to any offense committed after such date [18 Jan. 1973]." *Id.* at 446, 194 S.E. 2d at 29. Thus, on 7 June 1972, the date of the homicide for which defendant has been convicted, "murder was not a capital crime; the only permissible punishment for murder in the first degree was life imprisonment." *State v. Watkins,* 283 N.C. 17, 32, 194 S.E. 2d 800, 810 (1973). Clearly, therefore, the proper judgment was imposed upon defendant in case No. 37019. *See State v. Frazier,* 283 N.C. 99, 195 S.E. 2d 33 (1973); *State v. Miller,* 281 N.C. 740, 190 S.E. 2d 841 (1972) and cases cited therein.

[4] Defendant's fourth assignment of error is that the trial court erred in failing "to declare G.S. 14-17 unconstitutional." In his brief defendant cites no authority in support of this contention. His only argument is that when the Supreme Court of the United States invalidated the proviso of G.S. 14-17 "the other portion [was] left in an ambiguous state" and this Court, "by its ruling of January 18, 1973 [Waddell] has only added to the confusion"; that "the death penalty is revised, which in turn is contradictory to the United States Supreme Court decision." Any discussion of this assignment would serve no purpose. As we said in *State v. Duncan,* 282 N.C. 412, 420, 193 S.E. 2d 65, 70 (1972), "[T]his same contention [that G.S. 14-17 is unconstitutional] has been considered by this Court in a number of recent cases and has been decided adversely to defendant's contention."

In the trial below, we find

No error.

BOYD S. DICKENS, ADMINISTRATOR OF THE ESTATE OF SHIRLEY MARIE DICKENS v. DR. C. D. EVERHART

No. 12

(Filed 10 October 1973)

1. Physicians, Surgeons, Etc. § 11— care required of physicians

It is not enough to absolve a physician from liability that he possesses the required professional knowledge and skill, but he must exercise reasonable diligence in the application of that knowledge and skill to the particular patient's case and give to the patient such attention as the case requires from time to time.

2. **Physicians, Surgeons, Etc. § 11— care required of physicians — error of judgment**

A qualified physician who forms his judgment after a careful and proper examination or investigation of a particular patient's condition is not an insurer of his diagnosis or of the success of his treatment and is not liable for an honest error of judgment.

3. **Physicians, Surgeons, Etc. § 11— care required of physicians — knowledge of drugs**

The care and knowledge required of a physician extends to the physician's selection and use of drugs in the treatment of the patient and to his knowledge of the dangers inherent in their use.

4. **Physicians, Surgeons, Etc. § 11— care required of general practitioner**

The general practitioner is not liable by reason of his failure to possess the degree of knowledge and skill ordinarily possessed by a specialist in the field of his specialty.

5. **Physicians, Surgeons, Etc. § 11— care required of physicians — character of community**

The character of the community in which a physician practices is a circumstance to be considered in determining the degree of skill and ability to be required of him.

6. **Physicians, Surgeons, Etc. § 11— care required of physicians — practice in similar communities**

A physician is held to the standard of professional competence and care customary in similar communities among physicians engaged in his field of practice.

7. **Evidence § 50; Physicians, Surgeons, Etc. § 15— malpractice action — medical testimony — practice in similar community**

In this malpractice action, the trial court erred in ruling that, because plaintiff's medical expert was not in 1964 familiar with the quality of medical practice in Mount Airy, he could not state his opinion as to whether the defendant's treatment of decedent in Mount Airy in 1964 was in accord with accepted medical practice in 1964 in a community similar to Mount Airy.

8. **Evidence § 48— absence of formal tender of witness as expert — question of qualification — appellate review**

The Court of Appeals erred in ruling that the qualification of plaintiff's medical witness to answer hypothetical questions propounded to him was not presented because plaintiff did not formally tender the witness as an expert where it is obvious that plaintiff was tendering the witness as a medical expert and the defendant and the court so understood, the witness testified in detail as to his qualifications as a medical expert in pathology, defendant's objections were not directed to the witness's general qualifications as an expert pathologist but were objections to specific questions on the ground the witness was not qualified to answer them, and the court expressly ruled, as a matter of law, on his qualification to answer those questions.

ON *certiorari* to review the decision of the Court of Appeals, reported in 17 N.C. App. 362, 194 S.E. 2d 221, finding no error in the judgment of *Crissman, J.*, for the defendant.

The plaintiff brought this action to recover of the defendant, a practicing physician in Mount Airy, for injury to and the wrongful death of his seventeen year old daughter, Shirley Marie, alleged to be due to negligent failure of the defendant in treating her. The jury found that she was not injured by and did not die as the result of negligence by the defendant. Judgment was entered in accordance with the verdict.

The plaintiff introduced evidence to the following effect:

Shirley Marie had a tooth extracted on the afternoon of 3 October 1964. She was in good health prior thereto. A severe headache developed after her return to her home. The dentist advised her mother to consult a physician. The defendant, who was not the family physician and who had never previously treated Shirley Marie, was called by telephone. He instructed the mother to take Shirley Marie to the emergency room of the hospital, stating that he would meet them there. He did not. The nurse in charge of the emergency room administered by hypodermic 2 cc's of Mepergan, an analgesic, without taking the girl's temperature or her pulse.

Shirley Marie and her parents remained at the hospital waiting for the defendant. When he arrived, an hour later, she was asleep. The defendant said she was "asleep on that medicine," so there was no need in his examining her, that she should be taken home and would sleep until noon the next day and be all right. No further medication was administered at that time.

The following day the girl did not arouse and, after several attempts, her mother finally reached the defendant by telephone in the late afternoon. At his direction, they returned to the hospital where the defendant met them, Shirley Marie being still asleep. He admitted her to the hospital and prescribed glucose, which was given, saying this would cause her to wake up in about four hours. About midnight, without regaining consciousness, Shirley Marie began to move about in apparent pain. She was then given a shot of Codeine (ordered by the defendant) and very quickly thereafter ceased to breathe. The nurse administered artificial respiration. The defendant having been called, returned to the hospital and made arrangements

for the girl's immediate transfer to the Baptist Hospital in Winston-Salem, to which she was taken by ambulance. On arrival, she had no respiration and exceedingly low temperature and blood pressure, was limp and unconscious. Artificial respiration was continued and she was given an antibiotic to counteract a suspected infection. Without regaining consciousness, she died six days later. An autopsy revealed that she was suffering from blood poisoning, the accepted treatment for which is the administration of antibiotics.

Following the above evidence, the plaintiff called as his witness Dr. Phillip M. Toyama. He testified that he graduated from the College of Medicine of Howard University in 1963, served his internship at Youngstown, Ohio, from 1963 to 1964, trained in Pathology at Los Angeles County Medical Center in California from 1964 to 1968, practiced Pathology in California until September 1969, then moved to Winston-Salem, North Carolina, to head the Department of Pathology at Reynolds Memorial Hospital, where he remained until April 1972, at the time of his testimony he was practicing Pathology in two hospitals in Galax, Virginia, and is licensed to practice in North Carolina, Virginia and California. He further testified that at the hospitals in Winston-Salem and Galax, he had had patients from the Mount Airy area and was familiar with the general practice of medicine in the community, including Mount Airy. In California he practiced in Riverside, a community slightly larger than Mount Airy, about 70 miles east of Los Angeles.

The record does not show that the plaintiff formally tendered Dr. Toyama as an expert. The defendant objected to certain hypothetical questions, proper in form, as to whether the defendant's treatment of Shirley Marie was in accordance with accepted medical practice in the community of Mount Airy as of 3 October 1964. The objections were sustained, the court stating, in the absence of the jury:

> "My chief reason for sustaining the objection is that this man was either a medical student or an intern in Ohio or somewhere else in 1964. In my view it is impossible for him to know what is the customary practice in this case at that time."

The defendant introduced evidence to the following effect:

He had no recollection of having received a call from the mother of Shirley Marie prior to her visit to the emergency

room at the hospital. When the girl and her parents arrived there, the nurse in charge telephoned him and told him the girl's history, blood pressure and temperature, whereupon he prescribed the injection of Mepergan to relieve the pain until he could see the patient. He did go to the emergency room and see her there. At that time he did not consider the possibility of blood poisoning from the extraction of the tooth, although that is one risk of tooth extraction. He had never seen Shirley Marie prior to this occasion. The shot of Codeine, given for pain the night of October 4, was given by the nurse at his direction in response to the nurse's telephone call and, in response to her further telephone call to the effect that the patient had stopped breathing, he rushed back to the hospital and made arrangements to transfer Shirley Marie to the Baptist Hospital. When he saw the patient some two hours earlier at the local hospital, he considered the possibility of some infection in the body but felt there was none and so did not give her medication therefor. At the time of prescribing the Codeine, he had decided there was no infection present. In his opinion the Codeine had nothing to do with the girl's ceasing to breathe, but, when he returned to the hospital on that account, he gave her another drug to counteract the effect of the Codeine.

Other physicians practicing in Mount Airy, called as witnesses for the defendant, testified that his treatment of Shirley Marie was in accord with general practice of medicine in Mount Airy at that time.

The Court of Appeals held it was unnecessary for it to pass upon the validity of reason given by the trial court for sustaining the objection to the hypothetical questions propounded to Dr. Toyama, for the reason that the defendant did not admit that Dr. Toyama was a medical expert and the plaintiff did not ask the court to find him to be one. It also considered numerous assignments of error by the plaintiff and found no merit therein.

White & Crumpler by James G. White and Michael J. Lewis for plaintiff.

Folger & Folger by Fred Folger, Jr., for defendant.

LAKE, Justice.

The basis of liability of a physician or surgeon for negligence in the care of his patient is thus stated in *Hunt v. Bradshaw,* 242 N.C. 517, 88 S.E. 2d 762:

> "A physician or surgeon who undertakes to render professional services must meet these requirements: (1) He must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess; (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and (3) he must use his best judgment in the treatment and care of his patient. [Citations omitted.] If the physician or surgeon lives up to the foregoing requirements he is not civilly liable for the consequences. If he fails in any one particular, and such failure is the proximate cause of injury and damage, he is liable."

To the same effect see: *Starnes v. Taylor,* 272 N.C. 386, 158 S.E. 2d 339; *Koury v. Follo,* 272 N.C. 366, 158 S.E. 2d 548; *Galloway v. Lawrence,* 266 N.C. 245, 145 S.E. 2d 861; *Hawkins v. McCain,* 239 N.C. 160, 79 S.E. 2d 493; Strong, N. C. Index 2d, Physicians, Surgeons, etc., § 11.

[1-3] Thus, it is not enough to absolve the physician from liability that he possesses the required professional knowledge and skill. He must exercise reasonable diligence in the application of that knowledge and skill to the particular patient's case and give to the patient such attention as the case requires from time to time. *Galloway v. Lawrence, supra.* On the other hand, a qualified physician, who forms his judgment after a careful and proper examination or investigation of the particular patient's condition, is not an insurer of his diagnosis or of the success of his treatment and is not liable for an honest error of judgment. *Belk v. Schweizer,* 268 N.C. 50, 149 S.E. 2d 565; *Kennedy v. Parrott,* 243 N.C. 355, 90 S.E. 2d 754. The requirement as to care and knowledge extends to the physician's selection and use of drugs in the treatment of the patient and to his knowledge of the dangers inherent in their use. *Koury v. Follo, supra.*

[4-6] In *Wiggins v. Piver,* 276 N.C. 134, 171 S.E. 2d 393, this Court rejected the "locality rule" to the effect that, in order to recover on the ground of failure to possess or use the requisite professional skill and ability, the injured patient must prove

that the defendant failed to possess or use the skill and ability customary in the community in which the service was rendered. We there reaffirmed the rule that the physician or surgeon must possess the degree of learning, skill and ability which others *similarly situated* ordinarily possess. Thus, the general practitioner is not liable by reason of his failure to possess the degree of knowledge and skill ordinarily possessed by a specialist in the field of his specialty. Similarly, the character of the community in which the defendant practices is a circumstance to be considered in determining the degree of skill and ability to be required of him. Prosser on Torts, 3rd ed., Negligence, p. 166. He is, however, held to the standard of professional competence and care customary in similar communities among physicians engaged in his field of practice. Thus, in *Wiggins v. Piver,* we held that an expert witness, otherwise qualified, may state his opinion as to whether the treatment and care given by the defendant to the particular patient came up to the standard prevailing in similar communities, with which the witness is familiar, even though the witness be not actually acquainted with actual medical practices in the particular community in which the service was rendered at the time it was performed.

[7] It follows that the learned trial judge erred in his conclusion and ruling that, because Dr. Toyama was not in 1964 familiar with the quality of medical practice in Mount Airy, Dr. Toyama could not state his opinion as to whether the defendant's treatment of Shirley Marie Dickens was in accord with accepted medical practice in 1964 in a community similar to Mount Airy.

The answers given by the witness, in the absence of the jury, to the hypothetical questions propounded were somewhat equivocal. We are unable to say, however, that had the jury heard them the verdict would not have been affected thereby. Consequently, the error of the trial court cannot be deemed harmless.

[8] The Court of Appeals took the view that, since the plaintiff did not formally tender Dr. Toyama as an expert witness, the ruling of the trial court could not be deemed reversible error and so the question of his qualification to answer the hypothetical questions propounded was not reached. In this we think the Court of Appeals erred.

The record discloses that Dr. Toyama first testified in detail as to his medical education, internship and practice in the field of Pathology. Without objection, he testified as to the meaning of certain medical terms used by another medical witness as descriptive of the condition of this girl, saying that these were synonymous with blood poisoning, and testified as to accepted treatment therefor. The first of the hypothetical questions to which objections were interposed then followed. No ground for the objection was stated. In response to a question by the court, the witness then testified that he came to North Carolina after the treatment of this patient by the defendant. It was expressly on that ground that the court sustained the objections to the several hypothetical questions. After the first objection was sustained and the answer of the witness thereto was put into the record in the absence of the jury, he continued to testify, without objection, concerning the effects of Codeine and Mepergan upon the respiratory and nervous systems.

When the witness was asked to compare the community in California in which he had practiced with the community of Mount Airy, the court sustained an objection by the defendant. The jury was then excused. In its absence, a voir dire was conducted in which the two communities were compared and the experience of the witness, as a practicing pathologist, was set forth. The jury then returned and in its presence hypothetical questions, proper in form, were propounded as to whether the administration of the shots of Mepergan and Codeine to this patient was in accordance with accepted medical practice "in the community including the community of Mount Airy." The court sustained the objection of the defendant to these questions, stating that his reason for doing so was that, since Dr. Toyama was elsewhere in 1964, it was "impossible for him to know what is the customary practice in this case at that time."

Obviously, the plaintiff was tendering Dr. Toyama as a medical expert witness and the defendant and the court so understood. It is equally obvious that the defendant's objections were not directed to Dr. Toyama's general qualifications as an expert pathologist but were objections to the specific questions on the ground that Dr. Toyama was not qualified to answer them. The court expressly ruled, as a matter of law, on his qualification to answer those questions.

Nothing else appearing, when a question calling for the opinion of a witness, not previously offered as an expert, is propounded and an objection is made, if there is no finding by the court, or admission by the adverse party, that the witness is qualified to testify as an expert, the sustaining of the objection will not be held error by the appellate court. *Lumber Co. v. Railroad,* 151 N.C. 212, 65 S.E. 920; Stansbury, North Carolina Evidence, 2d Ed., § 133; Strong, N. C. Index 2d, Evidence, § 48. It is always the better practice for the party offering an expert witness to tender him as such formally and to request the court to find him to be such. See, *State v. Perry,* 275 N.C. 565, 169 S.E. 2d 839. However, to apply the above stated general rule under the facts of this case is to look solely to form and to disregard substance. The intent to offer the witness as an expert being clear, his qualifications being shown and the adverse ruling of the court thereon being expressly stated, together with the reason therefor, the record presents for appellate review the validity of the court's ruling.

The judgment of the Court of Appeals is, therefore, reversed and the matter is remanded to that court for the entry of an order granting a new trial.

Reversed and remanded.

STATE OF NORTH CAROLINA v. DONALD DEWEY NORRIS

No. 11

(Filed 10 October 1973)

1. **Criminal Law § 77— exculpatory statements made ten days after crimes — exclusion proper**

Trial court in a rape and kidnapping case did not err in excluding exculpatory statements made by defendant to the arresting officer where those statements were made ten days after the alleged offenses occurred.

2. **Kidnapping § 1; Rape § 5— sufficiency of evidence**

The trial court in a rape and kidnapping case properly denied defendant's motions to dismiss where the evidence tended to show that defendant forced his victim at gunpoint to accompany him in his vehicle to a secluded area, that defendant struck his victim on the head with the pistol, that defendant forced her into the woods where he raped her, that the victim immediately reported the crimes to police, and that in accordance with the victim's account, the officers found

at the crime scene a cigarette butt defendant had left there and a pair of socks the victim had left there.

3. Criminal Law § 126— instruction on unanimity of jurors — no error

The trial court in a rape and kidnapping case did not err in instructing the jury that the verdicts whether guilty or not guilty must be unanimous, nor was there error in the manner of the return of the verdict and of the polling of the jury.

APPEAL by defendant from *Friday, J.*, January 29, 1973 Session, GASTON Superior Court.

The defendant, Donald Dewey Norris, was charged, by bills of indictment, with the offenses of kidnapping and rape. The indictments, regular in form, named Jerry Lee Brown as the victim in each case. Without objection the charges were consolidated and tried together.

The State's evidence disclosed that on the morning of October 10, 1972, as Mrs. Jerry Lee Brown was walking along a public street in Gastonia on her way to a nearby tennis court, the defendant, in his automobile, stopped abreast of Mrs. Brown and made inquiry as to the residence of one, Mr. Benny. When Mrs. Brown stopped, he drew a pistol, grabbed her by the arm, pulled and forced her into his automobile. As she struggled, he struck her on the side of the head with the pistol. He drove to a secluded spot on Crowder Mountain and forced her to go with him into the woods where he committed two acts of sexual intercourse. Medical evidence disclosed that five stitches were required to suture the head wound resulting from the defendant's blow with the pistol.

Mrs. Brown's testimony was full and complete and made a strong case of the defendant's guilt of rape. The evidence disclosed that after the defendant forced Mrs. Brown into his automobile, Mrs. Brown signaled to a passerby that she was in distress. Mr. Sowsby, the passerby, saw the signal, immediately went to a telephone, notified the police, giving a description of the automobile and that a female passenger seemed to be in trouble. Mr. Sowsby testified in corroboration. Mrs. Brown described the places where the assaults occurred and at these places the officers found the socks Mrs. Brown was wearing to the tennis court and the cigarette butt Mrs. Brown had reported to the officers the defendant left at the scene.

The defendant neither testified nor offered evidence.

The jury returned a verdict of guilty in each case. The verdicts were duly verified by a poll of the jury at the defendant's request. On the charge of kidnapping, the court imposed a sentence of not less than twenty nor more than thirty years. On the charge of rape, the court imposed a sentence of life imprisonment. The defendant excepted and appealed.

Robert Morgan, Attorney General, by H. A. Cole, Jr., Assistant Attorney General, for the State.

Robert H. Forbes for the defendant.

HIGGINS, Justice.

The defendant's counsel argues that the defendant is entitled to a new trial on the kidnapping charge and a directed verdict of not guilty on the charge of rape, alleging the court committed errors of law: (1) By refusing to permit the investigating officer to repeat to the jury exculpatory statements made by the defendant at the time of the arrest; (2) and (3) in denying the defendant's motions to dismiss at the close of the State's evidence and repeated after the defense rested without offering evidence; (4) in charging the jury that a verdict either of guilty or not guilty must be unanimous; and (5) in permitting the clerk to poll the jury in the manner disclosed by the record.

[1] The defendant's purported exculpatory statements were made to the arresting officer ten days after the offenses. They were properly excluded. "It is settled by repeated adjudications, that declarations of a prisoner, made after the criminal act has been committed, in excuse or explanation, at his own instance, will not be received; and they are competent only when they accompany and constitute part of the *res gestae.*" *State v. Chapman,* 221 N.C. 157, 19 S.E. 2d 250. *State v. Peterson,* 149 N.C. 533, 63 S.E. 87; *State v. Stubbs,* 108 N.C. 774, 13 S.E. 90. The assignment of error is without merit.

[2] The evidence of Mrs. Brown was full and complete, disclosing all elements of the crimes charged. She made immediate report to the officers and directed and led them to the place where the assaults were committed. She reported to the officers the defendant left a cigarette butt at the scene. The officers found it and also a pair of socks Mrs. Brown left at the place where the assaults occurred. The evidence was ample to go to

the jury and to sustain the verdicts. *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431. The motions to dismiss the charges were properly denied.

[3] The defendant challenges the court's instruction that the verdicts whether guilty or not guilty must be unanimous. The charge is correct. The court accepts only a unanimous verdict reported by the jury. If the jury reports a failure to agree, the practice is for the judge to instruct the jury to continue its deliberations if a verdict seems at all likely. However, upon a finding the jury is hopelessly deadlocked, it is proper for the judge to declare a mistrial and reset the case for retrial. The judge, especially in a capital case, should make inquiry and should find facts before ordering a mistrial. After a jury is empaneled, jeopardy usually attaches. Hence the record should show just cause for a mistrial. *State v. Boykin,* 255 N.C. 432, 121 S.E. 2d 863; *State v. Cofield,* 247 N.C. 185, 100 S.E. 2d 355; *State v. Crocker,* 239 N.C. 446, 80 S.E. 2d 243.

Since the defendant finds fault with the form of the verdict and the manner of its return and of the polling of the jury, we quote here the record dealing with these subjects:

"VERDICT

The jury retired to the jury room to begin their deliberations at 2:10 o'clock p.m. They returned with their verdict at 4:12 o'clock p.m.

THE COURT: Ladies and Gentlemen of the Jury, will you please rise. (The jury stands.)

THE CLERK: Members of the Jury, answer to your name. (Whereupon, the Clerk called the names of each juror in the box and each juror answered 'here.'

THE CLERK: Have you all agreed on your verdict?

THE FOREMAN: Yes.

THE CLERK: Who shall speak for you?

THE FOREMAN: I will.

THE CLERK: Donald Dewey Norris, stand and hold up your right hand. Members of the Jury, look upon the defendant. What say you? Is he guilty of the felony or (sic) rape whereof he stands indicted or not guilty?

THE FOREMAN: Guilty.

THE CLERK: Harken to your verdict as the Court recordeth. You say that Donald Dewey Norris is guilty of rape whereof he stands charged. So say all of you. On the count of kidnapping, is the defendant, Donald Dewey Norris, guilty or not guilty as charged in the bill of indictment?

THE FOREMAN: Guilty.

THE CLERK: You find the defendant guilty of kidnapping. This is your verdict, so say all of you.

THE COURT: (To Mr. Forbes) You wish to have the jury polled?

MR. FORBES: Yes, sir, your Honor.

POLLING OF JURY

THE COURT: (To the Jury) Ladies and Gentlemen of the Jury, we will now, at the request of counsel, pole (sic) the jury. As your name is called, will you please rise and answer the questions which the Clerk will ask you. (The Clerk polls the jury as follows):

LYNDA GREEN

Q. You have reported to the Court a verdict of guilty of rape and guilty of kidnapping. Was this your verdict?

A. Yes.

Q. Is this now your verdict?

A. Yes.

Q. Do you still agree and assent thereto?

A. Yes.

The record also discloses that each of the other eleven who were members of the jury was asked the same questions and made precisely the same answers as did Lynda Green. The verdicts are regular in all respects.

The defendant's objections to his trial are utterly without merit. Only the gravity of the charges, and the findings of guilt thereon, justify this extended discussion.

No error.

STATE OF NORTH CAROLINA v. PRESTON McDONALD COPELAND

No. 10

(Filed 10 October 1973)

1. **Criminal Law § 161— appeal as exception to judgment**

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

2. **Criminal Law § 157— necessary parts of record proper**

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

DEFENDANT appeals from judgment of *Fountain, J.*, 22 January 1973 Session, PERQUIMANS Superior Court.

Defendant was tried on a bill of indictment, proper in form, charging him with the first degree murder of Stanley Wayne Blanchard on 5 August 1972. Attorneys Clarence W. Griffin and O. C. Abbott were appointed to represent him.

William Lee Chappell testified that he was acquainted with defendant and his wife Mary Ann Copeland. About ten days prior to 5 August 1972, defendant said he was having trouble with his wife, "that she would stay with him awhile and then take off again."

Chappell further testified that he had been a dealer in firearms for seven or eight years. On 4 August 1972, at defendant's request, Chappell purchased a 16-gauge Stevens double-barreled shotgun from Charles Young together with fifteen or sixteen shells for use in the shotgun. The following day he went to defendant's home around 7:30 p.m. to deliver the gun. Defendant examined it and asked Chappell "if he would come up there at 9:00 that night to pick him up, . . . that he wanted to put a scare in Stanley Wayne Blanchard, the deceased; that he thought if he put a scare in Blanchard it would keep Blanchard away from his wife, Mary Ann Copeland; that Stanley Wayne Blanchard would be in his brother-in-law's, Jack Dail's, trailer, and that arrangements were made for him, Chappell, to pick up Copeland . . . about 300 yards from the home of Preston Copeland." Chappell retained possession of the gun and rode around until approximately 9 p.m. He then drove to the appointed spot

where defendant, dressed in brown or grey pants, black sweater and a yellowish looking shirt, jumped in the car. Chappell then drove about four miles to a point beyond Jack Dail's trailer, turned around as directed by defendant, and let the defendant out near the trailer. Defendant put two shells in the shotgun, three in his pocket, and left the car. Chappell then drove about a mile down the highway and parked in a church yard to wait. About 9:35 p.m. defendant, with shotgun in hand, came running down the highway and re-entered Chappell's car. Chappell asked him if he talked to Stanley Wayne Blanchard and "he said he blowed his damn head off" and said if Chappell opened his mouth he would get him, that Chappell was just as guilty as he was. Defendant said he pulled a water cooler up to the window and saw Blanchard seated at the table eating and defendant's wife standing beside him; that he waited for his wife to leave the line of fire "and then he blew his damn brains out."

Chappell further testified that defendant removed all his clothing except his shorts and stuffed them in a big brown paper bag, saying the bloodhounds could not pick up a scent if he did not have any clothes on. Defendant told Chappell to take the gun and the clothes and throw them away and to keep his mouth shut or he would also be killed.

Chappell put defendant out at defendant's driveway. He then drove along Highway 158 near Sunbury and took various rural roads for several miles to a point where he heaved the shotgun and box of shells into the canal. Driving to another spot on an unpaved road, he threw the clothing in the bushes on the right hand side of the road. The pair of pants fell out of the paper bag and Chappell retrieved them and threw them in the bushes on the other side. He then drove to his cousin's trailer where he spent the remainder of the night.

On Sunday, 6 August 1972, he concluded that he could no longer keep the matter secret. He told Earl Jordan about it on Sunday afternoon and on Monday morning consulted a lawyer. He then talked to Sheriff Broughton of Perquimans County and SBI Agent Wise, telling them exactly what had happened. Accompanied by the sheriff and other officers, he showed them where he had thrown the gun and the defendant's clothing. Those items were recovered by the officers and offered in evidence at the trial.

Sheriff J. H. Broughton testified that in response to a call he went to the Jack Dail trailer at 9:50 p.m. on the night of

5 August 1972. He found Stanley Wayne Blanchard lying on his back on the floor in the kitchen area of the trailer. Blanchard had been shot in the back of the head. There was blood on the table and a large quantity of blood on the floor where he lay. He was still alive but died soon thereafter. It was stipulated at the trial that Blanchard died as a result of a shotgun wound to the head inflicted on 5 August 1972.

Sheriff Broughton further testified that he found a water cooler located about five feet from the trailer at the kitchen window. The kitchen window above the sink had a hole in it, and the front window was broken and the screen to it had round holes in it. There was glass on the front porch on the floor beneath the front window and on the windowsill. The water cooler was offered in evidence. A wad from a 16-gauge shotgun shell was lying in the seat of a chair at the table in the kitchen.

Sheriff Broughton further testified that prior to 5 August 1972 defendant and his wife had been living together part of the time and separated part of the time; that he saw William Lee Chappell on the afternoon of 7 August 1972 and Chappell related substantially the same account of events of the preceding Saturday night that he had testified to in court.

Charles Young corroborated Chappell's testimony with respect to purchase and sale of the shotgun and identified, by serial number, the shotgun offered in evidence as the same gun he sold Mr. Chappell.

Defendant did not testify and offered only one witness, his mother. She testified that on 5 August 1972 defendant came to her home for a few minutes around 7 p.m. He was dressed in a sport shirt with short sleeves and was wearing dark trousers. Later that night at 9:10 p.m. she called him on the telephone and conversed with him for five minutes. As a result of the phone conversation he again came to her home to get some cupcakes she had baked for him, arriving on this occasion around 9:30 p.m. and staying at her home until 11 p.m. She testified that she had been doing defendant's laundry for him for six or eight months; that he never owned a shirt like the one offered in evidence and never had a black sweater like State's Exhibit 2. She said defendant was her only son and is forty-six years of age.

The jury convicted defendant of murder in the first degree and he was sentenced to life imprisonment.

Twiford, Abbott & Seawell by O. C. Abbott, attorney for defendant appellant.

Robert Morgan, Attorney General, and John M. Silverstein, Associate Attorney, for the State of North Carolina.

HUSKINS, Justice.

The case on appeal contains no assignments of error. In the brief, defense counsel states that he is unable to find prejudicial error but has perfected the appeal to the end that this Court may examine the entire record.

[1] The appeal itself is considered an exception to the judgment and presents for review any error appearing on the face of the record proper. *State v. Cox,* 281 N.C. 131, 187 S.E. 2d 785 (1972); *State v. Elliott,* 269 N.C. 683, 153 S.E. 2d 330 (1967). Unless error appears on the face of the record proper, the judgment will be sustained. *State v. Bumgarner,* 283 N.C. 388, 196 S.E. 2d 210 (1973); *State v. Williams,* 268 N.C. 295, 150 S.E. 2d 447 (1966).

[2] Ordinarily, the record proper in criminal cases consists of (1) the organization of the court, (2) the charge (information, warrant or indictment), (3) the arraignment and plea, (4) the verdict, and (5) the judgment. *State v. Tinsley,* 279 N.C. 482, 183 S.E. 2d 669 (1971); *State v. McClain,* 282 N.C. 357, 193 S.E. 2d 108 (1972).

A careful examination of the record proper reveals no error. Evidence of defendant's guilt is overwhelming. In the trial, verdict and judgment we find

No error.

STATE OF NORTH CAROLINA v. LEROY CARTHENS

No. 18

(Filed 10 October 1973)

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

An appeal is itself an exception to the judgment and presents the question of whether any error appears on the face of the record proper.

2. Rape § 5; Robbery § 4— armed robbery — rape — sufficiency of evidence

The State's evidence was sufficient to be submitted to the jury in this prosecution for armed robbery and rape.

APPEAL by defendant from *Clark, J.*, at the 2 February 1972 Session of HOKE.

By separate indictments, each proper in form, the defendant was charged with the robbery of Sylvia Locklear with firearms or other dangerous weapon and with the rape of Sylvia Locklear. The offenses are alleged to have occurred on 21 August 1971, prior to the decision in *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19. He was found guilty of both offenses and was sentenced to imprisonment for not less than 25 years nor more than 30 years for the offense of robbery and to imprisonment for life for the offense of rape.

Throughout the trial and the imposition of sentences the defendant was represented by his privately employed counsel, who gave notice of appeal in each case. Neither appeal was perfected within the time allowed therefor, the defendant's privately employed counsel having advised him that such counsel did not consider there was any ground for appeal and that in his opinion such appeal would be frivolous. The defendant filed a petition for post conviction relief, asserting that he had at all times desired to have his cases reviewed by direct appeal. Upon the hearing of that petition, Braswell, J., finding a conflict in personalities had developed between the defendant and his privately employed counsel, relieved the privately employed counsel and, further finding the defendant to be an indigent, appointed the public defender as counsel for appellate review, instructing him to apply for a writ of certiorari to permit the late filing of an appeal. Such petition was filed with the Supreme Court of North Carolina in the rape case, and a further petition for certiorari to permit the review of the robbery conviction by the Supreme Court prior to its determination by the Court of Appeals was also filed. Both such petitions were allowed and, thereupon, the appeals were duly filed and heard in the Supreme Court, the defendant being represented therein by the public defender.

The case on appeal expressly states that there are no assignments of error. The defendant's brief on appeal states that counsel for the defendant "has carefully examined the record

in this case and has been unable to find any error which would justify a new trial." The only exception appearing in the record is to the denial of the defendant's motion for judgment of nonsuit at the conclusion of the State's evidence.

Sylvia Locklear, a witness for the State, testified to the following effect:

On 21 August 1971 she was 21 years of age and, together with her infant, illegitimate daughter, was living with her mother in a residence attached to a store owned and operated by her mother. At about 10 a.m. on 21 August 1971 she was in her bed asleep, her child and another infant girl being also present in the residence. Her mother was not at home and the store was closed. She was awakened by the defendant, who held an open knife at her neck. The defendant first told her that he wanted to get into the store. She agreed and started to arise to get the keys which were in another room. Thereupon, he took certain liberties with her person to which she objected. They went into the other room where she got the keys to the store, he having his arm around her neck and the knife at her neck. They returned to the bedroom where, over her protest, he had sexual intercourse with her against her will, she being frightened for her life and for the lives of the girls.

To reach the store it was necessary to go outside the residence. She and the defendant did so, he going around one side of the building to reach the door of the store and she going around the other side of the building to reach it. Although there was another filling station across the road and about 100 yards distant, which was open for business, she made no call for assistance and no effort to escape. She unlocked and opened the store and the defendant took therefrom four six-packs of beer and the money in the cash register, which she gave him because she was frightened. The defendant then departed with the beer and the money.

Shortly thereafter, the mother of the witness returned and the witness told her and another person that "a man had robbed the store." Later in the day a deputy sheriff arrived and she told him "what had happened." She was taken by the deputy to the hospital and was there examined by a physician.

The physician testified that he examined Sylvia Locklear and a vaginal smear disclosed the presence of live sperm. He

found no evidence of bruises or other physical injury except several small fresh scratches on her neck and upper chest.

The defendant testified in his own behalf and offered the testimony of other witnesses. He denied any contact with Sylvia Locklear, stating that he had never seen her before the trial, never had intercourse with her and did not take any money out of the store. He admitted having been in the store at an earlier hour that morning, at which time he exchanged some cans of warm beer for some which were cold, this being with the permission of another woman who was then attending the store and who, prior to the alleged offenses, closed it and left the premises. The defendant's evidence, if true, established an alibi for the time of the alleged offenses.

Attorney General Robert Morgan and Associate Attorney Howard A. Kramer for the State.

Kenneth A. Glusman, Assistant Public Defender, for defendant.

LAKE, Justice.

[1] Though the record contains no assignments of error, the appeal is, itself, an exception to the judgment and presents for our consideration the question of whether any error appears on the face of the record proper. *State v. Elliott,* 269 N.C. 683, 153 S.E. 2d 330; *State v. Darnell,* 266 N.C. 640, 146 S.E. 2d 800; *State v. Sloan,* 238 N.C. 672, 78 S.E. 2d 738. We find no such error. The indictments were proper in form, the verdicts were properly returned and they support the sentences imposed. See, *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19; G.S. 14-87.

Notwithstanding the absence of any assignment of error, the conclusion of the defendant's privately employed counsel, set forth in the record, that there is no sufficient ground for appeal, and the statement by the public defender in the defendant's brief that he has been unable to find any error which would justify a new trial, we have carefully reviewed the entire record, including the charge of the court to the jury. We find therein no error of law. The charge fully and correctly instructed the jury as to the elements of each of the offenses charged and as to the burden of proof and contained a full and accurate summary of the evidence.

[2] The motion for judgment of nonsuit was properly overruled, the testimony of Sylvia Locklear being sufficient, if true,

to show each element of the offense of robbery with a dangerous weapon and each element of the offense of rape. It is axiomatic that upon such a motion the evidence for the State is to be taken by the Court as true and is to be viewed in the light most favorable to the State, the evidence of the defendant in conflict therewith not being considered. *State v. Price,* 280 N.C. 154, 184 S.E. 2d 866; *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225; *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469; *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679; Strong, N. C. Index 2d, Criminal Law, § 104. It is equally elementary that: "The force necessary to constitute rape need not be actual physical force. Fear, fright, coercion may take the place of force. *S. v. Thompson,* 227 N.C. 19, 40 S.E. 2d 620. While consent by the female is a complete defense, consent which is induced by fear of violence is void and is no legal consent." *State v. Primes, supra.*

If the evidence of the State in the present case be true, the defendant is guilty of both of the offenses of which he has been convicted. If the evidence of the defendant be true, he is not guilty of either of these offenses. This conflict in the evidence presented simply a question for the jury, which elected to believe the evidence of the State. This Court is not authorized, in such a situation, to review the decision of the jury and substitute its opinion for that of the jurors. Relief on that ground, if any, may be obtained only through the exercise of the power of pardon or parole, which is not vested in this Court.

No error.

STATE OF NORTH CAROLINA v. MARVIN WAYNE JOHNSON

No. 19

(Filed 10 October 1973)

Criminal Law § 161— appeal as exception to judgment

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

APPEAL by defendant from judgment of *Chess, S.J.,* at the January 1, 1973 Session of GUILFORD Superior Court, Greensboro Division.

On an indictment proper in form defendant was tried on the charge of rape, the date of the alleged offense being 16 July 1972. The jury found the defendant guilty without recommendation of life imprisonment. The presiding judge pronounced the following judgment: "In view of the decision of the Supreme Court of North Carolina in case of State versus Connell Carroll and Archie Moore Stewart filed in the office of the clerk of the Supreme Court of North Carolina on December 13, 1972 [reported in 282 N.C. 326, 193 S.E. 2d 85 (1972)], it is the judgment of the court that the defendant be imprisoned in the State Prison for the term of his natural life under the supervision and control of the State Department of Correction as provided by law."

The evidence for the State tends to show that Catheretta Whitaker, age 18, lived with her parents, Mr. and Mrs. Jasper Whitaker, in Greensboro, North Carolina. On Sunday, 16 July 1972, at approximately 4:30 p.m., Catheretta left her home to visit her sister on Lutheran Street. While she was walking on U. S. Highway 29 on the way to her sister's home, a light blue 1961 Falcon automobile approached her from behind and stopped. A passenger, later identified as Howard Lee Flacks, asked her if she would like a ride. She refused and Flacks got out of the car, twisted her arm, and held her while the car driven by defendant Johnson turned around and came back. Although she was screaming and begging them to let her go, Flacks pushed her into the front seat, and Johnson drove off down U. S. Highway 29. After driving around for about fifteen minutes, Johnson stopped the car at Don's Curb Market. While there Catheretta made no request for assistance because at the time she was afraid to do so.

Johnson left the store, turned off the highway onto a dirt road, drove into some woods, and stopped. There, despite her resistance, he took off her panty hose, panties, and shoes and put them in the trunk of the car. Then both he and Flacks forcibly and against her will had sexual intercourse with Catheretta. After each had had intercourse with her two or three times, the two men got into the car and left. Catheretta screamed and ran after the car asking them for her clothes, but they refused to stop. She then walked to the highway and caught a ride to Greensboro where she reported to the Greensboro officers what had happened. One officer checked the license number which she had noted as the car left—LH-5949—

and found that the car belonged to defendant Johnson. The officer went to Johnson's home and after advising Johnson of his rights, he obtained permission to search the trunk of the 1961 Falcon automobile. Johnson voluntarily opened the trunk, and there the officer found Catheretta's panty hose, panties, and shoes.

Catheretta was examined by Dr. Karl L. Barkley at a Greensboro hospital on 17 July 1972 at approximately 7:30 a.m. His examination revealed that she had been penetrated by a male sexual organ, that sperm was in her vagina, and that there was a stretching of the posterior part of the vagina with a slight tearing.

Flacks, who was under indictment for rape as a codefendant, testified for the State. He fully corroborated Catheretta's testimony as to how she was forced into the car. He testified that when they arrived in the woods Johnson told Catheretta that he would shoot her if she refused to have sexual intercourse with him, and that Johnson took off her clothes while she pleaded and begged him not to do so. Flacks further testified that he did not see Johnson have intercourse with her, and that at the time he was drunk and does not remember having had intercourse with her himself.

Defendant Johnson did not testify but offered the evidence of Mrs. Gladys Brown who operated Don's Curb Market. Mrs. Brown testified that she remembered seeing Catheretta with Flacks and defendant Johnson on 16 July 1972 at the Curb Market. While there Catheretta did not ask for help or assistance of any kind.

Attorney General Robert Morgan and Assistant Attorney General Walter E. Ricks III for the State.

Z. H. Howerton, Jr., for defendant appellant.

PER CURIAM.

The case on appeal contains no assignments of error. The appeal itself constitutes an exception to the judgment and presents for review any error appearing on the face of the record. *State v. Cox,* 281 N.C. 131, 187 S.E. 2d 785 (1972); *State v. Elliott,* 269 N.C. 683, 153 S.E. 2d 330 (1967). In the absence of proper exception and assignment of error, the judgment must be sustained unless error appears on the face of the record

proper. *State v. Bumgarner*, 283 N.C. 388, 196 S.E. 2d 210 (1973); *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).

Defendant was tried in a properly organized court upon a valid bill of indictment. The verdict supports the judgment, and the sentence of life imprisonment is correct under the case cited by the presiding judge. See also *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19 (1973).

Counsel for defendant in his brief candidly states: "Counsel for defendant appellant has examined the record in the above cause at great length, and has been unable to find error."

We have carefully reviewed the entire record and find no error.

No error.

STATE OF NORTH CAROLINA v. CLYDE NELSON DIXON

No. 24

(Filed 10 October 1973)

Criminal Law § 161— appeal as exception to judgment

Though the record contained no assignments of error, the appeal itself constituted an exception to the judgment and presented for review only error appearing on the face of the record.

APPEAL by defendant from *Rousseau, J.*, at the 5 February 1973 Session of IREDELL Superior Court.

Defendant was charged in separate bills of indictment with the murder of Maceo Barnhardt and the murder of Edward Simpson. The cases were consolidated for trial without objection, and defendant, through his court-appointed counsel Mr. Fred G. Chamblee, entered pleas of not guilty.

The State's evidence, offered through the testimony of Sergeant J. L. Zimmerman of the Statesville Police Department, tended to establish the following: on 25 November 1972, Sergeant Zimmerman and other police officers, in response to a call, went to a dwelling located at 1132 Quincy Street in Statesville where they found the bodies of Maceo Barnhardt and

Edward Simpson. Each of the dead men had a deep wound on the side of his head. Autopsies thereafter performed revealed that Simpson and Barnhardt died from these head wounds.

The police officers found an axe in a branch about fifty feet behind the house.

Defendant surrendered to the Iredell County Sheriff's Department on the following day.

After being advised of his constitutional rights, defendant, in writing, waived counsel and acknowledged his understanding of these rights. He then made a statement to Sergeant Zimmerman which may be summarized as follows: on the night of 24 November, 1972, defendant was assaulted by Maceo Barnhardt and Edward Simpson who beat him into a state of unconsciousness. Upon regaining consciousness, defendant picked up an axe, approached Edward Simpson, who appeared to be sleeping on a couch, and struck Simpson on the head with the axe. He went into the next room, where Maceo Barnhardt also appeared to be sleeping and struck Barnhardt on the head with the axe. He then threw the axe into a branch behind the house and told a neighbor to call the police.

Defendant stated that the deceased men were his good friends but he guessed he was mad with them because they had beat him up. He further stated that he surrendered to the authorities on the following day.

At trial, defendant himself testified to facts which were, in substance, the same as those related in his confession.

The jury returned verdicts of guilty as to both charges of murder, and defendant appealed from judgments imposing consecutive sentences of life imprisonment.

Attorney General Robert Morgan and Deputy Attorney General James F. Bullock for the State.

Fred G. Chamblee for the defendant.

PER CURIAM.

This record contains no assignments of error, however, the appeal itself is an exception to the judgment and presents for review only error appearing on the face of the record. *State v. Smith,* 279 N.C. 505, 183 S.E. 2d 649; *State v. Higgs,* 270 N.C.

111, 153 S.E. 2d 781, *State v. Williams*, 268 N.C. 295, 150 S.E. 2d 447.

Defendant was tried in a properly organized court upon regular indictments which sufficiently charged the crimes of murder. The sentences imposed are supported by the verdicts and are within statutory limits.

We have carefully examined the entire record and find

No error.

STATE OF NORTH CAROLINA v. JOHNNY FRAZIER

No. 22

(Filed 10 October 1973)

APPEAL by defendant from *Grist, J.*, at the 2 April 1973 Regular Schedule B Session of MECKLENBURG Superior Court.

Attorney General Robert Morgan and Special Counsel Ralph Moody for the State.

Edward T. Cook for defendant appellant.

PER CURIAM.

On 14 March 1973, this Court remanded this case to the Superior Court of Mecklenburg County for judgment imposing a life sentence for the first degree murder of Carla Jean Underwood. *State v. Frazier*, 283 N.C. 99, 195 S.E. 2d 33. Judge Grist pronounced judgment in exact accord with the directions of this Court in its order of remand. Upon defendant's appeal therefrom, the judgment pronounced by Judge Grist is affirmed.

Affirmed.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

BENNETT v. GUARANTY CO.

No. 2 PC.

Case below: 19 N.C. App. 66.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 October 1973.

BURLINGTON INDUSTRIES v. FOIL

No. 29 PC.

Case below: 19 N.C. App. 172.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 2 October 1973.

GOLDING v. TAYLOR

No. 33 PC.

Case below: 19 N.C. App. 245.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 October 1973.

MOORE v. JOHN DOE

No. 73.

Case below: 19 N.C. App. 131.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 October 1973. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 October 1973.

MOSELEY v. TRUST CO.

No. 4 PC.

Case below: 19 N.C. App. 137.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 October 1973.

POWELL v. DUKE UNIVERSITY

No. 66.

Case below: 18 N.C. App. 736.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 October 1973. Motion of defendants to dismiss appeal allowed 2 October 1973.

RANDOLPH v. SCHUYLER

No. 128 PC.

Case below: 18 N.C. App. 393.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 2 October 1973.

SHANAHAN v. INSURANCE CO.

No. 22 PC.

Case below: 19 N.C. App. 143.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 October 1973.

SINK v. EASTER

No. 24 PC.

Case below: 19 N. C. App. 151.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 2 October 1973.

STATE v. GRANT

No. 11 PC.

Case below: 18 N.C. App. 722.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 October 1973.

STATE v. INGRAM

No. 5 PC.

Case below: 19 N.C. App. 92.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 October 1973.

STATE v. JOHNSON

No. 43 PC.

Case below: 16 N.C. App. 440.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 October 1973.

STATE v. LITTLEJOHN

No. 65

Case below: 19 N.C. App. 73.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 October 1973. Motion of Attorney General to dismiss appeal allowed 2 October 1973.

STATE v. SMITH

No. 23 PC.

Case below: 19 N.C. App. 158.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 October 1973.

STATE v. STEPPE

No. 61.

Case below: 19 N.C. App. 63.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 October 1973. Appeal dismissed ex mero motu for lack of substantial constitutional question 2 October 1973.

STATE v. TYNDALL

No. 153 PC.

Case below: 18 N.C. App. 669.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 October 1973.

STATE v. WATSON and CAPERS

No. 74.

Case below: 19 N.C. App. 160.

Petition by defendant Capers for writ of certiorari to North Carolina Court of Appeals denied 2 October 1973. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 October 1973.

TOMLINSON v. BREWER

No. 13 PC.

Case below: 18 N.C. App. 696.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 October 1973.

TROTTER v. HEWITT

No. 28 PC.

Case below: 19 N.C. App. 253.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 October 1973.

UTILITIES COMM. v. CONSUMERS COUNCIL

No. 19 PC.

Case below: 18 N.C. App. 717.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 October 1973.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

WILLIAMS AND ASSOCIATES v. PRODUCTS CORP.

No. 15 PC.

Case below: 19 N.C. App. 1.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 October 1973.

WILSON v. SMITH

No. 42 PC.

Case below: 18 N.C. App. 414.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 October 1973.

YOUNG v. INSURANCE CO. and MOORE v. INSURANCE CO.

No. 12 PC.

Case below: 18 N.C. App. 702.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 October 1973.

RALPH E. LEE, JR. v. F. M. HENDERSON & ASSOCIATES AND IOWA MUTUAL INSURANCE COMPANY

No. 14

(Filed 14 November 1973)

1. **Master and Servant § 94— workmen's compensation — Commission's modification of commissioner's findings**

In reviewing a workmen's compensation award of the hearing commissioner, the Industrial Commission is authorized to modify or strike out findings of fact made by the hearing commissioner if in the judgment of the Commission such findings were not proper. G.S. 97-85.

2. **Master and Servant § 56— workmen's compensation — causal relation between employment and injury**

In order for an injury to be compensable under the Workmen's Compensation Act, there must be some causal relation between the employment and the injury; but if the injury is one which, after the event, may be seen to have had its origin in the employment, it need not be shown that it is one which ought to have been foreseen or expected.

3. **Master and Servant § 56— workmen's compensation — injury arising "out of" employment**

It is generally said that an injury arises out of the employment when it is the natural and probable consequence or incident of the employment and a natural result of one of its risks, so there is some causal relation between the injury and the performance of some service of the employment.

4. **Master and Servant § 56— workmen's compensation — building doghouse for personal use — injury arising out of employment**

Plaintiff, a saleman employed by a cabinet manufacturer, worked in his employer's shop during his training period and obtained permission from his superiors to build a doghouse for his own use from scrap material during working hours when he had nothing else to do. Each of the employer's salesmen was required to work in the shop every third Saturday. While on duty in the shop one Saturday plaintiff cut some cabinet parts and, during a lull, resumed work on his uncompleted doghouse and injured himself with an electric saw. A practice or custom had been established by the employer allowing its employees to use its equipment for personal projects. *Held:* Plaintiff's use of his employer's electric saw and scrap material to build a doghouse during the Saturday morning lull was a reasonable activity and the risk inherent in such activity was a risk of the employment; therefore, plaintiff's injury arose "out of" his employment within the meaning of the Workmen's Compensation Act.

ON *certiorari* to the Court of Appeals.

Plaintiff seeks compensation from his employer, F. M. Henderson & Associates, and Iowa Mutual Insurance Company, the

employer's compensation insurance carrier, for an alleged injury by accident arising out of and in the course of the employment.

The jurisdictional facts were stipulated.

The initial hearing was before Chairman J. Howard Bunn, Jr. The evidence consisted of the testimony of plaintiff and of Norman Altman, employer's shop foreman. Based upon *his* findings of fact, Chairman Bunn concluded that plaintiff's injury *was* by accident arising out of and in the course of the employment and that plaintiff was entitled to compensation for permanent partial disability for the loss of a first finger and for the loss of a second finger as set forth in G.S. 97-31(2) (3). Thereupon, Chairman Bunn entered an award in plaintiff's favor.

Pursuant to defendants' notice of appeal and application for review, the case was heard by the Full Commission (Commission) as provided in G.S. 97-85. The "Opinion and Award for the Full Commission" by Commissioner Stephenson, Commissioner Shuford and Chief Deputy Commissioner Delbridge concurring, "vacates and sets aside the Opinion and Award of Chairman Bunn in its entirety." Based upon *its* findings of fact, the Commission concluded that the injury sustained by plaintiff on 26 September 1970 *was not* by accident arising out of and in the course of the employment. An order entered by the Commission denied plaintiff's claim and provided that each side pay its own costs.

The following are the Findings of Fact of the Commission:

"1. The defendant employer owns and operates a business which consists of the manufacturing and installation of cabinet units to businesses in the Raleigh area. The business consists of designing cabinet layouts for its customers and utilizing basic units constructed by the manufacturer. Carl Smith was the employer's manager for the Raleigh office and Norman Altman was the shop foreman. At the time complained of, the employer's shop and warehouse was one unit and located under one roof.

"2. Plaintiff is twenty-three years of age and was hired by the employer in early August of 1970 as a salesman. For the first two and one-half weeks of his employment, he worked exclusively in the employer's shop and warehouse to familiarize himself with the stock and the system of order as well as the

period of time necessary for a cabinet shipment. All of the employer's salesmen were required to work in the shop and warehouse for approximately thirty days as a part of the training program, but plaintiff's training period was shorter than average due to the fact that he had had some experience with woodworking machinery while in the Armed Forces. For the first two and one-half weeks of his employment, plaintiff worked exclusively in the shop and warehouse, actually building cabinets. He then started riding with a salesman part time and working in the shop part time. At the time complained of, he worked in the shop only every third Saturday, the three salesmen rotating so that someone would be in the shop on Saturday mornings, and each working his turn. This was the first Saturday plaintiff had worked on his rotation since becoming a full-time salesman.

"3. The employer's shop had several pieces of highly sophisticated woodworking machinery, including but not limited to a rotisserie saw used for cutting formica and various pieces of lumber, and several skill and saber saws. One of the saws was a table-mounted electric saw with the blades protruding from a plate in the table which could be raised or lowered to regulate the depth of the cut. The safety guard on this particular table saw was missing at the time complained of. Plaintiff was never given any instructions by the defendant employer as to the use of this table saw, but he had had experience in working with this type of equipment while in the Army and was generally familiar with such equipment.

"4. Soon after beginning work with the defendant employer in early August of 1970, plaintiff had a conversation with Carl Smith and told Smith that he would like to build a doghouse to use at his home in the employer's shop. He obtained permission from Smith to work on this doghouse in the employer's shop during working hours when he had nothing else to do and to use 'scrap' material to build the doghouse. In fact, Smith helped plaintiff soon after beginning this employment to design the doghouse on company time, using company materials. When plaintiff had finished his training program, the doghouse was only partially completed and was left in the shop.

"5. On Saturday, September 26, 1970 plaintiff began work for the defendant employer in the shop and warehouse, this being his Saturday to work. For the first hour, he worked in

the office and at approximately 8:45 A.M., the owner of the business, F. M. Henderson, instructed plaintiff by telephone to open the warehouse and shop and do whatever he saw needed to be done there. Plaintiff then went into the warehouse and shop, swept the floors, cut some cabinet parts, and then helped the shop foreman, Norman Altman, unload a load of cabinets. He then asked Altman to reset the saw so that it could be used to rip some three-eighths inch plywood scrap. After Altman reset the saw, he left, since he (Altman) was not required to work on this Saturday. Plaintiff then started ripping some three-eighths inch plywood scrap which he was intending to use in the completion of his doghouse. While ripping the plywood with the table saw above-described, his left hand became caught in the saw, resulting in loss by amputation of the first and second fingers of the left hand.

"6. The employer has continued plaintiff's salary to the present time and plaintiff has lost no wages by reason of his injury. A portion of his medical expenses has been paid by plaintiff's personal Blue Cross hospitalization carrier. No part of the medical expense incident to the injury has been paid by the employer or the workmen's compensation carrier in this case.

"7. It was not unusual for plaintiff and his co-workers to use the defendant employer's equipment for personal projects when the employees were not busy with company work. A practice or custom had been established by the employer, allowing the employees to use such equipment. However, at the time complained of plaintiff was performing an act personal to himself; constructing a doghouse for his own use, and this activity in no way enhanced the business of the defendant employer. At the time complained of, plaintiff did not sustain an injury by accident arising out of and in the course of his employment."

Plaintiff excepted to (1) designated findings of fact, (2) designated conclusions of law, and (3) the order denying his claim, and appealed. G.S. 97-86. Holding "that the Commission's conclusion of law that claimant did not sustain an injury by accident arising out of and in the course of his employment is not supported by its findings of fact which are pertinent to this appeal," the Court of Appeals reversed the order of the Commission and remanded the cause "for proceedings not inconsistent with [its] opinion." 17 N.C. App. 475, 195 S.E. 2d 48. On 30 April 1973 the Supreme Court allowed defendants' petition for certiorari to review the decision of the Court of Appeals.

Teague, Johnson, Patterson, Dilthey & Clay by C. Woodrow Teague and Robert W. Sumner for defendant appellants.

Manning, Fulton & Skinner by W. Gerald Thornton for plaintiff appellee.

BOBBITT, Chief Justice.

Upon appeal, plaintiff assigned as error the following portions of the Commission's findings of fact: (1) The finding "contained in paragraph No. 2 to the effect that the plaintiff was a 'full-time salesman' at the time of the accident"; (2) the finding "contained in paragraph No. 4 to the effect that the plaintiff had finished his training program prior to the time of the accident"; and (3) the finding "contained in paragraph No. 7 which reads as follows: 'However, at the time complained of, plaintiff was performing an act personal to himself, constructing a doghouse for his own use, and this activity in no way enhanced the business of defendant employer. At the time complained of, plaintiff did not sustain an injury by accident arising out of and in the course of his employment.' "

The Court of Appeals did not pass upon plaintiff's contentions that these findings were not supported by competent evidence. It decided that *the facts found by the Commission* established that plaintiff's injury was compensable.

[1] In reviewing the award of the hearing commissioner the Commission was authorized by G.S. 97-85 to "reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award." This authority carried with it "the power to modify or strike out findings of fact made by the . . . hearing Commissioner if in the judgment of the Commission such finding [was] not proper." *Brewer v. Trucking Co.*, 256 N.C. 175, 182, 123 S.E. 2d 608, 613 (1962).

[2] The only injury which is compensable under the Workmen's Compensation Act is an "injury by accident arising out of and in the course of the employment." G.S. 97-2(6). "The words 'out of' refer to the origin or cause of the accident and the words 'in the course of' to the time, place, and circumstances under which it occurred. [Citations omitted.] There must be some causal relation between the employment and the injury; but if the injury is one which, after the event, may be seen to have had its origin in the employment, it need not be shown that it is one which ought to have been foreseen or expected."

Conrad v. Foundry Company, 198 N.C. 723, 726, 153 S.E. 266, 269 (1930).

Unquestionably, plaintiff's injury by accident occurred "in the course of" his employment. It occurred on the morning of Saturday, 26 September 1970, when, as required by the terms of his employment, he was on duty in defendant's shop and warehouse. Whether his injury arose "out of" his employment is the determinative question.

[3] "An accident occurring during the course of an employment . . . does not *ipso facto* arise out of it. The term 'arising out of the employment' is not susceptible of any all-inclusive definition, but it is generally said that an injury arises out of the employment 'when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so there is some causal relation between the injury and the performance of some service of the employment.' *Perry v. Bakeries Co.,* 262 N.C. 272, 274, 136 S.E. 2d 643, 645 (1964)." *Robbins v. Nicholson,* 281 N.C. 234, 238-39, 188 S.E. 2d 350, 354 (1972).

"In practice, the 'course of employment' and 'arising out of employment' tests are not, and should not be, applied entirely independently; they are both parts of a single test of work-connection, and therefore deficiencies in the strength of one factor are sometimes allowed to be made up by strength in the other." 1 Larson, Workmen's Compensation Law § 29.00 (1972).

"Whether an accident arises out of the employment is a mixed question of fact and law, and the finding of the Commission is conclusive if supported by any competent evidence; otherwise, not." *Cole v. Guilford County,* 259 N.C. 724, 726, 131 S.E. 2d 308, 310 (1963).

There was competent evidence to support the Commission's findings that plaintiff was "a full-time salesman" at the time of the accident; that he had finished his training program; and that he was injured when operating the defendant's electric saw to construct a doghouse for his own use. Unchallenged pertinent factual findings are set out below.

"Specific findings of fact by the Industrial Commission are required. These must cover the crucial questions of fact upon which plaintiff's right to compensation depends. [Citations omitted.] Otherwise, this Court cannot determine whether an adequate basis exists, either in fact or in law, for the ultimate

finding as to whether plaintiff was injured by accident arising out of and in the course of his employment. [Citation omitted.]" *Guest v. Iron & Metal Co.*, 241 N.C. 448, 451, 85 S.E. 2d 596, 599 (1955).

The Commission's specific findings of fact include the following:

Plaintiff was employed in early August of 1970. For the first two and one-half weeks of his employment, plaintiff worked exclusively in the employer's shop and warehouse, "actually building cabinets." Ordinarily persons employed as salesmen were required to work in the shop and warehouse for approximately thirty days as a part of the training program. Plaintiff's training period was shorter because of his previous experience with woodworking machinery while in the armed forces. Each salesman was required to "work in the shop" every third Saturday morning. It was plaintiff's turn to perform this duty on Saturday, 26 September 1970.

During his training period, plaintiff obtained permission from Carl Smith, the manager of the employer's Raleigh office, to build a doghouse in the employer's shop during working hours when he had nothing else to do, using "scrap" material for that purpose. Smith helped plaintiff design the doghouse "on company time, using company materials." The doghouse was partially completed and left in the shop when plaintiff finished his training program.

After reporting for work on the morning of Saturday, 26 September 1970, plaintiff received telephone instructions from F. M. Henderson, the owner of the business, "to open the warehouse and shop and do whatever he saw needed to be done there." Thereupon, plaintiff "went into the warehouse and shop, swept the floors, cut some cabinet parts, and then helped the shop foreman, Norman Altman, unload a load of cabinets." At plaintiff's request, Altman reset the table saw "so that it could be used to rip some three-eighths inch plywood scrap." After he reset the saw, Altman left, he not being required to work on this Saturday. While "ripping some three-eighths inch plywood scrap which he was intending to use in the completion of his doghouse," plaintiff's left hand was caught in the saw.

"It was not unusual for plaintiff and his co-workers to use the defendant employer's equipment for personal projects when the employees were not busy with company work. A prac-

tice or custom had been established by the employer, allowing the employees to use such equipment."

The Commission's specific findings establish (1) that plaintiff's job included the actual use of defendant's shop equipment in the construction of cabinets and cabinet parts; (2) that plaintiff had "cut some cabinet parts" on Saturday, 26 September 1970, prior to his injury; (3) that he was injured when, during a Saturday morning lull, he resumed work on his uncompleted doghouse; (4) that, as permitted by his employer's established policy, he was using defendant's electric saw and "scrap" material; and (5) that plaintiff's construction of the doghouse under these circumstances had the express approval, cooperation and assistance of his superiors.

Unquestionably, plaintiff's injury would be compensable if he had been injured a few minutes earlier while engaged in cutting cabinet parts. Too, his right to compensation would be clear if he had been injured later when cutting a cabinet part for some drop-in customer. The question is whether, under the circumstances of this case, compensation should be denied solely on the ground that the particular piece of plywood on which he was working when injured was intended for use in the doghouse, a project specifically approved by his superiors.

Numerous cited decisions support the statement that "[t]he Workmen's Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees or their dependents, and its benefits should not be denied by a technical, narrow, and strict construction." 5 Strong, North Carolina Index 2nd, Master and Servant § 47.

Plaintiff was required to remain on duty in the shop and warehouse during the morning of Saturday, 26 September 1970, to act for his employer in the event any need for such action arose.

The rule applicable when the employee has been directed, *as part of his duties,* to remain in a particular place or locality until directed otherwise or for a specified length of time, has been well stated by the Court of Appeals of New York in *Davis v. Newsweek Magazine,* 305 N.Y. 20, 28, 110 N.E. 2d 406, 409 (1953), as follows: "In those circumstances, the rule applied is simply that the employee is not expected to wait immobile, but may indulge in any *reasonable* activity at that place, and if he does so the risk inherent in such activity is an incident of his

employment." Quoting this statement of the rule and basing decision thereon, the Court of Appeals of New York in *Penzara v. Maffia Bros.*, 307 N.Y. 15, 18, 119 N.E. 2d 570, 571 (1954), held the employee was entitled to compensation when injured under circumstances closely analogous to those under consideration in the present case.

In *Penzara,* undisputed evidentiary facts tended to show that claimant was employed as a handyman in an automobile supply and machine shop; that he was required to remain upon employers' premises during intervals when there was no work available on a customer's automobile, but was customarily permitted to use employers' tools and do work upon his own automobile when not otherwise occupied; and that, during a slack period, he was injured by an accident when fashioning a spring steel clip for use on his own automobile. Compensation was awarded.

On authority of *Penzara,* compensation was awarded in *Ingraham v. Lane Constr. Corp.*, 285 App. Div. 572, 139 N.Y.S. 2d 347, *aff'd mem.*, 309 N.Y. 899, 131 N.E. 2d 577 (1955).

[4] Under the circumstances of the present case, we hold that plaintiff's use of his employer's electric saw and "scrap" material during the Saturday morning lull was a *reasonable* activity and that the risk inherent in such activity was a risk of the employment. The reasonableness of plaintiff's activity on this occasion is attested by the express approval of his superiors as well as by the established policy of his employer.

In *Bellamy v. Manufacturing Co.*, 200 N.C. 676, 158 S.E. 246 (1931), and in *Stubblefield v. Construction Co.*, 277 N.C. 444, 177 S.E. 2d 882 (1970), the injury occurred when the employee was required to remain at his place of employment but had no task to perform in furtherance of the employer's business. In *Bellamy,* the claimant, an employee in the spinning department, was required to remain in the mill for a half hour after work therein had stopped. During this period she was injured by accident while riding in an elevator to another floor of the mill for the purpose of seeing about getting her friend a job in the mill. In *Stubblefield,* an employee of an electrical construction company was fatally injured on the premises of the Cherokee Brick Company. While awaiting the return of his foreman, the employee was standing in a room where several conveyor belts were in operation. The employee, when using his

idle time to knock dust and pieces of brick from the conveyor rollers with a pair of pliers, came into contact with the conveyor and received fatal injuries. Compensation was awarded in both *Bellamy* and *Stubblefield.*

In *Jones v. Desk Co.*, 264 N.C. 401, 141 S.E. 2d 632 (1965), cited by defendants, the factual situation was quite different from that now under consideration. In *Jones,* the Desk Company's policy did not permit an employee to do personal work on company time unless he first obtained permission from his foreman. Nor did it permit him to use cull or waste material for personal purposes without first presenting it to his superior for determination of its value and payment of the price fixed, if any. When injured, the plaintiff was using the Desk Company's "shaper" and material for his personal purposes and on company time, without obtaining permission to do so, all in violation of the Desk Company's policy.

In *Maheux v. Cove-Craft, Inc.*, 103 N.H. 71, 164 A. 2d 574 (1960), compensation was awarded an employee who was injured at his place of employment during noon lunch hour when operating a table saw to manufacture a checkerboard for his own use. The evidence disclosed that such employees used their employer's saw during the lunch hour for individual projects and that the employer, although he had notice of this practice, did not forbid such use. The court's opinion states: "It is settled in this jurisdiction that activities of a personal nature, not forbidden, but reasonably to be expected, may be a natural incident of the employment, so that injury suffered in the course of such activities is compensable." *Id.* at 74, 164 A. 2d at 576.

In the later case of *Hanchett v. Brezner Tanning Co.*, 107 N.H. 236, 221 A. 2d 246 (1966), compensation was awarded the dependents of an employee who was fatally injured when repairing his personal car during working hours, the car having slipped off the jack and crushed him. The employer maintained a garage and allowed its employees to repair their cars at this garage even during working hours. Under the circumstances, it was held that an occasional use by an employee of the employer's facilities to make repairs on his own car was reasonably expected and that the employee's death was compensable.

We have not overlooked the Commission's finding or conclusion that plaintiff when injured "was performing an act personal to himself" and that "this activity in no way enhanced

the business of the defendant employer." We take this as a finding that the particular piece of plywood with which plaintiff was working when injured was for his own personal use and that plaintiff's work thereon was of no value to the business of the employer. The specific findings of fact show that the employer, by its policy of permitting and encouraging such use of its equipment and "scrap" material, had determined that this course was for the mutual advantage of employer and employee in respect of employer-employee relationships as well as in development of the employees' skill in the areas of planning and construction. *See Wamhoff v. Wagner Electric Corp.*, 354 Mo. 711, 190 S.W. 2d 915, 161 A.L.R. 1454 (1945).

Our research has disclosed two decisions, *Shirley v. National Tank Co.*, 203 Okla. 508, 223 P. 2d 540 (1950), and *Foster v. Continental Gin Company*, 261 Ala. 366, 74 So. 2d 474 (1954), which support defendants' contentions. Compensation was denied under circumstances undistinguishable from those in the case before us. In each, decision was based primarily upon the fact that at the precise time of injury the employee was working on an article for his personal use. In our view, the denial of compensation solely on this ground narrowly and unduly restricts the protection the Workmen's Compensation Act was intended to provide injured employees.

On this appeal, we need not decide whether we should adopt a rule similar to that enunciated in the cited decisions of the Supreme Court of New Hampshire. In affirming the decision of the Court of Appeals, we simply hold that, under the circumstances of the present case, plaintiff's use of his employer's electric saw and "scrap" material during the Saturday morning lull was a *reasonable* activity and that the risk inherent in such activity was a risk of the employment.

Affirmed.

STATE OF NORTH CAROLINA v. MICHAEL TERRY FRANK

No. 67

(Filed 14 November 1973)

1. **Constitutional Law § 30— eight-ten months delay — right to speedy trial not abridged**

An eight to ten months delay in defendant's trial for first degree burglary and larceny was not unreasonable and was not prejudicial to defendant in preparing and presenting his defense.

2. **Searches and Seizures § 2— consent to search — Miranda warnings not required**

Warnings required by *Miranda* are inapplicable to searches and seizures, and a search by consent is valid despite failure to give such warnings prior to obtaining consent.

3. **Criminal Law § 84; Searches and Seizures § 2— consent to search — admissibility of evidence seized**

Consent to search, freely and intelligently given, renders competent the evidence thus obtained; therefore, items of property found in a search of defendant's premises made with his consent were properly admitted into evidence in his trial for first degree burglary and larceny.

4. **Criminal Law §§ 75, 76— voluntariness of confession — voir dire evidence — failure to make findings — no prejudice**

Where all the evidence on *voir dire* tended to show that defendant was fully warned of his constitutional rights, had knowingly and understandingly waived in writing his right to counsel, and then freely and voluntarily described the burglary with which he was charged, failure of the court to make findings of fact was harmless beyond a reasonable doubt, and the testimony relating to defendant's confession was properly admitted.

5. **Criminal Law § 50; Burglary and Unlawful Breakings § 4— opinion evidence as to dawn — admission not error**

Even if the trial court in a first degree burglary case erred in allowing a police detective to testify that in his opinion dawn occurred after 4 a.m. on 20 April 1972, the night of the burglary, such error was not prejudicial to defendant.

6. **Burglary and Unlawful Breakings § 6; Larceny § 8— oral and written jury instructions given — no error**

The trial court in a first degree burglary and larceny case did not err in orally instructing the jury as to the permissible verdicts, reducing to writing the elements of each crime involved in the permissible verdicts, and instructing the jury to carry the written instructions to the jury room for guidance during its deliberations.

7. **Burglary and Unlawful Breakings § 7— submission of lesser offenses — no error**

In a first degree burglary and larceny case, error, if any, in the submission of burglary in the second degree and felonious breaking

or entering without evidence to support the lesser offenses was favorable to defendant and hence not prejudicial.

8. **Burglary and Unlawful Breakings § 8; Larceny § 10— sentence within statutory limits — no cruel and unusual punishment**

Sentences of ten years for larceny and life imprisonment for burglary were within the maximum authorized by law and did not constitute cruel and unusual punishment. G.S. 14-2; G.S. 14-70.

DEFENDANT appeals from judgment of *Godwin, S.J.*, Third April 1973 Special Criminal Session, WAKE Superior Court.

Defendant was tried upon bills of indictment, proper in form, charging him with (1) first degree burglary of the home of Melvin Lewis Finch, Jr., located at 2110 St. Mary's Street, Raleigh, North Carolina, on 19 April 1972, and (2) larceny from the Finch driveway of one 1968 model Ford automobile valued at $1200.00, the property of The News and Observer Publishing Company, Inc. By consent the two cases were consolidated for trial.

Evidence offered by the State tends to show the facts narrated below.

M. L. Finch, Jr., his wife and three children, reside in a home at 2110 St. Mary's Street. He is employed by The News and Observer Publishing Company and on 19 April 1972 had in his possession a 1968 Ford automobile which belonged to his employer and was furnished for his use in the performance of his duties. On the night of 19 April 1972 he parked the vehicle in his driveway behind his house, removed the keys and left them on top of his briefcase on the dining room table when he retired that night about 11:15 p.m. His wife and three children had already gone to bed.

The Finch home has two stories and the entire family sleeps upstairs. The doors and windows were closed when Mr. Finch retired. Mrs. Finch had been washing windows that day, leaving the ladder used to reach the upper windows leaning against the house. The windows do not have screens on them. Mr. Finch arose the next morning about 6:15 or 6:30 a.m., came downstairs and noticed a screen door standing ajar, a window open, his briefcase on the floor of the den, and the car keys gone. He looked toward the driveway and discovered the car was gone. The family later discovered that a trumpet, a clarinet, a tape deck and some tapes were missing. These items, except the tapes, were later recovered, identified by Mr. Finch and offered

in evidence. The automobile was also recovered together with the keys.

No member of the Finch family knew the defendant or gave him permission to take the car or any of the other enumerated items.

J. Z. Holder is a fingerprint expert employed by the City and County Identification Bureau in Raleigh. He was called to the Finch residence about 7:30 a.m. on 20 April 1972. There he dusted the window ledge inside and out, photographed the latent prints made visible by the fingerprint powder, and lifted several latent fingerprints with lifting tape.

On 25 July 1972 Mr. Holder took an inked set of defendant's fingerprints. He then compared the latent prints lifted from the window ledge at the Finch home with defendant's set of inked prints and determined that the prints of defendant's left index finger, left middle finger and left ring finger were the same as the latent prints found on the window ledge inside the Finch residence.

H. Z. Looper is a City detective in Rocky Mount. Defendant was taken into custody on 18 May 1972 in Rocky Mount, fully advised of his constitutional rights, and signed a waiver of rights reading as follows: "I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me by anyone." The officers thereupon questioned him concerning charges of breaking and entering, carrying a concealed weapon, larceny and first degree burglary allegedly committed by defendant in Rocky Mount. Defendant talked freely and made a full confession of numerous offenses committed by him. He accompanied the officers to a house at 418 Lexington Street in Rocky Mount where, with defendant's permission, the officers searched the house. They found over two hundred items altogether, including the trumpet, clarinet and other items taken from the Finch home in Raleigh. The name of Mary Wheeler Finch, 2110 St. Mary's Street, Telephone Number 782-0683 appeared on the trumpet case. Defendant himself identified these articles. Officer Holder later surrendered the items of property belonging to Mr. Finch to Detective W. E. Ausley of the Raleigh Police Department. They

were properly identified and offered in evidence at the trial together with a tennis racket and an umbrella belonging to Mr. Finch which were located in the Ford automobile taken by defendant from the Finch driveway.

On 19 May 1972 Detective Ausley warned defendant of his constitutional rights after which defendant signed a waiver and talked freely concerning the break-in at the Finch home. Defendant said that around the 20th of April he parked a Rambler that he had stolen in Rocky Mount on St. Mary's Street in Raleigh; that he walked around behind the house across the street from where he parked, saw a ladder up to one of the windows, climbed the ladder, used a knife to unlock the window, went into the house, got the keys to the car, a clarinet, a trumpet and a small tape deck. After leaving the house he took a green Ford from behind the house. He told Detective Ausley that he entered the Finch home some time between midnight and 4 a.m. and said he always worked between midnight and 4 a.m. "because this is the time that people sleep the soundest." Detective Ausley stated that although he did not know the specific time dawn occurred on the morning of 20 April 1972, "it would have been after 4 a.m. on that date."

Defendant offered no evidence. His motion for judgment of nonsuit was denied. The jury found defendant guilty as charged in both cases. He was sentenced to life imprisonment in the burglary case and ten years in the larceny case to commence at the expiration of the life sentence. He appealed to the Supreme Court in the burglary case, and we allowed motion to bypass the Court of Appeals in the larceny case.

Robert Morgan, Attorney General, and Walter E. Ricks, III, Assistant Attorney General, for the State of North Carolina.

Carter G. Mackie, Attorney for defendant appellant.

HUSKINS, Justice.

[1] The burglary and larceny warrants were served on defendant on 19 May 1972. On 23 June 1972 defendant filed a written motion in Wake Superior Court demanding a speedy trial on the charges. Indictment was returned in the burglary case on 31 July 1972 and in the larceny case on 28 August 1972. No action was taken on defendant's motion until the cases were called for trial on 24 April 1973. Before pleading to the bills

of indictment defendant moved to dismiss for failure to afford him a speedy trial. Denial of said motion constitutes defendant's first assignment of error.

The record discloses that when defendant moved for a speedy trial on 26 June 1972 he was then serving six life sentences plus a term of ten years imposed at the 2 June 1972 Session of the Superior Court of Nash County upon defendant's pleas of guilty to six charges of second degree burglary and one count of breaking, entering and larceny. In response to an inquiry by the court, defendant and his counsel both stated that no witnesses essential to defendant's defense have disappeared, or would have been available in August 1972 but are not now available. In such a factual context the motion to dismiss was properly denied.

Of course the right to a speedy trial is an integral part of the fundamental law of this State, and the fact that an accused is in prison for other offenses does not mitigate against his right to a speedy and impartial trial. *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274 (1969); *Smith v. Hooey,* 393 U.S. 374, 21 L.Ed. 2d 607, 89 S.Ct. 575 (1969). Even so, the burden is on an accused who asserts denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution. *State v. Harrell,* 281 N.C. 111, 187 S.E. 2d 789 (1972); *State v. Johnson, supra; State v. Hollars,* 266 N.C. 45, 145 S.E. 2d 309 (1965).

"The word 'speedy' cannot be defined in specific terms of days, months or years, so the question whether a defendant has been denied a speedy trial must be answered in light of the facts in the particular case. The length of the delay, the cause of the delay, prejudice to the defendant, and waiver by defendant are interrelated factors to be considered in determining whether a trial has been unduly delayed." *State v. Brown,* 282 N.C. 117, 191 S.E. 2d 659 (1972). Here, the record is silent as to the cause of the eight to ten months delay in the trial of these cases. The length of the delay itself is not *per se* determinative, and there is no showing that the delay was purposeful or oppressive or by reasonable effort could have been avoided by the State. *See Pollard v. United States,* 352 U.S. 354, 1 L.Ed. 2d 393, 77 S.Ct. 481 (1957). The record affirmatively shows that defendant has not been prejudiced. He has not lost the benefit of any witnesses and has lost no "institutional opportunities." No detainer was filed in either case by the office of the solicitor; hence, there is

no reasonable basis for the assertion that the pendency of these two cases had any effect on defendant's treatment in prison, his classification as an inmate, his chances for parole, work release, good behavior credits, or in any other respect. *See State v. White,* 270 N.C. 78, 153 S.E. 2d 774 (1967).

We conclude that the length of the delay was not unreasonable and the delay itself was not prejudicial to defendant in preparing and presenting his defense. The constitutional right to a speedy trial prohibits arbitrary and oppressive delays by the prosecution. *State v. Johnson, supra.* The right is necessarily relative and under many circumstances is consistent with delays. *State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779 (1972); *Beavers v. Haubert,* 198 U.S. 77, 49 L.Ed. 950, 25 S.Ct. 573 (1905). Defendant's first assignment of error is overruled.

When the Rocky Mount police officers searched defendant's premises for items stolen from break-ins and robberies in and around Rocky Mount, they found, in addition to other stolen property, the property taken from the Finch home. These items were received in evidence over objection, and this constitutes defendant's second assignment of error. Defendant contends he did not consent to a search of his residence for the Finch items and argues that he was not warned that those items, if found, could be used in evidence against him.

[2] The question posed by this assignment has already been judicially determined contrary to defendant's position. "Warnings required by *Miranda* are inapplicable to searches and seizures, and a search by consent is valid despite failure to give such warnings prior to obtaining consent. It was so held in *State v. Oldham,* 92 Idaho 124, 438 P. 2d 275; *People v. Trent,* 85 Ill. App. 2d 157, 228 N.E. 2d 535; *State v. McCarty,* 199 Kan. 116, 427 P. 2d 616; *Lamot v. State,* 2 Md. App. 378, 234 A. 2d 615; *State v. Forney,* 182 Neb. 802, 157 N.W. 2d 403, cert. den. 393 U.S. 1044, 21 L.Ed. 2d 593, 89 S.Ct. 640. We adhere to that view. Furthermore, appellant has cited no decision, nor have we found any, holding that officers investigating a crime are required by the Federal Constitution to preface a request to search the premises with *advice* to the occupant that he does not have to consent to a search, that he has a right to insist on a search warrant, and that the fruits of the search may be used as evidence against him." *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28 (1970).

[3] Here, after full *Miranda* warnings and waiver of counsel in writing, defendant talked freely with officers concerning various crimes committed in the Rocky Mount area. Defendant told the officers he would take them to the house where the stolen property was concealed. "We told him that we would like to recover the property and the defendant told us that he would take us around to the house and we asked him if we could search the house. The defendant said that we could and that he would take us around there." Thus the evidence shows, and the trial court found on voir dire, that defendant consented to the search. We are bound by that factual finding. *State v. Little,* 270 N.C. 234, 154 S.E. 2d 61 (1967). Consent to search, freely and intelligently given, renders competent the evidence thus obtained. *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506 (1965); *State v. Coffey,* 255 N.C. 293, 121 S.E. 2d 736 (1961). Defendant's second assignment of error is overruled.

[4] Defendant objected to Detective Ausley's testimony narrating defendant's confession. The jury was excused and a voir dire examination conducted by the court. On voir dire, evidence elicited by the State—defendant offered none—is to the effect that after full *Miranda* warnings and waiver of counsel in writing, defendant stated "that around the 20th of April he parked a Rambler that he had stolen in Rocky Mount on St. Mary's Street; that he walked around behind the house across the street from the point where he parked the Rambler. He saw a ladder up to one of the windows, climbed the ladder, used a knife to unlock the window, went into the house, got the keys to the car, a clarinet, a trumpet and a small tape deck. After leaving the house he took a green Ford from behind the house."

At the conclusion of the voir dire the court stated: "Then the objection will be overruled. The court will receive in evidence in response to additional questions to the witness with regard to conversations that he had with the defendant on May 19. A formal order will be prepared. You will both be furnished with copies of it." The jury was recalled and defendant's incriminating statement was received in evidence. Apparently by oversight no formal order was ever prepared, and the record is bare of any findings of fact following the voir dire. Relying on the absence of such findings, defendant assigns as error the admission, over objection, of his incriminating in-custody statements.

The purpose of the voir dire was to hear evidence and determine whether defendant's statements to Detective Ausley were made voluntarily and understandingly and after he had been fully warned of his constitutional rights as required by *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). The test of admissibility is whether the statement by the defendant was in fact voluntarily made. *State v. Jones*, 278 N.C. 88, 178 S.E. 2d 820 (1971); *State v. Rogers*, 233 N.C. 390, 64 S.E. 2d 572 (1951). Whether the statement, if made, was made voluntarily and understandingly is a question of fact to be determined by the trial judge in the absence of the jury upon the evidence presented on the voir dire. *State v. Clyburn*, 273 N.C. 284, 159 S.E. 2d 868 (1968); *State v. Outing*, 255 N.C. 468, 121 S.E. 2d 847 (1961). "The trial judge should make findings of fact with reference to this question and incorporate those findings in the record." *State v. Gray*, 268 N.C. 69, 150 S.E. 2d 1 (1966). The inadvertent omission, however, to make such findings does not require a new trial in the factual setting of this case. "While it is the better practice for a judge on a voir dire respecting an alleged confession to make his finding as to the voluntariness thereof and enter it in the record, a failure to do so is not fatal. Voluntariness is the test of admissibility, and this is for the judge to decide. His ruling that the evidence was competent of necessity was bottomed on the conclusion the confession was voluntary. . . . There is nothing in this record upon which a contrary conclusion could be based." *State v. Litteral*, 227 N.C. 527, 43 S.E. 2d 84 (1947). So it is here.

As stated in *State v. Doss*, 279 N.C. 413, 183 S.E. 2d 671 (1971), "it is better practice for the court to make such findings at some stage during the trial, preferably at the time the statement is tendered and before it is admitted." *Accord, State v. Bass*, 280 N.C. 435, 186 S.E. 2d 384 (1972). *Compare State v. Vickers*, 274 N.C. 311, 163 S.E. 2d 481 (1968), and cases there cited. Even so, failure to do so constitutes harmless error in the factual context of this case. Here, all evidence of record tends to show that defendant had been fully warned of his constitutional rights, had knowingly and understandingly waived in writing his right to counsel, then freely and voluntarily described his entry into the Finch home on the night in question. Only one day prior to this confession he had confessed to six burglaries in Rocky Mount to which he later pled guilty in open court. Even now he does not challenge the voluntariness of any

confessions he made. He offered no evidence either on the voir dire or before the jury. Thus the only permissible inference to be drawn from the total picture is that defendant's confession was voluntary. Admission of the confession indicates that the trial judge so concluded. His failure to find the facts, as he should have done, upon which his conclusion was based, was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824, 24 A.L.R. 3d 1065 (1967); *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972). Defendant's third assignment of error is overruled.

[5] Defendant's fourth assignment of error is based on admission of Detective Ausley's testimony, over objection, that in his opinion dawn occurred after 4 a.m. on 20 April 1972, the night of the burglary. Defendant argues that the witness was no better qualified than the jury to form an "opinion" on the subject matter; and, further, that evidence as to the time of dawn on the night in question is irrelevant.

Dawn is defined as "[t]he break of day; the first appearance of light in the morning; show of approaching sunrise." Webster's New International Dictionary 672 (2d ed. 1934). To warrant a conviction of burglary "it must be made to appear that there was a breaking and entering *during the nighttime* of a dwelling or sleeping apartment with intent to commit a felony therein." *State v. Mumford*, 227 N.C. 132, 41 S.E. 2d 201 (1947) (emphasis added). If the burglarized dwelling is occupied, it is burglary in the first degree; if unoccupied, it is burglary in the second degree. G.S. 14-51; *State v. Cox*, 281 N.C. 131, 187 S.E. 2d 785 (1972). The law considers it to be nighttime when it is so dark that a man's face cannot be identified except by artificial light or moonlight. *State v. McKnight*, 111 N.C. 690, 16 S.E. 319 (1892). "The rule is thus laid down by Blackstone: 'If there be daylight or crepusculum enough, begun or left, to discern a man's face withal, it is not burglary. But this does not extend to moonlight.' This rule of Blackstone is substantially supported in those states where there is no statutory definition of nighttime." 13 Am. Jur. 2d *Burglary* § 22 (1964). *See* Annot., 82 A.L.R. 2d 643 (1962). With respect to burglary, there is no statutory definition of nighttime in North Carolina.

In determining the admissibility of opinion evidence, the essential question "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. Mitchell,* 283 N.C. 462, 196 S.E. 2d 736 (1973); *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971); 1 Stansbury's North Carolina Evidence § 133 (Brandis rev. 1973). The evidence here does not indicate that Detective Ausley was any better qualified than the jury to form an opinion as to whether dawn occurred before or after 4 a.m. on 20 April 1972 in Raleigh. Even so, his opinion on the subject was entirely harmless. Given defendant's own admission that he always worked between midnight and 4 a.m. "because this is the time that people sleep the soundest," the jury could reasonably infer that defendant committed this crime during the nighttime and before "the first appearance of light in the morning." Conceding that the admission of this opinion evidence was erroneous, we hold it was not prejudicial. It is a matter of common knowledge that nighttime included the hours between midnight and 4 a.m. on 20 April 1972 in Raleigh, North Carolina. This assignment of error is overruled.

[6] In the burglary case the presiding judge submitted as permissible verdicts (1) guilty of burglary in the first degree, or (2) guilty of burglary in the second degree, or (3) guilty of felonious breaking or entering, or (4) not guilty. In the other case the jury was instructed to return a verdict of (1) guilty of felonious larceny of the Ford automobile or (2) not guilty. In each case the judge correctly explained the law, pointed out the essentials to be proved by the State, and then applied the law to the various factual aspects of the evidence. At the close of the charge the judge reduced to writing the elements of burglary in the first degree, burglary in the second degree, and felonious breaking or entering. These writings were enclosed in three separate envelopes and the jury was instructed to carry them to the jury room for guidance during its deliberations. The same procedure was followed in the larceny case. The judge then suggested that the jury first consider and say whether the defendant was guilty or not guilty of the felonious larceny of the automobile, and then consider, *in descending order,* defendant's guilt or innocence of burglary in the first degree, burglary in the second degree, or felonious breaking or entering. Defendant objected "to the procedure of handing the jury written instructions as identified by the court," and assigns as error the overruling of his objection.

The main purpose of a charge is to aid the jury in arriving at a correct verdict according to law. *Lewis v. Watson,* 229 N.C.

20, 47 S.E. 2d 484 (1948). We said in *State v. Friddle,* 223 N.C. 258, 25 S.E. 2d 751 (1943): "The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and on the other, and to bring into view the relation of the particular evidence adduced to the particular issue involved."

We think the procedure employed here by the able trial judge promoted that objective. The jury was correctly instructed, both orally and in writing, with respect to the elements of each crime involved in the various permissible verdicts. The writing only served to aid the jury in following the oral instructions already given. We perceive no prejudice to defendant from the procedure employed.

The judge was not requested to put his instructions in writing and read them to the jury; nor did he do so of his own will. Thus, G.S. 1-182 does not apply in the factual context under discussion. This assignment of error is overruled.

[7] Error, if any, in the submission of burglary in the second degree and felonious breaking or entering without evidence to support these lesser offenses, as defendant argues, was favorable to defendant and hence not prejudicial. *State v. Accor and State v. Moore,* 281 N.C. 287, 188 S.E. 2d 332 (1972); *State v. Murry,* 277 N.C. 197, 176 S.E. 2d 738 (1970). This assignment has no merit.

[8] Defendant was sentenced to ten years for larceny and life imprisonment for burglary to commence at the expiration of the larceny sentence. He contends these consecutive sentences constitute cruel and unusual punishment prohibited by both State and Federal Constitutions. We have consistently held that a sentence of imprisonment which is within the maximum authorized by statute is not cruel or unusual in a constitutional sense, unless the punishment provisions of the statute itself are unconstitutional. *State v. Mitchell,* 283 N.C. 462, 196 S.E. 2d 736 (1973); *State v. Cradle,* 281 N.C. 198, 188 S.E. 2d 296 (1972); *State v. Hilton,* 271 N.C. 456, 156 S.E. 2d 833 (1967). The federal rule coincides with ours. *Martin v. United States,* 317 F. 2d 753 (9th Cir. 1963). First degree burglary committed prior to 18 January 1973 is punishable by life imprisonment. *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973); *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726 (1972). Felonious larceny is punishable by imprisonment not exceeding

ten years. G.S. 14-70; G.S. 14-2. Thus the judgments pronounced are within the maximum authorized by law and must be upheld. This assignment is overruled.

Defendant's remaining assignments of error relate to motions for nonsuit, new trial and arrest of judgment. These formal motions are overruled without discussion.

Defendant having failed to show prejudicial error, the verdicts and judgments will not be disturbed.

No error.

STATE OF NORTH CAROLINA v. HAROLD HUNTLEY

No. 48

(Filed 14 November 1973)

1. **Criminal Law §§ 75, 89— in-custody statement — no waiver of rights — admissibility for impeachment**

An accused's prior inconsistent statements, which were not coerced or involuntary in fact but were made without counsel and without waiver of rights, although inadmissible to establish the prosecution's case in chief could properly be used to impeach the accused's testimony; therefore, in a prosecution for kidnapping, assault with intent to commit rape, and crime against nature, the trial court did not err in admitting for impeachment purposes only a statement made by defendant while in custody as to what occurred between him and his alleged victim.

2. **Criminal Law § 113— reasonable doubt — assignment of error to charge — no prejudice shown**

Defendant's assignment of error to the trial court's instruction on reasonable doubt did not disclose prejudicial error where defendant contended that the court's definition of the term was not explicit enough and suggested that a more elaborate instruction should have been given.

3. **Criminal Law § 113— jury instruction on evidence — no error**

Trial court's failure to instruct the jury that defendant's alleged confession was not made under oath and was not to be considered as evidence in the trial was not error since the question was not whether the jury should accept the prior unsworn statement of defendant or the sworn testimony of defendant at trial, but the question was to what extent, if any, defendant's testimony at trial was discredited by his prior unsworn statement.

4. Criminal Law § 114— jury charge — no expression of opinion

The trial court did not commit error by commenting on the evidence where it correctly reviewed the evidence of the State and defendant in its charge to the jury and instructed that the jury must determine what weight should be given to defendant's testimony at trial.

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

An assignment of error based on failure of the court to give instructions should set out the defendant's contention as to what the court should have charged. Defendant did not suggest what instruction should have been given with reference to voluntary intoxication and failed to show prejudicial error.

APPEAL by defendant from *McConnell, J.*, 19 February 1973 Session of UNION Superior Court.

In separate indictments defendant was charged with the felonies of (1) kidnapping, (2) assault with intent to commit rape, and (3) crime against nature, committed upon Dorothy F. Swaney on 7 October 1972. The three cases grew out of the same transaction and were tried together.

The State's evidence, summarized except when quoted, is set forth below.

On and prior to 7 October 1972, Mrs. Dorothy F. Swaney was living with her sixteen and nineteen-year-old daughters in a house on East Franklin Street in Monroe. She had been separated from her husband for ten years, was forty-two years old, and was attending Central Piedmont College. Although not regularly employed, she had agreed to paint the inside of a house on Redwine Street so people could move in on Saturday, October 7. To meet this deadline, she started about two o'clock in the afternoon of Friday, October 6, and planned to continue until she finished the job. About midnight, she interrupted her work to go home for coffee and a sandwich. She made the trip in her 1964 four-door Cadillac.

Upon arrival at her home, Mrs. Swaney parked the car in the driveway, went into the house, and stayed "about 45 minutes or an hour." Then she went out to her car to go "back to Redwine Street and finish painting." The lights were shining around a Car Center Building which was next to her home. However, she saw no one in the area when she approached and got into her car.

Mrs. Swaney first saw defendant as she prepared to start her car. He appeared at the open window on the driver's side and asked her to take him to Maurice Street. She had never seen him before. When she told him she was "too busy and didn't have time," he replied that "he had a gun and [she] would take him to Maurice Street." Defendant walked around the car and got in the right front seat. Defendant had his hand in his pocket, but she did not see a gun or other weapon before moving her car.

Frightened, Mrs. Swaney started the car. Defendant took a knife from his pocket and opened it. "The knife looked about 10 inches long." When Mrs. Swaney told defendant she didn't know Maurice Street, he said he would tell her which way to go and directed her to drive "outside the city."

On one occasion, when "[a]nother car got behind [them] on the highway," Mrs. Swaney stopped her car and got out "to flag down the car." Defendant got out behind her, forced her back into the car, made her turn off the main road, go down a side road, and stop the car "about 5 or 6 miles from [her] residence."

With the knife in his right hand, he made her get in the back seat, and said "there was something he had to do." Putting the knife "at [her] side and neck," he made her take one leg out of her slacks and pushed her leg over the back seat. He tried to penetrate her vagina with his penis but was unsuccessful. She resisted by moving around and kicking him. Frustrated in that attempt, he stunned her with a blow and then succeeded in "[placing] his private parts in [her] rectum," which she was unable to prevent.

"When it was over," he told her if she "said anything about it he would kill [her]." Saying that he was going to Charlotte, he took her car keys from her. He made her get into the right front seat of the car. Over her protest, he took over the driving and headed toward Charlotte. Observing the edge of the closed knife, she managed to slip it from his pocket and put it in the back seat. She called on him to slow down, saying "that he was making [her] nervous." When they were "going about 35 or 40," she took the keys out of the ignition and jumped out of the car. Although suffering from bruises and lacerations, she ran to the nearby residence of Nathan Hargett, where she was admitted.

In response to a call received about 3:50 a.m. on 7 October 1972 Reid Helms, of the Union County Sheriff's Department, accompanied by Lt. Rollins, proceeded to the Hargett residence on Old 74 about 4 miles west of Monroe.

Before reaching the Hargett residence, the officers observed a "blue and white Cadillac four door" in the road "with the headlights still on" and the right front door open. At the Hargett residence the officers found Mrs. Swaney, whom they observed "was bruised about the knees, the legs and the arms."

After talking with Mrs. Swaney at the Hargett residence, the officers, accompanied by Mrs. Swaney, went back to the unoccupied Cadillac. It was "maybe 100 or 200 yards" up the road from where she jumped out and fell. After she jumped, the car "kept on moving" but was "not running." They searched the Cadillac and found a closed knife "about the center of the back seat." This knife (State's Exhibit 1) was identified by Mrs. Swaney as the knife with which she was threatened by her kidnapper and assailant.

The officers had traveled "approximately a mile" when they saw defendant. He had one foot on the pavement and the other on the shoulder and "was thumbing." The officers stopped their car and got out. Helms recognized defendant and said, "Harold, we need to talk to you." Mrs. Swaney identified defendant in these words: "That's him, he's the one that did it." When told that "he was under arrest for possible assault to commit rape," defendant tried to run away and scuffled with the officers until handcuffs were put on him. Helms testified that he "smelled a faint odor of alcohol on his person at that time."

Later, when defendant was booked in the sheriff's office, Helms removed an earring from defendant's wallet. This earring (State's Exhibit 2) was identified by Mrs. Swaney as an earring defendant was wearing when he kidnapped and assaulted her. She had described the earring to Helms prior to the arrest of defendant.

During the morning of October 7 a latent palm print was lifted from the inside of a glass in the left rear door of Mrs. Swaney's Cadillac. This print (State's Exhibit 3) and a palm print known to have been made by defendant (State's Exhibit 4) were submitted to and compared by a qualified fingerprint

expert. The expert testified that in his opinion the prints on these two exhibits were prints of the same palm.

The evidence offered by defendant consisted of his own testimony which, summarized except when quoted, was as follows:

He got off from work about 3:30 in the afternoon of October 6. Accompanied by a friend, he went to his mother's home and there drank Scotch and Smirnoff Vodka and smoked marijuana. They left about 6:30 p.m. and went to the Amleeax Club in "New Town." There they sat around, drank beer and some liquor, and danced. He drank Vodka at "New Town" and "was feeling drunk." About midnight, he and others left in a car "owned by a dude from Marshville." He (nobody else) got out at the corner of East Franklin Street, about 4 or 5 blocks from where he lived.

He was on the sidewalk on East Franklin Street when he saw Mrs. Swaney come out of her house. He had seen her before. "She spoke and [he] spoke." She asked him where he was going. When he told her that he lived on Maurice Street, she told him that she "would take [him] home after she went to town and got a newspaper." Mrs. Swaney got in on the driver's side and he "got in on the passenger side . . . in the back seat." They sat in the car and talked 15 or 20 minutes before leaving the house. In the course of their conversation, she told him that she had left her husband and was divorced.

When going down the road, he asked Mrs. Swaney "to turn to the left to carry [him] to Maurice Street." Instead, "[s]he went up West Franklin Street, turned down Church Street and cut down Green Street and she went somewhere else." It was hot in the car and he went to sleep.

When he woke up he was on the Old Charlotte Highway. Mrs. Swaney was not with him. He crawled out of the car "on the driver's side" and "started walking." He was walking "down 74" when Helms and Rollins drove up. He started toward their car. Helms jumped out of the car, put his (defendant's) head against the car and started choking him. He had no knife, did not at any time try to assault Mrs. Swaney and did not take her car.

Upon cross-examination, defendant testified he remembered talking with Helms but had not talked with him during the

night he was arrested. When asked if he had not told Helms that he had got out of a car operated by his cousin, defendant's objection was sustained. The court then excused the jury and conducted a *voir dire* examination. After hearing the testimony of Helms and of defendant, the court made findings to the effect that defendant signed a waiver-of-rights form and the statement set forth below freely and voluntarily; "that no promises were made to him, no threats, nor was he threatened in any manner"; that, at the time he signed these papers, defendant "was intelligent and normal"; and that "defendant knew he had a right to an attorney, and expressly waived the right to have an attorney present."

No statement made by defendant to the officers was offered in evidence as a part of the State's case.

After defendant rested, the State offered *rebuttal evidence* consisting of two writings, each signed by defendant and witnessed by Helms and Rollins on 7 October 1972 at 7:05 p.m., namely, (1) the waiver-of-rights form (State's Exhibit B), and (2) defendant's account of what had occurred between him and Mrs. Swaney (State's Exhibit C). These were offered and admitted in evidence over defendant's objection "only for the purpose of impeaching the defendant as he heretofore testified, if it does impeach him, and for no other purpose."

On rebuttal, Helms testified that defendant stated he could read and write; that he appeared normal and was cooperative; that defendant's account of what had taken place was in response to Helms's request that defendant tell "exactly what happened"; and that, although in Helms's handwriting, defendant's account of what happened was in defendant's own words.

Defendant's written statement of 7 October 1972 (State's Exhibit C) as to what occurred between him and Mrs. Swaney is as follows:

"I Harold Huntley, being of sound mind, make the following statement freely, without any promise threat or reward.

"I Harold got out of a car, at a point with a cousin John Robert Blakney, when I saw a boy come out of the house on Franklin Street, and go to a Cadillac automobile.

"I Harold asked the person to carry me to Maurice Street. I thought the person was a boy, and from Mrs. Swaney's home,

we went to Parker, where she told me to drive. She then stated for me, Harold, to go somewhere to get a cold drink. I drove the car up Highway 74 about four miles out, when she said I have to go pee. She then took the car keys out of the car, jumped out of the car on New Highway 74, and started thumbing for a ride, when Deputy Sheriff Reid Helms picked me up and brought me to town. Signed Harold Huntley, witnessed Reid Helms and C. L. Rollins."

[The record shows that at the close of all the evidence "the court dismissed the charge of theft of the automobile."]

In each case, the jury returned a verdict of guilty of the crime charged in the indictment. The court pronounced judgments as follows: In #73CR0993, kidnapping, a sentence of imprisonment for life; in #73CR0992, crime against nature, a sentence of imprisonment for ten years; and in #72CR6934, assault with intent to commit rape, a sentence of imprisonment for fifteen years. The judgments in #73CR0992 and #72CR6934 provide that the sentences imposed therein are to run concurrently with the life sentence imposed in #73CR0993.

Joe P. McCollum, Jr. for defendant appellant.

Attorney General Robert Morgan and Associate Attorney George W. Boylan for the State.

BOBBITT, Chief Justice.

[1] In Assignment of Error No. 1 defendant asserts that the court committed error "by allowing the State to cross examine the defendant concerning the alleged confession." There is no basis for or merit in this contention. Defendant's objection was *sustained* when the cross-examiner asked defendant if he had not told Helms that he (defendant) had gotten out of a car driven by his cousin.

After sustaining defendant's objection, the court conducted the *voir dire* examination referred to in our preliminary statement. Based upon evidence offered in the absence of the jury and upon his factual findings, the trial judge stated that "the Court will allow the statement to be admitted into evidence, at such time as it may be offered." Exception No. 1, on which Assignment of Error No. 1 purports to be based, is to the court's denial of a motion by defendant "to strike all the proceedings in the Voir Dire Hearing."

In Assignment of Error No. 2 defendant asserts that the court committed error "by allowing the confession of the defendant to be admitted into evidence." He contends that the court's order at the conclusion of the *voir dire* hearing did not contain an explicit finding that the defendant was given each of the warnings in respect of his constitutional rights required by *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602, 10 A.L.R. 3d 974 (1966), and therefore it [the so-called confession] was not admissible even for impeachment purposes. There is no merit in this contention.

We need not consider whether the evidence on *voir dire* and the court's factual findings were sufficient to render defendant's written account of his association with Mrs. Swaney admissible as substantive evidence. Suffice to say, it was offered and admitted only as it might tend to impeach the testimony of defendant. We note that the written statement (State's Exhibit C) referred to in the assignment of error as a confession, although it identifies defendant as being the man involved with Mrs. Swaney during the early morning hours of October 7, recounts what occurred between them in a manner tending to exculpate defendant.

In *State v. Catrett,* 276 N.C. 86, 97, 171 S.E. 2d 398, 405 (1970), this Court, based on our interpretation of the exclusionary rule adopted in *Miranda,* held "that in-custody statements attributed to a defendant, when offered by the State and objected to by the defendant, are inadmissible *for any purpose* unless, after a *voir dire* hearing in the absence of the jury, the court, based upon sufficient evidence, makes factual findings that such statements were voluntarily and understandingly made by the defendant after he had been fully advised as to his constitutional rights." In the later case of *Harris v. New York,* 401 U.S. 222, 28 L.Ed. 2d 1, 91 S.Ct. 643 (1971), the Supreme Court of the United States did not so interpret the *Miranda* exclusionary rule. In *Harris,* the Court held that an accused's prior inconsistent statements, which were not coerced or involuntary in fact but were made without counsel and without waiver of rights, although inadmissible to establish the prosecution's case in chief could properly be used to impeach the accused's testimony. The rule enunciated in *Harris* was adopted by this Court in *State v. Bryant,* 280 N.C. 551, 555, 187 S.E. 2d 111, 113 (1972), *cert. den.* 409 U.S. 995, 34 L.Ed. 2d 259, 93 S.Ct. 328 (1972). *Hence, Bryant* superseded *Catrett* as the law in this jurisdiction.

Assignments of Error Nos. 3, 4, 5 and 6 relate to the court's charge. None discloses prejudicial error.

[2] In Assignment of Error No. 3, defendant asserts that the court committed error "by not correctly defining the term 'Reasonable Doubt.'" The assignment does not point out any error in the portion of the charge to which it refers. Defendant contends the court's definition "was not explicit enough" and suggests that a more elaborate instruction should have been given.

[3] In Assignment of Error No. 4, defendant asserts that the court committed error "by failure to correctly instruct the jury concerning the admission of the confession for impeachment purposes." He does not point out any error in the portion of the charge to which he refers, to wit: "Now, the Court allowed the State to introduce the statement, which was made earlier to the police, solely for the purpose of impeaching his testimony, if you find that it does. That goes to the credibility of the witness. That is a matter for you to determine." On appeal, defendant suggests that a more elaborate instruction should have been given. [As indicated above, a similar instruction was given the jury when State's Exhibit C was offered and admitted into evidence.] Defendant contends that the court "did not instruct the jury properly in that they were not told that the earlier statement was not made under oath and they were not to consider it as evidence in this trial." There is no merit in this contention. The question was not whether the jury should accept the prior unsworn statement made shortly after defendant's arrest or the sworn testimony of defendant at trial. It was for the jury to determine to what extent, if any, defendant's testimony at trial was discredited by his prior unsworn statement.

[4] In Assignment of Error No. 5 defendant asserts that the court committed error "by commenting on the evidence of the defendant." The exception on which this assignment is based refers to a portion of the charge in which the court correctly reviewed portions of State's Exhibit C as well as defendant's testimony at trial. Full instructions were given to the effect that it was for the jury to determine what weight should be given to defendant's testimony at trial.

[5] In Assignment of Error No. 6, defendant asserts that the court committed error "by failing to instruct the jury on voluntary intoxication." In view of his complete denial of having molested Mrs. Swaney in any way, it is understandable that this

assignment contains no suggestion as to what instruction defendant contends should have been given with reference to voluntary intoxication. Suffice to say, "[a]n assignment based on failure to charge should set out the defendant's contention as to what the court should have charged." *State v. Wilson,* 263 N.C. 533, 534, 139 S.E. 2d 736, 737 (1965).

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

No error.

STATE OF NORTH CAROLINA v. TERRY FRANKLIN SHARPE

No. 28

(Filed 14 November 1973)

Criminal Law § 84; Searches and Seizures § 1— warrantless seizure of hair samples — constitutionality

The seizure of hair samples from defendant's head and arm without a warrant while defendant was in custody pursuant to a lawful arrest on a murder charge was not unreasonable and did not violate the Fourth Amendment to the U. S. Constitution, and expert testimony concerning a comparison of the hair so taken with hair taken from under the fingernail of the victim was properly admitted in defendant's trial for first degree murder.

APPEAL by defendant from *Grist, J.,* at the 1 January 1973 Schedule "B" Session of MECKLENBURG Superior Court.

Defendant was tried on two indictments, proper in form, charging him with armed robbery and murder in the first degree of Thomas Ross Garrison on 15 July 1972. At the end of the State's evidence, the trial court allowed defendant's motion for judgment as of nonsuit for the armed robbery charge, but retained the lesser included offense of common law robbery. Defendant was not tried for first degree murder under the felony-murder rule, but rather the State undertook the burden of proving premeditation and deliberation. The jury found defendant guilty of first degree murder and common law robbery, and defendant was sentenced to life imprisonment for the murder and to 10 years' imprisonment for the robbery, the 10-year sentence to commence at the expiration of the life sentence. From the judgments imposed, defendant appealed. Pursuant to G.S.

7A-31(a), the case on the robbery charge was certified for review by this Court prior to determination by the Court of Appeals.

At trial it was undisputed that during the early morning of 15 July 1972 Thomas Ross Garrison, a crippled polio victim, was killed in Charlotte, North Carolina. The scene of the crime was a dead-end road in an uninhabited portion of a residential development under construction. A Charlotte police officer on patrol in the area observed a car on fire and proceeded to investigate. He found the deceased's body and a bumper jack in some nearby bushes at the end of a trail of blood leading from a partially burned automobile later identified as belonging to the deceased. The deceased's head had recently been crushed and his upper body had received multiple blows. The police also found a charred portion of a shirt sleeve at the scene of the crime, which defendant admitted was torn from his shirt.

Shortly before the killing the deceased had been seen with two young men in a different part of Charlotte by another police officer and Johnny Ray Miles. Miles identified the two men that he had seen with the deceased as defendant and Jerry Vonn Trull. Trull was a friend of defendant who had been living with defendant's parents for a couple of weeks prior to 15 July 1972.

On the afternoon of 15 July 1972 a Charlotte police detective went to defendant's home. There defendant's mother, Mrs. Beatrice Sharpe, informed the police that her son and Trull came home early that morning without their shirts and with blood all over their other clothes. They told her that they had been in a fight with some black males, and that this explained the blood on their clothing. Mrs. Sharpe gave these clothes to the police. While at defendant's home the police also learned that defendant and Trull had gone to Myrtle Beach, South Carolina.

On the evening of 15 July 1972 defendant and Trull were arrested in Myrtle Beach, South Carolina, and taken to the Charlotte Police Department the following morning. Shortly after they were returned to Charlotte, venous puncture blood samples, head and arm hair samples, and fingernail scrapings were taken from them, over their attorney's objections and without a search warrant.

Prior to the State's calling this case for trial, Trull pleaded guilty to second degree murder. He then testified for the State. The State's evidence, based largely on Trull's testimony, tends

to show that during the early morning of 15 July 1972 defendant and Trull were in Charlotte in front of the home of Johnny Ray Miles. While they were there a car driven by the deceased pulled up along the curb and stopped. Defendant went over and talked with the deceased and persuaded him to take defendant and Trull to defendant's home. Pretending to direct the deceased to defendant's home, defendant instead directed him to a dead-end road in an uninhabited portion of a residential development under construction. There defendant took the deceased's car keys out of the ignition switch, knocked the deceased out of his car, got a bumper jack out of the trunk, and hit the deceased several times. Defendant then took approximately $30 from the deceased's person. He and Trull then dragged the body into some nearby bushes. Defendant threw the bumper jack into the bushes, set the deceased's car seat on fire, and he and Trull left the area and went to defendant's home.

The State introduced into evidence the blood-stained clothing belonging to defendant and Trull that defendant's mother had given to the police. Mrs. Mary Jane Burton, an employee of the Mecklenburg County Law Enforcement Crime Laboratory and an expert in the field of typing and comparison of human blood, testified that the blood on the clothing was of the same type as that of the deceased. This same witness was also offered by the State as an expert in the field of comparison of human and animal hairs. She testified that she had taken fingernail scrapings and hair samples from the deceased's body, and that the fingernail scrapings revealed the presence of dirt, blood, and a single hair. Based on her observations of this hair under a microscope, Mrs. Burton offered the following opinions: the hair taken from under the deceased's fingernails was a human hair from a Caucasian and was a "limb hair," meaning that it was from a leg, arm, or hand; it was not similar to an arm hair taken from the deceased or to an arm hair taken from Trull, but was similar to an arm hair taken from defendant.

Medical testimony for the State revealed that the deceased died as a result of a massive head injury from multiple blows from a blunt object, and that the bumper jack found at the scene of the crime could have caused the injury.

Defendant testified in his own behalf. He admitted that he had been expelled from East Mecklenburg High School six or seven times and that he had been convicted of larceny on one occasion. He testified that on the morning in question he "was

messed up on drugs and drinking alcoholic beverages." Although defendant, like Trull, admitted being at the scene of the crime, his testimony in all other respects was substantially different from the testimony given by Trull. Defendant testified that Trull asked the deceased for a ride home and that Trull directed the deceased to the scene of the crime; that Trull, after hitting the deceased, threw him out of his car and then got a bumper jack and beat and robbed him; that Trull asked defendant to help him carry the man's body into the bushes; and that he and Trull started the fire in the car using a match and a sleeve torn from defendant's shirt. Defendant further testified that "I never put my hands on him [the deceased] before the beating, and he never put his hands on me."

Defendant also called the State's expert in the field of typing and comparison of human blood, Mrs. Burton, as a defense witness. She testified that she had determined that the deceased's blood was type "A," that blood found under the fingernails of Trull was also type "A," but that blood found under the fingernails of defendant was type "B," and thus the blood found under defendant's fingernails was not that of the deceased. On cross-examination Mrs. Burton stated that at the time she took the fingernail scraping from defendant she saw "broken sores all over his face that evidently he had scratched."

Although the State admitted that at its request Mrs. Burton had taken a blood sample from defendant without a search warrant and had conducted a test to determine the blood type, at no time during the trial did either the State or the defense counsel elicit the results of the blood test. The record, therefore, is silent concerning defendant's blood type.

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

George S. Daly, Jr., for defendant appellant.

MOORE, Justice.

The sole assignment of error preserved by defendant and brought forward on appeal is whether hairs taken from defendant's head and arm were obtained in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

Defendant does not contend, and properly so, that the plucking and seizure of his hair was a violation of his Fifth

Amendment privilege against self-incrimination. In *Schmerber v. California,* 384 U.S. 757, 764, 16 L.Ed. 2d 908, 916, 86 S.Ct. 1826, 1832 (1966), a case involving the extraction of a blood sample, it was noted:

> " . . . [B]oth federal and state courts have usually held that [the privilege] offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it."

Defendant does contend, however, that his Fourth Amendment rights have been violated. The Fourth Amendment expressly provides that "[t]he right of the people to be secure in their *persons,* houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated. . . ." (Emphasis ours.) The obtaining of physical evidence from a person involves a potential Fourth Amendment violation at two distinct levels: (1) The seizure of the "person" necessary to bring him into contact with government agents, and (2) the subsequent search for and seizure of the evidence. See *United States v. Dionisio,* 410 U.S. 1, 8, 35 L.Ed. 2d 67, 76, 93 S.Ct. 764, 769 (1973); *Davis v. Mississippi,* 394 U.S. 721, 22 L.Ed. 2d 676, 89 S.Ct. 1394 (1969).

Unlike the defendant in *Davis v. Mississippi, supra,* defendant's rights in this case were not violated by an unlawful seizure of the person. In *Davis* the defendant and some twenty-three other persons were detained in police headquarters for fingerprinting without probable cause for arrest. The United States Supreme Court held that such detentions were constitutionally impermissible. In the present case the hairs were plucked from defendant's head and arm incident to a lawful arrest while defendant was in custody of the officers of the Charlotte Police Department charged with the first degree murder of Thomas Ross Garrison.

Testimony concerning the comparison between hair taken from under the fingernail of the deceased and that taken from defendant was presented by the State during its rebuttal to

counter defendant's defense that, although present at the scene of the crime, he did not touch the victim in an aggressive way likely to cause the victim to claw at defendant's arm. Such testimony would be competent unless the samples taken from defendant were obtained in violation of defendant's Fourth Amendment rights. *State v. Barber,* 278 N.C. 268, 179 S.E. 2d 404 (1971); *State v. Ray,* 274 N.C. 556, 164 S.E. 2d 457 (1968).

The question then arises: Was the plucking of the hairs, which were in plain view of the officers, and their seizure for microscopic examination, an unreasonable search and seizure within the meaning of the Fourth Amendment?

In *United States v. Dionisio, supra,* it is stated:

> "In *Katz v. United States, supra* [389 U. S. 347, 19 L.Ed. 2d 576, 88 S.Ct. 507], we said that the Fourth Amendment provides no protection for what 'a person knowingly exposes to the public, even in his home or office. . . .' 389 U.S. 347, at 351. The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world. . . .
>
> " . . . [A seizure of a voice exemplar] is like the fingerprinting in *Davis,* where, though the initial dragnet detentions were constitutionally impermissible, we noted that the fingerprinting itself, 'involves none of the probing into an individual's private life and thoughts that marks an interrogation or search.' *Davis v. Mississippi,* 394 U.S., at 727 [22 L.Ed. 2d 676, 89 S.Ct. 1394]; cf. *Thom v. New York Stock Exchange,* 306 F. Supp. 1002, 1009." 410 U.S., at 14, 35 L.Ed. 2d, at 79-80, 93 S.Ct., at 771-72.

Hair, like fingerprints or a man's facial characteristics or the body itself, is an identifying physical characteristic and is constantly exposed to public view. Here defendant's hair was in plain view of all who saw him. Unquestionably the plucking of defendant's hairs by the police constituted a "seizure" that might *conceivably* be subject to the constraints of the Fourth

Amendment. The law does not, however, prohibit a seizure without a warrant by an officer in the discharge of his official duties when the article seized is in plain view. *Harris v. United States,* 390 U.S. 234, 19 L.Ed. 2d 1067, 88 S.Ct. 992 (1968); *Ker v. California,* 374 U.S. 23, 42-43, 10 L.Ed. 2d 726, 744, 83 S.Ct. 1623, 1635 (1963); *State v. Howard,* 274 N.C. 186, 162 S.E. 2d 495 (1968); *State v. Craddock,* 272 N.C. 160, 158 S.E. 2d 25 (1967).

Moreover, although the United States Supreme Court in *Schmerber v. California, supra,* held that certain offical intrusions into an individual's person require a search warrant in order for the intrusions to be deemed reasonable and not violative of the Fourth Amendment, as stated in *United States v. D'Amico,* 408 F. 2d 331 (2d Cir. 1969):

> ". . . This holding does not comprehend that all official intrusions into an individual's person require, in the absence of extenuating circumstances, a search warrant in order to be reasonable. Some official in-custody investigative techniques designed to uncover incriminating evidence from a person's body are such minor intrusions into or upon the 'integrity of an individual's person' (384 U.S. at 772, 86 S.Ct. 1826), that they are not, in the absence of a search warrant, unreasonable intrusions."

See also *United States v. Richardson,* 388 F. 2d 842 (6th Cir. 1968); *United States v. Caruso,* 358 F. 2d 184 (2d Cir. 1966); *United States v. Collins,* 349 F. 2d 863 (2d Cir. 1965). Thus it has been held that "the obtaining of hair samples after lawful arrest, where the means employed are reasonable, is not a violation of [one's] constitutional right." *Grimes v. United States,* 405 F. 2d 477 (5th Cir. 1968). See also *United States v. D'Amico, supra.*

There is nothing in the record to indicate that the hair samples taken from the defendant were taken in a forceful or unreasonable manner, or in such a way as to cause defendant to suffer any true humiliation or affront to his "integrity." Mrs. Mary Jane Burton, who was not an officer but a trained laboratory technician, testified that she asked defendant to pull his own hair and that he pulled the hair sample from his head and handed it to her in the presence of his lawyer. The record does not disclose how the arm hair sample was removed. Under these circumstances, it would have been a vain exercise to procure a search warrant to authorize an officer to search for something that was exposed to all who saw defendant.

In *Cupp v. Murphy,* 412 U.S. 291, 36 L.Ed. 2d 900, 93 S.Ct. 2000 (1973), the United States Supreme Court held that taking scrapings from under a defendant's fingernails went beyond a seizure of "physical characteristics . . . constantly exposed to the public," (citing *United States v. Dionisio, supra)* but held that the seizure of the scrapings without a warrant was proper since the blood and skin tracings found there could have easily been destroyed had the officer waited to obtain the warrant. Defendant here contends that the hair samples taken from him were not destructible evidence as in *Cupp,* and that the State had ample time and could easily have procured a search warrant. This may be true, but this is not the determining factor for procuring a search warrant. "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances — the total atmosphere of the case." *United States v. Rabinowitz,* 339 U.S. 56, 66, 94 L.Ed. 653, 660, 70 S.Ct. 430, 435 (1950). " . . . Of course, the limits of reasonableness which are placed upon searches are equally applicable to seizures, *State v. Chinn,* 231 Ore. 259, 373 P. 2d 392, and whether a search or seizure is reasonable is to be determined on the facts of the individual case. *Cooper v. California,* 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed. 2d 730; *Preston v. United States,* 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed. 2d 777." *State v. Howard,* 274 N.C. 186, 202, 162 S.E. 2d 495, 506 (1968). Although no search was required in the present case, there was a seizure of the hair samples. Such seizure, however, was certainly reasonable. We fail to see how the taking of these few hairs from defendant while he was in custody could have been more prejudicial or offensive than the taking of his fingerprints or his photograph. *United States v. D'Amico, supra.*

We hold that the seizure of the hairs in the present case was not an unreasonable one or one violative of the Fourth Amendment and, therefore, that the testimony concerning the comparison of the hair found under the fingernail of the deceased and the hairs taken from the head and arm of defendant was properly admitted in evidence.

Defendant's own testimony is sufficient to sustain the verdicts, and our examination of the entire record reveals nothing that would justify disturbing the verdicts and the judgments in this case.

No error.

STATE OF NORTH CAROLINA v. JAMES WOODROW CAMERON, JR.

No. 21

(Filed 14 November 1973)

1. **Criminal Law § 79— accomplice's testimony of intention to plead guilty**

In this safecracking prosecution, trial court did not err in allowing defendant's accomplice, who was a witness for the State, to testify that he intended to plead guilty to a pending charge against him growing out of the same events where the accomplice's previous testimony clearly disclosed his participation in the crime for which defendant was on trial.

2. **Criminal Law § 79; Safecracking— charge on acts of co-conspirators — harmless error**

In a safecracking prosecution in which the State's evidence tended to show that, although defendant did not act alone, he participated in each element of the crime charged and defendant's sole defense was alibi, the trial court's instruction that "If two or more persons act together for the common purpose to commit the crime of safecracking, each of them is held responsible for the acts of others done in the commission of the crime of safecracking" did not arise upon the evidence; however, such instruction did not constitute prejudicial error in light of the clear choices afforded the jury by all the evidence of whether to believe the State's evidence or whether to believe defendant's evidence.

3. **Criminal Law § 112— additional instruction — failure to charge on burden of proof**

It was not necessary for the trial court in a safecracking case to charge further on the burden of proof in his additional instruction to the jury where the jury was properly instructed on the burden of proof when the charge is considered as a whole.

4. **Criminal Law § 139; Safecracking — indeterminate sentence — minimum term**

In imposing an indeterminate sentence on defendant for safecracking under former G.S. 14-89.1, the trial court was not confined to the lower limit of ten years provided in the statute but could properly impose a term of not less than twenty-five years to life imprisonment. G.S. 148-42.

5. **Constitutional Law § 36; Criminal Law § 139; Safecracking— indeterminate sentence — cruel and unusual punishment**

The authority to impose an indeterminate sentence for safecracking under G.S. 14-89.1 does not result in a lack of uniformity in sentencing so that such an indeterminate sentence constitutes cruel and unusual punishment.

6. **Criminal Law § 138— punishment statute changed pending appeal**

Defendant was not entitled to the benefit of the reduction in punishment for safecracking provided by the 1973 amendment to

G.S. 14-89.1 where the crime for which defendant was convicted occurred prior to the effective date of the amendment and the amending act provided that it should apply to all offenses committed *after* its ratification.

APPEAL by defendant from *Collier, J.*, 29 January 1973 Session of FORSYTH Superior Court.

Defendant was tried upon a bill of indictment which charged: "that James Woodrow Cameron . . . on the 28th day of August, 1971 with force and arms, . . . unlawfully, wilfully, and feloniously did by the use of tools force open a safe of Clinard and Baynes, Inc., a corporation, located at 630 West 4th Street, Winston-Salem, North Carolina, used for storing money and other valuables, . . . "

The State's evidence, given principally by defendant's admitted accomplices, Darrell Eugene Hicks, Glenn Wallace Enscore, Jr., and John Henry Hemrick, tended to show that on the evening of 28 August 1971, Darrell Eugene Hicks, David Pennell, Glenn Wallace Enscore, Jr., John Henry Hemrick and defendant met and were riding around the City of Winston-Salem. They discussed probable places they might break into which were not protected by burglar alarms and where there might be a safe containing money. Finally at about five or six o'clock a.m. on the morning of the 29th of August upon defendant's suggestion they all agreed to break in the business of Clinard and Baynes. Darrell Hicks, David Pennell and defendant broke into the rear of the building occupied by the business of Clinard and Baynes, Inc., removed a safe, and with the help of Enscore and Hemrick, placed it in the automobile in which they were riding. The safe was taken to a spot off Interstate 40 where they "beat the safe open" with some tools and picks. They then divided the money found in the safe. One of the owners of the business testified that prior to the breaking, the safe contained approximately $3,300 in cash and checks.

Defendant's evidence tended to show that he and his uncles, Coy Walker and William Walker, Jr., left Winston-Salem about 5:30 or 6:00 p.m. on 28 August 1971 and attended an automobile race at a track located near Durham and Burlington. They returned to Winston-Salem about 3:30 a.m. on the morning of 29 August 1971. Defendant arrived at his home about 3:30 a.m. and went to bed shortly thereafter. He remained in bed until approximately 7:00 a.m. on the following morning.

The jury returned a verdict of guilty of safecracking and pursuant to G.S. 7A-27(a) defendant appealed from judgment imposing a prison sentence of not less than 25 years to life imprisonment.

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

Richard C. Erwin, attorney for the defendant.

BRANCH, Justice.

[1] Defendant first contends that the trial judge erred by allowing the witness Enscore to testify as to how he intended to plead to a pending charge growing out of the same events.

Glenn Wallace Enscore, Jr., the State's witness, testified that he was with John Henry Hemrick, David Pennell, Darrell Eugene Hicks and defendant on the night of 28 August 1971 and the early morning of 29 August 1971. They went to a building occupied by Clinard and Baynes, Inc., and he and Hemrick remained with the automobile while the others went to the rear of the building. Enscore and Hemrick were later summoned to bring the automobile to the rear of the building where they all loaded a safe into the car. After he and his companions had transported the safe to a place near a fish camp off Interstate 40, they "beat the safe open." The money taken from the safe was divided and his share amounted to $225 or $250.

On redirect examination of Enscore by the Solicitor, the record discloses the following:

> "I have been charged in this case and I have not been tried. This is the only charge that is against me. I am represented by Mr. Fred Crumpler.
>
> Q. What is your plea going to be in this case?
>
> MR. COFER: Objection.
>
> A. Guilty.
>
> COURT: Overruled.
>
> EXCEPTION NO. 2"

Defendant contends that the above-quoted question and answer constituted prejudicial error.

This Court has not addressed itself to the precise question here presented. However, we think that the *effect* of the admission of the evidence that the witness *intended* to thereafter enter a plea of guilty is equivalent to allowing the Solicitor to elicit evidence that a co-participant, in fact, had entered a plea of guilty.

There is considerable authority to the effect that when two or more persons are separately indicted for the same offense and are tried separately, the guilty plea of one defendant is inadmissible against the other. The rationale of this rule is that every person charged with the commission of a criminal offense must be tried upon evidence *against him.* Evidence competent and satisfactory against one person is not necessarily competent against another charged with the same crime. The introduction of such a plea when the witness has not testified against the defendant would also deprive a defendant of his constitutional rights of confrontation and cross-examination. See Annot. 48 A.L.R. 2d 1016; Wharton's Criminal Evidence 12th Ed. § 439; *State v. Kerley,* 246 N.C. 157, 97 S.E. 2d 876.

In the case of *State v. Kerley, supra,* the defendants Kerley and Powell were charged in a single bill of indictment with armed robbery. During the course of the trial, the defendant Powell, through his counsel, withdrew his plea of not guilty and entered a plea of *nolo contendere.* Powell was not called as a State's witness. The Solicitor, in his argument, referred several times to the fact that the defendant Kerley's "friend" and co-defendant had entered a plea of *nolo contendere.* He referred to Powell as the "confessed robber." The Court, holding the Solicitor's argument to be reversible error stated:

> "None of the cited cases supports the view that the codefendant's plea of guilty is competent for consideration as evidence against the defendant then on trial.
>
> "When request therefor is made, it is the duty of the trial judge to instruct the jury that a codefendant's plea of guilty is not to be considered as evidence bearing upon the guilt of the defendant then on trial and that the latter's guilt must be determined solely on the basis of the evidence *against him* and without reference to the codefendant's plea. *Babb v. United States,* 218 F. 2d 538 (C.C.A. 5th); *United States v. Toner,* [173 F. 2d 140 (C.C.A. 3rd)];

United States v. Hall, [178 F. 2d 853 (C.C.A. 2nd)]; *O'Shaughnessy v. United States,* 17 F. 2d 225 (C.C.A. 5th).

* * *

"Reference is made to the cases cited in two Annotations: 43 A.L.R. 2d 1004; 48 A.L.R. 2d 1016. In the latter, the annotator, after noting that a mere reference to a codefendant's plea or conviction may not be deemed sufficiently prejudicial under the circumstances of a particular case to warrant a new trial, states: 'Where, however, a prosecuting attorney urges such other conviction as justification for the jury to find the accused guilty or urges or implies that it is evidence of the accused's guilt, real prejudice results and requires not only prompt but forceful action by the trial court to eliminate the harmful effect; under some circumstances, even curative instructions to the jury will not eradicate the prejudice to the accused.' The cases cited support this statement of the prevailing rule.

* * *

"The practical force and prejudicial effect of the solicitor's said argument is apparent. Powell's plea being incompetent as evidence against Kerley, the sanctioned use thereof as the evidential basis for said argument constitutes reversible error for which Kerley is entitled to a new trial."

This Court considered a similar question in the case of *State v. Bryant,* 236 N.C. 745, 73 S.E. 2d 791. There defendant was charged with felonious breaking and entering and larceny. The State's evidence tended to show that defendant and W. H. Ransom were police officers in the City of Charlotte. On 5 March 1951, at some time after midnight, Ransom at the request of defendant, drove a police car to a warehouse where defendant broke out a window, entered the warehouse, and returned with a TV set. They took the TV set to defendant's car. At defendant's trial Ransom testified to these facts. When the trial judge had completed the charge in defendant's case, the Solicitor announced that W. H. Ransom waived the finding of a bill of indictment and entered a plea of guilty in the prosecution against him. Defendant's counsel moved for a mistrial. The trial judge instructed the jury not to consider the Solicitor's announcement if, in fact, they had heard it, and thereupon denied defendant's motion for a new trial. This Court held that

the trial judge correctly denied defendant's motion for a new trial and stated:

> "Ransom had just been on the witness stand and testified to facts which clearly disclosed his participation in the crime for the commission of which the defendant was then on trial. The jury was already fully apprized of his guilt. For us to hold that his submission to the charge in the presence of the jury was prejudicial to the defendant would disrupt accepted procedure in criminal courts and materially hamper the orderly administration of the law. We can perceive no reason why we should place our stamp of disapproval upon it."

See also: *State v. Sutherland* (N.J.) 9 A. 2d 807; *Richards v. U. S.*, 193 F. 2d 554 (10th Cir. 1951); *Graff v. People* (Ill.) 70 N.E. 299; *Commonwealth v. Biddle*, (Pa.) 50 A. 262; *U. S. v. Rollnick*, 91 F. 2d 911, (2d Cir. 1937).

Bryant and *Kerley* are factually distinguishable. In *Kerley* the co-defendant's plea was strongly argued to the jury by the Solicitor; no such argument was made in *Bryant*. In *Kerley*, the person entering the plea did not testify. In *Bryant*, the person who entered the plea testified to facts which disclosed Bryant's guilt as well as his own.

In instant case, defendant was not deprived of his constitutional rights of confrontation and cross-examination. The record does not reflect any argument to the jury by the Solicitor concerning the witness' intent to enter a plea of guilty. Further, in view of the witness' sworn testimony, which amounted to a detailed and unequivocal admission of his guilt, we are unable to perceive how a statement of his intention to confirm this sworn, public confession by a subsequent plea of guilty could be prejudicial error.

[2] Defendant next contends that the trial judge committed prejudicial error in his charge to the jury.

The trial judge completed his charge to the jury and recessed for lunch at 12:20 p.m. When court reconvened, the following additional instruction was given to the jury:

> "COURT: Members of the jury, so there will not be any question about it—a question was raised during the lunch hour that you may not understand exactly how the law

applies—I shall instruct you further. For a person to be guilty of a crime, it is not necessary that he himself do all the acts necessary to constitute the crime. If two or more persons act together for the common purpose to commit the crime of safecracking, each of them is held responsible for the acts of the others done in the commission of safecracking—to clarify that in case there is any question in your mind about that particular aspect of the case.

You may now retire and begin your deliberation."

Defendant contends that the above-quoted instruction was erroneous in that (1) when considered with the other portions of the charge it is inconsistent and confusing, (2) the further charge omits the burden of proof necessary for conviction, (3) the instruction does not relate the law to the facts in evidence.

G.S. 1-180 requires the trial judge to clarify and explain the law arising on the evidence and a trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial. *State v. Jennings,* 276 N.C. 157, 171 S.E. 2d 447; *State v. Wilson,* 104 N.C. 868, 10 S.E. 315. The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence. *Stern Fish Co. v. Snowden,* 233 N.C. 269, 63 S.E. 2d 557 and *State v. Jackson,* 228 N.C. 656, 46 S.E. 2d 858.

The State's evidence, principally offered through the testimony of co-participants in the commission of the crime, tended to show that defendant was not alone. However, this compelling and direct evidence was amply sufficient to support a jury finding that defendant actually participated in each element of the charged crime. Defendant's sole defense was alibi. The jurors' decision was not clouded by questions of joint participation or common purpose to commit a crime. Thus the jury was given a clear-cut decision: whether to believe the State's evidence and return a verdict of guilty or believe the defendant's evidence of alibi and return a verdict of not guilty.

We must agree that the instruction given to the jury upon the reconvening of court did not arise upon the evidence and, therefore, could not have been properly applied to the evidence. However, in light of the clear choices afforded the jury by all the evidence, we do not believe that this one statement misled or confused the jury in reaching its verdict.

[3] It was not necessary for the trial judge to further charge upon the burden of proof in his additional instruction. It is well established that a trial judge's charge must be considered as a whole by a reviewing court. *Gilliland v. Board of Educ.*, 141 N.C. 482, 54 S.E. 413; *In re Will of Mrs. Hardee*, 187 N.C. 381, 121 S.E. 667. A contextual reading of the entire record discloses the trial judge placed the burden on the State to prove defendant's guilt beyond a reasonable doubt and correctly defined the term reasonable doubt to the jury. *State v. Cook*, 263 N.C. 730, 140 S.E. 2d 305; *State v. Brackett*, 218 N.C. 369, 11 S.E. 2d 146.

We find no prejudicial error in the charge.

Defendant contends that the trial judge erred in imposing sentence.

At the time defendant was sentenced, G.S. 14-89.1 provided:

> "Any person who shall by the use of explosives, drills, or other tools unlawfully force open or attempt to force open or 'pick' the combination of a safe or vault used for storing money or other valuables, shall, upon conviction thereof, receive a sentence, in the discretion of the trial judge, of from ten years to life imprisonment in the State penitentiary."

Defendant was sentenced to imprisonment for the term of not less than twenty-five years to life imprisonment.

[4, 5] Defendant contends that the minimum sentence in his indeterminate sentence should have been the minimum allowed by the statute, ten years, rather than the 25 years imposed. He argues that the lack of guidelines resulting from the granting of such wide judicial discretion results in lack of uniformity in sentencing so as to constitute cruel and unusual punishment. We do not agree.

It has long been recognized in this jurisdiction that a sentence within statutory limitation is not cruel or unusual punishment in the constitutional sense. *State v. Caldwell*, 269 N.C. 521, 153 S.E. 2d 34; *State v. Newell*, 268 N.C. 300, 150 S.E. 2d 405. The Legislature has granted to trial judges the power to impose, within an established range, sentences which they deem appropriate, and in exercising this discretion the trial judge is not confined to the lower limits in imposing an indeterminate

sentence. G.S. 148-42; *State v. Fleming,* 202 N.C. 512, 163 S.E. 453.

[6] Although it was not brought to our attention by either brief filed in this appeal, we are cognizant of the 1973 Amendment to G.S. 14-89.1. The statute as amended by Chapter 235 of Session Laws, effective 19 April 1973, now reads as follows:

> "Any person who shall, by the use of explosives, drills, or tools, unlawfully force open or attempt to force open or 'pick' the combination of a safe or vault used for storing money or other valuables, shall, upon conviction thereof, receive a sentence, in the discretion of the trial judge, of not less than two years nor more than 30 years' imprisonment in the State penitentiary."

The effect of the Amendment was to delete the word "other" preceding the word "tools" and to substitute "of not less than two years nor more than 30 years" in lieu of "from ten years to life imprisonment."

Section 2 of the act states: "This act shall apply to all offenses committed after its ratification and shall become effective upon ratification."

If, pending an appeal in a criminal case, the Legislature reduces the range of punishment in the statute under which defendant was indicted, the appellate court ordinarily must give effect to the reduction of punishment. *State v. Pardon,* 272 N.C. 72, 157 S.E. 2d 698; *State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765. However, when the amending statute contains a savings clause or manifests a legislative intent to make the amendment prospective only, then punishment must be imposed under the pre-existing law. *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706; *State v. Pardon, supra; State v. Perkins,* 141 N.C. 797, 53 S.E. 735.

The 1973 Amendment did not repeal G.S. 14-89.1. The main thrust of the Amendment was directed to the punishment provisions and by its Section 2, the amended statute expressly provided that this act shall apply to *all offenses committed after its ratification.* This Amendment clearly manifests a legislative intent that the reduction in punishment should apply only to acts committed after 19 April 1973.

Since the acts for which defendant was prosecuted occurred prior to 19 April 1973, the trial judge properly imposed sentence

according to the provision of G.S. 14-89.1 as it existed before the 1973 Amendment.

We are unable to find error sufficiently prejudicial to warrant a new trial.

No error.

STATE OF NORTH CAROLINA v. WILLIE JONATHAN CROSS

No. 26

(Filed 14 November 1973)

1. **Rape § 4— evidence of pregnancy resulting from rape — competency**

The trial court in a rape case did not err in allowing the prosecutrix to testify that she became pregnant as a result of the rape allegedly committed by defendant since the testimony tended to show penetration, one of the elements of rape, and since the testimony was also competent to corroborate the testimony of the prosecutrix that a male person had carnally known and abused her.

2. **Criminal Law §§ 34, 169— improper question — no prejudicial error**

Though a question asked defendant's wife by the State with respect to defendant's commission of an assault not related to the alleged rape for which he was on trial was improper, the question was not so prejudicial as to require a new trial.

3. **Criminal Law § 66— in-court identification of defendant — pretrial identification procedure — evidence admissible**

The trial court in a rape case did not err in refusing to suppress the prosecutrix' in-court identification of defendant and in permitting testimony about the pretrial identification of defendant where the prosecutrix' identification of defendant as her assailant was based on her observation of defendant for approximately one and one-half hours at the time of the attack and where the pretrial identification procedures were not impermissibly suggestive.

APPEAL by defendant from *Collier, J.*, at the 29 January 1973 Session of FORSYTH Superior Court.

On two indictments proper in form, defendant was tried and convicted of kidnapping and raping Cynthia Ann Beasley. Defendant appeals from judgments imposing consecutive life imprisonment sentences.

The evidence offered by the State tends to show that on 30 October 1972 Cynthia Ann Beasley was employed as a staff

nurse at the Baptist Hospital in Winston-Salem. Miss Beasley left the hospital at approximately 11:30 p.m. on that date and was walking toward her car when a black man approached her from behind, put his hand over her mouth, and while pointing a gun at her, told her not to scream or he would kill her. The man took Miss Beasley to her car and told her that he was from Brooklyn, New York, and that he was running from the police. He then forced her to drive him in and around Winston-Salem for about one and one-half hours. On two occasions during this time the man made Miss Beasley stop the car at dead-end streets, and he then forcibly and against her will had sexual intercourse with her. After threatening to kill Miss Beasley if she reported the incident and receiving assurances from her that she would not tell anyone, the man fled. Miss Beasley then drove back to her apartment and notified the police.

Miss Beasley described her assailant in detail to the police on the morning of 31 October 1972, and a composite drawing was made based on her description. This description included certain items of clothing worn by the man—a brown jacket, blue slacks, and boots. In an effort to identify her assailant, Miss Beasley viewed several hundred police photographs on several occasions. On 2 November 1972 she tentatively identified defendant as her assailant from a photograph, but told the police that she wanted to see another photograph of him since a shadow across defendant's face in that photograph prevented her making a positive identification. On the same day Miss Beasley viewed a "one-man lineup" consisting of one Ernest Floyd, a man whom the police suspected. Miss Beasley stated that this man was not her assailant. On 13 November 1972 Miss Beasley looked through another stack of police photographs, and at that time confirmed her 2 November 1972 identification by identifying two more photographs of defendant, one of which was a profile and the other a front view. Defendant's photograph with the shadow across the face was also in this stack, and Miss Beasley again said it was a picture of her assailant. On a later date Miss Beasley attended a lineup consisting of defendant and four other black males. There she identified defendant as her assailant. She again positively identified defendant at trial.

Reginald Hiawatha Hairston testified for the State. He stated that he was with defendant on the day of the alleged crimes, and that defendant said he had been to New York. Hairston also testified that on this date defendant was wearing a

brown jacket, blue slacks, and boots, and that defendant was "fooling with a gun."

Two doctors also testified for the State. They testified that on the morning after the alleged crimes they examined Miss Beasley and found spermatoza present within her vagina. Miss Beasley testified that she had not had sexual intercourse with any man since 30 October 1972, and that she became pregnant as a result of the rape.

Defendant testified in his own behalf. He admitted that he had been to Brooklyn, New York, during 1972. He also admitted that he had been with Hairston on 30 October 1972, and that he was wearing a brown jacket, blue slacks, and boots at that time. He denied, however, that he had a gun on that day. He further testified that he had never seen Miss Beasley before and that he did not rape her, and that on the night in question he was in a friend's house with a girl he later married, Rosalind Jackson, now Mrs. Rosalind Cross. He admitted on cross-examination that he had been convicted of several crimes and that the police were looking for him on the night of 30 October 1972.

Mrs. Rosalind Cross testified for defendant. She stated that she and defendant had been married on 23 December 1972 in the Forsyth County jail. She corroborated defendant's testimony about his presence in the friend's house on the night in question.

Attorney General Robert Morgan and Deputy Attorney General Andrew A. Vanore, Jr., for the State.

Legal Aid Society of Forsyth County by Charles O. Peed, Jr., for defendant appellant.

MOORE, Justice.

[1] Defendant first contends the trial court erred in permitting the prosecutrix to testify over objection that she became pregnant as the result of the rape. Defendant says this testimony was offered only to excite sympathy for the prosecutrix and to play upon the passions and prejudices of the jury.

Rape is the carnal knowledge of a female forcibly and against her will. *State v. Primes*, 275 N.C. 61, 165 S.E. 2d 225 (1969); *State v. Overman*, 269 N.C. 453, 153 S.E. 2d 44 (1967).

There must be penetration of the sexual organ of the female by the sexual organ of the male to constitute carnal knowledge in a legal sense, but the slightest penetration is sufficient. *State v. Sneeden,* 274 N.C. 498, 164 S.E. 2d 190 (1968). The testimony of the prosecutrix concerning her pregnancy tended to show penetration, one of the elements of rape. Defendant's plea of not guilty placed upon the State the burden of proving beyond a reasonable doubt all the essential elements of the offense charged. Hence, evidence tending to prove penetration, an essential element of the offense, was properly admitted. *State v. McNeil,* 277 N.C. 162, 176 S.E. 2d 732 (1970); *State v. Perry,* 275 N.C. 565, 169 S.E. 2d 839 (1969); Annot., 62 A.L.R. 2d 1083 (1958), and cases therein cited. Such testimony was also competent to corroborate the testimony of the prosecutrix that a male person had carnally known and abused her. See *State v. Jones,* 249 N.C. 134, 105 S.E. 2d 513 (1958). Relevant testimony will not be excluded simply because it may tend to prejudice defendant or excite sympathy for the cause of the party who offers it. 1 Stansbury's N. C. Evidence, Brandis Rev. § 80, at 242 (1973). See *State v. Cox,* 280 N.C. 689, 187 S.E. 2d 1 (1972); *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572 (1971). Defendant's first assignment is overruled.

[2] Mrs. Rosalind Cross testified that she was living with defendant on the date of the alleged offenses, and that she married him thereafter. On cross-examination Mr. Thomas, an assistant solicitor, asked Mrs. Cross the following questions:

"Q. Were you living with him on the 28th day of October?

A. Yes.

MR. PEED (attorney for defendant): Objection.

COURT: Overruled.

Q. And that is the day he went into the girls' dormitory in the School of the Arts and assaulted a girl?

MR. PEED: Objection. Assumes facts not in evidence.

COURT: No.

MR. THOMAS: I have no further questions.

MR. PEED: That is all."

The question asked defendant's wife was not answered; defendant contends, however, that the question itself was of such prejudicial character as to constitute reversible error. Prior to his wife's testimony, defendant had testified and a similar but more explicit question concerning an assault on Denise Myers was asked him. Although he had previously admitted that he had been convicted of shoplifting, of two assaults, and of larceny of an automobile on four different occasions, he specifically denied that he had assaulted Denise Myers with intent to rape her. From the record it is not clear whether this is the same assault to which the assistant solicitor's question refers. If so, the question was improper since the State was bound by defendant's answer that he had not assaulted Denise Myers. *Pearce v. Barham,* 267 N.C. 707, 149 S.E. 2d 22 (1966); *State v. King,* 224 N.C. 329, 30 S.E. 2d 230 (1944); 1 Stansbury's N. C. Evidence, Brandis Rev. §§ 48, 111, at 139, 342 (1973). In any event we think the question asked defendant's wife was improper. We hold, however, that it was not so prejudicial as to require a new trial. "This Court has repeatedly held that in order to obtain an award for a new trial on appeal for error committed in a trial of the lower court, the appellant must show error positive and tangible, that has affected his rights substantially and not merely theoretically, and that a different result would have likely ensued." *State v. Cogdale,* 227 N.C. 59, 40 S.E. 2d 467 (1946). See also *State v. Beal,* 199 N.C. 278, 154 S.E. 604 (1930); 1 Stansbury's N. C. Evidence, Brandis Rev. § 9 (1973). In this case no such showing appears.

[3] Finally, defendant contends that the trial court erred in refusing to suppress the prosecutrix's in-court identification of defendant and in permitting testimony by the prosecutrix and a Winston-Salem police officer about the pretrial identification of defendant.

Upon defendant's objection, the trial court conducted a lengthy *voir dire* to determine the competency of the identification testimony. This was the proper procedure for the court to follow. *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972); *State v. Accor* and *State v. Moore,* 277 N.C. 65, 175 S.E. 2d 583 (1970). During the *voir dire* the prosecutrix described in detail the identification procedures that the State had followed. She expressed certainty about her identification of defendant from three photographs and a five-man lineup. Her testimony concerning the identification procedures was cor-

roborated by R. A. Westmoreland of the Winston-Salem Police Department. Defendant offered no evidence on the *voir dire*. At the conclusion of the *voir dire*, the trial court found that the prosecutrix's identification of defendant as her assailant was based on her observation of defendant at the time of the attack and on her own independent recollection of defendant, and concluded that the constitutional requirements with respect to identification procedures prescribed by the United States Supreme Court and this Court had been followed.

Defendant challenges the pretrial identification as being impermissibly suggestive so that "a substantial likelihood of misidentification exists." His contention is set out in his brief as follows:

> " . . . [A]ll the evidence tends to show a pattern of use of three photographs of defendant, culminating in a line-up on November 13th. The only reasonable inferences, are that the police have been unsatisfied with each successive identification of defendant, and the prosecutrix must have concluded that the police believed defendant was the culprit, as his photo kept reappearing and as he was ultimately the only person fitting her assailant's description at the line-up."

Because of the circumstances underlying prosecutrix's pretrial identification, defendant further contends the trial court should have suppressed the prosecutrix's later in-court identification of defendant.

In *Simmons v. United States*, 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S.Ct. 967 (1968), the United States Supreme Court was asked to reverse a conviction in which the victims of a robbery identified the defendant from photographs shown to them by the police. In upholding the conviction, that Court stated:

> " . . . [C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

In construing *Simmons* our Court in *State v. Knight*, 282 N.C. 220, 192 S.E. 2d 283 (1972), held:

"Factors to consider in applying the *Simmons* test are: '(1) The manner in which the pretrial identification was conducted; (2) the witness's prior opportunity to observe the alleged criminal act; (3) the existence of any discrepancies between the defendant's actual description and any description given by the witness before the photographic identification; (4) any previous identification by the witness of some other person; (5) any previous identification of the defendant himself; (6) failure to identify the defendant on a prior occasion; and (7) the lapse of time between the alleged act and the out-of-court identification.' "

See also *United States v. Wade*, 388 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926 (1967); *State v. Blackwell*, 276 N.C. 714, 174 S.E. 2d 534 (1970). "If a consideration of the total circumstances reveals pretrial identification procedures unnecessarily suggestive and conducive to irreparable mistaken identification, such procedures would manifestly offend fundamental standards of decency, fairness and justice and amount to a denial of due process of law." *State v. Rogers*, 275 N.C. 411, 426, 168 S.E. 2d 345, 354 (1969).

There is absolutely no evidence in the record to support a conclusion that the identification procedures followed in this case were "impermissibly suggestive," or were such "as to give rise to a very substantial likelihood of irreparable misidentification." The prosecutrix viewed several hundred police photographs on several occasions in the days following the attack made upon her. Apparently the police had no idea who her assailant was. The only *possible* instance of any police intimation about who the culprit might be was the "one-man lineup" that was conducted on the third day following the alleged crimes. There the prosecutrix viewed a man—not the defendant—whom the police suspected. She immediately said this man was not her assailant.

It is not disputed that the prosecutrix had ample opportunity to fully observe her assailant. She was with him for about one and one-half hours, much of the time on brightly lighted streets. The record does not reflect any discrepancies between defendant's actual description and the description given by the prosecutrix to the police on which the composite drawing was based. Her description of the clothes he was wearing was corroborated by another witness who saw him on the day in question and by the defendant himself. Her initial identification

came only three days after the alleged crimes when she viewed defendant's photograph. This first photograph of defendant had a shadow across defendant's face, and she asked for a better photograph before making a positive identification. She confirmed her tentative identification eleven days later when she viewed two better photographs of defendant. Later she identified her assailant again when she attended a lineup consisting of defendant and four other black males. The totality of these circumstances surrounding the identification procedures followed by the police in this case requires us to conclude that there was no "substantial likelihood of irreparable misidentification." Therefore, the pretrial identification testimony was competent evidence. *State v. Miller*, 281 N.C. 70, 187 S.E. 2d 729 (1972).

In ruling that the prosecutrix's in-court identification testimony was admissible, the trial court found as a fact "that the identity of the defendant as her assailant was based on the observation of the defendant at the time of her attack and independent recollection of the defendant." This finding is fully supported by clear and convincing evidence and therefore is conclusive and must be upheld. *State v. Morris*, 279 N.C. 477, 183 S.E. 2d 634 (1971); *State v. Gray*, 268 N.C. 69, 150 S.E. 2d 1 (1966). The trial court's determination that the prosecutrix's in-court identification of defendant had an independent origin, together with our holding that the pretrial identification did not result from impermissibly suggestive identification procedures, renders the in-court identification testimony clearly admissible. See *State v. Knight, supra; State v. Accor* and *State v. Moore, supra; State v. Blackwell, supra; State v. Rogers, supra.* Defendant's motion to suppress the in-court identification was properly denied.

Defendant has had a fair trial, free from prejudicial error. The verdicts of the jury are fully supported by the evidence, and the judgments must therefore be upheld.

No error.

STATE OF NORTH CAROLINA v. JEREMIAH LOCK, ALIAS JERRY LOCK

No. 6

(Filed 14 November 1973)

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

In this prosecution for armed robbery, felonious assault and first degree murder, the trial court properly permitted the prosecuting witness to identify defendant as one of the persons who entered his store and committed the crimes charged where the court found upon supporting *voir dire* evidence that pretrial photographic procedures were not impermissibly suggestive and that the witness's identification of defendant was independent of and not influenced by the photographic identification.

2. **Criminal Law § 76— admissibility of confession**

Voir dire testimony of a police officer, corroborated by defendant's signed statement, was sufficient to support the trial court's determination that defendant's confession was free and voluntary and admissible in evidence.

3. **Robbery § 5— armed robbery — instructions — taking of money**

In this armed robbery prosecution, the trial court did not err in referring in the charge to the taking and carrying away of money as an element of the robbery.

4. **Criminal Law § 126— acceptance of verdict — repolling of jury**

The trial court did not err in accepting the verdict after one juror stated during the poll that she found defendant guilty of first degree murder "according to the law" where the court instructed the clerk to repeat the poll at which the juror repeated that her verdict was guilty of first degree murder and that she still assented thereto.

5. **Criminal Law § 26; Homicide § 31— murder in perpetration of robbery — separate punishment for robbery — double jeopardy**

Where defendant's conviction of first degree murder was based on a jury finding that the murder was committed in the perpetration of an armed robbery, no separate punishment could be imposed for the armed robbery.

APPEAL by defendant from *Brewer, J.*, February 5, 1973, Criminal Session, CUMBERLAND Superior Court.

In these criminal prosecutions the defendant, Jeremiah Lock, alias "Jerry" Lock, was charged by grand jury indictments with these criminal offenses: (1) The armed robbery of Joe's House of Cigarettes; (2) the felonious assault with a deadly weapon inflicting serious injury upon James Lampros;

and (3) the first degree murder of Christine Lampros. Mr. and Mrs. Lampros were the proprietors of Joes' House of Cigarettes. The charges grew out of one transaction. They were consolidated and tried together.

The State's evidence disclosed that on the morning of August 10, 1972, James Lampros and his wife, Christine Lampros, were in their place of business in Fayetteville. The defendant, Jeremiah Lock (previously known to Mr. Lampros as "Jerry") and three other men entered the store together, stayed a few minutes and left together. Within five to eight minutes, the defendant, Pop Kelly, and Leonard Carter entered the store. "Joseph Hurley remained outside as a lookout." Immediately after the three named entered the store, Pop Kelly drew a pistol and shot Christine Lampros, killing her instantly. He also shot James Lampros inflicting serious wounds.

Mr. Lampros testified that he knew the defendant as "Jerry" having seen him in the store many times. After Mr. Lampros sufficiently recovered from his wounds to be interrogated, he gave the officers a detailed description of Jerry. Thereafter, Officer Newsome showed the witness ten photographs of persons of the defendant's race, age group, and characteristics fitting in a general way the description Mr. Lampros gave of Jerry. Mr. Lampros immediately identified the photograph of the defendant, Jeremiah Lock, whom he had known as "Jerry."

After defense counsel challenged the admissibility of Mr. Lampros' identification, the court conducted a voir dire at which Mr. Lampros testified that prior to August 10, 1972, he had seen Jerry in the store perhaps as many as eighty times. While he identified the photographs, he did so on the basis of his having previously seen and known the defendant. At the end of the voir dire the court found the in-court identification was in no way influenced by the photographs and permitted the witness to identify the defendant before the jury.

When Sergeant Banks of the Fayetteville Police Department was called to testify he stated that he had interviewed the defendant who had made admissions concerning the offenses charged. Before permitting the officer to testify, the court conducted a further voir dire. Sergeant Banks testified that before the beginning of his interrogation he gave the defendant full and complete warnings and cautions and advised him fully of

his rights as detailed in state and Federal cases. Defendant stated that he understood them and freely and voluntarily made admissions of his participation. At that time the admissions were reduced to writing by Sergeant Banks and given to the defendant who examined, approved, and signed the writing which, among other things, contained the following:

"1. That I have the right to remain silent and not make any statement at all, nor incriminate myself in any manner whatsoever.

"2. That anything I say can and will be used against me in a court or courts of law for the offense or offenses concerning which this statement is herein made.

"3. That I can hire a lawyer of my own choice to be present and advise me before and during this statement.

"4. That if I am unable to hire a lawyer I can request and receive appointment of a lawyer by the proper authority, without cost or charge to me, to be present and advise me before and during this statement.

"5. That I can refuse to answer any questions or stop giving this statement any time I want to.

"6. That no law enforcement officer can prompt me what to say in this statement, nor write it out for me unless I choose for him to do so.

"A. No one denied me any of my rights, threatened or mistreated me, either by word or act, to force me to make known the facts in this statement. No one gave, offered or promised me anything whatsoever to make known the facts in this statement, which I give voluntarily of my own free will and accord.

"B. I do not want to talk to a lawyer before or during the time I give the following true facts, and I knowingly and purposely waive my right to the advice and presence of a lawyer before and during this statement.

"C. I certify that no attempt was made by any law enforcement officer to prompt me what to say, nor was I refused any request that the statement be stopped, nor at any time during this statement did I request for the presence or advice of a lawyer."

Officer Banks further testified:

"The defendant read this and signed it and then made an oral statement. He told me that he, Leonard Carter, Joseph Hurley and Malcolm McDonald, alias Pop Kelly, were together in Cross Creek Court, on the evening of this incident. That they had decided to commit a robbery. That the four people were together, this defendant, Leonard Carter, Joseph Hurley and Pop Kelly, his real name being Malcolm McDonald.

"That they went into a store, the four of them and made, or two of them made, a purchase. That they left then and went outside of the store and remained for a few minutes. That during the course of being outside, one or two people, including an automobile, drove up to the place. After the people had left, the three of them went back inside the store, this defendant, Malcolm McDonald, Pop Kelly and Leonard Carter. When they got in the store, this defendant told me that Malcolm McDonald or Pop Kelly was the one who did the shooting, that he shot Mr. Lampros; that he also shot Mrs. Lampros, the wife, who was standing at the cash register. He reached over across, this defendant said that he reached over across the counter and opened the cash register and removed the bills. That the three of them then left, running back from whence they had come, over to King Street, back to Cross Creek Court. That Joseph Hurley remained outside as a lookout. That they went back to, I believe it was 147 Cross Creek Court, where they divided the money. That he gave Malcolm McDonald or Pop Kelly fifteen dollars, he gave Leonard Carter fifteen dollars and when Pop Kelly came in he gave him fifteen dollars. He said he kept sixteen for himself. That after this they split and that he went to his girl friend's house."

The defendant on the voir dire stated he was nineteen years of age and had gone to the tenth grade in school. He admitted he signed the statement written by Officer Banks, but he gave the following explanation:

"The only reason I made any statement was that the officer kept messing with me, kicking the chair and desk and getting overruly and told me he didn't have all night to fool with me. I was afraid he was going to grab me and I got tired of him you know scarring me up and made the statement."

At the end of the voir dire the court found the statements made by the defendant to Officer Banks were freely and voluntarily made after the defendant had been fully advised as to his rights and had specifically stated that he did not desire the presence or advice of counsel. The court concluded the confessions were freely and voluntarily made by the defendant after having been fully advised of his options and rights. The court, over objection, permitted the State to offer the admissions in evidence before the jury.

The defendant elected not to testify nor to offer evidence before the jury.

After deliberating, the jury returned verdicts: (1) Guilty of murder in the first degree in the killing of Mrs. Lampros; (2) guilty of armed robbery; and (3) guilty of assault with a deadly weapon on James Lampros. The court ordered a poll of the jury at the defendant's request. One of the jurors when questioned as to her verdict of guilty answered, "Yes, according to the law." The court, however, ordered a repoll at which the juror gave the answers of guilty and signified that she still assented thereto. The court then accepted the verdicts and had them recorded in the minutes of the court. The court imposed a sentence of life imprisonment on the murder charge; thirty years on the armed robbery charge to begin at the expiration of the life sentence; and five years on the assault with a deadly weapon charge to begin at the expiration of the sentence for armed robbery. The defendant excepted and appealed.

Robert Morgan, Attorney General, by Ralf F. Haskell, Associate Attorney, for the State.

John G. Shaw for the defendant.

HIGGINS, Justice.

The defendant, by exceptive assignments supported by discussion in the brief and by oral argument, contends the court committed six prejudicial errors of law: (1) By admitting the evidence of James Lampros identifying the defendant as one of the persons who entered the store and committed the offenses charged; (2) by permitting Officer Banks to testify that the defendant made the oral admissions and signed the written confession introduced in evidence by the State; (3) and (4) by overruling defendant's motion to dismiss at the close of the

State's evidence and renewed after the defense rested without offering evidence; (5) by charging the jury with respect to the taking of $61.00 as an element of the robbery; and (6) by accepting the verdict.

Mr. Lampros, a witness for the State, testified that on August 10, 1972, the defendant and three other males entered the shop operated by him and his wife, Christine Lampros. They remained for a few minutes, made two small purchases, and then left together. They returned in about five minutes. One of the men drew a pistol and began shooting, killing Mrs. Lampros and severely wounding Mr. Lampros. Mr. Lampros testified that he had seen one of the parties many times. He knew his name as "Jerry" but did not know his last name. He gave the officers a detailed description of Jerry, his race, age group, and "characteristics." In order to further identify Jerry the officers selected the unmarked photographs of ten males of similar race, age, and characteristics of Jerry as described by the witness. The witness immediately identified the photograph of the defendant and recognized it as a photograph of Jerry.

[1] The foregoing was developed in the evidence on the voir dire at the conclusion of which the court concluded that the use of the photographs was not prejudicially suggestive and permitted the witness to identify the defendant before the jury as one of the robbers. The trial court found the identification of the defendant by Mr. Lampros was independent of and not influenced by the view of the photographs. The finding was suported by the evidence and was conclusive on appeal. *Simmons v. U.S.*, 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S.Ct. 967 (1968); *Stovall v. Denno*, 388 U.S. 293, 18 L.Ed. 2d 1199, 87 S.Ct. 1967 (1967); *State v. McPherson*, 276 N.C. 482, 172 S.E. 2d 50, and cases cited therein.

[2] When the State sought to introduce the defendant's in-custody confession, objection precipitated another voir dire. Officer Banks testified he gave the defendant the warnings and cautions, specifically stating them, which have been held by the United States and the state courts a prerequisite to their introduction in evidence. The defendant signed the written waiver of counsel, freely recited the details of the robbery and the shooting of both Mr. and Mrs. Lampros, the taking of the money from the cash register, and the division among the participants whom the defendant named.

The defendant testified on the voir dire admitting making the confession and signing the written report of it. However, he testified, "I was afraid he was going to grab me and I got tired of him you know scarring me up and made the statement."

The testimony of Officer Banks, corroborated by the defendant's signed statement, was sufficient to support the court's findings that the admissions were free and voluntary and admissible in evidence. Of course, the defendant contended the writing was signed involuntarily. The conflicting evidence required decision by the trial judge. *State v. Murphy,* 280 N.C. 1, 184 S.E. 2d 845; *State v. Haskins,* 278 N.C. 52, 178 S.E. 2d 610; *State v. Hill,* 276 N.C. 1, 170 S.E. 2d 885; *State v. Wright,* 275 N.C. 242, 166 S.E. 2d 681; *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1; *Miranda v. Ariz.,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). The objections to the admission of evidence and to its sufficiency to go to the jury are not sustained. *State v. Roseman,* 279 N.C. 573, 184 S.E. 2d 289; *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469; *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431. Hence Assignments of Error Nos. 3 and 4 are not sustained.

[3] The defendant contends the court committed error in the charge by referring to the taking and carrying away of money as an element of the robbery. The reason assigned is, "[T]here was no evidence of this taking." The robbery indictment charged the taking and carrying away of $61.00. The defendant's confession disclosed that he, or one of his companions, took the bills from the cash register and thereafter, he and his companions divided the money taken from the cash register. The amount of money involved in an armed robbery is immaterial. The attempt to rob with a dangerous weapon is a felony. In common law robbery a taking is necessary, but in armed robbery either the taking or the attempt to take will support a verdict under G.S. 14-87. *State v. Owens,* 277 N.C. 459, 178 S.E. 2d 226; *State v. Parker,* 262 N.C. 679, 138 S.E. 2d 496. The defendant's objection to the charge is not sustained.

[4] The defendant challenged the validity of the verdicts on the ground that one juror on the poll reported her findings that the defendant was guilty of murder in the first degree "according to the law." The court instructed the clerk to repeat the poll at which the juror repeated that her verdict was guilty of murder in the first degree and that she still assented thereto. The verdict of the jury was then received by the court and recorded

in its minutes. The foregoing, with respect to the verdict, was a full compliance with the requirements of the law. *State v. Best,* 280 N.C. 413, 186 S.E. 2d 1; *State v. Sanders,* 280 N.C. 81, 185 S.E. 2d 158; *Davis v. State,* 273 N.C. 533, 160 S.E. 2d 697. The objection to the verdict on the murder charge is not sustained.

[5] This Court has examined and found without merit all of defendant's assignments of error. Nevertheless, this Court, especially in cases involving grave consequences, carefully examines the record of the cases on appeal and *ex mero motu* notes all legal defects appearing thereon. Examination of the indictments, the verdicts (in the light of the court's charge) and the judgments discloses that the defendant was convicted of murder in the first degree in Case No. 72 CR 23379 on the ground the killing of Mrs. Lampros therein charged was committed in the course of the armed robbery charged in Case No. 72 CR 23381. The conviction on the armed robbery charge, treated by the State as an element in the charge of murder in the first degree, cannot be sustained. In *State v. Carroll,* 282 N.C. 326, 193 S.E. 2d 85, this Court disposed of a similar case in this manner:

> "It appears conclusively that the armed robbery charges were proved as essential elements in the capital offense of murder in the first degree upon which the defendants were convicted. The robberies, therefore, became a part of and were merged into the murder charges. Having been so used, the defendants cannot again be charged, convicted and sentenced for these elements although the robberies constituted crimes within themselves. The following is quoted from *State v. Peele,* 281 N.C. 253, 188 S.E. 2d 326:
>
> " 'Examination of the indictments, verdicts, and judgments discloses that the armed robbery charge was embraced in and made a part of the charge of murder in the first degree. Wharton's Criminal Law and Procedure, Vol. 1, Section 148, states the rule: "It is generally agreed that if a person is tried for a greater offense, he cannot be tried thereafter for a lesser offense necessarily involved in, and a part of, the greater, . . . " Many cases recognize and apply the same principle. Among them are *State v. Thompson,* 280 N.C. 202, 185 S.E. 2d 666; *State v. Hatcher,* 277 N.C. 380, 177 S.E. 2d 892; *State v. Parker,* 262 N.C. 679, 138 S.E. 2d 496; *State v. Birckhead,* 256 N.C. 494, 128 S.E. 2d 838; and *State v. Bell,* 205 N.C. 225, 171 S.E. 50.' "

On the charge of armed robbery the verdict is set aside and the judgment vacated. On the charges of murder in the first degree of Mrs. Lampros and the assault with a deadly weapon on Mr. Lampros, we find no error.

In No. 72 CR 23379—No Error.

In No. 72 CR 23380—No Error.

In No. 72 CR 23381—Verdict set aside; judgment vacated.

STATE OF NORTH CAROLINA v. EZEKIEL PATTERSON

No. 25

(Filed 14 November 1973)

1. **Homicide § 12— first degree murder — indictment**

An indictment for murder in the first degree contains all necessary averments and allegations and is sufficient if it follows the language of G.S. 15-144.

2. **Criminal Law § 42— admission of weapons**

Weapons may be admitted in evidence when there is evidence tending to show that they were used in the commission of a crime.

3. **Criminal Law § 42; Homicide § 20— murder weapon — sufficiency of identification**

In this homicide prosecution, a shotgun was sufficiently identified as the murder weapon to render it admissible in evidence where an eyewitness testified that it "is either the shotgun or very similar to the shotgun" the witness saw defendant use to shoot the victim; furthermore, the admission of the shotgun, if erroneous, did not constitute prejudicial error in light of the overwhelming evidence of defendant's guilt.

4. **Criminal Law §§ 34, 39, 89— murder case — explanation of bias toward defendant — testimony that defendant had raped witness**

In a prosecution of defendant for the murder of his wife wherein defense counsel on cross-examination elicited statements from defendant's stepdaughter that she disliked defendant and harbored a feeling of ill will toward him, testimony by the stepdaughter on redirect examination that she disliked defendant because he had raped her was competent since the witness was entitled to explain the circumstances giving rise to her bias against defendant.

5. **Criminal Law § 162— necessity for motion to strike testimony**

When a question asked a witness is competent, exception to his answer, when incompetent in part, should be taken by motion to strike out the part that is objectionable.

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

In this first degree murder prosecution, the record contains plenary evidence from which the jury could find that defendant, motivated by ill will and express malice toward his wife, shot her with deliberation after having premeditated the deed.

7. **Homicide §§ 17, 18— prior infliction of personal injuries — admissibility**

In a prosecution of defendant for first degree murder of his wife, evidence that on various occasions during the three years prior to her death defendant intentionally inflicted personal injuries on his wife was admissible as bearing on intent, malice, motive, and premeditation and deliberation.

8. **Criminal Law § 113; Homicide § 23— gauge of murder weapon — reference in charge — harmless error**

Although the record fails to reveal the gauge of the shotgun offered in evidence as the murder weapon, references in the charge to the murder weapon as "a .410 gauge shotgun" were not prejudicial error since the gauge of the gun is not a material fact in issue.

DEFENDANT appeals from judgment of *Webb, S. J.*, 13 November 1972 Session, LENOIR Superior Court.

Defendant was tried on a bill of indictment, proper in form, charging him with the first degree murder of his wife Annetta Patterson who died on 24 August 1972 from a shotgun wound in the back of her head.

At the trial defendant was represented by employed counsel; on appeal, by appointed counsel.

The State's evidence tends to show that defendant and his wife Annetta Patterson had been married about five years but had separated and were living separate and apart on 24 August 1972. On 27 August 1969 defendant stabbed his wife with a butcher knife. In July 1970 he sliced her back with a knife. In January 1972 he told Vivian Green, his wife's mother, that he intended to kill Annetta but would not injure the grandchildren. In February 1972 defendant attempted to assault his wife with a broken bottle but fled when officers were called.

Annetta Patterson lived in an apartment with her daughters, Pamela and Vickie, and worked at Caswell Center Training School in Kinston. On the morning of 24 August 1972 she got off work and arrived at her residence about 7 a.m., riding in the automobile of one James E. Marshburn. The defendant, accompanied by one Linwood Hood, walked across the street to the passenger side of the vehicle and accused his wife of going

with Mr. Marshburn. Defendant got into the back seat of the car and the accusatory conversation continued. Clifton Wiggins, a son of Annetta Patterson, in response to a telephone call from his sister Pamela, came to the scene with a pistol in his hand and ordered defendant and Linwood Hood to leave. Marshburn drove them away and as they left defendant yelled, "I'll be back but you won't know what time and I'll be back to get all of you."

Later that day James E. Marshburn saw defendant on the street in Kinston and defendant told him: "Somebody is going to get hurt today .... If I kill them they can't kill me. . . . They abolished capital punishment, don't have capital punishment anymore."

About 9 p.m. that night, 24 August 1972, Annetta Patterson was in her living room with a friend named Tyrone Fisher. Defendant entered the house through the front door, carrying "what looked to me like a put-together shotgun." He pushed his wife into a corner and shot her from a distance of three feet. Tyrone Fisher ran from the house and concealed himself in a soybean patch nearby. Defendant entered the bean patch and Fisher overheard him say to Linwood Hood: "I done and shot Annetta in the head and killed her . . . A nigger ran out here in the bean patch . . . I am going to get him and we'll have to get out because the law will be here in a little while." Shortly thereafter Fisher heard sirens approaching, returned to the house and saw Annetta Patterson lying on her back, apparently dead.

Tyrone Fisher identified a shotgun, State's Exhibit 5, as the murder weapon and said "if it isn't the one that I saw Zeke Patterson using on the night of August 24, it's the sister to it. This is either the shotgun or very similar to the shotgun I saw Zeke shoot Annetta with on the night of August 24, 1972."

At a time estimated to be about 8:45 p.m. on the night of 24 August 1972, Laurence Odell Foye saw defendant and Linwood Hood going down Forest Street in Kinston. As Foye walked with them a short distance, defendant told Foye he had just shot his wife in the head with a .410 shotgun. "Zeke said he had been mad with that bitch, he said there was another nigger, another man, her boyfriend. . . . Zeke told me he used a .410 shotgun. He said he walked right in and stuck it by her head and shot her." Defendant told Foye he had thrown the gun in some bushes but didn't say where. Defendant then asked

Foye to be a witness for him if the police came and to tell them he, Foye, and the defendant were drinking. Foye replied that he could not jeopardize himself.

Defendant offered no evidence. The jury returned a verdict of guilty of murder in the first degree, and defendant was sentenced to life imprisonment. He appealed, assigning errors noted in the opinion.

Robert Morgan, Attorney General; Walter E. Ricks III, Assistant Attorney General; Conrad O. Pearson, Assistant Attorney General; C. Diederich Heidgerd, Associate Attorney, for the State of North Carolina.

Herbert B. Hulse, Attorney for defendant appellant.

HUSKINS, Justice.

Defendant's first assignment of error is based on denial of his motion to quash the bill of indictment. He contends the bill "fails to set forth with a degree of particularity and specificity the elements of the crime of murder in the first degree as to enable the defendant to adequately prepare a defense for the same." In pertinent part, the bill of indictment reads as follows:

> "THE JURORS FOR THE STATE UPON THEIR OATH DO PRESENT, That Ezekiel Patterson late of the County of Lenoir on the 24th day of August 1972, with force and arms, at and in the said county, feloniously, wilfully, and of his malice aforethought, did kill and murder Annetta Patterson contrary to the form of the statute in such case made and provided and against the peace and dignity of the State."

The quoted indictment follows the language of G.S. 15-144 which provides:

> "In indictments for murder . . . it is not necessary to allege matter not required to be proved on the trial; but in the body of the indictment, after naming the person accused, and the county of his residence, the date of the offense, the averment 'with force and arms,' and the county of the alleged commission of the offense, as is now usual, it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law . . . and any bill

of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for murder . . . ."

[1] An indictment for murder in the first degree contains all necessary averments and allegations and is sufficient if it follows the language of the statute. *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652 (1972); *State v. Mays,* 225 N.C. 486, 35 S.E. 2d 494 (1945); *State v. Arnold,* 107 N.C. 861, 11 S.E. 990 (1890). Defendant's first assignment of error is overruled.

Defendant next contends that admission in evidence of the weapon identified as State's Exhibit 5 was prejudicial error. The weapon was admitted over objection after Tyrone Fisher, an eyewitness to the shooting, testified: "The item you are showing me marked State's Exhibit 5 is a shotgun and if it isn't the one I saw Zeke Patterson use on the night of August 24, it's the sister to it. This is either the shotgun or very similar to the shotgun I saw Zeke shoot Annetta with on the night of August 24, 1972."

[2] The general rule is that weapons may be admitted in evidence "where there is evidence tending to show that they were used in the commission of a crime." *State v. Wilson,* 280 N.C. 674, 187 S.E. 2d 22 (1972). Any article shown by the evidence to have been used in connection with the commission of the crime charged is competent and properly admitted in evidence. *State v. Sneeden,* 274 N.C. 498, 164 S.E. 2d 190 (1968). "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. Thus, weapons may be admitted where there is evidence tending to show that they were used in the commission of a crime or in defense against an assault." 1 Stansbury's North Carolina Evidence § 118 (Brandis Rev. 1973).

[3] We regard the testimony of Tyrone Fisher sufficient to identify State's Exhibit 5 as the gun used in the shooting of Annetta Patterson. In *State v. Macklin,* 210 N.C. 496, 187 S.E. 785 (1936), shotgun found in defendant's room was held properly admitted in evidence following testimony that it was "like the gun" defendant was seen carrying the night deceased was shot. But if it be conceded, *arguendo,* that State's Exhibit 5 had not been sufficiently identified as the murder weapon rendering its admission erroneous, in view of the eyewitness testimony that defendant shot his victim with a shotgun, its

admission was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967); *State v. Fletcher* and *State v. St. Arnold,* 279 N.C. 85, 181 S.E. 2d 405 (1971). Evidence of defendant's guilt is so overwhelming that admission of technically incompetent evidence is harmless unless it is made to appear that a different result likely would have ensued had the evidence been excluded. *State v. Barbour,* 278 N.C. 449, 180 S.E. 2d 115 (1971); *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969). Defendant's second assignment of error is overruled.

[4] Pamela Francine Wiggins, daughter of the deceased and stepdaughter of defendant, testified as a State's witness. She related several occasions on which defendant had cut her mother with a knife and testified regarding a threat defendant made against her mother on the morning of 24 August 1972. On cross-examination defense counsel elicited statements that she disliked the defendant and harbored a feeling of ill will toward him, thus impeaching the credibility of the witness by showing bias. On redirect examination by the solicitor, Pamela testified as follows:

> "I have disliked Ezekiel Patterson ever since he started arguments and all with my mother. I have some other reasons for disliking him, all the other things he had done to me.
>
> "Q. What are some of the things that he's done to you to cause you to dislike Mr. Ezekiel Patterson?
>
> "A. He raped me."

After the answer had been given, defense counsel objected but made no motion to strike. The objection was overruled. Defendant assigns as error the admission of the statement by Pamela Wiggins that defendant had raped her, contending that in this prosecution for murder the State may not offer evidence tending to show that he had committed another offense.

Of course, it is a general rule of evidence that in a prosecution for a particular crime the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense. Various exceptions to this general rule of inadmissibility, as well recognized as the rule itself, are discussed in *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954). The admissibility of the evidence challenged by this

assignment of error, however, is not governed by the rule of evidence discussed in *State v. McClain, supra.* Here, evidence was elicited from Pamela Wiggins on cross-examination calculated and intended to show bias and to discredit her testimony. This calls for application of the rule that where evidence of bias is elicited on cross-examination the witness is entitled to explain, if he can, on redirect examination, the circumstances giving rise to bias so that the witness may stand in a fair and just light before the jury. "A party cannot be allowed to impeach a witness on the cross-examination by calling out evidence culpatory of himself and there stop, leaving the opposing party without opportunity to have the witness explain his conduct, and thus place it in an unobjectionable light if he can. In such case the opposing party has the right to such explanation, even though it may affect adversely the party who cross-examined. Upon the examination in chief, the evidence may not be competent, but the cross-examination may make it so." *State v. Glenn,* 95 N.C. 677 (1886). *Stansbury* states the rule in these words: "If circumstances evidencing bias are elicited on cross-examination, the witness is entitled to explain them away, if he can, on redirect examination, after which the cross-examining party may produce evidence nullifying the effect of the explanation." 1 Stansbury's North Carolina Evidence § 45 (Brandis Rev. 1973). *Compare State v. Hicks,* 233 N.C. 511, 64 S.E. 2d 871 (1951); *State v. Warren,* 227 N.C. 380, 42 S.E. 2d 350 (1947); *State v. Oscar,* 52 N.C. 305 (1859).

[5] Furthermore, there was no motion to strike the answer of the witness to which objection is made. "In case of a specific question, objection should be made as soon as the question is asked and before the witness has time to answer. Sometimes, however, inadmissibility is not indicated by the question, but becomes apparent by some feature of the answer. In such cases the objection should be made as soon as the inadmissibility becomes known, and should be in the form of a motion to strike out the answer or the objectionable part of it." 1 Stansbury's North Carolina Evidence § 27 (Brandis Rev. 1973). We said in *Gibson v. Whitton,* 239 N.C. 11, 79 S.E. 2d 196 (1953): "The rule is that where a question asked a witness is competent, exception to his answer, when incompetent in part, should be taken by motion to strike out the part that is objectionable." *Accord State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534 (1970); *State v. Battle,* 267 N.C. 513, 148 S.E. 2d 599 (1966). Defendant's third assignment of error is overruled.

[6, 7] Defendant's several assignments of error based on denial of his motions for nonsuit, to set aside the verdict, in arrest of judgment, and for a new trial are overruled. The record contains plenary evidence from which the jury could find that defendant, motivated by ill will and express malice toward his wife, shot her with deliberation after having premeditated the deed. In addition to his expressed intent to kill her, there is evidence that on various occasions during the three years prior to her death defendant intentionally inflicted personal injuries upon his wife. This evidence was admissible as bearing on intent, malice, motive, and premeditation and deliberation. *State v. Moore,* 275 N.C. 198, 166 S.E. 2d 652 (1969); *State v. Gales,* 240 N.C. 319, 82 S.E. 2d 80 (1954).

[8] Likewise, defendant's assignment of error addressed to the charge has no merit. References in the charge to the murder weapon as "a .410 gauge shotgun" was not prejudicial error. "The rule is that the trial court in charging a jury may not give an instruction which assumes as true the existence or nonexistence of any material fact in issue. See G.S. 1-180 as rewritten." *State v. Cuthrell,* 235 N.C. 173, 69 S.E. 2d 233 (1952). Even so, the only substantive evidence in the record as to the gauge of the murder weapon appears in the testimony of Laurence Odell Foye, an acquaintance of defendant, who testified that while walking with defendant and Linwood Hood defendant said "he went into the house and shot her with a shotgun, a .410, that he shot her in the head." Although the record fails to reveal the gauge of the shotgun offered in evidence (State's Exhibit 5), the gauge of the gun is not "a material fact in issue." Defendant's guilt or innocence does not depend on the gauge of the weapon he used.

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

No error.

STATE OF NORTH CAROLINA v. JENNIE CAROL ELLINGTON

No. 42

(Filed 14 November 1973)

Searches and Seizures § 3— search warrant for marijuana — sufficiency of affidavit

In a prosecution for possession of marijuana with intent to distribute, there was probable cause for issuance of a search warrant where the affidavit alleged that a deputy sheriff in California telephoned Greensboro and informed officers there that, based on a tip from a reliable informer, he had information that two girls were flying into Greensboro at a specified hour with marijuana in their possession, the California officer described the girls' appearance in detail, the informer's reliability was attested to, the officer in Greensboro verified that the California sheriff was who he claimed to be, and the Greensboro officer confirmed through the airline company that defendant and a companion were passengers on a flight bound for Greensboro.

IN this criminal prosecution the defendant was tried before *Crissman, J.*, at the January 1973 Session, GUILFORD Superior Court (Greensboro Division) for feloniously possessing (with intent to distribute) more than five grams of marijuana.

At the trial the evidence disclosed that the Guilford County officers, under a search warrant issued by H. G. Shoffner, Magistrate, seized 138 pounds of marijuana carried in four suitcases and arrested the defendant, Jennie Carol Ellington, and her companion, Patrice Lee Walters. Both were arrested in Guilford County after they had arrived at the Greensboro Airport on Eastern Airlines Flight 203 from San Diego, California. Their baggage consisted of four large suitcases, each secured by a combination lock.

The defendant, represented by counsel, waived a preliminary hearing, and was bound over to the superior court. At the arraignment in the superior court and before the jury was chosen, defense counsel made these motions: (1) That the prosecution disclose the name and address of the alleged confidential informer referred to in the affidavit attached to the search warrant under which the officers seized the contraband; (2) that the search warrant and the affidavit upon which it was based were legally insufficient to authorize the magistrate to issue the search warrant; and (3) that all evidence resulting from the search be suppressed.

The affidavit upon which Magistrate Shoffner issued the search warrant is here quoted in full:

"AFFIDAVIT TO OBTAIN SEARCH WARRANT

STATE)
v.)

Two White Females described as follows:)

#1—Age 20's, 5'6", 105-110 lbs., Brown fuzzy hair)

#2—Age 20's, 5'6", 120-130 lbs., Blond hair)
Possibly using the names Miss J. Ellington)
or Miss P. Walters.)

C. D. Wade being duly sworn and examined under oath, says under oath that he has probable cause to believe that the above have in their possession certain property, to wit: 25 to 30 kilos of Marijuana, a controlled substance, a crime, to wit: Illegal Possession of Controlled Substance, Marijuana. The property described above is located Greensboro-High Point Regional Airport described as follows: Guilford County, N. C. (See Affidavit). The facts which establish probable cause for the issuance of a search warrant are as follows:

At 4:00 a.m., 9-22-72, Deputy Sheriff Robert Simmons of the San Diego, California Sheriff's Office, called the Communications Center of the Greensboro Police Department and talked to Operator Thomas. He gave the following information: He advised of the transportation of 25 to 30 kilos of Marijuana being transported by the following subjects: Two W/F's. (1) W/F, 20's, 5'6", 105-11 [sic] Lbs., has brown fuzzy hair & was wearing green and blue floor length flowered dress. Poss. travelling by the name of Miss J. Ellington or Miss P. Walters. (2) W/F, 20's, 5'6", 120-130 Lbs., has blonde hair and was wearing short white rough type fabric dress. Also poss. travelling by one of names aforementioned. They will have a total of 4 suitcases with them, they will all be large 3-suiter type. Two of them will be Blue Sky-way, 1 will be a brown sky-way, and the other will be a brown Ventura. All of them will have combination locks. The baggage tickets will be as follows 17-33-13, 17-33, 14, 17-33-15, 17-33-16. They are enroute to Greensboro from San Diego, their ultimate destination is here.

They will be coming into Greensboro-High Point Airport on flight 203 Eastern Airlines.

Deputy Simmons advises that his informer is 100% reliable, and that information obtained from this same informant recently led to the confiscation of 120,000 Barbiturates recently in New York City.

Deputy Simmons also advised that he could be reached after 0900 hrs. their time (1200 Hrs.) our time, at the following number 714-297-2848 this would be the Metropolitan Enforcement Detail.

This affiant, C. D. Wade, has confirmed through Eastern Airlines that subjects using the names above of the suspects, are in fact on Eastern Flight 203 and are expected to arrive at the Greensboro-High Point Regional Airport at 11:07 a.m. our time.

This affiant also confirmed by telephone that Deputy Simmons is in fact a law enforcement officer with the San Diego, California Sheriff's Office.

Signed: C. D. WADE
Affiant"

After obtaining the search warrant the Guilford County officers met Eastern Airlines Flight 203 at the airport in Guilford County. The defendant, Miss Ellington, and Miss Walters, her companion, deplaned and appeared at the baggage counter where they surrendered their baggage checks, claimed, and took possession of four large suitcases, each equipped with a combination lock. After the defendant and her companion took possession of the four bags, they entered a cab and headed for the open road. The officers stopped the cab, took possession of and searched the four bags in which they found 138 pounds of marijuana. The officers seized the bags and contents and arrested both females.

When the court overruled defense motions to suppress the evidence which the officers had obtained as a result of the search, the defendant moved to quash the indictment on the additional ground that G.S. 90-95(f) (3) was unlawfully discriminatory in that the statute made the possession of more than five grams of marijuana *prima facie* evidence of the intent to distribute the contraband. After the court overruled all defense motions, the trial before the jury began.

The State, over objection, offered the testimony of the officers with respect to their search and the finding of 138 pounds of marijuana in the luggage carried by the defendant and her traveling companion, Miss Walters. The State called as its witness and examined Miss Walters. She testified:

> "I was there [the airport] with the defendant, Miss Ellington. We were coming from San Diego, California; . . . Yes, I recognize those exhibits numbers 2, 4, 6 and 8 [the 4 suitcases seized by the officers] and I have seen them before. I first saw those four exhibits in San Diego, California on Mission Boulevard. Miss Ellington was there at the time. . . . Somebody loaded them up with marihuana. . . . Miss Ellington told me that I would be paid $50.00 for every pound of marihuana and that my plane fare to Greensboro and then back to California would be paid out of that fee. I know how many pounds were in there. There were approximately one-hundred pounds."

At the close of the State's evidence the defendant moved to dismiss, rested without offering evidence, and renewed the motion which the court overruled.

The jury returned a verdict finding the defendant guilty as charged in the bill of indictment. The court imposed a sentence of four years in the State's prison. The defendant excepted and gave notice of appeal to the Court of Appeals. The Court of Appeals, in the opinion by Campbell, J., concurred in by Hedrick and Vaughn, J.J., found no error in the trial. The defendant appealed to this Court, contending her constitutional rights were denied by the introduction of the fruits of an illegal search of her baggage.

Robert Morgan, Attorney General, by Charles A. Lloyd, Assistant Attorney General, for the State.

Booe, Mitchell, Goodson, and Shugart by William S. Mitchell for the defendant.

HIGGINS, Justice.

Both the Constitution of the United States and the Constitution of North Carolina contain guarantees against unlawful searches and seizures. Both constitutions contain limitations on

the right of the courts to issue search warrants. Article IV, Constitution of the United States, provides:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Constitution of North Carolina, Article 1, Sec. 20, provides:

> "General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted."

The guarantees protect against *unreasonable* searches and seizures. They are designed for the protection of the innocent. The issuing courts, in harmony with the law, presume innocence until probable cause to the contrary is made to appear.

Officer Wade, who made the affidavit, did not have or claim to have, any personal knowledge either of the identity of the two females on Eastern Airline Flight 203 from San Diego to Greensboro, or of the contents of the four bags they carried. Personal knowledge was not required. *McCray v. Illinois,* 386 U.S. 300, 18 L.Ed. 2d 62, 87 S.Ct. 1056. Wade's information came from Officer Simmons, a deputy sheriff in San Diego, California. Wade, an officer in North Carolina, was justified in relying on the information from an officer in California. *U. S. v. Ventresca,* 380 U.S. 102, 13 L.Ed. 2d 684, 85 S.Ct. 741. Deputy Sheriff Simmons called from San Diego to the sheriff's office in Greensboro at 4 a.m. and gave the information contained in the affidavit. "He advised of the transportation of 25 to 30 kilos of Marijuana. . . . " A kilo (metric) is approximately 2.4 pounds (avoirdupois). He advised the transportation was by two females, describing the defendant and Miss Walters. The descriptions gave the approximate age, dress, appearance, and stated that they possessed four large traveling bags, giving the color of the bags, which were secured by combination locks.

Simmons gave information that the subjects were passengers on Eastern Airlines Flight 203 from San Diego to Greensboro. Mr. Wade, before making the affidavit, checked further and ascertained that Simmons in San Diego was the officer he claimed to be. Officer Simmons stated that the defendant and Miss Walters, "[H]ave in their possession . . . 25 to 30 kilos of Marijuana . . . . " From the weight and bulk of the contraband a sensible officer would conclude that if they were transporting such quantity of marijuana, of necessity it must be in the bags. The number, size, and locks on the bags indicated they contained something of value.

When Wade's affidavit is critically examined, it furnished Magistrate Shoffner ample information upon which to find that probable cause existed for the search which the officers made. The California officer's information which was relayed to Magistrate Shoffner by Officer Wade, supplemented by the facts that Wade ascertained on his own account, taken together, furnished ample evidence to authorize the search and the seizure of the contraband and the arrest of the two females who were transporting it.

The defendant argues long and loud that *Aguilar v. Texas,* 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509, is authority against the sufficiency of Wade's affidavit. In Aguilar the following appears to be the full text of the affidavit upon which the warrant was based: "Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of law." The foregoing affidavit is a scatter gun shot in the dark and suggests that what the affiant wants is authority for a fishing expedition. It covers too many different materials to indicate anything less than a hope to catch a fish of some species and of some size.

In *State v. Campbell,* 282 N.C. 125, 191 S.E. 2d 752, the warrant issued on another scatter gun affidavit recites that the officer "[B]eing duly sworn and examined under oath, says under oath that he has probable cause to believe that Kenneth Campbell [and two others, naming them] has on his premises certain property, to wit: illegally possessed drugs (narcotics, stimulants, depressants), which constitutes evidence of a crime, to wit: possession of illegal drugs . . . . " This affidavit is in

the same category as the affidavit in Aguilar. Neither states facts from which probable cause for the search may be inferred.

In *Spinelli v. United States,* 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584, the Court said: "In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."

The latest pronouncement on the question before us comes from the decision of the Supreme Court of the United States in *U. S. v. Harris,* 403 U.S. 573, 29 L.Ed. 2d 723, 91 S.Ct. 2075:

> "In evaluating the showing of probable cause necessary to support a search warrant, against the Fourth Amendment's prohibition of unreasonable searches and seizures, we would do well to heed the sound admonition of *United States v. Ventresca,* 380 U.S. 102 (1965):
>
> > '[T]he Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teaching of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.' 380 U.S., at 108."

In this case we are dealing with a big league operation. Its ramifications span the continent. The amount of contraband involved, together with the evidence of Miss Walters, clearly shows that a big supplier in California was furnishing contraband to a big dealer in North Carolina. The defendant, and Miss Walters perhaps to a lesser degree, were serving major operators. But for the vigilance and combined efforts of the

law enforcement officers, 138 pounds of illegal dope would have been available to persons of all ages in and around Greensboro. The evidence in this case fails to disclose any valid legal or moral reason why the officers and the courts should look with favor on the defendant's highly technical and microscopic objections to the search warrant.

The defendant's objections not herein discussed are fully treated in the decision of the Court of Appeals which is now

Affirmed.

TIMOTHY SHELDON WINTERS BY HIS GUARDIAN AD LITEM L. G. GORDON, JR., AND HARRY C. WINTERS v. PATRICIA PATTERSON BURCH

No. 7

(Filed 14 November 1973)

1. **Automobiles § 63— children on or near highway — duty of motorist**

The presence of children on or near a highway is a warning signal to a motorist who must bear in mind that they have less capacity to shun danger than adults and are prone to act on impulse; therefore, the presence of children on or near the traveled portion of a highway whom a driver sees, or should see, places him under the duty to use due care to control the speed and movement of his vehicle and to keep a vigilant lookout to avoid injury.

2. **Automobiles § 63— striking of child — presumption of negligence**

No presumption of negligence arises from the mere fact that a motorist strikes and injures a child who darts into the street or highway in the path of his approaching vehicle.

3. **Automobiles § 63— striking child on tricycle — insufficient evidence of negligence — directed verdict proper**

In an action to recover for personal injuries sustained by minor plaintiff in a collision between his tricycle and defendant's automobile, the trial court properly granted defendant's motion for a directed verdict where the evidence did not provide the answer to the question as to whether defendant, in the exercise of due care, could have seen the minor plaintiff on his tricycle in sufficient time to anticipate his collision course and to take effective measures to avoid it.

PLAINTIFFS appeal under G.S. 7A-30(2) from the decision of the Court of Appeals affirming the judgment of *Gambill, J.*, 3 August 1972 Session of FORSYTH Superior Court.

In these two actions for damages, the minor plaintiff, Timothy Sheldon Winters (Timmy), seeks to recover for personal injuries sustained in a collision between his Big Wheelie tricycle and a 1962 Pontiac automobile being operated by defendant. Plaintiff Harry C. Winters (Winters), the father of Timmy, seeks to recover his son's medical expenses and damages for the loss of his son's services.

At the trial defendant offered no evidence. The evidence for the plaintiffs tended to show:

Pleasant Street runs north and south in the Waughtown area of Winston-Salem. At approximately 4:22 p.m. on 27 April 1971, a bright sunny day, defendant was driving her automobile south on Pleasant, approaching its intersection with Bretton Street. A short distance north of the intersection she collided with 7-year-old Timmy, who was riding his Big Wheelie. At that time defendant was en route to her work at Western Electric Company, about 2½ miles away, where she was due at 4:30 p.m.

Bretton Street enters Pleasant from the west to form a T intersection. North of Bretton, Pleasant is straight and approximately level for about 176 yards. This area is 75 percent residential, and on both sides of the streets are trees, shrubs, and fences. There are no sidewalks in the area; only the curb separates the yards from Pleasant Street.

Plaintiffs' home is located on the southwest corner of Bretton and Pleasant. On the east side of Pleasant directly across from the intersection and plaintiffs' house, is a parking lot which has a frontage of about 300 feet and an elevation of about four feet above street level. There are two entrances into this lot, the south entrance across from Bretton Street and the north entrance a few feet below the corner of a fence on the east side of the street. The investigating officer, R. C. Lambert, testified that the location of these entrances "wasn't pertinent."

In the northwest corner of the intersection of Bretton and Pleasant, directly across Bretton from the home of plaintiffs, is the home of Mrs. Millie Holt. In the front yard are two large trees. According to Winters' measurements, the Holt lot extends from Bretton 150 feet north on Pleasant to a 12-foot wide driveway along the northern property line, a total frontage of 162

feet. Lambert testified that he had "no idea" how far that driveway is from the northern edge of Bretton. However, when shown a small snapshot of Pleasant Street he said that "looking at the picture," in his opinion, the driveway would be approximately 20-30 feet north of Bretton. At the time of the collision between Timmy's Big Wheelie and defendant's automobile, Mrs. Holt's car was parked in this driveway. There were no cars parked on either side of Pleasant Street itself near the scene of the accident.

Adjoining the Holt property on the north is the Fine lot, on which a four-foot high chain fence runs east and west, parallel with the Holt drive and fifteen feet north of it. Across the front of the Fine lot this fence parallels Pleasant Street 6-8 feet from the curb. This section of the fence is broken by the entrance of a driveway into the lot. The record does not disclose the width of this drive or its distance from any fixed point. From the north curb of Bretton Street to the southeast corner of the Fine fence is 177 feet. In the corner of this fence, next to the Holt drive, is a large bush. There is also a large tree in the Fine yard.

When Lambert arrived at the scene about 4:30 p.m. Timmy was being placed in the ambulance. Lambert found defendant's car near the east curb of Pleasant, "a short distance back from the extended curb line of Bretton Street," if it were extended eastward. Mrs. Holt testified that "the car stopped at approximately right at the fire hydrant" on the east side of the street. Lambert testified he thought the hydrant was 2-3 feet north of Bretton Street, but "the fire hydrant had no bearing on the accident." The rear wheels of the Big Wheelie were wedged between the right front wheel and the bumper. The right front tire of the Pontiac was slick except for three tread impressions in the center. The other three tires were in good condition.

Pleasant Street is 26 feet wide. Looking for debris to determine the point of impact, Lambert found a small amount of mud 18 feet north of the curb line of Bretton Street extended, 10 feet east of the west curb of Pleasant, and three feet west of the center line. He concluded that this mud marked the point of impact. He testified that "there were approximately 20 feet of skid marks from her left rear tire and roughly 3-4 feet from the right rear tire." These marks "came out at an angle . . . going toward the east curb. . . . " These marks were north of the mud, there being no marks between the mud and the

resting place of the automobile. On his accident report Lambert noted that the "distance traveled after impact was approximately 21 feet . . . about two-car lengths. . . . "

Defendant told Lambert that she was turning to the east side (her left) of the road when she applied her brakes. The skid marks he saw "were in a swerved direction to her left." She also told Lambert that as she approached Bretton Street she was traveling between 15-20 MPH; "that she saw the boy on the trike bike, slowed down and he started out into the street from her right and she applied the brake and he kept on coming out and they collided."

Officer Lambert found no eyewitnesses to the accident. Timmy sustained a severe head injury in the collision. He testified that he remembered nothing about the accident.

Winters also made an investigation of the accident scene. Pertinent portions of his testimony follow:

"First there was a little bit of mud, a tiny bit of this black plastic from the wheel. . . . It was about 8 feet from the curb, exactly 8 feet as a matter of fact. . . . I saw skid marks at the scene. . . . I measured them. From the start of the tread marks between the two driveways to the car, it's the front of the car that was 54 feet. Yes, sir, the northernmost tread mark to the front of her car was 54 feet. That includes, of course, allowance for the curvature of the roadway. They begin where I found the plastic. I measured 54 feet from the front of the car to the beginning of the skid marks. . . . From the curb line of Bretton Street, that is, the north curb, northward to the edge of the [Fine] fence is 177 feet. . . . Mrs. Holt's frontage is 150 feet . . . north on Bretton Street to her driveway. . . . The fence in the Fine yard is a chain link fence standing 4 feet high and it's freely covered with some ivy. . . . There are two driveways over on the eastern side of the street . . . and three on the western side of the street. It is 150 feet from the Bretton Street curb going north to the first driveway which is 12 feet wide. . . . I counted 54 feet of distance from this mark to where the front of the car was."

At the hospital defendant told Mrs. Margaret Doss, Timmy's aunt, that she saw the boy but didn't think he was going to come out in front of her. Defendant told Timmy's mother that she saw him and "that's just where [she] stopped." Tim-

my's mother testified that it was his custom to play in the parking lot in the afternoon after school; that the last time she had seen Timmy before the accident he and his friend, Joey, were in the parking lot; and that immediately after the accident he was lying in the street close to the right front fender of the car. Neither Mrs. Holt, Mr. and Mrs. Winters, nor Mrs. Doss heard any horn blow prior to the collision. Mrs. Holt and Mrs. Winters heard the squeal of tires and the thud at approximately the same time. Officer Lambert didn't remember asking defendant whether she blew her horn prior to the collision or whether she told him one way or the other.

At the close of plaintiffs' evidence Judge Gambill allowed defendant's motion for a directed verdict and dismissed plaintiffs' actions. The Court of Appeals affirmed. *Winters v. Burch,* 17 N.C. App. 660, 195 S.E. 2d 343 (1973). One member of the panel having dissented, defendant appealed as a matter of right.

Hatfield and Allman by James W. Armentrout and R. Bradford Leggett, Jr., for plaintiff appellants.

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

SHARP, Justice.

[1] Defendant's motion for a directed verdict at the close of plaintiffs' evidence presents the question whether the evidence, considered in the light most favorable to plaintiffs, is sufficient to justify a verdict in their favor. *Summey v. Cauthen,* 283 N.C. 640, 197 S.E. 2d 549 (1973); *Younts v. Insurance Co.,* 281 N.C. 582, 189 S.E. 2d 137 (1972); *Kelly v. Harvester Co.,* 278 N.C. 153, 179 S.E. 2d 396 (1971). It has long been the rule in this State that the presence of children on or near a highway is a warning signal to a motorist, who must bear in mind that they have less capacity to shun danger than adults and are prone to act on impulse. Therefore, "the presence of children on or near the traveled portion of a highway whom a driver sees, or should see, places him under the duty to use due care to control the speed and movement of his vehicle and to keep a vigilant lookout to avoid injury." *Brinson v. Mabry,* 251 N.C. 435, 438, 111 S.E. 2d 540, 543 (1959). *See Hamilton v. McCash,* 257 N.C. 611, 127 S.E. 2d 214 (1962); *Pope v. Patterson,* 243 N.C. 425, 90 S.E. 2d 706 (1956); *Greene v. Board of Education,* 237 N.C. 336, 340, 75 S.E. 2d 129, 131 (1953).

[2] However, no presumption of negligence arises from the mere fact that a motorist strikes and injures a child who darts into the street or highway in the path of his approaching vehicle. *Brewer v. Green,* 254 N.C. 615, 119 S.E. 2d 610 (1961). The rule established by our decisions is well stated in 4 Blashfield, Automobile Law and Practice (3d Ed. 1965) § 151.11 as follows:

"A motorist is not, however, an insurer of the safety of children in the street or highway; nor is he bound to anticipate the sudden appearance of children in his pathway under ordinary circumstances. Accordingly, the mere occurrence of a collision between a motor vehicle and a minor on the street does not of itself establish the driver's negligence; and some evidence justifying men of ordinary reason and fairness in saying that the driver could have avoided the accident in the exercise of reasonable care must be shown. In the absence of such a situation, until an automobile driver has notice of presence or likelihood of children near line of travel, the rule as to the degree of care to be exercised as to children is the same as it is with respect to adults." *See Badger v. Medley,* 262 N.C. 742, 138 S.E. 2d 401 (1964); *Ennis v. Dupree,* 262 N.C. 224, 136 S.E. 2d 702 (1964); *Dixon v. Lilly,* 257 N.C. 228, 125 S.E. 2d 426 (1962); *Brewer v. Green, supra; Brinson v. Mabry, supra; Fox v. Barlow,* 206 N.C. 66, 173 S.E. 43 (1934); 4 Blashfield, *supra,* §§ 151.13, 151.23.

[3] Applying the foregoing principles to the evidence in this case, we hold that it fails to establish actionable negligence on the part of defendant. Her motion for a directed verdict, therefore, was properly allowed. There is no evidence tending to show that defendant was traveling at an excessive rate of speed. Taking as true Winters' testimony that there were 54 feet of skid marks, yet plaintiffs have offered no evidence that such marks indicate speeding. We note that in a residential district the maximum speed limit is 35 MPH. G.S. 20-141(b)(2). Further the skid marks support no inference that the slick tire affected defendant's ability to stop.

At this point we note that Winters did not identify the two driveways between which he said he found the plastic, the point where he said the skid marks began. It seems unlikely that he would have referred to Bretton Street as a driveway and, as Lambert suggested, the two driveways into the parking lot were not pertinent.

From Bretton Street north, Pleasant is straight for 176 yards. As defendant traveled south, however, her view to the right beyond the curb was necessarily obstructed at various points by trees, bushes, and fences, the exact location of most of which cannot be determined from the record. It is also possible that the Holt automobile parked in the drive was a partial obstruction.

While all the evidence tends to show that Timmy entered the street from defendant's right (west side), there is no evidence tending to show where he was when, in the exercise of proper care, she could or should have seen him, or at what point he rode into the street. Did the boy ride over the curb from the Holt yard into the street in front of defendant's approaching automobile? If so, from where did he come? Did he come out of a drive and, if so, which drive? Was he in the street, traveling in the same direction as defendant and suddenly turned to his left?

The evidence adduced at the trial does not provide the answer to the crucial question in the case, that is, whether defendant, in the exercise of due care, could have seen the boy in sufficient time to anticipate his collision course and to have taken effective measures to avoid it. Left to speculation is the time when defendant should have first seen Timmy as well as the place and manner of his entrance into the street. Negligence is not presumed from the mere fact that defendant's automobile struck and injured the boy. Plaintiffs have the burden of establishing that her negligence was the proximate cause of the boy's injury. In our view "the probabilities arising from a fair consideration of the evidence . . . afford no reasonable certainty on which to ground a verdict." *Mills v. Moore,* 219 N.C. 25, 31, 12 S.E. 2d 661, 665 (1941).

The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. LARRY EUGENE THOMAS

No. 29

(Filed 14 November 1973)

1. **Criminal Law § 75— volunteered statements — absence of Miranda warnings**

Defendant's statement to a police officer when the officer first saw him that he had "shot the sucker" and was looking for the police to turn himself in and defendant's inquiry to an officer after he had been arrested, "Bill, is the dude dead?" were volunteered and spontaneous and were properly admitted in evidence although defendant had not been given the *Miranda* warnings and had not waived his constitutional rights.

2. **Criminal Law § 75— waiver of counsel and right of self-incrimination**

A person may intelligently, knowingly and voluntarily waive his privilege against self-incrimination and his right to legal counsel.

3. **Criminal Law § 75— admission of signed confession**

Defendant's signed statement setting forth details of the shooting of deceased was properly admitted in evidence where defendant was twice given the *Miranda* warnings prior to making the statement and defendant affirmatively waived his right to legal counsel and freely and voluntarily made the signed statement.

4. **Criminal Law § 118— instructions on contentions**

A judge is not required by law to state the contentions of the parties, but when he does give the contention of the State on a particular phase of the case, it is error to fail to give defendant's opposing contention arising out of the evidence on the same aspect of the case.

5. **Criminal Law § 163— objection to review of evidence and contentions — waiver**

Objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires to afford the trial judge an opportunity for correction; otherwise they are deemed to have been waived and will not be considered on appeal.

6. **Criminal Law § 118— first degree murder — instructions on contention of intoxication**

In a first degree murder case in which the court reviewed evidence that defendant had a faint odor of alcohol about him and that defendant stated he had been drinking, the court stated that defendant contended "that you should consider that in this case," and the court stated that the State contended defendant was not intoxicated, defendant was not prejudiced by failure of the court to state further defendant's contention regarding intoxication where the court thereafter fully explained the effect of intoxication on the crime charged.

7. Criminal Law § 112— failure to define reasonable doubt

The trial court is not required to define "reasonable doubt" in the absence of a special request for such instruction.

APPEAL by defendant from *McConnell, J.*, at the 12 February 1973 Session of UNION Superior Court.

On an indictment proper in form, defendant was tried and convicted of murder in the first degree of Michael Eugene Massey. From a judgment imposing a sentence of life imprisonment, defendant appealed.

The State's evidence tends to show that prior to 30 December 1972 Wanda Faye Allsbrooks and defendant had been going together for approximately one and one-half years. During this time Miss Allsbrooks dated no one but defendant. On 22 December 1972 Miss Allsbrooks, against defendant's wishes, ended this relationship. Shortly thereafter she met the deceased, Michael Eugene Massey, and dated him on two occasions prior to 30 December 1972. On 28 December 1972 the deceased was visiting Miss Allsbrooks at her house on John Street in Monroe when defendant came by. Defendant wanted to talk to her, but she told him to leave which he did.

On 30 December 1972 around 10:30 p.m. the deceased was again visiting Miss Allsbrooks. She and the deceased, together with deceased's cousin, Jimmy Massey, were sitting in the deceased's car in front of her house. The deceased, who was sitting in the driver's seat, opened his door to let his cousin get out of the car. At this time Miss Allsbrooks saw defendant walking toward the car with a rifle in one hand and a pistol in the other. She told deceased that defendant had two guns and to shut the door. As the deceased was shutting the door, defendant took the rifle and knocked the door back open. Defendant then grabbed the deceased by the collar, told him that he was going to kill him, and pulled him out of the car. Miss Allsbrooks jumped out of the car and got between the deceased and defendant. The deceased pushed her out of the way, and defendant then started firing the rifle at deceased. After shooting the deceased several times, defendant turned to Miss Allsbrooks and said: "I'm going to give you two seconds to start running." Miss Allsbrooks ran to her home and did not come out again until she saw defendant walking north on John Street away from her house.

A few minutes after the shooting Officer James Sutton of the Monroe Police Department arrived at the scene. Miss Allsbrooks told him that defendant had shot deceased. About five minutes later Sutton observed defendant with a rifle in his hand walking south on John Street towards the deceased's car. Sutton went to his police car, got a shotgun, and started walking toward defendant. As Sutton approached defendant, defendant raised the rifle in the air and before Sutton said anything, defendant told him that he had "shot the sucker" and was looking for the police to turn himself in. Sutton then advised defendant of his rights. Defendant said he was familiar with them since he had "been through it before." Officer Sutton testified that he detected a faint odor of alcohol on defendant's breath.

After defendant had been at the Monroe Police Department approximately one hour, Sergeant Bill Helms—whom defendant knew—arrived. When defendant saw Helms he immediately asked: "Bill, is the dude dead?" Helms said he could not answer that question or even talk to defendant until defendant had been given his rights. Helms testified that after advising defendant of his rights, he specifically asked defendant if he wanted a lawyer. Defendant replied that he did not want a lawyer, and that if he needed an attorney it would be left up to his family and his brothers to obtain one the following day. Helms then asked defendant to make a statement, and defendant readily agreed to do so. Helms again asked defendant if he wanted an attorney to be present before he made the statement, and defendant again replied that he did not want an attorney. Defendant then signed a waiver of rights form, and made the following statement that was written by Helms, signed by defendant, and introduced at trial:

> "I told some people I mess around with that somebody was going to die tonight, the first person who messed with me. I left home with my Remington .22 caliber rifle and saw a car parked in front of 408 John Street. Me and my girl, Wanda Allsbrooks, had broke up and she was going with this dude. When I got to the car this dude opened the door and got out. The dude said he was going in the trunk and get some boxing gloves so we could duke. We started talking and arguing. I don't know what we were arguing about. This dude ran his hand in his pocket and I lit him up. I do not know how many times I shot but I stung him real good. I had sixteen shots in the gun and emptied it. I

don't remember if I shot him after he fell. I might have. All I remember is that I shot him. I left this dude lying in the road and went to my grandmother's and told her to call the police because I had killed somebody. I left her house with the gun and walked back to the car where this dude was lying on the ground. The police came and Officer Sutton got the gun. For a period of days I couldn't work for thinking if I was going to kill him or not. I really didn't have a reason because I didn't know his name or who he was. When I started shooting that gun, I couldn't stop." Signed "Larry Thomas" at 1:15 a.m., December 31, 1972.

Helms testified that after defendant made the statement defendant was allowed to read it for accuracy. Defendant informed Helms that the statement was correct except that it was a Remington rifle instead of a Winchester, and it was so corrected. Helms further testified that defendant admitted that he had a .22 caliber pistol with him at the time of the shooting, but that he had thrown it away after he left the scene of the crime. On cross-examination Helms testified that although he did not smell any odor of alcohol about defendant on the evening in question, he did ask defendant if he had had any alcoholic beverage prior to the shooting. Defendant replied that he had had eight or nine drinks of liquor and four beers during either the early part of that night or the afternoon—he could not remember when.

It was stipulated that the deceased died on 30 December 1972 from multiple gunshot wounds in the neck and left ear.

Defendant did not testify or offer any evidence.

Attorney General Robert Morgan and Associate Attorney Norman L. Sloan for the State.

Joe P. McCollum, Jr., for defendant appellant.

MOORE, Justice.

[1] Defendant first assigns as error the admission of his alleged "confession" into evidence. From defendant's brief it is not entirely clear whether this assignment of error relates solely to his signed statement or also relates to the two inculpatory statements allegedly made by him to Officer Sutton and Sergeant Helms prior to his making the signed statement. The first statement was made before he was arrested. When Officer Sut-

ton first saw him and before Sutton said anything to him, defendant said he had "shot the sucker" and was looking for the police to turn himself in. The second statement was made after he had been arrested for murder and was being held at the Monroe Police Department. When Sergeant Bill Helms—whom defendant knew—walked in, defendant spontaneously inquired: "Bill, is the dude dead?"

Miranda warnings are only required to be given when a person is being subjected to "custodial interrogation"; that is, "questioning *initiated by law enforcement officers* after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (Emphasis added.) *Miranda v. Arizona,* 384 U.S. 436, 444, 16 L.Ed. 2d 694, 706, 86 S.Ct. 1602, 1612 (1966). A volunteered confession is admissible even in the absence of warnings or waiver of rights. *Miranda v. Arizona, supra; State v. Blackmon,* 284 N.C. 1, 199 S.E. 2d 431 (1973); *State v. Haddock,* 281 N.C. 675, 190 S.E. 2d 208 (1972). See also *State v. Inman,* 269 N.C. 287, 152 S.E. 2d 192 (1967). Measured by *Miranda* standards, we hold that the two statements made by defendant to Officer Sutton and Sergeant Helms were spontaneous and volunteered, and were properly admitted into evidence.

Defendant also gave Sergeant Helms a signed statement setting forth the details of the shooting of the deceased. When this statement was offered into evidence, defendant objected and the court properly held a *voir dire* to determine the voluntariness of the statement. *Jackson v. Denno,* 378 U.S. 368, 12 L.Ed. 2d 908, 84 S.Ct. 1774 (1964); *State v. Barber,* 278 N.C. 268, 179 S.E. 2d 404 (1971); *State v. Catrett,* 276 N.C. 86, 171 S.E. 2d 398 (1970). After finding that defendant had been properly warned of his constitutional rights, the trial court concluded:

> "The court at this time finds that the statement was freely, voluntarily and intelligently made, that the defendant was not under the influence of any intoxicating beverage or narcotic drug, and that Officer Helms had known him for a number of years and that he was normal and rational, and that he was advised of his constitutional rights before he made any statement and waived his right to have an attorney present by affirmatively stating he did not want an attorney present after being advised that he had a right to have an attorney present."

[2] It is a well-established principle in North Carolina that a person may intelligently, knowingly, and voluntarily waive his privilege against self-incrimination and his right to legal counsel. *State v. Turner,* 283 N.C. 53, 194 S.E. 2d 831 (1973); *State v. McRae,* 276 N.C. 308, 172 S.E. 2d 37 (1970). In this case defendant was twice given the warnings required by *Miranda v. Arizona, supra,* and as Mr. Chief Justice Warren there said:

> ". . . After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. . . . " 384 U.S. at 479, 16 L.Ed. 2d at 726, 86 S.Ct. at 1630.

[3] The findings of the trial judge that defendant waived his right to legal counsel and freely and voluntarily made the signed statement are fully supported by competent and uncontradicted evidence. These findings, therefore, are conclusive on appeal and this Court cannot properly set aside or modify them. *State v. Thacker,* 281 N.C. 447, 189 S.E. 2d 145 (1972); *State v. Harris,* 279 N.C. 177, 181 S.E. 2d 420 (1971); *State v. McRae, supra; State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966). Accordingly, we hold that the trial judge properly admitted into evidence defendant's signed statement.

[4] Defendant next alleges that the trial judge erred in his charge to the jury by stating the State's contention regarding the intoxication of defendant and not stating defendant's contention. A judge is not required by law to state the contentions of the parties, but when he does give the contention of the State on a particular phase of the case, it is error to fail to give defendant's opposing contention arising out of the evidence on the same aspect of the case. *State v. Cook,* 273 N.C. 377, 160 S.E. 2d 49 (1968); *State v. King,* 256 N.C. 236, 123 S.E. 2d 486 (1962). The trial judge's charge in this case, however, reveals no support for defendant's allegations. The judge charged on contentions as follows:

> "Officer Sutton on cross examination testified that he smelled a faint odor of alcohol about the defendant at the time he had him in the car; he didn't smell it out on the street but he smelled it when he got him in the police car.
>
> "Officer Helms testified that the defendant, before he made a statement to him about what occurred there, said he

had had eight or nine drinks and a number of beers, but didn't say exactly when he had had them.

"*The defendant would contend that you should consider that in this case.* (Emphasis added.) . . . The State would contend that he was not intoxicated, that the officers knew him and that they testified that he was not. That is a matter for you to determine."

The trial judge further charged on the effect of intoxication as follows:

". . . [V]oluntary intoxication is not a legal excuse for crime. However, if you find that the defendant was intoxicated, you should consider whether this condition affected his ability to formulate the specific intent which is required for the conviction of first degree murder. In order for you to find the defendant guilty of first degree murder, you must find beyond a reasonable doubt that he killed the deceased with malice and in the execution of an actual specific intent to kill, formed after premeditation and deliberation. If, as a result of intoxication, the defendant did not have the specific intent to kill the deceased, formed after premeditation and deliberation, he is not guilty of first degree murder. Therefore, I charge you that if, upon considering the evidence with respect to the defendant's intoxication, you have a reasonable doubt as to whether the defendant formulated the specific intent required for a conviction of first degree murder, you will not return a verdict of guilty of first degree murder, but will consider whether you find the defendant guilty of second degree murder, as I have heretofore charged you, or not guilty."

[5, 6] The general rule in this State is that objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires 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. Tart,* 280 N.C. 172, 184 S.E. 2d 842 (1971); *State v. Williams,* 279 N.C. 515, 184 S.E. 2d 282 (1971); *State v. Butler,* 269 N.C. 733, 153 S.E. 2d 477 (1967). No such objections were made in this case. Moreover, at the end of the charge the trial judge asked if there were any requests for further instructions. Defense counsel replied in the negative. In view of the court's full explanation on the effect of intoxication, we do

not see how defendant could have been prejudiced by the failure of the court to further state defendant's contention. This assignment is without merit.

[7] Lastly, defendant contends that the trial court erred in its charge by not defining "reasonable doubt." In the absence of a special request, the trial court is not required to define the term "reasonable doubt." *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971); *State v. Ingland,* 278 N.C. 42, 178 S.E. 2d 577 (1971); *State v. Potts,* 266 N.C. 117, 145 S.E. 2d 307 (1965). Defendant made no such request, and therefore it was not necessary for the court to define this term.

Defendant has had a fair trial, free from prejudicial error. The jury's verdict is fully supported by the evidence, and the judgment must therefore be upheld.

No error.

STATE OF NORTH CAROLINA v. RALPH WAYNE RANKIN

No. 41

(Filed 14 November 1973)

1. **Criminal Law § 9— aider and abettor — findings required for conviction**

The mere presence of defendant at the scene of a crime, even though he is in sympathy with the criminal act and does nothing to prevent its commission, does not make him guilty of the offense; rather, to sustain a conviction of the defendant as principal in the second degree, the State's evidence must be sufficient to support a finding that the defendant was present, actually or constructively, with the intent to aid the perpetrator in the commission of the offense should his assistance become necessary and that such intent was communicated to the actual perpetrator.

2. **Larceny § 7— purse snatching — defendant as aider and abettor — sufficiency of evidence**

In a prosecution for larceny from the person where the evidence tended to show that the victim did not observe the purse snatcher and his companions in an alley prior to the time she was overtaken and her purse pulled from her grasp, but she then turned and observed the snatcher, defendant and a third person standing only a few feet apart, the snatcher emptied the purse of its contents, the three men then ran away together out of the alley, slowed down as they entered a street so as to make themselves less conspicuous and then proceeded together as if nothing had happened into a store where they made a

purchase, such evidence was sufficient to permit, though not to compel, the jury to find that defendant was present at the scene of the offense for the purpose of aiding the purse snatcher and that the snatcher was aware of such purpose.

3. **Criminal Law § 75— statement of codefendant — admissibility**

The trial court did not err in allowing testimony by an officer as to a statement made to him by one codefendant where the statement was voluntarily made and nothing in the statement related to defendant.

4. **Criminal Law §§ 118, 163— charge on State's contentions — failure of defendant to object — waiver of objection**

Where the evidence was sufficient to support a reasonable inference in accord with the State's contention as stated by the court, any error in the court's statement of the contentions of the State should have been brought by defendant to the attention of the court before the jury retired to consider its verdict and his failure to do so is a waiver of such error.

5. **Larceny § 8— larceny from the person — sufficiency of instructions**

In a prosecution for larceny from the person, the trial court's instructions to the jury concerning the elements of the offense with which defendants were charged and those things which the State was required to prove in order to convict were proper.

APPEAL by defendant from the decision of the Court of Appeals, reported in 18 N.C. App. 252, 196 S.E. 2d 621, finding no error in the judgment of *Crissman, J.*, sentencing the defendant to eight to ten years in the State prison upon his conviction of the offense of larceny from the person. The defendant's right to appeal arises from the dissenting opinion of Hedrick, J.

The indictment upon which the defendant was tried charges that on the date specified he "feloniously did steal, take and carry away from the person of Lucille Mitchell Langston" a purse containing approximately $15.00, the property of Lucille Mitchell Langston.

The appellant and two others, Crawford and Speed, were charged in separate indictments with this offense. The three cases were consolidated for trial. The evidence for the State is to the following effect:

At approximately 2:15 p.m. on 7 October 1972, Mrs. Langston, having had lunch at the S&W Cafeteria in Greensboro, was returning to her place of employment. She walked along South Elm Street to an alley running between Coe's Grocery Store and Southside Hardware to the parking lot in the rear of her place

of employment. She turned into the alley and had almost reached the parking area when a person, identified by her as Crawford, jerked at her pocketbook and said, "Give me your money." Turning, she observed Crawford, standing immediately behind her, and two others, whom she identified as Speed and Rankin, the three standing five or six feet apart. Crawford again jerked at her pocketbook and she released it. He then opened it, removed the billfold, opened it, took out the money which she had therein and threw the billfold and purse on the ground. Crawford then said to her, "You better not come this way." Then all three men started running and ran around the buildings. The two men with Crawford never spoke.

In response to Mrs. Langston's cries, Raymond McDonald, who had been sitting in a car parked nearby, came and ascertained what had happened. Before reaching Mrs. Langston he had observed the three defendants run down the alley to South Elm Street, turn onto it, stop and then go north along South Elm Street "like nothing had happened." Mr. McDonald first went into Coe's Grocery and asked that the police be called. Police officers arrived shortly and Mr. McDonald gave them a description of the clothing worn by the three men. He then went out to Elm Street, saw the men walking along it, walked after them and saw them go into Blumenthal's Store. He sought the assistance of two other police officers and, with them, walked into Blumenthal's Store and pointed the three defendants out to the officers, who took them outside the store. In the courtroom, he identified the three defendants as the three men he had seen run from the alley, walk along South Elm Street, enter Blumenthal's Store and leave the store with the two police officers.

After leaving Blumenthal's Store, the three defendants ran away from the officers but were pursued, captured and taken to jail. About 15 minutes elapsed from the time Mr. McDonald first saw Mrs. Langston to the time he pointed out the three men in Blumenthal's Store. At that time they were engaged in purchasing a pair of gloves. They denied their guilt and said they were waiting for a bus.

At the jail the three men were placed in separate cells. Approximately 20 minutes later one of the arresting officers went to Speed's cell to make "a clothing description" for the officer's report. Speed asked the officer what was the charge against him. The officer answered, "Taking a lady's purse." Upon objection by the defendants' counsel to Speed's response

to this statement, the trial court conducted a voir dire in the absence of the jury. On the voir dire the officer testified that he did not ask Speed any questions but simply responded to Speed's question concerning the charge against him. The court found as a fact that Speed was not being questioned and volunteered his statements to the officer. Upon this finding, the court overruled the objection and the officer proceeded to testify that Speed stated, in response to the officer's statement concerning the charge, that he did not take it, he just watched.

The defendants did not testify but called as witnesses in their behalf the proprietor of Coe's Grocery Store and one of the officers who came to interview Mrs. Langston immediately after the offense. Both of these witnesses testified that Mr. McDonald was much excited when talking to the officers in Coe's Grocery Store immediately after the offense occurred and before he proceeded to Blumenthal's Store. The officer testified that Mr. McDonald described the clothing worn by the three men who ran from the alley, his description being not entirely in accord with the clothing worn by the defendants when taken into custody.

Only the defendant Rankin appealed to the Court of Appeals.

Attorney General Morgan by Associate Attorney Sloan for the State.

Dallas C. Clark, Jr., Assistant Public Defender, for defendant appellant.

LAKE, Justice.

The serious question presented by this appeal is whether the evidence for the State is sufficient to withstand this appellant's motion for judgment of nonsuit (Assignment of Error No. 3). Like the Superior Court and the majority of the Court of Appeals, we hold that it is.

As Justice Parker, later Chief Justice, said in *State v. Taft,* 256 N.C. 441, 124 S.E. 2d 169, "It is thoroughly established law in this State that, without regard to any previous confederation or design, when two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty." *State v. Terry,* 278 N.C. 284, 179 S.E. 2d 368; *State v. Johnson,* 272 N.C. 239, 158 S.E. 2d 95; *State v. Craddock,* 272 N.C. 160, 158 S.E. 2d 25. To be sufficient to

sustain a conviction, it is not necessary that the evidence for the State show the defendant struck the blow, seized or carried away the property or spoke any word at the time and place of the offense. *State v. Terry, supra; State v. Johnson, supra; State v. Childress,* 267 N.C. 85, 147 S.E. 2d 595.

[1] The mere presence of the defendant at the scene of a crime, even though he is in sympathy with the criminal act and does nothing to prevent its commission, does not make him guilty of the offense. *State v. Gaines,* 260 N.C. 228, 132 S.E. 2d 485; *State v. Hargett,* 255 N.C. 412, 121 S.E. 2d 589. To sustain a conviction of the defendant, as principal in the second degree, the State's evidence must be sufficient to support a finding that the defendant was present, actually or constructively, with the intent to aid the perpetrator in the commission of the offense should his assistance become necessary and that such intent was communicated to the actual perpetrator. Such communication of intent to aid, if needed, does not, however, have to be shown by express words of the defendant, but may be inferred from his actions and from his relation to the actual perpetrator. "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." Wharton, Criminal Law, 12th Ed., § 246, quoted with approval in *State v. Hargett, supra; State v. Holland,* 234 N.C. 354, 67 S.E. 2d 272; *State v. Williams,* 225 N.C. 182, 33 S.E. 2d 880; and *State v. Jarrell,* 141 N.C. 722, 53 S.E. 127. *State v. Gaines, supra,* is distinguishable in that there the State offered exculpatory statements by the defendant and by the perpetrator of the offense, by which statements it was deemed bound.

It is elementary that, for the purpose of ruling upon a motion for judgment of nonsuit, evidence for the State is taken to be true, every reasonable inference favorable to the State is to be drawn therefrom and discrepancies therein are to be disregarded. *State v. Felton,* 283 N.C. 368, 196 S.E. 2d 239; *State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779; *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469. The immediate flight of the defendant from the scene of the crime is a circumstance to be considered by the jury, although not sufficient per se to withstand the motion for judgment of nonsuit. *State v. Gaines, supra.*

[2] Here, the evidence for the State is that Mrs. Langston did not observe the purse snatcher and his companions in the nar-

row alley prior to the time she was overtaken and her purse pulled from her grasp. Turning immediately, she observed Crawford, the appellant and Speed standing only five or six feet apart. After her purse was snatched and emptied of its contents by Crawford, the three men ran away together out of the alley, slowed down upon turning the corner onto South Elm Street, which would make them less conspicuous, and then proceeded together "as if nothing had happened" into a store where they made a purchase. The evidence was sufficient to permit, though not to compel, the jury to find the appellant was present at the scene of the offense for the purpose of aiding Crawford and that Crawford was aware of such purpose. Thus, there was no error in the denial of the motion for judgment of nonsuit.

[3] The appellant's Assignment of Error No. 2 is to the admission of the testimony of Officer Rooker as to the statement made to him by the defendant Speed. The record shows clearly that this was a voluntary statement by the defendant Speed, no question whatever having been directed to him by the officer. Furthermore, nothing in the statement relates to the appellant. There is no merit in this assignment of error.

[4] Assignment of Error No. 4 relates to the court's statement of the contentions of the State in the charge to the jury. As above shown, the evidence is sufficient to support a reasonable inference in accord with the State's contention, as stated by the court, that "these three defendants were together on this occasion and that they planned to do just what was done here in the snatching of this woman's pocketbook." That being true, if there was any error in the court's statement of the contentions of the State, the defendant should have called such error to the attention of the court before the jury retired to consider its verdict and his failure to do so is a waiver of such error. *State v. Ford,* 266 N.C. 743, 147 S.E. 2d 198; *State v. Saunders,* 245 N.C. 338, 95 S.E. 2d 876; Strong, N. C. Index 2d, Criminal Law, §§ 118, 163. No error in this statement of the State's contention in this respect having been so called to the attention of the trial judge, this assignment of error is overruled.

[5] We find no basis for granting a new trial in the appellant's Assignments of Error Numbers 5 and 8, relating to the court's instructions to the jury concerning the elements of the offense with which the defendants were charged and to those things which the State was required to prove in order to convict. The

court plainly instructed the jury that the fact that it might find one of the three defendants guilty, or that it might find two of them guilty, did not require it to find the third defendant guilty. The court clearly and correctly instructed the jury as to the elements of the offense charged and as to what it must find in order to convict a defendant by reason of his aiding and abetting the actual perpetrator in the commission of the offense. Considering the charge in its entirety, we find no basis for believing that the jury could have been misled thereby. These assignments of error are, therefore, overruled.

The remaining assignments of error set forth in the case on appeal are either formal or are waived by the failure to bring them forward in the brief and there support them by reason, argument or citation of authority. Rule 28, Rules of Practice in the Supreme Court; *State v. Anderson,* 281 N.C. 261, 188 S.E. 2d 336; Strong, N. C. Index 2d, Criminal Law, § 166.

No error.

KENNETH GLUSMAN, PETITIONER v. THE TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA, RESPONDENTS

— AND —

ANTHONY B. LAMB, PETITIONER v. THE BOARD OF TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA, RESPONDENT

No. 71

(Filed 14 November 1973)

Colleges and Universities; Constitutional Law § 20— in-State tuition — residence requirements — invalidity of regulation

Regulation providing that a student classified as a nonresident for tuition purposes at the time of his original enrollment at a State institution of higher learning, in order to qualify for in-State tuition, must be domiciled in this State for at least six months preceding the date of reenrollment without being enrolled in an institution of higher education during the six-month period is invalid.

Justice HIGGINS dissenting.

ON remand from the Supreme Court of the United States.

At 10 January 1972 Civil Session of WAKE Superior Court, after setting forth the "Agreed Statement of Facts" and his

conclusions of law, *Judge Braswell* entered the following judgment:

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that the tuition regulations which provide that the residence status of any student is forever to be determined as of the time of his first enrollment in an institution of higher education in North Carolina, and that residence status may not thereafter be changed if he continues reenrollment without first having dropped out of school for at least a six-months' period, is declared unconstitutional.

"The cases of Kenneth Glusman, petitioner, and Anthony B. Lamb, petitioner, are each, hereby remanded to the Residence Status Committee of the University of North Carolina at Chapel Hill; which Committee shall conduct a hearing, after notice, and it shall make a determination of residence of each petitioner during the period involved in each petition; and it shall make such ruling and order as the true facts warrant.

"In its determination of residence status of each petitioner the respondent shall not apply its regulations so as to discriminate against a male student who, being married, has since his first enrollment established a bona fide residence in North Carolina, and whose wife would be qualified to be enrolled as an in-state resident by virtue of the husband being then a legal resident of the State of North Carolina.

"Court costs are taxed against the respondent."

The respondent, The Board of Trustees of the University of North Carolina, excepted and appealed.

The "Agreed Statement of Facts" disclosed the following:

Both Glusman and Lamb had the status of nonresidents of North Carolina for tuition purposes at the time of their original enrollment as students in the Law School of the University of North Carolina at Chapel Hill (Law School).

Glusman came to North Carolina in September of 1968. He attended the Law School from September 1968 until June 1969; from September 1969 until June 1970; and from September 1970 until June 1971.

Lamb came to North Carolina in September of 1969. He attended the Law School from September 1969 until June 1970;

from September 1970 until June 1971; and from September 1971 until December 1971.

Each was required to pay the higher rates of tuition charged nonresident students as provided by regulations adopted by the Board of Trustees of the University of North Carolina on 10 November 1967. [Subsequently enacted statutes, and subsequently adopted regulations, are not relevant.]

Glusman seeks a judgment for the asserted difference ($1407.50) between the in-State and out-of-State tuition fees of the Law School for the academic years 1969-1970 and 1970-1971. He asserts no claim for the academic year 1968-1969.

Lamb seeks an order classifying him as eligible for in-State tuition status in the Law School as of January 1970, less than six months from his coming into North Carolina. He contends he became a resident for tuition purposes in January 1970 on account of his marriage to Susan I. Lamb, who was domiciled in and a resident of Carrboro, Orange County, North Carolina.

One regulation provided in substance that a student classified as a nonresident for tuition purposes at the time of his original enrollment, in order to qualify for in-State tuition, must be domiciled in this State for at least six months preceding the date of reenrollment *without being enrolled in an institution of higher education during the six-month period.* The italicized portion of this regulation is attacked by both Glusman and Lamb.

Lamb further contended that the respondent's failure to classify him as a resident for in-State tuition purposes as of the date of his marriage to a North Carolina domiciliary constituted a deprivation of his constitutional rights; that Regulation No. 4 granted in-State tuition status to a nonresident woman upon her marriage to a North Carolina domiciliary; that his marriage to a North Carolina domiciliary conferred upon him the same tuition status Regulation No. 4 conferred upon the nonresident wife of a North Carolina domiciliary; and that the denial thereof amounted to invidious discrimination based on sex in violation of the equal protection clauses of the North Carolina and United States Constitutions.

This Court held that the regulations as interpreted by it were valid, were not subject to successful attack by petitioners,

and reversed Judge Braswell's judgment. *Glusman v. Trustees* and *Lamb v. Board of Trustees,* 281 N.C. 629, 190 S.E. 2d 213 (1972). Petitioners appealed. Reference is made to our prior decision for a complete statement of facts.

Upon consideration of petitioners' appeal, the Supreme Court of the United States entered the following order: "Judgment vacated and case remanded to the Supreme Court of North Carolina for further consideration in light of *Vlandis v. Kline, et al,* 412 U.S. 441, 37 L.Ed. 2d 63, 93 S.Ct. 2230 (1973)." *Glusman v. Board of Trustees of University of North Carolina,* 412 U.S. 947, 37 L.Ed. 2d 999, 93 S.Ct. 2999 (1973).

Kenneth Glusman, pro se.

Smith, Patterson, Follin & Curtis by Norman B. Smith for Anthony B. Lamb.

Attorney General Morgan and Deputy Attorney General Vanore for respondent appellees.

BOBBITT, Chief Justice.

With reference to the regulation attacked by both Glusman and Lamb, we now hold, on authority of *Vlandis v. Kline,* 412 U.S. 441, 37 L.Ed. 2d 63, 93 S.Ct. 2230 (1973), that a student who was classified as a nonresident for tuition purposes at the time of his original enrollment could become, upon establishing his domicile in North Carolina for six months or more, entitled to in-State tuition status notwithstanding during this six months' period he was enrolled in an institution of higher education in this State. This is in accord with Judge Braswell's holding with reference to that regulation.

In our prior decision, we held that Lamb did not become entitled to in-State tuition status in January 1970 on account of his marriage then to a North Carolina domiciliary. Neither petitioners' appeal to the United States Supreme Court nor *Vlandis v. Kline, supra,* involved that decision.

The "Agreed Statement of Facts" contains these stipulations: When they came to North Carolina, both Glusman and Lamb had the intent of remaining in the State for an indefinite period of time. Both established residence in the State of North Carolina for the purposes of voting and payment of taxes. "[T]he only reason why both were denied, after six months had

elapsed, reclassification for tuition purpose to that of resident is that neither maintained a residence in the State for six continuous months exclusive of time spent while in attendance at the University of North Carolina School of Law."

The stipulations establish that Glusman qualified for in-State tuition from September 1969 to June 1970 and from September 1970 to June 1971; and that Lamb qualified for in-State tuition from September 1970 to June 1971 and from September 1971 until December 1971.

The stipulated facts do not establish that Lamb was qualified for in-State tuition from September 1969 until June 1970. He acquired in-State tuition status only for periods beginning six months or more after September 1969.

Accordingly, the judgment of the court below is vacated. The case is remanded to the superior court with direction that it remand the case to the Residence Status Committee of the University of North Carolina at Chapel Hill for further proceedings in accordance with the law as declared herein.

Remanded with directions.

Justice HIGGINS dissenting.

I am unable to agree with that part of the Court's judgment which vacates the order entered in the Superior Court by Judge Braswell.

After reciting the agreed facts, Judge Braswell concluded:

(1) "NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that the tuition regulations which provide that the residence status of any student is forever to be determined as of the time of his first enrollment in an institution of higher education in North Carolina, and that residence status may not thereafter be changed if he continues reenrollment without first having dropped out of school for at least a six-months period, is declared unconstitutional.

(2) "The cases of Kenneth Glusman, petitioner, and Anthony B. Lamb, petitioner, are each, hereby remanded to the Residence Status Committee of the University of North Carolina at Chapel Hill; which Committee shall conduct a hearing, after notice, and it shall make a determination of

residence of each petitioner during the period involved in each petition; and it shall make such ruling and order as the true facts warrant.

(3) "In its determination of residence status of each petitioner the respondent shall not apply its regulations so as to discriminate against a male student who, being married, has since his first enrollment established a bona fide residence in North Carolina, and whose wife would be qualified to be enrolled as an in-state resident by virtue of the husband being then a legal resident of the State of North Carolina."

The clear purport of Judge Braswell's order is that the Residence Status Committee of the University shall conduct a hearing and determine the bona fide residence status of *each of the plaintiffs* uninhibited by the former rule that residence status is forever determined by the time of the first enrollment.

No. (3) above quoted should be treated as surplusage. It may be presumed from (1) and (2) that the Committee will not discriminate against either of the plaintiffs on account of his marital status.

For the reasons assigned in my dissenting opinion in *Glusman v. Trustees* and *Lamb v. Trustees*, 281 N.C. 629, 190 S.E. 2d 213, it is my view that Judge Braswell gave the proper direction for determining the rights of Glusman and Lamb under the facts agreed.

(MRS.) EVELYN BARTLETT, WIDOW OF ROBERT B. BARTLETT, DECEASED, EMPLOYEE-PLAINTIFF v. DUKE UNIVERSITY, EMPLOYER, AND GLENS FALLS INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8

(Filed 14 November 1973)

1. Master and Servant § 56— workmen's compensation — in the course of employment — arising out of employment

As used in the Workmen's Compensation Act, the phrase "in the course of the employment" refers to the time, place and circumstances under which an accidental injury occurs; "arising out of the employment" refers to the origin or cause of the accidental injury.

2. **Master and Servant § 56— workmen's compensation — causal relation between injury and employment**

To have its origin in the employment an injury must come from a risk which might have been contemplated by a reasonable person familiar with the whole situation as incidental to the service when he entered the employment.

3. **Master and Servant § 56— workmen's compensation — traveling employee — choking to death in restaurant**

There was no causal relation between the death of a university employee and his employment where the employee, during a trip to Washington, D. C., to recruit an employee for the university, choked to death on a piece of meat while dining at a public restaurant with an old friend whom the trip to Washington had enabled him to visit.

APPEAL by defendants under G.S. 7A-30(2) from the decision of the Court of Appeals affirming an award of the North Carolina Industrial Commission in favor of plaintiff-claimant.

Plaintiff, the widow of Robert B. Bartlett, a retired Commander in the Civil Engineering Corps of the United States Navy, instituted this proceeding by filing a claim with the North Carolina Industrial Commission to recover compensation under the Workmen's Compensation Act for the death of her husband. The essential facts, which are either stipulated or undisputed, follow:

On 12 March 1970 Bartlett was employed by Duke University as Construction Administrator, Senior Administrative Staff. On that date he went by airplane to Washington, D. C. to explore the possibility of securing for the University a maintenance engineer from retiring Naval personnel. The Architect and Director of Physical Planning for Duke University testified that this trip "was in the course and scope of his employment by Duke University." Upon his arrival in Washington, Bartlett went to the office of the Naval Facilities Engineering Command, where he remained for several hours. He procured the names of three retiring officers who were prospects for the position he was seeking to fill, and he arranged an appointment with one of them for the following morning, March 13th. Thereafter he went to the home of long-time friends of his family, where he was to spend the night.

About 6:30 p.m. Bartlett and his hostess, Mrs. Rigoulot, proceeded to the Orleans House, a restaurant in nearby Rosslyn. While eating shish kebab Bartlett aspirated a chunk of meat and immediately became unconscious. The rescue squad was

called, and he was promptly taken to a hospital in Arlington, Virginia. Bartlett never regained consciousness. On 30 April 1970, he was transferred to the Naval Hospital in Bethesda, Maryland, where he died on 10 June 1970 from complications arising from the aspiration of the meat.

Before embarking on his flight to Washington, Bartlett had obtained an advance travel allowance from the University. Upon documentation of his expenditures, in addition to the cost of transportation, Bartlett would have been entitled to reimbursement for subsistence in amounts not to exceed $16.00 per night for lodging and $3.50 per meal. The University had no policy against its employees staying in the home of friends while away on University business. "In lieu of documentation" he would have been entitled to a per diem subsistence allowance of $16.00.

On 12 March 1970 Bartlett and Duke University were bound by the provisions of the Workmen's Compensation Act, and defendant Glens Falls Insurance Company was the compensation insurance carrier for the University.

Plaintiff's claim was heard on 25 June 1971 by Industrial Commission Chairman J. Howard Bunn, Jr. He concluded that Bartlett's death resulted from an injury by accident arising out of and in the course of his employment, and awarded plaintiff the benefits provided by G.S. 97-38 and G.S. 97-25. Defendants appealed to the full Commission, which affirmed the findings and award of Chairman Bunn. From the Commission's decision defendants appealed to the Court of Appeals, which affirmed the Commission in a 2-1 decision. *Bartlett v. Duke University,* 17 N.C. App. 598, 195 S.E. 2d 371 (1973). One member of the panel having dissented, defendants appealed to this Court as a matter of right.

F. Gordon Battle, Theodore H. Jabbs, James B. Maxwell, and Bryant, Lipton, Bryant & Battle for plaintiff-appellee.

Newsom, Graham, Strayhorn, Hedrick, Murray & Bryson by Josiah S. Murray III for defendant appellant.

SHARP, Justice.

[1] Under the Workmen's Compensation Act plaintiff's right to recover compensation for the death of her husband depends upon whether it resulted from an "accident arising out of and in the course of his employment" by Duke University. G.S. 97-2(6).

As used in the Act the phrase, "in the course of the employment," refers to the time, place, and circumstances under which an accidental injury occurs; "arising out of the employment" refers to the origin or cause of the accidental injury. The two phrases involve two ideas and impose two conditions, both of which must be met to sustain an award. *Sweatt v. Board of Education,* 237 N.C. 653, 75 S.E. 2d 738 (1953).

Conceding *arguendo* that, from the time of his arrival in Washington on the morning of 12 March 1970 up to and including the time he accidentally aspirated the kebab while dining at a restaurant that evening, Bartlett was in the course of his employment, the determinative question is whether a causal relation existed between his choking on the meat and his employment.

As we noted in *Robbins v. Nicholson,* 281 N.C. 234, 238-9, 188 S.E. 2d 350, 354 (1972), "The term 'arising out of the employment' is not susceptible of any all-inclusive definition, but it is generally said that an injury arises out of the employment 'when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so there is some causal relation between the injury and the performance of some service of the employment.' "

[2] To have its origin in the employment an injury must come from a risk which might have been contemplated by a reasonable person familiar with the whole situation as incidental to the service when he entered the employment. The test "excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence." *In re Employer's Liability Assurance Corporation,* 215 Mass. 497, 499, 102 N.E. 697, 697 (1913) (quoted with approval in *Harden v. Furniture Co.,* 199 N.C. 733, 735, 155 S.E. 728, 729-30 (1930), and *Robbins v. Nicholson, supra* at 239, and in accord with other cases cited therein). *See Cole v. Guilford County,* 259 N.C. 724, 131 S.E. 2d 308 (1963).

[3] Applying the foregoing test to the facts of this case, we hold that there was no causal relation between Bartlett's employment and his aspiration of the kebab. His day's work over and, business engagements scheduled for the morrow, he was having a leisurely evening meal at a public restaurant with an old friend, whom the trip to Washington had enabled him to visit. In this relaxed situation he put "a very large piece of meat" in his mouth. His friend "was of the opinion that it was too large, that he should have cut it in half but he consumed it anyway and immediately after he began to choke."

The risk that Commander Bartlett might choke on a piece of meat while dining at the Orleans House was the same risk to which he would have been exposed had he been eating at home or at any other public restaurant in the Washington area. Whether employed or unemployed, at home or traveling on business, one must eat to live. In short, eating is not peculiar to traveling; it is a necessary part of daily living, and one's manner of eating, as well as his choice of food, is a highly personal matter.

The National Safety Council of America estimates that 2,500 Americans choke to death on food each year, making food inhalation the sixth leading cause of accidental death. Understandably, however, few cases are reported in which claimants have sought compensation for the death of an employee, traveling on business for his employer, who choked to death while eating in a restaurant away from home. One such case, however, is *Klein v. Terra Chemicals International, Inc.*, 14 Md. App. 172, 286 A. 2d 568 (1972). In denying the widow's claim for workmen's compensation benefits, the Court of Special Appeals of Maryland said:

"That Klein choked on a piece of meat at a public restaurant while in the course of his employment with Terra Chemicals was not, in our opinion, the result of any obligation, condition, or incident of his employment; it did not occur because of any business activity attributable to his work. Klein's accident did not follow as a natural incident of his work, it was not, within reasonable contemplation, the result of any special exposure occasioned by the nature of his employment. Nor could it be traced to his employment as a contributing proximate cause; it did not flow from a hazard peculiar to his work, or incidental to the character of his employment. The risk he encountered in the public restaurant of choking on a piece of meat was no

greater or different in degree because of his employment than the risk experienced by all persons engaged in the process of eating a meal, whether in a restaurant or at home. . . . In short, there was nothing in Klien's work, or in the conditions under which it was required to be performed, that caused his injury." *Id.* at 176-77, 286 A. 2d at 570-71.

In *Snyder v. General Paper Company,* 277 Minn. 376, 152 N.W. 2d 743 (1967), by a 4-3 decision (one member of the majority concurring specially), the Supreme Court of Minnesota held that the death of a traveling employee, caused by choking on a piece of meat in a hotel restaurant where the employee was entertaining a prospective customer pursuant to his employer's instructions, arose out of and in the course of the employment. Justice Nelson, speaking for the majority, said: "Workmen's compensation cases in this state indicate that an injury arises out of the employment if, after the event, it can be seen that the injury has its source in circumstances in which the employee's employment placed him." *Id.* at 383, 152 N.W. 2d at 748. This broad generality is not the law in this jurisdiction.

On the contrary, the opinions of the three dissenting justices accord with the rationale upon which we decide this case: (1) There is no "causal relationship between choking on a piece of steak and the employment of decedent, even though he was eating while he was on the job." *Id.* at 389, 152 N.W. 2d at 751. (2) Conceding that the decedent died while in the course of his employment, nevertheless, "the conditions of his employment had no bearing on the fact he choked to death. His injury resulted entirely from an unintentional but self-inflicted mishap. There is no evidence whatever that the choking was induced by any business activity." *Id.* at 390, 152 N.W. 2d at 752. (3) To hold decedent's death compensable is either to "write out of the statute the essential factor that an accident must 'arise out of' the employment or [to] set traveling salesmen apart for vastly more favorable treatment than is accorded other employees. This manifestly was not the legislature's intent." *Id.* at 393, 152 N.W. 2d at 754.

The decisions cited by plaintiff which involve injuries sustained by an employee while walking or riding from his hotel to a restaurant, while eating on the employer's premises, or which result from eating tainted food at a place where the employer required him to eat, are not pertinent to the question we have decided here. *See Thornton v. Hartford Accident &*

Indemnity Co., 198 Ga. 786, 32 S.E. 2d 816 (1945); *Tscheiller v. Weaving Co.*, 214 N.C. 449, 199 S.E. 623 (1938); 17 N. C. Law Rev. 458 (1939); 1 Larson, Workmen's Compensation Law, §§ 25, 25.21 (1972); Annots., 6 A.L.R. 1151 (1920); 57 A.L.R. 614 (1928).

In our view the unquestioned facts compel the conclusion that the accident which caused Commander Bartlett's untimely death did not arise out of his employment. The decision of the Court of Appeals is reversed with directions that it remand the cause to the Industrial Commission for the entry of an award in accordance with this opinion.

Reversed.

ROLAND HICKS v. JAMES MICHAEL ALBERTSON

No. 52

(Filed 14 November 1973)

1. **Costs § 1— attorneys' fees as part of costs**

The general rule in this State is that, in the absence of statutory authority therefor, a court may not include an allowance of attorneys' fees as part of the costs recoverable by the successful party to an action or proceeding.

2. **Costs § 3— damages action — attorneys' fees as part of costs — liberal construction of statute**

Since it is a remedial statute, G.S. 6-21.1, providing for the allowance of attorneys' fees as part of court costs in damages actions where the judgment is two thousand dollars or less, should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope.

3. **Costs § 3— attorneys' fees — discretionary award in settlement of case — presiding judge defined**

As used in G.S. 6-21.1, the term "presiding judge" means the judge presiding over the court in which the action is instituted, and such judge can, without danger of injustice, fix a reasonable fee for the attorney of the party recovering damages by settlement prior to trial.

4. **Costs § 3; Rules of Civil Procedure § 68— offer of judgment — inclusion of attorneys' fees — reasonable interpretation**

Where defendant offered to allow judgment to be taken "for the sum of $150 plus the costs accrued to the date of this offer," plain-

tiff's interpretation of the offer to include attorneys' fees as part of the costs was reasonable. G.S. 1A-1, Rule 68(a).

APPEAL by defendant from the decision of the North Carolina Court of Appeals, reported in 18 N.C. App. 599, 197 S.E. 2d 624, Judge Campbell having dissented therefrom.

The plaintiff brought this action in the District Court of Guilford County, High Point Division, for the recovery of $150.00 "and costs to include a reasonable attorney fee for plaintiff's attorney pursuant to G.S. 6-21.1," alleging that his automobile was damaged by the negligence of the defendant.

The defendant filed answer in which he asserted a counterclaim for the recovery of $350.00 as damages to his automobile, together with "the costs of this action, including a reasonable attorney's fee, to be taxed against the plaintiff."

The automobiles of the parties collided at an intersection of highways at which there was a traffic light. Each alleged that the driver of the other vehicle was driving at an excessive speed and ran through a red light. Each denied any negligence by the pleader or the driver of his vehicle.

Pursuant to Rule 68(a) of the Rules of Civil Procedure, G.S. 1A-1, the defendant made an offer "to allow judgment to be taken against him in the above entitled cause for the sum of $150.00 plus the costs accrued to the date of this offer." Within the time allowed by the rule, the plaintiff served a notice of acceptance of this offer of judgment "for the sum of $150.00 plus the costs accrued to the date of said offer to include as a portion of said cost attorney's fees to be taxed against the defendant pursuant to G.S. 6-21.1 accrued to said date in the discretion of the Court." On the same day the plaintiff served upon the defendant notice that the plaintiff would move the court to enter an order pursuant to G.S. 6-21.1 allowing reasonable attorney's fees as a portion of the costs.

Thereupon, the clerk entered judgment that the plaintiff have and recover of the defendant $150.00, "together with the costs accrued to January 31, 1973, including as a portion of said costs such attorney's fee as the court may order as having accrued in this matter as of January 31, 1973, pursuant to G.S. 6-21.1."

In due time plaintiff moved the court to tax a reasonable attorney's fee under G.S. 6-21.1 as a portion of the costs. This motion was heard before District Judge Haworth at a regular session of the District Court, counsel for both parties being present. Judgment was entered setting forth findings of fact made "upon the record and judicial admissions of counsel." Pertinent findings, in addition to findings of matters above stated, were: Prior to the institution of this action, the defendant denied all liability and refused to make any payment to the plaintiff; the plaintiff then retained counsel and instituted this action; defendant's counsel attempted to persuade plaintiff on two occasions to accept a lesser amount than that prayed for in the complaint, the plaintiff to pay his own counsel; finally, defendant's counsel recommended to the defendant that he pay the plaintiff's claim in the amount requested; and the reasonable value of the services of the plaintiff's attorney was $75.00. Upon these findings, the District Judge ordered that the costs of the action to be taxed against the defendant include the sum of $75.00 as a reasonable attorney's fee for the benefit of the plaintiff's counsel.

From the judgment so directing, the defendant appealed to the Court of Appeals, which affirmed the judgment of the District Court.

Henson, Donahue & Elrod by Joseph E. Elrod III for defendant appellant.

Clontz, Gardner & Tate by J. W. Clontz and Rossie G. Gardner for plaintiff appellee.

LAKE, Justice.

[1] "The general rule in this State is that, in the absence of statutory authority therefor, a court may not include an allowance of attorneys' fees as part of the costs recoverable by the successful party to an action or proceeding." *In re King,* 281 N.C. 533, 540, 189 S.E. 2d 158. "Except as so provided by statute, attorneys' fees are not allowable." *Baxter v. Jones,* 283 N.C. 327, 330, 196 S.E. 2d 193. See also, *Bowman v. Chair Co.,* 271 N.C. 702, 157 S.E. 2d 378. An exception, recognized in the case of a party who, by his own effort and at his own expense, has preserved or increased a common fund or common property in which others may share with him, has no application to the present case. See: *Hoskins v. Hoskins,* 259 N.C. 704, 131 S.E.

2d 326; *Rider v. Lenoir County,* 238 N.C. 632, 78 S.E. 2d 745; *Horner v. Chamber of Commerce,* 236 N.C. 96, 72 S.E. 2d 21; *Trust Co. v. Schneider,* 235 N.C. 446, 70 S.E. 2d 578.

G.S. 6-21.1 provides:

> "In any personal injury or property damage suit * * * instituted in a court of record, where the judgment for recovery of damages is two thousand dollars ($2,000.00) or less, the *presiding judge* may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs." (Emphasis added.)

[2] The obvious purpose of this statute is to provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that is not economically feasible to bring suit on his claim. In such a situation the Legislature apparently concluded that the defendant, though at fault, would have an unjustly superior bargaining power in settlement negotiations. It is, of course, a matter of common knowledge that a great majority of such claims arise out of automobile accidents in which the alleged wrongdoer is insured and his insurance carrier controls the litigation. This statute, being remedial, should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope. *Weston v. Lumber Co.,* 160 N.C. 263, 75 S.E. 800; 50 AM. JUR., Statutes, §§ 303-305; 82 C.J.S., Statutes, § 388.

In the present case, a suit was instituted in a court of record for property damage and the judgment for recovery of damages was less than $2,000. Thus, the case falls squarely within the language of G.S. 6-21.1, unless the provision in the statute that the *presiding* judge may allow the fee as part of the costs excludes this case from the beneficent purpose of the statute.

[3] Where the suit is actually brought to trial, it is clear that the Legislature contemplated that the judge who presided at the trial would determine whether a fee for the attorney of the party recovering damages should be allowed and, if so, the amount. Such judge would be in a better position than any other

to make this determination. To hold, as the defendant here contends, that this use of the adjective "presiding" shows the Legislature intended that no fee be allowed in any case settled without actual trial is, in our opinion, to give this word an unreasonably strict construction.

So to construe the statute would defeat its purpose in large part, for such construction would require the claimant to insist that the case be carried to trial, thereby enlarging the reasonable attorney's fee, in order that his net recovery equal his actual loss. In this statute, we construe the term "presiding judge" to mean the judge presiding over the court in which the action is instituted. Such judge can, without danger of injustice, fix a reasonable fee for the attorney of the party recovering damages by settlement prior to trial. Here, the fee allowed was fixed by such judge. The defendant does not contend that the amount of it was unreasonable.

Rule 68(a) of the Rules of Civil Procedure provides:

> "(a) *Offer of judgment.*—At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment * * * * "

In the present case, the clerk did enter judgment, providing therein that the plaintiff have and recover $150.00 together with the costs, including, as a portion of such costs, an attorney's fee to be fixed by the court. Under G.S. 6-21.1 the clerk had no authority to determine whether a fee should be allowed as part of the costs or to fix the amount of such fee.

[4] In his brief and oral argument in this Court, the defendant contended that the plaintiff's purported acceptance of the defendant's offer of judgment was, in reality, a counter-offer for the reason that while the defendant's offer was to allow judgment to be taken "for the sum of $150.00 plus the costs accrued to the date of this offer," the alleged acceptance added the provision for an attorney's fee. Both the plaintiff, in his complaint and in his reply, and the defendant, in his counterclaim,

prayed for the recovery of damages and costs, including a reasonable attorney's fee. G.S. 6-21.1 does not provide for the recovery of a reasonable attorney's fee in addition to the court costs but "as a part of the court costs." The acceptance of this offer of judgment by the plaintiff proceeded from a reasonable interpretation by the plaintiff of the defendant's offer. If this was not the interpretation intended by the defendant, the misunderstanding is due to ambiguous language used by the defendant in making his offer and the defendant must bear any loss resulting therefrom. *Yates v. Brown,* 275 N.C. 634, 170 S.E. 2d 477; *Root v. Insurance Co.,* 272 N.C. 580, 158 S.E. 2d 829; *Realty Co. v. Batson,* 256 N.C. 298, 123 S.E. 2d 744. Nothing in the record indicates that the defendant moved to vacate the judgment entered by the clerk on the ground of mistake or of failure of the plaintiff to accept the defendant's offer within the time allowed by Rule 68(a) of the Rules of Civil Procedure.

Rule 68(a) of the Rules of Civil Procedure provides for the making of an offer of judgment in a specified amount "with costs then accrued." Since the attorney's fee, when allowed, is "a part of the court costs" and the fee allowed was for services rendered prior to the date of the offer, we find nothing in Rule 68(a) which supports the position of the defendant.

The defendant further contends that the findings of fact by the judge of the District Court are not supported by evidence, there having been no evidence introduced at the hearing on the plaintiff's motion for the allowance of an attorney's fee as part of the court costs. The material findings are all fully supported by the pleadings, the offer of judgment, the notice of acceptance thereof and the motion for the allowance of the attorney's fee. In addition, the judgment refers to unspecified judicial admissions. Apparently these include some made in the argument of the motion.

The judgment of the Court of Appeals is, therefore,

Affirmed.

HOUSING AUTHORITY OF THE CITY OF GREENSBORO, NORTH CAROLINA v. MABEL L. FARABEE AND SPOUSE, IF ANY, R. D. DOUGLAS, JR., TRUSTEE, HOME FEDERAL SAVINGS AND LOAN ASSOCIATION, INC., CITY OF GREENSBORO, COUNTY OF GUILFORD AND ALL OTHER PERSONS, IF ANY, WHO MAY HAVE OR CLAIM AN INTEREST IN THE SUBJECT MATTER OF THIS PROCEEDING

No. 13

(Filed 14 November 1973)

1. **Statutes § 5— construction — legislative intent**

In the interpretation and construction of statutes, the task of the judiciary is to seek the legislative intent.

2. **Attorney and Client § 9; Costs § 1; Eminent Domain § 9— condemnation by housing authority — attorney fees of landowner**

The General Assembly used the word "plaintiff" in G.S. 160A-243.1 in its natural, ordinary meaning; therefore, the word "plaintiff" in the second paragraph of the statute cannot be construed to mean "landowner."

3. **Attorney and Client § 9; Costs § 1; Eminent Domain § 9— condemnation by housing authority — award of attorney fees to landowner — error**

The second paragraph of G.S. 160A-243.1 authorizes and directs the court to award counsel fees to a landowner only when a city, agency, board or commission takes possession of private property for a public purpose without first instituting a condemnation proceeding and the landowner, as plaintiff or petitioner, institutes an inverse condemnation proceeding against the condemning authority and recovers just compensation for the taking; therefore, an award of counsel fees to the landowner was not authorized by that statute when judgment was entered awarding title to a housing authority and compensation to the landowner in a proceeding instituted by the housing authority.

4. **Eminent Domain § 9— condemnation by housing authority — attorney fees of landowner**

The fact that the Legislature has provided for payment of reasonable attorney fees of the landowner when the power of eminent domain is exercised by an urban redevelopment commission, G.S. 160-456(2), may not be used by the courts to infer a similar intention in condemnation proceedings instituted by housing authorities under statutes containing no language definitely indicating such intent, the statutes under which urban redevelopment commissions and housing authorities were created not being *in pari materia* because they do not deal with the same subject matter.

ON *certiorari* to the Court of Appeals to review its decision, 17 N.C. App. 431, reversing judgment of *Webb, S. J.*, 10 July 1972 Session, GUILFORD Superior Court.

On 15 July 1971 the petitioner, Housing Authority of the City of Greensboro, instituted this proceeding under Chapter 40 and Chapter 157 of the General Statutes of North Carolina to condemn the real property described in the petition for the purpose of constructing a housing project thereon for low income elderly persons.

On 2 August 1971 the owner of the property, Mabel L. Farabee, answered the petition and included in her answer a prayer that the court costs be taxed against petitioner.

The right of the Housing Authority to condemn and the amount to be paid the property owner as just compensation are no longer in controversy.

Relying on the provisions of G.S. 160A-243.1, Mabel L. Farabee filed a motion before the Clerk on 13 January 1972 seeking an order requiring the petitioner to pay, in addition to just compensation for the property taken, "such sums as will in the opinion of the Court reimburse such respondent for her reasonable cost, disbursements, and expenses, *including reasonable attorney's fees* and appraisal fees, incurred on account of this proceeding." (Emphasis ours.) This motion was denied by the Clerk, and respondent appealed to the superior court where the matter was heard before Judge Webb.

On 23 August 1972, Judge Webb entered judgment providing, among other things, that reasonable attorney's fees should be awarded to respondent's counsel and taxed against petitioner in the amount of $3,967.00. Petitioner appealed from that portion of the judgment allowing attorney's fees as a part of the costs to be taxed against petitioner, and the Court of Appeals reversed. We allowed certiorari to review that decision.

Frye, Johnson & Barbee by Ronald Barbee, Attorneys for Housing Authority of the City of Greensboro, petitioner appellee.

Smith, Patterson, Follin & Curtis by Marion G. Follin III, Attorneys for Mabel L. Farabee, respondent appellant.

HUSKINS, Justice.

The sole question presented is whether the trial court is authorized by G.S. 160A-243.1 to tax counsel fees for the landowner as part of the costs to be paid by the Housing Authority. This requires analysis of the statute involved.

G.S. 160A-243.1 reads in pertinent part as follows:

"The court having jurisdiction of an action instituted by a city or an agency, board or commission of a city to acquire any interest in real property by condemnation shall award the owner of any right, or title to, or interest in, such real property such sum as will in the opinion of the court reimburse such owner for his reasonable cost, disbursements, and expenses, including reasonable attorney fees, appraisal, and engineering fees, actually incurred because of the condemnation proceedings, if the final judgment in the action is that the city or agency, board or commission of a city cannot acquire such real property or interest therein by condemnation, or if the proceeding is abandoned by the city, agency, board or commission of a city.

"The judge rendering a judgment for the plaintiff in a proceeding brought under Chapter 40 of the General Statutes awarding compensation for the taking of property by a city or an agency, board or commission of a city shall determine and award or allow to such plaintiff, as a part of such judgment, such sum as will in the opinion of the court reimburse such plaintiff for his reasonable cost, disbursements and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding."

We said in *Wake County v. Ingle,* 273 N.C. 343, 160 S.E. 2d 62 (1968): "When the relevant language of a statute is plain and unambiguous, there is no occasion for construction. Such being the case a statute must be given effect according to its plain and obvious meaning." The first paragraph of the statute quoted above directs the court to award reasonable attorney fees and other named expenses to the landowner (the owner of any right, or title to, or interest in, such real property) in two situations: (1) When there is a final judgment that the city, agency, board or commission of a city cannot acquire the property by condemnation or (2) when the city, agency, board or commission abandons the condemnation proceeding theretofore instituted by it. Here, the Housing Authority did not abandon the proceeding, and the final judgment authorized acquisition of respondent's property by condemnation. Clearly, therefore, the respondent landowner is not entitled to an award of attorney fees under this paragraph. We do not understand respondent to contend otherwise.

The crucial question, then, involves interpretation and construction of the second paragraph of the statute quoted above. Respondent landowner contends that the word "plaintiff" in the second paragraph should be construed to mean "landowner." Respondent notes that under the Urban Redevelopment Law (Article 37 of Chapter 160 of the General Statutes), when an urban redevelopment commission uses the power of eminent domain, such commission must pay reasonable counsel fees as part of court costs to the property owner whose land is taken. *See* G.S. 160-456(2). By analogy, respondent says that since housing authorities are similar in nature to redevelopment commissions, G.S. 160A-243.1 should be construed to give the landowner whose property is condemned by a housing authority under Article 1 of Chapter 157 of the General Statutes the same right to attorney fees enjoyed by landowners whose property is condemned by an urban redevelopment commission under Article 37 of Chapter 160 of the General Statutes.

[1] In the interpretation and construction of statutes, the task of the judiciary is to seek the legislative intent. *State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765 (1970); *Underwood v. Howland,* 274 N.C. 473, 164 S.E. 2d 2 (1968). "In the interpretation of statutes, the legislative will is the all important or controlling factor. Indeed, it is frequently stated in effect that the intention of the legislature constitutes the law. The legislative intent has been designated the vital part, heart, soul, and essence of the law, and the guiding star in the interpretation thereof." 50 Am. Jur., Statutes, § 223. When interpreting a statute, "it is reasonable to assume that the Legislature comprehended the import of the words it employed to express its intent . . . . " *State v. Baker,* 229 N.C. 73, 48 S.E. 2d 61 (1948). "Words in a statute are to be given their natural, ordinary meaning, unless the context requires a different construction." *In re Watson,* 273 N.C. 629, 161 S.E. 2d 1 (1968). Our task, therefore, is to seek the meaning of the word "plaintiff" as used by the General Assembly in G.S. 160A-243.1.

A condemnation proceeding is a special proceeding. *Collins v. Highway Commission,* 237 N.C. 277, 74 S.E. 2d 709 (1953). *See* G.S. 1-1 through G.S. 1-3. Frequently, the party commencing a special proceeding is referred to as "petitioner." *Redevelopment Commission v. Hagins,* 258 N.C. 220, 128 S.E. 2d 391 (1962); *Housing Authority v. Wooten,* 257 N.C. 358, 126 S.E. 2d 101 (1962). However, the party instituting a special proceed-

ing is referred to as "plaintiff" in G.S. 1-394, *viz:* "Special proceedings against adverse parties shall be commenced as is described for civil actions. The summons shall notify the defendant or defendants to appear and answer the complaint, or petition, of the plaintiff within ten days after its service upon the defendant or defendants, . . . " The interchangeable use of the words "plaintiff" and "petitioner" is found in our case law as well as our statutes.

For all practical purposes, the words "petitioner" and "plaintiff" are synonymous. "The nature of the proceeding and the court in which it is instituted determines which term is the more appropriate under the circumstances." *Utilities Commission v. Mills Corporation,* 232 N.C. 690, 62 S.E. 2d 80 (1950).

[2, 3] In our opinion the General Assembly used the word "plaintiff" in G.S. 160A-243.1 in its natural, ordinary meaning. The plaintiff is the "person who brings an action . . . . " Black's Law Dictionary 1309 (Rev. 4th ed. 1968). It necessarily follows that the second paragraph of G.S. 160A-243.1 authorizes and directs the court to award counsel fees to the landowner when, and only when, the city, agency, board or commission takes possession of private property for a public purpose without first instituting a condemnation proceeding and the landowner, as plaintiff or petitioner, institutes an inverse condemnation proceeding against the condemning authority and recovers just compensation for the taking. An award of counsel fees to the landowner is not authorized when judgment is entered awarding title to the condemnor and compensation to the landowner *in a proceeding instituted by the condemnor.* The Court of Appeals so held and we affirm.

[4] The Legislature has provided for the payment of reasonable attorney fees when the power of eminent domain is exercised by urban redevelopment commissions under Article 37 of Chapter 160 of the General Statutes, regardless of which party is plaintiff. This, however, has no legal significance here and may not be used by the courts to infer a similar intention in condemnation proceedings instituted by housing authorities under other statutes which contain no language definitely indicating such legislative intent. Housing authorities and urban redevelopment commissions are separate legal entities, possess separate and distinct powers, and the statutes under which they were created are not *in pari materia* because they do not deal with the same subject matter. " . . . [S]tatutes which have no

common aim or purpose and scope, and which do not relate to the same subject, object, thing, or person, are not *in pari materia.*" 50 Am. Jur., Statutes, § 350. Furthermore, "[s]tatutes *in pari materia* may not be resorted to to control the clear language of the statute under consideration." 50 Am. Jur., Statutes, § 348. Where, as here, the language of a statute is plain and definite, the statute must be construed as written. *State v. Wiggins,* 272 N.C. 147, 158 S.E. 2d 37 (1967); *State v. Ross,* 272 N.C. 67, 157 S.E. 2d 712 (1967); *In re Duckett,* 271 N.C. 430, 156 S.E. 2d 838 (1967). Courts are without power to interpolate, or superimpose, provisions and meanings not contained therein. *Board of Architecture v. Lee,* 264 N.C. 602, 142 S.E. 2d 643 (1965). If the present language of G.S. 160A-243.1 reflects a legislative inadvertence, the General Assembly must supply the correction.

The decision of the Court of Appeals, reversing that portion of the judgment of the trial court which awarded counsel fees to respondent as a part of the court costs taxed against petitioner, is in all respects

Affirmed.

STATE OF NORTH CAROLINA v. JAMES EDWARD PENLEY

No. 34

(Filed 14 November 1973)

1. **Criminal Law § 75— absence of counsel — statements by fifteen year old — voluntariness**

Where the fifteen year old defendant and his mother were advised of the defendant's constitutional rights, the mother signed a written waiver and consented to the interrogation, and defendant made statements to the officers which tended to exculpate him, defendant's objection to his interrogation without counsel is not sustained.

2. **Criminal Law § 84; Searches and Seizures § 2— warrantless search of house — consent by owner — evidence against defendant admissible**

The trial court in a rape case did not err in allowing into evidence defendant's blood stained pants found under his bed after his arrest when officers who conducted the search in question had no warrant but defendant's mother, who owned the house in which the pants were found, gave her consent for the search.

State v. Penley

APPEAL by defendant from *Exum, J.*, February 5, 1973 Regular Criminal Session, GUILFORD Superior Court (High Point Division).

In this criminal prosecution the defendant, James Edward Penley, was brought before the court to plead to the following bill of indictment:

"STATE OF NORTH CAROLINA
COUNTY OF GUILFORD

In the General Court of Justice, Superior Court Division

October 23rd Criminal Session, 1972

The State of North Carolina
v.
James Edward Penley, Defendant

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That James Edward Penley in Guilford County, on or before the 23rd day of September 1972, with force and arms, at and in the county aforesaid, did, unlawfully, wilfully and feloniously ravish and carnally know Janice Kay Johnson, nine years of age, a female, by force and against her will against the form of the statute in such case made and provided and against the peace and dignity of the state.

s/ W. DOUGLAS ALBRIGHT
Solicitor"

The court, on a proper showing, appointed Richard S. Towers, Assistant Public Defender, as counsel for the defendant. After arraignment and plea of not guilty, the State presented evidence of which the following is a short summary.

On and prior to September 23, 1972, Janice Kay Johnson, age nine years, lived with her father, Fred Johnson; her mother, Gladys Johnson; and two brothers, Ray Johnson, age fifteen, and Ricky Johnson, age thirteen. Their home was located near a wooded area on the outskirts of High Point. The three Johnson children slept in one bedroom—the boys together in a double bed and Janice in a single bed. Ray Johnson and the defendant, James Edward Penley, worked together after school hours and sometimes at night at the Archdale Soda Shop.

Ray Johnson testified that he and the defendant and two other boys left the shop about one o'clock at night. They bought

some wine and beer and went to an old rock quarry where they remained drinking for about one hour or one hour and a half. Ray Johnson became sick and went home. The defendant went to another place to get some cigarettes and then proceeded to the Johnson home. He entered the bedroom where the three children slept and lay down across the boys' bed. He testified that the next thing he remembered he was at home in his own bed surrounded by the officers.

Janice Johnson testified that she is nine years old and weighs forty-five pounds. She had previously seen James Penley and knew his name. She testified that on the morning of September 23rd, "[H]e [the defendant] picked me up and had his hand over my mouth and he carried me out. . . . It was nighttime . . . he took me out of the back door and into the woods behind my house. . . . [H]e pulled my clothes off and he put his private parts in me. Yes, sir, I tried to holler. . . . He told me if I didn't be quiet, he would kill me. . . . After the defendant finished with me, he ran."

The witness returned to the house in great distress, bleeding profusely. She told her father and mother what had happened. They reported to the police and took Janice to the hospital where she received medical treatment for severe vaginal injuries. She remained in the hospital for a number of days. Tests disclosed the presence of live male sperm in a smear taken from her vagina.

The officers arrested the defendant, James Edward Penley, in his own home. He was in bed apparently asleep. They interviewed his mother after they ascertained that he was fifteen years of age. They gave both the defendant and his mother, with whom he lived, the usual warnings and cautions. The mother signed the written waivers. Mrs. Penley gave the officers permission to search the house and the room where James slept. Under his bed they found his pants with fresh blood on them. At the scene in the woods back of the Johnson house the officers found fresh tracks and one of the defendant's shoes.

At the conclusion of the State's evidence the court overruled the defendant's motion to dismiss.

The defendant offered John Enloe as a witness who testified that he went to the rock quarry with the defendant, Ray

Johnson, and others, and that the defendant drank two bottles of wine and two beers. The defendant testified that he is fifteen years of age and that he went with Ray Johnson and other boys to the quarry where he drank two bottles of wine and about four or five beers. "I had never consumed a similar amount of alcohol before." After the party broke up, he and Ray Johnson left together on foot. They separated, Ray to go home, and he to find some cigarettes and matches. Later he went to the Johnson home as he had done before, went into the bedroom where the children slept, lay down across the boys' bed, and went to sleep. "I don't even remember going to my house." The defendant said, "I am about five-six, I weigh about 140 pounds."

It appears from the addendum to the record, certified to by the clerk of the superior court, that the jury returned this verdict: "[G]uilty of Rape as charged in the bill of indictment." A poll of the jury verified the verdict.

The court entered judgment that the defendant be imprisoned for the term of his natural life. The defendant excepted and appealed.

Robert Morgan, Attorney General, by Charles M. Hensey, Assistant Attorney General, for the State.

Richard S. Towers, Assistant Public Defender, for the defendant.

HIGGINS, Justice.

[1] The defendant, age fifteen, objected to the trial court's finding that he consented to being questioned in the absence of counsel. At the beginning of the interrogation the officers ascertained the defendant was fifteen years of age. They sent for his mother with whom he lived. Both the defendant and his mother were advised of the defendant's constitutional rights. The mother signed a written waiver and consented to the interrogation.

The defendant said he had been drinking. The last he remembered he lay down on Ray Johnson's bed and went to sleep. The next thing he remembered was the officers surrounding his bed. He testified to the same effect before the jury as a witness in his own defense. His statements to the officers tended to exculpate him.

The court's findings that he made a voluntary waiver of counsel, even though he is a minor, is supported by the record

and by decided cases. *Gallegos v. Colorado,* 370 U.S. 49, 8 L.Ed. 2d 325, 82 S.Ct. 1209; *State v. Roseman,* 279 N.C. 573, 184 S.E. 2d 289; *State v. Haskins,* 278 N.C. 52, 178 S.E. 2d 610. One who has arrived at the age and condition of accountability for crime may make a valid waiver of counsel and make a voluntary confession. *State v. Hill,* 276 N.C. 1, 170 S.E. 2d 885.

Actually, the defendant, as a witness in his own behalf, testified that he was intoxicated and remembered nothing after he arrived at the Johnson boys' bedroom, lay down on their bed, and went to sleep. He knew nothing thereafter until the officers aroused him from his own bed. The objection to the interrogation without counsel is not sustained.

[2] The defendant excepted to the introduction of his blood stained pants found under his bed after his arrest. The basis of the objection is the absence of a search warrant. The mother owned the house. She gave consent for the search. Her consent was sufficient. *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755.

The defendant's other objections related to the failure of the court to grant his motions to dismiss and to set the jury verdict aside. They do not require discussion.

In the trial and judgment, we find

No error.

BROADCASTING SYSTEM v. TAPE CORP.

No. 37 PC.

Case below: 19 N.C. App. 217.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1973.

BROWN v. CASUALTY CO.

No. 62 PC.

Case below: 19 N.C. App. 391.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 1 November 1973.

CAMPBELL v. CHURCH

No. 32 PC.

Case below: 19 N.C. App. 343.

Petition for writ of certiorari to North Carolina Court of Appeals and for writ of supersedeas denied 1 November 1973.

CITY OF GASTONIA v. POWER CO.

No. 61 PC.

Case below: 19 N.C. App. 315.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1973.

COMR. OF INSURANCE v. ATTORNEY GENERAL

No. 48 PC.

Case below: 19 N.C. App. 263.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1973. Motion to dismiss appeal for lack of substantial constitutional question allowed 1 November 1973.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

DEVINE v. CASUALTY & SURETY CO.

No. 41 PC.

Case below: 19 N.C. App. 198.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1973.

DICKINSON v. PAKE

No. 47 PC.

Case below: 19 N.C. App. 287.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 1 November 1973.

FORSYTH COUNTY v. YORK

No. 65 PC.

Case below: 19 N.C. App. 361.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1973.

HENDRIX v. DEWITT, INC.

No. 56 PC.

Case below: 19 N.C. App. 327.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1973.

IN RE MITCHELL

No. 34 PC.

Case below: 19 N.C. App. 236.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 1 November 1973.

INSURANCE CO. v. SUPPLY CO.

No. 36 PC.

Case below: 19 N.C. App. 302.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1973.

LINCOLN COUNTY v. SKINNER

No. 25 PC.

Case below: 19 N.C. App. 127.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1973.

MANESS v. BULLINS

No. 63 PC.

Case below: 19 N.C. App. 386.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1973.

MANESS v. BULLINS

No. 64 PC.

Case below: 19 N.C. App. 388.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1973.

MCA, INC. v. TAPE CORP.

No. 40 PC.

Case below: 19 N.C. App. 218.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1973.

RECORDS v. TAPE CORP.

No. 39 PC.

Case below: 19 N.C. App. 207.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1973.

RECORDS v. TAPE CORP.

No. 38 PC.

Case below: 19 N.C. App. 219.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1973.

SCHAFRAN v. CLEANERS, INC.

No. 66 PC.

Case below: 19 N.C. App. 365.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1973.

STATE v. ALEXANDER

No. 120 PC.

Case below: 18 N.C. App. 460.

Second petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1973.

STATE v. BROWN

No. 99.

Case below: 19 N.C. App. 480.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 21 November 1973.

STATE v. COLEMAN

No. 51 PC.

Case below: 19 N.C. App. 389.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1973.

STATE v. ELAM

No. 86.

Case below: 19 N.C. App. 451.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1973. Motion of Attorney General to dismiss appeal allowed 1 November 1973.

STATE v. GRANT

No. 54 PC and No. 87.

Case below: 19 N.C. App. 401.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1973. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 1 November 1973.

STATE v. HAMILTON

No. 68 PC.

Case below: 19 N.C. App. 436.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1973.

STATE v. HUDSON

No. 60 PC.

Case below: 19 N.C. App. 440.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1973.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. KEITT

No. 71 PC.

Case below: 19 N.C. App. 414.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1973.

STATE v. McKINNEY

No. 50 PC.

Case below: 19 N.C. App. 249.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1973.

STATE v. MORRISON

No. 77 PC.

Case below: 19 N.C. App. 573

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1973.

STATE v. NORMAN

No. 46 PC.

Case below: 19 N.C. App. 299.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1973.

STATE v. PERRY

No. 55 PC.

Case below: 19 N.C. App. 449.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1973.

STATE v. RICHARDSON

No. 78 PC.

Case below: 14 N.C. App. 86.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1973.

STATE v. STANBACK

No. 67 PC.

Case below: 19 N.C. App. 375.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1973.

STATE v. WALSH

No. 53 PC.

Case below: 19 N.C. App. 420.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1973.

WILLIAMS v. GENERAL MOTORS CORP.

No. 59 PC.

Case below: 19 N.C. App. 337.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 November 1973.

STATE OF NORTH CAROLINA v. WILLIE FOSTER, JR.

No. 45

(Filed 12 December 1973)

1. **Burglary and Unlawful Breakings § 8; Constitutional Law § 36— maximum statutory sentence — no cruel and unusual punishment**

A sentence of imprisonment which is within the maximum authorized by statute is not cruel or unusual in a constitutional sense, unless the punishment provisions of the statute itself are unconstitutional.

2. **Criminal Law §§ 43, 60— fingerprints — photograph and opinion testimony admissible**

The trial court in a first degree burglary case did not err in admitting into evidence photographs which were properly authenticated as to accuracy and properly identified as enlargements of fingerprints lifted from flowerpots at the crime scene, nor did it err in allowing a police officer to testify as to his comparison of defendant's known fingerprint with the latent print and to give his opinion that the prints were made by the same finger.

3. **Criminal Law §§ 43, 60— fingerprint photograph — use by second expert witness — competency of testimony**

Where photographs of fingerprints had already been authenticated as to their accuracy and had already been introduced into evidence and used by another fingerprint expert to illustrate his testimony, testimony of a second fingerprint expert referring to the photographs was competent and did not constitute an improper use of the photographs.

4. **Criminal Law §§ 43, 60— fingerprint photograph — admissible as substantive evidence**

A photograph of fingerprints, when shown by extrinsic evidence accurately to represent, depict or portray the print it purports to show, is admissible as substantive evidence.

5. **Criminal Law §§ 60, 169— evidence of fingerprint card in master police file — harmless error**

Though the trial court erred in allowing into evidence testimony concerning a fingerprint card allegedly bearing the print of defendant in the master file at the police department where no foundation had been laid by evidence that the fingerprint on the master file card was in fact a fingerprint of this defendant, the error was harmless beyond a reasonable doubt.

6. **Criminal Law § 86— cross-examination of defendant — inquiry as to other offenses committed**

The trial court did not err in permitting the State to ask defendant on cross-examination for impeachment purposes whether he had committed other named criminal offenses unrelated to the case under consideration and for which he had not been tried or convicted.

7. **Criminal Law § 128— cross-examination — motion for mistrial — denial proper**

The trial court in a first degree burglary case did not abuse its discretion in denying defendant's motion for a mistrial where defendant contended that an unfinished question asked him during cross-examination but abandoned after a discussion in the absence of the jury deprived him of a fair trial.

8. **Criminal Law § 93— order of proof — discretionary matter**

The admission in a criminal prosecution of evidence as a part of rebuttal, when such evidence would have been properly admissible in chief, rests in the sound discretion of the trial judge and will not be interfered with in the absence of gross abuse of that discretion.

9. **Criminal Law § 111— error in instructions — immediate correction sufficient**

Defendant was not prejudiced where the trial court instructed the jury to disregard an inadvertent statement previously made and then proceeded to charge the jury correctly, since the inadvertence was discovered immediately and the correction was prompt and complete.

10. **Burglary and Unlawful Breakings § 7— first degree burglary — submission of lesser degrees of crime — harmless error**

Error of the trial court in a first degree burglary case in submitting the lesser included offenses of felonious and non-felonious breaking or entering was in defendant's favor, and the charge on those offenses, in view of the verdict of guilty of first degree burglary, was immaterial.

11. **Burglary and Unlawful Breakings § 5— first degree burglary — fingerprint evidence — sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a first degree burglary case where it tended to show that a fingerprint lifted from a flowerpot in the victim's home was in fact a print of defendant's right index finger, that the print of defendant's right index finger was placed on the flowerpot by defendant on the occasion referred to in the indictment, and that defendant was present when the crime charged in the indictment was committed and at least participated in its commission.

Chief Justice BOBBITT dissenting.

Justice SHARP joins in the dissenting opinion.

APPEAL by defendant from judgment of *Chess, S.J.*, 19 February 1973 Schedule "D" Conflict Criminal Session, MECKLENBURG Superior Court.

Defendant is charged in a bill of indictment, proper in form, with burglary in the first degree of the dwelling house of James Harley Davis located at 3422 Kentucky Avenue in

Charlotte. He was first tried for this offense at the 1 May 1972 Schedule "C" Regular Criminal Session of Mecklenburg Superior Court, convicted by the jury, and sentenced to life imprisonment. On appeal we awarded a new trial due to erroneous admission of hearsay evidence. See 282 N.C. 189, 192 S.E. 2d 320 (1972).

Evidence offered by the State tends to show the facts narrated below.

On 5 September 1971 James Harley Davis, his wife Rosa Mae Davis, their twelve-year-old daughter and ten-year-old son were at home in their dwelling at 3422 Kentucky Avenue. The house had five rooms consisting of three bedrooms, a living room and a kitchen. On Saturday night, 4 September 1972, Mr. Davis and his son went to bed about 9:00 or 9:30 p.m. in the daughter's bedroom. Mrs. Davis and the daughter slept in the front bedroom and went to sleep about 12 midnight. The bathroom was between and accessible from the front bedroom in which Mrs. Davis was sleeping and the back bedroom in which Mr. Davis was sleeping. The third bedroom in which the son normally slept was unoccupied that night due to a fresh paint job. The windows in the son's bedroom were left open so the odor of the paint might escape. The screens were in place and were latched by hooks.

Mrs. Davis awoke at approximately 1:50 a.m. A man was leaning over her beside the bed with his hands on her arms and leg. He was wearing a dark jacket with two white stripes down the sleeves and had a mask or stocking over his head. She called her husband several times, and each time the man would say, "sh-sh-sh." When the man stood up and turned her loose, she sat up in bed and screamed. He struck her in the face and ran toward the living room. He stopped, turned around, heard Mr. Davis coming through the bathroom, and ran out toward the kitchen. Mr. Davis, awakened by his wife's screams, searched for the intruder without success.

The police were called. Investigation revealed that the screen in the son's bedroom, which was in place and fastened when the family retired for the night, had been removed. Mr. Davis's pants and shirt were found in the son's bedroom, his empty wallet on the bed and his money gone. A television set and record player located in the corner of the living room were missing. Plastic flowerpots on stands approximately two and

one-half feet tall, one on each side of the television, had been moved from their regular location toward the center of the living room. Mrs. Davis had owned these two flowerpots about three years and had planted flowers in them many times. "I would change them and plant more flowers. I would wash the pots, loosen the dirt and put fresh dirt in. I kept the pots in the living room and they always stayed indoors."

There was evidence that neither Mrs. Davis nor her husband had known on seen defendant prior to 5 September 1971; that defendant had never been inside the Davis home; and that defendant had no permission "to come into or carry my television set or stereo or anything out of my home." None of the missing property has ever been recovered.

Officers Cobb and Adams of the Charlotte Police Department arrived at the Davis residence at approximately 2:45 a.m. on the morning of 5 September 1971. Cobb was trained and experienced in dusting for fingerprints and had with him the necessary equipment for lifting latent prints. After speaking with the patrol officers who were already there handling the preliminary investigation, Cobb and Adams entered the house and Cobb dusted for fingerprints around an open window in the son's bedroom but was unable to take any prints from that area. In the living room Cobb dusted two plastic flowerpots and lifted three latent fingerprints from one of them. The lifts were made by placing a clear plastic Scotch tape over the prints which showed up in the dust. The three prints thus lifted from the flowerpot were put on a three by five white index card. Officer Cobb handed this card to Officer Adams who made certain identifying notations thereon, *viz*: the complainant's name and address, the complaint number of this case, the offense, date, and his signature as technician. Adams put the card in a five by seven envelope and placed it in the "Crime Lab" at the Charlotte Police Department for the attention of Officer Stubbs. Later, Officer Adams got the card back from Officer Stubbs and used a fingerprint camera to photograph one latent print on the card designated by Officer Stubbs for enlargement purposes. The photograph thus taken was enlarged and given to Officer Stubbs.

Officer Stubbs is a fingerprint expert. Upon receiving from Officer Adams the latent lift from the flowerpot in the Davis home, he searched the master fingerprint file maintained in his

office to see if the latent print could be identified from any print in the master file. Based on leads thus obtained, defendant Willie Foster, Jr., was arrested and fingerprinted on 22 October 1971 in the booking office of the county jail by Preston Pendergrass, Jr., one of the Breathalyzer officers. In order to eliminate the necessity for Pendergrass to appear as a witness in this case, Officer Stubbs personally fingerprinted defendant on 12 November 1971, and a card bearing these fingerprints is State's Exhibit 2. An enlargement of defendant's right index fingerprint, as same appears on State's Exhibit 2, is reproduced on the left hand side of State's Exhibit 1.

The right hand side of State's Exhibit 1 purports to be an eight by ten enlargement of the photograph Officer Adams made of the latent print lifted from the flowerpot and given to Officer Stubbs. This "blowup" is the focal point of controversy in this case. The three by five card on which Officer Adams placed the latent print lifted from the flowerpot has been misplaced or lost from the clerk's office and was not available at this, the second, trial for visual comparison with the "blowup." The folder to which the "blowup" is attached has on it the words "latent print." No identifying data on the lost three by five card appears *in* this photograph of the one identifiable print placed on the card. However, written *on* the bottom right corner of the photograph is the number 71-77794. Officer Stubbs testified that "when I received the enlargements of the latent, in the lower right-hand corner I put in ink the complaint number that this print was involved with." Other testimony disclosed that the five by seven manila envelope, from which Officer Stubbs took the latent print card, had written on it "the name of the complainant, the address and complaint number which has been assigned to this particular case." Examination of the five by seven manila envelope, State's Exhibit 3, discloses the following words and numbers written across the top:

HB & L	James H. Davis	5 Sept 71
1st degree	3422 Kentucky	
	71-77794	

Defendant objected to the blowup photograph, contending it has not been established that said enlargement is a blowup of the latent lift taken from the flowerpot and placed on the now lost three by five card.

On voir dire in the absence of the jury, Officer Stubbs testified that the blowup photograph on the right hand side of State's Exhibit 1 under the lettering "latent print" fairly and accurately represents "a blowup photograph of the one identifiable print" he had observed on a three by five index card contained in an envelope in the "Crime Lab" marked for his attention: that it is "a blowup photograph of the identifiable print on the three by five card which on the front contained the notation, 'James Harley Davis' and '3422 Kentucky Avenue' and 'September 5, 1971.'" Based thereon, the court overruled defendant's objection, recalled the jury, and admitted in evidence State's Exhibit 1, State's Exhibit 2, and State's Exhibit 3. Then, over defendant's objection, Officer Stubbs testified that on the left of State's Exhibit 1 "is an enlargement of a known or inked fingerprint. On the right is an enlargement of what we call the latent or crime scene print. The comparisons between these two prints are made by what we call points of identification or characteristics." Officer Stubbs then pointed out thirteen characteristics which are identical in nature and in the same general places on the inked print and on the latent print. Based on his examination of the two prints, Officer Stubbs testified that in his opinion both were made by the same finger.

On cross-examination Officer Stubbs said he did not know of his own personal knowledge "where the latent lift on a three by five card to which I have testified came from."

The evidence for defendant is narrated below.

Hazeline Foster, wife of defendant, testified that on the evening of Saturday, 4 September 1971, and throughout that night, defendant was home in bed; that the family did not own a television set before that date and her husband did not bring home a television on or about that date; that she did the washing for the family and her husband did not own a dark jacket with white stripes down the sleeves and did not own a ski mask.

Willie Foster, Jr., testifying in his own behalf, said he was thirty-four years of age and lived at 532 Center Street, Apartment 3, with his wife and son; that he had lived in Charlotte about twenty-five years; that he has always had more work than he could do including caddying for several years at the country club and working for a number of named individuals, particularly the Triple-A Heating Company; that he lives about a block and a half from Kentucky Avenue but has never been in

the Davis home; that he has never owned any type of ski mask or any type of dark jacket with white stripes down the side; that he did not have a television set in his home on 5 September 1971; and that he has been in jail for fourteen months on the present charge. He emphatically denied that he had ever been on the Davis premises or touched any flowerpots. He admitted he had been fingerprinted but denied the commission of any criminal acts in the past.

Mrs. Henry Wilson testified that defendant had done yard work and heavy indoor work in and around her home for two or three years prior to October 1971; that she had left him alone in her house on many occasions and knows other people who regard defendant as an honest and conscientious worker; that his general reputation in the community is excellent.

By way of rebuttal, the State examined Lawrence A. Kelly, Identification Technician in the sheriff's office. Mr. Kelly testified that he has worked in the identification of fingerprints for fifty years; that he was with the 27th C.I.D. Crime Lab in Europe for four years and nine months dealing with the identification of fingerprints of displaced persons; that he was with the Durham Police Department, the City-County Bureau of Identification in Fayetteville, and the Mecklenburg County Police Department for twenty years; that he has attended many seminars given by the F.B.I. during the past forty years dealing with the identification of fingerprints.

Over objection, Mr. Kelly testified that defendant's counsel hired and paid him to examine the two blowup photographs on State's Exhibit 1 and make a comparison between them; that he did so in November 1971; that in his opinion the print on the left and the print on the right were made by one and the same person.

At the close of all the evidence defendant renewed his motions previously made to exclude State's Exhibit 1 and to strike all testimony relative thereto, and again moved for judgment of nonsuit. These motions were denied. The jury returned a verdict of guilty of burglary in the first degree as charged in the bill of indictment and defendant was sentenced to life imprisonment. He appealed to the Supreme Court assigning errors discussed in the opinion.

Robert Morgan, Attorney General; William M. Melvin and William B. Ray, Assistant Attorneys General, for the State of North Carolina.

Eugene C. Hicks III and Tate K. Sterrett of Hicks & Harris, attorneys for defendant appellant.

HUSKINS, Justice.

Upon the call of this case for trial defendant moved to dismiss it and seven other criminal cases pending against him on the ground that the State had failed to provide him a speedy trial. Denial of the motion constitutes his first assignment of error.

We note from defendant's brief that he has abandoned this assignment insofar as it pertains to the case before us but continues to assert the right to have seven other criminal cases pending against him dismissed under G.S. 15-10.

It suffices to say that defendant may not, in this action, assert motions pertaining to other cases. The question whether defendant has been denied a speedy trial should be raised in the case to which it pertains and a hearing conducted to determine the matter. This is neither the time nor the place to debate or decide questions arising in cases not now before us. Defendant's first assignment of error is overruled.

Defendant's second and third assignments of error are based on denial of his motions to quash the bill of indictment and in arrest of judgment. He asserts that G.S. 14-52, authorizing the death penalty or life imprisonment as the punishment for burglary in the first degree, violates the cruel and unusual punishment prohibition of the Eighth Amendment to the Federal Constitution and Article I, sections 19 and 27, of the Constitution of North Carolina.

[1] We have consistently held that a sentence of imprisonment which is within the maximum authorized by statute is not cruel or unusual in a constitutional sense, unless the punishment provisions of the statute itself are unconstitutional. *State v. Mitchell,* 283 N.C. 462, 196 S.E. 2d 736 (1973) ; *State v. Cradle,* 281 N.C. 198, 188 S.E. 2d 296 (1972) ; *State v. Hilton,* 271 N.C. 456, 156 S.E. 2d 833 (1967). The federal rule is to like effect. *Martin v. United States,* 317 F. 2d 753 (9th Cir. 1963). First degree burglary committed prior to 18 January 1973 is punish-

able by life imprisonment. *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973); *State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664 (1972); *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726 (1972). Thus the judgment pronounced is within the maximum authorized by law. The constitutional question raised by these assignments has already been the subject of conclusive judicial determination. Defendant's second and third assignments have no merit and are overruled.

Defendant's sixth assignment of error is abandoned under Rule 28, Rules of Practice in the Supreme Court.

[2] Defendant assigns as error the admission over objection of testimony of Officer Stubbs relative to comparison of defendant's fingerprint with the latent print and his opinion based thereon and the admission into evidence of State's Exhibit 1, on the ground that since the three by five index card containing latent prints taken from the Davis home was lost and not produced at the trial, the State could not establish that the latent print examined by Officer Stubbs and photographed by Officer Adams was, in fact, the latent print lifted from the flowerpot in the Davis home. Hence he contends that the State has failed to establish that the photographs on both sides of the folder marked State's Exhibit 1 were in fact the photographs made by Officer Adams.

The State offered evidence which tends to show: (1) Officer Cobb obtained three latent fingerprint lifts from the flowerpot in the Davis home, placed them on a three by five white card, and handed the card to Officer Adams at the Davis home; (2) Officer Adams indicated on the card the complainant's name, address, the offense, the date, complaint number of the case, and the technician's signature; (3) the card was inserted in a five by seven envelope and placed in Officer Stubbs' file box in the crime laboratory under lock and key; (4) Officer Stubbs received the envelope containing the three by five index card with the latent prints on it, examined the latent prints, and later returned it to Officer Adams for photographic enlargement; (5) Officer Adams photographed the one identifiable latent print designated by Officer Stubbs, using a fingerprint camera for enlargement purposes; (6) the photographic enlargement of the latent print was returned to Officer Stubbs who wrote in ink the complaint number "71-77794" in the lower right hand corner of said enlargement; and (7) that the enlargement of the latent print shows the number 71-77794 in

the lower right hand corner and is the photograph which appears on the right side of the folder marked State's Exhibit No. 1. This chain of possession establishes unmistakably that the enlarged photograph on the right side of State's Exhibit 1 is a blowup of the one identifiable latent print lifted by Officer Cobb from the flowerpot in the Davis home.

Officer Stubbs testified without objection that he personally fingerprinted the defendant on 12 November 1971. The fingerprints thus obtained were placed on State's Exhibit 2 and delivered to Officer Adams. Without objection, Officer Adams testified that he photographed the print of defendant's right index finger as it appeared on State's Exhibit 2, made an eight by ten enlargement thereof, and that that enlargement is the photograph on the left side of State's Exhibit 1. This evidence establishes unmistakably that the enlarged photograph on the left side of the folder marked State's Exhibit 1 is the photograph of defendant's right index fingerprint which was personally inked by Officer Stubbs on 12 November 1971.

Then, using the photographs which constitute State's Exhibit 1 to illustrate his testimony, Officer Stubbs testified over objection that the photograph on the left side of State's Exhibit 1 fairly and accurately depicts a blowup of defendant's right index finger and the photograph on the right side of the folder marked State's Exhibit 1 fairly and accurately depicts a blowup of the one identifiable latent print on the three by five index card which he received in the five by seven envelope, State's Exhibit 3. Officer Stubbs then testified as follows:

> "Ladies and gentlemen, on the left of this folder is an enlargement of a known or inked fingerprint. On the right is an enlargement of what we call the latent or crime scene print. The comparisons between these two prints are made by what we call points of identification or characteristics. These are when we can find the identical characteristics on both prints. Some of these types of characteristics are called ridge endings. This is where these friction or capillary ridges of the fingers create the fingerprint pattern ridge. A ridge ending will come to an abrupt end. There are other characteristics like bifurcation. This is when two ridges are running along parallel and just run together to form one ridge. The bifurcations can either run clockwise or counterclockwise. There are also ridge dots. This is just a very short ridge in itself, usually between two of the longer

friction ridges. There are also islands in these friction ridges in many instances where one ridge will be running along and then fork out to make a small dot or island; but it is from the comparisons of these identical characteristics on two prints that we can ascertain that one print is identical with another. In this particular case, I have marked off thirteen characteristics which are identical in nature and in the same general places as on the latent print. . . . [A]s I said, there are thirteen marked off on this particular print. However, there are many more on here that I did not mark off, but I have convinced myself that these were made by the same finger."

We hold that State's Exhibit 1 was properly admitted. Decisions of this Court since *Honeycutt v. Brick Co.*, 196 N.C. 556, 146 S.E. 227 (1929), adhere to the rule that in the trial of cases, civil or criminal, photographs may not be admitted as substantive evidence but, where there is evidence of the accuracy of a photograph, a witness may use it for the restricted purpose of explaining or illustrating his testimony relative and material to some matter in controversy. Stansbury's North Carolina Evidence § 34 (Brandis rev. 1973); *State v. Tew*, 234 N.C. 612, 68 S.E. 2d 291 (1951). Accuracy is established where, as here, it is shown by extrinsic evidence that the photograph is a true representation of the scene, object or person it purports to portray. *State v. Tew, supra; State v. Rogers*, 233 N.C. 390, 64 S.E. 2d 572 (1951); *Spivey v. Newman*, 232 N.C. 281, 59 S.E. 2d 844 (1950); *State v. Matthews*, 191 N.C. 378, 131 S.E. 743 (1926); 3 Wigmore on Evidence § 793 (Chadbourn rev. 1970).

It should be noted that these photographs were admitted over defendant's general objection and there was no request that their use be limited or restricted. When a general objection is interposed and overruled, "it will not be considered reversible error if the evidence is competent for any purpose." *State v. Casper*, 256 N.C. 99, 122 S.E. 2d 805 (1961); *State v. Cade*, 215 N.C. 393, 2 S.E. 2d 7 (1939); Rule 21, Rules of Practice in the Supreme Court.

Since the photographs contained in State's Exhibit 1 had been properly authenticated as to accuracy and properly identified as enlargements of the fingerprints they purport to portray, the testimony of Officer Stubbs relative to comparison of defendant's known fingerprint with the latent print and

his opinion based thereon was properly admitted. Defendant's seventh and ninth assignments of error are without merit and therefore overruled.

[3] Lawrence A. Kelly, a fingerprint expert, testified over objection that defendant's counsel hired and paid him to examine the two enlarged photographs on State's Exhibit 1 and make a comparison of the two fingerprints shown thereon; that he did so in November 1971 and in his opinion the fingerprints shown in the two photographs were made by one and the same person. Defendant argues that the court permitted the witness Kelly to use the photographs in State's Exhibit 1 as substantive evidence, thus rendering his testimony incompetent. He contends that a witness cannot offer substantive testimony "based solely on photographs, when the photographs themselves cannot be used as substantive evidence." The admission of this testimony over objection and denial of defendant's motion to strike it constitutes defendant's fifteenth and sixteenth assignments of error.

Whether Kelly's testimony here is prohibited by the rule that photographs may be used for illustrative purposes only, and not as substantive evidence, is open to question. Since the photographs were at least competent for illustrative purposes and were admitted over defendant's general objection and there was no request that their use be limited or restricted, they were properly in evidence and may be regarded as generally admitted for all purposes. *State v. Casper, supra; State v. Cade, supra.* Moreover, for an expert witness to say that he has compared two photographs and in his opinion they depict a fingerprint made by the same finger is arguably not equivalent to use of the photographs as substantive evidence. Kelly is a fingerprint expert. By reason of his superior learning, knowledge and skill in the field of identification by fingerprints, he is better qualified than the jury to form an opinion as to whether the two fingerprints shown in the enlarged photographs in State's Exhibit 1 were made by the same finger. He was asked to express his expert opinion concerning the similarity or dissimilarity of photographs which had already been authenticated as to their accuracy and which had already been introduced in evidence and used by Officer Stubbs, another fingerprint expert, to illustrate his testimony. In this factual setting, Kelly's testimony was competent and no improper use of the photographs has been shown.

But if Kelly's use of the photographs as here depicted requires them to be characterized as substantive evidence, so be it. North Carolina's "illustrative" rule of evidence as applied to photographs has been criticized and long regarded as erroneous by numerous commentators. Dean Henry Brandis comments as follows in Stansbury's North Carolina Evidence § 34 (Brandis rev. 1973):

> "The North Carolina rule is that material of this sort is not substantive evidence and may be used only to illustrate or explain the testimony of a witness. Like the original author of this text, the present author confesses his inability to grasp the significance of this distinction. . . ."

McCormick on Evidence § 214 (2d ed. 1972), commenting on the North Carolina rule, says:

> "The foregoing doctrine concerning the basis on which photographs are admitted is clearly a viable one and has undoubtedly served to facilitate the introduction of the general run of photographs. Unfortunately, however, some courts have tended to carry the implications of the theory to unwonted lengths, admitting photographs as 'illustrative' evidence but denying them 'substantive' effect. It is believed that this distinction is essentially groundless, and fails to warrant the practical consequences which are sometimes seen to flow from it."

McKelvey on Evidence § 381 (5th ed. 1944) says:

> "Photographs as silent witnesses have come increasingly into use in the Courts for the purpose of independent proof of their subject matter. Their character, as a means of putting before the jury original evidence, is quite different from that of illustrative evidence. Instead of explaining to the jury the testimony of a witness, they picture original evidence which reaches the jury through no human witness. If shown to be competent and if their story is material they tell it themselves as silent witnesses of what they portray. Such evidence has its own independent probative value."

The "silent witness" theory as to the use of photographs is recognized with approval in 3 Wigmore on Evidence § 790 (Chadbourn rev. 1970) in the following language:

> "Given an adequate foundation assuring the accuracy of the process producing it, the photograph should then be

received as a so-called silent witness or as a witness which 'speaks for itself.' "

In 2 C. Scott, Photographic Evidence § 1022 (2d ed. 1969), the North Carolina rule is criticized in the following language:

> "Photographic evidence is admissible when it assists a witness in illustrating or explaining his testimony. This test . . . is probably the poorest reason for the use of photographs in that, considered by itself, it fails to recognize their independent probative value."

The theory of admitting photographs as "silent witnesses" is not new to North Carolina jurisprudence. Chief Justice Clark, dissenting in *Hampton v. Railroad,* 120 N.C. 534, 27 S.E. 96 (1897), urged adoption of a rule which allowed photographs to be used as a substitute for a jury view. This is substantially the same theory as the silent witness theory. 3 Wigmore on Evidence § 790 at 220 n. 4 (Chadbourn rev. 1970). The subsequent history of the doctrine in North Carolina is discussed in detail in Gardner, The Camera Goes to Court, 24 N.C.L. Rev. 233 (1946). Although, as the Gardner comment demonstrates, the silent witness doctrine was seemingly adopted by the majority of this Court in a few cases, *Davis v. Railroad,* 136 N.C. 115, 48 S.E. 591 (1904); *Pickett v. Railroad,* 153 N.C. 148, 69 S.E. 8 (1910); *Bane v. Railroad,* 171 N.C. 328, 88 S.E. 477 (1916), that support was short-lived. In *Honeycutt v. Brick Co.,* 196 N.C. 556, 146 S.E. 227 (1929), the Court held that the admission of photographs as substantive evidence constituted error and reverted to the "illustrative" rule which has been the law in North Carolina until the present time.

Even so, *Honeycutt* has been discredited to some extent by the holding in *State v. Cade,* 215 N.C. 393, 2 S.E. 2d 7 (1939). There, a photograph of the murder victim at the spot where the body was found was admitted in evidence and shown to the jury. Justice Barnhill (later Chief Justice), writing for a unanimous Court in approving such use of the photograph, said: "The evidence merely shows that the photographs were exhibited to the jury and there was no request that their use be limited or restricted."

[4] While we are not prepared, in this case, to repudiate the "illustrative" doctrine with respect to all photographs, we hold that a photograph of *fingerprints,* when shown by extrinsic evidence to accurately represent, depict or portray the print it

purports to show, is admissible as substantive evidence. Our holding in this respect is in accord with the overwhelming majority of courts throughout the nation. See cases cited in 3 Wigmore on Evidence § 792, n. 1 (Chadbourn rev. 1970). Defendant's fifteenth and sixteenth assignments of error are overruled.

[5] Defendant's eighth assignment of error is addressed to the admission over objection of testimony of Officer Stubbs that he identified the latent fingerprint lifted from the flowerpot with an alleged fingerprint of the defendant contained on a fingerprint card of Willie Foster, Jr., in the "master file at the police department." No foundation had been laid by evidence that the fingerprint on the master file card was, in fact, a fingerprint of this defendant.

On a former appeal in this case, *State v. Foster,* 282 N.C. 189, 192 S.E. 2d 320 (1972), when a new trial was awarded, this Court alerted the trial court in the following language: "Upon the present record serious questions arise as to the admission over objection of testimony regarding a master fingerprint card bearing date 1958 and the name 'Willie Foster, Jr.,' . . . in the absence of testimony that the prints on these cards were made by defendant. A discussion of these questions is deemed unnecessary. If they arise at all at the next trial, presumably there will be additional evidence as to when and by whom these prints were taken." For some obscure reason, this red flag was apparently ignored by both the trial judge and the solicitor.

The fingerprint card from the master file was not introduced in evidence. Even so, introduced or not, the testimony concerning it, without evidence as to when and by whom the card was made and that the prints on the card were in fact those of this defendant, violated the hearsay rule and should have been excluded. If defendant's conviction rested upon this evidence, it could not stand. But such is not the case.

Comparison of the latent print lifted from the flowerpot with the fingerprint on the card in the master file apparently furnished the lead resulting in defendant's arrest. Officer Stubbs testified without objection that, following the arrest, he personally fingerprinted the defendant on 12 November 1971. The fingerprints thus obtained were placed on a card identified as State's Exhibit 2 and delivered to Officer Adams. Officer

Adams testified without objection that he photographed the print of defendant's right index finger as it appeared on State's Exhibit 2 and made an eight by ten enlargement thereof, which enlargement is the photograph on the left side of State's Exhibit 1. Defendant's right index fingerprint as shown by this enlarged photograph was then compared with the latent fingerprint lifted from the flowerpot as shown by the photographic enlargement of it; and Officer Stubbs, a fingerprint expert, testified that based on thirteen or more identical characteristics, those prints were made by the same finger. This evidence as to the common origin of defendant's known fingerprint and the latent print lifted from the flowerpot is so overwhelming, and the prejudicial effect of the incompetent testimony concerning the master file fingerprint is so insignificant by comparison, that the incompetent evidence was harmless beyond a reasonable doubt. *Schneble v. Florida,* 405 U.S. 427, 31 L.Ed. 2d 340, 92 S.Ct. 1056 (1972); *Chapman v. California,* 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967); *State v. Brinson,* 277 N.C. 286, 177 S.E. 2d 398 (1970). Unless there is a reasonable possibility that the evidence complained of might have contributed to the conviction, its admission constitutes harmless error. *State v. Smith,* 278 N.C. 476, 180 S.E. 2d 7 (1971); *State v. Fletcher* and *State v. St. Arnold,* 279 N.C. 85, 181 S.E. 2d 405 (1971). This accords with consistent decisions of this Court that admission of technically incompetent evidence is harmless unless it is made to appear that defendant was prejudiced thereby and that a different result likely would have ensued had the evidence been excluded. *State v. Barbour,* 278 N.C. 449, 180 S.E. 2d 115 (1971); *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969). We do not think exclusion of the evidence concerning the master file fingerprint could or would have produced a different result. Defendant's eighth assignment of error is overruled.

Defendant's tenth assignment of error is abandoned under Rule 28, Rules of Practice in the Supreme Court.

[6] Over objection the State was permitted to ask defendant on cross-examination for impeachment purposes whether he had committed other named criminal offenses unrelated to the present case and for which he has not been tried or convicted. Exceptions to this line of cross-examination constitute defendant's eleventh and twelfth assignments of error.

When a defendant elects to testify in his own behalf, he surrenders his privilege against self-incrimination and knows he will be subject to impeachment by questions relating to specific acts of criminal and degrading conduct. Such "cross-examination for the purpose of impeachment *is not limited to conviction of crimes.* Any act of the witness which tends to impeach his character may be inquired about or proven by cross-examination." *State v. Simms,* 213 N.C. 590, 197 S.E. 176 (1938) (emphasis added); *State v. Colson,* 194 N.C. 206, 139 S.E. 230 (1927). Recent cases upholding this rule include *State v. Mack,* 282 N.C. 334, 193 S.E. 2d 71 (1972); *State v. Gainey,* 280 N.C. 366, 185 S.E. 2d 874 (1972); *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174 (1971). Defendant concedes the rule to be as stated but requests the Court to re-examine and repudiate it. The rule is necessary to enable the State to sift the witness and impeach, if it can, the credibility of a defendant's self-serving testimony. We therefore adhere to our prior decisions. These assignments are overruled.

[7] Defendant assigns as error the following exchange which occurred during cross-examination of defendant:

"Q. One more question, Mr. Foster.

A. Yes, sir.

Q. Let me ask you if you didn't hire your own expert witness to examine . . .

MR. HICKS: Objection, your Honor, and I would like to be heard out of the hearing of the jury on this.

COURT: All right. Take the jury out."

Following a discussion in the absence of the jury, the unfinished question was abandoned. The jury returned to the jury box and defendant rested his case.

Defendant moved for a mistrial on the ground that the unfinished question quoted in the foregoing colloquy deprived him of a fair trial. Denial of the motion constitutes his thirteenth assignment of error.

This assignment has no merit. The unfinished question was no evidence against the defendant. Moreover, the allowance or refusal of a motion for a mistrial in a criminal case less than capital rests largely in the discretion of the trial court. *State v.*

Hines, 266 N.C. 1, 145 S.E. 2d 363 (1965); *State v. Humbles,* 241 N.C. 47, 84 S.E. 2d 264 (1954). The judge's action is not reviewable except under circumstances establishing gross abuse —a circumstance not shown by this record. *See State v. Guice,* 201 N.C. 761, 161 S.E. 533 (1931).

The action of the court in allowing the testimony of Lawrence A. Kelly as a "rebuttal" witness constitutes defendant's fourteenth assignment of error. Defendant argues that such evidence amounted to a reopening of the State's case and, further, that the evidence elicited was not in fact "rebuttal" testimony.

[8] The order of proof is a rule of practice resting in the sound discretion of the trial court. *State v. Thomas,* 244 N.C. 212, 93 S.E. 2d 63 (1956). "The court, to attain the ends of justice, may in its discretion allow the examination of witnesses at any stage of the trial." *State v. King,* 84 N.C. 737 (1881). The great weight of authority holds that "the admission in a criminal prosecution of evidence as a part of the rebuttal, when such evidence would have been properly admissible in chief, rests in the sound discretion of the trial judge and will not be interfered with in the absence of gross abuse of that discretion." 53 Am. Jur., Trial, § 129. *Accord, State v. Mack,* 282 N.C. 334, 193 S.E. 2d 71 (1972); *State v. Knight,* 282 N.C. 220, 192 S.E. 2d 283 (1972). This assignment is overruled.

Defendant's seventeenth assignment of error relates to the court's charge on first degree burglary.

[9] It appears that the court simply instructed the jury to disregard an inadvertent statement previously made and then proceeded to charge the jury correctly. The inadvertence was discovered immediately and the correction was prompt and complete. This is sufficient and is all the law requires. *State v. Orr,* 260 N.C. 177, 132 S.E. 2d 334 (1963); *Wyatt v. Coach Co.,* 229 N.C. 340, 49 S.E. 2d 650 (1948); *State v. Baldwin,* 178 N.C. 693, 100 S.E. 345 (1919). This assignment is overruled.

Defendant's eighteenth and nineteenth assignments relate to the instructions of the court on the law pertaining to felonious breaking or entering and non-felonious breaking or entering. Defendant contends the court erroneously defined, and failed to define, the essential elements of those offenses. These assignments are overruled for the reasons stated below.

[10] The court submitted as permissible verdicts: guilty of burglary in the first degree, guilty of felonious breaking or entering, guilty of non-felonious breaking or entering, or not guilty. All evidence offered by the State tended to show defendant was guilty of burglary in the first degree. All evidence offered by defendant tended to show defendant was not guilty and to support his alibi that he was home in bed at the time of the burglary charged in the bill of indictment. There was no evidence tending to show that defendant may be guilty of either felonious or non-felonious breaking or entering. "The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor." *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545 (1954). *Accord, State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969). Thus the court erred in submitting the lesser included offenses of felonious and non-felonious breaking or entering, but the error was definitely in defendant's favor and he is in no position to complain. *State v. Murry,* 277 N.C. 197, 176 S.E. 2d 738 (1970). The charge on these offenses, in view of the verdict, is immaterial.

[11] Assignments four and five relate to denial of motions for nonsuit and to set aside the verdict. Evidence offered by the State was sufficient to go to the jury and support its finding (1) that the latent print lifted from the flowerpot in the Davis home was in fact a print of defendant's right index finger; (2) that the latent print of defendant's right index finger was placed thereon by defendant on the occasion referred to in the indictment; and (3) that defendant was present when the crime charged in the indictment was committed and at least participated in its commission. *State v. Foster,* 282 N.C. 189, 192 S.E. 2d 320 (1972). These assignments are overruled.

On substantially similar evidence two juries have been satisfied beyond a reasonable doubt that defendant burglarized the Davis home as charged in the bill of indictment. In defendant's second trial now under review, we find no prejudicial error. The verdict and judgment must be upheld.

No error.

Chief Justice BOBBITT dissenting.

At 1 May 1972 Schedule "C" Regular Criminal Session, defendant was tried on two bills of indictment, one charging first degree burglary and the other charging assault with intent to commit rape. The assault indictment charged that defendant on 5 September 1971 assaulted Rosa Mae Davis with intent to rape her. With reference thereto the jury returned a verdict of not guilty. Mrs. Davis's testimony affirmatively disclosed that she could not identify defendant as the intruder who was in her *bedroom.* With reference to the burglary indictment, defendant was found guilty of first degree burglary; and, in compliance with the jury's recommendation, the court pronounced judgment which imposed a sentence of life imprisonment. G.S. 14-52. Upon defendant's appeal, this Court awarded a new trial on account of the admission of incompetent prejudicial testimony. *State v. Foster,* 282 N.C. 189, 192 S.E. 2d 320 (1972).

At the 19 February 1973 Schedule "D" Conflict Criminal Session, defendant was tried again on the same burglary indictment and was again found guilty of first degree burglary and was again sentenced to life imprisonment. The present appeal is from that verdict and judgment.

The following is an excerpt from our opinion on former appeal:

"Motions filed by defendant assert the following: After his arrest on 22 October 1971, defendant was confined in jail until released on 19 January 1972. Nine warrants had been issued, two of which were for the crimes for which he was tried at the 1 May 1972 Session. Defendant was present and represented by counsel at each of five scheduled preliminary hearings. At each of the first four, the hearing was continued on motion of the State and over defendant's objection. The last was on 19 January 1972 when, by order of the presiding District Court Judge, all of the cases were dismissed from the docket of that court and in each case the entry 'nolle prosse' was made.

"We take judicial notice that the 3 January 1972 Session, at which the two indictments on which defendant was tried were returned, was a one-week session. A week or so after his release on 19 January 1972, defendant was rearrested on a capias based on these indictments. Seemingly, the District Court Judge who ordered defendant's release on 19 January 1972 was unaware of the fact that defendant had been indicted by the grand jury." 282 N.C. at 195, 192 S.E. 2d at 324-25.

By order dated 17 February 1972 Judge Hasty denied defendant's motion that the indictments be dismissed because he had been denied a preliminary hearing. This Court found no error in such denial of defendant's motions to dismiss. *State v. Foster,* 282 N.C. at 197, 192 S.E. 2d at 325.

Under the caption, "MOTIONS PRIOR TO TRIAL," the record now before us shows the following:

"MR. GILCHRIST: Your Honor, prior to proceeding in one of the cases, *State v. Willie Foster, Jr.,* #72-CR-1171, the State elects to take a nolle prosequi, in that a True Bill has never been returned by the Grand Jury, and, insofar as the State is able to ascertain, the witness cannot be served.

"COURT: Let it be Nolle Prosequied.

"MR. GILCHRIST: The State intends to call for trial Case 72-CR-1173.

"MR. HICKS: That is the only case you are going to call?

"MR. GILCHRIST: Yes.

"MR. HICKS: Your Honor, prior to beginning the trial, we would like to make certain Motions.

"The defendant thereupon moved to dismiss for failure to bring defendant to trial prior to today, February 20, 1973, notwithstanding numerous terms of Court having intervened, as demanded by his prior Motion For Speedy Trial or For Discharge Under G.S. 15-10, made in Open Court and filed January 19, 1972 as to all the remaining seven cases calendared for trial at this February 19, 1973 Session, asking that all seven cases be dismissed, including the case being called for retrial by the prosecution, #72-CR-1173 (formerly #71-CR-62833 in the District Court), namely the seven cases known as Case #72-CR-1172, formerly #71-CR-62838 in District Court, charging First Degree Burglary with intent to steal from James Edward Sinclair on or about October 11, 1971; Case #72-CR-1174, formerly #71-CR-62835 in District Court, charging Housebreaking and Larceny from Lonnie W. Wallace at 217 South Turner Avenue, Charlotte, N. C. on or about February 20, 1971; Case #72-CR-1175, formerly #71-CR-62834 in District Court, charging Housebreaking and Larceny from Kenneth Walker at 128 S. Gregg St., Charlotte, N. C. on or about May 8, 1971; Case #72-CR-1176, formerly #71-CR-62840 in District Court, charging

Housebreaking and Larceny from Teretha Phillips at 2224 Roslyn Avenue, Charlotte, N. C. on or about May 23, 1971; Case #72-CR-1177, formerly #71-CR-62837 in District Court charging Housebreaking in the home of Shirley T. Torrence at 514 Honeywood Ave., Apartment No. 3, Charlotte, N. C., on or about September 17, 1971; and Case #72-CR-1178, formerly #71-CR-62836 in District Court charging Housebreaking and Larceny from Roy Lee Armstrong at 201 South Turner Ave., Charlotte, N. C. on or about July 24, 1971; inasmuch as the prosecution had just nolle prosequied Case #72-CR-1171, formerly #71-CR-62839 in District Court charging first degree Burglary with intent to rape Martha Pitts on or about August 3, 1971; and the defendant previously had been found Not Guilty in his first trial of and Case #72-CR-1170, formerly #71-CR-62841 in District Court, charging assault with intent to rape Rosa Mae Davis on or about September 5, 1971, said Motion to Dismiss filed January 19, 1972 having been as follows. . . . "

Whether the cross-examination of defendant referred to below was prejudicial must be considered against the background of the indictments of defendant for offenses for which the State did not choose to place defendant on trial.

The State's entire case rested upon the fingerprint on the flowerpot. The original of the latent print lifted from the flowerpot was unavailable at the second trial. However, a photograph of this lost print had been made. I am in accord with the Court's holding that this photograph of the lost print is competent. However, the loss of the original does suggest that even the most careful officers and court personnel make mistakes.

No evidence points to the guilt of defendant except that relating to the fingerprint on the flowerpot. Defendant's testimony and evidence tending to show where he was and what he was doing at the time of the alleged burglary was not impeached or discredited in any manner apart from the presence of the fingerprint on the flowerpot. Evidence offered by defendant consisting of testimony of his good character and of his employment record was not discredited or impeached in any manner except by the fingerprint on the flowerpot.

The case was before the jury in this posture: The State's case consisted of testimony tending to show that the fingerprint

on the flowerpot was made by defendant at or about the time of the alleged burglary. Defendant's evidence consisted of testimony tending to show that he had never been in the Davis home; that he was an employed person of good character; and that he was at his home at the time of the alleged burglary. Seemingly, the State's counsel considered it a matter of major importance that doubt be cast upon defendant's character and the credibility of his testimony.

As the Court's opinion points out, the admission of the card dated 1958, bearing the name "Willie Foster, Jr.," was erroneous. There was no evidence as to when, by whom or under what circumstances this fingerprint was obtained. The 1958 card added nothing to the State's case except to call attention to the fact that a card bearing the fingerprint of defendant was in the master file at the police department. The only significant impact of this incompetent evidence was to give rise to the inference or suspicion that on some prior occasion defendant had made contact with the police department incident to some criminal charge. This, standing alone, probably would not be sufficiently prejudicial to justify the award of a new trial.

On cross-examination, the State's counsel was permitted, over objection by defendant, to ask defendant the following questions:

I

"Q. Now, I will ask you if on October 20, of 19, excuse me, on August 3, of 1971 if you didn't break into Martha W. Pitts' house . . .

"MR. HICKS: Objection.

"Q. At 2416 Rozzelles Ferry Road here in the city?

"MR. HICKS: Objection.

"A. No, I sure didn't."

This is the subject of Exception No. 23.

II

"Q. I will ask you if you didn't break in the residence of James Sinclair at 312 Center Street on October 11, 1971, by going into the front door and reaching up and unscrewing with your fingers a light bulb in the ceiling?

"MR. HICKS: Objection.

"COURT: Overruled.

"Q. Did you or did you not?

"A. What you mean 'did I'? No, I didn't."

This is the subject of Exception No. 24.

III

"Q. I will ask you if you didn't break into the residence of Lonnie Bell Wallace at 217 South Turner Street? How far is South Turner Street from there on Center Street?

"MR. HICKS: Objection.

"A. I couldn't tell you.

"Q. I will ask you if you didn't break into Lonnie Bell Wallace's house on February 20, 1971, between 6:30 and 11:00 o'clock and by breaking out the center glass window in the front door?

"MR. HICKS: Objection.

"COURT: Overruled.

"A. Sure didn't."

This is the subject of Exception No. 25.

IV

"Q. I will ask you if you did not break into the residence of Teretha Phillips at 2224 Roslyn Avenue on the 23rd of May, 1971, by prying open her kitchen window and breaking out the window pane?

"MR. HICKS: Objection.

"COURT: Overruled.

"A. Sure didn't."

This is the subject of Exception No. 26.

V

"Q. I will ask you if on the 17th of September, 1971, you didn't break into the home of Shirley Torrence at 514 Honeywood, Apartment No. 3, by taking the screen off the window and breaking out the front window?

"MR. HICKS: Objection.

"COURT: Overruled.

"A. Sure didn't."

This is the subject of Exception No. 27.

VI

"Q. And I will ask you if you on the 25th day of July 1971 you didn't break into the residence of Roy Lee Armstrong at 201 South Turner Avenue?

"MR. HICKS: Objection.

"COURT: Overruled.

"A. Sure didn't."

This is the subject of Exception No. 28.

We note that the cross-examiner interrupted and revised his first question to correct an error in respect of the date on which the question suggests there was a breaking into the house of one Martha W. Pitts. The exact detail and particularity of each of these questions indicates that the cross-examiner had before him documents which alleged that defendant had committed such crimes. Indeed, it seems clear that these documents were the identical indictments referred to in the record under the heading, "MOTIONS PRIOR TO TRIAL," that is, indictments on which the State has not prosecuted defendant.

Although the record shows that defendant is under indictment for each of the six criminal offenses to which the cross-examiner's questions relate, there is no evidence that he committed any of them. The delay in prosecution notwithstanding defendant's repeated requests for preliminary hearings suggests that the State's evidence is insufficient to show that any of these alleged crimes was committed *by defendant.* The State elected to proceed only in a case which rested solely on a single fingerprint, presumably its strongest case.

Under the circumstances, the asking of these six questions by the State's counsel was highly prejudicial to defendant in that it tended to destroy by inference and suspicion the otherwise unimpeached evidence as to his alibi and as to his good character. The asking of these questions gave the impression that the State's counsel had knowledge of evidential facts suffi-

cient to support these insinuations. The record tends to negate rather than to support the view that he had such knowledge. If he did not have such knowledge, the cross-examination was improper. *State v. Phillips,* 240 N.C. 516, 82 S.E. 2d 762 (1954). If sufficient evidential facts do exist to support all or any of the six untried indictments, the State at long last may undertake to prosecute in such cases.

In *State v. Williams,* 279 N.C. 663, 672, 185 S.E. 2d 174, 180 (1971), this Court held "that, for *purposes of impeachment,* a witness, including the defendant in a criminal case, may *not* be cross-examined as to whether he has been *indicted* or is *under indictment* for a criminal offense other than that for which he is then on trial." Approval in this case of the six quoted questions would enable the cross-examiner to do indirectly what he could not do directly, that is, bring to the attention of the jury the fact that defendant was under indictment in other cases.

For the reasons indicated, I vote for a new trial.

Justice SHARP joins in this dissenting opinion.

MARGARET WILSON AND BRONNA SUMMERS; DONALD WILSON AND GEORGE SUMMERS, EXECUTORS OF WILL OF IDA PINNIX MURRAY, PLAINTIFFS v. FIRST PRESBYTERIAN CHURCH, REIDSVILLE, N. C. AND R. P. RICHARDSON AND O. A. ROTHROCK, MEMBERS OF SAID CHURCH AND ON BEHALF OF THEMSELVES AND ALL OTHER MEMBERS, DEFENDANTS,

— AND —

THE TRUSTEES OF ORANGE PRESBYTERY OF THE PRESBYTERIAN CHURCH, ADDITIONAL PARTIES DEFENDANT,

— AND —

ROBERT MORGAN, ATTORNEY GENERAL OF NORTH CAROLINA, ADDITIONAL PARTY DEFENDANT

No. 15

(Filed 12 December 1973)

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

A will must be construed so as to carry out the intent of the testatrix, unless that intent be contrary to public policy or to some rule

of law, and her intent is to be determined by examining the entire will in the light of all surrounding circumstances known to the testatrix.

2. **Trusts § 1— creation of trust**

The express use of the word "trust" or "trustee," or of any other technical terminology, is not necessary to engraft a trust upon a devise or bequest made in language sufficient *per se* to pass the absolute, unencumbered interest in the property.

3. **Trusts § 1— creation of trust**

The mere statement in a will of the purpose for which a bequest or devise is made does not show *per se* an intent to create a trust for the accomplishment of that purpose; on the other hand, the fact that the testator used words which, literally, express a request, hope, desire or recommendation that the property given will be used for a specified purpose does not necessarily preclude the establishment of a trust by such bequest or devise.

4. **Trusts § 4— devise for use in building church — charitable trust**

Provisions of a will in which testatrix devised and bequeathed real and personal property to the First Presbyterian Church of Reidsville "for the purpose of building a Presbyterian Church on a lot hereinafter devised to said Presbyterian Church, which church shall be built as a memorial to my beloved brother" and in which testatrix devised real property to said church with "the proceeds from said property to be spent in the building, repair or maintenance of the Presbyterian Church to be built as here-in-before provided" *are held* to have created a trust which was charitable in nature and not to have given the property to the First Presbyterian Church to be used by it for its own purposes and in its discretion.

5. **Trusts § 4— cy pres doctrine**

Under the *cy pres* doctrine, the superior court does not have authority to modify every charitable trust when it becomes impracticable to carry out the original purpose of the settlor or testator, but the court has such power only where the instrument creating the trust, interpreted in the light of all the circumstances known to the settlor or trustor, manifests a general intention to devote the property to charity. G.S. 36-23.2(a).

6. **Trusts § 4— cy pres doctrine — scope of charitable intent**

The *cy pres* doctrine may not be used to turn a narrow and particular charitable intent into a general charitable intent.

7. **Trusts § 4— charitable trust — memorial to brother — cy pres doctrine**

Where testatrix devised and bequeathed property to the First Presbyterian Church of Reidsville to be used to build a new Presbyterian Church at a specified location as a memorial to her deceased brother and the purpose of that trust has failed, the trust may not be modified pursuant to the *cy pres* doctrine since the testatrix had only a specific and limited charitable intent.

8. Trusts § 10— failure of charitable trust — passage of property to residuary legatee and devisee

Where a will creating a charitable trust which failed contained a residuary clause, it is apparent that the testatrix favored the residuary legatee and devisee over her general heirs at law, especially where the residuary legatee and devisee was a close relative for whom the testatrix obviously had affection, and upon the failure of the trust the corpus passed to the residuary legatee and devisee.

Justice BRANCH dissenting.

Chief Justice BOBBITT joins in the dissenting opinion.

Justice SHARP did not participate in the consideration and decision of this case.

APPEAL by defendants from *Blount, J.*, at the 23 October 1972 Session of ROCKINGHAM, heard prior to determination by the Court of Appeals.

This action was instituted 20 June 1960 by Ida Pinnix Murray. She having died while it was pending, Margaret Wilson and Bronna Summers, her residuary legatees and devisees and D. C. Wilson and George Summers, her executors, were made parties plaintiff in her stead. The principal prayer for judgment in the complaint was that the court declare the rights of the parties under and by virtue of the will of Susan E. Pinnix, who died 29 April 1919. The plaintiffs contend that the will devised and bequeathed real and personal property to the First Presbyterian Church of Reidsville upon trust, that the trust so attempted to be created by the will never became operative or otherwise failed and, consequently, Ida Pinnix Murray (and now the present plaintiffs as her successors) became entitled to the said properties.

Although, in their answer, the church and its trustees alleged that the trustees of the church held the properties "for the purposes of said will and in recognition of said trust," they now contend that the will of Susan E. Pinnex did not establish a trust but devised and bequeathed the property to the church in fee simple and absolutely. The Trustees of Orange Presbytery and the Attorney General were made additional parties defendant. They contend that the will established a charitable trust, that, by reason of changed conditions, it is not now practicable to carry out the specific purpose of the testatrix and that the trust should be modified through application of the cy pres doctrine. These additional defendants differ in their contentions as to what would be a proper use of the trust fund.

The First Presbyterian Church, its members and its trustees are hereinafter referred to as First Presbyterian and the Orange Presbytery and its trustees are hereinafter referred to as the Presbytery.

The pertinent provisions of the will of Susan E. Pinnix are as follows:

"THIRD: * * * I give and bequeath to J. F. Watlington and W. A. Trotter all the money which I may have on deposit in the Bank of Reidsville, also ten shares of Capital Stock of the Bank of Reidsville for a period of thirteen years from the date of my death *upon the following trust and for the following uses:* [The support of Nannie Ralph.] At the termination of *this trust* * * * I give and bequeath to the First Presbyterian Church, Reidsville, N. C. *for the purpose of building a Presbyterian Church on a lot here-in-after devised to the said Church.* (Emphasis added.)

* * *

"SIXTH: I give, devise and bequeath all my property, real, personal or mixed, not hereinbefore disposed of by me in this my will to my beloved brother Dr. J. A. Pinnix for the term of his natural life and at his death to be disposed of as hereinafter directed.

"SEVENTH: I give and devise to Ester H. Pinnix, wife of Dr. J. A. Pinnix, for the term of her natural life [certain described real property] subject to the life estate of Dr. J. A. Pinnix created in item sixth of this will. After the termination of the two life estates in said property, my executors shall sell said property either at public or private sale as in their judgment is deemed best. The net proceeds of said sale I give, devise and bequeath to the First Presbyterian Church, Reidsville, N. C. *for the purpose of building a Presbyterian Church on the lot here-in-after devised to said Presbyterian Church, which Church shall be built as a memorial to my beloved brother M. F. Pinnix, deceased.* (Emphasis added.)

* * *

"NINTH: I give and devise in *fee simple* to First Presbyterian Church, Reidsville, N. C. a certain lot [described] in the town of Reidsville, N. C. * * * subject to the life estate of Dr. J. A. Pinnix created in Item Sixth of my will. This lot *shall be used* by the said Presbyterian Church,

Reidsville, N. C. as a site for the erection of a Presbyterian Church to be erected on the said lot from the proceeds of property hereinbefore and hereinafter devised and bequeathed in my will. (Emphasis added.)

* * *

"ELEVENTH: I give and devise to Mrs. Lillie Pinnix, wife of J. S. Pinnix, for the term of her natural life [described real property] subject to the life estate of Dr. J. A. Pinnix created in item Fourth [sic] of my will * * * . After the termination of the two life estates created in the above described property, I give and devise the said property *in fee simple* to the First Presbyterian Church, Reidsville, N. C. the proceeds from said property *to be spent* in the building, repair or maintenance of the Presbyterian Church to be built as here-in-before provided. (Emphasis added.)

"TWELFTH: I give, devise and bequeath the residue of my estate (if any) after taking out the devises and bequests above mentioned to Dr. J. A. Pinnix, in fee simple."

Dr. J. A. Pinnix died 28 August 1931, leaving a will in which his daughter, Ida Pinnix Murray, the original plaintiff herein, was the residuary legatee and devisee, subject to a life estate in the wife of Dr. Pinnix.

Esther H. Pinnix, wife of Dr. J. A. Pinnix, died 29 July 1949, and Mrs. Lillie Pinnix died 26 June 1959, thus terminating the last of the life estates created by these wills. The present action was instituted approximately eleven months thereafter.

The answer filed 1 September 1960 by the original defendants (First Presbyterian and the administrators, d.b.n., c.t.a., of the estate of Susan Pinnix), by way of a further answer alleges:

"9. That as evidenced by the record and the large increase in the M. F. Pinnix Fund, the *trust placed by will of Susan E. Pinnix upon the First Presbyterian Church of Reidsville, N. C.* has been handled by the trustees of the Church in a most capable, farsighted and efficient manner; that they have performed the duties of the First Presbyterian Church to the best interest of the *trust fund;* that the First Presbyterian Church is now and at all times has been able, ready and willing to administer said fund and

to carry out the intentions and wishes of the deceased, Susan E. Pinnix, to further the work of the Presbyterian Church and to commemorate the memory of her brother, M. F. Pinnix. (Emphasis added.)

* * *

"11. That the defendants feel that the construction of a second Presbyterian Church in Reidsville at this time is impractical; that the decision in this matter should be postponed for a period not exceeding ten years * * * .

"12. That pending the selection of a new location for the Church and the final disposition of the M. F. Pinnix *Trust* Fund, the defendants should be authorized by the Court to invest the *funds of the trust* by making first mortgage interest bearing loans to the Presbyterian Mission Churches in the area around Reidsville for the purpose of expanding and adding additions to said churches as memorials to M. F. Pinnix, and thereby complying with one of the objectives of the Will." (Emphasis added.)

The principal prayer for relief in the answer was that the "*trustees* of the M. F. Pinnix Fund" be authorized to sell certain of the properties and be allowed ten years to select a site and construct the proposed church thereon. (Emphasis added.)

On 6 October 1961 the then parties waived trial by jury and agreed that the matter be heard upon the pleadings and the agreed statement of facts. Significant stipulations in this agreed statement, in addition to stipulations of facts hereinabove set forth, were:

"2. That Susan E. Pinnex died testate on the 29th day of April, 1919. That her will, * * * provided among other things for the creation of a *trust fund to build a church*. That said church was to be built by the First Presbyterian Church of Reidsville, North Carolina, on a lot located on Burton Street, Reidsville, North Carolina, as described in her will. * * * (Emphasis added.)

"4. That, however, because of change of conditions since testatrix's death as hereinafter set forth, the church site on Burton Street as designated in the Susan Pinnix will should not be used for the erection of a church * * * .

"5. That there is no immediate need for a new Presbyterian Church within a radius of five miles of the Burton

Street lot; from studies and surveys of church needs another church may be needed sometime within a period of ten years; that while the trustees of the First Presbyterian Church feel that they have carried out all terms of the trust to date in a successful manner, in their judgment the Board of Trustees of Orange Presbytery in conjunction with its Extension Committee, are better qualified to organize a congregation, erect a church, and carry out all other provisions of the trust; the *Board of Trustees of Orange Presbytery* as well as the Extension Committee *have agreed that they will accept the trust and carry out all terms of the trust within ten years;* * * * (Emphasis added.)

* * *

"9. * * * [T]he parties hereto do hereby agree and consent as follows:

(1) That the plaintiff shall receive from the trust assets the sum of $12,500.00. [This was paid to Ida Pinnix Murray.]

(2) That the plaintiff, upon receipt of the $12,500.00 above referred to, releases all claims which she, her heirs or assigns may have to the trust property *provided the provisions of Paragraph 3 below are carried out.* (Emphasis added.)

(3) That in the event the defendants or their successors do not erect a church in memory of M. F. Pinnix within a radius of five miles of the Burton Street site within ten years from the date of the judgment entered in this cause the defendants will not ask for a further extension of time and that *the plaintiff is authorized by motion in this cause to reaffirm her claim to the corpus of the trust.* (Emphasis added.)

(4) That the Board of Trustees of the Orange Presbytery be appointed Substitute Trustees in the place of the defendants.

(5) That * * * the lot on Burton Street [be sold] * * * the net proceeds from said sales to be added to the *corpus of the trust.* (Emphasis added.)

(6) That the *Substitute Trustees* be empowered to select and purchase a new site within a radius of five miles of the Burton Street lot and be empowered to organize a congregation and erect a church on the said new site within said period of ten years using all the net proceeds *from the trust fund* for this purpose, said church to be in memory of M. F. Pinnix. * * * ." (Emphasis added.)

Pursuant to this stipulation and agreed statement, a consent judgment was entered by Sharp, J., in the Superior Court of Rockingham County on 6 October 1961. In it, the Superior Court found the facts to be as set out in said stipulation, that a bona fide dispute existed between the parties as to the interpretation of the will and "the administration *of the trust,*" and that the proposed settlement "is for the best interest *of the trust* and calculated to carry out the intentions of the testatrix under the changed conditions." (Emphasis is added.) Upon these findings of fact the Superior Court entered judgment, its decree and order being in the exact language of the stipulation and consent above set forth. To this judgment all of the then parties consented.

Following the consent judgment in 1961, to which it was not a party, the Presbytery adopted a resolution by which it accepted appointment as Successor Trustee, being under the impression that there was a trust as the prior parties had assumed. Studies thereafter made by the Presbytery, through agencies of the Presbyterian denomination, convinced the Presbytery that "it has not been possible to establish a new church within the terms of the consent judgment as had been hoped," and led it to the conclusion that "there was no reasonable prospect of fulfilling the terms of the consent judgment." A report so concluding was made to and adopted by the Presbytery at its meeting on 24 June 1971, prior to the filing of the plaintiffs' motion in the cause.

Ten years from the date of such judgment having expired without any church having been erected pursuant to the provisions of the judgment or to those of the will of Susan E. Pinnix, the present plaintiffs were made parties in lieu of Ida Pinnix Murray and the Presbytery was made an additional party defendant, the order reciting that the Trustees of Orange Presbytery had been "appointed the trustees of said property

by this court" but had not previously been formally made parties to the proceeding.

On 20 June 1972 the present plaintiffs filed a motion in the cause reciting the above stated facts, substantially, and praying that the Presbytery be ordered to file an account and, after payment of reasonable compensation to it and to counsel, the balance of the trust properties be delivered over to the present plaintiffs.

The Presbytery filed a response to the motion, in which it asserted "that no trust *may have been* created under the will" of Susan E. Pinnix, that the parties to the above mentioned consent judgment had no authority to agree to dispose of the assets of Susan E. Pinnix contrary to her will, and that the Presbytery, "pursuant to their legal duty *as trustees* to see to the preservation *of a trust* demonstrably intended to serve religious interests and therefore the public interest," opposes the plaintiffs' motion to transfer the assets to private uses. (Emphasis added.) The response further asserted that the specific object provided for by the will "became impossible and impracticable of fulfillment, in that it was totally unsuitable to build a Presbyterian Church on the Burton Street lot mentioned in her will," that from and after the entry of the consent judgment, the Presbytery pursued its *"duties to manage the trust,"* and that "it has not been and is not feasible or practicable 'to organize a congregation and erect a church' under Presbyterian auspices within five miles of the Burton Street site." (Emphasis added.) Accordingly, the Presbytery prayed that the court deny the motion of the plaintiffs and adjudge that *"the trust in suit shall continue in effect"* and be amended to authorize the Presbytery "to develop plans within the ministry and mission of the Presbyterian Church for any project of benefit to the Reidsville community, and to apply to [the] court for further orders" approving and authorizing it to proceed with the execution of such plans. (Emphasis added.) The response describes several activities of First Presbyterian and of the Presbytery, which, in the opinion of the Presbytery, would be of benefit to the Reidsville community and in which the fund could be beneficially used.

First Presbyterian also filed a response to the motion of the plaintiffs, its prayer being that the court deny the motion of the plaintiffs and declare that the properties are the "property

of First Presbyterian Church of Reidsville, N. C., free and clear of any alleged trust."

The Presbytery also moved that the heirs and next of kin of Susan E. Pinnix be made parties in order to protect the Presbytery against any assertion by them of an interest in the properties. This motion was denied.

At the hearing of the plaintiffs' motion in the cause, there was uncontroverted evidence that Susan E. Pinnix was not a Presbyterian, but was a Baptist.

At the hearing of the plaintiffs' motion in the cause, the Presbytery presented affidavits stating, "[I]t has been at all times since October 5, 1961 [the date of the consent judgment] impracticable to execute the authority purportedly extended to the Trustees of Orange Presbytery as 'Successor Trustees' under the aforesaid consent judgment, and at all times impracticable for the Presbytery itself * * * to organize a congregation and erect a church within five miles of the Burton Street location identified in the will of Susan E. Pinnix."

At the hearing in the Superior Court the Pastor of First Presbyterian testified as to various projects of the Church in which, in his opinion, the funds now held by the Presbytery could be used for the benefit of people in the area served by First Presbyterian. These included a child development center, a counseling service, and other social services.

The Presbytery also sponsors and conducts various sociological services in the Reidsville area, such as housing projects for elderly people.

It was stipulated by the Presbytery that no demand has been made upon it by any of the heirs of Susan E. Pinnix, as such, with regard to the subject matter of this litigation.

The Superior Court concluded that the cy pres doctrine is not applicable, that it is not necessary for the heirs of Susan E. Pinnix to be made parties to this litigation and that the claim of First Presbyterian to be the owner of the properties free from any trust obligations should be denied. It found, as facts, that the present plaintiffs have succeeded to the rights and interest of Ida Pinnix Murray, the original plaintiff, that if living she would have been entitled to the properties, under and pursuant to the above mentioned consent judgment, that more

than ten years have elapsed since the entry of such judgment and that no congregation has been organized or church erected or commenced as provided for in such judgment. Upon these findings, the court concluded that the plaintiffs are entitled to the properties. It ordered and adjudged that the Presbytery file an accounting with the Clerk of the Superior Court, that the costs of the action, including reasonable counsel fees, be paid from the properties and that, after such payment, the remaining properties be delivered over to the plaintiffs.

From this judgment First Presbyterian, the Presbytery and the Attorney General appeal.

Griffin, Post & Deaton by Hugh P. Griffin, Jr., and William F. Horsley; Wharton, Ivey & Wharton by Richard L. Wharton for defendant appellants.

Dalton & Long by W. R. Dalton, Jr., for plaintiff appellees.

Russell G. Walker, Assistant Attorney General, for Robert Morgan, Attorney General, Intervenor.

LAKE, Justice.

The first question for our consideration arises upon the contention of First Presbyterian that the properties belong to it free and clear of any trust.

Nothing in the consent judgment rendered in 1961, or in the stipulations of the parties upon which that judgment rested, supports this contention. On the contrary, the parties, including First Presbyterian, then expressly stipulated that the will of Miss Pinnix "provided * * * for the creation of a trust fund to build a church."

Dr. J. A. Pinnix, the sole life tenant of the lot on which the testatrix intended that the new church be built, died in 1931. Thereupon, the right of possession of this lot passed to First Presbyterian. The trust created for the support of Nannie Ralph in shares of stock of the Bank of Reidsville and in the account of the testatrix in that bank terminated in 1932, if not earlier, and, thereupon, this personal property also came into the hands of First Presbyterian. Other properties subsequently came into its hands, under the will, for addition to the fund and were added thereto. Thus, for approximately thirty years, First Presbyterian held these properties intact and then, pur-

suant to the consent judgment, delivered them over to a "Successor Trustee" (the Presbytery). First Presbyterian made no claim to be the owner of these properties, free from trust, until forty years after it first came into the possession of them, more than fifty years after the death of Miss Pinnix.

Thus, the claim of First Presbyterian finds no support either in the judgment to which it consented or in the actions of its members and officers who were the contemporaries of the testatrix. The claim of First Presbyterian must, therefore, stand or fall upon the legal construction of the will of Miss Pinnix.

[1, 2] It is elementary that a will must be construed so as to carry out the intent of the testatrix, unless that intent be contrary to public policy or to some rule of law, and that her intent is to be determined by examining the entire will in the light of all surrounding circumstances known to the testatrix. *Y.W.C.A. v. Morgan, Attorney General,* 281 N.C. 485, 189 S.E. 2d 169; *Bank v. Home for Children,* 280 N.C. 354, 185 S.E. 2d 836; *St. James v. Bagley,* 138 N.C. 384, 50 S.E. 841. It is equally clear that the express use of the word "trust" or "trustee," or of any other technical terminology, is not necessary to engraft a trust upon a devise or bequest made in language sufficient per se to pass the absolute, unencumbered interest in the property. *Stephens v. Clark,* 211 N.C. 84, 189 S.E. 191; *Witherington v. Herring,* 140 N.C. 495, 53 S.E. 303; *King v. Richardson,* 136 F. 2d 849 (4th Circuit 1943); 54 AM. JUR., Trusts, § 40; 15 AM. JUR. 2d, Charities, § 8; Scott on Trusts, 3d Ed, § 351.

Since the problem for the court in each case is to ascertain the intent of the particular testator and the circumstances surrounding each testator vary, decisions reached in other cases, whether by this Court or by courts of other jurisdictions, are informative but not controlling. Professor Scott says in his treatise on Trusts, 3d Ed. § 25.2, "[W]here the question is one of ascertaining the intention of the testator, any hard and fast rule is inappropriate," and "[S]ince each will differs from every other will, the decisions are of importance only in showing how somewhat similar situations have been dealt with by the courts." Similarly, Professor Atkinson in his treatise on Wills (1937 Ed.), § 265, says: "It should be noticed that the court in this process [of construing a will] is determining only a question of fact as to what the testator intended. Hence in cases of this nature precedents are of little value for no matter of law is

decided. This is probably what the courts mean when they say that 'no will has a brother.' "

Pertinent circumstances are: Miss Pinnix was not a Presbyterian, but a Baptist. She obviously had a deep affection for her brothers, living and deceased. She desired the construction of a lasting memorial to her deceased brother, a former sheriff of the county, from whom she inherited much of the property disposed of by her will. She was a resident of Reidsville, acquainted with the area in which she proposed that the church be built and with the inhabitants of that area and their needs.

Nothing in the will, the pertinent portions of which are quoted above, or in any other circumstances set forth in the record, indicates that Miss Pinnix had more than a casual interest in the general religious or charitable program of First Presbyterian or of the Presbyterian denomination. Her two-fold purpose was to establish a memorial to her brother at the specified location and to promote religious activities in this part of her native city. A reasonable inference is that she believed the inhabitants of this area of the city would remember affectionately their former sheriff and, for reasons not disclosed in the record, a Presbyterian church was more likely to be constructed and to succeed therein than a church of her own denomination would be. There is nothing in the will, or elsewhere in the record, to indicate the remotest possibility that she contemplated that First Presbyterian, itself, would remove to this location and occupy the proposed building. Thus, the design of the testatrix was not to confer a benefit upon First Presbyterian, but to use the good offices of First Presbyterian in the establishment in this area of a kindred but separate church.

G.S. 36-21 provides, "No gift, grant, bequest or devise, whether in trust or otherwise, to religious, educational, charitable or benevolent uses * * * shall be invalid by reason of any indefiniteness or uncertainty of the objects or beneficiaries of such trust * * * ." See also G.S. 36-23.1.

[3] It is true that the mere statement in the will of the purpose for which a bequest or devise is made does not show per se an intent to create a trust for the accomplishment of that purpose. *Y.W.C.A. v. Morgan, Attorney General, supra;* Bogert, Law of Trusts and Trustees, 2d Ed. § 46. On the other hand, the fact that the testator used words which, literally, express a request, hope, desire or recommendation that the property given will

be used for a specified purpose does not necessarily preclude the establishment of a trust by such bequest or devise. As Chief Justice Gray said in *Hess v. Singler,* 114 Mass. 56, "It is a settled doctrine of Courts of Chancery that a devise or bequest to one person, accompanied by words expressing a wish, entreaty or recommendation that he will apply it to the benefit of others, may be held to create a trust if the subject and object are sufficiently certain." See also: 2 Pomeroy on Equity, p. 1015-1016; Scott on Trusts, 3d Ed, §§ 25.2 and 351; Bogert, Trusts and Trustees, 2d Ed, § 324.

The leading case on this question in North Carolina is *St. James v. Bagley, supra,* in which Justice Henry G. Connor, speaking for the majority of the Court, said, "The real test is whether the language is imperative or leaves the use and disposition of the property to the discretion of the donee." Likewise, Chief Justice Bigelow, in *Warner v. Bates,* 98 Mass. 274, said, "[T]o create a trust it must clearly appear that the testator intended to govern or control the conduct of the party to whom the language of the will is addressed, and did not design it as an expression or indication of that which the testator thought would be a reasonable exercise of a discretion which he intended to repose in the legatee or devisee." Professor Scott, in § 25.2 of his treatise on Trusts, 3d Ed, likewise says: "Where a testator uses language expressive of desire rather than of command, the question in each case is whether he intended to impose a legal duty upon the legatee to carry out the desired purpose, or whether he intended to leave the legatee free to carry it out or not as he should choose, even though the testator hoped that he would carry it out. In each case, in reaching its determination the court will examine the whole of the will, and examine it in the light of all the circumstances." See also, 54 AM JUR, Trusts, § 56; Annot., 107 ALR 896, 898.

Taking into account the facts that in the present case the testatrix was a member of a church of a different denomination and that her purpose was to establish a memorial to her brother, we are unable to conclude that her intent was to leave it to the discretion of the members or directing officers of First Presbyterian as to whether a new church would be built on the designated lot, or the lot and the proceeds of the other properties would be used for some other purpose deemed by them to be preferable.

The present case is readily distinguishable from *St. James v. Bagley, supra,* in which a conveyance was held absolute. There, the owner of property conveyed it to the Vestry and Wardens of the St. James Church by a deed which provided that the land was so conveyed "for the purpose of aiding in the establishment of a Home for Indigent Widows or Orphans *or in the promotion of any other charitable or religious objects* to which the property hereinafter conveyed may be appropriated by the said parties of the second part." (Emphasis added.) Quite clearly, the grantees were given a discretion as to what use they would make of the property.

Y.W.C.A. v. Morgan, Attorney General, supra, is also distinguishable from the present case. There, the husband of the testatrix had bequeathed to the Y.W.C.A. of Asheville a large sum of money, which bequest was conceded to have been absolute and free from a trust. His bequest was actually used by the legatee to construct a building which bore his name and which was used as a boarding house for young women. Thereafter, the testatrix left a bequest to the association "to be used by it exclusively for the upkeep and maintenance of Morehead House." Notwithstanding her use of the word "exclusively," this Court held the wife's bequest was an absolute gift to the association and did not create a trust. As we noted, the building which the testatrix desired to have kept up and maintained was the absolute property of the legatee and was used by it in carrying on the principal activity for which the legatee, itself, was organized. In the present case, on the contrary, the building contemplated by the testatrix was not for the use of the legatee, First Presbyterian, itself. In that case, the testatrix sought to benefit the legatee by relieving it of a financial burden incident to its carrying on its major function. In the present case, the testatrix did not seek to benefit the legatee but sought to aid a different group, and to memorialize her brother. To that end she sought the aid of the legatee and imposed a burden upon it. In that case, we observed, "Nor is there any limitation as to the expenditure of the principal of the fund." In the present case, the principal of the bequest and the subject of the devise were to be used in the construction of the new church.

[4] We conclude that it was not the intent of Miss Pinnix to give her property, real and personal, to First Presbyterian to be used by it for its own purposes and in its discretion, but to create a trust which was charitable in nature. Consequently, we

find no error in the Superior Court's rejection of the belated claim of First Presbyterian to be the absolute owner of the property.

The second question to be considered is whether the trust established by the will of Miss Pinnix may be modified pursuant to the cy pres doctrine.

Pursuant to the consent judgment entered in this action in 1961, the lot intended by the testatrix to be the site of the proposed church and devised by her upon trust for that purpose has been sold and conveyed and the proceeds of its sale added to the trust fund. We are not called upon in this proceeding to determine whether the Superior Court had authority so to order. The validity of the conveyance is not here attacked. It is conceded by all the parties that the construction of a church upon that lot was not practicable at the time of the entry of the consent judgment and is not practicable now. It is also undisputed that neither First Presbyterian, the original trustee, nor the Presbytery, the substitute trustee, has commenced the construction of a church, as contemplated by the testatrix, either upon that lot or upon any other site, in compliance with the will or in compliance with the terms of the consent judgment. The substitute trustee states unequivocally that it does not contemplate undertaking such construction. Thus, the specific purpose of the testatrix in establishing this charitable trust has failed and there is no intent on the part of the substitute trustee to carry out such purpose.

The cy pres doctrine came into the law of North Carolina in 1967 when G.S. 36-23.2 became effective. The pertinent provision of the statute is:

> "(a) If a trust for charity becomes illegal, or impossible or impracticable of fulfillment or if a devise or bequest for charity, at the time it was intended to become effective is illegal, or impossible or impracticable of fulfillment, and if the settlor or testator, *manifested a general intention to devote the property to charity,* any judge of the Superior Court may, on application of any trustee, executor, administrator, or any interested party, or the Attorney General, order an administration of the trust, devise or bequest as nearly as possible to fulfill the manifested general charitable intention of the settlor or trustee." (Emphasis added.)

[5] Under this doctrine, the Superior Court does not have authority to modify every charitable trust when it becomes impracticable to carry out the original purpose of the settlor or testator. Such power is conferred upon the Superior Court only where the instrument creating the trust, interpreted in the light of all the circumstances known to the settlor or testator, manifests a "general intention to devote the property to charity." This is indispensable to a proper application of the cy pres doctrine under this statute. *Y.W.C.A. v. Morgan, Attorney General, supra.* It is equally so in those jurisdictions where the cy pres doctrine developed without legislative action. Scott on Trusts, 3d Ed, § 399; Bogert, Trusts and Trustees, 2d Ed, § 436; 15 AM JUR 2d, Charities, § 135; Annot., 74 ALR 671.

The rule is thus stated by Professor Scott:

> "It is not true that a charitable trust never fails where it is impossible to carry out the particular purpose of the testator. In some cases, as we shall see, it appears that the accomplishment of the particular purpose and only that purpose was desired by the testator and that he had no more general charitable intent and that he would presumably have preferred to have the whole trust fail if the particular purpose is impossible of accomplishment. In such a case the cy pres doctrine is not applicable."

[6] Thus, again, we are required to return to the will of Miss Pinnix and to interpret it in the light of the circumstances. The cy pres doctrine "may not be used to turn a narrow and particular charitable intent into a general charitable intent." Bogert, Trusts and Trustees, § 431. Here, again, no two cases are exactly alike since it is the intent of the particular testator—a question of fact, not law—which is to be determined. Consequently, it is not possible to reconcile all of the decisions of the various courts, even where the circumstances are quite similar.

In *Rhode Island Hospital Trust Co. v. Williams,* 50 R.I. 385, 148 A 189, 74 ALR 664, the Court said, "If a gift to a specific charitable corporation lapses it may not be applied cy pres unless from the will or extrinsic evidence the Court may find a general charitable intent *beyond that shown by the gift to the specific charitable corporation.*" (Emphasis added.) There, such a general charitable intent was found and the doctrine was applied. In *Teele v. Bishop of Derry,* 168 Mass. 341, 47 N.E. 422, a bequest to trustees for the purpose of purchasing

a lot and building a chapel in a village in Ireland, to be used forever for the purposes of public worship under the auspices of a Roman Catholic Church, was found to be impracticable of fulfillment because the population of the place was too small and the people too poor to maintain such chapel. It was held that the purpose of the testatrix was limited to the purchase of a lot and the building of a chapel and no general intent to advance religion in the designated area could be inferred. Consequently, the cy pres doctrine was not applied. In 15 AM JUR 2d, Charities, § 136, it is said, "[I]f the gift is specifically for a memorial building to be erected for a designated purpose in the donor's home community, it is difficult to discover any broader charitable intention which can sustain its cy pres application to a different purpose."

[7] Here, the testatrix appears clearly to have had in mind a memorial to her brother in a specified part of her home community and the benefit of the inhabitants of that portion of the community through the establishment therein of a new church. Her charitable intent was specific and limited, both as to locations and as to the nature of the benefit. Consequently, we find no error in the ruling of the Superior Court that the cy pres doctrine has no application to this case.

[8] The third and final question to be determined is, Are the heirs of Miss Pinnix necessary parties to this proceeding?

In *St. James v. Bagley, supra,* the owner of land conveyed it to the Vestry and Wardens of St. James Church who, in turn, contracted to sell and convey to Bagley. The proceeding was a controversy without action to determine whether such grantee held the property in trust or could convey a good, unencumbered title to the defendant. The Court held, Chief Justice Clark dissenting on this point, that the heirs of the original grantor were not necessary parties.

In *Shannep v. Strong,* 160 Kan. 206, 160 P. 2d 683, suit was brought against the trustee of a testamentary charitable trust by the residuary devisee, who contended that the trust failed when the local church, which was the beneficiary, disbanded and that the property thereupon passed to her. The Court held that the cy pres doctrine being inapplicable, the property would have passed to the heirs of the testator had there been no residuary clause, but, since there was a residuary clause, it passed to the residuary devisee.

The Restatement of the Law, Trusts, 2d, § 411, says that the following is the general rule where an express trust fails:

> "Where the owner of property gratuitously transfers it and properly manifests an intention that the transferee shall hold the property in trust but the trust fails, the transferee holds the trust estate upon a resulting trust for the transferor or his estate, unless the transferor properly manifested an intention that no resulting trust should arise or the intended trust fails for illegality."

In Comment c upon this rule the Restatement says, "If real and personal property is devised or bequeathed upon a trust which fails and there is a provision in the will effectively disposing of the residue of the testator's real and personal property, the devisee or legatee, if he takes title to the property, holds it upon a resulting trust for the residuary devisee or legatee." Comment k states, "The rule stated in this Section is applicable not only where an intended trust fails at the outset but also where a trust is created which subsequently fails."

There is authority to the effect that if a testamentary trust never becomes operative the provision lapses and the property passes to the residuary legatee or devisee, if the will contains a residuary clause, but if the trust once becomes operative and then fails, the resulting trust is for the benefit of the testator's heirs. *Industrial National Bank v. Drysdale,* 84 R.I. 385, 125 A 2d 87, 62 A.L.R. 2d 756; Annot., 62 A.L.R. 2d 763; 15 AM JUR 2d, Charities § 128. We find no basis for this distinction. If the creator of the express trust were still living, the resulting trust would be for his benefit. The question is, Who is his successor in interest?

Where the will creating the trust contains a residuary clause, as here, it is apparent that the creator of the trust favored the residuary legatee or devisee over his general heirs at law. This is especially true where, as here, the residuary legatee and devisee was a close relative for whom the testator obviously had affection. Cases in which the trust which failed was, itself, created by a residuary bequest or devise are distinguishable. See: *Waterbury Trust Co. v. Porter,* 131 Conn. 206, 38 A 2d 598; *Rohiff v. German Old People's Home* (Neb.), 10 N.W. 2d 686.

We find in this record no basis for doubt that Miss Pinnix, after making the bequests and devises to First Presbyterian,

and other dispositions of her properties, intended by the residuary clause to provide that all other property interests which she might have, whether known to her or not, would pass to her surviving brother, the residuary legatee and devisee. He, in turn, named the original plaintiff in this action as his residuary legatee and devisee, thereby passing his interest to her. The present plaintiffs are her successors in interest by virtue of the residuary clause in her will.

We find no error in the conclusion of the Superior Court that the heirs at law of Susan E. Pinnex are not necessary parties to the present proceeding.

No error.

Justice SHARP did not participate in the consideration and decision of this case.

Justice BRANCH dissenting.

I am of the opinion that the property devised and bequeathed to the First Presbyterian Church of Reidsville by the will of Susan E. Pinnix created estates in fee simple, unencumbered by a trust.

In *Williams v. Thompson,* 216 N.C. 292, 4 S.E. 2d 609, certain real property was devised to the Methodist Episcopal Church, "to be used by the stewards or legal representatives of the said church in the Town of Plymouth, as a parsonage for the minister and for no other purpose . . . . " The Court held that this will devised a fee in the land and reasoned that the effect of the language in the will was only to express the wish of the testatrix as to the future use of the land.

In *Hall v. Quinn,* 190 N.C. 326, 130 S.E. 18, certain lands were conveyed to the Trustees of the James Sprunt Institution, an institution controlled by the Wilmington Presbytery, "to be used for the purposes of education, and for no other purposes." This Court held that the language of this conveyance created an estate in fee.

In the landmark case of *St. James v. Bagley,* 138 N.C. 384, 50 S.E. 841, a deed was executed to the Vestry and Wardens of St. James Church containing the following language:

> " . . . the said parties of the first part, for the purpose of aiding in the establishment of a Home for Indigent

> Widows or Orphans or in the promotion of any other charitable or religious objects to which the property hereinafter conveyed may be appropriated by the said parties of the second part, . . . do by these presents grant, bargain, and sell to the said parties of the second part, ... "

This Court held that such language did not create a trust, and, in part stated:

> " . . . By all of the canons of construction and the rules laid down by the courts for ascertaining the intention of the donor, we are brought to the conclusion that no trust is created by the language in this deed. . . . "

It is recognized, however, that no particular words are necessary to create a trust if the intent to create a trust is evident. Ultimately, construing a will involves finding the intent of the testator, and when found, giving this intent effect unless contrary to public policy or some rule of law. *Y.M.C.A. v. Morgan*, 281 N.C. 485, 189 S.E. 2d 169.

Examination of the provisions of this will in light of the circumstances known to the testatrix reveals an intent on her part to memorialize her brother. Such examination, however, reveals no intent to restrict the gifts or any indication that the testatrix wished to abandon her desire to commemorate the memory of her brother if it could not be accomplished by the erection of a church on the site indicated in the will.

The will of Susan E. Pinnix was obviously drawn by a competent lawyer. Yet, the pertinent items of the will do not contain language generally used by the legal profession in creating a trust. Further, the scrivener could have easily made the bequests and devises defeasible upon failure to perform *conditions* which testatrix might have imposed. The will, nevertheless, contains no clause of forfeiture upon conditions broken or clause of reentry.

I believe that the testatrix intended to devise and bequeath the property to the First Presbyterian Church, Reidsville, North Carolina, in fee simple, to express the motive which prompted her to make the gifts, and to indicate her *wishes* concerning the future use of the property.

With knowledge of the primary motive of the testatrix, the church, in all probability, would use the property to memorialize her brother in some appropriate way.

Finally, we note that the Consent Judgment entered in the Superior Court of Rockingham County on 6 October 1961 did not attempt to adjudicate the rights of the parties or to construe the will of Susan E. Pinnix. This judgment did no more than continue the cause for a period of ten years and provide that in the event defendants did not within that time erect a church in memory of M. F. Pinnix within a radius of five miles of the Burton Street property, that the plaintiff be "authorized by motion in this cause to reaffirm her claim to the corpus of the trust." In the present action, plaintiffs seek "to reaffirm their claims," if any they have.

I vote to reverse and remand to Rockingham Superior Court for entry of judgment declaring the First Presbyterian Church of Reidsville to be the absolute owner of all of the property, both real and personal, which was devised or bequeathed to it by the will of Susan E. Pinnix.

Chief Justice BOBBITT joins in this dissenting opinion.

Atkins v. Walker

R. E. ATKINS, TRUSTEE OF LITTLE MOUNTAIN BAPTIST CHURCH, AND GLADYS CUMMINGS, MAJOR F. CUMMINGS, LARRY ATKINS, ROBIN ATKINS, JOAN ATKINS, GARRY ATKINS, PAULINE ATKINS, MOIR ATKINS, DWIGHT ATKINS, BARBARA HICKS, RICKY HICKS, HERMAN HICKS, ETHEL ATKINS, MAYE ATKINS, MICIE WATSON, LEOLA KEY, KATHY KEY, POSEY SAWYERS, MAMIE SAWYERS, MYRTLE KEY, PAUL KEY, ALMA C. JOHNSON, BOBBY JOHNSON, GERTRUDE JOHNSON, TOMMY JOHNSON AND J. C. JOHNSON

v.

C. L. WALKER, RAYTON PUCKETT, HARVEY JOHNSON, LONNIE JOHNSON, BOBBY BRUNER, ELBERT WATSON, GRAHAM TILLEY, FRANK HOLIFIELD, CLAY GIBSON, WORTH BASS, MABLE CREED, ROSCOE CREED, FRANKIE LAWSON, CLYDE LAWSON, DAVID BUSSICK AND FRANCES VENABLE

No. 69

(Filed 12 December 1973)

1. **Constitutional Law § 22; Religious Societies and Corporations § 2— right to use church property — departure from church doctrine — First Amendment**

The First Amendment forbids a determination of rights to use and control church property on the basis of a judicial determination that one group of claimants has adhered faithfully to the fundamental faiths, doctrines and practices of the church prior to the schism, while the other group of claimants has departed substantially therefrom.

2. **Religious Societies and Corporations § 3— right to use church property — function of courts**

In an action to determine the right to use and control properties of a Missionary Baptist Church, the function of the courts is to determine, pursuant to neutral principles of law developed for use in all property disputes, (1) who constitutes the governing body of the particular Missionary Baptist Church, and (2) who the governing body has determined to be entitled to use the properties.

3. **Religious Societies and Corporations § 2— Missionary Baptist Church — governing body**

The governing body of a Missionary Baptist Church is its congregation and the determinations of that body are properly to be made in a meeting of the congregation in which every member, irrespective of age, sex or other circumstance, is entitled to vote, a majority vote determining the question.

4. **Religious Societies and Corporations § 2— actions taken by vote of congregation**

The congregation of a Missionary Baptist Church had the right, by majority vote in a duly called and conducted meeting, to adopt a constitution and bylaws for its own government, to call to its pastorate the man of its choice, to disassociate the church from other

Baptist churches and organizations thereof and determine what contributions, if any, it would make to activities of such associations, and to determine what literature, if any, should be used in its Sunday School and other activities.

5. **Religious Societies and Corporations § 3— right to use church properties — action by minority group**

A minority group of a Missionary Baptist Church may contest the validity of an action of the congregation, affecting such minority's right to use the church properties and to participate in the activities of the church, by showing that such action was not taken in a meeting duly called and conducted according to the procedures of the church, themselves properly adopted and then in effect.

6. **Religious Societies and Corporations § 3— right to use church property — issues**

Issues as to departure from church doctrine and practices by one faction or the other were not proper for determination by judicial proceedings in controversies concerning the right to use and control church property.

APPEAL by plaintiffs from the decision of the Court of Appeals, reported in 19 N.C. App. 119, 198 S.E. 2d 101, reversing the judgment of *Crissman, J.*, entered at the 29 May 1972 Session of SURRY.

The plaintiffs allege that they are members of the Little Mountain Baptist Church, one being a deacon and trustee. The defendant Puckett is the former pastor, the defendant Walker is the present pastor and the other defendants are members of the church. The prayer of the complaint is that the plaintiffs be declared the true congregation, that the defendant Walker be restrained from continuing to act as its pastor and that the defendants be enjoined to surrender to the plaintiffs the parsonage and the church building.

The complaint alleges that a division has arisen between the members of the church, that the plaintiffs have remained faithful to the characteristic usages, customs, doctrines and practices accepted by all members prior to the division, and that the defendants have departed radically and fundamentally therefrom in numerous specified respects, including: The adoption of a constitution; the severing of all relations with the Surry Baptist Association, the Baptist State Convention and the Southern Baptist Convention; the cutting off of support for the programs and institutions of such Association and Conventions; the support of missionary activities and other activities independent thereof; and the use of Sunday School and church

literature published by and obtained from a source independent of such Association and Conventions. The complaint further alleges that the defendants are attempting to set up a dictatorship in the pastor and have attempted to remove the names of the plaintiffs and others from the church rolls.

The defendants first filed a motion to dismiss the action for want of jurisdiction over the subject matter, asserting, "This action is in violation of Article I, Section 13 of the North Carolina Constitution and the First Amendment to the United States Constitution." This motion was overruled.

The defendants then filed answer, preserving the jurisdictional question and alleging further that the action should be dismissed as to the defendant Puckett for that he is no longer either the pastor or a member of the church. The answer further alleges that the church is an autonomous body, controlled by a majority of its members, being "a fundamental Missionary Baptist Church," that the defendants have faithfully adhered to the faith and customs of such church and the plaintiffs have not remained true thereto but have abandoned the church and have contributed nothing to it for a period of five years or more.

The following issues were submitted to and answered affirmatively by the jury:

> "1. Did the Plaintiffs remain faithful to the doctrines and practices of the Little Mountain Baptist Church recognized and accepted by the Plaintiffs and Defendants prior to the division?
>
> "2. Have the Defendants departed radically and fundamentally from the characteristic usages, customs, doctrines and practices of the Little Mountain Baptist Church accepted by all members prior to the division as alleged in the complaint?"

The Superior Court, thereupon, adjudged that the true congregation of the church consists of the plaintiff (sic) and all other members of the congregation who adhere to and submit to the characteristic doctrines, usages, customs and practices of the church recognized and accepted by both factions of the congregation before the dissension arose; that the defendants are enjoined to vacate and surrender to the plaintiffs the properties in question; and that the defendant Walker is restrained from acting as pastor of the church or from acting for it in any capacity.

The Court of Appeals reversed and remanded the matter to the Superior Court for proceedings not inconsistent with its opinion, Judge Britt, dissenting, the basis for the decision being that the Superior Court had based its judgment upon the determination of an issue which may not constitutionally be inquired into by a civil tribunal.

The plaintiffs introduced evidence to the following effect:

The land on which the church and the parsonage stand was given by the father of the plaintiff R. E. Atkins. (The record does not show whether this was by will or deed, the terms of the conveyance or whether title was conveyed to trustees.)

The division of the church developed during the pastorate of the defendant Puckett, who is no longer a member of the church. It began as a result of his pronouncements concerning the relative authorities of the pastor and the deacons. Prior thereto, the church was in fellowship with the Surry Baptist Association and the Southern Baptist Convention, making contributions thereto and using Sunday School and church literature received therefrom. All matters coming before the church, including the calling and dismissal of a pastor, were then determined by a majority vote of the congregation, any member being entitled to vote. The only requirement for membership in good standing was "to believe that Jesus Christ was [sic] the Son of God." Thereafter, Mr. Puckett was given a vote of confidence, by the standing vote of a majority of those present at a church conference, some of those standing in support of the motion being nonmembers, some of these being small children. (The witness stated he did not know whether such nonmembers were counted by those who tallied the votes.)

After the dissention arose and after the termination of the pastorate of Mr. Puckett, a representative of the Surry Association (Mr. Bradley) made certain recommendations designed to reunite the church, including the adoption of a constitution. At least some of these recommendations were adopted by the church. (The evidence is in conflict and in confusion as to whether the constitution adopted by the church was that recommended by Mr. Bradley. He testified it was not.)

The Surry Baptist Association does not recommend any particular form of constitution to churches affiliated with it. Different churches have differing constitutions. All Missionary

Baptist churches are autonomous and the Association has no control over any church.

Prior to the adoption of the present constitution, the church had none. The constitution provides that the church shall be a Missionary Baptist church, that its members subscribe to the declaration of faith set forth in the New Hampshire Confession of Faith. In a number of respects it prescribes qualifications for holding various offices in the church, including the pastorate, which had not theretofore been required. A new provision is to the effect that a member absenting himself from the regular services without good cause, for three months becomes an inactive, nonvoting member and one absenting himself, without good cause, for one year automatically ceases to be a member.

After the dissension arose, the church ceased to be associated with the Surry Baptist Association and the Southern Baptist Convention. Affiliation of a church with either of these bodies is voluntary.

After the dissension arose, after the adoption of the constitution and after the termination of the pastorate of the defendant Puckett, the defendant Walker became a member and the pastor. He was elected by a majority (standing) vote. Prior to the taking of the vote, it was announced (in accordance with the constitution) that those "who hadn't been there in three months" could not vote.

During the pastorate of the defendant Walker, the church has ceased to use literature published by the Southern Baptist Convention and has used more "fundamentalist" literature published by an independent publishing company.

At the close of the plaintiffs' evidence, the defendants moved for a directed verdict, which motion was denied.

The defendants then introduced evidence to the following effect:

The defendant Walker has not attempted to change the church from a Missionary Baptist church into one of another kind. Sunday School literature now used in the church and that published by the Southern Baptist Convention both use the same scripture selections, but the interpretations thereof are different. The church is not presently associated with the Southern Baptist Convention or with the Surry Baptist Association, having

been dismissed from fellowship by the Association. It is associated with a group of independent Baptist churches. This is in accordance with the wishes of Mr. Walker.

The church now makes regular, substantial contributions to mission programs of the independent Baptist churches with which it is affiliated but makes no contributions to the Southern Baptist Convention programs or those of the Surry Association.

The name of the church has not been changed. The plaintiffs are welcome to return to the church to worship with the congregation, but their votes in church meetings will not be counted until they make public apology to the church for their long continued absences from its services and for their having brought suit against it.

During Mr. Walker's pastorate, the church has taken no action, including the adoption of the change in Sunday School literature, except by the majority vote of the congregation. The doctrines of the church have not been changed. It is and always has been a Missionary Baptist church.

The constitution was adopted by a majority vote two years prior to the time Mr. Walker became pastor and the votes to call him to the pastorate were approximately 150 in favor to only two or three against extending the call, those voting in opposition being among the plaintiffs in this action.

Since the plaintiff group ceased attending the services of the church, the financial support of the church has substantially increased and so have its contributions to missions. The church debt has been retired. There has been no change in the type of teaching in the Sunday School or in the type of preaching at the services of the church since the dissension arose. The church formerly had a Woman's Missionary Society but this has been discontinued. The plaintiffs have not been taken off the church roll. The plaintiffs Atkins and Key were replaced as trustees of the church at their own requests.

The defendants renewed their motion for a directed verdict at the close of their evidence. The motion was again denied.

White & Crumpler by James G. White and Michael Lewis for plaintiff appellants.

Seawell, Pollock, Fullenwider, Van Camp & Robbins by H. F. Seawell, Jr., for defendant appellees.

LAKE, Justice.

In *Reid v. Johnston,* 241 N.C. 201, 85 S.E. 2d 114 (1954), this Court affirmed a judgment to the effect that a minority of the members of the North Rocky Mount Missionary Baptist Church were the true congregation thereof and entitled, as against the majority, to the use and possession of the church property. Speaking through Justice Parker, later Chief Justice, the Court recognized that, "nothing else appearing," the majority of the members of a self-governing Missionary Baptist church is entitled to control the church property. The Court then said:

> "While it is true the membership of the North Rocky Mount Missionary Baptist Church is a self-governing unit, a majority of its membership is supreme and entitled to control its church property only so long as the majority remains true to the fundamental faith, usages, customs, and practices *of this particular church,* as accepted by both factions before the dispute arose. [Citations omitted.] [Emphasis added.]
>
> "A majority of the membership of the North Rocky Mount Missionary Baptist Church may not, as against a faithful minority, divert the property of that church to another denomination, or to the support of doctrines, usages, customs and practices radically and fundamentally opposed to the characteristic doctrines, usages, customs and practices of that particular church, recognized and accepted by both factions before the dissension, for in such an event the real identity of the church is no longer lodged with the majority group, but resides with the minority adhering to its fundamental faith, usages, customs and practices, before the dissension, who, though small in numbers, are entitled to hold and control the entire property of the church."

As authority for this proposition the Court cited *Dix v. Pruitt,* 194 N.C. 64, 138 S.E. 412 (1927), which involved a controversy in a Primitive Baptist church concerning the calling to its pastorate of a minister who had been expelled by another Primitive Baptist church. According to the evidence in *Dix v. Pruitt, supra,* the then long established rule, apparently unwritten, of the Primitive Baptist denomination was that no Primitive Baptist church could call to its pastorate one who had been expelled from another Primitive Baptist church, until such person

was readmitted to the church which had so expelled him. In *Dix v. Pruitt, supra,* this Court held there was sufficient evidence in the record before it on the appeal to justify submitting to the jury this issue: "Were the plaintiff [the minority] and those united with them the *sole and only members* of the Dan River Primitive Baptist Church on 9 October 1923?" (Emphasis added.) The jury answered that issue in the affirmative. In affirming the judgment upon the verdict, this Court said, through Justice Brogden:

> "All Baptist Churches have the congregational system of government. They are independent sovereignties and exclusively self-governing units. * * * Hence, it must necessarily follow that a majority of the membership in any given congregation, *nothing else appearing,* is entitled to control the church property and direct and control the administrative affairs of the congregation. But it is equally true that each church or congregation is an orderly unit as well as a self-governing unit, and that there are certain fundamental faiths, immemorial customs and usages and uniform practices which form a part of the church life and constitute an integral part of its function. [Emphasis added.]
>
> "In other words, a majority in a Baptist Church is supreme, or a 'law unto itself,' so long as it remains a Baptist Church, or true to the fundamental usages, customs, doctrine, practice, and organization of Baptists. * * *
>
> "It is the duty of this Court to determine the merits of the controversy upon the record as presented. If the testimony in this particular record is to be believed, then there is a limitation to the independent sovereignty of a Primitive Baptist Church, and that limitation is the order, practice, and doctrine of the denomination; or, to state the proposition differently, according to the testimony in the record before us, a Primitive Baptist Church is a sovereign, self-governing unit so long as it remains in the order, practice, and doctrine prescribed by the written and unwritten law."

It will be observed that in *Reid v. Johnston, supra,* this Court applied to a Missionary Baptist church the rule laid down in *Dix v. Pruitt, supra,* concerning a Primitive Baptist church, with the modification that in the Missionary Baptist church the determinative faiths, doctrines and practices are those of the

local church. It is also to be noted that, according to the record in *Dix v. Pruitt, supra,* the Primitive Baptist churches, collectively, exercised some measure of control over who might be called to the pastorate of a local church. Thus, the Primitive Baptist churches were shown by the record in *Dix v. Pruitt, supra,* to be, in part, connectional in their government. A denomination may be, in its government, congregational in part and connectional in part. See *Conference v. Creech,* 256 N.C. 128, 140, 123 S.E. 2d 619, which involved a Free Will Baptist church. In this respect, and in others, there are differences between the several bodies of Baptist churches. Missionary Baptist churches are completely congregational in government. See: Baker, a Baptist Source Book (Broadman Press, 1966), p. 200; Annual of the Southern Baptist Convention, 1925, pp. 71-76, Article 22; Annual of Southern Baptist Convention, 1963, pp. 261-281, Article XIV; McDaniel, The People Called Baptists (published by Sunday School Board of the Southern Baptist Convention, 1925), pp. 43, 48; Encyclopedia of Southern Baptists (Broadman Press, 1958), pp. 140, 148, 277, 281; Semple, History of the Rise and Progress of the Baptists in Virginia (Beale's Edition, 1894), p. 62; Ryland, The Baptists of Virginia (1955), p. 205-6; Paschal, History of North Carolina Baptists (published by the General Board, North Carolina Baptist State Convention, 1930), p. 7.

The rule thus stated in *Dix v. Pruitt, supra,* was, itself, a departure from *Trustees v. Seaford,* 16 N.C. 453 (1830), apparently the first case to reach this Court concerning rights in the property of a divided church, in that instance a Lutheran church. There, this Court, then consisting of Chief Justice Henderson and Justices Hall and Ruffin, speaking through Justice Hall, after expressing the opinion that the grantor in the deed to the church would have had no claim, said:

> "If the grantor has no right, on what foundation does the plaintiffs' claim rest? It appears that they are seceders from the church, and are not the trustees or representatives of it; that they were a minority of the members before their secession. Had they remained in the church, they must have yielded to the government of the majority. Much less can they have any control over it when they are no part of it. * * *
>
> "With respect to the allegation made by the plaintiffs that the defendants, or the church which they represent,

have strayed from the true faith, or that errors have crept into the church government, the answer is that on that question it is not for them nor this Court to decide."

The above quoted pronouncements by this Court in *Reid v. Johnston, supra,* and in *Dix v. Pruitt, supra,* have been relied upon and followed in a number of more recent decisions of this Court. See: *Paul v. Piner,* 271 N.C. 123, 155 S.E. 2d 526 (1967) (Free Will Baptist); *Conference v. Piner,* 267 N.C. 74, 147 S.E. 2d 581 (1966) (Free Will Baptist); *Conference v. Miles,* 259 S.E. 2d 600 (1963) (Free Will Baptist).

An earlier dictum in *Kerr v. Hicks,* 154 N.C. 265, 70 S.E. 468 (1911) (Missionary Baptist), cited with approval in *Western North Carolina Conference v. Tally,* 229 N.C. 1, 47 S.E. 2d 467 (1948) (Christian), states, "In church organizations, those who adhere and submit to the regular order of the church, local and general, though a minority, are the true congregation." This is a quotation from Roshi's Appeal, 69 Pa. 462, which dealt with a controversy in the German Reformed Church, a connectional denomination. The only other authorities cited by this Court in *Kerr v. Hicks, supra,* in support of this statement are *Gable v. Miller,* 10 Paige 627 (N.Y. Chancery Court, 1844), which also concerned a controversy in the German Reformed Church, and *General Assembly of Free Church of Scotland et al. v. Overtoun et al.,* L. R. 1904, Appeal Cases 515 (House of Lords, 1904), which dealt with a controversy in the Free Church of Scotland, a connectional denomination. Thus, the cited authorities for the quoted statement dealt with situations quite different from that presented by a division among the members of a local church having a completely congregational government.

In 1969 the Supreme Court of the United States rendered its decision in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, et al,* 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed. 2d 658. In that case two local Presbyterian churches in Georgia withdrew from the hierarchical general church organization due to their belief that certain actions and pronouncements of the general church were violations of that organization's constitution and were departures from doctrines and practices in force at the time of the affiliation of the two local churches with the general church. The ministers of the two local churches and the majority of the ruling elders thereof renounced the jurisdiction and authority of the general church over them. A commission of the general

church proceeded to take over the properties of the local churches, which filed suits to enjoin the general church from trespassing. The trial court submitted the case to the jury on the theory that the law of Georgia implies a trust of local church property for the benefit of the general church on the sole condition that the general church adhere to its tenets of faith and practice existing at the time of affiliation by the local churches. The jury returned a verdict for the local churches and the trial court, thereupon, adjudged that the implied trust had terminated, and enjoined the general church from interfering with the use by the plaintiffs of the properties in question. The Supreme Court of Georgia affirmed. The Supreme Court of the United States reversed the decision of the state court, saying, through Mr. Justice Brennan:

> "The question presented is whether the restraints of the First Amendment, as applied to the States through the Fourteenth Amendment, permit a civil court to award church property on the basis of the interpretation and significance the civil court assigns to aspects of church doctrine. * * *
>
> "It is of course true that the State has a legitimate interest in resolving property disputes, and that a civil court is a proper forum for that resolution. Special problems arise, however, when these disputes implicate controversies over church doctrine and practice. * * *
>
> "Thus, the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes. It is obvious, however, that not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded. But First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in

matters of purely ecclesiastical concern. Because of these hazards, the First Amendment enjoins the employment of organs of government for essentially religious purposes [citations omitted]; *the amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine.* * * * [Emphasis added.]

"The Georgia courts have violated the command of the First Amendment. * * * [T]he departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role.

" * * * The departure-from-doctrine approach is not susceptible of the marginal judicial involvement contemplated in *Gonzalez* [*v. Archbishop,* 280 U.S. 1, 74 L.Ed. 131, 50 S.Ct. 5 (1929)]. Gonzalez' rights *under a will* turned on a church decision, the Archbishop's, as to church law, the qualifications for the chaplaincy. It was the Archbishopric, not the civil courts, which had the task of analyzing and interpreting church law in order to determine the validity of Gonzalez' claim to a chaplaincy. Thus, the civil courts could adjudicate the rights under the will without interpreting or weighing church doctrine but simply by engaging in the narrowest kind of review of a specific church decision—i.e., whether that decision resulted from fraud, collusion, or arbitrariness. Such review does not inject the civil courts into substantive ecclesiastical matters." (Emphasis added.)

The decision of the Supreme Court of the United States upon the applicability and meaning of a provision of the United States Constitution for litigation in state courts is, of course, controlling.

It follows that the above quoted passages from the opinions of this Court in *Reid v. Johnston, supra,* and *Dix v. Pruitt, supra,* may no longer be deemed authoritative in litigation concerning the use and control of church property when a division has arisen in the membership of the church. This is true whether the government of the church in question be congregational or connectional.

[1] It nevertheless remains the duty of civil courts to determine controversies concerning property rights over which such courts have jurisdiction and which are properly brought before them, notwithstanding the fact that the property is church property. Neither the First Amendment to the Constitution of the United States nor the comparable provision in Article I, Section 13, of the Constitution of North Carolina deprives those entitled to the use and control of church property of protections afforded by government to all property owners alike, such as the services of the Fire Department, police protection from vandals and trespassers or access to the courts for the determination of contract and property rights. It is expressly so noted in the above mentioned decision of the Supreme Court of the United States. See also, *Everson v. Board of Education,* 330 U.S. 1, 16, 67 S.Ct. 504, 91 L.Ed. 711 (1947). What is forbidden by the First Amendment, as now interpreted, is a determination of rights to use and control church property on the basis of a judicial determination that one group of claimants has adhered faithfully to the fundamental faiths, doctrines and practices of the church prior to the schism, while the other group of claimants has departed substantially therefrom. Pressed to its logical conclusion, such a judicial inquiry becomes a heresy trial. Such trials may not properly be conducted by any civil court, state or Federal, in view of the First Amendment to the United States Constitution and Article I, Section 13, of the Constitution of North Carolina.

We are not here concerned with the construction and enforcement of the provisions of a deed or will creating an express trust for the benefit of members of a religious congregation adhering to specified doctrines or practices or organizational affiliations. In this respect, the present case is distinguishable from *Western North Carolina Conference v. Tally, supra; Williams v. Williams,* 215 N.C. 739, 3 S.E. 2d 334 (1939); and *Nash v. Sutton,* 117 N.C. 231, 23 S.E. 178 (1895). Likewise, we do not have before us a claim of a grantor, or his representatives, or of the heirs or residuary legatee of a testator, that the title to the property conveyed or devised to a religious body has reverted to him, or them, by reason of the termination of a defeasible fee or the termination of a trust. See *Trustees v. Seaford, supra.*

The record below us does not show how the Little Mountain Baptist Church acquired title to, or a beneficial interest in,

the property, except that the land on which the buildings have been erected was "given" by the father of one of the plaintiffs. The clear inference in the record is that the church has named trustees, pursuant to G.S. 61-1, who hold the legal title but have no right of control "as against the governing body of the church." See *North Carolina Christian Conference v. Allen,* 156 N.C. 524, 72 S.E. 617 (1911). Thus, the right to use and control the properties is in "the governing body" of the Little Mountain Baptist Church.

[2] The function of the courts in this litigation is to determine: (1) Who constitutes the governing body of this particular Missionary Baptist church, and (2) who has that governing body determined to be entitled to use the properties. These determinations must be made pursuant to "neutral principles of law, developed for use in all property disputes." *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, et al, supra.* That is, these questions must be resolved on the basis of principles of law equally applicable to the use of properties of an unincorporated athletic or social club.

[3] It is clearly shown in the record that, prior to the commencement of the dissension in the church, it was, in organization, a typical Missionary Baptist church. Consequently, its governing body was its congregation and the determinations of that body were properly to be made in a meeting of the congregation in which every member, irrespective of age, sex or other circumstance, was entitled to vote, a majority vote determining the question.

"A Baptist church is a democracy in which every member has an equal voice." Paschal, History of North Carolina Baptists (1930), p. 8. "In a Baptist church equal suffrage is the right of young and old, rich and poor, male and female. Every member is entitled to a voice and vote. * * * Today, Baptist churches have absolute control over their affairs and elect their own officers as did those in the days of the apostles." McDaniel, The People Called Baptists (1925), pp. 43, 48. "Each local church is a self-governing unit. No outside authority, board, conference, association, convention, or individual can exercise authority over the affairs of a Baptist church. * * * Baptist churches are related to other Baptist churches in associations, conventions and alliances; but this relation is purely voluntary and advisory. Within the membership of a church all are equal. * * * Operating

as a simple democracy, the church decides matters by the vote of the congregation after full, free and open discussion. Under Baptist procedure the majority rules. * * * Participation in the affairs of the denomination by any church is voluntary. The church may identify itself with the denomination or withdraw such identification. The church may co-operate with any program of the denomination or refuse to co-operate." Encyclopedia of Southern Baptists (1958), p. 148. "Early Baptists and their successors have also consistently defended the doctrine of the autonomy of the local church. Each local congregation within the Baptist fellowship is competent to order its own affairs under the leadership of the Holy Spirit. * * * The local church is free to purge itself by means of spiritual discipline of unworthy or heretical members." Encyclopedia of Southern Baptists (1958), p. 281.

[4] Thus, the governing body of the Little Mountain Baptist Church before the dissension therein arose, and now, was and is the congregation of that church. It had the right, by a majority vote, in a duly called and conducted meeting of the congregation, to adopt a constitution and bylaws of its own choice for its own government and to call to its pastorate the man of its choice. By a constitution, so adopted, it could impose reasonable limitations upon the right to vote in its meetings. By a vote of a majority in a meeting duly called and conducted, according to its own established procedures, it could disassociate itself from other Baptist churches and organizations thereof and could determine what contributions, if any, it would make to any or all activities of such associations. By a majority vote in a meeting duly called and conducted, according to its own properly adopted procedures, it could determine what literature, if any, should be used in its Sunday School and other activities.

[5] It is open to a minority group, however small, to contest the validity of an action of the congregation, affecting such minority's right to use the church properties and to participate in the activities of the church, by showing that such action was not taken in a meeting duly called and conducted according to the procedures of the church, themselves properly adopted and then in effect. "Where civil, contract or property rights are involved, the courts will inquire as to whether the church tribunal acted within the scope of its authority and observed its own organic forms and rules." *Conference v. Creech, supra; Conference v. Miles, supra; McDaniel v. Quakenbush,* 249 N.C.

31, 105 S.E. 2d 94 (1958); 66 AM. JUR. 2d, Religious Societies, § 46; 76 C.J.S. Religious Societies, § 86.

There are allegations in the complaint, and there is evidence in the record, that at some meetings of the congregation, when standing votes were taken, persons not members stood with the majority, but there is no allegation or evidence that on any of these occasions the question was not carried by a majority of persons eligible to vote thereon. There is nothing in the record to suggest that any action of which the plaintiffs complain was not taken at a meeting of the congregation duly called, convened and conducted according to the properly established procedures of the church then in effect.

[6] In fairness to the learned trial judge, it should be stated that the issues submitted to the jury were consistent in form with the above quoted passages in *Reid v. Johnston, supra,* and in *Dix v. Pruitt, supra.* However, in the light of *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church et al, supra,* we now hold that these issues are not proper for determination by judicial proceedings in controversies concerning the right to use and control church property.

The Court of Appeals properly reversed the judgment of the Superior Court and remanded the matter for further proceedings. These will be not inconsistent with the opinion of the Court of Appeals or with this opinion.

Affirmed.

STATE OF NORTH CAROLINA v. WALTER JACKSON, JR.

No. 47

(Filed 12 December 1973)

1. **Jury § 6— examination of prospective jurors — question not relating to qualifications**

The trial court did not err in refusing to allow defense counsel to ask prospective jurors whether they would adopt an interpretation of the evidence which points to innocence and reject that of guilt if they found that the evidence is susceptible of two reasonable interpretations, since the question could not reasonably be expected to result in an answer bearing upon a juror's qualifications but could

well tend to commit, influence or ask the jury for a decision in advance of hearing all the evidence.

2. **Criminal Law § 67— voice identification**

Unless barred by constitutional grounds, identification by voice is admissible.

3. **Criminal Law § 67— voice identification — necessity for voir dire**

When voice identification testimony is offered and defendant objects and requests a *voir dire* hearing, the trial judge should hear evidence, from both the State and the defendant, make findings of fact, and thereupon rule on the admissibility of the evidence.

4. **Criminal Law § 67— voice identification — due process — totality of circumstances**

Whether an accused's constitutional right of due process has been violated by voice identification procedures depends upon the totality of the circumstances surrounding the confrontation.

5. **Criminal Law § 67— voice identification admitted — entire record shows unnecessarily suggestive procedures**

When voice identification testimony is properly admitted, but it is later conclusively or plainly demonstrated by the entire record that the identification testimony was based on procedures which were unnecessarily suggestive and conducive to irreparable mistaken identification, the entry of judgment without excluding the voice identification testimony deprives defendant of due process.

6. **Criminal Law § 67— admissibility of voice identification**

Rape victim's identification of defendant by voice when she overheard a conversation between defendant and his attorney after the preliminary hearing in district court did not occur under circumstances unnecessarily suggestive and conducive to irreparable mistaken identification, and the victim was properly allowed to testify at trial concerning such voice identification, notwithstanding the victim testified that prior to the preliminary hearing the police had shown her a photograph of defendant, told her his fingerprint matched one found in her apartment and informed her that defendant had been arrested, where the victim did not identify defendant by sight at the time the photograph was shown to her or at any time thereafter, and she described in detail the particular and peculiar characteristic of defendant's voice upon which she based her identification.

7. **Criminal Law §§ 34, 60— admission of fingerprint identification card**

In a burglary and rape prosecution, defendant was not prejudiced by the admission of a fingerprint identification card made in 1962 where the card, as altered prior to its introduction into evidence, did not disclose defendant's criminal record, and the only evidence relating the card to another criminal offense was the testimony of a police officer that it was police department procedure to place fingerprint information on such identification cards when a person is arrested.

8. **Criminal Law § 60— fingerprint identification card — hearsay — rights of confrontation and cross-examination — harmless error**

If the admission of a fingerprint identification card made in 1962 was erroneous on grounds that it was hearsay or deprived defendant of his rights of confrontation or cross-examination, any prejudice to defendant was dispelled by the fact the State introduced fingerprints taken upon defendant's arrest in 1972 for the crimes for which he was on trial.

9. **Criminal Law § 84— fingerprint identification card — alleged product of illegal arrest — necessity for voir dire on legality of arrest**

The trial judge was not required to conduct a *voir dire* examination concerning the legality of defendant's arrest in 1962 upon defendant's general objection to the admission of a fingerprint identification card made in 1962 where the court conducted a *voir dire* hearing to determine the admissibility of the card and defendant's counsel did not offer evidence, contend or intimate during the hearing that the card was the product of an illegal arrest or detention.

10. **Burglary and Unlawful Breakings § 5; Rape § 5— burglary and rape — fingerprint evidence — voice identification**

The State's evidence was sufficient for the jury in a prosecution for burglary and rape where it tended to show that someone entered the victim's apartment at 2:30 a.m. through a kitchen window and had sexual intercourse with the victim against her will, defendant's fingerprint was found on the lower sash of the kitchen window, and the victim identified defendant as her assailant by his voice.

APPEAL by defendant from *Rouse, J.*, at 26 February 1973 Criminal Session of NEW HANOVER Superior Court.

Defendant was charged in separate indictments with burglary and rape. By consent, the cases were consolidated for trial.

The State offered evidence tending to show that on 17 May 1972, Miss Margaret Rose Simpkins was living alone in an upstairs apartment at 9 North Seventh Street, Wilmington, North Carolina. Her former roommate had moved out during the preceding weekend. The upstairs apartment was a four-room apartment consisting of two bedrooms, a combination kitchen and dining area and a living room. There were two entrances to the apartment, one by way of an inside stairway from the front door of the building, and the other by way of an outside stairway at the back door. Upon entering the back door, a person would pass through the kitchen into the living room and then to the bedrooms located on the front of the building.

On the morning of 17 May 1972, Miss Simpkins retired about 1:00 a.m. after locking both doors and closing the window in the kitchen. She was awakened about 2:30 a.m. by a movement of her bed, and thereupon discovered a naked black man on her bed who said to her: "Be quiet; don't scream." He then put his hand over her mouth, held a pair of sharp shears to her neck, and asked her two times if she had any money. Thereafter, by force and by threat of injuring her with the shears, he had sexual intercourse with Miss Simpkins against her will. Before he left, he uttered the words, "No, no, don't call the police." Miss Simpkins immediately called the police. Upon their arrival, she related the details of the assault, and was taken to a hospital for examination. The examination revealed that she had engaged in sexual intercourse within 36 hours. There was a small scratch on her neck.

When the police arrived, the window in the kitchen was open. This window did not have a lock, and Miss Simpkins stated that she had not disturbed the window since she closed it upon retiring. The police found a latent fingerprint on the lower portion of this window sash. The latent fingerprint was photographed, lifted and placed on a 4" by 5" card. It was then placed in a special fingerprint file of the Wilmington Police Department. At trial, the latent fingerprint taken from the window sash was offered into evidence as State's Exhibit No. 13. A fingerprint impression taken from defendant Walter Jackson, Jr. on 25 October 1962 was also offered into evidence as State's Exhibit No. 14. Lieutenant David Turner, found by the court to be an expert in fingerprint identification, testified that in his opinion the fingerprint impression on State's Exhibits 13 and 14 were made by the same finger. He subsequently testified that the fingerprint on Exhibit 14 was identical to the print taken from defendant on 28 September 1972.

The prosecuting witness testified that she had never seen her assailant before the morning of 17 May 1972, and that she could not identify defendant as her assailant by sight. However, she positively identified defendant as her assailant by the sound of his voice.

Testimony concerning the fingerprints and the voice identification will be more fully considered hereinafter.

Defendant offered no evidence. The jury returned verdicts of guilty of rape, and non-felonious breaking and entering. The

trial judge imposed a sentence of life imprisonment in the rape case and a sentence of two years upon the verdict of non-felonious breaking and entering, the sentences to run concurrently. Defendant appealed, and we allowed motion to bypass as to the non-felonious breaking and entering charge on 19 July 1973.

Attorney General Robert Morgan and Assistant Attorney General William F. Briley for the State.

Goldberg and Anderson by Aaron Goldberg for defendant appellant.

BRANCH, Justice.

[1] During selection of the jury, defendant's counsel posed to the prospective jurors the following question:

> "MR. GOLDBERG: I ask you now collectively if you find from the evidence relating to any or all the facts in this case, in view of all the evidence, that it is susceptible of two reasonable interpretations; that is, one leading to his innocence and one leading to his guilt, I will ask you now if you will adopt that interpretation which points to innocence and reject that of guilt?"

The court sustained the State's objection to this question, and defendant contends that this ruling resulted in prejudicial error.

The *voir dire* examination of jurors has a double purpose, (1) to ascertain whether grounds for challenge for cause exist and (2) to enable counsel to exercise intelligently the peremptory challenges allowed by law. *State v. Allred,* 275 N.C. 554, 169 S.E. 2d 833. However, counsel's examination into the fitness of jurors is subject to the trial judge's close supervision. The regulation of the manner and extent of the inquiry rests largely in the trial judge's discretion. *State v. Bryant,* 282 N.C. 92, 191 S.E. 2d 745 and *Karpf v. Adams* and *Runyon v. Adams,* 237 N.C. 106, 74 S.E. 2d 325.

In *Baker v. Harris,* 60 N.C. 271, this Court disapproved of the practice of asking jurors whether their minds were in such a state that they might try a case fairly and impartially. There the Court stated: "Answers to such questions, in the great majority of cases, will not be likely to afford reliable information as to the true state of a juror's feelings."

In *State v. Bryant, supra,* this Court held that the trial judge did not commit error by refusing to allow defendant's counsel to ask the following question: "If you heard the evidence as presented here in this case and you thought that Delmos was probably guilty, and if you were not convinced absolutely that he was not guilty and you just thought he was probably guilty, will you be able to return a verdict of not guilty?"

In *State v. Washington,* 283 N.C. 175, 195 S.E. 2d 534, the Court held that the trial judge correctly refused to allow counsel for the defendant to ask the following question: "Would you consider, if you had the opportunity, evidence about this defendant, either good or bad, other than that arising from the incident here?" There, Chief Justice Bobbitt, speaking for the Court, said "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."

See, Annot., 99 A.L.R. 2d 7 (1965) for a detailed discussion as to the propriety of asking prospective jurors hypothetical questions on *voir dire* examination.

The hypothetical question posed in instant case could not reasonably be expected to result in an answer bearing upon a juror's qualifications. Rather it could well tend to commit, influence or ask the jury for a decision in advance of hearing all of the testimony.

It is the function of the court, not of the counsel for either party, to instruct the jury as to the law arising on the evidence. G.S. 1-180. *State v. Mundy,* 265 N.C. 528, 144 S.E. 2d 572. Here the trial judge correctly charged the jury as to the law of circumstantial evidence including the following instruction:

> "So after considering the evidence in this way and determining the circumstances, if any, which are established beyond a reasonable doubt, the next thing for the jury to determine is do these circumstances exclude every reasonable conclusion except that of guilt. If so, the evidence is sufficient to convict. If not, it is not sufficient to convict."

We find no error in the trial judge's ruling on the hypothetical question posed by defendant's counsel.

Defendant next contends the trial judge erred by allowing the prosecuting witness to testify she recognized defendant's voice as that of her assailant.

[2, 3] Unless barred by constitutional grounds, identification by voice is admissible. *State v. Coleman,* 270 N.C. 357, 154 S.E. 2d 485; *State v. Hicks,* 233 N.C. 511, 64 S.E. 2d 871; 1 Stansbury's North Carolina Evidence (Brandis Revision) § 96 (1973). When identification testimony is offered and defendant objects and requests a *voir dire* hearing, the trial judge should hear evidence from both the State and the defendant, make findings of fact, and thereupon rule on the admissibility of the evidence. *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174; *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844. If the trial judge's findings are supported by the evidence they are conclusive upon appellate courts. *State v. Taylor,* 280 N.C. 273, 185 S.E. 2d 677; *State v. Harris,* 279 N.C. 177, 181 S.E. 2d 420.

The prosecuting witness in this case at all times admitted that she could not identify defendant "by sight." Even so, she did furnish police with a general description as to the height, weight and color of her assailant. During the alleged rape, the assailant spoke several sentences to the prosecutrix, concluding with the statement, "No, no, don't call the police."

Defendant did not testify at the preliminary hearing. Prosecutrix did testify but admitted that she could not identify defendant by sight as her assailant.

After the conclusion of the preliminary hearing, at which time defendant was bound over for trial, prosecutrix by chance overheard a whispered conversation between defendant and his counsel, in which defendant said the words, "No, no."

During the trial in Superior Court, the Solicitor inquired if the witness recognized defendant's voice. Upon objection by defendant's counsel, Judge Rouse excused the jury and conducted a *voir dire* hearing. On *voir dire,* Miss Simpkins in part testified:

> "You asked if I can describe the voice of the man who was in my apartment on the morning of the 17th of May and I would say he spoke rather quickly and distinctly. It seemed to me—I mean he had an accent of his own. It didn't have much of a southern drawl. He spoke quickly. The main thing I remember was the way he pronounced

his words and he had long 'o's.' They were very full 'o's.' When he was leaving that night he said, 'No, no, don't call the Police,' and that was in a half whisper. And it was very anxious. When I heard the defendant say 'No, no,' in the District Court it was in the same anxious tone—it could not have been more perfect. I mean it just sounded exactly like it did that night—the same tone, the same words, same accent and everything.

"After I heard this defendant make the statement, 'No, no,' in the District Court I jumped out of my seat just about. I mean it shocked me and I recognized it right then and I told my attorneys about it. I told the people with me that it sounded exactly like the man I had heard that night. I was talking with Detective Page about it. I told him that was it—that was him—that was him."

On cross-examination, the witness admitted that she testified in District Court that she could not identify defendant "by sight"; however, she said that she was "positive beyond a reasonable doubt" that defendant was the person she heard speak on the night she was raped. Defendant offered no evidence on *voir dire*. The court thereupon made findings of fact and conclusions as follows:

"All right. The Court conducted a *voir dire* examination and from the evidence offered the Court makes the following findings of fact:

1. The prosecuting witness is unable to identify the defendant as being her assailant by sight.

2. That she saw the defendant in the District Court at the preliminary hearing.

3. Following the preliminary hearing she overheard the defendant say certain words and specifically the words, 'No, No.' At this time she was some thirty to thirty-five feet away from the defendant.

4. That among the statements allegedly made by the defendant at the time or immediately following the alleged assault were the following: 'No, no, don't call the Police.'

5. That the defendant is identified by the prosecuting witness by his voice.

The Court is of the opinion and finds that there is nothing impermissibly suggestive about the manner and circumstances of this identification and does therefore hold that the voice identification by this witness and the testimony offered on the *voir dire* is admissible."

The jury was recalled and the witness identified defendant as her assailant. On cross-examination, prosecuting witness *for the first time* testified that prior to her appearance in District Court, the police had shown her a picture of defendant, told her his fingerprint matched the one found in her apartment and informed her that defendant had been arrested.

We are not here concerned with defendant's Sixth Amendment guarantee of counsel at a pretrial lineup. There was no exhibition of the accused by the police officers to identifying witnesses before trial and in absence of counsel. *U. S. v. Wade,* 388 U.S. 218 and *Gilbert v. California,* 388 U.S. 263. In fact, at the time the witness recognized defendant's voice, he was talking to his lawyer. We need only to decide whether the unplanned confrontation in District Court occurred under circumstances so "unnecessarily suggestive and conducive to irreparable mistaken identification" as to deprive defendant of his constitutional right of due process. Decision must depend largely upon principles found in cases involving identification by sight. Nevertheless, in our opinion the same constitutional principles apply to identification by voice. *Stovall v. Denno,* 388 U.S. 293.

[4] Whether an accused's constitutional right of due process has been violated by identification procedures depends upon the totality of the circumstances surrounding the confrontation. *Stovall v. Denno, supra.* Applying this standard, the courts have held that a one-man confrontation while defendant was handcuffed and in police custody did not violate due process when the circumstances requiring immediate confrontation were imperative, *Stovall v. Denno, supra,* and that there was no violation of due process in a "station house" confrontation while accused was in police custody when there was ample evidence of identification of independent origin. *State v. Gatling,* 275 N.C. 625, 170 S.E. 2d 593. Likewise "unrigged" courtroom confrontations have been held not violative of due process, *U. S. v. Davis,* 407 F. 2d 846; *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384. Even where the accused was the only Negro sitting at counsel table, our court held such courtroom confrontation not

to be impermissibly suggestive when considered in context with the total circumstances. *State v. Haskins,* 278 N.C. 52, 178 S.E. 2d 610.

Here, the trial judge made findings and concluded that there was nothing "impermissibly suggestive" about the manner and circumstances of the identification. There was ample, competent evidence to support the findings and ruling admitting the in-court identification. *State v. Bass, supra.* However, whether this ruling should stand is beclouded by the facts thereafter elicited from the prosecuting witness by defendant's counsel. We note, that after defendant's counsel elicited this evidence, he did not move for a reconsideration of the ruling admitting the testimony of identification by voice, nor did he lodge a motion for mistrial.

[5] The United States Supreme Court and this Court recognize that when a *confession* is properly admitted, but it is later conclusively or plainly demonstrated *by the entire record* that the confession was involuntary, the entry of judgment without excluding evidence of the confession deprives the defendant of due process. *Davis v. North Carolina,* 384 U.S. 737; *Blackburn v. Alabama,* 361 U.S. 199; *State v. McCloud,* 276 N.C. 518, 173 S.E. 2d 753. Again we are of the opinion that this rule of law applies to the admission of identification testimony as well as to the admission of confessions. We must, therefore, consider the entire record in this case in determining whether the trial judge's ruling admitting the identification testimony may stand. *Blackburn v. Alabama, supra; Stovall v. Denno, supra.*

Admittedly, standing alone, the facts elicited on cross-examination by defendant's counsel could indicate that prosecutrix was exposed to suggestive influences prior to her courtroom identification of defendant. We must, however, consider this testimony in context with the total circumstances surrounding the identification in determining whether the District Court confrontation was violative of due process.

[6] Exhibition of the photograph and the statements concerning defendant's fingerprints and arrest preceded the District Court confrontation. However, it must be borne in mind that the witness did not identify defendant as her assailant at the time the photograph was shown to her. Further, any "impermissible suggestion" arising out of the exhibition of the photograph and the accompanying information did not cause Miss

Simpkins to change her testimony as to her inability to identify defendant by sight. She testified in District Court that she could not identify defendant. It was only upon her first opportunity to hear his voice that the witness Simpkins immediately and positively identified defendant. She testified that her identification did not stem from having seen his photograph, but was based solely upon her recognition of his voice. She described in detail the particular and peculiar characteristics of defendant's voice upon which she based her identification.

We do not believe that the total circumstances surrounding the District Court confrontation established a "very substantial likelihood of irreparable misidentification." *Simmons v. U. S.*, 390 U.S. 377; *State v. Knight,* 282 N.C. 220, 192 S.E. 2d 283.

We hold that there was no error in the admission of identification testimony of the witness Margaret Rose Simpkins.

[7] Defendant assigns as error the trial judge's ruling admitting into evidence State's Exhibit 14, a fingerprint identification card made in 1962. The exhibit was introduced for the purpose of identifying the latent fingerprint lifted from Miss Simpkins' apartment. Defendant strongly argues that the admission of this exhibit was prejudicial error because it constituted evidence of another separate crime having no relevancy to the crime here charged.

The general rule is that in the trial of a person charged with a criminal offense, who has not testified in his own behalf, the State may not, over objection by defendant, introduce evidence to show that the accused has committed another separate, independent offense when the only relevancy of the evidence is to show the character of the accused or his disposition to commit a similar offense. 1 Stansbury's North Carolina Evidence (Brandis Revision) § 91 (1973); *State v. Perry,* 275 N.C. 565, 169 S.E. 2d 839; *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364.

Lieutenant David Turner, admitted by the court as an expert in fingerprint identification, testified that he took the fingerprints of Walter Jackson, Jr. upon his arrest on 28 September 1972. He identified State's Exhibit 15 as containing the fingerprints which he personally took. He further testified that the fingerprints on Exhibit 14 were the fingerprints of Walter Jackson, Jr. and that the thumb print appearing on Exhibit 14 was identical to the latent print lifted from the windowsill of

Miss Simpkins' apartment, and identified as State's Exhibit 13. He testified that the thumb print on Exhibit 15 was identical to a thumb print shown on Exhibit 14.

He stated that the general procedure in the Wilmington Police Department was to enter information on the identification cards at the time of an arrest. On cross-examination, he testified:

> " . . . It is true that one of the areas that have (sic) been altered on that card referred to an unrelated offense unrelated to this particular trial. A criminal offense that is true."

In 1 *Wharton's Criminal Evidence* § 192 (13th ed. 1972), we find the following statement:

> "The introduction in evidence of a fingerprint record containing extraneous material which in itself is incompetent may or may not constitute reversible error, depending on such factors as whether the material was or was not seen by the jury or whether the objection thereto was waived by the defendant."

The Arizona Supreme Court considered a similar question in *Moon v. State,* 22 Ariz. 418, 198 P. 288. Headnote 6 of the opinion as reported in 16 A.L.R. 362 adequately reflects the Court's decision of this question. We quote:

> "6. Permitting the introduction in a criminal case of the finger-print records of accused, taken from the bureau of identification of a city, is not reversible error because on the same card is his criminal record, if the criminal record was so covered that it was not seen by the jury."

In *State v. Viola* (App.), 51 Ohio L. Abs. 577, 82 N.E. 2d 306, app. dismd. 148 Ohio St. 712, 76 N.E. 2d 715, *cert. den.* 334 U.S. 816, the Court held that the admission of defendant's fingerprints from the F.B.I. files was not error when a portion of a card showing the defendant's conviction of another crime was covered with a sheet of paper sealed to the card.

This Court, considering the effect of the introduction of a "mug shot" in the case of *State v. Hatcher,* 277 N.C. 380, 177 S.E. 2d 892, stated:

> "Defendant contends, however, that introduction of the 'mug shot' photograph of him tended to apprise the

jury of the fact that he had been in trouble before, reflected unfavorably upon his character and suggested that he had been convicted of other crimes. Upon the facts before us defendant's contention is unsound and cannot be sustained. Before the jury was allowed to see the photograph in question, the portions which might have been prejudicial to him *i.e.*, the name of the police department and the date, were covered by an evidence tag. This left only an ordinary photograph, which was offered and admitted for illustrative purposes bearing upon identification of defendant. The photograph was relevant and material on the question of identity and could not have been prejudicial in the sense suggested by defendant. There was nothing on it to connect defendant with previous criminal offenses. In the following cases photographs offered for identification purposes and *containing labels and markings which were covered or removed* were held properly admitted: *Cooper v. State,* 182 Ga. 42, 184 S.E. 716, 104 A.L.R. 1309 (1936); *State v. O'Leary,* 25 N.J. 104, 135 A. 2d 321 (1957); *State v. Tate,* 74 Wash. 2d 261, 444 P. 2d 150 (1968); *People v. Fairchild,* 254 Cal. App. 2d 831, 62 Cal. Rptr. 535 (1967), *cert. den.* 391 U.S. 955; *Johnson v. State,* 247 A. 2d 211 (Del. Sup. 1968); *Huerta v. State,* 390 S.W. 2d 770 (Tex. Crim. 1965)."

State's Exhibit 14, as altered prior to its introduction into evidence, does not disclose defendant's criminal record. It does not list a single arrest, indictment, or conviction. The only evidence admitted before the jury which relates the admission of the fingerprint identification card to another criminal offense was the statement of Lieutenant Turner that it was the procedure of the Wilmington Police Department to place fingerprint information on such identification cards when a person was arrested. We do not believe that the inference arising from this testimony was of such force as to prejudicially influence the jury in their consideration of the question of defendant's innocence or guilt.

[8] It should be noted that defendant does not base his argument upon contentions that the introduction of Exhibit 14 was erroneous because it was hearsay or deprived him of his Constitutional rights of confrontation or cross-examination. Assuming, arguendo, that the introduction of Exhibit 14 was erroneous on such grounds, any prejudice to defendant is dispelled by the

fact that the State introduced Exhibit 15, the fingerprint taken by Lieutenant Turner on 28 September 1972. Lieutenant Turner testified and was cross-examined by counsel for defendant. His testimony tended to show that the latent fingerprint, Exhibit 13; the print taken by Lieutenant Turner on 28 September 1972 upon defendant's arrest, Exhibit 15; and the challenged Exhibit 14 were made by the same thumb.

This assignment of error is overruled.

[9] Defendant also contends that Exhibit 14 should have been excluded as a product of an illegal arrest and detention. He argues that upon his general objection to the admission of the exhibit, the trial judge should have conducted a *voir dire* examination concerning the legality of his 1962 arrest.

In the absence of evidence to the contrary, the courts are bound to presume that the acts of public officers are in all instances legal. *State v. Brady*, 238 N.C. 407, 78 S.E. 2d 129; *State v. Gaston*, 236 N.C. 499, 73 S.E. 2d 311; *State v. Rhodes*, 233 N.C. 453, 64 S.E. 2d 287.

This record contains no evidence of an illegal arrest or of an illegal detention. The record does disclose that upon objection by defendant's counsel, a *voir dire* hearing was held concerning the admissibility of Exhibit 14. During this hearing, defendant's counsel did not offer evidence, contend, or intimate that the exhibit was the product of an illegal arrest or an illegal detention. Under these circumstances, the trial judge was not required to conduct an inquiry into the legality of the arrest.

There is no merit in this assignment of error.

[10] Defendant assigns as error the denial of his motion as of nonsuit.

The State's cases are based upon: (1) a fingerprint lifted from the lower sash of the window *inside* the kitchen of the apartment occupied by Miss Simpkins, (2) the voice identification of the defendant by the witness Simpkins.

In *State v. Foster*, 282 N.C. 189, 192 S.E. 2d 320, we considered whether certain fingerprint evidence was sufficient to warrant submitting the case to the jury. There, Chief Justice Bobbitt, speaking for the Court said:

> " 'To warrant a conviction, the fingerprints corresponding to those of the accused must have been found in the

place where the crime was committed under such circumstances that they could only have been impressed at the time when the crime was committed.' Annot., 'Evidence—Finger, Palm, or Footprint,' 28 A.L.R. 2d 1115, 1154, § 29 (1953). See also *State v. Smith,* 274 N.C. 159, 164, 161 S.E. 2d 449, 452 (1968), and authorities there cited."

Miss Simpkins testified that she did not know defendant and had never seen him prior to the morning of 17 May 1972. Nothing appears in the record to show that defendant had ever been in the apartment occupied by Miss Simpkins prior to the morning of 17 May 1972.

When considered in the light most favorable to the State, the State's evidence is sufficient, to support jury findings that: (1) the fingerprint lifted from the window sash was the defendant's fingerprint, (2) this latent fingerprint was placed there on the occasion set out in the bills of indictment, and (3) defendant was the person who committed the crimes charged in the bills of indictment. Further, Miss Simpkins' identification of defendant by his voice was sufficient to repel defendant's motion as of nonsuit. Whether she had ample opportunity to identify defendant's voice went to the weight of the evidence rather than to its admissibility. *State v. Hicks,* 233 N.C. 511, 64 S.E. 2d 871.

We hold that the trial judge correctly submitted the cases to the jury.

We do not deem it necessary to discuss defendant's remaining assignments of error. Suffice it to say that careful examination of the entire record reveals no reversible error.

No error.

STATE OF NORTH CAROLINA v. JAMES A. OVERMAN, JR., JAMES A. OVERMAN, SR., AND GAYNELL OVERMAN

No. 36

(Filed 12 December 1973)

1. **Criminal Law § 11— accessory after the fact to rape — knowledge that rape was committed required**

In a prosecution charging defendant mother and defendant father with the crime of accessory after the fact to the felony of rape com-

mitted by the defendant son, the trial court erred in denying the parents' motions for nonsuit where there was evidence that the parents had reason to believe that their son had become involved with his victim, that the victim had sustained an injury, that the son sought assistance to avoid detection and possible arrest for whatever had occurred, and that the parents gave him such assistance, but there was no evidence that the parents *knew* that their son had raped his victim. G.S. 14-7.

2. **Rape § 5— sufficiency of evidence**

The trial court in a rape case properly denied defendant's motion for nonsuit where the evidence tended to show that he took his victim to his trailer over her protest, that he there had sexual intercourse with her against her will, and that he and his parents subsequently abandoned her on a public highway.

3. **Criminal Law § 99— incidents during trial — no expression of opinion by court**

Actions of the trial court in a rape case did not amount to comments and opinions on the evidence and defendant was not prejudiced where (1) the trial court corroborated a witness's answer and sustained an objection which had not been interposed, (2) the court instructed defense counsel not to argue with the witness and announced his disagreement when defense counsel protested that he had not been arguing with the witness, and (3) the trial court instructed defense counsel not to interrupt the testimony of the prosecutrix.

4. **Criminal Law §§ 75, 89— incriminating statements — no Miranda warnings — admissibility for impeachment**

Statements made by defendants to a police officer during the initial phase of the investigation of the crime were properly admitted for the purpose of impeachment even though defendants had not been given sufficient *Miranda* warnings, since incriminating statements by a defendant obtained without compliance with *Miranda* may be used for impeachment when such defendant testifies in his own behalf.

APPEAL by defendants from *Bailey, J.*, 12 February 1973 Session of CHATHAM Superior Court.

Defendant James A. Overman, Jr. (Overman, Jr.) was indicted for the rape of Barbara Ann Sutton. Defendants James A. Overman (Overman, Sr.) and Gaynell Overman were indicted in separate bills for the crime of accessory after the fact to the rape of Miss Sutton by Overman, Jr.

Each defendant pleaded not guilty and the three cases were consolidated for trial.

In presenting its case, the State offered the testimony of Barbara Ann Sutton, the prosecutrix, of Donald Craig Thomas, and of Donald Whitt.

The following is a summary of MISS SUTTON'S testimony:

On the night of Saturday, 29 January 1972, Miss Sutton, age 26, went to the American Legion dance in West End. There she saw Overman, Jr., and danced with him. They left West End in his car about 9:30 p.m. It had been agreed that he was to take her to a dance in Southern Pines and thereafter take her to her home.

Overman, Jr., did not drive to Southern Pines. While traveling toward Siler City, he pulled off onto a dirt road, stopped, turned off the ignition, moved over toward Miss Sutton and started pulling off her blouse. She bit his finger, causing it to bleed, and he stopped his advances. He said he wanted to show her his trailer, but, upon her insistence, promised to take her home. Instead of taking her home (she lived with her mother between West End and Carthage) Overman, Jr., drove away from this area and, after traveling some distance on various roads, drove up a gravel road and stopped near the trailer in which Overman, Jr., lived.

Miss Sutton got out of the car and started running. Overman, Jr., chased and caught her. She pulled away and started toward a house which was near the trailer. She learned later that this house belonged to Overman, Sr., and Gaynell Overman, the parents of Overman, Jr. The chain around one of her boots became loose and hindered her running. When she took it off, Overman, Jr., grabbed it, struck her with it, and bruised her face. Despite her protests, Overman, Jr., said she was going into the trailer whether she wanted to or not. In their ensuing scuffle, Overman, Jr., knocked her backwards. She fell on her left leg and was unable to get up on it. Overman, Jr., picked her up and pulled her into the trailer.

Inside the trailer Miss Sutton took the boot off of her injured leg. Overman, Jr., promised to take her to the hospital after "he [had done] what he wanted to do." Thereupon, he undressed her, picked her up and laid her on the bed. She was crying and in pain. Over her protests, against her will, and despite her monthly menstrual period, Overman, Jr., had sexual intercourse with her. He then got up, put on his clothes and left the trailer.

Miss Sutton could hear that he was talking with someone outside the trailer. When he came back into the trailer, he told her to get dressed and then helped her to the door.

Upon leaving the trailer, Miss Sutton saw Overman, Sr., and a young boy in the front seat of the car in which she and Overman, Jr., had been riding. Overman, Jr., put Miss Sutton in the back seat and got in the back seat on the other side. Gaynell Overman got in the front seat with Overman, Sr., and the young boy. Miss Sutton told them she lived in West End and asked them to take her to the hospital. Overman, Sr., started the car and drove away from the trailer. It seemed to Miss Sutton that they were going in circles. Overman, Sr., and Gaynell Overman were whispering.

After they had been driving a half hour or more, Overman, Sr., stopped the car. Overman, Jr., and Gaynell Overman got out but, after a few minutes, got back into the car. Overman, Sr., drove a mile or so farther and stopped again. There Gaynell Overman told Miss Sutton: "[T]his is where you get out." When Miss Sutton asked why she was not being taken to the hospital, Gaynell Overman grabbed Miss Sutton's arm and pulled her out of the car. Miss Sutton was unable to stand up. The Overmans left, leaving Miss Sutton lying on a paved road, flat on the ground, where she stayed approximately fifteen minutes until Thomas, a motorist, saw her, stopped, placed her in his car, and took her to the Chatham Hospital.

Miss Sutton testified that at the hospital an x-ray was taken of her leg which showed that her leg was broken; that she was taken to a hospital at Chapel Hill where a cast was put on her leg; and that the cast remained there for six and one-half months.

At Chatham Hospital she related what had occurred to Deputy Sheriff Whitt of the Chatham County Sheriff's Department. Miss Sutton also testified that she had not been drinking on 29 January 1972.

DONALD CRAIG THOMAS testified that Miss Sutton was lying at the right side of the right-hand lane as he was driving home about 1:00 a.m. on 30 January 1972; that he stopped and was told by Miss Sutton that she couldn't get up and needed help; that she had one of her boots in her hand and was wearing her coat; that he picked her up completely off the ground, carried her to his car, and put her on the passenger's side of the front seat; that, in compliance with her request, he took her to the Chatham Hospital and waited there until officers came to ques-

tion her; and that he "did not notice any odor of alcohol about her. . . ."

DEPUTY SHERIFF WHITT, of the Chatham County Sheriff's Department, testified that he saw Miss Sutton at the Chatham Hospital at approximately 1:45 a.m. on Sunday, 30 January 1972. Whitt related what Miss Sutton had told him on that occasion, this being substantially in accord with what she testified as a witness at trial.

Their motions for judgment as in case of nonsuit having been overruled, defendants offered evidence consisting of the testimony of each defendant and the testimony of character witnesses.

A summary of the testimony of OVERMAN, JR., is narrated below.

He had been drinking when he arrived at the American Legion dance in West End about 8:30 p.m. He saw Miss Sutton there about 9:00 p.m. He had never danced with her before, but on this occasion they "started dancing and drinking a little bit." He described his trailer to her. She said "it sounded like it would be a groovy place" and suggested that they "ride up there." They left the American Legion dance and, without stopping, drove to the trailer. En route, they were "drinking and talking."

Upon entering the trailer they first played records. Miss Sutton went back to the bedroom. She returned to the living room, took off her clothes, and said, "come on in here." He noticed that she was having her monthly period and said, "No, if you are ready to go I will carry you back home." Thereupon she got mad, furious, started hitting and slapping him beside the head and in the stomach, and he "smacked her back." Then Miss Sutton said, "Are you going to carry me home?" Overman, Jr., replied that he was "too drunk to drive." He left the trailer to ask his mother and father to drive Miss Sutton home. He got in the car with Miss Sutton and his parents and they drove off. He "passed out about four miles from the trailer."

Overman, Jr., testified that "Miss Sutton drank a right smart wine and beer"; that he "did not see a chain on her boot and [he] did not hit her with it"; that he "didn't hit her and break her leg"; that "[s]he was perfectly all right in the auto-

mobile"; and that he "did not have sexual relations with Barbara Ann Sutton."

A summary of the testimony of GAYNELL OVERMAN is narrated below.

She, her husband, two children, and her mother-in-law, were at home on the night of 29 January 1972. When they heard Overman, Jr., call, she and her husband went out to see what he wanted. Overman, Jr., said he wanted his father to drive a woman to her home. She saw Miss Sutton walk from the trailer. She had never seen her before and didn't know her name. She was not limping. She got into the back seat of the car without help. Overman, Sr., was driving. She and her "little baby boy" were sitting on the passenger's side of the front seat. Miss Sutton and Overman, Jr., were in the back seat. Miss Sutton was directly behind her (Gaynell Overman). She could smell "whiskey and beer" on Miss Sutton.

Soon Overman, Jr., went to sleep. Miss Sutton said she would direct them where to go and when to stop. Later, she said she didn't want to go home. She called on them to stop and let her out at a green house where "a real bright yard light" was burning.

Overman, Sr., stopped the car as directed. Gaynell Overman raised the seat. Miss Sutton got out and "started walking down the hard surface" of the highway.

Overman, Sr., turned around and drove back home. They had left the area of the Overman home and trailer "around ten to eleven o'clock." When they got back, Overman, Jr., was so drunk that they "put him in bed" at their house.

There was no bruise on Miss Sutton's face. She said nothing about going to the hospital.

On Sunday, 30 January 1972, about 5:00 a.m., officers came to the Overman house and questioned them about "this girl." On Wednesday, 2 February 1972, officers brought Miss Sutton and her mother to the house. The Overmans were told to come to Siler City the following day for further questioning.

The testimony of Overman, Sr., was in substantial accord with that of Gaynell Overman.

After defendants had presented their evidence, Thomas and Whitt were recalled and testified in rebuttal.

In rebuttal, Thomas testified that he looked around at the place where he found Miss Sutton but observed no house and no light in the vicinity.

The rebuttal testimony of Whitt will be set forth in the opinion.

The jury found the defendant Overman, Jr., guilty of rape as charged and judgment imposing a sentence of life imprisonment was pronounced.

The jury found defendants Overman, Sr., and Gaynell Overman guilty of accessory after the fact of the felony of rape. As to each, a judgment imposing a prison sentence was pronounced.

Overman, Jr., appealed to the Supreme Court as a matter of right. We allowed the motions of Overman, Sr., and Gaynell Overman that their appeals be heard in the Supreme Court without prior determination in the Court of Appeals.

Attorney General Robert Morgan and Associate Attorney E. Thomas Maddox, Jr. for the State.

H. F. Seawell, Jr. for defendant appellants.

BOBBITT, Chief Justice.

Defendants set forth eighteen assignments of error and filed a joint brief. Assignments Nos. 4 and 5 are directed to the denial of defendants' motions to dismiss as in case of nonsuit.

[1] We consider first whether the court erred in denying the motions of Overman, Sr., and Gaynell Overman. Each of these defendants was charged with the crime of accessory after the fact of the felony of rape as set forth in our preliminary statement.

G.S. 14-7 in part provides: "If any person shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any statute made, or to be made, such person shall be guilty of a felony. . . . " An accessory after the fact under G.S. 14-7 "is one who, *knowing* that a felony has been committed by another, receives, relieves, comforts, or assists such other, the felon, or in any manner aids him to escape arrest or punishment." (Our italics.) *State v. Potter,* 221 N.C. 153, 156, 19 S.E. 2d 257, 259 (1942). *Accord,* 21 Am.

Jur. 2d, Criminal Law § 126 (1965); 22 C.J.S., Criminal Law § 96 (1961); Clark & Marshall, A Treatise on the Law of Crimes § 8.06 (7th ed. 1967); 1 Wharton's Criminal Law §§ 281-82, pp. 368-72 (12th ed. 1932).

To convict Overman, Sr., and Gaynell Overman, the State had the burden of proving beyond a reasonable doubt these essentials of the offense charged, namely: (1) That Overman, Jr., had actually committed the alleged crime of rape; (2) that the accused *knew* that Overman, Jr., had committed the alleged crime of rape; and (3) that the accused assisted Overman, Jr., in his efforts to avoid detection, arrest and punishment. *State v. Williams,* 229 N.C. 348, 49 S.E. 2d 617 (1948); *State v. McIntosh,* 260 N.C. 749, 753, 133 S.E. 2d 652, 655 (1963).

There was evidence to support findings that Overman, Sr., and Gaynell Overman had reason to believe that Overman, Jr., had become involved with Miss Sutton; that she had sustained an injury; and that Overman, Jr., sought assistance to avoid detection and possible arrest for whatever had occurred. Too, there was evidence that they removed Miss Sutton from the vicinity of their home, put her out of their car on a public highway and abandoned her, and later made false statements to investigating officers as to what had occurred. Moreover, there was evidence sufficient to support findings that Overman, Jr., had in fact committed the alleged felony of rape. Even so, we find no evidence that Overman, Sr., or Gaynell Overman *knew* that Overman, Jr., had raped Miss Sutton. Evidence (1) that Overman, Jr., left Miss Sutton in the trailer and sought the assistance of his parents; (2) that Miss Sutton heard Overman, Jr., talking with someone outside while she remained inside the trailer; and (3) that Overman, Sr., and Gaynell Overman conversed in undistinguishable whispers when Miss Sutton was riding with them, is insufficient to support a finding that Overman, Sr., and Gaynell Overman knew that Overman, Jr., had raped Miss Sutton.

There is no evidence that either Overman, Sr., or Gaynell Overman were present at the time of the alleged rape. Nor was there any evidence that anything was said in their presence to the effect that such rape had occurred. Although Miss Sutton testified that she complained to them of her injured leg and asked to be taken to the hospital, she did not testify that she made any complaint to either of them that she had been raped.

We note that Thomas testified that "[d]uring the period of time [he] was with Miss Sutton she did not mention anything about being raped."

According to Miss Sutton's testimony, the conduct of Overman, Sr., and Gaynell Overman was ruthless and inhumane. Whether such conduct would support a prosecution for a different crime is not before us. We simply hold that the evidence was not sufficient to support their conviction as accessories after the fact to the felony of rape as charged. Their motions to dismiss as in case of nonsuit should have been granted. The convictions of Overman, Sr., and Gaynell Overman must be and are reversed.

[2] Consideration of the evidence in the light most favorable to the State impels the conclusion that the motion of Overman, Jr., to dismiss as in case of nonsuit was properly overruled. Miss Sutton's testimony was sufficient to establish all essential elements of the alleged crime of rape. The credibility of her testimony was for jury determination.

There remains for consideration whether any of the other assignments disclose error prejudicial to Overman, Jr., and entitle him to a new trial.

Assignments Nos. 13, 14, 15, 16 and 17 are directed to designated portions of the court's instructions to the jury. None discloses prejudicial error. We note that Assignment No. 14 relates solely to Overman, Sr., and Gaynell Overman.

[3] In Assignment No. 2 defendants assert that "[t]he actions of the court as set out in Exceptions Nos. 2, 3 and 4 were comments and opinions on the evidence and were highly prejudicial to the defendants." The incidents to which these exceptions relate occurred during the cross-examination of Miss Sutton by defense counsel.

With reference to the incident referred to in Exception No. 2, the record shows that Miss Sutton testified on direct examination that she "hadn't known the defendant personally" before the night of Saturday, 29 January 1972, "but [she] had seen him quite a bit at dances." Early in the cross-examination of Miss Sutton, the following occurred:

"Q. Now, you say you had never seen this man before?

"A. No, sir.

"COURT: That isn't what she said.

"OBJECTION SUSTAINED."

After Miss Sutton had answered that she *had not said* that she had never seen defendant before 29 January 1972, the court corroborated her answer by a statement to that effect and sustained an objection which, so far as the record shows, had not been interposed by the State.

It does not appear that the court's action and comment were prejudicial to Overman, Jr. When the cross-examination proceeded, Miss Sutton testified that she had not had any dates with Overman, Jr., before the night of 29 January 1972; and that, although she did not know "where he lived, his age, statistics, so to speak," she had "danced with him quite a bit when there at different times."

With reference to the incident involved in Assignment No. 3, the record shows that Miss Sutton testified on direct examination that she became personally acquainted with defendant at the American Legion dance at West End; that he asked and was granted permission to take her home; and that they decided they would first go to a dance at Southern Pines. On cross-examination, Miss Sutton had testified that she had danced with defendant "quite a bit" at West End and that she "decided to leave the dance because it was a good idea to go someplace else." Then the following occurred:

"Q. You just decided it would be a good idea to go someplace else?

"A. Is there anything wrong with that?

"Q. Don't argue with me please, just answer my questions.

"COURT: Don't argue with the witness either, Mr. Seawell.

"MR. SEAWELL: I am not.

"COURT: I disagree."

The quoted question of the cross-examiner had just been answered by Miss Sutton. The solicitor might well have objected to the question on the ground that it invited needless repetition. Absent such objection, Miss Sutton, instead of repeating what she had just said, asked the quoted question.

Miss Sutton's response was not an answer to Mr. Seawell's question. Under these circumstances, the court enjoined Mr.

Seawell not to argue with the witness and announced his disagreement when Mr. Seawell protested that he had not been arguing with the witness. Although the cross-examination of Miss Sutton at this point is lacking in clarity and finesse, the record before us does not support the view that Mr. Seawell was engaging in an argument with Miss Sutton. When considered in its entirety, the impression prevails that the entire incident was much ado about very little.

With reference to the incident to which Exception No. 4 relates, Miss Sutton testified: "He picked me up and carried me into the trailer. I hollered several times when he was choking on me and when he knocked me down. He even said that he cut a girl's throat one time. He said he had hurt many people before. That is what he said. My leg was broken and I was in very much pain and he said he would hurt me even worse if I didn't cooperate. I laid [sic] perfectly still. I told him to leave me alone." Then the following occurred:

"Q. Just spoke to him?

"COURT: Let her finish her answer one time, Mr. Seawell.

"Q. Go ahead."

The record does not show whether Mr. Seawell had interrupted Miss Sutton on any prior occasion. Seemingly, Miss Sutton had not finished her answer on this particular occasion for the reason that her testimony resumes as if there had been no interruption after Mr. Seawell said "[g]o ahead." Suffice to say, the record is insufficient to show that Overman, Jr., was prejudiced by this incident.

[4] In Assignment No. 12, defendants assert that the court erred "in not conducting a proper voir dire, conducting a voir dire partially in the presence of the jury and not making proper findings of fact." Exceptions Nos. 23 and 24, on which this assignment is based, were noted in the record as indicated below.

Whitt's testimony during the State's presentation of its evidence in chief consisted solely of what Miss Sutton told him when he talked with her at the hospital in Siler City about 1:45 a.m. on Sunday, 30 January 1972. This testimony was offered and admitted only as corroborative evidence. At the conclusion of defendants' evidence Whitt was recalled and testified as to

what occurred when he and Deputy Sheriff Elkins went to the home of Overman, Sr., and Gaynell Overman during the morning hours of 30 January 1972.

Whitt was asked, "Did you question him [Overman, Jr.] about Miss Sutton, the lady who is the prosecuting witness in the case?" Exception No. 23 is addressed to the overruling by the court of defendants' objection to this question. Whitt answered, "Yes, sir." Whitt was then asked, "What did he tell you?" Defendants' counsel objected and said, "Qualify the witness." Thereupon, in the presence of the jury, Whitt testified that he advised Overman, Jr., with particularity of his constitutional rights as defined in *Miranda* and that he did so when all three defendants were together in a small room.

Whitt then testified, without further objection, that Overman, Jr., told him the following: "That he went to the dance at West End, that he got sick at the dance and came home early. That he came in and went to bed about eleven o'clock after his mother had got up and made him a sandwich and he drank a glass of milk and taken some aspirins and went to bed . . . he stated that he did not know Barbara Ann Sutton."

Whitt also testified that Mrs. Overman stated "that she fixed [Overman, Jr.] something to eat and he come in early that night and went on to bed, [and] they didn't know anything about any woman coming to the trailer or seeing any woman that night. . . ."

Whitt having stated that Overman, Sr., went outside with him and with Elkins, defendants' counsel objected "to anything said by Mr. James Overman, Sr." When Whitt testified that Overman, Sr., had made *a* statement, he was asked whether Overman, Sr., had been first advised of his constitutional rights under *Miranda.* He answered: "No, sir, at the time—other than at the time we were talking to the three of them, I advised him of his rights and I more or less at that time was talking to Mr. Overman, Jr."

Upon further objections by defendants' counsel, the jurors were excused and in their absence Whitt testified in substance as follows: That he did not specifically advise Overman, Sr., of his rights under *Miranda;* that Overman, Sr., was not at that time under investigation for any crime. In overruling defendants' objections to testimony as to any statement made by Overman, Sr., the court made these findings: "[T]he court finds at

the time of any statement made by Mr. and Mrs. Overman, on January 30th, that they had heard the rights as given to their son and knew that they were entitled to the same rights, but the investigation had not focused on them at that time. Statement made by them and their son was freely and voluntarily and understandingly made." Immediately following the quoted findings, the following appears: "Defendants Overman, Jr., Overman, Sr., and Gaynell Overman except. Exception No. 24."

Whitt then testified in the presence of the jury as follows: "I asked Mr. Overman, Sr., if that girl came to the trailer and if he knew anything about it. He said he did not. I advised him if he talked to us to tell the truth about it. He denied knowing anything about Miss Sutton. Mrs. Overman stated as Junior did, that when he came in sick she fixed him a sandwich and he drank a glass of milk and took some aspirins and went to bed. I asked her about a lady being in the trailer and she said she didn't see her." In response to a question on recross-examination Whitt testified: "All this took place before the warrant was sworn out."

We note that Mrs. Overman testified that officers brought Miss Sutton and her mother to the Overman house on Wednesday, 2 February 1972, and on that occasion Miss Sutton spoke to the officers but not to the Overmans. The officers then notified the Overmans to be present in Siler City on Thursday, 3 February 1972.

Whitt's testimony in rebuttal related to what defendants told him on 30 January 1972 during the initial phase of the investigation. The record shows that warrants for the arrest of defendants were not issued until 2 February 1972. The evidence tends to show that the warrants were served and defendants were arrested in Siler City on Thursday, 3 February 1972. There was no in-custody interrogation of any kind.

Whitt's testimony in rebuttal was offered solely to impeach the testimony of Overman, Jr., Overman, Sr., and Gaynell Overman. Even in-custody incriminating statements by a defendant obtained without compliance with *Miranda* may be used for impeachment when such defendant testifies in his own behalf. *Harris v. New York*, 401 U.S. 222, 28 L.Ed. 2d 1, 91 S.Ct. 643 (1971); *State v. Bryant*, 280 N.C. 551, 187 S.E. 2d 111, *cert. den.* 409 U.S. 995, 34 L.Ed. 2d 259, 93 S.Ct. 328 (1972).

The remaining assignments of error do not present questions of sufficient substance to justify discussion. Suffice to say, each has been considered and fails to disclose prejudicial error.

Having failed to show prejudicial error, the verdict and judgment as to Overman, Jr., will not be disturbed.

As to Overman, Sr., and Gaynell Overman: Reversed.

As to Overman, Jr.: No error.

H. L. KING, ADMINISTRATOR OF THE ESTATE OF BYRON SHARPE, DECEASED v. RONALD K. GRINDSTAFF, SR., RONALD K. GRINDSTAFF, JR., INDIVIDUALLY AND TRADING AS RONALD K. GRINDSTAFF & SON; LEONARD ROSS LEWIS AND BRADLEY LUMBER COMPANY, INC.

H. L. KING, ADMINISTRATOR OF THE ESTATE OF BERLIN SHARPE, DECEASED v. RONALD K. GRINDSTAFF, SR., RONALD K. GRINDSTAFF, JR., INDIVIDUALLY AND TRADING AS RONALD K. GRINDSTAFF & SON; LEONARD ROSS LEWIS AND BRADLEY LUMBER COMPANY, INC.

No. 30

(Filed 12 December 1973)

1. **Judgments § 36— collateral estoppel by judgment**

Under the principle of collateral estoppel by judgment, parties and parties in privity with them—even in unrelated causes of action—are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination.

2. **Judgments § 38— collateral estoppel by judgment — federal and state actions — identity of parties**

Where a mother and daughter injured in a collision with a truck recovered judgments for their personal injuries in federal court against the driver, owners and lessee of the truck, the personal representative of the husband and a son who were killed in the same accident brought wrongful death actions in a state court against the same defendants, and the mother and daughter would be the sole beneficiaries of any recovery in the wrongful death actions brought in the state court, the requirement of identity of parties in order for collateral estopped to be applicable was met, since the mother and daughter were the real parties in interest in the wrongful death actions.

3. **Judgments § 37— collateral estoppel by judgment — identity of issues**

In determining whether collateral estoppel is applicable to specific issues, certain requirements must be met: (1) The issues to be concluded must be the same as those involved in the prior action; (2) the issues must have been raised and actually litigated in the prior action; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

4. **Judgments § 36— collateral estoppel — erroneous judgment — binding effect**

Normally no matter how erroneous a final valid judgment may be on either the facts or the law, it has binding *res judicata* and collateral estoppel effect in all courts, federal and state, on the parties and their privies.

5. **Judgments § 38— collateral estoppel by judgment — federal and state actions — identity of issues**

Where a mother and daughter were injured and the father and a son were killed in a collision with a truck, the mother and daughter recovered judgment in a federal court against the driver and the corporate lessee of the truck, and the personal representative of the deceased father and son instituted a wrongful death action in a state court against the driver and corporate lessee, a finding that the truck driver was acting within the scope of his employment with the corporate lessee at the time of the collision was implicit in the federal court judgment which found that the driver was an employee of the corporate lessee and that the driver's negligence was imputable to the lessee, the issues in the federal and state actions were identical, and under the doctrine of collateral estoppel by judgment the only issue remaining for jury determination in the state wrongful death action was the issue of damages.

ON *certiorari* to review the decision of the Court of Appeals reported in 17 N.C. App. 613, 195 S.E. 2d 364 (1973), which affirmed summary judgment for plaintiff entered by *Collier, J.*, at the 13 October 1972 Session of FORSYTH Superior Court.

Plaintiff, as administrator of the estates of Byron and Berlin Sharpe, seeks to recover damages for his intestates' wrongful deaths that resulted from an automobile and tractor-trailer collision on 25 November 1966. The two actions were ordered continued by the presiding judge pending the final outcome of two companion cases for personal injuries that had been instituted by Alice Sharpe and Juanita Sharpe, by her next friend, in United States District Court for the Middle District of North Carolina, Winston-Salem Division.

The facts underlying these four cases, except those concerning damages, are the same. On 25 November 1966 Alice Sharpe

was driving her automobile southward on U. S. Highway 29 Bypass (temporary I-85) en route to her home in Atlanta, Georgia. She was accompanied by her husband Berlin, her minor son Byron, and her eleven-year-old daughter Juanita. She was near a point outside Lexington, North Carolina, where U. S. 29-A returns from the business district to reunite in a "Y" configuration with U. S. 29. Leonard Ross Lewis, who was driving a tractor-trailer truck on U. S. 29-A in a southerly direction, approached the merger point from the left just as the Sharpe automobile approached from the right. A double yellow line divided the two southbound lanes. The Sharpe automobile and the truck continued along side by side, each vehicle on its own half of the road and each observing the proper speed limits. When the yellow lines stopped and broken white lines began, Lewis checked his rear-view mirror but did not check the auxiliary mirror at the bottom of the rear-view mirror that shows traffic beside the truck. Unable to see the Sharpe automobile hidden in his rear-view's "blind spot" area, he flashed his right turn signal and immediately began to change into the right lane. The Sharpe automobile was alongside the cab of the truck before Lewis gave the signal and therefore Alice Sharpe was not in a position to see it. As Lewis's truck crossed the dividing line, his right front fender struck the automobile's left rear quarter panel. Momentarily the two vehicles were hooked together. Then the truck jackknifed, and as it did, the automobile shot forward and crashed into a bridge abutment. Alice Sharpe and her daughter Juanita were thrown from the automobile and seriously injured. Her husband Berlin and her minor son Byron died as a result of injuries received in the accident.

The truck driven by Lewis was owned by Ronald K. Grindstaff & Son, a partnership consisting of Ronald K. Grindstaff, Sr., and Ronald K. Grindstaff, Jr. (hereinafter referred to as the Grindstaffs). At the time of the accident the truck was leased to Bradley Lumber Company, Inc. (hereinafter referred to as Bradley), and Lewis had just completed delivering a load of lumber in Lexington for Bradley.

Alice and Juanita Sharpe—Juanita by her next friend, H. L. King—brought suit under diversity of citizenship in the United States District Court for the Middle District of North Carolina, Winston-Salem Division, seeking recovery for permanent injuries, pain and suffering, and medical expenses. The complaints in Alice's and Juanita's suits—which are substantially identical

to the complaints involved in these wrongful death actions—alleged that Lewis was negligent, that his negligence was the proximate cause of the injuries sustained, and that Lewis was driving the truck as the agent and servant of the Grindstaffs and Bradley and in furtherance of their business and within the scope of his authority from them. Alice and Juanita sought recovery against the same parties named as defendants in these wrongful death actions—the Grindstaffs, individually and trading as Ronald K. Grindstaff & Son; Leonard Ross Lewis; and Bradley.

The personal injury actions were heard by Judge Gordon without a jury. Judge Gordon's findings of fact and conclusions of law are set out in *Sharpe v. Grindstaff,* 329 F. Supp. 405, 411 (M.D.N.C. 1970), as follows:

> "In summary, it is concluded that Alice K. Sharpe and Juanita Sharpe, as a proximate result of the negligence of Leonard Ross Lewis, suffered severe and multiple injuries; that Leonard Ross Lewis, when the collision in question occurred, was acting within the scope of his employment for R. K. Grindstaff and Son; that there was no agency relationship either between Lewis and Bradley Lumber Company, Inc., or between the Grindstaffs and Bradley Lumber Company, Inc., and that Alice K. Sharpe was not contributorily negligent in the driving of her automobile."

Judgments in the total amount of $115,000 for Alice and Juanita were entered against Lewis and the Grindstaffs, the Grindstaffs being held liable under the doctrine of *respondeat superior.* The Grindstaffs and Lewis did not appeal from these judgments. Alice and Juanita, however, did appeal to the Fourth Circuit Court of Appeals, raising the single issue of whether Lewis was an employee of Bradley as well as the Grindstaffs. In holding that Lewis was not an employee of Bradley, Judge Gordon noted that the evidence presented "unfolded a rather unique business arrangement between Lewis, the Grindstaffs, and Bradley Lumber Company, Inc." 329 F. Supp. at 409. Part of this rather complicated arrangement was reviewed by Judge Sobeloff for the Circuit Court of Appeals:

> "The business relationship among the Bradley Lumber Company, the partnership, Grindstaff [Jr.], and Lewis can only be described as loose and informal, due in part perhaps to a family relationship. . . .

"Lewis received his entire compensation . . . by checks drawn by Bradley Lumber Company. The company [Bradley] treated Lewis as its employee. It not only carried him on its payroll, but reported him as its employee to the United States Internal Revenue Service, Social Security Administration, and the North Carolina taxing authorities. It also included him in its group hospitalization plan. Moreover, Bradley carried Lewis as an employee for unemployment and workmen's compensation purposes. By so doing, Bradley Lumber Company was under the protection that the North Carolina law affords employers—relief from unlimited liability at common law for employee injuries proximately caused by the employer's negligence. . . ." *Sharpe v. Bradley Lumber Co.*, 446 F. 2d 152, 154 (1971).

After reciting other similar aspects of the Lewis and Bradley arrangement, Judge Sobeloff concluded:

"We think that these facts ineluctably establish that Lewis was no less an employee of the Bradley Lumber Company than of R. K. Grindstaff & Son and that his negligence which brought injuries to the Sharpes is imputable to both. . . . If, as the appellee [Bradley] claims, the arrangements with respect to Lewis' employment were rooted in a desire of Grindstaff and Bradley to effect a 'convenient accommodation,' [as found by Judge Gordon] this does not alter the legal consequences of their agreement, particularly when the rights of innocent third parties injured by Lewis' negligence are involved.

". . . Bradley's belated disavowal of Lewis as an employee after the accident that injured the Sharpes cannot prevail over the clear evidence to the contrary in this record." 446 F. 2d at 155.

Accordingly, the Circuit Court of Appeals held that Alice and Juanita were entitled to judgments against Bradley as well as the Grindstaffs and Lewis, and reversed and remanded the cases for entry of judgment against Bradley.

Defendant Bradley then petitioned the entire membership of the Fourth Circuit Court of Appeals for a rehearing, or in the alternative, a rehearing *en banc*, Bradley contending that Lewis had deviated from his employment with Bradley and that the Court's decision should be reversed because of the deviation. This petition was denied, and Bradley then petitioned for

certiorari before the United States Supreme Court on the same grounds. This petition was also denied. *Bradley Lumber Co., Inc. v. Sharpe et al.*, 405 U.S. 919, 30 L.Ed. 2d 789, 92 S.Ct. 946 (1972).

Following entry of judgments against Bradley in the United States District Court, plaintiff was allowed to amend his complaint in each of the wrongful death cases to allege prior adjudication in the Federal Court. His amendment to each complaint reads in part as follows:

> "That since the institution of this action, two companion suits involving, in substance, the same allegations of fact and substantially the same complaints and answers, all growing out of the same accident . . . [t]his plaintiff pleads the doctrine of *res judicata* in this case by virtue of the said verdicts, findings of fact, conclusions of law and judgments in said companion cases in said Federal Court, and further alleges that the only issue remaining for the jury in this case is the issue of damages."

Only defendant Bradley filed answers to plaintiff's amendments. The answers were in the form of motions to dismiss plaintiff's plea of *res judicata* for the following reasons: (1) "The parties in this action are neither the same as the parties in the two United States District Court actions, nor are they privy to each other." (2) "The subject matter of this action is different from the subject matter of the United States District Court actions and, therefore, *res judicata* does not apply," and (3) "The actions of the majority of the Circuit Court Judges, in reversing the judgment of Judge Gordon, and in ordering that judgment be entered against Bradley Lumber Company, Inc., was contrary to the law of North Carolina, contrary to the evidence, and contrary to Rule 52, Federal Rules of Civil Procedure and other rules of the United States Courts under which the parties litigated and, therefore, the North Carolina Court should not be, and is not, bound by the Federal Court judgments."

Plaintiff then filed a motion in each case under Rule 56 of the North Carolina Rules of Civil Procedure moving for summary judgment "(1) as to Leonard Ross Lewis as an employee and agent of defendants, (2) as to negligence of Leonard Ross Lewis, (3) as to his negligence being the proximate cause of the alleged collision, and (4) as acting as agent within the

scope of his employment at the time of the accident, and (5) as to plaintiff's intestate being free of contributory negligence, leaving only the issue of damages to be determined by a jury."

The presiding judge, after considering all pertinent evidence and oral argument, entered the following order for summary judgment in each of the wrongful death cases:

> "And it appearing to the Court that this action and the above-designated Federal Court actions arise out of the same incident and involve the same named, beneficial, or real parties in interest, both plaintiff and defendants, the same subject matter, and the same issues as to negligence of the drivers of the vehicles involved and agency, and that, except as to the issues of damages, all pertinent issues arising between the plaintiff and defendants have been finally adjudicated in the Federal Court actions; that all of the issues except the issue of damages have been answered in favor of the plaintiff and against all of the defendants herein;
>
> "And it appearing to the Court and the Court finding that there is no genuine issue as to any material fact herein except as to the amount of damages, and having concluded that plaintiff is entitled to judgment as a matter of law for such amount as shall be found to be due as damages;
>
> "NOW, THEREFORE, IT IS ORDERED that the motion of plaintiff for Summary Judgment on all issues except the issue of damages be granted, and that this cause be placed on the jury calendar for trial on the sole issue of damages."

Only defendant Bradley appealed to the Court of Appeals from the judge's entry of summary judgment. The Court of Appeals, in an opinion by Judge Morris concurred in by then Chief Judge Mallard and Judge Hedrick, affirmed. We allowed *certiorari* on 1 June 1973.

Womble, Carlyle, Sandridge & Rice by W. F. Womble; Smith, Moore, Smith, Schell & Hunter by Richmond G. Bernhardt, Jr., for defendant appellant Bradley Lumber Company, Inc.

Deal, Hutchins and Minor by Fred S. Hutchins, Sr., for plaintiff appellee.

MOORE, Justice.

The sole question presented on this appeal is whether the trial court erred in allowing plaintiff's motion for summary judgment based on his plea of *res judicata*, leaving only the issue of damages for trial.

Res judicata deals with the effect of a former judgment in favor of a party upon a subsequent attempt by the other party to relitigate the same cause of action. In *Masters v. Dunstan*, 256 N.C. 520, 124 S.E. 2d 574 (1962), this Court stated:

> " 'It is fundamental that a final judgment, rendered on the merits, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to the parties and privies, in all other actions involving the same matter.' *Bryant v. Shields*, 220 N.C. 628, 18 S.E. 2d 157. '. . . (W)hen a fact has been agreed upon or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed.' *Humphrey v. Faison*, 247 N.C. 127, 100 S.E. 2d 524, citing and quoting *Armfield v. Moore*, 44 N.C. 157.
>
> "An estoppel by judgment arises when there has been a final judgment or decree, necessarily determining a fact, question or right in issue, rendered by a court of record and of competent jurisdiction, and there is a later suit involving an issue as to the identical fact, question or right theretofore determined, and involving identical parties or parties in privity with a party or parties to the prior suit. *Cannon v. Cannon*, 223 N.C. 664, 28 S.E. 2d 240; *Distributing Co. v. Carraway*, 196 N.C. 58, 144 S.E. 535."

See also *Shaw v. Eaves*, 262 N.C. 656, 138 S.E. 2d 520 (1964).

In Federal Court, Alice Sharpe and her daughter Juanita sued the Grindstaffs, driver Lewis, and Bradley for personal injuries sustained as a result of the alleged negligence of Lewis. In that litigation the Sharpes were required to prove that Lewis was negligent and that his negligence was imputable to the Grindstaffs and Bradley under the theory of *respondeat superior*. To recover under North Carolina's wrongful death statute the plaintiff in the present cases must also prove negligence and imputability. In Federal Court the Sharpes sought recovery for

their own personal injuries. The present litigation seeks recovery for the alleged wrongful deaths of Byron and Berlin Sharpe. Hence the causes of actions are not identical.

[1] Under a companion principle of *res judicata,* collateral estoppel by judgment, parties and parties in privity with them—even in unrelated causes of action—are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination. *Masters v. Dunstan, supra; Deaton v. Elon College,* 226 N.C. 433, 38 S.E. 2d 561 (1946); 5 Strong, N. C. Index 2d, Judgments § 35 (1968); 46 Am. Jur. 2d, Judgments § 418 (1969). See also *Poindexter v. Bank,* 247 N.C. 606, 101 S.E. 2d 682 (1958); *Craver v. Spaugh,* 227 N.C. 129, 41 S.E. 2d 82 (1947). As stated by Mr. Justice Murphy in *Commissioner v. Sunnen,* 333 U.S. 591, 599, 92 L.Ed. 898, 907, 68 S.Ct. 715, 720 (1948): "[Collateral estoppel] is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally."

The distinction between *res judicata* and collateral estoppel or estoppel by judgment was stated by Mr. Justice Field in *Cromwell v. County of Sac,* 94 U.S. 351, 353, 24 L.Ed. 195, 198 (1877):

> ". . . The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.
>
> "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."

This distinction was recognized and approved in *Clothing Co. v. Hay,* 163 N.C. 495, 79 S.E. 955 (1913); *Ferebee v. Sawyer,* 167 N.C. 199, 83 S.E. 17 (1914).

[2] To determine whether collateral estoppel applies in the present cases, it must first be decided whether the parties in these suits and those in the former Federal litigation are the same, or stand in privity to the parties in the former litigation. The Federal litigation was between the same defendants and plaintiffs Alice Sharpe and Juanita Sharpe by her next friend H. L. King. H. L. King as next friend for Juanita Sharpe was not a party in the legal sense; rather he was an officer appointed by the court to protect the interest of the minor, the minor being the real party in interest and the real plaintiff. *Rabil v. Farris,* 213 N.C. 414, 196 S.E. 321 (1938); *Krachanake v. Manufacturing Co.,* 175 N.C. 435, 95 S.E. 851 (1918); *George v. High,* 85 N.C. 113 (1881). Therefore, the real parties in the Federal litigation were the two Sharpes as plaintiffs with the same three defendants involved in the present cases.

Defendant Bradley contends that although the same defendants are involved in both the Federal and State litigation, the plaintiffs differ in that the plaintiffs in the Federal cases are neither the same parties nor in privity with the plaintiff in this litigation—H. L. King as administrator of the estates of Byron and Berlin Sharpe. Bradley readily concedes that the plaintiffs in the Federal personal injury actions, Alice and Juanita Sharpe, would be the sole beneficiaries of any recovery in the wrongful death actions now before this Court. It asserts, however, that this is not enough to warrant a conclusion that the requirement of identity of parties or parties in privity is met in order for collateral estoppel to be applicable.

Whether or not a person was a party to a prior suit "must be determined as a matter of substance and not of mere form." *Chicago, R.I. & P. Ry. v. Schendel,* 270 U.S. 611, 618, 70 L.Ed. 757, 763, 46 S.Ct. 420, 423 (1926). "The courts will look beyond the nominal party whose name appears on the record as plaintiff and consider the legal questions raised as they may affect the real party or parties in interest." *Davenport v. Patrick,* 227 N.C. 686, 44 S.E. 2d 203 (1947).

"In an action to recover damages for wrongful death the real party in interest is the beneficiary under the statute for whom recovery is sought, and not the administrator." *In re Estate of Ives,* 248 N.C. 176, 102 S.E. 2d 807 (1958). See also *Broadfoot v. Everett,* 270 N.C. 429, 154 S.E. 2d 522 (1967); *Davenport v. Patrick, supra;* G.S. 1A-1, Rule 17. Therefore, we conclude that the requirement of identity of parties is met.

In reaching the conclusion that the parties in the Federal litigation and in this litigation are the same, we are not unaware of the rather unique factual situation presented here. Here the *only* beneficiaries of the Byron and Berlin Sharpe estates—Alice and Juanita Sharpe—were also injured in the accident that gave rise to their personal injury suits against the same three defendants. Had only Alice Sharpe been in the accident with Byron and Berlin Sharpe—unaccompanied by her daughter Juanita—then only Alice Sharpe would have sued in Federal Court for personal injuries and a different factual situation would be presented in this litigation. Thus it is important to note that our holding that the parties in this litigation are the same as those in the Federal litigation is limited to the particular facts in the instant cases.

[3] Having decided that the parties are the same, we must next determine whether another requirement for the application of collateral estoppel—identity of issues—is present. In determining whether collateral estoppel is applicable to specific issues, certain requirements must be met: (1) The issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment. 1B Moore's Federal Practice § 0.443[1] (2d Ed. 1965). See also *Masters v. Dunstan, supra; Ferebee v. Sawyer, supra; Clothing Co. v. Hay, supra;* 5 Strong, N. C. Index 2d, Judgments § 35 (1968); 8 Encyclopedic Digest of N. C. Reports, Judgments §§ 364, 412 (1918).

In both the Federal litigation and the present cases the issues determinative of Bradley's liability are the negligence of Lewis and the imputability of Lewis's negligence to Bradley. These material and relevant issues, necessary and essential to the Federal Courts' judgments, were decided against defendant Bradley. The Fourth Circuit Court of Appeals, after setting out facts relating to the relationship of defendants Grindstaffs, Lewis, and Bradley, said: "We think that these facts ineluctably establish that Lewis was no less an employee of the Bradley Lumber Company than of R. K. Grindstaff & Son and that his negligence which brought injuries to the Sharpes is imputable to both." 446 F. 2d at 155. That Court then concluded " . . . [T]he appellants are entitled to judgment against Bradley Lumber Company as well as R. K. Grindstaff & Son." 446 F. 2d at 155.

Bradley contends, however, that there was no finding that Lewis, although an employee of Bradley, was acting in the course and scope of his employment at the time of the collision. Before the Circuit Court of Appeals could conclude that both the Grindstaffs and Bradley were liable for the negligence of Lewis, it was compelled to find, as plaintiffs alleged in the complaints, that Lewis was negligent, that his negligence was the proximate cause of plaintiffs' injuries, and that the relationship of master and servant existed between Bradley and Lewis at the time of the injuries and in respect to the very transaction out of which the injuries arose. *Jackson v. Mauney,* 260 N.C. 388, 132 S.E. 2d 899 (1963); *Lindsey v. Leonard,* 235 N.C. 100, 68 S.E. 2d 852 (1952); *Graham v. Gas Co.,* 231 N.C. 680, 58 S.E. 2d 757 (1950). See also *Southerland v. R. R.,* 148 N.C. 442, 62 S.E. 517 (1908). While the Federal judgments do not set out in detail the specific fact that Lewis was acting in the scope of his employment at the time of the collision, when a judgment does not set forth in detail the facts found by the court, it is presumed that the court upon proper evidence found the essential facts necessary to support the judgment entered. *Craver v. Spaugh, supra; McCune v. Manufacturing Co.,* 217 N.C. 351, 8 S.E. 2d 219 (1940). The crucial issues in the Federal cases were the negligence of Lewis and the liability of the Grindstaffs and Bradley for that negligence. Those issues were there decided against Bradley. When an issue has been directly tried and decided, it cannot be contested again between the same parties or their privies in the same or any other court. *Craver v. Spaugh, supra; Bryant v. Shields,* 220 N.C. 628, 18 S.E. 2d 157 (1942); *Clothing Co. v. Hay, supra.* "This rule prevails as to matters essentially connected with the subject matter of the litigation and necessarily implied in the final judgment, although no specific finding may have been made in reference thereto. If the record of the former trial shows that the judgment could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties." *Craver v. Spaugh, supra.*

As stated in 1B Moore's Federal Practice § 0.443[4] (2d Ed. 1965):

> "[Collateral estoppel's] requirement that an issue must have been determined by adjudication in the prior action is . . . significant . . . in situations in which the issue was

> undoubtedly raised and litigated in the prior action, but either was not in fact determined or cannot conclusively be shown to have been determined by the resulting judgment. In discovering what issues were determined by the judgment in a prior action, the court in the second action is free to go beyond the judgment roll, and may examine the pleadings and the evidence in the prior action. And if the rendering court made no express findings on issues raised by the pleadings or the evidence, the court may infer that in the prior action a determination appropriate to the judgment rendered was made as to each issue that was so raised and the determination of which was necessary to support the judgment."

See also *Gunter v. Winders,* 253 N.C. 782, 117 S.E. 2d 787 (1961); *Southerland v. R. R., supra.*

[4] Furthermore, Bradley's contention that this Court should not be bound by the Federal judgments since the Federal Courts erroneously applied North Carolina law and did not follow established rules of Federal procedure ignores an important rule applicable to *res judicata* and collateral estoppel. To be valid a judgment need not be free from error. Normally no matter how erroneous a final valid judgment may be on either the facts or the law, it has binding *res judicata* and collateral estoppel effect in all courts, Federal and State, on the parties and their privies. 1B Moore's Federal Practice § 0.405 [4.—1] (2d Ed. 1965). See *Hampton v. Pulp Co.,* 223 N.C. 535, 27 S.E. 2d 538 (1943); *In re Young,* 222 N.C. 708, 24 S.E. 2d 539 (1943); *Smathers v. Insurance Co.,* 211 N.C. 345, 190 S.E. 229 (1937); 5 Strong, N. C. Index 2d, Judgments § 18 (1968).

[5] While recognizing this principle, we agree with the North Carolina Court of Appeals that the issues determinative of Bradley's liability, including the issue of Lewis's acting within the scope of his employment with Bradley at the time of the accident, were considered by the Federal Courts and answered against Bradley. This conclusion is amply supported by the pleadings and the evidence in the cases in the Federal Courts.

Full faith must be given by State courts to final Federal Court judgments. Therefore, the parties hereto are bound by the judgments in the Federal Courts. *Motor Lines v. Johnson,* 231 N. C. 367, 57 S.E. 2d 388 (1950); *Yerys v. Insurance Co.,* 210 N.C. 442, 187 S.E. 583 (1936); 5 Strong, N. C. Index 2d, Judgments § 38 (1968).

For the reasons stated we hold that the issues of Lewis's actionable negligence and the imputability of his negligence to Bradley were conclusively determined in the Federal Courts between the same parties in interest involved in the present cases. Therefore, the trial court did not err in granting plaintiff's motion for summary judgment and directing that the causes be placed on the jury calendar for the trial on the sole issue of damages.

The decision of the Court of Appeals is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. CHARLES SUMMERS, JR.

No. 33

(Filed 12 December 1973)

1. **Burglary and Unlawful Breakings § 4— first degree burglary — evidence properly excluded**

In a prosecution for first degree burglary the trial court did not err in failing to require the prosecuting witness to answer that she had had her husband convicted three or four times for assaulting her.

2. **Criminal Law § 102— jury argument of solicitor — no impropriety**

The solicitor's remark during his argument to the jury that the grand jury had seen fit to indict defendant was not improper and defendant's motion for a new trial based thereon was properly overruled.

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

Evidence in a first degree burglary case was sufficient to be submitted to the jury where it tended to show a breaking into a closed and occupied dwelling house in the nighttime for the purpose of committing rape, the victim recognized the intruder by his voice and identified defendant, defendant's fingerprints were found on a metal spray container which the intruder had used as a weapon to inflict injuries on the head and face of the victim, and when the victim screamed, arousing her daughter, defendant fled the scene.

4. **Burglary and Unlawful Breakings § 8— first degree burglary — sentence of forty years imprisonment — error**

The only permissible sentence for first degree burglary committed on 5 August 1972, after the date of *Furman v. Georgia*, was life imprisonment, and the trial court erred in imposing a sentence of forty years imprisonment on defendant.

State v. Summers

IN this criminal prosecution the defendant was tried before *Cooper, J.,* at the November, 1972 Session, ALAMANCE Superior Court, upon a grand jury indictment, proper in form, which charged that Charles Summers, Jr. at about the hour of 1:30 a.m. on the night of August 5, 1972, feloniously and burglariously broke into and entered the dwelling house occupied by Carol Brooks and her two infant daughters with the intent to commit rape upon Carol Brooks. When arraigned, the defendant entered a plea of not guilty. A jury, satisfactory to both the State and the defendant, was selected and empaneled.

At the trial, Mrs. Carol Brooks testified that she and her two children went to bed upstairs in their apartment at 9:30 p.m. on August 5, 1972. The apartment in which they lived was owned by the Burlington Housing Authority. Before going to bed Mrs. Brooks locked the windows and doors to the apartment.

Some time later in the night she was awakened by a person on her bed attempting to remove her sleeping garment. When she screamed the intruder spoke to her, using words not necessary to be repeated here. She recognized the intruder's voice and thereby identified the defendant as the intruder. She had heard him talk and she knew his voice. She began screaming and the intruder held her and began hitting her on the head and face with a metal object. The older daughter, age seven, awoke and began screaming. At this juncture the intruder fled from the apartment.

Neighbors testified as to the outcry for help and Mrs. Brooks' excitement and distress.

Police Officer Elgin arrived and testified the time was 1:50 a.m. and that he ascertained that a window and a door to the apartment had been opened. Officer Elgin examined the apartment and found a metal hair spray container near Mrs. Brooks' bed. This appeared to be the weapon used in the attack on Mrs. Brooks. Microscopic and fingerprint examination of the container disclosed the clear fingerprints of the defendant.

The defendant did not testify and did not offer evidence. The court denied defendant's motions for a directed verdict of not guilty made at the close of the State's evidence and renewed after the defendant rested without offering evidence.

The jury returned this verdict: "Guilty of First Degree Burglary." The court imposed a sentence of forty years' imprisonment. The defendant moved to set aside the verdict on account of the solicitor's remarks during his argument to the jury: "That the grand jury for Alamance County had considered the charge against the defendant and had seen fit to indict him thereupon."

The defendant filed exceptions to the judge's refusal to permit his counsel to inquire of the prosecuting witness how many times she had filed charges in court against her husband for assaulting her. Her reply would have been, "Three or four times." These questions came during a protracted cross-examination involving matters beyond the scope of pertinent inquiry, involving matters not touching on the defendant's guilt or innocence, nor reflecting on the character of the prosecuting witness.

After the verdict was returned and the judgment entered, the defendant gave notice of appeal to the Court of Appeals. The defendant's brief contains the following:

> "In Group VII of the Assignments of Error, the defendant objected and excepted to the form of the judgment entered by the court upon the jury's verdict. The jury found the defendant 'Guilty as charged,' namely guilty of the capital crime of First Degree Burglary. The court, in the wake of such verdict, sentenced the defendant to a term of forty years in the State's Prison. Whether such a sentence is proper, in the state of the law at this time, defendant will submit into the hands of the court, without argument."

The parties agreed on the statement of the case on appeal which was filed in the Court of Appeals. The Attorney General, on behalf of the State, filed a petition with the Supreme Court pursuant to G.S. 7A-27 requesting that the case be transferred to this Court prior to review by the Court of Appeals. The motion was allowed and the transfer ordered on June 7, 1973.

Robert Morgan, Attorney General by Lester V. Chalmers, Jr., Assistant Attorney General for the State.

Herman L. Taylor for the defendant.

HIGGINS, Justice.

[1, 2] The defendant assigns as error the failure of the court to require Mrs. Brooks to answer this question: "How many

times have you had your husband convicted of assaulting you?" If required to answer, she would have said, "Three or four times." In sustaining the solicitor's objection to the inquiry, the trial judge evidently concluded the question would raise other questions and would tend to lead the jury into a consideration of issues not pertinent to the burglary charge. Because of his favorable position and his wide discretion in controlling the scope of cross-examination in criminal cases, the ruling of the trial judge should not be disturbed except when prejudicial error is disclosed. *State v. Robinson,* 280 N.C. 718, 187 S.E. 2d 20; *State v. Ross,* 275 N.C. 550, 169 S.E. 2d 875. Error prejudicial to the defendant does not appear. Likewise, the court did not commit error in sustaining the objection to the solicitor's argument. The solicitor merely stated that the grand jury had seen fit to indict the defendant. The court made the same statement in informing the jury as to the nature of the charge. The argument does not seem to be improper and the motion for a new trial based thereon was properly overruled.

[3] The defendant's motions to dismiss for insufficient evidence were properly denied. The State's evidence disclosed a breaking into of a closed and occupied dwelling house in the nighttime for the purpose of comitting rape. Mrs. Brooks recognized the intruder by his voice and identified the defendant. His fingerprints were found on the metal spray container which the evidence disclosed the intruder had used as a weapon to inflict injuries on the head and face of Mrs. Brooks. When she screamed, arousing her daughter, the defendant fled the scene.

The defense offered nothing in contradiction except an extensive cross-examination which the court had, with difficulty, kept within bounds. Motions to dismiss were properly overruled. The State had made out a case for the jury. *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679; *State v. Rowland,* 263 N.C. 353, 139 S.E. 2d 661; *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431.

The defendant objected to the charge on the ground of imbalance in the court's statements of the contentions. The court's charge, when examined in context, seems to be fair and in balance. The defendant should have made objection before the jury retired if he was dissatisfied with the statement of his contentions. *State v. Lambe,* 232 N.C. 570, 61 S.E. 2d 608; *State v. Thompson,* 226 N.C. 651, 39 S.E. 2d 823.

[4] We conclude the trial and verdict are free from legal objection. However, the judgment imposed was unauthorized by applicable law. "G.S. 14-52. *Punishment for burglary.*—Any person convicted, according to due course of law, of the crime of burglary in the first degree shall suffer death: Provided, if the jury when rendering its verdict in open court shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury."

On June 29, 1972, the Supreme Court of the United States decided *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726. Furman was under a death sentence in Georgia for murder. He filed in the Supreme Court of the United States a petition for certiorari. Two other persons under death sentences, one in Georgia and one in Texas, filed like petitions. "Certiorari was granted limited to the following question: 'Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?' 403 U.S. 952 (1971). The Court holds that the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings. So ordered."

The Per Curiam decision in Furman above quoted does not specify the legal reasoning which influenced the Court to invalidate the death sentences. From the individual opinions of the Justices, however, it appears a majority of the Court held the view that a death sentence is cruel and unusual punishment if the statute under which it was imposed gave to the judge or to the jury the option to fix the punishment at death or life imprisonment.

Since the decision in Furman, the Supreme Court of the United States has allowed certiorari to this Court, vacated death sentences, and remanded the cases to us for further proceedings. Our procedure has been to remand each case to the trial court for the imposition of a life sentence. In some instances, the trial judge upon a conviction of a capital felony without a jury recommendation of life imprisonment, has imposed a life sentence. Of course, the trial courts are, as this Court is, bound by the decision in Furman. *State v. Hill,* 279 N.C. 371, 183 S.E. 2d 97;

State v. Roseboro, 279 N.C. 391, 183 S.E. 2d 108; *State v. Atkinson*, 279 N.C. 386, 183 S.E. 2d 106; *State v. Chance*, 281 N.C. 746, 191 S.E. 2d 65; *State v. Doss*, 281 N.C. 751, 191 S.E. 2d 70; *State v. Miller*, 281 N.C. 740, 190 S.E. 2d 841; *State v. Westbrook*, 281 N.C. 748, 191 S.E. 2d 68.

The only sentence the trial judge was authorized to impose on the defendant for the crime he committed on August 5, 1972, was imprisonment for life. *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19.

Under the authority of the cases herein cited, we vacate the sentence of forty years' imprisonment imposed on the defendant, remand the case to the Superior Court of Alamance County to the end that the presiding judge, by proper writ, shall have the defendant and his counsel of record brought before the court, and the court shall enter judgment that the defendant be confined in the State's prison for the term of his natural life.

REMANDED FOR JUDGMENT.

STATE OF NORTH CAROLINA v. JAMES WESLEY SHAW, JR.

No. 58

(Filed 12 December 1973)

1. **Constitutional Law § 32; Jury § 2— summoning of supplemental jurors — right to have counsel at summoning**

Where the regular panel of jurors was exhausted on the second day of the trial and the trial judge thereupon ordered the sheriff to summon ten supplemental jurors, the trial court did not err in refusing to grant defendant's motion to allow his counsel or his counsel's representative to be present during summoning of the jury.

2. **Constitutional Law § 29; Jury § 7— Negroes peremptorily challenged — no arbitrary or systematic exclusion**

Where all prospective Negro jurors were peremptorily challenged by the solicitor but there was no indication in the record that the solicitor had previously followed practices which prevented Negroes from serving on the juries in his District, defendant failed to make out a *prima facie* case of arbitrary or systematic exclusion of Negroes from the jury.

3. **Criminal Law § 106; Rape § 5— uncorroborated testimony of prosecutrix — sufficiency of evidence**

In a prosecution for rape, crime against nature and armed robbery, uncorroborated testimony by the prosecutrix including an iden-

tification of defendant as her assailant was sufficient to carry the case to the jury where the prosecutrix had ample opportunity to observe clearly her assailant over a substantial period of time and her identifications were unequivocal.

4. **Criminal Law § 74— statement not a confession — necessity for voir dire**

Defendant's in-custody statement concerning his employment made to a police officer did not amount to a confession since it did not contain an acknowledgment of his guilt of any element of any one of the crimes charged, and the trial judge was not required to conduct a *voir dire* hearing before ruling on the admissibility of evidence pertaining to the statement.

5. **Criminal Law §§ 33, 169; Rape § 4— irrelevant evidence — admission not prejudicial**

Evidence concerning defendant's whereabouts some forty days subsequent to the date of the charged crimes was irrelevant since it failed to shed any light upon the issue of defendant's guilt or innocence, but admission of the evidence which did not inculpate defendant or impair his credibility did not result in prejudicial error.

6. **Criminal Law § 112— charge on reasonable doubt — no error**

The trial court's definition of reasonable doubt was substantially in accord with those approved by the Supreme Court, and it was not necessary for the trial judge to include an instruction that reasonable doubt might arise from a lack of or insufficiency of evidence since there was nothing in his definition which would lead the jury to believe that a reasonable doubt must arise only from the evidence presented.

APPEAL by defendant from *Braswell, J.*, 30 April 1973 Session, CUMBERLAND Superior Court.

By separate indictments, defendant was charged with the crimes of rape, crime against nature and armed robbery. The cases were consolidated for trial and defendant entered a plea of not guilty to each charge.

The State's evidence tended to establish the following facts:

At about 12:30 p.m. on 20 December 1972, Mrs. Barbara Jean Johnson was in her place of residence at Whispering Pines Trailer Court. At that time, someone knocked on the door of her mobile home, and when Mrs. Johnson opened the door, she observed two Negro men. The larger man, subsequently identified as defendant, asked for a glass of water. When Mrs. Johnson returned from the kitchen with the water, both men were inside the dwelling. Defendant, who was then armed with a knife, demanded that Mrs. Johnson give him everything of

value in the mobile home. He forced her into the bathroom where she gave him a dollar which was lying on the medicine cabinet. Defendant then carried Mrs. Johnson into the bedroom where he tied and gagged her. He then, by force and against her will, had sexual intercourse with Mrs. Johnson. Defendant left the room and his companion entered and also had intercourse with her by force and against her will. Thereafter, defendant returned, rolled Mrs. Johnson onto her stomach and penetrated her anus. When defendant and his companion left, Mrs. Johnson managed to free herself and call for help. She was carried to a hospital where she was examined by Dr. Jorge Equez who found marks on her wrists and ankles, and lacerations of the rectum. Medical testimony revealed that sperm was found in the vagina.

The lighting conditions in the trailer were good. Mrs. Johnson had ample opportunity over a substantial period of time to observe defendant's face, to see him walk and to hear his voice.

Mrs. Johnson identified defendant at a lineup on 30 January 1973, and subsequently made an in-court identification of defendant as her assailant.

Defendant testified that he did not know Mrs. Barbara Johnson, that he had never been in her home, and he had never seen her prior to his trial.

The jury returned verdicts of guilty as to each of the three charges. Judge Braswell imposed a sentence of life imprisonment on the rape charge, consolidated the armed robbery and the crime against nature charges for judgment, and sentenced defendant to imprisonment for ten years on the consolidated counts.

Defendant appealed, and we allowed his petition to bypass the Court of Appeals as to the charges of crime against nature and armed robbery.

Attorney General Robert Morgan by Associate Attorney Ralf F. Haskell for the State.

Neill Fleishman, Assistant Public Defender.

BRANCH, Justice.

[1] Defendant, without citation of authority, contends that the trial judge erred by refusing to grant his motion to allow

his counsel or his counsel's representative to be present during summoning of the jury.

The regular panel of jurors was exhausted at approximately 11:00 a.m. on the second day of the trial. The trial judge thereupon ordered the Sheriff to summon ten supplemental jurors to report for service at two o'clock p.m. on that day.

G.S. 9-11(a), in part, provides:

> "Supplemental jurors; special venire.—(a) If necessary, the court may, without using the jury list, order the sheriff to summon from day to day additional jurors to supplement the original venire. Jurors so summoned shall have the same qualifications and be subject to the same challenges as jurors selected for the regular jury list. . . . "

Objections to the special venire based on partiality, misconduct of the Sheriff, or irregularity in making out the jury list, are properly made by challenges to the array. *State v. Dixon*, 215 N.C. 438, 2 S.E. 2d 371; *State v. Levy*, 187 N.C. 581, 122 S.E. 386; *State v. Speaks*, 94 N.C. 865.

Defendant had ample opportunity to examine the additional jurors on *voir dire*. He elected not to challenge the array, and has failed to offer any proof that the Sheriff violated the trust placed in him as an elected official.

To adopt the rule urged by the defendant would be to place another stumbling block in the path of orderly and expeditious trials.

This assignment of error is overruled.

[2] Defendant moved for mistrial on the grounds that Negroes were systematically excluded from the jury. He assigns as error the denial of this motion.

The basis for this assignment of error lies in the fact that all prospective Negro jurors were peremptorily challenged by the Solicitor. Defendant was a Negro and Mrs. Johnson was a white woman. There is no suggestion in the record that the Solicitor has previously followed practices which prevented Negroes from serving on the juries in his District.

The United States Supreme Court has squarely ruled against the contention here urged by defendant. In *Swain v. Alabama*, 380 U.S. 202, 13 L.Ed. 2d 759, the Court, in part, stated:

"The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control. . . . "

* * *

"In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it. . . . "

* * *

" . . . the defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time. . . . "

Defendant has failed to make out a *prima facie* case of arbitrary or systematic exclusion of Negroes from the jury. Further, he has failed to show any violation of his Constitutional rights as guaranteed by Article I, Sec. 19 of the North Carolina Constitution.

The trial judge correctly denied defendant's motion for a mistrial.

[3] Defendant assigns as error the action of the trial judge in denying his motions for judgment as of nonsuit.

Defendant admits that Mrs. Johnson's testimony was sufficient to carry the case to the jury on all charges. He, however, argues that her uncorroborated identification of defendant is not sufficient to convict him of the crime of rape. Again defendant cites no authority and seeks to support his position by attacking the credibility of Mrs. Johnson's testimony.

In 2 Strong's N. C. Index 2d, Criminal Law § 106, p. 658, it is stated:

"Where the commission of the crime is admitted or established, the testimony of the prosecuting witness, or of one witness, identifying defendant as the perpetrator, carries the case to the jury regardless of the questionable character of the witnesses, since the credibility of witnesses is a matter for the jury. . . . "

See also *State v. Hanes,* 268 N.C. 335, 150 S.E. 2d 489.

Mrs. Johnson had ample opportunity to clearly observe her assailant over a substantial period of time and her identifications were unequivocal. There was ample, competent evidence to repel defendant's motions as of nonsuit.

[4] Defendant next assigns as error the action of the trial judge in permitting the Solicitor to cross-examine defendant concerning certain in-custody statements without first conducting a *voir dire* hearing.

On direct examination, defendant testified that on 20 December 1972, he was unemployed. On cross-examination, the following occurred:

"Q. I ask you, Mr. Shaw, if you did not state to Detective Bob Connerly, the individual seated on my immediate right, that you were employed with Allied Industries at Fort Bragg?

ATTORNEY FLEISHMAN: Objection

COURT: Overruled.

EXCEPTION EXCEPTION NO. 8

Q. And did not Mr. Connerly ask you where that place of employment was, and you did not know?

ATTORNEY FLEISHMAN: Objection

COURT: Overruled.

EXCEPTION EXCEPTION NO. 9

I don't know where Allied Industries is originated from. I knew where I was employed. I don't know the address. I worked at a mess hall. There was no specific person in charge of me. I worked with some young women. . . . "

In rebuttal, the State offered the testimony of Officer Bob Connerly who, in part, testified:

"Q. What, if anything, did you ask James Wesley Shaw at that time?

ATTORNEY FLEISHMAN: Objection. I am going to object to the line of questioning and request a voir dire on it.

COURT: Let me see both sides at the bench.

(All attorneys approached the bench.)

COURT: The request for voir dire is denied.

EXCEPTION No. 16

ATTORNEY FLEISHMAN: Your Honor, is the objection also overruled?

COURT: The objection is overruled.

EXCEPTION No. 17"

* * *

" . . . I asked him where he was employed; he said, 'I have been working at Fort Bragg as a KP for Allied Industries.' I asked him where the office of Allied Industries was and he said he didn't know. I asked him where the accounting office was so I could check his employment; he stated that he didn't know. I couldn't get him to advise me as to where I could check the employment. He merely stated that he was a KP at a mess hall at Fort Bragg as one of the civilian KP's hired by the military."

Defendant argues that the challenged evidence amounted to a confession and, therefore, upon his objection and request for a *voir dire,* the trial judge should have conducted a hearing in the absence of the jury to determine whether the confession was voluntarily made.

Unquestionably it is the rule in this jurisdiction that when the State offers a confession in a criminal trial and defendant objects, the trial judge should determine the competency of the evidence in a preliminary inquiry held in the absence of the jury. *State v. Jones,* 278 N.C. 88, 178 S.E. 2d 820; *State v. Vickers,* 274 N.C. 311, 163 S.E. 2d 481.

Here defendant voluntarily took the stand and thereby became subject to the traditional truth testing devices of cross-

examination and impeachment by contradiction. *Harris v. New York,* 401 U.S. 222, 28 L.Ed. 2d 1.

A confession is an acknowledgment in express words by the accused of his guilt of the charged crime or some essential element of it. *State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561.

Defendant's statement did not amount to a confession since it did not contain an acknowledgment of his guilt of any element of any one of the charged crimes. Thus, Judge Braswell was not required to conduct a *voir dire* hearing before ruling on the admissibility of this evidence.

[5] Defendant assigns as error the trial judge's ruling admitting evidence concerning his activities on 30 January 1973, some 40 days subsequent to the date of the charged crimes.

On cross-examination, the following exchange took place between the Solicitor and defendant:

> "Q. Mr. Shaw, I ask you, as of January 30th, if you did not state to Officers House and Devane of the Fayetteville Police Department that you were in the West Area Trailer Court looking for an individual named Farmer?
>
> ATTORNEY FLEISHMAN: Objection
>
> COURT: Overruled
>
> EXCEPTION EXCEPTION No. 10
>
> A. Yes, I did."

Thereafter, over defendant's objection, the Solicitor pursued a line of questioning as to whether Farmer lived in the trailer court, the exact address of his trailer, who lived with him and who actually owned the trailer occupied by Farmer.

It is an elementary rule of evidence that matter offered in a case must be relevant to the issues and must tend to establish or disprove them. *Sprinkle v. Ponder,* 233 N.C. 312, 64 S.E. 2d 171. It is also well recognized that in a criminal case, every circumstance which is calculated to shed light upon a supposed crime is relevant and admissible, if otherwise competent. *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506.

We are of the opinion that the challenged evidence is irrelevant since it fails to shed any light upon the issue of

defendant's guilt or innocence. However, there is nothing in the evidence which tends to inculpate defendant or impair his credibility. We do not believe that the jury would have reached a different result had the evidence been excluded. *State v. Sneeden,* 274 N.C. 498, 164 S.E. 2d 190; *State v. Temple,* 269 N.C. 57, 152 S.E. 2d 206.

We hold that the admission of the evidence did not result in prejudicial error.

[6] Defendant contends that the trial judge erroneously defined the term reasonable doubt.

Judge Braswell charged:

> "The State must prove to you that the defendant is guilty beyond a reasonable doubt. A reasonable doubt is not a vain, imaginary, or fanciful doubt, but is a sane rational doubt. Proof beyond a reasonable doubt means that you must be fully satisfied and entirely convinced or satisfied to a moral certainty of the defendant's guilt."

The trial judge need not define reasonable doubt unless requested to do so, and if he undertakes the definition he is not limited to the use of an exact formula. The definition is sufficient if it is in substantial accord with those approved by this Court. *State v. McClain,* 282 N.C. 396, 193 S.E. 2d 113; and *State v. Dobbins,* 149 N.C. 465, 62 S.E. 635.

The definition of reasonable doubt given in this case was substantially in accord with those approved by this Court. *State v. Britt,* 270 N.C. 416, 154 S.E. 2d 519; *State v. Cook,* 263 N.C. 730, 140 S.E. 2d 305; *State v. Phillip,* 261 N.C. 263, 134 S.E. 2d 386. However, defendant, relying on *State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133, argues that the trial judge erred by omitting from his definition of reasonable doubt an instruction that reasonable doubt might arise from a lack of evidence, or from its deficiency.

In *Hammonds,* the trial court instructed the jury that a reasonable doubt " . . . is a fair doubt, based on reason and common sense, *and growing out of the testimony in the case.*" There the Court reasoned that the above instruction was error because it was susceptible to an interpretation by the jury that reasonable doubt might arise only from the evidence in the case. The Court concluded "that when such expression is used in de-

fining reasonable doubt, without adding 'or from the lack or insufficiency of the evidence' or some equivalent expression, it is error." See Justice Sharp's concurring opinion in *State v. Britt, supra.*

In instant case, Judge Braswell did not use the phrase "and growing out of the testimony in the case" or its equivalent. There was nothing in his definition of reasonable doubt which would lead the jury to believe that a reasonable doubt must arise only from the evidence presented, and that a reasonable doubt could not arise from a lack of or insufficiency of the evidence.

We hold that Judge Braswell's definition of reasonable doubt was adequate.

We have carefully examined all of defendant's assignments of error and find no prejudicial error.

No error.

EDNA B. PEELE, WIDOW v. EUGENE FINCH AND WIFE MAEBELLE G. FINCH, RAY FINCH AND WIFE BILLIE FINCH, MAGGIE F. BRANNON AND HUSBAND CHARLIE BRANNON, RELLA MAE F. TRENT AND HUSBAND OLLIE L. TRENT, BEATRICE M. FINCH, WIDOW, BOBBY LEE FINCH AND WIFE PATRICIA D. FINCH, HARRY FINCH AND WIFE JANE S. FINCH, FAYE FINCH WILLIAMS AND HUSBAND CHARLES WILLIAMS, JOE ELLEN FINCH MURRAY AND HUSBAND ROBERT MURRAY, B. W. BROWN AND WIFE ADELE L. BROWN, FRANKLIN D. BROWN AND WIFE DORIS B. BROWN, JAMES E. BROWN AND WIFE LA VERNE H. BROWN, JOHN D. BROWN AND WIFE ANNA LEEN M. BROWN, CHARLES A. BROWN AND WIFE JANICE LEWIS BROWN, MARJORIE E. FINCH AND HUSBAND WILLARD C. FINCH, ROSE B. TILLEY AND HUSBAND FELTON D. TILLEY, IRENE P. GLOVER AND HUSBAND ERNEST B. GLOVER

No. 46

(Filed 12 December 1973)

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

Nothing else appearing, terms used in a will must be construed so as to accomplish the intent of the testator, which is determined from the will itself and the surrounding circumstances known to the testator.

2. **Wills § 28— property devised — identity of devisee — construction of will**

As to the property devised or bequeathed, the will is construed as if executed immediately prior to the testator's death; however, as

to the identity of the devisee or legatee, it is to be construed, nothing else appearing, in the light of circumstances known to the testator at the time of its actual execution. G.S. 31-41.

3. Wills § 48— devise to "issue" — inclusion of adopted child

It is the express provision of G.S. 48-23(3) that in any will the word "issue" shall be held to include any adopted person, unless the contrary plainly appears by the terms of the will itself, and such rule of construction shall apply whether the will was executed before or after the final order of adoption and irrespective of whether the will was executed before or after the enactment of the statute.

4. Statutes § 5— clear provisions — construction in accord with intent of Legislature

Where the terms of a statute are clear, no construction of its provisions is required, but it is the duty of the Court to apply the statute so as to carry out the intent of the Legislature, irrespective of any opinion the Court may have as to the wisdom of the statute or its injustice to the deceased testator, unless the statute exceeds the power of the Legislature under the Constitution.

5. Statutes § 8; Wills § 48— inclusion of adopted children as "issue" — retrospective statute — constitutionality

Retrospective statutes destroying or diminishing contingent interests in property do not, *per se*, deprive the holder thereof of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the U. S. or Article I, § 19 of the Constitution of N. C., or violate any other constitutional limitation upon legislative power; therefore, it was within the power of the Legislature to enact G.S. 48-23(3) after the death of the testator enlarging the class entitled to take under a provision of a will creating a contingent interest by providing that "issue" include adopted children.

6. Wills § 48— devise to "issue" — adopted child included in class

Where testator devised a tract of land to Laura Finch for life and then "to her children, if any, and, if none, then to her brothers and sisters, or to the issue of those that may be dead, share and share alike" and nothing in the devise indicated testator's intent with respect to an adopted child of Laura Finch's sister, the Court is required by G.S. 48-23(3) to hold that the adopted child is "issue" of the sister within the meaning of the will and takes thereunder a share in the proceeds from sale of the land devised to Laura Finch.

APPEAL by respondents Glover from *Bone, E.J.*, at the 6 March 1973 Session of NASH, heard prior to determination by the Court of Appeals.

This is a special proceeding brought before the Clerk for the sale of land for partition among tenants in common. Pursuant to the stipulation of the parties, the land has been sold and the proceeds are now held by the commissioner pending the determination of the rights of the parties to share therein.

The petition alleged that Irene P. Glover had no interest in the land. The response of Mrs. Glover and her husband alleged that she owned a one-fourth undivided interest therein. An issue having thus been raised, the matter was set for trial in the Superior Court.

Both the petitioner and the respondents Glover moved for summary judgment, there being no controversy as to the facts. The court granted the motion of the petitioner and gave judgment that the respondents Glover took no right, title or interest in the land and that the sole owners thereof, and so of its proceeds, are the persons alleged in the petition to be such.

All of the parties claim under the will of B. W. Brown, the former owner of the property. The pertinent portion of the will is as follows:

> "FOURTH: I give and devise to my daughter Laura Finch, wife of Thurman Finch, that certain tract in Ferrells' Township, Nash County, N. C. [described] to have and to hold to her, the said Laura Finch, for and during the term of her natural life and no longer, and after her death, to her children, if any, and, if none, then to her brothers and sisters, or to the issue of those that may be dead, share and share alike."

The testator died leaving five children surviving him, namely, Laura Brown Finch, Rella Brown Finch, C. A. Brown, Edna Brown Peele and Maggie Brown Glover.

Laura Brown Finch died in 1972 never having had a child. Maggie Brown Glover died in 1959 without leaving any natural born children, but was survived by the respondent Irene Glover, her adopted daughter, who was adopted in 1937, after the death of the testator. Irene Glover married the respondent Ernest B. Glover. Edna Brown Peele, the petitioner, is the sole survivor among the brothers and sisters of Laura Brown Finch. Naturally born issue of Rella Brown Finch and of C. A. Brown survive.

Vernon F. Daughtridge for Respondent Appellants.

Fields, Cooper & Henderson by Leon Henderson, Jr. for Petitioner Appellee.

LAKE, Justice.

At the death of the testator, Laura Brown Finch had no children and it could not be known whether she would have

children. Consequently, the will of B. W. Brown devised the land in question to her for life with a contingent remainder to her children, if any, and an alternative contingent remainder in her brothers and sisters and the issue of those who predeceased her. *Lawson v. Lawson,* 267 N.C. 643, 148 S.E. 2d 546. The interests of her brothers and sisters and of the issue of those who might predecease her did not vest until the death of Laura Brown Finch. Thus, those who, at the death of Laura Brown Finch, met the description of the class, "her brothers and sisters" and "the issue of those that may be dead," became the owners of the land and are now entitled to share in its proceeds. *Lawson v. Lawson, supra; Strickland v. Jackson,* 259 N.C. 81, 130 S.E. 2d 22; *Trust Co. v. Lindsay,* 210 N.C. 652, 188 S.E. 94; *Fulton v. Waddell,* 191 N.C. 688, 132 S.E. 669.

The sole question presented by this appeal is whether Irene P. Glover, the adopted daughter of a sister of Laura Brown Finch, whose adoption occurred after the death of the testator, is "issue" of her adoptive mother within the meaning of the will and thus entitled to share in the proceeds of the land.

[1, 2] We are not here concerned with the right of the adopted child to inherit, through the statutes of descent and distribution, from her adoptive parent or, through such parent, from that parent's intestate ancestor or collateral relative. That right is given her by G.S. 48-23(1). *Thomas v. Thomas,* 258 N.C. 590, 129 S.E. 2d 239. The question before us is whether the adopted child takes under the will of her adoptive mother's father, B. W. Brown. That depends upon whether she is "issue" of her parent within the meaning of the will. *Thomas v. Thomas, supra; In re Heard's Estate,* 49 Cal. 2d 514, 319 P. 2d 637; *Thomas v. Higginbotham (Mo.),* 318 S.W. 2d 234; *Commerce Trust Co. v. Weed (Mo.),* 318 S.W. 2d 289; *Prince v. Nugent,* 93 R.I. 149, 172 A. 2d 743; *Merson v. Wood,* 202 Va. 485, 117 S.E. 2d 661; 2 AM. JUR. 2d, Adoption, §§ 92, 94. Nothing else appearing, terms used in a will must be construed so as to accomplish the intent of the testator, which is determined from the will itself and the surrounding circumstances known to the testator. *Y.W.C.A. v. Morgan, Attorney General,* 281 N.C. 485, 189 S.E. 2d 169; *Bank v. Home for Children,* 280 N.C. 354, 185 S.E. 2d 836; *Trust Co. v. Dodson,* 260 N.C. 22, 33, 131 S.E. 2d 875. As to the property devised or bequeathed, the will is construed as if executed immediately prior to the testator's death. G.S. 31-41; *Trust Co. v. Dodson, supra.* As to the identity of the devisee or

legatee, however, it is to be construed, nothing else appearing, in the light of circumstances known to the testator at the time of its actual execution. *Thomas v. Thomas, supra; Trust Co. v. Green,* 239 N.C. 612, 80 S.E. 2d 771.

The will of B. W. Brown was made a few weeks prior to his death in 1920. Our attention has been called to no statute then in effect concerning the construction of the word "issue" to include an adopted child and our research has disclosed no such statute. At that time Consolidated Statutes § 185 was the only statutory provision dealing with the effect of an order of adoption. It provided:

> "Such order, when made, shall have the effect forthwith to establish the relation of parent and child between the petitioner and the child during the minority or for the life of such child, according to the prayer of the petition, with all the duties, powers and rights belonging to the relationship of parent and child, and in case the adoption be for the life of the child, and the petitioner died intestate, such order shall have the further effect to enable such child to inherit the real estate and entitle it to the personal estate of the petitioner in the same manner and to the same extent such child would have been entitled to if such child had been the actual child of the person adopting it. * * * "

[3] After having been amended and rewritten from time to time following the death of the testator, this statute was again rewritten in 1963, prior to the death of Laura Brown Finch, and now, under the designation G.S. 48-23 provides, in its pertinent parts:

> "The following legal effects shall result from the entry of every final order of adoption:
>
> > "(1) The final order forthwith shall establish the relationship of parent and child between the petitioners and child, and from the date of the signing of the final order of adoption, the child shall be entitled to inherit real and personal property by, through, and from the adoptive parents in accordance with the statutes relating to intestate succession. An adopted child shall have the same legal status, including all legal rights and obligations of any kind whatsoever, as he would have had if he were born the legitimate child of the adoptive parent or parents at the date of the

signing of the final order of adoption, except that the age of the child shall be computed from the date of his actual birth.

* * *

"(3) From and after the entry of the final order of adoption, the words 'child,' 'grandchild,' 'heir,' 'issue,' 'descendant,' or an equivalent, or the plural forms thereof, or any other word of like import in any deed, grant, will or other written instrument shall be held to include any adopted person, unless the contrary plainly appears by the terms thereof, whether such instrument was executed before or after the entry of the final order of adoption and whether such instrument was executed before or after the enactment of this section."

In *Thomas v. Thomas, supra,* the facts were virtually the same as those now before us. There, the testator died in 1926, at which time the adoption statutes in effect were the same as in 1920 when the present testator died. He devised land to his son for life, then to the son's wife for life, then to "the children of my said son living at the time of his death" and, if none, then to the brothers and sisters of the said son. The son who was the devisee for life had no naturally born children but adopted a son in 1949, long after the death of the testator. This Court held that the adopted son did not take anything under the will. At the time the case reached this Court, G.S. 48-23, consisting solely of what is now G.S. 48-23(1), was in effect. Speaking for the majority of the Court, Chief Justice Denny said:

"If the question here were one of inheritance we think G.S. 48-23 would give us the answer. * * *

"However, the courts in most jurisdictions still make a distinction between devises and inheritances with respect to the right of an adopted child, even though all distinctions between natural born and adopted children have been abolished by statute.

"In the case of *Smyth v. McKissick,* 222 N.C. 644, 24 S.E. 2d 621, this Court held that a child adopted after the effective date of a trust indenture, could not take thereunder. The Court said: 'The general rule is that the word "child," standing alone, when used in a deed as referring

to those to take in succession, does not include the adopted child of another, *unless it appears from the instrument itself or attendant circumstances that it was so intended.'* (Emphasis added.) * * *

"Likewise, we pointed out in the case of *Bradford v. Johnson,* 237 N.C. 572, 75 S.E. 2d 632, that [under] a testamentary provision for a child or children of a named person, a child adopted by such person after the testator's death does not take. * * *

"On the other hand, it seems to be the general rule that where no language showing a contrary intent appears in a will, a child adopted either before or after the execution of the will, but prior to the death of the testator, where the testator knew of the adoption in ample time to have changed his will so as to exclude such child if he had so desired, such adopted child will be included in the word 'children' when used to designate a class which is to take under the will. *Bullock v. Bullock,* 251 N.C. 559, 111 S.E. 2d 837; *Trust Co. v. Green,* 239 N.C. 612, 80 S.E. 2d 771; *Bradford v. Johnson, supra,* and cited cases. * * *

"In the instant case, the [adopted child] was not born when the testator died. * * * Moreover, at the time the testator executed his will, an adopted child was incapable of inheriting from the ancestor of the adoptive parents. * * * Consequently, at the time the testator executed his will, there was nothing in our statutes of descent and distribution or in our adoption laws, or in the will itself, as executed, to indicate that the testator had any idea that in leaving real estate to his son for life, then in fee simple to his children living at his death, if any, [such devise] would or could include any child except a child or children of the blood of the ancestor."

Clearly, the purpose of the Legislature in adding to G.S. 48-23 paragraph (3), enacted almost immediately after the decision of this Court in *Thomas v. Thomas, supra,* was to change the law as there declared. The express provision of the statute is that in any will the word "issue" shall be held to include any adopted person, unless the contrary plainly appears by the terms of the will itself. It is also expressly provided by the statute that such rule of construction shall apply whether the will was executed before or after the final order of adoption

and irrespective of whether the will was executed before or after the enactment of the statute.

[4] The terms of the statute being clear, no construction of its provisions by this Court is required. *Lutz v. Board of Education,* 282 N.C. 208, 192 S.E. 2d 463; *Utilities Commission v. Electric Membership Corp.,* 275 N.C. 250, 166 S.E. 2d 663; *Pipeline Co. v. Clayton, Commissioner of Revenue,* 275 N.C. 215, 166 S.E. 2d 671; *Highway Commission v. Hemphill,* 269 N.C. 535, 153 S.E. 2d 22. In such event, it is our duty to apply the statute so as to carry out the intent of the Legislature, irrespective of any opinion we may have as to its wisdom or its injustice to the deceased testator, unless the statute exceeds the power of the Legislature under the Constitution. *Highway Commission v. Hemphill, supra.*

It is elementary that the State Legislature, unlike the Congress of the United States, has all of the legislative powers of the people of North Carolina, themselves, except insofar as such power is taken from it by the State Constitution. *McIntyre v. Clarkson,* 254 N.C. 510, 119 S.E. 2d 888; *Lassiter v. Board of Elections,* 248 N.C. 102, 102 S.E. 2d 853, affirmed 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed. 2d 1072. Of course, State action prohibited by a provision of the United States Constitution is beyond the power of the people or of their representatives in the Legislature.

[5] We find no provision in either the State Constitution or the Federal Constitution which takes from the Legislature the power to do what the Legislature clearly undertook to do in the enactment of G.S. 48-23(3). At the time of the enactment of this statute, no brother or sister of Laura Brown Finch and no issue of a deceased brother or sister had any vested interest in the property in question, their rights at that time being contingent, as above noted. Retrospective statutes destroying or diminishing contingent interests in property do not, per se, deprive the holder thereof of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States or Article I, § 19, of the Constitution of North Carolina, or violate any other constitutional limitation upon legislative power. *Stanback v. Citizens National Bank,* 197 N.C. 292, 148 S.E. 313.

[6] G.S. 48-23(3) does not abolish the rule that the intent of the testator controls the construction of his will. See, *Trust Co.*

v. Andrews, 264 N.C. 531, 142 S.E. 2d 182. It changes the rule stated in *Thomas v. Thomas, supra,* to the effect that the adopted child does not take under a limitation to a "child" unless an intent that he take clearly appears in the instrument or in the attendant circumstances. Under the statute, such child takes unless a contrary intent plainly appears by the terms of the will or conveyance. Nothing in the devise made by the will of B. W. Brown throws any light whatever upon his intent with reference to this matter. Therefore, we are required by the statute to hold that the adopted child of Maggie Brown Glover is "issue" of Maggie Brown Glover within the meaning of this will and takes thereunder a share in the proceeds of the land devised to Laura Brown Finch.

For decisions of other jurisdictions giving effect to similar statutes enacted after the death of the testator so as to enlarge the class entitled to take under a provision of a will creating a contingent interest, see: *In re Heard's Estate, supra; Haskell v. Wilmington Trust Co. (Del.),* 304 A. 2d 53; *Major v. Kammer (Ky.),* 258 S.W. 2d 506; *Sewall v. Roberts,* 115 Mass. 262; *Loring v. Thorndike,* 87 Mass. 257; *Thomas v. Higginbotham, supra; Commerce Trust Co. v. Weed, supra; In re Upjohn's Will,* 304 N.Y. 366, 107 N.E. 2d 492.

Reversed.

STATE OF NORTH CAROLINA v. BENNIE LEE JACKSON

No. 54

(Filed 12 December 1973)

1. **Homicide § 14— mitigation or excuse — evidence offered against defendant**

An accused may establish facts in mitigation or excuse of a killing from the evidence offered against him as well as the evidence he may offer himself.

2. **Homicide § 14— death from intentional shooting — presumptions**

When the State satisfies the jury from the evidence beyond a reasonable doubt that defendant intentionally shot the deceased and thereby proximately caused his death, the law raises against him the presumptions (1) that the killing was unlawful and (2) that it was done with malice; and, nothing else appearing, the accused is guilty of second degree murder.

3. **Homicide § 14— burden of showing self-defense or absence of malice**

Where presumptions arise upon the State's evidence that a killing was unlawful and done with malice, defendant has the burden to satisfy the jury that the homicide was committed without malice, so as to mitigate it to manslaughter, or that the homicide was justified on the ground of self-defense.

4. **Homicide § 28— mitigation or excuse — instructions**

In this homicide prosecution, the jury was not limited to a consideration of mitigating circumstances arising only from the evidence offered by defendant by the court's instruction that defendant "must come forward and prove" the absence of malice or that he acted in self-defense where the court further instructed the jury that, in deciding whether mitigation or excuse existed, it should consider "all the circumstances as you find them to have existed from the evidence."

5. **Homicide § 28— instructions on self-defense — real or apparent necessity**

In this homicide prosecution, the court's use of the phrase "under the circumstances as they existed" in its instructions on self-defense did not restrict the right of self-defense to real necessity and exclude the right of self-defense under circumstances of apparent necessity.

6. **Homicide § 9— self-defense — real or apparent necessity**

The right of self-defense rests upon necessity real or apparent; and in the exercise of his lawful right of self-defense, an accused may use such force as is necessary or apparently necessary to protect himself from death or great bodily harm.

7. **Homicide § 28— instructions on self-defense — aggressor — excessive force — burden of proof**

Trial court's charge in a homicide case was erroneous in failing to require defendant to show that he was not the aggressor and did not use excessive force in order to be acquitted upon his plea of self-defense, but such error was favorable to defendant and he cannot complain thereof.

DEFENDANT appeals from judgment of *Exum, J.*, 2 April 1973 Criminal Session, GUILFORD Superior Court (Greensboro Division).

Defendant was tried upon a bill of indictment, proper in form, charging him with the first degree murder of Paul Arthur Norman on 1 December 1972.

The State's evidence tends to show that on the night of 1 December 1972 at about 9 p.m. Paul Arthur Norman was at a place called Shep's Eat-A-Bite in Greensboro. He was engaged in a little horseplay with a man named David Reece when the defendant, Bennie Lee Jackson, entered. Defendant made several

remarks about Norman's habit of grabbing people and said to Norman, "It's not going to be like it was before, you're always grabbing at people smaller than you are and picking at them." Norman told defendant to leave him alone and stated he did not want to fight defendant. The two men eventually left the bar and went outside where defendant held a gun to the nose of Norman and stated he was going to kill him. Norman said, "Go ahead and leave me alone, man, I don't want to fight you." Defendant was then seen placing the gun to Norman's forehead where he held it for several minutes. Then they both went back inside the bar. There is evidence that Norman was frightened and had tears in his eyes.

Defendant and Paul Norman then stood around inside the bar for some time. Eventually defendant "started right back on Paul Norman. He said, 'You think I'm going to shoot you in the foot, but I ain't going to shoot you in the foot . . . . I'm going to kill you.' " Norman said, "Go on and leave me alone. I don't want to fight you." Defendant then put the gun in Norman's back and told him to move, "and Paul didn't go out—wouldn't go out the door, so he stopped at the piccolo. After he stopped at the piccolo, Bennie stood there beside of him. Bennie was standing on the left side, standing on Paul Norman's left. He had his hand in his pocket right on. He just stood there beside of him and I turned around to get another beer, and when I turned back around, the gun said bam. I seen where he put the gun up to his head here. I guess he pulled the trigger. Yes, I heard the gun fire. I heard it fire. The gun was up there to his head. Yes, sir, that was the left side of Paul Norman's head."

All witnesses, both State and defense, testified that at no time during the evening did they see Paul Arthur Norman with any type of gun or knife or any other weapon. The State's witnesses testified that at no time did they see or hear the victim threaten or curse the defendant; rather, he kept telling defendant to leave him alone.

It was medically established that the cause of Paul Norman's death was a gunshot wound resulting in a massive hemorrhage in the brain. The bullet was removed from the brain by the attending pathologist.

Defendant testified he arrived at Shep's Eat-A-Bite at about 9 p.m., conversed briefly with Paul Norman inside the bar, and exchanged disparaging remarks with him. Defendant

left the bar to get change for a large bill, met one Carl Bowman and they returned to the bar together. As they entered, Bowman put a pistol in defendant's pocket and told defendant that Paul Norman had threatened to kill him, that he had better watch Norman.

Defendant further testified that Paul Norman invited the defendant outside. They went outside and Paul Norman lunged at defendant, whereupon defendant removed the gun from his pocket and told Norman, "I don't want no trouble out of you tonight. I don't want you to go hurt me and I'm not going to hurt you. The best thing for you to do is to go on and leave me alone. What is it you are mad about? I fired you from the Ford place, and you think I'm mad at you for jumping on me, but I have forgot about it. If you can let it go, I can let it go." Defendant said Norman replied, "Let's forget about the stuff," and they walked back into the bar. Shortly thereafter, a man whose nickname was Hands told defendant that Paul Norman "was trying to get me to get a gun and let him borrow it, he said he was going to kill you." Defendant said that meanwhile Paul Norman had taken a position in front of the piccolo, pointed his finger at defendant and said, ". . . It's either going to be you or me. . . . After he said that to me I started walking towards him. I was saying something like this, 'I thought you was going to forget about the mess.' I had the gun in my hand shaking it like that and the gun went off. . . . I didn't mean to shoot him. . . . The only thing I meant to do was to scare him off and keep him off of me."

Defendant said when Norman shook his finger at him and put his right hand under his sweater, he thought Norman was going for a weapon. Defendant admitted on cross-examination that at no time did Paul Norman push him, hit him, or in anywise assault him.

Defendant offered various witnesses who testified to defendant's good reputation in the community where he lived.

Henry Chapman, Jr., testifying on behalf of defendant, said he was at Shep's Eat-A-Bite place that night, heard the argument and exchange of insults between defendant and Paul Norman, and heard Paul Norman say that defendant "wouldn't be living the next morning."

The jury returned a verdict of guilty of murder in the first degree and defendant was sentenced to life imprisonment. He

appealed to the Supreme Court assigning errors discussed in the opinion.

Robert Morgan, Attorney General, and Roy A. Giles, Jr., Assistant Attorney General, for the State of North Carolina.

Vaiden P. Kendrick, Assistant Public Defender, Eighteenth Judicial District, for defendant appellant.

HUSKINS, Justice.

The judge submitted, as permissible verdicts in this case: Murder in the first degree, murder in the second degree, voluntary manslaughter, involuntary manslaughter, or not guilty. The court correctly defined each of these crimes. After the jury had been told what the State must prove beyond a reasonable doubt in order to support a verdict of guilty of murder in the first degree, the following instruction was given:

> "Now, Members of the Jury, if the State proves beyond a reasonable doubt that the Defendant, Bennie Jackson, intentionally killed Paul Norman with a deadly weapon . . . the law raises two presumptions: First, that the killing was unlawful, and second, that it was done with malice. . . . In order for you to find the Defendant guilty of murder in the second degree, the State must proved beyond a reasonable doubt that the Defendant, Bennie Jackson, intentionally shot Paul Norman with this pistol described in the evidence, thereby proximately causing Paul Norman's death. Then nothing else appearing in the case but that, the Defendant would be guilty of murder in the second degree. (In order to reduce that offense to manslaughter, because of the presumption arising which I explained to you, the Defendant must come forward and prove not beyond a reasonable doubt but simply to your satisfaction that there was, in fact, no malice on his part, and in order to excuse the shooting altogether on the ground of self-defense, the Defendant must prove again not beyond a reasonable doubt, but simply to your satisfaction, that he acted in self-defense, and I will explain that principle to you in a minute.)"

Defendant assigns as error that portion of the foregoing charge in parentheses, contending that it required him to introduce independent evidence to mitigate or excuse the homicide whereas under the law he was entitled to rely not only on evi-

dence offered by defendant but also on the evidence offered against him. We now explore the validity of this contention.

With respect to defendant's burden to show facts in mitigation or to excuse the killing altogether on grounds of self-defense, the court further instructed the jury as follows:

> "In making this decision, you should consider all the circumstances as you find them to have existed *from the evidence,* including the size, age, and strength of the Defendant as compared to that of the victim, Paul Norman. You should consider whether any assault or threatened assault was being made upon the Defendant by Paul Norman and the fierceness of the assault, if any, upon the Defendant, whether or not Paul Norman had a weapon in his possession and any threats or communicated threats, if any, which Paul Norman had made to the Defendant in this case, or any threats, whether or not they were communicated to the Defendant in this case, made by Paul Norman." (Emphasis added.)

[1] Of course, the law in this jurisdiction permits an accused to establish facts in mitigation or excuse from the evidence offered against him as well as the evidence he may offer himself. *State v. Warren,* 242 N.C. 581, 89 S.E. 2d 109 (1955); *State v. Todd,* 224 N.C. 358, 30 S.E. 2d 157 (1944).

[2, 3] When the State satisfies the jury from the evidence beyond a reasonable doubt that defendant intentionally shot the deceased and thereby proximately caused his death, the law raises against him the presumptions (1) that the killing was unlawful and (2) that it was done with malice; and, nothing else appearing, the accused is guilty of murder in the second degree. *State v. Cooper,* 273 N.C. 51, 159 S.E. 2d 305 (1968); *State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322 (1955). "The law then casts upon the defendant the burden of showing to the satisfaction of the jury, if he can do so—not by the greater weight of the evidence nor beyond a reasonable doubt, but simply to the satisfaction of the jury—from all the evidence, facts and circumstances, the legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or that will excuse it altogether upon the ground of self-defense. . . . The legal provocation that will rob the crime of malice and thus reduce it to manslaughter, and self-defense, are affirmative pleas, with the burden of satisfaction cast upon the defendant." *State v. Todd,* 264 N.C. 524, 142 S.E. 2d 154 (1965).

[4] A fair reading of the charge *as a whole* impels the conclusion that the jury was not limited to a consideration of mitigating circumstances arising only from evidence offered by defendant. The court instructed the jury that it should consider "all the circumstances as you find them to have existed from the evidence." The rule is well established that the charge of the court must be read as a whole and in the same connected way that the judge is supposed to have intended it and the jury to have considered it. *State v. Wilson,* 176 N.C. 751, 97 S.E. 496 (1918). The 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). If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for a reversal. *State v. Hall,* 267 N.C. 90, 147 S.E. 2d 548 (1966).

When the charge here is measured by these standards, no prejudicial error appears with respect to the subject matter of this assignment.

[5] Defendant assigns as error the following portion of the court's instruction relating to self-defense:

> "Now, Members of the Jury, if you are satisfied that *under the circumstances as they existed* at the time of the killing the Defendant, Bennie Jackson, reasonably believed it to be necessary to shoot Paul Norman in order to save himself, Bennie Jackson, from death or great bodily harm, and that Bennie Jackson was not the aggressor, did not bring on this affray, and did not use excessive force as I have described that term to you, then it would be your duty to return a verdict of not guilty, for you would have found that he acted in self-defense." (Emphasis ours.)

Defendant contends that use of the word "existed" in the phrase above emphasized restricts the right of self-defense to *real* necessity and excludes the right of self-defense under circumstances of *apparent* necessity.

We note that elsewhere in the charge the court had already instructed the jury as follows:

> "Now, in order to excuse the killing entirely on the ground of self-defense, the Defendant, Bennie Jackson, must satisfy you of four things: First, that at the time of the

shooting it appeared to him, Bennie Jackson, and he reasonably believed it to be necessary to shoot Paul Norman in order to save himself from death or great bodily harm. Second, that the circumstances as they appeared to the Defendant at the time, were sufficient to create such a belief in the mind of a person of ordinary firmness. Now, it is for you, the Jury, to determine the reasonableness of the Defendant's belief from the circumstances as they appeared to him to be at the time; in other words, you will look through the Defendant's eyes at the time of the alleged shooting and determine from what the events and circumstances appeared to him to be the reasonableness of his apprehension and belief."

After brief deliberation, the jury returned to the courtroom and requested the court "to review for us again the different verdicts we can find." The court did so, and the additional instructions included the following charge with respect to defendant's plea of self-defense:

"Now, to excuse the killing altogether on the ground of self-defense, the Defendant must satisfy you of four things: First, that it appeared to him and he reasonably believed it to be necessary to shoot Paul Norman in order to save himself from death or great bodily harm. Second, that the circumstances as they appeared to the Defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, and you will recall that I told you that it is for you to judge the reasonableness of his belief from all the facts and circumstances as they appeared to him at the time. Third, that he was not the aggressor, that is that he didn't participate in bringing on the argument between the two. Fourth, that he did not use excessive force, that is more force than reasonably appeared to him to be necessary at the time. Now, I instructed you that if you find that he acted properly in self-defense, that is he satisfied you that all these four conditions existed at the time of the shooting, you will find him not guilty because a person has the right to kill in defense of himself provided the conditions for it are met, if he satisfies you that they exist."

[6] The right of self-defense, as defendant correctly contends, rests upon necessity real or apparent; and, in the exercise of his lawful right of self-defense, an accused may use such force as

is necessary or apparently necessary to protect himself from death or great bodily harm. *State v. Jennings,* 276 N.C. 157, 171 S.E. 2d 447 (1970), and cases cited. "In this connection, the full significance of the phrase 'apparently necessary' is that a person may kill even though to kill is not actually necessary to avoid death or great bodily harm, if he believes it to be necessary and has a reasonable ground for that belief. The reasonableness of his belief is to be determined by the jury from the facts and circumstances as they appeared to him at the time of the killing. *State v. Kirby,* 273 N.C. 306, 160 S.E. 2d 24 (1968), and cases cited." *State v. Gladden,* 279 N.C. 566, 184 S.E. 2d 249 (1971).

[7] According to the record, the charge as originally given did not require defendant to show that he was not the aggressor and did not use excessive force in order to be acquitted upon his plea of self-defense. This was error favorable to the defendant of which he cannot complain. *State v. Ingland,* 278 N.C. 42, 178 S.E. 2d 577 (1971); *State v. Murry,* 277 N.C. 197, 176 S.E. 2d 738 (1970). The charge on self-defense given in the court's additional instructions is in accord with the law and afforded defendant the full benefit of the doctrine of apparent necessity. In fact, the charge as initially given was correct on that point. As expressed by Chief Justice Bobbitt in *State v. Gladden, supra,* this assignment of error "relates more to semantics than to substance." Lacking merit, it is overruled.

The State's evidence strongly portrays defendant as the aggressor in the perpetration of a senseless killing; and the record discloses no evidence, save defendant's own equivocal testimony, that he acted in self-defense. He has had a fair trial free from prejudicial error. Hence, the verdict and judgment will not be disturbed.

No error.

STATE OF NORTH CAROLINA v. CHARLES ERNEST HOLTON, JR.

No. 53

(Filed 12 December 1973)

1. Homicide § 21— sufficiency of evidence that victim is dead

The State's evidence in a homicide case was sufficient to show that the alleged victim is actually dead, although no witness testified

that he actually saw the dead body of the victim, where several witnesses testified without objection that they had known the victim before he died, and a medical witness testified about various treatments given to the victim from the time he entered a hospital after he was shot until he died, that the victim died on a certain date, that he had seen the victim's death certificate and autopsy report, and that in his opinion the victim's death resulted from his gunshot injuries.

2. **Homicide § 12; Indictment and Warrant § 17— indictment — date of shooting and date of death — variance**

There was no fatal variance between an indictment charging that deceased was killed on 4 September 1971 and evidence that deceased was shot on that date but that he did not die until 29 December 1971.

3. **Homicide § 15; Criminal Law § 52— medical expert — cause of death — opinion based on treatment and observation**

Although an expert medical witness was unable to say that he had seen an alleged homicide victim on the date of his death, the witness was properly allowed to give his opinion as to the cause of the victim's death where it is clear that such opinion was based on his treatment and observation of the victim for some four months between the time the victim was shot and the date of his death, it not being necessary to ask the witness a hypothetical question including facts not within his personal knowledge in order for him to state such opinion.

4. **Homicide § 23— instructions — reference to "the deceased"**

The trial court in a homicide case did not err in referring to the alleged victim in the charge as "the deceased" where all the evidence indicated the victim was dead.

APPEAL by defendant from *Copeland, S.J.*, at the 9 April 1973 Criminal Session of GUILFORD Superior Court, High Point Division.

By indictment, proper in form, defendant was charged with the murder of Buford Ball. He was found guilty of murder in the first degree and appeals from a judgment imposing a sentence of life imprisonment.

The State's evidence tends to show that during the early morning hours of 4 September 1971, from approximately 1:00 a.m. to 2:30 a.m., defendant and the deceased Buford Ball were in a poolroom in the Five Points News and Record Center in High Point, North Carolina. During this time Presley Spivey and David Patton were engaged in playing a series of games of pool, and both defendant and Ball had placed wagers on Spivey's winning. There was testimony that defendant and

Ball had been drinking during the evening, and that defendant had continued to drink while the games were in progress.

While the games were being played, defendant left the room to get a coke. When he returned, Ball was in his seat. Defendant cursed Ball and told him to get out of his seat. This precipitated a series of arguments between defendant and Ball that lasted for an hour or more. During one such argument defendant pulled a knife from his pocket and put it to Ball's throat, saying "I am going to cut your G— d— head off." The proprietor of the poolroom intervened and threatened to end the game if defendant and Ball did not quit scuffling. Sometime later another argument began. Ball said something about defendant's having cut him or tried to cut him with a knife, and then Ball hit defendant in the mouth, breaking defendant's partial dental plate and several teeth and causing his mouth to bleed. Two people in the poolroom stepped in and broke up the fight, and the proprietor told everyone to get out.

Defendant walked out of the poolroom, went to his car trunk and got a pistol, returned, and shot Ball three times. Ball ran outside onto the street holding his stomach, and then collapsed. Defendant walked up to him and said, "Buford, you are going to apologize to me or I am going to kill you." Spivey persuaded defendant not to shoot Ball any more, and defendant then turned around and walked away. Spivey drove Ball to the High Point Memorial Hospital.

Shortly after shooting Ball, defendant and his wife drove to the High Point Police Department. There Detective L. P. Royal advised defendant of his constitutional rights and defendant signed a waiver of rights form that was introduced at trial. Defendant described the events leading up to Ball's hitting defendant in the mouth and breaking his dental plate. Defendant told Royal that he was very upset about his dental plate being broken, and that he went to his car and got his pistol, cursed Ball a few times, and then shot him. Royal asked defendant if he knew there was a good chance that Ball might die. Defendant replied: "I hope he doesn't die; I want to have the chance one time to knock his teeth out." Royal testified that although he detected the smell of alcohol on defendant's breath, defendant coherently responded to all questions asked him. Defendant was placed under arrest for an assault with a deadly weapon with the intent to kill and inflicting serious injuries.

The testimony of Dr. Donald P. Douglas, the physician who examined and treated Ball at the High Point Memorial Hospital, and the facts surrounding Ball's death on 29 December 1971 are fully set out in the opinion.

Defendant did not testify or offer evidence.

Attorney General Robert Morgan and Assistant Attorneys General Claude W. Harris and Walter E. Ricks III, for the State.

Schoch, Schoch, Schoch and Schoch by Arch K. Schoch for defendant appellant.

MOORE, Justice.

[1] Defendant by his first assignment of error contends that the trial court erred in overruling his motion for a directed verdict of not guilty for the reason that the State failed to prove that Buford Ball, the alleged deceased, is actually dead. This contention is based upon the fact that no witness testified that he actually saw the dead body of Ball.

In a criminal case the proper motion to test the sufficiency of the State's evidence is a motion to dismiss the action or a motion for judgment as in the case of nonsuit. G.S. 15-173. *State v. Everette,* 284 N.C. 81, 199 S.E. 2d 462 (1973); *State v. Evans* and *State v. Britton* and *State v. Hairston,* 279 N.C. 447, 183 S.E. 2d 540 (1971). On such motion the evidence must be considered in the light most favorable to the State, and the State is entitled to every inference of fact that may be reasonably deduced from the evidence. Contradictions and discrepancies in the State's evidence are for the jury to resolve and do not warrant the granting of the motion. *State v. Henderson,* 276 N.C. 430, 173 S.E. 2d 291 (1970); *State v. Carter,* 265 N.C. 626, 144 S.E. 2d 826 (1965). Admitted evidence, whether competent or incompetent, must be considered on defendant's motion for judgment as in the case of nonsuit. *State v. Accor* and *State v. Moore,* 277 N.C. 65, 175 S.E. 2d 583 (1970); *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679 (1967); *State v. Virgil,* 263 N.C. 73, 138 S.E. 2d 777 (1964). Treating defendant's motion for a directed verdict of not guilty as a motion for judgment as of nonsuit under G.S. 15-173 and applying the well-established rules for such motion to the evidence in this case, we hold that there was ample evidence of Ball's death to require submission

to the jury. *State v. Cutler, supra; State v. Virgil, supra; State v. Thompson,* 256 N.C. 593, 124 S.E. 2d 728 (1962).

Several witnesses for the State testified without objection that they had known Ball before he died. Dr. Douglas, who treated the deceased over a period of months, testified about various treatments given to Ball from the time he entered the hospital until he died. Dr. Douglas further testified that Ball died on 29 December 1971, and that he had seen Ball's death certificate and the report on an autopsy performed on Ball. He further testified that in his opinion "Buford Ball died as a result of infection, debilitation directly as a result of gunshot injuries, including an injury to his large bowel with gross contamination at the time of his injuries." From this evidence, it is obvious that Ball is dead. This assignment has no merit.

[2] Defendant next contends that he was entitled to judgment as of nonsuit because of a fatal variance in the bill of indictment that charged that Ball was killed on 4 September 1971 and the evidence that showed that Ball was alive some four months later. While it is true that a fatal variance between the indictment and proof may be raised by a motion for nonsuit, *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741 (1967); *State v. Law,* 227 N.C. 103, 40 S.E. 2d 699 (1946), no such variance appears in this case. G.S. 15-155 provides that neither "omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly" shall vitiate an indictment. The indictment in this case stated the date on which the fatal injury was inflicted rather than the date on which the death occurred. This Court, as early as 1854 in *State v. Baker,* 46 N.C. 267, held that where an indictment charged the murder as of the date the blow was given, and the evidence revealed that the victim lived for twenty days after receiving the blow and then died, such variance was not material. See also *State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664 (1972); *State v. Trippe,* 222 N.C. 600, 24 S.E. 2d 340 (1943); *State v. Pate,* 121 N.C. 659, 28 S.E. 354 (1897).

[3] In his next assignment defendant asserts that the trial court erred in permitting the expert witness, Dr. Donald P. Douglas, to give his opinion about the cause of Ball's death without propounding a hypothetical question to include facts of which the doctor had no personal knowledge.

Dr. Douglas testified that he and his associate, Dr. Canipe, treated Ball from the time he entered the hospital on 4 Septem-

ber 1971 until the date of his death on 29 December 1971. Dr. Douglas first saw Ball in the emergency room of the High Point Memorial Hospital, and at that time Ball's condition was "quite serious." Ball was suffering from a gunshot wound in his right shoulder and three such wounds in his abdominal cavity. One bullet had passed through the large and small intestines, causing contamination and extensive damage, and then lodged in the left pelvic. During the first operation on the intestines Ball lost almost all of his body's blood. Dr. Douglas did not feel that Ball could survive any more surgery, and consequently he elected to temporarily leave the bullet in the pelvic. The contamination that resulted from bowel movement having been spilled throughout the abdominal cavity soon caused infection in the pelvic area and necessitated a subsequent operation by an orthopedic surgeon, Dr. Fred Wood, to remove the bullet and drain the infection. This operation was performed on 1 October 1971. On 2 November 1971 Ball suffered massive hemorrhage along a rubber tube that had been inserted in his abdominal cavity to drain the infected material that resulted from the initial contamination of the gunshot injury. Again surgery was required.

Dr. Douglas testified without objection: "In my opinion, the pus resulted from the initial contamination of the gunshot injury with the continued infection and drainage from this site from that point until the time of the patient's death. . . . I followed the patient from the time of his admittance until he died, well, Dr. Canipe and I did. I am not sure on the last days before his death whether Dr. Canipe or I took care of him." Dr. Douglas was then allowed to state over objection that in his opinion "Buford Ball died as a result of infection, debilitation directly as a result of gunshot injuries, including an injury to his large bowel with gross contamination at the time of his injuries." He further testified without objection: "I have found nothing in [the hospital] records to indicate that I gave him any treatment or saw him after December 25, 1971. I could have. . . . The nurses do not always note in their notes when the doctor comes to see a patient. They have a notation on December 25 that I was there. . . . I can say that Buford from the time of his hip surgery had a very slow but progressive downhill course, a very slow progressive downhill course."

Defendant contends that since Dr. Douglas cannot say that he saw Ball immediately before or after his death, Dr. Douglas is not qualified to give an opinion about the cause of his death

without a hypothetical question supplying facts which the doctor did not know of his own knowledge. We think, however, it is obvious from this record that, based on his knowledge and experience and his treatment and observation of the deceased Ball for approximately four months, Dr. Douglas was entitled to give an opinion on the cause of death based upon such facts within his personal knowledge. "It is not required that an expert testify in response to hypothetical questions when the witness has himself examined the person in question and is giving his expert opinion based on facts which he himself had observed." 3 Strong, N. C. Index 2d, Evidence § 49 (1967). See *Cogdill v. Highway Comm.* and *Westfeldt v. Highway Comm.*, 279 N.C. 313, 182 S.E. 2d 373 (1971); *Rubber Co. v. Tire Co.*, 270 N.C. 50, 153 S.E. 2d 737 (1967); *Bullin v. Moore*, 256 N.C. 82, 122 S.E. 2d 765 (1961). It is well settled in the law of evidence that a physician or surgeon may express his opinion on the cause of the physical condition of a person if based either on facts within the personal knowledge or upon an assumed statement of facts supported by evidence and cited in a hypothetical question. 1 Stansbury's N. C. Evidence, Brandis Rev. § 136 (1973); *Yates v. Chair Co.*, 211 N.C. 200, 189 S.E. 500 (1937); *State v. Stewart*, 156 N.C. 636, 72 S.E. 193 (1911). Although the evidence does not disclose that Dr. Douglas actually saw the deceased on the date of his death, his testimony shows that he and his associate, Dr. Canipe, treated Ball for a period of almost four months; that after his hip operation Ball's condition became progressively worse; and that Dr. Douglas continued to treat and observe him at least through 25 December 1971. It is clear then that his testimony on the cause of death was based on his observation, treatment, and knowledge of the deceased's condition and upon facts that he himself had observed. No hypothetical question was therefore necessary, and the doctor's testimony was competent.

[4] Defendant's final contention is that the court erred in its charge to the jury by referring to Buford Ball as "the deceased." All the evidence indicates that Ball was dead. Defendant's counsel even questioned a witness about Ball's death certificate and the autopsy performed on Ball. This assignment is without merit.

In the trial, verdict, and judgment we find no error.

No error.

STATE OF NORTH CAROLINA v. PERVA ALEXANDER HERRING ALIAS PERVA MACKEY

No. 94

(Filed 12 December 1973)

Criminal Law § 75— statements of defendant — voluntariness

Where a police officer first advised defendant of his rights without any interrogation, read the warrant charging defendant with armed robbery to which defendant replied, "I took the money," and read the warrant charging defendant with rape to which defendant replied, "It won't like that, nope it won't like that," the trial court properly concluded that defendant's statements did not result from interrogation, but were volunteered and legally admissible in evidence.

APPEAL by defendant from *Braswell, J.*, August 6, 1973 Criminal Session, CUMBERLAND Superior Court.

The defendant, Perva Alexander Herring, alias Perva Mackey, was charged by grand jury indictments with rape and armed robbery. The indictment in No. 73 CR 3817 charged the capital felony of rape committed upon the body of Patricia Moore, a female. The indictment in No. 73 CR 3818 charged the felony of armed robbery of Patricia Moore. The offenses were alleged to have been committed on January 10, 1973.

The record of the case on appeal shows the proper organization of the court, Judge E. Maurice Braswell presiding; valid grand jury indictments; appointment of Neill Fleishman and Sol Cherry as counsel following a showing of defendant's indigency; his arraignments; and pleas of not guilty.

At the August 6, 1973 Criminal Session, the defendant, through his counsel, entered pleas of not guilty. The two charges were consolidated for trial without objection. A jury satisfactory to both the State and the defendant was selected and empaneled.

At the trial, Mrs. Patricia Moore was examined as a witness for the State. She testified that between 7:30 and 8:00 o'clock on the evening of January 10, 1973, she left the place where she worked for an insurance company, taking with her the sum of $262.00 of the company's money for deposit in the bank the following morning. She picked up her thirteen-month-old son at the nursery and while she was driving home, her automobile stalled in the snow. The defendant and Mr. Harris, both of whom were strangers, assisted her in moving her auto-

mobile up the incline. They followed her in Harris' automobile until she arrived at her apartment.

Mrs. Moore parked her automobile and entered her apartment carrying her son. About ten minutes later the defendant entered the apartment and requested permission to use the telephone. After his attempt to complete his call failed, the defendant then assaulted the witness, striking her a number of violent blows about the head and face and by force and against her will, committed the crime of rape. He then seized the $262.00 which her employer had entrusted to her for deposit in the bank. The plaintiff called on her neighbors for help. Mrs. Williams, as a witness for the State, testified that she saw Mrs. Moore and the defendant at the apartment, that Mrs. Moore was very upset, was crying, her nose was bleeding, and her eyes were bloody. The defendant claimed to Mrs. Williams that Mrs. Moore had fallen in the bathtub. When the witness called him by name, he ran. It appears by inference he went to the State of Washington.

The parties stipulated that Dr. Equez, who was then on vacation, examined Mrs. Moore on the morning of January 11, 1973, and found that she had two black eyes and several bruises on the face and neck. One of her teeth was missing. The microscopic examination disclosed the presence of sperm.

The arresting officer, Mr. F. M. Boone, testified that he obtained warrants for the arrest of the defendant on the charges of rape and robbery. Before serving the warrants he advised the defendant fully as to his rights and obtained the defendant's signature to a written statement that he had been so advised. When Officer Boone, without asking any questions, read the warrant charging robbery, the defendant volunteered this statement: "I took the money." When the officer then read the warrant charging rape, the defendant volunteered this statement: "It won't like that, nope it won't like that."

After a voir dire hearing the court concluded the defendant's statements as above disclosed were freely and voluntarily made, were admissible, and permitted the State to offer them in evidence over defendant's objection.

The court overruled motions to dismiss. The defendant testified as a witness in his own behalf. He admitted going to Mrs. Moore's apartment, stayed for some time, drank some beer, and

that Mr. Harris left. Thereafter, he remained and engaged in an act of sexual intercourse with Mrs. Moore's consent.

The defendant's mother testified that the defendant left Fayetteville to go visit his father in the State of Washington and that she wrote to him to come back after she found out that he was being sought by the officers.

The defendant's other witness, Ruth Brown, testified without objection that the defendant told her over the telephone that, "[H]e was going with a girl in Colony Place and that her name was Pat."

On rebuttal the State called Mr. Harris who testified that he and the defendant helped Mrs. Moore get up the hill with her automobile and followed in his car until she got home safely and entered the house. The witness left the defendant near Mrs. Moore's apartment and went home. He did not enter the apartment.

The court overruled defendant's renewed motion to dismiss. The jury returned these verdicts: In Case No. 73 CR 3817, "We find the defendant guilty of rape." In Case No. 73 CR 3818, "We, the jury, find the defendant guilty of common law robbery." The jury was polled at the defendant's request. The poll verified the verdicts which the court accepted.

The court imposed a sentence of life imprisonment on the charge of rape and a sentence of ten years in prison on common law robbery, the latter to begin at the expiration of the former. The defendant excepted and appealed. This Court allowed certiorari to the superior court on the charge of robbery to the end that the appeals be considered together.

Robert Morgan, Attorney General, by H. A. Cole, Jr., Assistant Attorney General, for the State.

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

HIGGINS, Justice.

The defendant's assignments of error involve the admissibility of the defendant's statements made to the officer at the time he served the warrants charging armed robbery and rape. The evidence on the voir dire disclosed, and the trial judge found, that Officer Boone first advised the defendant of his rights

without any interrogation and that after he read the warrant charging armed robbery, the defendant volunteered the information, "I took the money." When the warrant charging rape was read, the defendant said, "It won't like that, nope it won't like that."

The defendant did not offer evidence on the voir dire. The court found facts and properly concluded the statements did not result from interrogation, but were volunteered and legally admissible in evidence.

> "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.
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> * * * * *
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> "The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit or warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."

The foregoing is taken from *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602. See also *State v. Muse,* 280 N.C. 31, 185 S.E. 2d 214; *State v. Perry,* 276 N.C. 339, 172 S.E. 2d 541; *State v. Hines,* 266 N.C. 1, 145 S.E. 2d 363.

The defendant's motions to dismiss were properly denied. The evidence was ample to go to the jury and to sustain its verdicts. The judgments were within the limits fixed by law for the offenses for which the defendant was convicted. Error of law does not appear either in the trial or on the face of the record proper.

No error.

STATE OF NORTH CAROLINA v. JULIUS O. HAIRSTON

No. 63

(Filed 12 December 1973)

Criminal Law § 177— reaffirmation of decision

The opinion in *State v. Yoes* and *Hale v. State*, 271 N.C. 616 (1967), is reaffirmed in this belated appeal in which defendant adopted the record on appeal, assignments of error and brief filed by his codefendants in those cases.

ON *certiorari* permitting late appeal by the defendant Hairston from *Gambill, J.*, at the 30 November 1964 Criminal Session of GUILFORD.

Hairston and three companions (Yoes, Hale and Davis) were charged in separate indictments, each proper in form, with successive rapes of the same woman in Guilford County on 21 June 1964. Over objection, the cases were consolidated for trial. As to each defendant, the jury returned a verdict of guilty with a recommendation that the defendant be sentenced to imprisonment for life. In accordance with the verdict, a sentence to imprisonment for life was imposed upon each defendant and each defendant is now serving such sentence.

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

Wallace C. Harrelson, Public Defender, for defendant.

LAKE, Justice.

At the trial in the Superior Court, and upon his subsequent appeal to this Court, Yoes was represented by privately employed counsel. Hairston, Hale and Davis were represented by court-appointed counsel.

Upon the imposition of sentences in accordance with the verdict, each defendant, in open court, gave notice of appeal to this Court. Each defendant, in due time, petitioned the Superior Court for permission to prosecute his appeal in forma pauperis. The Superior Court denied each such petition.

Upon application by Yoes, this Court granted certiorari permitting Yoes to appeal in forma pauperis and directed that a full transcript of the trial be supplied to him at the expense

of the county, which was done. Thereafter, this Court allowed numerous further motions by Yoes for extensions of time for the docketing of the record in this Court for review.

On 4 March 1965, on motion of the Solicitor, the Superior Court dismissed the appeals of Hairston, Hale and Davis for failure of those defendants to perfect their appeals within the time allowed therefor.

More than a year thereafter, Hale and Davis filed in the Superior Court separate petitions for post conviction relief, each alleging that his right of appeal had been improperly denied. Upon the hearing of those petitions on 15 July 1966, Shaw, J., so found and ordered the court-appointed counsel for Hale and Davis to prepare and to file their respective cases for review by this Court and directed that a complete transcript of the trial proceedings be furnished them at the expense of the county. Thereupon, petitions for certiorari to permit belated appeals were filed in this Court on behalf of Hale and Davis and, in each instance, the petition was granted, the cases being ordered set for argument in this Court, in the Fall Term of 1966, together with the appeal of Yoes which was still in process of preparation by his self-employed counsel. Further motions by Yoes, Hale and Davis for further extensions of time were granted by this Court.

Yoes, Hale and Davis joined in presenting to this Court the same record for review, the same assignments of error and a common brief. The printed record consisted of 1,562 pages, the assignments of error were 53 in number and the brief for the appellants covered 153 printed pages. The three appeals were consolidated for oral argument and were fully argued in this Court 6 September 1967.

The unanimous opinion of this Court, filed 1 November 1967, after careful consideration of each of the 53 assignments of error and each contention advanced by each of the three defendants, was that no error had been committed by the trial court and no reason had been shown to disturb the verdict, or the judgment rendered thereon, as to any of the defendants Yoes, Hale and Davis. *State v. Yoes* and *Hale v. State*, 271 N.C. 616, 157 S.E. 2d 386.

Careful consideration of the record of the trial and of subsequent proceedings culminating in that decision by this Court, then and now, led and leads inescapably to the conclusion that

the defendants Yoes, Hale and Davis were afforded every opportunity to present in the trial court, and on appeal, each and every defense or contention they, or any of them, saw fit to present, and to the conclusion that each received a trial free from prejudicial error and was sentenced to imprisonment in full accordance with the law of this State and in accord with the provisions of the Constitution of the United States.

In our opinion in *State v. Yoes* and *Hale v. State, supra,* at page 621, we noted: "Acting upon the advice of his court-appointed counsel, Hairston did not perfect his appeal, has not sought post conviction relief and has not otherwise sought appellate review of the judgment entered against him." See page 1274 of the record in that case, now also before us on the present appeal. This was the state of Hairston's case almost three years after he entered the State prison to serve the sentence so imposed upon him.

This Court is now advised, for the first time, that, after the lapse of still another three years, Hairston, through privately employed counsel, filed a petition for post conviction relief in the Superior Court, which petition was denied 8 October 1970, and that he thereafter filed an application with the United States District Court for the Middle District of North Carolina for a writ of habeas corpus. That application was denied and dismissed by District Judge Gordon, but his order was vacated by the United States Court of Appeals for the Fourth Circuit and the District Court was directed to grant the application if the State failed to grant Hairston a belated appeal or a retrial.

On 2 August 1973, the Superior Court appointed Wallace C. Harrelson, Public Defender for Guilford County, counsel for Hairston to prosecute his application for appellate review of his trial and conviction and directed that the State furnish Hairston a transcript of the trial and pay the cost thereof, together with all costs of the proceedings in the Appellate Division; i.e., in this Court, since appellate review of a sentence to imprisonment for life can be had in this Court only.

On 6 August 1973, a petition was filed in this Court for the issuance by us of a writ of certiorari to permit such appellate review, the first petition of any kind ever filed by, or on behalf of, Hairston in this Court. That petition was allowed, in our discretion, on 17 August 1973, just as it, obviously, would have been allowed by us in 1966 had Hairston then sought our per-

mission to file a belated appeal, as did his codefendants Hale and Davis. The order so entered by us waived compliance with the rule of this Court requiring the narration of the evidence in the statement of the case on appeal, so as to expedite the hearing of the appeal. The matter was set for argument in this Court on 9 October 1973 and the defendant was directed to file his brief on or before 12 September 1973. On that date Hairston, through his assigned counsel, petitioned this Court for an extension of time for the filing of his brief and this was promptly allowed by the order of this Court on 13 September 1973.

The record proper having been filed in this Court on 28 August 1973, the following stipulation was filed in this Court on 27 September 1973 by Hairston's assigned counsel and by the Attorney General, representing the State:

"IT IS STIPULATED AND AGREED * * * :

"1. That the Case on Appeal to the Supreme Court of North Carolina of the defendant Charles Donald Yoes, 271 N.C. 616 (1967) contains certain motions, objections, exceptions, evidence * * * and other matters * * * . It is stipulated and agreed that regardless of what the record indicates the same * * * are deemed to have been made on behalf of and introduced against the defendant Julius O. Hairston.

"2. That the purpose of entering into this stipulation is that the defendant Julius O. Hairston adopt the YOES case on appeal as his own individual Case on Appeal, thus avoiding the necessity of recompiling and reproducing lengthy individual case on appeal at the expense of Guilford County.

"3. The record in the YOES case indicates that defendant Yoes made certain objections, challenges, exceptions and offered evidence in regard to the selection of the jury. * * * [I]t is agreed that such * * * are deemed to have been made for or against the defendant Julius O. Hairston."

On 27 September 1973, Hairston, through his counsel, filed the following petition in this Court:

"Counsel for Petitioner-Appellant and Assistant Attorney General Richard N. League, have stipulated that the record and assignments of error in the case of STATE v.

YOES and HALE v. STATE, 271 N.C. 616 (1967), constitute the record on appeal in the case at bar.

"Counsel has reviewed and studied the record of trial, assignments of error, the brief of counsel in STATE v. YOES and HALE v. STATE. Counsel has searched and considered Federal and State legal authorities bearing on the issues raised in the case and finds no changes in the law which would require additional briefing or argument before the Court.

"Petitioner-Appellant desires to adopt the assignments of error and the brief previously filed in the case of STATE v. YOES and HALE v. STATE as his own.

"NOW, THEREFORE, Petitioner-Appellant prays unto the Court:

"1. That it consider the above-mentioned assignments of error and brief in the case at bar;

"2. That the judgment be set aside."

On 28 September 1973, this Court entered its order permitting Hairston so to adopt as his own the assignments of error and brief of Yoes, Hale and Davis.

Because of the serious nature of the offense of which Hairston was convicted and because of the nature of the sentence imposed upon him as the result thereof, we have again carefully reviewed the assignments of error and the brief so filed on behalf of the defendants Yoes, Hale and Davis, and now adopted as his own by Hairston, and have also reviewed carefully our decision in *State v. Yoes* and *Hale v. State, supra.* Notwithstanding the statement by Hairston, through his counsel, that his research has disclosed no State or Federal authority indicating any change in the applicable law since the issuance of our opinion therein, we have also conducted our independent research into these matters and we, likewise, have found no additional authority favorable to the position of the defendant. It would serve no useful purpose to review or extend the discussion of the numerous questions of law dealt with and decided in that opinion. It is now reaffirmed.

We direct attention, however, to the fact that in 1967, after the trial of these defendants, the General Assembly rewrote all provisions of Chapter 9 of the General Statutes relating to the

procedure for the selection of juries. The present law on this subject, which is statewide in its application, consists of G.S. 9-1 to G.S. 9-26, inclusive. Without intimating that the procedures followed in Guilford County, in the selection of the grand jury and the petit jury which indicted and tried Hairston and his codefendants, were in any respect defective or contrary to law, other than as noted by us in *State v. Yoes* and *Hale v. State, supra,* we call attention to the fact that these procedures are now no longer in effect in Guilford County or elsewhere in this State.

No error.

THOMAS G. LANE, JR., ADMINISTRATOR D.B.N. OF THE ESTATE OF TOMMY CURTIS COLEE, DECEASED v. BETTY COLEE SCARBOROUGH, THOMAS W. COLEE AND LYNN WOOD COLEE

No. 64

(Filed 12 December 1973)

1. **Husband and Wife § 11— separation agreement — construction**

Questions relating to the construction and effect of separation agreements between a husband and wife are ordinarily determined by the same rules which govern the interpretation of contracts generally.

2. **Contracts § 12— construction — intent of parties**

The heart of a contract is the intention of the parties which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time.

3. **Contracts § 12— construction — implied provisions given effect**

A contract encompasses not only its express provisions but also all such implied provisions as are necessary to effect the intention of the parties unless express terms prevent such inclusion.

4. **Husband and Wife § 11; Descent and Distribution § 13— separation agreement — release of right to share in spouse's estate**

Where plaintiff and her deceased spouse entered into a separation agreement in which they declared that they could no longer live together without endangering their health and well-being, they agreed to live wholly separate and apart from each other as though they had never been married, plaintiff agreed to make no demands upon deceased for support, each agreed that the other would thereafter hold, acquire and dispose of all kinds of property as though free and unmarried, without the consent or joinder of the other party, and each

released the right to administer upon the estate of the other, the specific terms of the contract were totally inconsistent with an intention that the parties would each retain the right to share in the estate of the other under G.S. 29-13 and G.S. 29-14, if he or she were to become the surviving spouse.

APPEAL by defendants Betty Colee Scarborough and Thomas W. Colee under G.S. 7A-30(2) from the decision of the Court of Appeals affirming the judgment of *Snepp, J.*, 1 January 1973 Schedule "C" Session of MECKLENBURG.

This action for a declaratory judgment was instituted by the administrator d.b.n. of Tommy Curtis Colee (Colee), who died intestate on 15 July 1971, to determine whether defendant Lynn Wood Colee (Lynn), Colee's surviving spouse, is entitled to share in his estate. Judge Snepp heard the controversy upon a waiver of jury trial and stipulated facts, which are summarized below.

Colee and Lynn were married on 12 October 1968. No children were born of their marriage. In June 1970 they executed the separation agreement, a copy of which is attached to the complaint as Exhibit A. At the time of Colee's death they were living separate and apart but were not divorced. Defendants Betty Colee Scarborough and Thomas W. Colee are the parents of Colee, and they claim his entire estate. Lynn also claims the estate, which is less than $10,000.00.

In the preamble to the separation agreement the parties recited their marriage, their separation on 14 June 1970, and their conviction that they could no longer live together as husband and wife. In the first three numbered paragraphs thereafter they agreed (1) that henceforth they would "live wholly separate and apart from each other in the same manner and to the same extent as though they had never been married"; (2) that no children were born of their marriage; and (3) that they would divide their household furnishings. The remaining paragraphs of the agreement are quoted verbatim:

"4. That from and after the date of this Agreement the said party of the second part [Lynn] does hereby agree that she will make no demands upon the said party of the first part [Colee] for support and further will incur no obligations, debts or otherwise which will be or become the responsibility of the said party of the first part.

"5. It is agreed that each of the parties may from this date, and at all times hereafter purchase, acquire, own, hold, possess, dispose of, and convey any and all classes and kinds of property, both real and personal, as though free and unmarried, without the consent or joinder of the other party, and each party does hereby release the right to administer upon the estate of the other.

"6. Both parties hereunto agree that henceforth neither of them, in any manner will molest or interfere with the personal rights, liberties, privileges or affairs of the other, and each shall henceforth live his and her own personal life as though unmarried, and unrestricted in any manner by the marriage that has heretofore existed."

Judge Snepp ruled that by their separation agreement Colee and Lynn did not "mutually release their right of intestate's succession" as provided by G.S. 29-13 and G.S. 29-14; that Lynn is an heir of Colee and "has the right to inherit from his estate as a surviving spouse." He ordered plaintiff administrator to distribute to Lynn the assets of Colee's estate to which she, as surviving spouse, would be entitled under G.S. 29-13 and G.S. 29-14. From this judgment defendant-parents appealed. In a 2-to-1 decision the Court of Appeals affirmed. *Lane v. Scarborough,* 19 N.C. App. 32, 198 S.E. 2d 45 (1973). By reason of the dissent defendant-parents appeal to this Court as a matter of right.

Allen A. Bailey by Douglas A. Brackett for defendant appellee.

Sanders, Walker & London by Robert G. Sanders and Robert C. Stephens for Betty Colee Scarborough and Thomas W. Colee.

SHARP, Justice.

As the parties have stipulated, the sole question presented by this appeal is whether Lynn, by executing the separation agreement, releasesd her distributive share as surviving spouse in the estate of Colee. G.S. 29-13 and G.S. 29-14.

[1] Questions relating to the construction and effect of separation agreements between a husband and wife are ordinarily determined by the same rules which govern the interpretation of contracts generally. Whenever a court is called upon to interpret a contract its primary purpose is to ascertain the intention

of the parties at the moment of its execution. *Bowles v. Bowles,* 237 N.C. 462, 75 S.E. 2d 413 (1953); 24 Am. Jur. 2d *Divorce and Separation* § 904 (1966); 27B C.J.S. *Divorce* § 301(3) (1959).

[2] "The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." *Electric Co. v. Insurance Co.,* 229 N.C. 518, 520, 50 S.E. 2d 295, 297 (1948). When a contract is in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact, the intention of the parties is a question of law. The court determines the effect of their agreement by declaring its legal meaning. *Briggs v. Mills, Inc.,* 251 N.C. 642, 111 S.E. 2d 841 (1960); *Howland v. Stitzer,* 240 N.C. 689, 84 S.E. 2d 167 (1954); *Strigas v. Insurance Co.,* 236 N.C. 734, 73 S.E. 2d 788 (1953); *Atkinson v. Atkinson,* 225 N.C. 120, 33 S.E. 2d 666 (1945); 4 Williston, *Contracts* § 616 (3d ed. 1961); Calamari & Perillo *Contracts* § 49 (1970).

[3] A contract, however, encompasses not only its express provisions but also all such implied provisions as are necessary to effect the intention of the parties unless express terms prevent such inclusion. 4 Williston, *Contracts* § 601B (3d ed. 1961). "The court will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it is entered into, an inference that the parties must have intended the stipulation in question." 1 Chitty, *Contracts* § 693 (23d ed. A. G. Guest 1968). The doctrine of implication of unexpressed terms has been succinctly stated as follows:

"Intention or meaning in a contract may be manifested or conveyed either expressly or impliedly, and it is fundamental that that which is plainly or necessarily implied in the language of a contract is as much a part of it as that which is expressed. If it can be plainly seen from all the provisions of the instrument taken together that the obligation in question was within the contemplation of the parties when making their contract or is necessary to carry their intention into effect, the law will imply the obligation and enforce it. The policy of the law is to supply in contracts what is presumed to have been inadvertently omitted or to have been deemed perfectly obvious by the parties, the parties being supposed to have made those stipulations which

as honest, fair, and just men they ought to have made." 17 Am. Jur. 2d *Contracts* § 255 at 649 (1964). However, "[n]o meaning, terms, or conditions can be implied which are inconsistent with the expressed provisions." 17 Am. Jur. 2d *Contracts, supra* at 652.

We come now to apply the foregoing principles to the construction of the separation agreement which Colee and Lynn executed in June 1970. In express terms they declared that they could no longer live together without endangering their health and well-being. They agreed that henceforth they would live wholly separate and apart from each other as though they had never been married and that neither would molest the other or interfere in his affairs. She agreed to make no demands upon him for support and to impose no obligation or responsibility upon him. Each agreed that the other would thereafter hold, acquire, and dispose of "all classes and kinds of property, both real and personal *as though free and unmarried,* without the consent or joinder of the other party" and each released *"the right to administer upon the estate of the other."* (Emphasis added.) Further, they agreed to divide their household furnishings between them. (Apparently, they owned no real estate jointly.)

[4] In our view, the specific terms of the contract are totally inconsistent with an intention that the parties would each retain the right to share in the estate of the other under G.S. 29-13 and G.S. 29-14, if he or she were to become the surviving spouse. The provisions that each would thereafter acquire, hold, and dispose of property as though unmarried and that each renounced the right to administer upon the estate of the other refute the contention that Lynn intended to retain any rights in her husband's estate.

"Agreements must receive a reasonable interpretation, according to the intention of the parties at the time of executing them, gathered from the language employed by them. . . . " *Stanley v. Cox* 253 N.C. 620, 635, 117 S.E. 2d 826, 836 (1960). We also point out that the "term 'separation and property settlement agreement' in the absence of clear language or impelling implications connotes not only complete and permanent cessation of marital relations, but a full and final settlement of all property rights of every kind and character." *Bost v. Bost,* 234 N.C. 554, 557, 67 S.E. 2d 745, 747 (1951).

In this case the intention of each party to release his or her share in the estate of the other is implicit in the express provisions of their separation agreement, their situation and purpose at the time the instrument was executed. The law will, therefore, imply the release and specifically enforce it. We hold that Lynn Wood Colee, the surviving spouse of Tommy Curtis Colee, deceased, released her right to share in his estate by the execution of the separation agreement of 19 June 1970.

The decision of the Court of Appeals is

Reversed.

STATE OF NORTH CAROLINA v. JOHN RICHARD NEWSOM

No. 39

(Filed 12 December 1973)

Criminal Law § 84; Searches and Seizures § 1— warrant to search for marijuana — seizure of other items

Officers lawfully seized checks and currency while executing a warrant authorizing a search of defendant's apartment for marijuana, and the checks and currency were properly admitted in defendant's trial for armed robbery, where the currency was found co-mingled with patently contraband drugs and the checks were thrown from a window of the apartment after officers entered it, the officers having had reasonable grounds to believe that a connection existed between the items seized and criminal behavior.

APPEAL by defendant from *Crissman, J.*, 23 October 1972 Criminal Session, GUILFORD County Superior Court.

Criminal prosecution tried upon defendant's plea of not guilty, to an indictment charging him with robbery with firearms, a violation of G.S. 14-87.

The State's evidence may be summarized as follows: On 16 March 1972 at approximately 10:45 p.m., Mr. Clyde Kiker was in his store in Greensboro, North Carolina, when two men, masked by ladies' nylon hose, entered the store. One of the men was armed with a pistol, and by threatened use of the pistol, took from him cash and checks totaling $3,483.10. Mr. Kiker made a positive in-court identification of defendant as the man who threatened him with a pistol during the robbery.

At about 8:45 p.m. on the evening of 16 March 1972, officers of the Forsyth County Sheriff's Department procured a search warrant authorizing them to search an apartment leased by defendant and Frank Payne for marijuana. At about 1:15 a.m., armed with a search warrant, these officers went to Building 361, Apartment C, Glendare (King's Gate Apartments). They inspected the exterior and the surrounding grounds of the apartment. There were no open windows, and there were no papers or litter on the ground around the apartment. The officers knocked on the front door, identified themselves to Frank Payne, and advised him that they had a search warrant for the premises. The warrant was read to Payne, and the officers proceeded to search the apartment. They found defendant in a back bedroom on the second floor. In the middle of the floor of that bedroom was a white plastic bag containing loose currency, capsules, a bottle of pills and a white powder. The window in the bedroom was open, and the officers observed papers scattered on the ground below the window. These papers were later identified as checks taken from Mr. Kiker on the night of 16 March 1972.

The cash and checks along with the contraband drugs were seized and were admitted into evidence over defendant's objection and motion to suppress.

Defendant offered evidence in the nature of an alibi.

The jury returned a verdict of guilty of robbery with a firearm as charged in the bill of indictment. Defendant appealed from judgment sentencing him to imprisonment for a term of not less than twenty nor more than twenty-five years. The Court of Appeals affirmed, and defendant appealed to this Court pursuant to G.S. 7A-30(1).

Attorney General Robert Morgan by Deputy Attorney General R. Bruce White, Jr. and Associate Attorney General Jones P. Byrd for the State.

Assistant Public Defender D. Lamar Dowda for the defendant appellant.

BRANCH, Justice.

The only assignment of error which defendant seriously argues before this Court is that the trial judge erred by allowing

into evidence checks and currency seized pursuant to the execution of a search warrant authorizing a search for marijuana.

Defendant, relying on *Warden, Maryland Penitentiary v. Hayden,* 387 U.S. 294, 18 L.Ed. 2d 782, 87 S.Ct. 1642, argues the checks and currency were improperly admitted into evidence because they were neither contraband nor fruits of a crime within the officers' knowledge at the time of seizure.

The Fourth Amendment of the United States Constitution intends to protect against unreasonable invasion of the "sanctity of a man's home and the privacies of life." *Boyd v. U. S.,* 116 U.S. 616, 29 L.Ed. 746, 6 S.Ct. 524.

A statement pertinent to decision of this question is found in *Warden, Maryland Penitentiary v. Hayden, supra,* viz:

> " . . . The requirements of the Fourth Amendment can secure the same protection of privacy whether the search is for 'mere evidence' or for fruits, instrumentalities or contraband. There must, of course, be a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior. Thus in the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. In so doing, consideration of police purposes will be required. . . . "

Neither the Fourth Amendment protection nor our statutory law applies to situations where there is no search. *Ker v. California,* 374 U.S. 23, 10 L.Ed. 2d 726, 83 S.Ct. 1623; *State v. Craddock,* 272 N.C. 160, 158 S.E. 2d 25. However, the limits of reasonableness which are placed upon searches apply with equal force to seizures, and whether a search or seizure is unreasonable depends on the circumstances of each case. *Preston v. U. S.,* 376 U.S. 364, 11 L.Ed. 2d 777, 84 S.Ct. 881; *State v. Howard,* 274 N.C. 186, 162 S.E. 2d 495.

In the case of *Abel v. United States,* 362 U.S. 217, 4 L.Ed. 2d 668, 80 S.Ct. 683, officers as an incident to an arrest of Abel, preliminary to his deportation on the ground of illegal residence in this country, seized a coded message which Abel was seeking to hide in his sleeve. Defendant sought to suppress this seized article upon his trial for conspiracy to commit espionage.

Rejecting his motion to suppress, the United States Supreme Court, in part, stated:

> "The other item seized in the course of the search of petitioner's hotel room was item (1), a piece of graph paper containing a coded message. This was seized by Schoenenberger as petitioner, while packing his suitcase, was seeking to hide it in his sleeve. An arresting officer is free to take hold of articles which he sees the accused deliberately trying to hide. This power derives from the dangers that a weapon will be concealed, or that relevant evidence will be destroyed. Once this piece of graph paper came into Schoenenberger's hands, it was not necessary for him to return it, as it was an instrumentality for the commission of espionage. This is so even though Schoenenberger was not only not looking for items connected with espionage but could not properly have been searching for the purpose of finding such items. When an article subject to lawful seizure properly comes into an officer's possession in the course of a lawful search it would be entirely without reason to say that he must return it because it was not one of the things it was his business to look for."

The case of *Crawford v. State,* 9 Md. App. 624, 267 A. 2d 317, is remarkably similar to the case before us for decision.

In *Crawford,* defendant appealed from his conviction of receiving stolen goods, contending that the trial judge erred by admitting into evidence a pawn ticket for a stolen radio. Appellant was convicted of receiving the radio described in the pawn ticket. This pawn ticket was seized by police officers while executing a search warrant authorizing a search for narcotics. The police found narcotic paraphernalia in defendant's bedroom and the challenged evidence among other pawn tickets in the bedroom closet.

In holding that the lower court did not err, the Maryland Court noting that "mere evidence" may be seized if there exist a nexus between the item seized and criminal behavior, *Warden, Maryland Penitentiary v. Hayden, supra,* reasoned:

> " . . . We think that here the police had reason to believe that there was a nexus between the 29 pawn tickets and criminal behavior. The large number of pawn tickets, come by on a valid search, showed that it was necessary that appellant frequently required cash and it was probable, in

the light of the narcotic paraphernalia found in his possession by a legal search, that the cash was used to buy narcotic drugs, the possession and control of which are ordinarily unlawful. We find that the seizure of the pawn tickets was reasonable and hold that the court did not err in admitting them."

See also *U. S. ex rel Myles v. Twomey,* 352 F. Supp. 180.

In instant case, there was no search involved in the seizure of the cash and checks. The officers who were legally upon the premises plainly saw the currency which was co-mingled with patently contraband materials. They also observed the checks scattered on the ground below an open window. The checks were not on the ground and the window was closed just before their entry into the apartment. At the time of seizure, it was reasonable for the officers to believe that the currency and checks were so related to the act of purchase or distribution of illicit drugs as to aid in the apprehension and prosecution of persons unlawfully dealing in those drugs. Further, the evident attempt to dispose of the checks was a circumstance which must have strengthened the officers' belief that a connection existed between the items seized and criminal behavior.

Under the circumstances of this case, the seizure of these suspicious objects which were in plain sight was reasonable.

We hold that the trial judge properly admitted the checks and currency into evidence.

Examination of the entire record failed to disclose error prejudicial to defendant, and further discussion of the remaining assignments is deemed unnecessary.

No error.

STATE OF NORTH CAROLINA v. JOHNAS BELL

No. 44

(Filed 12 December 1973)

1. Burglary and Unlawful Breakings § 1— burglary defined

Burglary is the breaking and entering during the nighttime of an occupied dwelling or sleeping apartment with intent to commit a felony therein. G.S. 14-51.

2. **Burglary and Unlawful Breakings § 2— breaking or entering — lesser offense of burglary**

The statutory offense of breaking or entering defined by G.S. 14-54(a) is a lesser included offense of burglary in the first degree.

3. **Criminal Law § 115— necessity for submitting lesser included offense**

When there is some evidence supporting a lesser included offense, a defendant is entitled to a charge thereon even where there is no specific prayer for such instruction, and error in failing to do so will not be cured by a verdict finding defendant guilty of a higher degree of the same crime.

4. **Burglary and Unlawful Breakings § 7— burglary — failure to submit felonious breaking or entering**

In this prosecution for first degree burglary, the trial court erred in failing to submit to the jury the lesser included offense of felonious breaking or entering where the evidence and the inferences to be reasonably drawn therefrom would not have required the jury to find that defendant entered the dwelling by a burglarious breaking.

APPEAL by defendant from *Collier, J.*, 13 February 1973 Session of FORSYTH. Defendant was charged in a bill of indictment with burglary in the first degree. He entered a plea of not guilty.

The State's evidence tended to show that Bonnie Lewis Whicker shared a room with her sister on the third floor of the Julia Higgins Cottage at the Children's Home located on Reynolda Road in Winston-Salem, North Carolina. The sisters retired about 10:00 p.m. on the night of 26 May 1971. Later that night or in the early morning hours of 27 May 1971, Bonnie Lewis Whicker was awakened, and realizing that someone was in her bed, screamed. A man who was lying in the bed with her put a knife to her throat and told her he would cut her throat if she screamed again. Other girls in the cottage were awakened and came to the door of the room. One of the girls turned on the lights in the room and all the girls who had gathered at the Whickers' room began screaming. The man on the bed pulled up his pants, ran from the room, down the stairs, and out of the cottage.

Miss Janice Chamberlin testified, in part, that she lived in the room next to the Whicker girls. On the evening of 26 May 1971 she had been "baby-sitting" and returned to the cottage at about 9:30 p.m. She entered the cottage through the front door, which was open. She thought that she was the last one in but she did not lock the door. Miss Chamberlin was one of the persons awakened by Bonnie's screams. When the lights

were turned on, she saw defendant sitting on the bed with a knife to Bonnie's throat. Miss Chamberlin ran down the stairway and defendant came directly behind her and "went out the living room window." On the cross-examination she testified that Miss Weaver, who was in charge of the cottage, generally locked the front door at approximately 9:30 p.m. There were three or four more doors to the cottage which were unlocked during the daytime and locked at night.

William R. Edwards, Superintendent of the Children's Home, testified that he was awakened by police car sirens and observed people at the Julia Higgins Cottage. Upon his arrival, he saw that the window screen to the left of the front door had a slit in it and the screen to the right of the door was completely pushed out. It appeared to him that someone had gone through the screen to the right of the door.

W. M. Reavis of the Forsyth County Police Department testified that the window screen to the right of the door was completely knocked out and that the screen to the left of the door was unlatched and had a slit in it.

Bonnie Lewis Whicker, Lou Ann Whicker and Janice Chamberlin each made an in-court identification of defendant as the man they saw on Bonnie Whicker's bed.

Defendant offered no evidence.

The jury returned a verdict of guilty of first degree burglary. Defendant gave notice of appeal from judgment imposing a life sentence but failed to perfect his appeal within the time allowed. We allowed defendant's Petition for Writ of Certiorari to Forsyth County Superior Court on 3 July 1973.

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

John J. Schramm, Jr. for the defendant appellant.

BRANCH, Justice.

The single question presented for decision is whether the trial judge erred by failing to submit to the jury the lesser included offense of felonious breaking or entering.

[1] Burglary in the first degree is the breaking and entering during the nighttime of an occupied dwelling or sleeping apart-

ment with intent to commit a felony therein. G.S. 14-51; *State v. Cox,* 281 N.C. 131, 187 S.E. 2d 785.

G.S. 14-54(a) provides: "Any person who breaks or enters any building with intent to commit any felony or larceny therein is guilty of a felony and is punishable under G.S. 14-2."

[2, 3] The statutory offense of felonious breaking or entering defined by G.S. 14-54(a) is a lesser included offense of burglary in the first degree. *State v. Fikes,* 270 N.C. 780, 155 S.E. 2d 277; *State v. Perry,* 265 N.C. 517, 144 S.E. 2d 591. When a defendant is indicted for a criminal offense, he may be convicted of the charged offense or a lesser included offense when the greater offense charged in the bill of indictment contains all of the essential elements of the lesser, all of which could be proved by proof of the allegations in the indictment. Further, when there is some evidence supporting a lesser included offense, a defendant is entitled to a charge thereon even when there is no specific prayer for such instruction, and error in failing to do so will not be cured by a verdict finding defendant guilty of a higher degree of the same crime. *State v. Riera,* 276 N.C. 361, 172 S.E. 2d 535; *State v. Childress,* 228 N.C. 208, 45 S.E. 2d 42; *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44.

If defendant entered the Julia Higgins Cottage with intent to commit a felony other than by a burglarious breaking, he would be guilty of felonious breaking or entering as defined by G.S. 14-54(a). *State v. Brown,* 266 N.C. 55, 145 S.E. 2d 297.

In the case of *State v. Chambers,* 218 N.C. 442, 11 S.E. 2d 280, the defendant was charged with first degree burglary. The evidence tended to show that defendant unlawfully entered a dwelling house and committed the felony of rape therein. The window in the room in which the felony was committed was open, and the defendant was first observed in that room. The defendant made his escape through the open window. There was circumstantial evidence tending to show that the entry was made by opening another window of the dwelling. This Court held that it was reversible error not to submit to the jury the question of the defendant's guilt of non-burglarious breaking or entering.

[4] In instant case, there was evidence that the last person known to enter the dwelling found the front door open and "she did not lock the front door." The evidence does not show whether

she closed the door or left it ajar. There were several doors to the cottage which ordinarily were unlocked during the day and locked at night. There was no direct evidence as to whether these doors had been locked on the night of the 26th of May 1971. There was evidence that the screen on the left of the front door was slit and unlatched. The evidence does not establish whether the window was open or whether the "slit" was large enough for a person to enter. Nor is there any evidence establishing when the screen was unlatched or when the slit was made. Likewise there is no direct conclusive evidence to show when the screen on the right of the front door was pushed out or when or how defendant entered the dwelling.

The evidence in the case and the inferences to be reasonably drawn therefrom were not such as would have *required* the jury to find that defendant entered the Julia Higgins Cottage by a burglarious breaking. Conversely the jury might reasonably have inferred that defendant made his entry without a burglarious breaking.

Under these circumstances, defendant was entitled " . . . to have different views arising on the evidence presented to the jury upon proper instructions. . . . " *State v. Childress, supra.*

For failure to charge on the offense of non-burglarious breaking or entering, there must be a

New trial.

STATE OF NORTH CAROLINA v. JAMES MONROE CUMMINGS

No. 37

(Filed 12 December 1973)

Criminal Law § 138; Homicide § 31— severity of sentence

Sentence of death was improperly imposed upon defendant in this first degreee murder case where the offense was committed prior to the date of *S. v. Waddell;* therefore, the case is remanded for imposition of sentence of life imprisonment.

DEFENDANT appeals from judgment of *Braswell, J.,* 19 March 1973 Session, JOHNSTON Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging him with the first degree murder of Charles H. Lee on 2 December 1972.

The State's evidence tends to show that on Saturday, 2 December 1972, James Monroe Cummings, Mary Louise Chance and Dale Brown were together at a house between Lillington and Sanford. After drinking intoxicants for awhile they left for Raleigh in a green Dodge pickup truck with Cummings driving. They took a half gallon jar of corn liquor with them and purchased a jar of homemade grape wine on the way. After spending approximately two hours in Raleigh, they started back to Lillington with Cummings driving. In Clayton, Cummings stopped and asked Marvin James Johnson how to get to Lillington. Johnson went to the police station and reported that three people he adjudged to be drunk were traveling east on Main Street in a green Dodge truck.

Officer Charles H. Lee was dispatched to investigate. He stopped the green Dodge truck, arrested the three occupants and placed them in the back seat of his patrol car. Officer Lee then removed the two jars from the Dodge truck and put them in the police car. While this was taking place, Cummings stated that he was going to kill the officer. When Officer Lee entered the police car and closed the left door, James Monroe Cummings fired two bullets into the back of the officer's head. Defendant Cummings, Mary Louise Chance and Dale Brown then left the police car, re-entered the green Dodge truck and drove away. Cummings said, "That damn pig won't stop anybody else. . . . He won't never convict nobody else of driving under the influence." They drove to Angier where they were arrested. A .32 caliber revolver (State's Exhibit 7) was removed from the floorboard of the green Dodge pickup and later examined in the firearms laboratory at the State Bureau of Investigation Offices in Raleigh. It contained one round of ammunition and two cartridge casings in the cylinder. An expert firearms examiner testified that the spent cartridge casings were fired from the revolver found on the floorboard of the green Dodge truck.

An expert pathologist testified that Charles H. Lee died as a result of the two bullet wounds to the head.

Defendant offered no evidence. The jury returned a verdict of guilty of murder in the first degree and defendant was sen-

tenced to death. His appeal brings the case to this Court for review.

Robert Morgan, Attorney General; Emerson D. Wall, Associate Attorney, for the State of North Carolina.

Wiley Narron, Attorney for defendant appellant.

HUSKINS, Justice.

Defendant's first assignment of error is based on exceptions to the solicitor's argument to the jury that the State was not seeking the death penalty. This assignment requires no discussion, for the disposition of defendant's second assignment with respect to the judgment is determinative of all matters involved on this appeal.

A sentence of death was pronounced in this case under a misapprehension of the law and must therefore be vacated.

For the reasons stated in *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (18 January 1973), the mandatory death penalty for capital offenses may not be constitutionally applied to any offense committed prior to the date of that decision. The *Waddell* decision was filed on 18 January 1973, and this offense was committed on 2 December 1972. Thus defendant's death sentence cannot stand. The case must be remanded to the Superior Court of Johnston County for imposition of a sentence of life imprisonment. This procedure accords with many decisions of this Court, including *State v. Blackmon,* 284 N.C. 1, 199 S.E. 2d 431 (1973); *State v. Watkins,* 283 N.C. 504, 196 S.E. 2d 750 (1973); *State v. Washington,* 283 N.C. 175, 195 S.E. 2d 534 (1973); *State v. Waddell, supra; State v. Doss,* 281 N.C. 751, 191 S.E. 2d 70 (1972); *State v. Westbrook,* 281 N.C. 748, 191 S.E. 2d 68 (1972); *State v. Chance,* 281 N.C. 746, 191 S.E. 2d 65 (1972); *State v. Hamby* and *State v. Chandler,* 281 N.C. 743, 191 S.E. 2d 66 (1972); *State v. Miller,* 281 N.C. 740, 190 S.E. 2d 841 (1972).

For the reasons stated, the judgment of the Superior Court of Johnston County insofar as it imposed the death penalty upon this defendant is reversed. The case is remanded to the Superior Court of Johnston County with directions to proceed as follows:

1. The presiding judge of the Superior Court of Johnston County will cause to be served on the defendant James Monroe

Cummings, and on his counsel of record, notice to appear during a session of said Superior Court at a designated time, not less than ten days from the date of the notice, at which time, in open court, the defendant James Monroe Cummings, 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 returned by the jury at the trial of this case at the 19 March 1973 Session, will pronounce judgment that the defendant James Monroe Cummings be imprisoned for life in the State's prison.

2. The presiding judge of the Superior Court of Johnston County will issue a writ of habeas corpus to the official having custody of the defendant James Monroe Cummings 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.

CLARY v. BOARD OF EDUCATION

No. 87 PC.

Case below: 19 N.C. App. 637.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 4 December 1973.

COMR. OF INSURANCE v. AUTOMOBILE RATE OFFICE

No. 92 PC.

Case below: 19 N.C. App. 548.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 December 1973.

INSURANCE CO. v. DRY CLEANERS

No. 73 PC.

Case below: 19 N.C. App. 444.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 4 December 1973.

McCRAW v. BANCORP, INC.

No. 20 PC.

Case below: 19 N.C. App. 21.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 December 1973.

McLAMB v. McLAMB

No. 104 PC.

Case below: 19 N.C. App. 605.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 December 1973.

McNEELY v. RAILWAY CO.

No. 81 PC.

Case below: 19 N.C. App. 502.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 December 1973.

ROSSER v. WAGON WHEEL, INC.

No. 80 PC.

Case below: 19 N.C. App. 507.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 December 1973.

STATE v. BASDEN

No. 89 PC.

Case below: 19 N.C. App. 258.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 December 1973.

STATE v. BLAND

No. 83 PC.

Case below: 19 N.C. App. 560.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 December 1973.

STATE v. BUNN

No. 79 PC.

Case below: 19 N.C. App. 582.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 December 1973. Motion of Attorney General to dismiss appeal allowed 4 December 1973.

STATE v. FLOYD

No. 85 PC.

Case below: 19 N.C. App. 580.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 December 1973.

STATE v. HICKS

No. 82 PC.

Case below: 19 N.C. App. 587.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 December 1973.

STATE v. HOUSTON

No. 97 PC.

Case below: 19 N.C. App. 542.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 December 1973.

STATE v. LYLES

No. 90 PC.

Case below: 19 N. C. App. 632.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 December 1973. Motion of Attorney General to dismiss appeal allowed 4 December 1973.

STATE v. SADLER

No. 93 PC.

Case below: 19 N.C. App. 641.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 December 1973. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 December 1973.

STATE OF NORTH CAROLINA v. JIMMY LEE CREWS

No. 43

(Filed 25 January 1974)

1. **Criminal Law § 163— exceptions to charge**

Exceptions to the charge which do not point out specific portions of the charge as erroneous are ineffectual as bases for assignments of error.

2. **Criminal Law § 163— assignments of error to charge**

Assignments of error to the charge were defective in failing to quote in each assignment the portion of the charge to which appellant objects.

3. **Criminal Law § 163— failure to charge — assignments of error**

Where an assignment of error is based on failure to charge, it must set out appellant's contention as to what the court should have charged.

4. **Homicide § 27— failure to instruct on voluntary manslaughter — instruction on involuntary manslaughter**

In a prosecution of defendant for the murder of his wife, defendant was not entitled to an instruction on voluntary manslaughter and was not prejudiced by the court's submission of involuntary manslaughter as a possible verdict where the State's evidence tended to show that defendant intentionally shot and killed his wife, there was no evidence that defendant shot his wife in the heat of passion or in self-defense, and defendant's testimony was to the effect that the pistol discharged when his mother-in-law was attempting to take the pistol from him.

5. **Homicide § 25— instructions — premeditation and deliberation — consideration of defendant's conduct after homicide**

The court's instruction in a homicide case that in determining the question of premeditation and deliberation the jury might consider defendant's conduct before and after as well as at the time of the homicide and all attendant circumstances did not permit the jury to consider defendant's flight on the question of premeditation and deliberation, and the court did not err in failing to charge on the law of flight after having given such instruction.

6. **Homicide § 14— accident or misadventure — burden of proof**

A contention by defendant that a homicide was the result of accident or misadventure is merely a denial of guilt and does not constitute an affirmative defense, and no burden of proof rests on defendant to show accident or misadventure.

7. **Criminal Law § 6; Homicide § 28— murder case — evidence defendant had been drinking — instructions**

The trial court in a homicide prosecution properly instructed the jury that it could consider defendant's testimony that he had been

drinking some whiskey as bearing upon whether the State had satisfied the jury beyond a reasonable doubt that defendant intentionally shot the victim and thereby proximately caused her death and that defendant unlawfully killed the victim in the execution of an actual specific intent to kill formed after premeditation and deliberation.

8. **Homicide § 27— instructions — involuntary manslaughter — reckless use of gun**

The trial court in a homicide case properly instructed the jury on the careless and reckless use of a gun as an element of involuntary manslaughter where defendant's testimony, if considered in the light most favorable to him, disclosed an unintentional homicide caused by his careless and reckless handling of the pistol.

9. **Criminal Law § 95— evidence competent for illustration — instructions at time of admission — further instructions in charge**

Where the court instructed the jury at the time exhibits were admitted that they were competent only to explain and illustrate the testimony of witnesses, the court was not required to repeat such instructions in the charge.

10. **Criminal Law § 76— admission of in-custody statements**

The *voir dire* evidence fully supported the court's evidentiary and ultimate findings that all statements made by defendant to police in another state were made freely, voluntarily and understandingly after defendant had been clearly and fully advised of all his constitutional rights, and the statements were properly admitted in defendant's homicide trial.

11. **Homicide § 20— photographs of victim's body — admission for illustration**

In this homicide prosecution, photographs of unclothed portions of the victim's body were properly admitted for the purpose of illustrating the testimony of a doctor with reference to the entrance of three bullets and the exit of two of them.

12. **Attorney and Client § 7— judgment against indigent defendant for counsel fees — notice and hearing**

Where the record afforded no basis for passing upon the validity of a judgment providing for the recovery of $1,000 by the State from defendant for services provided defendant as an indigent by the public defender, the Supreme Court vacated the judgment without prejudice to the State's right to apply for a judgment in accordance with G.S. 7A-455 after due notice to defendant and a hearing in the superior court.

APPEAL by defendant from *Lupton, J.*, 12 February 1973 Criminal Session of GUILFORD Superior Court.

Defendant was indicted and convicted for the first degree murder of his wife, Jevetta Louise Crews.

Uncontradicted evidence tends to show the facts narrated in the following numbered paragraphs.

1. The death of Jevetta Crews on 6 December 1972 was caused by gunshot wounds inflicted by bullets discharged from the .32 pistol in evidence as State's Exhibit No. 18. She was fatally injured and died in the home of her mother, Mrs. Ruby Hemphill, in Greensboro, N. C.

2. Prior to 6 December 1972 Jevetta, 27, and defendant, 32, had separated. On that date, Jevetta and Angela, 7, the daughter of Jevetta and defendant, were living in Greensboro with Mrs. Hemphill, Mr. Hemphill and Jimmy Henley, 13, Mrs. Hemphill's son by a former marriage. Mr. Hemphill was not at home on 6 December 1972 when defendant arrived or at any time defendant was in the Hemphill home.

3. On 6 December 1972 defendant lived alone in his house in High Point, N. C. From there he telephoned and talked to Jevetta, who was then in the Hemphill home. Later, defendant went to his uncle's service station in High Point. Without permission, he removed his uncle's .32 loaded pistol from the drawer where it was kept, stuck the pistol in his belt and proceeded to the Hemphill home in Greensboro. It was dark when he left his uncle's service station in High Point.

4. Defendant's finger was on the trigger of his uncle's .32 pistol (State's Exhibit No. 18) when it discharged the bullets which fatally injured Jevetta.

5. After Jevetta was shot, defendant left the Hemphill home. He drove from Greensboro on Interstate No. 85. The next day, 7 December 1972, in Montgomery, Alabama, defendant went voluntarily to the Police Department where, orally and in writing, he made statements to the Montgomery officers concerning what had happened the preceding night in Greensboro and delivered to them his uncle's .32 pistol. Defendant waived extradition and voluntarily returned to Greensboro with a Greensboro officer to whom the Montgomery officers delivered the .32 pistol.

6. Three bullets from the .32 pistol penetrated the body of Jevetta. Two passed through her body. They were picked up before her body was removed from the Hemphill home. One was removed from her body by the doctor who performed an autopsy.

The State's evidence as to what occurred while defendant was at the Hemphill house consists of the testimony of Mrs. Hemphill and of Jimmy Henley (hereafter Henley). Summarized, except when quoted, their testimony tends to show the facts narrated below.

Jevetta received a telephone call about 4:30 or 4:45 p.m. She talked ten or fifteen minutes and then went into the living room and sat down on the couch. About 7:00 p.m. Mrs. Hemphill observed that a car had stopped in front of her house. When she "cracked the door to see who it was," defendant pushed open the door and entered the living room. Jevetta and Angela were in the dining room. Henley was in his bedroom. Jevetta got up, went into the living room and there confronted defendant and said: "Jimmy, go back out. You know you're not wanted here. Go on and leave." After placing her hands upon defendant, Jevetta turned to Mrs. Hemphill and said: "Mother, he's got a gun." Mrs. Hemphill told her: "Get in yonder." Jevetta then turned around and started across the living room toward the hall. As she walked away, defendant pulled out his pistol and shot her. He fired this first shot into her back. Jevetta exclaimed, "Oh, my God, Jimmy," and then fell. As Mrs. Hemphill wrestled with him, defendant jerked loose from her grasp; and, as Jevetta lay on the floor, defendant "stood over top of her and shot her twice more." After he had fired the first of these shots, defendant said to Jevetta: "I told you I'd get you." He then fired the last shot. When these two shots were fired, Jevetta was lying on her back, with her feet in the living room and her head down the hall.

After the last two shots Mrs. Hemphill wrestled with defendant and got him away from Jevetta. Defendant pushed Mrs. Hemphill over a table and caused a lamp to fall across Jevetta's feet. Then defendant stepped back and pointed the pistol straight toward her chest. Grabbing his hand, she pushed it down on the couch. Defendant jerked away from her and ran out the door. Mrs. Hemphill asked the telephone operator to send the police and an ambulance. After making this call, she went over to her daughter, picking the lamp up off the floor in order to get to her. Blood was gushing out of Jevetta's mouth. Jevetta's body remained in the same position until the officers arrived. Mrs. Hemphill stepped on and picked up a bullet which she handed to an officer.

The pistol fired by defendant had been "stuck down in his sweater." Mrs. Hemphill saw him pull it out before firing the first shot.

When defendant fired the first shot, Angela ran out the back door and "went to a neighbor's."

When defendant entered the living room, Henley ran into the hall. He heard Jevetta, his sister, tell Mrs. Hemphill that defendant had a gun and heard Mrs. Hemphill tell Jevetta to go to the back room. Jevetta was coming toward Henley when defendant pulled out the pistol. He shot her as she reached the edge of the hall, close to where Henley was standing. Henley ran into the bedroom and was under his bed when the last two shots were fired. After he heard defendant's car "spinning off," Henley went back into the hall and saw Jevetta. Blood was coming out of her mouth, nose and ears.

Officers Jones and Nesbit arrived at the Hemphill home some eight minutes after 7:00 p.m. Their examination of Jevetta disclosed no signs of life. She was lying on her back. Her feet and lower legs were in the living room; the rest of her body was down the hall. Officer Bozarth, of the Police Department Identification Section, arrived at 7:46 p.m. Jevetta's body had not been moved. Bozarth made photographs of the area, and he and Officer Jones made measurements. The officers used these photographs to explain and illustrate their detailed observations at the scene.

The body was removed by ambulance from the Hemphill home about 8:20 p.m. to Cone Hospital where photographs were made of portions of the unclothed body of Jevetta. Three of these photographs were used to explain and illustrate the testimony of the officers and of the doctor who performed the autopsy with reference to the points of entrance and exit of the bullets.

The testimony of Dr. William Womble Forrest, the pathologist who performed the autopsy, includes the following: One of the three bullets entered at the left back, up high, about six inches down from the top of the shoulder and about three inches to the left of the vertebral column. It went through the left lung, caused hemorrhage in the left chest cavity, and came out in front. The entrance wounds of the two other bullets were on the front of the body, one at the right breast and the other at the abdomen just below the rib cage.

Detective J. C. Cunningham, of the Police Department from Montgomery, Alabama, testified to what happened in Montgomery. His testimony, summarized except when quoted, is narrated below.

On 7 December 1972, in response to a call from headquarters, he went to the office of Lt. Buchli, his supervisor. Buchli and defendant were sitting in Buchli's office. Defendant was drinking a cup of coffee and was crying. Buchli told him that defendant had a problem and asked him to see if he could help defendant. When he asked "what was his problem," defendant told Cunningham that "he had killed his wife on the previous night in Greensboro, North Carolina." He then stopped defendant from making any further statement and advised him orally of his constitutional rights. He and the defendant then went back to his office or interrogation room. There he read from a card the constitutional rights of defendant and had defendant read back his constitutional rights as stated on the card. Defendant read "in a competent manner." Defendant stated that he understood his constitutional rights and thereupon signed the waiver of rights statement admitted in evidence as State's Exhibit No. 17. After designating when and where the statement is made, and that "[t]he charge is homicide," the statement sets forth in detail each of the constitutional rights delineated in *Miranda*. The following words appear immediately above defendant's signature: "I fully understand the foregoing statement and do willingly agree to answer questions. I understand and know what I am doing. No promises or threats have been made to me by anyone and no pressure of any kind has been made against me by anyone." This statement was signed in Cunningham's presence at 11:05 a.m.

Defendant then told Cunningham that "he knew [his wife] was dead because he shot her once and she fell and he shot her two or three more times."

During their conversation, defendant told Cunningham that the pistol which he had used was in his car, under the front seat. He took defendant back to Buchli while he (Cunningham) made a phone call. Buchli and defendant went downstairs and came back with the pistol which defendant had volunteered to get for them. "It was a nickle silver .32 Smith and Wesson long Arminus revolver," bearing Serial Number 149320 "on the swing-out." Defendant turned over this pistol to Cunningham

and identified it as the weapon with which he had shot his wife. The pistol was admitted into evidence as State's Exhibit No. 18.

Cunningham called Greensboro and talked to Detective Schmidt, who advised him that there was a warrant for Jimmy Crews charging him with murder and requested that defendant be held for the Greensboro Police Department.

Following the brief oral statement made by defendant, defendant was afforded an opportunity "to be fed, washed, cleaned up, and relieve himself." At 12:40 p.m., after having been again fully advised of his constitutional rights, defendant signed a waiver of rights form exactly like the one he had previously signed and shortly thereafter made a narration of facts which was reduced to writing and signed by him. This second waiver of rights form and defendant's written statement were identified as defendant's Exhibit No. 1 and defendant's Exhibit No. 2, respectively. The written narrative, defendant's Exhibit No. 2, differs from oral statements attributed to defendant by Cunningham in respects noted below.

Evidence offered by defendant consists of (1) his testimony, (2) the testimony of four witnesses to the effect defendant's general reputation is good, and (3) defendant's Exhibits Nos. 1 and 2.

Summarized, except when quoted, defendant testified as narrated below.

He went to his mother-in-law's house to talk to his wife and get her to come home. He knocked on the door. Mrs. Hemphill opened the door and let him in. When he walked inside his wife walked over to him and asked what he wanted. His reply was that he wanted to talk to her. Mrs. Hemphill was standing to his left and Jevetta approached him and put her hands on his sweater at the place where he had the pistol. She hollered, "[h]e's got a gun." Mrs. Hemphill grabbed him. He pulled the gun out. In his struggle with Mrs. Hemphill the gun went off, possibly two or three times. He heard the shots, looked up and saw his wife. She "was kind of facing us" but "was falling on the floor" and "that was when [he] left."

Defendant testified that he didn't "really know why [he] took the gun out of [his] pants." He "just thought maybe [his] mother-in-law was going to try to get the gun." He "did not at any time get down over [his] wife to [his] recollection, as [his]

mother-in-law [had] testified about." He didn't "believe that [he] did that."

At the Police Station in Montgomery he told "the first detective that [he] talked to that [he] believed [he] had killed [his] wife." He was told to sit down and some coffee was brought to him. Detective Cunningham was called and soon came into the room. In answer to Cunningham's question, "[w]hat is the problem?", defendant told Cunningham "that [he] thought that [he] had killed [his] wife." When Cunningham asked, "Well, how do you know?", defendant told him "that [he] seen her falling on the floor." When asked how many times defendant shot, defendant told him "two or three or four times." Cunningham suggested that it might not be as serious as defendant thought because he had observed cases where people were still alive from that many wounds or shots and that he would call the Greensboro Police Department. While Cunningham was making this telephone call, defendant went with the other detective and got the gun. Cunningham returned, bringing word that defendant's wife was dead. Then defendant was taken to a small cell and was brought some food and some coffee. Later, he signed defendant's Exhibit No. 1 and defendant's Exhibit No. 2. Defendant identified the signature on State's Exhibit No. 17 as his signature but testified he didn't remember signing it.

Defendant's testimony on cross-examination includes the following:

After his telephone conversation with Jevetta, but before he went to his uncle's filling station and got the .32 pistol, defendant went to "the post" and "had fellowship with some members," and there "was drinking some . . . whiskey." Later, when he got the pistol he stuck it in his belt and then went over to Greensboro. He knew "that [he] was not welcome there . . . that the folks that owned the house didn't want [him] there." He didn't "remember Mrs. Hemphill telling her daughter to get out of there." He did not pull the gun out until Mrs. Hemphill had grabbed him. Jevetta had turned away from him and was going toward the hall. Mrs. Hemphill grabbed him. He pulled the gun away from her, trying to keep her from getting the gun. At this time, "the gun went off." He testified: "Yes, sir, I had my finger on the trigger. . . . No, sir, I don't suppose there is anyway in the world to make this gun fire unless I pull that trigger." During his struggle with Mrs. Hemphill, the gun went off "a few more times." He did not go over to his wife when

she was on the floor and fire shots into her. His wife fell over at the start of the hallway.

Defendant testified that he didn't believe he had told Cunningham that he had shot his wife some more after she fell. He testified: "No, sir, I won't deny telling him that because I don't know if I told him that or not."

Defendant admitted he had "struck" his wife "two or three times" on prior occasions and that, on one occasion, he had been convicted and sentenced for assaulting her with a deadly weapon.

Defendant's Exhibit No. 2 contains no statement to the effect that defendant shot his wife after she had fallen. It contains the following with reference to what occurred at the Hemphill home:

"I went to the door and they let me in. I just wanted to talk to her. They got to feeling under my sweater and they felt my gun. They got to hollering and screaming and trying to get the gun. While they was trying to get it, I believe I pulled it out.

"All of a sudden, the gun went off. I don't know how many times. It was three or four. I'm not sure. Jevetta fell and I ran. I went to my car and just drove and drove. I got where I couldn't stand it no more and that's when I came in here and told you about what happened. I didn't mean to kill her. I just wanted to talk to her."

The court submitted as a permissible verdict: (1) Guilty of murder in the first degree; (2) guilty of murder in the second degree; (3) guilty of involuntary manslaughter; or (4) not guilty.

The jury returned a verdict of guilty of murder in the first degree. Judgment imposing a sentence of life imprisonment was pronounced.

Based on defendant's affidavit of indigency, the Public Defender was appointed to represent him and did represent him at his preliminary hearing and throughout his trial. After judgment was pronounced, the Public Defender made appropriate appeal entries and ordered the preparation of a transcript for use in preparing defendant's case on appeal. Upon receipt of the transcript, the Public Defender delivered it to Stephen E. Lawing, Esquire, defendant's present counsel, who had been

privately retained to perfect the appeal and represent defendant in connection therewith. The Public Defender was permitted to withdraw as counsel and was relieved of further responsibility. On account of delay in perfecting the appeal, this Court issued its writ of certiorari and allowed additional time for defendant's present counsel to perfect the appeal.

Attorney General Robert Morgan and Assistant Attorneys General Edward L. Eatman, Jr. and Ralf F. Haskell for the State.

Stephen E. Lawing for defendant appellant.

BOBBITT, Chief Justice.

None of defendant's assignments of error challenges the sufficiency of the evidence to support the verdict of guilty of murder in the first degree. Obviously, there was ample evidence to warrant and support that verdict.

Defendant listed nineteen assignments of error. His brief states that Assignments Nos. 7, 8, 9, 10 and 13 are not brought forward. It contains no discussion of or reference to Assignments Nos. 14, 15 and 16. These eight assignments "will be taken as abandoned by him." Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, 810; *State v. Gordon,* 241 N.C. 356, 362, 85 S.E. 2d 322, 327 (1955).

Of the remaining eleven assignments, Nos. 1, 2, 3, 4, 5, 6, 11 and 18 refer to the court's charge; and Nos. 12 and 17 refer to the admission of evidence. Assignment No. 19 refers to a judgment for counsel fees entered after completion of the trial.

[1] We consider first those assignments which refer to the charge. We notice first that neither the exceptions nor the assignments comply with the Rules of Practice in the Supreme Court. These words and figures, "Exceptions Nos. 24, 25, 33, 32, 27, 26, 35," appear in the record immediately following the court's charge. Exceptions bearing these numbers do not appear *in* the charge. These words and figures do appear at intervals *in* the charge: "Exceptions Nos. 28 and 34"; "Exception No. 30"; "Exception No. 29"; and "Exception No. 31." None of these exceptions identifies by brackets or otherwise any particular portion of the charge to which exception is taken. These exceptions are ineffectual as bases for assignments of error in that

they do not point out specific portions of the charge as erroneous.

[2, 3] Moreover, those assignments of error which refer to the charge are also defective because of defendant's failure to comply with the requirement that the appellant quote in each assignment the portion of the charge to which he objects. Too, where an assignment is based on failure to charge, it is necessary to set out the appellant's contention as to what the court should have charged. *State v. Wilson,* 263 N.C. 533, 139 S.E. 2d 736 (1965); *State v. Kirby,* 276 N.C. 123, 131, 171 S.E. 2d 416, 422 (1970).

None of defendant's assignments of error comply with well established appellate rules. Notwithstanding, since a life sentence is involved, we have elected to discuss defendant's contentions.

[4] In Assignment No. 1, defendant asserts "[t]he court erred by failing to charge the jury with respect to the lesser degrees of the crime charged, in that the court failed to charge the jury with respect to voluntary manslaughter." There appears immediately below this assignment the following: "Exception No. 24."

The court properly instructed the jury that, *if* the State satisfied the jury beyond a reasonable doubt that defendant by the use of a pistol, a deadly weapon, *intentionally* shot and thereby killed his wife, the law would raise two presumptions, (1) that the killing was unlawful, and (2) that it was done with malice. *State v. Barrow,* 276 N.C. 381, 390, 172 S.E. 2d 512, 518 (1970), and cases cited. There was no evidence that defendant shot his wife in the heat of passion or in self-defense. Defendant's testimony was to the effect that the pistol discharged accidentally when his mother-in-law was attempting to take the pistol from him. Under these circumstances defendant was not entitled to an instruction on voluntary manslaughter and was not prejudiced by the court's submission of involuntary manslaughter as a permissible verdict. *State v. Wrenn,* 279 N.C. 676, 683, 185 S.E. 2d 129, 133 (1971); *State v. Stimpson,* 279 N.C. 716, 724, 185 S.E. 2d 168, 173 (1971).

[5] In Assignment No. 2, defendant asserts "[t]he court erred by failing to charge the jury with respect to the law of flight." There appears immediately below this assignment the following: "Exception No. 25."

In his brief, defendant quotes this excerpt from the charge: "In determining the question of premeditation and deliberation, it is proper for the jury to take into consideration the conduct of the defendant before and after, as well as at the time of the event, that is the time that Jevetta Louise Crews was shot and all the attending circumstances."

The quoted instruction is in substantial accord with the statement of Chief Justice Stacy in *State v. Evans,* 198 N.C. 82, 84, 150 S.E. 678, 679 (1929).

Defendant contends his "after" conduct would include his flight from the scene of homicide, a circumstance for consideration only on the issue of guilt and not as tending to show premeditation and deliberation. *State v. Blanks,* 230 N.C. 501, 504, 53 S.E. 2d 452, 454 (1949).

In *State v. Marsh,* 234 N.C. 101, 105-06, 66 S.E. 2d 684, 687-88 (1951), Chief Justice Stacy, referring to essentially the same instruction in a case where no instruction was given with reference to the law of flight, said: "The court was here speaking to the purpose and intent in the defendant's mind at the time of the homicide. This, the jury must have understood. Moreover, there is no mention in the court's charge of the defendant's . . . flight. . . . Nor was there any request to charge on the significance of these circumstances or in what light they should be considered by the jury. Evidently, the defendant's conduct long after the homicide was not a matter of debate on the hearing. The immediate circumstances were apparently sufficient. The contention presently advanced seems to have been an afterthought."

In the present case the court gave no instruction with respect to flight. The court related the testimony, principally that of defendant, with reference to what defendant did from the time his wife was shot until he appeared voluntarily at the Police Station in Montgomery, Alabama. Nothing in the court's review of the State's contentions implies that the State contended defendant's trip to Montgomery, Alabama, was a circumstance to be considered as evidence tending to show premeditation or deliberation. Our consideration of this contention impels the conclusion that the court's failure "to charge the jury with respect to the law of flight," was not prejudicial to defendant.

In Assignment No. 3 defendant asserts "[t]he court erred by failing to charge the jury with respect to accidental homicide"; and in Assignment No. 4 he asserts "[t]he court erred by failing to charge the jury with respect to the degree of proof of the defense of accidental homicide and other defenses available to the defendant." There appear immediately below these assignments, respectively, the following: "Exception No. 33," "Exception No. 32."

[6] A defendant does not plead an affirmative defense by contending that the homicide was the result of accident or misadventure. This contention is merely a denial of guilt. No burden of proof rests on defendant to show accident or misadventure and the burden of proof rests upon the State to prove beyond a reasonable doubt all elements of the alleged crime. *State v. Phillips*, 264 N.C. 508, 142 S.E. 2d 337 (1965); *State v. Fowler*, 268 N.C. 430, 150 S.E. 2d 731 (1966); *State v. Woods*, 278 N.C. 210, 179 S.E. 2d 358 (1971). We note this excerpt from the charge: "The court instructs you that if the killing of the deceased, Jevetta Louise Crews, was unintentional and not proximately caused by criminal negligence, then it would be your duty to return a verdict of not guilty."

[7] In Assignment of Error No. 5 defendant asserts "[t]he court erred by failing to charge the jury with respect to the law of intoxication"; and in Assignment No. 6 defendant asserts "[t]he court erred by failing to charge the jury with respect to the degree of proof of the defense of intoxication and other defenses." There appear immediately below these assignments, respectively, the following: "Exception No. 27," "Exception No. 26."

The court's charge includes the following: "[Y]ou will consider his [defendant's] testimony that he had been drinking some whiskey as bearing upon whether the State has satisfied the jury from the evidence beyond a reasonable doubt that the defendant intentionally shot Jevetta Crews and thereby proximately caused her death, and you will also consider this as evidence as bearing upon whether the State has satisfied the jury from the evidence and beyond a reasonable doubt that the defendant unlawfully killed Jevetta Louise Crews in the execution of an actual specific intent to kill formed after premeditation and deliberation."

There is no evidence that defendant was intoxicated. The following is the only evidence relating to defendant's drinking. The statement defendant signed in Montgomery, defendant's Exhibit No. 2, includes the following: "I got to drinking and I went over there to her mama's house." On cross-examination, defendant testified that he drank *some* whiskey at "the post" in High Point before going to his uncle's service station.

Assuming, without deciding, there was sufficient evidence of defendant's drinking whiskey to justify an instruction with reference thereto, the instructions given were in accordance with our decisions. *State v. Propst,* 274 N.C. 62, 71-72, 161 S.E. 2d 560, 567 (1968); *State v. Bunn,* 283 N.C. 444, 196 S.E. 2d 777 (1973), and cases there cited.

[8] In Assignment No. 11, defendant asserts "[t]he court erred in charging the jury as to the careless and reckless use of a gun constituting an element of involuntary manslaughter, there being no evidence of such careless or reckless use." There appears immediately below this assignment the following: "Exception No. 31."

The State's evidence is clear and positive to the effect that defendant intentionally shot and killed his wife. Defendant's testimony, if considered in the light most favorable to him, discloses an unintentional homicide caused by his careless and reckless handling of the pistol. The court's instructions with reference to involuntary manslaughter are in accord with our decisions. *State v. Foust,* 258 N.C. 453, 459, 128 S.E. 2d 889, 893 (1963); *State v. Phillips, supra,* at 517, 142 S.E. 2d at 343; *State v. Wrenn, supra,* at 683, 185 S.E. 2d at 133; *State v. Stimpson, supra,* at 724, 185 S.E. 2d at 173.

In Assignment No. 18, defendant asserts "[t]he court erred by failing to charge the jury that State's Exhibits 1 through 19, inclusive, were admitted as illustrative evidence only." There appears immediately below this assignment the following: "Exception No. 35."

[9] In all instances, where exhibits such as photographs, diagrams, etc., were competent only to explain and illustrate the testimony of witnesses, the judge instructed the jury to this effect. When such proper instructions are given when the evidence is admitted, the judge is not required to repeat these instructions in the charge. This assignment refers to Exhibits Nos. 1-19, inclusive. Certain of the exhibits, for example, the

pistol, the bullets, Jevetta's robe, etc., were competent as substantive evidence. This assignment is broadside, ineffectual and without merit.

[10] In Assignment No. 12, defendant asserts "[t]he court erred in admitting into evidence defendant's statements not voluntarily made in violation of defendant's constitutional right against self-incrimination as guaranteed by the United States Constitution." There appears immediately below this assignment the following: "Exceptions 18 and 19."

The initial incriminating statement was made by defendant in Montgomery, Alabama, when he voluntarily went to the Police Station and reported that he had killed his wife the preceding night in Greensboro, North Carolina. Before admitting other statements made by defendant, a *voir dire* hearing was conducted. The evidence at *voir dire* fully supports the court's evidentiary and ultimate findings to the effect that all statements made by defendant in Montgomery, Alabama, were made freely, voluntarily and understandingly after the defendant had been clearly and fully advised of all his constitutional rights. Indeed, the manner in which defendant was treated by the Montgomery police is worthy of commendation.

[11] In Assignment No. 17, defendant asserts "[t]he court erred in allowing into evidence State's Exhibits 1 through 19 containing photographs and items highly prejudicial and inflammatory to the defendant." Again, defendant lumps together Exhibits Nos. 1-19, inclusive, without differentiation as to the nature and character of these exhibits. Any contention that the photographs of unclothed portions of the body of Jevetta were incompetent when offered and admitted to illustrate the testimony of the doctor with reference to the entrance of the three bullets and the exit of two of them is without merit. Evidence that Jevetta was shot in her upper back once and twice in the front in the area of her chest and abdomen strongly corroborated the testimony offered by the State. They were competent for use by the doctor to illustrate his testimony. *State v. Cutshall*, 278 N.C. 334, 347, 180 S.E. 2d 745, 753 (1971), and cases cited.

[12] In Assignment No. 19, defendant asserts that "[t]he court erred in entering an order and judgment against defendant for payment of counsel fees, said order appearing on page 9 of the petition for certiorari, dated February 16, 1973 and signed by

Lupton, Judge." There appears immediately below this assignment the following: "Exception No. 38." There appears in the record a judgment dated 16 February 1973 signed by Judge Lupton. This judgment provides for the recovery by the State of North Carolina from defendant of the sum of $1,000.00 for services provided defendant as an indigent by the Public Defender. Presumably this judgment was entered pursuant to G.S. 7A-455(b).

In his brief, defendant attacks this judgment on the following grounds: He asserts it was entered in his absence, without notice to him of any hearing with reference thereto, and without affording him any opportunity to be heard in connection therewith. He asserts further "that the judgment is in the nature of a civil judgment and there were not findings of fact nor conclusions of law sufficient to support such judgment pursuant to Rule 52 of the North Carolina Rules of Civil Procedure.

The record before us affords no basis for passing upon the validity of this judgment. Nothing therein supports or negates defendant's contentions. Under the circumstances, this Court, in the exercise of its supervisory jurisdiction, vacates this civil judgment without prejudice to the State's right to apply for a judgment in accordance with G.S. 7A-455 after due notice to defendant and a hearing on such application in the Superior Court of Guilford County.

With reference to verdict and judgment thereon: No error.

With reference to civil judgment for counsel fees: Judgment vacated and cause remanded with instructions.

IN RE: ANNEXATION ORDINANCE ADOPTED BY THE CITY OF CHARLOTTE, DECEMBER 11, 1972, ALBEMARLE-YORK ROAD AREA

No. 90

(Filed 25 January 1974)

1. **Jury § 1; Municipal Corporations § 2; Rules of Civil Procedure § 38— review of annexation proceedings — no right to jury trial**

The provisions of G.S. 160-453.18(f) [now G.S. 160A-50(f)] authorizing review of annexation proceedings by the court without

a jury are not violative of Art. I, § 25 of the N. C. Constitution since the right to a jury trial guaranteed by that section applies only to cases in which the prerogative existed at common law or was procured by statute at the time the Constitution was adopted, nor have the provisions of G.S. 160-453.18(f) been superseded by the N. C. Rules of Civil Procedure since Rule 38(a) does not expand the right of trial by jury but only preserves the right where it existed previously.

2. **Public Officers § 8— performance of duty — burden of proof in showing irregularity of actions**

As a general rule it is presumed that a public official in the performance of his official duties acts fairly, impartially, and in good faith and in the exercise of sound judgment or discretion, for the purpose of promoting the public good and protecting the public interest; however, the presumption of regularity of official acts is rebuttable by affirmative evidence of irregularity or failure to perform duty, but the burden rests on him who asserts unlawful or irregular conduct.

3. **Statutes § 5— construction — intent of Legislature controlling**

If a strict literal interpretation of a statute contravenes the manifest purpose of the Legislature, the reason and purpose of the law should control and the strict letter thereof should be disregarded.

4. **Municipal Corporations § 2— annexation proceedings — population credits — application to annexation area as a whole**

Where the city divided an area to be annexed into small study areas and applied population credits as provided for in G.S. 160-453.16(c)(1) [now G.S. 160A-48(c)(1)] only to the study area in which such credits were accumulated rather than to the whole area to be annexed, the city's action constituted an unreasonable departure from the statutory standards; therefore, since this appeal concerns annexation of petitioner's property only and the remainder of the annexation ordinance is not challenged, petitioner is entitled to have her 106 acre tract of property on which she is the sole resident excluded from annexation, though the study area of which her property is a part did meet the statutory population requirements.

Chief Justice BOBBITT dissenting.

Justice HIGGINS joins in the dissenting opinion.

PETITIONER appeals from judgment of *Martin, S. J.*, 12 February 1973 Extra Civil Session, MECKLENBURG Superior Court.

After the Charlotte City Council adopted a resolution of intent to annex the Albemarle Road-York Road area, fixed the date for a public hearing on the question of annexation, and published notice of said public hearing in The Charlotte Observer, the petitioner, Mrs. Charles DeForest Lucas, through her counsel, appeared before the City Council and requested that

her property be deleted from the annexation area. Her request was denied, and on 9 January 1973 she filed a petition in the superior court requesting review pursuant to G.S. 160-453.18 (now G.S. 160A-50). Judicial review of the annexation proceedings was conducted by Martin, S.J., at the 12 February 1973 Extra Civil Session, Mecklenburg Superior Court.

Petitioner's timely motion for a jury trial was denied and evidence was thereupon offered by both petitioner and the City of Charlotte. The court then made findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. On October 24, 1972 the Charlotte City Council passed a resolution stating its intent to consider the annexation of property known as the Albemarle Road-York Road Area, which was fully and accurately described in the resolution. In accordance with the provisions of the resolution, notice of a public hearing on the question of annexation was published in a local newspaper of general circulation on November 6, 7, 13, 20 and 27 of 1972. A public hearing was held on December 1, 1972. The Charlotte City Council enacted the ordinance in question on December 11, 1972 and set its effective date as June 30, 1973.

2. The metes and bounds description of the area to be annexed that was published on November 6, 1972 was not complete in that the description was to be continued to another page of the newspaper but was not in fact continued. The remaining publications which were published once a week for four successive weeks contained complete and accurate descriptions of the area to be annexed.

3. The Charlotte-Mecklenburg Planning Commission had begun considering the possibilities of annexation in 1969. Twelve areas were initially studied to determine whether each of these areas satisfied the criteria for annexation set forth in Part 3, Article 36, Chapter 160 of the General Statutes. Four of the areas were determined by the Planning Commission not to be appropriate for annexation under the statutory guidelines. Of the eight remaining areas, six, when considered collectively, physically formed one large area. Since each of the six areas had qualified for annexation under the Planning Commission's studies,

these areas were then considered, for purposes of annexation, as one area, the Albemarle Road-York Road Area. No attempt was made to ascertain whether the area as a whole could be properly annexed since a determination had been made earlier that each of the six study areas had qualified individually under Part 3, Article 36, Chapter 160 of the General Statutes. The resultant area contains approximately 17,899 acres and 37,948 residents or approximately 2.12 persons per acre.

4. In establishing the boundaries of the six study areas and thus determining the boundary of the annexation area in question, the Planning Commission adopted a policy of including as much property as possible within the area to be annexed. While the boundary of the area to be annexed is irregular, the evidence shows that this irregularity is largely due to actual patterns of residential, commercial, and institutional development. A factor which contributed to a minor extent to the irregularity was the respondent's conglomeration of the six study areas into one area for the actual process of annexation.

5. Evidence was presented to the Court concerning large tracts of very valuable property which were not included within the area to be annexed. These unannexed areas were referred to as "fingers" reaching into the area of annexation and were further identified as being in the vicinity of Monroe Road, Providence Road, Carmel Road and Quail Hollow Road. (These areas may also be found on petitioner's exhibit number 8: Monroe Road—1, 2 and 3; Providence Road—4, 5, 6, and 7; Carmel Road—8 and 9; Quail Hollow Road—10 and 11.) Uncontradicted evidence shows that: The area near Monroe Road contains 431.62 acres; the area in the vicinity of Providence Road contains 454.62 acres; the area near Carmel Road contains 571.5 acres; and the area around Quail Hollow Road contains 356.59 acres. Evidence presented by the petitioner as to the number of residences in these areas is conflicting and sketchy, but even accepting a liberal view of the evidence and applying the uncontroverted figure of 3.42 as the average number of persons per household in the area to be annexed, these large tracts could not have been included in the area to be annexed without disqualifying the entire area on the criteria of population density.

6. On January 9, 1973, Mrs. Ruth S. Lucas filed a petition in Superior Court seeking review of Charlotte Ordinance 689-X which directs the annexation of the Albemarle Road-York Road Area. The petitioner is the owner of real property, approximately 106 acres of which is included within the area to be annexed. The petitioner's property is located on the eastern edge of the annexation area. Her western border is formed by Campbell Creek, the southern border by Margaret Wallace Road and a portion of her property touches McAlpine Creek which forms much of the actual annexation boundary. Abutting petitioner's property is the Thompson Orphanage and a sixty-eight acre tract owned by petitioner's daughter and son-in-law. The orphanage normally cares for 40-50 children at one time. Independence Boulevard is located less than one thousand feet from the petitioner's property. As is pointed out on page seven of the Plan, Independence Boulevard is a major arterial road drawing concentrated commercial and residential development. This fact is further illustrated by the "Generalized Land Use" map contained in the Plan for annexation. Independence Boulevard, or U.S. 74, generates a great deal of commercial and industrial activity, not only close to the existing City Limit but also in the vicinity of petitioner's property. In addition to those commercial and industrial uses shown on the land use map, a major car dealership has recently opened on the northern side of Independence Boulevard close to its intersection with Margaret Wallace Road. A large development of single family residences is located approximately 700 feet west of the northern tip of the petitioner's property and a second development of single family residences is located a short distance north of petitioner's property. Just to the southwest of petitioner's property and across Independence Boulevard is a large apartment complex. The evidence established that the complex contained 224 units at the time the qualification study for the area was conducted in 1971 and that plans call for 2,000 units to be constructed eventually. Directly across from petitioner's property on Margaret Wallace Road are approximately twenty-six single family residences.

7. There is one house on the petitioner's property in which petitioner lives alone. The petitioner's property is not otherwise developed for commercial or residential purposes due to petitioner's desire not to develop her property.

In addition, petitioner agreed to restrict any development of her property to three acre lots when she conveyed sixty-eight acres of her property to her daughter and son-in-law, whose property was burdened with a similar restriction. Portions of petitioner's property which border McAlpine and Campbell Creeks are not suited for residential development since these areas are flooded when heavy rains cause the creeks to overflow their banks. However, the real reason, as petitioner has testified, why she does not wish her property to be included within the area to be annexed is that she cannot afford to pay the taxes on the property without developing it. She does not want to develop it because of the property's very low basis for purposes of capital gains taxation. If she can retain the property until she dies, the property will acquire a basis equal to its fair market value at the time of her death so that her devisees will receive a great economic benefit.

8. The petitioner has not presented any evidence that tends to show that she has in any way suffered any injury because the metes and bounds description published on November 6, 1972 was incomplete. There is no evidence which tends to show that she was misled or did not know that her property would be included within the area to be annexed.

9. Section 3 of Ordinance No. 689-X reads as follows:

> "That it is the purpose and intent of the City of Charlotte to provide services to the area being annexed under the ordinance, as set forth in the report of plans for services approved by the City Council on the 6th day of November, 1972, and filed in the office of the Clerk for public inspection."

The ordinance did not contain nor paraphrase the plan for providing municipal services to the area as set forth in the plan prepared to satisfy Sec. 160-453.15 of the General Statutes.

Upon the foregoing FINDINGS OF FACT, the Court makes the following:

CONCLUSIONS OF LAW

1. The area as designated by the respondent and known as the Albemarle Road-York Road Area meets all criteria

authorizing annexation under Part 3, Article 36, Chapter 160 of the General Statutes. The annexation proceedings instituted by the respondent show *prima facie* that there has been substantial compliance with the essential provisions of these statutes.

Certainly a notice publication in some form of the public hearing is an essential element of an annexation proceeding. However, it is not necessary for this Court to decide if each and every aspect of the notice publication as outlined in Sec. 160-453.17(b) must be exactly followed before an otherwise proper annexation proceeding is to be remanded. The Court is especially mindful of this consideration where, as here, there has been no allegation or showing of any injury to the petitioner resulting from the alleged failure to publish the notice according to the letter of the statute. Suffice it to hold under the facts of this petition that the publication of notice on November 6, 1972, even though incomplete in its boundary description, may be properly considered in computing whether the time period between the dates of the first and last publication amounts to twenty-two days. So considered there are twenty-two days between the dates of first and last publication. Alternatively, the Court holds, in any event, that the twenty-two day restriction is not an essential element of the annexation statutes so that its violation, absent a showing of material injury, does not command that the ordinance be remanded, at least where every other notice requirement has been followed explicitly.

2. The petitioner has admitted in open Court that the respondent has followed the letter of the annexation statutes (except for the publication of notice). Under the facts of this case, the literal requirements of Part 3, Article 36, Chapter 160 of the General Statutes have been met.

3. While this Court does have only limited jurisdiction in reviewing an annexation proceeding, that jurisdiction does include a judicial determination of whether the respondent abused its discretion in improperly establishing the boundary of the area to be annexed so as to include the petitioner's property. Also within this Court's power is a determination of whether the application of the annexation statutes for cities of over 5,000 residents to the petitioner's property under the facts of this petition is proper

under the Constitution of North Carolina and the Fourteenth Amendment to the United States Constitution. However, these are heavy burdens to bear and the petitioner has not met these burdens. The evidence properly before this Court does not establish any abuse of discretion. While the Director of the Charlotte-Mecklenburg Planning Commission testified that the policy followed in defining the area to be annexed was to include as much property as possible regardless of that property's development, an examination of the evidence reveals that the areas actually to be annexed are either developed for urban purposes or are undergoing such development. At least the petitioner has not satisfied this Court to the contrary, and the petitioner does have the burden of proof on this point. The fact that a particular piece of property is undeveloped and included within an area to be annexed is not evidence of abuse of discretion by the annexing body where there is competent evidence that property in close proximity is undergoing such development. The fact that the boundary of the annexation area may be irregular in appearance is not, by itself, evidence of arbitrary and capricious action by the governing body in instituting an annexation proceeding. The applicable law requires only that the boundary follow urban patterns of development and, whenever practical, natural topographic features. Absent a showing of bad faith or deviation from these statutory guidelines in including petitioner's property, the petitioner cannot establish any abuse of discretion. No evidence of bad faith is before the Court and the petitioner has not satisfied the Court that the respondent deviated from the statutory guidelines, either in their letter or their spirit. Specifically, it has not been established that respondent used different interpetations of these statutory guidelines in locating a boundary line for one study area than was used in other study areas. Also it has not been shown that respondent's combining of six adjacent study areas into one large area for purposes of an annexation proceeding is improper.

4. While the petitioner's property is undeveloped, whether because of personal desires of self-imposed, developmental restrictions, the area in which it is located is either developed for urban purposes or is undergoing commercial and residential development.

5. Neither Part 3, Article 36, Chapter 160 of the General Statutes nor its application by respondent to include the petitioner's property within the Albemarle Road-York Road Area violated the Fourteenth Amendment to the United States Constitution or Article I, Sections 8, 19 and 25 of the North Carolina Constitution.

6. Section 3 of Ordinance No. 689-X complies with G.S. 160-453.17(c)(2) [sic, evidently intended to be G.S. 160-453.17(e)(2)]. Even if the statute were to be interpreted to state that the entire Plan, or at least a summation of it, for extending services into the area was to be included in Ordinance 689-X, the omission would not be fatal to the annexation proceeding. Such a statutory provision could not be an essential element of the applicable annexation statutes. The respondent has bound itself not only morally but legally to provide the services outlined in the Plan. This is true regardless of whether the Plan is re-recited in the ordinance. Section 3 clearly identifies the Plan as being definitive on the question of how the area is to be treated upon the effective date of annexation.

7. The respondent properly exercised its discretion in following the flow of McAlpine Creek so as to include petitioner's property within an area to be annexed into the City of Charlotte.

Upon the foregoing findings of fact, it is ORDERED, ADJUDGED AND DECREED that the action of the City Council of the City of Charlotte in the adoption of Annexation Ordinance is affirmed and the annexation may take place as scheduled. The costs of this action shall be taxed against the petitioner.

Petitioner appealed to the Court of Appeals, and we allowed motion to bypass that court prior to determination of the controversy. The case is now before the Supreme Court for initial appellate review.

By virtue of a consent order this appeal concerns petitioner's property only, permitting the annexation to be effective with respect to the remainder of the areas annexed concerning which no appeal has been taken. G.S. 160-453.18(h).

Craighill, Rendleman & Clarkson, P.A., by J. B. Craighill, Attorneys for the petitioner appellant, Ruth S. Lucas.

Henry W. Underhill, Jr.; H. Michael Boyd; W. A. Watts, Attorneys for respondent appellee, City of Charlotte.

HUSKINS, Justice.

[1] Petitioner assigns as error the denial of her motion for a jury trial incident to review of the annexation proceeding. She contends the constitutional questions involved in this proceeding are matters with respect to which she is entitled to trial by jury and that the provisions of G.S. 160-453.18(f) (now G.S. 160A-50(f)) relating to review without a jury are (1) violative of Article I, Section 25 of the Constitution of North Carolina and (2) are superseded by the Rules of Civil Procedure.

The provisions of Article I, Section 25 of the present Constitution of North Carolina are similar to the provisions of the first sentence of Article I, Section 19 of the Constitution of 1868. A similar contention with respect to the unconstitutionality of G.S. 160-453.18(f) was rejected by this Court in *In re Annexation Ordinances,* 253 N.C. 637, 117 S.E. 2d 795 (1960). We there said:

> "The procedure and requirements contained in the Act under consideration being solely a legislative matter, the right of trial by jury is not guaranteed, and the fact that the General Assembly did not see fit to provide for trial by jury in cases arising under the Act, does not render the Act unconstitutional.
>
> "The right to a trial by jury, guaranteed under our Constitution, applies only to cases in which the prerogative existed at common law, or was procured by statute at the time the Constitution was adopted. The right to a trial by jury is not guaranteed in those cases where the right and the remedy have been created by statute since the adoption of the Constitution. *Groves v. Ware,* 182 N.C. 553, 109 S.E. 568; *McInnish v. Bd. of Education,* 187 N.C. 494, 122 S.E. 182; *Hagler v. Highway Commission,* 200 N.C. 733, 158 S.E. 383; *Unemployment Comp. Com. v. Willis,* 219 N.C. 709, 15 S.E. 2d 4; *Belk's Dept. Store, Inc. v. Guilford County,* 222 N.C. 441, 23 S.E. 2d 897; *Utilities Commission v. Trucking Co.,* 223 N.C. 687, 28 S.E. 2d 201."

Moreover, the provisions of G.S. 160-453.18(f) authorizing review of annexation proceedings by the court without a jury have not been superseded by the North Carolina Rules of Civil Procedure. Rule 38(a) of the Rules of Civil Procedure provides:

"The right of trial by jury as declared by the Constitution or statutes of North Carolina shall be preserved to the parties in-

violate." This rule was not designed to expand the right of trial by jury but only to preserve the right where it had existed previously. Since the General Assembly has never granted the right to jury trial in judicial review of annexation proceedings, Rule 38(a) by its own language is inapposite. This assignment of error is overruled.

Petitioner contends that the City "acted arbitrarily, capriciously and unreasonably in that it did not uniformly apply the same standards throughout the entire Annexation Area."

Although the courts are vested with jurisdiction to review annexation proceedings, the scope of judicial review is limited by statute. G.S. 160-453.18 (now G.S. 160A-50) specifies the inquiries to which the courts are limited. These include the question presented by this case: Has the City met the requirements of G.S. 160-453.16(c)(1) as they apply to petitioner's property? *See* G.S. 160-453.18(a) and (f)(3); *In re Annexation Ordinance*, 278 N.C. 641, 180 S.E. 2d 851 (1971).

[2] As a general rule it is presumed that a public official in the performance of his official duties "acts fairly, impartially, and in good faith and in the exercise of sound judgment or discretion, for the purpose of promoting the public good and protecting the public interest. [Citation omitted.] The presumption of regularity of official acts is rebuttable by affirmative evidence of irregularity or failure to perform duty, but the burden of producing such evidence rests on him who asserts unlawful or irregular conduct. The presumption, however, prevails until it is overcome by . . . evidence to the contrary. . . . Every reasonable intendment will be made in support of the presumption. . . ." *Huntley v. Potter*, 255 N.C. 619, 122 S.E. 2d 681 (1961); *accord*, *Styers v. Phillips*, 277 N.C. 460, 178 S.E. 2d 583 (1971). Hence the burden is on the petitioner to overcome the presumption by competent and substantial evidence. 6 N. C. Index 2d, Public Officers, § 8 (1968).

Ordinance 689-X to extend the corporate limits of Charlotte by annexation of the Albemarle Road-York Road Annexation Area discloses that the Charlotte City Council found and declared that the described annexation area met the requirements of G.S. 160-453.16(b) and (c)(1) (now G.S. 160A-48(b) and (c)(1)). Petitioner does not contend that the requirements of G.S. 160-453.16(b) have not been met by the City but strongly insists that G.S. 160-453.16(c)(1), properly interpreted and

properly applied administratively, requires exclusion of her land from the Albemarle Road-York Road Annexation Area.

G.S. 160-453.16(c)(1) (now G.S. 160A-48(c)(1)) reads in pertinent part as follows: "(c) Part or all of the area to be annexed must be developed for urban purposes. An area developed for urban purposes is defined as any area which . . . (1) Has a total resident population equal to at least two persons for each acre of land included within its boundaries . . . . " The narrow issue presented, and here decided, is whether the City used "population credits" arbitrarily, capriciously or in an unreasonable manner so as to produce unfair and inequitable results not in keeping with legislative intent. On this question we now consider the evidence hereinafter narrated.

The Albemarle Road-York Road Annexation Area covers 17,899 acres. That area was initially broken down by the City into six "study areas," numbered 1, 2, 3, 4, 11 and 12 on Respondent's Exhibit 1. (Other study areas numbered 5, 6, 7, 8, 9 and 10 on said exhibit, two of which are the subject of litigation in other annexation cases, have no pertinence here.)

Testimony of Michael Schneidermann, Charlotte City Planner, discloses that each study area encompasses land contiguous to the present City boundary and that Study Areas 1, 2, 3, 4, 11 and 12, comprising the Albemarle Road-York Road Annexation Area, are contiguous to each other. These six study areas were thus treated as one area to be annexed. However, the City applied the statutory standard of population density—at least two persons per acre—to each individual study area separately in order to qualify it for annexation. For example, petitioner's property is located in Study Area No. 4, and her 107 acres with a population of one person was annexed because there was enough population in excess of two per acre from the developed urbanized portion of Study Area No. 4 to "populate" it, and other vacant acreage around it, at the rate of two persons per acre.

Testimony of William E. McIntyre, the Planning Director for Charlotte-Mecklenburg Planning Commission, discloses that "the philosophy followed was, with sufficient population credit, just to move out and take in additional open area, whether that area was developed for urban purposes or not."

Petitioner's evidence discloses that her land, 107 acres with a population of one person, is located on the outer edge

of Study Area No. 4, yet lies within the area to be annexed. Her evidence further shows that many tracts of land having a higher value per acre, and more densely populated than hers, which lie just outside the outer boundary of other study areas were not included in the Albemarle Road-York Road Annexation Area. One of these tracts lies along Providence Road, within Study Area No. 2 but outside the annexation boundary, and is designated by the figure 5 on Petitioner's Exhibit 8. This land contains 102 acres, is divided into sixteen separate tracts, and has a fairly large residential population. When explaining why petitioner's land was annexed and these sixteen tracts aggregating 102 acres were not, Mr. Schneidermann had this to say:

> "In regard to Petitioner's Exhibit Number 8 and that area designated as Number 5, according to the evidence containing 102.49 acres, it was not included within the annexation area because the density would not have been sufficient to qualify the entire area. And in the light of the criteria, it was left out because we didn't have sufficient population. The criteria was that it have a density of two persons per acre.
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> * * * *
>
> "It is very true that if we had left out Mrs. Lucas' 106 acres, completely undeveloped except for one person living on it, we could have taken in instead, without upsetting our population criteria in that area, Area Number 5 as shown on Plaintiff's [Petitioner's] Exhibit 8, with only 102 acres in it and with sixteen different tracts and lots of people living on it, but try to understand our procedure that was followed. When we performed these studies, we qualified each area individually, separately and independently from each other. Each area that is indicated on the maps was qualified separately. You can't really give credit to one area, because they were done separately. But we did lump them together in one annexation package.
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> * * * *
>
> "We qualified each study area individually instead of all together but uniformly as far as criteria. We took a standard and applied it. *The standard I have been speaking about was not applied to the entire area as a whole but to the smaller study areas that made up the entire area.* [Emphasis added.]

* * * *

"If we had applied that criteria to the whole area, we would have been able to take in, to the City's advantage, property around there (indicating property omitted in the Providence Road area) that has more population living on it and a higher tax value. We did have sufficient population credit to take in Mrs. Lucas' property, evidently, yes, because it qualified. . . . The whole story is not that we divided the entire area and applied the standard to the smaller study areas instead of to the overall area but that is part of what we did."

Mr. Schneidermann, still referring to areas excluded adjacent to the outer boundaries of Study Area No. 2, testified:

"As to whether if I had left out Mrs. Lucas' property, in addition to taking in that Area Number 5 that we mentioned, 102 acres, with sixteen tracts on it, we could easily have taken in Area Number 6 [on Petitioner's Exhibit 8] which has only 47 acres and has twenty-five different tracts and quite a number of different tracts on it, yes, when they were all grouped together, yes, we could have, yes. I think it is very important to keep in mind that these studies were performed and these surveys were done independently of one another and they qualified individually. . . . If we had taken in those areas, Numbers 5 and 6, (on Petitioner's Exhibit 8) which together total over 41 different tracts and less than 150 acres, we would have gotten credit there for a lot more than the one person that we got when we took in Mrs. Lucas' property."

Still other tracts of land in the Carmel Road-Providence Road area which were discussed by Mr. Schneidermann were excluded from the area to be annexed by reason of the "study area" formula used when applying population credits.

The foregoing testimony discloses that the statutory standard of two persons per acre was not applied to the 17,899-acre "area to be annexed" but to the small study areas that made up the whole. The City argues that since each study area qualified under the two-persons-per-acre rule, the whole area to be annexed also met that standard. The argument misses the point. The initial decision to use the "study area" technique determined, and perhaps even predetermined, which tracts of land containing fewer than two persons per acre would be annexed,

and which tracts would be excluded. Under this method the City never really considered the area to be annexed as a whole in applying the two-persons-per-acre standard. As a result, tracts of land more densely populated, considerably more valuable per acre, and better suited to annexation than petitioner's land were excluded. Some of these excluded areas are valued for tax purposes at more than $11,000 per acre, whereas petitioner's lands are appraised for taxation at $877 per acre.

[3] G.S. 160-453.16 deals with the character of the area to be annexed. In construing and interpreting the language of that statute, we are guided by the primary rule of construction that the intent of the Legislature controls. *Underwood v. Howland, Comr. of Motor Vehicles,* 274 N.C. 473, 164 S.E. 2d 2 (1968); *Freeland v. Orange County,* 273 N.C. 452, 160 S.E. 2d 282 (1968); 50 Am. Jur., Statutes, § 223 (1944). A construction which will operate to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language. *Ballard v. Charlotte,* 235 N.C. 484, 70 S.E. 2d 575 (1952). If a strict literal interpretation of a statute contravenes the manifest purpose of the Legislature, the reason and purpose of the law should control and the strict letter thereof should be disregarded. *Duncan v. Carpenter,* 233 N.C. 422, 64 S.E. 2d 410 (1951); *State v. Barksdale,* 181 N.C. 621, 107 S.E. 505 (1921). And, where possible, "the language of a statute will be interpreted so as to avoid an absurd consequence." *Hobbs v. Moore County,* 267 N.C. 665, 149 S.E. 2d 1 (1966).

[4] When G.S. 160-453.16(c)(1) is subjected to these rules of construction, it is quite clear that the Legislature intended "the area to be annexed" to mean the entire 17,899 acres embraced in the Albemarle Road-York Road Annexation Area rather than numerous "study areas" into which the area to be annexed has been divided. Not only must the entire annexation area *meet* the requirements of G.S. 160-453.16(c)(1), but even more importantly, the tests to determine whether an area is developed for urban purposes must be *applied* to the annexation area as a whole. The City has acted under a misapprehension of the law, and has misapplied the statutory standard, in deciding that population credits should be applied only in the study area in which such credits were accumulated rather than applied uniformly to the whole "area to be annexed."

We hold that petitioner's evidence is sufficient to overcome the presumption of regularity and demonstrates that the legis-

lative standard prescribed by G.S. 160-453.16(c)(1) has unwittingly been applied contrary to the legislative intent. The City's decision to follow the study area formula with respect to population credits was an unreasonable departure from the statutory standards.

Since this appeal, by virtue of the consent order, concerns annexation of petitioner's property only and permits annexation to be effective with respect to the remainder of Albemarle Road-York Road Annexation Area concerning which no appeal has been taken, *see* G.S. 160-453.18(h), the annexation of the remainder of that area is now an accomplished fact insofar as this case is concerned. The statutory procedure prescribed by G.S. 160-453.16(c)(1) not having been followed in annexing the property of Mrs. Lucas, petitioner herein, this case is remanded to Mecklenburg Superior Court with instructions to remand Ordinance 689-X to the Charlotte City Council for amendment of the boundaries excluding petitioner's property from the Albemarle Road-York Road Annexation Area.

The judgment below, insofar as it affects petitioner's property, but not otherwise, is

Reversed.

Chief Justice BOBBITT dissenting.

Upon compliance with standards prescribed by G.S. 160-453.16, the General Assembly has authorized the governing body (city council) to determine *what* area is to be annexed. This area may lie wholly or in part to the north, or to the south, or to the east, or to the west, of the existing city limits. The court has no authority to substitute its discretion for that of the municipal governing body. Annexation of the area to be annexed may be completed when provision is made for the extension of municipal services to such area. G.S. 160-453.17.

An annexation proceeding relates to *land* within a described area, without regard to the personal circumstances of the owner of any particular parcel or tract wholly or partly within its boundaries. In the present case, I find no valid objection to the annexation proceedings. Since each of the study areas is in full compliance, it follows that the composite of these areas is in full compliance.

The extension of the city limits to include undeveloped land is to enable the municipality to make plans for the orderly development of such areas. If the area to be annexed when considered as a whole meets the statutory requirements, the owner of an undeveloped tract is not entitled to have it excluded from the annexation because when considered alone it does not meet the statutory requirements. *In re Annexation Ordinance,* 255 N.C. 633, 642-43, 122 S.E. 2d 690, 698 (1961).

The result of the Court's decision is to validate the annexation in all respects except as to property of appellant. The annexation boundary would be McAlpine Creek until appellant's property is reached. Thence it would diverge from McAlpine Creek and follow the lines of appellant's property until it reaches a new location on McAlpine Creek. Thence it would proceed with the creek. The city council has not approved an annexation area having such boundaries.

Justice HIGGINS joins in this dissenting opinion.

HUMBLE OIL & REFINING COMPANY, PETITIONER v. BOARD OF ALDERMEN OF THE TOWN OF CHAPEL HILL, JOSEPH L. NASSIF, ALICE WELSH, REGINALD D. SMITH, ROSS F. SCROGGS, GEORGE L. COXHEAD, AND JAMES C. WALLACE

No. 31

(Filed 25 January 1974)

1. **Municipal Corporations § 30— exercise of option — standing of optionee to seek special use permit**

A prospective vendee under contract to purchase the property to be affected by the granting of a zoning variance or a special use permit is a proper party to apply therefor or to appeal a denial thereof, and the fact that he is bound to take the property only if a zoning variance or special use permit is granted does not deprive him of such standing; therefore, petitioner which exercised its option for a 20-year lease, renewable for three periods of five years, had standing to apply for a special use permit to erect and operate a service station on a site within a district zoned as "central business."

2. **Municipal Corporations § 30— zoning ordinance — definition of special use permit — procedure for granting**

A special permit is one issued for a use which the ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the ordinance exist, and it is granted or denied after compliance with the procedures prescribed in the ordi-

nance, including a duly advertised public hearing on the application before a joint meeting of the Aldermen and the Planning Board and the subsequent referral of the application to the Planning Board for its consideration and recommendations.

3. Municipal Corporations § 30— special use permit — failure of Board of Aldermen to follow required procedure

To be valid, the action of an agency must conform to its rules which are in effect at the time the action is taken, particularly those designed to provide procedural safeguards for fundamental rights; therefore, for failure of the Board of Aldermen to comply with the terms of a city ordinance requiring reference of a request for a special use permit to the Planning Board, the Aldermen's denial of plaintiff's application for a permit must be set aside, and the application must be considered *de novo*.

4. Municipal Corporations § 30— denial of special use permit — insufficiency of findings to support denial

Finding by the defendant Board of Aldermen that plaintiff's proposed use of lots to erect a service station would materially increase the traffic hazard and endanger the public safety at the intersection involved was not supported by competent and sufficient evidence where that evidence consisted of opinions of citizens unsupported by factual data or background that some trees would be destroyed, there were too many service stations in the area already, a traffic signal needed to be installed, and the proposed station would interfere with a church in the intersection.

5. Municipal Corporations § 31— board of aldermen — review of actions

When a board of aldermen, a city council, or zoning board hears evidence to determine the existence of facts and conditions upon which the ordinance expressly authorizes it to issue a special use permit, it acts in a quasi-judicial capacity, and its findings of fact and decisions based thereon are final, subject to the right of the courts to review the record for errors of law and to give relief against its orders which are arbitrary, oppressive or attended with manifest abuse of authority.

6. Municipal Corporations § 31— hearing before board of aldermen — elements of fair trial required

A zoning board of adjustment, or a board of aldermen conducting a quasi-judicial hearing, can dispense with no essential element of a fair trial: (1) The party whose rights are being determined must be given the opportunity to offer evidence, cross-examine adverse witnesses, inspect documents, and offer evidence in explanation and rebuttal; (2) absent stipulations or waiver such a board may not base findings as to the existence or nonexistence of crucial facts upon unsworn statements; and (3) crucial findings of fact which are unsupported by competent, material and substantial evidence in view of the entire record as submitted cannot stand.

7. **Municipal Corporations § 30— issuance of special use permits — validity of ordinance**

Ordinance of the Town of Chapel Hill providing for issuance of special use permits was not void for lack of adequate guiding standards where the ordinance required that the Board of Aldermen follow the procedures specified in the ordinance, conduct its hearing in accordance with fair trial standards, base its findings of fact only upon competent, material, and substantial evidence, and, in allowing or denying the application, state the basic facts on which it relied with sufficient specificity to inform the parties, as well as the court, what induced its decision.

ON *certiorari* granted upon petitioner's application for review of the decision of the Court of Appeals (17 N.C. App. 624, 195 S.E. 2d 360) affirming the judgment of *McKinnon, J.*, 30 October 1972 Session of ORANGE Superior Court.

Petitioner (Humble) began this proceeding on 27 October 1971 by petition for certiorari to the Superior Court to review the refusal of the Board of Aldermen of the Town of Chapel Hill (the Aldermen) to issue it a special use permit to erect and operate an automobile drive-in service station on a site within the district zoned as "central business." The facts, stated in chronological order insofar as possible, are summarized below:

In September and October 1970 Humble acquired options to purchase and lease three adjoining lots in Chapel Hill. Together these lots front 225.2 feet on the south side of West Franklin Street and extend back approximately 100 feet between Graham Street on the east and Merritt Mill Road on the west. The western terminus of West Franklin Street is Merritt Mill Road. On the west side of Merritt, Brewers Lane and Main Street converge and enter Merritt just north of West Franklin.

One of the two lots covered by the options to purchase is now a used-car sales lot; the other is vacant. On the third, or center lot, are situated two small one-story frame houses. Humble's option on this lot is for a 20-year lease, renewable for three periods of five years. On 15 September 1971 Humble exercised its option on each of the three lots.

Each contract provided that if Humble exercised its option the optionor would immediately take all necessary steps to obtain the permits, licenses, and authorizations required for the construction and operation on the premises of a drive-in gasoline service station in accordance with Humble's plans and specifications, including "the procurement of any variances from or

change of zoning restrictions or special exceptions under zoning laws, if required to authorize the issuance of said permits, licenses, and authorizations." The options further authorized Humble, at its election, to assist the sellers and lessees and to take such action as it deemed necessary to procure the required permits, authorizations, and licenses. Humble's obligations to purchase or lease were specifically made "conditional upon all said permits, licenses and authorizations being validly and irrevocably granted, without qualification, except such as may be acceptable to purchaser, and no longer subject to appeal."

Sections 3, 4-A, 4-B, 4-C, and 4-D-6 of the Chapel Hill zoning ordinance (the ordinance) permit the construction and operation of an automobile service station in the central business district upon the approval of a special use permit by the Aldermen. On 26 July 1971 Humble filed with the Board a request for a special use permit to construct a service station on the lots described in its options. The application was accompanied by the required documents, including the written consent of the optionors to the use of the property for a service station.

The Chapel Hill Community Appearance Commission reviewed Humble's application. On 16 August 1971 it recommended that, if the Aldermen approved the requested special use permit, it make certain stipulations pertaining to a large tree, the proposed revolving sign, island canopy, and lighting fixtures. On 27 September 1971, as required by Section 4-C of the ordinance, the Aldermen and the Planning Board, after due advertisement, sat jointly at the public hearing on Humble's application. The minutes of this hearing record the following events:

J. L. Gulledge, Humble's real estate representative, argued *inter alia* that a corner lot with "setbacks on both sides" was the most desirable and safest location for a service station; that the proposed facility would replace a used-car lot, two single-story frame houses and an overgrown, untidy vacant lot; that it would substantially reduce the hazard of blind and obstructed corners and improve the appearance of deteriorating property; that it would not subtsantially change the character of the area, which already has several drive-in businesses, two car washes, other service stations, and retail establishments; and that the proposed construction and use meet all ordinance requirements for a filling station. Mr. Gulledge cited a traffic count of ap-

proximately 12,000 vehicles and 28 pedestrians per day and noted that vehicle registrations had more than doubled in the Chapel Hill area during the last ten years. In support of the application he introduced photographs of the site, the area surrounding it, the plans for the proposed station and its landscaping pictures of similar stations constructed elsewhere, and a sketch showing the flow of traffic into and out of the proposed station.

Seven persons spoke against the issuance of the special use permit. Mr. Creech "felt some of the trees would be destroyed." The Reverend Manly "said that the nearby citizens oppose[d] it and that it would be a traffic problem until a traffic light [is] installed at this intersection." Mr. Berger said there were nine service stations in the Chapel Hill central business district and eight in the adjoining Carrboro area. Mrs. Perry objected "because of the church across the intersection, and the traffic problems." Mrs. Weaver "opposed it." Alderman Nassif noted "a service station study in progress" and suggested waiting until it was completed. Alderman Smith said "that this had been a dangerous intersection for the last 28 years; that at this point five (5) streets intersect, and that the State Highway Commission had been requested many years ago to study this site for the placement of a signal, and over a year ago had approved such installation" but to date "nothing had been erected." Alderman Welsh said "that there were too many service stations in this area." Alderman Scroggs noted "that a service station is a permitted use in the central business district under the present ordinance."

At the conclusion of the hearing, without referring Humble's application to the Planning Board for its review and recommendation, the Aldermen immediately denied the permit. The minutes of the meeting show the following:

"Alderman Smith moved, seconded by Alderman Welsh, to deny the request for this special use permit for the reason that at this time the proposed use would materially increase the traffic hazard at this intersection, and increase the danger of public safety at this intersection. . . . The motion was carried by a vote of five to nothing."

Within the time prescribed by ordinance Section 10-E, Humble petitioned the Superior Court of Orange County for a writ of certiorari to review the Board's denial of its application.

It alleged that the application had been summarily denied at the public hearing without having been referred to the Planning Board as required by the ordinance and that the denial was arbitrary, capricious, and unreasonable; that the Board listened to unsupported testimony; and that the denial was based on inadequate findings of fact.

In its answer to Humble's petition for certiorari the Aldermen admitted the factual allegations contained therein, but denied the allegations that it had acted arbitrarily and illegally. The Aldermen allege, *inter alia:* (1) Upon substantial evidence the Board found that an additional filling station in the area would increase hazardous conditions already existing there; (2) the ordinance did not require it to refer Humble's request to the Planning Board before *denying* it; (3) Humble, "being the holder of options only," is not the proper party to apply for a special use permit; and (4) all the testimony at the hearing, including that presented by Humble, was unsupported in that "no sworn testimony was taken."

The Superior Court issued the writ of certiorari, and thereafter Judge McKinnon heard the matter upon "the records as described in the writ of certiorari, as certified by the town pursuant thereto," and the arguments and briefs of counsel. With one omission Judge McKinnon found facts as detailed above. He did not find that on 15 September 1971 Humble had exercised its option on the three lots upon condition that the application for the special use permit be granted. At that time this fact was not shown by the record before the court. Based upon those findings he concluded: (1) The special use permit provisions of the ordinance are not invalid; (2) the Board's finding that the granting of the requested special use permit would increase the danger to public safety in the area involved was supported by competent evidence; (3) the procedure followed by the Board of Aldermen and the denial of the special use permit without referring the matter to the Planning Board, was not arbitrary, capricious, or unreasonable; (4) the action of the Aldermen was discretionary, presumed to be legal, and Humble has the burden of proving it to have been otherwise; and (5) Humble has not shown that the action of the Board was arbitrary or capricious.

Upon the foregoing findings, Judge McKinnon entered judgment sustaining the action of the Aldermen in denying

the special use permit. From this judgment Humble appealed. The Court of Appeals affirmed it, and we allowed certiorari.

Newsom, Graham, Strayhorn, Hedrick, Murray & Bryson by K. Byron McCoy and Malvern F. King, Jr., for petitioner appellant.

Haywood, Denny & Miller for respondent appellees.

SHARP, Justice.

[1] The first question which Humble, the petitioner-appellant, discusses in its brief is whether it has standing to challenge the Board's denial of its application for the special use permit. This question was not raised at the joint hearing before the Aldermen and the Planning Board. However, in its answer to Humble's petition to the Superior Court for a writ of certiorari, after responding to the merits of each averment, the Aldermen alleged "that the petitioner is not the proper party to apply for a special use permit, it being the holder of options only. . . . " Notwithstanding, at the hearing before Judge McKinnon the Board did not make this contention; nor did it raise this point in the Court of Appeals. That court, however, *ex mero motu,* considered the question. Relying upon *Lee v. Board of Adjustment,* 226 N.C. 107, 37 S.E. 2d 128, 168 A.L.R. 1 (1946), it held that Humble lacked standing. Even so it passed upon the assignments of error and affirmed the action of the Board in refusing to issue the special permit.

At the time Humble petitioned this Court for certiorari to review the decision of the Court of Appeals it also filed a motion suggesting a diminution of the record. Accompanying this motion were documents showing, as set forth in our statement of the facts, that Humble had conditionally exercised each of its three options. The motion to make these documents a part of the record on appeal in this Court was allowed. The question which we consider, therefore, is whether an optionee who has exercised his option upon condition that he obtain a special use permit which will enable him to use the property for the purpose he seeks to acquire it has standing to apply for the permit.

The case of *Lee v. Board of Adjustment, supra,* is factually distinguishable and does not dictate the answer to the question now posed. *See MacPherson v. City of Asheville,* 283 N.C. 299, 308, 196 S.E. 2d 200, 206-207 (1973). The applicant in *Lee* was a mere optionee. Humble, having exercised its option condition-

ally, is a prospective vendee, bound to purchase if the special use permit it seeks be granted. Humble, therefore, is the real party in interest, the only one in position to furnish the plans, specifications, and other data which under ordinance requirements, must accompany any application for a special use permit. *See Burr v. City of Keene,* 105 N.H. 228, 196 A. 2d 63 (1963).

In *Arant v. Board of Adjustment,* 271 Ala. 600, 126 So. 2d 100, 89 A.L.R. 2d 652 (1961), the Supreme Court of Alabama held that the right of a conditional vendee (such as Humble) to apply for a variance permit is equivalent to that of the vendor were he the one who desired the variance; that such a prospective purchaser is the equitable owner of the property. To hold otherwise, the Alabama Court said, would make the right to apply for a variance or special permit "depend on the identity of the owner instead of the situation of the property and the facts and circumstances of the case." *Id.* at 604, 126 So. 2d at 104. Reason and the weight of authority support the rule that a prospective vendee under contract to purchase the property to be affected by the granting of a zoning variance or a special use permit is a proper party to apply therefor or to appeal a denial thereof, and the fact that he is bound to take the property only if a zoning variance or special use permit is granted does not deprive him of such standing. *See* Annot., 89 A.L.R. 2d 663, 669, 671.

We hold that Humble had standing to apply for the special use permit and to challenge the denial of its application for the permit. This holding is in accord with the rationale of our decision in *MacPherson v. City of Asheville, supra,* decided after the decision of the Court of Appeals in this case was filed.

Humble contends that the Aldermen's denial of its application for a special use permit was arbitrary and a denial of due process in that (1) the Aldermen denied the application without first referring it to the Planning Board for study and recommendation as required by the ordinance; and (2) the Aldermen's finding that the issuance of the permit would materially increase traffic hazards and danger to the public at this intersection was unsupported by competent evidence. Humble also contends that the ordinance provisions authorizing the issuance of special use permits are invalid for lack of adequate standards governing their issuance.

Ordinance Section 4-D-6A makes the issuance of special use permits for drive-in business the duty of the Aldermen.

Subsection a. of Section 4-C-1 authorizes the Aldermen to issue special use permits for the uses listed in Section 4-D "after joint hearing with the Town Planning Board and after Planning Board review and recommendations." Subsections b, c, and d set out the requirements for the application, provide for notice and a public hearing as in case of an amendment to the ordinance, specify certain dates during each year for such hearings, and declare that "all interested persons shall be permitted to testify" at the joint hearing before the Board and the Planning Board. Subsection e requires the Planning Board to submit its recommendation to the Board within 30 days after the joint meeting at which the application is heard. Subsection f directs the Board, *on receiving the Planning Board's recommendations,* "to consider the application and said recommendation *and either grant or deny* the Special Use Permit requested." (Emphasis added.)

If the Board grants the permit Section 4-C provides that it must find:

"(1) that the use will not materially endanger the public health or safety if located where proposed and developed according to the plan as submitted and approved.

"(2) that the use meets all required conditions and specifications.

"(3) that the use will not substantially injure the value of adjoining or abutting property, or that the use is a public necessity, and

"(4) that the location and character of the use if developed according to the plan as submitted and approved will be in harmony with the area in which it is to be located and in general conformity with the plan of development of Chapel Hill and its Environs."

Subsection h requires the Board, if it denies the permit, to enter the reasons for the denial in the minutes of the meeting at which the action was taken.

We consider first whether the Court of Appeals erred in holding that the Aldermen's *denial* of Humble's application obviated the ordinance requirement that the Aldermen refer the application to the Planning Board for review and recommendation before acting upon it. That Court ruled "that before the Board of Aldermen could *issue* a special use permit, the appli-

cation would have to go to the planning board for review and recommendations, but not where, as here, the Board of Aldermen *denies* the permit." With this interpretation of the ordinance we cannot agree.

[2] A special permit (like a special exception) is one issued for a use which the ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the ordinance exist. *In re Application of Ellis,* 277 N.C. 419, 178 S.E. 2d 77 (1970); 8 McQuillan, *Municipal Corporations* § 25.160 (3d ed., 1965); 101 C.J.S. *Zoning* § 271 (1958). It is granted or denied after compliance with the procedures prescribed in the ordinance. These include a duly advertised public hearing on the application before a joint meeting of the Aldermen and the Planning Board and the subsequent referral of the application to the Planning Board for its consideration and recommendations. The Aldermen may grant the application only by making the required findings, which must be supported by substantial evidence. If the application is denied, the reasons for the denial must be entered in the minutes of the meeting at which the action is taken.

That the Aldermen are to defer any action on the application for the permit until they have had the benefit of the Planning Board's investigation, consideration, and recommendation is clearly spelled out by the provision of subsection f (heretofore quoted) that on receiving the Planning Board's recommendation the Aldermen shall consider the application and recommendation and *either grant or deny* the special use permit. The obvious purpose of this provision is to insure that every application for a special use permit receives the same careful, impartial consideration. Thus, whether the application is to be allowed or denied, the Aldermen must "proceed under standards, rules, and regulations uniformly applicable to all who apply for permit." *See In re Application of Ellis, supra* at 425, 178 S.E. 2d at 81. This means that, in passing upon an application for a special permit, a board of aldermen may not violate at will the regulations it has established for its own procedure; it must comply with the provision of the applicable ordinance.

[3] The procedural rules of an administrative agency "are binding upon the agency which enacts them as well as upon the public. . . . To be valid the action of the agency must conform to its rules which are in effect at the time the action is taken, particularly those designed to provide procedural safeguards

for fundamental rights." 2 Am. Jur. 2d *Administrative Law* § 350 (1962). In no other way can an applicant be accorded due process and equal protection, or the Aldermen refute a charge that their denial of a permit constituted an arbitrary and unwarranted discrimination against a property owner. *See Keiger v. Board of Adjustment,* 281 N.C. 715, 720, 190 S.E. 2d 175, 179 (1972).

The failure of the Aldermen to comply with the terms of the ordinance requires that its denial of Humble's application for a special use permit be set aside and that the application be considered *de novo.* We deem it expedient, therefore, to consider Humble's contention that the finding upon which the permit was denied (that to issue it would materially increase the traffic hazard and danger to the public at this intersection) is arbitrary in that it is unsupported by competent, material, and substantial evidence.

When an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it. A denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record. *See Jackson v. Board of Adjustment,* 275 N.C. 155, 166 S.E. 2d 78 (1969); *Utilities Commission v. Tank Line,* 259 N.C. 363, 130 S.E. 2d 663 (1963). In no other way can the reviewing court determine whether the application has been decided upon the evidence and the law or upon arbitrary or extra legal considerations.

If there be facts within the special knowledge of the members of a Board of Aldermen or acquired by their personal inspection of the premises, they are properly considered. However, they must be revealed at the public hearing and made a part of the record so that the applicant will have an opportunity to meet them by evidence or argument and the reviewing court may judge their competency and materiality. *Hyman v. Coe,* 102 F. Supp. 254 (D.D.C. 1952); *Goldstein v. Zoning Board of Review of City of Warwick,* 101 R.I. 728, 227 A. 2d 195 (1967); 2 Rathkopf, *The Law of Zoning and Planning,* Ch. 64 (3d ed., 1972); 2 Yokley, *Zoning Law and Practice* § 15-17 (3d ed., 1965); Application of Imperial Asphalt Corporation, 359 Pa. 402, 59 A. 2d 121 (1948).

[4] On the present record it appears probable that the Aldermen based their finding that Humble's proposed use of the lots in question would materially increase the traffic hazard and endanger the public safety at this intersection upon the following testimony:

Mr. Creech "felt some trees would be destroyed." Two persons thought there were too many service stations in this area already. One alderman wanted to wait until the completion of "a service station survey in progress." Mrs. Perry objected "because of the church across the intersection and the traffic problems." Mrs. Weaver opposed it. Alderman Smith said the intersection had been dangerous for twenty-eight years and the State Highway Commission had approved the placement of a signal not yet installed. The Reverend Manly said, "Some citizens opposed it and it would be a traffic problem until a traffic light is installed at this intersection." (Respondent appellee's brief advises us that since the denial of Humble's application eleven traffic control signals have been installed in the area.)

The foregoing statements, which are conclusions unsupported by factual data or background, are incompetent and insufficient to support the Aldermen's findings. Evidence that another filling station in this area would increase the hazards at intersections affected appears to be totally lacking. That another filling station in the area might disperse the business and thus the traffic is a reasonable assumption, but it is not at all certain that it will increase traffic or make a dangerous intersection more dangerous. An increase in traffic does not necessarily mean an intensification of traffic congestion or a traffic hazard. *Thomson Methodist Church v. Zoning Board of Review*, 99 R.I. 675, 210 A. 2d 138 (1965).

[5] When a board of aldermen, a city council, or zoning board hears evidence to determine the existence of facts and conditions upon which the ordinance expressly authorizes it to issue a special use permit, it acts in a quasi-judicial capacity. Its findings of fact and decisions based thereon are final, subject to the right of the courts to review the record for errors in law and to give relief against its orders which are arbitrary, oppressive or attended with manifest abuse of authority. *Lee v. Board of Adjustment*, 226 N.C. 107, 37 S.E. 2d 128, 168 A.L.R. 1 (1946); *In re Pine Hill Cemeteries, Inc.*, 219 N.C. 735, 15 S.E. 2d 1 (1941).

At the time this proceeding was brought in the Superior Court judicial review of orders of zoning boards of adjustment by proceedings in the nature of certiorari was authorized by G.S. 160-178 (now G.S. 160 A-388 (1972)). In *Jarrell v. Board of Adjustment*, 258 N.C. 476, 480, 128 S.E. 2d 879, 883 (1963), this Court held that such review is adequate only "if the scope of review is equal to that under G.S. Chapter 143, Article 33, 143-306 *et seq.*" Thus the general administrative agencies review statutes were made applicable to municipal agencies. *See* Hanft, *Some Aspects of Evidence in Adjudications by Administrative Agencies in North Carolina*, 49 N.C.L. Rev. 635 (1971).

Since boards of aldermen and city councils are generally composed of laymen who do not always have the benefit of legal advice, they cannot reasonably be held to the standards required of judicial bodies. For that reason N. C. Gen. Stats., Ch. 143, Art. 33A (G.S. 143-317, 318 (Supp. 1971)), which requires that the rules of evidence as applied in the General Court of Justice shall be followed in proceedings before State agencies (with noted exceptions), was not made applicable to county and municipal agencies. We construe a State administrative agency, as that term is used in Art. 33A, to mean an authority, board, bureau, commission, committee, department, or officer whose jurisdiction is statewide.

[6] Notwithstanding the latitude allowed municipal boards, as Justice Bobbitt (now Chief Justice) pointed out in *Jarrell*, a zoning board of adjustment, or a board of aldermen conducting a quasi-judicial hearing, can dispense with no essential element of a fair trial: (1) The party whose rights are being determined must be given the opportunity to offer evidence, cross-examine adverse witnesses, inspect documents, and offer evidence in explanation and rebuttal; (2) absent stipulations or waiver such a board may not base findings as to the existence or nonexistence of crucial facts upon unsworn statements *(see Craver v. Board of Adjustment*, 267 N.C. 40, 147 S.E. 2d 599 (1966)); and (3) crucial findings of fact which are "unsupported by competent, material and substantial evidence in view of the entire record as submitted" cannot stand.

As noted by Professor Hanft in his very valuable article in 49 N.C.L. Rev. 635, 667, this Court has not indicated any test for substantial evidence; nor are we yet ready to attempt one. Instead we repeat the "realistic statement by the Supreme Court," quoted in the article: " 'Substantial evidence is more

than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' It 'must do more than create the suspicion of the existence of the fact to be established. . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' " *Id.* at p. 667. The quoted words are those of Mr. Chief Justice Hughes in *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938), and of Mr. Justice Stone in *NLRB v. Columbian Enameling & Stamping Co.,* 306 U.S. 292, 300 (1939).

[7] Humble's third contention, that the provisions of Ordinance Section 4-C 1 f(1)-(4) (the special use provisions, heretofore quoted in full) are void for lack of adequate guiding standards, was not raised in its petition for certiorari directed to the Superior Court. Notwithstanding, that court decreed that the special use provisions of the ordinance "are not invalid," and the Court of Appeals affirmed the Superior Court. We agree with these rulings.

Some of the ordinance requirements for a special use permit are specific; others, not susceptible of exact definition, are necessarily stated in general terms. In our view the ordinance achieves reasonable specificity. Safeguards against arbitrary action by zoning boards in granting or denying special use permits are not only to be found in specific guidelines for their action. Equally important is the requirement that in each instance the board (1) follow the procedures specified in the ordinance; (2) conduct its hearings in accordance with fair-trial standards; (3) base its findings of fact only upon competent, material, and substantial evidence; and (4) in allowing or denying the application, it state the basic facts on which it relied with sufficient specificity to inform the parties, as well as the court, what induced its decision.

The decision of the Court of Appeals is reversed, and this cause is returned with direction that it be remanded to the Superior Court of Orange County for entry of a judgment (1) vacating the findings of fact and order of the Board of Aldermen of Chapel Hill from which Humble appeals; and (2) directing the Board of Aldermen to consider Humble's application *de novo* in accordance with the procedures specified in the ordinance and the principles set forth in this opinion.

Reversed.

STATE OF NORTH CAROLINA v. GOLDEN A. FRINKS

No. 84

(Filed 25 January 1974)

1. **Statutes § 4— construction — constitutional and unconstitutional interpretations**

Where a statute or ordinance is susceptible of two interpretations, one constitutional and one unconstitutional, the courts should adopt the interpretation resulting in a finding of constitutionality.

2. **Constitutional Law § 18— parading without permit — city ordinance — definite criteria — construction by court**

A city ordinance prohibiting a parade upon city streets without obtaining a permit is construed (1) to mean that a permit may be denied by the city manager and city council only when the proposed parade, due to the time for which it is scheduled, its intended route or the proposed manner of its execution, irreconcilably conflicts with public safety and convenience and (2) to require that in passing upon such considerations, a systematic, consistent and just procedure be adopted by city officials to insure that administrative action is free from improper or inappropriate consideration; when so construed, the ordinance contains sufficiently definite, objective criteria to guide the licensing authority in issuing or refusing to issue parade permits. First Amendment to U. S. Constitution; Art. I, § 12 and Art. I, § 14 of the N. C. Constitution.

3. **Constitutional Law § 18— parading without permit — city ordinance — burden of proof on appeal of permit denial — First Amendment**

A city ordinance requiring a permit for a parade upon city streets did not impermissibly burden defendant's First Amendment rights by providing that in case of an appeal to the city council from a permit denial by the city manager "the applicant shall have the burden of proof of showing that the proposed parade will not be contrary to the health, welfare, safety and morals of the city."

4. **Constitutional Law § 18— permit for parade — denial by city manager — appeal to city council — action within reasonable time**

A city ordinance requiring a permit for a parade upon city streets is not unconstitutional on the ground that it fails to insure a prompt review by the city council of a permit denial by the city manager since (1) the ordinance does not involve First Amendment rights and (2) it is inferred that the ordinance requires the city council to act within a reasonable time upon an appeal from the city manager.

APPEAL by defendant from *James, J.*, at the 5 February 1973 Session of WILSON Superior Court.

On 30 November 1972, at approximately 9:00 p.m., defendant was arrested in the City of Wilson for participating in a parade without a permit in violation of Article VII, Sections 30-141 and 30-142 of the Wilson City Code.

Article VII of the Wilson City Code provides:

"WILSON CITY CODE, ARTICLE VII

TRAFFIC

Article VII. Parades and Processions

Sec. 30-140. Definition

The term 'parade' as used in this article is defined as an assemblage of more than five (5) vehicles or twenty (20) pedestrians in a public procession along the streets and/or sidewalks of the city, but shall not include funeral processions or sightseeing groups or bands or marching groups proceeding to a point of assembly to participate in a parade. (Ord. No. 0-29-68 Sec. 13.108 11-14-68)

Sec. 30-141. Conformance to article provisions.

It shall be unlawful for any person to initiate, promote or participate in any parade over the streets and/or sidewalks of the city except in conformance with the provisions of this article. (Ord. No. 0-29-68, Sec. 13.109, 11-14-68)

Sec. 30-142. Permit required.

It shall be unlawful for any person to initiate, promote or participate in any parade within the city until a permit therefor has first been secured. (Ord. No. 0-29-68, Sec. 13.110, 11-14-68)

Sec. 30-143. Application for permit.

Parade permits may be obtained from the city manager upon application made in writing at least seventy-two (72) hours before the date on which the parade is to be held, upon application forms furnished by the city manager. (Ord. No. 0-29-68, Sec. 13.110, 11-14-68)

Sec. 30-144. Conditions of issuance.

The city manager shall issue parade permits unless he finds as a fact that the proposed parade will be contrary to the health, welfare, safety, and morals of the city. (Ord. No. 0-29-68, Sec. 13.111, 11-14-68)

Sec. 30-145. Denials; public hearing.

In the event an application for a parade permit is denied by the city manager, the applicant may apply to the city council for a hearing concerning the same.

At such hearing the applicant shall have the burden of proof of showing that the proposed parade will not be contrary to the health, welfare, safety and morals of the city. The city manager shall be heard in rebuttal to the granting of the application.

If, after hearing the applicant and the city manager, the city council shall find as a fact that the proposed parade will not be contrary to the health, welfare, safety and morals of the city, the application shall be granted by the city council. Otherwise the action of the city manager in denying the application shall stand. (Ord. No. 0-29-68, Sec. 13.112, 11-14-68)

Sec. 30-146. Compliance with provisions.

All parade permits shall be issued subject to the parade being held in conformity with all applicable provisions of this Code, state law and city ordinances, rules and regulations. Notwithstanding that a permit for the same has been issued by the city manager or the city council, the chief of police is hereby authorized, empowered and instructed to stop and disburse any parade conducted in violation of such provisions. (Ord. No. 0-29-68, Sec. 13.113, 11-14-68)

Sec. 30-147. Hours permitted.

No parades, or parts thereof, may be upon the streets or sidewalks of the city between the hours of 5:00 o'clock p.m. and 7:00 o'clock p.m.; provided, however, that upon application and a finding as a fact that to permit a proposed parade to be held upon the streets or sidewalks of the city during said hours will best serve the interest of the general public and will not be contrary to the health, welfare, safety and morals of the city, the city council may issue a permit for a parade to be held during such hours. (Ord. No. 0-29-68, Sec. 13.114, 11-14-68)

Sec. 30-148. Maximum number per day.

Not more than one parade may be conducted during any one calendar day, except Saturday. (Ord. No. 0-29-68, Sec. 13.115, 11-14-68)

Sec. 30-149. Routes, schedules.

Parade routes and schedules must be approved by the city manager or the city council before a permit for the same is granted. (Ord. No. 0-29-68, Sec. 13.116, 11-14-68)

Sec. 30-150. Number of units restricted.

Parades may not consist of more than seventy-five (75) motor vehicles but there shall be no limit on the number of bands or pedestrians participating therein. (Ord. No. 0-29-68, Sec. 13.117, 11-14-68)

Sec. 30-151. Distribution of materials.

It shall be unlawful for anyone riding in a parade to distribute from the vehicle upon which he is riding any handbills, advertising matter, candy, cigarettes, prizes or favors of any kind. (Ord. No. 0-29-68, Sec. 13.118, 11-14-68)

Sec. 30-152. Regulation of parking.

The chief of police, when expressly authorized and directed by the city manager or the city council, shall have the authority and duty to prohibit or restrict parking of vehicles along those parts of the streets of the city constituting a part of the route of a parade, or at the point of assembly or dispersal of a parade, for a period of from three (3) hours before its commencement to one hour after its dispersal. The chief of police shall post signs to such effect and it shall be unlawful for any person to park or leave unattended any vehicle in violation thereof. No person shall be liable for parking on a street unposted in violation of this section. (Ord. No. 0-29-68, Sec. 13.119, 11-14-68)

Sec. 30-153. Driving through funeral processions.

No vehicle shall be driven through a funeral procession, except fire department vehicles, police patrols and ambulances when the same are responding to calls. (Code 1952, Sec. 13.33)

Defendant was tried in Wilson County District Court on 12 December 1972 and found guilty. Judgment was entered sentencing him to imprisonment for a term of 30 days in the Wilson County Jail.

Defendant appealed to the Superior Court of Wilson County. Upon the call of the case in Wilson County Superior Court, and

prior to commencement of the trial, defendant moved to quash the warrant on the grounds that (1) it failed to allege a crime and (2) the City Ordinance was unconstitutional. The Motion was denied.

The State's evidence as reflected in the record of defendant's trial in Wilson Superior Court tends to show the following:

On 15 September 1972, defendant applied to the Wilson City Manager for a permit for a parade to be held on 17 September 1972. This permit was granted, and the parade was held on that date.

Defendant again applied to the City Manager on 12 October 1972 for a permit for a parade to be held on 15 October 1972. That application was denied. This decision was appealed to the City Council on 13 October 1972. On the same day, the City Council conducted a hearing and after finding as a fact that the proposed parade constituted a threat to the public safety and to the safety of the participants in the march, upheld the decision of the City Manager. However, the City Council proposed, as an alternative to the denied application, a parade over a different route, and offered to waive the provision in the City Ordinance requiring that application for a parade permit be made seventy-two hours prior to the date of the proposed parade. No application for a permit over the alternative route was made and no parade was conducted over either route.

On 30 November 1972, in response to a call, Robert Johnston, a police officer for the City of Wilson, went to the Atlantic Coastline Railroad Station located within the City of Wilson. There he observed defendant and approximately one hundred other people on and within the curbs of East Nash Street. Defendant was observed in the middle of the front row of the group of people with his arms linked to others in that row. Officer Johnston saw the group travel approximately fifty to seventy-five feet down the street. At that time, he advised defendant that he was under arrest. He also advised the other members of the group that they were violating the law, but if they would not participate further in the parade, they would not be arrested. However, approximately one hundred members of the group refused to dissipate and were also arrested.

Mr. J. T. Smith, a detective with the City of Wilson Police Department, was also present at the time of the arrests. He ob-

served a group of approximately one hundred people crossing the railroad tracks on Nash Street. The people were arrayed from curb to curb and completely blocked the street. He observed defendant in approximately the middle of the street.

At the time of defendant's arrest, Bruce T. Boyette was the City Manager for the City of Wilson. He testified that neither defendant nor any other person made an application for a parade permit for that area of the city for that date.

Defendant moved to dismiss at the close of the State's evidence. The motion was denied. Defendant offered no evidence and renewed his Motion to Dismiss which was again denied.

Defendant was found guilty of the charge of parading without a permit, and judgment was entered sentencing him to imprisonment for a term of thirty days in the Wilson County Jail.

Defendant appealed to the North Carolina Court of Appeals. The Court of Appeals found no error in the trial below. *State v. Frinks*, 19 N.C. App. 271, 198 S.E. 2d 570. Defendant appealed to this Court pursuant to G.S. 7A-30(1).

Attorney General Robert Morgan by E. Thomas Maddox, Jr., Associate Attorney, for the State.

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

BRANCH, Justice.

Defendant contends that Article VII of the Wilson City Code is a nullity because it contravenes his individual rights of assembly, petition and freedom of speech as guaranteed by the First Amendment to the Constitution of the United States and by Article I, Sec. 12 and Article I, Sec. 14 of the North Carolina Constitution and, therefore, the warrant charging him with the violation of that Article of the City Code should have been quashed.

He offers a three-pronged argument to support this contention.

[2] His first and principal argument is that Article VII of the Wilson City Code fails to contain definite, objective criteria to guide the licensing authority in issuing or refusing to issue parade permits.

[1] At the threshold of our consideration of the questions here presented, we note the well-recognized rule that where a statute or ordinance is susceptible of two interpretations, one constitutional and one unconstitutional, the courts should adopt the interpretation resulting in a finding of constitutionality. *City of Randleman v. Hinshaw,* 267 N.C. 136, 147 S.E. 2d 902; *Finance Co. v. Leonard,* 263 N.C. 167, 139 S.E. 2d 356; and *Nesbitt v. Gill,* 227 N.C. 174, 41 S.E. 2d 646.

We think that the law pertinent to decision of the question presented by defendant's first argument is stated in the cases of *Cox v. New Hampshire,* 312 U.S. 569, 85 L.Ed. 1049, decided 31 March 1941 and *Shuttlesworth v. Birmingham,* 394 U.S. 147, 22 L.Ed. 2d 162, decided 10 March 1969.

In *Cox v. New Hampshire, supra,* the defendants were five Jehovah's Witnesses who were convicted in the Municipal Court of Manchester, New Hampshire, for violation of a state statute prohibiting a parade without a special license.

The statute was silent as to the criteria governing the granting of permits, stating only:

> "Any city may create a licensing board to consist of the person who is the active head of the police department, the mayor of such city and one other person who shall be appointed by the city government, which board shall have delegated powers to investigate and decide the question of granting licenses under this chapter, and it may grant revocable blanket licenses to fraternal and other like organizations, to theatres and to undertakers." New Hampshire, P. L. Chap. 145, § 3.

Upon defendants' appeal to the New Hampshire Supreme Court, that court in refusing to overturn defendants' conviction, construed the challenged ordinance to mandate a systematic, consistent and just manner of treatment with reference to the convenience of the public use of highways and to require the licensing board to exercise its discretion in granting or denying permits in a uniform and reasonable manner, free from improper considerations or unfair discrimination. The defendants appealed to the United States Supreme Court. In affirming the decision of the New Hampshire Supreme Court, Chief Justice Hughes, speaking for the Court, in part, stated:

> "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining

public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. . . ."

* * *

" . . . As regulation of the use of the streets for parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places. *Lovell v. Griffin,* 303 US 444, 451, 82 L ed 949, 953, 58 S Ct 666; *Hague v. Committee for Industrial Organization,* 307 US 496, 515, 516, 83 L ed 1423, 1436, 1437, 59 S Ct 954; *Schneider v. Irvington,* 308 US 147, 160, 84 L ed 155, 164, 60 S Ct 146; *Cantwell v. Connecticut,* 310 US 296, 306, 307, 84 L ed 1213, 1219, 1220, 60 S Ct 900, 128 ALR 1352."

Chief Justice Hughes then acknowledged the aid given to the U. S. Supreme Court by the construction of the statute by the New Hampshire Court and referring to that Court's construction of the statute, stated:

". . . the state court considered and defined the duty of the licensing authority and the rights of the appellants to a license for their parade, with regard only to considerations of *time, place* and *manner so as to conserve the public convenience.* The obvious advantage of requiring application for a permit was noted as giving the public authorities notice in advance so as to afford opportunity for proper policing. And the court further observed that, in fixing time and place, the license served 'to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to minimize the risk of disorder. . . .' " (Emphasis added.)

The constitutionality of a city ordinance regulating the issuance of permits for a parade upon city streets was again considered by the United States Supreme Court in the case of

Shuttlesworth v. Birmingham, supra. There, Shuttlesworth was convicted of violating a Birmingham, Alabama, ordinance making it an offense to participate in any " 'parade or procession or other public demonstration' without first obtaining a permit from the City Commission." The Birmingham ordinance, in part, provided:

> "The commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused."

The ordinance also required that the purpose for which the parade was to be held be set out in the written application.

More than a week before the proposed march, Shuttlesworth sent a representative to apply for a parade permit. Commissioner Connor denied the representative's request telling her, "No, you will not get a permit in Birmingham, Alabama, to picket. I will picket you over to the City Jail." Two days later, Shuttlesworth requested by telegraph a permit to picket, to which Commissioner Connor replied, "I insist that you and your people do not start any picketing on the streets in Birmingham, Alabama." Despite the denial of a permit, Shuttlesworth led a group of 52 people, two abreast in orderly fashion, some four blocks on a Birmingham street. The marchers did not interfere with pedestrians or block public streets. Shuttlesworth was arrested and upon trial was convicted of violating this ordinance.

The Alabama Court of Appeals reversed Shuttlesworth's conviction, holding that the ordinance had been applied in a discriminatory fashion, and was unconstitutional in that it imposed an "invidious prior restraint" without providing ascertainable standards for the granting of permits. *Shuttlesworth v. Birmingham,* 43 Ala. App. 68, 180 So. 2d 114.

The Alabama Supreme Court construed the ordinance to authorize "no more than the objective and even-handed regulation of traffic on Birmingham streets" and reversed the Court of Appeals. *Shuttlesworth v. Birmingham,* 281 Ala. 542, 206 So. 2d 348.

The United States Supreme Court granted certiorari. The Court held the ordinance as written and applied to be unconstitutional and reversed the Alabama Supreme Court.

In *Shuttlesworth,* the Supreme Court recognized the same pertinent principles of law enunciated in *Cox,* but refused to affirm Shuttlesworth's conviction under the state court's interpretation of the ordinance. The *Shuttlesworth* decision, however, did *not* reverse, but distinguished *Cox.* In so doing the Court, after reviewing the relevant circumstances of the case before it *inter alia,* stated:

". . . The petitioner was clearly given to understand that under no circumstances would he and his group be permitted to demonstrate in Birmingham, not that a demonstration would be approved if a time and place were selected that would minimize traffic problems. There is no indication whatever that the authorities considered themselves obligated—as the Alabama Supreme Court more than four years later said that they were—to issue a permit 'if, after an investigation [they] found that the convenience of the public in the use of the streets or sidewalks would not thereby be unduly disturbed.'

"This case, therefore, is a far cry from *Cox v. New Hampshire, supra,* where it could be said that there was nothing to show 'that the statute has been administered otherwise than in the . . . manner which the state court has construed it to require.' Here, by contrast, it is evident that the ordinance was administered so as, in the words of Chief Justice Hughes, 'to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought . . . immemorially associated with resort to public places.' . . ."

Here the ordinance under attack is codified under the general heading of Traffic, and its language is directed to the *time, place* and *manner* of parades. It imposes no restraint upon speech concerning political matters or matters of public concern. Neither does it contain any inkling of discrmination against defendant or his associates.

The only provision possibly restrictive of expression precludes *distribution* of materials while *riding* in a parade. The enforcement of this provision of the ordinance might have an indirect effect on speech. However, this indirect effect is not fatal to the validity of the ordinance. The United States Supreme Court has held that when "speech" and "non-speech" elements are combined in the same course of conduct, a sufficiently important

governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. *United States v. O'Brien,* 391 U.S. 367, 20 L.Ed. 2d 672. There is an easily recognized relation to public health and safety in this portion of the ordinance since the distribution of materials would naturally result in (1) pedestrians, particularly children, crowding the streets in close proximity to moving vehicles, (2) an accumulation of trash and litter in the streets.

The regulation of the streets for the safety, comfort and convenience of the general public by this portion of the ordinance is such regulation as would justify an incidental limitation of constitutional rights.

We find that *Cox* controls the question under consideration. In *Cox,* the Supreme Court approved an ordinance which was completely void of criteria for issuing or denying a permit. The surrounding relevant circumstances in *Cox* and in instant case disclose a fair, non-discriminatory administration of the ordinance which did not contravene the rights of assembly or communication of thought. The only apparent distinction between the two cases is that the ordinance in the present case contained the broad language "health, welfare, safety and morals," while the ordinance in *Cox* was without criteria to guide the local authorities in issuing or rejecting permits.

We recognize that the courts have condemned the use of the broad terms used in instant ordinance as a prior restraint on constitutional rights. *Staub v. City of Baxley,* 355 U.S. 313, 2 L.Ed. 2d 302; *Shuttlesworth v. Birmingham, supra.* Yet, we cannot perceive how the use of these broad terms in the Wilson ordinance would create a more invidious restraint upon First Amendment freedoms than the ordinance in *Cox* which was devoid of guiding criteria.

Our Court of Appeals construed the ordinance to mean, "that the city manager and city council may only deny a permit when the proposed parade, due to the *time* for which it is scheduled, its intended *route,* or the proposed *manner* of execution, irreconcilably conflicts with public safety and convenience." Moreover, in the view of the Court of Appeals, "the ordinance required that in passing on the above considerations, a *systematic, consistent* and *just* procedure be adopted by city officials to insure that administrative action is free from improper or inappropriate consideration." (Emphasis added.)

It is implicit in the holdings in *Cox* and *Shuttlesworth* that the construction of the challenged ordinance by the New Hampshire Court related back to the time of its passage. Thus, if the Court of Appeals correctly construed the Wilson ordinance, the language adopted in its construction has the same effect as if originally set forth in the ordinance.

We approve and adopt the construction of the Wilson ordinance by our Court of Appeals.

[2] We therefore hold that, as construed by our Court of Appeals and this Court, Article VII of the Wilson City code contains sufficiently definite, objective criteria to guide the licensing authority in issuing or refusing to issue parade permits.

[3] Defendant next argues that Article VII of the Wilson City Code impermissibly burdens his First Amendment rights by requiring that in case of an appeal to the City Council from denial of a permit, "the applicant shall have the burden of proof of showing that the proposed parade will not be contrary to the health, welfare, safety and morals of the city." In support of this contention, defendant cites *Freedman v. Maryland,* 380 U.S. 51, 13 L.Ed. 2d 649 and *Speiser v. Randall,* 357 U.S. 513, 2 L.Ed. 2d 1460.

In *Freedman,* the Court held that a Maryland motion-picture censorship statute making it unlawful to exhibit a motion picture without having first obtained a license was unconstitutional. The Court held that the statute violated the guaranty of freedom of expression, among other reasons, because upon the censor's disapproval the exhibitor was forced to assume the burden of instituting *judicial* proceedings and of persuading the court that the film was *protected expression.*

In *Speiser,* appellants were veterans who claimed the veteran's property tax exemption provided for by the California Constitution. The California legislature enacted a statute requiring an applicant for the tax exemption to complete a loyalty oath as a condition for his application. Appellants refused to sign such an oath and were denied the tax exemption. The Court held that when the constitutional right to speech is sought to be deterred by a State's general taxing power, due process demands that speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition.

The case before us is clearly distinguishable from *Freedman* and *Speiser.* In both *Freedman* and *Speiser,* the Legislature

purported to directly restrict First Amendment rights. Here, under our construction of Article VII of the Wilson City Code, there is no intent to curb First Amendment rights. In *Speiser* and *Freedman,* the ordinances there considered did not purport to regulate the streets for the safety, comfort or convenience of the general public. In this case, the ordinance under attack is a traffic ordinance which requires a systematic, competent non-discrminatory administration of its provisions.

The State has the power to regulate procedures under which its laws are to be carried out, including placing the burden of producing evidence and the burden of persuasion, unless in so doing it offends some principle of justice deeply rooted in the traditions and conscience of our people. *Snyder v. Massachusetts,* 291 U.S. 97, 78 L.Ed. 674. Defendant Frinks was not required to state the purpose of his parade. He was not required to convince the City Council that his proposed parade constituted protected expression. Rather, the sole issue upon which he had the burden of proof is whether the proposed parade would interfere with traffic, public safety, and the public convenience.

We, therefore, hold that the ordinance does not place an impermissible burden on defendant to justify the exercise of his First Amendment freedoms.

[4] Finally, defendant attacks the ordinance on the ground that it fails to insure a prompt review in the event the City Manager should deny an application for a parade permit. Defendant cites and relies upon *Freedman v. Maryland, supra,* and *Shuttlesworth v. Birmingham, supra,* for the proposition that there must be provision for prompt review of any denial of permits or licenses involving an applicant's First Amendment rights. The holdings in these cases are bottomed on First Amendment rights. The Wilson Ordinance, as we have construed it, does not violate an applicant's First Amendment rights. Thus the recognition by *Freedman* and *Shuttlesworth* of extraordinary urgency for prompt review of questions involving the First Amendment guarantees does not exist in this case.

Moreover, it should be borne in mind that in construing this ordinance we may draw reasonable inferences and consider proper implications to the end that the ordinance may be declared valid. In so doing, we are guided by the rule that when a duty is imposed upon a public agency there arises, of necessity, an implication that adequate power is bestowed upon the agency

to perform the duty in accord with the federal and state constitutions. *Hill v. Lenoir County,* 176 N.C. 572, 97 S.E. 498; *Lowery v. School Trustees,* 140 N.C. 33, 52 S.E. 267.

We consider it proper to infer that when there is an appeal from the decision of the City Manager, the provisions of the ordinance under consideration require the City Council, within a reasonable time, to conduct a hearing, review the decision of the City Manager, and uphold or reverse such decision.

The inferences and implications which we draw from the language of this ordinance are buttressed by the action of the Wilson City Council in hearing and ruling on the denial of an earlier application for a parade permit on the same day defendant requested a hearing.

There is ample provision for review by the City Council within a reasonable time and thereafter an applicant for a parade permit has ready access to the North Carolina General Court of Justice through regular and recognized procedures.

The local government's control of its streets pursuant to the provisions of Article VII was not exercised so as to deny or unreasonably abridge defendant's First Amendment freedoms.

We hold the ordinance to be valid under both the Federal and the North Carolina Constitutions.

The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. WILLIAM HOBERT MOORE

No. 97

(Filed 25 January 1974)

1. Criminal Law § 75— voluntariness of confession

Defendant's confession in a first degree murder and armed robbery case was properly admitted where evidence on *voir dire* disclosed that proper cautions and warnings were given defendant by an agent of the Naval Investigation Service and by an SBI agent, defendant signed a written acknowledgment of the warnings and the waiver of counsel, and he consented to the interrogation.

2. **Homicide §§ 12, 25— first degree murder — murder in perpetration of robbery — no variance in indictment and proof — instructions proper**

Where the indictment charged that defendant murdered his victim after premeditation and deliberation, the trial court did not err in charging the jury that it might convict the defendant of murder in the first degree upon a finding beyond a reasonable doubt either that the defendant killed deceased after premeditation and deliberation or in the perpetration of armed robbery, since an indictment drawn under G.S. 15-144 will support a verdict of murder in the first degree without any further allegation of premeditation and deliberation or in the perpetration or attempt to perpetrate a felony.

3. **Criminal Law § 26; Homicide § 31— murder in perpetration of robbery — separate conviction for robbery — error**

Where the trial court in a first degree murder and armed robbery prosecution charged that a verdict of murder in the first degree could be rendered upon a finding beyond a reasonable doubt that the killing was done in the perpetration or in the attempt to perpetrate a robbery, the robbery in this case was merged in and became a part of the first degree murder charge; therefore, conviction and sentence on the armed robbery charge was error, the verdict is set aside, and judgment is vacated.

APPEAL by defendant from *Thornburg, J.*, June 25, 1973 Session, CARTERET Superior Court.

In these criminal prosecutions the defendant, William Hobert Moore, was brought to trial on two grand jury indictments. In Case No. 73CR154 the bill charged:

"THE JURORS FOR THE STATE UPON THEIR OATH, PRESENT, That William Hobert Moore late of the County of Carteret on the 1st day of January 1973 with force and arms, at and in the county aforesaid, unlawfully, wilfully, feloniously and of his malice aforethought did kill and murder William J. Casey with premeditation and deliberation against the form of the statute in such case made and provided and against the peace and dignity of the State.

s/ SAM J. WHITEHURST, JR.
Ass't Solicitor"

In Case No. 73CR155 the bill charged:

"THE GRAND JURORS FOR THE STATE UPON THEIR OATH PRESENT, That William Hobert Moore late of the County of Carteret on the 1 day of January 1973, with force and arms, at and in the county aforesaid, unlawfully, wilfully, and feloniously, having in ..... possession and with the use

and threatened use of firearms, and other dangerous weapons, implements, and means, to wit: a .38 Caliber Revolver whereby the life of Cpl. William J. Casey was endangered and threatened, did then and there unlawfully, wilfully, forcibly, violently and feloniously take, steal, and carry away one Seiko wrist watch, one silver colored ring, one cig. lighter, one wallet; $20.00 in currency and one 1965 Chev. Impala conv. motor vehicle of the value of excess of $200.00 from the presence, person, place of business, and residence of Cpl. William J. Casey contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

s/ ELI BLOOM
Solicitor"

On the State's motion, the charges were consolidated for trial.

The State's evidence in summary discloses: That about 9 o'clock on the morning of January 1, 1973, Willie Stallings discovered the dead body of William J. Casey lying in the front seat of a junked automobile in the Parrish Junk Yard near Newport in Carteret County. A pathological examination of the body disclosed two bullet wounds in the back of the head and neck. One of the bullets had passed through the muscles of the neck. The other had ranged downward through the lungs and heart and had caused almost instantaneous death.

Curtis James Riggles testified that he and the defendant, William Hobert Moore, were fellow Marine Corps members. They were together on December 31, 1972, celebrating New Year's Eve. They attended numerous parties and did much drinking. As they were riding in Riggles' automobile, the automobile became disabled, or stuck in the mud, and both left on foot. As Riggles and the defendant were walking towards the Marine Base, the deceased, William J. Casey, in his automobile, picked them up. The three stopped at a bar, did some drinking, and then left. " . . . Bill Moore [the defendant] slipped me a pistol and I pulled the pistol on Casey right in one of the trailer parks. Then I got in the back seat and Bill [the defendant] got up and drove the car to a junk yard in Newport. . . . Just as soon as we reached the junk yard Bill [the defendant] took his [Casey's] watch and wallet. . . . Bill Moore asked me for the pistol and I gave it to him and he told me to wait in the car

while he went and tied Mr. Casey up. . . . About a half hour later Bill came back and said that he had shot Mr. Casey. . . . [H]e said he had shot Casey twice. . . . When we got back to the base we went to Bill Moore's barracks, No. 216. Moore laid all the stuff he had gotten on the table. There was a watch, a ring, a twenty dollar bill, wallet, two ID cards, a set of keys and four empty cartridges."

On cross-examination Riggles testified: "When the car stopped I pulled this .38 caliber gun on Casey and put it right against his head and Bill took his wallet and his watch while I had the gun on him."

On further examination the witness admitted he was under indictment for participating in the murder and the robbery and that his lawyer had advised him it would be better for him to testify for the State and he agreed to testify for the State.

The prosecution informed the court that the State desired to offer the defendant's confession made to the Naval Investigative Service and to the agents of the State Bureau of Investigation. The court excused the jury and conducted a voir dire to determine the competency of the confession.

Henry Poole, an agent of the State Bureau of Investigation, testified that he participated in the interrogation of the defendant at the office of Agent Brock of the Naval Investigative Service at Cherry Point on January 2, 1973. Before the interrogation began, Agent Brock gave the defendant the warnings and cautions according to the use and custom in court-martial proceedings. These were somewhat different in form from the warnings and cautions given in State criminal investigations. Agent Poole, thereafter, gave the warnings according to the State rules, reading from a printed card. The defendant signed a written acknowledgment of the warnings and the waiver of counsel and consented to the interrogation. The defendant wrote and signed a statement which contained this recital:

> " . . . On the way back I was sitting in the back. Riggles was in the front. Riggles pulled the keys out of the car and pulled the gun. I told the driver [Casey] to scoot over, and he did. I started driving. Riggles got in the back seat. I drove back to this same junk yard and told this guy [Casey] to get in the front seat of the junk car on his stomach. Then I shot him twice in the back of the head. I left in the man's car that I shot. It was an old Chevy. I

don't know what year it was. I can't remember. Riggles was with me all this time. The car ran hot. We left it at a stop light. We started back to Base. We got back to the barracks. I took $20.00 from his wallet and I told Riggles to flush it down the toilet and he did."

Agent Brock testified for the State on the voir dire, corroborating the testimony of Agent Poole.

The defendant testified on the voir dire contending he did not remember anything after he and Smith and Riggles left the pub the previous night; that he signed a paper during the interrogation at the office of the Naval Investigative Service on the morning of January 2, 1973; that the paper he signed was dictated by the investigating officer and he signed it because he was told to sign it and not because the paper contained a true statement.

The court found the defendant was duly warned of his rights, including the right to military and civil counsel during the interrogation; that his waiver of counsel and his consent to the interrogation were entirely free and voluntary; that his admissions were freely and understandingly made and were properly admissible in evidence. The court permitted the State to introduce the statements before the jury. At the conclusion of the State's evidence, the court denied the defendant's motion to dismiss.

The defendant testified as a witness before the jury that he is nineteen years of age. He dropped out of school in the tenth grade and joined the Marines in April, 1971. He served overseas in Japan and Vietnam. While he was in Japan he was tried for stealing a car "while I was drinking." He had been drinking since he was thirteen.

Dr. Phillip G. Nelson was called and examined as a witness for the defense. The court found he was a medical expert in the field of psychiatry. He testified he examined the defendant and made inquiry in depth concerning the defendant's behavior pattern since early childhood. "All of these tests are standard psychological tests. They are used by experts and specialists in psychiatry as material upon which to consider and base the psychiatric diagnosis. . . . I examined records concerning the criminal convictions of the defendant. One thing that stands out at least as I see the record is that alcohol has always been associated with whatever goes wrong. . . . [A]lcoholic

blackout is a medically recognized syndrome. . . . [A]lcoholic blackout does not necessarily mean that the person is completely alcoholic drunk, passed out . . . . Now the matter of whether they are responsible I can't answer that question. I don't know myself."

The parties stipulated that the State's witness Riggles by arrangement was permitted to plead guilty to a charge of the armed robbery of William J. Casey and that other charges, including the charge of murder, were dismissed. The court again overruled the defendant's motion to dismiss.

In the charge to the jury, the court correctly defined the necessary elements involved in a killing in the perpetration of a robbery and instructed the jury that if they found from the evidence beyond a reasonable doubt that the defendant shot and killed William J. Casey in the perpetration or in the attempt to perpetrate a robbery, the defendant would be guilty of murder in the first degree and the jury should so find. The court also charged that if the jury found from the evidence beyond a reasonable doubt that the defendant with malice and with premeditation and deliberation shot and killed William J. Casey, the jury should return a verdict of guilty of murder in the first degree.

The jury returned a verdict in Case No. 73CR154 finding the defendant guilty of murder in the first degree; and in Case No. 73CR155 finding the defendant guilty of armed robbery. The court imposed a sentence of life imprisonment on the murder charge and a sentence of thirty years for robbery, the latter sentence to run concurrently with the life sentence for murder. The defendant excepted and appealed.

Robert Morgan, Attorney General by Eugene A. Smith, Assistant Attorney General, for the State.

Herbert B. Hulse and George F. Taylor for defendant appellant.

HIGGINS, Justice.

[1] During the course of the trial the defendant took many exceptions to the evidence offered by the State. Particularly, the defendant objected to the introduction of his confession. However, before permitting the State to introduce the confession, the court conducted a thorough voir dire hearing in the

absence of the jury. The details of this examination are set out in the factual statement. The evidence for the State disclosed the proper cautions and warnings were given by both Sergeant Brock of the Naval Investigative Service and by Mr. Poole of the State Bureau of Investigation. The defendant signed a written admission that the warnings were given and that he waived the right to have counsel present during the interrogation. He signed a confession that he forced the deceased to lie down on his stomach in the front seat of a junked automobile and fired two pistol shots into his head and neck in the course of taking his money, watch, and other articles.

The evidence on the voir dire fully justified the court's finding that the interrogating officers observed all procedural safeguards in conducting the interrogation which preceded the confession. *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602; *State v. Carroll,* 282 N.C. 326, 193 S.E. 2d 85; *State v. Haddock,* 281 N.C. 675, 190 S.E. 2d 208; *State v. Mems,* 281 N.C. 658, 190 S.E. 2d 164; *State v. Williams,* 276 N.C. 703, 174 S.E. 2d 503; *State v. Haynes,* 276 N.C. 150, 171 S.E. 2d 435; *State v. Meadows,* 272 N.C. 327, 158 S.E. 2d 638; *State v. Spence,* 271 N.C. 23, 155 S.E. 2d 802; *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1. The defendant's objections to the admission of his confession before the jury were properly overruled. The evidence was ample to go to the jury and to sustain the verdict. *State v. Vestal,* 281 N.C. 517, 189 S.E. 2d 152; *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741; *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431. The defendant's motion to dismiss was properly denied.

[2] The defendant stressfully contends the court committed error in charging the jury that it might convict the defendant of murder in the first degree either upon a finding beyond a reasonable doubt that the defendant killed Corporal Casey after premeditation and deliberation, or in the perpetration of armed robbery. The specific objection is that the indictment, having charged the killing was committed after premeditation and deliberation, it was error to permit the jury to convict the defendant of murder in the first degree upon a finding the defendant killed Casey in the perpetration of the robbery.

The legal question presented by the objection to the indictment and the charge was before this Court in the case of *State v. Fogleman,* 204 N.C. 401, 168 S.E. 536. The indictment against Fogleman is not quoted in full in this Court's opinion. However,

the record of the case on appeal discloses that the indictment contained two counts. The first count charged that "[O]n the 30th day of April, A.D., 1932, [the named defendant] with force and arms, at and in the County [Rockingham] aforesaid, unlawfully, wilfully, feloniously, premeditatedly, deliberately and of his malice aforethought, did kill and murder one W. J. Carter . . . . "

The second count charged that the named defendant, "[O]n the 30th day of April, 1932, with force and arms, at and in the County aforesaid, unlawfully, wilfully, feloniously, of his malice aforethought, and in the perpetration and in the attempt to perpetrate a felony, to-wit, robbery, did kill and murder one W. J. Carter . . . . " The evidence disclosed a killing in the attempt to commit a robbery.

Judge Stack charged the jury:

> "Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation, or in the perpetration of a robbery or attempt to perpetrate a robbery. . . . "

In passing on the defendant's objection to the two count indictment against Fogleman in the light of Judge Stack's charge, this Court said:

> "The indictment contains two counts, the first charging the essential facts of murder as required by C.S., 4614 [Now G.S. 15-144], the other charging murder committed in the perpetration of or in the attempt to perpetrate robbery. The prisoner excepted to an instruction referring to murder committed in the perpetration of robbery 'or other felony.' The first count in the indictment is sufficient; it contains 'every averment necessary to be made.' *S. v. Arnold,* 107 N.C., 861; . . . The instruction complained of was relevant upon the matters involved in the first count." (The first count charged premeditation and deliberation.)

The Court held that the first count charging premeditation and deliberation was sufficient to embrace a killing committed in an attempt to commit robbery.

In *State v. Arnold,* 107 N.C. 861, 11 S.E. 990, Clark, J. (later C. J.) referring to the allegations necessary to a valid indictment for murder said: "[I]t is proper to say that under

the decisions and statutes the following is full and sufficient in the body of an indictment for murder: 'The jurors for the State on their oaths present that A.B. in the county of E., did feloniously, *and of malice aforethought,* kill and murder C.D." (Emphasis added.) Research discloses that *State v. Arnold, supra,* has been cited and approved many times in the subsequent decisions of this Court.

In *State v. Craft,* 168 N.C. 208, 83 S.E. 772, the Court said: "A variance will not result where the allegations and the proof, although variant, are of the same legal significance."

In *State v. Mays,* 225 N.C. 486, 35 S.E. 2d 494, this Court said:

> "The bill of indictment charges the capital felony of murder in the language prescribed by statute. G.S., 15-144. [Formerly C.S. 4614.] It contains every averment necessary to be made. *S. v. Arnold,* 107 N.C., 861; . . . Proof that the murder was committed in the perpetration of a felony constitutes no variance between *allegata* and *probata.* (Citing *S. v. Fogleman.)* If the defendant desired more definite information he had the right to request a bill of particulars, in the absence of which he has no cause to complain."

In *State v. Grayson,* 239 N.C. 453, 80 S.E. 2d 387, the indictment charged murder in the first degree as prescribed by G.S. 15-144, without alleging either that the killing occurred after premeditation and deliberation, or in the perpetration of a designated felony. The evidence discloses the killing occurred in the perpetration or in the attempt to perpetrate the crime of rape. The defendant, claiming error, excepted to the trial court's instruction that the jury might find the defendant guilty of murder in the first degree if committed in the perpetration or attempt to perpetrate the crime of rape. The ground of the objection was the lack of a supporting allegation in the indictment. This Court, citing *Arnold, Fogleman,* and *Mays,* held: Where the bill of indictment contains every necessary averment, there is no variance between the allegation and the proof. The Court, however, awarded a new trial for error committed in the court's charge on the defendant's plea of insanity.

Any allegations in a bill of indictment over and above that which is held sufficient may be treated as surplusage. *State v. Stallings,* 267 N.C. 405, 148 S.E. 2d 252.

In *State v. Haynes, supra,* this Court held:

" . . . The indictment in this case neither alleged the killing was done after premeditation and deliberation, nor in the perpetration or attempt to perpetrate a robbery. Nevertheless, the bill is sufficient to sustain a verdict of murder in the first degree if the jury should find from the evidence, beyond a reasonable doubt, that the killing was done with malice and after premeditation and deliberation; or in the perpetration or attempt to perpetrate a robbery." (Citing *Arnold, Fogleman,* and other cases.)

In *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652, Justice Lake, for the Court, adopting the language of Judge Barnhill in *State v. Mays, supra,* says:

" 'The bill of indictment charges the capital felony of murder in the language prescribed by statute. G.S., 15-144. It contains every averment necessary to be made. (Citing *S. v. Arnold)* . . . Proof that the murder was committed in the perpetration of a felony constitutes no variance between *allegata* and *probata.*' "

The common law offense of murder connotes a malicious killing. When the State statute divided the offense into first and second degrees, the difference depended upon the presence or absence of premeditation and deliberation. At the same time the statute provided if the killing occurred in the perpetration or attempt to perpetrate a felony, the killing became murder in the first degree. A killing in the commission or in the attempt to commit a designated felony is known as "a felony murder."

"Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. The term 'malice aforethought' cannot be substituted for the term 'premeditation and deliberation' since it does not connote premeditation and deliberation but the pre-existence of malice.

"A murder which is committed in the perpetration or attempted perpetration of robbery, rape, arson, [etc.], is murder in the first degree, irrespective of premeditation or deliberation or malice." 4 N. C. Index 2d, Homicide, Sec. 4, 1947 Ed., citing many cases including *S. v. Maynard,* 247 N.C. 462, 101 S.E. 2d 340; *S. v. Streeton,* 231 N.C. 301, 56 S.E. 2d 649; *S. v. King,* 226 N.C. 241, 37 S.E. 2d 684.

The decision of this Court in *State v. Davis*, 253 N.C. 86, 116 S.E. 2d 365, in the light of the foregoing appears to be, but is not, actually in conflict with the foregoing authorities. In *Davis*, this Court held: "By specifically alleging the offense was committed *in the perpetration of rape*, the State confines itself to that allegation *in order to show murder in the first degree.*" (Emphasis added.) The indictment in Davis is here quoted in full:

> "The jurors for the State upon their oath present that: Elmer Davis, Jr., late of the County of Mecklenburg, on the 20th day of September, 1959, with force and arms, at and in the County aforesaid did unlawfully, willfully, feloniously while perpetrating a felony, to-wit; rape, kill and murder Foy Bell Cooper against the form of the statute and in such case made and provided and against the peace and dignity of the State."

It will be noted the indictment failed to charge malice, a necessary allegation in a murder indictment. *State v. Arnold, supra;* G.S. 15-144.

Judge Campbell was correct in charging the jury in the *Davis* case that a verdict of guilty of murder in the first degree could be rendered *only* upon a finding that Davis killed Mrs. Cooper in perpetrating or attempting to perpetrate the crime of rape. Our holding in *Davis* that the State was confined to its allegation in the indictment that the killing occurred *in the perpetration of rape was correct.* This Court could have said, but did not say, the indictment failing to charge malice, required the State to make out its case of murder in the first degree upon a showing the killing was done in the perpetration or attempt to perpetrate the crime of rape. The indictment, *omitting malice,* was insufficient to elevate the killing above the crime of manslaughter, *except for the "felony murder"* rule which Judge Campbell submitted to the jury. There was no evidence of manslaughter in the *Davis* case. Hence, Judge Campbell correctly declined to submit manslaughter.

The indictment now before us against Moore, as the first count in *Fogleman,* charged malice, premeditation and deliberation. The evidence against Fogleman and Moore disclosed a killing in the perpetration of robbery. Our decisions in *Fogleman* and since, have held that an indictment drawn under G.S. 15-144 will support a verdict of murder in the first degree

without any further allegation of premeditation and deliberation or in the perpetration or attempt to perpetrate a felony. If the bill does allege a malicious killing after premeditation and deliberation, nevertheless the conviction will be sustained if the evidence shows and the jury finds the killing was done in the perpetration or in the attempt to perpetrate a felony. It follows, therefore, that the indictment and the charge against the defendant, William Hobert Moore, were in accordance with our prior decisions and free from error.

[3] However, the record discloses error of law in the conviction and sentence on the charge of armed robbery. The court charged that a verdict of murder in the first degree could be rendered upon a finding beyond a reasonable doubt that the killing was done in the perpetration or in the attempt to perpetrate a robbery. Hence the robbery, in this case, was merged in and became a part of the first degree murder charge.

For the reasons fully set forth in *State v. Carroll, supra,* and *State v. Peele,* 281 N.C. 253, 188 S.E. 2d 326, the verdict finding the defendant guilty of armed robbery is now set aside, and the judgment of imprisonment is vacated on the robbery charge.

On the charge of murder in the first degree—NO ERROR.

On the charge of armed robbery—VERDICT SET ASIDE,

JUDGMENT VACATED.

CLYDE C. RANDOLPH, JR. v. ELVA J. SCHUYLER

No. 92

(Filed 25 January 1974)

1. **Attorney and Client § 7— contingent fee contract — scrutiny by courts**

Contracts for contingent fees are clearly scrutinized by the courts when there is any question of reasonableness of the fee.

2. **Attorney and Client § 7— contingent fee contract — execution during attorney-client relationship — reasonableness — burden of proof**

The burden of proof is upon the attorney to show the reasonableness and fairness of a contract fixing the attorney's fee made during the existence of the attorney-client relationship.

ON *certiorari* to the Court of Appeals to review its decision, reported in 18 N.C. App. 393, 197 S.E. 2d 3, affirming a summary judgment in favor of the plaintiff, entered by *Clifford, J.*, at the 19 February 1973 Session of the District Court of FORSYTH.

The plaintiff, an attorney at law, brought this action to enforce an alleged contract for a contingent fee for legal services. The complaint alleges: In September 1959, the defendant and her late husband engaged the plaintiff as their attorney to represent them "in their claim for benefits under a certain insurance certificate issued by a life insurance company pursuant to a group policy plan," the insurance company having denied any liability for the payment of benefits to the defendant as beneficiary or to her husband as the insured. The plaintiff agreed to represent the defendant and her husband "in their claim" for a contingent fee of "33-1/3% of the amount of the recovery." Pursuant to the agreement the plaintiff performed legal services and, "as a result thereof," the insurance company paid to the defendant "in settlement of said claim the sum of $13,000.00" on or about 18 April 1972. The reasonable value of such services to the defendant was $4,333.33. The defendant has not paid anything to the plaintiff on account of such services.

The answer of the defendant simply denied all of the material allegations of the complaint, other than the making of a written contract in September 1959 and nonpayment of any fee for services.

In response to the defendant's interrogatories, the plaintiff stated, in substance:

> He, the defendant and her husband made a written contract (Exhibit A), dated 11 September 1959. It provided that the defendant and her husband, "being advised that they have a cause of action against the Equitable Life Assurance Society of the United States [the Equitable] by reason of a claim of total and permanent disability," thereby retained and employed the plaintiff as their attorney to endeavor to obtain "a compromise settlement of said matter" or, failing that, "to bring an action thereon," the plaintiff's fee to be 33-1/3% of "the amount of recovery" by a settlement or by a final judgment in the Superior Court without appeal, 40% in event of an appeal and nothing "in the event that there is no recovery under the claim above referred to."

The original contract was superseded by a written contract (Exhibit B) dated 22 April 1960, which provided, in substance:

> The plaintiff, the defendant and her husband having contracted (Exhibit A) with respect to the professional services of the plaintiff and he having rendered to them "valuable professional services as their attorney with respect to a claim for life insurance benefits," by reason of the above mentioned certificate of insurance, and Dr. Edward R. White having also rendered valuable professional services in connection with the treatment and evaluation of the defendant's husband under the provisions of such certificate, the defendant and her husband desired to secure to the plaintiff and to Dr. White a portion of the proceeds of the certificate, payable upon the death of the defendant's husband, and the plaintiff and Dr. White desired to accept "in full payment of all professional services rendered" an interest in the proceeds of the said certificate of insurance. Therefore, in consideration of such services, the defendant and her husband did thereby "convey and assign" to the plaintiff and to Dr. White, as their interests might appear, one-third of the net proceeds of the said certificate of insurance. "This agreement shall supersede the previous contract" (Exhibit A).

Initially, prior to seeing the certificate of insurance, the plaintiff advised the defendant's late husband that he "probably" had a claim against the Equitable for periodic payments, totaling approximately $13,000, if he could furnish evidence of his total and permanent disability commencing prior to the termination of his employment by R. J. Reynolds Tobacco Company.

The plaintiff received a letter from the Equitable, dated 22 October 1959 (Exhibit C), advising that the certificate of insurance made no provision for periodic payments on account of total and permanent disability, *but calling attention to a provision therein for an extension of the insurance coverage without further premium payment* if certain proofs were submitted showing continuous total disability which commenced while the insurance was in force.

(Nothing in the record suggests that the plaintiff, at any time, advised the defendant or her husband that he had received this letter from the Equitable.)

Upon receiving this letter, the plaintiff reexamined the certificate of insurance and advised the defendant and her husband that the husband was "probably" entitled to such extension of the life insurance coverage and further advised that they "continue our efforts to assemble the necessary medical evidence so as to establish Mr. Schuyler's eligibility for group life insurance coverage without premium payment." The defendant and her husband agreed that this should be done.

On 4 December 1959 the plaintiff forwarded medical reports to the Equitable and on 27 January 1960 submitted further medical reports. On 28 March 1960 the plaintiff received written notice from the Equitable that Mr. Schuyler's claim was approved and that his insurance coverage would continue without premium payment for one year (7 December 1959 to 6 December 1960), provided he remained continuously and totally disabled.

Thereafter, until 21 September 1966, the plaintiff had several further conferences and some additional correspondence relating to the furnishing of medical proof of Mr. Schuyler's continued disability.

The plaintiff obtained from Dr. White an agreement that payment of the latter's bill to Mr. Schuyler for medical services, rendered between 16 December 1959 and 7 July 1960, would be deferred until the death of Mr. Schuyler and would be paid, with interest, from the "compensation" the plaintiff "anticipated receiving under the terms of Exhibit B."

The $13,000 paid to the defendant, as beneficiary under the said certificate of insurance, would not have been paid to her had the plaintiff not filed the proofs of Mr. Schuyler's disability and thus brought about the extension of the insurance coverage without further premium payment.

By deposition the defendant testified, in substance:

In 1959, while an employee of Reynolds Tobacco Company, her husband was permanently disabled by a severe heart attack. She and her husband conferred with the plaintiff "about the possibility of collecting insurance benefits." The plaintiff said that "he could get the benefits from this policy and that he would take a third of the policy to get it." They, thereupon, executed the agreement identified as Exhibit A. The purpose was to get something for the defendant, her husband and their

five small children "to live on," not to inquire about life insurance.

Thereafter, the plaintiff informed the defendant and her husband that "the policy did not contain disability benefits," but "he thought" that he could get the disability established and obtain a waiver of premium. On 22 April 1960 they signed another contract (Exhibit B) with the plaintiff, he telling them that he would pay Dr. White's bill.

After the policy was reinstated by Equitable, the Schuylers received each year from the company the form to be filled out by the doctor and returned to the company, which was done.

Pursuant to the plaintiff's request for admissions, the defendant admitted that on 18 April 1972 she received from the plaintiff the check of the Equitable Life Assurance Society in the amount of $13,000, the proceeds of the life insurance certificate. Also enclosed in the letter transmitting this check was a photostatic copy of the agreement (Exhibit B) dated 22 April 1960, and the plaintiff's statement for services rendered.

In reliance upon the verified complaint, the deposition of the defendant, the plaintiff's answers to interrogatories and the above mentioned exhibits, the plaintiff moved for summary judgment.

Thereupon, the defendant filed her affidavit to the following effect:

> Prior to 11 September 1959 her husband "consulted the plaintiff concerning a claim that he may have against the Equitable Life Assurance Society of the United States, at which time the defendant and her husband were informed by the plaintiff that the * * * husband * * * had a claim against the above referred to insurance company for periodic payments due to * * * disability." In reliance thereon, the defendant and her husband entered into the agreement identified as Exhibit A. Shortly after 22 October 1959, the plaintiff advised the defendant and her husband that her husband did not have a claim against the Equitable and could not collect the periodic payments. For this reason, the plaintiff is not entitled to compensation for services under the contingent fee agreement dated 11 September 1959 (Exhibit A).

The plaintiff's motion for summary judgment was allowed on 26 February 1973.

On 7 March 1973 the defendant moved for summary judgment and requested the court to make findings of fact to the effect that the plaintiff had not collected any periodic disability benefits for her husband and so had failed to perform his contract (Exhibit A). This motion and request for findings of fact were denied by the District Court.

Charles F. Vance, Jr., and W. A. Copenhaver for plaintiff. Of Counsel: Womble, Carlyle, Sandridge & Rice.

Allen A. Bailey and Thomas D. Windsor for defendant.

LAKE, Justice.

We concur in the holding of the Court of Appeals that under Rule 8(a), Rules of Civil Procedure, the allegations of the complaint are sufficient to permit the admission in evidence of the second contract between the plaintiff and the defendant and her husband (Exhibit B). This, however, does not dispose of the matter. The question which remains is, Upon all of the evidence, was the plaintiff entitled to a summary judgment for $4,333.33?

In *Casket Co. v. Wheeler,* 182 N.C. 459, 109 S.E. 378, 19 A.L.R. 391 (1921), in holding a contingent fee contract between an attorney and his client valid, this Court said:

> "A contract for a contingent fee must be made in good faith, without suppression or reserve of fact or of apprehended difficulties, and without undue influence of any sort or degree; and the compensation bargained for must be absolutely just and fair, so that the transaction may be characterized throughout by all good faith to the client. If the contract is shown to have been obtained by fraud, mistake, or undue influence; or it if is so excessive in proportion to the services to be rendered as to be in fact oppressive or extortionate, it will not be upheld. * * * One very properly may demand a larger compensation that is to be contingent, or not certain. A contingent fee is permitted to attorneys only as a reward for skill and diligence exercised in the prosecution of doubtful and litigated claims, and it is not allowed for the rendition of merely minor

services which any layman or inexperienced attorney might perform."

Dorr v. Camden, 55 W.Va. 226, 46 S.E. 1014 (1904), lays down the same rule, the Court saying, "It is the skill, diligence, ability, experience, judicial knowledge, and judgment of the attorney that is thereby rewarded, and the performance of duties that require no such qualities is wholly insufficient to sustain such fee as the true measure of such services can be ascertained on a quantum meruit." To the same effect, see 7 C.J.S., Attorney and Client, § 186 b.

In *Stern by Hyman,* 182 N.C. 422, 109 S.E. 79, 19 A.L.R. 844 (1921), this Court held void, as a matter of law, a contract between an attorney and his client fixing the attorney's compensation for professional services, the contract having been made while the relationship of attorney and client was in existence. The Court said that the trial judge should have granted this instruction:

> "It being admitted that at the time of the alleged contract between plaintiff Stern and the defendants (as claimed by plaintiffs) the relation of attorney and client existed between them, the plaintiffs would not be entitled to recover from the defendants any sum for their services which was not fair and reasonable under all the circumstances of the case, no matter what sum was mentioned in the said contract."

In the Stern case, the Court said that the burden of proof is on the plaintiff attorney to show that the contract, i.e., the fee demanded, was fair and reasonable, the attorney being entitled to no greater compensation that he would have been entitled to demand had there been no contract made during the existence of the relationship concerning the fee to be charged. The decision in *Stern v. Hyman, supra,* did not turn upon the fact that the contract, made during the existence of the attorney-client relationship, was for a contingent fee, as distinguished from a contract for a fixed sum, payable irrespective of the result of the attorney's efforts.

In *Higgins v. Beaty,* 242 N.C. 479, 88 S.E. 2d 80, 54 A.L.R. 2d 600 (1955), the contract between the attorney and client, fixing a specified fee for the attorney's services in certain litigation, was made prior to the commencement of the attorney-client rela-

tionship. This Court held that the rule of *Stern v. Hyman, supra,* did not apply. There was no suggestion that the specified fee was excessive, in view of the nature of the contemplated litigation and the large amount involved.

In *Ellis v. Poindexter,* 193 N.C. 565, 137 S.E. 595 (1927), suit was brought on a note given for an attorney's fee, the amount of which was agreed upon after the termination of the litigation for which the attorney was employed. There was nothing to indicate that the amount was excessive. Suit was brought on the note by a holder in due course. Judgment for the plaintiff was affirmed.

In *Dupree v. Bridgers,* 168 N.C. 424, 84 S.E. 696 (1915), it is said, "Written contracts between attorneys and their clients are to be treated and enforced as all other contracts, and in the absence of fraud, coercion, or undue advantage, the amount of compensation agreed upon in the contract is held to be conclusive and binding between the parties." In that case there was no indication that the agreed fee was unreasonable in amount or that the contract was not made with full knowledge by the client of all circumstances relating to the amount of the fee to be charged. The report of the decision shows that the attorneys were employed by the guardian for infant children to institute and prosecute a suit to set aside a deed which had been made by their mother. After the suit was instituted and while it was pending, one of the children became of age and executed a conveyance to the attorneys of a portion of his own interest in the land which was the subject of the suit. The deed recited that it was for "legal services to be performed" and that the grantor agreed to allow as the attorneys' fee, and to pay the attorneys, a portion of the recovery in the pending action an "to this end" conveyed the specified interest in the land described. In affirming the judgment in favor of the attorneys, this Court did not mention the circumstance that the agreement as to the fee and the conveyance in payment thereof were executed during the existence of the attorney-client relationship.

Dupree v. Bridgers, supra, has, apparently, never been cited by this Court. While no reference to it is made in *Stern v. Hyman, supra,* or in *Casket Co. v. Wheeler, supra,* those being later decisions of this Court, the views stated in *Dupree v. Bridgers, supra,* must be deemed overruled insofar as they are in conflict with those decisions.

[1, 2] The rule of *Stern v. Hyman, supra,* is more strict than that which prevails in other jurisdictions. We need not determine upon this appeal whether it should be modified. The generally accepted view appears to be that a contract made between an attorney and his client, during the existence of the relationship, concerning the fee to be charged for the attorney's services, will be upheld if, but only if, it is shown to be reasonable and to have been fairly and freely made, with full knowledge by the client of its effect and of all the material circumstances relating to the reasonableness of the fee. The burden of proof is upon the attorney to show the reasonableness and the fairness of the contract, not upon the client to show the contrary. See *Rose v. Frailey,* 10 Ill. 2d 514, 517, 140 N.E. 2d 711, 713; *Bounougias v. Peters,* 49 Ill. App. 2d 138, 198 N.E. 2d 142, 13 A.L.R. 3d 688 (1964); *Tucker v. Dudley,* 223 Md. 467, 164 A. 2d 891 (1960); *Thomas v. Turner's Admr.,* 87 Va. 1, 12 S.E. 149 (1890); Annot., 13 A.L.R. 3d 701, 710, 713; 7 AM. JUR. 2d, Attorneys at Law, §§ 211, 215. Contracts for contingent fees, especially, are closely scrutinized by the courts where there is any question as to their reasonableness, irrespective of whether made prior to the commencement of or during the attorney-client relationship. *Pocius v. Halvorsen,* 30 Ill. 2d 73, 195 N.E. 2d 137, 13 A.L.R. 3d 662 (1964); *Gair v. Peck,* 6 N.Y. 2d 97, 160 N.E. 2d 43; *Tonn v. Reuter,* 6 Wis. 2d 498, 95 N.W. 2d 261. It is also the generally accepted rule that even though the specific business for which the attorney was employed had been concluded before the agreement fixing the fee was made, the burden of proof as to its reasonableness does not shift from the attorney to the client. *Thomas v. Turner's Admr., supra;* Annot., 13 A.L.R. 3d 701, 718.

On page 722 of the above cited annotation in A.L.R. 13 3d, it is said, "In determining the enforceability of an account stated between an attorney and his client during the existence of the attorney-client relationship, the courts have generally treated such accounts stated as analogous to ordinary contracts and held them subject to the same general rules that govern the validity of fee contracts made during the existence of an attorney-client relationship." It also appears to be generally accepted in other jurisdictions that although the agreement fixing the amount of the attorney's fee is not made until after the conclusion of the litigation or other matter for which the attorney was employed, the burden of proof as to the fairness of the

agreement and the reasonableness of the fee does not shift from the attorney to the client. *Thomas v. Turner's Admr., supra;* Annot., 13 A.L.R. 3d 701, 789-793.

Tucker v. Dudley, supra, is especially pertinent to the present case. There the Maryland court set aside a judgment in favor of the attorney for the reason that the lower court had not considered whether the agreement was fair. The agreement was not reached until after the settlement of the controversy in which the attorney was employed. The Court said:

> "[W]e think the fact that the client agreed to the liquidation of the claim does not relieve the attorney of the burden of showing that the amount agreed upon was fair and reasonable. * * *
>
> "We think the appellee [attorney] did not sustain the burden, and that the fee claimed was excessive under the circumstances. By his own admission Dudley [the attorney] made no independent investigation of the facts or the law of the case. * * * The contention that Dudley might fairly claim one-third of the whole amount overlooks the fact that Tucker's [the client's] right to about one-half was uncontested * * *. In short, it may well be that what Dudley obtained for Tucker, with a minimum of effort, was no more than his due, whereas Dudley variously described it as a 'windfall' or 'shot at the moon.' Certainly Dudley was entitled to be paid for what he did and what he accomplished, but it would appear that he spent little time on the case. He did not attempt to estimate his time. There was no testimony from other lawyers as to the reasonable value of his services, nor did the chancellor undertake to value them out of his own experience. Under the circumstances we think the case should be remanded in order that the chancellor may fix a fair and reasonable fee, applying the tests laid down in the cases cited."

Applying these principles of law to the facts disclosed by the record before us, we conclude that the record does not support the granting of the summary judgment for $4,333.33 in favor of the plaintiff attorney.

Nothing in the record indicates that either the defendant or her husband was ever advised that the insurance company had, itself, written to the attorney suggesting that upon the

receipt of proper proof of disability it would continue the policy in effect, as a life insurance policy, without payment of further premiums. For all that appears in the record, a simple reading of the certificate of insurance was sufficient to disclose that the certificate holder was not entitled to payments during his lifetime on account of disability and also sufficient to disclose that, upon proof of such disability, he was entitled to the continuation of the certificate in effect without payment of further premiums. For all that appears in the record, the establishment of such disability was simply a matter of requesting the attending physician to complete the forms sent to the plaintiff by the insurance company. The record shows virtually nothing as to the amount of time spent by the plaintiff in procuring the proof of such disability and the continuance of the certificate in effect as a certificate of life insurance.

Nothing in the record shows that any demand, other than the plaintiff's letter, was ever made upon the insurance company for payments during the life of the certificate holder on account of disability. Nothing shows any other claim was ever made upon and denied by the insurance company prior to its own suggestion that the certificate might be continued in effect as a certificate of life insurance. Nothing in the record suggests there was ever any real possibility of litigation over the continuation of the certificate in effect. There is no evidence in the record as to the amount of time spent on the matter by the plaintiff and no testimony of any other attorney as to the reasonableness of the fee now claimed.

Unquestionably, the first contract (Exhibit A) between the plaintiff and the defendant and her husband was for the employment of the plaintiff to collect periodic payments during the lifetime of the defendant's husband. This the plaintiff quickly found and reported that he was unable to do. By the terms of that contract (Exhibit A), the plaintiff was not entitled to compensation for his services in attempting to reach that objective.

Thereupon, the nature of the employment was changed without terminating it and the plaintiff was directed to do that which was necessary to procure the continuation of the certificate as a certificate of life insurance. The record is not clear as to when this aspect of the attorney-client relationship

was concluded. According to the plaintiff's answers to the defendant's interrogatories, after the insurance company accepted the proofs of disability and agreed to continue the certificate in effect as a certificate of life insurance, the plaintiff and his clients entered into the agreement, or assignment of the certificate (Exhibit B), upon which he now relies. However, it also appears from his answers to these interrogatories that after the execution of this document the plaintiff, by reason of his employment as counsel, continued to correspond with the insurance company occasionally for several years and to supply the company, from time to time, with medical evidence of continuing disability. Thus, the agreement upon which the plaintiff relies was executed during the existence of the attorney-client relationship. Consequently, even under the less stringent rule prevailing in other jurisdictions, the burden is clearly upon the plaintiff to show the reasonableness of the fee he now claims and to show that, at the time they executed the second document (Exhibit B), the defendant and her husband knew that the suggestion as to continuing the certificate in force had originated with the insurance company so that there was no substantial likelihood that a request for such continuation would be contested.

The plaintiff is, of course, entitled to just compensation for his services. The fact that the clients were unable to pay at the time the services were rendered and, consequently, it was agreed that payment would be deferred until the death of the certificate holder must be taken into account in determining the amount which reasonably may be awarded to the plaintiff for the services rendered by him, but it is only a circumstance so to be considered.

The judgment of the Court of Appeals is, therefore, reversed and the matter is remanded to that court for the entry of an order further remanding it to the District Court for further proceedings therein not inconsistent with this opinion.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. JOHN THOMAS HELMS

No. 96

(Filed 25 January 1974)

1. **Criminal Law § 5— bifurcated trial — insanity — guilt**

The sound exercise of the trial court's discretion should result in a bifurcated trial only when a defendant shows that he has a substantial insanity defense and a substantial defense on the merits to any element of the charge, either of which would be prejudiced by simultaneous presentation with the other.

2. **Criminal Law § 5— denial of bifurcated trial — insanity — guilt**

The trial court in a rape and kidnapping case did not abuse its discretion in the denial of defendant's motion for a bifurcated trial—one jury to pass upon the question of his sanity or insanity and a separate jury to pass upon the issue of his guilt—made on the ground that evidence of defendant's prior deviant sexual misconduct, necessarily offered to explain his mental condition, tended to prejudice the jury on the question of his guilt or innocence where the record reveals no substantial defense on the merits which could have been prejudiced by simultaneous presentation with his defense of insanity.

3. **Criminal Law §§ 5, 63— insanity — M'Naghten rule — irresistible impulse doctrine**

The trial court in a rape and kidnapping case did not err in excluding expert psychiatric testimony to the effect that defendant lacked substantial capacity to conform his conduct to the requirements of the law by reason of mental defect or disease and in refusing to give special instructions which would mandate an acquittal if the jury found that defendant's actions resulted from an irresistible impulse since the ability of the accused to distinguish right from wrong at the time and with respect to the matter under investigation remains the test of criminal responsibility in this State.

DEFENDANT appeals from judgment of *Friday, J.*, 29 May 1973 Session, GASTON Superior Court.

Defendant was tried upon separate bills of indictment, proper in form, charging him with (1) kidnapping and (2) raping Marcia Dawn Adams on 9 October 1972 in Gaston County.

Upon the call of the case defendant filed a written motion for a bifurcated trial—one jury to pass upon the question of his sanity or insanity and a separate jury to pass upon the issue of his guilt or innocence. This motion was denied and constitutes the basis of one assignment of error on this appeal.

The State's evidence tends to show that on 9 October 1972 Marcia Dawn Adams, sixteen years of age, was a student at Hunter Huss High School in Gastonia. At 10:30 a.m. that morning she called her mother to come after her because she was not feeling well. To await the arrival of her mother, she went outside and sat down on a bank beside the street. She had been there only a few minutes when an old white car passed along the street in front of her, went into the parking lot, turned around and came back, stopping in front of her. The driver, later identified as defendant, pointed a pistol at her and ordered her into the car.

Miss Adams entered the car from the passenger side and started crying. Defendant told her if she did what he wanted her to do "and played it cool" that she would be all right. They drove through the city park once or twice and then to the Crowder's Mountain area and stopped. Defendant instructed Miss Adams to get out of the car and enter a wooded area near the road. He followed her with pistol in hand. At a spot not visible from the road, defendant instructed Miss Adams to stop, remove her clothing and lie on the ground. She obeyed the instructions and defendant raped her.

After raping Miss Adams, defendant instructed her to put on her clothes, which she did, and they returned to the car. She requested defendant to take her to the intersection of Belmar and Linwood Streets in Gastonia, a point not far from her home. On the way, in response to defendant's questions, Miss Adams said she would not inform the police and would not tell her mother about the rape. She left defendant's car at the chosen intersection and shortly thereafter accepted a ride from Ricky Strout, a passing motorist who observed her crying. Mr. Strout took her home and then to Hunter Huss School in search of her mother. Upon arrival at the school, she found her mother and told her what had occurred. The police were called and the incident reported.

From school Miss Adams was carried to a doctor's office where a pelvic examination revealed motile sperm in her vagina.

Four days later, on Friday, 13 October 1972, Miss Adams accompanied officers to a dwelling on Rural Paved Road 1307 where John Thomas Helms lived with his wife and there observed a Ford automobile which she identified as the car in

which she was kidnapped. This car was identified as the property of John Thomas Helms.

Following defendant's arrest, Miss Adams positively identified him as her assailant.

Defendant did not testify as a witness in his own behalf but offered the testimony of other witnesses narrated below.

C. T. Fuller, an officer with the Gaston Rural Police Department, testified that on 13 October 1972 he saw defendant near Ashbrook High School driving a yellow Opel GT in the high school parking lot; that Helms appeared to put something down beside the seat when he saw Officer Fuller; that he stopped defendant and found a pistol, State's Exhibit 2, between the seats; that defendant got out of his car and asked the officer what was wrong; that defendant produced his driver's license upon request without any trouble but failed to produce a registration card; that defendant said nothing else and Officer Fuller took him to the police station; that although defendant had no odor of alcohol about him, he appeared to be in a daze and under the influence of something; that he perspired profusely and seemed quite nervous.

Captain Bert Homesley of the Gaston Rural Police Department testified that he saw defendant on 13 October 1972 at the police station and gave him the *Miranda* warnings several times to make sure defendant understood his rights; that defendant never spoke on this occasion but gave his answers by nodding his head, indicating yes or no; that in that fashion he indicated he was not under the influence of alcohol or drugs, that he understood his rights, and that he did not want a lawyer present at a lineup which was conducted and at which Miss Adams again identified him as her assailant; that he looked then "as he looks now. He didn't say anything just sat there like he is now. He was not moving around during the whole 45 minutes. I didn't notice anything else unusual about him."

Dr. Eugene D. Maloney, who was admitted to be a specialist and expert in the field of psychiatry, testified that he first saw defendant in jail on 17 October 1972 and examined him. Defendant was shaking, trembling, sitting on the edge of his bunk, holding his head and rubbing his forehead. At times he would cry, at times he staggered, at times he was sleepy, slow moving, slow talking, slow thinking. He talked in a very low voice and

his answers to questions were short and incomplete. On 8 February 1973 Dr. Maloney again saw defendant in jail and found him a little better dressed and a little better able to answer questions but more depressed. On 16 March 1973 defendant was seen by Dr. Maloney in his office at which time defendant's actions were "somewhat inappropriate"—for example, "he would very frequently get out of the chair and squat in the floor saying he felt more comfortable sitting in the floor." Finally, Dr. Maloney saw defendant on 25 May 1973 at which time he was more able to answer questions, more talkative, a little more spontaneous. In answer to a hypothetical question, Dr. Maloney testified that in his opinion defendant "knows the nature and consequences of his act, and he has the mental facilities to know the difference between right and wrong; but now, we are going to fall into a gray area. While he has the mental ability to know this, he simply feels that it's not wrong to rape people—to rape women. We never did get into the diagnosis because things changed as time went by. His original diagnosis was sociopathic personality—one that doesn't profit from experience—depressive reaction. Well, that was the first interview; and the next interview I got into his sexual history and sexual behavior since being a child; and so, as an additional diagnosis, I would add sexual deviation and variety of types under this. Later on while in the jail, I felt that his depression increased to the point of just about going off the deep end; and in my opinion, he did go off the deep end while in jail, called—or what I would call a psychotic depressive reaction. Later, he was sent to Dix and given some treatment for this; and, of course, came back in good condition except on his last examination which I felt he could stand trial. I felt that he knew he was able—had the mental facility but a deep down belief that it was simply all right to rape women period. He felt it was morally all right to rape women and in his opinion it was legally all right to rape women. It was simply that the laws were wrong."

The following answer to a hypothetical question put to Dr. Maloney was excluded: "I feel that John Thomas Helms was suffering from a mental disease or defect that did affect his ability to foresee the rightfulness or wrongfulness of the situation. I am further of the opinion that because of this mental disease or defect he lacked substantial capacity to conform his conduct to the requirements of law. I do not believe he could conform to the law. Although then he had the capacity to know

that something was wrong, because of this defect, he lacked the capacity to conform his conduct to that law which he knew was wrong. Even in the strictest sense he had the mental capacity to appreciate this, but as a result of this mental reasoning or defective judgment that gave him defective reasoning, then it would give him the inability to conform. I have an opinion that in the future he will not be able to conform his conduct to the requirements of the law. This defect has been existing for some time in controlling his ability to conform his conduct and will continue to do so. John Thomas Helms had the capacity to distinguish between right and wrong as to whether or not it was right and wrong to rape someone and knew the law that he wasn't supposed to rape but he had another disease in that he thought the law was wrong and he had a right to do it." Defendant assigns exclusion of this evidence as error.

Christine Helms, defendant's wife, testified that her husband received a dishonorable discharge from the United States Army; that she had observed his behavior around teenage girls; that when he saw girls "with short dresses on or short shorts or something like that, he seemed to think they were asking to be assaulted or something. He just seemed like he thought they were asking him to stop and pick them up. He did this on more than one occasion. He acted on these occasions like his mind was wandering."

Mrs. Helms stated on cross-examination that she and her husband owned the white Ford in question and also the Opel that defendant was driving at the time of his arrest.

The jury found defendant guilty of kidnapping and guilty of rape. He was sentenced to a term of not less than twenty nor more than twenty-five years for kidnapping and to life imprisonment for rape, to run consecutively. Defendant appealed to this Court assigning errors discussed in the opinion.

Robert Morgan, Attorney General; Edwin M. Speas, Jr., Assistant Attorney General, for the State of North Carolina.

R. C. Powell, attorney for defendant appellant.

HUSKINS, Justice.

Defendant assigns as error the denial of his motion for a bifurcated trial. He contends that evidence of his prior deviant

sexual misconduct, necessarily offered to explain his mental condition, tended to prejudice the jury on the question of his guilt or innocence.

[1, 2] Bifurcation rests within the sound discretion of the trial judge. Exercise of that discretion is not reviewable absent abuse of it. *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 (1967). Other jurisdictions hold that the sound exercise of the trial court's discretion should result in a bifurcated trial *only* when "a defendant shows that he has a substantial insanity defense and a substantial defense on the merits to any element of the charge, either of which would be prejudiced by simultaneous presentation with the other." *Contee v. United States,* 410 F. 2d 249 (D.C. Cir. 1969). Here, the record reveals no substantial defense on the merits which could have been prejudiced. No abuse of discretion has been shown. This assignment of error is overruled.

[3] Defendant's remaining assignments of error relate to the exclusion of expert psychiatric testimony to the effect that defendant lacked substantial capacity to conform his conduct to the requirements of the law by reason of mental defect or disease, and to 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 impulse.

In substance, these assignments seek abandonment in this jurisdiction of the M'Naghten rule and adoption of the Model Penal Code's "irresistible impulse doctrine." Defendant argues that the M'Naghten rule violates the prohibition against cruel and unusual punishment proscribed by the Eighth Amendment to the Federal Constitution in that it requires the punishment of persons who would, under other tests of insanity, be committed to mental institutions for treatment rather than imprisoned for crime. We find this argument unpersuasive.

The M'Naghten rule—the ability of the accused to distinguish right from wrong at the time and with respect to the matter under investigation—has been recognized by this Court as the test of criminal responsibility for more than one hundred years. *State v. Humphrey,* 283 N.C. 570, 196 S.E. 2d 516 (1973); *State v. Mercer,* 275 N.C. 108, 165 S.E. 2d 328 (1969); *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 (1967);

State v. Creech, 229 N.C. 662, 51 S.E. 2d 348 (1949); *State v. Potts,* 100 N.C. 457, 6 S.E. 657 (1888); *State v. Brandon,* 53 N.C. 463 (1862).

In *Leland v. Oregon,* 343 U.S. 790, 96 L.Ed. 1302, 72 S.Ct. 1002 (1952), the United States Supreme Court said:

> "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. Moreover, choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility. This whole problem has evoked wide disagreement among those who have studied it. In these circumstances it is clear that adoption of the irresistible impulse test is not 'implicit in the concept of ordered liberty.'"

Chief Justice Stacy, speaking for this Court in *State v. Creech, supra,* said:

> "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."

Thus, the M'Naghten rule is constitutionally sound; and our adherence to it is based on reason and common sense. "Insanity is incapacity, from disease of the mind, *to know the nature and quality* of one's act or *to distinguish between right and wrong* in relation thereto." *State v. Mercer, supra.* Under the law of this State there is no halfway house on the road to insanity which affords sanctuary to those who know the right and still the wrong pursue. "The law does not recognize any moral power compelling one to do what he knows is wrong. . . . There are many appetites and passions which by long indulgence acquire a mastery over men more or less strong. Some persons,

indeed, deem themselves incapable of exerting strength of will sufficient to arrest their rule, speak of them as irresistible, and impotently continue under their dominion; but the law is far from excusing criminal acts committed under the impulse of such passions." *State v. Brandon,* 53 N.C. 463 (1862).

All the evidence tends to show that defendant knew it was wrong and a violation of the law to kidnap and rape. He was therefore answerable for his conduct.

For the reasons stated we adhere to the M'Naghten rule as the test of criminal responsibility in this State. The trial judge correctly excluded the psychiatric testimony and correctly refused to give the special instructions requested by defendant. Assignments of error based thereon are overruled.

The record in this case reveals no prejudicial error. The judgments imposed must therefore be upheld.

No error.

STATE OF NORTH CAROLINA v. WAYNE R. TUGGLE

No. 100

(Filed 25 Januuary 1974)

1. **Constitutional Law § 32; Criminal Law § 66— photographic identification — no right to counsel**

Defendant had no constitutional right to the presence of counsel when robbery victims were viewing photographs for purposes of identification regardless of whether defendant was in custody or at liberty at that time.

2. **Criminal Law § 66— pretrial photographic identification**

Circumstances surrounding photographic identification of defendant by robbery and kidnapping victims were not impermissibly suggestive and conducive to irreparable mistaken identity, and the photographic identifications did not taint the victims' in-court identifications of defendant, where the identifications occurred on the same night as the crimes, both victims had seen the uncovered face of defendant in a brightly lighted store, the distance between them and defendant was the length of a shotgun barrel, both victims looked separately at photographs shown them and identified the same photograph, and both victims thereafter identified two other photographs of defendant as the perpetrator of the crimes.

3. **Criminal Law § 66— in-court identification — necessity for voir dire**

When the admissibility of in-court identification testimony is challenged on the ground it is tainted by out-of-court identifications made under constitutionally impermissible circumstances, the trial judge must make findings of fact to determine whether the proffered testimony meets the tests of admissibility; when the facts so found are supported by competent evidence, they are conclusive on appellate courts.

4. **Criminal Law § 66— identification testimony — observation at crime scene**

In a prosecution for robbery of a grocery store, the evidence on *voir dire* supports the trial court's finding that identification of defendant by the manager of a nearby store as the person who robbed her store a short time before the robbery in question was based solely on her observation of defendant during the robbery in her store.

5. **Criminal Law §§ 34, 66— armed robbery — evidence of robbery of nearby store — admissibility on question of identity**

In a prosecution for armed robbery of a grocery store, testimony by the manager of another store located some three and a half miles from the grocery store that her store was robbed by defendant some 30 minutes before the grocery store robbery and that similar methods were used was properly admitted for consideration by the jury on the question of identity.

APPEAL by defendant from *Collier, J.*, 25 June 1973 Session of FORSYTH Superior Court.

In separate bills defendant was charged with (1) kidnapping Billy Joe Kiser (Kiser), (2) armed robbery of Kiser, taking from his presence and custody $450.00 of the money of Roger L. Moorefield, t/a Moorefield's Grocery, and (3) armed robbery of G. B. Smith (Smith). Upon arraignment, defendant pleaded not guilty in each case. The three indictments were consolidated for trial.

The State offered evidence tending to show the facts narrated below.

On 20 November 1972 about 7:15 p.m. defendant walked into Moorefield's Grocery Store with a shotgun. Addressing Kiser, the store manager, and Smith, a customer, defendant said, "This is a holdup." Defendant stuck the gun in Smith's stomach and shoved him back into the room. Defendant then turned the gun on Kiser, hit him in the stomach and knocked him against a cigarette rack. In compliance with defendant's orders, Smith removed from his wallet and laid upon the counter

approximately $450.00 in bills; and Kiser put Smith's bills and approximately $465.00 in bills he removed from the store's cash register in a paper bag which defendant provided for that purpose.

After taking the money, defendant held the shotgun on Kiser and Smith and ordered them out of the store. A station wagon in defendant's possession was parked in back of the store. Kiser was ordered to get in it and drive as directed by defendant. Smith was ordered to drive his own car and to stay right in front of the station wagon. The vehicles started out as directed "up North Main or Three Eleven Highway." Upon reaching the next filling station, Smith pulled off, stopped and called the sheriff's office. Kiser, as ordered by defendant, made a left turn from Highway #311 and stopped at a point approximately three to three and a half miles from Moorefield's store. Defendant then let Kiser go and "took off towards Davidson County." Kiser had been in defendant's presence for approximately fifteen minutes. When defendant drove away in the station wagon, Kiser went back to the Moorefield store. A deputy sheriff was there to whom Kiser gave a description of defendant.

Kiser testified: "The reason I gave him the money was because of the shotgun."

Smith testified: "I gave him the money because he had a gun in my stomach and demanded it."

Kiser further testified that he went with defendant "against [his] will"; that, when he was driving the station wagon, defendant was pointing the shotgun "[s]ometimes in the side of [his] head and sometimes in [his] ribs."

The inside of the store was well lighted with large fluorescent lights, and there were lights outside under the shed where gasoline was sold. Kiser and Smith were as close to defendant as the length of the gun barrel. Defendant had nothing over his face. Kiser and Smith noticed particularly defendant's facial features and expression. Each identified defendant unequivocally as the man who committed the alleged crimes.

The Kiser family lived upstairs over the store. From her bedroom window, Kiser's daughter, Mendy, saw a man holding a shotgun on her father and carrying him to the back of the store. She identified defendant as that man.

Between eight and eight-thirty Kiser went from the Moorefield store to a drugstore to "get something for [his] nerves." In response to a call, Kiser drove to the High Point police station and arrived there about 9:00 or 9:15 p.m. Smith arrived later. Both identified certain photographs of defendant as pictures of the man who had robbed them and kidnapped Kiser. Smith saw defendant that night while walking past a room in which defendant was seated. He recognized him as the man who had committed the robberies and kidnapping.

The station wagon used by defendant belonged to Mrs. Doris West, defendant's mother-in-law. Mrs. West lived in Thomasville. Defendant did not have permission to use it. Mrs. West had reported to the Thomasville Police Department that her station wagon had been stolen. This information was communicated to the High Point Police Department. The station wagon, a 1967 Mercury, when found in Thomasville, had in it, *inter alia,* "a single barrel shotgun," which Richard Lerner West, defendant's father-in-law, identified as belonging to his son Ricky and which was missing from the West home.

Being advised that defendant was planning to leave for Florida, the Greensboro police were notified and requested to check the bus station in Greensboro in an effort to locate and apprehend defendant. When arrested at the bus station in Greensboro defendant had with him $740.00 in cash and a bus ticket to Fort Lauderdale, Florida.

Defendant testified that he did not kidnap or rob anybody; that he had never seen any of the persons who identified him as the man who committed the alleged crimes; that his mother-in-law knew he had the station wagon; that Mr. West had asked him to go with Ricky to pick up Ricky's check; that he was mad with his mother-in-law because of her interference with his effort to get his wife to go back to Florida with him; and that the money he had with him when arrested was money he had been saving over a period of months.

Additional evidence will be set forth in the opinion, including the testimony of Mrs. Georgia Hicks, a State's witness, relating to a robbery of Stragley's Flash Market in High Point about 6:45 p.m. on 20 November 1972.

In each of the three cases, the jury returned a verdict of guilty as charged. The court consolidated the three cases for

judgment. A single judgment, which imposed a sentence of life imprisonment, was pronounced.

Defendant excepted, appealed and assigns as error the admission over his objection (1) of the identification testimony of Kiser and Smith, and (2) the testimony of Mrs. Hicks relating to the robbery of Stragley's Flash Market.

On 21 November 1973 this Court allowed defendant's motion to have his appeal in the robbery cases heard by the Supreme Court without prior determination in the Court of Appeals.

Attorney General Robert Morgan and Associate Attorney Thomas M. Ringer, Jr., for the State.

H. Glenn Davis for defendant appellant.

BOBBITT, Chief Justice.

Defendant's first and second assignments of error relate to the admission over his objection of the identification testimony of Kiser and Smith. He contends their testimony was tainted by impermissible pre-trial identification procedures and should have been excluded.

Before admitting the challenged testimony, the court conducted a *voir dire* hearing. Evidential facts and the court's findings will be set forth below.

[1] Defendant contends the in-court identification testimony of Kiser and of Smith was tainted because defendant was not represented by counsel when Kiser and Smith identified certain photographs of defendant as pictures of the man who committed the alleged crimes. There is no merit in this contention. Defendant had no constitutional right to the presence of counsel when Kiser and Smith were viewing photographs for purposes of identification regardless of whether defendant was in custody or at liberty at that time. *State v. Stepney,* 280 N.C. 306, 313, 185 S.E. 2d 844, 849 (1972), and cases there cited.

[2] Defendant further contends the in-court identification testimony of Kiser and of Smith was tainted because the circumstances surrounding the photographic identifications were impermissibly suggestive and conducive to irreparable mistaken identity. The evidence before the court on *voir dire* negates this contention. A brief summary will suffice.

The only pre-trial identifications by Kiser and by Smith were those made at the police station in High Point on the same night the robberies and kidnapping occurred. Kiser and Smith had recently seen the uncovered face of defendant in the brightly lighted store. The distance between them and defendant was the length of the shotgun barrel. Kiser arrived at the police station about 9:15. He looked through the photographs shown him and identified one as the picture of the man who had committed the alleged crimes. Smith did not arrive until about 11:00 p.m. He looked through the photographs shown him and identified the same photograph as the picture of the man who had committed the alleged crimes. Thereafter, both Kiser and Smith identified two other photographs of defendant as pictures of the man who committed the alleged crimes. Kiser testified: "I won't never forget that face." Smith referred to defendant's "very distinctive face" and identified him "without the slightest shadow of a doubt."

Defendant was not brought before Kiser or Smith in a lineup or otherwise. Kiser did not see defendant at the police station. Following his identification of defendant's photograph, Smith saw defendant momentarily under the following circumstances: Going down the hall on his way out of the police station, Smith passed a room (office) in which "half a dozen" people were seated. Looking back over his shoulder he recognized defendant as one of the persons seated in that room. It had been suggested that he look in this room as he passed.

[3] When the admissibility of in-court identification testimony is challenged on the ground it is tainted by out-of-court identification(s) made under constitutionally impermissible circumstances, the trial judge must make findings as to the background facts to determine whether the proffered testimony meets the tests of admissibility. When the facts so found are supported by competent evidence, they are conclusive on appellate courts. *State v. McVay* and *State v. Simmons*, 277 N.C. 410, 417, 177 S.E. 2d 874, 878 (1970); *State v. McVay* and *State v. Simmons*, 279 N.C. 428, 432, 183 S.E. 2d 652, 655 (1971); *State v. Morris*, 279 N.C. 477, 481, 183 S.E. 2d 634, 637 (1971).

The court's findings, which are supported by plenary uncontradicted testimony, are to the effect that the "in-court identification of the defendant" by Kiser and Smith was based on their observations of defendant on 20 November 1972 and that the testimony of each "[had] its origin independent of any in-

court, in-custody, or photographic viewing of the defendant by the witness." Defendant's objections to the in-court identification testimony of Kiser and of Smith were properly overruled.

Defendant's third (last) assignment of error relates to the admission over his objection of the testimony of Mrs. Georgia Hicks, the manager of Stragley's Flash Market, a store in High Point some three to three and a half miles from Moorefield's Grocery.

Mrs. Hicks testified in substance that on 20 November 1972 about 6:45 p.m. defendant entered the door of the Flash Market with a "[t]welve-gauge, single barrel shotgun" in front of him and demanded Mrs. Hicks's money. She removed all bills from the cash register and put them upon a counter. In response to defendant's further demands, Mrs. Hicks got a brown paper bag and she and defendant put the bills in it. Defendant ordered Mrs. Hicks to the back of the store, took the bag and left. Some two minutes later Mrs. Hicks closed the store and went to the High Point police station. There she looked through photographs shown her and identified a photograph of defendant as the picture of the man who had just robbed the Flash Market.

[4] Before admitting the in-court identification testimony of Mrs. Georgia Hicks to the effect that defendant was the man who robbed the Flash Market, the court conducted a *voir dire* hearing at which the only evidence was the testimony of Mrs. Hicks. On *voir dire,* Mrs. Hicks testified, *inter alia,* that defendant got as close to her as "[t]he length of that shotgun barrel" and that the Flash Market was lighted with twelve "[n]inety-six inch fluorescents." Suffice to say, plenary uncontradicted evidence supports the court's finding that Mrs. Hicks's in-court identification was based solely on her observation of defendant in the Flash Market on 20 November 1972.

[5] There remains for consideration defendant's contention that Mrs. Hicks's testimony concerning a robbery at the Flash Market should have been excluded on the ground it tended to show defendant had committed an unrelated criminal offense.

The evidence as to *what happened* when Kiser and Smith were robbed and Kiser was kidnapped was not contradicted. The primary issue was whether *defendant* committed these crimes. We note that the court gave explicit instructions that the jurors were to consider the testimony of Mrs. Hicks only as it might tend to bear upon the identity of the defendant as the person

who committed the crimes for which he was on trial and for no other purpose.

Although in different counties, the distance from the Flash Market to Moorefield's Grocery was three and a half miles or less. The interval between the robbery at the Flash Market and the robberies at Moorefield's Grocery was brief. Both were committed hurriedly by an unmasked man. In each, the mode of procedure was the same, that is, abrupt entrance into a lighted store with a shotgun pointed toward the occupant(s) and an immediate demand for the money. Proximity in place and time and similarities in method were relevant for consideration by the jury as to whether the man identified by her as defendant and who had robbed the Flash Market was also the man who had committed the crimes for which defendant was on trial. We hold that the testimony of Mrs. Georgia Hicks was competent on the question of identity and properly admitted. *State v. McClain,* 282 N.C. 357, 362-63, 193 S.E. 2d 108, 111-12 (1972), and cases there cited.

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

No error.

S. H. HURSEY, JR., t/b/a HURSEY'S HANDY CORNER; DWIGHT SHOFFNER, t/b/a HILLTOP GROCERY; TROY E. PERKINS, t/b/a PERKINS GROCERY, AND JOWEL BARRINGER, t/b/a GIBSONVILLE RED AND WHITE GROCERY STORE

— v. —

THE TOWN OF GIBSONVILLE, A MUNICIPAL CORPORATION, AND M. W. MILLIGAN, CHIEF OF POLICE OF THE TOWN OF GIBSONVILLE

— AND —

ROBERT MORGAN, ATTORNEY GENERAL OF NORTH CAROLINA

No. 55

(Filed 25 January 1974)

1. Intoxicating Liquor § 1— right to sell beer and wine

Other than as authorized by a legally issued permit, there is no right to sell beer, wine and other alcoholic beverages in North Carolina.

2. **Constitutional Law § 12; Intoxicating Liquor § 1— prohibition of sale of beer and wine on Sunday — exemption of holders of brown bagging permits — constitutionality of statute**

The statute authorizing municipalities and counties to regulate and prohibit beer and wine sales from 1:00 p.m. on Sunday until 7:00 a.m. on Monday, including its proviso that municipalities and counties shall have no authority to regulate and prohibit such sales by establishments having a "brown bagging" permit, does not create discriminatory classifications and is constitutional, and an action by plaintiff grocers to enjoin the enforcement of a city ordinance prohibiting them from selling beer and wine after 1:00 p.m. on Sunday for off-premises consumption should have been dismissed. G.S. 18A-33(b).

Chief Justice BOBBITT concurring.

Justice HUSKINS dissenting.

IN this civil action the four plaintiffs joined in one complaint in which they allege that each operates a retail grocery business in the incorporated Town of Gibsonville. Each holds for his place of business "an off premises beer permit" issued under Part 2 of Article 4, Chapter 18A, General Statutes. Each holds the applicable ABC Privilege License issued pursuant to the ordinances of the Town of Gibsonville. Each operates his place of business on Sunday.

The complaint further alleges:

"11. That in the Town of Gibsonville are several business establishments holding 'brown bagging' license and operating on Sunday and are selling beer and wine without interference from the City Officials or the Chief of Police. That the Plaintiffs do not have 'brown bagging' permits and are operating their businesses across the street or in the same block in some instances where businesses are being operated on Sunday and the sale of beer and wine is conducted.

"12. That the Plaintiffs operate their business in the Town of Gibsonville, selling beer and wine as their licenses permit at their place of business on other days of the week and desire to do so on Sunday.

"13. That the threatened enforcement by the Town of Gibsonville of the prohibition of Sunday beer and wine sales will cause irreparable damage to all of the Plaintiffs herein in that they will suffer multiple arrests and harassments; and that they will be prevented from a lawful activity with-

out authorization, with the result of loss of profits from said Sunday beer and wine sales; that they will suffer from undue publicity and loss of good will; that they will have no adequate remedy at law.

"14. That the enforcement of Chapter L, Article IV of the ordinances of the Town of Gibsonville as to the Plaintiffs in the operation of their businesses is invalid, void and in violation of Article I, Section 19 of the North Carolina Constitution and the Fourteenth Amendment of the Constitution of the United States in that it is unreasonable and discriminatory.

"15. That Section 33(b) of Chapter 18A of the North Carolina General Statutes violates Article I, Section 19 of the North Carolina Constitution and the Fourteenth Amendment of the Constitution of the United States in that it is unreasonable and discriminatory."

On the basis of the allegations of the complaint the plaintiffs pray for the following relief:

"1. For a declaratory judgment that Chapter L, Article IV of the ordinances of the Town of Gibsonville is invalid and of no force and effect as to these Plaintiffs and others similarly situated.

"2. That the Defendants be permanently enjoined from preventing Plaintiffs from selling beer on Sunday at the times specified herein or at such times as the Court declares it to be lawful for them to do so.

"3. That the Court, pending a final determination of this matter, issue a preliminary injunction restraining and enjoining the Defendants in the above described manner and form.

"4. That the Court, pending the issuance of such preliminary injunction, accept this verified complaint as a motion for temporary restraining order under Rule 65 of the North Carolina Rules of Civil Procedure, and that the Court issue a Temporary Restraining Order restraining and enjoining the Defendants either individually or through any persons acting under or in connection with them in the above described manner and form."

The Attorney General of North Carolina intervened as a party defendant and filed answer admitting the essential factual allegations of the complaint. The Attorney General alleged, however, that only one establishment in Gibsonville (Pete's Grill) holds a "brown bagging" permit. The Attorney General filed with the court a motion that the plaintiffs' applications for a temporary restraining order and for a permanent injunction be denied and the plaintiffs' action be dismissed for that the complaint fails to set forth a claim upon which relief may be granted. The Attorney General moved also that the court declare the ordinances of the Town of Gibsonville constitutional and valid except that the Town is without authority to invalidate a duly authorized "brown bagging" permit issued pursuant to the provisions of Sec. 18A-33(b) of the General Statutes.

Judge Exum, after hearing, entered the following judgment:

"1. The Town of Gibsonville shall hereafter give no further force or effect to the proviso of G.S. 18A-33(b) insofar as it purports to prohibit Gibsonville from enforcing its ORDINANCE against businesses holding BROWN BAGGING PERMITS to the extent that these businesses sell beer on Sundays for consumption off-premises.

"2. The Town of Gibsonville shall hereafter enforce the ORDINANCE against all businesses whether or not the businesses hold a BROWN BAGGING PERMIT to the extent that these businesses sell beer on Sundays for consumption off their own premises.

"3. The Town of Gibsonville shall comply fully with the proviso of G.S. 18A-33(b) insofar as it prohibits Gibsonville from enforcing the ORDINANCE against the sale of beer for consumption on-premises by any business which has a BROWN BAGGING PERMIT."

Both the plaintiffs and the Attorney General appealed to the North Carolina Court of Appeals. After review, the Court of Appeals concluded:

"The ordinance of the town of Gibsonville as authorized by G.S. 18A-33(b) is valid and enforceable against all its citizens without discrimination. G.S. 18A-33(b) is a constitutional exercise of the power of the General Assembly except for the proviso which excludes businesses with Article 3 or 'brown bagging' permits from the remainder of

G.S. 18A-33(b). The proviso is unconstitutional and void. The judgment below is modified to permit the town of Gibsonville to enforce its ordinance against the sale of beer and wine on Sundays after 1:00 p.m. without restriction.

"Modified and affirmed."

Forrest E. Campbell and Walker, Short & Alexander, by W. Marcus Short for plaintiff appellants.

Smith, Moore, Smith, Schell & Hunter by Beverly C. Moore for defendant appellees.

Robert Morgan, Attorney General, by Howard A. Kramer, Associate Attorney for the State.

HIGGINS, Justice.

The plaintiffs, the trial court, and the Court of Appeals seem to have proceeded on the theory that the plaintiffs have *a constitutional right to engage in the sale and distribution of wine and beer.* The assumption overlooks the fact that beer, wine, and other alcoholic beverages, because of the inherent danger in their unrestricted use, are made subjects of rigid regulation and control by the General Assembly acting under the State's police power.

Chapter 18A, General Statutes of North Carolina, 1971 Cumulative Supplement, establishes, "[A] uniform system of control over the sale, purchase, transportation, manufacture, and possession of intoxicating liquors in North Carolina . . . . " Article 2, Chapter 18A-14, creates a State Board of Alcoholic Control and gives the Board power and authority to make and enforce regulations for control of the sale, purchase, transportation, manufacture, and possession of intoxicating beverages. The Act provides for the issuance of permits by the Board of Alcoholic Control and, except as authorized by a legally issued permit, sales, etc. of alcoholic beverages are made unlawful. The Board of Alcoholic Control has no power to issue a permit which authorizes the holder to violate the restrictions fixed by the Control Act. *Underwood v. Board of Alcoholic Control,* 278 N.C. 623, 181 S.E. 2d 1; *Keg, Inc. v. Board of Alcoholic Control,* 277 N.C. 450, 177 S.E. 2d 861; *D & W, Inc. v. Charlotte,* 268 N.C. 577, 151 S.E. 2d 241; *Lampros Wholesale, Inc. v. ABC Board,* 265 N.C. 679, 144 S.E. 2d 895.

[1] Other than as authorized by a legally issued permit, there is no right to sell beer, wine, and other alcoholic beverages in North Carolina.

Section 18A-2. Definitions, provides:

"(4) The word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt or fermented beverages, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one half or one percent (½ of 1%) or more of alcohol by volume, which are fit for use for beverage purposes.

* * *

"(9) The word 'permit' shall mean a written or printed authorization to engage in some phase of the liquor industry which may be issued by the State Board of Alcoholic Control under the provisions of this Chapter."

Article 3, Section 18A-31, provides:

"(a) Permits.—Any person, association, or corporation making application for a permit under this Article shall file said application and appropriate fee with the State Board of Alcoholic Control, and said Board shall have the exclusive authority, not inconsistent herewith, in issuing any permit, or in renewing, suspending, or revoking any temporary or annual permit."

Article 3, Section 18A-31, authorizes the Board of Alcoholic Control to issue "brown bagging" permits:

"(7) All permits shall be issued for a designated location, a separate permit being required for each separate location of any business.

"(8) Said Board shall not refuse the issuance of any permit to any person, firm, or corporation who shall comply with the provisions of this Chapter, and the issuance of a permit shall not be arbitrary in any case, but issuance of a permit shall be mandatory to any person, firm, or corporation complying with the provisions of this Chapter."

The Town of Gibsonville, under the authority of Article 4, Part 1, Section 18A-33, passed a resolution prohibiting the sale of wine and beer on Sunday. Subsection (b) provides:

> "In addition to the restrictions on the sale of malt beverages and/or wines (fortified or unfortified) set out in this section, the governing bodies of all municipalities and counties in North Carolina shall have, and they are hereby vested with, full power and authority to regulate and prohibit the sale of malt beverages and/or wine (fortified or unfortified) from 1:00 P.M. on each Sunday until 7:00 A.M., on the following Monday. Provided, however, that municipalities and counties shall have no authority under this subsection to regulate or prohibit sales after 1:00 P.M. on Sundays *by establishments having a permit* [*"brown bagging"*] *issued under Article 3 of this Chapter.*" (Emphasis added.)

The statutory authority which gives Gibsonville the right to prohibit sales on Sundays, in the same section provides that such power does not include the right to invalidate or neutralize a "brown bagging" permit. Not only the Act protects a "brown bagging" permit, but a general State law takes precedence over a city ordinance. *State v. Williams,* 283 N.C. 550, 196 S.E. 2d 756; *Staley v. Winston-Salem,* 258 N.C. 244, 128 S.E. 2d 604; *Davis v. Charlotte,* 242 N.C. 670, 89 S.E. 2d 406. G.S. 160A-174(b) provides: "A city ordinance shall be consistent with the Constitution and laws of North Carolina . . . . An ordinance is not consistent . . . when . . . (2) The ordinance makes unlawful an act, omission or condition which is expressly made lawful by State or federal law."

[2] The General Assembly undoubtedly has authority to provide for the creation of classes and to classify objects of legislation. The classifications are upheld if they are practical and prescribe regulations for different classes. The one requirement is that the ordinance creating a classification must affect all persons similarly situated or engaged in the same business without discrimination. *Boyd v. Allen,* 246 N.C. 150, 97 S.E. 2d 864; *State v. McGee,* 237 N.C. 633, 75 S.E. 2d 783.

G.S. 18A-30 (and its predecessor G.S. 18-51) carefully prescribe the type of businesses which may hold "brown bagging" permits. The question of selection is legislative and not legal. Where the Legislature makes the classification, the courts are

not authorized to supplant the legislative intent and purpose by substituting their own. The Legislature is presumed to have provided for a reasonable classification and the burden is on the plaintiff to show the classification is unreasonable. "[C]lassifications as such are not unlawful. They become unlawful when they are arbitrary and unreasonable." *Galloway v. Lawrence,* 263 N.C. 433, 139 S.E. 2d 761. " 'Class legislation' is not offensive to the Constitution when the classification is based on a reasonable distinction and the law is made to apply uniformly to all the members of the class affected." *Cheek v. City of Charlotte,* 273 N.C. 293, 160 S.E. 2d 18. "The question of the propriety, wisdom, and expediency of legislation is exclusively a legislative matter and if an Act is otherwise unobjectionable, all that can be required of it is that it be general in its application to the class or locality to which it applies and that it be public in its character." *Furniture Co. v. Baron,* 243 N.C. 502, 91 S.E. 2d 236. "Neither the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution nor the similar language in Art. I, § 19, of the Constitution of North Carolina takes from the State the power to classify persons or activities when there is reasonable basis for such classification and for the consequent difference in treatment under the law . . . . " *Guthrie v. Taylor,* 279 N.C. 703, 185 S.E. 2d 193. The legislative determination of the class of establishments entitled to "brown bagging" permits does not seem to offend against constitutional guarantees. *Cheek v. City of Charlotte, supra. Surplus Co. v. Pleasants, Sheriff,* 264 N.C. 650, 142 S.E. 2d 697.

In this action the plaintiffs attempted either to obtain "brown bagging" privileges for which they have not applied, or in the alternative, that the "brown bagging" privileges held by a competitor in Gibsonville be declared to be illegal. A permit grants a privilege. It does not convey either a constitutional right or a property right. It is subject to cancellation by the issuing authority for cause. *Boyd v. Allen, supra;* 48 C.J.S., Intoxicating Liquors, § 109 a.; 30 Am. Jur., Intoxicating Liquors, § 136.

In view of the decisions of the superior court and the Court of Appeals in this case and the reasons assigned for the decisions, we have concluded the foregoing discussion not inappropriate, even though the allegations of the complaint (there being no factual dispute) fail to set forth facts constituting a claim upon which the Court may grant the relief prayed for by the

plaintiffs. The failure to establish a sufficient basis for injunctive relief, it follows that the Attorney General's motion that the plaintiffs' action be dismissed should have been allowed.

The plaintiffs allege they operate places of business in Gibsonville and that they have permits from the City to sell beer and wine for off premises consumption. The Town of Gibsonville has passed an ordinance prohibiting the sales on Sunday. One of the plaintiffs' competitors holds a "brown bagging" permit and sells beer and wine on Sunday, disregarding the Town's ordinance. The plaintiffs pray the Court to declare this Sunday ordinance unconstitutional, and its enforcement against them, on the ground that to permit a competitor to sell on Sunday (they being prohibited) is a denial of the plaintiffs' constitutional rights.

The Attorney General, for the State, answered the complaint, prayed that the Gibsonville Sunday ordinance be declared valid except as to businesses holding "brown bagging" permits issued under the State law, and that they be not affected by Gibsonville's Sunday ordinance.

This Court has uniformly held that the constitutionality of a criminal statute or ordinance may not be attacked by civil suit to restrain enforcement. Justice Sharp in *D & W, Inc. v. Charlotte, supra,* states the rule: "Equity will not restrain the enforcement of a criminal statute or regulatory ordinance providing a penalty for its violation; it may be challenged and tested only by way of defense to a criminal prosecution based thereon. . . . To the general rule, however, there is an exception: If the statute or ordinance itself is void, its enforcement will be restrained where there is no adequate remedy at law and such action is necessary to protect property and fudamental human rights which are guaranteed by the constitution. *Surplus Store, Inc. v. Hunter,* 257 N.C. 206, 125 S.E. 2d 764; . . . *Roller v. Allen,* 245 N.C. 516, 96 S.E. 2d 851; . . . " A plaintiff must allege and prove that enforcement deprives him individually of a constitutional and property right.

The main thrust of plaintiffs' complaint seems to be that a "brown bagging" permit entitles the holder to sell beer and wine on Sunday for off premises consumption—a right the plaintiffs do not have under their permits. The correct answer to the plaintiffs' complaint is provided by the statute. The plaintiffs, if they can qualify and pay the fees for the permits,

the Board of Alcoholic Control cannot deny, but must issue the permit. Article 3, Section 18A-31(a)(8) provides: "Said Board shall not refuse the issuance of any permit to any person, firm, or corporation who shall comply with the provisions of this Chapter, and the issuance of a permit . . . shall be mandatory to any person, firm, or corporation complying with the provisions of this Chapter."

The general rule is that when a valid ordinance requires a license or permit as a prerequisite to carrying on a certain business, the enforcement of the ordinance will not be enjoined when an application has not been made for a permit. 43 C.J.S., Injunctions, § 119, at p. 657. Our decisions hold the sale of alcoholic beverages can be legal only when authorized by a legally issued permit. The right to sell has its foundation in the permit and does not exist as a constitutional or property right. The record in this case, therefore, discloses neither a legal nor a factual foundation upon which a court of equity may grant to the plaintiffs the relief they demand.

We have discussed the legal propositions argued by the parties and decided by the superior court and by the Court of Appeals; however, we think adherence to sound principles of law and orderly procedure require this Court to hold that the superior court committed error of law by denying the Attorney General's motion to dismiss and the Court of Appeals likewise committed error by modifying and affirming the judgment.

For the reasons herein assigned and upon the authorities cited we conclude the Superior Court of Guilford County committed error in failing to grant the Attorney General's motion to dismiss made at the close of the hearing in the superior court. The decision of the Court of Appeals is reversed. The Court of Appeals will remand the cause to the Superior Court of Guiford County for the entry of judgment dismissing the plaintiffs' action.

REVERSED AND REMANDED.

Chief Justice BOBBITT concurring.

I am in accord with the majority view that G.S. 18A-33(b) in its entirety is constitutional and valid. It both *confers* and *limits* the authority of a municipality. Any portion of an ordinance which conflicts with or exceeds the authority conferred by G.S. 18A-33(b) is invalid.

G.S. 18A-33(b), if unconstitutional on account of the proviso, is unconstitutional in its entirety. *Cheek v. City of Charlotte,* 273 N.C. 293, 160 S.E. 2d 18 (1968). Whether the proviso should be deleted is for legislative—not judicial—determination.

Justice HUSKINS dissenting.

G.S. 18A-33(b) reads in pertinent part as follows:

> " . . . [T]he governing bodies of all municipalities and counties in North Carolina shall have, and they are hereby vested with, full power and authority to regulate and prohibit the sale of malt beverages and/or wine (fortified or unfortified) from 1:00 P.M. on each Sunday until 7:00 A.M. on the following Monday. Provided, however, that municipalities and counties shall have no authority under this subsection to regulate or prohibit sales after 1:00 P.M. on Sundays by establishments having a permit issued under G.S. 18A-30(2) and (4)."

Pursuant to the authority contained in the foregoing statute, the Town of Gibsonville adopted an ordinance providing in pertinent part as follows: "The sale of malt beverages and wine (fortified or unfortified) from 1:00 P.M. on each Sunday until 7:00 A.M. on the following Monday is prohibited. . . . " However, in order to comply with the proviso contained in G.S. 18A-33(b) the ordinance is not enforced against establishments having a permit issued under G.S. 18A-30(2) and (4), that is, holders of "brown bagging" permits. Plaintiffs contend this amounts to an unconstitutional discrimination against them and bring this action to remove the discrimination.

We have held in numerous cases that the observance of Sunday as a day of rest has a reasonable relationship to the public peace, welfare, safety and morals, and that such requirement rests within the police power of the State—a power often delegated by the State to its municipalities. *Clark's Charlotte, Inc. v. Hunter,* 261 N.C. 222, 134 S.E. 2d 364 (1964); *State v. Trantham,* 230 N.C. 641, 55 S.E. 2d 198 (1949).

In enacting statutes or ordinances for the observance of Sunday, the State, or a municipality to which the power has been delegated, may determine and classify the pursuits, occupations or businesses to be excluded from Sunday operations; and if the classifications are based upon reasonable distinctions and

have some reasonable relationship to the public peace, welfare, safety and morals, they will be upheld. *State v. McGee,* 237 N.C. 633, 75 S.E. 2d 783 (1953); *State v. Towery,* 239 N.C. 274, 79 S.E. 2d 513 (1954). "The one requirement is that the ordinance must affect all persons similarly situated or engaged in the same business without discrimination." *State v. Trantham, supra.* Conversely, if the classifications are based upon unreasonable distinctions and have no reasonable relationship to the public peace, welfare, safety and morals, they violate due process and deny equal protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution and Article I, section 19 of the Constitution of North Carolina.

Involved in this case is the business of selling beer and wine *for off-premises consumption.* As I view it, no legitimate reason appears why the Sunday sale of beer and wine for off-premises consumption by the holder of a "brown bagging" permit tends to "sustain life, promote health, and advance the enjoyment of Sunday as a day of rest," *Charles Stores v. Tucker,* 263 N.C. 710, 140 S.E. 2d 370 (1965), so as to come within the permissible Sunday pursuits, while the Sunday sale of beer and wine for off-premises consumption by a grocery store or any other lawful business establishment profanes the Sabbath and offends the purposes for which the statute or ordinance was enacted so as to come within the impermissible Sunday pursuits. Such classification, in my opinion, is founded upon unreasonable distinctions, discriminates against those engaged in the sale of wine and beer for off-premises consumption who are not holders of "brown bagging" permits, and has no reasonable relation to the objective sought by enactment of the statute or ordinance. Insofar as observance of the Sabbath is concerned, what is the *reasonable distinction* between selling *for off-premises consumption* a six-pack of beer in a brown bagging establishment and selling *for off-premises consumption* the same six-pack in a grocery store? I fail to see it.

It necessarily follows that insofar as G.S. 18A-33(b), and the Gibsonville ordinance by the manner of its enforcement, attempt to put in different classifications the sale of wine and beer for off-premises consumption by those who *do* and those who *do not* hold brown bagging permits—the one allowed and the other prohibited—said statute and discriminatory enforcement of the ordinance are unconstitutional and should not be upheld. Businesses which are essentially the same—selling beer

and wine *for off-premises consumption*—should not be treated in law as though they are different. Discrimination exists when, under the same conditions, persons engaged in the same business are subjected to different restrictions and permitted to enjoy different privileges. Such discrimination impairs equality of protection and denies due process of law which is vouchsafed for all men by both State and Federal Constitutions.

For the reasons stated I would affirm the decision of the Court of Appeals and hold unconstitutional that portion of G.S. 18A-33(b) which requires discriminatory enforcement of the ordinance against Sunday sales of wine and beer for off-premises consumption. Gibsonville could then enforce its ordinance without discrimination or repeal it, according to the wishes of its citizens.

IN THE MATTER OF: MRS. ROBERT ADAIR, REPRESENTATIVE OF MAGGIE BANGE, DECEASED v. ORRELL'S MUTUAL BURIAL ASSOCIATION, INC.

No. 95

(Filed 25 January 1974)

1. **Burial Associations; Constitutional Law § 25— burial association contract — right of legislature to change by statute**

The General Assembly may reserve the right to amend or repeal bylaws and regulations of a Mutual Burial Association which it created so as to bind the Association and its members, but the exercise of the powers of amendment or repeal is limited by the rule that any such subsequent amendment or repeal must be reasonable and within the scope and purpose of the original contract.

2. **Burial Associations; Constitutional Law § 25— payment of funeral benefits — provision for amendment of contract by law — statute not impairment of contract**

Where the contract which defendant burial association entered with its members was made with the specific reservation that it could be amended by act of the General Assembly, enactment of a statute which permitted payment of funeral benefits in cash to the funeral director who rendered decedent services, though changing the terms of the contract previously entered between deceased and the burial association, did not result in impairment of the contract in violation of Art. I, § 10 of the U. S. Constitution.

3. **Burial Associations; Statutes § 11— conflicting statutes — later statute given effect**

Provisions of G.S. 58-226 requiring that a funeral benefit consist only of a funeral in merchandise and service, that no cash be paid,

and that services be rendered by the official funeral director of the Association when a member dies within the territory served by him must yield to the subsequently enacted provisions of G.S. 58-224.2 permitting payment of funeral benefits in cash to one other than the Association's official funeral director, since G.S. 58-224.2 represents the latest expression of legislative will and intent.

APPEAL by defendant from *Seay, J.*, 19 February 1973 Session RANDOLPH Superior Court.

This proceeding was instituted before the Burial Commissioner of North Carolina pursuant to G.S. 58-241.4 seeking a decision requiring Orrell Mutual Burial Association (Orrell) to pay in cash, benefits due its deceased member Maggie Bange. Orrell appealed from the Burial Commissioner's decision directing it to pay the $200 benefit in cash to the represesntative of Maggie Bange. The matter came on for trial *de novo* in Randolph County Superior Court where the parties waived a jury trial and the case was heard on stipulated facts. These facts disclosed the following: Maggie Bange joined Orrell Burial Association on 7 September 1959 and remained a member in good standing until her death on 2 November 1971. Upon her death, she was entitled to maximum funeral benefits of $200. At the request of the persons contracting for her burial, Cumby Mortuary, Inc. (Cumby) furnished all services incident to Mrs. Bange's burial. Mrs. Bange's representatives requested Orrell, both before and after the funeral, to pay to Cumby the full benefits due under Maggie Bange's certificate of membership in its Association. Orrell has refused to pay Cumby or Mrs. Bange's represenatives any amount. Cumby Mutual Burial Association, Inc. is a duly organized Burial Association and is in good standing under the rules and regulations of the North Carolina Burial Association laws. Cumby Mortuary, Inc. was the official funeral director of Cumby Burial Association, Inc.

It was stipulated that if the Court should rule cash benefits to be due and payable under the certificate issued to Maggie Bange, the payments should be made to Cumby Mutual Burial Association, Inc., Mrs. Robert Adair and Mr. Charles Walter Cadwell.

The trial judge, after finding facts consistent with those above recited, adjudged and decreed that Orrell pay to Cumby Mortuary, Inc., Mrs. Robert Adair and Mr. Charles Walter Cadwell the sum of $200 in cash, together with the costs of the action.

Defendant Orrell appealed, and the North Carolina Court of Appeals affirmed. Defendant appealed from the decision of the Court of Appeals pursuant to G.S. 7A-30(1).

Miller, Beck and O'Briant, by Adam W. Beck, for plaintiff appellee.

DeLapp and Hedrick, by Robert C. Hedrick for defendant appellant.

BRANCH, Justice.

Defendant contends that the decision of the Court of Appeals affirming the judgment of the Superior Court is erroneous because it approved a statutory change which resulted in impairment of the obligations of a contract.

Article I, Section 10, Clause 1 of the United States Constitution provides: "No State shall . . . pass any . . . law impairing the obligations of contracts. . . . "

Prior to 1971, Mutual Burial Associations provided benefits to their members only in merchandise and services. These services were provided solely by the official funeral director of the Burial Association of which the deceased person was a member, when the member died within the territory served by the official funeral director. There was no provision for a cash transfer of burial benefits. G.S. 58-226.

The 1967 General Assembly amended Article 24 of Chapter 58 by inserting a new section numbered G.S. 58-224.2, which, in part, provides:

> "The Burial Association Commissioner, with the consent of the Commission, and after a public hearing, may promulgate reasonable rules and regulations for the enforcement of this Article and in order to carry out the intent thereof. The Commission is authorized and directed to adopt specific rules and regulations to provide for the orderly transfer of a member's benefits in merchandise and services from the official funeral director of the member's association to the official funeral director of any other mutual burial association in good standing under the provisions of this Article."

The General Assembly by Act effective 21 July 1971 amended G.S. 58-224.2 by inserting the words "cash or" between

the words "in" and "merchandise" so that the pertinent portion of the statute now reads: "The Commission is authorized and directed to adopt specific rules and regulations to provide for the orderly transfer of a member's benefits *in cash* or merchandise and services. . . . " (Emphasis added.) Pursuant to the 1967 and 1971 amendments, the Burial Commissioner with the consent of the Commission and after a public hearing as required by law, on 29 October 1971 duly adopted the following regulation:

> "On and after November 1, 1971, if a member of a Mutual Burial Association dies, the secretary-treasurer of the Burial Association of the deceased member WILL PAY IN CASH 100% of the deceased member's benefits TO ANY OFFICIAL FUNERAL DIRECTOR of a Burial Association that furnishes funeral services. Said payments shall be made within 30 days after the request for payment, which request shall be made in writing by the next of kin of the deceased or by any person who contracts for the burial of the deceased or by the official funeral director furnishing such services when requested to do so by the next of kin or the person contracting for burial of the deceased." (Emphasis added.)

Thus, upon the death of Maggie Bange, the rules duly adopted by the Burial Commissioner pursuant to the amended G.S. 58-224.2 required Orrell to transfer the funeral benefits in cash to Cumby Mortuary, Inc. upon request of the representative of the deceased member. However, Orrell pointing to the fact that when the certificate was issued to Maggie Bange its bylaws adopted pursuant to G.S. 58-226 precluded payment in cash or payment to anyone other than its official funeral director when a member died within the territory served by him, refused to pay the funeral benefits on the ground that the subsequent statutory changes resulted in impairment of its contract, in violation of Article I, Section 10, Clause 1 of the Constitution of the United States.

At the time the certificate was issued to Maggie Bange, G.S. 58-226 required all Mutual Burial Associations to adopt a uniform set of bylaws which were set out in the statute. Article 19 of the required bylaws stated:

> "These rules and bylaws shall not be modified, canceled or abridged by any association or other authority except by act of the General Assembly of North Carolina."

These bylaws were adopted by Orrell Mutual Burial Association and were printed on the certificate issued to Maggie Bange by Orrell.

Any law which enlarges, abridges or changes the intention of the parties as indicated by the provisions of a contract necessarily impairs the contract whether the law professes to apply to obligations of the contract or to regulate the remedy for enforcement of the contract. Article I, Section 10, Clause 1 of the United States Constitution; 16 Am. Jur. 2d, Constitutional Law, § 453; *Graves v. Howard,* 159 N.C. 594, 75 S.E. 998; *Bateman v. Sterrett,* 201 N.C. 59, 159 S.E. 14. An equally well-recognized principle of constitutional law concerning obligations of contracts is that any law affecting the validity, construction and enforcement of a contract at the time of its making becomes a part of the contract as fully as if incorporated therein. *Graves v. Howard, supra; Trust Co. v. Hudson,* 200 N.C. 688, 158 S.E. 244; *House v. Parker,* 181 N.C. 40, 106 S.E. 137; 16 Am. Jur. 2d, Constitutional Law, § 437.

When a Legislature reserves the right to amend or repeal a *Charter,* it retains the power to change the contract between the corporation and the State and the contracts between the corporation and its stockholders so that a later repeal or amendment of the Charter does not result in an unconstitutional impairment of the contract. *Looker v. Maynard,* 179 U.S. 46, 45 L.Ed. 79, 21 S.Ct. 21; *Close v. Glenwood Cemetery,* 107 U.S. 466, 27 L.Ed. 408, 2 S.Ct. 267; *Venner v. U. S. Steel Corp.,* 116 Fed. 1012; *Willis on Constitutional Law,* Personal Liberty: Impairment, page 633 (1936). Further, it is generally recognized that a mutual insurance company may adopt new or altered bylaws which are binding on a member if the member agrees to be so bound when his certificate of membership is issued or if the company reserves the right to make subsequent changes in the bylaws when the certificate is issued. *Knights Templars' & Masons' Life Indemnity Co. v. Jarman,* 187 U.S. 197, 47 L.Ed. 139, 23 S.Ct. 108; *Mutual Assurance Society v. Korn and Wisemiller,* 11 U.S. 396, 3 L.Ed. 383; *Korn and Wisemiller v. Mutual Assurance Society,* 10 U.S. 192, 3 L.Ed. 195; *Modern Woodmen of America v. White,* 70 Colo. 207, 199 P. 965, 17 A.L.R. 393; *Steen v. Modern Woodmen of America,* 296 Ill. 104, 129 N.E. 546, 17 A.L.R. 406; 43 Am. Jur. 2d, Insurance, § 104.

[1] It is therefore evident that the General Assembly may reserve the right to amend bylaws and regulations of a Mutual

Burial Association which it created so as to bind the Association and its members.

In *Helmholz v. Horst,* 294 Fed. 417, the Circuit Court of Appeals, 6th Circuit, considered the effect of an Act of Congress which enlarged the class of beneficiaries who could take under a certificate issued pursuant to the War Insurance Act of October 1917. The amending Act was passed subsequent to the certificate holder's death. The original Act provided that all contracts of insurance issued thereunder should be subject to the provisions of the Act or any amendment thereto. Holding that the amendment did not impair the obligations of the pre-existing contract, the Court stated:

> "In order to insure the accomplishment of the beneficial purposes of the War Risk Insurance Act, it was further provided therein that the terms and provisions of such contracts of insurance *should be subject in all respects to the provisions of the act or any amendments thereto,* and also subject to all regulations thereunder, *now in force or hereafter adopted,* all of which, together with the application for insurance and the terms and conditions published under authority of the act, should constitute the contract. All of these provisions and conditions were written into the certificate issued to Alfred R. Marshall, and became and are a part of the contract. For this reason subsequent amendments of the War Risk Insurance Act and subsequent regulations affecting this contract, which is still in force, do not impair the obligations of an existing contract, but are in direct conformity with its terms, and in furtherance of its purpose and intent." (Emphasis added.)

These general rules of law were recognized and applied by this Court when it considered the effect of a statute which modified the prescribed form of certificates issued by a burial association in the case of *Spearman v. United Mutual Burial Association,* 225 N.C. 185, 33 S.E. 2d 895. There, the original certificate of membership in the Burial Association provided that if a member should die in an area not served by the local funeral director, the secretary should, upon notice, cause the services and benefits provided by the certificate to be furnished and paid for, and upon failure to do so, the amount of the benefits should be paid in cash to the representative of the deceased. A subsequent statute modified the bylaws of the Association by providing that when a member died while serving in the Armed

Forces of the United States, his spouse or next of kin might elect the return of paid-in assessments or the prescribed funeral benefits if at any time the body was returned for burial in the territory served by the Burial Association. The Court, holding that no improper impairment of the obligation of the contract was effected by the subsequent statute, stated:

> " . . . True this last Act was ratified subsequent to the issuance of the certificate of membership to plaintiff's intestate, but the certificate sued on, as well as the general statute in force at the time, G.S., 58-226, contained the express provision that the rules and by-laws of the Association might be modified by Act of the General Assembly. Hence the plaintiff's intestate must be held to have accepted the certificate of membership with notice that its provisions could be 'modified, canceled, or abridged' by legislative enactment. Under these circumstances this Act of the General Assembly would not be considered offensive to the constitutional provision against the passage of a law which impairs the obligation of a contract. Cons. United States, Art. I, sec. 10; *Faulk v. Mystic Circle,* 171 N.C., 301, 88 S.E., 431; *Helmholz v. Horst,* 294 F., 417. The constitutional prohibition is qualifed by the measure of control which the state retains over remedial processes. *Home Building & Loan Assoc. v. Blaisdell,* 290 U.S., 432, (434).
>
> "The laws in force at the time of the execution of the contract become a part of the convention. This embraces those which affect its validity, construction, discharge and enforcement. *Bateman v. Sterrett,* 201 N.C., 59, 159 S.E., 14. The modification imposed by the Act of the General Assembly is within the scope of the plan and purpose of the Association, and is not unreasonable. *Strauss v. Life Association,* 126 N.C., 971, 36 S.E., 352; *Wilson v. Heptasophs,* 174 N.C., 628, 94 S.E., 443. . . . "

The exercise of these powers of amendment or repeal by the General Assembly is limited by the rule that any such subsequent amendment or repeal must be reasonable and within the scope and purpose of the original contract. *Wilson v. Order of Heptasophs,* 174 N.C. 628, 94 S.E. 443; *Home Building & Loan Asso. v. Blaisdell,* 290 U.S. 398, 78 L.Ed. 413, 54 S.Ct. 231.

[2] In instant case, the provisions of G.S. 58-226 and the certificate issued to Maggie Bange by Orrell contained an express reservation of power by the General Assembly to modify, cancel, or abridge the rules and bylaws of the Association. This was ample notice to both Orrell and the certificate holder of the reservation of power by the General Assembly. The amending statutes and the rules implementing them were reasonable and within the purpose of the Association, i.e., "to provide a plan for each member of this Association for the payment of one funeral benefit."

We hold that the statutory changes subsequent to the issuance of the certificate to Maggie Bange did not result in impairment of contract in violation of Article I, Section 10, Clause 1 of the United States Constitution.

Although not the basis of this decision, we note that other jurisdictions, even without such an express reservation of power by the legislature, hold that retroactive statutory modification of contracts for burial benefits are permissible because such contracts are in a business area subject to the broad regulatory police power of the State. *Metropolitan Funeral System Assoc. v. Forbes,* 331 Mich. 185, 49 N.W. 2d 131. See also, *Annot.:* Burial Service—Pre-Need Contracts, 68 A.L.R. 2d 1251.

[3] Finally, we consider the effect of certain conflicting provisions of G.S. 58-226 and G.S. 58-224.2. G.S. 58-226 still provides that the "[Funeral Benefit] . . . shall consist of a funeral in merchandise and service . . . and in no case shall any cash be paid." It also provides that the services shall be rendered by the official funeral director of the Association when a member dies within the territory served by him. The provisions of this statute were in effect prior to the enactment of G.S. 58-224.2 and prior to its amendment by the General Assembly of 1971. The portion of G.S. 58-224.2 which permits payment of funeral benefits in cash to one other than the Association's official funeral director is in irreconcilable conflict with the above stated provisions of G.S. 58-226. The conflicting provisions in G.S. 58-226 (the statute first enacted) must yield to the provision of G.S. 58-224.2, since the later statute represents the latest expression of legislative will and intent. *Bland v. City of Wilmington,* 278 N.C. 657, 180 S.E. 2d 813; *Victory Cab Co. v. City of Charlotte,* 234 N.C. 572, 68 S.E. 2d 433. The prevailing pro-

visions of G.S. 58-224.2 are consistent with the decision of the Court of Appeals.

The decision of the Court of Appeals is

Affirmed.

JOHN M. DUNN, JR. AND WIFE, OLLIE M. DUNN, MR. AND MRS. C. H. BLACK, AND MR. AND MRS. H. C. KEITH, PETITIONERS v. THE CITY OF CHARLOTTE, NORTH CAROLINA, RESPONDENT

RONALD K. BROWN AND WIFE, LINDA LEE BROWN, AND LARRY E. JOHNSON AND WIFE, MARY L. JOHNSON, PETITIONERS v. THE CITY OF CHARLOTTE, NORTH CAROLINA, RESPONDENT

JOHN A. DEGROOT AND WIFE, OPHELIA H. DEGROOT, AND A. KEITH WOODBERY AND WIFE, PETITIONERS v. THE CITY OF CHARLOTTE, RESPONDENT

No. 76

(Filed 25 January 1974)

1. **Municipal Corporations § 2— appeal from annexation ordinance — burden of proof**

Where the record of annexation proceedings on its face showed substantial compliance with every essential provision of the applicable statutes, the burden was upon petitioners who appealed from the annexation ordinance to show by competent evidence that the city in fact failed to meet the statutory requirements or that there was irregularity in the proceedings which materially prejudiced their substantive rights.

2. **Municipal Corporations § 2— annexation — proposed timetable for extension of services**

There was ample basis for the trial court's finding that the substantive rights of the petitioners have not been prejudiced by the absence from the city's plan for the extension of services into an area to be annexed of a "proposed timetable" for construction of major trunk water mains and sewer outfall lines into the area, the proposed timetable having been provided in discovery proceedings. G.S. 160-453.15(3)c.

3. **Municipal Corporations § 2— annexation — fire protection — use of water tankers**

A city's plan to purchase and use water tankers for fire protection in an area to be annexed until fire hydrants can be installed met the requirements of G.S. 160-453.15(3)a.

4. **Municipal Corporations § 2— annexation — financing of extension of services — use of federal funds**

A city's plan to finance the extension of services into an area to be annexed, including the contemplated use of federal funds, complied with G.S. 160-453.15(3)d.

5. **Municipal Corporations § 2— annexation — services not set forth in ordinance — reference to report of plans for services**

Annexation ordinances are not defective because services to be provided the areas being annexed are not set forth in the ordinances, it being sufficient that each ordinance contains a statement that the city intends to provide the services as set forth in the report of plans for services for the area to be annexed. G.S. 160-453.17(e)(2).

APPEAL by petitioners from *Martin, Special J.*, 12 February 1973 Session of the Superior Court of MECKLENBURG County, certified pursuant to G.S. 7A-31 for initial appellate review by the Supreme Court.

On 11 December 1972, the Charlotte City Council (Council), the governing board of the City of Charlotte (City), under authority of N.C. Gen. Stats. Ch. 160, Art. 36, Part 3, being G.S. 160-453.13 *et seq.*, adopted three annexation ordinances identified as 689-X, 690-X, and 691-X.

Prior to the adoption of the ordinances on 11 December 1972 the City had complied with the procedural requirements of G.S. 160-453.17(a), (b), (c) and (d). On 24 October 1972 the Council declared its intent to consider annexation of the three areas and set the time and place for a public hearing on the question of annexation. Plans setting forth services to be provided each of the three annexation areas were prepared. G.S. 160-453.15. These plans were approved by the Council on 6 November 1972 and filed in the office of the City Clerk and made available for public inspection. The public hearing was held 1 December 1972, after due advertisement. Features of the plan were explained and interested persons were given an opportunity to be heard. Each ordinance recites that the Council had taken into consideration the statements presented at such public hearing. Each contains the findings prescribed by G.S. 160-453.17 (e)(1).

Petitioners John M. Dunn, Jr., and wife, Ollie M. Dunn, Mr. and Mrs. C. H. Black, and Mr. and Mrs. H. C. Keith own real property in the Statesville Road-Derita Road Annexation Area, the subject of Ordinance 691-X. Hereafter the word "Dunn" will refer to all of these petitioners.

Petitioners Ronald K. Brown and wife, Linda Lee Brown, and Larry E. Johnson and wife, Mary L. Johnson, own real property in the Hickory Grove Annexation Area, the subject of Ordinance 690-X. Hereafter the word "Brown" will refer to all of these petitioners.

Petitioners John A. DeGroot and wife, Ophelia H. DeGroot, and A. Keith Woodbery and wife, own real property in the Albemarle Road-York Road Annexation Area, the subject of Ordinance 689-X. Hereafter the word "DeGroot" will refer to all of these petitioners.

On 10 January 1973, Dunn, Brown and DeGroot, under authority of G.S. 160-453.18(a), filed separate petitions in the Superior Court of Mecklenburg County in which they attacked the annexation ordinances on the ground the services to be provided the areas to be annexed as set forth in the approved plans were insufficient to constitute compliance with the requirements of G.S. 160-453.15. City answered each petition.

The court consolidated the three petitions for review at a single hearing. At the hearing, evidence was offered by petitioners and by respondents. In respect of each petition, the court made findings of fact, stated conclusions of law and entered judgment. Each judgment affirmed the ordinance and adjudged that "the annexation may take place as scheduled."

Each petitioner excepted and appealed. G.S. 160-453.18(h).

Casey & Daly by Hugh G. Casey, Jr., for petitioner appellants.

Henry W. Underhill, Jr., H. Michael Boyd and W. A. Watts for respondent appellee.

BOBBITT, Chief Justice.

The authority of the Council to extend the corporate limits of Charlotte is conferred by G.S. 160-453.14. The procedure is prescribed by G.S. 160-453.17.

[1] In each case, the court properly concluded that the record of the annexation proceedings on its face showed substantial compliance with every essential element of the applicable statutes. Therefore, the burden was upon petitioners, who appealed from the annexation ordinance, to show by competent evidence that the City in fact failed to meet the statutory requirements

or that there was irregularity in the proceedings which materially prejudiced their substantive rights. *In re Annexation Ordinance,* 278 N.C. 641, 647, 180 S.E. 2d 851, 855 (1971). Compare *Huntley v. Potter,* 255 N.C. 619, 628, 122 S.E. 2d 681, 686-87 (1961), which related specifically to annexation proceedings under G.S. 160-453.1 *et seq.* by municipalities of less than 5,000.

"In reviewing the procedure followed by a municipal governing board in an annexation proceeding the question whether the municipality is *then providing* services pursuant to the plan of annexation is not before the court. Obviously, extension of services into an annexed area in accordance with the promulgated plan *is not a condition precedent to annexation.*" *In re Annexation Ordinance, supra,* at 647, 180 S.E. 2d at 855. (Our italics.)

Petitioners' assignments of error do not comply with Rules 19(3) and 21 of the Rules of Practice in the Supreme Court, 254 N.C. 783 *et seq.,* as interpreted by this Court. *See State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1970), and cases cited; *Burnsville v. Boone,* 231 N.C. 577, 579, 58 S.E. 2d 351, 353 (1950), and cases there cited; *Putnam v. Publication,* 245 N.C. 432, 96 S.E. 2d 445 (1957); *State v. Hamilton,* 264 N.C. 277, 288, 141 S.E. 2d 506, 514 (1965), and cases cited. However, we have elected to discuss what appear to be petitioners' major contentions.

I.

G.S. 160-453.15(3) provides that the report of plans for the extension of services to the area proposed to be annexed shall include the following:

"b. Provide for extension of major trunk water mains and sewer outfall lines into the area to be annexed so that when such lines are constructed, property owners in the area to be annexed will be able to secure public water and sewer service, according to the policies in effect in such municipality for extending water and sewer lines to individual lots or subdivisions.

"c. If extension of major trunk water mains and sewer outfall lines into the area to be annexed is necessary, set forth a proposed timetable for construction of such mains and outfalls as soon as possible following the effective date of annexation. In any event, the plans shall call for contracts to be let and

construction to begin within 12 months following the effective date of annexation."

[2] The plans provide for the construction of major trunk water mains and sewer outfall lines to serve the areas proposed to be annexed and for contracts to be let and construction to begin within one year from the effective annexation date. However, the plans did not otherwise set forth "a proposed timetable." The City's "proposed timetable" was provided in discovery proceedings. Even so, petitioners contend the annexation proceeding is defective because of the City's failure to include *the timetable* in the report of its plans for the extension of services to the areas proposed to be annexed. Suffice to say, there was ample basis for the court's finding "that the substantive rights of the petitioners have not been materially prejudiced by the absence from the Plan of a proposed timetable for the construction of major trunk water mains and sewer outfall lines that are to be extended into the area." *See In re Annexation Ordinances,* 253 N.C. 637, 644, 117 S.E. 2d 795, 800 (1961).

II.

G.S. 160-453.15(3) provides that the report of plans for the extension of services to the area proposed to be annexed shall include the following:

"a. Provide for extending police protection, fire protection, garbage collection and street maintenance services to the area to be annexed on the date of annexation on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation. If a water distribution system is not available in the area to be annexed, the plans must call for reasonably effective fire protection services until such time as waterlines are made available in such area under existing municipal policies for the extension of waterlines."

Petitioners challenge the sufficiency of the provisions in the plans for the extension of fire protection services to the areas to be annexed.

[3] Each plan sets forth the City's plans to provide reasonable fire protection services from the date of annexation to the time when fire hydrants will be installed in the annexation area. Each plan involves the purchase and use of water tankers until fire hydrants can be installed and provision made for fire pro-

tection services comparable to those provided property within the existing city limits. There was ample basis for the court's finding that the plan for fire protection is adequate and will provide reasonably effective fire protection services to the area pending the completion of the City's effort to provide more complete fire protection.

III.

G.S. 160-453.15(3) provides that the report of plans for the extension of services to the area proposed to be annexed *shall include the following:*

"d. Set forth the method under which the municipality plans to finance extension of services into the area to be annexed."

[4] Each plan sets forth the City's proposals with reference to the financing of the extension of services into the area to be annexed. Petitioners attack these plans because the City contemplates the use of certain federal funds in connection with such financing. No sound reason appears why such funds may not be used for these purposes. Nor does it appear the unavailability of these funds in whole or in part would prevent the City from extending its services into the annexed areas from its own general revenues. There was ample basis for the court's findings that the method set forth in the plans to finance extension of the services into the areas to be annexed constituted compliance with G.S. 160-453.15(3)d.

IV.

[5] Petitioners contend the ordinances are defective because the services to be provided the areas being annexed are not set forth *in the ordinances.* We note that the petitions did not allege the ordinances were defective in this respect. Nor does it appear that any of the exceptions referred to in petitioners' assignments of error relate to this subject.

Nothing in the statute supports this contention. Nor is there support for petitioners' further contention that, absent incorporation in the ordinance, uncertainty exists as to the services the City is obligated to provide the area to be annexed. G.S. 160-453.17(e)(2) provides that "[a] statement of the intent of the municipality to provide services to the area being annexed as set forth in the report required by G.S. 160-453.15"

shall be included in the ordinance. Each ordinance provides: "*Sec. 3.* That it is the purpose and intent of the City of Charlotte to provide services to the area being annexed under this ordinance, as set forth in the report of plans for services approved by the City Council on the 6th day of November, 1972, and filed in the Office of the Clerk for public inspection." Thus, each ordinance identifies specifically the services to be rendered the area to be annexed. These are the plans which petitioners specifically challenged in their petition.

Whether the impact of annexation on any petitioner is greater or less than on any other owner of property in the area to be annexed does not appear.

G.S. 160-453.17(h) makes available to any person owning property in an annexed area a remedy by mandamus in the event the municipality has not followed through on its service plans adopted under the provisions of G.S. 160-453.15(3) and 160-453.17(e).

The statutory references herein are to sections of Part 3, Art. 36, Ch. 160, Volume 3D, Replacement 1972, of the General Statutes. We note that Parts 2 and 3 of Article 36, of Chapter 160, of the General Statutes as codified in Volume 3D, Replacement 1972, were recodified by Chapter 426 of the Session Laws of 1973 and now constitute Parts 2 and 3 of Article 4A of Chapter 160A.

The consolidation of two or more petitions for review in a single hearing referred to in G.S. 160-453.18(d) refers to the consolidation of two or more petitions which involve *a single* annexation area and ordinance. However, all parties have treated the three petitions as if properly consolidated for hearing in the court below. Suffice to say, no error prejudicial to petitioners results from such consolidation.

Petitioners having failed to show prejudicial error, each of the three judgments is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. WILLIAM OTIS ROBERTSON

No. 70

(Filed 25 January 1974)

1. **Jury §§ 2, 3— motion for special venire of blacks and young people**

In a prosecution for murder, kidnapping and rape, the trial court properly denied defendant's pretrial motion "for a special jury venire composed of blacks and young people of his age group, in addition to the regular jury venire."

2. **Homicide § 21— first degree murders — sufficiency of evidence**

The State's evidence was sufficient to be submitted to the jury on issues of defendant's guilt of the first degree murders of two persons where a nine-year-old girl testified that when she, her mother and a companion entered her mother's home, they were attacked by an intruder using a knife, that immediately after the attack her mother and the companion lay on the floor and blood was all around, and that the intruder then took their billfolds, the sheriff testified he found the dead bodies on the floor of the house the next morning, a medical expert testified the cause of death was stab wounds, an expert testified that defendant's fingerprints were found in the house, and the nine-year-old girl, who spent three days in defendant's company immediately after the attack, positively identified defendant in court as the man who had attacked her mother and the companion.

3. **Kidnapping § 1— sufficiency of evidence**

The State's evidence was sufficient to support submission of a kidnapping charge to the jury where a nine-year-old girl testified that, under threat of death if she did not obey him or attempted to escape, the defendant compelled her to accompany him from her home, to ride about with him all night in an automobile and then to roam with him in the woods for three days and nights.

4. **Rape § 5— sufficiency of evidence**

The State's evidence was sufficient for submission to the jury on a charge of rape where it tended to show that defendant had sexual intercourse with a nine-year-old girl and that defendant threatened to kill her if she did not do as he commanded.

5. **Homicide § 15— SBI agent — testimony that victims were dead — description of wounds**

The trial court in a murder prosecution did not err in permitting an SBI agent to testify that the victims were dead when he observed their bodies at the crime scene or in permitting him to state what wounds he observed on the bodies.

6. **Homicide § 31; Rape § 7— first degree murder — rape — sentences of life imprisonment**

The trial court properly sentenced defendant to life imprisonment for offenses of rape and first degree murder which occurred prior to the decision in *State v. Waddell*, 282 N.C. 431.

7. Kidnapping § 2— sentence of life imprisonment

The trial court properly imposed a sentence of life imprisonment for the offense of kidnapping. G.S. 14-39.

APPEAL by defendant from *Robert Martin, S. J.*, at the 9 April 1973 Session of SURRY.

By indictments, proper in form, the defendant was charged in Stokes County with the murder of William Lee Ernst, Betty G. Mabe, the kidnapping of her daughter, Brenda Lee Mabe, and the rape of Brenda Lee Mabe, a child nine years of age. Upon motion of the defendant, the cases were transferred to Surry County for trial. Without objection, they were consolidated for trial. The jury returned verdicts of guilty of murder in the first degree of William Lee Ernst, murder in the first degree of Betty G. Mabe, kidnapping and rape of a girl under 12 years of age. In each case the defendant was sentenced to imprisonment for life, the sentences to be served consecutively.

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

At about 7:30 p.m. on Sunday, 13 August 1972, Mrs. Betty G. Mabe and William Lee Ernst, returning from a trip to the beach, stopped in Kernersville to pick up her daughter Brenda Lee, nine years of age, at the home of an older daughter, Mrs. Taylor. Leaving the Taylor home, they drove to the home of Mrs. Mabe in Stokes County. On arrival there, at approximately 8:00 p.m., they observed a window at the back of the house had been broken and, upon entering the house, that "everything was torn up." They went upstairs and, as they entered one of the rooms, a man, positively identified in court by the child as the defendant, sprang at them, brandishing a knife. They ran down the stairs, the child in front. At the foot of the stairs she was pushed through the glass storm door. She promptly reentered the house and observed the defendant and Mr. Ernst fighting. She then ran outside again. Very shortly the defendant came out, took her by the hand and led her back into the house. There she observed Mr. Ernst lying on the floor and her mother lying in the kitchen, blood being "all over the place." The defendant then removed billfolds from the two bodies and also took the keys to Mr. Ernst's automobile in which he drove away, taking the child with him.

The defendant told the little girl that if she tried to get away or did anything that he did not want her to do, he would

kill her. She was frightened and stayed in the car while he went into a place of entertainment known as the Red Gate Club. While he was in the Red Gate Club, the child was observed in the parked car by several persons. After a time the defendant came out of the Red Gate Club and resumed driving, finally wrecking the Ernst car. Thereafter, a friend of the defendant's carried them back to a point near the Mabe home, where they arrived about daylight. After trying unsuccessfully to start Mrs. Mabe's automobile, which was parked at the house, the defendant compelled the child to go with him into one of the outbuildings where he had sexual intercourse with her, threatening to kill her if she did not submit. Thereafter, they reentered the house and the defendant, in the presence of the child, had sexual intercourse with the dead body of her mother.

At approximately 10:30 a.m., Mrs. Mabe's older daughter, Mrs. Taylor, being alarmed by her failure to reach her mother by telephone, went to the Mabe home, observed its condition from the outside and, without entering the house, went to the nearby home of a relative for assistance. The child and the defendant were in the Mabe house. Before Mrs. Taylor returned with the relative, the defendant went out of the back door, and into the nearby woods, taking the child with him.

The defendant and the little girl roamed through the woods, in the vicinity of the Dan River, for three or four days, she not knowing where she was and he threatening to kill her if she tried to run away from him. At the end of that period they observed some workmen and two trucks standing in a road. The defendant sent her to tell the men that her mother had fallen into the river and drowned, hoping thereby to get the men to leave their trucks and go searching along the river for the body of the child's mother, so that, in their absence, the defendant could steal one of the trucks and get away. The men, however, called the sheriff who recognized the child and took her to the hospital. The defendant was arrested shortly thereafter.

The doctor who examined the child was of the opinion that she had been sexually penetrated.

The Associate Chief Medical Examiner for the State performed autopsies upon the bodies of William Lee Ernst and Mrs. Betty Mabe. He described the stab wounds found by him upon each body and stated that, in his opinion, in each instance the death resulted from certain of the wounds so described.

A number of fingerprints lifted from the kitchen sink and cabinet in the home of Mrs. Mabe were compared with fingerprints known to be those of the defendant. In the opinion of the State's expert witness, the fingerprints so taken from the Mabe home were those of the defendant.

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

R. Lewis Ray for defendant.

LAKE, Justice.

The defendant set forth ten assignments of error in his statement of the case on appeal. In his brief he states frankly that he has been unable to find any error of significance or consequence but requests this Court to review the record to see if such error appears therein. Due to the seriousness of the offenses charged and to the nature of the sentences imposed, we have not only given careful consideration to the assignments of error but have also reviewed the entire record. Like the defendant's counsel, we find no error which would justify a new trial or modification of the judgments of the Superior Court.

[1] The first assignment of error is to the denial of the defendant's pre-trial motion "for a special jury venire composed of blacks and young people of his age group, in addition to the regular jury venire." Neither the Constitution of the United States nor the Constitution or any law of this State requires that the jury which tries a criminal case be composed of, or include in its membership, persons of any specified race, age or sex or members of any other group. What is required is that there be no arbitrary, systematic exclusion of the members of such group in the selection process. *Swain v. Alabama,* 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed. 2d 759; *Brown v. Allen,* 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469; *State v. Harris,* 281 N.C. 542, 189 S.E. 2d 249; *State v. Cornell,* 281 N.C. 20, 187 S.E. 2d 768; *State v. Yoes,* 271 N.C. 616, 632, 157 S.E. 2d 386; *State v. Brown,* 271 N.C. 250, 156 S.E. 2d 272. The defendant does not contend, and there is no evidence whatever in the record to suggest, that members of any race or any other group were systematically or arbitrarily excluded in the process by which the jury which tried the defendant was selected. There is no merit in this assignment of error.

[2] The defendant's Assignment of Error No. 10 is to the denial of his motion for judgment of nonsuit. This assignment is likewise without merit, the evidence being ample to support the verdict of guilty on each of the four offenses charged. The testimony of the little girl, Brenda Mabe, was that when she, her mother and their companion, William Lee Ernst, entered the home of Mrs. Mabe, they were attacked without provocation by an intruder armed with and using a knife. Immediately after the attack both her mother and Mr. Ernst lay on the floor and blood "was all around." The intruder then took their billfolds. The Sheriff of the County testified that he found the dead bodies of Mrs. Mabe and Mr. Ernst on the floor of the house the next morning. The medical expert who performed autopsies on the bodies testified that, in each case, the cause of death was stab wounds.

Expert testimony was to the effect that fingerprints of the defendant were found in the house. The little girl positively identified the defendant, in court, as the man who had so attacked her mother and Mr. Ernst. She, herself, had spent three days and three nights in the defendant's company immediately after the attack. There was no evidence of any pre-trial identification of the defendant by this witness. Clearly, the evidence was ample to support the verdict of murder in the first degree, and there was no error in denying the motion for judgment as of nonsuit with reference to either of the murder charges. *State v. Thompson,* 280 N.C. 202, 185 S.E. 2d 666; *State v. Sanders,* 276 N.C. 598, 174 S.E. 2d 487 (death sentence vacated, 403 U.S. 948, 91 S.Ct. 2290, 29 L.Ed. 2d 860).

[3] The child's testimony was that, under threat of death if she did not obey him or attempted to escape, the defendant compelled her to accompany him from her home, to ride about with him all night in an automobile and then to roam with him in the woods for three days and nights. This is ample evidence to support the submission to the jury of the charge of kidnapping. *State v. Murphy,* 280 N.C. 1, 184 S.E. 2d 845; *State v. Woody,* 277 N.C. 646, 178 S.E. 2d 407.

[4] The evidence shows the child was nine years of age at the time of the offenses and that the defendant had sexual intercourse with her. She testified that he threatened to kill her if she did not do as he commanded. Clearly, this evidence was sufficient to submit to the jury the charge of rape. G.S. 14-21; *State v. Cox,* 280 N.C. 689, 187 S.E. 2d 1; *State v. Murry,* 277

N.C. 197, 176 S.E. 2d 738; *State v. Temple,* 269 N.C. 57, 152 S.E. 2d 206.

The defendant's Assignments of Error 2, 3, 4, 5, 8 and 9 were to the court's sustaining objections by the State to questions propounded by the defendant's counsel to Brenda Mabe and to other witnesses for the State on cross-examination. In a number of these instances the witness answered the question notwithstanding the court's having sustained the objection, and the record does not indicate that the jury was instructed to disregard the answer. In other instances the record does not disclose what the answer of the witness would have been had the objection not been sustained. Furthermore, we find no error in the ruling of the trial judge on these various objections by the State. There is no merit in these assignments of error.

[5] The defendant's Assignments of Error 6 and 7 are to the court's overruling of the defendant's objections to questions propounded by the solicitor to an agent of the State Bureau of Investigation who participated in the investigation of the murders and, in the course thereof, observed the bodies of Mrs. Mabe and Mr. Ernst at the scene of the crimes. There was no error in allowing this witness to testify that Mrs. Mabe and Mr. Ernst were dead when he observed the bodies or in permitting him to state what wounds he observed on the bodies. There is no merit in either of these assignments of error.

The defendant did not except to any portion of the court's charge to the jury. We have, however, examined the charge carefully and find therein no error.

[6, 7] The rape of Brenda Mabe and the murders of Mrs. Mabe and Williaim Lee Ernst having occurred prior to our decision in *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19, the court properly sentenced the defendant to imprisonment for life for each of these offenses. There was also no error in the imposition of the sentence to life imprisonment for the offense of kidnapping Brenda Mabe. G.S. 14-39; *State v. Barbour,* 278 N.C. 449, 180 S.E. 2d 115.

No error.

JAMES A. SINK v. KENNETH WESLEY EASTER, JR.

No. 93

(Filed 25 January 1974)

1. **Actions § 10; Rules of Civil Procedure §§ 3, 4— issuance of summons — extension of time to file complaint — inability to gain personal service — alternate service by publication**

Where plaintiff instituted an action against defendant by issuing a summons and obtaining an extension of time within which to file a complaint, the summons and extension order were delivered to the Sheriff of Guilford County who returned them to the clerk of court unserved with the notation that defendant was in Amsterdam and his address was unknown, and plaintiff's attorney then called the residence of defendant in High Point and was advised that defendant was in Amsterdam and the party at his residence did not have his address or know how long he would be in Europe, plaintiff could have and therefore should have effected personal service of process by leaving copies of the summons and court order at defendant's High Point residence with a person of suitable age and discretion living there, and the attempted service of process by publication under Rule 4(j)(9)c was void.

2. **Process § 10— service by publication — strict construction of statutes**

Service of process by publication is in derogation of the common law; therefore, statutes authorizing it are strictly construed, both as grants of authority and in determining whether service has been made in conformity with the statute.

3. **Rules of Civil Procedure § 4— service of process by publication — mailing of notice to known address required**

Even if service of process by publication under Rule 4(j)(9)c had been proper in this case, the service would still have been fatally defective for failure to mail a copy of the notice of service of process by publication to defendant's known High Point address.

4. **Process § 10; Rules of Civil Procedure § 4— action dismissed — authority of court to act — failure of stipulation to revive action**

Where plaintiff did not continue the action in existence by securing an endorsement upon the original summons for an extension of time within which to complete service of process and did not sue out an alias or pluries summons, the action was discontinued ninety days after the summons was issued, and the court was thereafter without authority to entertain defendant's motion for summary judgment or to enter any judgment in the action except a formal order of dismissal; furthermore, defendant's stipulation long after the action was discontinued that "after the period of limitation had run, defendant was served by publication," could not and did not revive the action.

ON *certiorari* to the Court of Appeals to review its decision, 19 N.C. App. 151, 198 S.E. 2d 43 (1973), reversing judgment of *Long, J.*, 6 November 1972 Session, DAVIDSON Superior Court.

Civil action by the father of a minor to recover medical expenses incurred by him for injuries to the minor allegedly inflicted by defendant's negligence.

The automobile accident in which plaintiff's minor daughter was injured by the alleged negligence of the defendant occurred on 6 September 1968.

On 4 September 1971 summons was issued in this action; and on the same day plaintiff applied to the court for an extension of time within which to file his complaint, stating in the application the nature and purpose of the action. The court extended the time for filing complaint to 24 September 1971, ordering a copy of the application and order to be delivered to defendant with a copy of the summons.

On 10 September 1971 the sheriff returned the summons and order extending time to file complaint with the following notation: "Kenneth Wesley Easter not to be found in Guilford County—in Amsterdam address unknown."

On 23 September 1971 the complaint was filed. Notice of service of process by publication was published on 1, 8 and 15 October 1971 in The Thomasville Times.

On 11 November 1971 defendant, having returned from Amsterdam, filed a written motion to dismiss under Rule 12(b) of the Rules of Civil Procedure on the ground that he had not been served with process and the court lacked jurisdiction. This motion was denied by Judge Wood in an order dated 27 December 1971 but not filed until 27 March 1972. Defendant was allowed thirty days within which to answer or otherwise plead. Defendant excepted to the denial of his motion.

On 25 April 1972 defendant filed answer denying negligence on his part and raising the defenses of (1) lack of jurisdiction over defendant by reason of improper service of process, (2) the statute of limitations, G.S. 1-52, and (3) contributory negligence of the injured minor.

On 4 August 1972 defendant moved for summary judgment pursuant to the provisions of Rule 56, Rules of Civil Procedure, on the ground that the action was commenced more than three years after the date of the accident and after the cause of action accrued. In support of his motion defendant contended that the action was not commenced when the summons was is-

sued because the summons and order extending time to file complaint were never served. Therefore, defendant argues the action was not commenced until 23 September 1971 when the complaint was filed. On 22 November 1972 Judge Long allowed the motion, entered summary judgment in favor of defendant, and plaintiff appealed.

The Court of Appeals reversed for the reasons stated in its opinion, and we allowed certiorari to review that decision.

Walser, Brinkley, Walser & McGirt by Charles H. McGirt, Attorneys for the defendant appellant.

Charles F. Lambeth, Jr., Attorney for plaintiff appellee.

HUSKINS, Justice.

The question presented for review is whether the trial court erred in granting defendant's motion for summary judgment. To reach the correct answer we must first determine when the action was commenced, and then determine whether defendant was duly served with process.

Rule 3 of the North Carolina Rules of Civil Procedure (G.S. 1A-1, Rule 3) reads as follows:

> "A civil action is commenced by filing a complaint with the court. The clerk shall enter the date of filing on the original complaint, and such entry shall be prima facie evidence of the date of filing.
>
> A civil action may also be commenced by the issuance of a summons when
>
> (1) A person makes application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days and
>
> (2) The court makes an order stating the nature and purpose of the action and granting the requested permission.
>
> The summons and the court's order shall be served in accordance with the provisions of Rule 4. When the complaint is filed it shall be served in accordance with the provisions of Rule 4 or by registered mail if the plaintiff so elects. If the complaint is not filed within the period specified in the clerk's order, the action shall abate."

Plaintiff chose to follow the procedure which permits an action to be commenced by the issuance of a summons. He had a summons issued on 4 September 1971, made application to the court stating the nature and purpose of his action, and obtained the requisite court order granting permission to file the complaint within twenty days. On 23 September 1971, a date within the authorized period, plaintiff filed his complaint. Having proceeded in accordance with Rule 3, plaintiff's action against the defendant, Kenneth Wesley Easter, Jr., was properly commenced on 4 September 1971.

Rule 3 specifies that the summons and court order shall be served in accordance with the provisions of Rule 4, and when the complaint is filed it shall be served either by registered mail or in accordance with the provisions of Rule 4. The usual and most frequently employed methods for service of process on a natural person are personal service and substituted personal service. Rule 4(j)(1)a provides for service of process upon a natural person "[b]y delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein . . . ."

Acting pursuant to Rules 3 and 4(a), plaintiff delivered the summons and court order extending time to file the complaint to the Sheriff of Guilford County. On 10 September 1971 the summons was returned to the clerk of court unserved with the following notation thereon: "Kenneth Wesley Easter not to be found in Guilford County—in Amsterdam address unknown." According to an affidavit filed by plaintiff's attorney, he then "called the residence of the defendant in High Point and was advised that the defendant was in Amsterdam but that the party *at his residence* did not have his address and did not know how long the defendant would remain in Europe or in Amsterdam, the Netherlands." (Emphasis added.)

[1] It thus appears that plaintiff could have and therefore should have effected personal service of process by leaving copies of the summons and court order at defendant's High Point residence with a person of suitable age and discretion living there, *see* G.S. 1A-1, Rule 4(j)(1)a; Annot. 32 A.L.R. 3d 112, § 12[a] (1970). Instead of doing so, he chose to institute service of process by publication. On these facts, defendant was not subject to service of process by publication under Rule 4(j)(9)c. Therefore, the attempted service of process by means of publi-

cation was void. *See Byrd v. Piedmont Aviation, Inc.*, 256 N.C. 684, 124 S.E. 2d 880 (1962); *Scott & Co. v. Jones*, 230 N.C. 74, 52 S.E. 2d 219 (1949). But if the facts were otherwise, it appears that even under the method chosen, service of process would still be fatally defective.

Rule 4(j)(9)c, which sets forth the procedure for service of process by publication, reads in pertinent part as follows:

> "c. Service by publication.—A party subject to service of process under this subsection (9) may be served by publication whenever the party's address, whereabouts, dwelling house or usual place of abode is unknown and cannot with due diligence be ascertained, or there has been a diligent but unsuccessful attempt to serve the party under either paragraph a or under paragraph b or under paragraphs a and b of this subsection (9). Service of process by publication shall consist of publishing a notice of service of process by publication in a newspaper qualified for legal advertising in accordance with G.S. 1-597, 1-598, and published in the county where the action is pending or, if no qualified newspaper is published in such county, then in a qualified newspaper published in an adjoining county, or in a county in the same judicial district, once a week for three successive weeks. *If the party's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the party at or immediately prior to the first publication a copy of the notice of service of process by publication. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence.* Upon completion of such service there shall be filed with the court an affidavit showing the publication *and mailing* in accordance with the requirements of G.S. 1-75.10(2) and the circumstances warranting the use of service by publication." (Emphasis added.)

Examination of the notice of service of process by publication discloses that it is in substantial compliance with statutory requirements. *See* Rule 4(j)(9)c. The notice of service of process was published in The Thomasville Times on 1, 8, and 15 October 1971, such publication meeting the requirement that publication be made for three successive weeks in a qualified newspaper. The business manager of the publisher of The Thomasville Times furnished the publisher's affidavit showing compliance with the publication requirements of G.S. 1-75.10(2),

and plaintiff's attorney filed an affidavit specifying the circumstances which he thought warranted the use of service by publication. Rule 4(j)(9)c. However, there was no affidavit filed showing the mailing of the notice of service of process by publication to defendant's High Point address, *although that address was known.* In the absence of such an affidavit, we can only conclude that the mailing required by Rule 4(j)(9)c and G.S. 1-75.10(2) was omitted. Such mailing may be omitted only if the post-office address cannot be ascertained in the exercise of reasonable diligence.

[2] In many cases dealing with process, this Court has applied the rule that "[s]ervice of process by publication is in derogation of the common law. Statutes authorizing it, therefore, are strictly construed, both as grants of authority and in determining whether service has been made in conformity with the statute." *Harrison v. Hanvey,* 265 N.C. 243, 143 S.E. 2d 593 (1965). *Accord, e.g., Jones v. Jones,* 243 N.C. 557, 91 S.E. 2d 562 (1956); *Nash County v. Allen,* 241 N.C. 543, 85 S.E. 2d 921 (1955); *Comrs. of Roxboro v. Bumpass,* 233 N.C. 190, 63 S.E. 2d 144 (1951).

This rule has been applied in a number of cases dealing with service of process by publication under the law as it existed prior to the passage of Rule 4(j)(9). Prior to repeal by the 1971 General Assembly, G.S. 1-99.1 through G.S. 1-99.4 contained the procedural requirements for service of process by publication. According to the *Comment* to Rule 4, "[t]he mechanics of service by publication have not been substantially changed." One change has been made, however, in regard to the requirements of a mailing. Under the prior law, G.S. 1-99.2(c) (repealed 1971), the clerk of court, rather than the plaintiff, was the person required to mail a copy of the notice of service of process by publication to the defendant. In *Harmon v. Harmon,* 245 N.C. 83, 95 S.E. 2d 355 (1956), where plaintiff's affidavit actually specified the address of the party to be served by publication, judgment was vacated for failure of the court clerk to mail the notice of service of process by publication.

In *Harrison v. Hanvey, supra,* plaintiff's attorney failed to satisfy the statutory requirements in that his affidavit failed to either set out the address of the defendant or state that it was unknown. Plaintiff's attorney knew of several addresses at which defendant had lived since the cause of action accrued but failed

to state them in the affidavit. Since there was no address specified in the affidavit, the clerk of court never made the mailing. Both of these failures are listed as fatal defects in the purported service of process by publication.

In *Edwards v. Edwards,* 13 N.C. App. 166, 185 S.E. 2d 20 (1971), a divorce action, the court set aside judgment for lack of jurisdiction over defendant because "plaintiff failed to comply with the statute not only in failing to file the affidavit required by G.S. 1A-1, Rule 4(j)(9)(c) [sic], but in failing to file affidavit that notice of publication had been mailed as required by statute or in the alternative, a showing that reasonable diligence had been exercised, without success, to determine defendant's post office address."

[3] Thus, even if defendant had been subject to service of process by publication, which he was not, the purported service in this case would still be fatally defective for failure to mail a copy of the notice of service of process by publication to defendant's known High Point address.

Since there was no valid service of process, the court acquired no jurisdiction over defendant, *Scott & Co. v. Jones,* 230 N.C. 74, 52 S.E. 2d 219 (1949), and defendant's motion to dismiss under Rule 12(b) on jurisdictional grounds should have been allowed by Judge Wood.

[4] When the summons was returned unserved by the Sheriff of Guilford County, plaintiff did not continue the action in existence by securing an endorsement upon the original summons for an extension of time within which to complete service of process, Rule 4(d)(1), and did not sue out an alias or pluries summons returnable in the same manner as the original process pursuant to Rule 4(d)(2). This action was therefore discontinued ninety days after 4 September 1971, the date the summons was issued. Rule 4(e). Thereafter, the court was without authority to entertain defendant's motion for summary judgment or to enter any judgment in the action commenced on 4 September 1971 except a formal order of dismissal. *See Clark v. Homes,* 189 N.C. 703, 708, 128 S.E. 20, 23 (1925). Defendant's stipulation long after the action was discontinued that "after the period of limitation had run, defendant was served by publication," could not and did not revive the action.

For the reasons stated, the decision of the Court of Appeals is reversed, and the action is remanded to the Court of Appeals

for further remand to the Superior Court of Davidson County with instructions to dismiss for lack of jurisdiction.

Reversed and remanded.

STATE OF NORTH CAROLINA v. WILLIE ALBERT CURRIE

No. 85

(Filed 25 January 1974)

Criminal Law § 127; Statutes § 11; Weapons and Firearms — possession of firearm by felon — statute amended pending defendant's appeal — judgment arrested

Since the Felony Firearms Act applies only to those who are no longer citizens by reason of a prior conviction of a felony, and defendant's citizenship had not been restored at the time of his trial for possession of a firearm, his conviction under the Act was proper; however, revision of G.S. 13-1 to 13-4 while defendant's appeal was pending to provide for automatic restoration of citizenship to persons convicted of a felony thereby exempted defendant from provisions of the Felony Firearms Act, and the judgment entered against him must therefore be arrested.

APPEAL by the State from decision of the North Carolina Court of Appeals arresting the judgment of *Martin, S. J.*, at the 19 February 1973 Criminal Session of CUMBERLAND Superior Court, reported in 19 N.C. App. 241, 198 S.E. 2d 491 (1973).

Defendant was tried on an indictment charging him with the felonious possession of a firearm in violation of G.S. 14-415.1. From a verdict of guilty and a judgment imposing a sentence of imprisonment for not less than nine years nor more than ten years, defendant appealed to the Court of Appeals. That court in an opinion by Judge Campbell, concurred in by Judge Hedrick, ordered the judgment arrested. Judge Baley dissented and the State appealed, pursuant to G.S. 7A-30(2).

The State's evidence tends to show that on 15 September 1972 a confidential informant told Officer W. L. Davis of the Fayetteville Police Department that he had seen a large quantity of heroin, which he valued at approximately $30,000, at defendant's home in Fayetteville, North Carolina. The informant had also observed defendant selling heroin to several persons. Based on this information, and because the informant had in the past

provided information resulting in the arrest and conviction of drug dealers and users in the Fayetteville area, Officer Davis obtained a search warrant for defendant's home. On the same day Officer Davis, accompanied by four other officers, entered defendant's house and read the warrant in the presence of defendant and the other occupants. The search revealed the following items: a marijuana cigarette, 206 syringes, 5 pistols, a rifle, a shotgun, and $500 in cash. Defendant admitted that he was the owner of one of the pistols, but claimed the other firearms belonged to various friends who had left them at his house. The arresting officer knew that defendant had previously been convicted of the felony of selling marijuana, and consequently charged him with the felonious possession of a firearm in violation of G.S. 14-415.1.

Defendant did not testify or offer any evidence. His counsel, at various stages of the trial, made the following motions: To quash the bill of indictment because G.S. 14-415.1 is unconstitutional and because of the form and insufficiency of the bill; to grant defendant judgment as in the case of nonsuit; and to arrest the judgment. All motions were denied by the trial court.

Attorney General Robert Morgan and Associate Attorney C. Diederich Heidgerd for the State.

Nance, Collier, Singleton, Kirkman & Herndon by James R. Nance, Sr., and James R. Nance, Jr., for defendant appellee.

MOORE, Justice.

The 1971 General Assembly on 19 July 1971 enacted Chapter 954 of the Session Laws, effective 1 October 1971, entitled "The Felony Firearms Act." This Act is now codified as G.S. 14-415.1 and G.S. 14-415.2, and in pertinent part is as follows:

> "§ 14-415.1. *Possession of firearms, etc., by felon prohibited.*—(a) It shall be unlawful for any person who has been convicted in any court in this State, in any other state of the United States or in any federal court of the United States of a crime, punishable by imprisonment for a term exceeding two years, to purchase, own, possess or have in his custody, care or control, any hand gun or pistol.
>
> "Every person violating the provisions of this section shall be guilty of a felony and shall be imprisoned for not

more than 10 years in the State prison or shall be fined an amount not exceeding five thousand dollars ($5,000).

* * *

"§ 14-415.2 *Exemption where citizenship restored.*— Any person whose citizenship is restored under the provisions of Chapter 13 of the General Statutes, any comparable State or federal statute, shall thereafter be exempted from the provisions of G.S. 14-415.1."

Prior to 1971 Chapter 13 of the General Statutes provided that any person convicted of a crime whereby his rights of citizenship had been forfeited was entitled to have such rights restored at any time after two years from the date of discharge by filing a petition setting forth the information required by the statute, giving three months' notice, and having a hearing before a judge of the superior court. At the hearing it was necessary for the petitioner to prove by five respectable witnesses, who had been acquainted with the petitioner for three years next preceding the filing of his petition, that his character for truth and honesty during that time had been good. The court, on being satisfied that the character of the applicant for truth and honesty was good, could then restore his lost rights of citizenship. G.S. 13-1 to G.S. 13-5 (repealed in 1971).

Chapter 13 of the General Statutes was repealed on 16 July 1971 by Chapter 902 of the Session Laws, and was replaced by a new Chapter 13 enacted with the purpose as stated in the caption "to require the automatic restoration of citizenship to any person who has forfeited such citizenship due to committing a crime and has either been pardoned or completed his sentence," upon the occurrence of one of the following conditions: "(a) the Department of Correction at the time of release recommends restoration of citizenship; (b) two years have elapsed since release by the Department of Correction, including probation or parole, during which time the individual has not been convicted of a criminal offense of any state or of the Federal Government; (c) or upon receiving an unconditional pardon." Such person was only required to take an oath before any judge of the General Court of Justice stating that he had complied with one of the above-stated conditions, and that he would support and abide by the Constitution and laws of the United States and the Constitution and laws of North Carolina. Chapter 902 was codified as G.S. 13-1 to G.S. 13-3 (amended in 1973).

Chapter 251 of the 1973 Session Laws again revised and rewrote Chapter 13, substituting the present Sections 13-1 to 13-4 for Sections 13-1 to 13-3 as enacted in 1971, which now in pertinent part are as follows:

"§ 13-1. *Restoration of citizenship.*—Any person convicted of a crime, whereby the rights of citizenship are forfeited, shall have such rights restored upon the occurrence of any one of the following conditions:

(1) The unconditional discharge of an inmate by the State Department of Correction or the North Carolina Board of Juvenile Correction, of a probationer by the State Probation Commission, or of a parolee by the Board of Paroles; or of a defendant under a suspended sentence by the court.

(2) The unconditional pardon of the offender.

(3) The satisfaction by the offender of all conditions of a conditional pardon.

"§ 13-2. *Issuance and filing of certificate or order of restoration.*—The agency, department, or court having jurisdiction over the inmate, probationer, parolee or defendant at the time his rights of citizenship are restored under the provisions of G.S. 13-1(1) shall immediately issue a certificate or order in duplicate evidencing the offender's unconditional discharge and specifying the restoration of his rights of citizenship.

"The original of such certificate or order shall be promptly transmitted to the clerk of the General Court of Justice in the county where the official record of the case from which the conviction arose is filed. The clerk shall then file the certificate or order without charge with the official record of the case."

It is obvious that the 1971 General Assembly in enacting Chapter 902 intended to substantially relax the requirements necessary for a convicted felon to have his citizenship restored. These requirements were further relaxed in 1973. The Felony Firearms Act when enacted in 1971 provided that the Act did not apply to persons whose citizenship had been restored under Chapter 13. This, of course, referred to the new Chapter 13 as enacted in 1971, since the 1971 Chapter 13 was adopted three

days prior to the enactment of the Felony Firearms Act. When the General Assembly again revised Chapter 13 in 1973, the exemption provided in the Felony Firearms Act for persons whose citizenship had been restored under Chapter 13 was left intact.

Defendant in the present case was charged with violating G.S. 14-415.1 on 15 September 1972. The felony for which defendant had previously been convicted was the sale of marijuana. Judgment in that case was pronounced at the 7 September 1966 Session of Cumberland Superior Court, and defendant was then placed on probation for five years. His probation had to be unconditionally terminated on 7 September 1971. G.S. 15-200. Hence, when he was charged in the present case with the felonious possession of a firearm on 15 September 1972, he was no longer on probation. The record does not disclose, however, that his citizenship was restored under Chapter 13 as rewritten in 1971. Therefore, at the time of his trial on 19 February 1973 we assume that his citizenship had not been restored pursuant to Chapter 13.

On 20 April 1973, while his appeal in the Court of Appeals was pending, Chapter 13 of the General Statutes was replaced by new provisions as provided by Chapter 251, 1973 Session Laws, the pertinent provisions of which are now codified as G.S. 13-1 and G.S. 13-2 (quoted above) and provide for automatic restoration of citizenship upon the unconditional discharge of a probationer.

Thus, the determinative question presented by this appeal is whether defendant is entitled to the benefit of the 1973 revision of Chapter 13 enacted after his trial but while his appeal was pending.

G.S. 14-415.2 specifically provides that any person whose citizenship is restored under the provisions of Chapter 13 of the General Statutes, or any comparable State or federal statute, is thereafter exempted from the provisions of G.S. 14-415.1. Clearly then the General Assembly intended for the Felony Firearms Act to apply only to those felons whose citizenship had not been restored under Chapter 13.

Defendant asserts that his citizenship was restored by the 1973 revision of Chapter 13, and that therefore, pursuant to G.S. 14-415.2, he is exempt from the provisions of G.S. 14-415.1.

In *State v. Pardon,* 272 N.C. 72, 157 S.E. 2d 698 (1967), defendant on a plea of guilty was sentenced to eight months in jail for the third offense of public drunkenness within a twelve-month period. At the time defendant was sentenced on 2 May 1967, G.S. 14-335(11) (1965 Cumulative Supplement) made the third offense of public drunkenness within a twelve-month period a general misdemeanor punishable within the discretion of the court. While the case was pending on appeal, the General Assembly, by Chapter 1256 of the 1967 Sesslion Laws, rewrote G.S. 14-335 to make the punishment for public drunkenness uniform throughout the State. In doing so it reduced the maximum prison sentence for the first offense from thirty to twenty days. For any subsequent offense within a twelve-month period it made the punishment a fine of not more than $50 or imprisonment for not more than twenty days in the county jail or commitment to the custody of the Director of Prisons for an indeterminate sentence of not less than thirty days nor more than six months. It also made chronic alcoholism an affirmative defense to the charge of public drunkenness. In vacating the judgment and remanding the case to the superior court for trial *de novo* in which defendant would be entitled to prove if he could the affirmative defense of chronic alcoholism, the Court stated:

> " . . . The legislature may always *remove* a burden imposed upon citizens for State purposes. And, when this occurs pending an appeal, absent a saving clause, a manifest legislative intent to the contrary, or a constitutional prohibition, the appellate court must give effect to the new law. [Citations omitted.] Since the judgment is not final pending appeal 'the appellate court must dispose of the case under the law in force when its decision is given, even although to do so requires the reversal of a judgment which was right when rendered.' *Gulf, Col. & S. F. Ry. v. Dennis,* 224 U.S. 503, 506, 56 L.Ed. 860, 861, 32 S.Ct. 542, 543.
>
> * * *
>
> " . . . That defendant is, and was at the time of his trial, a chronic alcoholic is unquestioned on the record before us. If he were not, however, he would be entitled to have his sentence decreased in conformity with G.S. 14-335 (1967). *A fortiori,* notwithstanding his plea of guilty, under the facts here disclosed, he is also entitled to the benefit of the change in the law which would allow

him to prove that his conduct on 13 April 1967 was not criminal."

Defendant's possession of the firearm in the instant case was criminal at the time of his trial since his citizenship at that time had not been restored. Pending his appeal his citizenship was restored by legislative enactment. Under the terms of G.S. 14-415.2, he was, therefore, expressly exempt from the provisions of G.S. 14-415.1. The Felony Firearms Act applies only to those who are no longer citizens by reason of a prior conviction of a felony. Once they regain their citizenship, the Act no longer applies. The facts in this case do not warrant undue sympathy for defendant. Nevertheless, he is entitled to have his case disposed of under the law in force at the time of this decision, even though this requires the reversal of the judgment that was proper when rendered. See *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972); *State v. Spencer*, 276 N.C. 535, 549, 173 S.E. 2d 765, 775 (1970); *State v. Pardon, supra.* We agree with the Court of Appeals that the judgment in this case must be arrested.

The decision on this appeal is based solely on the ground that we must give defendant the benefit of the 1973 revision of Chapter 13. We do not reach other questions presented by the appeal or the constitutionality of G.S. 14-415.1.

The decision of the Court of Appeals is affirmed.

Affirmed.

JOSEPHINE B. CRUTCHER v. R. DAVID NOEL

No. 16

(Filed 25 January 1974)

1. **Trial § 11— scope of jury argument**

Counsel may argue all the evidence to the jury, with such inferences as may be drawn therefrom; but he may not "travel outside the record" and inject into his argument facts of his own knowledge or facts not included in the evidence.

2. **Trial § 11— jury argument — inviting retaliatory argument**

While there are occasions when counsel, in his remarks to the jury, may invite responsive or retaliatory argument by opposing coun-

sel, such invitation does not grant opposing counsel *carte blanche* license to travel outside the record or beyond the bounds of proper response and retaliation.

3. Physicians, Surgeons, Etc. § 11; Trial § 11— malpractice — jury argument — statement that medical witnesses would have testified certain way

The trial court in a malpractice action committed prejudicial error in permitting defense counsel to argue to the jury that twelve doctors, who were listed as defense witnesses but did not testify, would have testified to the same thing that his client had testified to since such argument offered facts outside the record which effectively buttressed his client's testimony on the crucial issue of the case without granting plaintiff his rights of confrontation and cross-examination.

APPEAL by plaintiff from *Godwin, S. J.*, at 17 April 1972 Session of GRANVILLE Superior Court.

Civil action seeking damages for permanent injuries allegedly caused by negligent treatment and care of plaintiff by defendants, Dr. R. David Noel, Dr. Charles B. Finch, the Granville Hospital Association, Inc., June Schmitt, Ursula Hughes and Betsy Tant.

Before trial, plaintiff entered a voluntary dismissal of the action as to defendants Schmitt, Hughes and Tant. At the close of plaintiff's evidence, the trial judge directed a verdict in favor of defendants, Dr. Finch and Granville Hospital Association, Inc. The motion for a directed verdict as to Dr. R. David Noel was denied.

In her Complaint, plaintiff alleged that Dr. Noel was negligent in that he: (1) failed to take proper precautions for the operation on plaintiff based on the knowledge and information available to him concerning plaintiff; (2) failed to conduct the operation in a proper and skillful manner; (3) applied a pneumatic tourniquet to plaintiff's right leg under improper pressure and allowed it to remain for such a period of time to cut off the circulation in plaintiff's leg; (4) failed to adequately follow plaintiff's progress in her operative aftercare.

On 10 April 1972 at final pre-trial conference, Judge Godwin signed an Order which included a list of twelve physicians who might be offered as witnesses by defendant at trial.

Plaintiff's evidence in support of her allegations, including the testimony of Dr. Noel, who was called as an adverse witness, in brief summary, tended to show:

Plaintiff was admitted to Granville Hospital on 20 January 1967 with a two-week history of chest pain and pain in her right knee. Plaintiff's admitting physician consulted with defendant regarding plaintiff's knee condition. Defendant examined plaintiff, and after a steroid injection failed to relieve the pain, suggested an operation. On 3 February 1967, defendant performed an arthrotomy on plaintiff's right knee, removing some tissue. Defendant closed the incision, dressed the wound, and applied an Ace bandage on plaintiff's leg. During the operative procedure, a Richard's tourniquet was applied in order to cut off the blood supply to the leg. Thereafter plaintiff developed a puffiness in the inside of her right thigh. The records contain the following reference to plaintiff's condition: Final Diagnosis—"necrosis of skin and subcutaneous tissue due to pressure of cuff, etiology undetermined." Defendant subsequently opened the affected area and inserted a drain; however, approximately three weeks after the operation, discolorations appeared on plaintiff's leg. Defendant debrided the discolored tissue and closed these areas. Approximately one week later the areas surrounding two of the incisions appeared to be again darkening. Plaintiff was then transferred to the Medical College of Virginia where she underwent several operations in attempts to effect skin grafts on the open wounds on her leg. These attempts were unsuccessful, and on 29 September 1969, plaintiff's right leg was amputated.

Plaintiff testified that after defendant performed the operation, she was in severe pain and could not move her leg or toes. She related the following conversation with Dr. Noel: " 'Dr. Noel, what on earth is wrong with my leg?' He said that when he operated on me, he tied the tourniquet too tight. 'I knew you were tender, but I didn't know you were that tender, and that is what caused the bruises.' "

Dr. Bennett M. Derby, in answer to a hypothetical question, was permitted to respond that a course of treatment as related to him would not meet the standards of good medical practice. He stated:

> "So, we have the appearance of tissue death in the leg following the pattern of compression gangrene in a person who was complaining abnormally of pain very early in the operative course, and it is my opinion that at the time this pain appeared, the bandage had to have been unwrapped to prevent further compression."

Defendant, Dr. Noel, offered no evidence.

The jury answered the issue of negligence in favor of defendant and plaintiff appealed from judgment entered on the jury verdict. The Court of Appeals found no error. We allowed plaintiff's petition for writ of certiorari to the North Carolina Court of Appeals to review its decision on 30 April 1973.

Yarborough, Blanchard, Tucker & Denson by Charles F. Blanchard for plaintiff appellant.

Smith, Anderson, Blount & Mitchell by John H. Anderson; Royster & Royster by Stephen S. Royster for defendant appellee.

BRANCH, Justice.

The sole question for decision is presented by the following assignment of error:

> "The Court erred in permitting counsel for defendant Noel to argue to the jury that doctors who were not called as witnesses by the defendant would have testified that Dr. Noel performed the operation on Mrs. Crutcher correctly and that nurses would have told Dr. Finch that the bandage was on too tight, as set forth in Plaintiff's Exception Numbers 5, 6 and 7."

During the jury arguments, counsel for plaintiff argued that defendant indicated to plaintiff and the court during jury selection, that he probably would call as witnesses Dr. Frank Warren Clippinger, Jr., Dr. John Glasson, Dr. T. B. Dameron, Dr. Don Pruitt, Dr. George Paschal, Dr. James Newsome, Dr. George Johnson, Dr. Ralph Coonrad, Dr. John W. Watson, Dr. Richard Taylor, Dr. R. L. Noblin, and Dr. Harry Fisk; and that he had failed to call any of those persons to testify in his behalf. Plaintiff's counsel further argued to the jury that if these named doctors would have been able to give testimony favorable to Dr. Noel's case, then certainly Dr. Noel would have called one or more of them as witnesses in his behalf.

In response to this argument, defendant's counsel thereafter argued to the jury that there was no use in the defendant presenting ten witnesses before the jury to say that Dr. Noel performed this operation correctly. At that time, plaintiff's counsel objected to this argument. The objection was overruled.

Defendant's counsel continued his argument saying, "I don't know why Mr. Blanchard should object to my mentioning the names of possible witnesses when Mr. Blanchard read the names of those witnesses to the jury. Why should we get them here just to say Dr. Noel did the operation correctly?" Defendant's counsel subsequently argued that one-half to three-quarters of the matters and things originally alleged by the plaintiff as specifications of negligence were no longer then in the lawsuit, and that Dr. Noel would only be bringing those witnesses *here to say what he, himself, had already said.* (Emphasis ours.) In regard to the nurses at Granville Hospital, Inc., defendant's counsel argued: "Don't you know that the nurses at the Hospital would have told Dr. Finch or Dr. Noel that the bandage was too tight, don't you know that?."

During the latter part of this argument, plaintiff's counsel again objected and his objection was again overruled.

[1] The general rule is that counsel may argue all the evidence to the jury, with such inferences as may be drawn therefrom; but he may not "travel outside of the record" and inject into his argument facts of his own knowledge or other facts not included in the evidence. *Cuthrell v. Greene,* 229 N.C. 475, 50 S.E. 2d 525; *State v. Little,* 228 N.C. 417, 45 S.E. 2d 542; and *Perry v. Western North Carolina R. Co.,* 128 N.C. 471, 39 S.E. 27.

[2] It is conceded, however, that there are occasions when counsel, in his remarks to the jury, may invite responsive or retaliatory argument by opposing counsel. *State v. Knotts,* 168 N.C. 173, 83 S.E. 972; *People v. Izzo,* 14 Ill. 2d 203, 151 N.E. 2d 329; *Bank v. Lancaster,* 100 S.W. 2d 1029 (Tex. Civ. App. 1936). Even so, such invitation does not grant opposing counsel *carte blanche* license to travel outside the record or beyond the bounds of proper response and retaliation.

When counsel makes an improper argument, it is the duty of the trial judge, upon objection or *ex mero motu,* to correct the transgression by clear instructions. If timely done, such action will often remove the prejudicial effect of improper argument. *Cuthrell v. Greene, supra.*

[3] Here, the trial judge overruled plaintiff's objection to the challenged argument and thereby highlighted its effect by placing the stamp of judicial approval upon the argument.

In this case, the weight of the medical testimony was the paramount issue. Appellee's counsel is a prominent, persuasive and respected lawyer. His statement, although clearly made in the heat of battle and without thought of impropriety, to the effect that twelve doctors, listed as his witnesses, would have testified to the same thing that his client had testified to, offered facts outside the record which effectively buttressed his client's testimony on this crucial issue without granting plaintiff the guaranteed rights of confrontation and cross-examination. We think that this argument departed from the record with such force that it weighted the verdict in defendant's favor.

The decision of the Court of Appeals is reversed, and this cause is remanded to that Court for entry by it of a Judgment granting a new trial in the cause.

Reversed and remanded.

STATE OF NORTH CAROLINA v. DANNY EDWARD COBB

No. 78

(Filed 25 January 1974)

Criminal Law § 127; Statutes § 11; Weapons & Firearms — possession of firearm by felon — statute amended pending defendant's appeal — judgment arrested

Revision of G.S. 13-1 and 13-2 while defendant's appeal was pending to provide for automatic restoration of citizenship to persons convicted of a felony thereby exempted him from the provisions of G.S. 14-415.1, and his conviction thereunder for possession of a firearm by a felon must be arrested.

ON *certiorari* to review decision of the North Carolina Court of Appeals affirming the judgment of *Exum, J.*, at the 27 November 1972 Regular Criminal Session of GUILFORD Superior Court, Greensboro Division, reported in 18 N.C. App. 221, 196 S.E. 2d 521 (1973).

Defendant was tried and convicted on an indictment charging him with the felonious possession of a firearm in violation of G.S. 14-415.1. From a judgment imposing a prison sentence of not less than two years nor more than five years, defendant appealed to the Court of Appeals. That court in an opinion by

Judge Britt, concurred in by Judges Hedrick and Baley, affirmed. We allowed *certiorari* on 31 August 1973.

The State's evidence tends to show that on 31 July 1972 several officers of the Greensboro Police Department procured a search warrant for defendant and a car in which he was supposed to be riding. The officers were parked at the Ramada Inn in Greensboro when they saw the car with defendant as a passenger drive by. They followed and when they were within some twenty-five feet of the car saw defendant lean to his left and make a motion with his right arm toward the center of the front seat. The officers then stopped the car and searched it. A loaded .32 caliber pistol was found under the arm rest in the front seat.

The basis for charging defendant with the felonious possession of a firearm in violation of G.S. 14-415.1 is set out in the indictment as follows:

> "... That Danny Edward Cobb ... did unlawfully, willfully and feloniously possess a hand gun; to wit: a .32 caliber revolver, serial #057073, he having been convicted for possession of methadon, a narcotic drug in the Superior Court of Guilford County, N. C. on October 6, 1970, the prior offense was committed on March 5, 1969, the maximum penalty being five years in the State's prison . . . a felony . . . judgment being that the defendant be imprisoned for the term of twelve (12) months in the State Department of Correction, . . . "

Defendant did not testify or offer any evidence.

Attorney General Robert Morgan, Assistant Attorney General Robert G. Webb, and Associate Attorney C. Diederich Heidgerd for the State.

Frye, Johnson & Barbee by Ronald Barbee for defendant appellant.

PER CURIAM.

Defendant was charged with violating the Felony Firearms Act, G.S. 14-415.1, which is as follows:

> "§ 14-415.1. *Possession of firearms, etc., by felon prohibited.*—(a) It shall be unlawful for any person who has

been convicted in any court in this State, in any other state of the United States or in any federal court of the United States of a crime, punishable by imprisonment for a term exceeding two years, to purchase, own, possess or have in his custody, care or control, any hand gun or pistol.

"Every person violating the provisions of this section shall be guilty of a felony and shall be imprisoned for not more than 10 years in the State prison or shall be fined an amount not exceeding five thousand dollars ($5,000)."

Defendant had previously been convicted for the felonious possession of methadon, for which offense he was sentenced on 6 October 1970 to a prison term of twelve months. The record does not disclose that defendant's citizenship was ever restored under Chapter 13 as rewritten in 1971 (1971 Cumulative Supplement, amended 1973). Therefore, we assume that at the time of his trial on 27 November 1972 his citizenship had not been restored. On 20 April 1973, while defendant's appeal in this case was pending in the Court of Appeals, Chapter 13 of the General Statutes was rewritten by Chapter 251 of the 1973 Session Laws to provide for the automatic restoration of citizenship upon the unconditional discharge of an inmate by the Department of Corrections. G.S. 13-1 and G.S. 13-2. Defendant contends that his citizenship was automatically restored by the 1973 revision of Chapter 13, and that under the provisions of G.S. 14-415.2 he is exempt from the provisions of G.S. 14-415.1 under which he was tried and convicted. G.S. 14-415.2 provides that "[a]ny person whose citizenship is restored under the provisions of Chapter 13 of the General Statutes, any comparable State or federal statute, shall thereafter be exempted from the provisions of G.S. 14-415.1."

Thus, the determinative question on this appeal is the same as that presented in *State v. Currie, ante,* 562, 202 S.E. 2d 153 (1974) : Is defendant entitled to the benefit of the 1973 revision of Chapter 13 enacted after his trial but while his appeal was pending? *Currie* answered this question affirmatively and is therefore controlling in the instant case.

As in *Currie,* this decision is based solely on the ground that we must give defendant the benefit of the 1973 revision of Chapter 13. We do not reach other assignments of error presented by the appeal.

Upon the authority of *Currie,* the decision of the Court of Appeals is reversed and the case is remanded to that court with direction that the judgment in the Superior Court be arrested.

Reversed and remanded.

ELLEN DICKINSON, JAMES LUPTON, CALLIE FERRIER, WILLIAM BAKER LUPTON, AND ALLEN W. LUPTON v. CHARLES L. PAKE AND WIFE, TOMMIE PAKE

No. 102

(Filed 1 February 1974)

1. **Adverse Possession § 23— burden of proving easement by prescription**

The burden of proving the elements essential to the acquisition of a prescriptive easement is on the party claiming the easement.

2. **Adverse Possession § 22— presumption of permissive use**

The law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears.

3. **Adverse Possession § 1— easement by prescription**

In order to acquire an easement by prescription, the use must be adverse, hostile or under a claim of right, the use must be open and notorious, the use must be continuous and uninterrupted for a period of twenty years, and there must be substantial identity of the easement claimed.

4. **Adverse Possession § 25; Easements § 4— roadway across defendants' land — easement by prescription — sufficiency of evidence**

In an action to establish an easement by prescription to use an unpaved roadway leading from plaintiffs' land over the land of defendants to a public road, plaintiffs' evidence was sufficient to rebut the presumption of permissive use and to carry the case to the jury where it would permit the jury to find that (1) plaintiffs' family continuously and uninterruptedly used the roadway substantially as now located, for any and all purposes incident to the use and enjoyment of their property, from 1938 until 1968 as their only means of access from their property to the public road, (2) the use of said roadway commenced before defendants acquired the servient estate and was continued under such circumstances as to give defendants notice that the use was adverse, hostile and under claim of right, and (3) the use was open and notorious and with defendants' full knowledge and acquiescence.

5. **Rules of Civil Procedure § 50— motion for judgment n.o.v.**

A motion for judgment notwithstanding the verdict is simply a motion that judgment be entered in accordance with the movant's ear-

lier motion for a directed verdict and notwithstanding the contrary verdict actually returned by the jury. G.S. 1A-1, Rule 50(b).

6. **Rules of Civil Procedure § 50— evidence sufficient to withstand motion for directed verdict — judgment n.o.v.**

Where the evidence offered by plaintiffs was sufficient to withstand defendants' motion for a directed verdict, the trial court erred in granting defendants' motion for judgment *non obstante veredicto.*

7. **Adverse Possession § 6— tacking possession**

Tacking is the legal principle whereby successive adverse users in privity with prior adverse users can tack successive adverse possessions of land so as to aggregate the prescriptive period of twenty years.

8. **Adverse Possession § 6; Easements §§ 4, 9— use of roadway — ripening of easement by prescription — succeeding possessors of dominant tenement**

Where plaintiffs' mother used a roadway across defendants' land for ingress to and egress from her land without interruption, openly, notoriously and adversely, under a claim of right, from 1938 until her death in 1967, a period of approximately twenty-nine years, her adverse use of the roadway ripened into a prescriptive easement appurtenant to her land which inured to the benefit of every succeeding possessor of the land.

9. **Rules of Civil Procedure § 50— reversal of judgment n.o.v. — vacation of conditional grant of new trial**

Where the appellate court reversed the grant of a judgment n.o.v. for defendants and determined that the record contains no error of law prejudicial to defendants, the appellate court also vacated the trial court's order conditionally granting defendants a new trial. G.S. 1A-1, Rule 50(c).

Justice BRANCH dissenting.

ON *certiorari* to review decision of the Court of Appeals affirming judgment *non obstante veredicto* entered by *Wheeler, J.*, 26 February 1973 Session, CARTERET District Court.

Plaintiffs instituted this action in December 1968 seeking a permanent injunction against defendants to restrain them from obstructing a roadway over lands of defendants in which plaintiffs claim a right-of-way by prescription.

Plaintiffs allege that they are all the children and heirs at law of Sophia Lupton who died intestate in 1967. By virtue of a deed dated 28 March 1938, Sophia Lupton became owner of the lands described therein, built a house on the land, and she and her children lived there until her death in 1967. Shortly after occupying her house, Sophia Lupton began using a road leading from her property and over lands now owned by defend-

ants to the public road. From 1938 until after Sophia Lupton's death in 1967, she and her successors in interest have used said road as the sole means of ingress and egress from the public road to the Sophia Lupton property. Said use has been under claim of right, adverse to the rights of all others and particularly to the claim of the defendants.

Plaintiffs further allege that on 16 March 1939 defendant Charles L. Pake purchased a tract of land from H. L. Graves, trustee, receiving a quitclaim deed for certain property therein described, lying between the property owned by plaintiffs as heirs at law of Sophia Lupton and the public road and including the area upon which is located the road leading from the Sophia Lupton property to the public road. Defendants and their agents have obstructed the road leading from the public road to the Sophia Lupton property, first blocking it with an automobile and later with a wire strung between two posts, thereby preventing the use of the roadway by plaintiffs and their invitees. Plaintiffs described the roadway as approximately twelve feet in width and located it on the ground by metes and bounds.

By answer duly filed, defendants admit that Sophia Lupton is deceased and that plaintiffs are her children. Defendants further admit that Charles Pake obstructed an area on his property, "which certain persons had been crossing," with an automobile. All other material allegations of the complaint are denied. Defendants demanded trial by jury.

Evidence offered by plaintiffs in support of their allegations will be discussed in the opinion. Defendants offered no evidence. The trial court submitted and the jury answered in favor of plaintiffs the following issue:

> "1. Have the plaintiffs acquired an easement over the lands of the defendants by prescriptive, adverse, hostile and non-permissive use of the same road as described in the complaint for a period of twenty (20) years next preceding the institution of this action?
>
> Answer: Yes."

Judgment was thereupon entered awarding plaintiffs an easement by prescription over the lands of defendants and permanently enjoining defendants from interfering with the use of said easement by plaintiffs.

The following day defendants filed motion for judgment notwithstanding the verdict, whereupon the trial court granted the motion, set aside the judgment theretofore entered and entered judgment for the defendants. In the alternative, the trial court granted defendants' motion for a new trial on the grounds that the verdict was contrary to law and contrary to the weight of the evidence.

Plaintiffs appealed to the Court of Appeals and that court, being of the opinion that plantiffs' use of the roadway in question was presumed by law to be permissive and that evidence offered by plaintiffs was insufficient to rebut the presumption, affirmed the judgment *non obstante veredicto,* entered by the trial court. We allowed certiorari to review that decision.

Taylor and Marquardt by Nelson W. Taylor, Attorneys for plaintiff appellants.

Wheatly & Mason by L. Patten Mason, attorneys for defendant appellees.

HUSKINS, Justice.

Development of the law in North Carolina with respect to acquisition of prescriptive easements has followed a tortuous route—roundabout and bent in different directions.

Coke states that at common law a long, continuous and peaceable user was necessary to establish a prescriptive right. Coke on Littleton § 113B. However, most American courts have sought to equate acquisition of prescriptive easements to acquisition of title by adverse possession so that it is generally held that prescriptive acquisition requires open, exclusive, continuous, uninterrupted, adverse user under a claim of right with the knowledge and acquiescence of the owner of the servient estate for the prescriptive period—usually twenty years. 25 Am. Jur. 2d, Easements, §§ 49-63 (1966); 3 R. Powell, Real Property, para. 413 (1973). The majority view today in other jurisdictions is that a *presumption of adverse user* arises when it is made to appear that the user has been enjoyed openly, continuously and uninterruptedly for the prescriptive period. 2 G. Thompson, Real Property, § 350 (repl. vol. 1961); Annot., 170 A.L.R. 776, 779 (1947).

Earlier North Carolina cases followed the majority view, holding that a prescriptive use was *presumed to be adverse,* sub-

ject to rebuttal evidence by the owner of the servient estate showing that the elements on which the presumption was based did not exist. *Wilson v. Wilson,* 15 N.C. 154 (1833); *Pugh v. Wheeler,* 19 N.C. 50 (1836); *Gerenger v. Summers,* 24 N.C. 229 (1842); *State v. Hunter,* 27 N.C. 369 (1845).

Gradually and almost imperceptively, however, North Carolina moved away from the presumption that the user was adverse and began to emphasize the necessity of showing adverseness without mention of any initial presumption to that effect. See *Felton v. Simpson,* 33 N.C. 84 (1850); *Mebane v. Patrick,* 46 N.C. 23 (1853); *Ingraham v. Hough,* 46 N.C. 39 (1853); *Smith v. Bennett,* 46 N.C. 372 (1854); *Ray v. Lipscomb,* 48 N.C. 185 (1855). "There must, then, be some evidence accompanying the user, giving it a hostile character and repelling the inference that it is permissive and with the owner's consent, to create the easement by prescription and impose the burden upon the land." *Boyden v. Achenbach,* 86 N.C. 397 (1882). Thus, we moved from the majority view that the user is presumed to be adverse to the view that it is presumed to be permissive; and the permissive presumption rule has been followed in this jurisdiction ever since. See Comment, Prescriptive Acquisition in North Carolina, 45 N.C.L. Rev. 284 (1966).

In the case before us we must apply the following legal principles which are now established by decisions of this Court:

[1] 1. The burden of proving the elements essential to the acquisition of a prescriptive easement is on the party claiming the easement. *Williams v. Foreman,* 238 N.C. 301, 77 S.E. 2d 499 (1953), and cases therein cited.

[2] 2. The law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears. *Henry v. Farlow,* 238 N.C. 542, 78 S.E. 2d 244 (1954); *Speight v. Anderson,* 226 N.C. 492, 39 S.E. 2d 371 (1946), and cases therein cited.

[3] 3. The use must be adverse, hostile, or under a claim of right. *Dulin v. Faires,* 266 N.C. 257, 145 S.E. 2d 873 (1966); *Weaver v. Pitts,* 191 N.C. 747, 133 S.E. 2 (1926); *Mebane v. Patrick,* 46 N.C. 23 (1853). "To establish that a use is 'hostile' rather than permissive, 'it is not necessary to show that there was a heated controversy, or a manifestation of ill will, or that the claimant was in any sense an enemy of the owner of the

servient estate.' [Citations omitted.] A 'hostile' use is simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under a claim of right." *Dulin v. Faires, supra.* There must be some evidence accompanying the user which tends to show that the use is hostile in character and tends to repel the inference that it is permissive and with the owner's consent. *Boyden v. Achenbach, supra.* A mere permissive use of a way over another's land, however long it may be continued, can never ripen into an easement by prescription. *Nicholas v. Furniture Co.,* 248 N.C. 462, 103 S.E. 2d 837 (1958); *Williams v. Foreman, supra.*

4. The use must be open and notorious. "The term adverse user or possession implies a user or possession that is not only under a claim of right, but that it is open and of such character that the true owner may have notice of the claim; and this may be proven by circumstances as well as by direct evidence." *Snowden v. Bell,* 159 N.C. 497, 75 S.E. 721 (1912).

5. The adverse use must be continuous and uninterrupted for a period of twenty years. *Speight v. Anderson,* 226 N.C. 492, 39 S.E. 2d 371 (1946). "The continuity required is that the use be exercised more or less frequently, according to the purpose and nature of the easement." J. Webster, Real Estate Law in North Carolina § 288 (1971). An interruption to an easement for a right-of-way "would be any act, done by the owner of the servient tenement, which would prevent the full and free enjoyment of the easement, by the owner of the dominant tenement . . . . " *Ingraham v. Hough,* 46 N.C. 39 (1853).

6. There must be substantial identity of the easement claimed. *Hemphill v. Bd. of Aldermen,* 212 N.C. 185, 193 S.E. 153 (1937). "To establish a private way by prescription, the user for twenty years must be confined to a definite and specific line. While there may be slight deviations in the line of travel there must be a substantial identity of the thing enjoyed." *Speight v. Anderson,* 226 N.C. 492, 39 S.E. 2d 371 (1946).

The evidence in this case, when considered in the light most favorable to plaintiffs, tends to show the facts narrated below:

Plaintiffs are the five children of Sophia Lupton, now deceased. By deed dated 28 March 1938 Sophia Lupton acquired title from her sister Julia Pake to a tract of land lying south of

the Lennoxville Road and next to Taylor's Creek in Carteret County. A house was built and Sophia and four of her five children moved into it sometime in 1938. (It was discovered around 1960 that the house had been built over the west property line and Julia Pake conveyed to Sophia Lupton an adjacent strip along the west boundary of the 1938 tract so as to give Sophia title to all the land on which the house was located, but this fact is without significance on the questions involved in this case.)

By deed dated 16 March 1939 defendants Charles L. Pake and wife acquired title to a tract of land north of the tract conveyed to Sophia Lupton in 1938, lying between the Lupton property and the Lennoxville Road. In 1940 defendants built a house on this land and have lived in it since that time.

When Sophia Lupton acquired her property in 1938 there was already in existence an unpaved road leading from the Lennoxville Road to Taylor's Creek, passing over the land acquired by defendants in 1939 and continuing over the Sophia Lupton property to the creek. This old roadway is designated as Lupton Drive on Plaintiffs' Exhibit 1.

Lupton Drive, a rutted, sandy road, had been used from 1915 until 1938 by local residents for access to Taylor's Creek. Sophia Lupton and her children used said road continuously as the sole route of ingress and egress to and from the Lupton property from 1938 until 1968 when defendants blocked it. It was being used in that fashion by Sophia Lupton and her children when defendants acquired their property in 1939. The road was used by family friends who came to visit, by deliverymen, and by all others having occasion to reach the Lupton property. Friends and relatives of the Luptons, and other persons, who docked their boats in Taylor's Creek also used the road. That portion of Lupton Drive between the Lennoxville Road and the Pake house was also used by the Pakes for ingress and egress after they moved onto their land in 1940.

From 1938 until the present time the location of Lupton Drive has remained essentially unchanged. At one time defendants placed shrubbery and old tires along one edge of the road so as to restrict travel to the well-defined roadway. At another time, a power pole was placed on the Lennoxville Road right-of-way so as to cause a slight narrowing of the mouth of Lupton Drive where it connects with the Lennoxville Road.

Plaintiffs and their mother, by raking leaves and scattering oyster shells in the roadway, have performed what slight maintenance was required to keep Lupton Drive in passable condition.

Mrs. Ellen Lupton Dickinson, one of the plaintiffs, moved out of her mother's home in 1941 but continued to use Lupton Drive four or five times a week to visit her mother. Callie Lupton Ferrier moved out of the house in 1959, and Allen Lupton moved out in 1960. The evidence does not disclose when James Lupton moved away. William Baker Lupton, the fifth child, was living in Florida in 1938 and has never lived in the Sophia Lupton house.

There is no evidence that plaintiffs ever sought permission or that defendants ever gave permission for use of the road. Plaintiffs and defendant Charles Pake are first cousins and had always been very close prior to obstruction of the road in 1968. Ellen Dickinson testified, among other things: "I and my brothers and sister did think this was our road. We had always used it and had a right to use it."

That portion of defendants' answer admitting that defendants had obstructed Lupton Drive to bar vehicular traffic was offered in evidence.

We must first decide, preliminary to the main question, whether the foregoing evidence is sufficient to withstand defendants' motion for a directed verdict and carry the case to the jury.

A motion for a directed verdict under Rule 50(a) presents substantially the same question as formerly presented by motion for judgment of nonsuit. *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971); *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). In passing upon such motion at close of plaintiffs' evidence in a jury case, as here, the evidence must be taken as true, considered in the light most favorable to plaintiffs, and may be granted only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiffs. *Younts v. Insurance Co.*, 281 N.C. 582, 189 S.E. 2d 137 (1972); *Adler v. Insurance Co.*, 280 N.C. 146, 185 S.E. 2d 144 (1971); *Cutts v. Casey, supra; Kelly v. Harvester Co., supra;* 5A Moore's Federal Practice, para. 50.02[1] (2d ed. 1971).

[4] So viewed, plaintiffs' evidence tends to show, and would permit but not compel a jury to find, that: (1) the Lupton family

continuously and uninterruptedly used Lupton Drive substantially as now located, for any and all purposes incident to the use and enjoyment of their property, from 1938 until 1968 as their only means of access from their property to the Lennoxville Road; (2) the use of said road commenced before defendants acquired the servient estate and was continued under such circumstances as to give defendants notice that the use was adverse, hostile, and under claim of right; (3) the use was open and notorious and with defendants' full knowledge and acquiescence. *Dulin v. Faires,* 266 N.C. 257, 145 S.E. 2d 873 (1966).

Hence, the evidence was sufficient to rebut the presumption that the use was permissive and carry the issue to the jury. The trial court properly overruled defendants' motion for a directed verdict.

The jury found that plaintiffs had acquired a prescriptive easement to use Lupton Drive and judgment was entered accordingly. We now consider the determinative question involved on this appeal: Did the trial court err in allowing defendants' motion for judgment notwithstanding the verdict?

In interpreting the Rules of Civil Procedure, commentators explain judgment notwithstanding the verdict as follows: "Rule 50(b) authorizes such a 'reserved directed verdict' motion practice. If the judge denies, or simply does not grant, a motion for directed verdict made at the conclusion of all the evidence and a verdict is then either not returned or returned against the movant, the judge may then entertain a motion by him for judgment 'in accordance with his motion for directed verdict.' The motion may be granted 'if it appears that the motion for directed verdict could properly have been granted.' This means that the same standard of sufficiency of evidence as that under the directed verdict motion is applied." 2 McIntosh, North Carolina Practice and Procedure, § 1488.35 (Phillips Supp. 1970).

"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 Intramural L. Rev. 1, 41 (1969).

[5, 6] So, a motion for judgment notwithstanding the verdict is simply a motion that judgment be entered in accordance with

the movant's earlier motion for a directed verdict and notwithstanding the contrary verdict actually returned by the jury. Rule 50(b), Rules of Civil Procedure; *Summey v. Cauthen,* 283 N.C. 640, 197 S.E. 2d 549 (1973). Consequently, since the evidence offered by plaintiffs in this case was sufficient to withstand defendants' motion for a directed verdict, the court below erred in granting defendants' motion for judgment *non obstante veredicto.*

The argument is advanced, however, that judgment notwithstanding the verdict was properly granted because (1) plaintiffs failed to prove title to the Lupton property and (2) plaintiffs "cannot tack a prescriptive right for roadway purposes."

[7, 8] Tacking is the legal principle whereby successive adverse users in privity with prior adverse users can tack successive adverse possessions of land so as to aggregate the prescriptive period of twenty years. J. Webster, Real Estate Law in North Carolina § 289 (1971). Here, taken in the light most favorable to plaintiffs, the evidence is sufficient to permit a finding by the jury that Sophia Lupton, mother of these plaintiffs, used Lupton Drive without interruption, openly, notoriously and adversely, under claim of right, from 1938 until her death in 1967, a period of approximately twenty-nine years. In this situation, her adverse use of the road for more than twenty years ripened into an easement by prescription, and the applicable legal principle is not tacking but succession. 3 R. Powell, Real Property, para. 418 (1973).

"Except as prevented by the terms of its transfer, or by the manner or the terms of the creation of the easement appurtenant thereto, one who succeeds to the possession of a dominant tenement thereby succeeds to the privileges of use of the servient tenement authorized by the easement." 5 Restatement of Property § 487 (1944). The explanatory notes to this section of the Restatement explain this principle of succession as follows: "An easement appurtenant is not a normal incident of possession but must at some time have been effectively created as incidental to the possession of the dominant tenement. . . . The possessor of the dominant tenement who claims the benefit of such an easement must prove the manner and the circumstances of its creation. . . . An easement appurtenant, once created, so long as it exists, attaches to the possession of the dominant land and follows it into whosesoever hands it may

come." 5 Restatement of Property, Explanatory Notes § 487, comment *a* at 3029-30 (1944); *see Boyden v. Achenbach,* 86 N.C. 397 (1882).

Adverse user of Lupton Drive by Sophia Lupton and her family for more than twenty years created an easement appurtenant to the Lupton land which inured to the benefit of the possessor of the land in his use of it. 5 Restatement of Property § 453 (1944). Hence possession, not title, is the relevant consideration. "Since an easement appurtenant is incidental to the possession of the dominant tenement, every succeeding possessor is entitled to the benefit of it while it continues to exist as such an easement and he remains in possession. It is immaterial how he comes into possession, whether by conveyance or by operation of law, whether rightfully or wrongfully. Even one who comes into possession of a dominant tenement wrongfully will be entitled, as against the possessor of the servient tenement, to the benefit of all easements appurtenant to the dominant tenement." 5 Restatement of Property, Explanatory Notes § 487, comment *e* at 3033 (1944).

[9] When defendants moved for judgment notwithstanding the verdict they included, in the alternative, a motion for a new trial on the grounds (1) that the verdict was contrary to law, (2) contrary to the weight of the evidence, and (3) that plaintiffs had not carried the burden of proof. See Rule 50(c), Rules of Civil Procedure. The trial court allowed this motion conditionally "on the ground that the verdict is contrary to law and is contrary to the weight of the evidence, this ruling to take effect only in the event that the ruling of this Court on the defendants' motion for judgment is reversed on appeal." This procedure is authorized by Rule 50(c)(1) which provides in pertinent part: "In case the motion for new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate division has otherwise ordered." As pointed out by Dean Dickson Phillips in his supplement to 2 McIntosh, North Carolina Practice and Procedure, § 1488.45 (Phillips Supp. 1970): "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." The rule is so interpreted and applied in *Summey v. Cauthen,* 283 N.C. 640, 197 S.E. 2d 549 (1973).

Having reviewed the record and being of the opinion that it contains no error of law prejudicial to defendants, we therefore vacate the order of the trial court granting a new trial on the issue raised by the pleadings and answered by the jury. No sound reason appears why the case should go back for another trial.

For the reasons stated the decision of the Court of Appeals, upholding the judgment *non obstante veredicto* entered by the trial court in favor of defendants, is reversed. The case is remanded to the Court of Appeals with instructions to remand it to the District Court of Carteret County for reinstatement of the verdict and judgment in favor of plaintiffs.

Reversed.

Justice BRANCH dissenting.

I am of the opinion that this case is controlled by the case of *Henry v. Farlow*, 238 N.C. 542, 78 S.E. 2d 244. There, plaintiff and her tenants used a roadway across defendant's land for a period of twenty-five years. Plaintiff did not request permission to use the roadway and defendant landowners voiced no objection to plaintiff's use of the roadway. This Court held that these facts did not show that the use of the roadway by plaintiff was accompanied by circumstances giving it an adverse character so as to rebut the presumption that the use was permissive.

I do not think that the facts of instant case disclose evidence of adverse or hostile use of the roadway by plaintiffs sufficient to rebut the presumption that the use of the roadway was permissive.

I vote to affirm the opinion of the Court of Appeals.

CARL R. WILLIAMS; WHRENS CASEY WILLIAMS; AND MINORS SAMUEL LEE WILLIAMS, III; AND LINDA WILLIAMS, BY THEIR NEXT FRIEND, F. C. PASCHALL v. NORTH CAROLINA STATE BOARD OF EDUCATION; NORTH CAROLINA WILDLIFE RESOURCES COMMISSION; AND STATE OF NORTH CAROLINA

No. 77

(Filed 1 February 1974)

1. **Deeds § 7— deeds prior to 1885 — inapplicability of Connor Act**

Since this case involves the application of North Carolina law to deeds made and recorded prior to 1885, North Carolina's recordation statute—the Connor Act—is not controlling.

2. **Deeds § 7— 19 months between execution and recordation — deed valid**

Deed conveying property to grantee in defendants' chain of title was not rendered void by the lapse of 19 months between execution and recordation of the deed, since the statute in effect at the time provided for a two-year period within which a deed could be registered after its execution and delivery.

3. **Deeds § 7; Registration § 4— registration of deed — relation back to date of execution for priorities**

Although the applicable North Carolina law at the time of the deeds to grantees in plaintiffs' and defendants' chains of title was that registration was required to make a deed good and valid with respect to subsequent purchasers, once a deed was validly registered within the permissible statutory period, *for purposes of priority* it related back to the time of execution and delivery of the deed.

4. **Deeds §§ 1, 6— requisites — presumption as to seal**

In North Carolina the word "deed" ordinarily denotes an instrument in writing, signed, sealed, and delivered by the grantor whereby an interest in realty is transferred from the grantor to the grantee, and a seal is necessary to the due execution of a deed; however, the recital of the seal in the instrument raises a presumption that a seal was affixed to the original deed even though such does not appear on the face of the registered deed.

5. **Deeds § 6— record of deed in evidence — presumption of seal raised**

Where the original deed from a grantor to a grantee in plaintiffs' chain of title was not in evidence, but the record of the deed recited that the parties "have interchangeable set their hands and seals dated the day and year first above written," the attestation clause signed by three witnesses recited that the instrument was "sealed and delivered" in their presence, and the acknowledgment by the mayor of Philadelphia recited that the grantor appeared before him and "acknowledged the said Indenture as his Act and Deed by him freely and voluntarily signed sealed and delivered," recital of these words raised a presumption that there was a seal affixed by the grantor to his signature on the original deed.

6. **Deeds § 7— delivery required**

Delivery is essential to the validity of a deed for land in North Carolina, and a deed takes effect from the time of its actual delivery.

7. **Deeds § 7— date of delivery — recitation in deed**

The date recited in the beginning of a deed is *prima facie* evidence that it was delivered on that date; however, evidence to the contrary may negate or neutralize this presumption.

8. **Deeds § 7— recordation — presumption of delivery raised**

When a deed is duly recorded as required by law, the public record thereof is admissible in evidence and raises a rebuttable presumption that the original was duly executed and delivered; however, no presumption of delivery arises from the acknowledgment of a deed by the grantor.

9. **Deeds § 7; Registration § 4— presumption of delivery of deed on date of execution — priorities**

Based on its registration on 24 May 1798 there is a presumption that the deed to the grantee in plaintiffs' chain of title was delivered, and, in the absence of evidence to the contrary, that it was delivered on its date, 13 December 1797. Based on its registration on 19 November 1798 there is a presumption that the deed to the grantee in defendants' chain of title was delivered, and, in the absence of evidence to the contrary, that it was delivered on its date, 17 April 1797; thus, under the law in effect in 1797 and 1798 the deed to the grantee in defendants' chain created superior record title and by reason thereof, defendants were entitled to summary judgment in plaintiffs' action to remove as a cloud from their title the claim of defendants to the portion of land in question and to declare plaintiffs the owner in fee of such land.

APPEAL by plaintiffs from *Rouse, J.*, at the 23 April 1973 Session of PENDER Superior Court, certified pursuant to G.S. 7A-31(a) for initial appellate review by the Supreme Court.

This action was brought by plaintiffs, pursuant to G.S. 41-10.1, to remove as a cloud from their title the claim of defendants to a portion of the lands described in the complaint and to declare plaintiffs the owner in fee of such lands. Defendants by answer denied plaintiffs' title, alleged the deed that plaintiffs claim is a cloud on their title is a part of the record title of defendants, and set forth certain further defenses, including adverse possession. Defendants also prayed that they be declared the owner of certain lands described in their further answer to the amended complaint and that the claim of plaintiffs be removed as a cloud on their title.

The parties stipulated as follows:

(1) That on 22 January 1795 the State of North Carolina granted to James Carraway 29,184 acres of land in the County of New Hanover as shown by a grant filed for record in 1795 and recorded in the Registry of New Hanover County in Record Book L-1, at page 92;

(2) That on 15 June 1796 James Carraway conveyed by warranty deed to David Allison the lands described in said grant, which deed was filed for record on 20 June 1796 and duly recorded in Book L-1, at page 273, of the Registry of New Hanover County;

(3) That the plaintiffs' claim of superior record title is derived from a deed from the said David Allison to Joshua B. Bond for this tract of land, dated 13 December 1797 and recorded 24 May 1798 in Book L-2, at page 513, of the New Hanover County Registry;

(4) That defendants' claim of superior record title is derived from a deed for said lands from David Allison to John Baker, dated 17 April 1797 and recorded on 19 November 1798 in Book L-2, at page 556, of the New Hanover County Registry;

(5) That defendants' chain of title depends upon the validity of said deed from David Allison to John Baker, and that the plaintiffs' chain of title depends upon the validity of said deed from David Allison to Joshua B. Bond;

(6) That the plaintiffs are not claiming title by adverse possession or by any means other than superior record title from the common source; to wit, David Allison; and

(7) That the deed from Allison to Baker and the deed from Allison to Bond both encompass the lands in dispute.

Defendants moved for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure on the ground that there was no genuine issue as to any material fact, and that defendants were entitled to judgment as a matter of law.

Plaintiffs, pursuant to Rule 56, moved for partial summary judgment to determine as a matter of law which of the deeds emanating from the common source (David Allison) had priority with respect to title.

The trial court, after making findings of fact and entering conclusions of law, adjudged that the deed to defendants recorded in Book 125, at page 47½, of the Registry of Pender County, North Carolina, does not constitute a cloud on plaintiffs' title since defendants have superior title from the common source. Accordingly, plaintiffs' action was dismissed.

From this judgment plaintiffs appealed, and we allowed motion for initial appellate review by the Supreme Court.

Moore & Biberstein by R. V. Biberstein, Jr.; Wells, Blossom & Burrows by W. C. Blossom; Rountree, Clark, Rountree & Newton by George Rountree, Jr., for plaintiff appellants.

Attorney General Robert Morgan and Assistant Attorney General Roy A. Giles, Jr., for defendant appellees.

MOORE, Justice.

[1] Both plaintiffs and defendants agree that since this case involves the application of North Carolina law to deeds made *and* recorded prior to 1885, North Carolina's present recordation statute—the Connor Act—is not controlling. See 1885 Laws of North Carolina, chapter 147, now codified as G.S. 47-18.

[2] The trial court in its judgment found that the deed from Allison to Baker under which defendants claim through mesne conveyances was dated 17 April 1797, was delivered no later than 17 July 1797, but was not recorded until 19 November 1798. Plaintiffs first contend that even if the Baker deed was executed and delivered prior to the Bond deed under which plaintiffs claim, nevertheless the Baker deed was not recorded within twelve months of its date or delivery and is therefore void. In support of this position plaintiffs rely on North Carolina's first registration law, the Act of 1715, chapter 7, § 1 [Laws of North Carolina, Potter (1821)], which provided:

> "That no conveyance or bill of sale for lands, (other than mortgage,) in what manner or form soever drawn, shall be good and available in law, unless the same shall be acknowledged by the vendor, or proved by one or more evidences, upon oath, either before the chief justice for the time being, or in the court of the precinct where the land lieth, and registered by the public register of the precinct where the land lieth, within *twelve months* after the date of the said deed, and that all deeds so done and executed,

shall be valid, and pass estates in land, or right to other estate, without livery of seizen, atturnment, or other ceremony in the law whatsoever." (Emphasis added.)

However, at a later session of the General Assembly, commencing on 12 December 1754 and continuing until 13 September 1756, the time for registering a deed after its execution and delivery was extended from twelve months to two years. This was done by the Act of 1756, chapter 58, § 2 [Laws of North Carolina, Potter (1821)], which provided in part:

" . . . [A]ll deeds and mesne conveyances of lands, tenements, and hereditaments, hereafter to be made, shall and may, at any time, within *two years* from the respective dates thereof, be acknowledged, or proved in manner aforesaid, and delivered to the registers of the counties wherein they are respectively situated." (Emphasis added.)

This two-year period within which a deed could be registered after its execution and delivery remained in effect until the passage of the Connor Act in 1885. See Code, chapter 27, § 1245 (1883); Bat. Rev., chapter 35, § 1 (1873); Rev. Code, chapter 37, § 1 (1854); Rev. Stat., chapter 37, § 1 (1837). Baker registered his deed within two years after its execution and delivery. Plaintiffs' assertion that the applicable law required registration within one year is erroneous. In view of the Act of 1756, it is unnecessary to consider the effect of the various acts passed prior to the Connor Act extending the time for registration of deeds. For a discussion of these acts, see II Mordecai's Law Lectures 1010-1011. (2d Ed. 1916).

Plaintiffs next contend that regardless of which deed was first executed and delivered, since the Bond deed was registered prior to the Baker deed, the Bond deed is superior as a matter of law. A similar contention was also raised in *Phifer v. Barnhart,* 88 N.C. 333 (1883), a leading North Carolina case discussing the pre-Connor Act rules with respect to priority of deeds, and there Justice Ruffin said:

" . . . [T]he bargainee in an unregistered deed . . . [cannot] be displaced, or defeated, by the mere act of the bargainor in making another conveyance to a third party without notice, and whose deed may be registered. . . .

"In *Morris v. Ford,* 2 Dev. Eq., 412 [17 N.C. 412 (1833)], it is said, that such a bargainee, after the execution

of his deed and before its registration, has not a mere equity in the land: he has an equity and an incomplete legal title, which will become *a perfect legal title from the time of the execution of the deed,* whenever the registration shall take effect. . . .

"Again, in *Walker v. Coltraine,* 6 Ired. Eq., 79 [41 N. C. 79 (1849)], it was declared to be an error to say that an unregistered deed confers only an equity; that it is a legal conveyance, which, although it cannot be given in evidence until registered and therefore is not a perfect legal title, yet has an operation as a deed from its delivery; and it was emphatically said, that the ignorance of such a title in one, who might afterwards buy the land, could not impair it.

"In *Wilcox v. Sparks,* 72 N.C., 208 [1875], Mr. Justice Reade, speaking for the court, says, that although a deed cannot be used to support a title until it is registered, still when registered it relates, and passes the title, as of the time of its execution. . . . "

See also *Janney v. Blackwell,* 138 N.C. 437, 50 S.E. 857 (1905); *Ray v. Wilcoxon,* 107 N.C. 514, 12 S.E. 443 (1890); *Edwards v. Dickinson,* 102 N.C. 519, 9 S.E. 456 (1889); *Austin v. King,* 91 N.C. 286 (1884); *United States v. Hiawassee Lumber Co.,* 238 U.S. 553, 568-69, 59 L.Ed. 1453, 1461, 35 S.Ct. 851, 858 (1915).

[3] Therefore, the applicable North Carolina law at the time of the Baker and Bond deeds was that although registration was required to make a deed good and valid with respect to subsequent purchasers, once a deed was validly registered within the permissible statutory period, *for purposes of priority* it related back to the time of execution and delivery of the deed. Consequently, prior registration of the Bond deed did not necessarily make the Bond deed superior to the subsequently registered Baker deed. Both deeds, when registered, related back to the date of execution and delivery, and thus the date of execution and delivery would control and determine priority as between the two deeds. Delivery of the deeds is discussed more fully later in the opinion.

The deed from Allison to Bond, as recorded, does not show that it was under seal. Defendants contend, therefore, that the deed is void and of no effect.

[4] In North Carolina the word "deed" ordinarily denotes an instrument in writing, signed, sealed, and delivered by the grantor whereby an interest in realty is transferred from the grantor to the grantee. *Supply Co. v. Nations,* 259 N.C. 681, 131 S.E. 2d 425 (1963); *Ballard v. Ballard,* 230 N.C. 629, 55 S.E. 2d 316 (1949). A seal is necessary to the due execution of a deed. *Dunn v. Dunn,* 242 N.C. 234, 87 S.E. 2d 308 (1955); 3 Strong, N. C. Index 2d, Deeds § 6 (1967). This Court, however, has held that the recital of the seal in the instrument raises a presumption that a seal was affixed to the original deed even though such does not appear on the face of the registered deed. In *Hopkins v. Lumber Co.,* 162 N.C. 533, 78 S.E. 286 (1913), the plaintiff in showing his chain of title introduced a copy from the registration books of a deed dated 1861. There was no seal after the grantor's name, but the instrument concluded with the phrase: "In testimony whereof I have hereunto subscribed my name and affixed my seal, this the first day of March, 1861." The Court in that case said:

> "In case of an ancient deed which is not produced, but is proved from the record, which fails to indicate in any way that the deed was sealed, there is a presumption that the deed was sealed, arising from a recital in the instrument itself that it was sealed. Jones on Real Property, secs. 1073-1075; *Aycock v. R. R.,* 89 N.C., 323; *Heath v. Cotton Mills,* 115 N.C., 202; *Strain v. Fitzgerald,* 130 N.C., 601; *Smith v. Lumber Co.,* 144 N.C., 50; *Edwards v. Supply Co.,* 150 N.C., 176; *Beardsly v. Day,* 52 Minn., 451; *Smith v. Dall,* 13 Cal., 510."

In *Jones v. Coleman,* 188 N.C. 631, 125 S.E. 406 (1924), the trial court instructed the jury as follows:

> "It appears from the evidence that the deed from Mollie L. Jones to her husband, W. A. Jones, has been burned and the original of it is not in evidence. The record of it is in evidence and there is no scroll or seal after Mrs. Jones' name on the record, but the record recites 'In testimony whereof the said Mollie L. Jones has hereunto set her hand and seal.'
>
> "I charge you that the recital of these words raises a presumption that there was a seal affixed by Mollie L. Jones to her signature on the original deed.

"I further charge you that no evidence has been offered or introduced in this case to rebut that presumption and therefore you are directed to answer the second issue 'Yes.' "

This Court, on the authority of *Hopkins,* overruled plaintiff's exception to this instruction. See also *Peel v. Corey,* 196 N.C. 79, 144 S.E. 559 (1928); *Roberts v. Saunders,* 192 N.C. 191, 134 S.E. 451 (1926).

[5] In the present case the original deed from Allison to Bond was not in evidence, but the record of this deed recites that the "parties have interchangeable set their hands and seals dated the day and year first above written." Further, the attestation clause signed by three witnesses recites that the instrument was "sealed and delivered" in their presence, and the acknowledgment by the mayor of Philadelphia recites that David Allison appeared before him and "acknowledged the said Indenture as his Act and Deed by him freely and voluntarily signed sealed and delivered. . . ."

We hold that the recital of these words in the record of the deed raises a presumption that there was a seal affixed by Allison to his signature on the original deed. In the absence of evidence to rebut this presumption, defendants' contention that the Bond deed is invalid for lack of a seal is without merit.

The trial court found that the delivery of the Baker deed occurred no later than 17 July 1797, the date of its acknowledgment before the mayor of Philadelphia. Plaintiffs contend that this finding is not supported by the evidence and that the court should have found that the Baker deed was not delivered until 16 July 1798, the date appearing immediately to the right of the subscribing witnesses' names.

In this connection it is helpful to examine in some detail the Baker deed as it appears in the record now before us. The deed is dated 17 April 1797 and notes that it is between David Allison and John Baker, both of Philadelphia. At the end of the deed appears the following:

". . . In Witness whereof he the said David Allison hath hereunto set his hand and affixed his seal the day & year first above written [17 April 1797].

David Allison (seal)

(sealed & delivered in the presence)
of us R. C. Smith
J. Trinchard
Thos. Blount 16th July 1798.

Rec. the day of the Date of the above written Indenture of John Baker a party thereto the sum of five shillings current money of the said State of Pennsylvania being in full for the consideration Money therein mentioned.

David Allison

R. C. Smith
J. Trinchard

Commonwealth of Pennsylvania
City of Philadelphia

On the 17th day of July, 1797 before me Hilary Baker, Mayor of the said City of Philadelphia came David Allison the grantor in the within Indenture named and acknowledged the said Indenture as his free and voluntary act and Deed and desired the same may be recorded as such according to the laws of the State of North Carolina. In testimony whereof I the Mayor aforesaid have subscribed by name and caused the seal of the said city to be affixed to these presents the 17 Day of July 1797.

Hilary Baker
Mayor

Thos. Blount Esq, one of the subscribing witnesses to this Deed appeared before me and made oath that on the 16 day of July last David Allison party to the said Deed acknowledged to him that the signature of 'David Allison' at the foot of the said Deed and the seal thereto annexed were his and that he had executed and delivered the same to John Baker also party thereto as the same proported [sic] to have been done on the day therein mentioned. Let it be registered.

I. Haywood IS CSC [Clerk of Superior Court in New Hanover County]

I. Haywood, 9th November 1798

Registered the 19 November 1798
R. Bradley, Regr."

Plaintiffs' assertion that the trial court erred in finding that the delivery of the Baker deed occurred no later than 17 July 1797—the date of its acknowledgment before the mayor of Philadelphia—rests essentially on two contentions. The first is that the date of 16 July 1798 appearing immediately to the right of Thos. Blount's name refers to the date of attestation by all three witnesses—Smith, Trinchard, and Blount—and consequently shows that the deed was sealed and delivered on that date.

Plaintiffs' second contention is that in the acknowledgment of the Baker deed before the mayor of Philadelphia nothing is said about the deed having been delivered. In contrast to this, in the acknowledgment of the Bond deed before this same mayor it is stated that "the grantor within written Indenture named and acknowledged the said Indenture as his Act and Deed by him freely and voluntarily signed sealed and delivered & desires that the same may as such be recorded."

Defendants, on the other hand, contend that the Baker deed was delivered on the date set forth in the deed, that is, 17 April 1797. They state this contention in their brief as follows:

> "The State submits that an examination of the deed to John Baker leads inescapably to the conclusion that Thomas Blount was not a subscribing witness to the instrument at the time of execution. Rather, execution of the deed was witnessed by Smith and Trinchard, and it was then re-acknowledged before Thomas Blount on July 16, 1798, over a year later.
>
> "Support for this position can be found in the fact that only Smith and Trinchard witnessed the receipt of the consideration on April 17, 1797. The date 16 July 1798 appears only after Blount's name. Further support can be found in the statement made by Thomas Blount before the Clerk of Superior Court in New Hanover County. Blount stated to the Clerk that David Allison had appeared before him on July 16, 1798 and acknowledged that the signature and seal at the bottom of the instrument was his. If Thomas Blount had been present as a witness when David Allison signed and sealed the deed, there would have been no need for him to appear before Blount and acknowledge the signature and seal as his own.
>
> * * *

"When David Allison appeared before Thomas Blount [as Blount told the Clerk he had], he acknowledged the fact that he had executed and delivered same to John Baker as the same purports to have been done 'on the day therein mentioned.' The day therein mentioned was the 'day and year first above written,' the date of the instrument [17 April 1797]."

[6-8] Delivery is essential to the validity of a deed for land in North Carolina. *Jones v. Saunders,* 254 N.C. 644, 119 S.E. 2d 789 (1961); *Elliott v. Goss,* 250 N.C. 185, 108 S.E. 2d 475 (1959); *Burton v. Peace,* 206 N.C. 99, 173 S.E. 4 (1934); 3 Strong, N. C. Index 2d, Deeds § 7 (1967). A deed takes effect from the time of its actual delivery. *Kendrick v. Dellinger,* 117 N.C. 491, 23 S.E. 438 (1895). The date recited in the beginning of a deed is prima facie evidence that it was delivered on that date. *Turlington v. Neighbors* and *Turlington v. Turlington,* 222 N.C. 694, 24 S.E. 2d 648 (1943). Evidence to the contrary, however, may negate or neutralize this presumption. *Kendrick v. Dellinger, supra.* When a deed is duly recorded as required by law, the public record thereof is admissible in evidence and raises a rebuttable presumption that the original was duly executed and delivered. *Lance v. Cogdill,* 236 N.C. 134, 71 S.E. 2d 918 (1952), and cases therein cited. See also *Vettori v. Fay,* 262 N.C. 481, 137 S.E. 2d 810 (1964). Unlike registration, no presumption of delivery arises from the acknowledgment of a deed by the grantor. *Tarlton v. Griggs,* 131 N.C. 216, 42 S.E. 591 (1902); Webster, *Real Estate Law in North Carolina* § 174 (1971).

After finding that the delivery of the Baker deed occurred not later than 17 July 1797, the trial court entered summary judgment for defendants.

If there is a genuine issue of fact, summary judgment is inappropriate. As stated in *Page v. Sloan,* 281 N.C. 697, 190 S.E. 2d 189 (1972):

"Our Rule 56 and its federal counterpart are practically the same. Authoritative decisions both state and federal, interpreting and applying Rule 56, hold that the party moving for summary judgment has the burden of 'clearly establishing the lack of any triable issue of fact by the record properly before the court. His papers are carefully scrutinized; and those of the opposing party are on the

whole indulgently regarded.' 6 Moore's Federal Practice (2d Ed. 1971) § 56.15[8], at 2439; *Singleton v. Stewart, supra* [280 N.C. 460, 186 S.E. 2d 400 (1972)]. Rendition of summary judgment is, by the rule itself, conditioned upon a showing by the movant (1) that there is no genuine issue as to any material fact, and (2) that the moving party is entitled to a judgment as a matter of law. G.S. 1A-1, Rule 56 (b); *Kessing v. Mortgage Corp., supra* [278 N.C. 523, 180 S.E. 2d 823 (1971)]."

See also *Blades v. City of Raleigh,* 280 N.C. 531, 187 S.E. 2d 35 (1972); *Koontz v. City of Winston-Salem,* 280 N.C. 513, 186 S.E. 2d 897 (1972); *Harrison Associates v. State Ports Authority,* 280 N.C. 251, 185 S.E. 2d 793 (1972).

"A deed is presumed to have been delivered at the time it bears date unless the contrary is satisfactorily shown." *Kendrick v. Dellinger, supra.*

[9] Plaintiffs offered no evidence by affidavit or otherwise that the Baker deed was not delivered on its date, 17 April 1797, and after the passage of nearly two hundred years it seems apparent that no such evidence is available. The dates in the attestation clause and in the acknowledgment are insufficient in themselves to rebut the presumption that the Baker deed was delivered on 17 April 1797 or to raise a genuine issue as to the date of delivery. To the contrary, we think they tend to corroborate that presumption. We hold that based on its registration on 24 May 1798 there is a presumption that the Bond deed, under which plaintiffs claim, was delivered, and, in the absence of evidence to the contrary, that it was delivered on its date, 13 December 1797. We further hold that based on its registration on 19 November 1798 there is a presumption that the Baker deed, under which defendants claim, was delivered, and, in the absence of evidence to the contrary, that it was delivered on its date, 17 April 1797, months before the Bond deed. Thus, under the law in effect in 1797 and 1798 the deed to Baker created superior record title and by reason thereof defendants were entitled to summary judgment. *Phifer v. Barnhart, supra; Janney v. Blackwell, supra; Ray v. Wilcoxon, supra; Edwards v. Dickinson, supra; Austin v. King, supra; United States v. Hiawassee Lumber Co., supra.*

It is noted that the Federal courts have passed upon the question now before this Court; that is, which of these two

ancient deeds has priority. In *Williams v. Weyerhaeuser*, Civil No. 1000 (E.D.N.C., 1966), the District Court accorded priority to the Baker deed. That court correctly held that the effect of the recordation of the Baker deed, although subsequent to the Bond deed, was to pass title as of the date of execution and delivery of the Baker deed, which the court determined was at least five months before the execution of the Bond deed. This decision was affirmed by the Fourth Circuit Court of Appeals. *Williams v. Weyerhaeuser*, 378 F. 2d 7 (1967).

Summary judgment for defendants having been correctly entered, the judgment of the Superior Court of Pender County is affirmed.

Affirmed.

BIGGERS BROTHERS, INC. v. G. A. JONES, JR., COMMISSIONER OF REVENUE, STATE OF NORTH CAROLINA

No. 83

(Filed 1 February 1974)

Taxation §§ 2, 15— soft drink tax — classification of products — methods of payment — no discrimination

Where the Soft Drink Tax Act divided taxable products into the three categories of bottled soft drinks, soft drink powders and soft drink syrups, provided for payment of the tax by means of tax stamps and taxpaid crowns, and further provided an alternate method of payment by which a distributor could report his monthly sales and pay the tax thereon without affixing stamps but limited such alternate method only to bottled drinks and powders, plaintiff did not show that failure of the Legislature to provide the alternate payment method to soft drink syrups was unconstitutional and void as discriminatory.

APPEAL by plaintiff from *Hobgood, J.*, March 12, 1973 Session, WAKE Superior Court.

The plaintiff, Biggers Brothers, Inc., a North Carolina corporation dealing in bottled soft drinks, soft drink powders, and soft drink syrups, instituted this civil action on May 26, 1970, against the Commissioner of Revenue praying for the following relief:

1. That the court order a refund of $237.50 paid for 250 stamps which the plaintiff was required to purchase and

to affix to containers of soft drink syrups as required by the Soft Drink Tax Act and the Administrative Rules adopted by the North Carolina Department of Revenue. Particularly, the plaintiff contends it should have been permitted to discharge its tax liability for soft drink syrups by monthly payments rather than by the use of tax paid stamps.

2. That the court declare G.S. 105-113.51, 105-113.56A and Administrative Rules Nos. 1, 2 and 3 of the Department of Revenue unconstitutional and void.

3. That the plaintiff and others similarly situated be permitted to pay the tax due on sales of soft drink syrups under the alternate (monthly payment) plan now applicable to bottled soft drinks and soft drink powders.

The plaintiff alleged the refusal of the Commissioner to allow it to pay the tax on syrup based products on a monthly basis rather than to require stamps or crowns, was an unlawful discrimination and denied the plaintiff its constitutional rights to due process and equal protection of the laws guaranteed by the State and United States Constitutions.

The Attorney General answered for the Commissioner admitting that the plaintiff is a distributor of (1) bottled soft drinks, (2) soft drink powders, and (3) soft drink syrups; that the three classifications under the law and the Revenue Department regulations are valid, proper, and nondiscriminatory. The regulations apply to all distributors exactly alike. The law and the regulations provide for an alternate method of the payment of taxes on bottled soft drinks and on soft drink powders, but not on soft drink syrups. The stamps which the plaintiff purchased and attached to the containers of soft drink syrups were required of all distributors. The Attorney General moved to dismiss the plaintiff's action.

The parties in pre-trial conferences waived a jury trial, stipulated that the court, without a jury, should make findings of fact, state conclusions of law, and render judgment. In addition to the pleadings, the court had before it the Revenue Commissioner's Applicable Rules 1, 2 and 3 and an affidavit filed by each party. The tax imposed on bottled soft drinks is one cent per bottle; on soft drink powders is one cent per ounce, and on soft drink syrups is $1.00 per gallon.

The Director of Privilege License, Beverage and Cigarette Tax Division of the North Carolina Department of Revenue filed an affidavit which disclosed that during the year 1972, 219 distributors paid tax on bottled soft drinks; 180 distributors paid the tax on bottled soft drinks under the alternate plan; and 39 paid the tax by the attachment of stamps. During the same period, 51 paid distributor's tax on soft drink powders by monthly check and 50 paid by the purchase and attachment of stamps. During the same period, 218 paid the tax on soft drink syrups by the attachment of stamps and only one (the plaintiff) attempted to pay by monthly check.

The plaintiff, by brief and oral argument, contended that G.S. 105-113.45 and the Administrative Rules promulgated under G.S. 105-113.63 unduly discriminated against the plaintiff and others similarly situated by requiring the payment of the tax by the attachment of stamps rather than by monthly check.

After full hearing, Judge Hobgood entered judgment from which the following is quoted:

> "5. Bottled soft drinks and certain dry soft drink powders, syrups and base products, including those sold and distributed by the plaintiff are subject to taxation under the provisions of the Soft Drink Tax Act.
>
> "6. In connection with the administration of the Soft Drink Tax Act, the defendant has issued Administrative Rules 1, 2 and 3 copies of which were received in evidence. With respect to bottled soft drinks, the Act and Administrative Rule 1 provide for payment of the tax by means of tax stamps and taxpaid crowns, and also provide an ALTERNATE method of payment by means of which a resident distributor or wholesaler may report his monthly sales and pay the Soft Drink Tax thereon without affixing stamps or crowns. With respect to those soft drink powders subject to the tax, and to those products which are taxed as powders, the Act and Administrative Rule 2 provide for payment of the tax by means of tax stamps, and also provide an OPTIONAL method of payment by means of which a distributor or wholesale dealer may report his monthly sales and pay the Soft Drink Tax thereon without affixing stamps. With respect to soft drink syrups and liquid soft drink base products taxed as syrups, the Act and Administrative Rule 3 provide for payment of the tax only by means of tax

stamps, which may be either affixed to the container by the distributor or wholesaler, or imprinted upon the container by the manufacturer thereof.

* * * *

"11. There were approximately 339 licensed distributors, wholesale dealers and retail dealers paying tax upon soft drink syrups taxed under G.S. 105-113.45(a) and (c), only one of which (the plaintiff herein) was paying the tax by a means other than taxpaid stamps imprinted upon or affixed to containers of soft drink syrups."

Judge Hobgood, based on the findings of fact, entered conclusions of law here quoted:

"2. The General Assembly has, in the Soft Drink Tax Act, subclassified taxable soft drink products into three categories: bottled soft drinks; soft drink powders; and soft drink syrups.

"3. The foregoing subclassifications of taxable soft drink products are based upon reasonable distinctions among the subclasses of products classed and are not arbitrary."

The court entered judgment dismissing the action.

The plaintiff gave notice of appeal to the Court of Appeals and at the same time filed in this Court a petition, as provided in G.S. 7A-31, requesting a certification for review here prior to review by the Court of Appeals. This Court allowed the motion on September 12, 1973.

Broughton, Broughton, McConnell & Boxley by J. Melville Broughton, Jr. and John D. McConnell, Jr. for plaintiff appellant.

Robert Morgan, Attorney General, by Myron C. Banks, Assistant Attorney General, for defendant appellee.

HIGGINS, Justice.

Under the Soft Drink Tax Act the State levies on the distributor a tax of one cent on each bottled drink; one cent on each ounce of soft drink powders, and $1.00 on each gallon of soft drink syrup. Tax stamps must be purchased from the State and attached to the containers showing the distributor has

paid the tax. An alternate method of tax payment, at the election of the distributor, is authorized in the case of bottled soft drinks and soft drink powders. In lieu of the purchase and attachment of stamps, the distributor may give bond, keep records, and on the fifteenth of each month pay the tax for the previous month. The alternate method of payment is not made applicable to the tax on syrups.

The alternate method of tax payment on bottled drinks and powders dispenses with the printing, purchase, and attachment of one hundred stamps for each dollar of tax revenue. In the case of syrups, the purchase and attachment of one stamp will produce $1.00 in tax revenue. Placing the bottles and powders in one category and syrups in another for tax purposes is proper and justified.

The record discloses that in actual operations some dealers in bottled soft drinks and in soft drink powders discharged their tax liability as provided by the alternate method. Other dealers bought and attached stamps or crowns and did not avail themselves of the monthly payment provision of the Soft Drink Tax Act. All dealers, however, except the plaintiff bought and attached stamps to the containers of soft drink syrups. The plaintiff did purchase 250 stamps at $1.00 each apparently to attach to 250 gallons of soft drink syrup, but otherwise, it sought to apply the alternate method of deferred payments which it asks the court to approve and demands the return of the amount paid for the 250 stamps. The plaintiff asks that the Revenue Department be directed to permit it to pay its tax on soft drink syrups on the fifteenth of each month for the purchases for the prior month and that it be not required to purchase and attach stamps.

By admissions in the brief, the plaintiff makes it plain that it does not challenge the validity of the soft drink tax or the three classifications, but it does contend that the failure of the Legislature to provide the alternate payment method to soft drink syrups which it applies to bottled drinks and powders is unconstitutional and void as discriminatory.

The plaintiff's brief, however, states:

> "The plaintiff raises no issue with respect to the constitutionality of the Soft Drink Tax Act *per se*, nor to the division of taxable products into three categories (namely,

bottled soft drinks, soft drink powders, and soft drink syrups). Nor is any issue raised regarding the rate of tax applicable to each type of product. Its complaint is addressed specifically to the manner in which the tax upon taxable syrups is collected, in comparison with the method applicable to the collection of the tax on taxable powders and bottled soft drinks."

Judge Hobgood properly concluded that the method of payment by attaching stamps on soft drink syrups was not discriminatory and not in violation of the plaintiff's rights. The lawmaking body, as it had a right to do, made classifications for tax purposes. "Acting within the limits of our Constitution, a large field is afforded the Legislature in its choice of subjects for taxation. When these subjects are segregated by descriptions or definitions with reasonable clearness,—the classification reasonable and the distinctions made not arbitrary or capricious,—the imposition of the tax is not assailable." *Henderson v. Gill, Comr. of Revenue,* 229 N.C. 313, 49 S.E. 2d 754. See also *Rigby v. Clayton, Comr. of Revenue,* 274 N.C. 465, 164 S.E. 2d 7; *Bottling Co. v. Shaw, Comr. of Revenue,* 232 N.C. 307, 59 S.E. 2d 819; *Whitney v. California,* 274 U.S. 357, 71 L.Ed. 1095, 47 S.Ct. 641.

The plaintiff cannot make out a case of discrimination. The tax burden falls equally upon all members of the class. In *Snyder v. Maxwell, Comr. of Revenue,* 217 N.C. 617, 9 S.E. 2d 19, the Court held: "It is clear that the Legislature has not exhausted its power of classification by making a distinction as to the manner in which an article is sold—as, for example, through mechanical devices—but it may make a further classification or sub-classification within reasonable limits with reference to the kinds of goods, wares, and merchandise which are so sold from them; and the fact that they are all sold in a similar manner will not defeat the further classification of the privilege."

Finally, the plaintiff makes it clear in its brief that it recognizes the distinction in the three categories subject to the soft drink tax. The plaintiff's brief contains the following: "Again, it is emphasized that plaintiff does not attack the tax itself, but only the collection method; . . . "

From the point of view of the plaintiff, the Court recognizes the plaintiff could save time and money if it were permitted to pay by check on the fifteenth of each month, but the

Court is not the forum in which the plea should be heard and determined. The appeal for relief sought should be made to the General Assembly and not to the Court. As said by the Supreme Court of the United States in *Tappan v. Merchants National Bank,* 19 Wall. 490, 22 L.Ed. 189: "The constitution does not require uniformity in the manner of collection. Uniformity in the assessment is all it demands. When assessed the tax may be collected in the manner the law shall provide; and this may be varied to suit the necessities of each case." In *Missouri, K. & T. Trust Co. v. Smart,* 51 La. Ann. 416, 25 So. 443, the Court said: "The constitutional requirement that taxation shall be equal and uniform applies to the levy, and not the method of collecting the tax."

The plaintiff's concessions in the brief, the evidence, the pleadings, the findings and conclusions of law by the trial court amply support the court's judgment. The record fails to disclose any reason why the judgment should be disturbed.

Affirmed.

STATE OF NORTH CAROLINA v. JAMES HENRY SNEED

No. 62

(Filed 1 February 1974)

1. **Constitutional Law § 32— effective assistance of counsel**

The general rule is that the incompetency of counsel for the defendant in a criminal prosecution is not a denial of his constitutional right to effective counsel unless the attorney's representation is so lacking that the trial has become a farce and a mockery of justice.

2. **Constitutional Law § 32— effective assistance of counsel**

The question of constitutional inadequacy of representation cannot be determined solely upon the amount of time counsel spends with the accused or upon the intensiveness of his investigation.

3. **Constitutional Law § 32—effective assistance of counsel— divided loyalties — role of advocate**

Counsel cannot be hobbled by divided loyalties and cannot assume the role of *amicus curiae* but must function in the active role of an advocate.

4. **Constitutional Law § 32— effective assistance of counsel — standard of proof**

A stringent standard of proof is required on the question of whether an accused has been denied the effective representation of counsel.

5. **Constitutional Law § 32— effective assistance of counsel — case by case decision**

Each case must be approached on an *ad hoc* basis, viewing circumstances as a whole, in order to determine whether an accused has been deprived of the effective assistance of counsel.

6. **Constitutional Law § 32— effective assistance of counsel — advising defendant to make statement to police — witnesses obtained as result of statement**

Where a defendant charged with the murder of a highway patrolman falsely told his court-appointed attorney that other persons had forced him at gunpoint to drive them from the scene of a break-in and that someone sitting in the back seat of his vehicle had thereafter shot the patrolman, the attorney advised defendant to make a statement to the police, and defendant subsequently made statements to the police in which he stated that someone else did the shooting without prior knowledge on his part and named two other persons who were in his vehicle at the time of the shooting, the conduct of defendant's court-appointed attorney did not amount to a denial of effective assistance of counsel so as to preclude the State from using the two persons named by defendant as witnesses against defendant. Sixth Amendment to U. S. Constitution; Art. I, §§ 19 and 23 of the N. C. Constitution.

7. **Constitutional Law § 32— effective assistance of counsel — acquaintance with deceased — law practice with public officials**

An attorney appointed to represent a defendant charged with murder of a highway patrolman was not fettered by divided loyalties by reason of his casual acquaintance with the patrolman or by the fact that the murder caused much public resentment and the attorney was a member of a firm which included the Speaker-Elect of the N. C. House of Representatiives and the Mayor of the Town of Roxboro.

APPEAL by defendant from *McKinnon, J.*, 5 March 1973 Session of PERSON.

Defendant was tried upon a bill of indictment charging that "James Henry Snead . . . on the 27th day of September 1972, . . . feloniously, wilfully and of his malice aforethought, did kill and murder Joe G. Wright. . . . "

Mr. Charles Hubbard, of the Person County Bar, was appointed to represent defendant on 29 September 1972. Mr. Hubbard was relieved of his duty to further represent defendant prior to the probable cause hearing in District Court, and defendant was thereafter represented by his privately retained counsel, Clayton and Ballance.

Upon arraignment on said indictment, defendant entered a plea of not guilty.

The State's evidence, in summary, tends to show:

On 27 September 1972, shortly after 1:00 o'clock p.m., Pasco Grinstead, Douglas Lee Cameron and Cecil O. Gentry, who were working at a tobacco barn, observed Patrolman Joe Wright, of the North Carolina Highway Patrol, as he stopped a tri-tone 1953 to 1956 Mercury automobile near the intersection of rural unpaved road 1735 and rural paved road 1715 in Person County. Patrolman Wright was operating a brown unmarked patrol car which he stopped about ten feet behind the Mercury automobile. Patrolman Wright approached the Mercury automobile, and when he was within about ten feet of the front door of that car, the person sitting in the driver's seat shot him three or four times. Patrolman Wright fell to the ground and the Mercury moved away. Mr. Grinstead went to the patrolman to render aid and thereafter summoned help. These witnesses saw three persons in the Mercury automobile and described them as black men, the driver being of a lighter complexion than the other two.

When the State offered the witness Levy Lowe, defendant's counsel objected on the ground that the conduct of his court-appointed lawyer amounted to a denial of assistance of effective counsel so as to preclude the introduction of this testimony. Judge McKinnon thereupon conducted a *voir dire* hearing before ruling on the admissibility of this testimony.

On *voir dire,* defendant James Henry Sneed testified that on 29 September 1972 police officers came to his home in Durham and inquired of him whether he owned a Mercury automobile. He replied that he did not. He was thereafter warned of his Constitutional rights, and carried to the Highway Patrol Station in Durham and from there to the police department in Roxboro. He requested a lawyer and made no statement to the officers. On the afternoon of 29 September 1972, he was served with a warrant charging him with murder. Mr. Hubbard was appointed to represent him and came to the jail at about 3:30 p.m. on the 29th of September. After defendant told Mr. Hubbard some of the things that had taken place on the 27th of September 1972, Mr. Hubbard advised him that it would be to his best interest to make a statement to the police. On the same day, in the presence of his court-appointed attorney and police officers, he made a statement concerning the events which occurred on the 27th of September. He admitted that he was driv-

ing the Mercury on 27 September 1972. He also admitted his part in the breaking and entering, and larceny which occurred in Durham County, but averred that an unnamed third person shot Patrolman Wright from the Mercury automobile. Later in the day he directed officers to the place where the stolen property was recovered. Thereafter, at his lawyer's request he wrote down the names of James Dennis Mack and Levy Lowe on a piece of paper and gave it to Mr. Hubbard. He instructed Mr. Hubbard not to give the information to anyone else. He made no statement to the police officers prior to being advised to do so by Mr. Hubbard, except to answer that he did not own the Mercury automobile.

Mr. Charles Hubbard then testified that he was a practicing attorney and had been practicing law in Roxboro since 1966. He was a member of the firm of Ramsey, Jackson and Hubbard. Mr. Ramsey was the Speaker-Elect of the North Carolina House of Representatives and Mr. Jackson was Mayor of Roxboro. Mr. Hubbard was notified that he had been appointed to represent James Henry Sneed on 29 September 1972. He went to the Municipal Hall and saw Sneed at about 1:30 p.m. on that day. He had previously represented Sneed as a privately retained counsel, and Sneed recognized him on that day. Defendant at that time told him that he was in the Rougemont area of Durham County for the purpose of seeing a girl, and as he was going down a rural road he saw four men emerging from a trailer carrying a TV and other items. One of the men stopped him by pointing a gun. The men entered his Mercury automobile and ordered him to drive into Person County. He thought that one of the men was "Big Boy" Mangum. He was stopped by an officer in Person County and one of the men in the back seat suddenly shot the officer. Sneed said that the only statement he had made to the officers was that he (Sneed) did own the 1956 Mercury. Mr. Hubbard further testified that he then advised Sneed to talk to the police because he was the only person in custody and that the statement would aid in his defense. He thought that the only way to apprehend the other persons was to acquaint the authorities with Sneed's statement. Later in the day, after expressing concern that someone else might be "taking off," Sneed wrote the names of James Dennis Mack and Levy Lowe on a yellow pad and told Mr. Hubbard to "get these men arrested." Mr. Hubbard specifically denied that Sneed told him not to divulge this information or that he told Sneed

that he would later decide what to do with it. He thought it to be to his client's advantage to pinpoint the killer.

Mr. Hubbard said that he knew Patrolman Wright and that they were friends. He knew of the public concern about Patrolman Wright's killing, but he did not feel that he would be adversely affected because he represented Sneed. He did not advise his client on the premise that it would or would not adversely affect him as a lawyer or an individual, but his advice was given solely on the premise that it would be helpful to his client.

Two statements made by defendant to officers were introduced. In both statements, defendant stated that someone else did the shooting without any prior knowledge on his part. In the first statement, he did not identify the person who fired the shots. In the second statement he placed Lowe and Mack in the Mercury automobile under such circumstances that one of them must have done the shooting. He refused to say which of the two actually fired the shots.

At the conclusion of the *voir dire* hearing, Judge McKinnon, stated that he would find the facts as stipulated and as testified to by Mr. Hubbard. He then ruled that Mr. Hubbard's actions did not prevent the use of the testimony of the witnesses Lowe and Mack.

The jury returned to the courtroom and Levy Lowe and James Dennis Mack gave testimony which in essence disclosed that they joined defendant on the morning of 27 September 1972, and traveled in his Mercury automobile to a trailer in the Rougemont area of Durham County. Sneed had a pistol at that time. They broke into a trailer and took a TV, a stereo, a shotgun and other personal property. They placed the stolen property into the back seat of the car and proceeded into Person County where they met a brown unmarked patrol car. Thereafter the patrol car returned and by the use of the siren, the driver signaled them to stop. Sneed stopped the automobile, and as the patrolman approached the Mercury automobile, he suddenly and without warning shot the patrolman four times. They left the scene, and Lowe and Mack left the automobile as soon as they could.

The State offered additional evidence which tended to show that the Mercury automobile was later found camouflaged by

bushes in Orange County. Fingerprints were lifted from the automobile and Mr. Stephen R. Jones, who was qualified as an expert in fingerprint identification, testified that in his opinion some of the prints taken from defendant while he was in custody in Roxboro were identical to those lifted from the Mercury automobile.

There was medical evidence showing that Patrolman Wright's death was caused by a massive hemorrhage resulting from bullet wounds. The State also offered several other witnesses whose testimony tended to corroborate its principal witnesses.

Defendant offered no evidence.

The jury returned a verdict of guilty of first degree murder. Defendant appealed from judgment sentencing him to life imprisonment.

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

Clayton and Ballance by Frank W. Ballance, Jr., for defendant appellant.

BRANCH, Justice.

The sole question presented by this appeal is whether defendant was denied effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Sections 19 and 23 of the Constitution of North Carolina.

Defendant contends that the testimony of State's witnesses Levy Lowe and James Dennis Mack and certain other related evidence offered by the State became available solely through statements procured from defendant as a result of Constitutionally inadequate representation by his court-appointed counsel. Defendant contends this testimony and other related evidence was, therefore, inadmissible.

The right to assistance of counsel is guaranteed by the Sixth Amendment to the Federal Constitution and by Article I, Sections 19 and 23 of the Constitution of North Carolina. The Sixth Amendment guarantee is made applicable to the states by the Fourteenth Amendment to the Federal Con-

stitution. *Avery v. Alabama,* 308 U.S. 444, 84 L.Ed. 377. This right is not intended to be an empty formality but is intended to guarantee effective assistance of counsel. *Powell v. Alabama,* 287 U.S. 45, 77 L.Ed. 158; *State v. Speller,* 230 N.C. 345, 53 S.E. 2d 294.

The case before us is unusual in that it arises on the trial judge's ruling on an objection to the admission of evidence. Our research discloses that the majority of the decisions relating to the alleged failure of counsel to render effective representation arises out of post-conviction proceedings. Nevertheless, we see no distinction in the application of the rules of law solely because of the manner in which the question is presented.

[1] Neither the United States Supreme Court, nor this Court, has fashioned a rule to guide us in determining whether an accused was denied his Constitutional right to effective assistance of counsel due to counsel's negligence, incomptency, conflicting loyalties or other similar reasons. However, there are numerous decisions from other jurisdictions and other federal courts which bear upon decision of the question here presented. A review of these decisions indicates the general rule to be that the incompetency (or one of its many synonyms) of counsel for the defendant in a criminal prosecution is not a Constitutional denial of his right to effective counsel unless the attorney's representation is so lacking that the trial has become a farce and a mockery of justice. *Snead v. Smyth,* 273 F. 2d 838; *Doss v. State of North Carolina,* 252 F. Supp. 298; *Edgerton v. State of North Carolina,* 230 F. Supp. 264; *DuBoise v. State of North Carolina,* 225 F. Supp. 51; *Jones v. Balkcom,* 210 Ga. 262, 79 S.E. 2d 1, cert. den. 347 U.S. 956, 98 L.Ed. 1101; See Annot., 74 A.L.R. 2d 1390 (1960), Conviction—Incompetency of Counsel.

[2, 3] Consistent with the above stated general rule, it has been held that the question of Constitutional inadequacy of representation cannot be determined solely upon the amount of time counsel spends with the accused or upon the intensiveness of his investigation. *O'Neal v. Smith,* 431 F. 2d 646; *Vizcarra-Delgadillo v. United States,* 395 F. 2d 70; *United States ex rel. Hardy v. McMann,* 292 F. Supp. 191. Neither does the Sixth Amendment guarantee the best available counsel, errorless counsel, or satisfactory results for the accused. *United States ex rel. Weber v. Ragen,* 176 F. 2d 579; *Palmer v. Adams,* 162 Conn.

316, 294 A. 2d 297; *Kinney v. United States,* 177 F. 2d 895. Nevertheless, counsel cannot assume the role of *amicus curiae, Ellis v. United States,* 356 U.S. 674, 2 L.Ed. 2d 1060, but must function in the active role of an advocate. *Entsminger v. Iowa,* 386 U.S. 748, 18 L.Ed. 2d 501. Nor can counsel be hobbled by divided loyalties. *People v. Stoval,* 40 Ill. 2d 109, 239 N.E. 2d 441; *State v. Crockett,* 419 S.W. 2d 22 (Mo. 1967).

[4] The Courts rarely grant relief on the grounds here asserted, and have consistently required a stringent standard of proof on the question of whether an accused has been denied Constitutionally effective representation. We think such a standard is necessary, since every practicing attorney knows that a "hindsight" combing of a criminal record will in nearly every case reveal some possible error in judgment or disclose at least one trial tactic more attractive than those employed at trial. To impose a less stringent rule would be to encourage convicted defendants to assert frivolous claims which could result in unwarranted trial of their counsels. In *Diggs v. Welch,* 148 F. 2d 667, Arnold, J., aptly stated: "The opportunity to try his former lawyer has its undoubted attraction to a disappointed prisoner."

[5] It is evident that there can be no precise or "yardstick" approach in applying the recognized rules of law in this area. Thus, each case must be approached upon an *ad hoc* basis, viewing circumstances as a whole, in order to determine whether an accused has been deprived of effective assistance of counsel. *Walker v. Caldwell,* 476 F. 2d 213; *Hegwood v. Swenson,* 344 F. Supp. 226; *Timmons v. Peyton,* 240 F. Supp. 749 (Reversed on other grounds 360 F. 2d 327); *Palmer v. Adams, supra.*

[6] In instant case, the Clerk of Superior Court appointed Mr. Charles Hubbard, a member of a respected law firm who had been engaged in the practice of criminal law for a period of approximately six years, to represent defendant. We note that Mr. Hubbard had previously represented defendant in a criminal matter as his privately retained counsel. Upon notification of his appointment, Mr. Hubbard promptly interviewed defendant. At that time defendant related facts to him which, if true, could have been an absolute defense to the homicide charge. The gist of defendant's statement was that another person or persons forced him at gunpoint to carry them into Person County, and there without any complicity on the part of defendant, shot and killed Patrolman Joe Wright.

Defendant takes the anomalous position that although he told his attorney a falsehood, his attorney should have known better than to believe him. We think that the attorney-client relationship is such that when a client gives his attorney facts constituting a defense, the attorney may rely on the statement given unless it is patently false. Therefore, under the circumstances of this case, it was reasonable for Mr. Hubbard to believe that someone other than defendant perpetrated the murder, and that unless these persons were apprehended they would flee. Based on these beliefs, Mr. Hubbard advised his client to inform the authorities of the true facts and thereby possibly clear himself of the murder charge. Under these circumstances, we cannot say that his advice was improper.

[7] In retrospect, it might appear to have been the better course for counsel to have advised his client to make no statement to the authorities until counsel had made a more intensive investigation. Conceding, *arguendo,* that counsel should have pursued this alternative action, his failure to do so does not amount to such abdication of duty as to deny defendant the Constitutionally guaranteed right to effective assistance of counsel. This record does not support defendant's contentions that his appointed counsel acted in the capacity of *amicus curiae* or that counsel was fettered by divided loyalties. The evidence of record reveals that the relationship between counsel and the deceased patrolman was no more than that of casual acquaintances. Further, we find no evidence of divided loyalty in the fact that Mr. Hubbard was a member of a firm which included the Speaker-Elect of the North Carolina House of Representatives and the Mayor of the Town of Roxboro. This association would seem to attest to his ability and character rather than to indicate a tendency to shirk his duty to his client because of aroused community resentment.

It is the duty of the trial judge and the prosecutor to see that the essential rights of an accused are preserved. *Glasser v. United States,* 315 U.S. 60, 86 L.Ed. 680; *Mooney v. Holohan,* 294 U.S. 103, 79 L.Ed. 791.

In *United States v. Handy,* 203 F. 2d 407, the Court, considering the circumstances requiring intervention of the Judge because of ineffective assistance of counsel, stated:

> "In the absence of such gross incompetence or faithlessness of counsel as should be apparent to the trial judge

and thus call for action by him it would be destructive of the relationship of counsel and client as we know it either to permit the trial judge to dictate to counsel his trial strategy in defending his client's interests or to permit the defendant after conviction to question that strategy and in effect to put his counsel on trial with respect to it. . . . "

Here the acts allegedly resulting in ineffective representation at trial by defendant's counsel did not occur in the presence of the Court. However, at trial the fair and learned trial judge conducted an extensive *voir dire* hearing concerning the admissibility of the challenged evidence, including testimony from defendant and appointed counsel. His ruling admitting this evidence, in effect, amounted to a finding by the Court that Mr. Hubbard's actions did not require intervention of the Judge or other officers of the Court.

We hold, under the circumstances of this case, that defendant James Henry Sneed was not denied effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Sections 19 and 23 of the Constitution of North Carolina.

Defendant offers no authority or argument to support his other assignments of error and we deem them to be 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; 1 Strong, N. C. Index 2d, Appeal and Error, § 45.

In the trial of the case below, we find

No error.

BURKHIMER v. HARROLD

No. 141 PC.

Case below: 20 N.C. App. 174.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 February 1974.

FOOD SERVICE v. BALENTINE'S

No. 98 PC.

Case below: 19 N.C. App. 654.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 9 January 1974.

HIGGINS v. BUILDERS & FINANCE, INC.

No. 128 PC.

Case below: 20 N.C. App. 1.

Petition for writ of certiorari to North Carolina Court of Appeals denied 9 January 1974.

MEZZANOTTE v. FREELAND

No. 110 PC.

Case below: 20 N.C. App. 11.

Petition for writ of certiorari to North Carolina Court of Appeals denied 9 January 1974.

PAPER CO. v. BOUCHELLE

No. 117 PC.

Case below: 19 N.C. App. 697.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 9 January 1974.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

ROBINSON v. INVESTMENT CO.

No. 108 PC.

Case below: 19 N.C. App. 590.

Petition for writ of certiorari to North Carolina Court of Appeals denied 9 January 1974.

ROSSMAN v. INSURANCE CO.

No. 102.

Case below: 19 N.C. App. 651.

Petition for writ of certiorari to North Carolina Court of Appeals denied 9 January 1974.

STATE v. ARMISTEAD

No. 14.

Case below: 19 N.C. App. 704.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 9 January 1974.

STATE v. BRANDON

No. 139 PC.

Case below: 20 N.C. App. 262.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 February 1974.

STATE v. BROWN

No. 147 PC.

Case below: 20 N.C. App. 71.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 February 1974.

STATE v. DAVIS

No. 153 PC.

Case below: 20 N.C. App. 191.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 February 1974.

STATE v. DOOLEY

No. 127 PC.

Case below: 20 N.C. App. 85.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 5 February 1974.

STATE v. DOZIER

No. 120 PC.

Case below: 19 N.C. App. 740.

Petition for writ of certiorari to North Carolina Court of Appeals denied 9 January 1974.

STATE v. FRANKS

No. 122 PC.

Case below: 20 N.C. App. 160.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 February 1974.

STATE v. HADDOCK

No. 106 PC.

Case below: 19 N.C. App. 714.

Petition for writ of certiorari to North Carolina Court of Appeals denied 9 January 1974.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. HALTOM

No. 105 PC and No. 107.

Case below: 19 N.C. App. 646.

Petition for writ of certiorari to North Carolina Court of Appeals denied 9 January 1974. Appeal dismissed ex mero motu for lack of substantial constitutional question 9 January 1974.

STATE v. HARRELL (HARRILL)

No. 152 PC.

Case below: 20 N.C. App. 352.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 February 1974.

STATE v. HEARD and JONES

No. 125 PC.

Case below: 20 N.C. App. 124.

Petition by defendants Heard and Jones for writ of certiorari to North Carolina Court of Appeals denied 5 February 1974. Motion of Attorney General to dismiss appeal of defendant Jones denied 5 February 1974.

STATE v. HOLLAND

No. 142 PC.

Case below: 20 N.C. App. 235.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 February 1974.

STATE v. HULTMAN

No. 123 PC.

Case below: 20 N.C. App. 201.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 February 1974.

STATE v. JOHNSON

No. 20.

Case below: 20 N.C. App. 53.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 February 1974.

STATE v. JUAN

No. 133 PC.

Case below: 20 N.C. App. 208.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 February 1974.

STATE v. LAWSON

No. 137 PC.

Case below: 20 N.C. App. 171.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 5 February 1974.

STATE v. McCLINTON

No. 15.

Case below: 19 N.C. App. 734.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 9 January 1974.

STATE v. MATTHEWS

No. 143 PC.

Case below: 20 N.C. App. 297.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 February 1974.

STATE v. MORRISON

No. 111 PC.

Case below: 19 N.C. App. 717.

Petition for writ of certiorari to North Carolina Court of Appeals denied 9 January 1974.

STATE v. NETTLES

No. 22.

Case below: 20 N.C. App. 74.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 February 1974.

STATE v. PEARSON

No. 124 PC.

Case below: 20 N.C. App. 203.

Petition for writ of certiorari to North Carolina Court of Appeals denied 9 January 1974.

STATE v. PENLAND

No. 21.

Case below: 20 N.C. App. 73.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 9 January 1974.

STATE v. POTTER

No. 140 PC.

Case below: 20 N.C. App. 292.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 5 February 1974.

STATE v. STANFIELD

No. 2.

Case below: 19 N.C. App. 622.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 9 January 1974.

STATE v. STANLEY

No. 109 PC.

Case below: 19 N.C. App. 684.

Petition for writ of certiorari to North Carolina Court of Appeals denied 9 January 1974.

STATE v. THOMAS

No. 144 PC.

Case below: 20 N.C. App. 255.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 February 1974.

STATE v. TORAIN

No. 130 PC.

Case below: 20 N.C. App. 69.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 February 1974.

STATE v. WILLIS

No. 115 PC.

Case below: 20 N.C. App. 43.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 9 January 1974.

STATE v. WILSON

No. 113 PC.

Case below: 19 N.C. App. 672.

Petition for writ of certiorari to North Carolina Court of Appeals denied 9 January 1974.

STATE v. WOOTEN

No. 135 PC.

Case below: 20 N.C. App. 139.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 February 1974.

STEWART v. INSURANCE CO.

No. 126 PC.

Case below: 20 N.C. App. 25.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 February 1974.

TRANSIT, INC. v. CASUALTY CO.

No. 138 PC.

Case below: 20 N.C. App. 215.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 5 February 1974.

UTILITIES COMM. v. COACH CO.

No. 101 PC.

Case below: 19 N.C. App. 597.

Petition for writ of certiorari to North Carolina Court of Appeals denied 9 January 1974.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM 1974

STATE OF NORTH CAROLINA v. HENRY N. JARRETTE

No. 46

(Filed 25 February 1974)

1. **Criminal Law § 92— four offenses — consolidation for trial**

The trial court did not err in consolidating for trial charges against defendant for murder, rape, kidnapping and armed robbery where the offenses constituted a continuing criminal episode lasting some two and one-half hours and were so related in time and circumstance as to permit the admission in evidence of each in the trial of the others. G.S. 15-152.

2. **Criminal Law § 15; Jury § 2— change of venue — special venire**

The trial court in this prosecution for murder, rape, kidnapping and armed robbery did not abuse its discretion in the denial of defendant's motion for a change of venue or for a special venire from another county on the ground of pretrial publicity where the newspaper stories relating to the crimes were within the normal limits of newspaper reporting of criminal activity, the circumstances under which the crimes were committed attracted the attention of all news media of the State, and defendant offered no evidence that such publicity was more widespread in the county of trial than in any other county to which the case might have been removed in accordance with G.S. 1-84.

3. **Criminal Law § 15— improper venue — waiver — motion for venue change because of local prejudice**

Although another county was the proper venue for trial of defendant on a kidnapping charge, defendant waived venue by going to trial without requesting transfer to the proper county, defendant's motion for change of venue on the ground of local prejudice not being such a request.

4. **Jury § 6— motion to question prospective jurors separately, out of presence of other jurors**

The trial court did not abuse its discretion in the denial of defendant's motion that prospective jurors be questioned separately, out of the presence of other selected or prospective jurors, on the ground a prospective juror might refer during the *voir dire* to what he had read or heard through the news media concerning the defendant's being an escaped prisoner.

5. **Jury § 6— prospective jurors — questions concerning views on capital punishment**

In this prosecution for murder, rape, kidnapping and armed robbery, the trial court did not err in permitting the solicitor to propound questions to prospective jurors concerning their views about the death penalty.

6. **Constitutional Law § 29; Criminal Law § 135; Jury § 7— jurors opposed to capital punishment — challenge for cause**

In a prosecution for murder and rape, the trial court properly allowed the State's challenges for cause to prospective jurors who stated, in effect, that under no circumstances could they vote for a verdict which would result in the imposition of the death penalty.

7. **Criminal Law §§ 34, 128— motion for mistrial — statement by prospective juror**

The trial court did not err in the denial of defendant's motion for a mistrial made on the ground that a prospective juror stated, in the presence of other prospective and selected jurors, that he remembered, he believed, having read that defendant had been declared an outlaw.

8. **Jury § 7— challenge for cause — juror who saw television news report about trial**

The trial court did not err in the denial of defendant's challenge for cause to a juror who had seen a television news report about the case the night before he was called into the jury box where defendant's interrogation of the juror developed no information indicating any prejudice against defendant or any preconceived idea concerning his guilt or innocence, and the juror stated upon inquiry by the court that he could give defendant a fair and impartial trial without being influenced by what he had previously heard.

9. **Criminal Law § 73— declaration of decedent showing intent — exception to hearsay rule**

In a murder prosecution wherein the State's evidence tended to show that the victim was stabbed by defendant while sitting in his brother's car at a launderette, testimony by the victim's brother that, when he borrowed the car and immediately before driving off in it, the victim said he was going to the launderette was admissible as an exception to the hearsay rule and as a part of the *res gestae* of the borrowing and departure.

10. **Criminal Law § 66— pretrial photographic identification — in-court identification — independent origin**

An officer's in-court identification of defendant as the driver of a car which the officer pursued was properly admitted, though the

officer had identified defendant from photographs, where the officer's testimony was based on what he saw in the course of his pursuit of the car, there is nothing in the record to indicate that the photographs or the circumstances under which the officer saw them were impermissibly suggestive and there is nothing to indicate a substantial likelihood of irreparable misidentification through inspection of the photographs.

11. Criminal Law § 34— nonresponsive testimony disclosing defendant is prison escapee

In a prosecution for murder, rape, kidnapping and armed robbery, the trial court did not err in the denial of defendant's motion for mistrial made on the ground that an F.B.I. agent's nonresponsive statement implying that defendant had escaped from prison constituted inadmissible evidence that defendant had committed a prior criminal offense where the court properly instructed the jury not to consider such statement.

12. Criminal Law §§ 34, 75— confessions — statements that defendant was prison escapee

In this prosecution for murder, rape, kidnapping and armed robbery, the trial court did not err in the admission of written and oral confessions containing statements by defendant to the effect that he had escaped from prison where defendant interposed only general objections to testimony relating to the confessions, *voir dire* examinations prior to introduction of the statements showed that defendant's concern was directed to whether the statements were voluntary and made with knowledge of defendant's constitutional rights, the trial court found upon supporting evidence that the confessions were not impermissibly obtained, and defendant did not request the court to strike or to instruct the jury to disregard expressions in the confessions showing that defendant was an escaped prisoner; furthermore, the admission of such expressions was harmless in view of the detailed confessions by defendant and the testimony by the rape and kidnapping victim who also witnessed the murder and armed robbery.

13. Criminal Law § 117— instructions — believing all or none of witness's testimony — omission of "or any part"

Trial court's omission of the words "or any part" from its instruction that the jury "may believe all that a witness says or you may believe none" was a technical omission which could not have affected the result and did not entitle defendant to a new trial.

14. Criminal Law § 111; Rape § 6— improper punctuation of instruction — no right to new trial

Although an instruction as shown in the record would appear to permit the jury to find defendant guilty of rape if defendant put the alleged victim in the back seat of a car by force and against her will rather than requiring the sexual intercourse to be by force and against her will, defendant is not entitled to a new trial where the insertion of commas before and after a phrase in the instruction makes the instruction completely accurate, since the court reporter's punctuation of the judge's charge is not sufficient evidence of error to warrant a new trial.

15. Rape § 6— failure to submit lesser offense

The trial court in a rape case did not err in failing to submit to the jury the lesser included offenses of assault with intent to commit rape and assault on a female where all the evidence showed completion of the act of sexual intercourse after the victim was abducted, with threats to injure her if she made an outcry, and transported, with her hands tied behind her back, to a remote spot where the act of intercourse was committed, and that defendant had a knife at all times.

16. Homicide § 30— failure to submit second degree murder

The trial court in a prosecution for first degree murder did not err in failing to submit to the jury the question of defendant's guilt of second degree murder where all the evidence was to the effect that defendant stabbed and killed the victim for the purpose of stealing the automobile in which the victim was sitting and that the killing was with premeditation and deliberation.

17. Constitutional Law § 36; Criminal Law § 135— mandatory death penalty for certain crimes — reaffirmation of decision

The decision of *State v. Waddell*, 282 N.C. 431, holding that a defendant lawfully convicted of an offense of first degree murder, rape, first degree burglary or arson committed after 18 January 1973 must be sentenced to death, is reaffirmed. G.S. 14-17; G.S. 14-21; G.S. 14-52; G.S. 14-58.

18. Criminal Law § 138— punishment — construction of State statute — decision of N. C. Supreme Court

The determination of what statutes of this State mean with reference to the punishment to be imposed for criminal offenses is a question of State law and the determination thereof by the N. C. Supreme Court is authoritative.

19. Constitutional Law § 2— construction of State Constitution — decision of N. C. Supreme Court

The meaning of the State Constitution is a matter of State law upon which the decision of the N. C. Supreme Court is final.

20. Constitutional Law § 36; Criminal Law § 135— death penalty — constitutionality — powers of solicitor, jury and Governor

The death penalty is not unconstitutionally discretionary and arbitrary because (1) the solicitor has the power to prosecute for a lesser charge, (2) the jury has the power to acquit or to convict of a lesser charge and (3) the Governor has the power to commute the sentence or grant a pardon.

21. Constitutional Law § 36; Criminal Law § 135— death penalty — constitutionality — number of death sentences

The number of death sentences imposed since the decision of *State v. Waddell*, 282 N.C. 431, does not show that such decision was contrary to the intent of the Legislature.

22. **Constitutional Law § 36; Criminal Law § 135— death penalty — constitutionality — number of death sentences**

The small number of death sentences imposed since the decision of *State v. Waddell*, 282 N.C. 431, does not show that the death penalty is imposed arbitrarily in this State.

23. **Constitutional Law § 36; Criminal Law § 135— death penalty — constitutionality — imposition on non-whites**

There is no merit in defendant's contention that the death penalty is unconstitutional on the ground that those sentenced to death since the decision of *State v. Waddell* are predominantly non-white.

24. **Constitutional Law § 36; Criminal Law § 135— death penalty — constitutionality — public opinion**

There is no merit in defendant's contention that the death penalty constitutes cruel and unusual punishment because public opinion has overwhelmingly repudiated it, it being clear that there is widespread opinion both in this State and the nation that the death penalty is the appropriate punishment for certain crimes.

25. **Constitutional Law § 36; Criminal Law § 135— death penalty — constitutionality — obtaining goals of punishment**

There is no merit in defendant's contention that the death penalty for rape and murder is unconstitutional on the ground that it is futile because it is not the most effective means for obtaining the goals of criminal punishment since the Legislature is not required to prescribe the most efficacious punishment for crime but it is sufficient that reasonable men can believe that the punishment prescribed is reasonably adapted to the attainment of the goals of all criminal punishment, and since the statutes prescribing the punishment for murder and rape meet this constitutional standard.

Chief Justice BOBBITT dissenting as to death sentences.

Justices HIGGINS and SHARP join in dissenting opinion.

Justice SHARP concurring further in dissenting opinion.

APPEAL by defendant from *McConnell, J.*, at the 18 June 1973 Criminal Session of UNION. This case was docketed and argued as No. 98 at the Fall Term 1973.

The defendant was found guilty of the rape of Gwendolyn Blackmon, a 16 year old Negro girl; the first degree murder of David Timothy Parker, a 16 year old white boy; the kidnapping of Gwendolyn Blackmon; and the armed robbery of David Timothy Parker. He was sentenced to death for the rape and for the murder and to imprisonment for life for the kidnapping. Prayer for judgment was continued on the charge of armed robbery, the State having relied upon this felony as an essential element of the murder in the first degree. The defendant appealed from all three of the judgments imposed, setting forth

126 assignments of error, many of which were abandoned in his brief. Many others present the same question of law.

Prior to the selection of the jury, the defendant made certain pretrial motions, including a motion for change of venue. From exhibits offered by the defendant in support of this motion, it appears that on 9 February 1973 the defendant was serving a sentence of 23 to 28 years in Odom Prison for two murders by stabbing with a knife, a circumstance not disclosed by the evidence presented in the presence of the jury in the present cases. It further appears from these exhibits that he was permitted to leave the prison on that date to attend a state convention of the Junior Chamber of Commerce (Jaycees), he being an officer in the chapter of that organization established in Odom Prison. While at the convention, he eluded the guard who had accompanied him and escaped. Two days later, he was in Charlotte and engaged in the activities from which the present charges arise. Four days thereafter, he was arrested by agents of the Federal Bureau of Investigation in Memphis, Tennessee. Waiving extradition, he was returned to Union County for trial.

The defendant offered no evidence before the jury. That introduced by the State showed, in substance, the following:

At approximately 3:30 p.m. on Sunday, 11 February 1973, Gwendolyn Blackmon, a 16 year old Negro high school student, drove alone in her automobile to the Charlotte Public Library. As she was getting out of her car in the parking lot, a man, whom she had never seen before but whom she positively identified, in court, as the defendant, pushed her back into the car, telling her that if she screamed or did not "go along with what he said," he would kill her, tied her hands behind her back, showed her a "scout knife," compelled her to lie down on the seat, took her keys from her purse and drove off with her in the car, telling her he was a sex maniac.

Upon arriving at a location, subsequently pointed out by Gwendolyn Blackmon to the sheriff, on a dirt road in rural Union County, the defendant put the girl into the back seat of the car, disrobed her completely and, with the knife at hand, had sexual intercourse with her, following which he committed an unnatural sexual act upon her. When, prior to these acts, she begged him not to touch her, he replied that he "didn't like for people to beg him, so please stop begging." Following these acts,

he instructed her to get dressed and, when she did so, he retied her hands behind her back. They returned to the front seat of the car and the defendant drove to the town of Waxhaw. En route, he told her he wished she were white because, if she were, he would kill her, but "if he could find a way of getting another car," he would give her car back to her and let her go free.

Arriving at the launderette in Waxhaw, the defendant parked beside another car, a 1971 Pontiac Grand Prix, yellow with a cream vinyl top, in which a 16 year old white boy, David Timothy Parker, sat alone. The defendant, taking the keys to Gwendolyn Blackmon's car with him, and leaving her in her car with her hands still tied behind her back, walked over to the boy's car. The Parker boy rolled down his window and the defendant engaged him in a brief conversation. The defendant then pulled the knife from his pants and stabbed the boy twice. The boy tried to get out of the other side of his car but was unable to do so. The blood was gushing from his mouth and nose. The defendant shoved the dying boy over onto the passenger's side of the front seat, got in the car and drove away. He returned momentarily to untie Gwendolyn Blackmon's hands and give her back the keys to her car. Thereupon, she returned to her home in Charlotte and reported what had happened to her parents and to the police.

At about 5:00 p.m. that afternoon, David Timothy Parker had borrowed his brother's 1971 Pontiac Grand Prix, yellow with a white vinyl top, saying he was going to the launderette. On 13 February, his body was discovered in a roadside ditch, 5.4 miles from the Waxhaw launderette. The cause of his death was a deep stab wound in the left chest. The Parker automobile was discovered in Charlotte, the night of 11 February. Its interior was quite bloody. No one other than David Timothy Parker had the owner's permission to drive it.

At approximately 9:00 p.m. on 11 February, Charlotte Police Officers Griffin and Callahan, while patrolling in a police automobile, observed the Parker car parked beside a telephone booth and a man, identified, in court, by Officer Griffin as the defendant, standing in the booth. They turned into the parking lot. As they drew near the Parker automobile, the defendant drove away in it. The officers pursued him with their blue light flashing and horn blowing. They bumped the Parker car several times in unsuccessful efforts to stop it. Finally, the defendant slowed down, jumped from the car and fled on foot. He was

pursued by Officer Griffin but escaped by climbing over a fence which the officer was unable to climb. On the ground at that point, Officer Griffin found a coat containing a name plate bearing the defendant's name. The coat was identified by Gwendolyn Blackmon as the one worn by her assailant. A "hunting knife" was found in the glove compartment of the Parker automobile by the police officers. It was not there when the vehicle was lent by its owner to David Timothy Parker. It was identified by Gwendolyn Blackmon as the knife used by her assailant in her abduction and in the stabbing of David Timothy Parker.

On 15 February, F.B.I. Agents Phelps and Cooper located and arrested the defendant in Memphis, Tennessee, a warrant charging unlawful flight having been issued for his arrest. The defendant was then carrying in his pocket a kitchen knife with a six-inch serrated blade. Following a voir dire examination, duly conducted, the trial court found that the defendant had been given the full Miranda warning by these officers, had signed a written waiver of his right to counsel prior to interrogation by them, was then not under the influence of intoxicating beverages, was experienced in matters of police interrogation, was well versed in his constitutional rights, was not threatened or promised any reward and signed voluntarily a written statement, which statement was admitted into evidence. It was to the following effect:

While in Raleigh attending a Jaycee meeting, the defendant walked away. By "hitching" rides and traveling by bus, he arrived in Charlotte. There he saw a Negro girl getting out of her car near the library, "told her to shove over and not to holler" or he would hurt her, took her in her car out into the country and there "made love" to her after explaining that he did not want to hurt her. Then he drove on with the girl, in her car, to Waxhaw where they observed a white boy sitting in a car in the parking lot of a launderette. The defendant parked close to the other vehicle, got out, approached the boy, engaged him in a brief conversation, pulled out his knife, stabbed the boy, shoved him over to the passenger's side where he died in two or three minutes, and drove off with the boy's body in the car. After driving around fifteen or twenty minutes, he put the body in the ditch and proceeded back to Charlotte where he stopped at a telephone booth and called his mother in Louisiana. After leaving the telephone booth, he was observed and chased by police officers whom he evaded. He stole another car in

Mocksville and drove to Knoxville, Tennessee, where he took a bus to Memphis.

Thereafter, in an oral statement, also found by the court to have been made voluntarily, following the full Miranda warning, the defendant told these F.B.I. agents that after leaving Waxhaw with the body of the Parker boy in the car, he became stuck in a ditch due to snow; a motorist, passing by with his wife and several children, stopped and helped him to get out of the ditch; had the motorist observed the body of the Parker boy in the car, the defendant "would have had to kill the man and his family." He further stated to Agent Cooper that he felt no guilt at the murder of the young boy in Waxhaw, and that if he had the opportunity he would kill Agent Cooper.

On the evening of 11 February, Gwendolyn Blackmon gave to Sheriff Fowler of Union County a statement concerning the abduction, the rape, the murder and the theft of the Parker car which was essentially the same as her testimony in court, above summarized. She then accompanied Sheriff Fowler to and pointed out the place where the rape occurred and the launderette where the stabbing of the Parker boy occurred. At that time, she told the sheriff her assailant was "a black male, with a medium short bush, a mustache" and "a gold tooth with an emblem of a star in the center of it." The defendant has such a tooth.

Sheriff Fowler received the defendant from the federal officers in Memphis and returned him to North Carolina. After a voir dire, duly conducted, the court found as facts that the defendant was given the Miranda warning by the sheriff, signed a waiver of his right to counsel, was not under the influence of any intoxicating beverage or narcotic drug, was intelligent and well educated and that no promises or threats were made to him but that he freely and voluntarily and intelligently made a statement to Sheriff Fowler. Evidence on the voir dire examination supported these findings. The statement of the defendant to the sheriff was then admitted in evidence. It was to the following effect:

The defendant, a colored male born 4 October 1950, completed 12 grades in school. On 9 February 1973, he "escaped from Odom Prison." He went to Charlotte and on 11 February he saw "a small black girl" getting out of her car and told her to get back in. She "hollered" and he told her to shut up or he

would hurt her. She then got back in her car and he tied her hands behind her, told her to lie down in the car, which she did, and he drove away with her. After driving about 15 miles into the country, he told the girl he wanted her car and she could get out but she would not leave her car. He then drove onto a dirt road and parked and told the girl "if she made love" he would not hurt her. Thereupon, he had sexual relations with her. Driving on to Waxhaw, he observed a white boy sitting in a Grand Prix Pontiac car in front of a launderette. He told the girl he had to get another car, so he parked beside the Pontiac, went to the driver's side, told the boy he was having car trouble and asked the boy to help him. When the boy refused, the defendant pulled a "scout knife" from his belt and stabbed the boy twice, once in the upper chest and once in the shoulder. The boy was striking at the defendant when the defendant stabbed him. The wound in the chest killed the boy in two or three minutes. The defendant then told the girl to leave, which she did. Her name was Gwendolyn Blackmon. The defendant then got in the white boy's car and rode around for about 15 minutes before he became stuck in a ditch, from which a passing motorist pulled him. The defendant "was glad the people who pulled him out of the ditch didn't see the body" as he did not know what he might have done to them if they had done so. The defendant then put the body of the white boy in a ditch and drove on to Charlotte where he was chased by but eluded the police officers. Going on to Mocksville he stole another automobile which he drove to Knoxville, Tennessee. From there he took a bus to Memphis where he was arrested.

Attorney General Robert Morgan by Associate Attorney Maddox for the State.

Griffin and Humphries by James E. Griffin and Charles D. Humphries for defendant.

Adam Stein, Julius Levonne Chambers, Jack Greenberg, James M. Nabrit III, Jack Himmelstein, Peggy C. Davis and Anthony G. Amsterdam, attorneys for the NAACP Legal and Educational Fund, Inc., Amicus Curiae.

LAKE, Justice.

The principal thrust of the defendant's brief and the brief of the amicus curiae, in its entirety, are directed against the imposition of the death penalty for the crimes of first degree

murder and rape. The defendant's remaining 125 assignments of error are directed to various rulings of the trial court which he contends entitle him to a new trial on all of the charges.

We do not reach the question of the validity of the judgments imposing the death penalty for first degree murder and for rape if the defendant is entitled to a new trial on these charges for the reason that he did not receive a fair trial in accordance with law. Therefore, we turn first to those 125 other assignments of error. Fifty of these are expressly abandoned by the defendant in his brief. Many of the others present the same question of law. Others are purely formal. Due to the gravity of the offenses charged and the punishments imposed, we have carefully considered the entire record and each assignment of error, including those abandoned, to determine whether the defendant is entitled to a new trial on any or all of the charges against him.

[1] Over the objection of the defendant, the State's motion to consolidate for trial the four charges (murder, rape, kidnapping and armed robbery) was granted and the defendant's motion for severance was denied. In these rulings there was no error.

G.S. 15-152 provides:

> "When there are several charges against any person for the same act or transaction or for two or more acts or transactions connected together, or for two or more transactions of the same class of crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court will order them to be consolidated * * *."

The uncontradicted evidence is that the entire series of events comprising the four crimes with which the defendant is charged began at about 3:30 p.m., Eastern Standard Time, on 11 February 1973 and was concluded when it was just dark enough to require lights on automobiles. On that date, this would be approximately two and one-half hours. Obviously, the four offenses constituted a continuing criminal episode. See: *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652; *State v. Turner,* 268 N.C. 225, 150 S.E. 2d 406; *State v. White,* 256 N.C. 244, 123 S.E. 2d 483; *State v. Chapman,* 221 N.C. 157, 19 S.E. 2d 250. They were so related in time and circumstance as to permit the admission in evidence of each in the trial of the others. *State*

v. Morrow, 262 N.C. 592, 138 S.E. 2d 245; *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364; *State v. Harris*, 223 N.C. 697, 28 S.E. 2d 232; Stansbury, North Carolina Evidence (Brandis Revision), § 91. Under these circumstances, the consolidation of the cases for trial was within the sound discretion of the trial judge. *State v. Yoes* and *State v. Hale*, 271 N.C. 616, 157 S.E. 2d 386.

[2] There was no error in the denial of the defendant's motions, heard before trial and in the absence of prospective jurors, for removal of the cases to another county for trial and, upon denial of that, for the summoning of a special venire from a county other than Union. The ground stated for each motion was that, due to the publicity in the various news media concerning these offenses and the resulting charges against the defendant, it would not be possible for him to obtain a fair and impartial trial in Union County by a jury composed of its residents. In support of his motion, the defendant offered affidavits and copies of stories appearing in newspapers published in Union County and in Charlotte. The State offered, in opposition, a number of witnesses who expressed the opinion that the defendant could receive a fair and impartial trial in Union County by a jury composed of its residents.

The newspaper stories were not inflammatory in nature. All were well within the normal limits of newspaper reporting of criminal activity. Their substance was as follows: On 9 February 1973, the defendant was serving a term in the Odom State Prison for two murders. While in prison, he became president of a chapter of the Junior Chamber of Commerce (Jaycees), organized within the prison. On 9 February 1973, he was permitted by the prison officials to leave the prison to attend a Jaycee convention in Raleigh, accompanied by a guard. In abuse of the confidence thus placed in him, he eluded the guard at the convention and escaped. Two days later, these criminal offenses occurred and the victim of the kidnapping and rape identified the defendant as the perpetrator of all four of them.

These circumstances attracted the attention of all the news media of the State. The defendant offered no evidence that such publicity was more widespread in Union County than in any other county to which the case might have been removed in accordance with G.S. 1-84. To hold that the defendant could not be tried in a county in which newspapers, carrying stories of

the offenses and charges, circulated would preclude trial in any county of the State.

As the defendant concedes, these motions were directed to the discretion of the trial court. *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123; *State v. Yoes* and *State v. Hale, supra; State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10; *State v. McKethan,* 269 N.C. 81, 152 S.E. 2d 341. There is no indication whatever of abuse of discretion in their denial in the present instance. See: *State v. Blackmon, supra; State v. Brinson,* 277 N.C. 286, 177 S.E. 2d 398; *State v. Conrad,* 275 N.C. 342, 168 S.E. 2d 39.

[3] We observe, though the defendant did not raise the point, that the kidnapping occurred in Mecklenburg County. Thus, Mecklenburg County was the proper venue for the trial of that charge. Venue, however, may be waived by a defendant and is waived by his going to trial without requesting transfer to the proper county. *State v. Ray,* 209 N.C. 772, 184 S.E. 836; Strong, N. C. Index 2d, Criminal Law, § 15. The motion for change of venue on the ground of local prejudice is not such a request. Consequently, placing the defendant on trial in Union County is not ground for a new trial on the charge of kidnapping in this instance.

[4] The defendant next moved, prior to trial, that prospective jurors be questioned separately, out of the presence of other selected or prospective jurors. The ground was that this would avoid possibility that a prospective juror, in response to a question, might refer, in the presence of other prospective or previously selected jurors, to what he had read or heard through the news media concerning the defendant's being an escaped prisoner. This motion also was directed to the sound discretion of the trial judge. *State v. Bryant,* 282 N.C. 92, 191 S.E. 2d 745; *State v. Perry,* 277 N.C. 174, 176 S.E. 2d 729. There was no abuse of discretion in its denial.

[5] Forty-four assignments of error relate to questions propounded by the Solicitor to the prospective jurors as to their views concerning the death penalty. No material difference in these questions is suggested by the defendant and we perceive none. Consequently, these assignments will be discussed together. It is to be observed that these assignments relate, not to the sustaining of a challenge by the State but merely to a propounding of a question to the prospective juror. Obviously, prospective jurors may be asked questions which will elicit information not,

per se, a ground for challenge in order that the party, propounding the question, may exercise intelligently his or its peremptory challenges. *Swain v. Alabama,* 380 U.S. 202, 219, 85 S.Ct. 824, 13 L.Ed. 2d 759; *State v. Allred,* 275 N.C. 554, 169 S.E. 2d 833; *State v. Atkinson,* 275 N.C. 288, 308, 167 S.E. 2d 241; G.S. 9-15.

The interrogations to which these assignments of error are directed are typified by the following question propounded to prospective juror, Mrs. McWhorter:

> "Do you have any moral or religious scruples or beliefs against the imposition of the death penalty in certain cases?"

No challenge to a prospective juror was sustained upon an affirmative answer to this question alone. The defendant asserts that merely "to ask such a question violates the spirit of *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 2d 776." We do not so construe either the letter or the spirit of the Witherspoon decision. We have held many times that there is no error in permitting questions to be propounded to prospective jurors concerning their views about the death penalty. *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345; *State v. Yoes* and *State v. Hale, supra,* at p. 643; *State v. Spence,* 271 N.C. 23, 155 S.E. 2d 802. We consider below the effect of the Witherspoon decision upon rulings of the Superior Court sustaining challenges to prospective jurors following their responses to other questions propounded by the Solicitor.

[6] The defendant assigns as error the court's sustaining of the Solicitor's challenges to prospective jurors Baucom, Haigler, Mosley, Mrs. McWhorter and Mrs. Purser, contending that the allowance of such challenges for cause violated "the spirit of Witherspoon." There was no material difference in the questions and answers upon the basis of which these five challenges for cause were sustained. Those here quoted, directed to and given by prospective juror Baucom, after he had stated that he did not believe in the imposition of the death penalty, are typical:

> "Q. On account of that moral or religious scruple, or scruples would it be impossible under any circumstances and in any event for you to return a verdict of guilty of

murder in the first degree and rape knowing at the time that the defendant would be sentenced to death?

"A. Yes, sir, I couldn't do it.

* * *

"Q. If you were chosen to sit on this jury, are you saying that you would not under any circumstances give any consideration to returning a verdict which would involve the death penalty?

"A. No, sir.

"Q. That is what you are saying?

"A. That is what I am saying, I couldn't do it."

The sustaining of the challenges for cause to these five prospective jurors, in view of their responses on voir dire, was not a violation of either the letter or the spirit of *Witherspoon v. Illinois, supra.* As the defendant concedes, these rulings were in accord with our decision in *State v. Sanders,* 276 N.C. 598, 174 S.E. 2d 487. They were also in accord with our similar rulings in *State v. Anderson,* 281 N.C. 261, 188 S.E. 2d 336; *State v. Watson,* 281 N.C. 221, 188 S.E. 2d 289; *State v. Frazier, supra; State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671; *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572, and many other recent decisions.

[7] The defendant assigns as error the denial by the Superior Court of his motion for a mistrial due to a response by juror Larry McCoy to a question by the defendant before he was accepted as a juror. After Mr. McCoy had stated that he had heard about the case and probably had read it in the newspaper but had not seen it on television or heard it on radio, the interrogation proceeded as follows:

"Q. At the time you read about it did you form an opinion as to this man's innocence or guilt?

"A. Yes, sir.

"Q. Do you still have that opinion?

"A. No, sir.

"Q. What stage did you cease to have it?

"A. No answer.

"Q. You said you had formed an opinion as to his innocence or guilt but now you do not have it any longer. Did you just forget what you had read—

"A. Yes, sir. I didn't recall exactly what I had read now.

"Q. And you are saying that you cannot now recall what you read about this case?

"A. Not word for word. The main part that I remember was what stuck in my mine [sic], I believe he was declared an outlaw. Is that not true? That's the part that stuck in my mind."

"MR. GRIFFIN (counsel for defendant): I move for a mistrial, your Honor.

"COURT: MOTION DENIED. EXCEPTION.

"Q. Mr. McCoy, as you sit there now do you have an opinion as to this man's innocence or guilt?

"A. No, sir.

"Q. Could you take what you read as being evidence of his innocence or guilt?

"A. No, sir."

The defendant did not elect to challenge this juror for cause or peremptorily. He had not at that time exhausted his peremptory challenges. Mr. McCoy served on the jury.

This assignment of error is not directed to Mr. McCoy's service on the jury. It is directed to the denial of the defendant's motion for mistrial for his statement, in the presence of other prospective and selected jurors, that he remembered, he believed, having read that the defendant was declared an outlaw.

A mistrial is not lightly granted. The granting of the defendant's motion therefor rests largely in the discretion of the trial judge. *State v. Self,* 280 N.C. 665, 187 S.E. 2d 93; Strong, N. C. Index 2d, Criminal Law, § 128. We see no error in the denial of the motion in this instance.

[8] The court denied the defendant's challenge for cause to juror Frank Parker. The ground for challenge was that Mr.

Parker, a member of the special venire, drawn and summoned after the regular panel was exhausted, had seen a television news report about the case the night before he was called into the jury box. Nothing whatever in the record suggests the nature of the television newscast so heard, nor does it appear that Mr. Parker had been summoned for jury duty prior to listening to the newscast. The defendant interrogated Mr. Parker at considerable length and no information was developed indicating any prejudice against the defendant, any preconceived idea concerning his guilt or innocence, or other ground for challenge. After the conclusion of the defendant's interrogation of this juror, the court interrogated him as follows:

> "COURT: I'd like to ask him a question. In view of the fact you heard something on the television last night about the trial, and this is the time when the jury is being selected, no evidence has been presented, do you feel that you can sit and hear the evidence as it comes from the witness stand and give this defendant a fair and impartial trial without being influenced in any way by what you previously heard?
>
> "A. Yes, sir, I could.
>
> "COURT: Including what you heard last night on the television?
>
> "A. Yes, sir."

There was no error in denying the defendant's challenge for cause to this juror. *State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561; *State v. DeGraffenreid,* 224 N.C. 517, 31 S.E. 2d 523.

Gwendolyn Blackmon, after testifying that the defendant, positively identified in court by her, kidnapped and raped her, testified that she saw him walk up to and stab, with his knife, a white boy sitting in a "1971 Grand Prix, yellow with a cream vinyl top," parked in the parking lot of a launderette (identified by her as the launderette in Waxhaw). She further testified that, as a result, blood gushed from the mouth and nose of the boy and the defendant got in the boy's car and, after shoving his body over into the passenger's seat, drove away. The boy so stabbed wore a cap similar in appearance to that found on the body of David Timothy Parker as it lay in a roadside ditch some five miles from the launderette.

The Parker boy's brother testified that he, himself, was the owner of such an automobile and had lent it that afternoon to

David Timothy Parker. This automobile was recovered that evening by police officers in Charlotte after the defendant, who was driving it, had fled from it. It was heavily blood stained, not having borne such stains at the time the owner lent it to David Timothy Parker. The cause of the Parker boy's death was a stab wound in the chest.

[9] Over objection, the brother of David Timothy Parker was permitted to testify that, when he borrowed the car and immediately before driving off in it, David Timothy Parker said he was going to the launderette in Waxhaw. The ground of the defendant's objection was that this was hearsay evidence, which, of course, it is. It is, however, within an exception to the hearsay rule noted by us in *State v. Vestal,* 278 N.C. 561, 581-590, 180 S.E. 2d 755. It was also admissible as part of the *res gestae* of the borrowing and departure. Annot., 163 A.L.R. 15, 21. If it were not admissible under either of these exceptions to the hearsay rule, its admission would be, at most, harmless error. The only effect of the evidence would be to tend to identify David Timothy Parker as the boy whom the defendant stabbed. As above noted, the other evidence in the case established this fact beyond controversy. There is no merit in this assignment of error.

[10] Officer Griffin of the Charlotte Police Department testified that on 11 February 1973 at approximately 9:00 p.m., he and another officer were patrolling in a police vehicle as a result of a call they had received. He observed the Parker automobile parked beside a telephone booth at a service station. In the booth was a Negro man. As they pulled into the parking lot for the purpose of questioning the man, he got in the car and drove off. They pursued him and at one point drew parallel with the other automobile on its left side. At that point the other car turned into the path of the police car and struck it, then speeding off.

Officer Griffin was seated in the passenger's seat of the police vehicle. Thus, he was immediately next to the driver of the other vehicle when the two cars were parallel and in collision. He testified that he had an opportunity to see the face of the driver of the other vehicle. The police officers continued the pursuit, bumping the Parker car several times in unsuccessful efforts to stop it. Finally, it slowed down and the driver jumped out and fled on foot. Officer Griffin pursued him on foot, drawing within ten feet of him. He unequivocally identified the de-

fendant in court as the man who was driving the Parker car. To this evidence, there was no objection.

On cross-examination, Officer Griffin testified that he saw the defendant at a distance of about ten feet for four to five seconds while pursuing him on foot. There were street lights in the area. He then testified: "My identification of that subject as being the defendant is not based on my observation of that driver for four to five seconds. I am basing my identification on pictures that I saw of the suspect. My identification is not based strictly on what I saw that night." Thereupon, the defendant's counsel moved to strike the officer's in-court identification of the defendant and the court conducted a voir dire examination of the officer.

On such voir dire, the officer testified that his identification of the defendant as the man he so pursued in Charlotte on the night of February 11, 1973 was based upon what he saw that night as he and his companion were chasing the car, that he saw photographs of the defendant later, but his in-court identification of the defendant as the man he so pursued was based "solely on my observation, seeing him in that car that night." He then described the appearance of the driver of the other vehicle as he saw him in the car and again identified the defendant as the man he then saw. Upon this evidence, the court overruled the motion to strike. In this ruling we find no error.

Although the trial judge should have made specific findings of fact following the voir dire, his overruling of the motion to strike, under the circumstances, necessarily implies the finding that the in-court identification by the witness was based on what the witness saw in the course of the pursuit of the other vehicle and its driver. The evidence is ample to support such finding. Furthermore, there is nothing whatever in the record concerning the nature of the pictures he saw later, or to indicate that these, or the circumstances under which he saw them, were impermissibly suggestive. The in-court identification had an independent origin. There is nothing to indicate a substantial likelihood of irreparable misidentification through the subsequent inspection of photographs. *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed. 2d 1247; *State v. Morris*, 279 N.C. 477, 183 S.E. 2d 634. Finally, as to this point, Officer Griffin's identification of the defendant, as the man he pursued, is corroborated by his finding of the defendant's coat on the ground at the point where the fleeing man jumped over

a fence and thus escaped. It is further corroborated by the defendant's own statement to Sheriff Fowler, discussed below.

The next three assignments of error are directed to the admission of statements made by the defendant to the agents of the Federal Bureau of Investigation who arrested and interrogated him.

Agent Phelps of the Federal Bureau of Investigation, who arrested the defendant in Memphis, Tennessee, testified concerning both an oral statement and a written statement given by the defendant to the witness as the result of in-custody interrogation. Before admitting this evidence, the court conducted voir dire examinations and made full findings of fact. He found that, before such interrogation, the F.B.I. agents conducting the interrogation gave the defendant the full warning required by *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694. He further found that the defendant signed a written waiver of his constitutional rights, including his right to have an attorney present at the interrogation, and that the defendant made the statements, oral and written, freely, voluntarily and intelligently. These findings, being fully supported by the evidence on the voir dire examination, are conclusive on appeal. *State v. Fox, supra; State v. Gray,* 268 N.C. 69, 79, 150 S.E. 2d 1; *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344; *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572. An in-custody confession is competent if made voluntarily after the defendant has been given proper warning of his constitutional rights and has full knowledge thereof. *State v. Chance,* 279 N.C. 643, 661, 185 S.E. 2d 227; *State v. Murry,* 277 N.C. 197, 176 S.E. 2d 738; *State v. Gray, supra.*

The defendant does not contend that the statements were not voluntary or that they were made without full knowledge of his constitutional rights. His contention is that it was error to permit Agent Phelps to read to the jury the written confession, consisting of five pages of detailed account of the defendant's activities from the abduction of Gwendolyn Blackmon to the arrest of the defendant in Memphis, because it includes the defendant's statement, "[W]hile I was attending a J.C. Day in the General Assembly in Raleigh, North Carolina, at the Hilton Inn, I walked away." It is his contention that this "shows escape and previous convictions," evidence of which would not be admissible.

As a matter of fact, the written confession also states that the defendant telephoned his mother in Louisiana and told her he had "escaped from prison" and that he told the woman, in whose house he was arrested in Memphis, that he "had just got out of prison."

Agent Phelps also testified that, in his oral statement, the defendant "told us that on February 9, 1973 that while he was in Raleigh attending a Jaycee meeting he walked away from the guards that were there." The defendant's contention on appeal is that this is also inadmissible evidence of his having committed some prior criminal offense. (At no time was there any evidence before the jury as to the nature of the prior offenses.)

[11] Finally, in this connection, the defendant assigns as error the denial of his motion for a mistrial for the reason that Agent Phelps testified, "We asked Mr. Jarrette if he would relate to us details surrounding the time of his escape until the time [of his arrest in Memphis]." Again, the contention of the defendant is that such testimony was inadmissible evidence to the effect that the defendant had committed previously some criminal offense. The circumstances of this ruling are disclosed by the record to have been as follows:

After the court had conducted the voir dire examination concerning the defendant's oral statement to the F.B.I. agents, and had ruled evidence thereof admissible, the jury returned to the courtroom and Agent Phelps resumed his testimony. The record shows the following took place:

"Q. Thereafter, after the defendant placed his signature at or near the bottom of State's Exhibit 18 [the signed waiver of his constitutional rights], Mr. Phelps, what, if any, statement *did he make to you?* [Emphasis added.]

"OBJECTION. OVERRULED.

"Q. Go ahead.

"A. At that time *we asked* Mr. Jarrette if he would relate to us details surrounding the time of his escape until the time—[Emphasis added.]

"OBJECTION.

"COURT: If he would relate to you what?

"A. If he would relate to us the events that evolved from the time he had escaped until the time he was arrested.

"MR. GRIFFIN [defendant's counsel]: Move that that portion 'escaped' be stricken.

"COURT: You will not consider his statement as to 'escaped.'

"Q. Mr. Phelps, my question is what, if any, statement did he make, not what you said.

"MR. GRIFFIN: I'd like to get—

"COURT: You will not consider any statement that Officer Phelps made asking the defendant to relate the events subsequent to an escape.

"MR. GRIFFIN: I would like the record to show that I made a motion to a mistrial at this time.

"COURT: MOTION DENIED. EXCEPTION."

It is, of course, the general rule that upon the trial of a criminal charge, the defendant not having taken the stand as a witness, evidence of his bad character is not competent and, for this reason, the State may not introduce evidence showing that he committed an unrelated criminal offense. *State v. McClain, supra;* Stansbury, North Carolina Evidence (Brandis Revision), § 91. However, Agent Phelps' statement inferring that the defendant had escaped from prison was not responsive to the question propounded to him by the Solicitor. Immediately, upon motion of the defendant's counsel, the court properly instructed the jury not to consider this statement. We find in this circumstance no ground for a mistrial. *State v. Self, supra.*

[12] Thereupon, Agent Phelps, in response to the Solicitor's question, related to the jury the detailed, oral statement of the defendant to him, including the words, "[W]hile he was in Raleigh attending a Jaycee meeting he walked away from the guards that were there." At the conclusion of the witness' answer, the defendant made a motion to strike the entire answer, but not a motion to strike the statement that the defendant had walked away from the guards.

Again, when the defendant's written confession was introduced in evidence, there was a general objection only and, after it was read, a general motion to strike the entire answer. The court was not requested to strike or to instruct the jury to disregard the expressions therein that, while attending the Jaycee

meeting in Raleigh the defendant "walked away," that he telephoned his mother and told her he had "escaped from prison" and had told the woman, in whose home he was arrested in Memphis, that he "had just got out of prison."

The earlier ruling by the court, concerning Agent Phelps' non-responsive use of the word "escape," shows clearly that, had the defendant requested him to do so, the judge would have stricken from the written confession the above quoted words contained therein. Nothing in the record indicates that these particular expressions in the written document were called to the court's attention. The objection was to the introduction of the document in its entirety and the evidence on the voir dire examinations, conducted with reference both to the oral and to the written statements of the defendant to the officers, gave the court to understand that the defendant's objections were to the statements in their entirety and on the ground that they were impermissibly obtained, not to any specific words therein. "When testimony or a document is inadmissible only in part, the objection should specify the objectionable part; and if it is not so confined, it is not error to overrule it." Stansbury, North Carolina Evidence (Brandis Revision), § 27. In *Nance v. Telegraph Co.*, 177 N.C. 313, 98 S.E. 838, this Court said, "[W]here a part of testimony is competent, although the other part of it may not be, and exception is taken to all of it, it will not be sustained. * * * We will not set off the bad for him and consider only that much of it, upon the supposition that his objection was aimed solely at the incompetent part."

It will be observed that in these three assignments of error the defendant is not asserting that his constitutional rights have been denied or violated. He does not contend that the statements by him to the interrogating officers were involuntary, or that they were made without full knowledge of his constitutional rights. His contention is simply that, in these instances, evidence tending to show that he had previously committed some undesignated criminal offense was improperly placed before the jury. Under the circumstances, these assignments are without merit.

As the Supreme Court of the United States said in *Bruton v. United States*, 391 U.S. 123, 135, 88 S.Ct. 1620, 20 L.Ed. 2d 476, "Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every

trial where inadmissible evidence creeps in, usually inadvertently. 'A defendant is entitled to a fair trial but not a perfect one.' *Lutwak v. United States,* 344 U.S. 604, 619, 73 S.Ct. 481, 97 L.Ed. 593."

In *Schneble v. Florida,* 405 U.S. 427, 432, 92 S.Ct. 1056, 31 L.Ed. 2d 340, the Court, after referring to the above statement in the Bruton case, supra, said:

> "Thus, unless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required. * * * In this case, we conclude that the 'minds of an average jury' would not have found the State's case significantly less persuasive had the testimony as to Snell's admission been excluded. The admission into evidence of these statements, therefore, was at most harmless error."

In view of the detailed confession by the defendant and the testimony of Gwendolyn Blackmon, it is inconceivable that had the jury never heard these objectionable statements relating to the defendant's being an escaped prisoner, they would have rendered verdicts other than those which they did return.

Sheriff Fowler testified that after he returned the defendant to Union County, he also warned the defendant of his constitutional rights, in compliance with *Miranda v. Arizona, supra,* and the defendant signed another written waiver thereof, including his right to have counsel present at the interrogation. Thereafter, the defendant made an oral statement which the Sheriff reduced to writing but the defendant did not sign. Upon objection being interposed, the court conducted another full voir dire examination and thereafter made full findings of fact, fully supported by the evidence on the voir dire examination, to the effect that such statement was made voluntarily and intelligently, after the giving of the requisite warning concerning his constitutional rights. The court then overruled the objection to the testimony of the Sheriff concerning such statement. The Sheriff thereupon related to the jury the statement so given him by the defendant which included the following:

> "I, Henry Jarrette, escaped from Odom Prison February 9, 1973. I, Jarrette, was at the Jaycee Day in the General Assembly in Raleigh. I, Jarrette, escaped because of the prison conditions. After I escaped, I, Jarrette, went to Charlotte * * * ."

Here, again, the objection was general and the defendant's motion to strike was directed to the entire statement. The lengthy voir dire examination of Sheriff Fowler, prior to the introduction of this testimony, clearly indicates that the defendant's concern was directed to whether the statement was voluntary and made with knowledge of the defendant's constitutional rights. For the reasons above mentioned, this assignment of error also is without merit.

The court, in its charge to the jury, said:

> "You may believe all that a witness says or you may believe none. You are to weigh the evidence and find where the truth lies. * * * ."

[13] The defendant assigns this as error, saying the court should have charged, "You may believe all, *or any part,* or none of what a witness says." (Emphasis added.) While the instruction suggested by the defendant would have been correct, and an improvement upon that actually given, we do not think the jury was misled by the omission of the words "or any part." This was a technical omission, not substantial, and could not have affected the result. Consequently, the defendant is not entitled to a new trial on account of it. *State v. Ingland,* 278 N.C. 42, 178 S.E. 2d 577; *State v. Lee,* 277 N.C. 205, 176 S.E. 2d 765; *State v. Gatling,* 275 N.C. 625, 170 S.E. 2d 593. At the conclusion of its entire charge, the court asked counsel if any further instructions were requested. Both the Solicitor and counsel for the defendant replied in the negative.

[14] The record shows that the court, in its charge to the jury, said:

> "If the State has satisfied you from the evidence and beyond a reasonable doubt that on or about the 11th day of February, 1973, the defendant, after tying the hands of Gwendolyn Blackmon, carrying her from Charlotte into Union County, and showing her a hunting knife, that he took off her clothes and had sexual relations with her in the back seat of the car after placing her in the back seat by the use of force and without her consent and against her will, he would be guilty of rape."

The defendant assigns this as error, contending that under this instruction the jury might have found the defendant guilty of rape if the defendant put the girl in the back seat of the car

by the use of force and without her consent and against her will, even though the act of intercourse was not with force and was with her consent. It will be observed that the insertion of commas before and after the phrase "after placing her in the back seat" makes the charge, on this point, completely accurate. The court reporter's punctuation of the judge's charge, standing alone, is not sufficient evidence of error to warrant a new trial. In the immediately preceding paragraph of the charge, the judge fully and accurately defined the crime of rape. It is not conceivable that the jury was misled by the above quoted portion of the charge.

[15] The defendant assigns as error the failure of the trial court to charge the jury that the defendant might be found guilty of assault with intent to commit rape or of assault on a female. There is no merit in this contention. These are lesser offenses included in the offense of rape. However, it is not necessary for the court to submit to the jury a lesser, included offense, or to instruct the jury thereon, where there is no evidence tending to show the defendant may be guilty of such lesser offense. *State v. Carnes,* 279 N.C. 549, 184 S.E. 2d 235; *State v. Murry, supra;* Strong, N. C. Index 2d, Criminal Law, § 115.

All of the evidence, including the statements given by the defendant to the arresting officers in Memphis and to Sheriff Fowler, shows completion of the act of sexual intercourse after the girl was abducted, with threats to injure her if she made an outcry, and transported, with her hands tied behind her back, to a lonely spot on a rural road where the act of intercourse was committed. The girl's testimony was that at all times the defendant exhibited to her, or had at hand, the knife with which he subsequently stabbed the Parker boy to death. The defendant's own statements were to the effect that he told her that *if she submitted,* he would not hurt her. There is no evidence whatever that she yielded except through fear of serious injury. Under these circumstances, it was not error to fail to charge the jury concerning the lesser included offenses and to instruct them that on the charge of rape they might return a verdict of guilty of rape or a verdict of not guilty. *State v. Bryant,* 280 N.C. 551, 556, 187 S.E. 2d 111; *State v. Carnes, supra;* Strong, N. C. Index 2d, Criminal Law, § 115.

[16] There was likewise no error in the court's failure to submit to the jury the question of the defendant's guilt of second

degree murder, and to instruct the jury thereon. All of the evidence, including the statements by the defendant to the arresting officers and to Sheriff Fowler, is to the effect that the defendant stabbed and killed David Timothy Parker for the purpose of stealing the automobile in which the Parker boy sat and in the accomplishment of that purpose. The larceny of the automobile under these circumstances was robbery. G.S. 14-87; *State v. Bailey,* 278 N.C. 80, 178 S.E. 2d 809. A murder committed in the perpetration of a robbery is murder in the first degree. G.S. 14-17. *State v. Rich,* 277 N.C. 333, 177 S.E. 2d 422. The evidence, furthermore, shows clearly that the killing of the Parker boy was with premeditation and deliberation. There being no evidence whatever of a lesser degree of homicide, it was not error for the court to fail to instruct the jury concerning the lesser degrees of homicide and to instruct them that, on the charge of murder, they might return a verdict of guilty of murder in the first degree or a verdict of not guilty.

The defendant's remaining assignments of error, relating to the denial of his motions for nonsuit as to each of the charges, to instructions of the court to the jury and to rulings and procedures prior to the entry of the judgments, have all been carefully examined, whether abandoned by the defendant in his brief or not. There is no merit whatever in any of them. It would serve no useful purpose to discuss them individually. The verdicts of guilty of kidnapping, rape, murder in the first degree and armed robbery are each fully supported by the evidence. The record shows that the defendant received, on each charge, a fair trial in accordance with the law of this State. The record discloses no basis for disturbing any of the verdicts or the granting of a new trial upon any of the four charges.

We are thus brought to the defendant's principal contention, the sole contention of the amicus curiae, that even though the defendant received a fair trial, free from error, and, consequently, stands properly convicted of murder in the first degree and of rape, it was error to enter judgments on these charges sentencing him to death, and so, in Case No. 73CR1342 (murder) and Case No. 73CR1339 (rape), the judgments entered should be vacated and the cases remanded for judgments sentencing the defendant to imprisonment for life.

It will be noted that this assignment of error has no relation to the judgment imposing a sentence to imprisonment for life in

Case No. 73CR2843 (kidnapping). It will also be noted that in Case No. 73CR1341 (armed robbery) prayer for judgment was continued, this offense having been used by the State as an element of the crime of murder in the first degree.

In *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346, the Supreme Court of the United States held that the Eighth and Fourteenth Amendments to the Constitution of the United States forbid a state to inflict the penalty of death if, under the law of the state, either the jury or the judge is permitted, as a matter of discretion, to choose between the imposition of the death penalty and the imposition of the penalty of imprisonment. Each of the nine Justices, five concurring in the decision and four dissenting therefrom, wrote a separate opinion. The five Justices concurring in the decision did not agree, among themselves, as to the basis upon which the decision rests.

It is neither the function nor the purpose of this Court to defend or justify Furman, the stated reasons for it or the results which have flowed from it. Our function and intent has been, and is, to comply with it and to determine its effect upon the statutes of North Carolina, which expressly provide what penalty is to be imposed upon a defendant lawfully convicted of first degree murder, rape, first degree burglary or arson. G.S. 14-17, G.S. 14-21, G.S. 14-52, and G.S. 14-58.

Pursuant to Furman, we have received from the Supreme Court of the United States, and have complied with, mandates to vacate sentences of death affirmed by us prior to that decision. *State v. Frazier,* 283 N.C. 99, 195 S.E. 2d 33; *State v. Miller,* 281 N.C. 740, 190 S.E. 2d 841; *State v. Hamby and Chandler,* 281 N.C. 743, 191 S.E. 2d 66; *State v. Chance, supra; State v. Westbrook, supra; State v. Doss,* 281 N.C. 751, 191 S.E. 2d 70. In other cases, reaching this Court after the decision in Furman, involving offenses committed prior to our decision in *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19, we have, in conformity thereto, vacated death sentences, and, having found no error in the trial, remanded the matters to the Superior Court for the imposition of sentences to life imprisonment. *State v. Blackmon,* 284 N.C. 1, 199 S.E. 2d 431; *State v. Watkins,* 283 N.C. 504, 196 S.E. 2d 750; *State v. Waddell, supra; State v. Carroll,* 282 N.C. 326, 193 S.E. 2d 85. See also: *State v. Gurley,* 283 N.C. 541, 196 S.E. 2d 725; *State v. Washington,* 283 N.C.

175, 195 S.E. 2d 534; *State v. Talbert,* 282 N.C. 718, 194 S.E. 2d 822.

Prior to 1949, the imposition of a sentence to death was mandatory, in this State, upon a conviction of first degree murder or rape. In 1949, the Legislature inserted a proviso in the statutes relating to the punishment of first degree murder and rape, similar provisions having been inserted earlier into the statutes relating to first degree burglary and arson. As so amended, G.S. 14-17 (relating to murder), at the time of Furman read:

> "A murder * * * which shall be committed in the perpetration or attempt to perpetrate any * * * robbery * * * shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury."

G.S. 14-21 (relating to rape), as so amended, was to the same effect, so far as punishment is concerned.

At the time *Furman v. Georgia, supra,* was decided, this Court had held in numerous decisions that the effect of the proviso, inserted into these statutes by the 1949 amendment, and the effect of the like provisos previously inserted in G.S. 14-52 (burglary) and G.S. 14-58 (arson), was to confer upon the jury in each case the absolute, "unbridled" discretion to fix the punishment at either death or imprisonment for life. *State v. Manning,* 251 N.C. 1, 110 S.E. 2d 474; *State v. Denny,* 249 N.C. 113, 105 S.E. 2d 446; *State v. Conner,* 241 N.C. 468, 85 S.E. 2d 584; *State v. Simmons,* 234 N.C. 290, 66 S.E. 2d 897; *State v. McMillan,* 233 N.C. 630, 65 S.E. 2d 212; *State v. Shackleford,* 232 N.C. 299, 59 S.E. 2d 825; *State v. Mathis,* 230 N.C. 508, 53 S.E. 2d 666. This, Furman held, the State may not do by reason of the Eighth and Fourteenth Amendments to the Constitution of the United States.

The question was therefore presented, as a result of *Furman v. Georgia, supra.* What part of G.S. 14-17 (murder) and what part of G.S. 14-21 (rape), if any, remains the law of North Carolina? That question came before this Court and was determined by us in *State v. Waddell, supra.*

While the decision in *State v. Waddell, supra,* was not unanimous, no member of this Court took the view that Furman invalidated G.S. 14-17 or G.S. 14-21 in its entirety. All of the members of this Court agreed that, notwithstanding Furman, these statutes remain in the law of North Carolina, in part, and only in part. The difference of opinion among the members of this Court was as to which part of each such statute remained the law of this State, the original provision making death the mandatory punishment, or the proviso, added by the 1949 amendment, which attempted to confer upon the jury the discretion forbidden by Furman. It was the view of the majority of this Court that the portion of each of these statutes which survived Furman, and remained the law of North Carolina, was the original provision making the death penalty mandatory and *State v. Waddell, supra,* so decided. The Supreme Court of Delaware reached the same conclusion as to the effect of *Furman v. Georgia, supra,* upon the similar statutes of that State. *State v. Dickerson* (Del.), 298 A. 2d 761.

To avoid another, and different, serious question of constitutional validity, should we give *State v. Waddell, supra,* retroactive effect, we there held that our decision would not be retroactive and that, consequently, the death penalty would be imposed only in cases where the offense was committed after the date of that decision (18 January 1973). To the same effect, see *State v. Dickerson, supra.*

[17] The reasons for our decision in *State v. Waddell, supra,* are fully set forth in the opinions therein and need not be recounted here. Having given full consideration to the brief and oral argument of the defendant and to the brief of the amicus curiae, requesting us to reconsider *State v. Waddell, supra,* we now reaffirm that decision and hold that the meaning of G.S. 14-17, G.S. 14-21, G.S. 14-52, and G.S. 14-58, in the light of the decision of the Supreme Court of the United States in *Furman v. Georgia, supra,* is that a defendant, lawfully convicted of first degree murder, rape, first degree burglary or arson, the offense having been committed after 18 January 1973, must be sentenced to death, the trial judge having no discretion in the matter of the sentence to be imposed and the jury having no authority to fix a different punishment.

[18] The determination of what the statutes of this State mean, with reference to the punishment to be imposed for criminal

offenses, is a question of State law and the determination thereof by this Court is authoritative. It is not a Federal question. *Adderly v. Florida,* 385 U.S. 39, 46, 87 S.Ct. 242, 17 L.Ed. 2d 149, reh. den., 385 U.S. 1020, 87 S.Ct. 698, 17 L.Ed. 2d 559; *Shuttlesworth v. Birmingham,* 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed. 2d 176.

Having determined that the defendant has been lawfully and fairly convicted of first degree murder and of rape and having determined that G.S. 14-17 and G.S. 14-21 require a defendant so convicted to be sentenced to death, the question then becomes whether the imposition of such sentence in this case violates any provision of the Constitution of North Carolina or of the Constitution of the United States.

[19] The Constitution of North Carolina, Article XI, §§ 1 and 2, expressly permits the imposition of the death penalty upon conviction of first degree murder or upon the conviction of rape. The meaning of the State Constitution is also a matter of State law upon which the decision of this Court is final.

The contention of the defendant, and of the amicus curiae, is that a State statute, which makes it mandatory that a defendant, fairly and lawfully convicted of first degree murder or of rape, be sentenced to death, violates the Eighth and Fourteenth Amendments to the Constitution of the United States.

Furman v. Georgia, supra, does not so hold, only two of the nine Justices (Mr. Justice Brennan and Mr. Justice Marshall) indicating such a view in their opinions in that case. No other decision of the Supreme Court of the United States so holds. This is, of course, a Federal question and our determination of it is subject to review by the Supreme Court of the United States, but we must make the initial determination and must do so in the light of decisions heretofore rendered by that Court.

The arguments of the defendant and of the amicus curiae, in support of their position on this question, may be summarized as follows: (1) Although G.S. 14-17 (murder) and G.S. 14-21 (rape), as construed in *State v. Waddell, supra,* make the imposition of the death sentence mandatory upon conviction of first degree murder or rape, the death penalty is nevertheless discretionary and selective because (a) the Solicitor has the power to prosecute for a lesser charge, (b) the jury has the power to acquit or to convict of a lesser charge, and (c) the

Governor has the power to commute the sentence or grant a pardon; (2) since our decision in *State v. Waddell, supra,* the death sentence has been imposed in North Carolina more frequently than was the case prior to the decision in *Furman v. Georgia, supra,* from which it is concluded that our construction of these statutes is contrary to the legislative intent; (3) nevertheless, since *State v. Waddell, supra,* was decided, the death penalty has been imposed in such a small number of cases that its imposition is clearly selective and arbitrary; (4) the defendants sentenced to death since *State v. Waddell, supra,* was decided are predominantly non-white; (5) death is a cruel and unusual punishment because an "enlightened" public opinion has overwhelmingly repudiated it; (6) the punishment of death is both cruel and futile.

Although the mere statement of these contentions, in clear and simple terms, seems sufficient to show their lack of substance, the seriousness with which they are advanced impels us to take note of each of them briefly.

(1) The Death Penalty Is Discretionary And Selective.

[20] As is true of any other criminal charge, a murder case or a rape case begins with someone notifying police officers that the offense has occurred. As the result of ensuing police investigation, the person charged is arrested and, in due time, the matter comes to the attention of the Solicitor. It is his duty to evaluate the information and determine whether to seek an indictment and, if so, for what offense. It is not the Solicitor's duty to seek the indictment or the conviction of the innocent, or to seek the conviction of a person, guilty of one crime, upon another and more serious charge of which he is not guilty. It is elementary and fundamental that a defendant is not to be convicted unless his guilt is established beyond a reasonable doubt. The decision of the Solicitor as to the offense for which he will seek an indictment from the grand jury and his decision as to whether to accept, with the permission of the court, a plea to a lesser charge, included within the offense specified in the indictment returned, are the results of an evaluation of the available evidence, including its credibility. The Solicitor's decision to charge a defendant with a crime, punishable by death if he is convicted, is a solemn one, properly reached only when, in the Solicitor's judgment, the evidence of guilt is clear and convincing. This is a human evaluation. There is often room

for difference of opinion concerning it. To say, as does the brief of the amicus curiae, that because the Solicitor determines in many cases that he should seek a conviction of a lesser offense, his decisions to seek convictions on capital charges in other cases are "freakish" is a patent absurdity, unjust to the skilled and honorable attorneys who hold and have held the high office of Solicitor in this State.

The purpose of vesting the power of judgment in an official is to enable him to make different decisions in different cases in the light of what he determines to be materially different factual situations. All governmental actions are based on this delegation of responsibility. The Fourteenth Amendment to the Constitution of the United States does not require a state, in the enforcement of its criminal laws, so to hedge its prosecuting attorney about with "guidelines" that he becomes a mere automaton, acting on the impulse of a computer and treating all persons accused of criminal conduct exactly alike. From the foundation of the country to the present date, the discretion, now complained of by the amicus curiae, has been vested in prosecuting officers throughout the country. Without it, the greatest injustices would necessarily be inflicted upon innocent persons accused of crime.

The suggestion by the amicus curiae that the death penalty is unconstitutional because in many cases, in which the prosecuting attorney seeks the death penalty, the jury acquits the defendant altogether or convicts him of a lesser, included offense, has, if possible, even less plausibility. Article I, § 24, of the Constitution of North Carolina requires a trial by jury in all such cases. The Sixth Amendment to the Constitution of the United States contains a like provision. Obviously, the possibility of different verdicts by different juries in different cases upon different evidence was not believed by the framers of these constitutional provisions to be a sound reason for denying a state the power to impose an otherwise lawful penalty upon one found guilty by the jury which tried him, he having had a fair trial in accordance with the applicable law. *State v. Yoes* and *State v. Hale, supra,* at p. 631.

It is quite true that Article III, § 5(6), of the Constitution of North Carolina gives to the Governor of this State the authority to commute a death sentence imposed upon any defendant, or to grant to such defendant an absolute pardon, and to refuse to disturb such sentence imposed upon a different de-

fendant. Article II, § 2, of the Constitution of the United States confers a like power upon the President. So far as we have been able to determine, a like power is vested in the Governor, or some other official of the Executive Department, in each of our states. This power has existed and has been exercised repeatedly by the Governors of every state and by the President of the United States from the birth of our country. If its existence and frequent exercise makes the imposition of the death penalty unconstitutional per se, the nine Justices of the Supreme Court of the United States wasted a great deal of thought and much paper in *Furman v. Georgia, supra.* None of them so suggested in that case.

We reject categorically the contention of the amicus curiae that "the inevitable result of the North Carolina system of commutation is that an arbitrarily selected number of those convicted of like crimes will be put to death." The Governor exercises his judgment after investigation of the record of the trial and other circumstances, including subsequently discovered evidence. This Court reviews the rulings of the trial judge. The Governor reviews the decision of the jury, which we may not do. The exercise by one Governor of this judgment, resulting in the commutation of the sentence of one man convicted of murder or rape and the refusal to commute the sentence of another convicted of such crime, cannot be called "freakish" or "arbitrary" merely because another Governor might, theoretically, have reached opposite conclusions.

The Equal Protection Clause of the Fourteenth Amendment makes no distinction between sentences to death and sentences to imprisonment. The Due Process Clause of that amendment protects liberty as well as life. The discretion in the Solicitor, in the jury and in the Governor, of which the amicus curiae complains, extends also to non-capital cases. If the existence of these discretionary powers makes the imposition of the death penalty unconstitutional, it would also make unconstitutional all prison terms, however long or short. Quite obviously, this is not the kind of discretion which the Supreme Court of the United States held impermissible in *Furman v. Georgia, supra.*

(2) *The Number Of Death Sentences Imposed Since State v. Waddell, Supra, Shows That Decision Was Contrary To The Intent Of The Legislature.*

[21] This argument has no relation to the constitutionality of the death penalty. Our decision in *State v. Waddell, supra,* was announced 18 January 1973. It was well publicized. Bills were promptly introduced in the 1973 Session of the Legislature to counteract it and to abolish the death penalty. Obviously, this was within the authority of the Legislature. North Carolina Constitution, Article XI, § 2. Those bills failed to pass. This is a clearer indication of the intent of the Legislature than is a statistical comparison of death sentences imposed per year prior to *Furman v. Georgia, supra,* and subsequent to *State v. Waddell, supra.*

It is but natural that more death sentences per year will be imposed under a mandatory statute than under one giving the jury discretion as to the penalty. While the 1973 Session of the Legislature did not have before it statistics now available, it could hardly have supposed that the number of death sentences would not increase, at least until the fact that the death penalty is the lawful punishment in North Carolina for first degree murder, rape, first degree burglary and arson becomes known to those inclined to commit such offenses.

It is also perfectly obvious that it was the hope of the 1949 Session of the Legislature to reduce the number of death sentences imposed for murder and rape. Unfortunately, the statutory device which it adopted to effectuate such intent was held by the Supreme Court of the United States to be beyond the power of the Legislature. *Furman v. Georgia, supra.* By that determination, we are bound.

(3) *The Small Number Of Death Sentences Imposed Since State v. Waddell, Supra, Shows The Death Penalty Is Imposed Arbitrarily.*

[22] Having first contended that too many have been sentenced to death since *State v. Waddell, supra,* the amicus curiae here contends that the number is too small. *State v. Waddell, supra,* held the death penalty could be imposed under G.S. 14-17 (murder), G.S. 14-21 (rape), G.S. 14-52 (first degree burglary), or G.S. 14-58 (arson) only for offenses committed after 18 January 1973. There is, unavoidably, some time lag between the commission of an offense and the trial and sentencing of the offender.

As of 14 January 1974, virtually one complete year since our decision in *State v. Waddell, supra,* twenty-one persons,

including the present appellant, have been sentenced to death in North Carolina for crimes committed after the decision was announced, three being co-defendants charged with the rape of the same victim. The present appellant was the first person so to be sentenced and his is the first appeal from those so sentenced to reach this Court. It has, therefore, not yet been finally determined whether any or all of the remainder were tried and sentenced pursuant to law. Of all the twenty-one, thirteen were convicted of first degree murder only, one (the defendant) was convicted of first degree murder and of rape, five were convicted of rape only, one of first degree burglary only and one of first degree burglary and of rape.

We are not advised by the defendant or by the brief of the amicus curiae as to how many individuals were brought to trial in North Carolina during this twelve-month period on capital charges and no statistics on that matter are available to us. Consequently, we do not have before us the number acquitted or the number convicted of lesser, included offenses. If we had such statistical data, it would neither establish nor disprove the contention that the twenty-one sentenced to death were arbitrarily selected. Arbitrary discrimination cannot be shown from statistical data. It requires, at least, careful study of the records in cases where different results were reached in order to determine whether those differences in result were justified by differences in the facts. What we do know is that all defendants *convicted* of first degree murder or of rape, committed since 18 January 1973, have been sentenced to death. The contention of arbitrariness is, therefore, not established.

(4) *Those Sentenced To Death Since State v. Waddell, Supra, Are Predominantly Non-White.*

[23] The present record is completely silent as to the racial composition of the grand jury which indicted this defendant and the petit jury which found him guilty. We are quite certain that had there been no members of the defendant's race thereon, or had there been the slightest suggestion otherwise of racial discrimination in the selection of either the grand jury or the petit jury, the defendant and the amicus curiae would not have left us in ignorance thereof. We do know from our own repeated investigation and study of the matter in other cases in recent years that there is no substantial or widespread racial discrimination in the selection of grand or petit jurors in this State.

Consequently, we cannot predicate a conclusion that North Carolina juries are, or in recent years have been, more inclined to convict guilty Negroes than guilty white defendants, of crimes for which the death penalty is imposed, on nothing save an assertion to that effect by "enlightened" opponents of the death penalty and a statistical tabulation of convictions classified by race.

Five of the twenty-one individuals sentenced to death in the twelve months since *State v. Waddell, supra,* was announced are white, one is an Indian and fifteen are Negroes. Of the five white men, three were convicted of murder in the first degree, one of burglary in the first degree and of rape and one of rape only. Their appeals have not been heard. As above shown, we have nothing before us or available to us to show how many white defendants or how many Negro defendants, charged with the commission of a capital offense during this twelve-month period, were brought to trial and acquitted or convicted of a lesser, included offense.

Courts can deal only with individuals brought before them on charges of criminal acts. Neither the defendant nor the amicus curiae shows or even suggests that the police officers of North Carolina have discriminated between white and Negro individuals so charged in the matter of arrest or investigation. We know of no provision in the Constitution of the United States which requires police officers, having arrested a Negro rapist or murderer, to arrest no more Negroes so charged until a quota of white murderers and rapists, proportionate to the racial distribution of the population, has been so charged and arrested. Nor are we aware of any provision in the Constitution which requires prosecuting attorneys to defer bringing defendants of one race to trial until members of the other race have been tried for such offenses in proportion to the respective racial population in the area. The experience of this twelve-month period demonstrates clearly that North Carolina juries can and will convict white defendants of capital crimes and North Carolina judges will sentence them to death upon such conviction.

The record of this Court establishes beyond question that such sentences have been, and will be, affirmed when the defendant has had a fair trial in accordance with law. In the seven years the writer of this opinion had been a member of this Court prior to *Furman v. Georgia, supra,* there were before it ap-

peals by twenty-six defendants sentenced to death. Sixteen were Negroes, nine were white and one was an Indian. One was a woman. Ten of the twenty-six were granted new trials by this Court, apart from any action of the Supreme Court of the United States. Of those ten, eight were Negroes and two were white. Thus, of the sixteen death sentences, affirmed by this Court in the seven years prior to *Furman v. Georgia, supra,* eight were imposed upon Negro defendants, seven upon white defendants and one upon an Indian. In those cases, each record was carefully reviewed by each member of this Court, over and beyond the reviews required by the formal assignments of error, just as has been done in the present case. In each of those cases, just as in the present case, the record revealed a cruel, brutal murder or rape, or both, with no extenuating circumstance. Nothing whatsoever in the record of any of those cases, or in the record of this case, offers the slightest justification for the statement, or the suspicion, that the juries of this State have been affected by the race of the defendant in their determination that those defendants, or the present defendant, should be executed. Nothing whatsoever in those records, or in the present record, justifies the suggestion, or a suspicion, that the death sentence in any of those cases, or in this one, was "freakishly" imposed or "freakishly" affirmed.

(5) *Death Is A Cruel And Unusual Punishment Because An "Enlightened" Public Opinion Has Overwhelmingly Repudiated It.*

[24] The brief of the amicus curiae does not define its term, "enlightened." The implication, reasonably drawn from it, is that an "enlightened" person is one who opposes the death penalty. Only on this hypothesis can the statement that "enlightened" public opinion has repudiated the death penalty be found true.

Since *Furman v. Georgia, supra,* was decided on 29 June 1972, according to the brief of the amicus curiae, twenty states, scattered over the entire country, have reinstated capital punishment by legislation. In addition to our own decision in *State v. Waddell, supra,* Delaware has retained the death penalty by judicial decision, holding its "Mercy Statute" severable from its earlier "Murder Statute." *State v. Dickerson, supra.* Thus, there are now twenty-two states which have made some provision, since Furman, to inflict the death penalty for one or more offenses.

According to the dissenting opinion of Mr. Justice Powell in *Furman v. Georgia, supra,* at p. 417, approximately six hundred individuals were in state and Federal prisons, throughout the country, under sentence of death at the time Furman was decided. Many others, including six in North Carolina (one under two death sentences) had had their death sentences reduced to life imprisonment just a short time earlier, by virtue of the decisions of the Supreme Court of the United States in *United States v. Jackson,* 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed. 2d 138, and *Pope v. United States,* 392 U.S. 651, 88 S.Ct. 2145, 20 L.Ed. 2d 1317. (See: *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.) As above noted, twenty-one have received sentences of death in this State since 18 January 1973.

The present record shows that fifty prospective jurors were examined by the State. Of these, five were challenged by the State for cause, due to their expressed unwillingness to return a verdict which would necessitate the imposition of the death penalty under any circumstances. Seven others were challenged peremptorily by the State. Assuming that all of these peremptory challenges were due to the Solicitor's misgivings concerning the views of the prospective jurors as to the death penalty, this record shows that only twenty-four per cent of those called for jury service in this case, in Union County, believed that in no case should the death penalty be imposed.

It is thus quite clear, both throughout North Carolina and throughout the nation, that there is widespread opinion that the death penalty is the appropriate punishment for certain crimes. We do not accept the pronouncement by the amicus curiae that this widespread opinion, held by legislators, judges and jurors, is "unenlightened."

(6) *The Punishment Of Death Is Both Cruel And Futile.*

The severity of the death penalty is obvious. For that reason, it has been, and should be, imposed only for the most serious crimes and only when the defendant's guilt of such an offense has been established beyond reasonable doubt.

[25] The amicus curiae contends that to inflict the death penalty for any crime is futile because such penalty is not the most effective means for obtaining the goals of criminal punishment which it says are: (1) Retribution, (2) moral reenforcement or reprobation, (3) isolation of the offender, (4) reformation and rehabilitation of the offender, and (5) deterrence.

Like Mr. Justice Stewart, in his opinion in *Furman v. Georgia, supra,* at p. 308, we "cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment." The reasonable certainty, or even likelihood of a punishment commensurate with the offense, imposed by the State, is more likely to deter private effort by the family and friends of the victim to "balance the account," than is a policy of correction designed to release the offender in society as soon as possible.

The amicus curiae acknowledges that "moral reenforcement or reprobation doubtless requires that the most serious crimes be punished most seriously." If so, the death penalty is not futile so far as the attainment of this goal is concerned.

"Isolation of the offender" apparently means prevention of further crime by him. The death penalty is certainly not futile in the attainment of this objective.

Reformation and rehabilitation of the offender is obviously cut off by his execution. The present defendant, however, is not a promising prospect for rehabilitation by human punishment of any sort. Before going to trial, he was committed to one of the State hospitals for the insane for the purpose of an examination into his sanity. He was returned for trial with the report, "Without Psychosis (Not Insane)." That evaluation of his mind is not challenged. It is not contended by the appellant or by the amicus curiae that this defendant is lacking in intelligence. Prior to the offenses with which we are now concerned, the defendant was convicted of the murders of two other persons by stabbing them. For these offenses he was imprisoned for a term of years. While serving that sentence, he was permitted to join a national civic society, the Junior Chamber of Commerce, and became the president of a chapter of this society organized within the prison. He was permitted to leave the prison so as to attend a State convention of this organization. He took advantage of this leniency and escaped. Two days later, within a space of less than three hours, he abducted and raped a girl of his own race,

whom he had never seen before, and stabbed to death a complete stranger, a teenager sitting quietly in a parked car, for the sole purpose of stealing the automobile. He callously drove off with the dying boy and abandoned his body in a roadside ditch. When arrested four days thereafter by agents of the Federal Bureau of Investigation, he was carrying, concealed, on his person, another deadly knife, and his only expression of regret was that he had not had an opportunity to kill the arresting officer. The evidence is not convincing that another term in prison would be more efficacious in rehabilitating this defendant.

Whether the imposition of the death penalty in such a case will be futile in deterring others from like acts is, necessarily, a matter of opinion, upon which reasonable minds may and do differ. The steadily rising tide of crimes of the most serious nature, throughout the nation, has occurred in an era of unprecedented permissiveness in our society and of emphasis on sympathy for the accused rather than for his victim and those endangered by him. This is ample basis for reasonable men to conclude that some punishment of exceptionally vicious crimes, other than imprisonment coupled with carefully organized programs for rehabilitation designed to assure the prisoner that he has the sympathy of society, is necessary to bring about the turning of the tide.

Through recent years, the efforts of North Carolina actually to impose capital punishment in the most flagrant instances of vicious crime have been blocked by mandates of the Supreme Court of the United States stemming from *Furman v. Georgia, supra, United States v. Jackson, supra, and Pope v. United States, supra.* We, therefore, do not have recent experience which would support or disprove the contention of the amicus curiae that the carrying out of the death sentence in this instance would be less effective than imprisonment as a means of deterring others from like acts.

It is not, however, the function of this Court to determine the most efficacious punishment for the crimes of murder in the first degree and of rape. That is the function of the Legislature. Nothing in the Constitution of the United States requires that the Legislature prescribe the most efficacious punishment for crime, or even the one favored by "enlightened" sociologists. It is sufficient that reasonable men can believe that the punishment prescribed is reasonably adapted to the attainment of the

goals of all criminal punishment. In our opinion, G.S. 14-17 and G.S. 14-21, as construed by us in *State v. Waddell, supra,* meet this constitutional standard.

We, therefore, reject the contentions of the defendant and of the amicus curiae that the imposition of the death penalty for the crimes of first degree murder and rape is, per se, a violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

No error.

Chief Justice BOBBITT, with whom Justices HIGGINS and SHARP join, dissenting as to death sentences.

State v. Waddell, 282 N.C. 431, 194 S.E. 2d 19, was decided 18 January 1973. *All* members of this Court agreed, as stated in the majority opinion, that "the *Furman* decision [*Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726, decided 29 June 1972] holds that the Eighth and Fourteenth Amendments will no longer tolerate the infliction of the death sentence if either judge or jury is permitted to impose that sentence as a matter of discretion." 282 N.C. at 439, 194 S.E. 2d at 25. Waddell's death sentence was *vacated* and his case remanded to the superior court for a judgment of life imprisonment.

All of us agreed that *Furman* required this disposition of Waddell's case. However, the majority opinion stated that for crimes of first degree murder, rape, first degree burglary, and arson, committed after 18 January 1973, the date of the *Waddell* decision, punishment by death would be mandatory. In accord with that statement, the majority sustain the death sentences herein. Three of us dissented in *Waddell* and now dissent from that view of the law. We were and are of the opinion that the impact of *Furman* upon our statutes is *to prohibit*—not to require or permit—*the imposition of death sentences until such time as our statutes are amended by the General Assembly.*

The statutes enacted by our General Assembly provide that a person convicted of first degree murder, G.S. 14-17, or of rape, G.S. 14-21, or of first degree burglary, G.S. 14-52, or of arson, G.S. 14-58, shall suffer death *unless* the jury, at the time of rendering its verdict in open court, recommends that the defendant's punishment shall be imprisonment for life in the State's prison. These statutes were rewritten as now codified by Chapter 299,

Session Laws of 1949. The 1949 Act provided: "This Act shall be in full force and effect from and after its ratification, *not excepting trials for offenses committed prior to its ratification.*" (Italics added.) The application of the 1949 Act to offenses committed prior to its ratification is further indication of the General Assembly's intent that punishment by death was not to be imposed unless the jury was given the discretion to recommend that punishment be life imprisonment and failed to make such recommendation. No changes have been made *by the General Assembly* in any of the provisions of G.S. 14-17, G.S. 14-21, G.S. 14-52, and G.S. 14-58, since the 1949 Act.

The majority (4) were of the opinion that the impact of *Furman* was to invalidate the proviso in each of these statutes; and that, upon invalidation of the proviso, the remaining portion provided unconditionally for punishment by death. The minority (3) were of the opinion that the impact of *Furman* was to invalidate *the death penalty provision* of these statutes; and that, unless and until the statutes were amended *by the General Assembly,* the punishment for each of these crimes is life imprisonment.

In *Waddell,* I expressed by dissenting views in these words: "I do not think *any death sentence* may be constitutionally inflicted unless *our General Assembly* strikes from our present statutes the provisions which leave to the unbridled discretion of a jury whether the punishment shall be death or life imprisonment. In my opinion, this Court has no right to ignore, delete or repeal these provisions, which were put there by the General Assembly as an integral part of its plan for the punishment of crimes for which the death sentence was permissible. *Furman* did not repeal them. This Court has no right to repeal them." *State v. Waddell, supra,* at 453-54, 194 S.E. 2d at 31.

In *Waddell,* I reviewed court decisions of Ohio, Mississippi, Louisiana, Oklahoma, Illinois, Pennsylvania, Arkansas, Washington, Virginia, Florida and Texas, relating to the impact of *Furman* upon statutes of those states containing essentially the same provisions as our G.S. 14-17, G.S. 14-21, G.S. 14-52 and G.S. 14-58. Each interpreted *Furman* as holding that no death sentence could be imposed as long as the statute(s) of that state contained provisions which left to the unbridled discretion of a judge or jury whether the punishment would be death or life imprisonment. Later, decisions to the same effect were handed down in Alabama [274 So. 2d 298 (1973)]; Arizona

[506 P. 2d 248 (1973)]; Kansas [513 P. 2d 248 (1973)]; Maryland [297 A. 2d 696 (1972)]; Massachusetts [300 N.E. 2d 439 (1973)]; New York [300 N.E. 2d 139 (1973)]; South Carolina [192 S.E. 2d 720 (1972)]; Tennessee [496 S.W. 2d 900 (1972)].

The majority opinions in *Waddell* and in the present case cite *State v. Dickerson, Del. Supr.,* 298 A. 2d 761, the only decision which supports to any extent the views of the majority. I now add to the dicussion of *Dickerson* in my dissenting opinion in *Waddell* the following: Further research discloses a comprehensive revision of Title 11, Parts 1 and 2, of the Delaware Code, was approved by the General Assembly of Delaware on 6 July 1972 and became effective 1 April 1973. 58 Delaware Laws, Chapter 497. The portion of this revision codified as Section 4209 sets forth in detail a new procedure for determining whether the punishment is to be death or life imprisonment upon a plea or conviction of guilty of murder in the first degree committed on or after 1 April 1973. *Dickerson* was decided 1 November 1972. The statutes to which it relates became obsolete on 1 April 1973. *Dickerson* held that first degree murders committed in Delaware during the five (5) months between 1 November 1972 and 1 April 1973 were punishable by death. My research indicates there has been no decision of the Supreme Court of Delaware since *Furman* which sustains a death sentence. Apparently, the four-to-three decision in this case is the only decision since *Furman* which sustains a death sentence under statutory provisions similar to ours.

The majority opinion in the present case states: "All of the members of this Court agreed that, notwithstanding Furman, these statutes remain in the law of North Carolina, in part, and only in part. The difference of opinion among the members of this Court was as to which part of each such statute remained the law of this State, the original provision making death the mandatory punishment, or the proviso, added by the 1949 amendment, which attempted to confer upon the jury the discretion forbidden by Furman." These sentences do not accurately state the views of the minority. In our view, the provisions of these statutes embody an indivisible and unified plan for punishment of the felonies referred to therein. *Furman* did not purport to delete, isolate or invalidate any particular portion of the statute. *Furman* simply held that the death penalty provision under the statutes as now constituted

is invalid and that, absent amendment, no death sentence can be constitutionally imposed and carried out.

On authority of *Furman,* the Supreme Court of the United States vacated the death sentences which this Court had sustained in the *Miller, Hamby and Chandler, Chance, Westbrook* and *Doss* cases; and, pursuant to the mandate of the Supreme Court of the United States, this Court remanded these cases for judgments imposing sentences of life imprisonment. For citations, *see State v. Waddell, supra,* at 453, 194 S.E. 2d at 30-31. *Furman* did not reinstate death as the only permissible punishment for murder in the first degree, rape, burglary in the first degree, and arson.

The majority opinion responds to the portions of the briefs of defendant and of the amicus curiae which urge this Court to do what the Supreme Court of the United States refused to do in *Furman,* that is, to hold that punishment by death constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. Being of the opinion that, for the reasons stated herein, the death sentences must be vacated and the cases remanded for judgments of life imprisonment, I refrain from discussing these matters otherwise than by repeating this statement from my dissenting opinion in *Waddell, viz:* "I agree that the *Furman* decision has not established the proposition that capital punishment under all circumstances constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. Moreover, nothing in the *Furman* decision would seem to invalidate a statute of our General Assembly prescribing death as the sole and exclusive punishment for murder in the first degree, rape, burglary in the first degree, or arson. Whether such a statute should be enacted is for legislative determination." 282 N.C. at 473, 194 S.E. 2d at 43.

Since the provisions of G.S. 14-17 (murder in the first degree) and G.S. 14-21 (rape) are now the same as when *Furman* was decided, I think the only permissible course is *to vacate each of the death sentences* and *to remand the cases for the pronouncement of judgments of life imprisonment.*

Justice SHARP, concurring further in the dissenting opinion of Chief Justice Bobbitt.

To Chief Justice Bobbitt's succinct interpretation of the effect of the *Furman* decision upon our statutes which have specified the punishment for first-degree murder, rape, first-degree burglary, and arson, I can add nothing. He has expressed my views exactly. However, I make the following comments:

In my view the death sentence is not constitutionally impermissible as cruel and unusual punishment for first-degree murder and rape. The question of capital punishment, however, is one of momentous public policy to be determined by the legislature. It is not for this Court to declare either by unanimous decision or four-three division.

In 1949 the legislature, in effect, made the punishment for first-degree murder, rape, first-degree burglary, and arson death or life imprisonment as the jury, in its discretion, might determine. In 1972 the *Furman* decision wrecked that plan by outlawing the imposition of the death penalty under any statute which permitted either judge or jury to impose it as a matter of discretion. On 18 January 1973 this Court, in the four-three *Waddell* decision, completed the destruction of the legislative plan by making the death sentence mandatory for the four crimes when committed after that date. Since these two decisions the legislature has not rewritten the affected statutes. Surely it is time for the General Assembly to exercise its constitutional, legislative prerogative. N. C. Const. art. I, § 6 declares, "The legislative, executive, and supreme judicial power of the State government shall be forever separate and distinct from each other."

STATE OF NORTH CAROLINA v. TOMMY NOELL

No. 10

(Filed 25 February 1974)

1. **Jury §§ 5, 7— jurors acquainted with defendant — challenge for cause — excusal proper**

The trial court did not err in excusing for cause three prospective jurors who stated unequivocally that because of their acquaintance and friendship with defendant and his family they could not find defendant guilty even though the State had convinced them beyond a reasonable doubt of his guilt.

2. Constitutional Law § 29; Jury § 7— challenge of Negroes on petit jury — no systematic exclusion

Where defendant showed that the solicitor challenged for cause all prospective Negro jurors who indicated some bias toward defendant because of their acquaintance with him or because of their feelings against the death penalty and the solicitor peremptorily challenged the last remaining Negro on the petit jury but the record was silent about any prior instances in which the solicitor challenged Negroes from the jury, defendant failed to establish a *prima facie* case of arbitrary and systematic exclusion of Negroes from the jury. Art. I, § 26, Constitution of North Carolina; Amendments VI and XIV to the Constitution of the United States.

3. Jury § 7— challenge of juror for cause — denial — subsequent peremptory challenge

Defendant was not prejudiced by the trial court's refusal to excuse a juror for cause where defendant questioned the juror with respect to any prejudice she might have because defendant, a Negro, had married a white woman, the trial court overruled defendant's motion to excuse her for cause and instructed defense counsel that he could examine the juror further if he wanted to, counsel chose not to do so but excused her peremptorily, and defendant made no request for additional peremptory challenges.

4. Constitutional Law § 29; Criminal Law § 135; Jury § 7— jurors opposed to death penalty — excusal for cause

Where it was clear from three prospective jurors' answers in the record upon *voir dire* examination that each of them, before hearing any of the evidence, had already made up his mind that he would not return a verdict in this rape case pursuant to which the defendant might lawfully be executed, whatever the evidence might be, the trial court properly permitted the jurors to be excused for cause.

5. Jury §§ 5, 7— examination of juror as to reasonable doubt — challenge for cause denied

Trial court did not err in refusing to excuse a juror for cause where the juror indicated that if he had a reasonable doubt, he would not find defendant guilty, if the doubt was strong enough, and the juror thereafter told the court he would not hesitate to return a verdict of not guilty if he had a reasonable doubt as to defendant's guilt.

6. Criminal Law §§ 96, 119; Rape § 4— hearsay evidence — immediate withdrawal and instruction by court — failure to request further instruction

Where the victim in a rape case testified that a surgical nurse who helped examine her after the assault told her that she had subcutaneous hemorrhages about her eyes, the court's prompt action in sustaining defendant's objection, allowing his motion to strike, and instructing the jury not to consider what the surgical nurse told the witness and to dismiss that from their minds was sufficient to eliminate any possible prejudice to defendant, particularly since the matter objected to had already been established in evidence and

since defendant's counsel did not request any more specific instruction to the jury.

7. **Criminal Law § 96; Rape § 4— incompetent evidence immediately withdrawn — no prejudice to defendant**

Testimony by the examining nurse in a rape case that tests given the victim were "normal procedure in any normal rape case" and testimony that she did not know the whereabouts of the doctor who performed the tests did not prejudice defendant since the court in both instances instructed the jurors not to consider the answers by the witness.

8. **Criminal Law § 87— leading question properly allowed**

The trial court in a rape case did not abuse its discretion in allowing the solicitor to ask the investigating officer a leading question.

9. **Constitutional Law § 31— right of defendant to have crime investigated**

Defendant's right to obtain and preserve evidence and his right to a fair trial were not violated when the police failed to take immediate action following his arrest for rape to interview his alibi witness, to place a watch found in the victim's apartment on defendant's wrist to see if it matched the impression that the investigating officer stated he observed on defendant's wrist, to check defendant's outer garments, underwear, fingernails and other body parts, to seize the shirt that officers testified they saw hanging on a clothesline at defendant's home, to search the vehicle allegedly driven by the attacker, and to obtain a search warrant to search the premises occupied or used by defendant, since there was no showing that the investigation wanted by defendant would have produced evidence that had any bearing on the outcome of the case.

10. **Criminal Law § 88— cross-examination of defendant**

The trial court did not err in allowing the defendant to be cross-examined with respect to his whereabouts one year prior to the date of the crime charged since a defendant who voluntarily testifies becomes subject to cross-examination and may be required to answer questions designed to impeach or discredit him and since this particular question, even if irrelevant, did not mislead the jury or prejudice defendant.

11. **Criminal Law § 102— jury argument of solicitor — matter outside record argued — no prejudice**

That portion of the solicitor's argument which went outside the record in responding to defendant's contention that the police had failed to do all that they could to preserve the evidence concerning the crime and suggested that the police could not abandon investigation of all other violations to concentrate their efforts on this particular crime did not constitute an impropriety so sufficiently grave as to be prejudicial to defendant.

12. **Criminal Law § 102— solicitor's jury argument — reference to veracity of witnesses**

Where the testimony of defendant, his wife, and his witnesses all conflicted with respect to defendant's whereabouts on the day before

the crime was allegedly committed, the solicitor's statement to the jury, "I submit to you, that they [defendant's witnesses] have lied to you" represented a reasonable comment on the evidence.

13. **Criminal Law § 102— solicitor's jury argument — defendant's objection sustained — no prejudice**

Defendant was not prejudiced by the solicitor's jury argument that defense counsel had "done a fine job in defending his client. When you don't have a defense, you do the best you can," nor was defendant prejudiced when the solicitor in his argument stated, "You know when your defense is mighty weak, it is common to employ . . . ", defendant objected before the statement was completed, and the court sustained the objection.

14. **Criminal Law §§ 102, 165— solicitor's jury argument — failure of defendant to object**

Defendant was not prejudiced where the solicitor in his jury argument called attention to defendant's previous criminal convictions, but defendant made no objection to the argument at the time and made no request for an instruction to the jury about the significance of character evidence.

15. **Criminal Law § 111— sufficiency of jury instructions**

Trial court's instruction which applied the law to the evidence and gave the positions taken by the parties as to the essential features of the case complied with the requirements of G.S. 1-180, though the court failed to refer specifically to certain portions of defendant's testimony.

16. **Rape § 6— failure to submit assault with intent to commit rape — no error**

Where defendant's defense to the charge of rape was that of an alibi and the prosecutrix testified positively that after defendant had choked her and threatened to kill her, he forcibly and against her will had sexual intercourse with her and that he did in fact penetrate her, there was no evidence of an assault with intent to commit rape, and the trial court was not required to charge on the lesser included offense.

17. **Criminal Law § 162— failure to object to incompetent evidence — no prejudice**

Testimony indicating that the baby of defendant and his wife was conceived out of wedlock, though incompetent, was not ground for a new trial where defendant did not object to the testimony or move to strike.

18. **Constitutional Law § 36; Criminal Law § 135; Rape § 7— death penalty proper in rape case**

The death penalty was the sole and exclusive punishment for rape committed by defendant subsequent to 18 January 1973, the date of *State v. Waddell*, 282 N.C. 431.

Chief Justice BOBBITT and Justices HIGGINS and SHARP dissenting as to death sentence.

State v. Noell

APPEAL by defendant from *Hall, J.*, at the 30 July 1973 Session of ORANGE Superior Court.

On an indictment proper in form, defendant was tried and convicted of raping Linda DiCenzo. Defendant appeals from a judgment imposing a sentence of death.

The State's evidence tends to show that on 23 May 1973 Linda DiCenzo was employed as a nurse's aide at the North Carolina Memorial Hospital in Chapel Hill. Miss DiCenzo left the hospital at approximately 8:55 a.m. on that date and drove to her apartment on Highway 54 Bypass in Carrboro, North Carolina. She arrived at her apartment at approximately 9:05 a.m. On the way to her apartment she had seen defendant in a car in front of her. Defendant had turned off Highway 54 Bypass into the apartment complex in front of Miss DiCenzo and then pulled over to the curb, allowing her to pass him. When she got to her apartment she again noticed defendant drive by.

Miss DiCenzo went in her apartment, closed the door, and proceeded toward the bedroom. She then heard a knock at the door, and since she was expecting a friend to come by to go shopping, she said "come in." Defendant walked in and said he was selling vacuum cleaners. She replied that she did not want a vacuum cleaner, but that he could come back that evening and talk to her roommate about getting one. Defendant turned around and went toward the door as though he was leaving, but rather than leaving, he locked the door. He then turned to Miss DiCenzo and informed her in obscene language that he intended to have sexual intercourse with her then or else he would kill her. She screamed and defendant put his hand over her mouth and started strangling her. After she unsuccessfully tried to persuade defendant to leave, he "pulled" her from the living room into the bedroom and proceeded to rape her. During the course of this experience, Miss DiCenzo lost consciousness several times. Once upon regaining consciousness, she discovered that defendant had left and she then called the Carrboro Police Department.

Miss DiCenzo's testimony also revealed the following: The rape transpired during the day, she saw defendant's face, and she had no doubts whatsoever that defendant was her attacker; defendant was wearing light green slacks and a burgundy or maroon pull-over knit shirt with stripes; defendant was driving

a small compact car that was light green with a stripe down the side, and the car had a vinyl top that was a darker green in color than the body, maybe even being black; and although she never saw a watch on defendant's wrist, when defendant left she found a watch with a broken band on the floor in the walking area between the living room and the bedroom where defendant had been.

Patrolman Kenneth Horne of the Carrboro Police Department testified that he received a call from Miss DiCenzo on 23 May 1973 and that he arrived at her apartment at 9:42 a.m. He noted that when he arrived Miss DiCenzo's hair was messed up, her throat and arms were scratched, and there was blood in her eyes. Another witness for the State, Mrs. Mary Ford, who helped examine Miss DiCenzo at the North Carolina Memorial Hospital emergency room, also testified about Miss DiCenzo's physical appearance following the alleged incident, and her testimony corroborated that of Patrolman Horne.

Captain John Blackwood of the Carrboro Police Department conducted the investigation involving Miss DiCenzo's alleged rape. He had first taken Miss DiCenzo to the hospital. At approximately 2:30 p.m. he took her from the hospital to the Carrboro Police Department. His conversations with her there led to the subsequent arrest of defendant.

Originally the officers went to defendant's home at Greenway Trailer Park in Chatham County. There on defendant's clothesline Captain Blackwood saw a dark red pull-over shirt with blue stripes. The shirt was wet and appeared to have just been washed. Defendant's wife came to the door and informed the officers that defendant was at his brother's trailer. The police went there and arrested him.

At the police department defendant informed Captain Blackwood that he knew nothing about the alleged raping. He said that at approximately 9 a.m. that day he had been in Durham at Bronson's Tire Company applying for a job. He had a 9 a.m. appointment for this job interview. Defendant also informed the police that although he owned a car, it was broken down and that he had been driving his mother's car that day. This car was a 1971 Maverick. It was green with a brownish vinyl roof, and also had a stripe across the trunk.

Defendant was also asked if he had a watch. He replied that he owned a watch but that he had lost it a couple of weeks before. Captain Blackwood testified that he observed an impression on defendant's left wrist that appeared to be the impression of a wrist watch, and that there was no such impression on defendant's right wrist. During cross-examination by defense counsel it was revealed, however, that defendant had been handcuffed on the way to the police station. Captain Blackwood did not place the wrist watch found at Miss DiCenzo's apartment on defendant's arm to see if it matched the impression.

Captain Blackwood also testified that he went to Bronson's Tire Company to check out defendant's alibi.

Defendant testified in his own behalf. He denied having raped Linda DiCenzo or ever having seen her before the trial. He stated that he woke up around 7:30 a.m. on 23 May 1973, took his mother to work, and then picked up two children and took them to a day-care center. On the day before, 22 May, about 3 p.m. defendant had gone to see Ray Locke at the Snelling & Snelling employment service in Chapel Hill. Locke had told him to take an appointment card to Bronson's Tire Company in Durham and to be neatly dressed. Defendant testified that he did not take the appointment card out of the envelope until he got to Durham the following morning.

After leaving the children at the day-care center on the morning of 23 May, it was a little after 8 a.m. Defendant then proceeded to Bronson's Tire Company in Durham. He testified that on the way over he had a flat tire and that he finished changing the tire about 8:20. When he arrived at Bronson's Tire Company it was past 9 a.m., but the place was not yet open. While he waited for it to open, he attempted to fix a broken door on his mother's car. Defendant's description of the car was as follows: It was a light green Maverick with a brown vinyl top. He specifically noted that it did not have a stripe down the side.

Defendant testified that at 9:10 or 9:15 a.m. he talked with Bill Austin about the job and filled out an application. He left Bronson's Tire Company around 9:25 a.m. and drove home, the trip being 17 or 18 miles and taking about 25 minutes. When he arrived at his trailer, he helped his wife re-arrange some

furniture. They had been in the process of moving into their trailer from another trailer since the previous Monday, 21 May.

Around 9:50 a.m. defendant decided to go over to his mother's and work on his car. Therefore, he changed into some work clothes; before changing clothes he was wearing a pair of maroon pants and a flower design shirt that buttoned. He also testified that the shirt was not a knit shirt, and that he had had these clothes on all day. Furthermore, he stated that he did not take any clothes with him to Bronson's Tire Company besides the clothes he was wearing.

During its cross-examination of defendant, the State introduced an appointment card from Snelling and Snelling employment service that defendant identified as being the one Ray Locke had given him. The card reads as follows: "Mr. Bill Austin, Service Manager, Bronson's Tire Company, 1014 North Main Street, Durham, 5-22-73; time 9:00 a.m." Defendant acknowledged that the date "5-22-73" would indicate that the appointment was for "the day before May 23." He also admitted on cross-examination: His mother's car has a double stripe down the hood and a double stripe down the trunk of the car; he had worked as a vacuum cleaner salesman until the Thursday before the date of the alleged raping; he was convicted on 9 May 1972 of an assault, and that he had previously been convicted of a conspiracy. He denied that he forced a lady named Leslie Morecock to have intercourse with him on 6 January 1973.

Defendant's next witness was his mother, Mrs. Loulabelle Noell. She corroborated defendant's testimony about his picking her up on the morning of 23 May; about her loaning him her car to go for the job interview on that day; about the clothing he was wearing that day; about his having had a flat in that she later discovered a flat tire in the trunk of her car; and about the door to her car having been broken. On cross-examination she testified that she last saw defendant on the morning of 23 May at 7:50 a.m. when he dropped her off at her work. She also testified that he used her car on the afternoon of 22 May, but not during the morning of 22 May. She stated that his car was "in the process of going bad, and it was hard to start, but he could use it" on 22 May.

Defendant next offered Sadie Horton Edwards as a witness. She testified that she was working at the Chapel Hill

Cooperative Child Care Center on 23 May 1973 and that she had seen defendant bringing some children to the Center "early" that morning.

Defendant's next witness was Bill Austin. He testified that he was the manager of Bronson's Tire Company in Durham, and that he had seen defendant between 9 and 10 a.m. on either 22 May or 23 May; he could not remember which although he was positive he had seen him on one of the two days. Austin was "not positive" about what defendant had been wearing when he saw him, but he did testify that he remembered "it was a shade of blue, or something of that nature, it was not a solid color. As best I can remember he was wearing a button-down shirt. I do not recall the color of his trousers. I did not notice any unusual marks or abrasions on his face." Austin also testified that someone from Snelling and Snelling had called him on what he believed was 21 May and told him that defendant would be coming over.

Defendant also called his wife, Barbara Noell, as a witness. She testified that she and defendant were married on 17 March 1973. She stated that she and defendant spent 21 May and 22 May moving into a different trailer, and that she was with him during all the morning on 22 May except for a brief time prior to 7:50 a.m. when he had taken his mother to work. Therefore she said defendant could not have gone to Durham on the morning of 22 May. She testified that on the morning of 21 May he called Snelling and Snelling and he was then informed about the job opening in Durham at Bronson's Tire Company. She stated that on the evening of 22 May she and defendant went to his mother's house to arrange for him to borrow his mother's car to go to Durham on 23 May. She corroborated his testimony about what he wore on 23 May; that is, burgundy slacks and a flower design shirt that buttoned. She estimated that he returned from Durham sometime around 9:30 a.m. on 23 May.

Mrs. Noell partially corroborated Captain Blackwood's testimony about a shirt being on the clothesline at defendant's home. She testified that the shirt was a "gray knit pull-over shirt with two burgundy, wine stripes across the chest, with baby blue stripes above and below the burgundy stripes. The shirt was gray." She stated that she had hung the shirt up to dry on the night of 22 May. She further testified that defendant

did not own any light green pants, but that he did have a red shirt with blue stripes; however, this shirt was packed on 22 and 23 May because of the move. Additionally, she noted that defendant had worn the same clothes on both 22 and 23 May because everything else was packed for their move. On cross-examination she stated that defendant did not tell her on 22 May that he had been to Snelling and Snelling.

At the completion of his wife's testimony, defendant again took the stand. He noted that he had been nervous when he had earlier testified about having gone by Snelling and Snelling on 22 May at 3 p.m. He testified that he had his mother's car on 22 May and that he had taken her to work that morning and some children to the day-care center, and that then he believed he had gone by Snelling and Snelling. It was on this occasion, he testified, that Mr. Locke gave him the appointment card for Bronson's Tire Company. After leaving Snelling and Snelling, defendant returned home. On cross-examination defendant testified that he had decided to change his testimony because while his wife was testifying he had remembered that his trip to Snelling and Snelling was on the morning of 22 May.

Defendant then rested, and the State called Roy Locke, an employment counselor with Snelling and Snelling, as a rebuttal witness. Locke testified that he knew defendant by sight and that defendant was in his office in Chapel Hill at 8 a.m. on 22 May. According to Locke, the interview with Bronson's Tire Company had been set up on the previous day, 21 May, and was for 22 May at 9 a.m. in Durham. Locke said that he did not know what day defendant had actually gone for the interview, but that he had made no change in the interview time. Locke also testified that on the morning defendant came by—22 May—he was wearing a "red tank shirt." Locke asked him if he planned to change his shirt, and he replied that he did.

Following Locke's testimony, the State rested.

Attorney General Robert Morgan and Assistant Attorney General John R. B. Matthis for the State.

Robert Epting for defendant appellant.

David E. Kendall for the NAACP Legal Defense Fund.

MOORE, Justice.

Defendant first assigns as error the action of the trial court in excusing for cause three prospective jurors: Mr. Alston, Dorothy Stone, and Katherine Alston.

[1] During the selection of the jury, several veniremen stated that they knew defendant and his family. The solicitor asked one of them, Mr. Alston, about the extent of his acquaintance with defendant. Mr. Alston replied, "Acquainted with the whole family." The solicitor then asked, "Well, let me ask you this, sir. As a result of your acquaintance with the family, would it be impossible for you to bring in a verdict of guilty against the defendant?" To which Mr. Alston replied, "I would think so." In reply to the solicitor's next question if he would find defendant guilty if the State satisfied him beyond a reasonable doubt of his guilt, Mr. Alston replied, "Very well acquainted with the family." The judge then stated, "That is not the point he's making. If the State satisfied you beyond a reasonable doubt, would you be able to find him guilty?" Mr. Alston replied, "With the connection of the family, no sir." The judge then excused him for cause.

Venireman Dorothy Stone stated that she knew defendant, had worked with him in the city schools, was well acquainted with his mother, and was a good friend of the family. In reply to the solicitor's question, "Would the fact that you're acquainted with and a friend of the family of Mr. Noell make it impossible for you to bring in a verdict of guilty, even if the State satisfied you of his guilt, beyond a reasonable doubt?" She replied, "It would." The judge then excused her for cause.

Venireman Katherine Alston stated that she knew defendant and his family and considered them good friends. In answer to the solicitor's question, "If the State satisfied you of Tommy Noell's guilt beyond a reasonable doubt, would it be impossible for you to bring in a verdict of guilty?" She replied, "Yes, it would." The judge then excused her for cause.

G.S. 9-14 provides "[T]hat the presiding judge shall decide all questions as to the competency of jurors." Decisions as to a juror's competency to serve rests in the trial judge's sound discretion. *State v. Harris,* 283 N.C. 46, 194 S.E. 2d 796 (1973); *State v. Johnson,* 280 N.C. 281, 185 S.E. 2d 698 (1972). The trial judge's rulings on such questions are not

subject to review on appeal unless accompanied by some imputed error of law. *State v. Harris, supra; State v. Watson,* 281 N.C. 221, 188 S.E. 2d 289 (1972). "The ruling in respect of the impartiality of [a juror] presents no reviewable question of law." *State v. DeGraffenreid,* 224 N.C. 517, 31 S.E. 2d 523 (1944). See also *State v. Spencer,* 239 N.C. 604, 80 S.E. 2d 670 (1954).

In *State v. Spence,* 274 N.C. 536, 539, 164 S.E. 2d 593, 595 (1968), Justice Higgins stated:

> "According to the Federal Court decisions 'the function of challenge is not only to eliminate extremes of partiality on both sides but to assure the parties that the jury before whom they try the case will decide on the basis of the evidence placed before them and not otherwise.' The purpose of challenge should be to guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the State the scales are to be evenly held.' *Swain v. Alabama,* 380 U.S. 202; *Tuberville v. United States,* 303 F. 2d 411 (cert. den. 370 U. S. 946); *Logan v. United States,* 144 U.S. 263; *Hayes v. Missouri,* 120 U.S. 68."

The three prospective jurors in question stated unequivocally that they could not find defendant guilty even though the State had convinced them beyond a reasonable doubt of his guilt. Thus, they were not impartial jurors and were properly excused for cause.

[2] In his next assignment of error defendant notes that the trial judge allowed the solicitor's challenges for cause of all the prospective Negro jurors who indicated some bias toward defendant because of their acquaintance with him or because of their feelings against the death penalty. Then defendant notes that the solicitor asked the last Negro venireman how long he had known defendant, to which the venireman replied either four or five years. The solicitor peremptorily challenged this venireman. Defendant complains that the trial judge's permitting the elimination of the last remaining Negro from the petit jury by a peremptory challenge after all the other Negroes had been excused for cause violated defendant's rights under the Sixth and Fourteenth Amendments to the United States Constitution and under Article I, section 26, of the North Carolina Constitution.

"In all capital cases the State may challenge peremptorily *without cause* nine jurors for each defendant and no more." G.S. 9-21(b). (Emphasis added.) Peremptory challenges are challenges that may be made according to the judgment of the party entitled thereto without being required to assign a reason therefor, and the reason for challenging a juror peremptorily cannot be inquired into. *State v. Allred,* 275 N.C. 554, 169 S.E. 2d 833 (1969). A defendant has no right to be tried by a jury containing members of his own race or even to have a representative of his own race to serve on the jury. Defendant does have the right to be tried by a jury from which members of his own race have not been systematically and arbitrarily excluded. The burden is upon the defendant, however, to establish racial discrimination in the composition of the jury. *State v. Cornell,* 281 N.C. 20, 187 S.E. 2d 768 (1972).

In *Swain v. Alabama,* 380 U.S. 202, 222, 13 L.Ed. 2d 759, 773, 85 S.Ct. 824, 837 (1965), the United States Supreme Court in discussing this question stated:

> "In the light of the purpose of the peremptory system . . . we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it.
>
> * * *
>
> " . . . There is no allegation or explanation, and hence no opportunity for the State to rebut, as to when, why and under what circumstances in cases previous to this one the prosecutor used his strikes to remove Negroes. In short, petitioner has not laid the proper predicate for attacking the peremptory strikes as they were used in this case. Petitioner has the burden of proof and he has failed to carry it."

Defendant's mere showing that all Negroes in this case were challenged by the solicitor is not sufficient to establish a *prima facie* case of an arbitrary and systematic exclusion of Negroes. The record is silent about any prior instances in which the solicitor challenged Negroes from the jury. The defendant has the burden of proof of showing such arbitrary and systematic exclusion, and he has failed to carry that burden. This assignment is without merit.

[3] Defendant next assigns as error the refusal of the trial court to grant defendant's motion to excuse for cause a juror who expressed the view that defendant's interracial marriage would adversely affect her deliberations in the cause. The record pertaining to this juror shows the following occurred:

"MR. EPTING [counsel for defendant]: Now, Mrs. Carver, would you let the fact that this man is from an interracial marriage affect your consideration of the testimony in this case?

JUROR CARVER: No.

MR. EPTING: Do you have any personal feelings about interracial marriages?

JUROR CARVER: Not especially.

MR. EPTING: Well, I take it from your answer that you mean that they are not especially strong feelings?

JUROR CARVER: Yes, sir.

MR. EPTING: Do you have any feelings for or against interracial marriages, or are you telling me that your feelings are neutral?

JUROR CARVER: Mine would be against.

MR. EPTING: Do you feel that your feelings against interracial marriage could affect your consideration of the testimony in this case?

JUROR CARVER: It probably could.

MR. EPTING: Your Honor, I would ask that Mrs. Carver be excused.

COURT: The challenge for cause is overruled. You may examine her further, if you would like to."

Defendant cites *Aldridge v. United States,* 283 U.S. 308, 75 L.Ed. 1054, 51 S.Ct. 470 (1931), in support of his contention that the court should have excused Mrs. Carver for cause. In that case the United States Supreme Court held that the refusal of a lower court to accede to a request that jurors be interrogated about racial prejudice was reversible error in a trial where a Negro was charged with killing a white man. This holding was reaffirmed in *Ham v. South Carolina,* 409 U.S. 524, 35 L.Ed. 2d 46, 93 S.Ct. 848 (1973). In the present case, however, defendant was allowed to question Mrs. Carver about any prejudice she might have because defendant, a Negro, had married a white woman, and, after overruling defendant's motion to excuse her for cause, the trial court again told defendant's counsel, "You may examine her further, if you would like to." Counsel chose not to do so and excused her peremptorily. Under these circumstances, neither *Aldridge* nor *Ham* applies.

The question of a juror's competency rests in the sound discretion of the trial judge and his ruling is not subject to review on appeal unless accompanied by some imputed error of law. *State v. Harris, supra; State v. Watson, supra.* No such error appears in connection with the challenge to the prospective juror Mrs. Carver, and no request for additional peremptory challenges was made by defendant as was done in *State v. Allred, supra.* Hence, this assignment is overruled.

[4] Defendant next asserts that "the trial court erred in permitting the State to excuse for cause several jurors who expressed death penalty reservations in form other than as required by the principles of *Witherspoon v. Illinois,* 391 U.S. 510 [20 L.Ed. 2d 776, 88 S.Ct. 1770] (1968)."

In *Witherspoon* the United States Supreme Court held that the sentence of death may not be carried out if the jury that imposed it was chosen by excluding veniremen for cause simply because they had general objections to the death penalty or expressed conscientious or religious scruples against infliction of the death penalty. But in footnote 21 of that opinion it is stated:

> "We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made

unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt."

Since *Witherspoon* this Court has held that if a prospective juror states that under no circumstances could he vote for a verdict that would result in the imposition of the death penalty no matter how aggravated the case and regardless of the evidence shown, the trial court can properly dismiss the juror upon a challenge for cause. *State v. Anderson,* 281 N.C. 261, 188 S.E. 2d 336 (1972); *State v. Watson,* 281 N.C. 221, 188 S.E. 2d 289 (1972); *State v. Cook,* 280 N.C. 642, 187 S.E. 2d 104 (1972); *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572 (1971); *State v. Dickens,* 278 N.C. 537, 180 S.E. 2d 844 (1971); *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969).

The three jurors to which this assignment pertains were Rogers, Dennis, and Beaver. The record as to Rogers reads:

"MR. PIERCE [the solicitor]: And Mrs. Rogers, let me ask you the same question, that I have been asking. Would it be impossible for you to bring in a verdict requiring the imposition of the death penalty, under any circumstances, no matter—even though the State proved to you the defendant's guilt beyond a reasonable doubt?

JUROR ROGERS: I do not believe in capital punishment.

MR. PIERCE: Let me ask you this question, again, with your answer in mind, please. Would it be impossible to bring in a verdict that required the imposition of the death penalty, no matter what the State showed you, by way of the evidence?

JUROR ROGERS: I think so."

As to Dennis the following transpired:

"MR. PIERCE: Mr. Dennis and Mr. Snipes, let me go ahead and get to this question. Let me ask you, would either one of you find it impossible, under any circumstances, to bring in a verdict which resulted in the imposi-

tion of the death penalty, even though the State satisfied you beyond a reasonable doubt of the defendant's guilt, from the evidence in this case?

[Mr. Snipes' answers omitted.]

JUROR DENNIS: I really don't know.

MR. PIERCE: Let me put the question to you the same way, would it be impossible, under any circumstances, even though the State had satisfied you beyond a reasonable doubt, from the evidence in the case, as to the defendant's guilt, to bring in a verdict which resulted in the death penalty?

JUROR DENNIS: Well, for what this is, I'd have to say yes.

MR. PIERCE: In a rape case, you couldn't do it?

JUROR DENNIS: Right."

Concerning Beaver the record discloses:

"MR. PIERCE: Okay, let me ask you this question now. Would it be impossible for you, Mr. Beaver, to bring in a verdict that required the imposition of the death penalty in this rape case, would it be impossible for you to bring in such a verdict, even though the State had proven by evidence and beyond a reasonable doubt that the defendant Tommy Noell is guilty? Now, think about that right carefully, please, sir.

JUROR BEAVER: I believe it would.

MR. PIERCE: Well, could you listen to his Honor, and the charge of the court, as to the law in this case, on the law after listening to the evidence, and then if you are satisfied beyond a reasonable doubt that he is guilty, can you bring in a verdict, knowing that it carries the death penalty?

JUROR BEAVER: No sir, I would not.

MR. PIERCE: You would not, under any circumstances, do it?

JUROR BEAVER: No, sir."

It is clear from their answers in the record upon *voir dire* examination that each of these prospective jurors, before hearing any of the evidence, had already made up his mind that he would not return a verdict in this rape case pursuant to which the defendant might lawfully be executed, whatever the evidence might be. Under *Witherspoon* and the decisions of this Court cited above, we hold that these three jurors were properly excused for cause.

Defendant also included prospective juror Goyer in the above assignment. This juror, contrary to the argument in defendant's brief, was excused by the State by a peremptory challenge. Hence, defendant's argument as to the challenge for cause is not pertinent.

[5] Defendant next contends that "the trial court erred in refusing to excuse for cause a juror who indicated an unwillingness to return a verdict of not guilty even if after hearing the evidence, he should have a reasonable doubt about defendant's guilt."

During the jury selection defendant's counsel inquired of Juror Morgan, "If there was any reasonable doubt in your mind, regardless of the balance of the evidence, you couldn't at this time say that you would return a verdict of not guilty?" Juror Morgan replied, "I am not too sure." Counsel moved that this juror be removed for cause. After this exchange, the court instructed the juror that if he had a reasonable doubt about defendant's guilt, it would be his duty to return a verdict of not guilty, and then inquired, "Would you do so, or would you find him guilty, even though you had a reasonable doubt about his guilt?" The juror replied that if he had a reasonable doubt, he would not find him guilty, if it was strong enough. Thereafter the juror told the court that he would not hesitate to return a verdict of not guilty if he had a reasonable doubt as to his guilt. The court then told defendant's counsel that he could examine the juror further and that his challenge for cause was overruled for the time being. Defendant's counsel asked no further questions and later excused this juror peremptorily. No abuse of discretion is shown in the trial court's refusal to excuse this juror for cause. This assignment is overruled.

[6] Defendant next contends that the trial court committed prejudicial error in not further instructing the jury to dis-

regard certain hearsay testimony. This testimony resulted from an examination of the prosecuting witness and appears in the record as follows:

"Q. MR. PIERCE: What was the purpose of you going to the hospital, if you will tell the members of the jury?

A. MISS DICENZO: Because at that time, I intended to prosecute the man that I had identified as assaulting me, and it's necessary in these cases to have a medical examiner confirm this, and I also wanted a little medical treatment for some other things. After that I looked in a mirror and saw that I had hemorrhages in my eyes, some bruises on my arms and a bruised area on my back. There were some ruptured blood vessels in my face. I had my face rubbed in the rug. So, I was a mess.

Q. MR. PIERCE: Now, what was that you said about your eyes?

A. MISS DICENZO: Subcutaneous hemorrhages, *surgical nurse told me that they result from screaming,* and I don't know whether that's a pressure thing or not.

MR. EPTING: Objection.

COURT: Sustained.

MR. EPTING: Move to strike.

COURT: Motion is allowed. Do not consider what someone told this witness; dismiss that from your minds." (Emphasis added.)

Defendant now claims that "the Court's instruction to the jury was so short and without force that defendant's rights were not protected and in fact were prejudiced thereby." Miss DiCenzo had previously testified that she had subcutaneous hemorrhages about her eyes and that she did a lot of screaming during the attack. Mrs. Mary Ford, a nurse at North Carolina Memorial Hospital who helped examine Miss DiCenzo, had also previously testified that Miss DiCenzo had subcutaneous hemorrhages about her eyes. This fact was then amply established. In *State v. Childs,* 269 N.C. 307, 152 S.E. 2d 453 (1967), this Court held that where hearsay evidence that is of minor importance and relates to matters amply established by other competent evidence is immediately withdrawn by the court

upon defendant's objection, and the jury is instructed to disregard it, any prejudice in the admission of such evidence is cured. It is presumed that the jurors followed the court's instructions in this case to disregard this evidence and to dismiss it from their minds. Justice Sharp in *State v. Moore,* 276 N.C. 142, 171 S.E. 2d 453 (1970), quoted with approval from *State v. Ray,* 212 N.C. 725, 194 S.E. 2d 482 (1938), wherein it was stated:

> ". . . [O]ur system for the administration of justice through trial by jury is based upon the assumption that the trial jurors are men of character and of sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so. *Wilson v. Mfg. Co.,* 120 N.C. 94, 26 S.E. 629."

In the present case the court's prompt action in sustaining defendant's objection, allowing his motion to strike, and instructing the jury not to consider what the surgical nurse told her—and to dismiss that from their minds—was sufficient to eliminate any possible prejudice to defendant. This is particularly true since defendant's counsel did not request any more specific instruction to the jury. *State v. Childs, supra.* This assignment of error is overruled.

[7] Mrs. Mary Ford, the nurse at the hospital where the prosecutrix was examined, testified as follows:

> "Q. MR. PIERCE: Now Miss Ford, Mrs. Ford, were any tests conducted there at the hospital on Miss DiCenzo?
>
> A. MRS. FORD: Yes; there were.
>
> Q. MR. PIERCE: What were they, if you know of your own knowledge?
>
> A. MRS. FORD: There were slides done, surgical secretion, bubble secretion, which is normal procedure in any normal rape case.
>
> MR. EPTING: Objection.
>
> COURT: Sustained.
>
> MR. EPTING: Move to strike.
>
> COURT: The motion is allowed. Do not consider that last statement.

Q. MR. PIERCE: Were you present when a vaginal examination was done on this lady?

A. MRS. FORD: Yes, I was.

Q. MR. PIERCE: Since you're not a physician, don't undertake to give your opinion, but were you there during the entire time that the examination took place?

A. MRS. FORD: Yes, sir; I was.

Q. MR. PIERCE: Where is the doctor?

A. MRS. FORD: At the present?

Q. MR. PIERCE: Yes.

A. MRS. FORD: I don't know.

Q. MR. PIERCE: Is he on vacation?

MR. EPTING: Objection.

COURT: Overruled, if she knows.

A. MRS. FORD: I don't know.

COURT: Sustained. Don't consider that."

Again defendant contends that the court's instruction to the jury was so meager as to be ineffective in calling the attention of the jurors to the fact that her statement, "which is normal procedure in any normal rape case," should in no way be taken as evidence of rape in this case. The nurse did not attempt to testify as to the results of the examination or the tests conducted on Miss DiCenzo, and in reply to questions concerning the whereabouts of the doctor who performed these tests, she stated that she did not know. In both instances the court instructed the jurors not to consider the answers by the witness. Again we see no merit to this contention. *State v. Moore, supra; State v. Childs, supra.*

[8] Captain Blackwood, while testifying for the State, indicated that he talked with Miss DiCenzo on the day of the alleged rape. Then the solicitor inquired, "And as a result of that conversation, and what transpired there, did you make an arrest later?" Defendant properly contends that the question was leading. But defendant also contends that the phrase "and what transpired there" prejudiced defendant in his right to

have only sworn witnesses whom he could cross-examine give evidence against him. This, defendant contends, required reversal. We are not persuaded by defendant's arguments. Generally, the rulings by the trial judge on the use of leading questions are discretionary and are reversible only for abuse of discretion. *State v. Staten,* 271 N.C. 600, 157 S.E. 2d 225 (1967); 1 Stansbury's N. C. Evidence, Brandis Rev. § 31 (1973), and cases therein cited. Absent a showing of abuse of discretion by the judge and prejudice to the defendant, the rulings of the trial judge will not ordinarily be disturbed. *State v. Painter,* 265 N.C. 277, 144 S.E. 2d 6 (1965); *State v. Cranfield,* 238 N.C. 110, 73 S.E. 2d 353 (1953). Captain Blackwood simply testified that as a result of his investigation he made an arrest later. No abuse of discretion and no prejudice to defendant is shown by this statement. This assignment is without merit.

[9] Defendant contends his rights to obtain and preserve evidence and his rights to a fair trial were violated when the police did not take immediate action following his arrest in the following respects: (1) Interview defendant's alibi witness; (2) place the watch found in Miss DiCenzo's apartment on defendant's wrist to see if it matched the impression that Captain Blackwood stated he observed on defendant's wrist; (3) check defendant's outer garments, underwear, fingernails and other body parts; (4) seize the shirt that officers testified they saw hanging on a line at defendant's home; (5) search the vehicle allegedly driven by the attacker; and (6) obtain a search warrant to search the premises occupied or used by defendant.

Defendant has grouped together these possible investigative techniques and claims that the failure to do them prejudiced his substantial right to a fair trial. In support of this contention, he cites a number of cases including *United States v. Marion,* 404 U.S. 307, 30 L.Ed. 2d 468, 92 S.Ct. 455 (1971); *Dickey v. Florida,* 398 U.S. 30, 26 L.Ed. 2d 26, 90 S.Ct. 1564 (1970); *Smith v. Hooey,* 393 U.S. 374, 21 L.Ed. 2d 607, 89 S.Ct. 575 (1969), all of which, however, relate either to a delay in arresting a defendant or bringing his case to trial. As stated by defendant in his brief, "The gist of this line of cases is well summarized by *United States v. Marion,* which holds that if defendant at trial can demonstrate actual prejudice resulting from such delay, then his prosecution will

be barred." In the present case defendant was arrested the day of the alleged offense, and no contention is made about any delay in bringing the case to trial. The record reveals that the alleged offense was committed 23 May 1973 and defendant's trial began on 30 July 1973.

Moreover, the record does not disclose that defendant asked the police to take any action concerning checking his alibi, securing search warrants, or making other investigations. Defendant also assumes that if the police officers had taken the action about which he complains, the results of such action would have proved him innocent. Such reasoning is, of course, purely speculative and furthermore is not supported by the evidence in this case. In *State v. Maloney*, 105 Ariz. 348, 464 P. 2d 793 (1970), cert. den. 400 U.S. 841, 27 L.Ed. 2d 75, 91 S.Ct. 82 (1970), it was held that even though the police officers threw away certain articles found at the scene of a bedroom homicide, this would not be sufficient to overturn a murder conviction where the officers apparently acted in good faith and the probative effect of laboratory examination of these items was speculative. In so holding that Court quoted with approval the following language from *People v. Tuthill*, 31 Cal. 2d 92, 187 P. 2d 16 (1947): "There is no compulsion on the prosecutor to call any particular witness or to make any particular tests so long as there is fairly presented to the court the material evidence bearing upon the charge for which the defendant is on trial." Here, no deliberate destruction of evidence or deliberate failure to obtain evidence to prevent its use has been demonstrated or even argued.

Defendant contends that the failure of the Carrboro Police Department to interview his alibi witness for approximately six days violated his constitutional rights and prevented him from getting a fair trial because the witness, when interviewed, could not remember what day he saw defendant.

This contention assumes that had the Carrboro Police Department checked out his alibi immediately, Bill Austin of Bronson's Tire Company would have testified that he talked to defendant on 23 May, the day of the alleged assault on Miss DiCenzo. This, however, in addition to being mere speculation, is also contrary to other evidence presented in the case. Another witness, Roy Locke of Snelling and Snelling employment service,

testified that he talked with defendant in his office in Chapel Hill about eight o'clock in the morning on 22 May, the morning defendant was supposed to go to Durham for the interview with Bronson's Tire Company. Locke further testified that the interview with Bronson's Tire Company had been arranged on 21 May, that it was scheduled for 22 May, and that he did not make any change in the interview time. The case for the interview having been on 22 May rather than 23 May is also supported by the appointment card introduced by the State which provided: "Mr. Bill Austin, Service Manager, Bronson's Tire Company, 1014 North Main Street, Durham, 5-22-73; time 9:00 a.m." Further, the witness from Bronson's Tire Company, Bill Austin, testified that he received a call from Snelling and Snelling on what he believed was 21 May informing him that defendant would be coming over, and this tends to corroborate Locke's testimony about the interview being set up on 21 May for 22 May. No evidence was presented to the court below that indicated the interview time had been changed from 22 May to 23 May. Additionally, the testimony of Mrs. Barbara Noell, wife of defendant, that she was with her husband from 7:50 in the morning until noon on 22 May—and that consequently defendant could not have gone to Durham on that day—was contradicted not only by the witness Roy Locke but also by defendant himself when he took the stand the second time.

Defendant's contentions regarding the failure of the police officers to place the watch found at the scene of the attack on defendant's wrist to see if it matched the impression observed, to check defendant's clothing, and to search his car and premises for other items are grouped together for the purpose of discussion. Defendant contends that had this evidence been obtained, there is a strong possibility it would have shown him innocent. This does not necessarily follow. Even had the clothing been obtained and subjected to examination and found not to contain any evidence connecting defendant with the attack, this would not prove him innocent. Such evidence would have been neutral in character and would not have shown guilt or innocence. This is also true concerning any items which might have been found in the car or in his home. There is no showing that the investigation wanted by defendant would have produced evidence that had any bearing whatsoever on the outcome of this case. Here, Miss DiCenzo positively identified defendant as her attacker. She testified that she saw him on three occasions before he entered her room—the first time on Highway 54 Bypass, the sec-

ond time when he drove to the curb and she passed him in the apartment complex, and the third time when he drove by her after she had parked her car and just prior to her entering her apartment. This was during daylight hours. She further testified that when defendant entered her room she talked to him for a few minutes prior to the attack, that she saw him during the attack, that in all he was in the apartment for about thirty minutes, that it was daylight and that she could see his face, and that she had no doubts whatsoever that defendant was the man who attacked her.

Police officers are under no duty to take any particular course of action when investigating a crime. Of course, they cannot suppress evidence. *Brady v. Maryland,* 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963). They are not required, however, to follow all investigative leads and to secure every possible bit of evidence, and their failure to do so is not prejudicial error. In *People v. Baber,* 31 Mich. App. 106, 187 N.W. 2d 508 (1971), the failure of the police to check footprints in the snow, to test a gun found at the scene of the crime for fingerprints, to check a broken window and screen for fibers of clothing, or otherwise take fingerprints in the house was held not to give rise to a valid claim of a constitutional denial of due process.

We hold that these assignments are without merit.

[10] During cross-examination of defendant by the solicitor, the following exchange occurred:

> "Q. MR. PIERCE: Now Mr. Noell, you testified in details about the times on May 23 [1973]. Tell us about May 23, 1972; what did you do that morning?
>
> MR. EPTING: Objection.
>
> THE COURT: Overruled.
>
> A. MR. NOWELL: I do not know where I was on May 23, 1972."

In his brief defendant states that the solicitor "obviously intended to imply to the jury by the defendant's inability to remember where he was on May 23 one year before the assault that his memory as to where he was on May 23, 1973, was also not to be believed." For this reason, defendant argues, the court committed prejudicial error in allowing the question to be asked.

While defendant in a criminal action may not be required to become a witness unless he voluntarily does so, G.S. 8-54, once he does so he becomes subject to cross-examination and may be required to answer questions designed to impeach or discredit him as a witness. *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174 (1971); *State v. Wilson,* 217 N.C. 123, 7 S.E. 2d 11 (1940).

Defendant also argues that the question should not have been admitted because it was not relevant to the case. "Strictly speaking, evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case. Evidence which has no such tendency is inadmissible, although its admission will not constitute reversible error unless it is of such a nature as to mislead the jury or prejudice the opponent." 1 Stansbury's N. C. Evidence, Brandis Rev. § 77 (1973). Assuming the question was not relevant, defendant in this case has made no showing that the jury was misled or that defendant was prejudiced. Therefore this assignment is overruled.

[11] Defendant next contends that the solicitor argued improperly and outside the record when he commented on the contention of the defense during the trial that the Carrboro Police Department had not done all they could to preserve the evidence concerning the crime. During the trial and the closing jury argument the defense had repeatedly contended that the police should have taken immediate steps to obtain search warrants and gather evidence that, as the defendant contends, would have tended to prove that defendant did not commit the offense charged. In response to this contention, the solicitor in his closing argument stated:

> "But gentlemen, is it reasonable to believe that the Carrboro Police should throw aside all their other cases, look, we can't mess with this, any of this stuff, we have this rape case and we have to proceed and concentrate all efforts for days on one thing, while other people who break the law, go wild in all other matters. Is it reasonable to expect that the Carrboro Police Department would do that?"

It is well settled that counsel are entitled to argue to the jury all the law and facts that are in evidence and all reasonable inferences that may be drawn therefrom. But it is also the rule that counsel may not "travel outside the record" and inject into his arguments facts of his own knowledge or other facts not

included in the evidence. *Crutcher v. Noel,* 284 N.C. 568, 201 S.E. 2d 855 (1974); *Cuthrell v. Greene,* 229 N.C. 475, 50 S.E. 2d 525 (1948); *State v. Little,* 228 N.C. 417, 45 S.E. 2d 542 (1947); *Perry v. R. R.,* 128 N.C. 471, 39 S.E. 27 (1901). However, as stated in 2 Strong, N. C. Index 2d, Criminal Law § 102 (1967):

> "The control of the argument of the solicitor and counsel must be left largely to the discretion of the trial court, and an impropriety must be sufficiently grave to be prejudicial in order to entitle defendant to a new trial. It is only in extreme cases of abuse of the privilege of counsel, and when the trial court does not intervene or correct an impropriety, that a new trial may be allowed."

No such case of abuse is presented here, and under the circumstances in this case, this portion of the solicitor's argument does not represent an impropriety so sufficiently grave as to be prejudicial.

[12] Defendant also contends that the trial court erred in overruling an objection to the following statement made by the solicitor during his final argument to the jury: "Mr. Epting did a good job for the client he had. It's his job to defend the man. I'm talking about the witnesses who took the stand. I submit to you, that they have lied to you."

In *State v. Miller,* 271 N.C. 646, 157 S.E. 2d 335 (1967), this Court held that it was improper for the solicitor to argue, "I *knew* he was lying the minute he said that." (Emphasis added.) In that case this Court stated: "It is improper for a lawyer in his argument to assert his opinion that a witness is lying. *He can argue to the jury that they should not believe a witness,* but he should not call him a liar." (Emphasis added.)

In the present case the solicitor did not call the defense witnesses liars. He submitted that question to the jury for its determination when it made its findings and returned its verdict. The State had presented to the jury direct evidence that defendant was the individual who committed the assault upon the prosecutrix. The State had also presented evidence that showed that defendant's wife and defendant himself had given different stories concerning the whereabouts of defendant on 22 May. All of this evidence was contrary to the testimony of the witnesses for defendant concerning his whereabouts on that date. There-

fore, the remarks of the solicitor represented a reasonable comment on the evidence.

[13] Defendant further contends that the solicitor injected defense counsel's personality into the jury's consideration when he stated, "I certainly don't intend to be critical of Mr. Epting, as I said he's done a fine job in defending his client. When you don't have a defense, you do the best you can." It was the solicitor's contention that the evidence for the State overwhelmingly showed defendant's guilt, and the evidence for defendant was at best self-serving and contradictory. In *State v. Williams*, 276 N.C. 703, 712, 174 S.E. 2d 503, 509 (1970), it is stated:

> "In this jurisdiction wide latitude is given to counsel in the argument of contested cases. Moreover, what constitutes an abuse of this privilege must ordinarily be left to the sound discretion of the trial judge. *State v. Bowen*, 230 N.C. 710, 55 S.E. 2d 466. . . ."

Defendant further contends that prejudicial error was committed when the solicitor in his argument stated, "You know when your defense is mighty weak, it is common to employ— — — — " Defendant immediately interrupted by objecting before the statement was completed, and the court sustained the objection. Defendant contends, however, that since no instruction to disregard the remark was given that this was prejudicial error. This remark could hardly be prejudicial to defendant because nothing was really said. The objection was made to what the defense counsel anticipated the solicitor would say and the objection was sustained by the court.

[14] The solicitor during his final argument to the jury also made the following comments:

> "Now, the [prosecutrix] says that the man who came in was Mr. Noell, and who she positively identified as Mr. Noell over there. And let me add, at this point, by his own admission, he had two strikes already. So, remember that in evaluating his testimony, gentlemen. You were listening to a man that admitted he had pled guilty one time to willful and wanton injury to real property, and he had pled guilty to assault and battery by his own admission.
>
> "Two strikes. Now, gentlemen, three and you're out. That's the way the game goes. I don't mean this is a game,

this is justice. This not a game, in the sense that we're talking about sports."

Defendant contends that by these remarks the solicitor improperly argued that defendant's character as evidenced by his previous criminal convictions could be considered as substantive evidence of his guilt rather than as just impeachment evidence going to defendant's credibility. Furthermore, defendant contends that the trial judge on his own initiative should have corrected the solicitor at the time the alleged improper argument was made or at least have charged the jury later on the law of character evidence.

Defendant made no objection to what he now contends was improper argument by the solicitor, nor did he request an instruction to the jury about the significance of character evidence. An objection to argument comes too late after verdict. *State v. Williams,* 276 N.C. 703, 174 S.E. 2d 503 (1970); *State v. Lea,* 203 N.C. 13, 164 S.E. 737 (1932), cert. den. 287 U.S. 649, 77 L.Ed. 561, 53 S.Ct. 95 (1932). " . . . [T]he comment of counsel upon the testimony and conduct of parties and witnesses 'must be left, ordinarily, to the sound discretion of the judge who tries the case; and this Court will not review his discretion, unless it is apparent that the impropriety of counsel was gross and well calculated to prejudice the jury.' *Jenkins v. Ore. Co.,* 65 N.C. 563; *S. v. Tyson,* 133 N.C., 698; *S. v. Davenport,* 156 N.C., 597; *Maney v. Greenwood,* 182 N.C., 579." *Lamborn v. Hollingsworth,* 195 N.C. 350, 142 S.E. 19 (1928). There is nothing in this record that indicates an abuse of that sound legal discretion committed by law to the trial judge.

In the absence of a request, the trial judge is not required to charge the jury as to the significance of character evidence. 1 Stansbury's N. C. Evidence, Brandis Rev. § 108 (1973). See *State v. Goodson,* 273 N.C. 128, 159 S.E. 2d 310 (1968); *State v. Norkett,* 269 N.C. 679, 153 S.E. 2d 362 (1967); *State v. McKinnon,* 223 N.C. 160, 25 S.E. 2d 606 (1943). No such request was made in this case.

[15] Defendant by his next assignment of error attacks the charge on the ground that the court in reviewing what defendant's evidence tended to show did not refer specifically to certain portions of defendant's testimony, and that defendant was prejudiced by these omissions.

The charge of the court to the jury must be construed contextually, and segregated portions will not be held prejudicial error when the charge as a whole is free from objection. 3 Strong, N. C. Index 2d, Criminal Law § 168 (1967). The trial judge instructed the jury that he had not tried to refer to all the evidence and that they should be guided by their own recollection of the evidence and not what he said. "In instructing the jury the court is not required to recapitulate all of the evidence. The requirement of G.S. 1-180 that the judge state the evidence is met by presentation of the principal features of the evidence relied on respectively by the prosecution and defense. A party desiring further elaboration on a subordinate feature of the case must aptly tender request for further instructions." *State v. Guffey,* 265 N.C. 331, 144 S.E. 2d 14 (1965). Nothing more is required than a clear instruction that applies the law to the evidence and gives the position taken by the parties as to the essential features of the case. *State v. Thompson,* 257 N.C. 452, 126 S.E. 2d 58 (1962). The court's charge complies with the statutory requirement of G.S. 1-180. This assignment of error is overruled.

[16] By his next assignment of error defendant asserts that the trial court erred in failing to submit to the jury a charge of assault with intent to commit rape, defendant contending that the trial court should have submitted the lesser included offense because of the lack of concrete, independent proof of actual penetration in this case due to the prosecutrix's statement that she lost consciousness at various times while the actual assault was taking place.

"The trial court is not required to charge the jury upon the question of the defendant's guilt of lesser degrees of the crime charged in the indictment when there is no evidence to sustain a verdict of defendant's guilt of such lesser degrees." 3 Strong, N. C. Index 2d, Criminal Law § 115 (1967). In the present case defendant's defense was that of an alibi—that he was not present when the alleged offense occurred. He, therefore, completely denies assaulting the prosecutrix or forcing her to have sexual intercourse with him. The prosecutrix testified positively that after defendant had choked her and threatened to kill her, he forcibly and against her will had sexual intercourse with her, and that he did in fact penetrate her. Thus, there was no evidence of an assault with intent to commit rape, and the trial court was not required to charge on the lesser included offense.

"G.S. 15-169 and G.S. 15-170 [providing for convictions of lesser included offenses] are applicable *only when there is evidence* tending to show that the defendant may be guilty of a lesser offense." *State v. Williams,* 275 N.C. 77, 88, 165 S.E. 2d 481, 488 (1969).

[17] On direct examination counsel for defendant asked defendant's wife how long she and defendant had been married. She testified that they were married on 17 March 1973. On cross-examination, in response to a question from the solicitor, she stated that her child was due to be born on September 30. Defendant contends that this question sought to elicit information irrelevant to the issue in the case and that the solicitor's question should not have been allowed since it was highly prejudicial to the defendant in that its answer indicated to the jury that the baby had been conceived out of wedlock.

The record does not disclose that defendant objected to this question or moved to strike the answer. "Nothing else appearing, the admission of incompetent evidence is not ground for a new trial where there was no objection at the time the evidence was offered." *State v. Williams,* 274 N.C. 328, 334, 163 S.E. 2d 353, 357 (1968). See also *State v. Mitchell,* 276 N.C. 404, 172 S.E. 2d 527 (1970). However, we do not see how this testimony could be prejudicial to defendant. The witness was pregnant and her baby was due to be born in September. Her condition at the trial in August must have been apparent to the jurors. This assignment is without merit.

[18] Finally, defendant contends that the death sentence imposed upon him is legally unauthorized and constitutes cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the United States Constitution.

In *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973), this Court declared that the death penalty is the sole and exclusive punishment for a rape under G.S. 14-21 committed in North Carolina after 18 January 1973. The rape for which this defendant has been convicted was committed on 23 May 1973. The death sentence was, therefore, not only proper but was the only one that the court below could impose. For a full review of the law in North Carolina pertaining to capital punishment, see *State v. Waddell, supra,* and *State v. Jarrette, ante,* 625, 202 S.E. 2d 721 (1974).

In view of the seriousness of the charge and the gravity of the punishment imposed, we have carefully examined each of defendant's assignments of error. Examination of the entire record discloses that defendant has had a fair trial free from prejudicial error.

No error.

Chief Justice BOBBITT, Justice HIGGINS and Justice SHARP dissent as to death sentence and vote to remand for imposition of a sentence of life imprisonment for the reasons stated in the dissenting opinion of Chief Justice Bobbitt in *State v. Jarrette,* 284 N.C. 625, 666, 202 S.E. 2d 721, 747 (1974).

Justice HIGGINS dissenting as to death sentence.

In my opinion a valid death sentence cannot be imposed in this State unless the Supreme Court of the United States reverses the holding in *Furman v. Georgia, or* unless the North Carolina General Assembly repeals the proviso for jury recommendation of life imprisonment.

The reasons for my views are stated in my concurring in result opinion in *State v. Waddell.* In Waddell this Court reversed (in effect vacated) the death sentence and remanded for a sentence of life imprisonment.

Since the Supreme Court of the United States has not modified the holding in Furman and since the North Carolina General Assembly has not repealed the proviso for jury recommendation of life imprisonment, I vote to vacate the death sentence and to remand for a sentence of life imprisonment.

STATE OF NORTH CAROLINA v. WILLIAM CARROLL DAVIS AND JAMES WALLACE HONEYCUTT

— AND —

STATE OF NORTH CAROLINA v. MACK FISH

No. 40 and No. 41

(Filed 25 February 1974)

1. Criminal Law § 162— necessity for objection to evidence and motion to strike

Defendant was not prejudiced by testimony that during the trial he waved a piece of paper at the witness on which was written, "Don't

worry; Jesus will save me," and by testimony that he showed another witness a piece of paper which said, "Don't worry; Jesus will save you," since defendant made no objection to the questions which elicited that testimony and no motion to strike the answers.

2. **Criminal Law §§ 23, 74— letter as confession or tendered guilty plea**

A letter written by defendant and sent to the superior court judge while defendant was in jail awaiting trial which contained the words " . . . I'm guilty of my charge of murder . . . . Judge, here is my confession in writing," if genuine, was a confession and not a tendered plea of guilty.

3. **Criminal Law § 76— voluntariness of confession — specific findings not made on voir dire — harmless error**

Where defendant wrote a letter containing his confession and had it delivered to the superior court judge but at trial contended that the letter was not written with understanding, the trial court's ruling that the letter was admissible of necessity was based on the court's conclusion that defendant wrote it voluntarily and with understanding, and error of the trial court in failing to make specific findings was harmless beyond a reasonable doubt.

4. **Criminal Law §§ 76, 81— transcript of confession — best evidence rule**

Though a tape recording was made of defendant's statement given to police officers in the presence of his codefendants, the best evidence rule did not preclude one of the officers from reading at trial from a transcript which, according to his sworn testimony, recorded the exact words used by the accused in his presence.

5. **Criminal Law §§ 162, 163— insufficiency of assignments of error to exclusion of evidence, charge**

Defendant's assignments of error to the trial court's exclusion of evidence concerning his medical history and mental capacity and to the trial court's charge did not comply with Rule 19(3) of the Rules of Practice in the Supreme Court since they did not set out the questions to which objections were sustained and the answers which the witnesses would have given had they been permitted to answer or the portion of the charge which was objectionable.

6. **Homicide § 21— murder of store owner — sufficiency of evidence**

In a prosecution for murder, evidence was sufficient to withstand defendants' motions for nonsuit where it tended to show that defendants conspired to rob the victim at his store; defendants stole a car for use in the robbery; while one defendant waited in a truck in a wooded area nearby, two defendants drove the car to the victim's store; in the robbery attempt one defendant shot and killed the victim; immediately thereafter, the two defendants drove the car to the waiting truck and the third defendant; there they abandoned the car and drove the truck to one defendant's home in Raleigh where one defendant passed out after smoking some dope; and later that same afternoon, the two other defendants left Raleigh and were apprehended eleven days later in Texas.

7. **Criminal Law §§ 76, 95— consolidated trials — admissibility of confession**

In a consolidated trial all portions of an extrajudicial confession or incriminating statement by one defendant which implicate a codefendant are inadmissible unless (1) special circumstances render the statement also admissible against the codefendant, or (2) the defendant making the statement takes the stand so that he may be cross-examined.

8. **Constitutional Law § 31; Criminal Law §§ 95, 169— consolidated trials — admission of statements and confessions harmless error**

In the consolidated trial of three defendants where none of the defendants testified, the trial court erred in allowing into evidence statements by third persons and by defendants, though the court instructed the jury to consider certain of the statements only against certain of the defendants, since the admission of the statements denied defendants their constitutional right of confrontation and cross-examination guaranteed by the Sixth and Fourteenth Amendments; however, competent evidence against defendants so positively established their guilty participation in the victim's murder that the incompetent evidence, even in its totality, was harmless beyond a reasonable doubt.

9. **Criminal Law § 76— admissibility of defendant's statement — finding of voluntariness**

Statement made by one defendant to officers that statements of his two codefendants made to officers on the same day were true was properly admitted into evidence where the trial court conducted a *voir dire* and found that the three statements involved were made freely, understandingly, and voluntarily.

APPEAL by defendants under G.S. 7A-27(a) from *Braswell, J.*, 9 April 1973 Session of WAKE, docketed and argued as cases Nos. 59 and 60 at the Fall Term 1973.

Defendants were jointly tried upon separate bills of indictments, couched in the words of G.S. 15-144 and returned at the 2 November 1972 Session, in which each was charged with the murder of Albert Eugene Bunn on 29 August 1972. Upon affidavits of indigency the Court appointed counsel for defendant Honeycutt on 6 September 1972 and for defendants Davis and Fish on 12 September 1972. Thereafter, upon the affidavit of his counsel, each defendant was committed to Dorothea Dix State Hospital at Raleigh pursuant to G.S. 122-91. Each defendant was examined there and found to be "without psychosis [not insane]." In due course each was returned to the Superior Court of Wake County as competent to stand trial and to assist effectively in his defense.

When the three cases were called for trial on 9 April 1973 Davis and Honeycutt each moved for a trial separate from the

other two defendants. The solicitor moved to consolidate the three cases for trial. Over the objection of each defendant the court allowed the motion to consolidate, and Davis and Honeycutt excepted. After being individually arraigned, each defendant entered a plea of not guilty.

The evidence for the State tended to show:

At the time of his death Albert Eugene Bunn was 71 years old. He operated a small country store at the intersection of the Old Smithfield Road and Schoolhouse Road in the vicinity of Knightdale in Wake County. Schoolhouse Road runs from Old Smithfield Road to another road which goes past Knightdale School and on back into Old Smithfield Road. These three connecting roads form a three-mile circle around Bunn's store. About one mile from the store on Schoolhouse Road a dirt lane leads into a heavily wooded parking area.

About 1:00 p.m. on 29 August 1972 Ricky Pope, a teenage boy, parked his tractor across Schoolhouse Road from the front of Bunn's store to wait for his friend, Tim Holmquist, who was driving another tractor behind him. Ricky's plan was to buy a drink at the store. However, a burgundy Dodge automobile, which had just passed him "going pretty fast," backed into the store yard. As Ricky watched, Fish and Davis alighted from the vehicle and Fish, the driver, with a sawed-off shotgun in his hand, forced Mr. Bunn inside the store. As they entered the door the three men passed from Ricky's view. He heard a shot and seconds thereafter Fish and Davis ran out of the store. Ricky "took off" toward his home. The burgundy Dodge passed him again, and when he "got around the curve" he saw a white truck come out of the woods. He went home and got his father. Defendant Honeycutt was not with Davis and Fish in the burgundy Dodge or at Bunn's store.

After the sheriff came, Ricky went down the path on which the white truck emerged from the woods. The burgundy Dodge which he had seen earlier was parked down the path.

In response to a telephone call Deputy Sheriffs Covert and Chalk went to Bunn's store about 1:30 p.m. on 29 August 1972. They found Bunn's body lying face down across the threshold. Bunn was dead from a gunshot wound in the left chest. Under the left side of his body was a paring knife. His .22 revolver, fully loaded with unexpended bullets, was at his right side. A trail of blood led from a store counter to the body.

Sometime after 11:55 a.m. on 29 August 1972 Mr. V. E. Wilkins' burgundy Dodge automobile was stolen from a parking lot in Clayton. On 31 August 1972 Honeycutt's truck was found parked 300-500 yards from the place where the Dodge was stolen. (The presence of this evidence suggests that it was Wilkins' burgundy Dodge which Fish drove to Bunn's store, but there is no evidence to substantiate this.)

On the Sunday evening prior to Mr. Bunn's death, 27 August 1972, Honeycutt was at the home of Fish on Gavin Street in Raleigh. Debra Garland Nipper, who "was sleeping with Fish at the time," was also there. She testified that she heard Fish and Honeycutt talking about a filling station. Honeycutt told Fish that the man who ran the store always had a lot of money but he had a gun which he kept in a cigar box all the time; that he was an old man, not too smart, and it shouldn't be hard to rob him. This testimony was admitted over Davis' objection. The court restricted it to Fish and Honeycutt and denied Davis' motion to strike.

About 2:00 p.m. on Tuesday, 29 August 1972, Fish (aged 24), Davis (17), and Honeycutt (26) were at Fish's residence. Linda Faye Ashworth was also there. Fish, who had blood on his T-shirt, told Linda there had been some trouble about which he couldn't tell her. He sent her and Honeycutt to a laundromat to get Kim Zachary Wall and Debra Garland Nipper. When those three returned Fish had changed clothes and shaved off his goatee and mustache. Wall testified that at first he did not recognize Fish.

Over the objection of Davis and Honeycutt, Wall testified that Fish told him "they had went and the man had pulled a gun on them and it was either one of them getting shot. . . . [H]e said he had to shoot him." Debra Garland Nipper testified that she also heard Fish tell Wall "that he had to do a man a job"; that the man had pulled a gun on him and it was his life or the other man's life. Davis and Honeycutt were not present during this conversation. Each objected to the foregoing testimony, which the court admitted only as to Fish.

After the conversation about the shooting Fish asked Wall to walk around the house with him. He did so, and Fish hid his gun, State's Exhibit #1, while Wall watched. Two days thereafter, on 31 August 1972, Deputy Sheriff Anthony went to Fish's home and talked to Kim Wall. Wall led Anthony to a pile

of creosoted timbers on adjoining property about 21 yards back of the residence. Under these timbers the officer found the gun (State's Exhibit #1).

On 9 September 1972 Covert and another deputy sheriff returned Fish and Davis to Wake County from Hondo, Texas, about 90 miles from the Mexican border, where they were in the county jail. During the trip back from Texas the officers did not question either of the two men. In order to give both officers and defendants time to "rest up" questioning was delayed for two days. Meanwhile Fish and Davis were placed in the Wake County jail.

On 11 September 1972, about 9:35 a.m., Deputy Sheriff Munn, in the presence of Covert, fully advised Davis of his constitutional rights as required by the *Miranda* decision, and Davis read a statement of them. Thereafter, in the interrogation room of the Wake County Sheriff's Department, Davis signed the following waiver of his constitutional rights:

"I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me by anyone."

After signing the above waiver in the presence of Munn and Covert, Davis stated that on August 29th he and two unnamed friends "went to Clayton and got a car," stopped at Mr. Bunn's store and while he and his friends were there Bunn "was shot and killed." They then "got rid of the car and went on and left." After making this statement Davis told the officer that if they would get Fish and Honeycutt and let the three of them converse with each other, they would get their statements straightened out. Accordingly, about 10:35 a.m., the officers brought Fish and Honeycutt down from the jail. Each was given the *Miranda* warning and each thereafter signed the same waiver of rights which Davis had signed. Fish, Honeycutt, and Davis were then left alone in the interrogation room, where nothing they said to each other could be overheard.

After 15-20 minutes the defendants knocked on the door and Deputies Munn, Covert, and Anthony went in. In the presence of defendants Fish and Honeycutt, Davis made the following statement:

"This statement made by William Carroll Davis at the Wake County Sheriff's Department, at 11:00 a.m. in the presence of Wallace Honeycutt, Mack Fish, Deputy Sheriff Anthony, Deputy Sheriff Covert, Deputy Sheriff M. T. Munn. This statement is being made on September 11, 1972. On August 29 at approximately 12:30 I was picked up by Mack Fish and Wallace Honeycutt at a friend's house. We left and went and got something to drink and messed around for a while and then went to Clayton and got a car, then rode to Mr. Bunn's store. We drove past it once and the second time Mack and I stopped and asked the man for some beer. We got outside of the car and I stood outside and Mack and Mr. Bunn—Mr. Bunn went in first and Mack followed in behind him and Mack had his back turned to me and I just glanced over there and when I glanced over there, I heard a gun go off and I seen Mr. Bunn fall to the ground and we left and I went and ditched the car in the woods and rode back to Raleigh with Wallace Honeycutt and then we left."

On the same occasion, in the presence of the three officers, Davis and Honeycutt, Fish made a statement which, in pertinent part, is set out below:

"This statement is being made by Mack Fish at the Wake County Sheriff's office on September 11, 1972, at 11:11 a.m. in the presence of Wallace Honeycutt, William Carroll Davis, J. W. Anthony, Deputy Sheriff, L. S. Covert, Deputy Sheriff, and M. T. Munn, Deputy Sheriff. I was driving the car and I pulled up and I remember two people sitting on the outside, and I asked the man out of the car window—I said, 'Do you sell beer here?' and he said, 'Yea.' And I remember telling him that I wanted all his beer. And I was going to ask him for his money—I must have had—but anyway I got out of the car. And it was an old man and he was peeling potatoes and he had a knife. And he walked into the store, and he was near about running. . . . I remember I had to speed up to catch up with him. And he went to the back and when he turned around he had a gun. . . . I said 'Put that gun down.' And he pointed the gun at me and I just shot. And the man fell on top of me and I like not to got out under him. . . . and when I got to the end of the door, he fell and we just turned around and I believe I told Billy, 'Let's go.' And he jumped in the car because he was on the outside and I got in and I drove away. . . . I went on down. . . and there was a dirt path on the other side of the bridge and I turned down there. And the best I remember—like Wallace, he was

pretty drunk and I told him, I said, 'Man I can drive a lot better than you anyway.' And so I got in the car, made him get in the truck or something—anyway I ended up driving. And so we left. . . . I ended up home and then I pulled out some dope and I rolled up some joints, and we all smoked some dope and Wallace [Honeycutt] passed out on the bed and I remember going and changing clothes there in my back room and hiding my gun and clothes behind the house. . . . [T]hen I went on in and smoked some more grass. . . . And then later on I think Billy woke me up and said something about the cops are looking for us or something like that and I said, 'Well, let's go.' And so we took off hitchhiking. So after we left Raleigh hitchhiking we hitchhiked on down to Columbia, South Carolina . . . and I bought us two tickets for Atlanta, Georgia. And so we caught the bus from Columbia, Alabama to Atlanta, Georgia—Columbia, South Carolina to Atlanta, Georgia. Okay. And then we hitchhiked on down to Birmingham. . . . I bought a little grass at Birmingham and I sat down and smoked half of that and went to the truck stop and bought some beer and drunk that. And I woke up then and Billy . . . wanted to spend the night in a motel . . . and we spent the night there and the next day I went on in and drunk some more beer and we hitchhiked on out to Texas and that's where I remember a guy letting us off and as soon as he let us off, a policeman picked us up."

The Davis statement, over their objections, was admitted as to the three defendants. Davis and Honeycutt excepted. Over objection, the Fish statement was likewise admitted as to all defendants. Davis and Honeycutt again excepted.

After Davis and Fish had made the statements set out above, Deputy Munn asked Honeycutt if the statements were true and he said, "Yes, they are." Honeycutt had been present the entire time and knew the statements were being taped. The court overruled objections by defendants Davis and Honeycutt to Honeycutt's statement and also their motion to strike it from the evidence.

Before admitting the statements of Davis, Fish, and Honeycutt set out above Judge Braswell conducted a *voir dire* to determine their competency. At this inquiry Officer Munn testified that the statements of Davis and Fish were verbatim transcripts of their words as recorded at the time they were spoken; that the tapes were available; that defendants were promised no reward or assistance for making a statement; that they were not threat-

ened, mistreated, abused or denied any necessities or conveniences.

Defendant Davis, offering evidence "for the purpose of voir dire only," testified that "before or after he signed the waiver"—he was not sure which—Covert told him that if the judge asked whether he cooperated he would tell the judge how it was; that aside from that statement by Covert no person made any promises or threats to encourage him to sign a waiver or make a statement.

Fish testified that at the time he made his statement he was so sick he didn't know what to say and "they" would tell him what to say; that Mr. Munn told him they had his bloody clothes and gun; so he said whatever they wanted him to say; that he "was like a small child"; that he had been on drugs until he was put in jail in Wake County but for a week prior to the interrogation he had had none; that during the week he had had no conversation with anyone he knew.

Fish's sister testified that when she saw him, a week after he was brought back from Texas, she noticed a "definite change" in his behavoir and general physical condition. His mother testified that when she saw him (she did not recall the day) "he was in terrible physical condition and refused to talk to her."

Honeycutt testified that at the end of the statements made by Davis and Fish, Mr. Munn asked him if he wanted to change anything and he said, "No sir"; that he did not think he was asked if the statements were true.

At the conclusion of the *voir dire* Judge Braswell found that Officer Munn advised Davis of all his constitutional rights prior to the time Davis signed the waiver; that both of his statements were free and voluntarily made thereafter and were obtained without a violation of any constitutional right. The court specifically found that, after observing the demeanor of Davis during the time he was testifying, he could put no credence in his testimony that his statement was induced by the hope of reward; that there is no believable evidence to support a finding that any person held out any hope of leniency to Davis.

As to defendants Fish and Honeycutt, Judge Braswell found that they too had each been fully warned of all constitutional rights prior to signing the waiver; that each had voluntarily, knowingly, and with full understanding of his constitutional

right to remain silent, had made the statements offered in evidence; that no threats, promises, or hope of reward was held out to either; that the three defendants had an opportunity to see, hear, converse with and contradict each other; and that no contradictions were made.

On 7 November 1972 one of the jailers informed Deputy Sheriff Covert that Fish wanted to see him. When Covert went to his cell in the Wake County jail, Fish handed him a letter through the bars and asked him to take it to the judge of the superior court. Covert delivered the letter to Judge Harry E. Canaday, who ordered it made a part of the court records. The letter, reproduced below, was admitted in evidence over the objections of Fish and Davis against Fish only:

"November 7, 1972

"Dear Sir:

"Judge, Your Honor, my name is Mack Fish and I'm writing you in concern of my case. Your Honor, I have been in jail for over two months and I hadn't received a hearing yet. Your Honor, I'm guilty of my charge of murder. I don't know how to began to ask for mercy, so I'm asking now. Judge, God has dealt in life as the most powerful thing that ever entered into my life. Judge, here is my confession in writing and I am asking you if you would set me a bond so I might be with my family before I get tried. Judge, Your Honor, my mother has cancer since I have been in here and it has broken my heart. I know that God made the law to live by and as the Bible said. I have a fiancee and two children who I would like to spend a few days with before I'm tried. I know I don't deserve anything, but your Honor, I'm begging, not asking. Please talk to me and ask God for guiding in my case. Thank you for reading this. Yours sincerely, Rev. Mack Fish. And this is true from my heart. God bless."

Prior to the introduction of the letter, at the request of Fish, Judge Braswell conducted a *voir dire*. On this hearing Covert detailed the circumstances under which he received the letter as set out above. Fish testified that he wrote the letter, which he handed to Covert in a sealed envelope on 7 November 1972; that he told Covert it was a confession and asked him to deliver it to the judge. He also testified that at the time he wrote the letter he was insane, "just as crazy as a man could

be part of the time . . . having drawbacks from drugs." He said, "I had a lot of other stuff on my mind. I was entangled." In explanation of his signature to the letter he said that he "was licensed as a minister by the Full Gospel Fellowship in 1971." Fish's sister and Jailer Hodge testified that in October and November 1972 Fish would not communicate, "did gross things," seemed irresponsive and "not right in his mind." Jailer Bagwell testified he "noticed that Fish had no trouble communicating with people."

At the conclusion of the *voir dire*, in the absence of the jury, Judge Braswell found that Fish wrote the letter and delivered it to Covert as both had testified he did and he ruled that the letter was competent evidence; that the statement, "I am guilty of my charge of murder," is sufficient to constitute a confession, but that the weight and credence to be accorded the contents of the letter was a matter for the jury.

At the conclusion of the State's evidence Fish offered the testimony of his mother and Dr. John A. Gallemore, Jr., an assistant professor of psychiatry at Duke University. Their evidence tended to show:

Fish lived in his mother's home until three weeks before Mr. Bunn was killed. During those three weeks she saw him every three to four days and noticed a change in his behavior. He was unable to hang wallpaper straight and complained of headaches. In her opinion, "before the alleged crime" and after he was incarcerated in the Wake County jail, Fish could not distinguish right from wrong.

Dr. Gallemore examined Fish on October 13th and 15th in the Wake County jail. Each examination lasted about thirty minutes. At that time he found Fish "intact mentally in terms of his clarity, of his comments and his relating. . . . His comments were heavily involved with supernatural. At times there was a bit of intense anger and effects demonstrated." At that time he was not able to reach any diagnosis of Fish's mental condition. In December, after Fish's admission to the State Hospital, Dr. Gallemore examined him again. Fish gave a lengthy history of drug use and Dr. Gallemore "obtained a history of violence of Mack Fish after he had been on amphetamines. In 1970 he was taking amphetamines in heavy amounts when he shot himself." On 8 December 1972, Dr. Gallemore's diagnosis was "personality disorder of the emotional unstabled type." He

had no opinion satisfactory to himself whether Mack Fish knew the nature and consequences of his action or knew right from wrong at the time of the crime charged, *i.e.*, 29 August 1972. However, in his opinion, on December 8th, Fish did know right from wrong and the nature and consequences of his actions. It was also his opinion that Fish's condition was unchanged since August 29th.

Defendant Davis offered evidence tending to show that at the time of the trial he was seventeen years of age and that his general character and reputation were good.

Defendant Honeycutt offered no evidence. None of the three defendants testified.

The court charged the jury that as to each defendant it would return a verdict of "guilty of murder in the first degree as charged or not guilty." The jury found each defendant guilty of the murder charged and the court adjudged that each be imprisoned for life in the State's prison. Each defendant appealed to the Supreme Court. Davis and Honeycutt appealed jointly. Fish filed a separate appeal.

Robert Morgan, Attorney General, John R. B. Matthis, Assistant Attorney General, Ralf F. Haskell, Assistant Attorney General, for the State.

William A. Smith, Jr., for Mack Fish, defendant appellant.

Robert Morgan, Attorney General, Ralph Moody, Special Counsel, for the State.

James R. Fullwood for William Carroll Davis, defendant appellant.

William E. Marshall, Jr., for James Wallace Honeycutt, defendant appellant.

SHARP, Justice.

APPEAL OF DEFENDANT FISH

[1] Fish's first assignment of error is based upon the admission of evidence of the following incidents:

Kim Zachary Wall testified that during the trial Fish waved a piece of paper at him in the courtroom on which was written, "Don't worry; Jesus will save me." Debra Nipper testified that

on the same morning Fish showed her a piece of paper which said, "Don't worry, Jesus will save you."

The record shows no objection to the questions which elicited the foregoing testimony and no motion to strike the answers. An objection to the admission of evidence must be made at the time it is offered. Objection to incompetent evidence should be interposed at the time the question intended to elicit it is asked, and a motion to strike an incompetent answer should be made when the answer is given. An objection not made in apt time is waived. *Reeves v. Hill,* 272 N.C. 352, 158 S.E. 2d 529 (1968); *State v. Hunt,* 223 N.C. 173, 25 S.E. 2d 598 (1943). However, if we concede, as both the State and Fish contend, that the notes were irrelevant, Fish's contention that they inevitably prejudiced him in the eyes of the jury is not convincing. The obvious purpose of the notes was to comfort and reassure his friends. Such a motive was not reprehensible; nor was defendant's first reference to religion and the deity contained in these notes.

In his first assignment defendant has not shown prejudicial error. *State v. Woolard,* 260 N.C. 133, 132 S.E. 2d 364 (1963).

[2] Defendant's second assignment of error is that the court erred in holding that his letter to the superior court judge "was a confession rather than a statement of how the defendant intended to plead." Defendant's contention seems to be that the letter was in the nature of a tendered plea of guilty which could be withdrawn at any time before acceptance; that his plea of not guilty withdrew the tendered plea and thereby rendered the letter inadmissible in evidence. This contention is untenable.

In the letter defendant wrote these words: "Your Honor, I'm guilty of *my* charge of murder. . . . Judge, here is *my confession* in writing." (Italics ours.) A plea of guilty is "a formal confession of guilt before the court in which defendant is arraigned." 2 Strong's N. C. Index 2d *Criminal Law* § 23 (1967). The letter was not such a plea. However, if genuine it qualified as the confession which defendant himself denominated it. *See State v. Hamer,* 240 N.C. 85, 81 S.E. 2d 193 (1954). If voluntarily and understandingly written it was admissible in evidence.

On *voir dire* defendant testified that he wrote the letter, "told Mr. Covert that the letter was a confession and to carry it to the judge." He makes no contention that the letter was in

any manner coerced. However, at the trial he attempted to expunge the letter by saying, "I was having drawbacks from drugs. . . . I was insane when I wrote the letter. . . . I had a lot of other stuff on my mind. I was entangled."

[3] Defendant now contends that the failure of the judge, after conducting the *voir dire,* to make a specific finding that Fish wrote the letter "with understanding" rendered its admission error. The State contends that the evidence which defendant offered to establish a lack of understanding on 7 November 1972 was insufficient to raise the issue.

The mental capacity of a defendant is, of course, a circumstance to be considered in passing upon whether a confession was voluntarily and understandingly made. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966). After conducting the *voir dire,* as he was required to do by the objection to the admission of the letter, the judge should have made a finding on the only question defendant disputed. *State v. Vickers,* 274 N.C. 311, 163 S.E. 2d 481 (1968); *State v. Barber,* 268 N.C. 509, 151 S.E. 2d 51 (1966). Obviously, however, the ruling that the letter was admissible of necessity was based on the court's conclusion that Fish wrote it voluntarily and with understanding. *State v. Painter,* 265 N.C. 277, 144 S.E. 2d 6 (1965); *State v. Litteral,* 227 N.C. 527, 43 S.E. 2d 84 (1947). Indeed, defendant's own testimony on *voir dire* would make any other conclusion irrational. Fish remembered writing the letter, signing it "Reverend Mack Fish," sealing it, and delivering it to Mr. Covert. He also remembered telling him that it was a confession and to carry it to the judge. The contents of the letter itself establish the understanding of its author.

Upon the *voir dire* to determine the admissibility of the statements which Fish made to the investigating officers on 11 September 1972, approximately two months before he wrote the letter on 7 November 1972, Fish and his sister, Mrs. Nichols, gave substantially the same testimony with reference to his mental condition which they gave on *voir dire* to determine the admissibility of the letter. In addition, Mrs. Leona Fish, defendant's mother, testified that his behavior was not normal. At the conclusion of the *voir dire* to determine the admissibility of defendant's oral confession, Judge Braswell specifically found (1) that there was no believable evidence that Fish lacked understanding of what he was doing at the time he made his

statement to the officers on September 11th; and (2) that he made these statements voluntarily and understandingly. These findings are supported by ample evidence and are binding upon this court.

If defendant knew what he was saying on September 11th, the presumption is that he also knew on November 7th. At that time he had been in jail for two months, and the record contains no suggestion that he had had access to drugs there. Furthermore, the statement of September 11th which contains details omitted in the letter fully substantiated Fish's admission therein that he was guilty of the murder with which he was charged.

The trial judge's inadvertent omission to make a finding that Fish wrote the letter voluntarily and with understanding was error. Even so, in the factual setting of this case, the omission was harmless error. As we said in *State v. Frank*, 284 N.C. 137, 145, 200 S.E. 2d 169 (1973), his failure to find the facts upon which his conclusion was based, as he should have done, was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824, 24 A.L.R. 3d 1065 (1967); *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972).

Defendant's second assignment of error is overruled.

[4] Defendant assigns as error the admission of his statements to the officers on September 11th, but he does not contend that these were either involuntary or made without understanding. He contends that the memorandum from which Deputy Sheriff Munn read while testifying as to the statements constituted secondary evidence; that the tapes which recorded the conversation were the best evidence. Munn testified that the paper from which he read was "a verbatim transcript" of the statement which Fish made to him and the other officers in the presence of his codefendants. It was defendant's oral confession which was offered and admitted in evidence, and it was permissible for Munn to read from a transcript which, according to his sworn testimony, recorded the exact words used by the accused in his presence.

A properly authenticated recording of an accused's confession if voluntary and otherwise lawful is admissible in evidence. *State v. Doss*, 279 N.C. 413, 183 S.E. 2d 671 (1971); *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971); *State v. Fox*, 277 N.C. 1, 175 S.E. 2d 561 (1970). However, the fact that a re-

cording has been made of an oral confession does not prevent one who heard the confession from testifying as to what was said. *State v. Fox, supra.* "[U]nless the effort is to prove the contents of the recording as such, as distinguished from proof of the statement or conversation which was recorded, the best evidence rule . . . does not apply to *require* the introduction of the recording, *S. v. Fox, supra.*" Stansbury's N. C. Evidence (Brandis Rev., 1973) § 32 n. 95. *See also* § 191 n. 24. We note that defendant made no request for the production of the tapes. Assignment of error No. 3 is overruled.

Defendant's assignment No. 4 is: "The Court erred when it did not allow the mother of the defendant or a medical expert to answer questions pertaining to the defendant's medical history. Exceptions Nos. 8, 9 (R p 77), 10 (R p 78), and 12 (R p 80)." Assignment No. 5 is: "The Court erred when it disallowed answer to question as leading questions propounded to an expert, which pertained to facts that led to the expert's opinion of the mental capacity of the defendant. Exceptions Nos. 11 (R p 79), 13, 14 (R p 80), and 15 (R p 81)."

[5] Assignments Nos. 4 and 5 present no questions for this Court's consideration. Rule 19(3) of the Rules of Practice in the Supreme Court require that an assignment to the exclusion or admission of evidence show specifically what question appellant intends to present. This means that the question to which the objection was sustained and the answer which the witness would have made had he been permitted to answer must be set out in the assignment. *State v. Gainey,* 280 N.C. 366, 185 S.E. 2d 874 (1972); *Grimes v. Credit Company,* 271 N.C. 608, 157 S.E. 2d 213 (1967); *In Re Will of Adams,* 268 N.C. 565, 151 S.E. 2d 59 (1966). Where the court sustains an objection to evidence and the record fails to show what the evidence would have been, the exclusion of such evidence cannot be held prejudicial. *State v. Mabry,* 269 N.C. 293, 152 S.E. 2d 112 (1967); 3 Strong's N. C. Index 2d *Criminal Law* § 169 (1967). Here, in each instance, the record fails to show the answer sought to be elicited. We note, however, that evidence of the import suggested by several of the questions had been previously admitted without objection and that none of the rulings suggest prejudicial error.

In his brief, Fish expressly abandons his assignments of error Nos. 6 and 7. Assignment of error No. 8 is: "The Court erred by giving an erroneous summation of the evidence. Ex-

ception No. 19 (R p 88)." This assignment likewise fails to comply with Rule 19(3) of the Rules of Practice in the Supreme Court, which requires that the portion of the charge which appellant contends to be erroneous shall be set forth in the assignment itself. *State v. Robinson,* 272 N.C. 271, 158 S.E. 2d 23 (1967); 3 Strong's N. C. Index 2d *Criminal Law* § 163 (1967). Notwithstanding, we have read page 88 of the record and on it we find no error prejudicial to defendant.

In the trial of defendant Fish we find no error.

APPEAL OF DAVIS AND HONEYCUTT

[6] Davis and Honeycutt each assign as error the court's refusal to allow their motions for nonsuit. The State's evidence as to Davis, excluding the extrajudicial statements of his codefendants and all evidence which the court instructed the jury not to consider against him, tends to show the following facts:

About 1:30 p.m. on 29 August 1972 law enforcement officers found Mr. Bunn's dead body across the threshold of his store, a two-inch hole in his chest. A trail of blood led from a counter in the store to the body. (This evidence was also competent as to Honeycutt.)

About 11:00 a.m. on 29 August 1972 Davis was the passenger in a burgundy Dodge automobile which Fish backed up to the door of Mr. Bunn's store. Davis got out, followed by Fish, who was waving a sawed-off shotgun. Fish forced Bunn, who had been standing in the yard, into his store. *All three of them went into the store.* Thereafter Ricky Pope, who was observing these proceedings, heard a shot. In about a minute *Fish and Davis* came out of the store and sped away in the burgundy Dodge. Later that afternoon the officers found the Dodge on the path into the wooded area from which Ricky had seen a white truck emerge as he left the vicinity of Bunn's store.

About 2:00 p.m. that afternoon Davis, Fish, and Honeycutt were together at Fish's residence in Raleigh. On 9 September 1972 Wake County officers returned Fish and Davis to Raleigh from a Texas town about 90 miles from the Mexican border. Two days later, after being fully warned of his constitutional rights, Davis told the officers that on August 29th he and two other friends, after talking for a while, "went to Clayton and got a car." Then they went to Mr. Bunn's store, and while he and his friend were there Bunn was shot and killed. Thereafter they "got rid of the car and went on and left."

After making the above statement Davis told the officers that if they would permit him, Fish, and Honeycutt to talk "they would get a complete statement straightened out." The officers permitted the defendants to confer privately and thereafter Davis made the statement which has been heretofore set out in full in the preliminary narrative of the evidence. In his second statement Davis said that he, Fish, and Honeycutt went to Clayton and got the car in which he and Fish drove to Bunn's store; that he stood outside, and "Mr. Bunn went in first and Mack followed in behind"; that he heard a gun go off and saw Bunn fall; that they then left, ditched the car in the woods, rode back to Raleigh with Wallace Honeycutt, and then they left.

The State's evidence against Honeycutt, excluding the evidence which the court instructed the jury not to consider against him, tends to show:

On 27 August 1972, the Sunday before Mr. Bunn was killed, Honeycutt was at Fish's home. There Debra Garland Nipper heard Fish and Honeycutt "talking about a service station or something." Honeycutt told Fish that the man who ran the store always had money but he kept a gun in a cigar box; that he was an old man, not too smart, and it shouldn't be hard to rob him. About 2:00 p.m. on Tuesday, 29 August 1972, about one hour after Mr. Bunn was killed, Honeycutt was at Fish's residence with him and Davis.

On 11 September 1972 Fish, Davis, and Honeycutt, who were in the Wake County jail, after being fully advised of their constitutional rights, were permitted to confer privately. After being alone for 15-20 minutes they knocked on the door of their conference room and the officers went in. Thereupon Davis and Fish made the statements which have heretofore been set out in full in the preliminary summation of the evidence. After Davis and Fish had concluded their statements, Officer Munn asked Honeycutt if the statements by Fish and Davis were true and he said that they were.

In his statement with reference to Honeycutt, Davis said that on August 29th about 12:30 p.m. Honeycutt and Fish picked him up at a friend's home; that they then went to Clayton and got the car in which he and Fish went to Bunn's store; that after Mr. Bunn was shot they "ditched the car in the woods and rode back to Raleigh with Wallace Honeycutt. . . ."

Fish's statement contains the following reference to Honeycutt: (After leaving Bunn's store Fish drove the automobile down a dirt path on the other side of the bridge.) "I turned down there and the best I remember—like Wallace [Honeycutt] he was pretty drunk and I told him, I said, 'Man I can drive a lot better than you anyway' so I got in the car—made him get in the truck or something. Anyway I ended up driving. . . . I don't think we stopped any place else to get any beer or anything; but anyway I ended up home and then I pulled out some dope and I rolled up some joints and we all smoked some dope and Wallace, he passed out on the bed. . . ."

All admitted evidence, competent and incompetent, is for consideration in passing upon the motions for nonsuit. *State v. Stallings*, 267 N.C. 405, 148 S.E. 2d 252 (1966). However, considering the preceding evidence, unaugmented by the statements of codefendants and in the light most favorable to the State, *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967), the State's evidence is sufficient to establish the following facts:

Fish, Davis, and Honeycutt conspired to rob Mr. Bunn at his store. For that purpose the three went to Clayton, where they stole a burgundy Dodge. While Honeycutt waited for them in a truck at a parking place in a wooded area nearby, Fish and Davis drove the stolen Dodge to Bunn's store. In the attempt to rob him Fish shot and killed Bunn. Immediately thereafter he and Davis drove the Dodge to the area where Honeycutt awaited them. There they abandoned the Dodge and returned in Honeycutt's truck to Fish's home in Raleigh, where Honeycutt passed out after smoking some dope. Later in the afternoon Davis and Fish left Raleigh and eleven days later were apprehended in Hondo, Texas.

We hold the foregoing facts sufficient to sustain the jury's verdict that Davis and Honeycutt were guilty of the felony-murder with which each was charged.

We next consider the court's refusal to grant the motions of Davis and Honeycutt for trials separate and apart from each of their codefendants.

Prior to the decision in *Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968), whether defendants indicted for the same crime would be tried jointly or separately was a matter resting in the sound discretion of the trial judge.

State v. Battle, 267 N.C. 513, 148 S.E. 2d 599 (1966). In the absence of a showing that a joint trial had deprived the objecting defendant of a fair trial, the court's exercise of its discretion would not be disturbed upon appeal. When the extrajudicial confession of one defendant which implicated another against whom it was inadmissible, was offered in evidence, the trial judge admitted it with an instruction that the confession was evidence only against the confessor and must not be considered against the codefendant. *State v. Lynch,* 266 N.C. 584, 146 S.E. 2d 677 (1966).

[7] In *Bruton,* the Supreme Court held that, in a joint trial, the admission of a confession which implicated a codefendant violated his Sixth Amendment right of confrontation when the confessor did not take the stand so that he could be cross-examined. In consequence of *Bruton,* in *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492 (1968), we hold "that in joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or the declarant. If such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately. The foregoing pronouncement presupposes (1) that the confession is inadmissible as to the codefendant (see *State v. Bryant, supra* [250 N.C. 113, 108 S.E. 2d 128], and (2) that the declarant will not take the stand. If the declarant can be cross-examined a codefendant has been accorded his right to confrontation." *Id.* at 291, 163 S.E. 2d at 502. *See State v. Kerley,* 246 N.C. 157, 97 S.E. 2d 876 (1957).

[8] Since none of the three defendants in this case testified, both Davis' and Honeycutt's first assignment of error presents the question whether, in the joint trial, the admission of incriminating statements by a codefendant constituted prejudicial error against the objecting defendant. Under the rule we laid down in *Fox* and subsequent cases Davis and Honeycutt will each be entitled to a new trial unless the statements were competent against the nondeclarant or, if incompetent, their admission was harmless beyond a reasonable doubt. In *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969), and *State v. Parrish,* 275 N.C. 69, 165 S.E. 2d 230 (1969), new trials were awarded. For cases holding that the trial court's infraction of the *Fox* rule was harmless beyond a reasonable doubt, *see State v. Jones,* 280 N.C. 322, 185 S.E. 2d 858 (1972); *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); *State v. Brinson,* 277 N.C. 286, 177 S.E. 2d 398 (1970).

The jury was instructed not to consider against Davis the following evidence which was admitted over his objection:

(a) Debra Garland Nipper's statement that on August 27th she heard Fish and Honeycutt talking about a filling station and that Honeycutt told Fish the man who ran the store always had a lot of money; that he had a gun, but he kept it in a cigar box; that he was an old man, not too smart, and it should not be hard to rob him. (b) Nipper's statement that on August 29th Fish told Wall "he had had to do a man a job"; "that the man pulled a gun on him and it was either his life or the other man's." (c) Wall's statement that Fish told him on August 29th that "They had went and the man had pulled a gun on them and it was either one of them getting shot," and that he had to shoot him. (d) The gun, State's Exhibit No. 1. (e) Fish's letter of November 7th to the judge.

In addition to the foregoing evidence Davis assigns as error the admission of Fish's statement, made September 11th, and of Honeycutt's statement that the statements of Fish and Davis were correct. These statements were admitted generally.

Honeycutt also objected to statements (b) and (c) and the gun (d), set out above in the enumeration of Davis' objections, and the jury was instructed not to consider this evidence (admitted only as to Fish) against Honeycutt. In addition Honeycutt objected to the statements which Fish and Davis made on September 11th. His objections were overruled and these statements were admitted without restriction.

Under the rule enunciated in *Bruton* and *Fox* the court's attempt to restrict the application of any of the foregoing evidence to a specified defendant was a futile gesture. The admission of statements (a), (b), (c), the letter (e) and the statements which Fish and Honeycutt made to the officers on September 11th, which the court admitted generally, denied Davis his constitutional right of confrontation and cross-examination guaranteed by the Sixth and Fourteenth Amendments. *State v. Brinson, supra. See also* Stansbury's N. C. Evidence (Brandis Rev. 1973) § 179. The admission in evidence of items (b), (c) and (e) deprived Honeycutt of the same

right. The admission of the gun (d), which Ricky Pope identified as the gun he saw Fish take into Bunn's store, was not error as to either. Nor was the admission of the statements of Fish and Davis error as to Honeycutt, who adopted them when he told the officers that they were true.

It is our view, however, that competent evidence against both Davis and Honeycutt so positively establishes their guilty participation in Bunn's murder that the incompetent evidence, even in its totality, was harmless beyond a reasonable doubt. The test of harmless error is "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *State v. Brinson, supra* at 295, 177 S.E. 2d at 404.

Competent evidence as to Honeycutt establishes that he was the author of the plan to rob Mr. Bunn. Competent evidence as to both Davis and Honeycutt establishes that the three defendants went together to Clayton where they "got" the car in which Davis and Fish drove to Bunn's store; that Honeycutt waited in a truck at the wooded parking area about a mile from the store while Fish and Davis went there to rob Bunn; that Fish, by means of a shotgun, forced Bunn into his store and Davis followed; that while those two were in the store Bunn was shot and killed and they fled in the Dodge; that a few minutes later a truck came out of the entrance to the wooded parking area, where later that afternoon officers found the Dodge in which Fish and Davis went to Bunn's store; that about 1:30 p.m. the officers found Bunn's dead body lying across the threshold to his store, a two-inch hole in his chest; that in less than an hour after Davis and Fish left Bunn's store in the Dodge they and Honeycutt were at Fish's home in Raleigh.

To the foregoing basic facts the details contained in confessions of codefendants and the statements which Fish made to Nipper and Wall add nothing of significance. Without them we have no doubt that the verdicts would have been the same. *See State v. Jones, supra; State v. Brinson, supra.*

[9] Davis' assignment of error which challenges the validity of the two statements which he made to the officers on September 11th, and Honeycutt's assignment of error challenging the admissibility of his statement to the officers that the Davis and Fish statements of September 11th were true, are without merit. Before admitting the challenged statements the court conducted

a *voir dire* on which he heard the witnesses for the State and the testimony of Davis and Honeycutt. Thereafter, upon supporting evidence, he found that the three statements were made freely, understandingly, and voluntarily. These findings are conclusive on appeal. *State v. Roseman,* 279 N.C. 573, 184 S.E. 2d 289 (1971).

After considering defendants' other assignments of error we deem it unnecessary to discuss them. None discloses prejudicial error.

[7] In concluding this labored opinion we are constrained to note that it points up the hazards which lie in wait for the State when it moves to consolidate such cases as these for trial. After the judge allowed the solicitor's motion to consolidate, both seem to have proceeded under the law as it existed in the era before *Bruton* and *Fox.* Both ignored the *Fox* pronouncement that in a consolidated trial all portions of an extrajudicial confession or incriminating statement by one defendant which implicate a codefendant are inadmissible unless (1) special circumstances render the statement also admissible against the codefendants, or (2) the defendant making the statement takes the stand so that he may be cross-examined. *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492, 502 (1968).

In the trial, as to each of the three defendants, we find no prejudical error.

No error.

EUGENE S. ANDERSON II, BY HIS GUARDIAN AD LITEM, NANCY S. ANDERSON, AND EUGENE S. ANDERSON v. CORNELIUS BUTLER, JR., AND WIFE, PHYLLIS H. BUTLER

No. 49

(Filed 25 February 1974)

1. **Rules of Civil Procedure § 50— motion for directed verdict — statement of grounds mandatory**

The provision in Rule 50(a) of the N. C. Rules of Civil Procedure that a motion for a directed verdict shall state the specific grounds therefor is mandatory; however, the courts need not inflexibly enforce the rule when the grounds for the motion are apparent to the court and the parties.

2. **Rules of Civil Procedure § 50— failure to state grounds for directed verdict — consideration of denial on appeal**

Where it was obvious to the trial judge and the adverse parties that defendants' motions for directed verdict challenged the sufficiency of the evidence to carry the case to the jury, the Supreme Court will consider denial of the motions though no grounds were assigned for the motions in the trial court.

3. **Negligence § 53— duty of landowner to invitee — duty to young child**

If the owner, while the licensee is upon the premises exercising due care for his own safety, is actively negligent in the management of his property or business, as a result of which the licensee is subjected to increased danger, the owner will be liable for injuries sustained as a result of such active or affirmative negligence; however, a higher measure of care is required when a duty is owed to young children, and the owner cannot assume that a child will exercise due care for his own safety.

4. **Negligence § 5; Parent and Child § 8— dangerous instrumentality — liability of parent for injury caused by child**

Ordinarily, a parent is not liable for the torts of his minor child, but a parent may be liable for his independent negligence if he permits his child to possess a dangerous instrumentality which causes injury to another; likewise, when a parent entrusts to an immature child an instrumentality which is not inherently dangerous but which becomes dangerous because of the child's immaturity or lack of judgment, the parent may incur liability for injuries or damages to others resulting from the use of the instrumentality by the child.

5. **Negligence § 5— forklift as dangerous instrumentality**

A forklift is not a dangerous instrumentality *per se;* rather, it is a dangerous instrumentality when placed in the hands of a person who lacks the capacity to operate it safely.

6. **Negligence §§ 18, 58— nine year old plaintiff — no contributory negligence as a matter of law**

Since a child between the ages of seven and fourteen years may not be held guilty of contributory negligence as a matter of law, an issue as to the nine year old plaintiff's contributory negligence did not complicate the question of defendants' right to a directed verdict in this negligence action.

7. **Negligence § 57— injury to minor invitee — sufficiency of evidence of negligence**

In an action to recover for personal injuries sustained by minor plaintiff when he was struck by a forklift operated by defendants' minor son, evidence was sufficient to be submitted to the jury with respect to the negligence of the male defendant where such evidence tended to show that defendant owned the forklift, that he entrusted the forklift to his eleven year old son knowing at the time that the nine year old plaintiff was on the premises by invitation, and that defendant gave no warnings or precautionary instructions to the child operator or to the visiting child concerning the operation or use of the machinery. Evidence was insufficient to be submitted to the jury

as to the negligence of the feme defendant where such evidence tended to show that she did not own the forklift and did not place it in the possession of her minor son, that the son at no time operated the forklift as her servant, by her direction or under her control, and that defendant spent the entire day on which the accident occurred engaged in her household duties, completely removed from the activities outside the dwelling.

This case was docketed and argued as No. 104 at the Fall Term 1973.

APPEAL by plaintiffs pursuant to G.S. 7A-30(2) from decision of the North Carolina Court of Appeals, 19 N.C. App. 627, 199 S.E. 2d 684, reversing the judgment of *Crissman, J.*, 4 December 1972 Session GUILFORD, Greensboro Division.

This is a civil action by plaintiff Eugene S. Anderson, II a minor, appearing by his Guardian Ad Litem, Nancy S. Anderson, to recover damages for personal injuries, and by plaintiff Eugene S. Anderson, father of Eugene S. Anderson, II, to recover for medical and hospital expenses incurred by him as a result of injuries suffered by his minor son. Both plaintiffs allege that injuries complained of were proximately caused by defendants' joint and several negligence.

The record evidence tends to show the following: Pursuant to telephone arrangements between his wife, and defendant Phyllis H. Butler, plaintiff Eugene S. Anderson on 11 April 1970 took his son Eugene S. Anderson, II (Sonny) to defendants' home to visit and play with their youngest son, Russell Butler (Russell). Russell and Sonny were nine years old. Defendants were living in a new home, and on that day their yard was being graded by a bulldozer operated by Needham Hockett. The terrain of the premises was still rough and partially ungraded. Mr. Anderson took Sonny inside the Butler home and left him with Mrs. Butler after telling Mrs. Butler to call if Sonny did not behave.

Mr. Butler operated a trailer manufacturing business in a shop which was located about 200 to 250 feet behind his dwelling. On the morning of 11 April 1970, defendants' eleven year old son, Donald, was operating a forklift which was ordinarily used in the trailer manufacturing business. The forklift was not being operated as a part of the trailer business, but was being used for the purpose of removing trash and litter from the premises of the Butler residence. Donald was operating the

machine with his father's knowledge, permission, and direction. The forklift was about seven or eight feet long from its mast to its rear and weighed between nine and ten thousand pounds. There was a mast on the front of the machine on which the forks slid up and down and on which a chain hoist operated to raise and lower the forks. The machine was powered by a diesel engine which could propel it at speeds described as a "slow walk" and a "fast walk." Donald had been operating the forklift for a period of two years at intervals of approximately once or twice a week. According to his father, Donald could handle the machine as well as he could.

On the morning of 11 April 1970, Sonny and Russell played in the house for a while and then went outside until lunch. After lunch they went to a nearby river and then returned to Russell's room. Between 2:30 and 3:00 p.m., Mrs. Butler told them that the bulldozer had run over the septic tank and the boys went outside to see it. At that time, Donald drove up on the forklift and asked Russell and Sonny to get on the machine and hold a rug in place that he was moving. The two younger boys mounted the machine as it stood near the rear of the dwelling and sat on the rug which was lying across the forks. Donald started the machine toward the shop building, and when they were about 75 feet from the shop the machine hit a bump, and Sonny fell from the forklift and was struck by it. He suffered serious personal injuries. Sonny testified that the forklift was being operated, " . . . as fast as it would go."

At the time Sonny and Russell mounted the forklift the male defendant was scraping dirt from the septic tank. According to Sonny, "I could see him and he could see me." There was no other evidence tending to show that either of the defendants actually saw Sonny or Russell on the forklift. However, both of the defendants knew of his presence on the premises prior to the accident.

Mrs. Butler stated that she was in the house most of the day engaged in her household work. She saw neither Russell nor Sonny on the forklift. During the morning Sonny asked her if he could ride on the forklift and she replied, "Absolutely not." Sonny denied that such conversation took place. Mrs. Butler first learned of the accident when Donald called her on the telephone from the shop.

Mr. Butler testified that he knew nothing of Sonny's visit until he saw him when he came in for lunch. He never saw Sonny

or Russell on the forklift and he first learned of Sonny's injury from his wife. He took Sonny home and then to the hospital.

Defendants moved for directed verdict at the close of the plaintiffs' evidence and at the close of all the evidence. The Motions were denied.

Issues were submitted to and answered by the jury as follows:

"1. Was the plaintiff minor injured as a result of the negligence of the defendants, as alleged in the Complaint?

ANSWER: 'Yes.'

2. Did the plaintiff minor by his own negligence contribute to his injury, as alleged in the Answer?

ANSWER: 'No.'

3. What amount, if any, is the plaintiff minor entitled to recover from the defendants?

ANSWER: '$15,000.00'.

4. What amount, if any, is the plaintiff, EUGENE S. ANDERSON, the father, entitled to recover of the defendants as special damages incurred on behalf of the plaintiff minor?

ANSWER: 'Total medical expenses which we think are $4,849.45'."

Defendants' Motions for Judgment notwithstanding the verdict were denied.

Defendants appealed from Judgment entered, and the Court of Appeals in an opinion by Judge Vaughn, concurred in by Judge Campbell, held it was error to deny defendants' Motions for a directed verdict and reversed the judgment entered in Superior Court. Judge Baley dissented.

Dees, Johnson, Tart, Giles & Tedder by J. Sam Johnson, Jr., for plaintiff appellants.

Harry Rockwell, John R. Hughes and Worth Coltrane for defendant appellees.

BRANCH, Justice.

[1] Initially we are confronted with plaintiffs' contention that defendants are not entitled to present as an assignment of error

the denial of their Motions for directed verdicts upon appeal since they assigned no grounds for the Motions in the trial court.

Rule 50(a) requires that "A motion for a directed verdict shall state the specific grounds therefor."

The Federal Courts have construed the identical provisions in their Rule 50(a) of the Federal Rules to mean that the requirement is mandatory. *Capital Transportation Company v. Compton,* 187 F. 2d 844 (8th Cir. 1951); *Atlantic Greyhound Corp. v. McDonald,* 125 F. 2d 849 (4th Cir. 1942); *Duncan v. Montgomery Ward & Co.,* 108 F. 2d 848 (8th Cir. 1940); Wright & Miller, Federal Practice and Procedure: Civil § 2533. Our Court of Appeals has adopted the Federal construction *Wheeler v. Denton,* 9 N.C. App. 167, 175 S.E. 2d 769. The question has not been directly presented to this Court, but the Federal construction of the rule was approved in a dictum statement in *Hensley v. Ramsey,* 283 N.C. 714, 199 S.E. 2d 1.

We note that some of the Federal Courts have held that the rule is sufficiently complied with when the moving party makes his position clear by oral explanation, *Dowell, Inc. v. Jowers,* 166 F. 2d 214 (5th Cir. 1948), and when there is but a single issue, a Motion for directed verdict properly presents to the appellate courts the question of the sufficiency of the evidence to carry the case to the jury. *Rochester Civic Theatre, Inc. v. Ramsay,* 368 F. 2d 748 (8th Cir. 1966).

The purpose of the rule is to apprise the Court and the adverse parties of movants' grounds for the motion.

Professor James E. Sizemore's excellent discussion of the general scope and philosophy of the New Rules in 5 Wake Forest Intramural Law Review 1, at p. 37, (1969) includes the following:

> " . . . If movant states the specific grounds of the motion, plaintiff may be able to meet the defect with proof, and his case would be complete. If movant was not required to state the specific ground, the defect might be the cause of a later judgment notwithstanding the verdict when it is too late for plaintiff to supply the proof. Failure to state specific grounds for the motion is sufficient reason to deny the motion. . . "

We hold that the provision in Rule 50(a) that a motion for a directed verdict shall state the specific grounds therefor is mandatory. However, the courts need not inflexibly enforce the rule when the grounds for the motion are apparent to the court and the parties.

[2] In instant case, it is obvious that the motion challenged the sufficiency of the evidence to carry the case to the jury. There was no misapprehension on the part of the trial judge or the adverse parties as to the grounds for the motion. We, therefore, elect to review the denial of defendants' motions for directed verdicts.

We turn to the principal question presented by this appeal, that is, whether the evidence was sufficient to withstand defendants' motions for directed verdict.

All of the record evidence shows that the minor plaintiff was on defendants' premises as an invited guest and was therefore a licensee. *Murrell v. Handley,* 245 N.C. 559, 96 S.E. 2d 717.

[3] If the owner, while the licensee is upon the premises exercising due care for his own safety, is actively negligent in the management of his property or business, as a result of which the licensee is subjected to increased danger, the owner will be liable for injuries sustained as a result of such active or affirmative negligence. *Hood v. Coach Company,* 249 N.C. 534, 107 S.E. 2d 154; *Wagoner v. R. R.,* 238 N.C. 162, 77 S.E. 2d 701. We think that a higher measure of care is required when a duty is owed to young children. In the case of *Greer v. Lumber Co.,* 161 N.C. 144, 76 S.E. 725, this Court quoted with approval from *Holmes v. R. R.,* 207 Mo. 149, 105 S.W. 624, the following:

> " . . . 'But common experience tells us that a child may be too young and immature to observe the care necessary to his own preservation, and therefore, when a person comes in contact with such a child, if its youth and immaturity are obvious, he is chargeable with knowledge of that fact and he cannot indulge the presumption that the child will do what is necessary to avoid an impending danger. Therefore, one seeing such a child in such a position is guilty of negligence if he does not take into account the fact that it is a child, and regulate his own conduct accordingly . . . ' "

See also, 57 Am. Jur. 2d, Negligence, § 124.

[4] Ordinarily a parent is not liable for the torts of his minor child. *Griffin v. Pancoast,* 257 N.C. 52, 125 S.E. 2d 310; *Langford v. Shu,* 258 N.C. 135, 128 S.E. 2d 210. However, the parent may be liable if a tort is committed while the minor child is acting as the servant or agent of the parent and the negligent act was the proximate cause of an injury to another. *Johnson v. Lamb,* 273 N.C. 701, 161 S.E. 2d 131; *Hawes v. Haynes,* 219 N.C. 535, 14 S.E. 2d 503; *Linville v. Nissen,* 162 N.C. 95, 77 S.E. 1096. And a parent may be liable because of his independent negligence if he permits his child to possess a dangerous instrumentality which causes injury to another. *Smith v. Simpson,* 260 N.C. 601, 133 S.E. 2d 474; *Lane v. Chatham,* 261 N.C. 400, 111 S.E. 2d 598; *Bowen v. Mewborn,* 218 N.C. 423, 11 S.E. 2d 372. Likewise, when a parent entrusts to an immature child an instrumentality, such as an automobile, which is not inherently dangerous but which becomes dangerous because of the child's immaturity or lack of judgment, the parent may incur liability for injuries or damages to others resulting from the use of the instrumentality by the child. In both of the latter instances, liability arises from the parents' independent negligence and not from the imputed negligence of the child. The test of responsibility in all of these types of cases, as in all negligence actions, is whether an injurious result could have been foreseen by a person of ordinary prudence. *Linville v. Nissen, supra;* 57 Am. Jur. 2d, Negligence, §§ 110 and 118.

[5] It is our opinion, and we hold, that a forklift is not a dangerous instrumentality *per se.* Rather, like an automobile, it is a dangerous instrumentality when placed in the hands of a person who lacks the capacity to operate it safely. *Taylor v. Stewart,* 172 N.C. 203, 90 S.E. 134; *Linville v. Nissen, supra; Miles v. Harrison,* 115 Ga. App. 143, 154 S.E. 2d 377; 57 Am. Jur. 2d, Negligence § 110.

A motion for a directed verdict by a defendant in a jury case presents the question of whether, as a matter of law, the evidence is sufficient to require submission of the case to the jury. *Bowen v. Constructors Equipment Rental Co.,* 283 N.C. 395, 196 S.E. 2d 789; *Investment Properties of Asheville, Inc. v. Allen,* 281 N.C. 174, 188 S.E. 2d 441. The motion presents substantially the same question as to sufficiency of evidence as did a motion for involuntary nonsuit under former G.S. 1-183. It is axiomatic that on a motion for directed verdict, plaintiff's evidence is to be taken as true and all of the evidence must be

considered in the light most favorable to plaintiff, giving him the benefit of every fact and inference of fact pertaining to the issues, which may be reasonably deduced from the evidence. *Bowen v. Gardner,* 275 N.C. 363, 168 S.E. 2d 47.

[6] Decision of the question before us is not complicated by the question of the minor plaintiff's contributory negligence since a child between the ages of seven and fourteen years may not be held guilty of contributory negligence as a matter of law. *Bell v. Page,* 271 N.C. 396, 156 S.E. 2d 711; *Welch v. Jenkins,* 271 N.C. 138, 155 S.E. 2d 763.

Whether there was sufficient evidence to withstand the motions of directed verdict by each defendant must be considered in light of the above-stated rules.

[7] We first consider the motion for a directed verdict by the male defendant, Cornelius Butler, Jr.

It was alleged in the Complaint and admitted in the Answer that the male defendant owned the forklift. There was sufficient evidence to permit, but not require, the jury to find that the male defendant entrusted to his eleven year old son Donald the forklift knowing at that time that the nine year old minor plaintiff was on the premises by invitation, and without giving any warnings or precautionary instructions to the child operator or to the visiting child concerning the operation or use of the machinery.

We are aware of the evidence concerning Donald's competency in the manual operation of the forklift. However, a distinction must be drawn between the manual skill and the maturity of judgment of any eleven year old child.

" . . . [I]n all negligence cases, the issue in the last analysis is whether the parent exercised reasonable care under all the circumstances . . . " *Langford v. Shu, supra.*

When considered in the light most favorable to the plaintiff, we think that there was sufficient evidence to permit the jury to decide whether under the circumstances of this case Cornelius Butler, Jr. exercised reasonable care when he placed the forklift in charge of his child of tender years.

We note, parenthetically, that the record discloses plenary evidence to have justified submission of the case to the jury on the theory of *Respondeat superior* as to defendant Cornelius Butler, Jr.

We next consider the motion for a directed verdict by defendant Phyllis H. Butler.

It is established by the pleadings that the forklift belonged to defendant, Cornelius Butler, Jr. When considered in the light most favorable to plaintiffs, the evidence does not support a reasonable inference that the feme defendant had any part in placing the machine in Donald's possession or that he at any time operated it as her servant, by her direction or under her control. However, there is substantial evidence to the effect that prior to the accident, the defendant Phyllis H. Butler, spent the entire day of 11 April 1970 engaged in her household duties, completely removed from the activities outside the dwelling.

We hold that when considered in the light most favorable to the plaintiffs, there was not sufficient evidence to carry the case to the jury as to the defendant Phyllis H. Butler.

Defects in the charge, if any, are not before this Court by proper exception or assigment of error.

This cause is remanded to the Court of Appeals with direction that it be returned to the Superior Court of Guilford County, Greensboro Division, for entry of judgment in accordance with this opinion.

As to the defendant, Cornelius Butler, Jr., the decision of the Court of Appeals is reversed.

As to the defendant, Phyllis H. Butler, the decision of the Court of Appeals is affirmed.

WOOD-HOPKINS CONTRACTING COMPANY, A CORPORATION v. NORTH CAROLINA STATE PORTS AUTHORITY

No. 45

(Filed 25 February 1974)

1. **Contracts § 12— interpretation of contract**

In case of disputed items in a contract, the interpretation of the contract will be inclined against the person who drafted it.

2. **Contracts § 12— interpretation of contract**

When general terms and specific statements are included in the same contract and there is a conflict, the general terms should give way to the specific.

3. Contracts § 27— construction of contract — lump sum or unit price

In an action to recover an amount allegedly due for installing fill in the performance of a contract for improvement of defendant's port facilities, the trial court properly found that plaintiff's compensation for all work performed under the contract was not limited to the lump sum stated in the contract and that plaintiff was entitled to compensation for the fill on a unit price basis where the contract contained a provision that fill would be paid for at the rate of $2.00 per cubic yard and defendant's engineer, who prepared the contract, testified that such provision was placed in the contract with the expectation that an adjustment would be made when the material was in place.

4. Contracts § 27— construction of contract — responsibility for extra fill

Contract provision making plaintiff contractor responsible for "slides, washouts, settlement, subsidence, or any mishap to the work while under construction" did not require plaintiff to install fill at his own expense in a void created outside the contract line by action of the river in carrying riverbed material into the deep channel which had been dredged.

APPEAL by defendant from *Rouse, J.*, April 5, 1973 Special Session, NEW HANOVER Superior Court. This case was docketed and argued at the Fall Term 1973 as No. 91.

The plaintiff, a Florida corporation, instituted this civil action for breach of contract against the North Carolina State Ports Authority, a State agency created by Article 22, Chapter 143, General Statutes of North Carolina.

Prior to the institution of the action, the plaintiff submitted to the North Carolina Department of Administration a claim against the defendant for $108,880.00 due by contract for installing fill as a part of the defendant's improvement project at the North Dock extension of its Wilmington Port Terminal. The Director of the Department of Administration denied the claim. The plaintiff instituted the action in the Superior Court of New Hanover County where the contract was performed.

The complaint alleged the plaintiff had installed 54,440 cubic yards of underwater fill for which the defendant had agreed to pay $2.00 per cubic yard, and had breached its contract by refusing to pay the claim.

The defendant, by answer, set up these defenses: (1) That the contract required the plaintiff to perform all work shown on its plans and specifications at a fixed amount of $3,392,149.00. (2) That the contract was a lump sum contract and not a fixed unit contract. (3) That while the contract provided for a price

of $2.00 per cubic yard, the provision was included in the contract to be used to compute payment in the event extra work was ordered and approved. (4) That the work for which the plaintiff seeks payment was made necessary by plaintiff's failure to exercise proper care and the extra fill was not authorized. (5) That the fill was installed beyond the lines called for in the contract. In the alternative, the failure to meet the contract lines resulted from a sloughing of the river bank which was the responsibility of the plaintiff. (6) That the contract in Paragraph 5, Section 2A, Plans and Specifications, provided: "The Contractor shall be responsible for slides, washouts, settlement, subsidence, or any mishap to the work while under construction. He shall be responsible for the stability of all embankments constructed under this specification and shall replace any portion which may become displaced from any cause before completion and acceptance . . . . "

At a pre-trial conference many exhibits were identified and introduced and many stipulations were entered into before the trial judge. It was stipulated the contract between the parties grew out of an advertisement for bids according to plans and specifications prepared by the defendant, giving the *type, amount,* and details of the work to be done and the materials to be furnished. The plaintiff filed its bid which the defendant accepted. Among the stipulations were the following:

> "(4) A part of the general contract entails certain dredging and fill work [including blueprints and specifications] . . . . "

The contract defined fill as:

> "[S]and containing not more than 20% of material passing a No. 200 sieve, after passing through the dredge and to the stockpile. . . . [F]ill material shall be allowed to drain and dry prior to final placing . . . . The first layer shall be approximately 18" thick . . . . Subsequent layers shall be lifts of 12 inches or less, and compacted to obtain 95% Standard Proctor dry density." (Section 2A, Paragraph 7)

The contract provided:

> " '*Fill*' shall be paid for on a cubic yard basis in place as determined by before and after surveys." (Section 2A, Paragraph 10b)

"(6) During the progress of the work and subsequent thereto, Wood-Hopkins Contracting Company has been paid $3,425,619.09 and this constitutes payment in full for all work performed under the contract, except payment for 54,440 cubic yards of fill placed outside of the plan line."

The evidence disclosed that after the channel was dredged to the required depth (apparently 28 feet) the water carried movable material from the outside into the channel thus creating a void. This void required fill in order to stabilize the bed of the river in this critical position.

The parties further stipulated:

"(14) On August 21, 1971, soundings were taken by representatives of Wood-Hopkins Contracting Company, the North Carolina State Ports Authority, and Register and Cummings, Engineers. The soundings indicated that additional dredging needed to be done as the depth required by the contract had not been reached at some stations.

"(15) Dredging was continued and final soundings were taken on or about August 23, 1971, and indicated that the required contract depth had been obtained.

"(16) These soundings were subsequently plotted by Wood-Hopkins Contracting Company and the results were given to Register and Cummings, Engineers, and these disclosed that a void had been established behind the plan line."

The parties agreed that the void which was outside the line established by the survey made in the planning stage required fill of the same type as required for in-line fill. The defendant does not contend that more fill was pressed in place beyond the plan line than was required.

At the conclusion of the hearing the court made numerous findings, among them:

"31. The amount of fill required to fill the area between the ground line as established by the after dredge and before fill survey and the ground line as established by the after fill survey was 311,613 cubic yards. Plaintiff has been paid for only 257,173 cubic yards of fill and has not been paid for the difference of 54,440 cubic yards."

The court concluded that it was the contractor's obligation (under Paragraph 5, Section 2A) to be responsible for slides, washouts, settlement, subsidence, or mishap and required the contractor to redredge the channel at his own expense, but that Paragraph 5, Section 2A, did not require the contractor to install at his own expense any fill. The agreement was to prepare and keep clear the channel in condition to receive the fill. The court concluded the provisions of Section 2A, Paragraph 5, of the contract did not require the plaintiff to install or replace any fill at his own expense. The court stated:

> "1. The clear meaning of Section 2A, Paragraph 10(b) of the contract, ' "Fill" shall be paid for on a cubic yard basis in place as determined by before and after surveys,' is that plaintiff is entitled to be paid for the amount of 'fill' between the ground line as established by the survey taken after the dredging had been completed and before the fill operation was begun, and the ground line as established by the survey taken after the fill operation had been completed, or a total of 311,613 cubic yards of fill. As the plaintiff has been paid for only 257,173 cubic yards of fill, the plaintiff is entitled to be paid for an additional 54,440 cubic yards at the contract rate of $2.00 per cubic yard."

The court entered judgment that the plaintiff recover $108,880.00 with interest at 6% from December 13, 1971.

The defendant excepted to the judgment, gave notice of appeal, and immediately filed with this Court a petition that the case be certified here for initial review. The petition was allowed on October 2, 1973.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston by: Joseph W. Grier, Jr., and William L. Rikard, Jr., for plaintiff appellee.

Robert Morgan, Attorney General, by: Edwin M. Speas, Jr., Assistant Attorney General, for defendant appellant.

HIGGINS, Justice.

The defendant first challenged the plaintiff's right to recover in this action on the ground the contract required the plaintiff to perform labor, furnish materials, and complete its obligation under the contract for the fixed lump sum stated in the contract.

The parties stipulated that the plaintiff filed a base bid of $2,947,417.00 and $350,330.00 and $94,402.00 for certain alternative proposals. The contract specifically provided for a unit price for certain items of construction. These items included a provision of $2.00 per cubic yard for underwater fill compressed in place as base support for pilings designed to support the above-water unloading facilities. The plaintiff claimed pay at the rate of $2.00 per cubic yard for 54,440 cubic yards of fill. The defendant denied the claim on the ground that the entire work was covered by the amount bid which was a lump sum contract provision.

It is admitted that the defendant's engineers, chief of whom was Mr. Joseph R. Gordon, prepared the plans and specifications and, after the plaintiff's bid was accepted, drew the contract which specifically stated that fill should be paid for at the rate of $2.00 per cubic yard. The engineer first testified that the purpose of inserting the price per unit was, "To be fair to the contractor we wanted to give him an adjustment for the work he actually performed. So, if the river bottom changed from the time of the survey until the time he began work, that would be one reason the unit prices were included. That actually happened. That was the primary reason. . . . The second reason was that there was some money held back at the time of the letting of the contract that the Ports Authority intended to spend along the end and the unit price would be used to negotiate additional changes for which a change order would have been written. These unit prices are also included to cover extra work that might need to be done. They form the basis of negotiating the change order for the extra work." But in the pinch Mr. Gordon testified:

> "Q The fact is, Mr. Gordon, that these figures were put in simply for the contractor's guidance with the expectation that when the material was in place there would be an adjustment?
>
> "A This was the best figure we had, yes, sir, and we did expect to adjust them on the basis of what was actually done."

The foregoing does not support a lump sum claim for all work. The very fact that a specific price was inserted for fill negates a lump sum claim.

[1] The specifications were drawn by Mr. Gordon, the defendant's engineer. It is a rule of contracts that in case of disputed items, the interpretation of the contract will be inclined against the person who drafted it. *Yates v. Brown,* 275 N.C. 634, 170 S.E. 2d 477; *Root v. Insurance Co.,* 272 N.C. 580, 158 S.E. 2d 829; *Lester Bros., Inc. v. Thompson Co.,* 261 N.C. 210, 134 S.E. 2d 372; *Trust Co. v. Medford,* 258 N.C. 146, 128 S.E. 2d 141.

[2] Another rule of law which supports the plaintiff's claim is that when general terms and specific statements are included in the same contract and there is a conflict, the general terms should give way to the specifics. Authorities are listed in Am. Jur. 2d, Vol. 17, Contracts, Section 270.

[3] The court was correct in holding the unit per cubic yard price of fill rather than the lump sum contention prevails. The above question was argued in the defendant's brief, but the defendant's position is shaded and weakened, if not eliminated, by a stipulation entered at the final hearing.

> "(9) The soundings taken after completion of the dredging showed a void beyond the plan line, and there is no dispute as to the amount of additional fill required to fill this area and to complete the contract."

The dispute is reduced to the question whether the plaintiff is entitled to receive payment for the fill placed behind the plan line.

[4] In addition to the general denial and the lump sum claim, the defendant has set up these further defenses: The extra fill was caused by plaintiff's negligence in dredging behind the plan line or, in the alternative, "[P]laintiff's failure to meet the contract lines resulted from sloughing of the riverbank." The defendant attempts to support the contention by Paragraph 5, Section 2A of the contract. "The contractor shall be responsible for slides, washouts, settlement, subsidence, or any mishap to the work while under construction. He shall be responsible for the stability of all embankments constructed under this specification and shall replace any portion which may become displaced from any cause before completion and acceptance . . . . "

According to the testimony, the void behind the plan line was caused by the action of the river in carrying the riverbed material into the deep channel which had been dredged up to the plan lines. Of course when the material was washed into

the dredged channel, it was the obligation of the plaintiff to remove that material. This it did without charge. The material which had washed into the channel left the void beyond the channel line which required the fill. Nothing in Paragraph 5, Section 2A, required the plaintiff to do anything except remove obstructions. Nothing required it to compress fill in place except for the unit price provided in the contract.

The court found from the evidence, "The void area behind the plan line was not caused by over-dredging." The unstable condition of the riverbed is shown by this stipulation of the parties: "[T]he area in which the work was performed had in past time been rice fields."

The plaintiff, recognizing its responsibility for slides, etc., redredged the channel and inserted 54,440 cubic yards of fill which was required "to complete the work."

The evidence disclosed that all dredging was done and all fill compressed in place under the watchful eye of the defendant's engineer. During the progress of the work, the plaintiff, as provided in the contract, filed claims for partial advances which were approved by the engineer and paid by the defendant without objection. Never at any time prior to the acceptance of the finished job, did the defendant make any objection or raise any question with respect to that part of the fill which is the subject of the present dispute.

The trial court's findings of fact are supported by the evidence. In a case of this character, the judge's findings have the same force as a jury verdict. G.S. 143-135.3 provides that a suit against a State agency for a breach of contract shall be tried in the Superior Court of Wake County or in the jurisdiction of the court in which the work was done, *without a jury. Harrison Associates v. State Ports Authority,* 280 N.C. 251, 185 S.E. 2d 793. In a trial before a judge, technical objections to the admissibility of evidence will not be observed. Prejudicial results must be shown or it may be deemed the court in its findings considered only competent evidence. *General Metals v. Manufacturing Co.,* 259 N.C. 709, 131 S.E. 2d 360; *Construction Co. v. Crain and Denbo, Inc.,* 256 N.C. 110, 123 S.E. 2d 590; *Bizzell v. Bizzell,* 247 N.C. 590, 101 S.E. 2d 668.

The court's findings of fact are amply supported by evidence and the findings support the judgment.

Affirmed.

BURLINGTON INDUSTRIES, INC. v. MARTIN B. FOIL, JR., WILLIAM H. TAYLOR, AND TUSCARORA COTTON MILL

No. 43

(Filed 25 February 1974)

1. **Frauds, Statute of § 5— oral guaranty of payment — main purpose rule — insufficient interest in transaction**

Plaintiff's evidence was insufficient to support a jury finding that defendant had a sufficient direct, immediate and pecuniary interest in a corporation's transactions with plaintiff so that defendant's oral guaranty of payment for yarn furnished by plaintiff to the corporation did not come within the statute of frauds, G.S. 22-1, where it showed that defendant was an officer, director and minority stockholder in the corporation, that defendant's investment in the corporation was only $750 and that credit extended by plaintiff to the corporation ultimately reached $125,000.

2. **Frauds, Statute of § 5— oral guaranty — main purpose rule — insufficient interest in transaction**

Plaintiff's evidence was insufficient to support a jury finding that defendant's oral guaranty of payment for yarn furnished by plaintiff to a textile corporation was binding under the "main purpose rule" because the corporation was a customer and debtor of a group of other textile companies owned and controlled by defendant's family where there was no evidence about how much or the type of business the corporation did with the other textile companies, who conducted it, whether it was for cash or credit, or what type of debt relationship, if any, existed between these various corporations.

3. **Frauds, Statute of § 5— promise to pay for goods furnished corporation — credit to promisor or corporation**

In an action to recover upon defendant's oral promise to pay for yarn furnished by plaintiff to a corporation, it was not necessary for the court to submit an issue as to whether the credit had been extended directly and exclusively to the defendant rather than to the corporation where plaintiff alleged and the parties stipulated that defendant had personally guaranteed payment of the outstanding debt of the corporation.

4. **Frauds, Statute of § 5— oral guaranty of payment — main purpose rule — insufficient interest in transaction**

Plaintiff's evidence was insufficient to support a jury finding that defendant's oral guaranty of payment for yarn furnished by plaintiff to a textile corporation was binding under the "main purpose rule" where it showed only that defendant was an officer, director and minority shareholder of the corporation and that defendant paid $25,000 of the debt to plaintiff with his personal check on behalf of the corporation and thereby became a creditor of the corporation.

5. **Corporations § 25; Guaranty— guaranty by corporation**

While a North Carolina corporation may enter into a contract of guaranty, such guaranty must be made in connection with the carrying out of the corporation's chartered purpose. G.S. 55-17(b)(3).

6. **Corporations § 8— authority of corporation's president**

The authority of the president of a corporation to act for the corporation is limited to those matters that are incidental to the business in which the corporation is engaged; that is, to matters that are within the corporation's ordinary course of business.

7. **Corporations § 8—authority of corporation's president — necessity for approval of board of directors**

Generally, when some act is undertaken by the president of a corporation that relates to material matters that are outside the corporation's ordinary course of business, in the absence of express authorization for such act by the board of directors, the corporation is not bound.

8. **Corporations § 8; Guaranty— guaranty by corporation's president — absence of approval by board of directors — effect on corporation**

Defendant textile corporation was not bound by its president's oral guaranty of payment of another company's account with plaintiff where there was no evidence that the guaranteeing of another company's account was part of the ordinary business conducted by defendant corporation and there was no showing that the president had authority from defendant's board of directors to guarantee the account.

ON *certiorari* to review the decision of the Court of Appeals reported in 19 N.C. App. 172, 198 S.E. 2d 194 (1973), which affirmed the judgment of *McConnell, J.*, entered at the 4 December 1972 Regular Civil Session of Cabarrus Superior Court. This case was docketed and argued as No. 88 at the Fall Term 1973.

Plaintiff seeks to recover $55,577.58 with interest from 22 September 1971, the balance due plaintiff for the sale of polyester yarn to Colonial Fabrics, Inc. (hereinafter referred to as Colonial), a North Carolina corporation that went into involuntary bankruptcy on or about 28 October 1971.

Stipulations entered into by the parties include the following: (1) Defendant Foil was a stockholder, director, and treasurer of Colonial at all times relevant hereto; (2) defendant Taylor was a stockholder, director, and secretary of Colonial at all times relevant hereto; (3) defendant Tuscarora Cotton Mill (hereinafter referred to as Tuscarora) is a North Carolina corporation; (4) defendant Foil is, and was at all times relevant hereto, a shareholder, director and the president of Tuscarora;

(5) defendant Taylor is, and was at all times relevant hereto, a shareholder, director, and the executive vice president of Tuscarora; (6) on or about 6 April 1971, and on various dates thereafter, up to and including 22 May 1971, plaintiff contracted to sell and did sell Colonial polyester yarn valued at $126,191.79; (7) under the terms of such sales, the account of Colonial became delinquent on 6 June 1971, and has remained delinquent at all times since that date, and there has been due and owing since 22 September 1971 the amount of $55,577.58.

Plaintiff's complaint alleges that the three defendants are jointly and severally liable for this amount since plaintiff extended credit to Colonial in reliance on defendants' guaranties of payment of Colonial's account. Specifically, plaintiff's complaint alleges that defendant Tuscarora guaranteed payment for the yarn sold by plaintiff to Colonial, and that defendants Foil and Taylor also each personally guaranteed to plaintiff the payment of the Colonial account. Plaintiff further alleges that in reliance upon the personal guaranties from Foil and Taylor, plaintiff refrained from taking legal action against Colonial and Tuscarora, despite the large amount of the indebtedness and the length of time it had been outstanding. Plaintiff finally alleges that despite frequent demands by plaintiff of Colonial and each of the three defendants, none of these defendants have paid anything except a $25,000 payment personally made by Taylor on 16 September 1971.

The answers filed by each of the defendants are substantially identical. They deny the guaranties alleged to have been made to plaintiff and allege that plaintiff's complaint fails to state a claim against defendants upon which relief can be granted. The answers also specifically plead two defenses: first, that no consideration of any sort was given by plaintiff to defendants for any guaranty by defendants of the credit extended Colonial, and that consequently any guaranty made by defendants is not binding on defendants; and secondly, that plaintiff's complaint alleges agreements and guaranties by defendants to answer for the debt of another, and that since these purported agreements and guaranties were never in any writing signed by defendants or by their authorized agents, they are unenforceable under the provisions of G.S. 22-1.

Defendants' answers admit that none of the defendants have paid plaintiff for the account of Colonial, and further allege that the purported $25,000 personal payment by Taylor

was not a payment by Taylor on his own behalf but rather was a loan by Taylor to Colonial. Defendants further allege that plaintiff through its officer and agent, J. Houston Barnes, entered into contracts and sold polyester yarn directly to Colonial and extended credit directly to Colonial; that thereafter plaintiff through its agent Barnes attempted to persuade defendants to enter into guaranties of the credit of Colonial, and that these defendants consistently refused to do so and advised plaintiff that it must look directly to Colonial for payment of Colonial's account.

The evidence presented tends to establish the following: Colonial was organized in December 1970 by defendants Foil and Taylor, Edwin B. Fowler III, and Foy Brooks. The corporation commenced business on 1 January 1971 with a capitalization of $3,000, and by March 1971 fifty percent of Colonial's stock was owned by its president and general manager, Fowler, and the remaining fifty percent was owned equally by defendants Foil and Taylor and Mrs. Jean M. Foil, defendant Foil's mother.

Colonial did very well during its first four or five months of operation and was able to meet the payments to its creditors out of the corporation's profits. During this period of successful operation by Colonial—specifically toward the end of March 1971—a salesman from plaintiff corporation came by to see Fowler about the possibility of Colonial's purchasing some yarn from plaintiff. Fowler proposed purchasing some yarn on a 60-day basis; that is, Colonial would pay for the yarn sixty days after receiving it. The salesman assured Fowler that this would be acceptable if Colonial's financial condition warranted such a credit arrangement, and accordingly Fowler placed an order for yarn with plaintiff.

At this time Barnes was serving as plaintiff's credit manager. This job entailed the approving of credit for all new and existing customers before shipments were made by plaintiff. By 30 March 1971 plaintiff had received several orders for yarn from Colonial, and on that day Barnes contacted Fowler by telephone about plaintiff's extending credit to Colonial on a 60-day basis. Fowler explained the nature of Colonial's operation and informed Barnes that Fowler's "associates in this business, his partners, Mr. Martin Foil, Jr., and Mr. William Taylor, and Tuscarora, would guarantee the account." Fowler also stated that there was no financial statement on Colonial available, to

which Barnes replied that in the absence of such a statement credit could not be extended to Colonial. Fowler then suggested that Barnes call Foil.

After his conversation with Fowler on 30 March 1971, Barnes ordered a Dun and Bradstreet National Credit Office investigation of Tuscarora and Colonial. Barnes then—prior to contacting Foil—approved the credit extension to Colonial, and plaintiff started shipping goods to Colonial. This was on 6 April 1971, and by this time the double knit market in which Colonial was primarily involved had begun to deteriorate because of a flood of double knit goods on the market.

On 19 April 1971 Barnes contacted Foil for the first time by telephone. By this time plaintiff had already shipped yarn valued at $44,541.72 to Colonial. Barnes told Foil about his 30 March 1971 conversation with Fowler and, according to Barnes, the following transpired:

> "I [Barnes] told Mr. Foil in our conversation on April 19th that we had already started shipping on the strength of the guarantee that we already had. Mr. Fowler wanted to increase the program. Mr. Foil said, 'Well, don't increase the program. I'm trying to get him [Fowler] to clear all these things with me before he does it.' I said, 'I haven't even seen a statement on Colonial Fabrics.' He said, 'I'll have Ed [Fowler] send you one.' I said, 'I'm going to guess without even seeing it, it won't justify the credit we are talking about.' He said, 'You are exactly right.' And I said, 'You know we are looking to Tuscarora Cotton Mills and you, Martin Foil, for payment.' And he said, 'Yes, I understand that.' "

Barnes further testified that following this conversation he sent Foil the following letter on 20 April 1971 concerning their conversation:

> "Confirming our telephone conversation yesterday, we are enclosing a form, in duplicate, by which Tuscarora Cotton Mills, Inc., will guarantee the account of Colonial Fabrics, Inc. Please complete both sides of the form returning one copy to us, the extra copy is for your files. If you have any questions regarding the form, please let me know. It's nice to be back in touch with you and hope we can get together again before too long."

Foil did not complete this corporate guaranty and return it to Barnes or reply to the 20 April 1971 letter. There was no further correspondence between Barnes and Foil. Barnes testified, "I did not receive back any written corporate guaranty, or any written guaranty of any type from any defendant in this case." Consequently, on 11 May 1971 Carl M. Aycock, Barnes' assistant, terminated shipments of yarn to Colonial.

The next contact between plaintiff and any of the defendants occurred on either 13 May or 15 May 1971 when Barnes again telephoned Foil. At this time plaintiff had already shipped yarn valued at $106,835.47 to Colonial. Barnes stated at trial:

> "I called Mr. Foil and told him I understood he was not actually going to sign the guarantee form. He [Foil] said, 'That's right, Tuscarora'—he was advised by counsel on a loan agreement that he could not sign it, 'but it does not change anything. I have already told you Tuscarora was standing behind this, and you have nothing to worry about.' This was on May 15, 1971. He never told me after his conversation of April 19th that Tuscarora or he was not guaranteeing this account. The gentleman never did tell me that they were not guaranteeing, he did not ever tell me that."

After his conversation Barnes instructed Aycock "to commence shipment to Colonial Fabrics based upon the fact that the written guaranties could not be signed by Tuscarora Cotton Mills, and that Mr. Martin Foil had given his verbal guarantee." Shipments were again commenced and plaintiff sent Colonial more yarn valued at $19,356.32 between 13 May 1971 and 22 May 1971. On 22 May 1971 Barnes stopped shipments to Colonial.

Apparently the next contact between plaintiff and any of the defendants occurred during the middle or last part of June 1971 when Barnes again telephoned Foil. At this time plaintiff had completed its shipments to Colonial and Colonial's account with plaintiff was past due. According to Barnes, Foil suggested that he go see Fowler, to which Barnes replied:

> ". . . I didn't extend Colonial Fabrics credit, or Ed Fowler credit, I don't know either one of them, I extended this credit to you, Tuscarora Cotton Mills. He [Foil] said, 'That's right, but I would still like for you to go up and meet Ed [Fowler], and visit with him and, frankly, get

your opinion of what you think of it.' He said, 'I don't know what you are worried about because I have already told you Tuscarora and I were standing behind this.' "

On 3 September 1971, at Foil's suggestion, Barnes met with Taylor, Colonial's secretary, and Fowler in Colonial's office in Kannapolis. Barnes' description of this meeting is as follows:

> "I met with Mr. Taylor on that date. I had received a [$25,000] check but it had been returned for insufficient funds. The check was drawn on Colonial Fabrics. I told Mr. Taylor and Mr. Fowler that I was very much upset about this, and Mr. Taylor told me to redeposit the check, and he assured me that it would clear. He also outlined the fact that he had taken an active part in the management, and he intended to be there on a daily basis, and that he would see that I was paid. I believe his words were, 'I'll see you paid.' That was Mr. Taylor talking to me. The amount due at that time was approximately $105,000.00."

According to Fowler, Colonial's president and general manager, Barnes wanted full payment from Colonial on 3 September 1971. Colonial had around $55,000 of accounts receivable at the time, and Fowler, Taylor, and Barnes reached an agreement that Colonial would send the proceeds from these accounts to plaintiff as they came in. Taylor confirmed this plan of payment in a letter dated 3 September 1971 addressed to Barnes.

Barnes again met with Taylor and Fowler on either 9 or 16 September 1971. Pursuant to Taylor's instructions given on 3 September 1971, Barnes had redeposited Colonial's check for $25,000. Barnes testified that at this meeting he informed Taylor and Fowler that the check had been returned unpaid again, and that he "was getting considerable pressure and my company [plaintiff] was not going to stand for this; and unless we could get adequate assurance they would take it out of my hands and would probably start legal action." Taylor then gave Barnes a personal check for $25,000. This check was made payable to plaintiff corporation and on the check Taylor noted that it was for "Payment on Colonial Fabrics' Account." Barnes also testified that after Taylor gave him the check, Taylor again said "he would see me paid" and offered to call Barnes' superiors in New York to assure them of this.

Other facts pertinent to this decision are set out in the opinion.

After plaintiff rested, the three defendants made a motion for a directed verdict pursuant to Rule 50 of the North Carolina Rules of Civil Procedure on the basis that:

> ". . . [T]he evidence of the plaintiff fails to justify a verdict for the plaintiff as to each of the defendants. More specifically, the evidence affirmatively shows that there was no written guarantee on the part of either of the defendants; that the evidence fails to show that the plaintiff has brought itself outside the statute of frauds as pleaded by the defendants. . . ."

The presiding judge allowed defendants' motion for a directed verdict and entered judgment for defendants. Plaintiff appealed to the Court of Appeals, and that court in an opinion by Judge Campbell, concurred in by Judges Hedrick and Baley, affirmed the judgment. We allowed *certiorari* on 2 October 1973.

Sanford, Cannon, Adams & McCullough by E. D. Gaskins, Jr., Robert W. Spearman, and J. Allen Adams for plaintiff appellant.

Williams, Willeford & Boger by John Hugh Williams; Jordan, Wright, Nichols, Caffrey & Hill by Lindsay R. Davis, Jr., and Charles E. Nichols for defendant appellees.

MOORE, Justice.

Plaintiff first alleges that defendant Foil personally guaranteed Colonial's account and that credit was extended to Colonial in reliance on Foil's personal guaranty.

"A guaranty of payment is an absolute promise by the guarantor to pay a debt at maturity if it is not paid by the principal debtor. This obligation is separate and independent of the obligation of the principal debtor, and the creditor's cause of action against the guarantor ripens immediately upon the failure of the principal debtor to pay the debt at maturity." *Investment Properties v. Norburn*, 281 N.C. 191, 188 S.E. 2d 342 (1972).

Plaintiff contends that Foil's oral guaranty is not within North Carolina's statute of frauds because Foil had a direct, immediate, and pecuniary interest in Colonial's transactions with plaintiff. The North Carolina statute of frauds, G.S. 22-1, provides in pertinent part:

> "No action shall be brought . . . to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized."

North Carolina has long recognized an exception to the statute of frauds, generally referred to as either the "main purpose rule" or the "leading object rule." In discussing this exception this Court has often quoted with approval the following language from *Emerson v. Slater,* 63 U.S. (22 How.) 28, 43, 16 L.Ed. 360, 365 (1859):

> ". . . [W]henever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability."

See, *e.g., Warren v. White,* 251 N.C. 729, 112 S.E. 2d 522 (1960); *Garren v. Youngblood,* 207 N.C. 86, 176 S.E. 252 (1934); *Handle Co. v. Plumbing Co.,* 171 N.C. 495, 88 S.E. 514 (1916); *Dale v. Lumber Co.,* 152 N.C. 651, 68 S.E. 134 (1910).

Some of the various situations in which the main purpose rule has been applied in North Carolina are reviewed in Note, *Statute of Frauds—The Main Purpose Doctrine in North Carolina,* 13 N.C.L. Rev. 263 (1935). Generally, if it is concluded that the promisor has the requisite personal, immediate, and pecuniary interest in the transaction in which a third party is the primary obligor, then the promise is said to be original rather than collateral and therefore need not be in writing to be binding. Professor Lee, in North Carolina Law of Suretyship 12 (3d Ed. 1970), notes that the main purpose rule is applicable when a court has determined that the promisor's "answering for the debt or default of another is merely incidental to his broader purposes. He is participating in the principal contract and making its obligation his own. The expected advantage to the promisor must be such as to justify the con-

clusion that his main purpose in making the promise is to advance his own interests."

Plaintiff's evidence relating to Foil's personal guaranty reveals that on 19 April 1971, after plaintiff had already shipped Colonial yarn valued at approximately $45,000, and on subsequent occasions thereafter, Foil made oral guaranties to personally stand behind Colonial's account with plaintiff. Plaintiff asserts that the evidence presented is sufficient to indicate Foil's direct, immediate, and pecuniary interest in Colonial's transactions with plaintiff, in that it reveals Foil was treasurer of Colonial, one of its four directors, and a "major stockholder." Plaintiff's evidence discloses, however, that at all times relevant to the transactions between Colonial and plaintiff, Fowler was the controlling shareholder in Colonial, owning 50% of Colonial's capital stock, and that Foil owned only 75 of the 450 shares, or one-sixth, of Colonial's outstanding capital stock.

Plaintiff also contends that Foil was vitally interested in the success of Colonial because Colonial was a customer and debtor of a group of other textile corporations owned and controlled by the "Foil family." This group included Tuscarora, Colonial Threads, Oakboro Cotton Mills, and Fashion Knits. Because of these "interlocking business enterprises," plaintiff asserts that Foil stood to gain personally if Colonial obtained materials from plaintiff, sold them, and paid its debts to Foil's family businesses.

The question then becomes: Considering plaintiff's evidence as true, has plaintiff offered evidence sufficient as a matter of law to justify a verdict for plaintiff on the ground that the main purpose rule is applicable so that Foil's promise though oral was binding? We think not.

Two quotations from Annot., 35 A.L.R. 2d 906 (1954) point out an important distinction recognized by our decisions:

> "As applied to promises by stockholders, officers, or directors, to pay a debt of the corporation, it may be said that the promise is original where the promisor's primary object was to secure some direct and personal benefit from the performance by the promisee of his contract with the corporation, or from the latter's refraining from exercising against the corporation some right existing in him by virtue of the contract. *The benefit to the promisor is to be distinguished from the indirect benefit which would accrue to*

him merely by virtue of his position as a stockholder, officer, or director. If the benefit accruing is direct and personal, then the promise is original within the rule above discussed, and the validity thereof is not affected by the statute of frauds." (Emphasis added.) *Id.* at 910.

"Where an oral promise by a stockholder, officer, or director of a corporation is collateral in form and effect, and the consideration was not intended to secure or promote some personal object or advantage of the promisor—as distinguished from the benefit accruing to a person from the mere fact of his being a stockholder, officer, or director—, the promise is collateral and within the statute of frauds." *Id.* at 914.

This language was quoted with approval by Justice Bobbitt (now Chief Justice) in *Warren v. White, supra.* It expresses the majority rule that the benefit to be derived from one's ownership of stock or holding the position of an officer or director is too indirect or remote to invoke the application of the main purpose rule. Something more—some other expected benefit or advantage to be gained by making the promise—is required to make the main purpose rule applicable. See 49 Am. Jur., Statute of Frauds § 110 (1943); Annot., 35 A.L.R. 2d 906 (1954); Annot., 8 A.L.R. 1198 (1920); Calamari and Perillo, The Law of Contracts § 288 (1970); 2 Corbin on Contracts § 372 (1950); Lee, North Carolina Law of Suretyship 13 (3d Ed. 1970); Simpson on Suretyship 143-44 (1950).

This principle is recognized in the North Carolina cases in which shareholders have been held liable under the main purpose doctrine. In *May v. Haynes,* 252 N.C. 583, 114 S.E. 2d 271 (1960), plaintiffs sought to hold the president of a corporation liable for certain construction work done by plaintiffs. Although it was determined that the president of the corporation had contracted for the work in his own individual capacity rather than just as a surety for the corporation, Justice Bobbitt (now Chief Justice) in discussing the main purpose rule noted that the defendant had a personal, immediate and pecuniary interest in the transaction. This was partly shown by the fact that the defendant owned 41 of the 43 shares of the corporation's capital stock (his wife owning the remaining two shares), and was the president and general manager of the corporation.

In *Warren v. White, supra,* defendant was the owner of a corporation in serious financial difficulty. The defendant hired

plaintiff as a general manager, orally promising him at the inception of plaintiff's employment that he would "personally pay" plaintiff for any sums plaintiff might advance to the failing corporation. The corporation then failed, and plaintiff sued for the advancements he had made. The evidence revealed that defendant was the incorporator and owner of almost all the corporation's capital stock. Additionally, after plaintiff became general manager, defendant had personally advanced more than $23,000 to the corporation in an attempt to save it. Justice Bobbitt, in holding that the statute of frauds was not applicable to defendant's promise, noted: "There can be no doubt but that defendant was personally, directly and pecuniarily interested in the continuance in business of the corporation and would be the prinipal beneficiary if this were accomplished and the principal loser if it were forced out of business."

In *Garren v. Youngblood, supra,* the plaintiff was allowed to recover on an oral agreement by defendant that he would be personally responsible for any loss plaintiff might sustain if her funds were permitted to remain on deposit with a bank. The evidence there revealed that defendant was the bank's vice president, a director, and a shareholder. Additionally, defendant had a substantial deposit with the bank which he stood to lose in the event the bank failed.

[1] Plaintiff's evidence in the instant case fails to establish any such direct interest on the part of Foil in Colonial's transactions with plaintiff. To the contrary, plaintiff's own evidence reveals that other than through his interest as a minority shareholder, officer, and director of Colonial, Foil's interest in Colonial was limited. Foil's investment in Colonial was only $750. The protection of this investment would hardly justify his guaranteeing credit for Colonial that ultimately reached $125,000. If his only expected benefit or advantage in making the guaranty was to protect this interest, then his promise to guarantee Colonial's debts must be considered within the statute of frauds, since such an interest is too indirect and remote to invoke application of the main purpose rule.

Plaintiff further contends, however, that the question of whether there was a direct, immediate, and pecuniary interest sufficient to hold Foil liable is a question of fact to be decided by the jury. In support of this position, plaintiff cites *Farmers Federation, Inc. v. Morris,* 223 N.C. 467, 27 S.E. 2d 80 (1943),

and *Peele v. Powell,* 156 N.C. 553, 73 S.E. 234 (1911), rev'd on rehearing, 161 N.C. 50, 76 S.E. 698 (1912).

In *Farmers Federation, Inc. v. Morris, supra,* it was alleged that defendant induced plaintiff to furnish goods to a corporation engaged in the restaurant business upon defendant's promise that he would be personally responsible for all the corporation's bills. Defendant admitted to being the corporation's president and a stockholder, but the court refused to allow further examination into the defendant's connection with the corporation. In reversing the case and ordering a new trial, this Court stated:

> "Whether a promise is an original one not coming within the statute of frauds, or a collateral one required by the statute to be in writing, is to be determined from the circumstances of its making, the situation of the parties, and the objects sought to be accomplished. *Simmons v. Groom,* 167 N.C., 271, 83 S.E., 471; *Balentine v. Gill,* 218 N.C., 496, 11 S.E. (2d), 456; *Dozier v. Wood,* 208 N.C., 414, 181 S.E., 336. Where the intent is doubtful, the solution usually lies in summoning the aid of a jury. *Whitehurst v. Padgett,* 157 N.C., 424, 73 S.E., 240. The issue was properly submitted to the jury in the instant case. *Taylor v. Lee,* 187 N.C., 393, 121 S.E., 659; *Peele v. Powell,* 156 N.C., 553, 73 S.E., 234, on rehearing, 161 N.C., 50, 76 S.E., 698.
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> * * *
>
> "In respect of the character of the promise, it was competent to show that the defendant had a personal, immediate and pecuniary interest in the transaction. *Balentine v. Gill, supra; Whitehurst v. Padgett, supra.* For this purpose, it was proper to inquire about his entire connection with the corporation.
>
> "In excluding the evidence offered and limiting the cross-examination to the time of the purchase of the supplies, the jury was left without a full knowledge of the facts and denied information regarding the defendant's long-continued interest in the business which would have thrown some light on the matter. 'Anything which shows the intention or the actual contract of the parties is material, and any evidence which goes to show the intention of the parties is admissible whether it be by way of conduct or documentary in nature.' 34 Cyc., 980. . . . "

There was no exclusion of any evidence in the instant case. It is apparent that the Court in *Farmers Federation, Inc. v. Morris, supra,* was simply setting forth the rule that all pertinent information necessary to the application of the main purpose rule is relevant and should be admitted. If, however, there is insufficient evidence as a matter of law to bring the main purpose rule into play, the case should not be allowed to go to the jury under the theory of the main purpose rule.

This point is illustrated by one of the cases on which plaintiff relies, *Peele v. Powell, supra.* In that case plaintiff sued defendant, a landlord, on an alleged promise by defendant to stand for supplies furnished his tenant. The Court there had to decide as a matter of law whether a landlord generally has a sufficient personal, immediate, and pecuniary interest in the successful operation of his farm by his tenant to take the landlord's promise to pay the tenant's debt out of the statute of frauds by reason of the main purpose rule. The Court originally held that there was no evidence of any such benefit or interest in the landlord, and therefore refused to let the case go to the jury, although the Court in so doing noted that a jury would have been justified in finding from the evidence that the promise had in fact been made. On a petition for rehearing, the Court reconsidered and decided that there was sufficient evidence of such a benefit to require submission of the case to the jury. See also *Handle Co. v. Plumbing Co., supra.* Similar landlord and tenant cases are *Dozier v. Wood,* 208 N.C. 414, 181 S.E. 336 (1935); *Tarkington v. Criffield,* 188 N.C. 140, 124 S.E. 129 (1924); *Taylor v. Lee,* 187 N.C. 393, 121 S.E. 659 (1924); *Whitehurst v. Padgett,* 157 N.C. 424, 73 S.E. 240 (1911).

[1, 2] We hold that plaintiff's evidence about Foil and his relationship with Colonial fails to establish the required direct interest on the part of Foil in Colonial's transactions with plaintiff. The only interest plaintiff's evidence—when considered as true—establishes is one that is too indirect and remote to invoke application of the main purpose rule. Plaintiff's evidence about Foil's interest in Colonial because of his alleged interest in the related textile concerns is also insufficient to support the conclusion that Foil had a personal, immediate, and pecuniary interest in Colonial's transactions with plaintiff. There is no evidence about how much or the type of business Colonial did with Tuscarora, Colonial Threads, Oakboro Cotton Mills, and Fashion Knits, who conducted it, whether it was for cash or

credit, or what type debt relationship, if any, existed between these various corporations. In summary, plaintiff has failed to offer any evidence that, even with the benefit of every reasonable intendment and inference arising therefrom, tends to show any personal, immediate, and pecuniary benefit or advantage to Foil other than that naturally accruing to him as a shareholder, director, or officer. Therefore, plaintiff's evidence was insufficient as a matter of law to justify a verdict for plaintiff on the basis of the main purpose rule.

[3] Having determined that the main purpose rule is not applicable to the present facts, the sole issue remaining to be decided is whether Foil's alleged promise can otherwise be considered an original, rather than a collateral, promise. In this connection this Court has often quoted with approval the following language from Clark on Contracts 67-68 (2d Ed. 1904):

> "There must be either a present or prospective liability of a third person for which the promisor agrees to answer. If the promisor becomes himself primarily, and not collaterally, liable, the promise is not within the statute, though the benefit from the transaction accrues to a third person. If, for instance, two persons come into a store, and one buys, and the other, to gain him credit, promises the seller, 'If he does not pay you, I will,' this is a collateral undertaking, and must be in writing; but if he says, 'Let him have the goods, and I will pay,' or 'I will see you paid,' *and credit is given to him alone, he is himself the buyer, and the undertaking is original. In other words, whether the promise in such a case is within the statute depends on how the credit was given. If it was given exclusively to the promisor, his undertaking is original; but it is collateral if any credit was given to the other party.*" (Emphasis added.)

See also Annot., 20 A.L.R. 2d 246 (1951); 49 Am. Jur., Statute of Frauds §§ 63, 90 (1943); 2 Corbin on Contracts §§ 352, 353 (1950); 37 C.J.S., Statute of Frauds § 20 (1943). Many North Carolina cases have noted that it is for the jury to determine to whom credit was extended. In these cases if it was determined that the credit was extended directly and exclusively to the promisor, then the promise is considered original and not within the statute of frauds. See, *e.g.*, *Rubber Corp. v. Bowen*, 237 N.C. 426, 75 S.E. 2d 159 (1953); *Balentine v. Gill*, 218 N.C. 496, 11 S.E. 2d 456 (1940); *Brown v. Benton*, 209 N.C. 285, 183 S.E. 292 (1936); *Parker v. Daniels*, 159 N.C. 518, 75 S.E. 712

(1912); *Jenkins v. Holley,* 140 N.C. 379, 53 S.E. 237 (1906); *Sheppard v. Newton,* 139 N.C. 533, 52 S.E. 143 (1905); *White v. Tripp,* 125 N.C. 523, 34 S.E. 686 (1899). See also *Dozier v. Wood, supra; Tarkington v. Criffield, supra; Taylor v. Lee, supra; Whitehurst v. Padgett, supra,* cases in which the Court discussed the main purpose rule in conjunction with the above-noted principle.

It was unnecessary in this case, however, for a jury to determine to whom credit was extended. In paragraphs 9 and 11 of plaintiff's complaint, admitted by Foil, it is alleged:

> "9. On or about April 6, 1971, and on various dates thereafter, up to and including May 22, 1971, the plaintiff, contracted through its Madison Throwing Company Division, to sell and did sell and deliver to Colonial polyester yarn on account at the price of and in the total amount of $126,-191.79, as shown on the Accounts Receivable Ledger, marked Exhibit A, and attached hereto and made a part hereof."
>
> "11. Under the terms of the sale, the account of Colonial became delinquent on June 6, 1971, and has remained delinquent at all times since that date, and there has been due and owing since September 22, 1971, the amount of $55,577.58."

Plaintiff's complaint also alleges:

> "12. Subsequent to April 6, 1971, both Foil and Taylor personally guaranteed to plaintiff the payment of the outstanding debt of Colonial. . . ."

Stipulations to the same effect were entered into by the parties. Accordingly, there was never any question but that Colonial was the party to whom credit was extended. See 2 Corbin on Contracts § 353 at 236 (1950). Since the main purpose doctrine has no application to Foil's alleged guaranty to plaintiff, Foil's alleged promise to answer for the debt of Colonial is a collateral one, and since it was not in writing as required by G.S. 22-1, it is ineffective to bind Foil. Under these facts, Foil's motion for a directed verdict was appropriate.

A defendant's motion for a directed verdict at the close of plaintiff's evidence under G.S. 1A-1, Rule 50(a) presents substantially the same question formerly presented by a motion for involuntary nonsuit; that is, whether the evidence considered

in the light most favorable to plaintiff would justify a verdict in his favor. *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).

The decision of the Court of Appeals affirming the judgment of the trial court in directing a verdict in favor of defendant Foil is affirmed.

[4] Plaintiff also contends that defendant Taylor personally guaranteed Colonial's account, and that Taylor's oral guaranty is not within the statute of frauds because Taylor, like Foil, had a direct, immediate, and pecuniary interest in Colonial's transactions with plaintiff. Plaintiff's allegations in support of this contention are: first, Taylor was Colonial's secretary; secondly, Taylor was one of Colonial's four directors; thirdly, Taylor was a "major shareholder" of Colonial; and lastly, "Taylor paid part of the debt [$25,000] to [plaintiff] with his own personal check thereby demonstrating his direct interest and becoming a creditor of Colonial himself."

With respect to plaintiff's allegation that Taylor was a "major shareholder," it should be noted that at all times relevant to the transactions between Colonial and plaintiff, Taylor owned the same amount of Colonial's stock as did Foil; that is, 75 of the 450 shares, or one-sixth, of Colonial's outstanding capital stock. Therefore, with respect to plaintiff's contention about Taylor's interest as an officer, director, and a shareholder, that part of this opinion discussing the legal effect of Foil's similar interest in Colonial is controlling. Accordingly, we hold that this evidence is insufficient to invoke the application of the main purpose rule.

Plaintiff's other evidence concerning Taylor discloses that the first contact plaintiff had with Taylor was on 3 September 1971 when Taylor met with Barnes and Fowler at the office of Colonial. This was approximately three months after the last shipment from plaintiff to Colonial. Apparently the reason for this meeting was that Colonial's check to plaintiff had been returned for insufficient funds. At that time plaintiff was looking to Colonial for payment and had in fact received several payments on Colonial's account from Colonial. Prior to that time demand for payment of the Colonial account had not been made on anyone other than Colonial, and neither at this meeting nor a subsequent meeting on either 9 or 16 September 1971 was any

demand made upon anyone other than Colonial. At the 3 September 1971 meeting Taylor allegedly told Barnes that he was taking an active part in the management of Colonial and he would see that Barnes was paid. Barnes testified that he believed Taylor's words were, "I'll see you paid." Taylor was secretary for Colonial, and on this same date wrote Barnes a letter on Colonial's stationery in which he set forth a program for Colonial's payment of its account with plaintiff from the proceeds of Colonial's own accounts receivable.

On either 9 or 16 September 1971 Barnes again met with Taylor and Fowler at the office of Colonial. Colonial's check for $25,000 had been redeposited and had again been returned for insufficient funds. At this meeting Taylor gave Barnes his personal check for $25,000 payable to plaintiff, marked "For payment on Colonial Fabrics' Account." At the same time Fowler signed a written statement acknowledging that Colonial was indebted to Taylor in the amount of $25,000 for making this payment to plaintiff on behalf of Colonial. This written statement noted that the interest on the loan was to be for 6½% and that the loan was payable on demand. There was no further conversation after 16 September 1971 between Taylor and Barnes or between Taylor and anyone else representing plaintiff.

It is clear that the entire indebtedness of Colonial to plaintiff had accrued long before Taylor was even approached about the account. Taylor's only promise was to the effect that he would try to work it out so that Colonial could pay plaintiff; to assist Colonial he loaned the corporation $25,000 to pay plaintiff. Colonial at no time was released from the indebtedness, but plaintiff continued its efforts to collect from Colonial. Thus it is apparent that Taylor's alleged promise to personally pay Colonial's account, if made, was a collateral promise which is required to be in writing to withstand a plea of the statute of frauds.

There is not sufficient evidence to support plaintiff's allegation that it refrained from taking legal proceedings for collection of Colonial's account because of Taylor's alleged guaranty. Hence, this allegation need not be considered on this appeal.

Therefore, the evidence with respect to Taylor's alleged liability to plaintiff was insufficient to be submitted to the jury. The decision of the Court of Appeals affirming the judgment

of the trial court directing a verdict in favor of defendant Taylor is affirmed.

Plaintiff finally contends that the president of Tuscarora, Foil, orally guaranteed the Colonial account on behalf of Tuscarora, and that Tuscarora is bound by this guaranty.

[5] Under North Carolina's Business Corporation Act, a North Carolina corporation may enter into a contract of guaranty. Such a guaranty must, however, be made in connection with carrying out the corporation's chartered purpose. G.S. 55-17(b)(3). See generally, Robinson, North Carolina Corporation Law and Practice § 14 at 47 (1964) [hereinafter cited as Robinson].

The business and affairs of a corporation are ordinarily managed by its board of directors. G.S. 55-24(a). In general, the directors establish corporate policies and supervise the carrying out of those policies through their duly elected and authorized officers. Robinson § 70.

The day-to-day business of a corporation is actually conducted by its officers, employees and other agents under the authority and control of its board of directors. Robinson § 98. Under G.S. 55-34(b), the officers of a corporation have such authority and may perform such duties in the management of the corporation as provided either specifically or generally in the bylaws, or as may be determined by action of the board of directors not inconsistent with the bylaws.

[6] This Court has frequently held that the president of a corporation by the very nature of his position is the head and general agent of the corporation, and accordingly he may act for the corporation in the business in which the corporation is engaged. *Pegram-West v. Insurance Co.*, 231 N.C. 277, 56 S.E. 2d 607 (1949); *Mills v. Mills*, 230 N.C. 286, 52 S.E. 2d 915 (1949); *Warren v. Bottling Co.*, 204 N.C. 288, 168 S.E. 226 (1933). The authority of the president to act for the corporation is limited to those matters that are incidental to the business in which the corporation is engaged; that is, to matters that are within the corporation's ordinary course of business. *Pegram-West v. Insurance Co., supra; Trust Company v. Transit Lines*, 198 N.C. 675, 153 S.E. 158 (1930); *Brimmer v. Brimmer & Co.*, 174 N.C. 435, 93 S.E. 984 (1917).

[7] Generally, when some act is undertaken by the president that relates to material matters that are outside the corporation's ordinary course of business, in the absence of express authorization for such act by the board of directors, the corporation is not bound. See *Tuttle v. Building Corp.*, 228 N.C. 507, 46 S.E. 2d 313 (1948); *Brinson v. Supply Co.*, 219 N.C. 498, 14 S.E. 2d 505 (1941); *Warren v. Bottling Co., supra; Stansell v. Payne*, 189 N.C. 647, 127 S.E. 693 (1925); Robinson §§ 98, 99; 2 Strong, N. C. Index 2d, Corporations § 8 (1967). As stated in *Brinson v. Supply Co., supra*, "[f]or a contract executed by the officer of a corporation to be binding on the corporation it must appear that (1) it was incidental to the business of the corporation; or (2) it was expressly authorized; and (3) it was properly executed." And in *Tuttle v. Building Corp., supra*, it is stated:

> "In the absence of a charter or bylaw provision to the contrary, the president of the corporation is the general manager of its corporate affairs. *Phillips v. Land Co.*, 174 N.C., 542, 94 S.E., 12; *Trust Co. v. Transit Lines*, 198 N.C., 675, 153 S.E., 158; *White v. Johnson and Sons, Inc.*, 205 N.C., 773, 172 S.E., 370; *Lumber Co. v. Elias*, 199 N.C., 103, 154 S.E., 54; *Warren v. Bottling Co.*, 204 N.C., 288, 168 S.E., 226. His contracts made in the name of the company in its general course of business and within the apparent scope of his authority are ordinarily enforceable. 2 Fletcher, Cyc. Corporations, 467, sec. 592; *Huntley v. Mathias*, 90 N.C., 101; *Wynn v. Grant*, 166 N.C., 39, 81 S.E., 949; *Powell v. Lumber Co.*, 168 N.C., 632, 84 S.E., 1032; *Brimmer v. Brimmer*, 174 N.C., 435, 93 S.E., 984. But, usually, he has no power to bind the corporation by contract in material matters without express authority from the directors or stockholders. *Lumber Co. v. Elias, supra;* 2 Fletcher Cyc. Corporations, 440, sec. 557."

See also 19 Am. Jur. 2d, Corporations § 1170 (1965); Annot., 34 A.L.R. 2d 290 (1954).

[8] Plaintiff's evidence shows that Tuscarora is in the textile industry. There is no evidence that the guaranteeing of another corporation's account is part of the ordinary business conducted by Tuscarora. In *Stansell v. Payne, supra*, the president of a bank executed a note for $2,000 in the name of another corporation in which he had an interest. He then endorsed the note for

the bank as president. The bank had no interest in the corporation that borrowed the money and had not authorized the president to endorse the note for it. The note was not paid, and the payee brought suit against the bank on the endorsement. This Court, in reversing judgment for plaintiff, stated:

> " . . . Defendant [bank] is liable for the acts of its [president], T. J. Payne, only when within the scope of his authority, express or implied. It is plaintiff's misfortune that she made no inquiry as to the authority of the president to endorse the note. She had notice that he was acting, in this transaction, not in the interest of defendant bank, but in the interest of himself, or at least of a third party—Carolina Farms & Development Company. She acted in good faith, and believed the endorsement made upon said note, in name of defendant, by its president valid. This fact elicits sympathy for her, but cannot fix defendant with liability for the unauthorized act of T. J. Payne."

In the present case plaintiff apparently realized it was only by authorization of Tuscarora's board of directors that Foil could guarantee the account of Colonial for Tuscarora. This is shown by letter of 20 April 1971 from Barnes, credit manager for plaintiff, to Foil, president of Tuscarora, which reads as follows: "Confirming our telephone conversation yesterday, we are enclosing a form, in duplicate, by which Tuscarora Cotton Mills, Inc., will guarantee the account of Colonial Fabrics, Inc. Please complete both sides of the form returning one copy to us, the extra copy is for your files. . . . " This guaranty form, after setting forth the controlling features of the guaranty, provided for the signature of a corporate officer, a place for a notary public to verify such signature and to further verify that the signature was "so affixed by order of the board of directors of said corporation and that he signed his name thereto by like order." Another portion of the guaranty provided for the secretary's certificate relating to a resolution of the board of directors authorizing the corporate guaranty. Tuscarora refused to execute this guaranty form. Despite this refusal, plaintiff continued to make shipments to Colonial.

Throughout Colonial's transactions with plaintiff, Fowler, president and general manager of Colonial, owned 50% of Colonial's stock. This ownership arrangement renders G.S. 55-22(a) (2) and G.S. 55-22(b) inapplicable to the alleged guaranty

by Tuscarora, and these statutes are not considered in this opinion.

Plaintiff further contends that Tuscarora should be held liable on the oral promise by Foil because Tuscarora had an immediate and pecuniary interest in plaintiff's sales to Colonial. The record fails to show what pecuniary interest, if any, Tuscarora had in Colonial. There is no evidence about how much or the type of business Tuscarora did with Colonial, who conducted it, whether it was for cash or credit, or what type of debt relationship, if any, existed between the two corporations. Regardless of Tuscarora's interest, however, the failure of plaintiff to show that Foil had authority from Tuscarora's board of directors to guarantee the account of Colonial bars plaintiff's right to recover against Tuscarora. The Court of Appeals correctly affirmed the directed verdict entered by the trial court in favor of Tuscarora.

The decision of the Court of Appeals as to all the defendants is affirmed.

Affirmed.

APPENDIX

RULES GOVERNING ADMISSION TO
THE PRACTICE OF LAW

RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

The attached amendment to the Rules Governing Admission to the Practice of Law in the State of North Carolina was duly adopted at a regular quarterly meeting of the Council of The North Carolina State Bar.

BE IT RESOLVED that Rule VII of the Rules Governing Admission to the Practice of Law in the State of North Carolina be and the same is hereby amended by striking the period at the end of Sub-section iv of paragraph 5(b) of Section 1 as appears in 279 N.C. 736 and inserting in lieu thereof a comma and adding the following: ", or as full time member of the Faculty of the Institute of Government of The University of North Carolina at Chapel Hill." and causing said Sub-section iv to read as follows:

RULE VII

Requirements for Comity Applicants

Section 1. (5) b. iv. Serving as a full time teacher in a law school approved by the Council of The North Carolina State Bar, or as full time member of the Faculty of the Institute of Government of The University of North Carolina at Chapel Hill.

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 Governing Admission to the Practice of Law in the State of North Carolina and Rules and Regulations of The North Carolina State Bar has been duly adopted by the Council of The North Carolina State Bar at a regular quarterly meeting of said Council.

Given over my hand and the Seal of The North Carolina State Bar, this the 22nd day of January, 1974.

B. E. James, Secretary-Treasurer
The North Carolina State Bar

After examining the foregoing amendment of the Rules of the Board of Law Examiners as adopted by the Council of The North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 25th day of January, 1974.

William H. Bobbitt, Chief Justice
Supreme Court of North Carolina

Upon the foregoing certificate, it is ordered that the foregoing amendment of the Rules of the Board of Law Examiners and the Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the 25th day of January, 1974.

Moore, J.
For the Court

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WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this index, e.g. Appeal and Error § 1, correspond with titles and section numbers in N. C. Index 2d.

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ACTIONS

§ 3. Moot Questions

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§ 10. Method of Commencement of Action

Where plaintiff could have effected personal service of process by leaving copies of the summons and court order at defendant's residence with a person of suitable age and discretion living there, an attempted service of process by publication was void. *Sink v. Easter*, 555.

ADVERSE POSSESSION

§ 6. Tacking Possession

Adverse possession of a roadway by plaintiffs' mother ripened into a prescriptive easement appurtenant to her land which inured to the benefit of every succeeding possessor of the land. *Dickinson v. Pake*, 576.

§ 22. Presumption of Possession by Holder of Legal Title

The law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears. *Dickinson v. Pake*, 576.

§ 25. Sufficiency of Evidence

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ASSAULT AND BATTERY

§ 5. Assault with Deadly Weapon

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Violation of G.S. 14-34.1 prohibiting the discharge of a firearm into an occupied building is an unspecified felony within the purview of the felony-murder rule. *Ibid.*

Evidence was sufficient to withstand motion for nonsuit in prosecution for murder and for unlawfully discharging a firearm into an occupied building. *Ibid.*

Defendant was properly convicted simultaneously of armed robbery and of felonious assault of one victim arising out of one continuous course of conduct. *S. v. Alexander*, 87.

§ 15. Instructions

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ATTORNEY AND CLIENT

AUTOMOBILES

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BURGLARY AND UNLAWFUL BREAKINGS—Continued

§ 6. Instructions

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§ 7. Verdict and Instructions as to Possible Verdicts

Any error in the submission of lesser degrees of the crime charged was favorable to defendant and hence not prejudicial. *S. v. Frank*, 137.

Trial court in a first degree burglary case erred in failing to submit lesser included offense of felonious breaking or entering where the evidence would not have required the jury to find that defendant entered the dwelling by a burglarious breaking. *S. v. Bell*, 416.

Submission of lesser degrees of the crime in a first degree burglary case was harmless error. *S. v. Foster*, 259.

§ 8. Sentence

Sentence of life imprisonment for first degree burglary was within the statutory limits and did not constitute cruel and unusual punishment. *S. v. Frank*, 137.

Trial court erred in imposing a sentence of 40 years imprisonment on defendant upon his conviction for first degree burglary. *S. v. Summers*, 361.

BURIAL ASSOCIATIONS

Contract between a burial association and members which provided for amendment by statute was not impaired by a statute subsequently enacted permitting payment of funeral benefits in cash to the funeral director who rendered decedent services. *Adair v. Burial Assoc.*, 534.

G.S. 58-224.2 permitting payment of funeral benefits in cash to one other than a burial association's official funeral director, though conflicting with G.S. 58-226, must be given effect since it is the later statute. *Ibid.*

COLLEGES AND UNIVERSITIES

Regulation providing that student classified as nonresident, in order to qualify for in-State tuition, must be domiciled in this State for at least six months preceding the date of reenrollment without being enrolled in an institution of higher education during the six month period is invalid. *Glusman v. Trustees*, 225.

CONSTITUTIONAL LAW

§ 4. Persons Entitled to Raise Constitutional Questions

Whether a party has standing to attack the constitutionality of a statute cannot be settled by stipulation. *Stanley v. Dept. Conservation & Development*, 15.

Taxpayers have standing to attack the constitutionality of the Pollution Abatement and Industrial Facilities Finance Act. *Ibid.*

§ 11. Police Power in General

The power of the State to regulate private institutions and industries under its police power is more extensive than the authority to accomplish

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the same purpose by use of its taxing power. *Stanley v. Dept. Conservation & Development,* 15.

§ 12. Regulations of Trades and Professions

Statute authorizing municipalities and counties to regulate and prohibit beer and wine sales from 1:00 p.m. on Sunday to 7:00 a.m. on Monday, including its proviso that municipalities and counties shall have no authority to regulate and prohibit such sales by establishments having a "brown bagging" permit, is constitutional. *Hursey v. Town of Gibsonville,* 522.

§ 13. Safety, Sanitation and Health Regulations

The Legislature has authority to abate and control pollution of all kinds in the exercise of the State's police power. *Stanley v. Dept. Conservation and Development,* 15.

§ 18. Rights of Assemblage

City ordinance prohibiting a parade upon city streets without obtaining a permit, as construed by the court, is constitutional. *S. v. Frinks,* 472.

§ 20. Equal Protection and Discrimination

Regulation providing that student classified as nonresident, in order to qualify for in-State tuition, must be domiciled in this State for at least six months preceding the date of reenrollment without being enrolled in an institution of higher education during the six month period is invalid. *Glusman v. Trustees,* 225.

§ 22. Religious Liberty

The First Amendment forbids a determination of right to use and control church property on the basis of a judicial determination of adherence to fundamental faiths, doctrines and practices of the church. *Atkins v. Walker,* 306.

§ 25. Obligations of Contracts; Impairment

Contract between a burial association and members which provided for amendment by statute was not impaired by a statute subsequently enacted permitting payment of funeral benefits in cash to the funeral director who rendered decedent services. *Adair v. Burial Assoc.,* 534.

§ 29. Right to Indictment and Trial by Duly Constituted Jury

There was no evidence of arbitrary or systematic exclusion of Negroes from the jury where all prospective Negro jurors were peremptorily challenged by the solicitor. *S. v. Shaw,* 366.

Trial court properly allowed State's challenges for cause to prospective jurors who stated that under no circumstances could they vote for a verdict which would result in the imposition of the death penalty. *S. v. Jarrette,* 625; *S. v. Noell,* 670.

Defendant failed to establish a prima facie case of arbitrary and systematic exclusion of Negroes from the jury. *S. v. Noell,* 670.

§ 30. Due Process in Trial

Defendant's right to a speedy trial was not abridged by an eight to ten months delay. *S. v. Frank,* 137.

CONSTITUTIONAL LAW—Continued

§ 31. Right of Confrontation, Time to Prepare Defense, and Access to Evidence

Defendant's right to obtain and preserve evidence and his right to a fair trial did not include the right to have the crime investigated as he wished. *S. v. Noell*, 670.

Trial court erred in admitting statements and confessions in the consolidated trial of three defendants, but such error was harmless beyond a reasonable doubt. *S. v. Davis*, 701.

§ 32. Right to Counsel

Trial court did not err in refusing to grant defendant's motion to allow his counsel to be present during the summoning of supplemental jurors. *S. v. Shaw*, 366.

Defendant had no constitutional right to the presence of counsel when robbery victims were viewing photographs for purposes of identification. *S. v. Tuggle*, 515.

Conduct of defendant's court-appointed counsel in advising defendant to make a statement to the police did not amount to a denial of defendant's right to effective assistance of counsel so as to preclude the State from using two witnesses discovered as a result of defendant's statement. *S. v. Sneed*, 606.

§ 35. Ex Post Facto Laws

Sentence of death given defendant for a homicide committed prior to State v. Waddell cannot stand. *S. v. Blackmon*, 1.

§ 36. Cruel and Unusual Punishment

Sentence of life imprisonment was the only sentence that could be imposed upon defendant's conviction of first degree murder committed prior to 18 January 1973. *S. v. Alexander*, 87.

The murder statute is constitutional. *Ibid.*

Indeterminate sentence for safecracking is not cruel and unusual punishment. *S. v. Cameron*, 165.

The death penalty was the sole and exclusive punishment for rape committed by defendant subsequent to State v. Waddell. *S. v. Noell*, 670.

Decision of State v. Waddell, holding that a defendant lawfully convicted of first degree murder, rape, first degree burglary or arson committed after 18 January 1973 must be sentenced to death, is reaffirmed. *S. v. Jarrette*, 625.

The death penalty is not unconstitutionally discretionary and arbitrary because (1) the solicitor has the power to prosecute for a lesser charge, (2) the jury has the power to acquit or convict of a lesser charge, and (3) the Governor has the power to commute the sentence or grant a pardon. *Ibid.*

The number of death sentences imposed since State v. Waddell does not show that such decision was contrary to the intent of the Legislature or that the death penalty is imposed arbitrarily in this State. *Ibid.*

The death penalty is not unconstitutional on the ground that those sentenced since State v. Waddell are predominantly non-white. *Ibid.*

The death penalty is not unconstitutional on the ground that it is not the most effective means for obtaining the goals of criminal punishment or on the ground that public opinion has repudiated it. *Ibid.*

CONTRACTS

§ 27. Sufficiency of Evidence and Nonsuit

In an action to recover an amount allegedly due for installing fill in the performance of a contract for improvement of defendant's port facilities, trial court properly found that plaintiff was entitled to compensation for the fill on a unit price basis. *Contracting Co. v. Ports Authority*, 732.

CORPORATIONS

§ 8. Authority and Duty of President and Power to Bind Corporation

Textile corporation was not bound by its president's oral guaranty of payment of another company's account with plaintiff where the president had not been authorized by the corporation's board of directors to guarantee the account. *Burlington Industries v. Foil*, 740.

COSTS

§ 1. Recovery of Costs as Matter of Right by Successful Party

In the absence of statutory authority, a court generally may not include an allowance of attorneys' fees as part of the costs recoverable by the successful party to an action. *Hicks v. Albertson*, 236.

In an eminent domain proceeding brought by a housing authority, award of counsel fees to the landowner was not authorized by statute when judgment was entered awarding title to the housing authority and compensation to the landowner. *Housing Authority v. Farabee*, 242.

§ 3. Taxing of Costs in Discretion of Court

The presiding judge could properly fix a reasonable fee for the attorney of plaintiff who recovered damages by settlement prior to trial. *Hicks v. Albertson*, 236.

CRIMINAL LAW

§ 5. Mental Capacity in General

Trial court in a rape and kidnapping case did not abuse its discretion in denial of defendant's motion for a bifurcated trial—one jury to pass upon the question of his sanity or insanity and a separate jury to pass upon the issue of his guilt. *S. v. Helms*, 508.

Trial court in a rape and kidnapping case did not err in excluding expert psychiatric testimony that defendant lacked substantial capacity to conform his conduct to the requirements of the law by reason of mental defect and in refusing to give special instructions on the irresistible impulse doctrine. *Ibid.*

§ 6. Mental Capacity as Affected by Intoxicating Liquor

Trial court in a homicide case properly instructed the jury on the consideration of defendant's testimony that he had been drinking some whiskey prior to the time of the crime. *S. v. Crews*, 427.

§ 11. Accessories After the Fact

Where defendants were charged with the crime of accessory after the fact to rape, the trial court erred in denying their motion for nonsuit where there was no evidence that defendants actually knew that the principal had committed rape. *S. v. Overman*, 335.

CRIMINAL LAW—Continued

§ 15. Venue

Trial court properly denied defendant's motion for a change of venue and for a special venire from another county on the ground of pretrial publicity. *S. v. Jarrette*, 625.

Defendant waived proper venue by going to trial without requesting transfer to the proper county. *Ibid.*

§ 23. Plea of Guilty

Defendant's letter containing the words "I'm guilty of my charge of murder. Judge here is my confession in writing" was a confession and not a tendered plea of guilty. *S. v. Davis*, 701.

§ 26. Plea of Former Jeopardy

Defendant could be convicted of the murder of one person in the perpetration of an armed robbery and of the armed robbery and felonious assault of a second person. *S. v. Alexander*, 87.

Defendant was properly convicted simultaneously of armed robbery and of felonious assault of one victim arising out of one continuous course of conduct. *Ibid.*

In a prosecution for murder and for unlawfully discharging a firearm into an occupied building, trial court erred in imposing separate punishment for the felony and the murder. *S. v. Williams*, 67.

Where conviction of first degree murder was based on finding that murder was committed in perpetration of armed robbery, no separate punishment could be imposed for the armed robbery. *S. v. Lock*, 182; *S. v. Moore*, 485.

§ 34. Evidence of Defendant's Guilt of Other Offenses

In a prosecution for armed robbery of a grocery store, testimony by the manager of another store that the other store was robbed by defendant 30 minutes before the grocery store robbery and that similar methods were used was properly admitted on the question of identity. *S. v. Tuggle*, 515.

Defendant in a burglary and rape case was not prejudiced by admission of a fingerprint identification card made in 1962 where the card did not disclose defendant's criminal record. *S. v. Jackson*, 321.

Trial court did not err in admission of written and oral confessions containing statements by defendant that he had escaped from prison where defendant interposed only general objections to testimony relating to the confessions. *S. v. Jarrette*, 625.

Trial court properly denied defendant's motion for mistrial on ground that a prospective juror stated that he had read that defendant had been declared an outlaw. *Ibid.*

Trial court properly denied defendant's motion for mistrial made on the ground of an FBI agent's nonresponsive statement implying that defendant had escaped from prison. *Ibid.*

§ 39. Evidence in Rebuttal of Facts Brought Out by Adverse Party

Testimony by witness that she disliked defendant because he had raped her was competent to explain the reason for her bias against defendant which had been brought out on cross-examination. *S. v. Patterson*, 190.

CRIMINAL LAW—Continued

§ 42. Articles Connected with the Crime

Testimony that exhibit was very similar to the shotgun used in a murder sufficiently identified the exhibit as the murder weapon to render it admissible in evidence. *S. v. Patterson*, 190.

§ 43. Photographs

Photographs of fingerprints when shown by extrinsic evidence accurately to represent the prints they purport to show are admissible as substantive evidence. *S. v. Foster*, 259.

Trial court did not err in admitting into evidence properly identified and authenticated photographs of fingerprints and in allowing a police officer to give an opinion based on the photographs. *Ibid.*

§ 50. Opinion Testimony in General

Opinion evidence as to dawn given in a first degree burglary case was not prejudicial to defendant. *S. v. Frank*, 137.

§ 52. Examination of Experts

Although an expert medical witness was unable to say that he had seen a homicide victim on the date of his death, the witness was properly allowed to give his opinion as to the cause of the victim's death based on his treatment and observation of the victim for some four months between the time the victim was shot and the date of his death. *S. v. Holton*, 391.

§ 60. Evidence in Regard to Fingerprints

Photographs of fingerprints when shown by extrinsic evidence accurately to represent the prints they purport to show are admissible as substantive evidence. *S. v. Foster*, 259.

Trial court did not err in admitting into evidence properly identified and authenticated photographs of fingerprints and in allowing a police officer to give an opinion based on the photographs. *Ibid.*

Defendant in a burglary and rape case was not prejudiced by admission of a fingerprint identification card made in 1962 where the card did not disclose defendant's criminal record. *S. v. Jackson*, 321.

§ 63. Evidence as to Sanity of Defendant

Trial court in a rape and kidnapping case did not err in excluding expert psychiatric testimony that defendant lacked substantial capacity to conform his conduct to the requirements of the law by reason of mental defect and in refusing to give special instructions on the irresistible impulse doctrine. *S. v. Helms*, 508.

§ 66. Evidence of Identity by Sight

In-court identification testimony was properly admitted where voir dire evidence supported determination that pretrial photographic procedures were not impermissibly suggestive and that the identification was independent and not influenced by the photographic identification. *S. v. Lock*, 182.

Trial court in a rape case properly allowed in-court identification of defendant based on the prosecutrix' observation of defendant for one and one-half hours at the crime scene. *S. v. Cross*, 174.

CRIMINAL LAW—Continued

In a prosecution for armed robbery of a grocery store, testimony by the manager of another store that the other store was robbed by defendant 30 minutes before the grocery store robbery and that similar methods were used was properly admitted on the question of identity. *S. v. Tuggle*, 515.

Defendant had no constitutional right to the presence of counsel when robbery victims were viewing photographs for purposes of identification. *Ibid.*

Circumstances surrounding photographic identifications of defendant by robbery and kidnapping victims were not impermissibly suggestive and conducive to irreparable mistaken identity and photographic identifications did not taint the victims' in-court identifications of defendant. *Ibid.*

Where admissibility of in-court identification testimony is challenged on the ground it is tainted by out-of-court identification, the trial judge must make findings of fact to determine whether the testimony meets the test of admissibility. *Ibid.*

An officer's in-court identification of defendant as the driver of the car which the officer pursued was properly admitted though the officer had identified defendant from photographs. *S. v. Jarrette*, 625.

§ 67. Evidence of Identity by Voice

Rape victim's identification of defendant by voice when she overheard a conversation between defendant and his attorney after the preliminary hearing in district court did not occur under circumstances unnecessarily suggestive and conducive to irreparable mistaken identification. *S. v. Jackson*, 321.

§ 73. Hearsay Testimony

Testimony that the murder victim had stated he was going to a launderette was admissible as an exception to the hearsay rule. *S. v. Jarrette*, 625.

§ 74. Confessions

Defendant's letter containing the words "I'm guilty of my charge of murder. Judge here is my confession in writing" was a confession and not a tendered plea of guilty. *S. v. Davis*, 701.

Defendant's in-custody statement concerning his employment was not a confession and no voir dire was required to determine its admissibility. *S. v. Shaw*, 366.

§ 75. Voluntariness of Confession and Admissibility

Where the written confession of a retarded 18-year-old defendant was involuntary, subsequent oral confession was likewise presumed to be involuntary in the absence of a showing by the State that defendant was advised that the prior written confession could not be used against him. *S. v. Edwards*, 76.

Defendant's spontaneous and voluntary response to a co-defendant's statement made while defendant was in custody was properly admitted into evidence as a volunteered statement made under circumstances requiring neither warnings nor the presence of counsel. *S. v. Blackmon*, 1.

Statements made by defendants to a police officer during the initial phase of the investigation of the crime were properly admitted for the purpose of impeachment even though defendants had not been given sufficient Miranda warnings. *S. v. Overman*, 335.

CRIMINAL LAW—Continued

Where defendant was advised of his rights without any interrogation, his responses upon having warrants read to him were volunteered and admissible in evidence. *S. v. Herring*, 398.

Statement volunteered by defendant was properly admitted into evidence although defendant had not been given the Miranda warnings and had not waived his constitutional rights. *S. v. Thomas*, 212.

Defendant's signed statement setting forth details of the shooting of deceased was properly admitted into evidence. *Ibid.*

Defendant's prior inconsistent statements made without counsel and without waiver of rights were admissible to impeach defendant. *S. v. Huntley*, 148.

Statement made by a 15-year-old in the absence of counsel was made voluntarily. *S. v. Penley*, 247.

Statement of codefendant was admissible in defendant's trial for larceny from the person. *S. v. Rankin*, 219.

Failure of trial court to make findings of fact after a voir dire to determine the voluntariness of defendant's confession was harmless beyond a reasonable doubt. *S. v. Frank*, 137; *S. v. Davis*, 701.

Defendant's confession made after proper warning was voluntary. *S. v. Moore*, 485.

Trial court did not err in admission of written and oral confessions containing statements by defendant that he had escaped from prison where defendant interposed only general objections to testimony relating to the confessions. *S. v. Jarrette*, 625.

§ 76. Determination and Effect of Admissibility of Confession

Voir dire testimony of a police officer, corroborated by defendant's signed statement, was sufficient to support court's determination that defendant's confession was admissible in evidence. *S. v. Lock*, 182.

The voir dire evidence fully supported the court's determination that statements made by defendant to police in another state were admissible in evidence. *S. v. Crews*, 427.

§ 77. Admissions and Declarations

Trial court properly excluded exculpatory statements made by defendant ten days after commision of the crime. *S. v. Norris*, 103.

§ 79. Acts and Declarations of Companions

Although trial court's instructions that "If two or more persons act together for the common purpose to commit the crime of safecracking, each of them is held responsible for the acts of others done in the commission of the crime of safecracking" did not arise upon the evidence, such instruction did not constitute prejudicial error. *S. v. Cameron*, 165.

Where an accomplice's testimony disclosed his participation in the crime for which defendant was on trial, trial court did not err in allowing the accomplice to testify that he intended to plead guilty to a pending charge against him growing out of the same events. *Ibid.*

§ 81. Best Evidence Rule

Though a tape recording was made of defendant's confession, the best evidence rule did not preclude an officer from reading at trial the transcript of defendant's recorded words. *S. v. Davis*, 701.

CRIMINAL LAW—Continued

§ 84. Evidence Obtained by Unlawful Means

Seizure of hair samples from defendant's head and arm without a warrant while defendant was in custody pursuant to a lawful arrest did not violate defendant's constitutional rights. *S. v. Sharpe*, 157.

Evidence seized in a warrantless search of the 15-year-old defendant's mother's home was admissible where the mother consented to the search. *S. v. Penley*, 247.

Items of property found in a search of defendant's premises made with his consent were properly admitted in his trial for first degree burglary and larceny. *S. v. Frank*, 137.

Officers lawfully seized checks and currency while executing a warrant authorizing a search of defendant's apartment for marijuana, and the checks and currency were properly admitted in defendant's trial for armed robbery. *S. v. Newsom*, 412.

Trial judge was not required to conduct a voir dire examination concerning the legality of defendant's arrest in 1962 upon defendant's general objection to the admission of a fingerprint identification card made in 1962. *S. v. Jackson*, 321.

§ 86. Credibility of Defendant

Cross-examination of defendant as to other unrelated offenses was proper for the purpose of impeachment. *S. v. Foster*, 259.

§ 88. Cross-Examination

Cross-examination of defendant with respect to his whereabouts one year before the crime charged was proper. *S. v. Noell*, 670.

§ 89. Credibility of Witness and Impeachment

Defendant's prior inconsistent statements made without counsel and without waiver of rights were admissible to impeach defendant. *S. v. Huntley*, 148.

Testimony by witness that she disliked defendant because he had raped her was competent to explain the reason for her bias against defendant which had been brought out on cross-examination. *S. v. Patterson*, 190.

Statements made by defendants to a police officer during the initial phase of the investigation of the crime were properly admitted for the purpose of impeachment. *S. v. Overman*, 335.

§ 92. Consolidation of Counts

Trial court properly consolidated for trial charges against defendant for murder, rape, kidnapping and armed robbery. *S. v. Jarrette*, 625.

§ 93. Order of Proof

Order of proof rests in the discretion of the trial judge. *S. v. Foster*, 259.

§ 95. Admission of Evidence Competent for Restricted Purpose

Where the court instructed the jury at the time exhibits were admitted that they were competent only to explain and illustrate testimony of witnesses, the court was not required to repeat such instruction in the charge. *S. v. Crews*, 427.

CRIMINAL LAW—Continued

Trial court erred in admitting statements and confessions in the consolidated trial of three defendants, but such error was harmless beyond a reasonable doubt. *S. v. Davis*, 701.

§ 96. Withdrawal of Evidence

Incompetent evidence followed by immediate withdrawal and instruction by the trial court did not prejudice defendant. *S. v. Noell*, 670.

§ 99. Expression of Opinion by Court on Evidence During Trial

Trial judge's remarks to the solicitor and defendant's counsel did not constitute an expression of opinion. *S. v. Arnold*, 41.

Trial court did not express an opinion in questioning a witness and in instructing a witness to speak louder. *S. v. Everette*, 81.

Actions of the trial court in a rape case did not amount to comments and opinions on the evidence. *S. v. Overman*, 335.

§ 102. Argument and Conduct of Solicitor

The solicitor's remark during his argument to the jury that the grand jury had seen fit to indict defendant was not improper. *S. v. Summers*, 361.

Solicitor's jury argument which traveled outside the record and referred to the veracity of defendant's witnesses did not prejudice defendant. *S. v. Noell*, 670.

§ 111. Form and Sufficiency of Instructions

Immediate correction of an error in the trial judge's instructions was sufficient. *S. v. Foster*, 259.

Defendant in a rape case was not entitled to a new trial because of erroneous instruction appearing in the record where insertion of commas before and after a phrase in the instruction makes it completely accurate. *S. v. Jarrette*, 625.

§ 112. Instructions on Burden of Proof and Presumptions

Trial court was not required to define "reasonable doubt" in the absence of a special request for such instruction. *S. v. Thomas*, 212.

It was not necessary for the trial court in a safecracking case to charge further on the burden of proof in his additional instructions to the jury. *S. v. Cameron*, 165.

Defendant's assignment of error to the trial court's instruction on reasonable doubt did not disclose prejudicial error. *S. v. Huntley*, 148.

Trial court's charge on reasonable doubt was substantially in accord with those approved by the Supreme Court. *S. v. Shaw*, 366.

§ 113. Statement of Evidence and Application of Law Thereto

Although the evidence did not support court's references to the murder weapon as a ".410 gauge shotgun," such references were not prejudicial error since the gauge of the gun was not a material fact in issue. *S. v. Patterson*, 190.

Trial court's instructions with respect to defendant's alleged confession were proper. *S. v. Huntley*, 148.

§ 117. Charge on Credibility of Witnesses

Trial court's omission of the words "or any part" from its instructions that the jury "may believe all that a witness says or you may believe none" was not prejudicial error. *S. v. Jarrette*, 625.

CRIMINAL LAW—Continued

§ 118. Charge on Contentions of the Parties

Defendant was not prejudiced by failure of the court to charge further on defendant's contentions regarding intoxication. *S. v. Thomas*, 212.

Failure of defendant to object to the court's charge on the State's contentions constituted a waiver of objection. *S. v. Rankin*, 219.

§ 126. Unanimity of Verdict, Polling the Jury, and Acceptance of Verdict

Trial court did not err in instructing jury that the verdict must be unanimous, nor did it err in the manner of the return of the verdict and the polling of the jury. *S. v. Norris*, 103.

Where a juror stated during the poll that she found defendant guilty of first degree murder "according to the law," trial court properly accepted the verdict after the clerk repeated the poll and the juror stated that her verdict was guilty of first degree murder and that she still assented thereto. *S. v. Lock*, 182.

§ 127. Arrest of Judgment

Defendant's conviction of possession of a firearm by a felon is vacated where, pending his appeal, defendant's citizenship rights were restored and he was thereby exempted from the provisions of the firearm statute. *S. v. Currie*, 562; *S. v. Cobb*, 573.

§ 128. Discretionary Power of Court to Set Aside Verdict and Order Mistrial

Trial court properly denied defendant's motion for mistrial made on ground that a prospective juror stated that he had read that defendant had been declared an outlaw. *S. v. Jarrette*, 625.

§ 135. Judgment and Sentence in Capital Case

Sentence of death given defendant for a homicide committed prior to State v. Waddell cannot stand. *S. v. Blackmon*, 1.

Sentence of life imprisonment was the only sentence that could be imposed upon defendant's conviction of first degree murder committed prior to 18 January 1973. *S. v. Alexander*, 87.

Trial court properly allowed State's challenges for cause to prospective jurors who stated that under no circumstances could they vote for a verdict which would result in the imposition of death penalty. *S. v. Jarrette*, 625; *S. v. Noell*, 670.

The death penalty was the sole and exclusive punishment for rape committed by defendant subsequent to State v. Waddell. *S. v. Noell*, 670.

Decision of State v. Waddell, holding that a defendant lawfully convicted of first degree murder, rape, first degree burglary or arson committed after 18 January 1973 must be sentenced to death, is reaffirmed. *S. v. Jarrette*, 625.

The death penalty is not unconstitutionally discretionary and arbitrary because (1) the solicitor has the power to prosecute for a lesser charge, (2) the jury has the power to acquit or convict of a lesser charge, and (3) the Governor has the power to commute the sentence or grant a pardon. *Ibid.*

The number of death sentences imposed since State v. Waddell does not show that such decision was contrary to the intent of the Legislature or that the death penalty is imposed arbitrarily in this State. *Ibid.*

CRIMINAL LAW—Continued

§ 177. Determination and Disposition of Cause

The opinion in State v. Yoes and Hale v. State, 271 N.C. 616, is reaffirmed in this belated appeal in which defendant adopted the record, assignments of error and brief filed by his codefendants in those cases. *S. v. Hairston,* 402.

DEEDS

§ 6. Execution, Acknowledgment and Probate

Though the original deed was not in evidence, the record of the deed recited words sufficient to raise a presumption that there was a seal by the grantor to his signature on the original deed. *Williams v. Board of Education,* 588.

§ 7. Delivery, Acceptance, and Registration

In 1797 and 1798 once a deed was validly registered within the permissible statutory period, for purposes of priority it related back to the time of execution and delivery of the deed. *Williams v. Board of Education,* 588.

Delivery is essential to the validity of a deed, and the date recited in the beginning of a deed is prima facie evidence that it was delivered on that date. *Ibid.*

The deed in defendants' chain of title which was delivered eight months prior to the deed in plaintiff's chain of title took priority over plaintiffs' deed though plaintiffs' deed was recorded six months prior to defendants' deed. *Ibid.*

DESCENT AND DISTRIBUTION

§ 13. Release of Right to Share in Estate

A separation agreement between a husband and wife, when construed to give effect to the intentions of the parties, constitutes a release of the right to share in the deceased spouse's estate. *Lane v. Scarborough,* 407.

EASEMENTS

§ 4. Creation of Easement by Prescription

Plaintiffs' evidence was sufficient for the jury in an action to establish an easement by prescription to use an unpaved roadway leading from plaintiffs' land over the land of defendants to a public road. *Dickinson v. Pake,* 576.

§ 9. Easements Running with the Land

Adverse possession of a roadway by plaintiffs' mother ripened into a prescriptive easement appurtenant to her land which inured to the benefit of every succeeding possessor of the land. *Dickinson v. Pake,* 576.

EMINENT DOMAIN

§ 9. Condemnation by Housing Authority

In an eminent domain proceeding brought by a housing authority, award of counsel fees to the landowner was not authorized by statute when judgment was entered awarding title to the housing authority and compensation to the landowner. *Housing Authority v. Farabee,* 242.

EVIDENCE

§ 32. Parol or Extrinsic Evidence Affecting Writings

In an action to recover on a renewal promissory note, parol evidence rule did not prohibit the admission of evidence by defendant to prove that contemporaneously with the signing of defendant's original note defendant and plaintiff's agent agreed the note would include the amounts of two customers' notes for bookkeeping purposes only but that defendant would not be liable for the payment of such amounts. *Borden, Inc. v. Brower,* 54.

§ 48. Competency and Qualification of Experts

Court of Appeals erred in ruling that the qualification of plaintiff's medical witness to answer hypothetical questions propounded to him was not presented because plaintiff did not formally tender the witness as an expert. *Dickens v. Everhart,* 95.

§ 50. Medical Testimony

Trial court in a malpractice action erred in ruling that, because plaintiff's medical expert was not in 1964 familiar with the quality of medical practice in Mount Airy, he could not state his opinion as to whether the treatment of decedent was in accord with accepted medical practice in 1964 in a community similar to Mount Airy. *Dickens v. Everhart,* 95.

FRAUDS, STATUTE OF

§ 5. Contract to Answer for Debt or Default of Another

Plaintiff's evidence was insufficient to support jury finding that defendant had sufficient direct, immediate and pecuniary interest in a corporation's transactions with plaintif so that defendant's oral guaranty of payment for yarn furnished by plaintiffs to the corporation did not come within the statute of frauds. *Burlington Industries v. Foil,* 740.

GUARANTY

Textile corporation was not bound by its president's oral guaranty of payment of another company's account with plaintiff where the president had not been authorized by the corporation's board of directors to guarantee the account. *Burlington Industries v. Foil,* 740.

HOMICIDE

§ 4. Murder in the First Degree

Defendant could be convicted of the murder of one person in the perpetration of an armed robbery and of the armed robbery and felonious assault of a second person. *S. v. Alexander,* 87.

Violation of G.S. 14-34.1 prohibiting the discharge of a firearm into an occupied building is an unspecified felony within the purview of the felony-murder rule. *S. v. Williams,* 67.

In a prosecution for murder and for unlawfully discharging a firearm into an occupied building, trial court erred in imposing separate punishment for the felony and the murder. *Ibid.*

§ 12. Indictment

Indictment for first degree murder is sufficient if it follows the language of G.S. 15-144. *S. v. Patterson,* 190.

HOMICIDE—Continued

There was no fatal variance between an indictment charging that deceased was killed on 4 September 1971 and evidence that deceased was shot on that date but did not die until 29 December 1971. *S. v. Holton,* 391.

Where the indictment drawn under G.S. 15-144 charged that defendant murdered his victim after premeditation and deliberation, trial court did not err in charging the jury that it might convict defendant upon finding that defendant killed deceased after premeditation and deliberation or in the perpetration of armed robbery. *S. v. Moore,* 485.

§ 14. Presumptions and Burden of Proof

Where presumptions arise upon the State's evidence that a killing was unlawful and with malice, defendant has the burden of satisfying the jury that the homicide was committed without malice or was justified on the ground of self-defense. *S. v. Jackson,* 383.

An accused may establish facts in mitigation of a killing from the evidence offered against him as well as the evidence he may offer. *S. v. Jackson,* 383.

A contention by defendant that a homicide was the result of accident or misadventure is merely a denial of guilt and does not constitute an affirmative defense. *S. v. Crews,* 427.

§ 15. Relevancy and Competency of Evidence

Although an expert medical witness was unable to say that he had seen a homicide victim on the date of his death, the witness was properly allowed to give his opinion as to the cause of the victim's death based on his treatment and observation of the victim for some four months between the time the victim was shot and the date of his death. *S. v. Holton,* 391.

Trial court properly allowed an SBI agent to testify that the victims were dead when he observed their bodies at the crime scene and to state what wounds he observed on the bodies. *S. v. Robertson,* 549.

§ 17. Evidence of Threats, Motive and Malice

Evidence in first degree murder case that on various occasions during the years prior to her death defendant intentionally inflicted personal injuries on the victim was admissible as bearing on intent, malice, motive, and premeditation and deliberation. *S. v. Patterson,* 190.

§ 20. Demonstrative Evidence; Photographs and Physical Objects

Testimony that exhibit was very similar to the shotgun used in a murder sufficiently identified the exhibit as the murder weapon to render it admissible in evidence. *S. v. Patterson,* 190.

Photographs of unclothed portions of the victim's body were properly admitted for the purpose of illustrating the testimony of a doctor. *S. v. Crews,* 427.

§ 21. Sufficiency of Evidence and Nonsuit

Evidence was sufficient to withstand motion for nonsuit in prosecution for murder and for unlawfully discharging a firearm into an occupied building. *S. v. Williams,* 67.

Evidence was sufficient for the jury in first degree murder prosecution. *S. v. Everette,* 81; *S. v. Patterson,* 190.

JUDGMENTS

§ 36. Parties Concluded

Normally no matter how erroneous a final valid judgment may be on either the facts or the law, it has binding *res judicata* and collateral estoppel effect on all courts, federal and state, on the parties and their privies. *King v. Grindstaff*, 348.

§ 38. Judgments of Federal Courts

Where mother and daughter injured in a collision with a truck recovered for their personal injuries in a federal court against the driver, owners and lessee of the truck, the personal representative of the husband and son killed in the same accident brought wrongful death actions in a State court against the same defendants, and the mother and daughter were the sole beneficiaries of any recovery in the State wrongful death actions, the doctrine of collateral estoppel by judgment applied so that the only issue remaining for jury determination in the State wrongful death action was the issue of damages. *King v. Grindstaff*, 348.

JURY

§ 1. Right to Trial by Jury

Statutes authorizing review of annexation proceedings by the court without a jury are not unconstitutional. *In re Annexation Ordinance*, 442.

§ 2. Special Venires

Trial court did not err in refusing to grant defendant's motion to allow his counsel to be present during the summoning of supplemental jurors. *S. v. Shaw*, 366.

Trial court properly denied defendant's pretrial motion "for a special jury venire composed of blacks and young people of his age group, in addition to the regular jury venire." *S. v. Robertson*, 549.

Trial court properly denied defendant's motion for a change of venue and for a special venire from another county on the ground of pretrial publicity. *S. v. Jarrette*, 625.

§ 5. Personal Disqualification

Jurors acquainted with defendant who were challenged for cause were properly excused. *S. v. Noell*, 670.

§ 6. Examination of Jurors

Trial court did not err in refusing to allow defense counsel to ask prospective jurors whether they would adopt an interpretation of the evidence which points to innocence and reject that of guilt if they found the evidence is susceptible of two reasonable interpretations. *S. v. Jackson*, 321.

Trial court properly denied defendant's motion that prospective jurors be questioned out of the presence of other jurors on the ground that prospective jurors might refer to what they had read or heard about defendant's being an escaped prisoner. *S. v. Jarrette*, 625.

Trial court properly permitted the solicitor to propound questions to prospective jurors concerning their views about the death penalty. *Ibid.*

§ 7. Challenges

There was no evidence of arbitrary or systematic exclusion of Negroes from the jury where all prospective Negro jurors were peremptorily challenged by the solictor. *S. v. Shaw*, 366.

MASTER AND SERVANT—Continued

§ 94. Findings and Award of Commission

In reviewing a workmen's compensation award, the Industrial Commission is authorized to modify or strike out findings of fact made by the hearing commissioner. *Lee v. Henderson & Associates*, 126.

MUNICIPAL CORPORATIONS

§ 2. Territorial Extent and Annexation

Substantive rights of petitioners were not prejudiced by the absence from the city's plan for extension of services into an area to be annexed of a "proposed timetable" for construction of major trunk water mains and sewer outfall lines into the area. *Dunn v. City of Charlotte*, 542.

The burden was upon petitioners who appealed from the annexation ordinance to show that the city failed to meet the statutory requirements or that there was irregularity in the proceedings which materially prejudiced their substantive rights. *Ibid.*

A city's plan to purchase and use water tankers for fire protection in an area to be annexed until fire hydrants could be installed met statutory requirements. *Ibid.*

A city's plan to finance the extension of services into an area to be annexed, including the contemplated use of federal funds, complied with the statute. *Ibid.*

Annexation ordinances were not defective because services to be provided the areas to be annexed were not set forth in the ordinances themseslves. *Ibid.*

Where the city divided an area to be annexed into small study areas and applied population credits as provided for by statute only to the study area in which such credits were accumulated rather than to the whole area to be annexed, the city's action constituted an unreasonable departure from the statutory standards. *In re Annexation Ordinance*, 442.

Statutes authorizing review of annexation proceedings by the court without a jury are not unconstitutional, nor have they been superseded by N. C. Rule of Civil Procedure No. 38(a). *Ibid.*

§ 30. Zoning Ordinances and Building Permits

A prospective vendee under contract to purchase the property to be affected by the granting of a zoning variance or a special use permit is a proper party to apply therefor or to appeal a denial thereof. *Refining Co. v. Board of Aldermen*, 458.

Ordinance of the Town of Chapel Hill providing for issuance of special use permits was not void for lack of adequate guiding standards. *Ibid.*

For failure of defendant board of aldermen to comply with the terms of a city ordinance requiring submission of a request for a special use permit to the planning board, the aldermen's denial of plaintiff's application for a permit must be set aside. *Ibid.*

§ 39. Issuance of Bonds and Levy of Taxes

The Legislature may exempt revenue bonds of a municipal corporation from taxation. *Stanley v. Dept. Conservation & Development*, 15.

NEGLIGENCE

§ 5. Dangerous Instrumentality

A parent may incur liability for injuries to others resulting from the use by a child of an instrumentality not inherently dangerous but which becomes dangerous because of the child's immaturity or lack of judgment. *Anderson v. Butler*, 723.

A forklift is not a dangerous instrumentality per se. *Ibid.*

§ 18. Contribtuory Negligence of Minors

A child between the ages of seven and fourteen may not be held guilty of contributory negligence as a matter of law. *Anderson v. Butler*, 723.

§ 57. Sufficiency of Evidence and Nonsuit in Action by Invitee

In an action to recover for personal injuries sustained by minor plaintiff when he was struck by a forklift operated by defendants' minor son, evidence was sufficient to be submitted to the jury with respect to the negligence of the male defendant but not the female defendant. *Anderson v. Butler*, 723.

§ 58. Nonsuit for Contributory Negligence of Invitee

Since a child between the ages of seven and fourteen may not be held guilty of contributory negligence as a matter of law, there was no issue as to a nine year old plaintiff's contributory negligence in determining defendant's right to a directed verdict. *Anderson v. Butler*, 723.

NUISANCE

§ 10. Abatement of Public Nuisances

The Legislature has authority to abate and control pollution of all kinds in the exercise of the State's police power. *Stanley v. Dept. Conservation & Development*, 15.

Pollution Abatement and Industrial Facilities Finance Act is unconstitutional. *Ibid.*

PARENT AND CHILD

§ 8. Liability of Parent for Tort of Child

A parent may incur liability for injuries to others resulting from the use by a child of an instrumentality not inherently dangerous but which becomes dangerous because of the child's immaturity or lack of judgment. *Anderson v. Butler*, 723.

PHYSICIANS & SURGEONS, ETC.

§ 11. Malpractice Generally

A physician is held to the standards of professional competency and care customary in similar communities among physicians engaged in his field of practice. *Dickens v. Everhart*, 95.

Trial court in a malpractice action committed prejudicial error in permitting defense counsel to argue to the jury that 12 doctors, who were listed as defense witnesses but did not testify, would have testified to the same thing that his client had testified to. *Crutcher v. Noel*, 568.

PHYSICIANS AND SURGEONS, ETC.—Continued

§ 15. Competency and Relevancy of Evidence; Matters in Exclusive Province of Experts

Trial court in a malpractice action erred in ruling that, because plaintiff's medical expert was not in 1964 familiar with the quality of medical practice in Mount Airy, he could not state his opinion as to whether the treatment of decedent was in accord with accepted medical practice in 1964 in a community similar to Mount Airy. *Dickens v. Everhart*, 95.

RAPE

§ 4. Relevancy and Competency of Evidence

Evidence that defendant abducted a young woman several hours prior to the abduction and rape of his victim was admissible to show a common plan or scheme of defendant. *S. v. Arnold*, 41.

Testimony of the prosecutrix in a rape case that she became pregnant as a result of the rape allegedly committed by defendant was competent. *S. v. Cross*, 174.

Evidence concerning defendant's whereabouts 40 days subsequent to the date of the charged crime was irrelevant, but its admission was not prejudicial. *S. v. Shaw*, 366.

Incompetent evidence followed by immediate withdrawal and instruction by the trial court did not prejudice defendant. *S. v. Noell*, 670.

§ 5. Sufficiency of Evidence

State's evidence was sufficient for the jury in a prosecution for rape. *State v. Arnold*, 41; *S. v. Carthens*, 111; *S. v. Norris*, 103; *S. v. Overman*, 335.

State's evidence, including fingerprint and voice identification testimony, was sufficient for the jury in a prosecution for burglary and rape. *S. v. Jackson*, 321.

Evidence was sufficient to be submitted to the jury where it consisted of uncorroborated testimony of the prosecutrix. *S. v. Shaw*, 366.

State's evidence was sufficient for the jury in a prosecution for the rape of a nine-year-old girl. *S. v. Robertson*, 549.

§ 6. Instructions and Submission of Lesser Degrees of the Crime

Trial court properly failed to instruct on lesser included offenses in a rape case. *S. v. Arnold*, 41; *S. v. Jarrette*, 625.

Defendant in a rape case was not entitled to a new trial because of an erroneous instruction appearing in the record where insertion of commas before and after a phrase in the instruction makes it completely accurate. *S. v. Jarrette*, 625.

Failure of trial court in a rape case to submit lesser included offense of assault with intent to commit rape was not error. *S. v. Noell*, 670.

§ 7. Verdict and Judgment

Trial court properly sentenced defendant to life imprisonment for rape committed prior to the decision in State v. Waddell. *S. v. Robertson*, 549.

The death penalty was the sole and exclusive punishment for rape committed by defendant subsequent to State v. Waddell. *S. v. Noell*, 670.

REGISTRATION

§ 4. Priorities

In 1797 and 1798 once a deed was validly registered within the permissible statutory period, for purposes of priority it related back to the time of execution and delivery of the deed. *Williams v. Board of Education*, 588.

The deed in defendants' chain of title which was delivered eight months prior to the deed in plaintiffs' chain of title took priority over plaintiffs' deed though plaintiffs' deed was recorded six months prior to defendants' deed. *Ibid.*

RELIGIOUS SOCIETIES AND CORPORATIONS

§ 2. Government, Management, and Property

The First Amendment forbids a determination of right to use and control church property on the basis of a judicial determination of adherence to fundamental faiths, doctrines and practices of the church. *Atkins v. Walker*, 306.

The congregation of a Missionary Baptist Church had the right, by majority vote, to adopt a constitution and bylaws, to call the man of its choice to its pastorate, to disassociate the church from other Baptist churches and organizations, and to determine what literature should be used in church activities. *Ibid.*

§ 3. Actions

A minority group of a Missionary Baptist Church may contest the validity of an action of the congregation by showing that such action was not taken in a meeting duly called and conducted according to the procedures of the church. *Atkins v. Walker*, 306.

ROBBERY

§ 4. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient for jury in armed robbery prosecution. *S. v. Carthens*, 111.

§ 5. Instructions

Trial court in armed robbery case did not err in referring in the charge to the taking and carrying away of money as an element of the robbery. *S. v. Lock*, 182.

§ 6. Verdict and Sentence

Defendant was properly convicted simultaneously of armed robbery and of felonious assault of one victim arising out of one continuous course of conduct. *S. v. Alexander*, 87.

RULES OF CIVIL PROCEDURE

§ 4. Process

Where plaintiff could have effected personal service of process by leaving copies of the summons and court order at defendant's residence with a person of suitable age and discretion living there, an attempted service of process by publication was void. *Sink v. Easter*, 555.

RULES OF CIVIL PROCEDURE — Continued

Even if service of process by publication had been proper in this case, the service would still have been fatally defective for failure to mail a copy of the notice to defendant's known address. *Ibid.*

§ 38. Jury Trial of Right

Statutes authorizing review of annexation proceedings by the court without a jury have not been superseded by N. C. Rules of Civil Procedure No. 38(a). *In re Annexation Ordinance*, 442.

§ 50. Motion for Directed Verdict and for Judgment N.O.V.

Trial court erred in granting defendants' motion for judgment n.o.v. where evidence offered by plaintiffs was sufficient to withstand defendants' motion for directed verdict. *Dickinson v. Pake*, 576.

In an action in which the appellate court reversed the grant of a judgment n.o.v. for defendants, the court also vacated the trial court's order conditionally granting defendants a new trial. *Ibid.*

Requirement that a motion for a directed verdict state the specific grounds therefor is mandatory. *Anderson v. Butler*, 723.

§ 68. Offer of Judgment

Plaintiff's interpretation of defendant's offer of judgment to include attorneys' fees as part of the costs was reasonable. *Hicks v. Albertson*, 236.

SAFECRACKING

Indeterminate sentence for safecracking is not cruel and unusual punishment. *S. v. Cameron*, 165.

In imposing sentence for safecracking, trial court was not confined to the lower limit of 10 years provided in the statute but could properly impose a term of not less than 25 years. *Ibid.*

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

Seizure of hair samples from defendant's head and arm without a warrant while defendant was in custody pursuant to a lawful arrest did not violate defendant's constitutional rights. *S. v. Sharpe*, 157.

Officers lawfully seized checks and currency while executing a warrant authorizing a search of defendant's apartment for marijuana, and the checks and currency were properly admitted in defendant's trial for armed robbery. *S. v. Newsom*, 412.

§ 2. Consent to Search Without Warrant

Evidence seized in a warrantless search of the 15-year-old defendant's mother's home was admissible where the mother consented to the search. *S. v. Penley*, 247.

Miranda warnings are inapplicable to searches and seizures. *S. v. Frank*, 137.

Items of property found in a search of defendant's premises made with his consent were properly admitted in his trial for first degree burglary and larceny. *Ibid.*

SEARCHES AND SEIZURES — Continued

§ 3. Requisites and Validity of Search Warrant

An affidavit was sufficient to support issuance of a search warrant for marijuana concealed in the luggage of two airline passengers. *S. v. Ellington*, 198.

STATUTES

§ 5. General Rules of Construction

If a strict literal interpretation of a statute contravenes the manifest purpose of the Legislature, the purpose of the law should control and the strict letter thereof should be disregarded. *In re Annexation Ordinance*, 442.

§ 8. Prospective and Retroactive Effect

It was within the power of the Legislature to enact G.S. 48-23(3) after the death of the testator enlarging the class entitled to take under a provision of a will creating a contingent interest by providing that "issue" include adopted children. *Peele v. Finch*, 375.

§ 11. Repeal and Revival

G.S. 58-224.2 permitting payment of funeral benefits in cash to one other than a burial association's official funeral director, though conflicting with G.S. 58-226, must be given effect since it is the later statute. *Adair v. Burial Assoc.*, 534.

Defendant's conviction of possession of a firearm by a felon is vacated where, pending his appeal, defendant's citizenship rights were restored and he was thereby exempted from the provisions of the firearm statute. *S. v. Currie*, 562; *S. v. Cobb*, 573.

TAXATION

§ 1. Power to Tax

The power of the State to regulate private institutions and industries under its police power is more extensive than the authority to accomplish the same purpose by use of its taxing power. *Stanley v. Dept. Conservation & Development*, 15.

§ 2. Uniform Rule and Discrimination

Statute requiring taxes on bottled soft drinks, soft drink powders and soft drink syrups and providing for payment of such tax through the purchase and application of stamps was not discriminatory where an alternate method of payment of the tax was provided but was available only as to bottled drinks and powders. *Biggers Brothers v. Jones*, 600.

§ 7. Public Purpose

Rules relating to determination as to whether an activity is for a public purpose. *Stanley v. Dept. Conservation & Development*, 15.

Pollution Abatement and Industrial Facilities Finance Act is unconstitutional. *Ibid.*

§ 15. Sales, Use, and Transfer Taxes

Statute requiring taxes on bottled soft drinks, soft drink powders and soft drink syrups and providing for payment of such tax through the

WORD AND PHRASE INDEX

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