NORTH CAROLINA REPORTS

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SUPREME COURT OF NORTH CAROLINA

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THE SUPREME COURT OF NORTH CAROLINA

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Associate Justices

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

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	JAMES H. POU BAILEY	Raleigh
11	HARRY E. CANADAY	Smithfield
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	COY E. BREWER	Fayetteville
13	EDWARD B. CLARK	Elizabethtown
14	CLARENCE W. HALL	Durham
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16	HENRY A. MCKINNON, JR.	Lumberton

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	THOMAS W. SEAY, JR.	Spencer
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	HARVEY A. LUPTON	Winston-Salem
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30	LACY H. THORNBURG	Webster

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[1] Appointed Associate Judge, Court of Appeals, 29 July 1974.
[2] Appointed 1 October 1974.
[3] Deceased 26 October 1974.

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	BILL J. MARTIN[17]	Hickory
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	J. CHARLES McDARRIS	Waynesville

[1] Elected 5 November 1974 and took office 2 December 1974 to succeed Fentress Horner who retired 30 November 1974.

[2] Elected 5 November 1974 and took office 2 December 1974 to succeed Wilton F. Walter whose term expired 1 December 1974.

[3] Elected 5 November 1974 and took office 2 December 1974.

[4] Appointed 11 April 1974 to succeed N. F. Ransdell who retired 31 March 1974.

[5] Elected 5 November 1974 and took office 2 December 1974.

[6] Elected 5 November 1974 and took office 2 December 1974 to succeed Seavy A. Carroll whose term expired 1 December 1974.

[7] Elected 5 November 1974 and took office 2 December 1974.

[8] Elected 5 November 1974 and took office 2 December 1974.

[9] Elected 5 November 1974 and took office 2 December 1974 to succeed Thomas H. Lee whose term expired 1 December 1974.

[10] Elected 5 November 1974 and took office 2 December 1974 to succeed Hal Hammer Walker whose term expired 1 December 1974.

[11] Elected 5 November 1974 and took office 2 December 1974 to succeed Odell Sapp whose term expired 1 December 1974.

[12] Elected 5 November 1974 and took office 2 December 1974 to succeed L. Roy Hughes whose term expired 1 December 1974.

[13] Elected 5 November 1974 and took office 2 December 1974 to suceed C. H. Dearman whose term expired 1 December 1974.

[14] Elected 5 November 1974 and took office 2 December 1974 to succeed Wheeler Dale whose term expired 1 December 1974.

[15] Elected 5 November 1974 and took office 2 December 1974 to succeed Randy Dean Duncan whose term expired 1 December 1974.

[16] Elected 5 November 1974 and took office 2 December 1974 to succeed Marshall E. Cline whose term expired 1 December 1974.

[17] Elected 5 November 1974 and took office 2 December 1974 to succeed John David Ingle whose term expired 1 December 1974.

[18] Elected 5 November 1974 and took office 2 December 1974.

[19] Appointed 2 December 1974 to succeed William H. Abernathy who resigned 31 October 1974.

[20] Elected 5 November 1974 and took office 2 December 1974.

ATTORNEY GENERAL OF NORTH CAROLINA

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30	MARCELLUS BUCHANAN III	Sylva

CASES REPORTED

PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

PETITIONS TO REHEAR

GENERAL STATUTES CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

LICENSED ATTORNEYS

I, Fred P. Parker III, Executive Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 1st day of September, 1974, and said persons have been issued certificates of this Board:

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CAROLYN DENTON JOHNSON	Durham
KENNETH MCARTHUR JOHNSON	Shallotte
LEE BEST JOHNSON	Dunn
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ROBERT PERRY JOHNSTON	Durham
THOMAS WALLS JORDAN, JR.	Raleigh
CANNIE RAY JOYNER	Rocky Mount
ROBERT WAYNE KAYLOR	Chapel Hill
KENNETH RALPH KELLER	Raleigh
MICHAEL EVERETTE KELLY	Chapel Hill
BARRY BLOUNT KEMPSON	Asheville
JENNINGS GRAHAM KING, JR.	Winston-Salem
GEORGE MATTHEW KINGSLEY	Wilmington
RICHARD JEFFREY KLINE	Charlotte
KENNETH DAVID KNIGHT	Eden
LEIGH EMERSON KOMAN	Durham
ARPAD DE KOVACSY	Durham
LAURA ANTOINETTE KRATT	Charlotte
LOKIE CHARLES LACKEY	Greensboro
PAUL LENDON LASSITER	Raleigh
DURWOOD SWINDELL LAUGHINGHOUSE	Pantego
LARRY BRUCE LEAKE	Raleigh
CHARLES BEAUREGARD LEFLER, JR.	Albemarle
ELIZABETH MCNEELY LEIGHT	Carrboro
JAMES RICHARD LEVINSON	Benson
FREDERICK GUSTAVE LIND	Chicago, Ill.
ANNE REBECCA LITTLEJOHN	Carrboro
WILLIAM CHARLES LIVINGSTON	Chapel Hill
PHILIP BRUCE LOHR	Lexington
SAMUEL HENRY LONG III	Raleigh
JAMES MINOR LUDLOW, JR.	Chapel Hill
PAMELA BROOKS GANN LUTHER	Charlotte

KENNETH WAYNE MCALLISTER	High Point
JOHN NOWLIN MCCLAIN, JR.	Signal Mountain, Tenn.
JOEL CALDWELL MCCONNELL, JR.	Winston-Salem
JAMES ALEXIS MACDONALD	Winston-Salem
LEIGHTON WILSON MCFARLAND III	Greensboro
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PETER MICHAEL MCHUGH	Reidsville
ALBERT STUART MCKAIG III	Charlotte
JAMES BRUCE MCKINNEY	Louisville, Ky.
DAN JOHNSON MCLAMB	Raleigh
DANIEL FRANCIS MCLAWHORN	Newport
MICHAEL BRUCE MAGERS	Winston-Salem
GREGORY COLEMAN MALHOIT	Raleigh
MICHAEL STEVEN MANDEL	Durham
DAVID HUFF MANER	Winston-Salem
JULIAN MANN III	Raleigh
EDWARD MARCUS MARSH, JR.	Winston-Salem
MICHAEL TERRY MARSHALL	Greensboro
DOUGLAS MCCORKLE MARTIN	Asheville
JAMES ANDY MARTIN	Charlotte
ALEX LOUIS MARUSAK	Ennis, Tex.
JOAN DAVISON MASON	Raleigh
MICHAEL DANA MASON	Raleigh
RICHARD ELIE MATTAR	Blowing Rock
JEANINE LOUISE MATTE	Carrboro
JAMES MICHAEL MATTHEWS	Durham
CLARENCE VANCE MATTOCKS	Carrboro
JONATHAN VIRETT MAXWELL	Chapel Hill
JAMES RANDALL MAY	High Point
HIRAM JOHNSON MAYO, JR.	New Bern
TRAYLOR TULLAR MERCER	Durham
TURNER PAUL MESSICK, JR.	Burlington
KATHRINE SUE MILLER	Winston-Salem
SONDRA BOYLES MILLER	Chapel Hill
TIMOTHY EUGENE MITCHELL	Spindale
PHILIP HARBY MOISE	Durham
DANIEL HOPKINS MONROE, JR.	Burlington
ROBERT EUGENE MONROE	Deposit, N. Y.
CHARLES HARVEY MONTGOMERY	Cary
JOSEPH CALHOUN MOORE III	Raleigh
WILLIAM RICHARD MOORE	Four Oaks
GARY LAMBETH MURPHY	Greensboro
JAMES DONALD MYERS	Charlotte
ROBERT GERALD NATH	Raleigh
WILLIAM ANDERSON NEWMAN	Clinton
WALTER MARCUS NEWTON	Columbia, S. C.
GARY WINFORD NICHOLS	Hayesville
LENDAL STAUNTON NORRIS	Burnsville
MITCHELL DOUGLAS NORTON	Salemburg
DANIEL CALVIN OAKLEY	Chapel Hill
RORY ROBERT OLSEN	Durham
JOHN BURKE O'DONNELL, JR.	Raleigh
JAMES FRANCIS O'NEILL	Chapel Hill

JOHN KIRK OSBORN	Chapel Hill
DOUGLAS FLOYD OSBORNE, JR.	Eden
RONALD MARTIN OWEN	Rocky Mount
JOHN RICHARD PARKER	Murfreesboro
LARRY BENSON PARKER	Raleigh
RAYMOND ALBERT PARKER II	Winston-Salem
WILLIAM ANDREW PARKER	Greensboro
CARL FRANKLIN PARRISH	Winston-Salem
MICHAEL FREDERICK PARRISH	Knoxville, Tenn.
DAVID BATE PARSONS	Greensboro
CHRISTOPHER BIRAM PASCAL	Durham
WILLIAM DANIEL PATE	Rowland
MARGARET PHILLIS PAYNE	Winston-Salem
ROBERT SHEPHERD PAYNE	Winston-Salem
MICHAEL PENDEXTER PEAVEY	Durham
JOHN FULTON PENDERGRASS	Chapel Hill
HUGH HERMAN PEOPLES	Mount Airy
RONALD LIMER PERKINSON	Winston-Salem
BONNIE JEAN PETER	Statesville
STEVEN EDWARD PHILO	Winston-Salem
RICHARD WAYNE PICKETT	Chapel Hill
ASHMEAD PRINGLE PIPKIN	Durham
GEOFFREY ALAN PLANER	Gastonia
WILLIAM EDWARD POE, JR.	Charlotte
RAEMON MAURICE POLK	Greensboro
ALFRED MAURY POLLARD	Chapel Hill
SCOTT TROENDLY POLLARD	Chapel Hill
THOMAS LAWRENCE POLLARD	Durham
WILLIAM ROBERT POPE, JR.	Mooresville
RICHARD FREEMAN PRENTIS, JR.	Durham
ROBERT RANDOLPH PRICE	Black Mountain
PAMELA PROTHRO	Chapel Hill
ROBERT LOUIS QUICK	Chapel Hill
CYNTHIA ANN HATLEY RABIL	Carrboro
WILLIAM EDMOND RABIL	Carrboro
GWYNN GARDINER RADEKER	Asheville
WILTON EDWARD RAGLAND	Durham
SARAH HELEN RAMSEY	Chapel Hill
DAVID HOLLAND RANKIN, JR.	Charlotte
JAMES CLAUDE RAY	Raleigh
CHARLES RICHARD RAYBURN, JR.	Durham
EDWARD EUGENE RAYMER, JR.	Winston-Salem
MARK EVERETT RAYNOR	Maple Hill
EDGAR MAYO ROACH, JR.	Chapel Hill
DANIEL STEVE ROBBINS	Chapel Hill
DAVID LEE ROBERTS	Creedmoor
JOSEPH WILLIAM ROBINSON	Lowell
BENJAMIN EDISON RONEY, JR.	Raleigh
STEPHEN GEORGE ROYSTER	Grover
ELLEN TART RUFF	Chapel Hill
THOMAS CHALMERS RUFF, JR.	Chapel Hill
LEONARD WAYNE SAMS	Raleigh
CHARLES EDWARD SAMUEL	Durham

BILLY GENE SANDLIN	Carrboro
LOGAN EVERETT SAWYER, JR.	Chapel Hill
JAMES ERNEST SCARBROUGH	Chapel Hill
ZIA CATALFANO SCHOSTAL	Durham
STUART MCGUIRE SESSOMS, JR.	Durham
PAUL TREVOR SHARP	Ann Arbor, Mich.
STUART LEE SHELTON	Atlantic Beach
BERRELL FRANKLIN SHRADER	Rural Hall
RICKY FRANKLIN SHUMATE	Greensboro
ALBERT JAY SINGER	Raleigh
EVELYN SPARKS SLAGLE	Bakersville
JOSEPH ESMOND SLATE, JR.	High Point
GREGORY ELI SMITH	Chapel Hill
MARGARET DIANE SMITH	Lenoir
NORMAN AUSTIN SMITH	Durham
REGINALD KENT SMITH	High Point
ANN STEPHANIE WOOD SPRAGENS	Durham
KURT CHRISTOPHER STAKEMAN	Chapel Hill
KAREN JANE STAM	Greensboro
RONALD LANE STEPHENS	Durham
RICHARD YATES STEVENS	Raleigh
PHYLLIS BLACKMON STEVENSON	Cary
PAUL HERBERT STOCK	Chapel Hill
DAVID VAN STRAWN	Charlotte
CAROLINE JANE STRUTHERS	Lemon Springs
EDWARD ALFRED STUDZINSKI	Durham
THOMAS SADLER STUKES	Charlotte
THOMAS RICHARD SUHER	Chapel Hill
WILLIAM DALE TALBERT	Chapel Hill
JOHN COWLES TALLY	Fayetteville
MARY LOCKETT TALLY	Durham
WILLIAM LITTLE TANKERSLEY III	Chapel Hill
JAMES MOORE TATUM, JR.	Chapel Hill
CAROLE YVONNE TAYLOR	Chapel Hill
GEORGE HENRY TEMPLE, JR.	Zebulon
JAMES LEWIS TENNANT	High Point
BRYCE OLIN THOMAS, JR.	Matthews
ROBERT FARMER THOMAS	Raleigh
CHARLES CLENDENIN THOMPSON III	Graham
PETER KARL KIMBLE THOMPSON	Chapel Hill
JACK EWALD THORNTON, JR.	Chapel Hill
FRANK LESESNE TODD, JR.	Hendersonville
JAMES WORTH TOLIN, JR.	Roxboro
ROGER SAMUEL TRIPP	Greensboro
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CHARLES HANCOCK TURNER, JR.	New Bern
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CARROLL DOUGLAS TUTTLE	Chapel Hill
PETER JAMES UNDERHILL	Charlotte
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ANTHONY JOSEPH VRSECKY	Winston-Salem
PATRICIA HAMM WAGNER	Durham
GARY JOE WALKER	Winston-Salem
ROBERT DAWES WALKER, JR.	Raleigh
JOHN WILLIAM WALL, JR.	Greensboro
MARK LOUIS WAPLE	Fayetteville
ALFRED DECATUR WARD, JR.	New Bern
JAMES SMITH WARREN	Wake Forest
TYLER BROWN WARREN	Robersonville
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BARBARA JANE GORE WASHINGTON	Greensboro
DONALD MINOR WATSON, JR.	Durham
RICHARD NEILL WATSON	Red Springs
ROBERT LEE WATT III	Reidsville
ALDEN BRANNON WEBB	Rockingham
ROBERT MICHAEL WELLS	Winston-Salem
ROBERT NEWTON WELLS	Winston-Salem
WILLIAM JOHN WHALEN	Charlotte
VERNON LANE WHARTON	Raleigh
THOMAS SQUIRES WHITAKER	Winston-Salem
WILLIAM O'BRIEN WHITE, JR.	Durham
ROBERT ELLIOTT WHITLEY	Winston-Salem
ANTOINETTE RAY WIKE	Lexington
RALPH GIBBON WILLEY III	Enfield
RONALD CALVIN WILLIAMS	Charlotte
MARY JEAN WILSON	Monroe
RICHARD WRIGHT WILSON	Charlotte
ROBERT EARL WILSON	Wilmington
EDWARD CYRUS WINSLOW III	Tarboro
RONALD EUGENE WOLFINGTON	Chapel Hill
DONN HAMILTON WOOD	Chapel Hill
RAYMOND LAWRENCE YASSER	Durham

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

JONATHAN ROSS HARKAVY	Greensboro
JOHN EMIL LEONARZ	Chapel Hill
JOHN BONIFACE MAIER	Greensboro
MICHAEL LEROY ISENBERG	Raleigh
MARY JOHNSON TURNER	Blowing Rock
ROBERT DOUGLAS HOFFMAN	Charlotte
PAUL FREDERIC HENSON	Charlotte
EVALYN BILLINGS CARSON	Sparta
ANDREW FREDERICK SAYKO	Charlotte
BURTON FRANKLIN WIAND	Whispering Pines
CHARLES WEARN CONNELLY, JR.	Matthews
DAVID JAMES CONROY	Asheville
THEODORE S. FARFAGLIA	Reston, Va.
LOUIS WILLIAM HOPPE	Kitty Hawk
ROBERT DALE JACOBSON	Lumberton
HELEN HILLHOUSE MADSEN	Lumberton

PATRICIA HINDS SPEARMAN ..... Durham
JOHN HARVEY MARTIN ..... Chapel Hill
HARRIS JACK WINKELSTEIN ..... Greensboro
WILLIAM WAYNE NELSON ..... Charlotte
JOHN DENISON RAY ..... Chapel Hill
MICHAEL JOHN ANDERSON ..... Nashville
JAMES ALBERT CABLER, JR. ..... Highlands
KENNETH MARK GREENE ..... Greensboro

Given over my hand and the Seal of the Board of Law Examiners, this the 25th day of September, 1974.

FRED P. PARKER III, *Executive Secretary*
The Board of Law Examiners of
the State of North Carolina

I, Fred P. Parker III, Executive Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the additional named persons below duly passed the examinations of the Board of Law Examiners, and by Resolution of the Board on October 24, 1974, said persons have been issued certificates of this Board:

HIRAM JOHNSON CUTHRELL, JR. ..... Salisbury
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KIRTLEY QUENTIN COX ..... Chapel Hill
PHILLIP GREGORY KELLEY ..... Cherokee
HUBERT KENDALL WOOTEN ..... Raeford

Given under my hand and the Seal of the Board of Law Examiners, this the 22nd day of November, 1974.

FRED P. PARKER III, *Executive Secretary*
The Board of Law Examiners of
the State of North Carolina

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM 1974

STATE OF NORTH CAROLINA v. ALTON JAMES HENDERSON

No. 8

(Filed 13 March 1974)

1. **Criminal Law § 84 — evidence unconstitutionally obtained**

Evidence unconstitutionally obtained is excluded in both State and Federal courts as essential to due process.

2. **Criminal Law § 66— pretrial identification procedures — due process**

The test under the due process clause as to pretrial identification procedures is whether the totality of the circumstances reveals pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice.

3. **Constitutional Law § 32; Criminal Law § 66— confrontation for identification prior to criminal proceedings — right to counsel**

Defendant did not have a constitutional right to the presence of counsel at an out-of-court identification proceeding where no adversary judicial criminal proceedings had been initiated against defendant prior to the confrontation.

4. **Criminal Law § 66— illegal pretrial identification — in-court identification**

Illegality of an out-of-court identification will render inadmissible an in-court identification unless it is first determined on *voir dire* that the in-court identification is of independent origin.

5. **Criminal Law § 66— illegal pretrial identification — in-court identification — independent origin**

Even if the single exhibition of defendant to a rape victim was impermissibly suggestive and conducive to misidentification, the victim was properly allowed to identify defendant in court as her assailant where the trial court found upon competent *voir dire* evidence that the in-court identification was based on the victim's observation of defendant at the crime scene and was not tainted by the pretrial confrontation.

6. **Criminal Law §§ 50, 68— use of "I think" — defendant's question to victim — competency to show identity**

Rape victim's testimony that her assailant "asked me if I knew a family I didn't know. I think the name was Wood" was not rendered inadmissible by use of the term "I think" and became competent on the question of identity when defendant testified on cross-examination that he worked for a man named Woods.

7. **Burglary and Unlawful Breakings § 1— first degree burglary defined**

Burglary in the first degree 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.

8. **Burglary and Unlawful Breakings § 5— evidence of breaking — locked doors**

There was sufficient evidence of a breaking to support a conviction of first degree burglary where the prosecuting witness testified that she had locked all three doors of her trailer shortly before defendant's entry, it not being necessary for the State to offer direct evidence that the locks on the doors had been tampered with or that force had been applied to the locks.

9. **Rape § 1— force required**

The force necessary to constitute rape need not be actual physical force since fear, fright or coercion may take the place of physical force.

10. **Rape § 1— consent induced by violence**

Although consent is a perfect defense to a charge of rape, there is no legal consent when it is induced by violence or threat of violence.

11. **Rape § 5— sufficiency of evidence**

Although the State introduced a statement in which the prosecutrix related that her assailant wasn't as rough after she "submitted," the State's evidence was sufficient to require a jury determination as to whether defendant obtained carnal knowledge of the prosecutrix forcibly and against her will where it tended to show that the prosecutrix was subjected to a violent beating, she struggled to get away, she was choked until she "felt all the air and everything going out of her body," she was then pushed onto the bed, pinned down and raped, and that she did not consent to have intercourse with defendant.

12. **Burglary and Unlawful Breakings § 6— instructions — breaking as element of first degree burglary**

In a first degree burglary case, trial court's instruction that the State must prove "that the building was entered by the defendant com-

ing into the mobile home, and coming into the bedroom would be an entering" did not constitute an expression of opinion that the State did not have to show a "breaking" where immediately prior to such instruction the court charged on the element of "breaking" and the court specifically mentioned both the elements of breaking and entering when charging on other elements of the crime of first degree burglary.

13. Criminal Law § 114— expression of opinion — defendant's alibi testimony

The trial court did not express an opinion concerning the strength of defendant's defense when he twice stated that defendant's alibi was in the form of his own testimony.

14. Criminal Law §§ 135, 138— instructions — punishment — death penalty

In a rape and burglary case in which the jury requested further instructions regarding punishment and whether it could make a recommendation, under the circumstances of this case the trial court did not err in failing to instruct the jury that a verdict of guilty upon either the charge of rape or upon the charge of first degree burglary would result in the imposition of the death penalty.

15. Constitutional Law § 31— failure of investigating officers to make laboratory tests

Defendant in a rape and burglary case was not denied a fair trial because the investigating officers failed (1) to make a microscopic comparison of a blond hair found on defendant's clothing and a hair taken from the head of the prosecutrix and (2) to make a laboratory comparison of defendant's blood and the blood found on the bed clothing belonging to the prosecutrix.

16. Burglary and Unlawful Breakings § 6— instructions on breaking — entry through open door

The trial court in a burglary case did not err in failing to instruct the jury that if a door to the victim's mobile home was open in the slightest degree, entering the trailer through that door would not be a breaking, where there was no testimony indicating that any door of the mobile home was opened at the time defendant entered it and the uncontroverted evidence was that all three doors were locked prior to defendant's entry.

17. Burglary and Unlawful Breakings § 6— instructions on breaking

Trial court's instruction in a burglary case that a breaking "simply means the opening or removal of anything blocking entrance, so the pushing open of a door that is latched would be a breaking," while disapproved, did not constitute prejudicial error where the court in other portions of the charge correctly instructed on the law of breaking as related to first degree burglary.

18. Rape § 6— failure to submit lesser offenses

The trial court in a rape case did not err in failing to submit the lesser included offenses of assault with intent to commit rape and assault on a female where all the evidence showed a completed act of intercourse, defendant's defense was alibi, and there was no evidence to support either of the lesser included offenses.

19. Burglary and Unlawful Breakings § 6— first degree burglary — intent to rape — instructions

The trial court's instructions on intent to commit rape as it related to a charge of first degree burglary were adequate, although the court failed to instruct the jury that defendant must have had an intent to gratify his passions notwithstanding any resistance on the part of the prosecutrix, particularly since the record shows that the intent was, in fact, executed.

20. Burglary and Unlawful Breakings § 6— burglary — intent to rape — instructions — non-burglarious breaking and entering

In a first degree burglary case in which the felonious intent was allegedly an intent to commit rape, the trial court did not err in failing to instruct the jury that it could return a verdict of guilty of the lesser included offense of non-burglarious breaking and entering if defendant entered the prosecutrix' room without intent to use force but only formed the intent to accomplish his purpose by force after she screamed where there was no evidence to support such instruction and where defendant's counsel did not request an instruction on such contention.

21. Rape § 6— instructions — degree of resistance required

The trial court in a rape case did not err in failing to describe the degree of resistance required by the prosecutrix and to relate it to the facts of the case.

22. Criminal Law § 113— recapitulation of evidence — failure to include evidence elicited on cross-examination

In a prosecution for rape and first degree burglary, defendant was not prejudiced by the court's failure to include in the charge evidence elicited by defense counsel on cross-examination as to the victim's nearsightedness, the length of time the victim observed defendant at a pretrial confrontation, her inability to recognize the color of her assailant's shirt, the absence of damage to her locks, or her inconsistent statement concerning being knocked off her bed by her assailant.

23. Constitutional Law § 36; Criminal Law § 135; Burglary and Unlawful Breakings § 8; Rape § 7— constitutionality of death penalty for rape and burglary

Sentence of death for the crimes of rape and first degree burglary does not constitute cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the United States Constitution.

Chief Justice BOBBITT and Justices HIGGINS and SHARP dissenting as to death sentences.

APPEAL by defendant from *Webb, S.J.*, 27 August 1973 Session, ALAMANCE Superior Court. Defendant was tried upon a bill of indictment charging him with first degree burglary and rape of Judith Ann Strader.

Prior to his trial, defendant was represented by Mr. Wiley P. Wooten, who was appointed by the court on 20 June 1973.

Thereafter defendant employed Mr. Fred Darlington, III, of the Alamance County Bar to represent him on these charges, and by Order dated 9 August 1973 Mr. Wooten was relieved of further responsibilities as court-appointed counsel. Prior to his discharge, Mr. Wooten had obtained an Order committing defendant to Cherry Hospital for sixty days for observation and determination of his competency to stand trial upon the pending charges. The Court was furnished with the diagnostic conference and discharge summary, signed by Dr. Eugene V. Maynard, of the Cherry Hospital Staff, which stated that examination, observation and testing performed at Cherry Hospital revealed no evidence of insanity or any serious mental disorder which might interfere with defendant's competency to stand trial upon the charges of first degree burglary and rape.

Upon his arraignment defendant entered a plea of not guilty to both charges.

The State's evidence, in substance, discloses the following:

Judith Ann Strader testified that she was employed as a teacher by the Burlington City School system. On the night of 18 June 1973, she returned to her mobile home in Terrywood Mobile Home Park at about 9:30 p.m. after attending a ceramics class in Burlington. She lived in a 65 foot mobile home which contained two bedrooms, a living room, dining room and kitchen. The master bedroom is at one end of the mobile home and the kitchen is at the other end. The living room is located between the kitchen and master bedroom and the front door of the mobile home enters into the living room. There is a back door to the kitchen and a back door entering the hall next to the bathroom serving the master bedroom. After visiting a neighbor, she locked the doors of the mobile home, undressed and put on a robe. She lay down on her bed in the master bedroom between 10:30 and 10:45 p.m. and dropped off to sleep. She had planned to get up and straighten the kitchen and had therefore left the lights on in the living room. There were three Duke Power night-lights located near her trailer. One light was near the front of the mobile home, one was near the rear of the trailer and one light was across the street so that it shone almost directly into her bedroom window. The moon was about half full on this night. She was awakened by the barking of her Pekinese dog, and when she sat up in the bed, she saw a man standing in the doorway of her bedroom.

At this point the Solicitor asked if the man she saw on that night was in the courtroom. Defendant's counsel objected and asked to be heard. After a voir dire hearing, the trial judge overruled defendant's objection and motion to suppress. (We will hereafter more fully discuss the voir dire hearing and the resulting ruling by the trial judge.)

The jury returned to the courtroom and Judith Ann Strader identified defendant as her assailant. She further testified:

> "When I was aroused by my dog, I saw the man standing in the doorway of my bedroom and I raised up on my arms and looked and first I felt shocked and then he lunged at me. I was struggling to get away, and I screamed two or three times, I am not sure, and I screamed and when I did he hit me with his fist in my face and bruised my upper face and forehead, my eyes, the side of my face and my lip and I kept struggling the best I knew how to get away and at this time he started choking me. He didn't say anything at all at that time. He choked me almost to the point I felt all the air and everything going out of my body, and he pushed me up in the bed and at this time he did rape me, keeping one hand at my neck part of the time and my body was penned down. My body was penned down. The defendant's private parts entered my private parts. I didn't give consent for him to have intercourse with me. I didn't give the defendant or any other person consent or permission to come into my mobile home that night. . . . "

Miss Strader further stated that defendant remained in her trailer for nearly an hour, and upon the pretext of quieting her barking dog she managed to escape and flee to a nearby trailer occupied by Mr. and Mrs. Don Hall. The Halls summoned law enforcement officers, and after she talked to them she was carried to the hospital.

Mrs. Elizabeth Hall testified that in the early morning hours of 19 June 1973, Judith Strader came to her mobile home in a hysterical condition. Miss Strader told her that there was a man in her trailer and that he had raped her. Mrs. Hall said that at that time she looked out the window and saw a beige colored 1964 Chevelle automobile with a dent in the side and back fender. The automobile was being operated by a male person. She had previously seen defendant drive this car. Mrs. Hall testified that there was a knot and a bruise over Judith Strader's

right eye, a bruise on her left eye, red marks on her throat and that her lip was swollen.

Mr. James Little of the Alamance County Sheriff's Department testified that in response to a call he went to Judith Ann Strader's mobile home. The only person there was Mr. Don Hall. He found the bedroom "torn up," the bedspread on the floor and blood on the sheets and pillow case. He talked to Miss Strader at about 1:30 a.m. on 19 June 1973. The statement made to him by Miss Strader was admitted into evidence under a proper limiting instruction.

Mr. James Andrews of the Alamance County Sheriff's Department testified that as a result of a call, he stopped defendant at about 1:30 a.m. on 19 June 1973 on Highway 49 near Haw River. Defendant was operating a 1964 light colored Chevelle with a damaged back fender. At his request, defendant accompanied him to the Alamance County Sheriff's Department where Officer Talbert advised defendant of his Constitutional rights.

Mr. Kenneth Talbert of the Alamance County Sheriff's Department stated that he talked with defendant during the early morning hours of 19 June 1973. After advising defendant of his rights he began to question him, but defendant said that he did not wish to answer any questions until he had contacted an attorney. However defendant agreed to an inspection of his clothing, and Mr. Talbert found two blond hairs about 12 to 18 inches in length on defendant's clothes.

The State rested and defendant's motions as of nonsuit as to both charges were denied.

Defendant, testifying in his own behalf, stated that he lived with his wife and two children in a mobile home in Terrywood Park. His daughter had sandy blond hair. He had seen Judith Strader, who was acquainted with his wife, around the trailer park. On 18 June 1973 he worked until about 4:00 p.m. for Alcar Tree Company. On that day, he wore a long-sleeved work shirt, trousers and laced-up boots. Upon leaving work, he went to his mother's home in Graham for a short visit, then to the ABC store in Graham where he purchased a pint of vodka. He then went to Dean Bonding Company where he had a drink, then to Mebane where he drank two beers, then into Caswell County where he took another drink of vodka, then returned to

Mebane where he drank three beers, then to Hillsborough where he had two beers. He started to Burlington on Highway I-85, and he was stopped at about 8:30 p.m. and cited for speeding 80 mph in a 65 mph zone. From there he proceeded to Gus' Drive-In on Highway 54 between Burlington and Graham where he drank more beer. He then went to a cafe for more beer. He left the cafe at about 11:00 p.m. and returned to Gus' Drive-In where he remained until about midnight. He returned to Highway I-85 and left that highway at the Haw River Exit where he stopped and called his wife from a telephone booth. After talking to her for 15 to 25 minutes, he proceeded through and beyond Haw River, North Carolina, on Highway 49 where he was stopped by a police officer. He did not go back to Terrywood Mobile Home Park after he left there at about 6:00 a.m. on the morning of the 18th. The scratches on his arms were caused by his tree cutting work. He had been convicted of assault with intent to commit rape in 1969. He could not remember the number of assault charges for which he had been convicted.

Upon completion of defendant's testimony, both the State and defendant rested.

The jury returned verdicts of guilty of first degree burglary and rape.

The trial judge pronounced judgment sentencing Alton James Henderson to death by asphyxiation.

Attorney General Robert Morgan and Associate Attorney Richard F. Kane for the State.

W. R. Dalton, Jr., and Fred Darlington III for defendant appellant.

David E. Kendall for the NAACP Legal Defense Fund.

BRANCH, Justice.

Defendant assigns as error the admission, over his objection, of the in-court identification testimony by the prosecuting witness, Judith Strader. He argues that this testimony was tainted by an out-of-court identification procedure which violated Constitutional rights guaranteed to him by the Sixth and Fourteenth Amendments to the United States Constitution in that the identification procedure was conducted in the absence of counsel and was impermissibly suggestive and conducive to mistaken identification.

Since the State did not offer evidence in presence of the jury concerning identification of the accused at a lineup or a showup, we are only concerned with the admissibility of the in-court identification testimony.

[1, 2] Since *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684, the general rule has been that evidence unconstitutionally obtained is excluded in both State and Federal Courts as essential to due process — not as a rule of evidence but as a matter of Constitutional law. *State v. Rogers*, 275 N.C. 411, 168 S.E. 2d 345; *State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376. The test under the due process clause as to pretrial identification procedures is whether the totality of the circumstances reveals pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice. *Foster v. California*, 394 U.S. 440, 22 L.Ed. 2d 402, 89 S.Ct. 1127; *Stovall v. Denno*, 388 U.S. 293, 18 L.Ed. 2d 1199, 87 S.Ct. 1967; *Rochin v. California*, 342 U.S. 165, 96 L.Ed. 183, 72 S.Ct. 205; *State v. Haskins*, 278 N.C. 52, 178 S.E. 2d 610; *State v. Austin*, 276 N.C. 391, 172 S.E. 2d 507; *State v. Rogers, supra.*

These due process requirements have been enlarged by case holdings requiring presence of counsel at lineups or showups. *United States v. Wade*, 388 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926; *Gilbert v. California*, 388 U.S. 263, 18 L.Ed. 2d 1178, 87 S.Ct. 1951; *Stovall v. Denno, supra.* The broad principles set forth in *Wade, Gilbert* and *Stovall* resulted in many diverse interpretations by other appellate courts. One of the questions causing conflict in the appellate courts was at what stage of the proceedings the rule requiring presence of counsel became operative.

Our Court has generally held that an accused has a Constitutional right to presence of counsel at an in-custody identification proceeding, and when counsel is not present and there is no voluntary waiver of counsel by the accused, testimony of witnesses that they identified the accused at such confrontation must be excluded. Furthermore, an in-court identification of the accused by a witness who took part in such pretrial confrontation must be excluded unless it is first determined by the trial judge on voir dire that the in-court identification is of independent origin and thus not tainted by the illegal pretrial identification procedure. *United States v. Wade, supra; Gilbert v. California, supra; State v. Bass*, 280 N.C. 435, 186 S.E. 2d

384; *State v. Smith,* 278 N.C. 476, 180 S.E. 2d 7; *State v. Austin, supra; State v. Rogers, supra.*

The recent case of *Kirby v. Illinois,* 406 U.S. 682, 32 L.Ed. 2d 411, 92 S.Ct. 1877, which defendant cites and relies upon, considerably limits the stage at which the right to counsel attaches in pretrial identification procedures. In that case, the United States Supreme Court held that a person's Sixth and Fourteenth Amendment right to counsel in pretrial identification procedures attaches only "at or after the time that adversary judicial proceedings have been initiated against him." See *State v. Mems,* 281 N.C. 658, 190 S.E. 2d 164. Although our Court's rather broad language might appear to be at odds with the holding in *Kirby,* examination of the actual holdings of this Court shows that our interpretation of the right to counsel at pretrial identification procedures has often comported with the rationale of the holding in *Kirby, e.g.,* we have held that identifications made during the investigatory stage of proceedings were not in the critical stage, requiring presence of counsel. *State v. Mems, supra; State v. McNeil,* 277 N.C. 162, 176 S.E. 2d 732. In *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581, this Court held that defendant's right to counsel in a pretrial identification procedure was not violated until the proceeding " . . . lost its character as a pretrial investigative procedure and became a 'critical' stage . . . " requiring the presence of counsel. Even so, the holding in *Kirby* considerably narrows our interpretation as to when the right to counsel attaches in pretrial identification proceedings.

It is not argued that defendant was an indigent and subject to the provisions of Article 36 of Chapter 7A of the General Statutes. However, we note that the General Assembly amended G.S. 7A-451(b)(2), effective 10 April 1973, to require counsel for indigents at pretrial identification proceedings *only after formal charges have been preferred* and at which the presence of the indigent was required. This amendment apparently stems from the holding in *Kirby.*

[3] Here, the alleged rape occurred after midnight on 19 June 1973. Judith Strader remained at a nearby neighbor's home until police officers arrived. She was questioned by them, and thereafter she was taken to the hospital for examination and treatment. The record does not disclose at what time she returned from the hospital. Defendant was taken to the Sheriff's Department at about 1:30 a.m. on the morning of 19 June 1973. The

confrontation between Judith Strader and defendant occurred at the Sheriff's Department at about 10:30 a.m. on the same day. The record does not indicate that any adversary judicial criminal proceedings had been initiated against defendant prior to the confrontation. The record *does* show that a warrant was served on defendant on the same day. There had been no previous identification of defendant. It is therefore reasonable to infer that the warrant was served after the confrontation at the Sheriff's Department, and that at the time of the confrontation the proceeding was investigatory rather than accusatory. Thus the proceeding had not reached the critical stage which required the presence of counsel for defendant.

Defendant further contends that the confrontation offended fundamental standards of decency, fairness and justice so as to deny him his Constitutional right of due process.

The practice of showing suspects singly to persons for purposes of identification has been widely condemned. *Stovall v. Denno, supra; State v. Wright, supra.* However, whether such a confrontation violates due process depends on the totality of the surrounding circumstances. *Stovall v. Denno, supra.*

We recognize that there are circumstances under which the single exhibition of a suspect may be proper. The landmark case of *Stovall v. Denno, supra,* held that the showing of a single suspect in a hospital room while he was handcuffed to police officers did not violate due process because the possibility of the impending death of the witness required an immediate confrontation. Our Court has held that there was no violation of due process when there were "unrigged" courtroom and station house confrontations which amounted to single exhibitions of the accused. *State v. Tuggle,* 284 N.C. 515, 201 S.E. 2d 884; *State v. Bass, supra; State v. Haskins, supra; State v. Gatling,* 275 N.C. 625, 170 S.E. 2d 593. Similarly we have recognized that a confrontation which takes place when a suspect is apprehended immediately after the commission of the crime may be proper. *State v. McNeil, supra.*

Whether an accused has been denied due process by a showup or a single exhibition of the accused requires an application of the recognized principles of law to the total circumstances. This often presents a difficult task.

Here the fact that the single exhibition of defendant was held within a short time and as soon as feasible after the assault

when the prosecuting witness had the opportunity to closely observe her assailant is counterbalanced by the fact that defendant was in custody under circumstances which would have easily permitted the formation of a lineup. However, the facts of this case do not require decision of this question. Even if we were to concede the confrontation to have been impermissibly suggestive and conducive to misidentification, and we do not, we are of the opinion that the in-court identification was properly admitted into evidence.

[4] It is well established that the primary illegality of an out-of-court identification will render inadmissible the in-court identification unless it is first determined on voir dire that the in-court identification is of independent origin. *Wong Sun v. United States,* 371 U.S. 471, 9 L.Ed. 2d 441, 83 S.Ct. 407; *State v. Bass, supra; State v. Austin, supra; State v. Rogers, supra; State v. Wright, supra.*

The recent case of *Neil v. Biggers,* 409 U.S. 188, 34 L.Ed. 2d 401, 93 S.Ct. 375, is strikingly similar to instant case. In *Neil,* the defendant was accused of rape. The evidence against him included testimony by the prosecutrix of a pretrial police showup which consisted of two detectives walking the defendant past her.

In that case, the Court noted:

> " . . . The victim spent a considerable period of time with her assailant, up to half an hour. She was with him under adequate artifical (sic) light in her house and under a full moon outdoors, and at least twice, once in the house and later in the woods, faced him directly and intimately. . . . Her description to the police, which included the assailant's approximate age, height, weight, complexion, skin texture, build, and voice, . . . was more than ordinarily thorough. She had 'no doubt' that respondent was the person who raped her. . . . She testified . . . that there was something about his face 'I don't think I could ever forget.' "

In holding that the evidence was properly admitted and that the identification was reliable even though the confrontation procedure was suggestive, the Court set out certain factors to be considered in evaluating the likelihood of mistaken identification, including: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior de-

scription of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.

In instant case, upon objection and motion to suppress the identification testimony, the trial judge excused the jury and conducted a voir dire hearing. On voir dire, Judith Strader positively identified defendant as her assailant. She testified that the lights were on in her living room and that there were three Duke Power nightlights near her trailer, one of which shone almost directly into her bedroom window. The moon was half full and "there was plenty of light for me to recognize the face that I saw." She further stated that defendant was in her bedroom for about one hour and that after he had raped her, "we must have spent at least 30 or 35 minutes . . . he kept on talking to me." At that time she observed defendant very carefully because she "was looking for facial characteristics, things I might be able to pick out." On cross-examination she stated that her identification was based on his "hairline, length of hair, eyebrows and lips" and that defendant was wearing a shirt, trousers and brogan type laced boots. She averred that she had no doubt whatever about defendant being the man who was in her trailer on the night of the alleged rape and she based her identification " . . . on the face that I saw that night and the face, you don't forget, I won't ever forget it . . . . "

The testimony of Miss Strader was the sole evidence offered on voir dire.

At the conclusion of the voir dire hearing the trial judge found as a fact:

> " . . . that the witness' identification of the defendant in the courtroom is based on her observation of the alleged person in the trailer on the night of June 18, 1973, and is not tainted by any suggestion when she saw him at the sheriff's office at a later hour on the following day.
>
> The defendant's motion to suppress the testimony as to the identification is OVERRULED."

In the recent case of *State v. Tuggle, supra,* Chief Justice Bobbitt concisely stated the rules governing voir dire hearings when identification testimony is challenged, to wit:

> "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)."

Here the uncontradicted voir dire evidence shows that the prosecuting witness spent approximately an hour with her assailant in a room lighted by interior and exterior artificial light supplemented by a half full moon. She gave careful attention to and noted defendant's clothing and his physical features including his hairline, eyebrows and lips. Miss Strader at no time identified any other person as her assailant. The actual identification procedure occurred within ten or eleven hours of the assault. The victim of the rape was a school teacher who, on the voir dire hearing tellingly voiced the reliability of her testimony by stating that she based her identification "on the face I saw that night . . . you don't forget, I won't ever forget it."

The Court's findings on the critical facts were amply supported by competent evidence, and are therefore conclusive on this Court.

[5] We hold that under the totality of the circumstances the in-court identification of defendant was not tainted by the out-of-court confrontation and the trial judge correctly overruled defendant's objection and motion to suppress.

[6] Defendant's seventh assignment of error is as follows:

> "7. That his Honor erred in permitting the witness to state: 'He asked me if I knew a family I didn't know. I think the name was Wood', as shown by EXCEPTION NO. 8 (R p 25)."

The Solicitor asked the witness Judith Strader to tell what defendant did after she first saw him in the trailer. After testifying to the actual rape she, without further questioning, told of conversations occurring after the assault. While relating the conversation she, in part, testified:

" . . . And then I said, 'Who are you?' He said, 'If I told you, then you would know who I was,' and he asked me my name. He asked me where I was from and I told him, and he asked if I knew a family I didn't know. I think the name was Wood.

MR. DARLINGTON: Objection.

THE COURT: Overruled.

DEFENDANT'S EXCEPTION NO. 8"

Defendant seems to contend that the use of the words "I think" was a prejudicial expression of opinion.

When terms such as "I think," "my impression is" or "I believe" connote an indistinctiveness of perception or memory, they are not objectionable although they may carry little weight. 1 Stansbury's North Carolina Evidence, § 122 (Brandis Revision 1973); McCormick, on Evidence, § 10 (1954 Ed.); *State v. Haney,* 263 N.C. 816, 140 S.E. 2d 544.

Obviously, Miss Strader's use of the words "I think" indicated an unsure memory as to the family name.

Defendant, on cross-examination, testified that he worked for a man named Woods. We think at this point the evidence became relevant and competent on the question of identity since identity is provable by circumstantial evidence even when there is a direct identification by a witness. *State v. Perry,* 275 N.C. 565, 169 S.E. 2d 839.

The ground upon which defendant asserts his objection was not indicated by the question. However, defendant's counsel should have moved to strike the portion of the answer which he considered objectionable. 1 Stansbury's North Carolina Evidence, § 27 (Brandis Revision 1973); *State v. Little,* 278 N.C. 484, 180 S.E. 2d 17. Counsel did not move to strike the above-quoted testimony or the subsequent evidence that defendant had worked for a man named Woods.

It should be clearly understood that this assignment of error would not be decided adversely to defendant in this capital case because of the absence of motions to strike. Nevertheless, we think that the failure of defendant's able and experienced counsel to move that the testimony be stricken highlights his own characterization of the evidence as originally admitted as being

innocuous and our conclusion that no prejudicial error resulted because of its admission.

This assignment of error is overruled.

Defendant contends that the trial judge erred in denying his motion for judgment as of nonsuit as to the charge of first degree burglary because there was no evidence of a "breaking."

[7] Burglary in the first degree 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; *State v. Cox,* 281 N.C. 131, 187 S.E. 2d 785; *State v. Allen,* 279 N.C. 115, 181 S.E. 2d 453. A "breaking" is an essential element of the offense of first degree burglary. *State v. Knight,* 261 N.C. 17, 134 S.E. 2d 101; *State v. McAfee,* 247 N.C. 98, 100 S.E. 2d 249; *State v. Chambers,* 218 N.C. 442, 11 S.E. 2d 280. This Court has held that there is a sufficient "breaking" to sustain a charge of first degree burglary when a person unlocks a door with a key, *State v. Knight, supra,* or opens a closed, but not fastened window. *State v. McAfee, supra.*

Here defendant's counsel concedes that the opening of a closed door would be sufficient evidence of breaking. He argues, however, that there is no satisfactory evidence that all the doors were closed.

Upon motion for judgment as of nonsuit the evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom, and nonsuit should be denied where there is sufficient evidence direct, circumstantial or both, from which the jury could find that the offense charged has been committed and that defendant committed it. *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469; *State v. Vincent,* 278 N.C. 63, 178 S.E. 2d 608; *State v. McNeil,* 280 N.C. 159, 185 S.E. 2d 156; 3 N.C. Index 2d, Criminal Law § 105.

[8] In this case, the prosecuting witness unequivocally testified that "before I laid down across the bed, I locked my doors. There were three." And on cross-examination she testified "I knew my doors were locked. As to my having a recollection of locking each door, I have a phobia about locking those doors . . . I can't tell if the lock has been tampered with."

In order to show a breaking it is not required that the State offer evidence of damage to a door or window. *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269.

Conceding that the State did not offer direct evidence that the locks on the doors had been tampered with or that force had been applied to the locks, we think that there was ample evidence from which the jury could reasonably infer that there was a "breaking" within the meaning of the term as used in reference to first degree burglary.

Defendant next contends that his motion for judgment as of nonsuit as to the charge of rape was erroneously denied because there was insufficient evidence to show that prosecuting witness continued to resist until the offense was consummated.

[9, 10] Rape is the carnal knowledge of a female person by force and against her will. *State v. Flippin,* 280 N.C. 682, 186 S.E. 2d 917; *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225; *State v. Crawford,* 260 N.C. 548, 133 S.E. 2d 232. The force necessary to constitute rape need not be actual physical force. Fear, fright or coercion may take the place of physical force. *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481; *State v. Primes, supra.* Although consent is a perfect defense to a charge of rape, there is no legal consent when it is induced by violence or threat of violence. *State v. Carter,* 265 N.C. 626, 144 S.E. 2d 826.

The prosecuting witness testified:

> "When I was aroused by my dog, I saw the man standing in the doorway of my bedroom and I raised up on my arms and looked and first I felt shocked and then he lunged at me. I was struggling to get away, and I screamed two or three times, I am not sure, and I screamed and when I did he hit me with his fist in my face and bruised my upper face and forehead, my eyes, the side of my face and my lip and I kept struggling the best I knew how to get away and at this time he started choking me. He didn't say anything at all at that time. He choked me almost to the point I felt all the air and everything going out of my body, and he pushed me up in the bed and at this time he did rape me, keeping one hand at my neck part of the time and my body was penned down. My body was penned down. The defendant's private parts entered my private parts. I didn't give consent for him to have intercourse with me. I didn't give the defendant or any other person consent or permis-

sion to come into my mobile home that night. . . . I felt like if I did try to get away he was going to kill me."

[11] Thereafter, the State, for the purpose of corroboration, offered into evidence a statement made by the prosecuting witness to Officer James Little. This statement reiterated the violent assault upon Miss Strader and concluded with these words:

" . . . After I submitted he wasn't as rough. He must have been there at least thirty-five or forty minutes. He asked if he could come back again and I said not."

Defendant relies on the above-quoted statement to support this assignment of error.

The statement by the prosecuting witness that she "submitted" must be examined in light of all of the surrounding circumstances. Miss Strader was subjected to a violent beating. She was choked until she "felt all the air and everything going out of her body." She was then pushed onto the bed, pinned down and raped. She "was struggling to get away." Further, Miss Strader positively stated that she did not consent to have intercourse with defendant, and that even after the completion of the carnal act, she feared that he was going to kill her.

Certainly under these circumstances the prosecuting witness resisted to the extent of her abilities. We cannot imagine circumstances more conducive to such fear and coercion as would supplant physical force.

There was ample evidence of both physical force and overpowering coercion and fear to require a jury determination as to whether defendant obtained carnal knowledge of Judith Strader "forcibly and against her will."

Defendant's Assignment of Error No. 20 is as follows:

[12] "That his Honor erred in instructing the jury:

'the second thing the State must prove is that the building was entered by the defendant coming into the mobile home, and coming into the bedroom would be an entering.' "

Defendant apparently contends that the instruction complained of amounted to an expression of opinion by the trial judge that the State did not have to show that there was a "breaking."

The entry of a dwelling or sleeping apartment is an essential element of the crime of burglary. *State v. Cox, supra.*

Immediately prior to the instruction complained of, the trial judge charged that the State *must* prove beyond a reasonable doubt seven things, the first being that:

> " . . . there was *a breaking* by the defendant. This simply means the opening or removal of anything blocking entrance, so the pushing open of a door that is latched would be a breaking. If you are satisfied beyond a reasonable doubt that *there was a break-in* of Miss Strader's mobile home that night, the State would have satisfied you of the first thing *necessary* for you to convict the defendant on this charge." (Emphasis added.)

Immediately after the instruction assigned as error, the trial judge recited five additional elements of the crime that the State must prove. In each of these charges the trial judge specifically mentioned both the elements of breaking and entering.

It is a well-recognized rule of law that the trial judge's charge must be construed contextually as a whole, and when, so construed, it presents the law of the case in such a manner as to leave no reasonable cause to believe the jury was misled or misinformed, an exception thereto will not be sustained. 7 N.C. Index 2d, Trial § 33.

We do not believe that the isolated statement here complained of was sufficient to confuse the jurors or to mislead them into believing that the State need not prove the element of "breaking" in proving the burglary charge.

[13] Defendant argues that the trial judge erroneously expressed an opinion concerning the strength of defendant's defense when he twice stated that defendant's alibi was in the form of his own testimony.

The statements complained of were made by the trial judge during the course of a full and fair charge on defendant's defense of alibi. Defendant was the sole witness for the defense and every juror had to be fully aware that his defense of alibi was supported only by defendant's testimony.

A contextual reading of the charge does not disclose that the admittedly unintentional statements here complained of

unduly highlighted the fact that only defendant's testimony supported a defense of alibi.

[14] Defendant assigns as error the failure of the trial judge to instruct the jury that a verdict of guilty upon either the charge of rape or upon the charge of first degree burglary would result in the imposition of a sentence of death.

During their deliberations the jury returned to the courtroom and the following exchange took place:

> "THE COURT: I understand the jury has a question?
>
> FOREMAN: Yes, sir, we would like further instructions regarding the punishment and whether or not we can make a recommendation.
>
> THE COURT: First of all, I will instruct you the penalty to be imposed is really not your concern. Your function is to pass on the guilt or not guilt as to both counts. So, I will not instruct you on what the penalty will be, that is not a concern of yours. As far as the recommendation is concerned, you cannot make a recommendation. You find him guilty or not guilty according to the evidence and the instructions I have given you."

In criminal cases the general rule is that the trial judge has the sole responsibility to render judgments upon jury verdicts within the limits prescribed by statute. The sole responsibility of the jury is to decide the guilt or innocence of the accused without being hindered by the *quantum* of punishment possible, probable or certain upon conviction. *State v. Davis,* 238 N.C. 252, 77 S.E. 2d 630; *State v. Howard,* 222 N.C. 291, 22 S.E. 2d 917. Formerly, there was an exception to this general rule in reference to capital cases pursuant to the proviso in G.S. 14-21. This proviso permitted the jury in capital cases to recommend at the time that it rendered a verdict of guilty in open court that the punishment should be life imprisonment. Since our decision in *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19, decided 18 January 1973, the jury no longer has the discretion to recommend, and thereby fix the punishment for rape, arson, burglary in the first degree or murder in the first degree at life imprisonment. In *Waddell,* we said: "The punishment to be imposed for these capital felonies is no longer a discretionary question for the jury and therefore no longer a proper subject for an instruction by the judge." See also *State v. Washington,* 283 N.C.

175, 195 S.E. 2d 534; *State v. Dillard, post,* 72, 203 S.E. 2d 6.

The offense in instant case was committed subsequent to 18 January 1973. We hold that the trial judge properly refused to instruct the jury as to the punishment which would result from a conviction of rape or first degree burglary.

[15] Defendant argues that he was denied a fair trial because the investigating officers failed to (1) present evidence of a microscopic comparison of a blond hair found on his clothing with a hair taken from the prosecuting witness' head and (2) make a laboratory comparison of defendant's blood and the blood found on the bed clothing belong to prosecuting witness.

In the recent case of *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750, Justice Moore, speaking for the Court stated:

> "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 constiutional denial of due process."

Since this assignment of error is related to the identification of defendant as the assailant, it must be borne in mind that there was other strong evidence identifying defendant as the person who committed the crimes. Further, the record does not disclose that counsel sought to have the tests performed, that he requested the State to conduct these tests, or that he sought to suppress evidence of the blond hair or the blood stains at trial. Neither is there any indication that the officers or the prosecutor sought to suppress evidence favorable to defendant. In any event, defendant has failed to show prejudice since we have no way of knowing what the tests might have disclosed.

We find no prejudicial error in the failure of the officers to pursue these particular investigative procedures.

[16] Defendant contends that the trial judge erred by failing to instruct the jury that if a door to the mobile home was open in the slightest degree, entering the trailer through that door would not be a breaking.

The trial judge in a criminal action is required to declare and explain the law arising on the evidence given in the case, and it is error to instruct on law which does not arise on the evidence. G.S. 1-180; *White v. Cothran,* 260 N.C. 510, 133 S.E. 2d 132.

The record reveals no testimony which indicates that any door of the mobile home was open at the time defendant entered the trailer. Rather the uncontroverted evidence is that all three doors were locked prior to defendant's entry. Therefore, it was not error for the trial judge to fail to instruct the jury that if the door were open the slightest degree, entering through that door would not be a breaking.

[17] As a part of this assignment of error, defendant argues that the trial judge erred by charging that a breaking " . . . simply means the opening or removal of anything blocking entrance, so the pushing open of a door that is latched would be a breaking."

The trial judge in other portions of the charge correctly instructed on the law of breaking as related to first degree burglary and the uncontroverted evidence shows that all the doors were locked.

Although we do not approve the language used by the trial judge in this portion of the charge, we do not believe that the jury was misled by this single statement.

This assignment of error is overruled.

[18] By Assignments of Error Numbers 32 and 33, defendant objects to the court's failure to submit to the jury the lesser included offenses of rape—assault with intent to commit rape and assault on a female.

The necessity for instructing a jury as to an included crime of lesser degree than the one charged arises only when there is evidence to support the included crime of lesser degree. *State v. Watson,* 283 N.C. 383, 196 S.E. 2d 212; *State v. Bryant,* 280 N.C. 551, 187 S.E. 2d 111; *State v. Carnes,* 279 N.C. 549, 184

S.E. 2d 235; *State v. Murry,* 277 N.C. 197, 176 S.E. 2d 738; and *State v. McNeil, supra.*

Here, all the evidence shows a completed act of intercourse. Defendant's defense was alibi. There was no evidence to support either of the lesser included offenses.

The trial judge did not err by failing to instruct the jury on the charge of assault with intent to commit rape or upon the crime of assault upon a female.

Defendant, without assignment of error, argues in his Brief that the lesser included offenses of burglary should have been submitted to the jury. This argument must fail by virtue of the same authorities and reasoning upon which we overruled Assignments of Error 32 and 33.

By Assignments of Error 26 and 27, defendant contends that the trial judge failed to correctly charge on intent to commit rape, as it related to the charge of first degree burglary.

[19] He first argues that the trial judge did not instruct the jury that defendant must have had an intent to gratify his passions notwithstanding any resistance on the part of the prosecuting witness.

In this connection the trial judge, in part, charged:

"The sixth thing that the State must prove and prove beyond a reasonable doubt before you can convict the defendant of first degree burglary is that at the time of the breaking and entering, the defendant intended to commit rape.

If you are satisfied from the evidence and beyond a reasonable doubt that at the time the defendant broke and entered this mobile home that he intended to rape Miss Strader then the State would have satisfied you of the sixth thing necessary for you to convict the defendant of first degree burglary.

* * *

"Now, I charge you as to the rape. Rape is the forcible sexual intercourse with a female person against her will.

I charge you for you to find the defendant guilty of rape, the State must prove three things beyond a reasonable doubt.

First, that the defendant had sexual intercourse with Miss Strader.

Second, that the defendant used or threatened to use force sufficient to overcome any resistance that she might make, and

Third, the State must prove and prove beyond a reasonable doubt that Miss Strader did not consent to the sexual intercourse and it was against her will."

We think under the circumstances of this case, that the charge on the "intent to commit rape" was adequate. This is particularly so since the record evidence shows that the intent was, in fact, *executed* in connection with a brutal assault.

[20] Defendant further argues that the Judge should have instructed the jury that if defendant entered the prosecutrix's bedroom without intent to use force but only formed the intent to accomplish his purpose by force after she screamed, they could return a verdict of guilty of the lesser included offense of non-burglarous breaking and entering.

There was no evidence to support this instruction. *State v. Watson, supra; State v. Bryant, supra; State v. Carnes, supra.*

Further the instruction which defendant claims was erroneously omitted is in the nature of a contention. The instruction was not requested by defendant's counsel and if given, would have run counter to his sole defense of alibi.

These assignments of error are overruled.

[21] Defendant also contends that the instructions on the charge of rape were erroneous in that they did not sufficiently describe the required degree of resistance and relate it to the facts of this case.

In the case of *State v. Vicks,* 223 N.C. 384, 26 S.E. 2d 873, Judge Bone charged the jury as follows:

" . . . if the State has, by evidence, satisfied the jury beyond a reasonable doubt that this defendant had carnal knowledge or sexual intercourse, the two terms being synonymous, with the prosecutrix, and that he accomplished it by force and violence, and against her will, it would be your duty to return a verdict of guilty of rape, as charged in the bill of indictment. . . . "

Finding no error in the charge, this Court stated:

> "When the whole charge is considered contextually it is definite and leaves the jury no option to convict the defendant of rape if the evidence failed to satisfy them beyond a reasonable doubt of each of the essential elements of the offense. . . . "

In addition to the definition of rape quoted in the preceding assignment of error, Judge Webb in his mandate to the jury on the rape charge stated:

> "I charge you if you find from the evidence and beyond a reasonable doubt that on or about June 18, 1973, the defendant Alton James Henderson by the use of force or threat of force had sexual intercourse with Judy Ann Strader without her consent and against her will, it would be your duty to return a verdict of guilty of rape. If you do not so find or have a reasonable doubt as to one or more of these things, you will find the defendant not guilty of rape."

We think that the instruction on the charge of rape was correct and was given in a manner calculated to aid the jury in understanding the case and in reaching a correct verdict.

[22] Defendant objects to the trial judge's failure to include in his charge certain evidence which defense counsel elicited on cross-examination.

Defendant points to the following omitted matters which he claims favored defendant, to wit:

> "1. That she is nearsighted and needs glasses. That she was not wearing glasses when her attacker was standing in the doorway. (R p 28)
>
> 2. That the prosecuting witness had to look at Alton Henderson in police custody for five minutes before she was able to recognize him. (R p 30)
>
> 3. That the prosecuting witness did not notice the next day that any injury was done to the door or the locks. (R p 32)
>
> 4. That she was unable to recognize the color of the shirt of the man attacking her. (R pp 32-33)

5. That the prosecuting witness had made an earlier statement inconsistent with her statement that she was knocked out of the bed. (R p 42)"

The general rule is that objections to the charge in stating contentions of the parties or in recapitulating the evidence must be called to the court's attention in apt time to afford opportunity for correction. However, this rule does not apply where contentions are given by the Judge which are based on unintroduced evidence, which erroneously recite defendant's testimony, or which misstate the burden of proof to defendant's prejudice. See 3 N. C. Index 2d, Criminal Law § 163, and cases there cited.

The matters of which defendant complains are within the general rule requiring counsel to bring their omission to the court's attention. It should also be noted that the record reveals that at the time prosecuting witness stated she was nearsighted, she also stated, "I know I see very well close with my glasses off, with the glasses off I do not see distances." The other more compelling omission concerning the length of time that she observed defendant at the confrontation at the Sheriff's Department was explained in the following manner:

"A. Sir, I knew the moment I saw him that he was, but I stood there and looked because I knew how important it was, and I wanted to make very sure in my own mind if that was the man."

Whether prosecuting witness recognized the color of her assailant's shirt, noticed the damage to her locks or made an inconsistent statement concerning being knocked off the bed by her assailant do not appear to be of crucial importance to defendant's defense.

Certainly a contextual reading of the entire charge fails to show that the charge was weighted in favor of the State or that the omission of the matters here complained of amounted to an expression of opinion by the trial judge in violation of G.S. 1-180.

This assignment of error is overruled.

[23] Finally, defendant contends that the death sentence was illegally imposed and that it constituted cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the United States Constitution.

In *State v. Waddell, supra,* this Court declared that upon conviction, the death penalty would be imposed upon any person who committed the crimes of burglary in the first degree, first degree murder, arson or rape after 18 January 1973. On 25 February 1974, this Court decided the case of *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721. In *Jarrette* the Court reaffirmed the holding in *Waddell* and answered all the viable contentions presented by defendant's brief and argument concerning the death penalty. See also *State v. Dillard, supra,* and *State v. Noell, supra.*

We have again carefully considered all of the arguments which were forcefully presented by defendant's counsel. However, we do not find them sufficiently persuasive to warrant disturbing the holdings in *Waddell* and *Jarrette.*

Because of the imposition of the death penalty in this case, we have carefully examined the entire record and every contention and argument proffered by defendant. Our examination discloses that defendant received 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).

STATE OF NORTH CAROLINA v. JOE BRYANT

— AND —

STATE OF NORTH CAROLINA v. RAYMOND MITCHELL FLOYD

No. 24

(Filed 13 March 1974)

1. **Obscenity— showing of motion pictures — contemporary community standards proper test for obscenity**

In a prosecution of defendant for the dissemination of obscenity in a public place, the fact that the prosecution was required to establish and did establish that the films involved were patently offensive when tested by "contemporary national community standards" rather

than by "contemporary community standards" affords defendants no ground for complaint.

2. **Constitutional Law § 18; Obscenity— dissemination of obscenity — test for obscenity**

Where G.S. 14-190.1 requires that material to be obscene must be utterly without redeeming social value, but the U. S. Supreme Court has held that the constitutional test is whether the material alleged to be obscene when taken as a whole lacks serious literary, artistic, political or scientific value, the statute imposed upon the State in this prosecution for dissemination of obscenity in a public place the necessity for proof substantially beyond that required by the test approved by the U. S. Supreme Court, and defendants were thereby afforded no ground for complaint.

3. **Constitutional Law § 18; Obscenity— specificity required of state obscenity statutes — application to hard-core pornography only**

In *Miller v. California*, 413 U.S. 15, the U. S. Supreme Court held that state obscenity statutes as written do not define what sexual conduct may be deemed obscene and patently offensive with sufficient specificity to comply with the guidelines set forth in *Miller*, but the state courts should be afforded an opportunity by construction to confine the obscene matter prohibited by their statutes to "hard-core" pornography.

4. **Obscenity— construction of obscenity statute — material considered obscene**

As the Court construes G.S. 14-190.1, the only material prohibited thereby as obscene consists of patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated and patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

5. **Indictment and Warrant § 9; Obscenity— dissemination of obscenity — sufficiency of warrant**

The conduct of defendants as charged in the warrants and as established by the verdicts constitutes a violation of G.S. 14-190.1 as construed by the N. C. Supreme Court, and the warrants gave defendants full and explicit notice that the obscene material on which these prosecutions are based was "hard-core" pornography which *Miller v. California* authorizes the state courts to prohibit.

APPEAL by defendants from the decision of the North Carolina Court of Appeals reported in 20 N.C. App. 223, 201 S.E. 2d 211.

Warrants for the arrest of defendants were issued 28 September 1971. The affidavit portion of the warrant against Joe Bryant (Bryant) reads as follows:

"The undersigned, G. C. Hager, being duly sworn, complains and says that at and in the County named above and on

or about the 10th day of September, 1971, the defendant named above did unlawfully, willfully, and did intentionally disseminate obscenity in a public place, to wit: The Adult Book Center, 407 North Tryon Street, Charlotte, N. C., in that he did provide obscene 8mm motion picture, did exhibit and make available 8mm motion pictures, and did rent and sell and provide obscene motion picture 8mm film which with the representation, embodiment, performance and publication of the obscene, and that the said 8mm motion picture film did show actual acts of sexual intercourse, fellatio and cunnilingus performed by and between human males and human females.

"The offense charged here was committed against the peace and dignity of the State and in violation of law G.S. 14-190.1."

The affidavit portion of the warrant against Raymond Mitchell Floyd (Floyd) is identical to that against Bryant except that the word "allow" appears instead of the word "provide" as the fifth word after the words "Charlotte, N. C."

Defendants were first tried, found guilty and sentenced in the District Court of Mecklenburg County. Upon appeal, the cases were consolidated for trial and tried *de novo* at the 6 March 1972 Session of Mecklenburg County Superior Court. Each defendant was found guilty, sentenced and appealed. The Court of Appeals found no prejudicial error. *State v. Bryant* and *State v. Floyd,* 16 N.C. App. 456, 192 S.E. 2d 693.

Defendants gave notice of appeal to the Supreme Court of North Carolina and also filed a petition for a writ of certiorari. This Court, on motion of the Attorney General, dismissed defendants' appeal and also denied certiorari. Defendants then filed a petition for certiorari in the Supreme Court of the United States for a review of the decision of the Court of Appeals. On 25 June 1973, the Supreme Court of the United States granted defendants' petition for writ of certiorari, vacated the judgment of the Court of Appeals, and remanded the case to the Court of Appeals "for further consideration in light of *Miller v. California,* 413 U.S. 15, 37 L.Ed. 2d 419, 93 S.Ct. 2607 (1973); *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 37 L.Ed. 2d 446, 93 S.Ct. 2628 (1973); *Kaplan v. California,* 413 U.S. 115, 37 L.Ed. 2d 492, 93 S.Ct. 2680 (1973); *U. S. v. 12 200 Ft. Reels of Super 8mm Film,* 413 U.S. 123, 37 L.Ed. 2d 500, 93 S.Ct. 2665 (1973); *U. S. v. Orito,* 413 U.S. 139, 37 L.Ed. 2d

513, 93 S.Ct. 2674 (1973); *Heller v. New York*, 413 U.S. 483, 37 L.Ed. 2d 745, 93 S.Ct. 2789 (1973); *Roaden v. Kentucky*, 413 U.S. 496, 37 L.Ed. 2d 757, 93 S.Ct. 2796 (1973); and *Alexander v. Virginia*, 413 U.S. 836, 37 L.Ed. 2d 993, 93 S.Ct. 2803 (1973)," which had been decided 21 June 1973. *Bryant v. North Carolina*, 413 U.S. 913, 37 L.Ed. 2d 1036, 93 S.Ct. 3065.

Upon remand, the case was before the Court of Appeals for further consideration of the constitutionality of G.S. 14-190.1 as applied to defendants in the light of *Miller v. California, supra,* and the other cited cases. In an opinion by Chief Judge Brock, with whom Judge Vaughn concurred, the Court of Appeals reaffirmed the constitutionality of G.S. 14-190.1. Judge Parker dissented.

Attorney General Robert Morgan and Associate Attorney Richard F. Kane for the State.

Smith, Carrington, Patterson, Follin & Curtis by Michael K. Curtis and J. David James for defendant appellants.

BOBBITT, Chief Justice.

G.S. 14-190.1, the statute under which defendants are charged, was enacted by Chapter 405, Session Laws of 1971, to become effective 1 July 1971. Prior to consideration thereof, it seems appropriate to review briefly the content and fate of prior criminal statutes relating to the dissemination of "obscene" material.

The 1971 Act expressly repealed former G.S. 14-189.1 which had been enacted by Chapter 1227 of the Session Laws of 1957 and amended by Chapter 164 of the Session Laws of 1965. *See State v. McCluney*, 280 N.C. 404, 185 S.E. 2d 870 (1972), and *State v. Bryant*, 280 N.C. 407, 185 S.E. 2d 854 (1972).

Former G.S. 14-189.1, a comprehensive statute, provided in part: "It shall be unlawful for any person, firm or corporation to purposely, knowingly or recklessly disseminate obscenity . . . . " Section 14-189.1(b) defined "obscene" as follows: "A thing is obscene if considered as a whole its predominant appeal is to the prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or presentation of such matters."

A warrant based on former G.S. 14-189.1(a) was considered by this Court in *State v. Barnes*, 253 N.C. 711, 117 S.E. 2d 849 (1961). The warrant was held fatally defective because it did not sufficiently describe and identify the alleged obscene matter to protect the accused from a second prosecution. The constitutionality of former G.S. 14-189.1 was not discussed.

In *Roth v. United States*, 354 U.S. 476, 1 L.Ed. 2d 1498, 77 S.Ct. 1304, decided 24 June 1957, the Supreme Court of the United States affirmed convictions based on violations of federal and California statutes. As summarized in the opinion of Justice Brennan: "The federal obscenity statute makes punishable the mailing of material that is 'obscene, lewd, lascivious, or filthy . . . or other publication of an indecent character.' The California statute makes punishable, inter alia, the keeping for sale or advertising material that is 'obscene or indecent.' " *Id.* at 491, 1 L.Ed. 2d at 1510, 77 S.Ct. at 1312. It was held "that these statutes, applied according to the proper standard for judging obscenity, do not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited." *Id.* at 492, 1 L.Ed. 2d at 1511, 77 S.Ct. at 1313. It was said that the test was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489, 1 L.Ed. 2d at 1509, 77 S.Ct. at 1311. The court approved instructions of both trial judges which sufficiently followed that standard. The statutes involved in *Roth* did not define with specificity what material would be considered obscene. In holding that "obscenity is not within the area of constitutionally protected speech or press," it was noted that "obscenity" had been rejected "as utterly without redeeming social importance." *Id.* at 484, 1 L.Ed. 2d at 1507, 77 S.Ct. at 1309. Justice Brennan, the author of the majority opinion, was speaking for five members of the Court.

Chief Justice Warren concurred in the result in both cases but expressed doubts as to the wisdom of the broad language used in the majority opinion. Justice Harlan concurred in the result in the case involving the California statute but dissented in the case involving the federal statute. Justice Douglas, joined by Justice Black, dissented in both cases, expressing the view that the statutes were violative of the constitutional guarantees of free speech and press.

In *Jacobellis v. Ohio,* 378 U.S. 184, 12 L.Ed. 2d 793, 84 S.Ct. 1676, decided 22 June 1964, the Supreme Court of the United States reversed a conviction under the Ohio obscenity statute. Jacobellis was charged with the possession and exhibition of "The Lovers," a French film depicting an unhappy marriage and the wife's love affair with a young archaeologist. Included in the last reel was an explicit, but fragmentary and fleeting, love scene. The conviction had been affirmed by the Ohio Court of Appeals, 115 Ohio App. 226, 175 N.E. 2d 123, and thereafter by the Supreme Court of Ohio, 173 Ohio St. 22, 18 Ohio Ops. 2d 207, 179 N.E. 2d 777 (1962). The opinion of Justice Brennan, with whom Justice Goldberg joined, expressed the views of two of the six members who voted for reversal. Justice White concurred in the reversal without opinion. Justice Stewart concurred in the reversal on the ground that under the First and Fourteenth Amendments, criminal obscenity laws are constitutionally limited to hard-core pornography, and that the film, "The Lovers," was not hard-core pornography. Justice Black, with whom Justice Douglas joined, concurred in the reversal on the broad ground that a conviction for exhibiting a motion picture abridges freedom of the press as safeguarded by the First Amendment, which is made obligatory on the States by the Fourteenth Amendment. Two of the three dissenting Justices expressed their views in a dissenting opinion by Chief Justice Warren, with whom Justice Clark joined, and the third, Justice Harlan, expressed his views in a separate dissenting opinion.

In *Jacobellis,* the opinion of Justice Brennan expressed the view that "contemporary community standards" as used in *Roth* meant contemporary *national* community standards.

On 21 March 1966 the Supreme Court of the United States, by its decision in *Memoirs v. Massachusetts,* 383 U.S. 413, 16 L.Ed. 2d 1, 86 S.Ct. 975, notwithstanding uncertainty engendered by the diverse views of individual justices, indicated substantial modification of the criteria stated in *Roth* in respect of what may be considered "obscene."

In *Memoirs,* the Supreme Judicial Court of Massachusetts, in a civil equity suit, adjudged obscene the book commonly known as "Fanny Hill," relating to the adventures of a young girl who became a prostitute. The Supreme Court of the United States reversed. The opinion of Justice Brennan, with whom Chief Justice Warren and Justice Fortas joined, expressed the

views of three of the six members who voted for reversal. The remaining three, Justice Black, Justice Douglas and Justice Stewart, in separate opinions, expressed diverse views in support of their votes for reversal. The dissenting Justices, Justice Clark, Justice Harlan and Justice White, in separate opinions, expressed diverse views for their dissents.

In *Memoirs,* the trial judge received the book in evidence, heard the testimony of experts and accepted other evidence, such as book reviews, in order to assess the literary, cultural or educational character of the book. He adjudged "Fanny Hill" obscene and "not entitled to the protection of the First and Fourteenth Amendments to the Constitution of the United States." His judgment was affirmed by the Supreme Judicial Court of Massachusetts. *Attorney General v. "John Cleland's Memoirs of a Woman of Pleasure,"* 349 Mass. 69, 206 N.E. 2d 403 (1965).

The opinion of the Supreme Judicial Court of Massachusetts included the following: "[T]he fact that the testimony may indicate this book has some minimal literary value does not mean it is of any social importance. We do not interpret the 'social importance' test as requiring that a book which appeals to prurient interest and is patently offensive must be unqualifiedly worthless before it can be deemed obscene." 349 Mass. at 73, 206 N.E. 2d at 406.

The opinion of Justice Brennan stated that the definition of obscenity in *Roth,* as elaborated in subsequent cases, required that these three elements must coalesce: "[I]t must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." *Memoirs v. Massachusetts, supra,* at 418, 16 L.Ed. 2d at 5-6, 86 S.Ct. at 977. The opinion of Justice Brennan further stated: "The Supreme Judicial Court erred in holding that a book need not be 'unqualifiedly worthless before it can be deemed obscene.' A book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently;

the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness. Hence, even on the view of the court below that Memoirs possessed only a modicum of social value, its judgment must be reversed as being founded on an erroneous interpretation of a federal constitutional standard." *Id.* at 419-420, 16 L.Ed. 2d at 6, 86 S.Ct. at 978.

In *Shinall v. Worrell,* 319 F. Supp. 485, decided 18 December 1970, the three-judge federal court composed of Circuit Judge Craven and of District Judges Butler and Larkins, held G.S. 14-189.1 "unconstitutional on its face and void because it abridges the Freedom of Speech Clause of the First Amendment made applicable to the states by the Fourteenth Amendment." After comparing the elements of obscenity as defined in G.S. 14-189.1 with the elements of obscenity as defined in *Memoirs,* Circuit Judge Craven, for the three-judge court, concluded: "Only the first of the three tests of G.S. 14-189.1 is in compliance of the minimum three-pronged standard of *Memoirs.*"

In *Gregory v. Gaffney,* 322 F. Supp. 238, decided 20 January 1971, a three-judge federal court in a split decision held that portions of G.S. 14-193 which made criminal the exhibition of "obscene or immoral" films were unconstitutionally vague and overbroad and violated the free speech clause of the First Amendment. The majority view was set forth in an opinion by Circuit Judge Craven. District Judge Jones dissented, expressing his views in a dissenting opinion.

The Attorney General of North Carolina did not seek appellate review of the decisions in *Shinall* and *Gregory.* Instead, attention was given to the drafting of the 1971 Act codified as G.S. 14-190.1 in an effort to comply with the *then* current criteria apparently established by the Supreme Court of the United States. G.S. 14-190.1, on which these prosecutions are based, provides in pertinent part:

"(a) It shall be unlawful for any person, firm or corporation to intentionally disseminate obscenity in any public place. A person, firm or corporation disseminates obscenity within the meaning of this Article if he or it:

* * *

"(3) Publishes, exhibits or otherwise makes available anything obscene; or

"(4) Exhibits, broadcasts, televises, presents, rents, sells, delivers, or provides; or offers or agrees to exhibit, broadcast, televise, present, rent or to provide; any obscene still or motion picture, film, filmstrip, or projection slide, or sound recording, sound tape, or sound track, or any matter or material of whatever form which is a representation, embodiment, performance, or publication of the obscene.

"(b) For purposes of this Article any material is obscene if:

"(1) The dominant theme of the material taken as a whole appeals to the prurient interest in sex; and,

"(2) The material is patently offensive because it affronts contemporary national community standards relating to the description or representation of sexual matters; and,

"(3) The material is utterly without redeeming social value; and,

"(4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina."

G.S. 14-190.1 became effective 1 July 1971. The alleged violations thereof by defendants occurred 10 September 1971. The first decision relating to the constitutionality of G.S. 14-190.1 was *State v. Bryant* and *State v. Floyd*, 16 N.C. App. 456, 192 S.E. 2d 693, decided 22 November 1972 by the Court of Appeals on the appeals of defendants in these cases. In an opinion by Chief Judge Mallard, the constitutionality of G.S. 14-190.1 was upheld as in compliance with the announcements of the Supreme Court of the United States in *Roth* and *Memoirs*. This Court agreed.

In *Miller*, the defendant was convicted of mailing unsolicited sexually explicit material in violation of a California statute which defined "obscene" as follows: " 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, *i.e.*, a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance." The Supreme Court of the United States vacated the

judgment of the California appellate court which had affirmed the conviction and remanded the case to the California appellate court for further proceedings.

The decision in *Miller* represents the views of *five* members of the Court as expressed in the opinion of Chief Justice Burger. *All* members of the Court rejected and abandoned the obscenity test as formulated in *Memoirs*. Speaking for five members of the Court, Chief Justice Burger undertook the difficult task of defining "the standards which must be used to identify obscene material that a state may regulate without infringing the First Amendment as applicable to the States through the Fourteenth Amendment." *Miller v. California, supra,* at 20, 37 L.Ed. 2d at 428, 93 S.Ct. at 2612. After citing prior decisions which established that "obscene" material is not protected by the First Amendment, Chief Justice Burger stated: "We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. [Citation omitted.] As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, *as written or authoritatively construed.* A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." (Italics added.) *Id.* at 23-24, 37 L.Ed. 2d at 430, 93 S.Ct. at 2614.

Chief Justice Burger further stated: "We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) [whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law] of the standard announced in this opinion, supra:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.* at 25, 37 L.Ed. 2d at 431, 93 S.Ct. at 2615.

Chief Justice Burger further stated: "The basic guidelines for the trier of fact must be: (a) Whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest [citation omitted]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24, 37 L.Ed. 2d at 431, 93 S.Ct. at 2615.

[1] We note that our General Assembly incorporated in G.S. 14-190.1(b)(2) a requirement that material to be obscene must be patently offensive because it affronts "contemporary *national* community standards relating to the description or representation of sexual matters." (Italics added.) This was in accord with the view expressed by Justice Brennan in *Jacobellis,* presumably shared by Justice Goldberg and Justice White. Under *Miller,* whether material alleged to be obscene is patently offensive may be determined by "contemporary community standards" rather than by "contemporary national community standards." The fact that the prosecution in these cases was required to establish and did establish that the films involved here were patently offensive when tested by "contemporary national community standards" affords defendant no ground of complaint.

[2] We further note that our General Assembly incorporated in G.S. 14-190.1(b)(3) the requirement indicated in *Memoirs* that material to be obscene must be "utterly without redeeming social value." Under *Miller,* the constitutional test is whether the material alleged to be obscene, "taken as a whole, lacks serious literary, artistic, political or scientific value." 413 U.S. at 24, 37 L.Ed. 2d at 431, 93 S.Ct. at 2615. In the present cases, there was ample evidence to support the jury finding that the films involved herein were "utterly without redeeming social value," more stringent criteria than indicated in *Miller.* The fact that the prosecution in these cases was required to meet the more difficult test gives these defendants no ground for complaint.

In the respects noted above, G.S. 14-190.1 imposes upon the prosecution the necessity for proof substantially beyond that required by the constitutional standards approved in *Miller.*

However, the broad terms in which obscene material is defined in G.S. 14-190.1(b) fall far short of Miller's require-

ment that the sexual conduct which may be deemed obscene and patently offensive must be specifically defined. A comparison of the provisions of G.S. 14-190.1(b) and the example approved in *Miller,* quoted above, illustrates plainly the wide gap between our statute *as written* and the requirements of *Miller.*

If our statute had specifically defined the sexual conduct which may be deemed obscene and patently offensive as described in the example approved in *Miller,* quoted above, the conduct charged in the warrants and established by the evidence would have constituted violations of its express terms. The evidence, including stipulated facts, is reviewed by Chief Judge Mallard in *State v. Bryant* and *State v. Floyd,* 16 N.C. App. 456, 192 S.E. 2d 693. Further discussion thereof is unnecessary. The pornography here involved is obscene material whether tested by *Roth, Memoirs* or *Miller.*

In *Miller,* the majority (five) undertook the difficult task of formulating new guidelines whereby a state, by specifically defining the sexual conduct deemed patently offensive, could at least prohibit the dissemination of *hard-core* pornography. We note that four of the justices, including the author of the opinions in *Roth* and *Memoirs,* were of opinion that the California statute under consideration was void on its face and voted for *reversal.*

We refer next to Chief Justice Burger's statement in *Miller* that the sexual conduct which may be deemed patently offensive "must be specifically defined by the applicable state law, as written or as authoritatively construed." When *Miller* and companion cases were decided the Supreme Court of the United States had before it many petitions for certiorari similar to that of these defendants. Since the judgment in each was vacated —but not reversed—and the case remanded for further consideration in the light of *Miller* and companion cases, it seems clear that each of these cases involved a state statute which *as written* did not comply with the requirements of *Miller.*

Footnote 6 to Chief Justice Burger's opinion in *Miller* includes the following: "We do not hold, as Mr. Justice Brennan intimates, that all states other than Oregon must now enact new obscenity statutes. Other existing state statutes, as construed *heretofore or hereafter,* may well be adequate. See *United States v. 12 200-Ft. Reels of Film,* 413 U.S. at 130 n. 7, 37 L.Ed. 2d at 507, 93 S.Ct. at 2670." (Italics added.)

Footnote 7 to Chief Jusice Burger's opinion in *United States v. 12 200-Ft. Reels, supra,* reads: "We further note that, while we must leave to state courts the construction of state legislation, we do have a duty to authoritatively construe federal statutes where ' "a serious doubt of constitutionality is raised" ' and ' " a construction of the statute is fairly possible by which the question may be avoided." ' [Citations omitted.] If and when such a 'serious doubt' is raised as to the vagueness of the words 'obscene,' 'lewd,' 'lascivious,' 'filthy,' 'indecent,' or 'immoral' as used to describe regulated material in 19 U.S.C. § 1305(a) and 18 U.S.C. § 1462, see *United States v. Orito* [citation omitted], we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller v. California* [citation omitted]."

In *United States v. Thevis,* 484 F. 2d 1149 (1973), the United States Court of Appeals for the Fifth Circuit construed 18 U.S.C. § 1462 (transportation by common carrier of obscene material in interstate commerce) as applicable to material which is obscene under *Miller* guidelines and affirmed convictions in prosecutions based on conduct prior to *Miller.* We note that 18 U.S.C. § 1462 *as written* related to "any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character. . . ."

In *United States v. One Reel Film,* 481 F. 2d 206 (1973), the United States Court of Appeals for the First Circuit held 19 U.S.C. 1305(a) (importation of obscene material) as applicable to material which is obscene under *Miller* guidelines and affirmed a conviction based on conduct prior to *Miller.* We note that the material regulated by 19 U.S.C. 1305(a) *as written* is generally described by the words "obscene," and "immoral."

In *United States v. Lang,* 361 F. Supp. 380 (C.D. Cal. 1973), cited by defendants, a United States District Judge dismissed an indictment based on 18 U.S.C. § 1461 (placing obscene material in United States mails) on the ground the judicial construction subsequently placed upon it would deprive defendants "of due process by having denied them fair warning that their acts, when committed, constituted a crime." The material regulated by 18 U.S.C. § 1461 *as written* is generally described by the words "obscene," "lewd," "lascivious," "indecent," "filthy,"

and "vile." (Note: The nature of the allegedly obscene material involved in *Lang* does not appear.)

[3, 4] In our view, the majority in *Miller* held: The state statutes *as written* do not define what sexual conduct may be deemed obscene and patently offensive with sufficient specificity to comply with the guidelines set forth in *Miller*. Since the standards originally stated in *Roth* and modified in *Memoirs* have been superseded by those enunciated in *Miller*, the state courts should be afforded an opportunity by construction to confine the obscene matter prohibited by its statute to "hard-core" pornography such as that set forth in the example approved in *Miller*. Accordingly, as we construe G.S. 14-190.1, the only material prohibited thereby as obscene consists of the following:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

We note that our statute *as written* applies only when "[t]he material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina." G.S. 14-190.1(b)(4).

[5] As stated above, the conduct of defendants as charged in the warrants and as established by the verdicts constitute violations of G.S. 14-190.1 as construed by this Court. No decision of this Court or of the Court of Appeals has applied G.S. 14-190.1 to allegedly obscene material other than that prohibited by our present construction of its provisions.

The warrants gave defendants full and explicit notice that the obscene material on which these prosecutions are based was "hard-core" pornography. Notwithstanding, defendants contend the definition of obscene material in G.S. 14-190.1 is vague and overbroad and therefore insufficient to give notice of what conduct might be considered a violation of its terms. This contention would have merit if made in a case in which the allegedly obscene material fell short of the hard-core pornography which *Miller* authorizes the state courts to prohibit. It would be naive to suggest that these defendants were not fully aware that the hard-core pornography they were disseminating constituted obscene material of the grossest character. As in *Redlich v. Capri*

Cinema, Inc., 349 N.Y.S. 2d 697 (1973), the ultimate acts of sexual perversion here involved would have been regarded as "obscene" by the standards of Sodom and Gomorrah.

We are aware of the diversity of decisions in the various state jurisdictions which have considered the constitutionality of their statutes in the light of *Miller* and companion cases. Full evaluation of these decisions would require consideration in detail of the statute and decisions of the particular jurisdiction, the specificity of the accusation and the nature of the evidence. To do this would require us to go far beyond the already extended limits of this opinion.

State court decisions (in addition to that of our Court of Appeals) generally in accord with the conclusion reached herein include the following: *Mitchum v. State*, ____ Tenn. Crim. App. ____, ___ S.W. 2d ___ (1973); *State v. Watkins*, ____ S.C. ____, 203 S.E. 2d 429 (1973); *State ex rel. Keating v. Vixen*, 35 Ohio St. 2d 215, 301 N.E. 2d 880 (1973), and companion Ohio cases; *State v. J-R Distributors, Inc.*, 82 Wash. 2d 584, 512 P. 2d 1049 (1973); *People v. Enskat*, 33 Cal. App. 3d 900 (1973); *Redlich v. Capri Cinema, Inc., supra.*

State court decisions generally contra to the conclusion reached herein include the following: *State v. Shreveport News Agency*, ___ La. ____, 287 So. 2d 464 (1973), a split decision; *Stroud v. Indiana*, ____ Ind. ____, 300 N.E. 2d 100 (1973), and companion Indiana case; *Papp v. State*, 281 So. 2d 600 (Dist. Ct. App. Fla. 1973).

See also, *Rhodes v. State*, 283 So. 2d 351 (Fla. 1973); and *State v. Wedelstedt*, 213 N.W. 2d 652 (Iowa 1973).

The burden now placed on the prosecution by G.S. 14-190.1 to establish that the allegedly obscene material affronts contemporary *national* community standards and is *utterly* without redeeming social value seems likely to preclude successful prosecution except in isolated cases involving expensive and extended trials. Whether the present decision of this Court is upheld or reversed it would seem appropriate and urgent for the General Assembly to give consideration to the amendment of G.S. 14-190.1 and associated statutes so as to bring them in accord with the guidelines of *Miller* and thereby place no greater burden upon the prosecution than required by the *constitutional* standards of *Miller*.

The decision of the North Carolina Court of Appeals is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. ALBERT CROWDER, JR.

No. 7

(Filed 13 March 1974)

1. **Constitutional Law § 29; Jury § 7; Criminal Law § 135— selection of jury — inquiries as to death penalty views**

Prospective jurors in a capital case may be asked whether they have moral or religious scruples against capital punishment and, if so, whether they are willing to consider all of the penalties provided by law or are irrevocably committed to vote against the death penalty regardless of the facts and circumstances that might be revealed by the evidence.

2. **Criminal Law § 42— .38 caliber pistol — admissibility in murder case**

The trial court properly allowed a .38 caliber pistol into evidence in a first degree murder prosecution where the evidence tended to show that the victim was shot, the defendant told the victim he had "a .38" for her just before the shot was fired, an eyewitness testified that the pistol resembled the one he saw defendant use, and the pistol, which contained four full rounds and one empty cartridge, was found 1½ hours after the shooting some four to six parking spaces from the spot where deceased was shot.

3. **Criminal Law § 96— evidence withdrawn from jury consideration — no prejudice**

Where the sister of the victim in a first degree murder case testified that deceased met defendant in Caledonia in prison, prejudice, if any, in admission of the evidence was removed when the evidence was withdrawn and the jury instructed not to consider it.

4. **Criminal Law § 43; Homicide § 20— photograph of murder victim's body — admissibility**

A photograph of the nude body of deceased taken in the morgue was properly admitted in a first degree murder case to illustrate the testimony of an officer of the City-County Identification Bureau.

5. **Criminal Law § 57— gunshot residue wipings — qualification of SBI agent to take**

An SBI agent was qualified to take gunshot wipings from defendant's hands where the procedure was not "highly technical," the agent's background included technical police investigatory work and the agent had been given personal instruction by a chemist who was expert in the field of gunshot residue tests.

6. **Criminal Law § 57— gunshot residue wiping tests — competency of evidence**

Where the procedure that an SBI agent testified he followed in taking gunshot wipings from defendant's hands was essentially the same as the procedure contained in the instruction sheet from a wiping kit which was read to the jury by an SBI chemist who wrote the instructions, defendant was not prejudiced, though the instruction sheet accepted into evidence may not have been the same sheet used by the agent in taking wipings from defendant's hands.

7. **Criminal Law § 57— gunshot residue wiping tests — reliability — admissibility**

Gunshot residue wiping tests which used flameless atomic absorption spectrophotometry produced results which were sufficiently reliable to be admitted into evidence in defendant's first degree murder prosecution.

8. **Constitutional Law § 36; Criminal Law § 135; Homicide § 31— first degree murder — death penalty proper**

In this jurisdiction the penalty for murder in the first degree committed after 18 January 1973 is death, and that penalty is neither cruel nor inhuman in a constitutional sense.

Chief Justice BOBBITT and Justices HIGGINS and SHARP dissenting as to death sentence.

DEFENDANT appeals from Judgment of *Martin, J.*, First July, 1973 Assigned Criminal Session, WAKE Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging that on 4 March 1973, with malice aforethought, he did kill and murder Peggy Ann Bryant.

The State offered evidence tending to show that on the night of 4 March 1973 defendant was at King's Lounge, a Raleigh tavern. The deceased Peggy Ann Bryant, defendant's girl friend, arrived in an auto with her two sisters and two other girls. Peggy called defendant to the car where an argument ensued following which defendant went back into the tavern. Shortly thereafter defendant came out of King's Lounge, called Peggy, and they went around the corner of the building. They returned in a few minutes and defendant reentered the lounge while Peggy talked to the other girls at the car in the parking lot. When defendant came out of King's Lounge the second time, Peggy left the car and again followed defendant to the side of the tavern. What then occurred is described by Milton Hunter, an eyewitness, in the following paragraph.

Hunter had parked his car in a parking space at the corner of King's Lounge and thus could see down two sides of the

building and was seated on the hood of his car drinking beer and talking with an acquaintance, a soldier named Edward Patterson. He observed defendant and Peggy Ann Bryant beside the building. He heard defendant call Peggy a vulgar name and say: "I got something for you, I have got your goddamn birthday present right here." Peggy said: "What is it?" Defendant replied: "This .38 here." According to the witness Hunter, the pistol was not in defendant's hand at the time. "He reached up this way and got up beside of his stomach and got it." Defendant then shot Peggy Ann Bryant in the face, began hitting the hood of the car next to Hunter's car, and yelled for an ambulance, saying "someone from the highway over there shot my girl friend." Peggy Ann Bryant was taken by ambulance to the hospital where she died as a result of extensive injury to the brain caused by a bullet which had entered directly above the left eye and penetrated the brain. An autopsy was performed and two lead fragments lodged in the back of the head were removed.

Numerous other witnesses testified that they saw Peggy Ann Bryant accompanying the defendant to the side of the building and then heard a shot.

Officer Hinton testified that the death weapon was not immediately found but approximately an hour and a half later, after returning from the hospital, he made a thorough search of the parking lot and found a .38 caliber Smith and Wesson revolver with a two-inch barrel approximately four to six parking spaces from where Peggy Ann Bryant was lying. The pistol was loaded at the time and contained four full rounds and one spent round.

Gunshot wipings taken from the back of defendant's right hand and the palm of his left hand showed significant concentrations of barium, antimony and lead, particularly on the back of the right hand between the thumb and forefinger. This indicated that he had recently fired a gun according to the testimony of R. D. Cone, a forensic chemist and an expert in the taking and interpretation of gunshot residue tests.

Glen Glesne, a laboratory analyst in the field of chemisty, blood and body fluids, did an analysis of the blood of Peggy Ann Bryant and determined that it belonged to Group A. Reddish colored stains on the shoes and trousers of defendant were

analyzed and found to be blood of human origin which demonstrated the A blood grouping factor.

Defendant offered no evidence. The jury convicted defendant of murder in the first degree and he was sentenced to death. His appeal to this Court presents for review the assignments of error discussed in the opinion.

Robert Morgan, Attorney General; T. Buie Costen and Rafford E. Jones, Assistant Attorneys General, for the State of North Carolina.

Gerald L. Bass, attorney for defendant appellant; David E. Kendall of the NAACP Legal Defense Fund, attorney for defendant appellant.

HUSKINS, Justice.

[1] Over defendant's objection the solicitor was permitted to ask each prospective juror the following question: "Do you have any moral or religious scruples or beliefs against capital punishment?" Ten jurors answered no, one answered yes but said that after hearing all the evidence and listening to the case she could consider a verdict of guilty in a capital case, and one said it would depend upon the circumstances. The record shows that no juror was excused for cause by either the solicitor or defense counsel. Defendant contends the trial court erred in allowing the jurors to be questioned concerning their views on capital punishment. This constitutes defendant's first assignment of error.

With respect to jury selections in capital cases, *Witherspoon v. Illinois,* 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968), establishes two things: (1) veniremen may not be challenged for cause simply because they voice general objections to the death penalty or express conscientious or religious scruples against its infliction; and (2) veniremen who are unwilling to consider all of the penalties provided by law and who are irrevocably committed, before the trial has begun, to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the trial may be challenged for cause on that ground.

Since the decision in *Witherspoon* this Court has held in many cases that prospective jurors in a capital case may be asked whether they have moral or religious scruples against

capital punishment; if so, whether they are willing to consider all of the penalties provided by law, or are irrevocably committed to vote against the death penalty regardless of the facts and circumstances that might be revealed by the evidence. *See e.g., State v. Washington,* 283 N.C. 175, 195 S.E. 2d 534 (1973); *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652 (1972); *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671 (1971); *State v. Sanders,* 276 N.C. 598, 174 S.E. 2d 487 (1970); *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969); *State v. Peele,* 274 N.C. 106, 161 S.E. 2d 568 (1968).

In order to insure a fair trial before an unbiased jury, it is entirely proper in a capital case for both the State and the defendant to make appropriate inquiry concerning a prospective juror's moral or religious scruples, beliefs, and attitudes toward capital punishment. Defendant's first assignment of error is overruled.

[2] A .38 Smith and Wesson pistol was identified as State's Exhibit 2 and admitted into evidence over defendant's objection. Defendant contends the pistol was improperly admitted since it was never identified as the murder weapon. This constitutes defendant's second assignment of error.

As a general rule 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 into 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).

Applying these legal principles to the evidence in this case, we hold that State's Exhibit 2 was properly admitted. Sergeant Hinton identified State's Exhibit 2 as the pistol he found in the parking lot at King's Lounge about one and one-half hours after the shooting. Officer Holder testified that the entire parking area was not searched immediately after the shooting due to crowd control problems and the large number of vehicles in

the area. The pistol, which contained four full rounds and one empty cartridge, was found approximately four to six parking spaces from the spot where the deceased was shot. Milton Hunter, an eyewitness to the shooting, testified that defendant told deceased he had "a .38" for her just before the shot was fired; that he didn't see what happened to the gun afterwards; and that State's Exhibit 2 resembles the gun he saw defendant use. Deborah Bryant, when shown State's Exhibit 2, testified: "I have seen defendant Albert Crowder with a pistol before. It was similar to that one over at his house one night. It looked like that one to me. It was about a week before March 4." All this evidence tends to show a relevant connection between State's Exhibit 2 and the murder of Peggy Ann Bryant. The weapon was properly admitted. Defendant's second assignment of error is overruled.

[3] Jacquelyn Otelie Bryant, sister of the deceased, testified that defendant had been dating the deceased from July or August 1972 until the date she was shot. The solicitor then asked the witness if she knew of her own knowledge where defendant and deceased met. Defendant's objection to that question was overruled and the witness replied: "She met him in Caledonia in prison." Objection was then sustained and the jury was instructed not to consider the answer. At defendant's request the jury was excused and defendant moved for mistrial on the ground that the answer was so highly prejudicial the error could not be cured by the court's instructions. Denial of this motion constitutes defendant's third assignment of error.

Defendant relies on *State v. Aycoth,* 270 N.C. 270, 154 S.E. 2d 59 (1967), in support of his motion for mistrial. There, Aycoth and his co-defendant John Shadrick were on trial for armed robbery. Deputy Sheriff Fowler was asked if he knew who owned the automobile which was in Aycoth's possession at the time of his arrest. The deputy replied that at the time Aycoth had been arrested on another charge he had said it was his car, and then added: "His wife asked me to go search the car and see if I could find some articles that was left in the car sitting in the yard *when he was indicted for murder.*" (Emphasis added.) Defendant's objection and motion to strike were allowed, and the court instructed the jury not to consider what defendant's wife had said. Defendant's motion for a mistrial was denied. This Court awarded a new trial, saying: "The unresponsive statement of Fowler informed the jury that Aycoth had been

indicted for murder. . . . *Subsequent incidents* tend to emphasize rather than dispel the prejudicial effect of Fowler's testimony. Shadrick testified the arresting officer answered his inquiry as to why he was being arrested by saying, 'Running around with Aycoth is enough.' Too, the solicitor, in cross-examing Shadrick, asked (1) whether Shadrick had become acquainted with Aycoth in prison, and (2) whether Shadrick knew Aycoth while Shadrick was in prison. . . . Being of the opinion the incompetent evidence to the effect Aycoth had been or was under indictment for murder was of such serious nature that its prejudicial effect was not erased by the court's quoted instruction, we are constrained to hold that Aycoth's motion for a mistrial should have been granted." (Emphasis added.)

Ordinarily, where objectionable evidence is withdrawn and the jury instructed not to consider it no error is committed. *State v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686 (1947). The rule is aptly stated in *State v. Strickland,* 229 N.C. 201, 49 S.E. 2d 469 (1948), as follows: "In appraising the effect of incompetent evidence once admitted and afterwards withdrawn, the Court will look to the nature of the evidence and its probable influence upon the minds of the jury in reaching a verdict. In some instances because of the serious character and gravity of the incompetent evidence and the obvious difficulty in erasing it from the mind, the court has held to the opinion that a subsequent withdrawal did not cure the error. But in other cases the trial courts have freely exercised the privilege, which is not only a matter of custom but almost a matter of necessity in the supervision of a lengthy trial. Ordinarily where the evidence is withdrawn no error is committed." (Citations omitted.)

It is readily apparent that substantial differences distinguish this case from *Aycoth.* In the latter, the objectionable statement was that Aycoth had been *indicted* for murder. Here, the statement was only that defendant had met deceased in Caledonia in prison. While the statement does suggest that defendant may have been in prison, it has other connotations as well: Who was in prison—defendant, deceased, or both? Furthermore, no *subsequent events* tended to emphasize this aspect of the matter. In fact, the subject was not mentioned again. This evidence, therefore, may not be deemed so inherently prejudicial that its initial impact could not be erased by the judge's prompt instruction: "Ladies and gentlemen of the jury, do not consider the answer to that question."

"[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 sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so." *State v. Ray,* 212 N.C. 725, 194 S.E. 482 (1938). We hold that the prejudicial effect, if any, of the evidence under discussion was removed when that evidence was withdrawn and the jury instructed not to consider it. This accords with recent decisions of this Court, including *State v. Moore,* 276 N.C. 142, 171 S.E. 2d 453 (1970), and *State v. Self,* 280 N.C. 665, 187 S.E. 2d 93 (1972). Moreover, the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the stricken evidence is so insignificant by comparison, that the occurrence complained of in this assignment was harmless beyond a reasonable doubt. Defendant's third assignment of error is overruled.

[4] A photograph of the nude body of deceased taken in the morgue was admitted over objection to illustrate the testimony of Officer Holder of the City-County Identification Bureau. Defendant contends this photograph was inflammatory and prejudicial, and its admission constitutes his fourth assignment of error.

Photographs are admissible in this State to illustrate the testimony of a witness, and their admission for that purpose under proper limiting instructions is not error. *State v. Duncan,* 282 N.C. 412, 193 S.E. 2d 65 (1972); *State v. Cutshall,* 278 N.C. 334, 180 S.E. 2d 745 (1971); *State v. Atkinson,* 278 N.C. 168, 179 S.E. 2d 410 (1971); *State v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824 (1948). *See generally* 1 Stansbury's North Carolina Evidence § 34 (Brandis rev. 1973).

The fact that a photograph may depict a horrible, gruesome or revolting scene, indicating a vicious, calculated act of cruelty, malice or lust, does not render it incompetent. When such photograph is properly authenticated as a correct portrayal of conditions observed and related by the witness who uses it to illustrate his testimony, it is admissible for that purpose. *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969); *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10 (1967). The photograph having been used in accordance with the rule, defendant's fourth assignment is without merit and is overruled.

[5] Defendant's fifth, sixth and seventh assignments of error are addressed to evidence concerning gunshot wipings and

the gunshot residue test based thereon. The fifth assignment presents the question whether SBI Agent Sampson, who secured the wipings, was qualified to take them.

Lee Edward Sampson, a Special Agent with the State Bureau of Investigation, took gunshot wipings from defendant's hands during the early morning hours of 5 March 1973. This agent testified that in taking the wipings he used the kit supplied by the SBI Chemical Laboratory and followed the instructions and the procedures contained in that kit.

The record shows that Agent Sampson had two years of college training, had worked for the Federal Bureau of Investigation in its Fingerprint Identification Division for one year and had been an agent with the State Bureau of Investigation for two years and five months at the time he took the wipings. He had been personally instructed in the procedure to be followed by R. D. Cone, the SBI chemist who wrote the instructions contained in all gunshot residue wiping kits used by the SBI.

The procedure for taking the wipings is not "highly technical" as defendant contends. It is a relatively simple matter to follow the instructions, take the wipings, and turn them over to a qualified chemist for analysis and testing. That is all Agent Sampson did, and he was qualified by training and experience to perform that simple task. His background in technical police investigatory work and his personal instruction by a chemist who was expert in the field of gunshot residue tests insured the exercise on Agent Sampson's part of the utmost care in taking the wipings. Defendant's fifth assignment is without merit.

[6] Defendant's sixth assignment asserts error by the court in accepting into evidence an instruction sheet contained in a gunshot wiping kit without evidence that it was in fact the same sheet used by Agent Sampson in taking the wipings from defendant's hands. R. D. Cone, a forensic chemist for the SBI Chemical Laboratory with a Bachelor of Science Degree from North Carolina State University and a Master of Science Degree from Michigan State University, and with fifty semester hours of chemistry with major emphasis of study in the area of microbiology and biochemistry, testified that he authored the instructions placed in all SBI gunshot residue wiping kits. After outlining the procedure followed in taking a wiping, he identified a document as an accurate copy of the instructions contained in

the kits. Then, over objection, he read the instructions to the jury. Defendant contends there was no evidence that it was the same instruction sheet used by Agent Sampson in taking the wipings and, under the best evidence rule, it was error to allow its introduction into evidence.

The instructions, in pertinent part, read as follows:

"Instructions for collecting gunshot residue. North Carolina State Bureau of Investigation, Raleigh, North Carolina. The following procedure should be used to swab surfaces suspected of containing gunshot residue with the kit supplied by the North Carolina State Bureau of Investigation Chemical Laboratory.

Number 1. Thoroughly wash your hands with soap and water and dry them with a clean towel prior to doing the wiping for gunshot residue.

Number 2. Remove one of the cotton swabs from the plastic zip-lock bag and moisten it with four drops of two percent hydrochloric acid.

Number 3. Use the moistened swab and thoroughly swab the back of the left hand including the back of the fingers.

Number 4. Place the used swab into one of the clean zip-lock plastic bags. Seal the bag and label it in the following manner: a. Location of wiping (left back, right palm, etc.) b. Name of suspect. c. Date of wiping. d. Your identification mark.

Number 5. Using three additional swabs, moisten each one individually as in Step 2 and swab the left palm, right back, and right palm, respectively as in Step 3. These swabs should be placed in separate zip-lock bags and treated as in Step 4.

Note: If at any time during the wiping procedure the hand of the wiper should come in contact with the cotton end of the swab or the suspect's hands, the hands should be thoroughly washed in soap and water before the next swab is used. In cases where the same person is wiping the hands of more than one suspect, it is necessary to wash your hands between doing each person.

Number 6. Moisten one of the swabs with four drops of two percent hydrochloric acid and immediately place it in a separate zip-lock plastic bag. This bag should be labeled 'control' as the swab will be analyzed to determine the purity of the materials used to collect the gunshot residue.

Number 7. Swab the inside of the cartridge casing (if available) with a cotton swab moistened with four drops of two percent hydrochloric acid and handle it as in Step 4. This step is particularly important since some types of ammunition do not contain antimony in their primer.

Note: It is advisable not to handle the cartridge casing until the other wipings have been completed. And there is an asterisk for the footnote below this.

When weapons and/or fired cartridge casings are being submitted to the firearms laboratory, do not follow Step 7. In these cases, the chemical laboratory will make a cartridge case wiping in the firearms laboratory. Indicate on the evidence sheet when this evidence has been submitted to the firearms laboratory.

Item Number 8. Fill out the attached evidence sheets completely and enclose them in the mailing envelope with the wipings. The information on these sheets should include the type of weapon involved, the caliber and manufacturer of the ammunition, the condition of the weapon, and the amount of time elapsed between the firing of the weapon and the wiping of the suspect's hands.

Nine. Seal all of the plastic bags used in the self-addressed envelope and mail them by first class mail. The envelope should be marked on the outside 'Attention Chemical Laboratory — Gunshot Residue.'

Number 10. An official report will be mailed to the requesting officer within a reasonable period of time. If rush results are needed, this should be indicated by a personal telephone call to the chemical laboratory."

The procedure Agent Sampson testified he followed in taking the wipings and the procedure contained in the instruction sheet read to the jury by SBI Chemist Cone are essentially the same. Under these circumstances we need not decide whether defendant's technical objection to the introduction of the in-

struction sheet is sound. The record clearly demonstrates that defendant was not prejudiced in the slightest by the introduction of the instruction sheet into evidence and for that reason his sixth assignment of error is overruled.

[7] Defendant contends that scientific tests conducted on gunshot residue wipings are speculative and highly unreliable and that the court erred in allowing R. D. Cone to testify concerning such tests. This constitutes defendant's seventh assignment of error.

SBI Chemist Cone testified that, using flameless atomic absorption spectrophotometry, he personally analyzed the gunshot residue wipings taken by Agent Sampson from defendant's hands to determine whether they contained barium, antimony and lead. This analysis showed "significant concentrations" of all three elements in the wipings taken from the back of defendant's right hand and the palm of his left hand. Based on these test results, Mr. Cone testified that in his opinion "the subject could have handled and fired a gun."

Scientific tests of this nature are competent only when shown to be reliable. The record shows that Mr. Cone is a man experienced in the field of gunshot residue tests and has, on several occasions, presented technical papers on the subject to various associations of forensic scientists. He testified that only in "very rare circumstances" was it possible for all three of the test elements to be found together in situations in which no gunshot was involved; and that in those rare circumstances the concentrations would be the highest on the palms of the hands. Mr. Cone further noted that in tests performed in his laboratory he found that when these elements appeared on the hands of persons who had not fired or handled a gun, "they were always present in concentrations which were different than what you would normally expect to find on the hand of a person who has fired a gun." With respect to the tests that were performed on the wipings taken from defendant's hands, Mr. Cone testified that the concentrations of barium, antimony and lead were highest on the back of defendant's right hand and were about "[a]verage or middle for a person who has fired a .38 caliber weapon."

Independent research on gunshot residue tests verifies the reliability of this type of test. In a series of tests performed on persons involved in occupations where occupational contamina-

tion of the hands might cause interference with the test procedure, researchers have found that "[n]o false tests were obtained nor failure of tests to detect antimony, barium, and lead were encountered because of occupational contamination of the hands." Harrison and Gilroy, Firearms Discharge Residues, 4 J. For. Sci. 184, 198 (1959). Although chemical reagents were used in the Harrison and Gilroy experiments to test for the presence of firearm discharge residue rather than flameless atomic absorption spectrophotometry, as in this case, the difference does not appear significant. Flameless atomic absorption spectrophotometry appears to be an improvement over the use of chemical reagents because chemical reagents detect only the presence of significant concentrations of the three test elements whereas spectrophotometry can also determine the weight of the elements deposited on the subject's hands.

The crucial concern with tests of this type is that the test could indicate that a subject had fired a handgun when in fact he had not. It was for this reason that many courts rejected the dermal nitrate (paraffin) test. *See Brooke v. People,* 139 Colo. 388, 339 P. 2d 993 (1959); *Born v. State,* 397 P. 2d 924 (Okla. Crim. 1964), *cert. denied,* 379 U.S. 1000 (1965); *Clarke v. State,* 218 Tenn. 259, 402 S.W. 2d 863, *cert. denied,* 385 U.S. 942 (1966). This test proved unreliable because it could not distinguish between nitrates deposited on the hand from the firing of a handgun and nitrates deposited on the hands of persons who had come in contact with such common substances as explosives, fireworks, fertilizers, pharmaceuticals, leguminous plants (peas, beans, alfalfa), and burning tobacco products such as cigarettes. 5 Am. Jur. Proof of Facts, Firearms Identification 119-20 (1960). Apparently because of this fact, participating experts in the 1963 seminar on the scientific aspects of police work conducted by the International Criminal Police unanimously rejected the dermal nitrate test as being without value. Moenssens, Moses and Inbeau, Scientific Evidence in Criminal Cases § 4.12 (1973).

According to the testimony of Mr. Cone, antimony, barium and lead will in "rare circumstances" be found on the hands of persons who have not fired a handgun. Even so, by reason of the location and the level of concentrations of the test elements on the subject's hands he is able to determine the probability, great or small as the case may be, whether the test substances came from the discharge residues of a handgun or from some

other source. In our view, the test employed by Mr. Cone in this case avoids the pitfalls inherent in the dermal nitrate test and demonstrably possesses the degree of reliability required to render it competent. We hold that evidence of the results of the test was properly admitted. The mere fact that such evidence does not exclude every remote possibility of error does not render it incompetent. Moreover, defendant has not been prejudiced by the introduction of the results of the gunshot residue test since an eyewitness to the shooting testified that defendant fired a pistol pointed at the victim's face. Defendant's seventh assignment of error is overruled.

Assignments of error 8, 9, 10 and 11 are based on exceptions to the trial judge's charge to the jury. Defendant asserts in these assignments: (1) that the court violated G.S. 1-180 when it characterized as "boresome" the recapitulation of the evidence; (2) that the court erred in defining deliberation and erroneously instructed with respect to proof thereof; (3) that the charge on the elements of first degree murder was erroneous and confusing; and (4) that the court erroneously invaded the province of the jury in that portion of the charge dealing with the jury's deliberations.

These assignments require no discussion and are overruled. Their total lack of merit is revealed by careful examination of the entire charge.

[8] Defendant contends the death penalty imposed in this case is legally unauthorized and constitutes a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States. This constitutes his twelfth and final assignment of error.

In an excellent brief, similar in many respects to the *amicus curiae* brief filed by the NAACP Legal and Educational Fund, Inc., in *State v. Jarrette*, 284 N.C. 625, 202 S.E. 2d 721 (1974), we are urged to reconsider our decision in *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19 (1973), and hold that life imprisonment is the sole penalty for the four previously capital crimes in this State—murder, arson, burglary and rape—until the Legislature acts to revise the present statutes dealing with those crimes.

All arguments here, attacking the soundness of our decision in *Waddell* and urging the unconstitutionality of the death

penalty under the Eighth and Fourteenth Amendments, were fully considered in *State v. Jarrette, supra.* Our decision in *Jarrette* reaffirms the holding in *Waddell* and is controlling here. In this jurisdiction the penalty for murder in the first degree committed after 18 January 1973 is death. That penalty is neither cruel nor inhuman in a constitutional sense. Defendant's twelfth assignment of error is overruled.

All the evidence tends to show a senseless, vicious, calculated murder without mitigating circumstances. Having received a fair trial free from prejudicial error, the verdict and judgment must be upheld.

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).

CAROLINA PAPER COMPANY, INC., PLAINTIFF v. EVERETT B. BOUCHELLE, T/A BOUCHELLE ENTERPRISES, DEFENDANT, AND W. P. CHERRY & SON, INC., GARNISHEE

No. 27

(Filed 13 March 1974)

1. **Garnishment § 2— invalid service of process — void judgment**

If service of process on the employee of the corporate garnishee was insufficient, the court did not acquire jurisdiction over the garnishee, the conditional and final judgments against the garnishee are void, and a motion in the cause to correct the record is the appropriate action.

2. **Garnishment § 2; Process § 12— garnishment proceedings — agent for service of process**

An employee of a corporate garnishee was an "agent" authorized to receive process in a garnishment proceeding within the purview of G.S. 1-440.26(a) where the employee was the son-in-law of the president and owner of the corporate garnishee, he had been working for the corporation for two months, he was made president of a subsidiary shortly after beginning his employment with the corporation, he was 38 years old with 15 years of business experience, he was in charge of the corporation's office and some 17 employees while its

president and its bookkeeper were away, and neither was in the office when process was served on the employee.

Justice LAKE dissents.

ON *certiorari* to review the decision of the Court of Appeals reported in 19 N.C. App. 697, 200 S.E. 2d 203 (1973), which affirmed the order of *Abernathy, J.*, at the 2 April 1973 Regular Session of MECKLENBURG District Court.

The undisputed or stipulated facts show that in 1970 defendant Everett B. Bouchelle, trading as Bouchelle Enterprises (hereinafter referred to as Bouchelle), and garnishee W. P. Cherry & Son, Inc. (hereinafter referred to as Cherry) were working in Statesville, North Carolina, on a construction job involving the construction of apartment buildings. Cherry was one of the general contractors on the project, and Bouchelle was a subcontractor under Cherry. Bouchelle was in the plastering business and purchased the materials for this project from plaintiff, a North Carolina corporation with its principal place of business in Mecklenburg County.

On 15 October 1970 plaintiff instituted suit in Mecklenburg District Court against Bouchelle, alleging in its complaint that Bouchelle was indebted to plaintiff in the amount of $12,004.93 with interest from 16 September 1970. Plaintiff also instituted supplemental attachment and garnishment proceedings against Cherry on 15 October 1970 by posting bond and filing the required garnishment papers naming Cherry as garnishee. On 16 October 1970, J. D. Morris, a deputy sheriff from the Mecklenburg County Sheriff's Department, delivered copies of the summons, notice of levy, and order of attachment to the office of Cherry in Charlotte. Deputy Morris stated that when he arrived at the office of Cherry, neither W. P. Cherry, Jr., the president and owner of Cherry, nor Clifford Ambrose, the company's bookkeeper, was in the office, and therefore Morris served copies of the summons, notice of levy, and order of attachment on William F. Lyon. In acknowledging receipt of the garnishment papers for Cherry, Lyon signed his name and then beside his signature wrote "purchasing agent."

The summons to Cherry noted among other things that within twenty days after service of the summons, Cherry was required to file a verified answer in the office of the clerk of the Superior Court in Mecklenburg County showing whether

Cherry was indebted to Bouchelle or had any property in its possession belonging to Bouchelle, and notifying it that unless such answer was filed a conditional judgment would be taken against it for the full amount for which plaintiff prayed judgfent against Bouchelle, plus interest and costs. Cherry failed to answer.

Plaintiff's action against Bouchelle was tried on the merits before Judge Horner without a jury at the 24 April 1972 Civil Jury Term of the Mecklenburg District Court. Judge Horner found that Bouchelle was indebted to plaintiff in the amount of $10,404.87 for sheetrock and other materials plaintiff had furnished Bouchelle in connection with the construction project, and entered judgment against Bouchelle in the amount of $10,404.87 with interest from 16 September 1970 and costs. This judgment also stated:

> "IT IS FURTHER ORDERED that this action remain on the active docket for such further proceedings as may be appropriate under the Supplemental Attachment Proceedings instituted herein, including such proceedings as may be appropriate as against W. P. Cherry & Son, Inc. [Garnishee herein, who was served with a Summons and Notice] of Levy in October, 1970."

On 26 April 1972, upon application of plaintiff, a conditional judgment was entered against Cherry by the clerk of the Mecklenburg Superior Court for $10,404.87 with interest from 16 September 1970 and costs. The conditional judgment contained the following notice:

> "YOU ARE HEREBY NOTIFIED to appear before me, at the Offices of the Superior Court in the Mecklenburg County, North Carolina, Courthouse not later than ten (10) days after a copy of this notice has been served upon you, and to show cause, if any there be, as to why the foregoing Conditional Judgment shall not be made final."

A copy of this conditional judgment and the accompanying notice was served upon Cherry on 28 April 1972 by delivery of the same to its president, W. P. Cherry, Jr., by Donald W. Stahl, Sheriff of Mecklenburg County.

Cherry failed to take any action, and after the expiration of more than ten days plaintiff moved before the clerk that the conditional judgment against Cherry be made final. Plain-

tiff's motion was allowed and final judgment against Cherry was entered on 10 May 1972 for $10,404.87 with interest from 16 September 1970 and costs.

On 1 December 1972 the Sheriff of Mecklenburg County came by Cherry's office with an order of execution. W. P. Cherry, Jr., then immediately turned over the copies of the garnishment papers and the conditional judgment to an attorney. This attorney on 1 December 1972 filed a motion in Mecklenburg District Court, pursuant to G.S. 1A-1, Rule 60(b)(4), to set aside the final judgment against Cherry on the ground that such judgment was void because of insufficiency of the service of process of the garnishment papers on 16 October 1970. After a hearing conducted on 2 April 1973, Chief District Judge Abernathy by an order dated 10 April 1973 denied Cherry's motion.

Cherry appealed from this order. The Court of Appeals in an opinion by Judge Hedrick, concurred in by Chief Judge Brock and Judge Britt, affirmed. We allowed *certiorari* on 9 January 1974.

Ruff, Bond, Cobb, Wade & McNair by Thomas C. Ruff; and John E. McDonald, Jr., for movant-garnishee, W. P. Cherry & Son, Inc., appellant.

Harkey, Faggart, Coira & Fletcher by Harry E. Faggart, Jr., Francis M. Fletcher, Jr., and Philip D. Lambeth for plaintiff appellee.

MOORE, Justice.

G.S. 1-440.21 states that "garnishment is not an independent action but is a proceeding ancillary to attachment and is the remedy for discovering and subjecting to attachment . . . any indebtedness to the defendant and any other intangible personal property belonging to him. . . . " This same section states that "a garnishee is a person, firm, association, or corporation to which such a summons as specified by § 1-440.23 is issued."

After defining garinshment, our statutes set forth the procedures to be followed in garnishment proceedings. G.S. 1-440.22 provides that "a summons to garnishee may be issued (1) at the time of the issuance of the original order of attachment, by the court making such order, or (2) at any

time thereafter prior to judgment in the principal action, by the court in which the action is pending."

G.S. 1-440.25 in pertinent part provides that "the levy in all cases of garnishment shall be made by delivering to the garnishee, or . . . some representative of a corporate garnishee designated by § 1-440.26, a copy of each of the following: (1) the order of attachment, (2) the summons to garnishee, and (3) the notice of levy."

G.S. 1-440.26 pertains to the service of garnishment papers when the garnishee is a domestic corporation. It provides that in such cases "the copies of the process listed in § 1-440.25 may be delivered to the president or other head, secretary, cashier, treasurer, director, managing agent or local agent of the corporation."

G.S. 1-440.27 provides that "when a garnishee, after being duly summoned, fails to file a verified answer as required, the clerk of the court shall enter a conditional judgment for the plaintiff against the garnishee for the full amount for which the plaintiff shall have prayed judgment against the defendant, together with such amount as in the opinion of the clerk will be sufficient to cover the plaintiff's costs. . . . The clerk shall thereupon issue a notice to the garnishee requiring him to appear not later than ten days after the date of service of the notice, and show cause why the conditional judgment shall not be made final. If, after service of such notice, the garnishee fails to appear within the time named and file a verified answer to the summons to the garnishee, or if such notice cannot be served upon the garnishee because he cannot be found within the county where the original summons to such garnishee was served, then in either such event, the clerk shall make the conditional judgment final."

Assuming proper service was had on Cherry, plaintiff followed the statutory procedures set out above. Therefore, the sole question presented by this appeal is whether W. F. Lyon, an employee of the garnishee Cherry, was a proper person for delivery of process in this proceeding under the terms of G.S. 1-440.26(a).

Initially it should be noted that former G.S. 1-97, concerning service of process generally, provided for the delivery of summons in an action against a corporation "to the president

or other head of the corporation, secretary, cashier, treasurer, director, managing or local agent thereof." G.S. 1-97(1). This is substantially the same language now contained in G.S. 1-440.26(a) as to service on a corporate garnishee. When the North Carolina Rules of Civil Procedure were enacted in 1967, G.S. 1-97 was repealed and replaced by G.S. 1A-1, Rule 4(j)(6)(a). However, G.S. 1-440.26(a) has not been changed and continues to govern service of process in garnishment proceedings. Hence, Rule 4(j)(6)(a) has no application to this case. Nevertheless, we do note that service in this case on Lyon would have been valid under Rule 4(j)(6)(a), since under that rule service may be had on a corporation by leaving a copy of the summons and complaint in the office of the president of the corporation with the person "who is apparently in charge of the office." The testimony shows that Lyon was not only apparently in charge but that he was actually in charge of the office when process was served upon him.

Because the language used in former G.S. 1-97(1) was the same as now appears in G.S. 1-440.26(a), cases decided under former G.S. 1-97(1) are still pertinent. In defining the term "agent" as used in the statute, Justice Hoke in *Whitehurst v. Kerr,* 153 N.C. 76, 68 S.E. 913 (1910), stated:

> " . . . [T]he cases will be found in general agreement on the position that in defining the term agent it is not the descriptive name employed, but the nature of the business and the extent of the authority given and exercised which is determinative, and the word does not properly extend to a subordinate employee without discretion, but must be one regularly employed, having some charge or measure of control over the business entrusted to him, or of some feature of it, and of sufficient character and rank as to afford reasonable assurance that he will communicate to his company the fact that process has been served upon him. [Citations omitted.]"

See also *Heath v. Manufacturing Co.,* 242 N.C. 215, 87 S.E. 2d 300 (1955); *Mauney v. Luzier's, Inc.,* 212 N.C. 634, 194 S.E. 323 (1937); *Lumber Co. v. Finance Co.,* 204 N.C. 285, 168 S.E. 219 (1933).

The definition given in *Whitehurst v. Kerr, supra,* was approved in *Service Co. v. Bank,* 218 N.C. 533, 11 S.E. 2d 556 (1940), where Justice Barnhill (later Chief Justice) also stated:

" . . . A local agent is one who stands in the shoes of the corporation in relation to the particular matters committed to his care. He must be one who derives authority from his principal to act in a representative capacity . . . and he must represent the corporation in its business in either a general or limited capacity. . . . Thus the question is to be determined from the nature of the business and the extent of the authority given and exercised. *Lumber Co. v. Finance Co.*, 204 N.C., 285, 168 S.E., 219. It is merely a question whether the power to receive service of process can reasonably and fairly be implied from the character of the agency in question. [Citations omitted.]

"In the absence of any express authority the question depends upon a review of the surrounding facts and upon the inference which the court might properly draw from them."

[1] The record in this case shows service on Lyon; however, if such service was insufficient because not authorized by G.S. 1-440.26(a), the court never acquired jurisdiction over Cherry and the conditional and final judgments against it, though apparently regular, would be void, and a motion in the cause to correct the record is the appropriate action. See G.S. 1A-1, Rule 60(b). Such void judgment is "without life or force, and the court will quash it on motion, or *ex mero motu.*" *Carter v. Rountree,* 109 N.C. 29, 13 S.E. 716 (1891). See *Mills v. Richardson,* 240 N.C. 187, 81 S.E. 2d 409 (1954).

Lyon was not the president or the head of Cherry, nor was he secretary, cashier, treasurer, or director. The question then becomes: Was he such an agent, "regularly employed, having some charge or measure of control over the business entrusted to him, or of some feature of it, and of sufficient character and rank as to afford reasonable assurance that he will communicate to his company the fact that process has been served upon him?" *Whitehurst v. Kerr, supra.*

Mr. Cherry testified that when the process was served on William F. Lyon on 16 October 1970, he was informed that a garnishee paper of some sort from plaintiff had been received in the company's office; that he had Mr. Bruce Boney of Lawyers Title Company contacted and that "he assumed that he had cleared up the paper"; that he personally received the papers marked "conditional judgment" in April 1972 but did

not turn them over to an attorney at that time because he "did not realize that [he] was supposed to do anything" about it; that he did not look for the summons and notice when he got the conditional judgment; and that he did not know that final judgment had been taken until execution was served on him in December 1972. Mr. Cherry further testified that after the execution was served, he looked and found in his office copies of the summons and notice of levy that had been served on Lyon on 16 October 1970, and that he now knows he should have turned these papers over to his attorney but he did not do so because he thought the matter was between plaintiff and defendant Bouchelle.

Thus, Cherry, through its president and owner, had notice that garnishment papers had been served on Lyon, that a conditional judgment had been rendered against Cherry for $10,404.87 plus interest and costs, and that this judgment would become final unless Cherry answered within ten days and showed that it was not indebted to Bouchelle. Despite this notice Cherry's president and owner did nothing when originally informed of the garnishment proceeding except contact Mr. Boney of Lawyers Title Company, who in turn apparently did nothing with respect to plaintiff's proceeding. When notice of the conditional judgment was served on him, again Mr. Cherry ignored the notice and did nothing. It is difficult to understand how an experienced businessman could be so lax in the conduct of his company's affairs.

[2] The garnishment papers were served on Lyon. He was the son-in-law of W. P. Cherry, Jr., the president and owner of the garnishee; he was 38 years of age with 15 years' business experience, during which time he served as manager of a department store where he had had experience with garnishment proceedings. Mr. Cherry had recently persuaded Lyon to accept a position with his company, and shortly after beginning his employment with Cherry, Lyon was made president of Edgewood Components, a subsidiary of Cherry. On 16 October 1970, the date of the service of the garnishment papers, Lyon had been an employee with Cherry for two months. According to the testimony of both Lyon and the company's bookkeeper, Mr. Ambrose, when Mr. Cherry and Mr. Ambrose were out of the office, Lyon was in charge of the company's office where some 17 other employees worked. When process was served in this case, neither Mr. Cherry nor Mr. Ambrose was in the office.

Lyon acknowledged receipt of the process and signed as "purchasing agent" since he had done some purchasing, although usually under the direction of Mr. Cherry. The deputy sheriff who served the papers in question had served other papers on the garnishee over the years by leaving them with the person in charge of the office since Mr. Cherry was rarely in. The company had been sued many times and no question had ever been raised about the process being left with the person in charge.

Lyon testified that he thought he gave the papers to Mr. Cherry or to Mr. Ambrose, but he was not sure. Usually when he received papers for Cherry he would place them on Mr. Cherry's desk since he worked closely with him. Mr. Cherry had never told him that he should not receive suit papers.

Under the circumstances in this case it can reasonably and fairly be implied that Lyon was an agent of Cherry of sufficient character and rank as to afford reasonable assurance that he would—as he in fact did—communicate to his company that process had been served upon him. We hold, therefore, that Lyon was an agent authorized to receive process and that service upon him was valid under G.S. 1-440.26(a).

The decision of the Court of Appeals affirming the order of Judge Abernathy denying Cherry's motion to strike the final judgment against it is affirmed.

Affirmed.

Justice LAKE dissents.

IN THE MATTER OF: THE APPEAL OF FORSYTH COUNTY, NORTH CAROLINA FROM AN ACTION AND FINAL DECISION OF THE STATE BOARD OF ASSESSMENT RELATING TO THE 1972 AD VALOREM TAXES ON CERTAIN TOBACCO INVENTORY OF R. J. REYNOLDS TOBACCO COMPANY

No. 13

(Filed 13 March 1974)

1. **Statutes § 5— construction — consideration of caption**

Where the meaning of a statute is doubtful, its title may be called in aid of construction, but the caption will not be permitted to control when the meaning of the text is clear.

2. Taxation § 25— ad valorem taxes — tobacco in processing area

Tobacco belonging to a manufacturer of tobacco products which has been removed from the manufacturer's storage facilities and transferred to the processing area is still an agricultural product coming within the classification provided by G.S. 105-277(a) and is therefore subject to ad valorem taxation at only 60% of the rate applicable to other property in the local taxing unit.

Justices SHARP and LAKE did not participate in the consideration or decision of this case.

THIS proceeding originated by petition of the R. J. Reynolds Tobacco Company addressed to the Forsyth County Tax Supervisor requesting that tobacco, which is the subject of this controversy, be taxed at 60% of the tax rate applicable to other species of property as provided by G.S. 105-277(a) (1971). The record recites: "The property involved in this appeal consists of leaf tobacco belonging to the [original] appellant which has been removed from the firm's storage facilities and transferred to their processing area for the purpose of being processed and manufactured into cigarettes and other tobacco products." The Tax Supervisor denied the request and demanded that the taxpayer pay at the full tax rate. The taxpayer appealed to the County Board of Equalization and Review which affirmed the decision of the Tax Supervisor. The taxpayer appealed to the State Board of Assessment which heard evidence, oral arguments, and considered written briefs.

The evidence before the State Board consisted of the testimony of a single witness, Mr. Carroll Thompson, a research chemist holding a degree of Bachelor of Science from William Jewell College and a Master's Degree from the Massachusetts Institute of Technology. He testified that he had been employed by R. J. Reynolds Tobacco Company for more than twenty years. During his employment he had filled every supervisory job in the manufacturing department of his company. He is now superintendent of production.

> " . . . My job specification calls for total responsibilities in scheduling our production in our factories on all tobacco products. This includes not only personnel and materials but the tobacco as well . . . .
>
> . . . .
>
> "Processing of the tobacco really begins when the farmer takes the tobacco out of the field and puts it into

a curing barn. In the case of flue-cured tobacco which is grown in Florida, Georgia, South Carolina, North Carolina, and Virginia, this is heated artificially to induce the cure. In the case of burley tobacco which is grown in western North Carolina, Kentucky, and Tennessee, this is an air curing process where the tobacco is allowed to wilt in the field and then air dried in slatted barns under cover. The farmer then takes his tobacco to an auction market and [it] is sold to representatives of the various tobacco companies.

"They, in turn, take that product from the auction market to either a prize house or directly to a steaming operation where the mid-stem is removed. The moisture is adjusted and the resulting strips of tobacco, exclusive of the stems, are stored in hogsheads. The hogsheads go into the storage shed for a period of at least one year where significant changes take place in the product during aging. This is a necessary part of the aging of the product in order to qualify for the uses in manufacturing operation.

"After approximately a year and a half or thereabouts, the tobacco is taken out of the storage shed and sent to a processing and cleaning room where the hogshead materials are removed from the tobacco. Moisture is re-adjusted so that it's raised and the leaf is pliable and will not shatter in subsequent processing.

"It is run through a series of tumbling drums with screens to remove foreign material and sand that might be left on the leaf product.

"The various many different grades that constitute the type of tobacco crop are then blended to give an homogeneous mixture of product. And the product is delivered to another department which we would call the blending operation. . . . [I]t is delivered by a conveyor to another area where the tobacco is further processed in relationship to its moisture content. It has to be very critically adjusted.

"Certain flavoring ingredients are added at that point. The tobacco goes into storage for equilibration purposes of at least forty-eight hours. After it is removed from the storage area, it's delivered to yet another department where additional humectants are added. The finished products are

sprayed and the moisture is then adjusted to a higher moisture level to prevent shattering and breaking in the shredding and cutting operation.

"The tobacco goes to a cutting machine which reduces the size of the leaf . . . to the narrow strands that we customarily think of in cigarette tobacco. The tobacco is then run through a drying operation to reduce the moisure from this higher level down to a desired level and it goes down to storage for a minimum of forty-eight hours.

"After it is removed from that [final] storage process, it goes into the making and packing department. It is fed pneumatically or manually to the hopper of the cigarette making machine."

The machine rolls the cigarettes, seals them in packages, and applies the Internal Revenue stamps, completing the manufacturing process.

The State Board of Assessment, sitting as the State Board of Equalization and Review, made these findings:

"(1) That R. J. Reynonds Tobacco Company is a manufacturer of tobacco products.

"(2) That tobacco is an agricultural product which requires a period of more than one year's storage and processing in order to age or condition the product for manufacturing.

"(3) That the tobacco under appeal has been held in storage by R. J. Reynolds Tobacco Company for at least one year as of January 1, 1972.

"(4) That as of January 1, 1972, the subject tobacco had been removed from the firm's storage facilities, transferred to the processing area and removed from the hogsheads in which it had been stored.

"(5) That as of January 1, 1972, the tobacco in question was at some stage in the manufacturing process between storage and the final step in which the tobacco is manufactured into cigarettes."

The Board concluded:

"From our review of the applicable law, the evidence and our findings of fact, we conclude and so decide that

the subject property comes within the classification provided by G.S. 105-277(a). The tobacco was owned by a manufacturer of tobacco products; it required storage for more than one year for aging and conditioning for manufacture. It was therefore subject to tax at 60% of the rate applicable to other property in the county." This order followed:

"WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the action of the Forsyth County Board of Equalization and Review in assessing the subject property at the full tax value rather than the 60% rate was in error and is hereby reversed."

The County of Forsyth filed a petition in the superior court for judicial review alleging error in the findings and conclusions and the order of the State Board of Assessment.

After hearing, Judge Wood in the superior court, entered this order:

"THIS CAUSE coming on to be heard and being heard before the undersigned Presiding Judge of the Superior Court of Forsyth County, North Carolina, at the July 30, 1973 Session of the Superior Court of Forsyth County, upon the petition of Forsyth County for judicial review of the Final Decision of the State Board of Assessment in the above-styled matter; and the Court having reviewed the record of the State Board of Assessment and having considered the briefs submitted by the parties, and having heard oral arguments of the parties, and the Court being of the opinion that the findings of fact and conclusions of law of the State Board of Assessment should be affirmed, the Court finding that the findings of fact of the State Board of Assessment are supported by the evidence and that the property which is the subject of this proceeding was located at the premises of R. J. Reynolds Tobacco Company in Forsyth County, North Carolina on January 1, 1972 while the plant facilities were closed for the holidays and while it was awaiting conversion into a manufactured product, and the Court being of the further opinion that the conclusions of law of the State Board of Assessment are in accordance with law and supported by the findings of fact of the State Board of Assessment;

"NOW, THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED that the property which is the subject of this

proceeding is entitled to the classification set forth in § 105-277(a) of the General Statutes and is, therefore, entitled to be taxed at sixty percent (60%) of the rate levied on real estate and other tangible personal property by the City of Winston-Salem, and the County of Forsyth on January 1, 1972. The final decision of the State Board of Assessment is therefore affirmed in all respects.

"It is further ORDERED that the costs of this action shall be taxed against Forsyth County.

"This 2nd day of August, 1973.

WILLIAM Z. WOOD
Presiding Judge of Superior Court."

Forsyth County excepted to the judgment, alleging three errors in the findings and conclusion: (1) That the property was awaiting conversion into a manufactured product on January 1, 1972; (2) the finding and conclusion that the subject property is entitled to the classification set forth in G.S. 105-277(a) and therefore entitled to be taxed at sixty percent (60%) of the tax rate on January 1, 1972; (3) that the subject property was not in storage as of January 1, 1972, and was no longer an agricultural product within the meaning of the statute. Forsyth County gave notice of appeal.

Both parties joined in a petition that this proceeding be certified to the Supreme Court for review prior to determination in the North Carolina Court of Appeals. The petition was allowed on December 4, 1973.

P. Eugene Price, Jr., and Chester C. Davis for appellant.

Hudson, Petree, Stockton, Stockton and Robinson by William F. Maready for appellee.

HIGGINS, Justice.

The parties agree that the resolution of this controversy depends upon the interpretation of G.S. 105-277(a) (1971). The act provides: "Agricultural Products in Storage. Any agricultural product held in North Carolina by any manufacturer or processor for manufacturing or processing, which agricultural product is of such nature as customarily to require storage and processing for periods of more than one year in order to age or condition such product for manufacture, is hereby classified

as a special class of property under authority of § 2(2), Article V of the Constitution." The parties conceded that tobacco qualifies as an agricultural product and it is of such character as requires storage and processing for periods of more than one year; and that R. J. Reynolds Tobacco Company is a manufacturer and processor. The County has contended that the tobacco loses its preferred character for tax purposes when it is removed from the shed where the hogsheads were stored during the early part of the aging process. The taxpayer contends it retains its preferred status during the time it is *held in North Carolina by a manufacturer or processor for manufacturing or processing.*

In Chapter 806, Session Laws of 1971, the General Assembly rewrote the North Carolina Machinery Act of 1971. § 105-277 is here quoted in material part:

> *"Property classified for taxation at reduced rate.*— (a) Agricultural Products in Storage. Any agricultural product held in North Carolina by any manufacturer or processor for manufacturing or processing, which agricultural product is of such nature as customarily to require storage and processing for periods of more than one year in order to age or condition such product for manufacture, is hereby classified as a special class of property under authority of § 2(2), Article V of the Constitution. Such agricultural products so classified shall be taxed uniformly as a class in each local taxing unit at sixty per cent (60%) of the rate levied for all purposes upon real estate and other tangible personal property by said taxing unit in which such agricultural product is listed for taxation."

The taxing authorities for Forsyth County contend that subtitle "(a) Agricultural Products in Storage" controls and that the tobacco becomes taxable at the moment it leaves the latticed shed where the hogsheads had been stored. Such is not the meaning of the body of subsection (a). The subsection covers "Any agricultural product *held* in North Carolina by any manufacturer or processor *for manufacturing or processing*" (emphasis added) provided the product is of the nature as to require storage in order to assist in the aging and conditioning for its ultimate use.

Assuming the headnote "(a) Agricultural Products in Storage" was inserted by the General Assembly and not by a com-

piler, nevertheless the body of the statute provides that the product be *held* for manufacturing and processing.

[1] The law is clear that captions of a statute cannot control when the text is clear. *In re Chisholm's Will,* 176 N.C. 211, 96 S.E. 1031. Especially is this true if the headnote is the work of a compiler. In *Dunn v. Dunn,* 199 N.C. 535, 155 S.E. 165, Chief Justice Stacy stated the rule: "Where the meaning of a statute is doubtful, its title may be called in aid of construction . . .; but the caption will not be permitted to control when the meaning of the text is clear. . . . Especially is this true where the headings of sections have been prepared by compilers and not by the Legislature itself."

[2] The County argues that when a product is removed from storage and enters the manufacturing process, it is no longer an agricultural product. The evidence taken before the State Board discloses that the processing begins when the farmer removes the tobacco from the field into his barn for curing, and continues through the many steps and stages described by Mr. Thompson. Attention is called to that part of the evidence which requires different periods and places of storage after removal from the hogsheads until finally the leaf is shredded and placed in the hopper to be conveyed to the cigarette machines. It is still tobacco and still an agricultural product until it comes out of the cigarette machine in a sealed package with the Internal Revenue stamp affixed.

The contention that the product here involved is not an agricultural product is not supported by the record which contains this stipulation: "The property involved in this appeal consists of leaf tobacco belonging to the appellant which has been removed from the firm's storage facilities and transferred to their processing area for the purpose of being processed and manufactured into cigarettes and other tobacco products."

The evidence, the findings, and the stipulations fully support the conclusion of the State Board of Assessment and the judgment entered in the superior court by Judge Wood.

The judgment is

Affirmed.

Justices SHARP and LAKE did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. DAVID EARL DILLARD

No. 9

(Filed 13 March 1974)

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

The evidence was sufficient to withstand defendant's motion for nonsuit in a prosecution for first degree murder where such evidence tended to show that defendant went to the church which his wife attended and remained in the vicinity for two and one half hours before the shooting, defendant smuggled a gun into the church under his coat, defendant shot his wife at close range as she was proceeding down the aisle of the church and then fired two more shots into her body as she lay on the floor, and defendant then fired several shots at his wife's relatives as they fled from the scene.

2. **Criminal Law §§ 102, 135; Homicide § 31— first degree murder — no jury argument on punishment**

Since the punishment to be imposed was not a matter to be determined by the jury in a first degree murder case, defendant's counsel was not entitled to argue that question to the jury.

3. **Constitutional Law § 36; Criminal Law § 135; Homicide § 31— first degree murder — death penalty proper**

The trial court in this first degree murder case did not err in overruling defendant's motion in arrest of judgment on the ground that the death sentence imposed upon defendant was not authorized by a constitutionally valid statute of the State but was cruel and unusual punishment prohibited by the U. S. Constitution.

Chief Justice BOBBITT and Justices HIGGINS and SHARP dissenting as to death sentence.

APPEAL by defendant from *Braswell, J.*, at the 30 July 1973 Session of ROBESON.

By an indictment, proper in form, the defendant was charged with the murder of Mattie Bell Dillard, his wife, and was found guilty of murder in the first degree. Pursuant to the verdict, he was sentenced to death. His three assignments of error are: (1) The denial of his motion for judgment of nonsuit; (2) the denial of his motion that he be permitted to argue to the jury the question of punishment; and (3) the denial of his motion in arrest of judgment. The basis for the motion in arrest of judgment, as set forth in his brief on appeal, is that "the death sentence imposed upon appellant is legally unauthorized and constitutes a cruel and unusual punishment prohibited

by the Eighth and Fourteenth Amendments to the Constitution of the United States."

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

On 22 April 1973 (Easter Sunday) at about 7:30 a.m., a witness for the State, whose home adjoined the property of the church attended by the deceased and occasionally by the defendant, saw the defendant walking around in the church yard carrying a shotgun. At 9:30 a.m. the defendant came to the back door of the home of this witness and talked briefly to her husband. Following that conversation, he walked back toward the front door of the church. He entered the church and was told by the janitor that the church "opened" at 10:00 a.m. but the janitor did not object to his staying in the church and waiting until that time. The defendant, however, left the building to get a drink of water.

At about 10:00 a.m. the defendant was observed by several witnesses sitting in the back of the church; i.e., near the front door. Sunday School exercises had begun and were being conducted in the front portion of the church; i.e., near the pulpit. The deceased, 19 years of age, her one-year-old baby, her brother, his wife and their two little girls then entered the church and proceeded down the aisle toward the front, where the Sunday School exercises were in progress. The defendant thereupon shot his wife with the shotgun. She fell to the floor of the church aisle and, as she lay there, he reloaded the gun twice and shot her again and again.

The defendant then pointed the shotgun at his brother-in-law who fled from the church, as did most of the other occupants. As the brother-in-law was fleeing to the home next door to the church, the defendant shot him, the shot striking him in the foot. The brother-in-law and his wife then ran through the house and as they emerged from its front door, the defendant shot again and wounded the wife of his brother-in-law. He then went back toward the church and shot at an automobile in which his parents-in-law appear to have been sitting.

Immediately after their marriage, the defendant and the deceased lived with her parents. Later they separated and he moved out of the home of his parents-in-law. Thereafter, he and his wife became reconciled and then, some three or four weeks

prior to the shooting, they separated again, she returning to the home of her parents.

The deceased sustained three shotgun wounds at close range, one in the right side of her face or neck, below the jaw, one in her right arm and one in her right side. Prior to the shooting, she was in good health. Shortly thereafter, when her body was removed from the church for transportation to the hospital by ambulance, she appeared to be dead.

Approximately one hour after the shooting, Patrolman Daniels of the State Highway Patrol was proceeding to the church in response to a call. Half a mile from the church, he met the defendant walking along the road, carrying a shotgun. Patrolman Daniels stopped his automobile. The defendant came up and said that he was the man for whom the patrolman was looking and that he had just killed his wife. Patrolman Daniels took the defendant into his car and carried him to the sheriff's office. He asked the defendant no questions concerning the shooting but, on the contrary, told him to say no more until he talked with the investigating officer. Nevertheless, the defendant continued to talk and stated that "had it not been for his mother-in-law's interference, it wouldn't have happened." At the sheriff's office, Patrolman Daniels delivered the defendant and the shotgun into the custody of Deputy Sheriff Walters.

Deputy Sheriff Walters advised the defendant of his constitutional rights as set forth in *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602, and offered him the use of a telephone. The defendant stated that he understood his rights. He told Deputy Walters that he had taken the gun into the church under his coat, had taken a seat on the back seat of the church, had thrown his coat over the gun and had shot his wife due to family problems, which he attributed to his mother-in-law.

Attorney General Robert Morgan by Assistant Attorney General Costen and Assistant Attorney General Jones for the State.

McManus & McManus by J. M. McManus for the defendant.

David E. Kendall for NAACP Legal Defense Fund, amicus curiae.

LAKE, Justice.

The judge's charge to the jury is not set forth in the record and no assignment of error is directed thereto. Consequently, it is presumed that the court correctly instructed the jury on every phase of the case with respect both to the law and to the evidence. *State v. Pinyatello,* 272 N.C. 312, 327, 158 S.E. 2d 596; *State v. Hines,* 266 N.C. 1, 145 S.E. 2d 363; Strong, N. C. Index 2d, Appeal and Error, § 42, and Criminal Law, § 158.

[1] The denial of the defendant's motion for judgment as of nonsuit was obviously correct. The undisputed testimony of several eyewitnesses to the shooting of the deceased clearly identified the defendant as the perpetrator of the offense and was sufficient to show that the shooting was intentional. Thus, the evidence was sufficient to give rise to a presumption of malice. *State v. Bolin,* 281 N.C. 415, 189 S.E. 2d 235; *State v. Duboise,* 279 N.C. 73, 81, 181 S.E. 2d 393. The undisputed evidence further shows that the defendant, armed with a shotgun, went to the church, remained in that vicinity some two and one half hours before the shooting, smuggled the gun into the church under his coat and, when his wife entered the church and was proceeding down the aisle, shot her at close range and then fired two more shots into her body as she lay on the floor. Following that, he fired several shots at her relatives as they fled from the scene. Thus, the evidence was ample to support the finding that the murder of his wife was with premeditation and deliberation. As we said in *State v. Duboise, supra,* at page 82, "The additional ingredient of premeditation and deliberation necessary in first degree murder may be inferred from the vicious and brutal circumstances of the homicide, *e.g.,* lack of provocation, threats before and during the occurrence, infliction of lethal blows after the victim had been felled and rendered helpless, and conduct of the defendant before and after the killing." There is in this record no evidence whatever of provocation, or that the deceased spoke to or was aware of the presence of the defendant prior to the shooting.

[2] There was no error in the court's ruling that the defendant's counsel could not make an argument to the jury upon the question of the punishment to be imposed. In *State v. Waddell,* 282 N.C. 431, 445, 194 S.E. 2d 19, we said, with reference to the trial of a defendant upon the charge of murder in the first degree, rape, arson or burglary in the first degree:

> "Upon the trial of any defendant so charged, the trial judge may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment. The trial judge should charge on the constituent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned. Upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death. The punishment to be imposed for these capital felonies is no longer a discretionary question for the jury and therefore no longer a proper subject for an instruction by the judge."

The punishment to be imposed not being a matter to be determined by the jury, defendant's counsel was not entitled to argue this question to the jury.

[3] The defendant's third, and last, assignment of error is to the overruling of his motion in arrest of judgment on the ground that the death sentence imposed upon the appellant is not authorized by a constitutionally valid statute of this State, but is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States. Of the seventy-five page brief filed by the defendant in this Court, all but three pages are in support of this contention. This portion of the brief is a verbatim copy of the brief filed by the amicus curiae in *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721, decided 25 February 1974. Contrary to the usual practice of this Court, the same amicus curiae was permitted, at the hearing of this appeal, to make a full oral argument in support of its contentions concerning this matter. All of the contentions of this defendant and of the amicus curiae upon this question were carefully considered by us and found to be without merit in *State v. Jarrette, supra.*

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).

IN RE: PROBATE OF WILL OF LEVI E. (L. E.) MITCHELL

No. 47

(Filed 13 March 1974)

Wills § 8— revocation of will by marriage — effect of revision of statute on revoked will

Where testator's will made in January 1963 was revoked under former G.S. 31-5.3 by his marriage in November 1963, the will was not revived by the 1967 revision of G.S. 31-5.3 providing that no will should be revoked by any change in the marital status of the maker.

ON *certiorari* granted upon applicants' petition for review of the decision of the Court of Appeals (19 N.C. App. 236, 198 S.E. 2d 233) reversing the judgment of Judge *Perry Martin*, 22 January 1973 Session of WAYNE, docketed and argued in the Supreme Court as Case No. 101 at the Fall Term 1973.

This proceeding was begun by an application to the Clerk of the Superior Court for the probate of a paperwriting purporting to be the will of Levi Mitchell (Mitchell). The following facts are stipulated:

On 16 January 1963 Mitchell, then a widower, duly executed a will in which he devised all his property to the seven children of his second wife, who had died in 1962. Omitted as beneficiaries were the three children of his first wife, who died in 1923.

In November 1963 Mitchell married his third wife, Alma Mitchell (Alma), who survives him. No children were born of this marriage. The will which Mitchell executed on 16 January 1963 made no reference to Alma or a contemplated marriage, and it exercised no power of appointment.

On 18 July 1972 Mitchell died. Thereafter L. E. Mitchell, Jr., and Leon C. Mitchell, the two sons named as executors, presented the will dated 16 January 1963 to the clerk for probate. Alma protested the probate. The clerk refused to probate the proffered instrument on the ground that G.S. 31-5.3 as written in November 1963 had revoked the will *eo instante* when Mitchell married Alma. From his order denying probate, entered 16 October 1972, applicants appealed to the judge of the superior court, and Judge Martin heard the matter at the January 1973 Session. Being of the opinion that G.S. 31-5.3 as rewritten in 1967 applied retroactively to the will of persons dying

after 1 October 1967, Judge Martin held that Mitchell's subsequent marriage had not revoked his will.

From Judge Martin's order that the paperwriting be probated as Mitchell's last will and testament, Alma appealed to the Court of Appeals. That Court reversed Judge Martin's order and directed that the order of the clerk denying probate be reinstated. Upon applicants' petition we allowed certiorari.

Taylor, Allen, Warren & Kerr for applicant-appellants.

Roland C. Braswell and Herbert B. Hulse for protestant-appellee.

SHARP, Justice.

Between 9 January 1845 and 1 October 1967 it was the law in North Carolina (with two exceptions not applicable to this case) that upon the marriage of any person his or her will was revoked. *Sawyer v. Sawyer,* 52 N.C. 133 (1859); 1 Wiggins, *Wills and Administration of Estates in North Carolina* § 100 (1964). This law, enacted as N. C. Sess. Laws, Ch. 88, § 10 (1844-45), was codified as G.S. 31-5.3 (Vol. 2A, 1966 Replacement) at the time Mitchell executed his will and on the date of his marriage. It was repealed by N. C. Sess. Laws, Ch. 128 (1967) (hereinafter referred to as 1967 G.S. 31-5.3), which provided:

"Section 1. G.S. 31-5.3 is hereby rewritten to read as follows:

"A will is not revoked by a subsequent marriage of the maker; and the surviving spouse may dissent from such will made prior to the marriage in the same manner, upon the same conditions, and to the same extent, as a surviving spouse may dissent from a will made subsequent to marriage.

"Sec. 2. This act shall apply only to wills of persons dying on or after October 1, 1967.

"Sec. 3. All laws and clauses of laws in conflict with this Act are hereby repealed.

"Sec. 4. This Act shall become effective on October 1, 1967."

The question here presented is whether 1967 G.S. 31-5.3 retroactively applies to save from revocation under former G.S.

31-5.3 a will made by an unmarried person who married prior to 1 October 1967 and died thereafter. As the Court of Appeals noted, this is an issue of first impression in this State. It was for that reason we allowed certiorari.

The applicants for probate contend that because a will is ambulatory, and speaks only as of the date of its maker's death, it may not be held revoked under a statute which was repealed before the maker's death; that the right to probate is governed by the law in force at the maker's death.

Protestant contends that, under former G.S. 31-5.3, Mitchell's will was revoked *eo instante* upon his marriage to her and that thereafter it could be revived only by re-execution as provided by G.S. 31-5.8 (1966).

In our view the logic of protestants' contentions is irrebuttable.

Under former G.S. 31-5.3 the effect of marriage upon a maker's will was "positive revocation." *Sawyer v. Sawyer, supra.* In 1958 this Court said, "The object of G.S. 31-5.3 is set out as plainly as language can do it. The statute provides that a person's subsequent marriage *ipso facto,* with certain exceptions, revokes all prior wills made by such person." *In Re Will of Tenner,* 248 N.C. 72, 73, 102 S.E. 2d 391, 392 (1958). Thus, at the time of Mitchell's marriage in November 1963 his will was revoked by operation of law, and it could not be revived "otherwise than by a re-execution thereof, or by the execution of another will in which the revoked will or part thereof is incorporated by reference." G.S. 31-5.8. After his marriage Mitchell never attempted to revive his revoked will in any manner whatever. Albeit his will remained intact as a paperwriting, on the effective date of 1967 G.S. 31-5.3 it had had no legal existence for almost four years. Marriage had revoked the will as completely as if it had been physically destroyed. Thus, at the time of his death on 18 July 1972 Mitchell had no will and, as an intestate, 1967 G.S. 31-5.3 had no application to him. Had this marriage occurred *after* 1 October 1967 it would not have revoked his will but Alma, as the surviving spouse, could have dissented in the same manner as if the will had been made subsequent to the marriage.

A statute will not be construed to have retroactive effect unless that intent is clearly expressed or arises by necessary

implication from its terms. *Smith v. Mercer*, 276 N.C. 329, 172 S.E. 2d 489 (1970); 7 N. C. Index 2d, *Statutes* § 8 (1969). Although 1967 G.S. 31-5.3 is made applicable only to the wills of persons dying after 1 October 1967, we find nothing in that statute to support applicants' argument that this limitation clearly manifests the legislative intent to change retroactively the effect which marriage had upon the will of a single person prior to 1 October 1967, or to revive *ipso facto* a will which had been positively and totally revoked prior to its enactment. The legislature was well aware that for over 122 years prior to 1 October 1967, by operation of law, marriage had instantly revoked a will and that, under G.S. 31-5.8, a revoked will could be revived only by the re-execution of another will. Had it intended that 1967 G.S. 31-5.3 would revive wills previously revoked by marriage we must assume it would have said so specifically.

The conclusion we reach in this case is supported by the following decisions: *In Re Estate of Crohn*, 8 Ore. App. 284, 494 P. 2d 258 (1972); *Wilson v. Francis*, 208 Va. 83, 155 S.E. 2d 49 (1967); *In Re Estate of Stolte*, 37 Ill. 2d 427, 226 N.E. 2d 615 (1967); *In Re Berger's Estate*, 198 Cal. 103, 243 P. 862 (1926). *See also* 2 Page on Wills (Bowe-Parker Rev. 1960) § 21.97.

In Re Berger's Estate, supra, is the leading case dealing with this question. The facts in *Berger* were these:

In 1911, C. D., unmarried, made her will. The California law then provided that marriage revoked a woman's will and it was not revived by her husband's death. In 1913, C. D. married H. L. B. from whom she was later divorced. In 1918 she married Berger. In 1919 the law was changed to provide that if, after making a will, the maker married and her husband survived her, the will was revoked unless it provided for him or manifested an intention to disinherit him. In 1923 Berger died. In 1924 Mrs. Berger died childless, and her 1911 will was offered for probate. In the ensuing contest the parties made the same contentions which are being made here. In denying probate the California Supreme Court recognized that wills are ambulatory and create no rights until the maker's death, and that the legislature has full power to regulate the right to make a will, the manner of its execution and revocation. The court disposed of applicant's contention that revocation, like the will

itself, is ambulatory and therefore depends upon the law in force at the time of the maker's death upon two grounds:

(1) "Revocation being a 'thing done and complete' is not in its nature ambulatory. The rules of law applicable to the reviving of wills revoked by the act of the makers are equally applicable to the reviving of wills revoked by act of law, *e.g.*, the effect of marriage; for in either case the will, being revoked, is of no effect until new life is given to it. *Sawyer v. Sawyer,* 52 N.C. 134."

(2) The contention depends upon a retroactive application of the 1919 law, which was passed some six years after C. D. married H. L. B. "That cannot be done. Section 1300, as amended in 1919, is not retroactive in terms. No indication can be gathered from it that the Legislature intended that it should be retroactive. Consequently we must regard the intention to have been that it should have only a prospective, and not a retrospective, operation." *Id.* at 110, 243 P. at 865.

In *Wilson v. Francis, supra,* upon facts and law substantially the same as those of this case, the Supreme Court of Appeals of Virginia denied probate to a will revoked by marriage under a law repealed before her death. Upon the authority of *Berger* it held that the law in effect at the time of the decedent's marriage (Code Sec. 64-58) controlled the effect of marriage upon her will; that under Section 64-58 her marriage had *ipso facto* revoked her will and its subsequent repeal had no retroactive effect. In an indistinguishable situation the Illinois Supreme Court also relied upon *Berger* in deciding that a will revoked under prior law by the maker's marriage was not revived by a subsequent amendment to the law which provided that no will should be revoked by any change in the marital status of the maker. The court perceived in the language of amendment no intent that it should have retroactive application but said, "Even if such language were to show an intent to make the amendment retroactive it could only apply to wills in existence." *In Re Stolte, supra* at 434, 226 N.E. 2d at 619.

Upon facts and law analogous to those of this case the Court of Appeals of Oregon, citing *Berger, Wilson v. Francis,* and *In Re Estate of Stolte,* posed and answered the determinative question as follows:

"If a will was revoked prior to the effective date of the new probate code, does the revocation remain effective? The

only logical answer is, 'Yes.' Although the new code applies to wills of decedents dying on or after July 1, 1970, Alfred Crohn no longer had a will on that date because it had previously been revoked." *In Re Estate of Crohn, supra* at 288, 494 P. 2d at 260.

Reason and authority support the decision of the Court of Appeals, which is

Affirmed.

STATE OF NORTH CAROLINA v. JAKE HORN

No. 38

(Filed 13 March 1974)

1. **Obscenity— constitutionality of statute — sale of magazines**

As construed by the Court, the statute prohibiting the dissemination of obscenity in a public place, G.S. 14-190.1, is constitutional when applied to charges against defendant of exhibiting, offering for sale and selling certain magazines.

2. **Criminal Law § 146— appeal under G.S. 7A-30(1)— scope of review**

Where a case is before the Supreme Court solely by reason of defendant's appeal under G.S. 7A-30(1), the review to which defendant is entitled is limited to the constitutional question presented by him.

APPEAL by defendant from the decision of the North Carolina Court of Appeals reported in 18 N.C. App. 377, docketed and argued as No. 49 at Fall Term 1973.

A warrant for the arrest of defendant was issued 12 May 1972. The affidavit portion thereof reads as follows:

"The undersigned, D. A. Hollifield, being duly sworn, complains and says that at and in the county named above and on or about the 11th day of May, 1972, the defendant named above did unlawfully, wilfully, intentionally, and knowingly while working for Glenn's Book Store, a firm doing business at 107 Market St., Wilmington, N. C., a public place, disseminate obscene literature to the public by exhibiting, offering for sale, and selling to a member of the public, D. A. Hollifield, certain magazines, entitled Seizure, Vol. II, No. 1, French Luv (Europ.

Ser. 104), Swingers (No. 3), and having a retail price of $3.50, $10.00, and $4.00 respectively. Said magazines and pictures are obscene in that their dominant theme taken as a whole appeals to the prurient interest in sex, the material is patently offensive in that it affronts contemporary national community standards relating to the description or representation of sexual matters, the material is utterly without redeeming social value, and the material as used is not protected or privileged under the Constitution of the U. S. or N. C., in that the magazines display both male and female private parts (sexual organs), nude males and nude females engaged in both bisexual and homosexual sex play, nude males and nude females shown in various positions of copulation or staged copulation, and nude males and nude females engaged in cunnilingus and fellatio.

"The offense charged here was committed against the peace and dignity of the State and in violation of law N.C. G.S. 14-190.1."

Defendant was first tried, found guilty and sentenced in the District Court of New Hanover County. Upon appeal, defendant was tried *de novo* at the 20 November 1972 Criminal Session of New Hanover Superior Court and was found guilty and sentenced. Upon appeal, the Court of Appeals found no error. Defendant then appealed to this Court under G.S. 7A-30(1) asserting that G.S. 14-190.1 is unconstitutional "because it fails to incorporate standards held constitutionally required by the United States Supreme Court in its most recent attempt to define obscenity."

Attorney General Robert Morgan and Associate Attorney Emerson D. Wall for the State.

Smith, Carrington, Patterson, Follin & Curtis by Michael K. Curtis and J. David James for defendant appellant.

BOBBITT, Chief Justice.

The Court of Appeals rejected defendant's attack on the constitutionality of G.S. 14-190.1 and upheld the constitutionality of this statute on authority of its prior decision on 22 November 1972 in *State v. Bryant* and *State v. Floyd,* 16 N.C. App. 456, 192 S.E. 2d 693.

On 13 June 1973, when the Court of Appeals filed its decision in the present case, the petition for certiorari filed by

the defendants in the above-cited *Bryant* and *Floyd* cases was pending in the Supreme Court of the United States. On 25 June 1973, the Supreme Court of the United States granted certiorari, vacated the judgment of the Court of Appeals and remanded the above-cited *Bryant* and *Floyd* cases to the Court of Appeals for further consideration in the light of *Miller v. California,* 413 U.S. 15, 37 L.Ed. 2d 419, 93 S.Ct. 2607, and other cited cases. Upon such further consideration, the Court of Appeals on 19 December 1973 in *State v. Bryant* and *State v. Floyd,* 20 N.C. App. 223, 201 S.E. 2d 211, again upheld the constitutionality of G.S. 14-190.1 as applied to the charges against defendants therein, which decision has been affirmed by this Court today in *State v. Bryant* and *State v. Floyd,* 285 N.C. 27, 203 S.E. 2d 27.

[1] In the present case, the conduct of defendant as charged in the warrant and as established by the verdict constitutes violation of G.S. 14-190.1 as construed by this Court. For the reasons stated in our opinion filed today in *Bryant* and *Floyd,* we uphold the constitutionality of G.S. 14-190.1 as applied to the charges against this defendant.

[2] Since the case is before this Court solely by reason of defendant's appeal under G.S. 7A-30(1), the review to which defendant is entitled is limited to the constitutional question presented by him. The Court of Appeals passed upon defendant's non-constitutional assignments of error and defendant filed no petition for certiorari for a review thereof by this Court. Suffice to say, defendant's non-constitutional assignments of error do not disclose sufficient merit to warrant further appellate review by this Court. See *State v. Colson,* 274 N.C. 295, 305, 163 S.E. 2d 376, 383 (1968).

The decision of the North Carolina Court of Appeals is affirmed.

Affirmed.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

ALPAR v. WEYERHAEUSER CO.

No. 13 PC.

Case below: 20 N.C. App. 340.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 March 1974.

BANK v. DAIRY

No. 136 PC.

Case below: 20 N.C. App. 101.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 March 1974.

BROADNAX v. DELOATCH

No. 19 PC.

Case below: 20 N.C. App. 430.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 March 1974.

FOY v. BREMSON

No. 12 PC.

Case below: 20 N.C. App. 440.

Petition by defendant Bremson for writ of certiorari to North Carolina Court of Appeals allowed 5 March 1974.

KOHLER v. CONSTRUCTION CO.

No. 22 PC.

Case below: 20 N.C. App. 486.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 March 1974.

MORSE v. CURTIS

No. 145 PC.

Case below: 20 N.C. App. 96.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 March 1974. Appeal dismissed ex mero motu for lack of substantial constitutional question 5 March 1974.

STATE v. BARRETT

No. 15 PC.

Case below: 20 N.C. App. 419.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 March 1974.

STATE v. BLOUNT

No. 17 PC.

Case below: 20 N.C. App. 448.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 March 1974.

STATE v. BOYD

No. 63.

Case below: 20 N.C. App. 475.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 March 1974.

STATE v. BRIGGS

No. 18 PC.

Case below: 20 N.C. App. 61.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 March 1974.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. BROWN

No. 55.

Case below: 20 N.C. App. 413.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 12 March 1974.

STATE v. CARSON

No. 134 PC.

Case below: 20 N.C. App. 211.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 March 1974.

STATE v. CARTER

No. 16 PC.

Case below: 20 N.C. App. 461.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 March 1974.

STATE v. CLARK

No. 146 PC.

Case below: 20 N.C. App. 197.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 March 1974. Motion of Attorney General to dismiss appeal allowed 5 March 1974.

STATE v. COCKMAN AND LUCAS

No. 10 PC.

Case below: 20 N.C. App. 409.

Petition by defendant Lucas for writ of certiorari to North Carolina Court of Appeals denied 5 March 1974.

STATE v. FULCHER

No. 149 PC.

Case below: 20 N.C. App. 259.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 March 1974.

STATE v. GOLDEN

No. 11 PC.

Case below: 20 N.C. App. 451.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 March 1974.

STATE v. KING

No. 9 PC.

Case below: 20 N.C. App. 505.

Petition by the State for writ of certiorari to North Carolina Court of Appeals allowed 5 March 1974.

STATE v. REISCH

No. 4 PC.

Case below: 20 N.C. App. 481.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 March 1974.

STATE v. SPEED

No. 129 PC.

Case below: 20 N.C. App. 76.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 March 1974.

STATE v. WILLIAMS

No. 2 PC.

Case below: 20 N.C. App. 310.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 March 1974.

STATE OF NORTH CAROLINA v. JESSE THURMAN FOWLER

No 34

(Filed 10 April 1974)

1. **Criminal Law § 166— abandonment of assignment of error**

Assignments of error not brought forward and argued in the brief are deemed abandoned. Supreme Court Rule 28.

2. **Criminal Law § 114; Homicide § 25— instructions on premeditation and deliberation — absence of provocation**

The trial judge did not express an opinion that there was no evidence of provocation in a first degree murder case when he instructed the jury that in determining whether there was premeditation and deliberation the jury could consider evidence "of the absence of provocation."

3. **Criminal Law § 114; Homicide § 25— manner of summarizing evidence — no expression of opinion on provocation**

In this first degree murder case, the manner in which the court summarized the evidence did not indicate to the jury that there was no provocation in the case.

4. **Criminal Law § 114; Homicide § 28— plea of self-defense — State's contention — no expression of opinion**

The trial court did not express an opinion on the evidence in stating the State's contention upon defendant's plea of self-defense that there was no evidence that the victim was assaulting defendant or threatening him with an assault and that there was no circumstance from which defendant might reasonably have believed that he was about to suffer death or great bodily harm.

5. **Criminal Law § 118; Homicide § 28— instructions — contention of defendant — elapse of time between fight and shooting**

In this first degree murder case, the court's instruction that defendant contended he saw deceased "a fairly brief time" after deceased jumped on defendant and broke his nose was in accord with defendant's evidence that 30 minutes had elapsed and was favorable to defendant.

6. **Criminal Law § 163— exceptions to charge**

Exceptions to the charge which fail to point out specific portions of the charge as erroneous are ineffectual as bases for assignments of error.

7. **Criminal Law § 163— assignments of error to charge**

Assignments of error to the charge should quote the portion of the charge to which defendant objects, and assignments of error based on failure to charge should set out appellant's contentions as to what the court should have charged.

8. **Homicide § 27— instruction on manslaughter — verdict of first degree murder — harmless error**

In a homicide case in which the court instructed the jury that it could find defendant guilty of first degree murder, second degree murder, manslaughter or not guilty, the court erred in failing to instruct the jury in the charge on manslaughter that if the State failed to satisfy the jury from the evidence beyond a reasonable doubt that defendant shot the victim and thereby proximately caused his death, the jury should return a verdict of not guilty; however, such error was harmless since the court properly instructed the jury as to both degrees of murder and the jury found defendant guilty of first degree murder.

9. **Homicide § 8— effect of intoxication**

If a person on trial for first degree murder was so drunk at the time he committed the homicide that he was utterly incapable of forming a deliberate and premeditated purpose to kill, an essential element of first degree murder is absent and the offense is reduced to second degree murder.

10. **Homicide § 28— failure to instruct on intoxication**

There was not sufficient evidence of intoxication to require an instruction as to the law on intoxication as a defense to murder in the first degree where all the evidence, except defendant's exculpatory statement to a detective, was to the effect that defendant was not drunk or intoxicated when he shot the victim.

11. **Constitutional Law § 29; Criminal Law § 135; Jury § 7— jurors opposed to death penalty — excusal for cause**

If a prospective juror in a capital case 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.

12. **Constitutional Law § 29; Criminal Law § 135; Jury § 6— questioning jurors — views on capital punishment**

In a capital case it is proper to inquire into a prospective juror's views on capital punishment in order to determine his competency to serve in an impartial manner.

13. **Constitutional Law § 29; Criminal Law § 135; Jury § 7— stipulation — prospective jurors — death penalty views — challenge for cause**

Stipulation that two jurors were excused for cause "because of their views on capital punishment" does not provide an adequate basis for determining whether such jurors were properly excused under *Witherspoon v. Illinois* and decisions of the N. C. Supreme Court.

14. **Constitutional Law § 29; Criminal Law § 135; Jury § 7— death penalty views — excusal of jurors — transcript of voir dire — peremptory challenges**

Defendant's contention that the trial court erred in excusing two jurors for cause because of their views on capital punishment and in failing to order that a transcript of the jury *voir dire* examination

be transcribed and included in the case on appeal is without merit where the Supreme Court *ex mero motu* ordered that the *voir dire* examination be transcribed and made a part of the case on appeal, and such transcript discloses that no prospective juror was excused for cause by reason of his views on capital punishment but that two jurors who expressed some reservation as to capital punishment were excused peremptorily by the State.

15. Constitutional Law § 36; Criminal Law § 135— death penalty — cruel and unusual punishment

The death penalty for first degree murder is not cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the U. S. Constitution and Article I, §§ 19, 24 and 27 of the N. C. Constitution.

Chief Justice BOBBITT and Justices HIGGINS and SHARP dissenting as to death sentence.

APPEAL by defendant from *McKinnon, J.*, at the 24 September 1973 Session of WAKE Superior Court.

On an indictment proper in form, defendant was tried and convicted of murder in the first degree of John Griffin. Defendant appeals from a judgment imposing a sentence of death.

The State's evidence tends to show that around 6:30 or 7:00 o'clock on the evening of 1 July 1973 John Griffin, the deceased, was with his two children in front of a neighbor's house at 1300 Branch Street in Raleigh, North Carolina. While Griffin was visiting with the neighbor, a car in which defendant was a passenger drove up and stopped fairly close to where Griffin was standing. Griffin walked over to the car, snatched the car door open, and said to defendant, "I don't want to fight you no more. I want you to go on home." Griffin then turned to the driver, Johnny Fraizer Dolby, and asked him to take defendant home, and Dolby agreed to do so. After Dolby had driven only a short distance down the street, defendant insisted that he stop the car and let him out. Dolby complied with defendant's request, and defendant got out of the car and started walking toward Griffin. When the two were fairly close, defendant pulled a pistol and shot at Griffin twice, hitting him once in the stomach. Griffin fell and defendant left the scene of the shooting and went home. At the time defendant shot Griffin, Griffin had no weapon of any kind in his hand and no weapon was found on or near his body after the shooting.

The police were called and Griffin was taken to a hospital where later that night he died as a result of the gunshot wound.

A few hours after the shooting, defendant, upon the urging of his wife and a friend, went to the Raleigh Police Department to explain what had happened. At the police station defendant was informed of his constitutional rights and indicated that he understood them and that he did not want an attorney present. He also signed a waiver of rights form that was introduced at trial. Defendant said that he wanted the police to know that he was drunk when he shot Griffin. According to Detective D. C. Williams of the Raleigh Police Department, defendant explained to the police that he had gotten drunk on 30 June 1973 and had gotten up the next morning, 1 July 1973, and started drinking again. Defendant's statement to the police also revealed that on 1 July 1973 defendant had gone over to Sylvester Jones' house where a crap game was in progress. There defendant and Griffin got into an argument about a ten dollar bill, but nothing happened as a result of this argument. Around 6 p.m. defendant left the game and went to King's Lounge on Rock Quarry Road. Griffin arrived at the Lounge later, and shortly after Griffin's arrival he and defendant resumed their argument about the ten dollar bill. Griffin asked defendant to come outside with him, and as defendant was walking out, Griffin hit him in the nose, knocking defendant down and breaking his nose. Defendant told the police that at this time he had a .38 caliber pistol in his pocket. He left the King's Lounge and went to his home for awhile, and then decided to catch a ride and go see a friend who lived in the vicinity where the shooting occurred. When he arrived in the area, he saw Griffin, and Griffin came over to the car and wanted to fight defendant again. Defendant then persuaded Dolby, the driver, to let him out so that Dolby would not get into any trouble. When defendant got out he started walking away but Griffin came toward him. Defendant shot at him but missed, then shot again and hit him.

All the State's witnesses testified that although defendant's eyes were bloodshot at the time of the shooting incident and when he made his statement, he appeared to be in complete control of his mental and physical faculties and was not drunk.

Much of defendant's evidence tended to corroborate the statement defendant had given to the police on the night following the shooting, except as to that part when he stated he was drunk. His evidence further tended to show that he and some

of his friends had planned to go fishing on the day of the shooting, and that it was defendant's custom to carry a pistol with him when he went fishing to shoot snakes; that he had his .38 caliber pistol with him all day for that purpose and had not gotten it after his scuffle with Griffin at the King's Lounge. Defendant also testified that immediately after his fight with Griffin at the King's Lounge, Charles Gene Rogers came up to him and told him, "Man, you better go ahead on because John Griffin is trying to get a pistol to kill you." Rogers corroborated this testimony.

Defendant testified concerning the events leading up to the shooting substantially as follows: Before his fight with Griffin he had been drinking some beer at the King's Lounge. Following the fight defendant decided to go over to an apartment complex known as Walnut Terrace to see his sister-in-law. At the time defendant did not know that Griffin would be in the area, and he was not out looking for Griffin. He got two rides to the complex, the last being with Johnny Fraizer Dolby. When Dolby got to the Walnut Terrace area, he and defendant saw Griffin on the street. Griffin came over to the car, snatched the car door open and told defendant, "I don't want to fight you no more. So why don't you go on home." Griffin then shut the car door, and Dolby drove down the street after telling defendant that he would take him home. After the car had gone only a short distance, defendant told Dolby to stop the car and let him out. Defendant testified that he did this because he wanted to leave the area the "easiest" way possible because Griffin had "popped up" in the area. Defendant got out of the car and started crossing the street. At this point he looked down the street and saw Griffin crouched down behind Charles McCoy. McCoy was walking up the street in the direction of defendant, and Griffin was "crouched down tipping up the street behind" McCoy. Suddenly, Griffin pushed McCoy out of the way so that Griffin and defendant were facing each other. Then Griffin said, "Nigger, I am going to make you use what you have got in your pocket." At this point defendant got his pistol out of his pocket and shot it once in the air hoping Griffin would turn back. Griffin did not turn back and so defendant shot at him a second time, this time hitting him in the stomach. Defendant stated that at the time he shot Griffin he was thinking about having heard that Griffin was looking for a gun and that he

was just trying to keep Griffin off of him; he did not shoot to kill him.

Attorney General Robert Morgan and Assistant Attorney General Sidney S. Eagles, Jr., for the State.

Chambers, Stein, Ferguson & Lanning by Charles L. Becton for defendant appellant.

MOORE, Justice.

[1] Assignments of error Nos. 1, 2, 3, 6, and 7 are not brought forward and argued in defendant's brief, and consequently these assignments are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court; *State v. Crews,* 284 N.C. 427, 201 S.E. 2d 840 (1974); *State v. McLean,* 282 N.C. 147, 191 S.E. 2d 598 (1972). However, in view of the gravity of the punishment in this case, we have carefully reviewed these assignments but find them to be without merit.

By his fourth assignment of error defendant asserts that "[t]he trial court erred in its instructions to the jury in that the trial court: (1) misstated the law; (2) expressed opinions to the jury; and (3) inaccurately summarized the evidence and contentions of the State and of the defendant."

[2] Under this assignment defendant first contends that the trial court in discussing premeditation and deliberation expressed an opinion contrary to G.S. 1-180 that there was no evidence of provocation in the case. That portion of the charge to which defendant points in support of this contention is as follows:

> "Premeditation and deliberation may be shown by circumstances and in determining whether there was such premeditation and deliberation the jury may consider evidence *of the absence of provocation* and all other circumstances under which the homicide was committed." (Emphasis by defendant.)

This contention is without merit. Concerning premeditation and deliberation, the court stated:

> "I have used the word 'premeditation' and 'deliberation.' Those elements must be proved beyond a reasonable doubt before a verdict of murder in the first degree can be rendered against the defendant. The State may prove these

elements in many ways. Ordinarily they are not susceptible of direct proof but may be inferred from circumstances such as ill will, previous difficulty between the parties, declarations of an intent to kill either before or after the inflicting of the fatal wound, or where the evidence shows that the killing is done in a brutal and ferocious manner.

"Premeditation and deliberation may be shown by circumstances and in determining whether there was such premeditation and deliberation the jury may consider evidence of the absence of provocation and all other circumstances under which the homicide was committed.

"In determining the question of premeditation and deliberation the jury must take into consideration the conduct of the defendant before and after and all attending circumstances in determining whether the act shall be attributed to premeditated design or sudden impulse."

Thereafter, the court fully defined premeditation and deliberation. When that portion of the charge to which defendant excepts is viewed in its context, it is apparent that the statement by the court was not an expression of an opinion that there was no evidence of provocation in this case. To the contrary, this instruction was a correct statement of the law in the case and was given by the court, as required by G.S. 1-180, to assist the jury in reaching a verdict. It is in accord with many well-considered decisions of this Court. See *State v. Van Landingham,* 283 N.C. 589, 197 S.E. 2d 539 (1973) ; *State v. Duncan,* 282 N.C. 412, 193 S.E. 2d 65 (1972) ; *State v. DuBoise,* 279 N.C. 73, 181 S.E. 2d 393 (1971) ; *State v. Hamby* and *State v. Chandler,* 276 N.C. 674, 174 S.E. 2d 385 (1970).

[3] Defendant next contends that the manner in which the court summarized the evidence indicated to the jury that there was no provocation in the case. The paragraph in the charge complained of is as follows:

"The State's evidence tends to show that the defendant got a ride with Dolby to the Walnut Terrace area; that he had a pistol at the time of going there; that he got out of the automobile of Dolby and returned toward John Griffin after they had words as they passed in the automobile and the State's evidence tends to show that John Griffin did not have a weapon; was with his children or near his children and that he did not do any act or commit any act

which would constitute provocation which would reduce the offense to manslaughter and that he did not do any act which would give a person reasonable grounds to believe that he was going to suffer any bodily harm whatsoever and particularly any serious bodily harm from John Griffin."

This recapitulation of the evidence is in substantial accord with the testimony in the case. In reviewing the evidence the court is not required to give a verbatim recital of the evidence but only a summation sufficiently comprehensive to present every substantial and essential feature of the case. If there are minor discrepancies, they must be called to the attention of the court in time to afford opportunity for correction, otherwise they are deemed to be waived and will not be considered on appeal. *State v. Thomas,* 284 N.C. 212, 200 S.E. 2d 3 (1973); *State v. Tart,* 280 N.C. 172, 184 S.E. 2d 842 (1971); *Shopping Center v. Highway Commission,* 265 N.C. 209, 143 S.E. 2d 244 (1965); 7 Strong, N. C. Index 2d, Trial § 33 (1968). No prejudicial error is shown by this statement. If defendant desired a more comprehensive statement of the evidence on this phase of the case, he should have requested it.

[4] Under this same assignment defendant also contends that the trial court stated the following contention in such a manner that the jury could reasonably infer that this statement was the court's opinion:

"The State contends upon the plea of self-defense that there was no evidence that Griffin was at this time making any assault on the defendant or threatening him with an assault; that there was no circumstance from which the defendant might reasonably have believed that he was about to suffer any death or great bodily harm. . . ."

This contention was amply supported by the State's evidence. Again, if defendant had any objection to this contention, he should have stated it at the time. *State v. Thomas, supra; State v. Tart, supra; Emanuel v. Clewis,* 272 N.C. 505, 158 S.E. 2d 587 (1968); 7 Strong, N. C. Index 2d, Trial § 34 (1968).

[5] Additionally, defendant contends that the manner in which the trial court stated defendant's contentions lends credence to defendant's contention that the trial court gave unequal stress to the contentions for the State. The statement in the charge complained of is as follows: "The defendant's evidence tends

to show that sometime after that, he contends a fairly brief time, that he was actually starting to visit a friend and got a ride with Dolby. . . . " Defendant stated that here the court, "as if editorializing," inserted "he contends a fairly brief time." Defendant had testified that approximately thirty minutes had elapsed from the time the deceased jumped on him and broke his nose at the King's Lounge to the time he saw the deceased at Walnut Terrace. The State's evidence was that three to four hours had elapsed. Therefore, the court's statement of defendant's contention was in accord with defendant's evidence and was in fact favorable to him. No prejudice appears.

By assignment of error No. 5 defendant asserts that "[t]he trial court erred by failing to give a full instruction on the circumstances under which the jury could return a verdict of not guilty. . . . " Defendant contends that the charge limited in effect the verdict of not guilty to a finding by the jury that defendant killed the deceased in self-defense, and that under the decisions in *State v. Woods,* 278 N.C. 210, 179 S.E. 2d 353 (1971), and *State v. Ramey,* 273 N.C. 325, 160 S.E. 2d 56 (1968), the court erred in failing to instruct the jury that if the State failed to satisfy it from the evidence beyond a reasonable doubt that the defendant was guilty of murder in the first degree or murder in the second degree or manslaughter, the jury should return a verdict of not guilty.

[6, 7] This assignment and the exceptions on which it is based do not comply with well-established appellate rules. Exceptions Nos. 34 and 35 appear at the end of the charge. Neither 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. Neither does this assignment quote the portion of the charge to which defendant objects. Too, where the assignment of error is based on failure to charge, it is necessary to set out appellant's contention as to what the court should have charged. *State v. Crews, supra; State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1970) ; *State v. Wilson,* 263 N.C. 533, 139 S.E. 2d 736 (1965). Even though this assignment does not comply with the well-established rules, since a death sentence is involved we have elected to discuss defendant's contention.

[8] The court correctly instructed the jury as to murder in the first degree and murder in the second degree as follows:

"I instruct you, Members of the Jury, that if you find from the evidence beyond a reasonable doubt that on or about the first of July of this year the defendant, Jesse Thurman Fowler, did intentionally and without justification or excuse shoot John Griffin with a pistol and thereby proximately caused his death and that Jesse Thurman Fowler then intended to kill John Griffin and that he acted with malice and premeditation and deliberation, if you find all of those facts to exist beyond a reasonable doubt, 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 any one or more of those things, you would not return a verdict of guilty of murder in the first degree.

"If you do not find the defendant guilty of murder in the first degree, you must determine whether he is guilty of murder in the second degree. Upon that charge if you find from the evidence beyond a reasonable doubt that on or about the first of July of 1973, Jesse Fowler did intentionally and with malice shoot John Griffin with a pistol thereby proximately causing his death, then nothing else appearing, it would be your duty to return a verdict of guilty of murder in the second degree. However, if you do not so find, or have a reasonable doubt as to any one or more of those things, you would not return a verdict of guilty of murder in the second degree."

In instructing on manslaughter the court said:

"If you do not find the defendant guilty of murder in the second degree, you must consider whether he is guilty of voluntary manslaughter. And upon that charge if you find from the evidence beyond a reasonable doubt that he did on the day in question shoot John Griffin proximately causing his death but you are satisfied that he killed him without malice in the heat of sudden passion lawfully aroused by adequate provocation, as I have defined that to you, or if you find—that is, satisfied, not beyond a reasonable doubt but satisfied that although he believed that it was necessary to shoot John Griffin to protect himself, he did not have reasonable ground for that belief, then it would be your duty to return a verdict of guilty of voluntary manslaughter.

"If, although you are satisfied beyond a reasonable doubt that the defendant did intentionally shoot John

> Griffin and thereby proximately caused his death, if you are satisfied, not beyond a reasonable doubt, but are satisfied that at the time of the shooting the defendant did have reasonable ground to believe and did believe that he was about to suffer death or serious bodily harm at the hands of John Griffin, and under those circumstances he used only such force as reasonably appeared necessary under the circumstances, then he would be justified by reason of self-defense and it would be your duty to return a verdict of not guilty."

In the above-quoted portions of the charge the court, after instructing the jury as to what they must find before returning a verdict of guilty of either murder in the first degree or second degree, concluded the instruction as to each of those offenses as follows: "However, if you do not so find, or have a reasonable doubt as to any one or more of those things, you would not return a verdict of guilty. . . . " On the charge as to manslaughter no comparable instruction was given to the effect that if the State failed to satisfy the jury from the evidence beyond a reasonable doubt that defendant did on the day in question shoot John Griffin thereby proximately causing his death, then the jury should return a verdict of not guilty. As stated by Justice Bobbitt (now Chief Justice) in *State v. Ramey, supra:*

> "In our opinion, and we so decide, defendant was entitled to an explicit instruction, even in the absence of a specific request therefor, to the effect the jury should return a verdict of not guilty if the State failed to satisfy them from the evidence beyond a reasonable doubt that a bullet wound inflicted upon Mabry by defendant proximately caused his death. The trial judge inadvertently failed to give such instruction. The necessity for such instruction is not affected by the fact there was plenary evidence upon which the jury could base a finding that a bullet wound inflicted upon Mabry by defendant proximately caused his death. *State v. Redman, supra* [217 N.C. 483, 8 S.E. 2d 623 (1940)]." *Accord, State v. Woods, supra.*

As in *Ramey,* the trial judge in the present case inadvertently failed to give such instruction. This was error. However, in this case it is not such error as to require a new trial.

In *State v. Freeman,* 275 N.C. 662, 170 S.E. 2d 461 (1969), defendant was on trial for murder, and the jury was instructed

that it could return a verdict of guilty of murder in the first degree, guilty of murder in the second degree, guilty of manslaughter, or not guilty. The jury was correctly instructed on the law pertaining to murder in the first degree and murder in the second degree, but an erroneous instruction was given on the charge of manslaughter. The jury returned a verdict of guilty of murder in the first degree. In finding no error in the trial Justice Sharp, for the Court, stated:

> "Erroneous though the challenged instruction was, it does not entitle defendant to a new trial for, demonstrably, it was harmless. First, the verdict of murder in the first degree established that defendant had unlawfully killed Sawyer with malice, premeditation, and deliberation. *State v. Moore,* 275 N.C. 198, 166 S.E. 2d 652. Defendant assigns no error in the charge as it related to murder in the first or second degree. . . . Ordinarily, when the jury is instructed that it may find defendant guilty of murder in the first degree, murder in the second degree, manslaughter, or not guilty, and the verdict is guilty of murder in the second degree, an error in the charge on manslaughter will require a new trial. In such event it cannot be known whether the verdict would have been manslaughter if the jury had been properly instructed. But where, as here, the jury was properly instructed as to both degrees of murder and yet found defendant guilty of murder in the first degree rather than the second degree, it is clear that error in the charge on manslaughter was harmless. In *State v. Munn,* 134 N.C. 680, 47 S.E. 15, the jury found 'that beyond all reasonable doubt the prisoner slew the deceased willfully, deliberately and with premeditation, and was guilty of murder in the first degree. The State (had) thus satisfied them of facts raising the crime above murder in the second degree, which only was presumed from the (intentional) killing with a deadly weapon. If there were error in the charge as to mitigation below murder in the second degree, it was therefore immaterial error.' "

Similarly, in the present case when the jury became convinced beyond a reasonable doubt that defendant, after deciding to take Griffin's life, intentionally and unlawfully shot and killed him, the error in the charge below murder in the second degree was immaterial error. This assignment is overruled.

By assignment of error No. 5 defendant also contends the trial court erred in failing to instruct the jury as to the law on intoxication as it relates to the facts in this case. Again, the assignment does not set out what the court should have charged. See *State v. Crews, supra.* We have, however, considered defendant's contention.

[9] Voluntary intoxication is not a legal excuse for crime. *State v. Bunn,* 283 N.C. 444, 196 S.E. 2d 777 (1973); *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560 (1968). Although it is no excuse for crime, where a specific intent is an essential element of the offense charged, the fact of intoxication may negate the existence of that intent. *State v. Propst, supra.* If a person on trial for murder in the first degree was so drunk at the time he committed the homicide charged in the indictment that he was utterly incapable of forming a deliberate and premeditated purpose to kill, an essential element of murder in the first degree is absent. *State v. Bunn, supra.* In such a situation it is said that "'the grade of offense is reduced to murder in the second degree.'" *State v. English,* 164 N.C. 497, 511, 80 S.E. 72, 77 (1913).

[10] While there was evidence that defendant was drinking, there was no evidence that he was drunk or intoxicated except defendant's exculpatory statement to Detective Williams. All the State's witnesses who saw him at the time of the shooting or when he made his statement to Detective Williams testified that defendant appeared to be in complete control of his mental and physical faculties and was not intoxicated or drunk. None of defendant's numerous witnesses who saw him testified that he was drunk at anytime during the day on Sunday, July 1, up to and including the time of the shooting, or after the shooting until defendant surrendered to the police. Defendant testified in his own behalf and recited in minute detail his activities on Saturday, June 30, and Sunday, July 1. At no time in his testimony did he state that he was intoxicated or that his mind was in any manner impaired or affected by anything he had had to drink. His only defense was self-defense, and he did not request any instruction on intoxication as a defense to first degree murder. We hold, therefore, that there was not sufficient evidence of intoxication in this case to require an instruction as to the law on intoxication as a defense to murder in the first degree. See *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671 (1971); *State v. Hamby* and *State v. Chandler, supra; State v. Bunton,* 247 N.C. 510, 101 S.E. 2d 454 (1958).

Apparently in an attempt to simplify matters on appeal, the State and defense counsel entered into the following stipulation:

> "[We] hereby stipulate and agree that upon the voir dire of the jury the following transpired at the trial of this matter.
>
> "1. That the jury voir dire was not transcribed.
>
> "2. That the State questioned the prospective jurors with regard to their attitudes about the death penalty and advised them that death would be the penalty as a result of a first degree murder verdict.
>
> "3. That two jurors were excused for cause because of their views on capital punishment."

Now defendant, under his eighth assignment of error, asserts that the death qualification of the jury wherein the jury was advised that death would be the penalty upon a first degree murder verdict, the exclusion of death-scrupled jurors from appellant's jury and the failure of the trial court to have the jury *voir dire* transcribed violated appellant's Sixth Amendment right to a jury that reflects a fair and representative cross section of the community.

Defendant first contends under this assignment that the Sixth Amendment to the United States Constitution mandates that no venireman be excluded for cause because of his views on the death penalty, regardless of what his views may be. Therefore, defendant argues, the trial court committed error in permitting the veniremen to be questioned about their beliefs on capital punishment and in allowing the State to advise the prospective jurors that death is the penalty in a first degree murder conviction.

The Supreme Court of the United States in *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968), decided otherwise. 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."

[11] Since *Witherspoon* this Court has consistently 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. Noell,* 284 N.C. 670, 202 S.E. 2d 750 (1974); *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).

Under these decisions it is permissible to ask a prospective juror about his beliefs on capital punishment in order that the State, as well as the defendant, may have a trial by an impartial jury. To achieve this impartial jury the State is allowed to challenge for cause any juror who would automatically vote against a verdict that would require the imposition of the death penalty without regard to the evidence that might be developed at the trial of the case, or whose attitude towards the death penalty would prevent him from making an impartial decision as to defendant's guilt. As stated by this Court in *State v. Doss, supra,* "a venireman should be willing to consider all the penalties provided by State law and he should not be irreparably committed before the trial has begun to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceeding." See also *State v. Childs,* 269 N.C. 307, 152 S.E. 2d 453 (1967). Justice Higgins in *State v. Spence,* 274 N.C. 536, 539, 164 S.E. 2d 593, 595 (1968), stated the reason for challenge as follows:

"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 evi-

dence placed before them and not otherwise.' The purpose of challenge should be to guarantee 'not only the 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."

[12] We hold that in a capital case it is proper to inquire into a prospective juror's views on capital punishment in order to determine his competency to serve in an impartial manner. See *State v. Crowder,* 285 N.C. 42, 203 S.E. 2d 38 (1974).

Under this same assignment of error defendant also contends that the trial court erred in not ordering the court reporter to transcribe the jury *voir dire,* and that such failure requires that defendant's death sentence be vacated. In making this contention, defense counsel in his brief points to the stipulation entered into with the State whereby it was stipulated that the jury *voir dire* was not transcribed and that two jurors were excused for cause because of their views on capital punishment.

"A stipulation is a judicial admission. [Citations omitted.] It has been said in North Carolina that courts look with favor on stipulations, because they tend to simplify, shorten, or settle litigation as well as saving cost to the parties. [Citations omitted.]

* * *

" . . . '[S]tipulations will receive a reasonable construction with a view to effecting the intent of the parties; but in seeking the intention of the parties, the language used will not be so construed as to give the effect of an admission of a fact obviously intended to be controverted, or the waiver of a right not plainly intended to be relinquished. . . .' 36 Cyc. 1291, 1292. . . ." *Rickert v. Rickert,* 282 N.C. 373, 193 S.E. 2d 79 (1972).

" . . . 'While a stipulation need not follow any particular form, its terms must be definite and certain in order to afford a basis for judicial decision. . . . ' " *State v. Powell,* 254 N.C. 231, 118 S.E. 2d 617 (1961). On its face the stipulation in the present case is not definite and certain. The stipulation only notes that two jurors were excused for cause "because of their views on capital punishment," but does not reveal whether the

State or defendant moved for their exclusion or what their views on capital punishment might have been. As defense counsel in his brief states:

> "No stipulation or admission based on recollection can reflect the many possible answers given in response to the death-qualifying questions. No reflection now can show this Court how resolute or irresolute an answer may have been. Did either of the excused jurors voice general objections to the death penalty or express conscientious or religious scruples against its infliction? Was an excused juror's response ambiguous? Was one of the jurors excused because he said that he could not vote for the death penalty in this particular case? We do not know the answer to these questions; there is no transcript."

[13] In effect, it is now defendant's position that the stipulation entered into by defense counsel and the State is insufficient in that it does not provide this Court with an adequate basis for determining whether the two jurors allegedly excused for cause because of their views on capital punishment were properly excused under *Witherspoon* and the decisions of this Court cited above, and furthermore that it was error for the trial court not to order the *voir dire* examination of the jurors transcribed. We agree that the stipulation was deficient as contended by defendant. In order to determine whether the two jurors were in fact properly excused, this Court *ex mero motu* ordered that the court reporter's record of the *voir dire* examination as to all jurors in this case be transcribed and certified by the trial court to this Court, and that such transcript be made a part of the case on appeal. This was done. See Rule 19, Rules of Practice in the Supreme Court.

This sixty-five page transcript discloses that, contrary to the stipulation, *no* prospective juror was excused for cause by reason of his views on capital punishment. Although two prospective jurors who expressed some reservation as to capital punishment were excused, they were *not* excused for cause but were excused peremptorily by the State. Including these two peremptory challenges the State utilized seven of its permissible nine peremptory challenges, and defendant seven of his permissible fourteen. See G.S. 9-21. Peremptory challenges are challenges that may be made according to the judgment of the party entitled thereto, and the reason for challenging a juror peremptorily cannot be inquired into. *State v. Noell, supra; State v. Allred,* 275 N.C. 554, 169 S.E. 2d 833 (1969).

It is the primary duty of defense counsel to prepare and docket a true and adequate transcript of the record in the case on appeal in a criminal case. *State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561 (1970); *State v. Roux,* 263 N.C. 149, 139 S.E. 2d 189 (1964); G.S. 15-180; G.S. 1-282. It is also the duty of the solicitor to scrutinize the copy that the appellant serves upon him. If it contains errors or omissions, it is the solicitor's responsibility to file exceptions or countercase. *State v. Fox, supra.* If, as in the present case, defense counsel desires to take exception to the act of the court in excusing a prospective juror, he should either enter into a stipulation with the State setting out in detail the reason for excusing the juror, or he should include a transcript of the *voir dire* examination as to that juror in the case on appeal. He should not take exception to his own failure to prepare and docket a true and adequate transcript of the record in the case on appeal. Such action is not approved.

[14] Since the complete record now before us discloses that no juror was excused by the State for cause due to his view on capital punishment, defendant's contention that the trial court erred in excusing jurors for cause is overruled, and his contention as to the failure of the trial court to order a transcript of the *voir dire* examination to be included in the case on appeal is no longer tenable.

[15] Defendant by his final assignment of error contends that the death penalty in this case is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, sections 19, 24, and 27 of the Constitution of North Carolina. He further contends that capital punishment in North Carolina is still imposed in a selective and arbitrary manner, in violation of *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726 (1972).

Defendant also adopts and incorporates by reference the contentions and citations of authority contained in the brief filed in *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974), by the NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae,* and the brief filed in *State v. Blackmon,* 284 N.C. 1, 199 S.E. 2d 431 (1973), by the North Carolina Civil Liberties Union Legal Foundation, Inc., as *amicus curiae.* Suffice it to say that the arguments advanced in this case were fully discussed and rejected in the opinions filed in those cases. Further discussion would serve no useful purpose.

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 murder in the first degree committed in North Carolina after 18 January 1973. G.S. 14-17. The murder for which this defendant has been convicted was committed on 1 July 1973. The death sentence, therefore, was not only proper but was the only one that the trial court could impose.

An examination of the entire record discloses that defendant has had a fair trial free from prejudicial error. The judgment imposed must therefore be upheld.

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).

STATE OF NORTH CAROLINA v. SAMUEL A. POOLE

No. 18

(Filed 10 April 1974)

Burglary and Unlawful Breakings § 5— first degree burglary — sufficiency of circumstantial evidence

Trial court in a first degree burglary case erred in denying defendant's motion for nonsuit where the evidence tended to show that the homeowner did not identify defendant as the intruder, defendant was in possession of a red panel truck and a sawed off rifle as late as seven hours before commission of the crime, there was no evidence as to where the truck was during the seven hours immediately prior to the crime but a police officer found it within minutes of the crime in the vicinity of the crime scene where defendant said he had left it when it ran out of gas, a button which was found at the crime scene matched those on a shirt found during a second search of defendant's house, and there was no evidence relating to fingerprints inside the house or track prints outside the house.

Jusice LAKE dissenting.

Justices HIGGINS and HUSKINS join in the dissenting opinion.

APPEAL by defendant from *Braswell, J.,* 13 August 1973 Session of MOORE Superior Court.

State v. Poole

Defendant was tried on an indictment which charged that, on 19 May 1973, defendant "unlawfully and wilfully did feloniously and burglariously break and enter, between the hours of 9:00 p.m. and 9:30 p.m. in the night of the same day, the dwelling house of Tennie A. Maness, Rt. 1, Robbins, North Carolina, there situate, and then and there actually occupied by the said Tennie A. Maness, with the felonious intent he, the said Samuel A. Poole, to forcibly and violently ravish and carnally know Tennie A. Maness, a female occupying and sleeping in said dwelling house, without her consent and against her will."

The only evidence was that offered by the State. Summarized, except when quoted, the testimony of each of the State's witnesses is narrated below.

MISS TENNIE MANESS

On 19 May 1973, she was living alone in her "four-room brick house" on Route 1, Robbins, in Moore County. About 9:00 p.m., "just as it was getting dark," she returned to her home after a visit with her brother, Wilmer Maness, who lived about a quarter of a mile from her.

Inside her home, alone, "about 9:15 or 9:30 p.m.," she was in bed, reading, when she heard a noise at her *front* door. Her two doors, front and side, and all windows, had been closed and locked. It was then dark and the only light burning was in her bedroom. She called Wilmer and asked him to come to her house "because someone was at the front door."

"Five or ten minutes later," she heard "a cutting noise like on metal or glass" at the *side* door. She then "turned the back light on," thinking "it would frighten them." She "didn't hear them come in." Thinking "they were going to break in," she opened the bedroom door to try "to get out." When she opened the door, she saw "a colored man and tall" standing in the hall "approximately 10 feet from [her] bedroom door."

The hall area where this man was standing "was lighted by [her] bedroom light." The man had "a short-barreled gun." She didn't see "the stock of the gun." He was "just standing still" and "didn't say anything." She "just caught a glimpse" of him. She didn't see his clothes and didn't know "whether he had on a hat." She slammed the door as quickly as she could and locked it. She then climbed up on a chair beside her bedroom

window, raised the window, opened the screen, and climbed out "through the bottom section of the window." It was "probably 12 feet from the bottom of the window to the ground." She estimated that this required "probably two minutes' time."

"After going through the window," she ran to the side of the house and turned toward the road, "just as quick as [she] could." When she "was 75 feet away," she heard a man say, "Stop, I've got a gun." She stopped "for one minute," then saw Wilmer in her yard and "started screaming and running toward [her] brother."

She did not know when the person behind her left, whether he was running when he left or where he went. She has "a slight hearing loss."

She estimated it "was probably only ten minutes from the time he broke in till [her] brother got there." She did not go back to her house until the next morning. She then found that the lock on her bedroom door was broken. "[She] did not hear anything which caused [her] to think it was being broken. The bedroom door was a new door and had only been on there 4 or 5 years. It was in good condition before [she] left [her] bedroom." "The curtains on the window are white, probably cotton or a mixture of cotton and a synthetic fabric."

She "had never seen the defendant before." The person(s) referred to in her testimony did not touch her. She did not know how the man she saw in the hall got out of the house.

DEPUTY SHERIFF DALTON CHEEK

He arrived at the residence of Miss Maness at approximately 9:33 p.m. on May 19th. There he saw and talked with Wilmer Maness. He did not see Miss Maness until the following day.

Upon his examination of the premises he found the glass in the side door was broken. There was glass "immediately inside the side door." The "bedroom lock had been busted off." The window to the bedroom was raised. Half of the curtain was still intact. The other half was "on the ground approximately 2 or 3 feet from the house immediately below the window." At approximately 3:30 a.m. on May 20th, he first saw a dark brown button (Exhibit No. 9) "in the fold of the curtain that was laying on the ground directly beneath the open window of the Tennie Maness residence." He placed this button in an envelope.

He showed it to Miss Maness the next day and "asked her if it came from any of her garments." [He testified, without objection, that Miss Maness told him "it did not come from any of her clothing."]

On Sunday, May 20th, he saw defendant at approximately 9:30 a.m. at the Robbins Police Station. Defendant "is approximately 6 feet 2 inches." He told defendant "there had been a lady's house went into the night before" and he "needed to talk with [defendant] about it." Thereupon, he advised defendant of his "constitutional rights" and, after reading the paper, defendant signed a waiver of rights.

At approximately 9:45 a.m. he (Cheek) asked defendant if he minded if they went to his premises, that they "would be looking for anything that would be incriminating on his part." [There was no testimony on direct examination of a visit to defendant's premises *during the morning* of May 20th.]

At 5:45 p.m. at the jail he wrote up a statement (Exhibit 7), which was signed by defendant, in which defendant gave his "full consent to Deputies of the Moore County Sheriff's Department to inspect [his] premises for any incriminating evidence in the Tennie A. Maness breaking and entering case." Accompanied by defendant, he went to defendant's residence, searched it and removed a shirt (Exhibit 8) from which one button, the second from the bottom, was missing.

On the morning of May 20th, defendant told him that he ran out of gas when driving a red panel truck on a rural paved road near the residence of Miss Maness. He (Cheek) had seen the truck in that vicinity at approximately 9:33 p.m. on May 19th. It was located approximately 2/10 of a mile south of the residence of Miss Maness. There was "no residence close to the panel truck and the Maness residence." There was "no ignition key in the truck."

The following day at noon he obtained an ignition key and started the vehicle without any trouble. He "just started the truck up and let it run for a while and shut it off." Defendant stated he had left the truck where he (Cheek) had found it; that, when he left the truck, he traveled south on the rural paved road and was picked up by two boys who carried him to his residence. Defendant made no statement as to when he was picked up and did not give any name of the persons he said picked him up.

When asked "whether he owned any weapon of any kind on that evening," defendant stated "he had not had a weapon in several years."

On cross-examination, Cheek testified as follows:

When he first searched defendant's residence at approximately 9:45 a.m. on May 20th he "looked in all of the rooms." At that time Officer Cockman of the Robbins Police Department was with him. About 5:45 p.m., when defendant gave him permission to search again, he told defendant that he "would be looking for a garment of some type to match the button [he] had found." Deputy Sheriff Whitaker was with him on the second search. On the second search he found the shirt (Exhibit 8) in the front bedroom next to the bed. From 9:30 a.m. on May 20th, when he first saw defendant, defendant was either in his (Cheek's) custody or in the custody of someone in the Moore County Sheriff's Department.

He did not get any fingerprints at the Maness residence. He talked to Miss Maness on the telephone at approximately 3:30 p.m. on May 20th. He first saw the truck at approximately 9:33 p.m. on May 19th when en route to the residence of Miss Maness. He checked the vehicle at that time, but did not operate it on the night of May 19th. He had the vehicle "towed in and stored at Yow's Garage in Robbins." It "was in Yow's Garage that [he] started the vehicle." Someone else towed the vehicle to Yow's Garage.

Cheek testified on redirect examination as follows:

The vehicle was towed to the garage because there was no ignition key. Mr. Bradley brought the ignition key down the next day.

He (Cheek) delivered the button and shirt to Mr. Pearce at the SBI Laboratory in Raleigh on May 23rd. The button was in the same condition it was in when he first obtained it from the folds of the curtain on May 20th. There were threads through the holes in the button. The shirt was in the same condition it was in when he first obtained it from defendant's residence.

WILLIAM E. PEARCE

As an employee in the Chemical Laboratory of the State Bureau of Investigation his duties included the analysis of various items of evidence in connection with criminal investigations.

On May 24th and 25th, he made examinations and comparisons of the button (Exhibit 9) and the shirt (Exhibit 8) which Cheek had submitted to him on May 23rd. There were black cotton threads in Exhibit 9 and in the buttons on Exhibit 8. There were six strands on one side and seven strands on the other. On the back, "the strands were knotted." These buttons were put on by a machine. Exhibit 9 was "the same in all respects, measurements, diameter, color, number of holes and depressions" as the buttons on Exhibit 8.

To make the comparison, he used a button which he removed from the pocket of the shirt. He "did not remove the buttons in the line of the shirt, for fear they might be related for further evidence." He compared them "cursorily without taking them off the shirt." He compared the knot on the buttons used by him for comparison with that "tied on the back of the remaining buttons on the shirt," and "it appeared" they were "tied in the same manner."

He concluded his testimony on direct examination by stating that in his opinion "Exhibit 9 could have been torn from the shirt, Exhibt 8."

On cross-examination, he testified that the label on the shirt read, "Washington Dee and Cee, permanent press shirt"; that the shirt appeared to be "a common, everyday workshirt, gray cotton"; that "that button could have come from a shirt of that particular type made by the same manufacturer" but that he wouldn't want to base his opinion on whether the shirt was made by the same manufacturer; and that the button "certainly came from a shirt which had other buttons on it which were identical to it."

BOYCE DOWD testified that he sold defendant "a sawed-off .22 rifle" on or about 12 May 1973; and that defendant paid him $20.00 for it and left "with the rifle."

ROBERT MOSELEY testified that he saw defendant on May 19th "about 1:00 or 2:00 in the afternoon"; that defendant was traveling in a red panel truck; that he and defendant went to the liquor store in Carthage "about 2:00"; that, when he got out to go home, "about 2:30," he saw "a .22 automatic rifle with the barrel sawed off to about 18 inches" in the front of the truck "where you change the gears"; and that, when asked where he got the rifle, defendant said "it wasn't his." On cross-

examination, he testified that he and defendant "had not been drinking that day"; that they had gone to Carthage to get something to drink; and that he had been convicted of shooting defendant about three years back and was then on probation for it.

WILLIAM RALPH BRUCE testified that he had possession of a red panel truck which he used "to pick up work hands"; that "on Friday morning" he allowed defendant to drive the truck; that the next time he saw the truck was on Sunday morning "about 1:00"; that the truck was then "close to the North Moore School"; and that he did not know how much gasoline was in the truck when he let defendant have it.

LESTER BRADLEY testified that he was "self-employed hauling poultry"; that, on or about May 19th, he permitted Bruce, his employee, to have possession of his (Bradley's) red panel truck, which Bruce used to "pick up help in the area and bring them to Siler City"; that he saw the truck again on Sunday in the Yow Garage; that the foreman of the crew for which Bruce works drove it away; that the "gasoline gauge [was] broken"; and that it took 13.7 gallons to fill it up "after it had made its route to pick up the hands and come back to Siler City, a distance of 38 miles."

HARRY PERSON testified that he was 15 years old and lived in Robbins; that he saw defendant on May 19th, "in the evening," but "[didn't] really know what time it was"; that, "at the store," Officer June Cockman "asked [him] questions"; that, accompanied by James Davis, his cousin, he left the store "about 20 minutes later to go home"; that he saw defendant "in the path leading out to the main road"; that "[t]he path starts at the road and goes out to the store"; that defendant was alone; and that defendant "was coming toward [him] . . . was coming towards the road to the store."

Deputy Sheriff Cheek, when recalled, testified to extrajudicial statements previously made to him by Moseley and Dowd which tended to corroborate the testimony of these witnesses at trial.

Other evidence will be noted in the opinion.

The jury returned a verdict of guilty of burglary in the first degree and judgment imposing a sentence of death was pronounced. Defendant excepted and appealed.

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

Seawell, Pollock, Fullenwider, Van Camp & Robbins by P. Wayne Robbins; Chambers, Stein, Ferguson & Lanning by Adam Stein; and David E. Kendall, NAACP Legal Defense Fund, New York, New York, for defendant appellant.

BOBBITT, Chief Justice.

Defendant assigns as error the denial of his motion under G.S. 15-173 for judgment as in case of nonsuit. The question presented by this assignment is whether the evidence was sufficient to warrant the submission thereof to the jury and to support a verdict of guilty of the criminal offense charged in the indictment.

The rules for testing the sufficiency of the evidence to withstand defendant's motion are well established. 2 Strong, N. C. Index 2d, Criminal Law § 104. The evidence most favorable to the State must be considered as true. When so considered, was it sufficient to warrant a finding that the crime charged was committed and that it was committed by defendant? *State v. Goines,* 273 N.C. 509, 513, 160 S.E. 2d 469, 472 (1968), and cases cited.

The testimony of Miss Maness was sufficient to support a finding that an unauthorized man unlawfully broke into and entered her occupied dwelling between 9:15 and 9:30 p.m. on Saturday, 19 May 1973. *Arguendo,* we assume the sufficiency of the evidence to warrant a finding that the intruder's intent when breaking and entering was to commit the felony of rape. The crucial question was whether the evidence was sufficient to warrant a finding that defendant was the unlawful intruder. In respect of this crucial question, the State's case depends wholly on circumstantial evidence.

The well established rule, cited with approval in numerous subsequent cases, is stated by Justice Higgins in *State v. Stephens,* 244 N.C. 380, 383-84, 93 S.E. 2d 431, 433-34 (1956), as follows: "[T]here must be substantial evidence of all material elements of the offense to withstand the motion to dismiss. It is immaterial whether the substantial evidence is circumstantial or direct, or both. To hold that the court must grant a motion to dismiss unless, in the opinion of the court, the evidence excludes

every reasonable hypothesis of innocence would in effect constitute the presiding judge the trier of the facts. Substantial evidence of guilt is required before the court can send the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict. What is substantial evidence is a question of law for the court. What that evidence proves or fails to prove is a question of fact for the jury."

The crucial question is whether there was substantial evidence that this defendant was the intruder who entered Miss Maness's home on the night of 19 May 1973. This question can be answered only after close analysis of the evidence.

Miss Maness did not identify defendant as the intruder. The only time she saw the intruder was when she "just caught a glimpse" of him when he was "just standing" in the hall, approximately 10 feet from the door of her bedroom. The hall area was lighted "by [her] bedroom light." The intruder did not speak. He was "a colored man and tall." He had a "short-barreled gun." Miss Maness didn't see his clothes and didn't know whether he was wearing a hat. Although she learned the next day that the lock to her bedroom door had been broken, "[she] did not hear anything which caused [her] to think it was being broken."

Miss Maness did not see the man outside who called to her that he had a gun and ordered her to stop. No witness testified to the identity of this man. There is evidence that he left the vicinity of Miss Maness's home when Wilmer Maness arrived. The evidence is silent as to the direction in which he was traveling when he left. Wilmer Maness did not testify.

Cheek testified defendant "is approximately 6 feet 2 inches." Dowd testified he sold defendant "a sawed-off .22 rifle" on or about May 12th. Moseley testified that, at 2:30 p.m. on Saturday, May 19th, such a rifle was in a truck operated by defendant.

Bruce, an employee of Bradley, testified that on Friday, May 18th, he (Bruce) had given defendant permission to drive Bradley's red panel truck. Cheek testified he first saw the truck on Saturday, May 19th, at 9:33 p.m., when going to Miss Maness's house; that the truck, unattended, was approximately 2/10 of a mile south of Miss Maness's house; that he checked the vehicle but did not operate it; that the ignition key was missing; that the next day, Sunday, May 20th, he (Cheek)

arranged for the truck to be towed to Yow's Garage; that Bradley, the owner of the truck, brought an ignition key to Yow's Garage; and at that time he (Cheek) "just started the truck up and let it run for a while and shut it off."

Person testified that on Saturday, May 19th, "in the evening," he was "at the store," at which time Officer June Cockman "asked [him] questions"; and that, when he (Person) left the store "to go home" he saw defendant, alone, "coming toward [him] . . . coming towards the road to the store." Cheek, when recalled, testified that he was "familiar with the store referred to by Mr. Person," and that "the store is approximately ¾ miles from the nearest point to the paved road, 1479."

The evidence reviewed above tends to show that defendant had possession of the truck and of "a sawed-off .22 rifle" as late as 2:30 p.m. on Saturday, May 19th; and that he was seen "coming towards the road to the store" by Person, who didn't "really know what time it was."

There was no evidence as to where the truck was on Saturday, May 19th, from 2:30 p.m. until 9:33 p.m. We note Cheek's testimony that defendant told him that, "as soon as he left the truck, he traveled south on the rural paved road and was picked up by two boys that carried him to his residence." We further note Cheek's testimony that defendant made no statement "as to what time he was picked up" and "did not give the names of any persons who he said picked him up." Apart from these statements attributed to defendant, there was no evidence as to where defendant was from 2:30 p.m. on Saturday, May 19th, until Person saw him at some unspecified time "in the evening," and no evidence as to where defendant was from the time Person saw him until Cheek saw him on Sunday, May 20th, at approximately 9:30 a.m., at the Robbins Police Station.

Cheek, when recalled, testified to the distance from the store referred to by Person to the nearest point of the paved road. Originally, Cheek had testified that "[t]here is a store approximately two miles from the Maness residence in the Belview section." Whether this is the store referred to by Person is obscure.

The evidence reviewed above tends to place defendant 2/10 of a mile south of Miss Maness's house at some unidentified time on Saturday, May 19th. There was no evidence relating to fingerprints of the man inside the house or relating to track

prints of the man outside the house. The man inside the house did not speak. There was no evidence tending to identify the voice outside the house as that of defendant.

To place defendant at the scene of the crime, the State relies upon testimony relating to a dark brown button which Cheek found at approximately 3:30 a.m. on Sunday, May 20th, "in the fold of the curtain that was laying on the ground directly beneath the open window of the Tennie Maness residence." At about 5:45 p.m., during his *second* search of defendant's residence, Cheek found in the front bedroom a shirt from which one button was missing. Pearce testifed to his examination and comparison of the button found by Cheek and the remaining buttons on the shirt. The shirt was "a common, everyday work shirt, gray cotton," bearing the label "Washington Dee and Cee, permanent press shirt." Pearce concluded that the button "could have been torn from the shirt"; that the button could have come from a shirt of that particular type made by the same or a different manufacturer; and that the button "certainly came from a shirt which had other buttons on it which were identical to it."

In our view, the opinion evidence of Pearce is insufficient to warrant a finding that the button found by Cheek came from the shirt found by Cheek on his *second* search of defendant's residence. In addition, we note the following:

The evidence is silent as to when, where and under what circumstances defendant was arrested. When arrested, was defendant wearing the shirt from which a button was missing or had been torn? Was the shirt in defendant's bedroom when Cheek, accompanied by Officer Cockman, first searched defendant's residence at approximately 9:45 a.m. on Sunday, May 20th? The shirt (Exhibit 8) was picked up when Cheek, accompanied by Officer Whitaker, made the *second* search of defendant's residence. Defendant was in custody at all times between the first search and the second search. Neither Cockman nor Whitaker testified.

Although Cheek observed the half of curtain on the ground below Miss Maness's window when he arrived at 9:33 p.m. on Saturday, May 19th, he did not see the button until 3:30 a.m. on Sunday, May 20th. Was the curtain in the custody of an officer during all or any part of this six-hour period? Was it

accessible for handling by unauthorized persons during this six-hour period? The evidence is silent as to these matters.

The evidence is silent as to whether Miss Maness used her bedroom curtain or any part thereof when dropping from the bedroom window to the ground some 12 feet below. It is also silent as to when, by whom and under what circumstances the curtain had been hung.

The State suggests, but without support in the evidence, that the intruder (1) left the bedroom by way of the same window used by Miss Maness, and (2) used the curtain to break the force of his descent. Miss Maness estimated that "two minutes" elapsed from the time she locked the bedroom door until she reached the ground. During that period, she did not hear anything which caused her "to think [the lock] was being broken." She testified positively that she did not know how the man whom she saw in the hall got out of the house. Seemingly, it would have been quicker and easier for him to leave by the side door through which he entered.

The State points out that it has offered evidence which contradicts statements attributed to defendant by Cheek. There was uncontradicted evidence that the gas gauge on the truck was broken. However, the State's evidence was sufficient to support a finding that defendant's explanation as to why he had left the truck was false. Too, there was evidence that defendant made a false statement with reference to his ownership of a weapon. However, assuming the statements attributed to defendant were false, the evidence reviewed above is the only evidence which purports to place defendant in the immediate vicinity of the home of Miss Maness at or about the time the crime was committed.

When the evidence most favorable to the State is sufficient only to raise a suspicion or conjecture that the accused was the perpetrator of the crime charged in the indictment, the motion for judgment as in case of nonsuit should be allowed. *State v. Cutler,* 271 N.C. 379, 383, 156 S.E. 2d 679, 682 (1967), and cases cited. Notwithstanding there was evidence which raises a strong suspicion of defendant's guilt, we are constrained to hold that there was no *substantial* evidence that defendant was the person who broke into and entered the home of Miss Maness on the night of 19 May 1973. See *State v. Jones,* 280 N.C. 60, 67, 184 S.E. 2d 862, 866 (1971), and cases cited.

Therefore, defendant's motion for judgment as in case of nonsuit should have been allowed.

Reversed.

Justice LAKE dissenting.

It is unquestionably true that upon the defendant's motion for judgment of nonsuit in a criminal action, the evidence of the State, including any which may have been improperly admitted, must be deemed to be true, the State is entitled to all inferences reasonably to be drawn therefrom and any discrepancies or inconsistencies therein are to be resolved in favor of the State. *State v. McNeil,* 280 N.C. 159, 185 S.E. 2d 156; *State v. Vincent,* 278 N.C. 63, 178 S.E. 2d 608; *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225; *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44; Strong, N. C. Index 2d, Criminal Law, § 104. "Regardless of whether the evidence is direct, circumstantial, or both, if there is evidence from which a jury *could* find that the offense charged has been committed and that defendant committed it, the motion to nonsuit should be overruled." (Emphasis added.) *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469.

In passing upon the motion for judgment of nonsuit, the court does not sit as a jury to determine whether the evidence is sufficient to convince the court beyond a reasonable doubt that the defendant is guilty of the offense charged. The function of the court, when such a motion is made, is simply to consider whether there is enough evidence, including all inferences which *may* reasonably be drawn therefrom, to permit a jury to so find. *State v. McNeil, supra.* If there is such evidence, it is for the jury, not the court, to say whether it is convinced beyond a reasonable doubt of the defendant's guilt of the offense charged, or of a lesser offense included therein. Strong, N. C. Index 2d, Criminal Law, § 106. This jury was so convinced.

There is, in this record, ample evidence to support a verdict that someone committed the offense charged in the indictment—burglary in the first degree, the felonious intent accompanying the breaking and entering being the intent to rape the female occupant of the house. The undisputed evidence of the State is that Miss Maness returned to her home just as it was getting dark and was in bed reading, thus having a light burning in her bedroom. After dark, a Negro man broke and entered the house through a locked, outside door. He carried a firearm.

Miss Maness, observing him in the hallway, slammed the door to her bedroom and locked it and escaped through the window. When she, and those who came to her assistance, reentered the house immediately after the disturbing events were concluded, the locked door to the bedroom had been forced open and splintered. The intruder called to her as she fled from the house, saying, "Stop, I've got a gun." It is not conceivable that the purpose of the breaking and entering, under these circumstances, was other than to rape the occupant of the home.

The remaining question is whether there was enough evidence to permit a jury to find that the defendant was the perpetrator of this offense. The evidence is that the intruder was a "colored man and tall." The defendant is a colored man, six feet two inches in height. A red, panel truck was found by the deputy sheriff, shortly after this break-in occurred, on a rural road less than a quarter of a mile from the Maness residence. The defendant drove it to that point and left it there shortly before the break-in at the Maness residence. There was no residence closer to the truck than the Maness residence. There was no key in the truck. When questioned the following morning about his abandonment of the truck at that point, the defendant told the officer he had run out of gas. Obtaining an ignition key from the owner, the officer promptly started the truck without difficulty. The defendant also told the investigating officer that he had not had a firearm in several years. The evidence is that he purchased a sawed-off rifle one week prior to this occurrence and had it in his possession a few hours before the breaking and entering occurred.

The curtain at the window of the bedroom, through which Miss Maness escaped from the house, was found by the deputy sheriff lying on the ground outside the window when he arrived on the premises shortly after the breaking and entering occurred. Six hours later, the officer, continuing his investigation, found in the fold of this curtain a button. The record indicates that this discovery was made six hours before the defendant was arrested. Miss Maness testified that it did not come from any of her garments. The following day, the residence of the defendant was searched, with his permission, and a shirt, from which a button was missing, was found by the officers. The button found in the fold of the curtain, lying on the ground outside the window of Miss Maness' bedroom, matched exactly the buttons remaining on the shirt so taken from the defendant's

residence, not only as to the size, shape, color and texture of the button, but also as to the thread remaining in the holes of the button so found and the thread by which the other buttons were attached to the defendant's shirt.

To say that this evidence is not sufficient to submit to a jury, for its determination, the question of whether this defendant, beyond a reasonable doubt, was the intruder into the Maness home is, in my opinion, completely at variance with the above stated rules governing the determination of a motion for a judgment of nonsuit.

Justices HIGGINS and HUSKINS join in this dissenting opinion.

STATE OF NORTH CAROLINA v. KARL DEGREGORY

No. 4

(Filed 10 April 1974)

1. **Homicide § 18— premeditation and deliberation — proof by circumstantial evidence**

Premeditation and deliberation are not usually susceptible of direct proof and are therefore susceptible of proof by circumstances by which the facts sought to be proved may be inferred.

2. **Homicide § 18— premeditation and deliberation — circumstances to consider**

Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are want of provocation on the part of the deceased, conduct of defendant before and after the killing, use of grossly excessive force or the dealing of lethal blows after deceased has been felled.

3. **Homicide § 21— premeditation and deliberation — sufficiency of circumstantial evidence**

Where the evidence tended to show that defendant shot one victim twice and the other victim three times, that both victims died as a result of shots through the heart, and that severe head wounds which exposed the skull were inflicted upon both victims before the shots were fired, the ingredients of premeditation and deliberation necessary in first degree murder could be inferred, and the trial court properly denied defendant's motion for nonsuit.

4. **Criminal Law § 52— psychiatrist's opinion — personal examination as basis — admissibility**

In a first degree murder case the trial court did not err in allowing a psychiatrist to base his expert opinion as to the sanity of defendant upon both his own personal examination and other information contained in the patient's official hospital record, though that other information itself would have been inadmissible.

APPEAL by defendant from judgments of *Ervin, J.*, 23 July 1973 Schedule "A" Criminal Session, MECKLENBURG Superior Court.

Separate bills of indictment, proper in form, charging defendant with the murders of Clovis P. Powell and wife Mae Cochrell Powell on 2 March 1972, were consolidated for trial.

The State offered evidence tending to show that Clovis P. Powell and wife Mae Cochrell Powell resided in a one-story single family dwelling at 5201 Londonderry Road in Charlotte. At approximately 7 p.m. on 2 March 1972 James Kutcher, a neighbor, carried some bones to the Powell dwelling for their dog and delivered them to Karl DeGregory who answered the door. Clovis Powell was in the kitchen at the time and spoke to Mr. Kutcher.

William E. Oats and his wife Evelyn P. Oats, residents of Rock Hill, South Carolina, were shopping in Charlotte on 2 March 1972 and arrived at the Powell home about 9:45 p.m. for a visit. Mr. Powell was Mrs. Oats' father and Mrs. Powell was her stepmother. After parking their automobile in the rear of the Powell home and while standing outside the back door, they heard a noise "like a metal door slamming twice." Mrs. Oats checked the front door but no one answered. After several minutes Mrs. Oats returned to her car and Mr. Oats went to the Kutcher residence to phone the Powells. At that time defendant emerged from the back door of the Powell residence and told Mr. and Mrs. Oats he was a house guest of the Powells and that they were not at home but had gone out to dinner with some friends. Defendant's appearance and demeanor appeared normal and he behaved in a calm rational manner. After conversing with defendant for a few minutes, Mr. and Mrs. Oats left, noting at the time that both automobiles belonging to the Powells were parked at the back of the house.

At approximately 11:30 p.m. that evening, Worth Taylor Phillips, a highway patrolman stationed in Lexington, North

Carolina, pursued and stopped a green Oldsmobile driving north on I-85 near Lexington at an excessive rate of speed. Defendant Karl DeGregory, operator of the vehicle, told the patrolman it belonged to Mr. Powell and that he and Mr. Powell were thinking about going into business together. The defendant acted normal at that time.

At about 10:30 p.m. on 2 March 1972, one hour before he was stopped by Patrolman Phillips, defendant telephoned a man named Raymond Mileski who lived at 1214 Greensboro Road, High Point, North Carolina, and advised Mr. Mileski that he was calling from a phone booth near the airport. As a result of the phone conversation, defendant arrived at the Mileski home in High Point about 12:20 a.m. on 3 March 1972. Defendant and Mileski were old friends and after a general conversation about tax matters and other problems, they retired for the night. About 6 a.m. Mr. Mileski loaned defendant $40.00 for a plane ticket to return to defendant's home in Florida, and he left the Mileski home about 6:15 a.m.

When Mrs. Powell failed to report for work on the morning of March 3, a co-worker drove to the Powell residence to ascertain the reason. She observed a windowpane broken in the back door, opened the door, found the dog crying, ashes and cigarette butts on the floor, the lights on, the morning paper still on the porch, the television blaring, Mrs. Powell's glasses on the floor and her purse overturned. She became frightened, sought help at the Kutcher house nearby, and called the police.

The police found Mr. Powell's body lying in the hall and Mrs. Powell's body in a sitting position between the commode and the bathtub in one of the bathrooms. Mr. Powell's rear pockets were turned inside out. He was lying in a pool of blood. Mrs. Powell had blood on her face and a bloody towel on top of her head. A piece of the bathroom door lock was lying on the bathroom floor and the door facing was splintered. Several dresser drawers and chest drawers in the home were pulled out and several spent .380 cartridge casings were found near the bodies. Blood was on one of the beds and blood drippings were found in the hallway. On the kitchen table was a note in defendant's handwriting reading as follows: "Mr. Powell, Mr. Oats was by to see you. I told him you and Mae were going out. Karl. P. S. Will call on Saturday."

Dr. Hobart R. Wood, the Medical Examiner for Mecklenburg County, performed an autopsy on the body of Clovis Powell.

He found three gunshot entry wounds, two exit wounds and one bullet embedded under the skin. One bullet had entered the right temporal area and exited through the left upper cheek. A second bullet had passed through the heart while the third bullet entered at the lower left chest below the rib cage, passed through the abdominal cavity and was found embedded in the tissue of the muscles of the lower right back. This bullet was recovered. There were, in addition, extensive head injuries involving a series of five deep lacerations leaving the skull bare. Based on the autopsy, Dr. Wood was of the opinion that the head wounds were inflicted by a blunt instrument before the gunshot wounds and that the bullet wound through the heart was the immediate cause of death.

The autopsy on Mrs. Powell revealed two entry and two exit gunshot wounds, one bullet entering the left upper chest area and the other entering the left upper quadrant of the abdomen below the rib cage. One bullet remained in the clothing and was recovered. The stone in the setting of a ring on Mrs. Powell's third finger right hand was missing. Mrs. Powell also had two deep scalp lacerations, one in the parietal area near the midline of the head and the other in the back of the head in the right occipital area. These wounds were very deep. In Dr. Wood's opinion, Mrs. Powell died of the gunshot wound in the chest.

On 9 January 1971, Karl DeGregory, who lived in Ormond Beach, Florida, purchased from Richard J. Buchwald, a gun shop owner in Daytona Beach, Florida, a Browning .380 automatic pistol, serial number 535188, and four boxes of Remington Peters .380 ACP cartridges. A record of this transaction was kept by Mr. Buchwald as required by law and was offered in evidence. Mr. Buchwald testified: "State's Exhibit #13 is the exact gun I sold Karl DeGregory on January 9, 1971. The Serial Number on the gun is 535188. It is the same type, style, brand, caliber and serial number."

On 13 March 1972 Sergeant William A. Shaw, Jr., Detective Holmberg and Detective Travis, all with the Mecklenburg County Police Department, went to the home of Ray Mileski in High Point and, with his permission, searched the house. There is a fireplace in the Mileski living room containing a trapdoor leading to an ash pit below. In the ash pit in the basement the following items were discovered: a pink washcloth, a set of keys marked "American Motors," a pair of green plastic gloves, a white handkerchief, a wooden handle, a Browning automatic and some torn

up Oldsmobile floor mats. These items were all offered in evidence. The Browning automatic pistol is State's Exhibit 13 which Mr. Buchwald sold to Karl DeGregory on 9 January 1971 in Daytona Beach, Florida. Dried blood taken from the front of State's Exhibit 13 was determined to be the same type as Mrs. Powell's blood. Blood taken from other portions of the pistol matched a blood type produced by a mixture of Mr. and Mrs. Powell's blood. The washcloth contained traces of human blood but in insufficient quantity to be typed. The handkerchief contained smears of human blood the same type as Mrs. Powell's blood. The pair of gloves contained traces of human blood Type O, the same as Mr. Powell's blood type.

An expert in the field of firearms identification examined the .380 automatic pistol, State's Exhibit 13, and the .380 caliber bullets recovered by Dr. Wood from Mr. Powell's body and Mrs. Powell's clothing. By test firing the pistol and making microscopic comparisons it was determined that the bullet removed from Mr. Powell's body and the bullet found in Mrs. Powell's clothing were both fired from the .380 Browning automatic pistol, State's Exhibit 13.

Defendant, testifying as a witness in his own behalf, said he was staying with Mr. and Mrs. Powell on 2 March 1972; that he was very close to them and they always treated him like a son; that he remembered Mrs. Powell coming home about 9:30; that State's Exhibit 13 was his gun and he remembered having it with him in the Powell home after 9:30 p.m. on March 2; that he remembered being in the bedroom changing clothes to go to New Jersey or to Florida to be with his wife and children; that he remembered Mrs. Powell coming into the bedroom, kissing him in an improper way and talking to him; that he remembered Mr. and Mrs. Oats coming to the door and going outside to talk with them but remembered nothing else of what occurred in the Powell home; and that he remembered being stopped for speeding by Officer Phillips and receiving a citation but did not remember putting the gun and other items in the ash pit in Mr. Mileski's home. He testified that he was arrested in Ormond Beach, Florida, on Saturday, 4 March 1972.

Defendant further testified that he had been employed by a chemical firm in High Point at an annual salary in excess of $10,000. His territory was between Virginia and Florida. He quit that job in February 1972. Prior thereto his annual salary was $18,500 plus expenses working for a Canadian firm. In

March 1972 he owed Mr. Mileski approximately $5,000 and his financial picture was "borderline." His house rent in Florida was $300 per month and he was one month behind in rent. When arrested on 4 March 1972 he knew nothing about the circumstances of the murders in Charlotte and first became aware of them when so informed at the time of his arrest.

Defendant testified that on several occasions, after arguments with his wife, he would have lapses of memory and labor under the delusion that he had a twin brother named Michael; that on 29 November 1971 in Melrose, Florida, he became lost, stopped at a beauty shop to inquire about directions, saw two women partially undressed inside, remembered that he had a gun in his hand while in the beauty shop but did not remember hearing the gun go off, and remembered a sixteen-year-old girl being in his car after he left the beauty shop. He said "Michael" was with him on 21 February 1972 at Wildwood, Florida, when he stopped at a restaurant and observed a man and a woman leave the restaurant and enter an automobile. He remembered following this couple to a nearby cemetery and coming up to the vehicle and punching both occupants with a knife but didn't remember seeing any blood.

Deputy Sheriff Wayne Allen, Sergeant Investigator for the Volusia County Sheriff's Office, Deland, Florida, testifying for the defendant, said that three females were slain in Melrose, Florida, on 29 November 1971, and a male and a female were slain near Wildwood, Florida, on 21 February 1971; that Karl DeGregory had told him that he believed he was responsible for these killings, but that as a professional police officer he was not totally satisfied that the killings were done by Karl DeGregory.

A number of other police officers from Florida also testified for the defendant, relating their investigations of the Melrose and Wildwood slayings, their interviews with defendant concerning these killings, and the fact that Karl DeGregory was not under indictment in Florida for either the Melrose or Wildwood killings although investigations concerning Karl DeGregory were still underway in Florida. Some of the information given by these police officers tended to show that Karl DeGregory had been told about the Florida slayings during a police interrogation on 9 March 1972 and that it was only after that date that he started talking about his involvement in the Melrose and Wildwood incidents. Other testimony was to the effect that

Karl DeGregory had information concerning the Wildwood slayings that would have been unavailable to him unless he had been there at the time of the slayings.

On recross examination, defendant identified his signature on a gas receipt from a service station in Winston-Salem showing the date 29 November 1971, the same date of the Melrose slayings. In the face of this receipt defendant insisted that on 29 November 1971 he was in Melrose, Florida, and implied that the date on the receipt was wrong.

Raymond Mileski, called by defendant as a witness, testified that he had conversed with defendant many times prior to 2 March 1972; that he visited defendant in jail in Florida on 11 March 1972; that based upon his long acquaintance with defendant he had learned that defendant thinks he has a twin brother named Michael; that Michael hated sex and was an avenger; and that defendant was convinced to a certainty that Michael, in fact, did exist. In the opinion of Mr. Mileski defendant did not have the capacity to distinguish between right and wrong on 2 March 1972.

Dr. Ann McMillan, a clinical psychologist with the Mental Health Guidance Center, Volusia County, Florida, testified she saw defendant on 6 March 1972 in the Volusia County Jail; that defendant was upset and disturbed; that she conducted thirty hours of testing and interviewing defendant and found him to be mentally ill, suffering from schizophrenia with paranoid tendencies. Based upon her examinations and evaluations of defendant, she found Michael to be a delusion, the actor-out of all things which the rigid, straight, and religious Karl would not accept. According to the professional opinion of Dr. McMillan, the defendant was legally insane and did not have the capacity to know right from wrong on 2 March 1972.

Dr. Robert Rollins, a medical expert specializing in the field of psychiatry, testified for the State as a rebuttal witness. His evidence tends to show that he is Superintendent of Dorothea Dix Hospital in Raleigh; that defendant Karl DeGregory was admitted under court order for observation and evaluation and spent approximately sixty days in the hospital. Based upon his own examination, Dr. Rollins testified that in his opinion the defendant was not a paranoid schizophrenic.

The prosecuting attorney posed the following question to Dr. Rollins: "Based upon your own personal examination and

interview of Karl DeGregory, and any other information contained in his official record of which you were the custodian and had available to you, did you make a diagnosis of the defendant?" Over objection, Dr. Rollins gave this answer: "For the purposes of our report back to the court, the psychiatric diagnosis was without psychosis; that is, not insane, that Mr. DeGregory was competent to stand trial."

Following instructions admittedly free from error, the cases were submitted to the jury upon defendant's plea of not guilty and not guilty by reason of insanity. The jury convicted defendant of murder in the first degree in both cases and he was sentenced to life imprisonment in each case. His appeal to this Court presents for initial appellate review the two assignments of error discussed in the opinion.

W. Herbert Brown, Jr., Attorney for defendant appellant.

Robert Morgan, Attorney General; Rafford E. Jones, Assistant Attorney General, for the State of North Carolina.

HUSKINS, Justice.

At the close of all the evidence defendant moved for judgment of nonsuit in each case. His first assignment of error is based on denial of these motions. He contends the motions should have been allowed with respect to the charges of murder in the first degree because "no evidence was presented during the trial which related to the elements of premeditation and deliberation, either by direct proof or by any other inference or circumstance."

[1] "Premeditation and deliberation are not usually susceptible of direct proof, and are therefore susceptible of proof by circumstances by which the facts sought to be proved may be inferred." *State v. Walters,* 275 N.C. 615, 170 S.E. 2d 484 (1969); *accord State v. Duboise,* 279 N.C. 73, 181 S.E. 2d 393 (1971); *State v. Reams,* 277 N.C. 391, 178 S.E. 2d 65 (1970).

[2] "Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are: want of provocation on the part of the deceased; the conduct of defendant before and after the killing; the use of grossly excessive force, or the dealing of lethal blows after the deceased has been felled. *See State v. Walters* and cases cited, 275 N.C. 615, 623-24, 170 S.E. 2d 484, 490 (1969). *See also State v.*

Johnson, 278 N.C. 252, 179 S.E. 2d 429 (1971)." *State v. Van Landingham,* 283 N.C. 589, 197 S.E. 2d 539 (1973).

[3] Evidence offered by the State tends to show, *inter alia:* Mr. Powell died as a result of gunshot wounds—two in the chest with one bullet piercing the heart, and one in the head. Each bullet wound was potentially fatal and the temple shot was fired after the shot through the heart and at a time when Mr. Powell was dying. Mrs. Powell was shot once in the upper abdomen and once in the chest, the latter shot piercing the heart.

Both victims had severe head lacerations. Mr. Powell had five deep scalp wounds, some of which exposed the skull. Mrs. Powell had two deep scalp wounds, both of which exposed the bone. Examination of these wounds indicated to Dr. Wood that "they were struck with a blunt instrument several times in a frenzy." In the opinion of Dr. Wood *the head wounds were inflicted before the gunshot wounds.*

Mrs. Powell's body was found in a sitting position in the bathroom. The officer who found the body "observed a piece of metal, which appeared to be a piece of the door lock, lying on the bathroom floor. The door facing appeared to be splintered. The door was slightly ajar, and it appeared it was split down the section where the lock is placed on the door."

The ingredients of premeditation and deliberation necessary in first degree murder may be inferred from the vicious and brutal circumstances of the homicide. The evidence here shows a complete lack of provocation and a viciousness which demonstrates that death was the actor's objective. The deadly shots through the heart after each victim had been felled and rendered helpless by mortal blows to the head support, almost require, the legitimate inference of premeditation and deliberation. This evidence is sufficient to repel the motions for nonsuit and require submission of the cases to the jury on the issue of murder in the first degree. *State v. Duncan,* 282 N.C. 412, 193 S.E. 2d 65 (1972); *State v. Duboise,* 279 N.C. 73, 181 S.E. 2d 393 (1971); *State v. Reams,* 277 N.C. 391, 178 S.E. 2d 65 (1970); *State v. Perry,* 276 N.C. 339, 172 S.E. 2d 541 (1970); *State v. Faust,* 254 N.C. 101, 118 S.E. 2d 769 (1961). Defendant's first assignment of error is overruled.

[4] Over defendant's objection the solicitor was permitted to propound the following question to Dr. Robert Rollins, Superin-

tendent of Dorothea Dix Hospital, a medical expert specializing in the field of psychiatry: "Based upon your own personal examination and interview of Karl DeGregory, *and any other information contained in his official record of which you were the custodian and had available to you,* did you make a diagnosis of the defendant?" Defendant's objection to the italicized portion of the question was overruled and defendant assigns as error the ruling of the court in this respect. Dr. Rollins replied: "Yes I did. For the purposes of our report back to the court, the psychiatric diagnosis was without psychosis; that is, not insane, that Mr. DeGregory was competent to stand trial. . . . Karl DeGregory was assigned to Dorothea Dix Hospital for examination purposes for approximately two months. Based upon my own examination, I am of the opinion that Mr. DeGregory is not a paranoid schizophrenic. I have some general knowledge of the circumstances surrounding the crime with which Karl DeGregory is charged." On cross-examination, Dr. Rollins testified: "Personally, I spent about three hours with Karl DeGregory. My testimony is predicated on the three hours which I spent with Karl DeGregory and upon the information furnished me by members of my staff. I spent three separate occasions with Karl DeGregory. Mr. DeGregory was responsive to my questions. I had the feeling at times that he was not answering with the completeness that I might have liked, but I thought that not unusual for a person in his situation. . . . I was not treating Mr. DeGregory. I was just diagnosing. . . . [I]n some aspects of the evaluation, it's just as important to observe what the patient doesn't say or how he avoids a question as to how he answers. Other than presenting as comprehensive a report as possible, I don't actually think that any of the tests run were necessary to perform, in my opinion. I do not think the Rorschach test or the MMPI test was necessary. I am satisfied that Karl DeGregory was not criminally insane based upon my three hours with him. . . . [T]he existence of mental illness is not synonymous with not being responsible for what you do. The following quote satisfies my definition of criminal responsibility but not my definition of insanity: 'An accused is legally insane and exempt from criminal responsibility by reason thereof if he commits an act which would otherwise be punishable as a crime and at the time of so doing is laboring under such a defect of reason from disease of the mind as to be incapable of knowing the nature and quality of the act he is doing, or if he does know this, incapable of distinguishing between right and wrong in

relation to such act.' . . . Paranoids are capable of murder. Schizophrenics are capable of murder. Paranoid schizophrenics are capable of murder and are capable of suffering from amnesia afterward."

Defendant asserts that Dr. Rollins based his expert opinion "on information obtained by someone else, which information was inadmissible in evidence," and cites the following quotation from *State v. David,* 222 N.C. 242, 22 S.E. 2d 633 (1942), in support of his contention that this was error prejudicial to his insanity defense: "There are two avenues through which expert opinion evidence may be presented to the jury: (a) Through testimony of the witness based on his personal knowledge or observation; and (b) through testimony of the witness based on a hypothetical question addressed to him, in which the pertinent facts are assumed to be true, or rather, assumed to be so found by the jury." We now explore the validity of this assignment.

Defendant's interpretation of the quotation from *State v. David, supra,* is too limited. The quotation states that an expert may base his testimony on facts within his personal knowledge or observation, or may base his opinion on facts presented in a hypothetical question, but it does not purport to limit facts and information within the personal knowledge of an expert to knowledge *derived solely* from matters personally observed. As demonstrated in opinions of this Court since *State v. David, supra,* an expert witness has wide latitude in gathering information and may base his opinion on evidence not otherwise admissible.

In *Penland v. Coal Co.,* 246 N.C. 26, 97 S.E. 2d 432 (1957), the testimony of a physician was challenged because his opinion was based on statements made to him by the patient during the course of a professional examination. We noted that although the statements of the injured patient were "not admissible as evidence of the facts stated, [they could] be testified to by the physician to show the basis of his opinion," and held that it is permissible for a physician to base his opinion, *wholly or in part,* on such statements, if made by the patient in the course of professional treatment, or during the course of an examination made for the purpose of treatment and cure.

In *Highway Commission v. Conrad,* 263 N.C. 394, 139 S.E. 2d 553 (1965), speaking to the competency of expert witness

testimony in a condemnation proceeding, we quoted with approval the following language from 5 Nichols on Eminent Domain, 3d ed., § 18.42(1), p. 256: "The fact that certain elements are not independently admissible in evidence . . . does not bar their consideration by an expert witness in reaching an opinion. Thus, it has been said: 'An integral part of an expert's work is to obtain all possible information, data, detail and material which will aid him in arriving at an opinion. Much of the source material will be in and of itself inadmissible evidence but this fact does not preclude him from using it in arriving at an opinion. All of the factors he has gained are weighed and given the sanction of his experience in his expressing an opinion. It is proper for the expert when called as a witness to detail the facts upon which his conclusion or opinion is based and this is true even though his opinion is based entirely on knowledge gained from inadmissible sources.' *(People v. Ganghi Corp.,* 194 C.A. (2d) 427, 15 Cal. Rep. 25)." In accord with these expressions is *State v. Arnold,* 341 P. 2d 1089 (Ore. 1959).

In *Potts v. Howser,* 274 N.C. 49, 161 S.E. 2d 737 (1968), we held it proper to allow a medical expert to give his opinion as to what was shown by a radiologist's report and the accompanying X-rays used by him in diagnosing plaintiff's injuries but not introduced into evidence.

Federal courts have held that a psychiatrist's testimony based on hospital records together with his own observation of defendant is admissible. *United States v. Davila-Nater,* 474 F. 2d 270 (5th cir. 1973); *Birdsell v. United States,* 346 F. 2d 775 (5th cir.), *cert. denied,* 382 U.S. 963 (1965), and cases cited therein.

In *Birdsell* the defendant contended that the testimony of a psychiatrist as to defendant's sanity, based upon a personal interview with the defendant *and* examination of defendant's tests, case history and hospital records, was inadmissible. Judge Friendly, writing for the court, first noted that prior decisions had established that opinions as to sanity contained in hospital records are not admissible under the Business Records Act, 28 U.S.C. § 1732, but that such an opinion is admissible in evidence if the expert rendering it is made available for cross-examination. The court then stated that while the records of a hospital performing psyschiatric investigations with respect to the symptoms recounted by the subject or the results of recognized

psychological tests may, unlike records of many physical symptoms, be useless to a jury and be excludable on that ground, "there is abundant authority that an expert witness who is available for cross-examination at the trial may use such records as the basis of an opinion without the proponent having to call every person who made a recorded observation. [Citations omitted.] With the increased division of labor in modern medicine, the physician making a diagnosis must necessarily rely on many observations and tests performed by others and recorded by them; records sufficient for diagnosis in the hospital ought to be enough for opinion testimony in the courtroom." *Birdsell v. United States, supra.*

On these authorities, and on reason as well, we hold it was proper for Dr. Rollins to base his expert opinion as to the sanity of Karl DeGregory upon both his own personal examination and other information contained in the patient's official hospital record. The question was proper and the answer was competent.

We note, moreover, that even had defendant been correct in his assertion that an expert cannot base an opinion on personal examination *plus* inadmissible information obtained from other sources, defendant could not prevail on this assignment. Even though the question put to Dr. Rollins sought his diagnosis of defendant based upon both his personal observation of defendant *and* information contained in defendant's records at Dorothea Dix Hospital, his testimony discloses that his opinion of defendant's sanity is based strictly on his own personal observation of defendant. At one point Dr. Rollins said: "Based upon my own examination, I am of the opinion that Mr. DeGregory is not a paranoid schizophrenic." Later, on cross-examination, he made the following statement: "I am satisfied that Karl DeGregory was not criminally insane based upon my three hours with him." Although Dr. Rollins did at one point in his testimony state that his testimony was based on both his personal interview with Karl DeGregory and information furnished by his staff, it is clear that on the crucial question of Karl DeGregory's sanity, he based his testimony solely on his personal observation of defendant. It thus appears that defendant has not been prejudiced by the doctor's testimony even under the more restrictive view of the law urged by defendant. This assignment is overruled.

Defendant having failed to show prejudicial error, the verdict and judgment in each case must be upheld.

No error.

DOMESTIC ELECTRIC SERVICE, INC. v. THE CITY OF ROCKY MOUNT AND COKEY APARTMENTS, LTD.

No. 52

(Filed 10 April 1974)

1. **Electricity § 2; Utilities Commission § 4— electric power — area outside municipality — competition**

Chapter 287 of the Session Laws of 1965, including G.S. 62-110.2, did not, without more, alter the competitive rights of municipalities, investor-owned utilities and electric membership corporations to compete for patronage in areas outside the corporate limits of municipalities; therefore, any premises in any such area could, prior to an assignment of such area by the Utilities Commission, have been served by any of the three competitors chosen by the user (assuming no contract restricting competition and assuming an extension to serve such user would fall within the "reasonable limitation," applicable to service by the municipality).

2. **Electricity § 2; Municipal Corporations § 4; Utilities Commission § 4— electric service — area assigned to utility — authority of municipality to provide service**

Since a city is neither a "public utility" nor an electric membership corporation and thus is not an "electric supplier" as that term is used in G.S. 62-110.2, a city is not prohibited by G.S. 62-110.2(b)(10) from providing electricity for new customers in an area outside the city limits which has been assigned by the Utilities Commission to an investor-owned utility.

3. **Electricity § 2; Municipal Corporations § 4; Utilities Commission § 4— electric service —area assigned to utility — authority of municipality to provide service**

G.S. 62-110.2(b)(8) does not grant an assignee of an area outside a municipality the exclusive right to serve electric customers therein and thus does not prohibit a municipality from extending its service lines into an area assigned to a public utility.

4. **Electricity § 2; Municipal Corporations § 4; Utilities Commission § 4— city's power to extend electric lines beyond boundaries**

A city's power to extend its lines and distribute electric current beyond its corporate boundaries is expressly restricted by G.S. 160A-312 to "reasonable limitations."

5. **Municipal Corporations § 4— primary function of municipality**

The primary function of a municipal corporation is to provide local government within its limits and authorized services to its inhabitants, not to engage in business enterprises for profit outside its corporate limits.

6. **Electricity § 2; Municipal Corporations § 4; Utilities Commission § 4— extension of electric service beyond city limits — reasonable limitations**

The term "reasonable limitations" does not refer solely to the territorial extent of the venture but embraces all facts and circumstances which affect the reasonableness of the venture.

7. **Electricity § 2; Municipal Corporations § 4; Utilities Commission § 4— electric service — city's extension beyond boundaries — exceeding reasonable limitations**

A city's extension of its electric system across its city limits to serve a new apartment complex in an area assigned to an investor-owned utility exceeds "reasonable limitations" and, therefore, is beyond the authority of the city, where the investor-owned utility had its service lines in the immediate vicinity of the apartment complex and was ready, able and willing to serve the apartments, there is nothing to indicate that its service will be inadequate, and both its service and rates are subject to regulation by the Utilities Commission while the city's service and rates are not regulated by any agency.

APPEAL by the City of Rocky Mount from the decision of the Court of Appeals, reported in 20 N.C. App. 347, 201 S.E. 2d 720, *Judge Britt* having dissented therefrom.

For many years the City of Rocky Mount has furnished electric service to its inhabitants and to users located outside the city limits, its most distant customer being fourteen miles from the city. Cokey Apartments, Ltd., hereinafter called Cokey, is a limited partnership which owns a tract of land containing 9.1 acres, lying partly within and partly outside the city limits. When this action was instituted, Cokey was in process of constructing a large number of apartment units, contained in six separate buildings, on that portion of its land lying outside the corporate limits of the city. Domestic Electric Service, Inc., hereinafter called Domestic, is a privately owned public service corporation. For many years it has furnished electric service to the public in parts of Nash, Edgecombe and Wilson Counties, including some customers located within the present city limits of Rocky Mount. Domestic operates under a certificate of public convenience and necessity issued by the Utilities Commission and is an electrical supplier, as that term is defined in G.S. 62-110.2(a)(3).

On 13 March 1970, the Utilities Commission, pursuant to G.S. 62-110.2(c), assigned to Domestic a service area in Edgecombe County, including that portion of the land of Cokey on which all of Cokey's apartments were being constructed at the time the present action was instituted.

In July 1972, Cokey informed the city that Cokey desired the city to furnish electric service to its apartments. The city agreed with Cokey, in writing, that it would do so. The United States Department of Housing and Urban Development approved the financing of the construction of the apartments with knowledge of this agreement.

Since November 1929, Domestic has supplied electric service to residences and other buildings located on a 21 acre tract of which the Cokey land was originally a part. It continues to do so. Domestic also supplies electric service to a number of other residential and commercial users located on each side of Cokey Road (N. C. Highway No. 43) on which the Cokey land abuts. Some of these are now located inside the city limits, as a consequence of an annexation of territory by the city in 1970. Domestic presently serves numerous customers within 300 feet of the land of Cokey and, since 20 April 1965, has had its distribution lines immediately adjacent to the Cokey land.

On 4 May 1973 Cokey made formal application to the city for electric service to its apartments then under construction. At that time, and on 9 May 1973, when this action was instituted, the nearest customer served by the city was within the city limits and 650 feet from the Cokey land on which these apartments were being constructed. Immediately upon receiving Cokey's application, the city began construction of an extension of its previously existing distribution line, running 675 feet to the boundary of the Cokey land, for the purpose of serving the apartments then under construction by Cokey. This extension of the city's distribution line crossed and paralleled previously existing distribution lines of Domestic. It was completed 10 May 1973, the day after this suit was instituted. Prior to the commencement of its construction, Domestic advised city officials having direction of the city's utility system that Domestic expected to serve the Cokey Apartments.

At the time of the above mentioned assignment of territory to Domestic in 1970, the city had distribution lines located within such assigned territory. Its right to continue service to its then

customers reached by those lines is not involved in this action. The city was not a party to the proceeding before the Utilities Commission in which such assignment of territory was made but was served, by publication, with notice of that proceeding and of its right to intervene therein.

On 9 May 1973, Domestic brought this action for a temporary restraining order, a preliminary injunction and a permanent injunction, restraining and enjoining the city from supplying electric service to the said apartments and restraining and enjoining Cokey from accepting such service from any supplier other than Domestic. A temporary restraining order was issued without notice to the defendants and the matter was set for hearing before James, J., who granted a preliminary injunction in accordance with the prayer of the complaint pending the determination of the matter upon its merits.

The matter came on for hearing before Lanier, J., at the 14 August 1973 Session of Nash. A jury trial was waived and the facts recounted above were stipulated. The Superior Court found the facts to be as so stipulated and concluded as follows:

> "1. Extension of the City's lines a distance of 675 feet beyond its corporate limits to serve Cokey is not an unreasonable extension.
>
> "2. Neither Domestic nor the City is prohibited from providing electricity to Cokey. Domestic's right arises under the order of the Utilities Commission dated March 13, 1970, issued pursuant to G.S. 62-110.2. The City's right arises under G.S. 160A-312, et seq.
>
> "3. Cokey, as customer, has the right in this case to choose between Domestic or the City as its electric supplier.
>
> "4. Because Cokey has chosen the City, the City has the right to furnish electric service to Cokey to the exclusion of Domestic."

Upon these conclusions, Lanier, J., entered judgment dissolving the preliminary injunction and denying the plaintiff's prayer for a permanent injunction. The plaintiff appealed to the Court of Appeals, assigning as error each of the above quoted conclusions and the signing of the judgment. The Court of Appeals reversed, holding that G.S. 62-110.2(b)(8) gives to Domestic the exclusive right to provide electricity for all new

customers in the territory assigned to it by the Utilities Commission.

The order of the Utilities Commission, above referred to, was entered 13 March 1970 in a proceeding before the Commission, begun by the joint application of Domestic, other privately owned suppliers of electricity and the Edgecombe-Martin Electric Membership Corporation, requesting the Commission to assign service areas in Edgecombe County pursuant to G.S. 62-110.2(c), enacted in 1965. Notice of hearing and of the right to intervene or to protest the requested assignment was duly published. No such intervention or protest was filed. Thereupon, the Utilities Commission heard the matter and made findings of fact, including findings that the applicants before it, including Domestic, were electric suppliers, as that term is defined by G.S. 62-110.2(a) (3), and that no other electric supplier, as so defined, operated in the areas of Edgecombe County to which the application related or asserted any claim for assignment to it of any portion of the area. The Commission further found as a fact that a joint agreement had been reached between the applicants before it covering the areas in the county "which are outside the corporate limits of municipalities and more than three hundred (300) feet from the lines of any electric supplier." Pursuant to such agreement between the applicants, the Commission assigned to Domestic the territory which includes the land on which the Cokey Apartments are located, this area being more than 300 feet from the lines of any electric supplier and being outside the corporate limits of any municipality.

Spruill, Trotter & Lane by D. C. McCotter III and Robert K. Smith; and Tally & Tally by J. O. Tally, Jr., and James D. Garrison for The City of Rocky Mount.

Battle, Winslow, Scott & Wiley, P.A. for Domestic Electric Service, Inc.

LAKE, Justice.

Prior to the enactment of Ch. 287 of the Session Laws of 1965, investor-owned electric power companies and electric membership corporations, unless restricted by contract, were free to compete, in areas outside the corporate limits of municipalities, for the patronage of users and potential users of electric power. *Utilities Commission v. Lumbee River Electric Membership Corp.*, 275 N.C. 250, 166 S.E. 2d 663; *Pitt & Greene Electric*

Membership Corp. v. Light Co., 255 N.C. 258, 120 S.E. 2d 749; *Light Co. v. Johnston County Electric Membership Corp.*, 211 N.C. 717, 192 S.E. 105. In absence of such contract, an electric membership corporation was also free to continue to serve its members notwithstanding their having become residents of a municipality, by virtue of the annexation by the municipality of the territory in which such members were located, and notwithstanding the fact that it had no franchise from the municipality. *Pee Dee Electric Membership Corp. v. Light Co.*, 253 N.C. 610, 117 S.E. 2d 764; *Power Co. v. Blue Ridge Electric Membership Corp.*, 253 N.C. 596, 117 S.E. 2d 812. In addition, a municipality, operating its own electric distribution system for the service of its inhabitants, had the right, under Ch. 285 of the Public Laws of 1929, codified as G.S. 160-255 (now G.S. 160A-312), to extend its lines beyond its corporate limits "within reasonable limitations" and thus to compete in rural areas with investor-owned power companies and with electric membership corporations. *Grimesland v. Washington*, 234 N.C. 117, 66 S.E. 2d 794.

"In the absence of a valid grant of such right by statute, or by an administrative order issued pursuant to statutory authority, and in the absence of a valid contract with its competitor or with the person to be served, a supplier of electric power, or other public utility service, has no territorial monopoly, or other right to prevent its competitor from serving anyone who desires the competitor to do so." *Utilities Commission v. Lumbee River Electric Membership Corp., supra*, at p. 256. Such three-way competition resulted in substantial duplication of power lines and facilities, the lines of one supplier frequently paralleling or crossing those of its competitor. As we said in *Utilities Commission v. Lumbee River Electric Membership Corp., supra*, at p. 257:

> "It is for the Legislature, not for this Court or the Utilities Commission, to determine whether the policy of free competition between suppliers of electric power or the policy of territorial monopoly or an intermediate policy is in the public interest. If the Legislature has enacted a statute declaring the right of a supplier of electricity to serve, notwithstanding the availability of the service of another supplier closer to the customer, neither this Court nor the Utilities Commission may forbid service by such supplier merely because it will necessitate an uneconomic

or unsightly duplication of transmission or distribution lines. In such event, it is immaterial whether the Legislature has imposed upon such supplier a correlative duty to serve."

Frequent litigation between investor-owned power companies and electric membership corporations grew out of contracts between them defining and limiting territories to be served by each. To avoid or reduce such litigation and uneconomic duplication of transmission and distribution systems, the investor-owned electric utilities and the electric membership corporations, throughout the State, collaborated in recommending to the Legislature the enactment of Ch. 287 of the Session Laws of 1965. The language of the Act was the result of their collaboration and agreement and was carefully chosen for the accomplishment of this purpose. See, *Utilities Commission v. Lumbee River Electric Membership Corp., supra,* at p. 258. The Act contained two parts. The first, relating to electric service within the corporate limits of municipalities, is codified as G.S. 160A-331 to G.S. 160A-338, including subsequent amendments not pertinent to this appeal. The second, relating to electric service outside the corporate limits of municipalities, is codified as G.S. 62-110.2.

The first part of the Act of 1965 sets forth, in great detail, the rights of a "primary supplier" and the rights of a "secondary supplier" to serve within the corporate limits of a municipality. A "primary supplier" is a city which owns and maintains its own electric system, or a person, firm or corporation furnishing electric service within a city pursuant to a franchise granted by, or a contract with, the city or continuing to do so after the expiration of a previously held franchise or contract. A "secondary supplier" is a person, firm or corporation, other than a primary supplier, who furnishes electricity at retail to one or more customers, other than itself, within the limits of a city. This part of the Act of 1965 has no direct bearing upon the question presented by the present appeal.

The second part of the Act of 1965, relating to electric service outside the corporate limits of municipalities, defines, also in great detail, the rights of, and restrictions upon, "electric suppliers" in such areas. G.S. 62-110.2(a)(3) defines "electric supplier" to mean "any *public utility* furnishing electric service or any electric membership corporation." (Emphasis added.)

G.S. 62-110.2, specifying the rights of, and restrictions upon, an "electric supplier," is, of course, a part of Ch. 62 of the General Statutes. G.S. 62-3, defining terms "as used in this chapter, unless the context otherwise requires," states in Clause (23) (d), "The term 'public utility,' except as otherwise expressly provided in this Chapter, *shall not include a municipality* * * *." (Emphasis added.) Thus, a municipality is not an "electric supplier" as that term is used in G.S. 62-110.2.

G.S. 62-110.2(c) (1) provides:

> "In order to avoid unnecessary duplication of electric facilities, the [Utilities] Commission is authorized and directed to assign, as soon as practicable after January 1, 1966, to *electric suppliers* all areas, by adequately defined boundaries, that are outside the corporate limits of municipalities and that are more than 300 feet from the lines of all *electric suppliers* as such lines exist on the dates of the assignments * * *. The Commission shall make assignments of areas in accordance with public convenience and necessity, considering, among other things, the location of existing lines and facilities of *electric suppliers* and the adequacy and dependability of the service of *electric suppliers*, but not considering rate differentials among *electric suppliers*." (Emphasis added.)

G.S. 62-110.2(b) (8) provides:

> "Every *electric supplier* shall have the *right* to serve *all premises* located wholly within the service area assigned to it pursuant to subsection (c) hereof." (Emphasis added.)

G.S. 62-110.2(b) (10) provides:

> "No *electric supplier* shall furnish electric service to any premises in this State outside the limits of any incorporated city or town except as permitted by this section * * *. (Emphasis added.)

[1] The Act of 1965, including G.S. 62-110.2, did not, without more, alter the competitive rights of municipalities, investor-owned utilities and electric membership corporations to compete for patronage in areas outside the corporate limits of municipalities. *Utilities Commission v. Woodstock Electric Membership Corp.*, 276 N.C. 108, 117, 171 S.E. 2d 406. Any premises in any such area could, prior to an assignment of such area by

the Utilities Commission, have been served by any of the three competitors chosen by the user (assuming no contract restricting competition and assuming an extension to serve such user would fall within the "reasonable limitation," applicable to service by the municipality).

[2] Here, we have more. The Utilities Commission has assigned the territory in question to Domestic. Thus, Domestic has the "right to serve *all* premises" (emphasis added) located wholly within the territory in question, including the Cokey Apartments. G.S. 62-110.2(b)(8). It is also true that no other "public utility" and no electric membership corporation may serve any premises, including the Cokey Apartments, lying wholly within this territory. G.S. 62-110.2(b)(10). However, the City of Rocky Mount is neither a "public utility" nor an electric membership corporation. Therefore, the city is not an "electric supplier," as that term is used in G.S. 62-110.2. Consequently, the city is not prohibited from serving Cokey Apartments by the provision of G.S. 62-110.2(b)(10).

[3] While, by reason of G.S. 62-110.2(b)(8), Domestic has the *right* to serve *all* premises in the area, including Cokey Apartments, the mere grant of a right to serve is not the grant of an exclusive right to do so. If G.S. 62-110.2(b)(8) granted to the assignee of the territory an exclusive right to serve therein, G.S. 62-110.2(b)(10) would be surplusage. The presumption is that no part of a statute is mere surplusage, but each provision adds something which would not otherwise be included in its terms. *State v. Harvey,* 281 N.C. 1, 19, 187 S.E. 2d 706; *In re Watson,* 273 N.C. 629, 634, 161 S.E. 2d 1. Furthermore, "the right of a potential user of electric power to choose between vendors of such power seeking his patronage is not lightly to be denied." *Blue Ridge Electric Membership Corp. v. Power Co.,* 258 N.C. 278, 128 S.E. 2d 405; *Utilities Commission v. Woodstock Electric Membership Corp., supra,* at p. 118.

An assignment of territory by the Utilities Commission can, of course, have no greater effect than that which is given to it by the statute, the Commission having no authority except that conferred upon it by the statute. *Utilities Commission v. Woodstock Electric Membership Corp., supra,* at p. 119.

Thus, we hold that the assignment to Domestic by the Utilities Commission of the area which includes the Cokey Apart-

ments did not automatically preclude the City of Rocky Mount from extending its service lines into the area.

Since G.S. 62-110.2(c)(1) directs the Utilities Commission to assign to electric suppliers all areas outside the corporate limits of municipalities and the Commission has now completed, or virtually completed, this task, a contrary construction of G.S. 62-110.2(b)(8) would make it unlawful for a city to construct a new line across the city limits to serve a residence or a business establishment, however close it may be to the city limits and however remote it may be from the existing line of the "electric supplier" to whom the area has been assigned. This would nullify G.S. 160A-312, which, as amended by Ch. 426 of the Session Laws of 1973, provides:

> "(A) city may acquire, construct, establish, enlarge, improve, maintain, own and operate any public enterprise *outside its corporate limits,* within reasonable limitations. * * *." (Emphasis added.)

The predecessor of this statute, G.S. 160-255, authorizing a municipality to render light, water, sewer and gas services outside its corporate limits, was in effect until replaced by G.S. 160A-312, as set forth in Ch. 698, Session Laws of 1971. Nothing in the legislative history of this statute indicates a legislative intent completely to deprive municipal corporations of the authority to serve new users outside the corporate limits.

[4] On the other hand, "It is equally clear that without legislative authority the [city] would not be permitted to extend its lines beyond the corporate limits for the purpose of selling electricity to nonresidents of the city." *Williamson v. High Point,* 213 N.C. 96, 195 S.E. 90. Its power to extend its lines and distribute electric current beyond its corporate boundaries is expressly restricted to "reasonable limitations."

[5, 6] The primary function of a municipal corporation is to provide local government within its limits and authorized services to its inhabitants, not to engage in business enterprises for profit outside its corporate limits. See, *Williamson v. High Point, supra.* "The term 'within reasonable limitations' does not refer solely to the territorial extent of the venture but embraces all facts and circumstances which affect the reasonableness of the venture." *Service Co. v. Shelby,* 252 N.C. 816, 115 S.E. 2d 12. An extension of a city's electric system, reasonable at the time

of and under the circumstances prevailing in *Grimesland v. Washington, supra,* would not necessarily be reasonable in the present day under the circumstances disclosed in the record before us.

[7] In the present instance, the investor-owned utility, to which the territory has been assigned by the Utilities Commission "in accordance with public convenience and necessity," had its service lines in the immediate vicinity of the Cokey Apartments and was ready, able and willing to serve Cokey. There is nothing to indicate that its service will not be adequate. Both its service and its rates are subject to regulation by the Utilities Commission. Neither the service nor the rates of the city are subject to regulation by any agency other than the city itself. G.S. 62-3(23)(d); G.S. 160A-312; *Dale v. Morganton,* 270 N.C. 567, 155 S.E. 2d 136. Under these conditions, we conclude and hold that the extension by the city of its electric system across its city limits to serve Cokey exceeds "reasonable limitations" and, therefore, is beyond the authority of the city.

While the Court of Appeals based its decision upon a construction of G.S. 62-110.2, which we deem erroneous, its decision to reverse the judgment of the Superior Court was correct for the reason herein stated and will not be disturbed.

Affirmed.

DAVID LEE SIMMS v. MASON'S STORES, INC. (NC-1)

No. 39

(Filed 10 April 1974)

1. **Process § 12; Rules of Civil Procedure § 4— insufficient service of process on domestic corporation**

Defendant corporation was not effectively served with process as required by G.S. 1A-1, Rule 4(j)(6) where the deputy sheriff delivered the summons and complaint to a security officer who was standing near a cash register in defendant's place of business, the security officer not being an employee of defendant or an agent authorized to accept service and not being in charge of the manager's office when the sheriff delivered the summons to her.

2. **Appearance § 2— general appearance — jurisdiction over the person**

G.S. 1-75.7 provides that a court having jurisdiction of the subject matter may acquire jurisdiction over the defendant who makes a general appearance without serving a summons upon him.

3. **Rules of Civil Procedure § 12— defense of lack of jurisdiction over the person — time of making — waiver**

Under Rule 12(b) the defenses of lack of jurisdiction over the person, insufficiency of process, and insufficiency of service of process may be made either by a pre-answer motion or joined with one or more of the other four specified defenses or objections in a responsive pleading, and unless so made the defense of lack of jurisdiction is waived under Rule 12(h)(1); furthermore, the defense is also waived if, prior to answering, the defendant raises any one of the other defenses enumerated in subsection (b) by pretrial motion and omits his jurisdictional defense therefrom.

4. **Appearances § 2; Rules of Civil Procedure § 12— general appearance — jurisdiction over the person**

Construing Rule 12 and G.S. 1-75.7 together, it is apparent that Rule 12 did not abolish the concept of the voluntary or general appearance but did eliminate the special appearance and, in lieu thereof, gave defendant the option of making the defense of lack of jurisdiction over the person by pre-answer motion or by answer.

5. **Appearance § 1— request for extension of time — general appearance**

It is the established rule in this State that a voluntary appearance whereby a defendant obtains an extension of time in which to plead is a general appearance which waives any defect in the jurisdiction of the court for want of valid summons or proper service thereof.

6. **Appearance § 1; Statutes § 5— general appearance — definition — incorporation in statute**

When the legislature used the term "general appearance" in G.S. 1-75.7, it used a term which had acquired a settled meaning through judicial construction, and, in the absence of anything indicating a contrary intent, the legislature is presumed to have used the statutory term in its judicially established meaning.

7. **Appearance § 2; Rules of Civil Procedure §§ 4, 12— general appearance — lack of jurisdiction over person — waiver**

By securing an extension of time in which to plead or otherwise answer, defendant made a general appearance which rendered service of summons upon it unnecessary, and the trial court therefore erred in dismissing the action for want of jurisdiction over the person of defendant.

ON *certiorari*, granted upon plaintiff's petition, to review the decision of the Court of Appeals (18 N.C. App. 188, 196 S.E. 2d 545) affirming the judgment of *Fountain, J.*, 17 July 1972 Session of TRANSYLVANIA, docketed and argued in the Supreme Court as Case No. 51 at the Fall Term 1973.

On 29 June 1971 plaintiff, a resident of Transylvania County, commenced this action for damages against defendant, a domestic corporation operating a retail department store at

the Tunnel Road Shopping Center in Asheville, by filing a complaint and securing the issuance of summons. Plaintiff seeks to recover for an assault allegedly made upon him on 24 December 1970 by an employee of defendant acting within the scope of his employment.

On 13 July 1971 Ervin L. Penland, a deputy sheriff of Buncombe County, purported to serve the summons upon defendant, and made the following return:

"I certify that this summons was received on the 7 day of July 1971, and together with the complaint was served as follows: On Mason's Stores, Inc. on the 13 day of July 1971, at the following place: Mason Dept. Store, Tunnel Rd. Asheville BY; leaving copies with Vera Wallin who is a person of suitable age and discretion and who resides in the defendant's dwelling house or usual place of abode."

On 11 August 1971, upon motion of defendant's attorneys, the Clerk of the Superior Court of Transylvania County signed an order allowing defendant thirty days additional time within which to answer or otherwise plead. Thereafter defendant filed answer in which, *inter alia,* he denied all material allegations of the complaint and moved to dismiss the action under G.S. 1A-1, Rule 12, for that defendant had not been properly served with process and the court had acquired no jurisdiction over it.

Upon the hearing of defendant's motion to dismiss the court found the following facts, which are supported by the evidence:

On 13 July 1971, at the time Deputy Sheriff Penland left the summons and complaint in this case with Vera Wallin (Wallin), she was not an employee or agent of defendant. She neither received nor handled any money for defendant. She exercised no control whatever over any of defendant's employees; nor was she under the supervision, direction or control of any officer or employee of defendant. On that date Wallin was employed as a security officer by Link Security, Inc., of Danville, Virginia. Link was then under contract to furnish defendant security officers to protect its property, and it had assigned Wallin to defendant's store in the Tunnel Road Shopping Center. She was subject to reassignment and relocation by Link at any time. With reference to her working hours, duties, and the manner in which she performed those duties she was responsible only to Link.

About 8:30 p.m. on 13 July 1971 Wallin was standing near the checkout counter at the front of defendant's store watching customers come and go. While she was thus engaged in her duties as a security officer, Deputy Sheriff Penland came through the front door and served upon Wallin copies of the summons and complaint in an action (unrelated to the instant case) in which she was a defendant. After having done so he said to her, "I might as well give these to you also," and he handed her copies of the summons and complaint in this action. At that time the defendant's manager or assistant manager was on duty in the store. The manager's office and the business office of defendant, side by side, were about 100 feet north of the main entrance and visible therefrom. Wallin made no representations to the officer as to her status with defendant. Later that evening Wallin showed these copies to the assistant manager, who asked her to retain them overnight and hand them to the manager the next morning. On the morning of 14 July 1971 Wallin delivered the copy of summons and complaint in this action to defendant's manager.

Upon the foregoing findings Judge Fountain concluded as a matter of law (1) that the delivery of process in this action to Wallin was not served upon the defendant in a manner specified by statute and the court had acquired no jurisdiction over defendant; and (2) that by obtaining an extension of time to answer, defendant had not waived its right under G.S. 1A-1, Rule 12, to attack the court's jurisdiction. From his order dismissing the action plaintiff appealed to the Court of Appeals, which affirmed the judgment of the trial judge. We allowed plaintiff's petition for certiorari.

Morris, Golding, Blue and Phillips by James W. Williams and William C. Morris, Jr., for plaintiff-appellant.

Uzzell and Dumont by J. William Russell for defendant-appellee.

SHARP, Justice.

This appeal presents these questions: (1) Has defendant corporation been effectively served with process; and (2) if not, did defendant, by obtaining an extension of time within which to answer or otherwise plead, make a general appearance or waive its right under G.S. 1A-1, Rule 12, to move to dismiss this action for lack of jurisdiction over it?

[1] The manner of service of summons upon a domestic or foreign corporation is governed by G.S. 1A-1, Rule 4(j)(6). This rule requires service by delivering a copy of the summons and complaint (a) "to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office"; or (b) "to an agent authorized by appointment or by law to be served or to accept service or process or by serving process upon such agent or the party in a manner specified by statute."

The trial court's findings of fact makes it quite clear that Wallin was not a representative of defendant corporation upon whom valid service of process could be made. "Where the officer or agent upon whom service of process in an action against a corporation may be made is specified in the statute or rule of practice, service must be made upon that identical officer or agent; otherwise the service is insufficient." 19 Am. Jur. 2d, *Corporations* § 1463 (1965). With reference to Federal Rule of Civil Procedure 4(d)(3), which is not materially different from our Rule 4(j)(6), the comment in 2 Moore's Federal Practice § 4.22(2) is: "Where, at the time service is made the person to whom the process is delivered is not an officer or managing or general agent of the organization or an agent authorized by appointment or by law to accept service of process upon the organization, or qualified to accept service under state law, the service upon the organization is not proper." *Id.* at p. 1130. *See Gottlieb v. Sandia American Corporation,* 452 F. 2d 510 (CA 3d 1971). The phrase "any other agent authorized by appointment" refers to an agent "expressly or impliedly appointed by the corporation" to receive process, *Id.* at p. 1116. The phrase "any other agent authorized . . . by law" would embrace an agent specified by statute as a proper person to receive service. It "may also refer to an agency implied in law, or an agency by estoppel, *i.e.*, where it is determined by the conduct of the corporation . . . that it has appointed an agent for the acceptance of service or that it is estopped from denying such appointment." *Id.* at pp. 1118-19.

Under no aspect of the law did Wallin qualify as a process agent for defendant. The Court of Appeals correctly answered the first question NO. Plaintiff contends, however, that even though he obtained no service of process upon defendant it had waived service and submitted to the court's jurisdiction

by obtaining an extension of time "within which to answer or otherwise plead," and therefore the second question should be answered YES. Defendant contends that the North Carolina Rules of Civil Procedure, effective 1 January 1970, eliminated special appearances and made all appearances general subject to the right of the defendant to attack the court's jurisdiction over his person if done as provided in Rule 12.

Prior to 1 January 1970 there is no doubt that defendant's motion for an extension of time in which to plead would have constituted a general appearance giving the court jurisdiction over defendant without the service of process. At that time G.S. 1-103 provided, "A voluntary appearance of a defendant is equivalent to personal service of the summons upon him." A defendant makes a voluntary appearance in an action commenced against him when he submits himself by accepting service of process, filing an answer without having been served with process, entering his appearance of record, or doing any other overt act which will constitute a general appearance. *See Mosely v. Deans,* 222 N.C. 731, 734, 24 S.E. 2d 630, 632 (1943); 5 Am. Jur. 2d *Appearance* § 25 (1962); 6 C.J.S., *Appearances* § 1 c. (1) n. 9; Black's Law Dictionary (4th ed. 1968) p. 125; Ballentine's Law Dictionary, p. 82 (1969). But *cf.* cases involving the situation where defendant, by special appearance, denominated as such moves for an extension of time for the purpose of determing whether to plead or object to the jurisdiction. *Easterling v. Volkswagen of America, Inc.,* 308 F. Supp. 966 (S.D. Miss., 1969); 5 Am. Jur. 2d, *supra;* Annot., 81 A.L.R. 166, 169 (1932). "[A] general appearance is one whereby the defendant submits his person to the jurisdiction of the court by invoking the judgment of the court in any manner on any question other than that of the jurisdiction of the court over his person." *In Re Blalock,* 233 N.C. 493, 504, 64 S.E. 2d 848, 856 (1951).

In *Youngblood v. Bright,* 243 N.C. 599, 91 S.E. 2d 559 (1956), it was held that by obtaining an extension of time to plead defendants had made a general appearance which obviated the necessity for service in the manner prescribed by statute, and defendants' objection to the jurisdiction of the court made *after* applying for and obtaining an extension of time to plead came too late. The Court said: "A voluntary appearance whereby a defendant obtains an extension of time in which to plead, is a general appearance. . . . 'A general appearance waives any defects in the jurisdiction of the court for want of valid sum-

mons or of proper service thereof.' " *Id.* at 602, 91 S.E. 2d at 561. *Accord, In Re Blalock, supra; Wilson v. Thaggard* and *Stone v. Thaggard,* 225 N.C. 348, 34 S.E. 2d 140 (1945), and cases cited. It is sometimes said that "a *voluntary general* appearance is equivalent to personal service of summons on defendant and waives objections to the jurisdiction of the court over his person." (Emphasis added.) 5 Am. Jur. 2d *Appearance* § 6 (1962). The terms *general appearance* and *voluntary appearance* are commonly used interchangeably.

Formerly if a defendant wished to test the jurisdiction of the court over his person he appeared solely for the purpose of objecting to the lack of valid process of the proper service of it. This constituted a special appearance which did not subject him to the jurisdiction of the court. If, however, he invoked the judgment of the court for any other purpose he made a general appearance and by so doing he submitted himself to the jurisdiction of the court whether he intended to do so or not. *In Re Blalock, supra* at 503-4, 64 S.E. 2d at 856; *Williams v. Cooper,* 222 N.C. 589, 24 S.E. 2d 484 (1943).

In 1951 the enactment of G.S. 1-134.1 eliminated the necessity for special appearances by permitting the objection that the court had "no jurisdiction over the person or property of the defendant" to be presented either by motion *or* answer. The making of other motions or the pleading of other defenses *simultaneously* with the jurisdictional objection was declared not to be a waiver of it, but the statute provided "that the making of any motion or the filing of answer *prior to the presentation of such objection shall waive it.*" (Emphasis added.) Construing this statute, in *Youngblood v. Bright, supra,* this Court held that it had no application where objection to the Court's jurisdiction was not made until after defendant had applied for and obtained an extension of time in which to plead.

G.S. 1-134 and G.S. 1-103 were repealed by Chapter 954, N. C. Sess. Laws of 1967, the same chapter which enacted the Rules of Civil Procedure, codified as Chapter 1A of the General Statutes, and which inserted in Chapter 1 of the General Statutes a new subchapter entitled *Jurisdiction,* codified as Article 6A, G.S. 1-75.1 through G.S. 1-75.12.

[2] In pertinent part G.S. 1-75.7 provides: "A court of this State having jurisdiction of the subject matter may, without serving a summons upon him, exercise jurisdiction in an action

over a person: (1) Who makes a general appearance in an action. . . ." As defined by G.S. 1-75.2, *"person"* includes a corporation.

In pertinent part G.S. 1A-1, "Rule 12. Defenses and objections—when and how presented. . . ." provides:

"(b) *How presented.*—Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defense may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter,

(2) Lack of jurisdiction over the person,

(3) Improper venue or division,

(4) Insufficiency of process,

(5) Insufficiency of service of process,

(6) Failure to state a claim upon which relief can be granted,

(7) Failure to join a necessary party.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. The consequences of failure to make such a motion shall be as provided in sections (g) and (h). No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. . . .

"(g) *Consolidation of defenses in motion.*—A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except. . . . (The exception is not pertinent here.)

"(h) *Waiver or preservation of certain defenses.*—

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (i) if omitted from a motion in the

circumstances described in section (g) or (ii) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course."

[3] Under Rule 12(b) the defenses, lack of jurisdiction over the person, insufficiency of process, and insufficiency of service of process, may be made either by a pre-answer motion or joined with one or more of the other four specified defenses or objections in a responsive pleading. Unless so made the defense of lack of jurisdiction is waived under (h)(1). This defense is also waived if, prior to answering, the defendant raises any one of the other defenses enumerated in subsection (b) by pretrial motion and omits his jurisdictional defense therefrom, § (g). At this point we note that sections (b), (g), and (h)(1) of Federal Rule 12 are substantially the same as their North Carolina counterparts.

Defendant asserts that the *only* way in which a defendant can waive the defense of no jurisdiction is by failing to make it in the manner specified in Rule 12(b), (g), and (h)(1), and that he has strictly complied with the rule by asserting the defense by answer, his first responsive pleading; that his only pre-answer motion was made under Rule 6(b) for an enlargement of time to plead; that such a motion has no relation to any defense or objection listed in Rule 12(b). He therefore contends that his failure to join his motion to dismiss for lack of jurisdiction with the motion for an extension did not preclude him from thereafter asserting the jurisdictional defense by answer since Rule 12(g) requires only the joinder of those defenses then available under "this rule" *(i.e.,* Rule 12). In support of its position defendant cites numerous federal cases construing Fed. R. Civ. P. 12(b), (g), and (h)(1). *See* 2A Moore's Federal Practice ¶12.12, pp. 2324-2328 and cases cited in footnotes 16, 17, and 18; Wright & Miller, Federal Practice and Procedure: Civil § 1344 (1969); *Pacific Lanes, Inc. v. Bowling, Proprietors Asso. of America,* 248 F. Supp. 347 (D.C. Ore., 1965); *Juszczak v. Huber Mfg. Co.,* 13 F.R.D. 434 (1953); *Blanton v. Pacific Mutual Life Ins. Co.,* 4 F.R.D. 200 (1944), *Appeal dismissed,* 146 F. 2d 725 (CA 4th, 1944); *Kaufman v. U.S.,* 35 F. Supp. 900 (D.D.C. 1940); *Devine v. Griffenhagen,* 31 F. Supp. 624 (D. Conn., 1940).

In the leading case of *Orange Theater Corp. v. Rayherstz Amusement Corp.,* 139 F. 2d 871 (CA 3rd, 1944), *cert. den.,*

322 U.S. 740 (1944), the plaintiff sued in the District Court for the District of New Jersey and caused summons to be served on the defendants in New York. Defendants, after having secured an extension of time to plead, moved to quash the out-of-state service. The plaintiff contended that defendants had waived the right to assert this defense by their voluntary appearance in the district court. The court recognized the generally prevailing rule that the defendants' procurement of an extension of time to answer or otherwise move with respect to the complaint "amounted to a voluntary appearance in the action which gave the court power to adjudicate the controversy to which they were parties." The court said, however, that the question presented was "whether by thus voluntarily placing themselves under the court's power the individual defendants lost the right to assert the original lack of jurisdiction over their persons."

In answering the question the court reasoned that when Fed. R. Civ. P. 12 omitted any reference to either a special or general appearance and gave a defendant the option of asserting a jurisdictional defense by motion before answer *or in the answer itself* "[i]t necessarily follows that Rule 12 has abolished for the federal courts the age-old distinction between general and special appearances. A defendant need no longer appear specially to attack the court's jurisdiction over him. . . . We conclude that within the time allowed for serving the answer the defendant may assert this defense unless he has waived it by some action other than his voluntary appearance." *Id.* at 874.

If a defendant fails to raise the defense of lack of jurisdiction over his person by timely motion or answer the defense is waived. *See Spearman v. Sterling Steamship Company,* 171 F. Supp. 287 (E.D. Pa., 1959); *Waterbury Metal Stamping Co. v. Ads Metal Prod. Co.,* 131 F. Supp. 301 (E.D. N.Y., 1955). However, this is not the only manner in which the defense can be waived. "A defendant may, by his actions or conduct, waive the defense even if he does attempt to assert it by motion, answer, or otherwise." 2 Kooman, Federal Civil Practice § 12.23, p. 121; 62 Am. Jur. 2d, *Process* § 161 (1972). As pointed out in Wright & Miller Federal Practice and Procedure: Civil § 1344, the elimination of the former distinction between special and general appearance does not mean that interposing Rule 12(b) defenses and objections within the time allowed to answer or move will protect a litigant against loss of his personal jurisdic-

tion, venue, and service of process under all circumstances. If the court considers a defendant's conduct sufficiently dilatory or inconsistent with the later assertion of one of these defenses such conduct will be declared a waiver. The case of *Wyrough & Loser, Inc. v. Pelmor Laboratories, Inc.*, 376 F. 2d 543 (CA 3d 1967), illustrates this statement.

In *Wyrough & Loser, Inc.*, the plaintiff sued to enjoin the misappropriation of trade secrets. Seven days after defendant received notice of the action the district court began four days of hearings upon the question of issuing a preliminary injunction. Without making any objection to the court's jurisdiction defendant participated by cross-examining plaintiff's witnesses and offering defense testimony. At the conclusion of the hearing the court found facts and issued the injunction. Sixteen days later, within the time for answering, defendant filed a consolidated motion to dismiss which included the defense that the court lacked jurisdiction over defendant's person. The district court held that defendant had waived that defense by participating in the four-day hearing on the issue of the preliminary injunction. Upon appeal to the United States Court of Appeals, Third Circuit, defendant relied upon that court's earlier decision in the Orange Theater case and contended that its participation could not be deemed a waiver so long as it could file a timely motion to dismiss under Rule 12(b).

The court, after noting (1) that the whole philosophy behind the Federal Rules militates against placing parties in a procedural strait jacket by requiring them to possibly forego valid defenses by hurried and premature pleading, and (2) that "there also exists a strong policy to conserve judicial time and effort" and preliminary matters such as defective service, personal jurisdiction and venue should be raised and disposed of before the court considers the merits or quasi-merits of a controversy, said that the reconciliation of these countervailing policies and "the process of deciding which is superior must necessarily depend on a case-by-case approach." *Id.* at 547. In *Wyrough & Loser, Inc.*, the court found the policy of disposing of preliminary matters prior to considering the merits of the case to be paramount. It thought that defendant, having had sufficient time to apprise itself of the jurisdictional questions, should have alerted the court to them. It held therefore that defendant's participation in the injunction hearing waived the defense of lack of personal jurisdiction.

Against the background of federal decisions we consider the effect of defendant's general appearance under our Rule 12 and G.S. 1-75.7, *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970).

We note first that nothing in the language of Rule 12 prevents a defendant, prior to filing answer or motion in which he could set up a section (b) defense, from submitting himself (or itself) to the jurisdiction of the court in which an action has been filed against him by formally entering his voluntary appearance, by seeking some affirmative relief at the hands of the court, or by utilizing the facilities of the court in some other manner inconsistent with the defense that the court has no jurisdiction over him. Once a defendant has submitted himself to the jurisdiction of the court by such conduct the defense of lack of jurisdiction over his person is no longer available to him.

When the federal courts have said that Rule 12(b), (g), and (h) (1) permits the defense of jurisdiction over the person to be waived only by failing to assert it in a pre-answer motion or by answer as provided in sections (b), (g), and (h) (1), they have, in effect, held that the defendant's conduct upon which plaintiff relied as a waiver had not invoked the power of the court to such an extent that it would be entirely inconsistent to object to the court's jurisdiction. It is still possible for a party by such action "to waive" the defense of no jurisdiction over his person. It was so held in *Wyrough & Loser, Inc., supra,* wherein the court stated that whether the challenged action will waive service of process will be determined on an *ad hoc* basis. However, under the federal decisions, nothing else appearing, a defendant's motion for an enlargement of time to plead will not waive lack of jurisdiction over the person if the defense is timely presented thereafter in accordance with Rule 12 requirements.

Secondly, we advert to the fact that G.S. 1-75.7 has no counterpart in the federal practice. That statute, enacted simultaneously with the North Carolina Rules of Civil Procedure, provides that when a defendant "makes a general appearance" in an action pending in a court having jurisdiction of the subject matter, the court acquires jurisdiction over him without serving a summons upon him.

Whether conduct which will dispense with the necessity of service of summons be denominated a general appearance, sub-

mission to the jurisdiction, or left unlabeled is immaterial; the effect of such conduct remains the same. However, G.S. 1-75.7 denominates such conduct "a general appearance in an action."

[4] Construing Rule 12 and G.S. 1-75.7 together, as obviously we must do since they are a part of the same enactment, *Fletcher v. Comrs. of Buncombe,* 218 N.C. 1, 9 S.E. 2d 606 (1940), it is apparent that Rule 12 did not abolish the concept of the voluntary or general appearance. On the contrary, as repealed G.S. 1-134.1 had done when it was enacted in 1951, Rule 12 eliminated the special appearance and, in lieu thereof, gave a defendant the option of making the defense of lack of jurisdiction over the person by pre-answer motion or by answer even though a defendant makes a general appearance when he files an answer. 5 Am. Jur. 2d, *Appearance* §§ 14, 16 (1962). However, as heretofore pointed out, after a defendant has submitted himself to the jurisdiction of the court by conduct constituting a general appearance, he may not assert the defense that the court has no jurisdiction over his person either by motion or answer under Rule 12(b).

[5, 6] When the General Assembly enacted G.S. 1-75.7 and the Rules of Civil Procedure it was aware of the well established rule in this State that a voluntary appearance whereby a defendant obtains an extension of time in which to plead is a *general appearance* which waives any defect in the jurisdiction of the court for want of valid summons or proper service thereof. *Youngblood v. Bright, supra.* When the legislature used the term *general appearance* in G.S. 1-75.7, it used a term which had acquired a settled meaning through judicial construction, and that construction became a part of the law. In the absence of anything which clearly indicates a contrary intent, the legislature is presumed to have used the statutory term under consideration in its judicially established meaning. *Brown v. Brown,* 213 N.C. 347, 196 S.E. 333 (1938); 50 Am. Jur., *Statutes* § 322 (1944).

[7] By moving for an extension of time in which to plead a defendant invokes the jurisdiction of the court and requests its affirmative intervention in his behalf. In G.S. 1-75.7 the legislature made the policy decision that *any* act which constitutes a general appearance obviates the necessity of service of summons. Obviously there are sound reasons for such a policy. In addition to the fact that courts should conserve judicial time and effort by

disposing of preliminary defenses relating to personal jurisdiction before considering the merits of a controversy, to allow a party to delay raising the defense of insufficiency of service of process by securing an extension of time to plead may permit the statutes of limitations to bar a claim for relief by a plaintiff who, through no fault of his, is ignorant of the defense.

We hold that by securing an extension of time in which to plead or otherwise answer defendant made a general appearance which rendered the service of summons upon it unnecessary. Therefore, the Superior Court erred in dismissing the action for want of jurisdiction over the person of defendant.

The decision of the Court of Appeals is

Reversed.

STATE OF NORTH CAROLINA v. WILLIAM J. "BILL" DOOLEY

No. 57

(Filed 10 April 1974)

1. **Criminal Law § 113— court's duty to charge on defenses**

The trial court has the duty to charge the jury on all defenses presented by defendant's evidence without special request therefor. G.S. 1-180.

2. **Homicide § 28— duty to instruct on self-defense**

Where there is evidence that defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in defendant's evidence.

3. **Homicide § 28— instructions — final mandate — possible verdicts — not guilty by reason of self-defense**

The trial judge in a homicide prosecution erred in failing to include not guilty by reason of self-defense as a possible verdict in his final mandate to the jury, and such error was not cured by the discussion of the law of self-defense in the body of the charge.

ON *certiorari* to review the decision of the North Carolina Court of Appeals reported in 20 N. C. App. 85, 200 S.E. 2d 818 (1973), which found no error in the trial before *McLean, J.*, at the 9 April 1973 Criminal Session of GASTON Superior Court.

In an indictment proper in form defendant was charged with murder in the first degree of Troy L. (Towhead) Thomas.

At the call of the case the State announced that it was not seeking a conviction of murder in the first degree, but rather was seeking a conviction of either murder in the second degree or manslaughter "as the evidence might present itself." Defendant was found guilty of manslaughter and from a judgment imposing a sentence of imprisonment for not less than 12 years nor more than 15 years, defendant appealed to the Court of Appeals. That court found no error in the trial. We allowed *certiorari* on 5 February 1974.

The State's evidence reveals that on 18 January 1973 about 1:50 p.m. officers from the Gastonia Police Department responded to a call to investigate a shooting at the home of defendant at 1013 West Airline in Gastonia, North Carolina. At the rear of defendant's house they found Troy L. (Towhead) Thomas lying on his back near some railroad tracks, some twenty feet from a dilapidated fence enclosing defendant's back yard. Thomas had been shot in the forehead and was rushed to a local hospital. One week later Thomas died as a result of the head wound inflicted by a .22 caliber weapon.

When the police first arrived at defendant's house, they found defendant sitting on his front porch drinking liquor. One of the investigating officers, Officer Charles Bell, informed defendant of his *Miranda* rights. Defendant then told the police where they could find the gun. As a result Officer Bell went into the bedroom and found a .22 caliber pistol under a pillow on defendant's bed. Defendant was then arrested and taken to the local police station. While there defendant on several occasions said, "I killed the son-of-a-bitch," and "Towhead Thomas was no good." These statements were admitted into evidence against defendant at trial.

During cross-examination by defense counsel, Officer Bell acknowledged that there was one eyewitness to the shooting, Robert Cunningham, and also that defendant had made a statement to the police at 2:57 p.m., approximately one hour after the shooting. Defense counsel sought to get this statement by defendant into evidence, but the State's objection to its admission was sustained by the trial judge. Officer Bell also testified that although he had found no weapon near the deceased's body, he had not looked for a weapon until the following day, 19 January 1973. However, another investigating officer from the Gastonia Police Department, Officer William Spratt, did testify

that on the day of the shooting he did not observe a weapon of any kind on the deceased or in the area around the deceased.

The State also offered the testimony of Officer Charles Heafner of the Gastonia Police Department. Heafner testified that he examined the .22 caliber pistol found at defendant's house and found three empty, or fired, cartridges in the chamber.

Defendant's evidence consisted of testimony by a defendant, Robert Cunningham, and Officer Bell. Testimony given by Cunningham and defendant tends to show the following: Defendant has only one leg and must use crutches to get around. He raised puppies in his back yard, and rats had been killing his puppies. On the afternoon of 18 January 1973 he took his wife's .22 caliber pistol into his back yard to try to kill some of the rats. His back yard was enclosed by a dipalidated wire fence about four feet in height. While he was in his back yard Robert Cunningham, an acquaintance, walked by on the railroad tracks behind defendant's house and "hollered" at him. Defendant called Cunningham over and, after some conversation, Cunningham bought a watch and pocketknife from defendant for $5. Defendant and Cunningham continued talking for about five or ten minutes, after which Thomas, the deceased, came walking down the railroad tracks.

Both defendant and Cunningham had known Thomas for many years. According to defendant, in 1964 he had given Thomas a ride home. When he got to Thomas's house, Thomas asked defendant to take him somewhere to get some liquor. Defendant was in a hurry and refused. Thomas, apparently without any warning, got out of the car and came over to defendant's side of the car and took a bottle opener and cut defendant on the throat. Defendant testified that during the intervening nine years he had not spent any time with Thomas and had avoided him.

Thomas saw defendant and Cunningham and came over to the fence and asked them whether they had anything to drink, explaining that he was sick and wanted a drink. Cunningham told Thomas that he had given his last $5 to defendant, and Thomas then turned to defendant and asked him if he would get him a drink and some cigarettes. Defendant agreed, gave Cunningham the $5, and told him to go get some wine and cigarettes at a store less than a block away. As Cunningham was

leaving to get the wine, he heard Thomas say he was sorry he had cut defendant in 1964. According to defendant, while Cunningham was gone he and Thomas discussed defendant's reasons for his not having had anything to do with Thomas since the cutting incident. When Cunningham returned, defendant and Thomas were "friends." Cunningham gave the quart bottle of wine he had purchased to Thomas, and Thomas drank "it all but about two swallers." Defendant drank the rest. As Thomas started to leave, he turned to defendant and said, "Well, we'll be friends from now on." The two then shook hands over the fence, and defendant said, "Anytime you see me now, I'll be your friend from now on." Thomas replied, "Okay," turned and started walking toward the railroad tracks.

Thomas had almost reached the tracks when he suddenly turned around and started running toward defendant with a three-inch blade pocketknife in his hand crying, "You goddam son-of-a-bitch, I'm going to kill you, or you're going to kill me." Defendant, who was on the other side of the fence from Thomas, told Thomas to stop and attempted to move backwards. In doing so he dropped one of his crutches and fell part-way down. When Thomas was some six to eight feet away from him and still on the other side of the fence, defendant pulled the .22 caliber pistol from his pocket and fired a shot into the ground. Thomas kept "coming straight on just as hard as he could come," and so defendant fired twice more "in the air." When defendant fired the second and third shots, Thomas "was reaching for the fence and fixing to throw his leg over the fence." The third shot hit Thomas in the head. Thomas then stopped, turned around and walked back towards the tracks. He sat down on the tracks and then "laid backwards on his back."

Cunningham immediately left to call the police and an ambulance. Defendant walked into his house, put the pistol under the pillow on his bed, and sat down on his front porch while he waited for the police to arrive. He drank either a pint or one-half pint of liquor before the police arrived.

Defendant testified that he shot Thomas "because I was scared of him. I was afraid he would get over that fence and kill me with the pocketknife. I said I had known Mr. Thomas or Mr. Thomas' reputation prior to the time that he came there on January 18, 1973. On January 18, 1973 I knew Troy Thomas' general character and reputation as a dangerous and violent fighting man with a knife."

Cunningham also testified that he knew Thomas's reputation in the community as being a dangerous and violent fighting man with a knife. Cunningham further testified that Thomas was "mad" when he was coming toward defendant with the knife, and that he did not hear defendant threaten Thomas at any time prior to the shooting. Under cross-examination by the State, Cunningham denied that he and defendant had been drinking buddies for years, but admitted that he had been tried once for driving under the influence, had been convicted "of being drunk" several times, and that on one occasion "they had me for an assault with a deadly weapon."

During cross-examination by the State, defendant stated that except for the two inches of wine he drank out of the bottle Cunningham had bought, he had nothing to drink on 18 January prior to the shooting and that he was not drunk at the time of the shooting. In response to the solicitor's question, "Would you say it's a fair statement that you've been drunk some thirty-eight or forty times in the last few years?" Defendant replied that he could not remember how many times it had been.

Officer Bell, one of the investigating officers who had testified for the State, also testified for defendant. Bell stated that at 3:30 p.m. on the afternoon of the shooting Cunningham had made a statement to the police. This statement was read to the jury and was received into evidence for the sole purpose of corroborating the testimony Cunningham had already given about the shooting. Officer Bell also testified as follows: "I don't know it to be a fact that Troy Thomas is dangerous. All I know is what I've heard. Well, I know for a fact that he's bad to drink. I've heard that he was dangerous with a knife. He would cut people."

Attorney General Robert Morgan, Deputy Attorney General James F. Bullock, and Associate Attorney E. Thomas Maddox, Jr., for the State.

Harris and Bumgardner by Don H. Bumgardner for defendant appellant.

MOORE, Justice.

Defendant brings forward fourteen assignments of error designated as Exceptions Nos. I to XIV. We first consider Exception No. XIV, which defendant states in his brief as follows:

"The defendant objects and excepts in the record to the failure of the court to charge the jury in his mandates to the jury the following proposition: 'Or, if you are satisfied that the defendant acted in self-defense, then it will be your duty to return a verdict of not guilty.' "

[1] G.S. 1-180 requires that the trial judge fully instruct the jury as to the law based on the evidence in the case. It is the duty of the court to charge the jury on all substantial features of the case arising on the evidence without special request therefor. *State v. Todd*, 264 N.C. 524, 142 S.E. 2d 154 (1965); *State v. Spencer*, 256 N.C. 487, 124 S.E. 2d 175 (1962); *State v. Jones*, 254 N.C. 450, 119 S.E. 2d 213 (1961); *State v. Faust*, 254 N.C. 101, 118 S.E. 2d 769 (1961), cert. den. 368 U.S. 851, 7 L.Ed. 2d 49, 82 S.Ct. 85 (1961). And all defenses presented by defendant's evidence are substantial features of the case. *State v. Faust, supra.* See also *State v. Sherian*, 234 N.C. 30, 65 S.E. 2d 331 (1951).

[2] Where there is evidence that defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in defendant's evidence. *State v. Hipp*, 245 N.C. 205, 95 S.E. 2d 452 (1956); *State v. Sherian, supra; State v. Riddle*, 228 N.C. 251, 45 S.E. 2d 366 (1947).

At the outset of the charge the trial judge explained that defendant was presumed to be innocent and that the burden rested with the State to satisfy the jury beyond a reasonable doubt of defendant's guilt before they could convict him. After general instructions and a review of the evidence of the State and of defendant, instructions were given as to the elements of second degree murder and of manslaughter. The court then charged the jury in substance that the intentional use of a deadly weapon as a weapon when death proximately results from such use gives rise to the presumptions (1) that the killing was unlawful, and (2) that it was done with malice, and that an unlawful killing with malice is murder in the second degree. The trial judge further charged that in such event it would be incumbent upon defendant to satisfy the jury of facts sufficient to mitigate the killing and reduce it to manslaughter or to excuse it altogether on the ground of self-defense. The court then gave a general statement as to the law of self-defense and as to what the defendant must satisfy the jury in order to mitigate the

killing and reduce it to manslaughter or to excuse it altogether on the ground of self-defense.

In the final mandate to the jury the court stated:

"So, I charge you, members of the jury, that if you find from the evidence beyond a reasonable doubt that on this 18th day of January, 1973, the defendant intentionally and with malice and without justification or excuse, shot the deceased, Thomas, with a pistol as has been offered in evidence here as State's Exhibit 3, thereby proximately causing Thomas' death, nothing else appearing, it would be your duty to return a verdict of guilty of murder in the second degree.

"However, if you do not so find, or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty of murder in the second degree; or, if, in a fair and impartial consideration of all the facts and circumstances in the case, there should arise in your minds a reasonable doubt as to either element of the offense of murder in the second degree, it would be your duty to give the defendant the benefit of that doubt, and to acquit him on the count of murder in the second degree.

"Now, if you find the defendant guilty of murder in the second degree, you will not consider the count of manslaughter. But, if you find the defendant not guilty of murder in the second degree, then, you will consider whether or not he be guilty of the offense of manslaughter.

"So, the court instructs you, members of the jury, if you find the defendant not guilty of murder in the second degree, but you find from the evidence beyond a reasonable doubt that on or about the 18 day of January, 1973, the defendant intentionally shot Thomas with a deadly weapon, that is, the pistol offered in evidence here as State's Exhibit 3, thereby proximately causing Thomas' death, but you are satisfied that the defendant killed Thomas without malice, or that he killed him in the heat of a sudden passion, and that in doing so, that he used excessive force in the exercise of self-defense, it would be your duty to return a verdict of manslaughter. If you do not so find, you would return a verdict of not guilty; or, if upon a fair and impartial con-

sideration of all the facts and circumstances in the case there should arise in your minds a reasonable doubt as to this offense of manslaughter, it would be your duty to give the defendant the benefit of that doubt, and to find him not guilty upon the count of manslaughter.

EXCEPTION XIV

"Now, if you find the defendant not guilty of murder in the second degree, and you find the defendant not guilty of manslaughter, it would be your duty to return a verdict of not guilty.

"Now, are the twelve in the box all in good health, and feel like you can deliberate and return a verdict in this case? All right, at this time, the court will excuse the 13th and 14th jurors. You may stand aside. The twelve may retire and deliberate as to your verdict, and after you have reached a verdict, which must be unanimous, come back in the courtroom, please. You may retire."

Defendant contends that following the mandate on manslaughter the jury should have been instructed: "Or, if you are satisfied that the defendant acted in self-defense, then it will be your duty to return a verdict of not guilty."

[3] We agree with defendant that a specific instruction on self-defense should have been given by the trial judge in his final mandate to the jury. Defendant's defense rested solely on self-defense. Although the court prior to the final mandate explained the law relating to self-defense, in his final instruction he omitted any reference to self-defense other than to say "but [if] you are satisfied that the defendant killed Thomas without malice, or that he killed him in the heat of a sudden passion, and that in doing so, that he used excessive force in the exercise of self-defense, it would be your duty to return a verdict of manslaughter." Here in the final mandate the court gave special emphasis to the verdicts favorable to the State, including excessive use of force in self-defense as a possible verdict. At no time in this mandate did the court instruct the jury that if it was satisfied by the evidence that defendant acted in self-defense, then the killing would be excusable homicide and it would be their duty to return a verdict of not guilty.

The failure of the trial judge to include not guilty by reason of self-defense as a possible verdict in his final mandate

to the jury was not cured by the discussion of the law of self-defense in the body of the charge. By failing to so charge, the jury could have assumed that a verdict of not guilty by reason of self-defense was not a permissible verdict in the case. The defendant was entitled under the law, following the mandate on manslaughter, to an instruction substantially as follows:

> "If, however, although you are satisfied beyond a reasonable doubt that the defendant did intentionally shoot Thomas and thereby proximately caused his death, if you are further satisfied, not beyond a reasonable doubt, but are satisfied that at the time of the shooting the defendant did have reasonable grounds to believe and did believe that he was about to suffer death or serious bodily harm at the hands of Thomas, and under those circumstances he used only such force as reasonably appeared necessary, you the jury being the judge of such reasonableness, and you also are satisfied that the defendant was not the aggressor, then he would be justified by reason of self-defense, and it would be your duty to return a verdict of not guilty."

See *State v. Fowler, ante,* 90, 203 S.E. 2d 803 (1974); *State v. Camp,* 266 N.C. 626, 146 S.E. 2d 643 (1966); *State v. Faust, supra; State v. Washington,* 234 N.C. 531, 67 S.E. 2d 498 (1951).

The trial court's failure to include such an instruction in its final mandate to the jury was prejudicial error and entitles defendant to a new trial.

The questions raised by defendant's other assignments of error may not recur upon a new trial. Hence, particular consideration thereof upon the present record is deemed inappropriate.

The case is remanded to the North Carolina Court of Appeals with direction that it remand it to the Superior Court of Gaston County for a new trial in accordance with the principles herein stated.

New trial.

STATE OF NORTH CAROLINA v. CALLOWAY HEARD AND RONALD EXCELL JONES

No. 61

(Filed 10 April 1974)

1. **Criminal Law § 169— constitutional error — determination of harmlessness**

In determining whether a Federal Constitutional error is prejudicial, the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction, and a court, before it can find a Constitutional error harmless, must be able to declare a belief that such error was harmless beyond a reasonable doubt.

2. **Criminal Law §§ 95, 169— consolidated trials — confession of nontestifying codefendant — prejudicial error**

In the consolidated trial of two defendants for armed robbery, the trial court's error in allowing into evidence the confession of a nontestifying codefendant was not harmless beyond a reasonable doubt where defendant testified that he was present at the crime scene but strongly denied any part in the planning or execution of the robbery, the codefendant's erroneously admitted confession unequivocally implicated defendant in the planning and execution of the robbery, and, upon their arrest shortly after the robbery, defendant had no weapon in his possession but the nontestifying codefendant had two pistols in his pocket.

APPEAL by defendant, Ronald Excell Jones, pursuant to G.S. 7A-30(1), from decision of the Court of Appeals reported in 20 N.C. App. 124, 201 S.E. 2d 58, finding no error in the trial before *Blount, S.J.*, 23 April 1973 Session of CRAVEN Superior Court.

Defendants Calloway Heard and Ronald Excell Jones were charged in separate bills of indictment with armed robbery. The cases were consolidated for trial over objection of defendant Heard. Both defendants entered pleas of not guilty.

The State's evidence, except when quoted, may be summarized as follows: Jesse Wilson testified that on 9 February 1973 between 10:00 a.m. and noon, Ronald Excell Jones (Jones) and Calloway Heard (Heard), in company with three other men came into his store, which was located in Craven County near the town of Vanceboro. They shot pool, and Jones purchased and ate a sandwich. On the same day at about 2:00 p.m., while

Mr. John Thomas Mumford was in the store, defendants Jones and Heard returned. Mr. Wilson related:

> " . . . I raised my head up when they walked in the door expecting them to call for a drink or something, and that one with no coat on throwed a gun in my face and shot me with a blank right in my face, and I don't know if he was drunk or what, and I jumped back and I said, 'What in the world ails you, what do you mean?' And at that time neither one of them had said a word. He was around there on me, and he shot me in the face again and said it was a hold-up and Jones about that time shot Mr. Mumford in the face and told him to stand over there and chunk his pocketbook on the drink box. He started beating me over the head."

Heard took Mr. Wilson's pocketbook, which contained between eight or ten dollars, from his person. Heard and Jones then fled. Police were called, and one of the officers took Mr. Wilson to the hospital where approximately twenty stitches were taken to close wounds in his head.

On cross-examination, Mr. Wilson stated:

> " . . . the second time he shot me, Mr. Jones shot Mr. Mumford at the same time. Sure my eyes were burning, then, he had done shot me once. They were watering. If someone would shoot you in the face, you couldn't help but throw your hands up. I was backing away; I jumped backwards when he shot me the first time and said, 'What in the world ails you, what do you mean?' And at that time he was around the box and he was shooting Mr. Mumford. I was backing away as fast as I could, my eyes were burning, my eyes were watering, and I had thrown one or both hands up to my face, and I still saw Mr. Jones."

Deputy Sheriff E. E. Rowe, of the Craven County Sheriff's Department, testified that on 9 February 1973, shortly after 2:00 p.m., he went to the area of Mr. Wilson's store after receiving a radio call concerning an alleged robbery at the store. He was accompanied by Deputy Sheriff Pritchard and they were looking for "two colored males, medium build; one was supposed to be dressed in a gray sweater, pullover type; one with a light brown coat . . . . " Shortly after reaching the area, they observed defendants walking along the road about a mile and a half from

Mr. Wilson's store. He observed a red substance about Heard's wrist. At that time, Heard was wearing a brown coat and Jones was wearing a gray sweater. A .22 caliber blank pistol which would expel blanks or gas, a .22 caliber pistol containing six unfired bullets and eight dollars were found on Heard's person. No weapons were found on Jones. Jones and Heard were arrested and carried to the courthouse in New Bern.

Both Heard and Jones made statements to the officers after they had been advised of their rights and had signed waivers of rights. When the State offered these statements, counsel objected. Judge Blount allowed Deputy Sheriff Rowe to testify concerning both statements. Prior to admitting this testimony, Judge Blount instructed the jury that the testimony relating to the statement made by Heard was to be considered only as to defendant Heard and not as to defendant Jones. A like instruction was given to the effect that the statement made by Jones was to be considered only as to defendant Jones and not as to defendant Heard.

According to Deputy Rowe, Heard stated that he went to Wilson's store for the purpose of robbing the store; that he used the gas gun and hit Mr. Wilson on the head three or four times with a Pepsi-Cola bottle. He, at that time, took Mr. Wilson's wallet from his pocket. He further stated that he and two other men went to the store and that *all of them knew what they were going there for and what they were going to do after they got there.*

Deputy Rowe further testified that Jones admitted going to Wilson's store and saying, "Let's get out of here." They went to the store in his Plymouth automobile and the only thing that was said about money was that, "they had to have some money to get back to Alabama just before we got to the store."

John Thomas Mumford testified that he was in the store when Jones and Heard came in at around 2:00 p.m. He heard someone say, "This is a stickup," and when he looked up, he was shot in the eye with something. He said that the man who had the pistol on him had on a gray slipover sweater and that the man told him to keep his back turned. On cross-examination, Mr. Mumford stated:

> " . . . I do not know if I was shot with the same gun Mr. Wilson was, and I do not know if I was shot before he was.

I heard three or four different shots and then I heard the man say, 'This is a stick-up.' My eyes stung and even though I had glasses on I had to close them; and, when he told me to keep my back turned, I kept my back turned. I had my back to the man closest to me, and I couldn't say who he was. I don't know if the man in the gray sweater was the one behind me, but I saw a gray sweater when I first raised up. I don't know if the man who was doing the shooting had on a gray sweater or not. . . . "

At the close of the State's evidence, defendants each moved for judgment as of nonsuit. The motions were denied.

Defendant Jones, testifying in his own behalf, stated that he was a resident of Grifton, North Carolina. On 9 February 1973 he, Heard, and his brother-in-law Chester Atkinson, a resident of the State of Alabama, drove to Winton, North Carolina, in his automobile. After purchasing some whiskey and beer, they proceeded to Williamston where he allowed Atkinson to drive. They were drinking intoxicants as they traveled. His back was hurting so he took a pill and lay down in the back seat. He remembered hearing Atkinson and Heard mention needing some money, but nothing was said about a robbery. They drove up to Mr. Wilson's store and he went in to get some cigarettes. Heard also went in the store, and shortly after they entered the store a gas gun went off causing a stinging in his eyes. He saw Heard beating Mr. Wilson and he (Jones) said, "Man let's get away from here." He had no weapon, did not hit anyone, and knew nothing about a planned robbery. Upon leaving the store, he saw that Atkinson and his car were gone. He walked away from the store and was later joined by Heard. They were picked up by officers and carried to the courthouse in New Bern. He and Heard had not been in Mr. Wilson's store on the morning of 9 February 1973.

Defendant Heard offered no evidence.

The jury returned verdicts of guilty of armed robbery as to both Jones and Heard. Each defendant appealed from judgment imposing prison sentences of not less than twenty-five nor more than thirty years. The Court of Appeals found no error in the trial below.

Each defendant petitioned for writ of certiorari to the North Carolina Court of Appeals to review its decision. We denied these petitions on 5 February 1974. Defendant Jones ap-

pealed pursuant to G.S. 7A-30(1). The Attorney General moved to dismiss this appeal and we denied his Motion on 5 February 1974.

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

Ward, Tucker, Ward & Smith by Michael P. Flanagan and C. H. Pope, Jr., for defendant appellant Ronald Excell Jones.

BRANCH, Justice.

Defendant Jones contends that the trial judge erred by admitting into evidence the confession of his codefendant Calloway Heard who did not testify at their trial.

Defendant particularly points to that portion of Heard's confession which stated: "That he and two other men went to the store; that all of them knew what they were going there for and what they were going to do after they got there, and he and two other persons stated and agreed that if they got caught they would not tell on the other."

Prior to the decision in *Bruton v. United States,* 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (decided 20 May 1968), it was the federal and North Carolina rule that the admission of the extra-judicial confession of one codefendant which implicated another codefendant against whom it was inadmissible was not error when the trial judge instructed the jury that it was admissible only against the confessor and must not be considered against another.

In *Bruton,* the United States Supreme Court held that an accused's Constitutional right of cross-examination is violated at his joint trial with a codefendant who does not testify, when the Court admits the codefendant's confession inculpating the accused, notwithstanding jury instructions that the confession must be disregarded in determining the accused's guilt or innocence.

Recognizing the binding effect of the decision in *Bruton* on this Court, Justice Sharp, speaking of the Court in *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492, stated the rule that is now the recognized law in this jurisdiction, to wit:

> " . . . 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,* [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. See *State v. Kerley,* [246 N.C. 157], at 160, [97 S.E. 2d 876], at 879."

In instant case, the Court of Appeals adhered to the rule stated in *Bruton* and *Fox* and correctly found that the trial judge erred when he admitted the confession of the codefendant Heard, who did not testify and who was not subjected to a cross-examination. The Court of Appeals, however, held the admission of this evidence to be "harmless error."

We must now decide whether the admission of this evidence complained of was, in fact, harmless error.

[1] We recognize that all Federal Constitutional errors are not prejudicial, and under the facts of a particular case, they may be determined to be harmless, so as not to require an automatic reversal upon conviction. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. Nevertheless, before a court can find a Constitutional error to be harmless it must be able to declare a belief that such error was harmless beyond a reasonable doubt. *Schneble v. Florida,* 405 U.S. 427, 31 L.Ed. 2d 340, 92 S.Ct. 1056; *Harrington v. California,* 395 U.S. 250, 23 L.Ed. 2d 284, 89 S.Ct. 1726; *Chapman v. California,* 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824; *Fahy v. Connecticut,* 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229; *State v. Cox* and *State v. Ward* and *State v. Gary,* 281 N.C. 275, 188 S.E. 2d 356; *State v. Jones,* 280 N.C. 322, 185 S.E. 2d 858; *State v. Swaney,* 277 N.C. 602, 178 S.E. 2d 399; *State v. Brinson,* 277 N.C. 286, 177 S.E. 2d 398.

The State relies heavily on *Harrington v. California, supra.* In *Harrington,* the defendants were jointly tried upon charges of first degree murder and attempted robbery. Three of the defendants confessed and their confessions were offered into evidence. Only one of the confessing defendants took the stand so as to be subjected to cross-examination. The confessions of the two codefendants who did not testify were admitted into evidence.

These confessions placed defendant Harrington at the scene of the crime, but did not place a gun in his hand. Harrington also made a statement which was offered into evidence in which he admitted being at the scene of the crime, but denied that he had a gun, or that he took any part in the crime. There was testimony by other persons which placed Harrington at the scene, with a gun in his hand actively participating in the crime. Harrington was convicted of murder. The United States Supreme Court affirmed and, *inter alia,* held that the admission of the confessions of the two codefendants who did not testify was "harmless error beyond a reasonable doubt" because of the other overwhelming evidence against Harrington.

Harrington is distinguishable from instant case. In *Harrington* one of the codefendants testified in court and placed the defendant at the scene with a gun in his hand at the time of the murder. Other persons testified that he was at the scene with a gun and was an active participant in the crimes. The challenged confessions placed him at the scene but did not place a gun in his hands. Harrington, by his own statement, admitted he was at she scene without a gun. Thus in *Harrington* the challenged confessions did not contradict defendant's statement or conflict with the theory of his defense.

[2] In instant case, the credibility of the testimony of the witnesses Mumford and Wilson was seriously impaired by cross-examination. Defendant, although admitting that he was present at the scene of the crime, strongly denied any part in the planning or execution of the robbery. The erroneously admitted statement of his codefendant Heard unequivocally implicated defendant Jones in the planning and execution of the robbery. When defendant Jones was arrested shortly after the robbery he did not have a weapon in his possession. Defendant Heard had two pistols in his pocket at the time of the arrest.

Under the facts of this case, we are of the opinion that Heard's erroneously admitted confession might have contributed to Jones' conviction. Certainly, we are unable to say beyond a reasonable doubt under the special circumstances of this case that the jury would have convicted defendant Jones without benefit of the challenged evidence.

For reasons stated, there must be a new trial

Reversed.

STATE OF NORTH CAROLINA v. BILLY HONEYCUTT

No. 53

(Filed 10 April 1974)

1. **Constitutional Law § 29; Criminal Law § 135; Jury § 7— exclusion of jurors opposed to capital punishment**

There is no merit in defendant's contention that a juror cannot be excused under any circumstances because of his convictions concerning capital punishment, it being well established that in a capital case a juror may be properly challenged for cause if he indicates he could not return a verdict of guilty knowing the penalty would be death even though the State proved to him by the evidence and beyond a reasonable doubt that the accused was guilty of the capital crime charged.

2. **Constitutional Law § 29; Criminal Law § 135; Jury § 7— exclusion of jurors opposed to capital punishment — representative jury**

The exclusion of jurors opposed to capital punishment does not result in an unrepresentative jury which is weighted toward conviction.

3. **Constitutional Law § 29; Criminal Law § 135; Jury § 5— voir dire in capital case**

There is no merit in defendant's contention that in capital cases there should be no *voir dire* examination of prospective jurors.

4. **Constitutional Law § 36; Criminal Law § 135— constitutionality of death penalty**

The death penalty does not constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

Chief Justice BOBBITT and Justices HIGGINS and SHARP dissenting as to death sentence.

APPEAL by defendant from *Tillery, J.*, 1 October 1973 session of DUPLIN Superior Court. Defendant was charged in a bill of indictment, proper in form, with the first degree murder of Brenda Honeycutt. He entered a plea of not guilty.

The State offered evidence which tended to show the following: Prior to 6 June 1973, defendant, his wife Brenda Honeycutt and their nine year old daughter, Billie Jean Honeycutt, had lived in a trailer rented from J. D. Sheppard which was located about 200 feet from Mr. Sheppard's dwelling. On the date of Brenda Honeycutt's death, defendant and his family had been separated for about three weeks, and Brenda and Billie Jean had continued to live in the trailer. Shortly after midnight on the morning of 6 June 1973, Mr. Richard Rouse, at defend-

ant's request, carried defendant to the trailer occupied by his wife and child. Mr. Rouse told Brenda Honeycutt that he had brought her husband to talk with her, and she responded "All right." Mr. Rouse then departed.

Defendant's daughter testified that when defendant came into the trailer on the morning of 6 June 1973, he immediately started to call her mother ugly names and among other things told her, "If I can't have you, no man can." Following a prolonged argument defendant took a butcher knife from his pants and stabbed her mother as she walked down the hall of the trailer. Her mother then told her to go out and get help. Billie Jean went to the Sheppard home and told them what had happened. She further testified that her mother had no gun or knife.

J. D. Sheppard stated that he was awakened by Billie Jean Honeycutt some time after midnight, and after talking with her he immediately called the Sheriff's Department. Later defendant came into his house and stated that he had stabbed his wife several times and he thought that she was dead. Billy Honeycutt appeared to be sober at that time.

Deputy Sheriff E. E. Proctor, of the Duplin County Sheriff's Department, testified that pursuant to a telephone call which he received at about 12:45 a.m. on 6 June he went to the trailer occupied by Brenda Honeycutt. He found her body lying on the floor of the trailer in a pool of blood. He found defendant on the premises and advised him of his rights. Defendant then asked if his wife were dead, and upon being told that she was dead, the defendant said: "Ha, I'm damn glad of it."

Dr. Frank W. Avery, an expert in pathology, stated that he performed an autopsy on the body of Brenda Honeycutt on 7 June 1973. There were five stab wounds on the trunk of her body, three being in front and two in the back. One of the wounds pierced her chest and passed through her right lung causing a hemorrhage which, in his opinion, was the proximate cause of her death.

There was other testimony to the effect that after his separation from his family, defendant had on at least three occasions told persons that he was going to kill his wife.

At the close of the State's evidence defendant moved for a directed verdict of not guilty. The motion was denied.

Defendant, testifying in his own behalf, stated that he and his wife had been separated for about three weeks before the date of her death. He left home to try to get a better job. During the night of 5 June 1973 and the early morning hours of 6 June 1973, he had been drinking beer and liquor. He was worried because he was separated from his family. He went to the trailer in the early morning hours of 6 June to talk to his wife and to make her see how much he loved her. He was not angry when he arrived at the trailer and he did not feel the liquor that he had consumed. Upon arrival, his wife told him that she did not intend to ever live with him again, and that she was going to take his children away to make sure that he would not see them again. He further testified that Brenda Honeycutt came out of the kitchen with a knife in her hands, and he struggled with her in an attempt to take the knife from her. He did not remember stabbing his wife, but he did remember seeing her on the floor. He had not planned to hurt his wife although he had, in a joking manner, made statements which might indicate that he intended to kill his wife.

Defendant offered no evidence other than his own testimony.

The jury returned a verdict of guilty of murder in the first degree. Defendant appealed from judgment sentencing him to death.

Attorney General Robert Morgan by Assistant Attorney General Thomas B. Wood and Associate Attorney Archie W. Anders for the State.

Russell J. Lanier, Jr. for defendant appellant.

BRANCH, Justice.

Defendant by his first assignment of error contends that the jury selection process in this case deprived him of a truly representative and impartial jury as guaranteed by the Sixth Amendment to the United States Constitution.

Defendant seeks to support this assignment of error with several separate arguments.

The record contains only the following statement concerning jury selection:

"JURY SELECTION

It is stipulated and agreed by counsel for the defendant and the solicitor for the State, that the following questions are true and accurate questions asked by the State in the selection of the jury that tried Billy Honeycutt.

1. Do you have any moral or religious scruples about capital punishment?

2. On account of these moral or religious scruples, would it be impossible, under any circumstances, and in any event, for you to return a verdict of guilty as charged even though the State proves the defendant guilty beyond a reasonable doubt?

3. Would you automatically vote against the imposition of capital punishment without regard to any evidence that might develop at the trial?

4. You would not vote in favor of the death penalty under any circumstances, no matter how aggravated the case was and no matter what the facts were?

It is further stipulated and agreed that no objections were interposed at the time the above questions were asked the jury during the jury selection of this case. It is further stipulated and agreed that the defendant did not exhaust his peremptory challenges to the jury in the jury selection in this case.

EXCEPTION NO. 1

That the court erred in allowing the State's challenge for cause of jurors who had conscientious objections to capital punishment and who stated that their objection to capital punishment would not allow them to return a guilty verdict in this case."

This record does not disclose the answers given by any juror. Neither does it reveal that any juror was excused for cause because of his opposition to capital punishment. An appellate court is bound by the record as certified and ordinarily can judicially know only what appears of record. 1 N. C. Index 2d, Appeal and Error § 42.

Our consideration of this assignment of error must therefore be limited to the effect of the inquiries to prospective jurors concerning their views on capital punishment.

[1] We find no merit in defendant's contention that a juror cannot be excused under any circumstances because of his convictions concerning capital punishment. It is now well established that in a capital case a juror may be properly challenged for cause if he indicates he could not return a verdict of guilty knowing the penalty would be death, even though the State proved to him by the evidence and beyond a reasonable doubt that the accused was guilty of the capital crime charged. *Witherspoon v. Illinois,* 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770, reh. den. 393 U.S. 898, 21 L.Ed. 2d 186, 89 S.Ct. 67; *State v. Washington,* 283 N.C. 175, 195 S.E. 2d 534; *State v. Cook,* 280 N.C. 642, 187 S.E. 2d 104; *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652; *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671; *State v. Sanders,* 276 N.C. 598, 174 S.E. 2d 487.

[2] Defendant further contends that excluding veniremen opposed to capital punishment denied him an impartial and representative jury. He argues that polls and studies establish that a large part of contemporary society has some scruples about capital punishment and that employing a jury selection process which excludes such persons does not reflect a "cross section of the community" and is impermissible. He specifically contends that a jury without scrupled jurors is unbalanced or weighted toward conviction.

The United States Supreme Court addressed this same question in *Witherspoon v. Illinois, supra.* There the defendant contended that such a jury, unlike one chosen at random from a cross section of the community, must necessarily be biased in favor of conviction, for the kind of juror who would be unperterbed by the prospect of sending a man to his death is the kind of juror who would too readily ignore the presumption of the defendant's innocence, accept the State's version of the facts and return a verdict of guilty.

After considering surveys cited by defendant in his brief, the Court in Witherspoon said:

> " . . . We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. In light of the presently available information, we are not prepared to announce a per se constitutional rule requiring the reversal

of every conviction returned by a jury selected as this one was."

In instant case petitioner presents the same argument without additional evidence or authority. Logic and the weight of authority require that we reject this argument.

[3] Defendant argues that in capital cases there should be no voir dire examination of prospective jurors.

The purpose of the voir dire examination and the exercise of challenges, either peremptory or for cause, is to eliminate extremes of partiality and to assure both the defendant and the State that the persons chosen to decide the guilt or innocence of the accused will reach that decision solely upon the evidence produced at trial. *Swain v. Alabama,* 380 U.S. 202, 13 L.Ed. 2d 759, 85 S.Ct. 824; *Logan v. United States,* 144 U.S. 263, 36 L.Ed. 429, 12 S.Ct. 617; *State v. Spence,* 274 N.C. 536, 164 S.E. 2d 593.

Defendant's arguments in support of this assignment of error run counter to the well-recognized principle that both the State and the defendant are entitled to a trial by an impartial jury. *Tuberville v. United States,* 303 F. 2d 411, cert. den. 370 U.S. 946, 8 L.Ed. 2d 813, 82 S.Ct. 1607; *State v. Childs,* 269 N.C. 307, 152 S.E. 2d 453.

In the recent case of *State v. Crowder,* 285 N.C. 42, 203 S.E. 2d 38, we find the following pertinent statement:

> "In order to insure a fair trial before an unbiased jury, it is entirely proper in a capital case for both the State and the defendant to make appropriate inquiry concerning a prospective juror's moral or religious scruples, beliefs, and attitudes toward capital punishment."

Here, the questions asked the prospective jurors by the Solicitor were permissible under both Federal and State decisions, and were necessary to insure trial by an impartial and representative jury.

This assignment of error is overruled.

Although assigned as error, defendant does not argue in his brief that the Court erred in denying his motion for a directed verdict of not guilty. We think it sufficient to state that the trial judge properly denied defendant's motion since there was

ample, substantial evidence of every essential element of the crime of murder in the first degree to carry the case to the jury.

[4] Finally, defendant contends that the death penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

This Court has declared that upon conviction any person who commits the crime of burglary in the first degree, first degree murder, arson or rape after 18 January 1973 shall suffer the penalty of death. *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19. We fully considered the constitutionality of the death sentence in light of the Eighth and Fourteenth Amendments to the United States Constitution in the case of *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721, and there reaffirmed the holding of *Waddell.* See also *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750; *State v. Dillard,* 285 N.C. 72, 203 S.E. 2d 6; *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10; *State v. Crowder, supra.* The holdings in *Waddell, Jarrette, Noell, Dillard, Henderson* and *Crowder* control this assignment of error.

This assignment of error is overruled.

Examination of each assignment of error, every argument offered by counsel for defendant and a careful review of the entire record discloses that defendant has received 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).

STATE OF NORTH CAROLINA v. COLLEY THOMPSON

No. 5

(Filed 10 April 1974)

1. **Criminal Law § 29— mental capacity of defendant to stand trial — determination by trial court**

Trial court did not err in denying defendant's motion for a jury trial on the question of defendant's competency to stand trial, since the preliminary question of a defendant's mental capacity to plead to a bill of indictment and to aid in the preparation and conduct of his defense is properly a question to be decided by the trial court in its discretion.

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

In a prosecution for first degree murder and armed robbery, the trial court did not err in admitting defendant's confession where the evidence on *voir dire* disclosed that defendant was given all warnings and cautions required by the State and Federal rules of evidence, defendant understood them and freely and voluntarily waived the right to have counsel present, and defendant then stated that he shot the victim and took money from the place of business.

3. **Homicide § 25; Robbery § 5— first degree murder and armed robbery — separate crimes — instructions**

In a prosecution for first degree murder and armed robbery where the charges were consolidated under G.S. 15-152 on the ground that they were separate and distinct felonies, connected in time, place, and surrounding circumstances, the trial court properly submitted both offenses to the jury, and separate conviction and sentence on each charge is upheld.

APPEAL by defendant from *Webb, S.J.*, April 2, 1973, NASH Superior Court.

In these criminal prosecutions the defendant, Colley Thompson, was charged with murder and armed robbery. The indictment in Case No. 72CR11977 charged that the defendant on November 22, 1972, with force and arms, at and in the county aforesaid, feloniously and of his malice aforethought did kill and murder Amy Claire Breedlove. In Case No. 72CR11978 the indictment charged that the defendant by the use and threatened use of a firearm, to wit, a .38 caliber pistol whereby the life of Amy Claire Breedlove was endangered and threatened, did unlawfully, forcibly, violently, and feloniously take, steal, and carry away United States currency of the value of $204.97 from the presence, person, place of business of George Breedlove contrary to the statute, etc.

On the day following the alleged offenses, the defendant was arrested in Florence County, South Carolina, under a fugitive warrant. He waived extradition and consented to be returned to Nash County, North Carolina, where warrants for his arrest were served.

Attorney Grover P. Hopkins was privately employed to represent the defendant. He filed a petition requesting the defendant be committed to Cherry Hospital for psychiatric examination. The court entered the commitment order on December 4, 1972. The report of the examination at Cherry Hospital is not in the record.

In the Nash Superior Court at the April 2, 1973 Special Session, the court, on the State's motion, ordered the cases consolidated for trial. The defendant filed a motion that the cases be moved to another county on the ground of unfavorable publicity in Nash County. After hearing, the court denied the motion to remove.

At the formal arraignment "[T]he defendant remains mute as to the substantive charges of both counts of Armed Robbery and First Degree Murder and interposes at this time a plea of Not Guilty by Reason of Insanity." The defendant moved for a bifurcated trial on the issue of insanity. By agreement, the motion was continued until after the selection of the jury. Twelve regular jurors and one alternate juror were selected and empaneled.

The court, in the absence of the jury, heard lay and expert testimony on behalf of the defendant and the State on the issue of the defendant's competency to stand trial.

The defendant's brief, which the State accepts as accurate, contained the following:

> "Evidence introduced by the defendant tends to show that the defendant was treated by a psychiatrist in Florence, South Carolina in March of 1972 who placed him on medication and made a tentative diagnosis that he was paranoid and incompetent and that he lived in and believed in his delusional system and in the opinion of Dr. Camp this delusional system continued with defendant through the time of the crime. The defendant was assigned to Cherry Hospital at Goldsboro, North Carolina for examination concerning his competency and in the opinion of Dr. Eugene

Maynard, Psychiatrist at Cherry Hospital, the defendant was both competent to stand trial and did not possess any psychosis of sufficient severity to be exculpatory."

At the conclusion of the hearing, in the absence of the jury, the court concluded:

"[A]t the end of all the evidence and at the end of the voir dire hearing, the court finds as a fact that the defendant has the capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner and to cooperate with his counsel to the end that any available defense may be interposed. The court concludes as a matter of law that the defendant is competent to plead to the indictments and to stand trial and the court orders the defendant to plead to the two (2) bills of indictment against him. The defendant, through counsel, excepts to all the findings of fact and conclusions of law and objects to the ruling of the court, and makes a motion for arrest of trial on the grounds that the commitment order under which the defendant was placed in Cherry Hospital was not completed by the hospital as ordered by the committing judge. Motion overruled. Exception by the defendant."

The State's evidence disclosed that the deceased, Amy Claire Breedlove, age eighteen, on November 22, 1972, was in charge of her father's self-service station, the Gas Mart, out in Nash County. In the early afternoon of November 22, 1972, the dead body of Amy Claire Breedlove was discovered in an outbuilding at the Gas Mart. Dr. Scarborough, a pathologist, performed an autopsy and found the deceased had been shot twice with a firearm. He removed one bullet from the skull which, in his opinion, had caused death. The bullet was of .38 caliber. The owner of the Gas Mart, where his daughter was at work, had purchased a pistol and left it at the Mart for protection in case of robbery. The box in which the pistol was delivered to the purchaser contained its serial number.

Witnesses had observed a Pontiac automobile bearing a South Carolina license plate in possession of a young colored male at the Mart. One witness became suspicious and took the license number of the vehicle. Nash County officers ascertained that the Pontiac bearing the South Carolina license plate was registered in the name of the defendant's mother who lived in Florence County, South Carolina.

The officers immediately went to South Carolina and interviewed the defendant. After having been given the proper warnings, he voluntarily consented to interrogation and waived the presence of an attorney. He told the officers that he had been to the Gas Mart in Nash County a number of times and had talked with the deceased; that on the previous day (November 22nd) he was at the Mart; that he saw the pistol near the cash register and slipped it in his pocket. Later he shot Miss Breedlove with the pistol, took $50 or $60 from the cash register, and left for South Carolina. He first stated that he had thrown the pistol in a pond, but when further questioned, admitted that he sold it to a boy in Florence County for $20.00. The officers found the boy and recovered the pistol. The serial number was identical with the number recorded on the box in which it was purchased. A ballistics expert found that the bullet which had caused the death of Miss Breedlove had been fired from the .38 pistol they recovered in South Carolina.

The defendant did not testify either at the hearing before the court on the issue of his competency to stand trial or at the trial on the issue of his guilt or innocence. However, the defendant and the State offered evidence before the jury substantially the same as that offered before the court on the question of mental capacity.

At the conclusion of the evidence, the court overruled the motions to dismiss and charged the jury:

> "There are several verdicts you can return. As to the charge of first degree murder you can either find the defendant guilty as charged, that is, guilty of first degree murder; or you can find him guilty of second degree murder, or you can find him not guilty, or you can find him not guilty by reason of insanity.
>
> "As to the charge of armed robbery, you can either find him guilty as charged, that is, guilty of armed robbery, or you can find him not guilty, or you can find him not guilty by reason of insanity."

The jury returned these verdicts: In Case No. 72CR11977—"Guilty of first degree murder." In Case No. 72CR11978—"Guilty of armed robbery." The verdicts were verified by a poll of the jurors at the request of defendant's counsel. The court overruled motions to set the verdicts aside, in arrest of the judgments, and for new trials.

In Case No. 72CR11977 (charging murder) the court imposed a sentence of life imprisonment. In Case No. 72CR11978 (charging armed robbery) the court imposed a prison sentence of ten years to begin at the expiration of the life sentence.

The defendant gave notice of appeal on the murder charge and moved for certiorari on the armed robbery charge. The motion for certiorari was allowed on September 10, 1973.

Robert Morgan, Attorney General, by Raymond W. Dew, Jr., Assistant Attorney General, for the State.

Grover Prevatte Hopkins for defendant appellant.

HIGGINS, Justice.

Defense counsel of record was privately employed throughout the trial in the superior court. Thereafter, upon a showing of the defendant's indigency, Mr. Hopkins was appointed by the trial court to prosecute this appeal. At all stages he has been careful and vigilant in discharging his duties as counsel in these cases.

Immediately following his employment, counsel moved for and obtained an order committing the defendant to Cherry Hospital for psychiatric examination. Thereafter at the arraignment and before plea, counsel filed an affidavit stating that Dr. Camp, a psychiatrist in Florence, South Carolina, in 1972 examined the defendant and found him to be "very psychotic," "depressed and paranoid." Upon the basis of the affidavit, the defendant first moved for a bifurcated trial on the issue of the defendant's mental capacity to stand trial, and that the issue be tried by a jury and not by the court. The motion was denied.

[1] By his first assignment of error the defendant challenges the court's denial of his motion for a jury trial on the question of defendant's competency to stand trial. It is not contended, however, that the defendant became mentally irresponsible after the homicide and before the trial. The mental capacity to plead and assist in the defense were preliminary questions to determine whether there should be a trial.

The preliminary question of a defendant's mental capacity to plead to a bill of indictment and to aid in the preparation and conduct of his defense, is properly a question to be decided by the trial judge. The rule is stated in *State v. Propst,* 274 N.C.

62, 161 S.E. 2d 560: "Ordinarily, it is for the court, in its discretion, to determine whether the circumstances brought to its attention are sufficient to call for a formal inquiry to determine whether defendant has sufficient mental capacity to plead to the indictment and conduct a rational defense. . . . Whether defendant is able to plead to the indictment and conduct a rational defense should be determined prior to the trial of defendant for the crime charged in the indictment. . . . '(T)he defendant's capacity to enter upon a trial, should be determined before he is put upon the trial; . . . '" See also *State v. Moore,* 245 N.C. 158, 95 S.E. 2d 548; *State v. Sullivan,* 229 N.C. 251, 49 S.E. 2d 458; *State v. Khoury,* 149 N.C. 454, 62 S.E. 638.

In this case, Judge Webb after a voir dire hearing in the absence of the jury, upon the basis of lay and expert testimony, found the defendant was competent to stand trial. The facts found and the conclusion drawn from them are supported by the evidence before the court. The defendant's assignment of error is not sustained. *State v. Humphrey,* 283 N.C. 570, 196 S.E. 2d 516; *State v. Spence,* 271 N.C. 23, 155 S.E. 2d 802.

[2] The defendant has excepted to and assigned as error the court's admission of his confession before the jury. When the State indicated its intention to offer the defendant's confession in evidence, the court excused the jury and conducted a thorough voir dire. Sheriff Womble of Nash County and Mr. W. F. Dowdy, Special Agent of the State Bureau of Investigation, testified the defendant was given all warnings and cautions required by the State and Federal rules of evidence; that the defendant understood them and freely and voluntarily waived the right to have counsel present. He told the officers that he had shot Miss Breedlove with a pistol taken from the place of business; and that he took $50 or $60 from the cash register and left for South Carolina.

One of the store's customers, Mr. Deans, had seen the defendant at the store on other occasions, had been suspicious, and had noted the South Carolina license number of the Pontiac automobile he was driving. This license number led to the defendant's almost immediate arrest in South Carolina.

When confronted by Deans' story, defendant confessed, first stating he threw the pistol in a pond, later saying he sold it to a boy in South Carolina for $20.00. The officers recovered the pistol. The serial number on the box in which it came was the

same as the number on the pistol. The ballistics test disclosed that the bullet which caused the death of Miss Breedlove had been fired from that pistol.

The defendant did not offer evidence on the voir dire which the court held to determine the admissibility of the confession. The defendant was in lawful custody under a fugitive warrant. He waived extradition and consented to accompany the North Carolina officers to Nash County. The admissions dovetailed with the facts independently developed by the investigating officers. The evidence on the voir dire supported the findings that his confession was free and voluntary. The findings, having support in the evidence, are conclusive on appeal. *State v. Frazier*, 280 N.C. 181, 185 S.E. 2d 652; *State v. Hill*, 276 N.C. 1, 170 S.E. 2d 885; *State v. Vickers*, 274 N.C. 311; 163 S.E. 2d 481; *State v. Barnes*, 264 N.C. 517, 142 S.E. 2d 344; *State v. Outing*, 255 N.C. 468, 121 S.E. 2d 847.

The defendant's counsel has argued before this Court other objections not herein discussed. They have been considered with a care commensurate with the seriousness and gravity of the offenses charged. The determination that the defendant is competent to stand trial, and his detailed confession, form solid support for the jury's finding of guilt. Nothing in the evidence suggests innocence.

[3] Judge Webb instructed the jury that in order to return a verdict of guilty of murder in the first degree, the jury was required to find from the evidence beyond a reasonable doubt that the defendant acted with malice and after premeditation and deliberation in killing Amy Claire Breedlove. At no time did the court permit the jury to consider or rely on the felony murder rule as a basis for finding the defendant guilty of murder in the first degree.

Under the court's instructions, the jury was not permitted to consider armed robbery in connection with the charge of murder. In the court's charge, murder and robbery were treated as entirely separate and independent crimes. The charges were consolidated for trial under G.S. 15-152 on the ground that they were separate and distinct felonies, connected in time, place, and surrounding circumstances. *State v. Anderson*, 281 N.C. 261, 188 S.E. 2d 336; *State v. Fox*, 277 N.C. 1, 175 S.E. 2d 561; *State v. White*, 256 N.C. 244, 123 S.E. 2d 483. The decision that both charges may be upheld in this case is not inconsistent

with our holdings in *State v. Moore,* 284 N.C. 485, 202 S.E. 2d 169; *State v. Lock,* 284 N.C. 182, 200 S.E. 2d 49; *State v. Carroll & Stewart,* 282 N.C. 326, 193 S.E. 2d 85; *State v. Peele,* 281 N.C. 253, 188 S.E. 2d 326. In the cited cases, the armed robbery charges were merged into and made a part of the first degree murder charges because of the instruction to the jury that if the defendant killed the deceased in the perpetration or in the attempt to perpetrate the robbery, the finding would justify a verdict of guilty of murder in the first degree without a finding or proof of malice or of premeditation and deliberation.

The court charged that a verdict of guilty of murder in the first degree could be rendered only upon a finding from the evidence beyond a reasonable doubt that the killing was done with malice and after premeditation and deliberation. The felony murder rule was not submitted to the jury in this case.

A careful review of the record fails to disclose any error of law or legal inference committed by the trial court. The verdicts and judgments will be upheld.

No error.

ROGER DALE CLARY v. ALEXANDER COUNTY BOARD OF EDUCATION

— AND —

PHYLLIS CLARY, ADMINISTRATRIX OF THE ESTATE OF FRED H. CLARY v. ALEXANDER COUNTY BOARD OF EDUCATION

No. 12

(Filed 10 April 1974)

1. **Parent and Child § 5— injury to minor — rights of action**

Personal injury to an unemancipated minor child, proximately caused by the negligence of another, may give rise to two causes of action, one on behalf of the child for recovery of damages for personal injury, including damages for pain and suffering, for permanent injury and for impairment of earning capacity after majority, and the other by the parent for loss of services of the child during minority and for reimbursement for expenses incurred by the parent for necessary medical treatment of the child.

2. **Parent and Child § 5— injury to minor — parent's action to recover medical expenses — insufficiency of evidence**

In a father's action against a county board of education to recover for medical and hospital expenses allegedly incurred by him in the

treatment of injuries sustained by his minor son, the father's evidence was insufficient to be submitted to the jury where no evidence was presented to show the amount of any medical or hospital bill or any payment by plaintiff father, or by anyone else, for treatment of his injured son, or the incurring of liability therefor by the father.

3. **Schools § 11; State § 6— county board of education — liability for torts — waiver of immunity**

No action can be maintained against a county board of education to recover damages for a tort alleged to have been committed by it in the performance of its statutory duties except insofar as its immunity to such suit has been waived pursuant to statutory authority.

4. **Schools § 11; State § 6— actions against school board — failure to show waiver of immunity**

Plaintiffs' evidence was insufficient to be submitted to the jury in actions against a school board by a father to recover medical expenses expended in the treatment of injuries received by his minor son during basketball practice in the school gymnasium and by the son to recover damages for his personal injuries where there was no evidence that defendant board of education, at the time of the injuries in question, had procured liability insurance so as to waive its immunity to suit for tort as permitted by G.S. 115-53.

ON *certiorari* to the Court of Appeals to review its decision, reported in 19 N.C. App. 637, 199 S.E. 2d 738, affirming the judgment of *Winner, S.J.*, at the 9 April 1973 Session of ALEXANDER.

Roger Dale Clary sued for damages for personal injuries. This action was instituted by Fred H. Clary, his father, as guardian ad litem, but, Roger Dale Clary having become of age prior to trial, the action was thereafter prosecuted by him.

Fred H. Clary sued to recover sums expended by him for medical and hospital expenses incurred by him in the treatment of the injuries sustained by his minor son, Roger Dale Clary. Fred H. Clary having died prior to trial, his administratrix was substituted as the party plaintiff in that action.

The cases were consolidated for trial and, at the conclusion of the plaintiff's evidence, the defendant's motions for directed verdicts were granted and each action was dismissed, with prejudice, on the ground that the evidence showed, as a matter of law, that Roger Dale Clary was contributorily negligent.

Each complaint alleges that Roger Dale Clary was injured on 8 October 1968, at which time he was a student at Stony Point High School and, while engaging in basketball practice

under the supervision of the coach, ran into and through a glass window, or partition, in the school gymnasium. The defendant is alleged to have been negligent in that: (a) It permitted the installation of such glass partition when it knew or should have known that it constituted a severe hazard to basketball players, (b) through its coaching staff, it directed players on the basketball team to run sprints toward a point immediately in front of the partition, and (c) it maintained the gymnasium in a hazardous condition with respect to such partition.

Each complaint was amended to allege that the defendant had procured liability insurance against negligence or other tortious conduct and had waived its immunity from suit for such conduct in accordance with G.S. 115-53. As to this allegation, the answer in each case alleged: "The allegations of Paragraph XVIII (XV in the suit of the father) of the Complaint as amended, are *not* admitted, to the extent that they apply to the incident in question." (Emphasis added.)

The record on appeal contains no stipulation as to the amount of any medical or hospital expense paid or incurred by Fred H. Clary by reason of the injuries sustained by his son, Roger Dale Clary, and contains no evidence with reference to such expense, although there was testimony that immediately following the injuries a doctor was summoned and Roger Dale Clary was carried to a hospital in a pickup truck. The complaint of Fred H. Clary alleges that he incurred such expenses in the amount of $2,656. The answer denies the allegation for lack of sufficient information and knowledge to answer the same.

There is no evidence in the record concerning liability insurance carried by the defendant or otherwise tending to show a waiver by the defendant of its immunity from suit for torts.

The evidence for the plaintiff was to the following effect:

On 8 October 1968, Roger Dale Clary, a seventeen year old senior student in the Stony Point High School, was in the school gymnasium as a candidate for the school basketball team. He and other candidates for the team, by direction of and under the supervision of the coach, engaged in conditioning exercises, including windsprints.

The gymnasium was slightly longer and somewhat wider than a basketball court. At each end of the court, there was a space of approximately three feet between the end line of the

court and the end wall of the room. The wall at the back end of the room was solid brick. Immediately behind the basketball goal at this end of the room, there was suspended and hanging against the wall a gymnasium mat, to protect the players against injury from running against the wall. At the opposite or front end of the room there were no mats. At that end, immediately behind the basketball goal, were two double swinging doors, providing ingress and egress to the building, each door having a center glass panel. Adjoining these doors on each side was a large, glass window, beginning about three feet from the floor and extending to the top of the doorway. Glass panels, or transoms, were also over each window and each door. All of the glass was what is known as wire glass, having small "chicken" wire enclosed within the glass itself.

On the occasion of the injury, the members of the basketball squad were arranged in four lines, beginning at or just outside of the end line of the basketball court and extending back to the doors or windows and then alongside such doors or windows as required by the length of the line of boys. Roger Dale Clary was in the line in front of one of the windows. The windsprints ordered by the coach required the front boy in each line to run, at full speed, to the opposite end of the court and then back, at full speed, to touch the hand of the next boy in line, who would then take off on a similar sprint, the boy who had concluded his sprint then taking his place at the back end of the line to await another turn.

On his first such sprint that afternoon, Roger Dale Clary, running at full speed, touched the hand of the next boy in line and endeavored to stop but was unable to do so until he crashed into the glass window and shattered it, sustaining severe cuts on his arm and body.

On other occasions both Roger Dale Clary and other players, as well as the coach, himself, had, while engaging in windsprints and when driving toward the basket for "layups," run into these doors and windows, but no one had ever before shattered the glass. Roger Dale Clary had been on the school basketball team for three years prior to this occurrence, playing in the same gymnasium. He had seen other boys run into the window, not being able to stop before striking it.

On previous occasions, the school janitor had replaced sections of glass which had been cracked. These were in the tran-

soms above the doors or windows and the glass had been broken on those occasions by thrown basketballs. On each former occasion when cracked panels of glass were replaced, the janitor replaced them with the same type of glass; that is, wire glass. At the time of this incident, other types of glass, less likely to shatter into jagged pieces, were available. Wire glass is not "safety glass." Its principal function is to make it more difficult for an intruder to enter a building by breaking a pane of glass, since such intruder would also have to cut through the wire. On the occasion in question, Roger Dale Clary's arm, head and upper body went through the glass and wire, leaving jagged fragments of the glass panel which apparently were the cause of the severe injuries.

On this occasion, the coach in charge of the exercises ordered the boys to engage in windsprints. He testified that the boys were supposed to run on the gym floor at full speed from one end line of the court to the other and back. He had observed other players collide with the glass on other occasions and had done so himself. He never warned any of the players about the glass at the front end of the gymnasium.

Collier, Harris, Homesley & Jones by Jack R. Harris and Edmund L. Gaines for plaintiffs.

Hedrick, McKnight, Parham, Helms, Warley & Kellam by Philip R. Hedrick and Edward L. Eatmon, Jr.; Frank & Lassiter by Jay Frank and Michael T. Lassiter for defendant.

LAKE, Justice.

[1] It is well settled that a personal injury to an unemancipated minor child, proximately caused by the negligence of another, may give rise to two separate and distinct causes of action. The first is on behalf of the child for the recovery of damages for the personal injury, including damages for pain and suffering, for permanent injury and for impairment of earning capacity after majority. The second is a right in the parent of the child (usually the father) to recover damages for the loss of services of the child during minority and for reimbursement for expenses incurred by the parent for necessary medical treatment of the child. *Kleibor v. Rogers,* 265 N.C. 304, 144 S.E. 2d 27; *Ellington v. Bradford,* 242 N.C. 159, 86 S.E. 2d 925; Strong, N. C. Index 2d, Parent and Child, § 5.

In this instance, the action on behalf of the child and that brought by the father in his own right were consolidated for trial. At the close of the plaintiffs' evidence, the defendant moved for a directed verdict in its favor in each action on three grounds: (1) The evidence was insufficient to justify the submission of the case to the jury, (2) the evidence was insufficient to show actionable negligence on the part of the defendant, and (3) the plaintiff was negligent as a matter of law so as to bar any claim for damages against the defendant.

In each action, the Superior Court granted the defendant's motion for a directed verdict on the ground that the child was guilty of contributory negligence. There was neither allegation nor evidence of contributory negligence by the father himself or that the child, at the time of the injury, was acting as the father's agent.

By reason of the deficiencies noted below in the proof supplied by the plaintiffs, the motion for a directed verdict should have been allowed in each case on the first ground stated in the motion. This being true, we do not reach and we express no opinion upon these questions: (1) Was the plaintiffs' evidence sufficient to support a finding of negligence by the defendant in the construction of the building, or in its maintenance or in instructing, through its employees, the basketball coach, this high school student to engage in the activity which resulted in his injury? (2) Did the evidence of the plaintiffs show that the plaintiff child, in carrying out his assignment, was guilty of contributory negligence as a matter of law? (3) If so, does such contributory negligence of the child bar the father's right to recover in his action?

It is correctly stated in 67 CJS 2d, Parent and Child, § 41(c), "The parent has no right of action unless he has sustained some direct pecuniary injury from the wrong done to the child." The burden is on the plaintiff father to allege and show that he has been damaged, through the loss of the child's services or through his having to pay or incur liability for medical treatment of the child's injuries. The complaint of the father alleges that he incurred expenditures for such medical treatment in the amount of $2,656, the recovery of which he prays. The answer of the defendant denies this allegation.

[2] There is in the record no evidence whatsoever to show the amount of any medical or hospital bill or any payment by the

plaintiff father, or by anyone else, for medical or hospital treatment of his injured son, or the incurring of liability therefor by the father. Nothing in the record, or in the briefs of the parties in the Court of Appeals or in this Court, suggests any stipulation of the parties with reference to this matter. There is, therefore, in the record before us a complete failure of evidence to show any damage suffered by the plaintiff father by reason of the alleged negligence of the defendant. Consequently, the plaintiffs' evidence was not sufficient to justify submitting the father's case to the jury.

[3] Furthermore, the defendant Board of Education is a governmental agency created by statute for the purpose of performing governmental functions. *Benton v. Board of Education,* 201 N.C. 653, 161 S.E. 96. That being true, no action can be maintained against it to recover damages for a tort alleged to have been committed by it in the performance of its statutory duties, except insofar as its immunity to such suit has been waived pursuant to statutory authority. *Huff v. Board of Education,* 259 N.C. 75, 130 S.E. 2d 26; *McBride v. Board of Education,* 257 N.C. 152, 125 S.E. 2d 393; *Fields v. Board of Education,* 251 N.C. 699, 111 S.E. 2d 910; *Turner v. Board of Education,* 250 N.C. 456, 109 S.E. 2d 211; *Smith v. Hefner,* 235 N.C. 1, 68 S.E. 2d 783; *Benton v. Board of Education, supra.* "[I]n the absence of an allegation in the complaint in a tort action against a city board of education, to the effect that such board has waived its immunity by the procurement of liability insurance to cover such alleged negligence or tort, or that such board has waived its immunity as authorized in G.S. 115-53, such complaint does not state a cause of action." *Fields v. Board of Education, supra.* In this respect there is no distinction to be drawn between a county board of education and a city board of education. *A fortiori,* when such allegation in the complaint is denied by the answer, the burden is upon the plaintiff to prove the requisite waiver.

[4] By an amendment to his complaint, the plaintiff father alleged that the defendant had waived its immunity to suit for tort by procuring liability insurance as authorized in G.S. 115-53. The answer of the defendant to this allegation was: "The allegations of Paragraph XV of the Complaint, as amended, are *not* admitted, to the extent that they apply to the incident in question." (Emphasis added.) There is no evidence whatsoever in the record to show that the defendant Board of Educa-

tion, at the time of the injury in question, had procured liability insurance so as to waive its immunity to suit as permitted by G.S. 115-53. The Tort Claims Act, G.S. 143-291 through G.S. 143-300.1, has no application to an injury of the kind here in question. Thus, there was a complete failure of evidence to show an indispensable element of the plaintiff father's right to recover in this action. For this reason also, the plaintiffs' evidence was insufficient to justify the submission of the case of the father to the jury and the motion for a directed verdict in favor of the defendant should have been granted.

In the suit brought on behalf of the injured boy by his next friend, the plaintiff also alleged, by an amendment to his complaint, that the defendant Board of Education had waived its immunity to suit for tort by the procurement of liability insurance as authorized by G.S. 115-53. The answer of the defendant, with reference to this allegation, was identical to the above quoted answer to the like allegation in the complaint of the father. The cases having been consolidated for trial, the evidence is the same as to each action. Thus, in the suit of the injured boy also, there is a complete failure of evidence to show a waiver by the defendant of its immunity to such action. For this reason, the evidence of the plaintiffs was insufficient to justify the submission of the boy's action to the jury and the defendant's motion for a directed verdict should have been allowed on this ground.

Although the Superior Court and the Court of Appeals inadvertently failed to note the insufficiencies of the plaintiffs' evidence in the respects herein set forth, the granting of the motion for a directed verdict in favor of the defendant was proper in each case and the judgment will not be disturbed.

Affirmed.

STATE OF NORTH CAROLINA v. HERBERT HILL WILLIS

No. 29

(Filed 10 April 1974)

1. **Criminal Law § 86— improper impeaching question — no prejudicial error**

In a prosecution for traveling 90 mph in a 65 mph zone, defendant was not entitled to a new trial where the court overruled his objection

to the solicitor's improper question, "Did you see Trooper Willis [who was asked to stand] . . . when he clocked you travelling 94 miles per hour in a 65 mile zone?"

2. **Criminal Law § 169— objection to testimony — inclusion of testimony in record**

Where objections to questions are sustained and counsel wishes to insert in the record what the witnesses' answers would have been, the better practice is to excuse the jury and complete the record in open court in the absence of the jury.

3. **Automobiles § 117; Criminal Law § 114— instructions — comment by court**

In a prosecution where defendant was charged with speeding, trial court's remark in explaining the speeding statute, "which doesn't make one bit of sense on earth," was not prejudicial to defendant.

4. **Criminal Law § 157— necessary parts of record on appeal**

A case on appeal must show the organization of the trial court, a valid charge (information, warrant or indictment), arraignment and plea, verdict, judgment, and appeal entries.

5. **Criminal Law § 157— sufficiency of record on appeal**

The record on appeal in a speeding case, though deficient in certain particulars, nevertheless contained enough information from which the Supreme Court could conclude that the superior court was regularly held and had jurisdiction of the defendant and of the offenses charged.

ON *certiorari* to the North Carolina Court of Appeals to review its decision filed November 28, 1973, finding no error in the trial of Herbert Hill Willis in the Superior Court of ALAMANCE COUNTY at the April 30, 1972 Session on a charge of operating a motor vehicle on the public highway in Alamance County at a speed of ninety miles per hour in a sixty-five mile per hour zone. This Court allowed certiorari on January 9, 1974.

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

Alston, Pell, Pell & Weston by E. L. Alston, Jr.; Broughton, Broughton, McConnell & Boxley, P.A., by Melville Broughton, Jr., and William G. Ross, Jr., for defendant appellant.

HIGGINS, Justice.

The record certified here for our review contains a blank (unsigned) affidavit purported to have been made by E. W. Clemmons before _____ Magistrate/Assistant Deputy Clerk of Superior Court. The unsigned warrant contains two

counts: first, for operating a motor vehicle on the public highway at a speed of ninety miles per hour in a sixty-five mile per hour zone; and second, for operating a motor vehicle on the public highway while under the influence of intoxicating liquor. An unauthenticated and unsigned entry in the case on appeal filed in the North Carolina Court of Appeals recites: "DISTRICT COURT JUDGMENT. Let the Defendant pay a fine of $50.00 and the costs of Court." Defendant gave notice of appeal to the superior court. Bond of $600.00 was required. The record fails to show the verdict entered in the district court.

The next entry is a stipulation signed by the solicitor and defense counsel at the April 30, 1972 Regular Session of Alamance Superior Court which recited that the court convened with Judge James H. Pou Bailey presiding. The defendant entered a plea of not guilty. The jury returned a verdict "Guilty as charged" on the count which charged operating a vehicle on the public highway at a speed of ninety miles per hour in a sixty-five mile per hour zone. The defendant did not challenge the sufficiency of the warrant issued in the district court. The trial in the superior court was *de novo*. The superior court seems to have had jurisdiction of the offense and the alleged offender.

The State's witness, Colonel Guy of the State Highway Patrol, testified that on the night of June 4, 1970, he and Mr. Fred Morrison, Jr., were driving north on I-85 in Alamance County at about sixty miles per hour when he observed the lights of a vehicle approaching from the rear and that the vehicle passed at a high rate of speed. He gave chase and clocked the vehicle at ninety miles per hour. He finally, by means of his siren and light, induced the driver to stop. Some difficulty (not the subject of the criminal charge) occurred between the defendant and the witness.

E. W. Clemmons, a member of the State Highway Patrol, testified that he received from Colonel Guy a radio message, and in response went to the Huffine Mill Road exit where he saw the defendant in custody. The witness testified: "I detected a strong odor of alcoholic beverages, and he staggered when he walked." On cross-examination, defense counsel asked the witness if he heard Colonel Guy's testimony. He answered, "Yes, sir" and continued: "I recorded Mr. Willis' license number on the ticket. Q. And that wasn't the same license number Colonel Guy testified was on the car, was it?" The court sus-

tained the objection. No effort was made at the time to have the answer the witness would have given placed in the record. The State rested.

The defendant testified that his speed was not at any time in excess of the posted speed limit of sixty-five miles per hour. He testified that he had not been drinking and that Officer Guy assaulted him at the time of the arrest. On cross-examination the defendant, having been asked about his prior traffic violations, made this admission: "I think I have about twenty-three speeding convictions in my lifetime." Question by solicitor: "Did you see Trooper Willis—Trooper Willis, will you stand up, please. On September 19, 1971, did you see that highway patrolman, [indicating Trooper Willis] when he clocked you traveling 94 miles per hour in a 65 mile zone? (A state highway patrolman, in uniform, stands.)" The court overruled the defendant's objection. "A. I was not speeding that fast that day."

Beatrice Cross, a witness for the defendant, testified she was driving in front of the defendant just before he parked at the Huffine Mill exit (where he was arrested). ". . . I was driving my car between 60 and 65 miles per hour, and staying in front of Mr. Willis. . . . Mr. Willis had nothing to drink."

After defense counsel rested, he moved that he be allowed to insert in the record of the case on appeal the answers the witnesses would have given but for the court's ruling sustaining the State's objections.

> "The ruling of the Court on this motion is as follows: All right, let the record show that Mr. Alston moved that he be allowed at this stage to put into the record what certain answers would have been to questions to which objections were sustained by the trial court. Let the record further indicate that no request was made at the time the question was asked, or at the time the ruling was made, that the witness be permitted to put his answer in the record. The request to do so now is denied. Defendant Excepts."

In rebuttal the State called Fred Morrison, Jr., who testified that he was a passenger in Colonel Guy's automobile during the chase prior to the defendant's arrest. He testified the defendant passed at a speed he estimated to be between ninety and one hundred miles per hour.

The jury returned a verdict of guilty as charged. The court imposed a prison sentence of ninety days. Defendant appealed to the North Carolina Court of Appeals. The decision finding no error in the trial is recorded in 20 N.C. App. 43, 200 S.E. 2d 408.

[1] The defendant alleges prejudicial error on account of the solicitor's question addressed to the defendant on cross-examination, "Did you see Trooper Willis? [who was asked to stand] . . . when he clocked you traveling 94 miles per hour in a 65 mile zone?" The objection was overruled and the defendant answered, "I was not speeding that fast that day." The question was not fairly phrased. The defendant answered that he was not speeding that fast.

The prosecutor did not ask if the defendant had been indicted or if he had been arrested by Trooper Willis or if he had been accused. He was not asked whether he was speeding ninety-four miles per hour in a sixty-five mile zone. But the solicitor was patently "fudging a little" in framing the question. However, the cases cited, *State v. Gainey,* 280 N.C. 366, 185 S.E. 2d 874, and *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174, are not authority for a new trial on the facts of this case. The off-color question, in view of the State's evidence, did not have controlling effect on the outcome of the trial. No doubt the conviction resulted from the testimony of Patrolman Guy and Mr. Morrison and the defendant's admission, "I think I have about twenty-three speeding convictions in my lifetime." The irregularity in framing an impeaching question was insufficient to send the case back for another trial. The burden is on the defendant not only to show error, but also to show that the error complained of may have affected the result adversely to him. Strong, N. C. Index 2d, Vol. 3, Criminal Law, Harmless Error, § 167. *State v. Williams,* 279 N.C. 515, 184 S.E. 2d 282; *State v. Paige,* 272 N.C. 417, 158 S.E. 2d 522; *State v. Brown,* 271 N.C. 250, 156 S.E. 2d 272; *Fahy v. Conn.,* 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229.

[2] The defendant's other major objection was to the trial court's refusal to let counsel insert in the record what the witnesses' answers would have been if the objections had not been sustained. The motion to permit the defense counsel to insert the answers in the case on appeal was not made until after the defendant had rested. The record does not indicate whether the

witnesses were still in court or were available so that their answers could be obtained.

The practice of permitting counsel to insert answers rather than have the witness give them in the presence of the court should not be encouraged. The words of the witness, and not the words counsel thinks the witness might have used, should go in the record. Ordinarily the trial judge should hear the answers. The better practice is to excuse the jury and complete the record in open court in the absence of the jury.

[3] The defendant also objected to the trial on the ground the court, in the charge, found fault with the wording of the speeding statute involved in this case. The court, in explaining the speeding statute, stated: "[W]hich doesn't make one bit of sense on earth." The objection is the subject of Exception No. 5. The court, however, charged:

> "Thus, I charge you, that if you find from the evidence and beyond a reasonable doubt that on or about the 4th of June, 1970, Herbert Hill Willis drove his Lincoln Continental car along and over I-85, at a speed greater than the posted speed limit, to wit: sixty-five miles per hour, if you believe that to be the posted limit from the evidence, and you further find that sixty-five was the speed limit, posted by proper authorities, it would be your duty to return a verdict of guilty of exceeding the posted limit. However, if you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of Not Guilty."

The jury trial was not the proper place for the court to criticize the law under which the defendant was being tried. However, the criticism of the statute under which the defendant was charged would appear to react in favor of the defendant rather than to his prejudice. The Court of Appeals found no error in the trial. This Court allowed the petition for certiorari in part, at least, upon the ground of defects in the record which are heretofore referred to.

The case on appeal contained what purported to be an affidavit charging the named defendant with driving a motor vehicle on the public highway at ninety miles per hour in a sixty-five mile zone. The line for the signature was blank. The line for the signature of the issuing officer was blank. The warrant of arrest was blank. The record failed to show any

hearing or finding of guilt. Here is the full record of the hearing in the district court as it came to us from the Court of Appeals:

"DISTRICT COURT JUDGMENT

"Let the Defendant pay a fine of $50.00 and the costs of Court.

"Defendant gives Notice of Appeal in open Court, to the Superior Court. Bond set in the amount of $600.00."

Defense counsel and the solicitor stipulated, "[T]he foregoing constitutes the Agreed Record and Agreed Case on Appeal."

Both the defense counsel and the Attorney General filed briefs in the Court of Appeals. Neither made any objection or called any attention to the defective condition of the record. The Court of Appeals conducted a review and found no error in the trial. After the case was certified here, defense counsel and the Attorney General filed additional briefs.

The district court, the superior court, and the Court of Appeals, as well as counsel for the State and for the defendant, at all stages, have ignored the defective condition of the case on appeal. However, in response to our demand for a sufficient record, the Attorney General by Motion in Diminution, which we allowed, filed an addendum which indicated that photostats were made of the original documents. The photostating process failed to disclose the signatures or the check marks on the documents. The judgment entered in the district court, by check marks, shows a finding of guilty on the speeding count and not guilty on the driving under the influence count.

The purpose of this discussion is to alert counsel and court officials that this Court, in reviewing criminal appeals, will require that the case on appeal show that the trial court had jurisdiction of the defendant and of the offense charged. A criminal court acquires jurisdiction of a defendant when he is brought before the court pursuant to arrest, or comes before the court voluntarily and submits himself to its jurisdiction. The court acquires jurisdiction of the offense by valid information, warrant, or indictment. The court must have jurisdiction both of the offender and of the offense in order to proceed to judgment.

[4] A case on appeal must show: (1) The organization of the trial court; (2) a valid charge (information, warrant, or indictment); (3) arraignment and plea; (4) verdict; (5) judgment; and (6) appeal entries. *State v. Tinsley,* 279 N.C. 482, 183 S.E. 2d 669. Obviously the clerk of the district court used a printed form and by means of check marks recorded the court proceedings. This practice, no doubt, saves time, but in case of challenge, the authenticity and accuracy of a check mark may be difficult to establish.

[5] The record before us, though deficient in certain particulars, nevertheless contains enough information from which we may conclude the superior court was regularly held and had jurisdiction of the defendant and of the offenses charged and that in the trial and in the review by the Court of Appeals prejudicial error is not made to appear.

No error.

STATE OF NORTH CAROLINA v. JACK EDWARD SYKES

No. 56

(Filed 10 April 1974)

1. **Constitutional Law § 32— Miranda warnings — requirement after arrest**

Miranda warnings and waiver of counsel are required when, and only when, the defendant is being subjected to custodial interrogation, that is, after defendant has been taken into custody or otherwise deprived of his freedom of action in any significant way.

2. **Constitutional Law § 32; Criminal Law § 75— no Miranda warnings — admission of defendant — admissibility**

Where an officer stopped defendant because he was driving his vehicle in an erratic manner and the officer conducted a general on-the-scene investigation during which he asked defendant if defendant had been drinking, the trial court did not err in allowing into evidence the question and defendant's affirmative answer, though Miranda warnings had not been given defendant at that time, since defendant was not then under arrest.

3. **Automobiles § 126; Constitutional Law § 33; Criminal Law § 64— breathalyzer test — Miranda requirements inapplicable**

Miranda requirements are inapplicable to a breathalyzer test administered pursuant to the statutes of this State; therefore, whether defendant had waived counsel at the time he initially agreed to take

a breathalyzer test was immaterial, and the trial court properly allowed the test results into evidence.

4. **Constitutional Law §§ 32, 33— breathalyzer test — warnings given — no coercion**

Where defendant was advised that refusal to take the breathalyzer test would result in revocation of his driver's license for sixty days and he was advised of his right to the presence of counsel and a witness to view the testing procedures, defendant's prior consent given to an officer before the warnings were given him had no coercive effect upon him and afforded no ground for a new trial.

DEFENDANT appeals from decision of the Court of Appeals, 20 N.C. App. 467, 201 S.E. 2d 544, upholding judgment of *Martin (Perry), J.*, 21 May 1973 Session, WAYNE Superior Court.

Defendant was initially tried in district court upon a warrant charging that on 14 June 1972 at 11:50 p.m. he unlawfully and willfully operated a motor vehicle upon a public street or highway while under the influence of intoxicating liquor, third offense. District Judge Lester W. Pate found defendant guilty of driving under the influence, first offense, and from judgment pronounced defendant appealed to the Superior Court of Wayne County for trial *de novo* before a jury.

Don Wood, State Highway Patrolman, testified that on 14 June 1972 at 11:50 p.m. he saw defendant operating a 1972 model Ford pickup truck on a public street or highway in Goldsboro, Wayne County. He followed the truck driven by defendant and "observed it run off the right shoulder, weaving noticeably and finally crossing the center line of the highway a couple of times." Defendant turned right into a driveway and stopped. Patrolman Wood pulled in behind the truck and asked defendant to get out. Defendant was wearing ordinary work clothes with the exception of his shoes—"he was wearing soft pink lady's slippers." Officer Wood asked defendant for his driver's license and at that time smelled a high odor of alcohol on his breath. Defendant's face was very red and flushed. "I asked Mr. Sykes if he had been drinking and he said yes. I asked him to walk for me. As he was walking there on the driveway he was staggering and stumbling. . . . I gave the balance test and at the time I gave him this test he fell forward noticeably. I advised Mr. Sykes he was under arrest for driving under the influence and asked him if he would take a breathalyzer test. He said that he would."

Officer Wood further testified that two other persons, both female, were in defendant's truck. A quick search of the vehicle revealed no alcoholic beverages. As defendant walked to the patrol car he staggered noticeably.

Officer Wood advised defendant of his constitutional rights en route to the jail and defendant said he understood them. This witness also stated that after placing defendant in the patrol car and advising him of his rights he explained the breathalyzer test and told defendant "that the State of North Carolina had a law whereby when you were arrested for driving under the influence you were required to submit to a breathalyzer test. Refusal to take such a test would result in a 60-day suspension of your driver's license. After telling Mr. Sykes this, he still did not know whether he wanted to take the test or not. I explained it to him again and he said he would take it." In the opinion of this officer, "Sykes was very much under the influence—to the extent that both his mental and physical faculties were appreciably impaired."

Officer Roger Flynn testified that he had a valid breathalyzer operator's license and that prior to giving defendant the breathalyzer test early in the morning hours of 15 June 1972 he advised him of his statutory right to have an attorney or witness present to observe the test so long as it did not delay the test over thirty minutes. Defendant said he did not want an attorney or witness. Officer Flynn gave the test at 12:25 a.m. and it showed .15 alcoholic content in the blood.

Defendant offered no evidence. His motion to dismiss was denied. The jury returned a verdict of guilty as charged. From judgment pronounced defendant appealed to the Court of Appeals which found no error. Defendant thereupon appealed to the Supreme Court asserting constitutional and statutory violations of his rights. These alleged violations will be discussed in the opinion.

Robert Morgan, Attorney General; Claude W. Harris, Assistant Attorney General, for the State of North Carolina.

Douglas P. Connor, Attorney for defendant appellant.

HUSKINS, Justice.

Defendant assigns as error the trial court's action in admitting over objection the following testimony of Officer Wood:

"I asked Mr. Sykes if he had been drinking and he said yes. I asked him to walk for me. As he was walking there on the driveway he was staggering. . . . I gave the balance test and at the time I gave him this test he fell forward noticeably. I advised Mr. Sykes he was under arrest for driving under the influence. . . . "

Defendant contends his incriminating statement was elicited by custodial interrogation before he had been advised of his constitutional rights as mandated in *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). He therefore argues that his incriminating statement should have been excluded.

[1] *Miranda* warnings and waiver of counsel are required when, and only when, the defendant is being subjected to custodial interrogation. *State v. Blackmon,* 284 N.C. 1, 199 S.E. 2d 431 (1973). "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." *Miranda v. Arizona, supra.*

At the time Officer Wood asked defendant if he had been drinking, defendant was not in custody, under arrest, or "deprived of his freedom of action in any significant way." While there is no absolute test to ascertain exactly when an arrest occurs, the time and place of an arrest is determined in the context of the circumstances surrounding it. *State v. Allen,* 282 N.C. 503, 194 S.E. 2d 9 (1973).

Officer Wood's initial detention of defendant to investigate defendant's erratic driving did not amount to an arrest. "The brief detention of a citizen based upon an officer's reasonable suspicion that criminal activity may be afoot is permissible for the purpose of limited inquiry in the course of a routine investigation, and any incriminating evidence which comes to the officer's attention during this period of detention may become a reasonable basis for effecting a valid arrest." *United States v. Harflinger,* 436 F. 2d 928 (8th Cir. 1970).

Furthermore, the decision in *Miranda* was not intended to hamper the traditional function of police officers in investigating crime. "Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. . . . In

such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present. * * * In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence." *Miranda v. Arizona, supra.*

In relation to routine police investigations of traffic violations, one federal court had this to say:

> "The questioning of a driver of a stopped car on an open highway by one policeman, without more, cannot be characterized as a 'police dominated' situation or as 'incommunicado' in nature. * * * This general on the scene questioning is a well accepted police practice; it is difficult to imagine the police warning every person they encounter of his *Miranda* rights. This is why the opinion in *Miranda* expressly excluded 'on-the-scene questioning' from the warning requirements." *Lowe v. United States,* 407 F. 2d 1391 (9th Cir. 1969).

[2] In the factual context of this case defendant was not in custody and Officer Wood was merely in the process of conducting a general on-the-scene investigation when defendant responded that he had been drinking. It was only after that admission, and after observing defendant's inability to walk normally or retain his balance that he was placed under arrest. In light of these facts, *Miranda* warnings were not required.

We observe in passing that *State v. Beasley,* 10 N.C. App. 663, 179 S.E. 2d 820 (1971), and *State v. Tyndall,* 18 N.C. App. 669, 197 S.E. 2d 598 (1973), should not be interpreted to hold that the rules of *Miranda* are inapplicable to *all* motor vehicle violations. We said in *State v. Hill,* 277 N.C. 547, 178 S.E. 2d 462 (1971): "One who is detained by police officers under a charge of driving under the influence of an intoxicant has the same *constitutional* and statutory rights as any other accused." (Emphasis added.) We adhere to that view. Even so, it was no violation of this defendant's constitutional rights for the officer to observe and converse with him during the on-the-scene investigation and then testify with respect to defendant's state of insobriety. For a general discussion on the applicability of *Miranda* to traffic offenses, see Annotation, Police Interrogation

—Traffic Offense, 25 A.L.R. 3d 1076 (1969). Defendant's first assignment of error is overruled.

[3] After advising defendant he was under arrest for driving under the influence of intoxicants, Officer Wood asked him if he would take a breathalyzer test and defendant said that he would. Officer Wood then requested Trooper Flynn to come to the jail to perform the breathalyzer test. Prior to giving defendant the test Trooper Flynn advised him of his statutory rights to an attorney or a witness to observe the test so long as it did not delay the test over thirty minutes. Defendant said he did not want an attorney or witness and the test was administered with his consent at 12:25 a.m. on 15 June 1972. Over defendant's objection, the results of the breathalyzer test were admitted in evidence. The action of the court in this respect constitutes the basis for defendant's second assignment of error.

Defendant concedes that the breathalyzer test was properly administered by a qualified operator. His argument is that at the time Officer Wood obtained defendant's initial commitment to take the breathalyzer test, defendant had not waived his constitutional right to counsel and had not been advised of his statutory rights embodied in G.S. 20-16.2(a).

We hold it immaterial that defendant had not waived counsel at the time he initially told Officer Wood he would take the breathalyzer test. Admission of the breathalyzer test is not dependent upon whether *Miranda* warnings have been given and constitutional right to counsel waived. In *State v. Randolph,* 273 N.C. 120, 159 S.E. 2d 324 (1968), this Court, citing *Schmerber v. California,* 384 U.S. 757, 16 L.Ed. 2d 908, 86 S.Ct. 1826 (1966), held that the taking of a breath sample from an accused for the purpose of the test is not evidence of a testimonial or communicative nature within the privilege against self-incrimination. For that reason the requirements of *Miranda* are inapplicable to a breathalyzer test administered pursuant to our statutes.

[4] Equally untenable is defendant's contention that the results of the breathalyzer test were inadmissible because his initial "commitment" to take the test was obtained before he was advised of his statutory rights embodied in G.S. 20-16.2(a).

G.S. 20-16.2(a), as written at the time the offense involved in this case was committed, read in pertinent part as follows:

> "(a) Any person who operates a motor vehicle upon the public highways of this State . . . shall be deemed to have given consent, subject to the provisions of G.S. 20-139.1, to a chemical test or tests of his breath or blood for the purpose of determining the alcoholic content of his blood if arrested for any offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of intoxicating liquor. The test or tests shall be administered at the request of a law-enforcement officer having reasonable grounds to believe the person to have been driving a motor vehicle upon the public highways of this State . . . while under the influence of intoxicating liquor. The law-enforcement officer shall designate which of the aforesaid tests shall be administered. Before any of the tests shall be administered, the accused person shall be permitted to call an attorney and to select a witness to view for him the testing procedures; providing, however, that the testing procedures shall not be delayed for these purposes for a period of time of over thirty (30) minutes from the time the accused person is notified of these rights."

Any person under arrest on 14 June 1972, the date of this offense, who willfully refused to take the breathalyzer test was subject to mandatory revocation of his driving privilege for a period of sixty days. See G.S. 20-16.2(c) as rewritten by Chapter 1074 of the 1969 Session Laws.

Under G.S. 20-16.2(a) defendant, by driving his vehicle on the public highway, is deemed to have given his consent to take the test. Refusal to take the test subjected him to the sixty-day revocation penalty. Under the statute he was entitled to be informed of that fact and he was so informed by Officer Wood. Before the test was administered he had the right to call an attorney and to select a witness to view for him the testing procedures. He was so informed by Trooper Flynn and stated he did not want an attorney or witness.

It is perfectly apparent that defendant expressly waived the presence of counsel and of a witness to view the testing procedures and voluntarily took the breathalyzer test. His statement to Officer Wood, prior to being advised of his statutory

rights, that he would take the test had no coercive effect upon him and affords no ground whatsoever for a new trial. Defendant was fully advised of the rights afforded him by the statute and was entitled to nothing more under either the statute or the Constitution.

For the reasons stated, decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. CONNELL DECK

No. 6

(Filed 10 April 1974)

1. **Homicide § 16— dying declarations**

Statements by a stabbing victim were not admissible as dying declarations where there was no indication that the victim believed he was dying or that he was in full apprehension of his danger of death when he made the statements.

2. **Criminal Law § 73; Evidence § 35— spontaneous utterances — exception to hearsay rule**

Where a witness testified that she called to deceased when she saw him and another man running up the highway, that upon her offer of assistance deceased stopped running and came over to her, and that she asked deceased what was wrong, statements made by deceased to the witness, "My God, that man tried to rob me" or "did rob me" and "I've been stabbed with this" were admissible under an exception to the hearsay rule permitting the admission of spontaneous utterances.

3. **Homicide § 9— self-defense — real or apparent necessity**

The right to act in self-defense is based upon necessity, real or apparent, and a person may use such force as is necessary or apparently necessary to save himself from death or great bodily harm in the lawful exercise of his right of self-defense.

4. **Homicide § 9— right to kill in self-defense**

A person may kill even though it be not necessary to kill to avoid death or great bodily harm if he believes it to be necessary and he has reasonable grounds for such belief, it being for the jury to determine the reasonableness of his belief from the facts and circumstances as they appeared to the accused at the time of the killing.

5. **Homicide § 28— necessity for charging on self-defense**

The trial court is required to charge on self-defense when there is competent evidence of such defense even absent a special request for such instruction.

6. Homicide § 28— failure to charge on self-defense

The trial court in a homicide case erred in failing to instruct on self-defense where the State's evidence would permit, but not require, the jury to find that: (1) defendant was without fault in bringing on the difficulty, (2) deceased was armed with and first assaulted defendant with a deadly weapon, (3) the fatal blow was struck during a struggle for the weapon first used by deceased and (4) the defendant used such force as was necessary or as appeared to him to be necessary to save himself from death or great bodily harm.

APPEAL by defendant from *Webb, S.J.*, 9 April 1973 Session of NASH Superior Court.

Criminal prosecution on an indictment charging that "Connell Deck . . . on the 19th day of December 1972 . . . feloniously, wilfully, and of his malice aforethought, did kill and murder William Randolph Wheless . . . . "

The State offered evidence which tended to show that on the morning of 19 December 1972, defendant went to a jewelry store operated by William Randolph Wheless in Spring Hope, North Carolina. Mrs. Wheless, the wife of decedent, was the only person in the store. Defendant and Mrs. Wheless engaged in some conversation concerning the possible purchase of a ring, and defendant examined some watches in a display case. Mr. Wheless returned in a very short time, and Mrs. Wheless departed, leaving only her husband and defendant in the store.

The State's only evidence as to the crucial events which took place in the store was the testimony of SBI Agent Matt Gwynne concerning in-custody statements made to him by defendant. According to defendant's statement, he walked into the Wheless Jewelry Store to have a new crystal put in his watch. After Mrs. Wheless left, Mr. Wheless was examining his watch and called defendant behind the counter to show him a diagram and some "green stuff" that was in the watch. Mr. Wheless told defendant that it would cost $2.10 to fix the watch, and defendant replied that he could not afford to have the watch fixed. Mr. Wheless then tried to trade him an electric watch which was lying on the counter beside defendant's watch. When defendant reached for his watch, Mr. Wheless reached for an ice pick which was lying nearby. Defendant thereupon pulled his knife from his pocket, but dropped it on the floor when Mr. Wheless scratched his hand with the ice pick. Defendant's statement as related by SBI Agent Gwynne continued:

" . . . Deck stated that he grabbed the man's left hand and grabbed the man around the neck and got the man turned around so that the man's back was facing him.

"Deck stated he got control of the ice pick and that he stabbed the man in the chest with the ice pick and that he tried to pull the ice pick out of him but that the pick part of the ice pick came loose from the handle. Deck further stated that after he stabbed the man in the chest he and the man fell over the watch counter display case. Deck stated the man was moving around on the floor and that he heard the jewelry store man yell something out and that he ran through the alley between the Sears store and the Spring Hope Grocery store out behind the old school and came out to Highway 581 north."

The State's evidence further disclosed that defendant ran out of the store and was pursued by Mr. Wheless for about 100 feet. Charlotte Lathy saw him running up Highway 64 and called to inquire if she could help. Mr. Wheless then started walking toward the Sears Department Store and told her, "My God, that man tried to rob me" or "did rob me." He then said "I've been stabbed with this," and he held the pick in his hand. She told deceased to sit down so that she could get some help for him. He then fell to the ground and shortly thereafter stopped breathing.

The State also offered testimony of Dr. D. E. Scarborough, admitted as an expert pathologist, who testified that in his opinion "the primary cause of death was related to the stab wound . . . . "

At the close of the State's evidence, defendant moved for judgment as of nonsuit.

This motion was overruled.

Defendant offered no evidence, and again moved for judgment as of nonsuit. The motion was overruled.

The jury returned a verdict of guilty of murder in the first degree and defendant appealed from a judgment sentencing him to imprisonment for the term of his natural life. He failed to perfect his appeal in due time, and we allowed defendant's petition for writ of certiorari on 17 August 1973.

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

Chambers, Stein, Ferguson & Lanning, by Charles L. Becton for defendant appellant.

BRANCH, Justice.

Defendant first contends that the trial court erred by admitting into evidence, over objection, the testimony of Charlotte Lathy concerning statements made to her by the deceased.

In this connection, the record discloses:

"A. I saw Mr. Wheless. In front of the Sears Store, running by. And I went to the back of the store and went out through the back entrance and saw Mr. Wheless and another man running up Highway 64, and I called to him and asked him what was wrong and could I help him, and he started to walk towards the Sears store then and I went over to meet him. When he came closer to me I asked him again what was wrong and he said, 'My God, that—'.

MR. ROSSER: OBJECTION.

COURT: OVERRULED.

EXCEPTION NO. 14.

Q. Go ahead and tell what he said to you.

A. He said, 'My God, that man tried to rob me,' or 'did rob me'. I don't remember which he said. And then he said—

MR. ROSSER: MOTION TO STRIKE.

COURT: OVERRULED.

EXCEPTION NO. 15.

Q. Go ahead.

A. And then he said, 'I've been stabbed with this,' and he held the pick in his hand.

EXCEPTION NO. 16."

[1] Defendant contends that this testimony was inadmissible as a dying declaration. He argues that there is no indication that the deceased believed himself to be dying or was in full appre-

hension of his danger of death. We agree. However, the trial judge did not state the basis upon which he admitted the evidence. His ruling might well have been based upon an entirely different reason.

Evidence is called hearsay, " . . . when its probative force depends, in whole or in part, upon the competency and credibility of some person other than the witness by whom it is sought to produce it." *State v. Robbins,* 275 N.C. 537, 169 S.E. 2d 858; *State v. Cannon,* 273 N.C. 215, 159 S.E. 2d 505; 1 Stansbury's North Carolina Evidence (Brandis Revision 1973) § 138.

There are many exceptions to the Hearsay Rule. These exceptions are generally justified because of circumstances which make the declaration especially trustworthy. The dying declaration is one recognized exception to this rule. Another and equally operative exception relates to spontaneous utterances.

"When a startling or unusual incident occurs, the exclamations of a participant or a bystander concerning the incident, made spontaneously and without time for reflection or fabrication are admissible . . . The trustworthiness of the present type of utterance lies in its *spontaneity*—the unlikelihood of fabrication because the statement is made in immediate response to the stimulus of the occurrence and without opportunity to reflect . . . . " 1 Stanbury's North Carolina Evidence (Brandis Revision 1973) § 164. *Hargett v. Insurance Co.,* 258 N.C. 10, 128 S.E. 2d 26; *Tart v. Register,* 257 N.C. 161, 125 S.E. 2d 754; *State v. Litteral,* 227 N.C. 527, 43 S.E. 2d 84.

This exception was applied in *State v. Spivey,* 151 N.C. 676, 65 S.E. 995, where deceased heard a noise under his house and went outside to investigate. His family heard a shot, and within one or two minutes went outside to look. They found deceased down on his hands and knees at the corner of the house. He made a statement to his wife as to the identity of his assailant. At trial, the wife of deceased was allowed to testify over objection that, "Frank told me Henry Spivey shot him; said, 'Oh, Jenny, Henry Spivey shot me, because I saw him.' " In holding that the statement of deceased was admissible, the Court quoted from the concurring opinion of Connor, J., in *Seawell v. R. R.,* 133 N.C. 515, 45 S.E. 850, as follows: "The element of time is not always material . . . The spontaneous, unpremeditated character of the declarations, and the fact that they seem to be the natural and necessary concomitants of some relevant transaction

in which their author was a participant, constitute the basis of their admission as evidence." The Court, speaking through Manning, J., further pointed out that such statements derive their reliability from their spontaneity when (1) there has been no sufficient opportunity to plan false or misleading statements, (2) they are impressions of immediate events and (3) they are uttered while the mind is under the influence of the activity of the surroundings.

[2] In instant case, the witness testified that she first called to deceased when she saw him and another man running up the highway. Upon her offer of assistance, he stopped running and came over to her. She again asked him what was wrong. At that point he said, "My God, that man tried to rob me" or "did rob me," and "I've been stabbed with this" holding the pick in his hand.

We think the challenged statements were made in immediate response to the stimulus of the occurrence and without opportunity to reflect or fabricate. Further, decedent had no motive for fabrication. The time lapse between the completion of the alleged crime, the ensuing chase and the statements made to the witness was negligible.

In our opinion, the challenged statements were spontaneous utterances and were therefore correctly admitted by the trial judge.

Defendant next contends that the trial judge erred by refusing to instruct the jury on the law of self-defense.

[3, 4] The right to act in self-defense is based upon necessity, real or apparent, and a person may use such force as is necessary or apparently necessary to save himself from death or great bodily harm in the lawful exercise of his right of self-defense. A person may kill even though it be not necessary to kill to avoid death or great bodily harm if he believes it to be necessary and he has reasonable grounds for such belief. The reasonableness of his belief is to be determined by the jury from the facts and circumstances as they appeared to the accused at the time of the killing. *State v. Gladden,* 279 N.C. 566, 184 S.E. 2d 249; *State v. Jennings,* 276 N.C. 157, 171 S.E. 2d 447; *State v. Kirby,* 273 N.C. 306, 160 S.E. 2d 24.

[5] The Court is required to charge on all substantial and essential features of a case which arise upon the evidence even

absent a special request for the instruction. *State v. Mercer,* 275 N.C. 108, 165 S.E. 2d 328; *State v. Todd,* 264 N.C. 524, 142 S.E. 2d 154; *State v. Faust,* 254 N.C. 101, 118 S.E. 2d 769; *State v. Brady,* 236 N.C. 295, 72 S.E. 2d 675; *State v. Melton,* 187 N.C. 481, 122 S.E. 17.

When supported by competent evidence, self-defense unquestionably becomes a substantial and essential feature of a criminal case.

[6] In instant case, defendant's counsel requested the Court to instruct on self-defense, and the Court refused to so instruct.

The State's evidence presents testimony which would permit, but not require, the jury to find that: (1) defendant was without fault in bringing on the difficulty, (2) deceased was armed with and first assaulted defendant with a deadly weapon, (3) the fatal blow was struck during a struggle for the weapon first used by deceased and (4) the defendant used such force as was necessary or as appeared to him to be necessary to save himself from death or great bodily harm.

We hold that the evidence in this case was sufficient to require the trial judge to state and apply the law of self-defense to the facts of the case. The Court's failure to so do constituted prejudicial error.

We do not deem it necessary to discuss remaining assignments of error since the questions there presented may not arise at the next trial.

For reasons stated, there must be a

New trial.

WALTER SANDERS, JR., ADMINISTRATOR OF THE ESTATE OF WAVON ATKINSON, DECEASED v. J. FELTON WILKERSON

No. 54

(Filed 10 April 1974)

1. **Easements § 11— license to use land**

A license is not an estate and creates no substantial interest in land but merely serves to authorize one to do certain specified acts upon the lands of the licensor.

2. **Easements § 11— license to remove sand and gravel**

Where plaintiff and defendant executed a written agreement whereby defendant was to remove sand and gravel from plaintiff's property, but the agreement was subsequently declared invalid, defendant's status during the time he removed sand and gravel from plaintiff's property was at least that of a licensee.

3. **Damages § 5; Mines and Minerals § 3— removal of sand and gravel from land — measure of damages**

In the absence of a valid contract as to the basis on which plaintiff was to be compensated for gravel, sand and dirt removed from his land with his knowledge and consent, plaintiff was entitled to recover the value of the gravel, sand and dirt as they lay in the earth before being disturbed.

4. **Trespass § 7— wrongful taking of sand and gravel — estoppel issue — summary judgment improper**

In an action to recover for sand and gravel allegedly wrongfully removed from plaintiff's land by defendant, the trial court erred in entering summary judgment for plaintiff since there were unresolved factual issues with respect to estoppel.

CROSS appeals by plaintiff and by defendant under G.S. 7A-30(2) from the Court of Appeals.

Wavon Atkinson instituted this action in July 1969 (1) for a declaration that a purported contract giving the defendant the right to enter upon plaintiff's land and remove gravel, sand and dirt therefrom is null and void, and (2) for damages for the gravel, sand and dirt defendant *had removed* from plaintiff's land.

The purported contract attacked by plaintiff consists of a writing dated 29 September 1966 by the terms of which Wavon Atkinson and wife, Arletha M. Atkinson, sold and conveyed to J. Felton Wilkerson, his heirs and assigns, "the right to mine, dig and remove all or any part of the soil, ore, gravel, sand, dirt or mineral" situate on their described land in Selma Township, Johnston County, North Carolina.

Subsequent to the filing of plaintiff's amended complaint and defendant's answer thereto, plaintiff moved for partial summary judgment on the issue of the validity of the contract. In support of his motion, he submitted the contract and answers of defendant to interrogatories served upon him by plaintiff. Based on findings that defendant gave no consideration therefor and that it was vague and indefinite as to (1) time of performance, and (2) the area involved, the writing of 29 September

1966 was adjudged null and void by Judge Bailey in partial summary judgment entered 1 October 1970. Upon defendant's appeal, Judge Bailey's partial summary judgment was affirmed. 10 N.C. App. 643, 179 S.E. 2d 872 (1971). Reference is made to Judge Campbell's opinion for the provisions of the writing of 29 September 1966 and for the grounds on which it was adjudged null and void.

The decision of the Court of Appeals was filed 31 March 1971. The original plaintiff having died, Walter Sanders, Jr., Administrator of the Estate of Wavon Atkinson, Deceased, was substituted by order of 7 August 1972 as party plaintiff in this action. Hereafter, the word "plaintiff" will refer to the original or substituted plaintiff according to context.

On 27 October 1972, based solely on defendant's answers filed 29 July 1970 and 9 September 1970 to plaintiff's interrogatories, plaintiff moved for summary judgment (1) that he recover as liquidated damages the sum of $4,484.31, together with the costs of this action, and (2) that he be granted summary judgment on the defendant's counterclaim. After a hearing on this motion for summary judgment and defendant's answer thereto, Judge Canaday entered judgment as follows: (1) " . . . that the plaintiff have and recover of the defendant, the sum of Four Thousand Four Hundred Eighty-Four and 31/100 ($4,484.31) Dollars, with interest thereon from this date until paid, together with the costs of this action"; (2) " . . . that the defendants' counterclaim, being based upon a null and void agreement, be and it is hereby dismissed"; and (3) " . . . that the defendant's motion for dismissal and judgment on the pleadings be and it is hereby denied."

Defendant excepted to each of the three quoted adjudications and appealed. Plaintiff excepted to that portion of the first quoted adjudication which provided for his recovery of interest on the $4,484.31 *only* from the date of judgment.

The Court of Appeals, by a two-to-one vote, affirmed Judge Canaday's judgment in its entirety. Judge Baley dissented. 20 N.C. App. 331, 201 S.E. 2d 571. Both plaintiff and defendant gave notice of appeal to this Court.

L. Austin Stevens for plaintiff appellant-appellee.

Wallace Ashley, Jr. for defendant appellant-appellee.

BOBBITT, Chief Justice.

The hearing before Judge Canaday was on plaintiff's second motion for summary judgment and defendant's answer thereto. The evidence consisted solely of defendant's answers filed 29 July 1970 and 9 September 1970 to the interrogatories filed by plaintiff, this being the same evidence which was before Judge Bailey on 1 October 1970.

Defendant's answers to plaintiff's interrogatories disclosed defendant had collected a total of $8,667.53 from sales of gravel, sand and dirt removed from plaintiff's farm; that the items making up this total of $8,667.53 were collected on various dates during the years 1966, 1967, 1968, and during the first three months of 1969; and that defendant had made payments to plaintiff in the total amount of $4,183.22.

Plaintiff's motion for summary judgment is based on the premise that Atkinson was entitled to all of the $8,667.53 which defendant collected from his sales of gravel, sand and dirt removed from plaintiff's farm. The Court of Appeals, in affirming Judge Canaday's summary judgment for plaintiff, based decision on its view that the liability of defendant to plaintiff was that of a person who had trespassed upon plaintiff's farm and had wrongfully converted to his own use the gravel, sand and dirt he had removed therefrom.

The unresolved questions relate solely to defendant's liability to plaintiff for gravel, sand and dirt which he removed from plaintiff's farm and sold during the years 1966, 1967, 1968, and 1969, all of which occurred prior to plaintiff's attack in this action on the validity of the writing of 29 September 1966.

The writing of 29 September 1966 having been adjudged null and void, neither plaintiff nor defendant can predicate legal rights thereon. Defendant acquired no right, title or interest in plaintiff's farm or in any of the gravel, sand and dirt thereon. Absent a valid writing, defendant could not and did not acquire an easement or profit a prendre. *Council v. Sanderlin,* 183 N.C. 253, 111 S.E. 365, 32 A.L.R. 1527 (1922).

Although defendant acquired no right, title or interest in the gravel, sand and dirt on plaintiff's farm, his allegations and answers to interrogatories are to the effect that he removed

and sold this gravel, sand and dirt with the full knowledge and consent of the plaintiff and made frequent payments to plaintiff of portions of the funds received from such sales. Notwithstanding failure to reach agreement as to the basis on which defendant was to compensate plaintiff, the evidence discloses that the removal of gravel, sand and dirt by defendant from plaintiff's farm continued with plaintiff's knowledge and consent, express or implied, during the years 1966, 1967, 1968 and 1969.

[1] "A license is not an estate and creates no substantial interest in land but merely serves to authorize one to do certain specified acts upon the lands of the licensor. A license operates merely as a permission or waiver permitting the licensee to do acts upon the land which would otherwise be a trespass. A license is generally revocable, while easements and profits a prendre are not." Webster, Real Estate Law in North Carolina, § 310 (1971). *See also,* Restatement of the Law of Property, Chapter 43, Licenses, §§ 512, 514 and 515.

[2] During the years 1966, 1967, 1968, and 1969, defendant's status was at least that of a licensee.

In the absence of a valid contract as to the basis on which he is to be compensated, what is the measure of damages when gravel, sand and dirt are removed from land with the owner's knowledge and consent?

[3] "One who inadvertently, or under a claim of right or a bona fide belief of title, encroaches upon the land of another and mines or removes mineral therefrom, is generally held to be liable in damages only for the minerals removed, based upon their value in situ, that is, as they lay in the earth before being disturbed." 54 Am. Jur. 2d, Mines and Minerals, § 253. *See also,* Annotation, 21 A.L.R. 2d at 383. In certain contexts gravel, sand and dirt have not been considered "minerals." *See Builders Supplies Co. v. Gainey,* 282 N.C. 261, 267-68, 192 S.E. 2d 449, 454 (1972), and cases cited. In the present context, the quoted rule seems appropriate without regard to whether the gravel, sand and dirt should be classified technically as minerals. *See* Dobbs, Law of Remedies § 5.2 (1973). The recovery by plaintiff of the value of the gravel, sand and dirt as they lay in the earth before being disturbed would suffice to compensate plaintiff for what he owned. We adopt this as the measure of damages recoverable by plaintiff in the absence of a valid contract prescribing the measure of plaintiff's right to compensa-

tion. Nothing in the evidence discloses whether compensation on this basis would be more or less than the amount for which summary judgment was entered. However that may be, we hold that plaintiff is not entitled as a matter of law to summary judgment for all money collected by defendant from his sales of gravel, sand and dirt removed by him from plaintiff's farm. On this phase of the case, our views appear to be in substantial accord with those expressed by Judge Baley in his dissenting opinion.

[4] Moreover, defendant is entitled to a factual determination in respect of his allegations of estoppel. If, as alleged by defendant, the gravel, sand and dirt were removed by defendant from plaintiff's farm with plaintiff's full knowledge and consent, and plaintiff, with knowledge of the facts, accepted the amounts paid to him by defendant as the amounts due him under their subsisting arrangements, plaintiff would be estopped to assert a further right to recover therefor.

As a counterclaim defendant alleged that, notwithstanding plaintiff had granted him the exclusive right to remove gravel, sand and dirt from plaintiff's farm, plaintiff had removed or had caused to be removed gravel, sand and dirt, and had sold it or caused it to be sold, and that defendant was entitled to $401.00, this being one-half (½) of the sale price thereof. Since defendant acquired no right, title or interest in the gravel, sand and dirt on plaintiff's farm, we agree with the Court of Appeals that there is no basis for a recovery by defendant on such a counterclaim.

Since the case goes back for trial, we deem it inappropriate to discuss the question raised by plaintiff in respect of interest. Suffice to say, we are in general accord with the views expressed by Judge Morris in her opinion for the Court of Appeals.

Being of the opinion that there are unresolved factual issues, we hold the motion for summary judgment was improvidently granted. Consequently, the summary judgment entered 6 March 1973 by Judge Canaday is vacated; and the cause is remanded to the Court of Appeals with direction to remand to the Superior Court of Johnston County for a determination of all unresolved factual issues pertinent to a determination as to what amount, if any, is owing by defendant to plaintiff.

Error and remanded.

STATE OF NORTH CAROLINA v. VERNON CHARLES TALBERT

No. 32

(Filed 10 April 1974)

1. **Homicide § 31— first degree murder — life imprisonment**
Sentence of life imprisonment was proper for an offense of first degree murder committed prior to 18 January 1973.

2. **Criminal Law § 161— exception to judgment — appellate review**
An assignment of error to the signing and entry of the judgment presents for review only errors appearing on the face of the record proper.

3. **Homicide § 32— first degree murder — absence of error in record**
No error appears in the record in this appeal from a conviction of first degree murder.

APPEAL by defendant from *Bailey, J.*, at the 24 September 1973 Criminal Session of ROWAN.

By an indictment, proper in form, the defendant was charged with the murder of Robert J. Eury, a deputy sheriff of Cabarrus County, on 5 May 1972. The jury returned a verdict of "guilty of murder in the first degree as charged in the indictment." The defendant was sentenced to be imprisoned for life. The only assignment of error is that the court erred in signing and entering the judgment.

Upon motion of the defendant, the case was transferred to Rowan County for trial. It first came on for trial at the September 1972 Criminal Session of Rowan County, a verdict of "guilty as charged" was returned by the jury and the defendant was sentenced to death. On appeal, a new trial was granted for the reason that the form of the verdict would not support a sentence for murder in the first degree. *State v. Talbert,* 282 N.C. 718, 194 S.E. 2d 822.

Upon motion of the defendant, a special venire from Iredell County was summoned for such new trial and a jury selected therefrom returned the verdict, above noted, upon which the sentence to imprisonment for life was imposed and the judgment, from which the present appeal is taken, was entered.

The evidence for the State at the second trial was to the following effect:

On 5 May 1972, at approximately 7:30 p.m., the defendant went to the home of his estranged former girl friend, Pamela Morgan, and demanded to know why she would not continue to have dates with him. He pushed her about the house and attempted to stab her. She escaped from the house and, as she fled to the home of a neighbor, the defendant pursued her and stabbed her in the back. She then telephoned the sheriff's office and requested that an officer be sent to pick up the defendant.

Prior to the arrival of Deputy Eury at the Morgan home, the defendant remained therein or thereabout. He "waved a gun" in the face of the driver of a pickup truck which drove into a neighbor's driveway and, as the truck hastily left the scene, fired a shot in its direction. He then fired one or more additional shots.

At that time, Deputy Eury arrived and entered the carport of the Morgan home. Immediately thereafter he was observed by witnesses, some 150 feet away, standing with his hands raised while the defendant stood two feet behind him with a pistol in his hand. Deputy Eury then got down on his hands and knees in the carport. The defendant, loudly addressing the officer by a vile and obscene term, directed him to crawl to the officer's car. The defendant then squatted down on the floor of the carport with a pistol in each hand. A shot was fired. The defendant then got up and walked to the officer's car, waving both guns in the air and firing several shots. Using the radio in the officer's car, the defendant advised the dispatcher in the Sheriff's Department: "I shot the son-of-a-bitch. He deserved to die. Now come and get me."

At that moment, Deputy Sheriff Compton, who had also been directed by the dispatcher in the sheriff's office to go to the scene, arrived, stopping his car approximately 100 feet from that of Deputy Eury. He observed the defendant in the Eury car holding the microphone of its radio and heard over the radio receiver in his own car the above quoted statement. Deputy Compton ordered the defendant to get out of the car with his hands up. The defendant did so, placing his hands on the top of his head, and walked toward Deputy Compton. As the defendant approached, he vilely cursed Deputy Compton and said: "I shot and killed the son-of-a-bitch. Now shoot me." Arriving within three feet of Deputy Compton, the defendant jerked his hands off his head. Deputy Compton thereupon struck

him on the head with the deputy's pistol, knocked him unconscious and handcuffed him. He then went to Officer Eury who was lying in the carport, face down, bleeding from a gunshot wound above his right temple.

Deputy Eury was taken by ambulance to a hospital where he died. An autopsy revealed that the cause of death was the gunshot wound in the head. Particles in the skin about the wound indicated that the bullet had been fired from a gun within six to ten inches from the officer's head.

Deputy Compton found on the seat of Deputy Eury's car, where he had observed the defendant, two cocked pistols. One was the pistol issued to and customarily carried by Deputy Eury, the other a pistol of the father of the girl, which had been taken from the home without permission.

The defendant testified in his own behalf to the following effect:

He had argued and stabbed Miss Morgan and, thereafter, had gone into the house and taken her father's pistol. He went outside and began shooting in the air. He went back into the house and then again came out as Deputy Eury walked up to the door through the carport. He had the pistol pointed at the officer, who threw up his hands. He told the officer to get down, which the officer did. The defendant then took the officer's pistol and container of mace from him and squatted down beside the officer with a pistol in each hand. At that time, the radio in the officer's car "came on" and the defendant started to get up. One of the pistols fired, the defendant having no intention of firing it. He does not recall whether the pistols were cocked at the time he squatted down beside the officer. He fired two shots in the air to attract attention, yelling, " I shot an officer and he needs help." He went to Deputy Eury's car, took the radio microphone and called for help for the officer. He does not recall making the statement that Deputy Eury deserved to die or referring to him by the offensive epithet. He had no ill feeling or animosity toward Officer Eury and did not order him to crawl, but merely directed him to get down on the carport floor.

The defendant had previously been convicted of breaking and entering, possession of tax paid liquor (sic), public intoxication and resisting arrest. On this occasion, he had been drinking beer but it had no effect whatever on his mental ability and,

at the time of these events, his mind was clear. He had never seen Deputy Eury before and recalls nothing that the officer said to him prior to the shooting. Deputy Eury did not offer any bodily harm to the defendant. The defendant did not curse Deputy Compton.

Attorney General Robert Morgan by Assistant Attorney General O'Connell for the State.

George L. Burke, Jr. and Arthur J. Donaldson for defendant.

LAKE. Justice.

[1] The defendant having been convicted of murder in the first degree and the offense having been committed prior to 18 January 1973, the sentence to imprisonment for life was proper. *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19. Upon the former appeal in this case, we noted that since our decision in *State v. Waddell, supra,* applies prospectively only, "It follows that if defendant should be convicted of murder in the first degree upon a second trial, his sentence will be imprisonment for life." *State v. Talbert,* 282 N.C. 718, 194 S.E. 2d 822.

[2] The defendant's only assignment of error is that the court erred in signing and entering the judgment as it appears of record. This is an exception to the judgment alone and presents for review only errors appearing on the face of the record proper. *State v. Hilton,* 271 N.C. 456, 156 S.E. 2d 833; *State v. Sloan,* 238 N.C. 672, 78 S.E. 2d 738; *State v. Williams,* 235 N.C. 429, 70 S.E. 2d 1; Strong, N. C. Index 2d, Criminal Law, § 161. As we said in *State v. Williams, supra:*

> "This exception presents the one question: Is there error appearing on the face of the record? On this appeal it must be answered in the negative. The court below had jurisdiction. The bill of indictment charges a criminal offense. The verdict is in due form and the sentence pronounced is within the limits permitted by law."

[3] Due to the serious nature of the offense and of the sentence imposed, we have, however, carefully reviewed the entire record and find no error therein. There was no objection to any evidence offered by the State and an examination of the record discloses no basis for any such objection. There was no objection by the State to any evidence offered by the defendant. The

defendant, in his own testimony, acknowledges the shooting and disclaims any justification therefor. The medical evidence is clear and uncontroverted that the shot so fired by the defendant was the cause of death. The defendant's sole contention at the trial was that he did not intend to fire the pistol.

The charge to the jury was clear, precise and a correct statement of the applicable law. The court instructed the jury that it might return any one of five verdicts: Guilty of murder in the first degree, guilty of murder in the second degree, guilty of voluntary manslaughter, guilty of involuntary manslaughter or not guilty. The elements of each offense were clearly explained to the jury and it was specifically and carefully instructed as to what it must find in order to return a verdict of guilty of each such offense.

The testimony of the defendant as to his intentions presented only a question of fact for the jury. The jury obviously did not believe his testimony in that respect. The evidence for the State fully supports the verdict.

No error.

VIOLA PHILPOTT v. ALLEN F. KERNS AND JEAN KERNS

No. 42

(Filed 10 April 1974)

1. Process § 16— nonresident motorists — service through Commissioner of Motor Vehicles — defective summons

The summons in an action against nonresident motorists was patently defective where it was not directed to defendants but to the Commissioner of Motor Vehicles, who was "summoned and notified to appear and answer" the complaint within thirty days after service. G.S. 1-105; G.S. 1A-1, Rule 4(c).

2. Appearance § 2; Rules of Civil Procedure §§ 4, 12— securing extension of time to plead — general appearance — waiver of service of summons

Defendants made a general appearance, thereby submitting themselves to the court's jurisdiction and obviating the necessity of any service of summons, when they secured an enlargement of time in which to plead before asserting their defense that the court had obtained no jurisdiction over their persons by answer or pre-answer motion as provided by G.S. 1A-1, Rule 12(b), (g), and (h)(1).

ON *certiorari*, granted upon plaintiff's petition, to review the decision of the Court of Appeals (18 N.C. App. 663, 197 S.E. 2d 595 (1973), affirming the judgment of *Bailey, J.*, 11 December 1972 Session of DURHAM, docketed and argued in the Supreme Court as Case No. 79 at the Fall Term 1973.

Plaintiff filed this action on 6 October 1972 to recover damages for personal injuries allegedly sustained in Durham, North Carolina, on 8 October 1969 in a collision between her automobile and an automobile owned by defendants, citizens and residents of Florida, and operated by the male defendant. At the time the complaint was filed "Civil Summons" was issued in words as follows:

"STATE OF NORTH CAROLINA
County of Durham

Viola H. Philpott
Against
Allen F. Kerns and Jean Kerns

STATE OF NORTH CAROLINA

"To each of the defendants named below—

GREETING:

Defendant	Address
Serve Commissioner of Motor Vehicles	Department of Motor Vehicles, Raleigh, North Carolina

"YOU ARE HEREBY SUMMONED AND NOTIFIED to appear and answer to the above entitled civil action as follows: a written answer to the complaint must be served upon the plaintiff's attorney within THIRTY DAYS after the service of this summons and a copy thereof must be filed at the office of the undersigned clerk. If you fail to do so, the plaintiff will apply to the court for the relief demanded in the complaint.

"Issued at 11:15 o'clock a.m., this 6 day of October 1972.

W. W. PERRY

W. W. Perry, Plaintiff's Attorney
Post Office Box 884, Durham, N. C.
Address"

SARAH W. GARNER
Deputy Clerk of
Superior Court"

The sheriff made the following "Return of Service" upon the summons:

"I certify that this summons was received on the 16 day of October 1972, and together with the complaint was served as follows:

"On J. W. Garrett, Comm. of Mtr. Veh (Defendant) on the 16th day of October 1972, by leaving a copy with Becky Watkins at the following place: Dept. Mtr Vehicles Office—Sec.

Robert J. Pleasants, Sheriff of
Wake County, N. C.

By: A. E. HADDOCK, Deputy
Date: 16 October 1972"

Upon motion of counsel, on 15 November 1972, defendants obtained from the court a twenty-day extension of time in which to answer or otherwise plead. A copy of this order was mailed to plaintiff's attorney.

On 1 December 1972 defendants filed a motion under G.S. 1A-1, Rule 12(b)(2), (4), and (5) to dismiss the action for lack of jurisdiction over the person of defendants because of insufficiency of process and insufficiency of service of process. They also moved under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. On 12 December 1972 Judge Bailey allowed the motion to dismiss upon the grounds that defendants had not been properly served with summons and the court, therefore, lacked jurisdiction over the person of defendants. Thereafter plaintiff moved to vacate the judgment of dismissal on the grounds that defendants had made a general appearance in the action by procuring an extension of time to plead and that, by virtue of G.S. 1-75.7, the court had jurisdiction of the action even though summons had not been served upon them. Judge Bailey denied the motion to vacate and plaintiff appealed.

The Court of Appeals held that the summons was patently defective; that valid service had not been made upon defendants; that defendants had not made "a general appearance to confer jurisdiction" by obtaining an enlargement of time to plead. It affirmed the trial court's judgment dismissing the action. We allowed plaintiff's petition for certiorari.

Pearson, Malone, Johnson & DeJarmon by W. G. Pearson II and W. W. Perry for plaintiff appellant.

Haywood, Denny & Miller by George W. Miller, Jr., for defendant appellees.

SHARP, Justice.

[1] The Court of Appeals correctly held that the court acquired no jurisdiction over defendants by the service of the summons issued in this case upon the Commissioner of Motor Vehicles. Under G.S. 1-105 (1973 Supp.) in any action for damages against a nonresident which grows out of his operation of a motor vehicle upon the public highways of this State summons may be served upon the nonresident by leaving a copy thereof with the Commissioner of Motor Vehicles and transmitting a copy to the defendant by registered mail. The required contents of a summons are set out in G.S. 1A-1, Rule 4(c), and one of the essential requirements is that the summons "shall be directed to the defendant or defendants."

This summons was patently defective in that it was not directed to defendants but to the Commissioner of Motor Vehicles, who was "summoned and notified to appear and answer" the complaint within thirty days after service. The contents of this summons do not differ materially from the one which we considered in *Distributors v. McAndrews,* 270 N.C. 91, 153 S.E. 2d 770 (1967). In *Distributors* we said:

"The provisions [of G.S. 1-105] are in derogation of the common law and must be strictly complied with. . . . 'Actual notice given in any manner other than that prescribed by the statute cannot supply constitutional validity to it or to service under it.' " *Id.* at 94, 153 S.E. 2d at 772. . .

"They [defendants] did not make a general appearance, and summoning the Commissioner of Motor Vehicles was of no avail. Thus the court obtained no jurisdiction of the persons of the defendants." *Id.* at 97, 153 S.E. 2d at 774.

G.S. 1-105 as presently written became effective 1 January 1970. However, differences in the wording of the statute before and after that date are not material here. The decision in *Distributors* states the law applicable to the summons in this case. There is, however, a material difference between the facts in *Distributors* and the facts of this case.

[2] Defendants in this case, before asserting their defense that the court had obtained no jurisdiction over their persons by answer or pre-answer motion as provided by Rule 12(b), (g), and (h) (1), secured an enlargement of time in which to plead. By so doing they made a general appearance, thereby submitting themselves to the court's jurisdiction and obviating the necessity of any service of summons. *Simms v. Mason's Stores, Inc.* (decided contemporaneously herewith), *ante,* 145, 203 S.E. 2d 769 (1974).

The Superior Court erred in dismissing this action for want of jurisdiction over the person of defendants. The decision of the Court of Appeals affirming its judgment is

Reversed.

STATE OF NORTH CAROLINA v. PRESTON MAYNARD CARLISLE

No. 51

(Filed 10 April 1974)

Automobiles § 2— habitual offender statute — revocation of driver's license — nature of proceeding

Since a driver's license revocation proceeding is not intended to punish the habitual offender of traffic laws but to remove from the highway one who is a potential danger to himself and other travelers, the proceeding is not criminal in nature, and the trial court's judgment which held the habitual offender statute unconstitutional and which was based on a misconception as to the nature of the proceeding was properly reversed by the Court of Appeals.

ON April 2, 1973, the solicitor of the Eighth Solicitorial District instituted this proceeding in the Superior Court of LENOIR County by filing a petition to which was attached an abstract of the "conviction record of Preston Maynard Carlisle" as maintained by the Commissioner of Motor Vehicles. The petition requested that the court issue a citation notifying the respondent to appear in court and show cause, if any he has, why he should not be adjudged an habitual offender whose motor vehicle license should not be revoked as provided in G.S. 20-220-231. The citation, with the petition and conviction record attached, was served on the respondent on May 7, 1973.

The respondent filed answer on May 21, 1973, alleging, "That the Statute under which the State of North Carolina

purports to act is unconstitutional." The respondent moved to dismiss the proceeding for that it was criminal in nature, denied the respondent the right of a jury trial and subjected him to double jeopardy and additional punishment for offenses for which he had already been tried and convicted.

On June 7, 1973, Judge Perry Martin conducted a hearing and entered the following judgment:

> "THIS CAUSE coming on to be heard and being heard before the undersigned Judge of Superior Court at the June, 1973, Session upon the Petition of F. Ogden Parker, Solicitor, Eighth Solicitorial District, and upon the call of said case, the Court having considered the Petition of the State, the evidence presented for the State, and having considered Defendant's motion to dismiss said action, deems that the Statute under which the Solicitor is attempting to proceed is unconstitutional;
>
> "IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that said Statute be, and the same is hereby declared unconstitutional, in that it violates the United States Constitution and the North Carolina Constitution, and it is further ordered that this action be, and the same is hereby dismissed."

The Attorney General for the State excepted to the order and gave notice of appeal. The North Carolina Court of Appeals reversed the decision and remanded the proceeding to the Superior Court of Lenoir County for hearing. The respondent, alleging a serious constitutional question is involved, gave notice of appeal to the Supreme Court.

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

Sasser, Duke and Brown by John E. Duke for defendant appellant.

HIGGINS, Justice.

In order to obtain a license to operate a motor vehicle upon the public highways, the applicant must by examination, satisfy the Department of Motor Vehicles that he is mentally and physically competent to operate a motor vehicle without undue risk to other travelers. The law recognizes that one who has been

found to be competent may lose his competency and become an undue hazard before the date his permit expires. Hence, provision is made for revocation of the license for cause. Thus when the holder of a permit becomes a menace to others on the highways by accumulating such number of convictions for violating safety rules as to disclose that he is an habitual offender, Article 8 of Chapter 20 of the General Statutes (G.S. 20-220-231) makes provision for judicial determination whether proper cause exists for revocation. The permittee has the right of appeal from an adverse judgment.

In *Fox v. Scheidt, Comr. of Motor Vehicles,* 241 N.C. 31, 84 S.E. 2d 259, this Court held:

> "The General Assembly has full authority to prescribe the conditions upon which licenses to operate automobiles are issued, and to designate the agency through which, and the conditions upon which licenses, when issued shall be suspended or revoked. *S. v. McDaniels,* 219 N.C. 763, 14 S.E. 2d 793."

In *Joyner v. Garrett, Comr. of Motor Vehicles,* 279 N.C. 226, 182 S.E. 2d 553, this Court held:

> "Proceedings involving the suspension or revocation of a license to operate a motor vehicle are civil and not criminal in nature, and the revocation of a license is no part of the punishment for the crime for which the licensee was arrested. (Citing authorities.) A license to operate a motor vehicle is not a natural or unrestricted right, nor is it a contract or property right in the constitutional sense. It is a conditional privilege, and the General Assembly has full authority to prescribe the conditions upon which licenses may be issued and revoked. However, once issued, a license is of substantial value to the holder and may be revoked or suspended only in the manner and for the causes specified by statute. (Citing authorities.)"

Our cases offer no support for the view that a revocation proceeding is, in its nature, criminal. The comments of the trial judge in this case, at the time of entering judgment, show his misconception of a revocation proceeding. The record quotes him as saying: "[I]t's [G.S. 20-220, et seq.] a criminal one wherein the respondent has no right to trial by jury . . . ."

The respondent's counsel, in the brief, falls into the same error. A revocation proceeding is intended to withdraw author-

ity to operate a motor vehicle upon a showing that permittee has become a menace to the safety of travel upon the public highway. *Harrell v. Scheidt,* 243 N.C. 735, 92 S.E. 2d 182; *Commonwealth v. Ellett,* 174 Va. 403, 4 S.E. 2d 762 (1940); *Commonwealth v. Funk,* 323 Pa. 390, 186 A. 65 (1936); *Steele v. Road Comm.,* 116 W.Va. 227, 179 S.E. 810 (1935).

The purpose of a revocation proceeding is not to punish the offender, but to remove from the highway one who is a potential danger to himself and other travelers. *People ex rel. Karlin v. Culkin,* 248 N.Y. 465, 162 N.E. 487 (1928).

The Court of Appeals was correct in reversing the judgment entered in the Superior Court of Lenoir County and in remanding this proceeding to the superior court for the hearing contemplated by G.S. 20-220-231.

The decision of the Court of Appeals is correct and is

Affirmed.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

AUMAN v. DAIRY PRODUCTS

No. 32 PC.

Case below: 20 N.C. App. 599.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1974.

BOYER v. BOYER

No. 34 PC.

Case below: 20 N.C. App. 637.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1974.

CITY OF BREVARD v. RITTER

No. 6 PC.

Case below: 20 N.C. App. 380.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 2 April 1974.

CITY OF WINSTON-SALEM v. PARKER

No. 33 PC.

Case below: 20 N.C. App. 634.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1974.

HAMMER v. ALLISON

No. 36 PC.

Case below: 20 N.C. App. 623.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1974.

HARTLEY v. BALLOU

No. 21 PC.

Case below: 20 N.C. App. 493.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 2 April 1974.

JONES v. JONES

No. 30 PC.

Case below: 20 N.C. App. 607.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1974.

LAWING v. JAYNES and LAWING v. McLEAN

No. 27 PC.

Case below: 20 N.C. App. 528.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 2 April 1974.

MANUFACTURING CO. v. UNION

No. 23 PC.

Case below: 20 N.C. App. 544.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1974.

NOLAN v. NOLAN

No. 25 PC.

Case below: 20 N.C. App. 550.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1974.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

OIL CO. v. WELBORN

No. 41 PC.

Case below: 20 N.C. App. 681.

Petition by defendant Ruth Welborn for writ of certiorari to North Carolina Court of Appeals denied 2 April 1974.

POWER CO. v. BOARD OF ADJUSTMENT

No. 35 PC.

Case below: 20 N.C. App. 730.

Petition by Thurston, Crayton and Rutledge for writ of certiorari to North Carolina Court of Appeals denied 2 April 1974.

RUCKER v. HOSPITAL

No. 40 PC.

Case below: 20 N.C. App. 650.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 2 April 1974.

SEARCY v. JUSTICE and LEVI v. JUSTICE

No. 26 PC.

Case below: 20 N.C. App. 559.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1974.

SMITH v. KEATOR

No. 60 PC.

Case below: 21 N.C. App. 102.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1974.

STATE v. ARTIS

No. 37 PC.

Case below: 21 N.C. App. 73.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1974.

STATE v. CLARK

No. 49 PC.

Case below: 21 N.C. App. 35.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1974.

STATE v. COBLE

No. 65.

Case below: 20 N.C. App. 575.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 26 March 1974.

STATE v. McQUEARY

No. 5 PC and No. 35.

Case below: 20 N.C. App. 472.

Petition for writ of certiorari to North Carolina Court of Appeals denied 26 March 1974. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 26 March 1974.

STATE v. MARKHAM

No. 48 PC.

Case below: 20 N.C. App. 736.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1974.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. SCARBOROUGH

No. 31 PC.

Case below: 20 N.C. App. 571.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1974.

STATE v. TYSON

No. 50 PC.

Case below: 21 N.C. App. 100.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1974.

THOMPSON v. WATKINS

No. 38 PC.

Case below: 20 N.C. App. 717.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 2 April 1974.

TRAVEL AGENCY v. DUNN

No. 39 PC.

Case below: 20 N.C. App. 706.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1974.

WATCH CO. v. BRAND DISTRIBUTORS and WATCH CO. v. MOTOR MARKET

No. 67.

Case below: 20 N.C. App. 648.

Motion of plaintiff to dismiss appeal for lack of substantial constitutional question denied 26 March 1974.

STATE OF NORTH CAROLINA v. JAMES PERRY POTTER

No. 60

(Filed 15 May 1974)

1. **Criminal Law §§ 5, 29— mental capacity — defendant under medication — synthetic sanity**

Though defendant was taking a prescribed medication at the time of his trial to control the psychotic symptoms of a paranoid schizophrenic, he was nevertheless capable of understanding the nature and object of the proceedings against him and assisting in his own defense, and defendant's assertion that he was incompetent to stand trial because his mental capacity was one of "synthetic sanity" is without merit.

2. **Criminal Law §§ 29, 63— sanity of defendant — test — evidence as to sanity**

Diagnosis of a defendant's mental condition or disease as "paranoid schizophrenia," standing alone, does not exempt him from legal responsibility for criminal conduct; rather, he is exempt only if insane by reason of his incapacity to know the nature and quality of his acts or to distinguish between right and wrong in relation thereto, and expert testimony in respect of defendant's mental condition or disease is for consideration by the jury along with all other evidence pertinent to the issue raised by the plea of insanity.

3. **Robbery § 6— robbery of two employees — one offense — one judgment**

When the lives of all employees in a store are threatened and endangered by the use or threatened use of a firearm incident to the theft of their employer's money or property, but no employee is injured or killed and no employee's personal property is taken, a single robbery with firearms is committed; therefore, where defendant was convicted of robbing two employees of the same store during one hold-up, and defendant took only money belonging to the employer, two judgments imposing prison sentences of not less than twenty nor more than twenty-five years with the sentences to run consecutively are to be considered as if a single judgment had been entered.

Justice HUSKINS dissenting.

Justice BRANCH joins in the dissenting opinion.

ON *certiorari*, granted on motion of defendant, to review the decision of the Court of Appeals, 20 N.C. App. 292, 201 S.E. 2d 205, which found "No error" in the trial before *Judge Lanier*, and a jury, at the 26 March 1973 Session of WAYNE County Superior Court.

In indictment #73CR535, defendant was charged with the armed robbery of Dallas Mike Hall on 29 December 1972, in which $265.00 was taken from his "presence, person, place of

business, and residence. . . . " In indictment #73CR3557, defendant was charged with the armed robbery of Jack Harrell on 29 December 1972, in which $265.00 was taken from his "presence, person, place of business, and residence. . . . " The two cases were consolidated for trial.

When arrested, defendant was first confined in the Wake County Jail. He was removed to the Wayne County Jail on 12 January 1973.

Upon petition filed 5 February, 1973 by J. Thomas Brown, Jr., Esquire, defendant's court-appointed counsel, Judge Perry Martin ordered that defendant "be committed to Cherry Hospital for not more than 60 days for observation and treatment," and that the Superintendent of Cherry Hospital report his findings to the Clerk of Superior Court of Wayne County.

After the reading of the indictments and the selection of the jury, defendant's counsel "moved the Court to inquire into whether or not the defendant is capable of pleading to the indictments and conducting a rational defense and cooperating with counsel in defense of the charges which have been filed against him." The requested inquiry was conducted by the court in the absence of the previously selected jurors.

The prosecuting attorney offered in evidence a report dated 9 March 1973 signed by Eugene V. Maynard, M.D., Regional Director of Forensic Psychiatry at Cherry Hospital. The report indicates that it reflects the findings and conclusions reached at a conference of "the staff" on 6 March 1973.

The report contains data set forth at length under the following captions: (1) Statistical Data; (2) Past and Social History, as Related by Defendant; (3) Mental Status on Admission; (4) Hospital Course; (5) Physical Examination; and (6) Laboratory Studies.

The report concludes as follows:

"DIAGNOSIS: Schizophrenia, Paranoid Type, In Remission.

"RECOMMENDATIONS: The examination, observation and testing performed in this hospital reveal evidence of a serious mental disturbance known as schizophrenia, paranoid type; however, it is the opinion of this staff that the illness is in such a state of remission as to not interfere with the defendant's competency to stand trial to the charge of armed robbery. Mr. Potter

has demonstrated the capacity to comprehend his position and to understand the nature and object of the proceedings against him. He has the capacity to conduct his defense in a rational manner and to cooperate with his counsel to the end that any available defense may be interposed. It is the opinion of this staff that Mr. Potter should be returned to the court inasmuch as he is competent to plead to the charge against him.

"It is respectfully suggested that Mr. Potter continue on his present medications of Haldol 15 mg three times a day and Artane 5 mg twice a day. He should continue to receive follow-up care and treatment of his mental illness by the appropriate mental health facility relative to the disposition of his charges."

Dr. Maynard was called as a witness by defendant's counsel and examined extensively on direct and cross-examination.

The report and testimony of Dr. Maynard constituted the only evidence before Judge Lanier bearing upon whether defendant was competent to stand trial.

We quote below what appears in the record concerning Judge Lanier's findings that defendant was competent to stand trial.

"COURT: According to the report, the people on the staff say that his condition is in such a state of remission as to not interfere with the defendant's competency to stand trial on the charge of armed robbery; that Mr. Potter has demonstrated the capacity to comprehend his position and to understand the nature and object of the proceedings against him. He has the capacity to conduct his defense in a rational manner and to cooperate with his counsel to the end that any available defense may be interposed. Now that's the opinion of the staff. He was committed under the laws of the State of North Carolina to determine whether he was competent to stand trial. From the evidence, from the reports, he is competent to stand trial. . . .

"The Court finds as a fact that the defendant under order of the Court pursuant to General Statutes 122-91 was committed to Cherry Hospital, Goldsboro, North Carolina, to be evaluated regarding his competency to stand trial to the charges against him on the 6th day of February, 1973; that he was released the 27th day of March, 1973; that he was treated throughout his stay in Cherry Hospital; that he is still under medication; that his mental illness is now in a remission; that the defendant is

mentally competent at this time in all respects to stand trial to the charges against him. It is hereby ordered that the trial proceed."

Thereupon, defendant pleaded not guilty to the indictments and the jurors, who had been previously selected, were recalled from the jury room and sworn and empaneled to try the cases.

Uncontradicted evidence offered by the State tends to show the following. The defendant entered the Convenient Food Market about 8:00 p.m. on 29 December 1972. Hall and Harrell (referred to in the evidence as Horrell), employees of the Food Market, were the only persons in the store when defendant entered. Hall was standing at the counter behind the two cash registers. Harrell was working at a food freezer some twenty-five feet away. Defendant approached Hall and asked for a job, stating that he wanted work as a cashier. Hall advised him there was no vacancy at this store and made suggestions as to where defendant might find a job. During this conversation, Harrell became engaged in a telephone conversation, the telephone being "about six feet from the registers."

When Harrell hung up the telephone, "that's when the defendant started." He drew a revolver from his coat and said, "Freeze, I want all the money." Defendant told Harrell "to get over there," and stated "that he wanted all the money in a brown paper bag and no checks." Hall placed the cash from one register (referred to as No. 1) in a brown paper bag and handed it to defendant. Defendant placed this money in his left coat pocket and walked "less than six feet" to the other cash register (referred to as No. 2) where Harrell was standing. Harrell got the cash from register No. 2 and gave it to defendant. When he came over to cash register No. 2 to get the money, defendant told Harrell: "Old man this gun will kill you," and "[y]ou can call the police if you want to," but "[d]on't follow me or I'll kill you." Defendant put the money from cash register No. 2 in his left coat pocket and ran out the front door. The money taken from both registers totaled approximately $265.00.

Defendant had been in the store at least three or four minutes before he made known his purpose was robbery. Hall testified that defendant appeared to be in his right mind. Harrell testified that defendant appeared to be sane. Both Hall and Harrell testified that they turned the money over to defendant because they were put in fear by defendant's demands and his display of the revolver.

Detective Sergeant R. A. Stocks, of the Goldsboro Police Department, testified that he, along with Captain Floares, brought defendant from the Wake County Jail to the Wayne County Jail on 12 January 1973; that he had known defendant "probably 25 years"; that he observed defendant for approximately two hours before their arrival at the Wayne County Jail; that their conversation was general in nature and did not include any discussion of this case; that after their arrival in Goldsboro, defendant was advised of his constitutional rights, at which time he stated "he wanted a lawyer" and thereupon "all questioning ceased"; that, in his opinion, defendant "was in his right mind" and "was acting like a man in his right mind."

Defendant did not testify. His evidence consisted of testimony of Dr. Maynard; of Robert Potter, defendant's father; and of Ann Bass.

The testimony of Dr. Maynard, summarized except when quoted, is narrated below.

He first saw defendant on 6 February 1973 at Cherry Hospital. His diagnosis of defendant's condition was "paranoid schizophrenia," with a secondary diagnosis of "psychopathic," that is, "anti-social," personality. He testified: "A layman's definition of paranoid schizophrenia would be as follows: Schizophrenia is a mental disease of psychotic depth which is manifested by disorders of behavior, thinking and feeling oftentimes manifested by hallucinations and delusional thinking." Paranoia is usually manifested by feelings or ideas of persecution or grandiosity and by "false ideas of reference."

The first manifestation of delusional thinking observed by Maynard occurred when defendant declared he was "the reincarnation of Jesse James," and that he had robbed the rich and given to the poor as (he thinks) Jesse James did. Maynard testified that defendant demonstrated "paranoid ideation in his feelings towards people who have worldly goods and the poor people, including himself, having been deprived of them all his life." However, he observed that defendant "remembers very well stealing from his own parents when he was a child."

Maynard testified that defendant's idea that he was "the reincarnation of Jesse James," was a manifestation of grandiosity and "was apparently a very important thing to him." In Maynard's opinion, the adoption by defendant of the idea that

he was the reincarnation of Jesse James "would give him the idea of [sic] what he was doing was right when in actuality he knew he was doing wrong."

Maynard testified that "[e]very schizophrenic is an individual," and that, in his opinion, "some clearly know right from wrong and . . . some don't." He testified that in his opinion defendant did know right from wrong; that he formed this opinion on February 19th, about thirteen days after he started treating defendant. He further testified that on February 19th he did not think defendant had reached a sufficient level of competency to be brought back to court to stand trial.

(At this point in Maynard's testimony, defendant "threw a Bible at the witness," and exclaimed: "I told you I'm not crazy. Let me get out before I" (end of statement). The court, after excusing the jury, asked defendant: "Do you think that you can carry on without disrupting the Court?" Defendant answered: "Yes, sir, I don't know what made me do it." Thereupon, the court asked: "Well, do you promise to do that?" Defendant answered: "Yes, sir, I just slipped." Thereupon, the jury was brought in and the testimony of Maynard continued.)

Maynard testified that defendant related to him numerous previous encounters with the law which resulted in his confinement in training school, jails, prisons and mental institutions.

Maynard testified that defendant recounted "terrific tales concerning various hold-ups and things that he ha[d] imagined," and that "[a]pparently this young man has led a life of crime and anti-social behavior since his very early years." Maynard further testified that defendant stated that "he hears the word of his mother who has been dead some time and also hears the voice of God." He further testified that defendant said "he had sold his soul to the devil in 1963 for eternal life" and that there "were directions from the devil giving him instructions as to what he should do. . . ."

Maynard testified that on February 19th defendant made the statement "that he really didn't believe that he was the reincarnation of Jesse James," and that if he continued to believe it "he would probably be in Cherry Hospital for the rest of his life," and "he didn't want to"; but later he repeated his earlier statement that "he really believed that he was the reincarnation of Jesse James and that he had sold his soul to the devil in 1963 for eternal life."

Maynard further testified that he knew defendant had been confined in mental hospitals on three occasions; that on each of these occasions defendant had been diagnosed as "without psychosis" and as "anti-social personality"; and that his records disclose that defendant had been confined in Cherry Hospital in December of 1969 and was found "to have a personality disorder not of psychotic level."

Maynard testified that "[p]sychopathic behavior is not considered a mental disease, but rather a personality disorder"; that "[a]nti-social personalities can function in society" and are found "in every walk of life"; and that "[y]ou do not have a much more serious problem with psychopathic behavior and schizophrenia if the schizophrenia is in remission."

Maynard was then asked and answered the following question:

"Q. Doctor, based on your two months' examination, roughly two months' examination and conferences with Mr. Potter, based on your knowledge of his condition, mental condition or conditions, do you have an opinion as to whether or not on December 29th, 1972 while not on Haldol, the defendant James Perry Potter knew the difference between right and wrong?

"A. Yes, I do.

"Q. What is that opinion?

"A. That he did know right from wrong."

It was stipulated that Dr. Maynard "is a medical expert practicing in the field of psychiatry."

The testimony of Dr. Maynard narrated above was elicited when he was questioned on direct examination by counsel for defendant.

On cross-examination by the solicitor, Maynard testified: "Hearing voices is generally called auditory hallucination." In Maynard's opinion, "normal people have these." Maynard had seen "scars from defendant's cutting himself" and knew defendant had been transferred from State Prison to Dorothea Dix Hospital "because of self-mutilation oftentimes done with a scraped off toothbrush handle." In Maynard's opinion, these episodes of self-inflicted mutilations were designed "[t]o manipulate himself from a prison cell to a hospital."

Maynard testified that in his opinion the anxiety connected with defendant's arrest and confinement prior to his admission to Cherry Hospital "could cause an acute episode of schizophrenia, paranoid type." Based upon his observations and discussions with defendant in Cherry Hospital, Maynard testified that "the defendant displayed the ability to react appropriately to the circumstances in which he found himself at Cherry Hospital"; that "the defendant displayed the ability to coordinate his actions such as eating, smoking, and drinking"; that "he displayed the ability to give responsive answers to your questions and to ask appropriate questions"; that he "displayed the ability to conform to the routine of the hospital and to the routine that was expected of him"; and that the defendant had a good memory "of historical facts, past and present." Maynard testified that defendant had never shown any hostility to him prior to his outburst at trial.

Robert Potter testified that, when "about 7 years old," defendant "fell out of a tree and fell on his head and broke his arm"; that defendant "had a big knot on his head and finally got over it but has never acted right since"; that defendant lived in his home until he was "about 13," at which time "he was sent off to a training school"; that defendant is now "about 27 years old"; that defendant has been married twice; that defendant hadn't stayed in his home "in a year or more"; and that he didn't know "what [his] son [had] been like in over a year."

On direct examination, Robert Potter testified that, based on his association with defendant throughout his lifetime, it was his opinion that defendant was "insane." On cross-examination, when asked what he had in mind as to the legal meaning of the word "insane," he testified as follows: "I define being crazy as insane. I do this by the way a person acts. I mean by insane you can look at his arms there where he sliced himself when he had fits and had spells. He cut himself all to pieces and tried to hang himself right down here in jail one time and being living around him and being with him in his early years, I could tell he was crazy. I do not believe my son knows the difference between right and wrong."

Robert Potter further testified that he had spoken to defendant the morning of the day he testified, at which time they did not talk about "this case" and that defendant did not "ask [him] to testify for [defendant]."

Ann Bass, 19, an adopted daughter of Robert Potter, testified she had known defendant since she was 11; that she had seen him "about 7 or 8 times off and on"; that she had been "in his company and had an opportunity to observe him"; that defendant "does not act like a person who is in his right mind"; and that, in her opinion, defendant is insane. She testified that in her presence defendant talked "about killing himself and killing other people," and that on one occasion defendant cut himself on his arm "at [her] daddy's house" and "sewed it up himself."

On cross-examination, Ann Bass testified that the defendant talked and acted "foolish," and that she thought "that anybody that writes checks and robs people is bound to be crazy." She further testified she had seen defendant and had talked with him "just a few minutes" on the morning of her testimony, and on that occasion defendant "did not tell [her] anything about testifying."

In rebuttal, the State offered the testimony of Harrison and Minshew, the employees of the Sheriff's Department who, on the day of the trial, were charged with the responsibility of bringing defendant to the courtroom. Each testified defendant was placed temporarily in the "bullpen," an area near the courtroom; that a person in the bullpen could see through the window in the front door persons in the hall leading from the courtroom to the bullpen; and that each was standing outside the bullpen, off from the door. Each testified that, about 9:30 a.m., Robert Potter and Mrs. Bass were in the hall; that, when they approached the front door of the bullpen, defendant yelled or called out, "Daddy, you've got to tell them I'm crazy." Harrison also testified that defendant asked his father (1) if he were nervous and (2) if he had seen his lawyer that morning. Each testified that he heard, "through the door," what defendant had said.

In #73CR535 (Hall case), the court pronounced judgment which imposed a prison sentence of not less than twenty (20) nor more than twenty-five (25) years. In #73CR3557 (Harrell case), the court pronounced judgment which imposed a prison sentence of not less than twenty (20) nor more than twenty-five (25) years, this sentence to commence upon expiration of the sentence in #73CR535. Defendant excepted and appealed to the Court of Appeals.

Attorney General Robert Morgan, Assistant Attorney General Myron C. Banks and Associate Attorney Norman L. Sloan for the State.

Sasser, Duke and Brown by J. Thomas Brown, Jr., for defendant appellant.

James Perry Potter in propria persona.

BOBBITT, Chief Justice.

We consider first the assignment of error which challenges the court's ruling that defendant when arraigned and tried had sufficient mental capacity to plead to the indictments and to conduct a rational defense.

"In determining a defendant's capacity to stand trial, the test is whether he has the capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed." 21 Am. Jur. 2d, Criminal Law § 63 (1965); *accord, State v. Propst,* 274 N.C. 62, 70, 161 S.E. 2d 560, 566 (1968); *State v. Jones,* 278 N.C. 259, 266, 179 S.E. 2d 433, 438 (1971); 2 Strong, N. C. Index 2d, Criminal Law § 29.

The uncontradicted evidence is to the effect that, when tested by the rule stated above, defendant had sufficient mental capacity to plead to the indictments and conduct a rational defense. Assuming, *arguendo,* he had such mental capacity at the time of his arraignment and trial, defendant contends it was dependent upon his continued use of prescribed medication to control the psychotic symptoms of a paranoid schizophrenic. Defendant refers to mental capacity under these circumstances as "synthetic sanity" and asserts such a person is mentally incapable of pleading to the indictment and conducting a rational defense.

The Supreme Court of Louisiana considered and rejected the precise contention now made by defendant. The Louisiana statute provided: "Mental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense." In *State v. Plaisance,* 252 La. 212, 210 So. 2d 323 (1968), and in *State v. Hampton,* 253 La. 399, 218 So. 2d 311 (1969), the defendant asserted he was mentally

incapable of pleading and of standing trial in that his "sanity" was "synthetic" because of circumstances closely analogous to those disclosed by the evidence in the present case. Speaking for the Supreme Court of Louisiana, Justice (now Chief Justice) Sanders, in *Hampton,* said:

"The test of present insanity under the above Article is whether the defendant *presently* lacks the capacity to understand the proceedings or to assist in the defense. A defendant who is capable of understanding the nature and object of the proceedings and assisting rationally in the defense is competent to stand trial. [Citations omitted.]

"The members of the sanity commission were the only witnesses to testify at the hearing. In their opinion, defendant can understand the nature of the proceedings and assist in her defense. The record contains no evidence to the contrary. The psychotic symptoms are in remission. That this condition has resulted from the use of a prescribed tranquilizing medication is of no legal consequence. Under the codal test, the court looks to the condition only. It does not look beyond existing competency and erase improvement produced by medical science." *State v. Hampton, supra,* at 403, 218 So. 2d at 312. *Cf. State v. Hancock,* 247 Or. 21, 426 P. 2d 872 (1967); *State v. Rand,* 20 Ohio Misc. 98, 247 N.E. 2d 342 (1969).

[1] The sole question now under consideration is whether defendant was capable of pleading and standing trial at the time of his arraignment and trial. All the evidence tends to show he had sufficient mental capacity at that time to meet the prescribed test. Hence, the court's ruling was proper.

We consider now the assignment of error which challenges the court's denial of defendant's motion at the conclusion of all the evidence for judgment as in case of nonsuit. Defendant's position is based largely on the fact that his mental condition was diagnosed "paranoid schizophrenia" and on Dr. Maynard's testimony (on *voir dire)* that he knew of no cure for schizophrenia or paranoia, although both could be brought into remission by medication. The contention seems to be that a person who has the mental condition or disease diagnosed as "paranoid schizophrenia" lacks legal responsibility for conduct which constitutes a violation of the criminal law when committed by a "normal" person and therefore is not guilty as a matter of law.

In view of the recurrence of trials in which the mental condition of the defendant is diagnosed as "schizophrenia" or "paranoia" or "paranoid schizophrenia," we have set forth the evidence in greater detail to indicate the legal problems these cases present to the jury and to the court.

Defendant's contention that he is exempt from criminal responsibility as a matter of law by reason of mental disease ignores the well established legal test for determining whether a person is exempt from criminal responsibility by reason of insanity. In *State v. Swink,* 229 N.C. 123, 125, 47 S.E. 2d 852, 853 (1948), Ervin, J., restated the rule in this jurisdiction as follows: "[A]n accused is legally insane and exempt from criminal responsibility by reason thereof if he commits an act which would otherwise be punishable as a crime, and at the time of so doing is laboring under such a defect of reason, from disease of the mind, as to be incapable of knowing the nature and quality of the act he is doing, or, if he does know this, incapable of distinguishing between right and wrong in relation to such act." Subsequent decisions in accord therewith include the following: *State v. Creech,* 229 N.C. 662, 674, 51 S.E. 2d 348, 357 (1949); *State v. Spence,* 271 N.C. 23, 38, 155 S.E. 2d 802, 814 (1967); *State v. Jones,* 278 N.C. 259, 266, 179 S.E. 2d 433, 438 (1971); *State v. Humphrey,* 283 N.C. 570, 573-74, 196 S.E. 2d 516, 518-19 (1973); *State v. Helms,* 284 N.C. 508, 513, 201 S.E. 2d 850, 853-54 (1974). 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,* 275 N.C. 108, 117, 165 S.E. 2d 328, 335 (1969); *State v. Atkinson,* 275 N.C. 288, 313-14, 167 S.E. 2d 241, 256 (1969); 2 Strong's N. C. Index 2d, Criminal Law § 5.

When a defendant in a criminal case pleads insanity, the applicable rule with reference to the burden of proof on this issue has been well stated as follows: "Since soundness of mind is the natural and normal condition of men, everyone is presumed to be sane until the contrary is made to appear. This presumption of sanity applies to persons charged with crime, but it is rebuttable. [Citations omitted.] These considerations give rise to the firmly established rule that the burden of proof upon a plea of insanity in a criminal case rests upon the accused who sets it up. But he is not obliged to establish such plea beyond a reasonable doubt. He is merely required to prove his insanity to the satisfaction of the jury. [Citations omitted.]" *State v. Swink, supra,* at 125, 47 S.E. 2d at 853.

Dr. Maynard testified that "every schizophrenic is an individual"; that "some clearly know right from wrong and . . . some don't"; and that, in his opinion, defendant knew the difference between right and wrong on 29 December 1972, the date of the alleged crime(s), without regard to whether he was then under medication. However, the opinion of an expert psychiatrist is not conclusive. As noted in *In re Tew*, 280 N.C. 612, 619, 187 S.E. 2d 13, 18 (1972): "Psychiatry is not an exact science. . . ." Here, in addition to Dr. Maynard's expert testimony, the evidence includes testimony of significant facts bearing upon whether defendant was criminally responsible on 29 December 1972.

The testimony of Hall and Harrell tends to portray defendant as a somewhat nervous person; that defendant entered the store at night at a time when no one was there except the two cashiers; that he got his bearings while making inquiry and getting advice concerning a job; that he wanted all the cash but no checks; and that before walking out he warned the employee(s) of the store not to follow him. Their testimony tends to show a planned robbery, executed with finesse. In their opinion, defendant appeared to be in his right mind. There is no evidence that defendant had identified himself with Jesse James prior to his entering Cherry Hospital on 6 February 1973. The facts recited by him to Dr. Maynard do not point to any incident in which he contributed to the poor the fruits of any robbery or theft he committed.

There was evidence tending to show that, when arrested and advised of his constitutional rights, defendant made no statement except to say that he wanted a lawyer; and that, when brought from Wake jail to Wayne jail, defendant appeared to be in his right mind.

There was evidence tending to show that on the morning of his trial he called upon his father to testify that he was crazy. Too, it might be inferred that his outburst at trial, considered in the light of the evidence that he had not previously shown hostility toward Maynard, was a calculated attempt to convey the impression that he was insane.

[2] We hold that diagnosis of a defendant's mental condition or disease as "paranoid schizophrenia," standing alone, does not exempt him from legal responsibility for criminal conduct; that he is exempt only if insane when tested by the rule stated above;

and that expert testimony in respect of his mental condition or disease is for consideration by the jury along with all other evidence pertinent to the issue raised by the plea of insanity.

The jury decided the issue of insanity against this defendant and found him guilty of the crime(s) charged in the indictments. The evidence fully warranted this verdict.

We have considered above the questions discussed by defendant in his supplemental brief. We refrain from discussing defendant's numerous assignments of error involving rulings on evidence and portions of the court's charge. Suffice to say, we approve the discussion and disposition thereof by Judge Baley in his opinion for the Court of Appeals. Hence, in accord with the Court of Appeals, we find no error with reference to the trial and verdicts.

Defendant has presented in this Court the contention that there was a single robbery and that the verdict(s) will support only one judgment for violation of G.S. 14-87. Although this question was not presented to or discussed by the Court of Appeals, consideration thereof is deemed appropriate since two judgments were pronounced, each imposing a prison sentence of not less than twenty nor more than twenty-five years, with provision that these sentences are to run consecutively.

Each indictment refers to the felonious taking of $265.00 on 29 December 1972. Neither alleges the ownership of the $265.00 to which it refers. Although the reading of the two indictments, *side by side,* leaves the impression each refers to the same $265.00, and that Hall and Harrell were robbed on the same occasion, neither refers to the other. Each indictment is complete.

The evidence discloses *all* of the $265.00 defendant obtained from Hall and Harrell belonged to the Food Market, their employer; and that, on the same occasion, and in the immediate presence of both, defendant, by the *threatened* use of a revolver, first obtained from Hall the cash in register No. 1 and immediately thereafter obtained from Harrell the cash in register No. 2. Although we find no evidence that defendant actually pointed the revolver at Hall or at Harrell, each was put in fear by defendant's threatened use of the revolver. Neither Hall nor Harrell was physically injured in any manner.

The evidence indicates that, when the robbery occurred, Hall had immediate charge of register No. 1 and Harrell had

immediate charge of register No. 2. However, the cash in both registers belonged to their employer. Both Hall and Harrell had custody thereof for their employer and the right to retain possession of *all* of it against robbery or theft.

In the light of the evidence, we hold that the verdicts have the same effect as if defendant had been found guilty after trial on a single indictment which charged the armed robbery of Hall and Harrell on 29 December 1972 in which $265.00 of the money of Food Market, their employer, had been taken from their persons and presence.

In *State v. Ballard,* 280 N.C. 479, 490, 186 S.E. 2d 372, 378 (1972), it is stated: "This case is of first impression in this jurisdiction involving a factual situation in which several employees of a store or other place of business are confronted by armed robbers and the life of each employee is endangered and threatened."

In *Ballard* the defendant was indicted for armed robbery involving the theft of $1501.17 of money belonging to the Great Atlantic and Pacific Tea Company, Inc. The first of two trials was on an indictment which charged, *inter alia,* that the robbery was committed by the use or threatened use of a .38-caliber pistol whereby the "life of Kane Parsons" was threatened and endangered and the $1501.17 was taken from the "person of Kane Parsons." Evidence disclosed that, although Parsons was an employee and in the store when the robbery occurred, the money was actually taken from his fellow employees, namely, Pat Britt and Nolan Smith. Nonsuit was allowed for variance between the indictment and proof. The second trial was upon a new indictment in all respects the same as the first except it alleged that the "lives of Pat Britt and Nolan Smith" were endangered and threatened, and the $1501.17 was taken "from the presence and person of Pat Britt and Nolan Smith."

Defendant was convicted and sentenced. This Court reversed, holding the nonsuit (acquittal) at the first trial precluded further prosecution.

In reaching this conclusion, the Court stated: "Clearly, both indictments and the evidence at both trials relate to what occurred on the same occasion, namely, the robbery of the A & P store on August 21, 1970, allegedly by defendant and two others, perpetrated by endangering and threatening the lives of all employees then present. The evidence, on which Ballard was

convicted at the second trial, tended to show that Ballard was one of three men who entered the store about 8:55 p.m. on August 21, 1970; that Ballard and one of his confederates were armed with and displayed pistols; that, in the perpetration of their crime, the robbers commanded all employees to 'freeze' and for everybody to 'hit the floor,' which commands were promptly obeyed; that the employees in the store who heard and obeyed these commands included Pat Britt, Nolan Smith and Kane Parsons; that, although the money was removed from the immediate presence of Pat Britt and Nolan Smith, all employees in the store were confronted by the robbers and had responsibility for the custody and care of the employer's money; and that the life of each was threatened and would have been further endangered if any one or more of these employees had offered resistance to the armed robbers. We have concluded that this evidence was sufficient to have sustained the conviction of Ballard at the first trial and that the termination thereof in his favor supports his plea of double jeopardy.

"The duty of Kane Parsons to his employer would have required him to intervene to protect the property if he could have done so without further endangering his life. (Kane Parsons testified on *voir dire* that he was the assistant manager of this A & P store.) The fact that he happened to be farther from the property than Pat Britt and Nolan Smith when it was actually taken into possession by the robbers does not negate the fact it was taken from the presence of Parsons and all other employees then on duty in the store."

In *Ballard,* as in the case at hand, no physical injury was inflicted on any employee. Nor was any property taken except that of the employer.

[3] Although double jeopardy and collateral estoppel are not directly involved in the present case, the rationale of *Ballard* is that, when the lives of all employees in a store are threatened and endangered by the use or threatened use of a firearm incident to the theft of their employer's money or property, a single robbery with firearms is committed.

We express no opinion as to factual situations in which, in addition to robbery, an employee is physically injured or killed, or to factual situations in which, in addition to the theft of the employer's money or property, the robber takes money or property of an employee or customer.

The foregoing leads to these conclusions: We find no error in the trial and uphold the verdicts. However, the two verdicts are to be considered the same as a single verdict of guilty of armed robbery. The judgments pronounced are to be considered as if a single judgment were pronounced which imposed a prison sentence of not less than twenty nor more than twenty-five years, subject to credit for time in jail prior to trial. The judgments are so modified.

The cause is remanded to the Court of Appeals with direction to remand to the Superior Court of Wayne County with direction to that court to withdraw its prior commitment(s) and issue a new commitment in conformity with this decision.

No error in trial.

Judgment modified and cause remanded.

Justice HUSKINS dissenting.

I respectfully dissent from that portion of the majority opinion which holds that only one armed robbery was committed.

G.S. 14-87 provides that any person who, (1) having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, (2) whereby the life of *a person* is endangered or threatened, (3) unlawfully takes or attempts to take personal property from another, (4) at any time either day or night, (5) shall be guilty of a felony.

The gist of the offense is the attempt to commit robbery, whether consummated or not, by the use or threatened use of firearms or other dangerous weapon. The force or intimidation occasioned by the use or threatened use of the weapon is the main element of the offense. In such case it is not necessary or material to describe accurately or prove the particular identity or value of the property, provided the indictment shows that the property was that of the person assaulted *or under his care,* and that such property is the subject of robbery and had some value. *State v. Owens,* 277 N.C. 697, 178 S.E. 2d 442 (1971). The offense is complete if there is either a taking or an attempt to take the personal property of another by the use or threatened use of firearms or other dangerous weapon. *State v. Evans,* 279 N.C. 447, 183 S.E. 2d 540 (1971).

We held in *State v. Waddell,* 279 N.C. 442, 183 S.E. 2d 644 (1971) that a variance, between the allegation in the indict-

ment that one person was the owner and in charge of the store from which the property was forcibly taken and the evidence which disclosed that another person owned the store, is not fatal to an indictment which contained all essential averments required by the statute.

In this Court, for the first time, defendant makes the contention that there was but a single robbery and that the verdicts in these cases will support only one judgment for violation of the armed robbery statute, G.S. 14-87. The question was not presented to the Court of Appeals; and since our function is to review decisions of that court for errors of law, the question is not properly before us. Even so, when considered on the merits it is my view that the evidence discloses the commission of two armed robberies on the occasion in question.

Defendant is charged in one indictment with the armed robbery of Dallas Mike Hall and in the other indictment with the armed robbery of Jack Harrell. The evidence discloses that on 29 December 1972 defendant entered a food market in Goldsboro armed with a revolver and by the threatened use of that weapon obtained from Dallas Mike Hall a sum of money in cash register number one which was under Hall's care. Immediately thereafter, and in like fashion, defendant obtained from Jack Harrell an additional sum of money in register number two which was under Harrell's care. Each of these men was put in fear by defendant's threatened use of the revolver. The fact that the cash in both registers belonged to the food market is immaterial. Two robberies were committed, the same as if the money taken had belonged individually to Hall and Harrell, since it is not necessary that ownership of the property be laid in any particular person in order to allege and prove the crime of armed robbery. *State v. Rogers,* 273 N.C. 208, 159 S.E. 2d 525 (1968). The State need only show that it was the property of the person assaulted, *or in his care,* and had some value. *State v. Mull,* 224 N.C. 574, 31 S.E. 2d 764 (1944). The fact that neither victim was injured is immaterial since the gist of the offense is the taking by force or putting in fear with the use or threatened use of a firearm or other dangerous weapon.

Apparently, the majority opinion holds that only one robbery is committed if a robber enters Belk's Department Store and with the use or threatened use of a firearm endangers the life of each Belk employee in charge of the various cash registers, going from register to register, and from floor to floor, and

with the threatened use of the gun obtains from each employee the money in the register under his or her care. This is strange law to which I do not subscribe. I therefore respectfully dissent from this aspect of the majority opinion and vote to affirm the decision of the Court of Appeals.

Justice BRANCH joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. JAMES EDWARD (JIMMY) BRITT

No. 36

(Filed 15 May 1974)

1. **Homicide § 4— premeditation defined**

Premeditation means thought beforehand for some length of time, however short.

2. **Homicide § 4— deliberation defined**

Deliberation does not require brooding or reflection for any appreciable length of time, but imports the execution of an intent to kill in a cool state of blood without legal provocation and in furtherance of a fixed design.

3. **Homicide § 21— premeditation and deliberation — sufficiency of evidence**

The State's evidence was sufficient to allow a legitimate inference of premeditation and deliberation so as to require the trial judge to submit an issue of first degree murder to the jury where it tended to show that there was ill feeling between defendant and the victim because defendant had been "going with" the victim's estranged wife, that on the evening of the shooting defendant told a deputy sheriff that if he could not take care of the victim, defendant could, that defendant purchased a pistol some three to four days prior to the shooting, that defendant took the pistol and a shotgun to the house of the victim's wife, placed the shotgun on the couch where he was sitting and had the pistol on a nearby table, that the victim had his hands raised and was fleeing from defendant when he was shot in the back, and that defendant did not attempt to aid the victim after the shooting.

4. **Criminal Law § 132— motions to set aside verdict and for new trial**

Motions to set aside the verdict and for a new trial on the ground the verdict was contrary to the greater weight of the evidence were addressed to the sound discretion of the trial judge and are not reviewable on appeal in the absence of abuse of discretion, and no abuse of discretion appears in the denial of such motions in this first degree murder case. G.S. 15-174; G.S. 1A-1, Rule 59.

5. Criminal Law § 127— motion for arrest of judgment

No fatal defect appears on the face of the record proper in this first degree murder case which would support defendant's motion for arrest of judgment.

6. Homicide § 20— admissibility of pistol

A .357 magnum pistol was sufficiently connected with a homicide to permit its admission in evidence where defendant testified that he shot the victim with a .357 magnum pistol, and a deputy sheriff testified that he had received the pistol from defendant's wife on the night of the shooting, that it had been in his possession since that time and that it was the weapon described by defendant in his testimony as being the one used in the shooting.

7. Criminal Law § 169— exclusion of evidence — answer not in record

Where the record fails to show what the witness would have testified had he been permitted to answer questions objected to, the exclusion of such testimony is not shown to be prejudicial.

8. Homicide § 15— sustaining of objection — failure to move to strike — absence of prejudice

In this homicide prosecution, defendant was not prejudiced when the court sustained the solicitor's objection to defendant's testimony that he found two bullet holes in the rear screen of the residence in which the shooting occurred, thereby somewhat refuting testimony that the victim was shot as he ran out the front door with his hands raised, where there was no motion to strike the testimony and the trial judge gave no instruction to the jury to disregard the testimony.

9. Constitutional Law § 29; Jury § 7; Criminal Law § 135— jury selection — right to question as to death penalty views

In a first degree murder prosecution, the trial court erred in refusing to allow counsel for defendant and the solicitor to inquire into the moral or religious scruples, beliefs and attitudes of the prospective jurors concerning capital punishment.

10. Criminal Law §§ 120, 135, 138— instructions on punishment — death penalty

While it is not ordinarily the duty of the trial judge in criminal actions to instruct the jury as to punishment, in a capital case there may be a compelling reason which makes disclosure necessary in order to keep the trial on an even keel and to insure complete fairness to all parties; thus, if the trial judge in a capital case observes that the jury is confused or uncertain as to whether one of its permissible verdicts would result in a mandatory death sentence, the trial judge should act to alleviate such confusion or uncertainty by informing the jury of the consequences of their possible verdicts.

11. Criminal Law §§ 120, 135, 138— capital case — duty of court to inform jury as to punishment

When the jury in a first degree murder case returned a verdict of "first degree murder, with mercy," it became apparent that the jurors were confused as to the law and as to their duties as jurors, and the trial judge should have informed them that under the exist-

ing law, neither the jury nor the court had any discretion as to punishment if the jury returned a verdict of guilty of first degree murder.

12. **Criminal Law §§ 102, 135— jury argument on death penalty**

While counsel in a capital case may not argue the question of punishment in the sense of attacking the validity, constitutionality or propriety of the imposition of the death penalty, counsel may inform or remind the jury that the death penalty must be imposed in the event it should return a verdict of guilty upon a capital charge.

APPEAL by defendant from *Bailey, J.*, 27 August 1973 Session ROBESON Superior Court.

Criminal prosecution upon a bill of indictment charging defendant Jimmy Britt with the first degree murder of Clarence Blackwell. Upon his arraignment, defendant, through counsel, entered a plea of not guilty.

The following is a summary of the evidence introduced at the trial. Carl Herring, a deputy sheriff of Robeson County, testified that on 3 May 1973, at about ten o'clock p.m., Jimmy Britt came to his house and reported that Clarence Blackwell had been harassing Blackwell's estranged wife, Carolyn. Defendant offered to give the officer $50 if he would "lock Blackwell up." Deputy Herring told defendant that under the circumstances related to him, there was nothing he could do. He advised defendant to go home, and told defendant that he would follow Mrs. Blackwell to work that night, and if her husband violated any law, he would place him under arrest. Defendant then told the officer that if he (Herring) couldn't take care of it, he (Britt) could. Britt further stated that "he would take care of him and that he was not going to mess her that night like he did the night before." Later, in response to a radio message, Deputy Herring and Deputy Sanderson proceeded to the residence occupied by Carolyn Blackwell and her children. Upon arriving on these premises at approximately eleven o'clock, they found the body of Clarence Blackwell lying face down in the front yard. At that time, the officers observed a wound in Blackwell's back and two wounds in the front of his body. No weapons were found in Blackwell's automobile or near his body. A pocket knife was found in a chair in the living room of the residence. Officer Herring later saw defendant at the hospital where he was being treated for cuts on his hand, arm, stomach and back.

David Blackwell, decedent's ten year old son, testified that he was awakened by a noise on the night of 3 May 1973, and

upon going into the hall, he saw defendant and his father fighting in a chair. He saw his father run out the front door with his hands in the air, and at that time defendant fired a short gun toward the front door. Defendant then picked up a longer gun and left. David said that he found an open pocket knife in the living room which he recognized as his father's knife. He closed the knife and put it under a cushion of the chair in which the two men had been fighting. He did not see his father after he ran out the front door.

Mrs. Neill Watson testified that she lived next door to Mrs. Blackwell on 3 May 1973. On that night at about ten o'clock, she saw defendant's truck and a patrol car stopped down the road. After the patrol car left, she saw defendant's car leave and go toward town. A few minutes later she saw defendant follow Mrs. Blackwell's automobile toward town. They both returned in a short time and entered the Blackwell house. Later she saw Mr. Clarence Blackwell enter the house, and in about three or four minutes Mr. Blackwell ran from the house with his hands upraised. She heard a shot and saw Mr. Blackwell pitch from the porch into the yard. She heard him say, "Oh my God." She observed these latter occurrences from her window next to Mrs. Blackwell's house.

Billy Ray Watson, the fifteen year old son of Mrs. Neill Watson, testified that he saw defendant's truck sitting in the driveway of their yard at about ten o'clock p.m. This driveway led to defendant's house. At that time, a patrolman was sitting about fifty feet down the road. Defendant left immediately after the patrolman. He later saw Mrs. Blackwell and Jimmy Britt enter the Blackwell house at about 10:25 p.m. A short time later he heard a horn blow, and upon going into the front yard, he saw and talked with Mr. Clarence Blackwell. The next time he saw Mr. Blackwell, he was " . . . coming through the front door, he was moving fast. His hands were being held like this. (indicating) They were up in the air, raised. I heard a shot. When I heard it, Mr. Blackwell was right close to the doorsteps. He was on the porch. When I heard the shot, Mr. Blackwell fell forward and I heard him say, 'Oh, my God.' I didn't see him wiggle after he hit the ground. That is basically what happened that night." He was standing at the window by his mother when he saw Mr. Blackwell run from the house.

Dr. Marvin Thompson, a physician specializing in pathology, testified that he performed an autopsy on the body of

Clarence Blackwell. He found an entry wound in his back and two exit wounds in his abdomen. He was unable to say how the single bullet caused the two exit wounds but theorized that the bullet might have split. In his opinion Clarence Blackwell died from a hemorrhage resulting from a gunshot wound.

H. L. Wiggins testified that he sold defendant a .357 magnum pistol three or four days before Clarence Blackwell was shot.

The State rested, and defendant's counsel moved for a dismissal and a directed verdict of not guilty. The Motions were denied.

Defendant, Jimmy Britt, testified that on 3 May 1973, between 9:30 and 10:00 p.m. Clarence Blackwell called him and told him that he was going to kill him and Blackwell's estranged wife, Carolyn. Defendant stated that he went to the police station where he talked to Officer Wesley Baxley. Upon leaving the police station, he talked to an auxiliary policeman named John McLendon. After calling Carolyn Blackwell, he went to see Deputy Sheriff Carl Herring who told him that, "He couldn't go." He then went to Carolyn Blackwell's house and again called the police station. After calling the police station, he returned to the couch where he had been sitting, and at that time Clarence Blackwell burst into the room and began cutting him. Despite his attempts to get away, Blackwell cut him on his back, leg and stomach. While he was being cut, he managed to reach his pistol and shoot Blackwell. He then picked up his shotgun and left, leaving Blackwell crawling out the door. He went to the police station and from there to the hospital. On cross-examination he admitted that he had been "going with" Carolyn Blackwell since March, and that he went to her house on the night of 3 May 1973, armed with a pistol and a shotgun.

Police Officer Burley Hammonds testified that he saw defendant at about ten o'clock p. m. on 3 May 1973. Defendant told him that he was having trouble with Clarence Blackwell and asked him if it was illegal for him to carry a shotgun in his truck. He next saw defendant at about 10:45 p.m. in the police station after defendant had been cut.

John D. McLendon testified that he saw defendant at about 10:00 p.m. on 3 May 1973, and Britt, at that time, told him that a man was threatening to kill him.

Carolyn Blackwell testified that defendant came to her house on the night of 3 May 1973, armed with a shotgun and a pistol. While she and defendant were sitting in the living room, her husband rushed into the room. Defendant picked up his shotgun, and she went to the back of the house. She went to the Britt home but shortly returned and left the premises with her children. She saw something on the ground in front of her house as she was leaving. On cross-examination, she admitted that she had been going with Jimmy Britt since March.

Mrs. Neill Watson was recalled to the stand, and she testified that she could clearly see Blackwell as he ran out of the house.

Defendant rested, and the State recalled Deputy Sheriff Herring who identified a .357 magnum pistol as the weapon which he had obtained from defendant's home. This pistol was introduced into evidence. On cross-examination, Deputy Sheriff Herring stated:

> "I have had an opportunity to examine the Watson home since Court yesterday. It is true that the two windows of that home, on the west side nearest the highway, are boarded up. I went to the open window on the west side of that house and stood in front of it and looked back toward the Blackwell front porch. You can see about half the porch but I could not see the front door. I could see the outer part of the steps but I couldn't see them right up next to the porch. . . . "

Both the State and defendant rested. Judge Bailey denied defendant's Motions for dismissal and a directed verdict of not guilty.

The jury returned a verdict of guilty of murder in the first degree, as charged in the bill of indictment. Defendant appealed from judgment sentencing him to death by asphyxiation.

Attorney General Robert Morgan by Assistant Attorney General James E. Magner, Jr. and Associate Attorney Archie W. Anders for the State.

Johnson, Hedgpeth, Biggs & Campbell by John Wishart Campbell for the defendant appellant.

BRANCH, Justice.

Defendant first assigns as error the action of the trial judge in denying his Motions for "a Judgment of Dismissal" and a directed verdict of not guilty.

The Motion to Dismiss and the Motion for a Directed Verdict of not guilty presented the question of whether the evidence was sufficient to warrant its submission to the jury and to support a verdict of guilty of the offense charged in the indictment. *State v. Cooper,* 275 N.C. 283, 167 S.E. 2d 266. These Motions have the same legal effect as a Motion for Judgment in case of nonsuit. *State v. Glover,* 270 N.C. 319, 154 S.E. 2d 305.

The lodging of these Motions when the indictment charges first degree murder requires the trial judge to determine whether the evidence, when taken in the light most favorable to the State, is sufficient to raise a legitimate inference, and to permit the jury to find that a defendant, after premeditation and deliberation, formed a fixed purpose to kill and thereafter accomplished his purpose. *State v. Johnson,* 278 N.C. 252, 179 S.E. 2d 429; *State v. Perry,* 276 N.C. 339, 172 S.E. 2d 541.

All of the evidence in this case discloses that defendant did intentionally shoot deceased with a deadly weapon thereby proximately causing his death. Defendant's counsel, therefore, properly restricts his argument to the question of whether the evidence was sufficient to permit a jury to find that defendant acted after premeditation and deliberation.

[1] Premeditation means thought beforehand for some length of time, however short. *State v. Johnson, supra; State v. Reams,* 277 N.C. 391, 178 S.E. 2d 65, cert. den. 404 U.S. 840, 30 L.Ed. 2d 74, 92 S.Ct. 133.

[2] Deliberation does not require brooding or reflection for any appreciable length of time, but imports the execution of an intent to kill in a cool state of blood without legal provocation, and in furtherance of a fixed design. *State v. Johnson, supra; State v. Lamm,* 232 N.C. 402, 61 S.E. 2d 188.

"Cool state of blood" does not mean the absence of passion and emotion, but an unlawful killing is deliberate and premeditated if done pursuant to a fixed design to kill, notwithstanding that defendant was angry or in an emotional state at the time unless such anger or emotion was such as to disturb the faculties and reason. *State v. Reams, supra; State v. Faust,*

254 N.C. 101, 118 S.E. 2d 769, cert. den. 368 U.S. 851, 7 L.Ed. 2d 49, 82 S.Ct. 85.

In *State v. Van Landingham,* 283 N.C. 589, 197 S.E. 2d 539, we stated:

> "Ordinarily it is not possible to prove premeditation and deliberation by direct evidence. These facts must be established by proof of circumstances from which they may be inferred. Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are: want of provocation on the part of the deceased; the conduct of defendant before and after the killing; the use of grossly excessive force, or the dealing of lethal blows after the deceased has been felled."

See State v. Walters, 275 N.C. 615, 170 S.E. 2d 484, and *State v. Fountain,* 282 N.C. 58, 191 S.E. 2d 674.

In instant case, there was evidence of ill feeling between defendant and Clarence Blackwell, stemming from defendant's relationship with Blackwell's estranged wife.

On the evening of the shooting, defendant told Deputy Sheriff Herring that he had been to the City Police, talked to them about Clarence Blackwell, and "didn't get no satisfaction." He told the Deputy that if he couldn't take care of Blackwell, he, defendant could. He said that Clarence Blackwell was not going to "mess" Carolyn Blackwell that night like he did the night before. Defendant had purchased the .357 magnum pistol some three or four days prior to the shooting. He took this weapon and a shotgun into Mrs. Blackwell's house, placed the shotgun on the couch where he was sitting and laid the pistol on a nearby table. Defendant testified he shot Clarence Blackwell with the .357 magnum pistol.

Three witnesses testified that Clarence Blackwell had his hands raised and was fleeing from defendant when the shot was fired. Expert medical testimony tended to show that Clarence Blackwell died as a result of a gunshot wound that entered from his back, and that there were no powder burns on deceased's body.

After the shooting, defendant did not attempt to aid the stricken victim, but according to his own testimony, "I cocked the gun and started to shoot him again and thought I better not. He was on the floor at the time and coming after me. I was going

to shoot him." Defendant then walked out of the house carrying the pistol and the shotgun. He testified that he left Blackwell on the floor, "pulling or crawling or something."

[3] This evidence, when taken in the light most favorable to the State, is sufficient to allow a legitimate inference of premeditation and deliberation so as to require the trial judge to submit murder in the first degree to the jury.

The trial court properly refused to grant defendant's Motions for Judgment of Dismissal and a directed verdict of not guilty.

Following the jury verdict of guilty of murder in the first degree, defendant moved that the verdict be set aside as being contrary to the weight of the evidence and the law. This motion was denied. Defendant then moved for a new trial. This motion was also denied.

[4, 5] We find no merit in defendant's contention that the trial judge erred in denying these motions to set aside the verdict and for a new trial on the ground that the verdict was contrary to the greater weight of the evidence. The motions were addressed to the sound discretion of the trial judge, and in the absence of abuse of discretion are not reviewable on appeal. G.S. 15-174; G.S. 1A-1, Rule 59; *State v. Bridgers,* 267 N.C. 121, 147 S.E. 2d 555; *Pruitt v. Ray,* 230 N.C. 322, 52 S.E. 2d 876; *State v. Wagstaff,* 219 N.C. 15, 12 S.E. 2d 657; 6A Moore's Federal Practice, § 59.05(5). No abuse of discretion is shown. Neither do we find any fatal defect on the face of the record proper which would support defendant's motion for arrest of judgment. *State v. Chestnutt,* 241 N.C. 401, 85 S.E. 2d 297; *State v. Higgins,* 266 N.C. 589, 146 S.E. 2d 681.

[6] Defendant next assigns as error the ruling of the trial judge permitting the introduction into evidence of a .357 magnum pistol. He argues that this weapon was not sufficiently connected with the commission of the offense to permit the trial court to admit it into evidence.

Defendant testified that he shot Clarence Blackwell with a .357 magnum pistol. Later on direct examination by defendant's counsel, Deputy Sheriff Herring testified that Britt's wife brought the weapon and a shotgun to him after the shooting.

Thereafter Deputy Herring was called as a rebuttal witness and testified that he received State's Exhibit 4, a .357 magnum

pistol, from defendant's wife on the night of the shooting, that it had been in his possession since that time, and that it was the weapon described by defendant in his testimony as being the one used in the shooting of Clarence Blackwell.

Any object which has a relevant connection with the case is admissible in evidence. *State v. Sneeden,* 274 N.C. 498, 164 S.E. 2d 190; *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506. Thus, weapons may be admitted into evidence when there is evidence tending to show that they were used in the commission of a crime. *State v. Crowder,* 285 N.C. 42, 203 S.E. 2d 38; *State v. Patterson,* 284 N.C. 190, 200 S.E. 2d 16; *State v. Wilson,* 280 N.C. 674, 187 S.E. 2d 22; *State v. Sneeden, supra;* 1 Stansbury's North Carolina Evidence § 118 (Brandis Revision, 1973).

Here the evidence was sufficient to identify State's Exhibit 4 as the pistol used in the commission of the crime charged. Even absent such identification, admission of the exhibit would have been harmless error in view of defendant's testimony admitting that he shot Clarence Blackwell with a .357 magnum pistol. *State v. Wilson, supra.*

[7] Defendant contends that the trial judge erred in two instances by refusing to admit testimony concerning conversations he had with police officers. The record does not disclose what the witness would have said had he been permitted to testify.

> "Where the record fails to show what the witness would have testified had he been permitted to answer questions objected to, the exclusion of such testimony is not shown to be prejudicial. This rule applies as well to questions asked on cross-examination."

State v. Kirby, 276 N.C. 123, 171 S.E. 2d 416. *Accord, State v. Staten,* 271 N.C. 600, 157 S.E. 2d 225. *See* 3 N. C. Index 2d, Criminal Law § 169 and cases there cited.

There is no merit in this contention.

[8] Defendant argues that the trial judge erred in refusing to permit him to testify as to the condition of the rear door of the residence in which the shooting took place.

On redirect examination of defendant, the following occurred:

> "After I got out of the hospital, I made an examination of the back screen. I could see where the bullet went, and

I found the holes in the back screen door, two holes about so far apart through the screen. (indicating)

Q. State whether or not they were there before the shooting if you know.

A. No, sir, they were not.

MR. BRITT: Object.

THE COURT: Sustained."

It should be noted that there was no motion to strike this testimony and that the trial judge gave no instruction to the jury to disregard the testimony. Defendant seems to have successfully placed before the jury testimony which tended to show that the bullet exited from Blackwell's body and went through the back screen, and thereby in some degree refuted the testimony that Blackwell was shot as he ran out the front door with his hands upraised. We see no prejudice to defendant in this ruling.

Defendant contends that the trial judge committed prejudicial error during the voir dire examination of prospective jurors by, in effect, ruling that defendant's counsel could not examine prospective jurors concerning their moral or religious scruples, beliefs and attitudes toward capital punishment.

During the voir dire examination of prospective jurors by Mr. Britt for the State, the following colloquy occurred:

"JUROR: Mr. Solicitor, I wanted to inquire whether if we find this man guilty the death penalty would be involved, as I am against capital punishment and would not vote to convict a person knowing that he would be sentenced to death.

MR. BRITT: The Court will have to answer your question.

THE COURT: Mr. Juror, the question of punishment should be of no concern to you; the jury has nothing to do, whatsoever, with punishment in this or any other criminal case. *The punishment of a person convicted is entirely in the hands of the Court and is no concern of yours.* Does that answer your question?

JUROR: Well, sir, I just wanted the Solicitor to know that I was opposed to capital punishment." (Emphasis ours.)

It was stipulated by counsel for defendant and by the State that in the trial of this cause Judge Bailey ruled that no mention was to be made in the presence of the jury of the fact that this was a capital case or that the death penalty might be imposed.

It is well established by our decisions and the decisions of the federal courts that in a capital case both the State and the defendant may, on the voir dire examination of prospective jurors, make inquiry concerning a prospective juror's moral or religious scruples, his beliefs and attitudes toward capital punishment, to the end that both the defendant and the State may be insured a fair trial before an unbiased jury. *Witherspoon v. Illinois,* 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770; *Swain v. Alabama,* 380 U.S. 202, 13 L.Ed. 2d 759, 85 S.Ct. 824; *Logan v. United States,* 144 U.S. 263, 36 L.Ed. 429, 12 S.Ct. 617; *Turberville v. United States,* 303 F. 2d 411, cert. den. 370 U.S. 946, 8 L.Ed. 2d 813, 82 S.Ct. 1607; *State v. Crowder,* 285 N.C. 42, 203 S.E. 2d 38; *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750; *State v. Honeycutt,* 285 N.C. 174, ... S.E. 2d ..... . A prospective juror's response to such inquiry by counsel may disclose basis for a challenge for cause or the exercise of a peremptory challenge. The extent of the inquiries, of course, remains under the control and supervision of the trial judge.

[9] It was error for the trial judge to refuse to allow counsel for defendant and the Solicitor for the State to inquire into the moral or religious scruples, beliefs and attitudes of the prospective jurors concerning capital punishment.

It is apparent that the decision of the United States Supreme Court in *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726, and our interpretations of the effects of the *Furman* decision as related to punishment in capital cases have created some uncertainty among lawyers, the judiciary, and the general public, the source of the triers of fact in most litigation. It is probable that the enactment by the 1974 General Assembly of Senate Bill 157, "An Act to Amend G.S. 14-17 Murder Defined and Punishment Provided for Murder, Rape, Burglary and Arson," Chapter 1201, Session Laws 1973-74 (effective 8 April 1974), will for a time accentuate this uncertainty. We,

therefore, deem it proper to clarify the law concerning the duty of the trial judge to instruct the jury as to punishment in capital cases, and to further clarify the law as to the right of counsel to argue the question of the death penalty to a jury.

Initially we consider the question of whether the trial judge in a capital case has the duty to instruct the jury on the question of punishment.

During the jury deliberations, the following occurred in open court:

> "THE CLERK: Mr. Foreman, has the Jury agreed upon the verdict?
>
> THE FOREMAN: We have, sir.
>
> THE CLERK: Would the defendant please stand?
>
> (Defendant complies)
>
> THE FOREMAN: First—
>
> THE CLERK: Just a minute, please, sir.
>
> Ladies and Gentlemen of the Jury, how do you find the defendant, James Edward Britt, guilty of murder in the first degree as charged in the Bill of Indictment, or guilty of murder in the second degree, or guilty of voluntary manslaughter, or guilty of involuntary manslaughter or not guilty?
>
> THE FOREMAN: First-degree murder, with mercy.
>
> THE COURT: That is not a possible verdict. The verdict must be either guilty of murder in the first degree *or guilty of whatever you find him guilty of.* The Court will not accept the recommendation of the Jury as to punishment in the matter, *for punishment is entirely for the Court.*" (Emphasis ours.)

The question of whether the trial judge should inform the jury as to the punishment which a verdict would allow or require him to impose was considered by this Court in *State v. Rhodes,* 275 N.C. 584, 169 S.E. 2d 846. In that case, defendant was convicted of rape and the jury recommended life imprisonment. The Court imposed the mandatory life sentence *as then required by G.S. 14-21.* Defendant appealed, contending among

other things that the trial judge committed prejudicial error when in response from an inquiry from the jury, he told the jurors the punishment which could be imposed upon conviction of the lesser offense of assault with intent to commit rape. Holding the Court's action to be nonprejudicial error, this Court, speaking through Justice Sharp, stated:

> "In this jurisdiction, except in one class of cases, the presiding judge fixes the punishment for a convicted defendant within the limits provided by the applicable statute. The exception is capital cases in which the jury may reduce the penalty from death to life imprisonment. G.S. 14-17 (murder in the first degree); G.S. 14-21 (rape); G.S. 14-52 (burglary in the first degree); G.S. 14-58 (arson). In all other instances, the jury has performed its function and discharged its duty when it returns its verdict of guilty or not guilty. *State v. Davis*, 238 N.C. 252, 77 S.E. 2d 630; *State v. Howard*, 222 N.C. 291, 22 S.E. 2d 917; *State v. Matthews*, 191 N.C. 378, 131 S.E. 743.
>
> "... *In the absence of some compelling reason which makes disclosure as to punishment necessary in order 'to keep the trial on an even keel'* and to insure complete fairness to all parties, the trial judge should not inform the jurors as to punishment *in noncapital cases.* If information is requested he should refuse it and explain to them that punishment is totally irrelevant to the issue of guilt or innocence. When, however, such information is inadvertently given, the error will be evaluated like any other." (Emphasis ours.)

At the time *Rhodes* was decided, the trial judge in capital cases was *required* to charge on punishment because of the proviso in G.S. 14-21 which permitted the jury to recommend upon return of their verdict that the punishment should be life imprisonment, thereby fixing the punishment to be imprisonment for life. This accounts for the language in *Rhodes* which states that the trial judge should not inform the jurors as to punishment in "noncapital cases." The reason for this exception in capital cases was removed when the decision in *Furman v. Georgia, supra,* abrogated the right of the jury to recommend life imprisonment. Since the decision in *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19, a conviction in a capital case which occurred after 18 January 1973, requires the mandatory imposition of the death penalty.

Even after the decision in *Furman* and *Waddell,* we have adhered to the general rule stated in *Rhodes* that absent compelling reasons for disclosure the trial judge should not inform a jury as to punishment. *See State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10; *State v. Watkins,* 283 N.C. 504, 196 S.E. 2d 750; *State v. Washington,* 283 N.C. 175, 195 S.E. 2d 534; *State v. Waddell, supra.*

In *State v. Waddell, supra,* we said:

> "The punishment to be imposed for these capital felonies is no longer a discretionary question for the jury and therefore no longer a proper subject for an instruction by the judge."

In *State v. Watkins, supra,* the jury convicted the defendant of murder in the first degree and recommended mercy. Defendant appealed from a sentence of death by asphyxiation. One of defendant's assignments of error was that the trial judge failed to inform the jury that a conviction of murder in the first degree would result in a mandatory sentence of death. The assignment of error was overruled on the ground that no prejudice resulted to the defendant since the death sentence was being vacated by this Court pursuant to the holding in *Waddell* that the death sentence could not be imposed as a result of a capital crime committed prior to 18 January 1973. The murder for which defendant Watkins was convicted occurred on 24 February 1972. The opinion in *Watkins* contained a dictum statement approving the general rule set out in *Rhodes.*

In the case of *State v. Washington, supra,* this Court again approved the general rule that the trial judge is not required to instruct as to punishment. There Judge Brewer with reference to a charge of rape instructed the jury that, "if you return a verdict of guilty of rape, the law provides that the defendant will be put to death in the gas chamber." The rape was committed on 2 August 1972. This Court found the error to be nonprejudicial on the issue of guilt or innocence, and speaking through Chief Justice Bobbitt, in part, stated:

> "In the light of *Waddell,* Judge Brewer should have submitted this case for jury determination solely in respect of whether defendant was guilty or not guilty of rape without referring to the punishment in the event of conviction; and, if convicted, defendant should have been sentenced to imprisonment for life. This is the appropriate procedure

in respect of trials for the crimes of murder in the first degree, rape, burglary in the first degree and arson committed *prior to* 18 January 1973. . . . "

The record in *Washington* does not disclose whether counsel were allowed to inquire of prospective jurors as to their religious or moral convictions and their attitudes toward the death penalty.

We again considered this question in the case of *State v. Henderson, supra.* There defendant was charged with rape and first degree burglary. During the jury deliberations the jury returned to the courtroom and the following exchange took place between the trial judge and the foreman of the jury:

"THE COURT: I understand the jury has a question?

FOREMAN: Yes, sir, we would like further instructions regarding the punishment and whether or not we can make a recommendation.

THE COURT: First of all, I will instruct you the penalty to be imposed is really not your concern. Your function is to pass on the guilt or not guilt as to both counts. So, I will not instruct you on what the penalty will be, that is not a concern of yours. As far as the recommendation is concerned, you cannot make a recommendation. You find him guilty or not guilty according to the evidence and the instructions I have given you."

In *Henderson,* we held that the trial judge properly refused to instruct the jury as to the punishment which would result from a conviction of rape or first degree burglary. Again, the record in *Henderson* does not disclose whether the trial judge precluded counsel from examining prospective jurors concerning their beliefs and attitudes toward capital punishment. It should be noted that the trial judge elected to answer the main inquiry from the jury by explaining to them that they could not make any recommendation. We did not discuss the question of whether such compelling reasons existed as to require disclosure of punishment.

The purpose of an instruction is to clarify the issues for the jury and to apply the law to the facts of the case. *State v. Jennings,* 276 N.C. 157, 171 S.E. 2d 447; *Stern Fish Co. v. Snowden,* 233 N.C. 269, 63 S.E. 2d 557; 7 N. C. Index 2d, Trial § 32. We must always remain advertent to the fact that the para-

mount duty of the trial judge is to control the course of a trial so as to prevent injustice to any party. In the exercise of this duty he possesses broad discretionary powers. *Greer v. Whittington*, 251 N.C. 630, 111 S.E. 2d 912; *Miller v. Greenwood*, 218 N.C. 146, 10 S.E. 2d 708.

It must be borne in mind that at the present time, neither the trial judge nor the jury has discretion in imposing punishment when a person is convicted of a capital crime, *State v. Waddell, supra,* and that in capital cases all prospective jurors may be examined concerning their attitudes toward capital punishment. *State v. Crowder, supra.*

[10] We cannot perceive how the question of instruction concerning the penalty in a capital case can often arise in light of the above-stated principles of law. Nevertheless, we here reaffirm and adhere to the proposition that ordinarily it is not the duty of the trial judge in criminal actions to instruct the jury as to punishment. However, we recognize that in a capital case, there may be a "compelling reason which makes disclosure as to punishment necessary in order 'to keep the trial on an even keel' and to insure complete fairness to all parties. . . . " *State v. Rhodes, supra.* Thus in a capital case if the jury appears to be confused or uncertain, the trial judge should act to alleviate such uncertainty or confusion. Specifically, if the trial judge observes that the jury is confused or uncertain as to whether one of its permissive verdicts would result in a mandatory death sentence, in our opinion, sufficient compelling reason exists to justify his informing the jury of the consequence of their possible verdicts.

[11] In instant case, when the jury returned a verdict of "first degree murder, with mercy," it became apparent that the jurors were confused as to the law and as to their duties as jurors. At that point the trial judge should have informed them that under the existing law, neither the jury nor the Court had any discretion as to punishment if the jury returned a verdict of guilty of first degree murder. The need for such action on the part of the trial judge is underscored by the fact that on two occasions the trial judge used language in the presence of the jury which might well have left the jury with the erroneous impression that he had some discretion in imposing punishment in the event the jury returned a verdict of guilty of murder in the first degree. Further the gravity of this case, and the apparent confusion and uncertainty among the jurors when the un-

accepted verdict was returned, demanded more clarification as to possible verdicts than the statement: "The verdict must be either guilty of murder in the first degree or guilty of whatever you find him guilty of."

[12] Finally, we consider whether counsel may argue to the jury the question of the death penalty in a capital case.

In *State v. Dillard,* 285 N.C. 72, 203 S.E. 2d 6, the defendant was convicted of first degree murder. On appeal, defendant assigned as error the ruling that defendant's counsel could not make an argument to the jury upon the question of punishment. The Court, speaking through Justice Lake, held that there was no error in the Court's ruling that defendant's counsel could not make an *argument* to the jury upon the *question* of the punishment to be imposed.

In his brief in this Court, counsel for Dillard properly, though in our opinion erroneously, argued at length that the imposition of the death penalty upon a defendant lawfully convicted of murder in the first degree was a violation of such defendant's constitutional rights, contending that the death penalty is cruel and unusual punishment as a matter of law. Such an argument to a jury would be improper for the reason that the law of this State is otherwise. Counsel may, in his argument to the jury, in any case, read or state to the jury a statute or other rule of law relevant to such case, including the statutory provision fixing the punishment for the offense charged. G.S. 84-14; *State v. Crisp,* 244 N.C. 407, 94 S.E. 2d 402, 67 A.L.R. 2d 236; Annot. 67 A.L.R. 2d 245. He may not, however, state the law incorrectly or read to the jury a statutory provision which has been declared unconstitutional. *See, State v. Banner,* 149 N.C. 519, 526, 63 S.E. 84. Nor may counsel argue to the jury that the law ought to be otherwise, that the punishment provided thereby is too severe and, therefore, the jury should find the defendant not guilty of the offense charged but should find him guilty of a lesser offense or acquit him entirely.

State v. Dillard, supra, did not hold that counsel, in his argument to the jury, cannot inform or remind the jury that the death penalty must be imposed in the event it should return a verdict of guilty upon a capital charge. Rather *Dillard* stands for the proposition that counsel may not argue the question of punishment in the sense of attacking the validity, constitutionality, or propriety of the imposition of the death penalty.

We do not deem it necessary to consider the remaining assignments of error since they may not arise at the next trial.

For reasons stated, there must be a

New trial.

STATE OF NORTH CAROLINA v. CHRISTOPHER SPICER

No. 25

(Filed 15 May 1974)

1. **Criminal Law § 88— cross-examination to show bias — limitation improper**

Where a State's witness testified that he shared a cell with defendant and defendant admitted to the witness that he committed the robbery and murder in question, the trial court erred in refusing to allow defendant to cross-examine the witness as to who was paying the living expenses of the witness and his wife, neither of whom was working, and who procured a bond for the witness which was reduced from $5,000 to $400, since that evidence might show the witness's bias and have a bearing on his credibility.

2. **Criminal Law §§ 117, 119— accomplice testimony — request for instructions — denial improper**

Where the evidence was sufficient to permit a finding that a witness was an accessory before the fact to the offense of robbery and murder, the trial court erred in failing to comply with defendant's request that the judge charge the jury to scrutinize the witness's testimony, even though defendant withdrew the request, since the withdrawal resulted from pressure by the trial court to do so.

APPEAL by defendant from *Cohoon, J.*, September 3, 1973 Session, NEW HANOVER Superior Court.

The defendant, Christopher Spicer, was charged by grand jury indictments with the armed robbery and murder of Donnie P. Christian. The indictments allege the offenses were committed in New Hanover County on April 5, 1973.

After the defendant's arrest on the charges, the court, upon a showing of indigency, appointed Mathias P. Hunoval attorney for the defendant.

Before arraignment, defense counsel made written motions for a bill of particulars, for discovery, for speedy trial, for a jury from another county, to dismiss for failure of the State

to hold a preliminary hearing, and to grant the defendant a severance from the cases involving Isaac Monk. After hearing on the motions, the court allowed in part the motion for a bill of particulars and for a severance, denied the motion to dismiss, and ordered a venire from Sampson County.

At the September 4, 1973 Session, New Hanover Superior Court, the defendant, Christopher Spicer, was arraigned on bills of indictment charging armed robbery and murder and thereto entered pleas of not guilty. The charges were consolidated for trial. A jury from a Sampson County venire was selected and empaneled. The defendant made and the court denied a motion that the witnesses be sequestered.

The State introduced evidence in material substance as follows: On and prior to April 5, 1973, Donnie P. Christian was Vice President and Office Manager of Christian Foods, Incorporated, a distributor of poultry and restaurant supplies. The place of business was located in the outskirts of Wilmington. The work force consisted of sixteen or seventeen employees. At the close of each work day, Donnie P. Christian placed the cash receipts in a metal box, closed the building, and left the grounds which were surrounded by a woven wire fence. He closed and locked the gate to the enclosure. Usually the cash receipts and checks for that day were taken in the metal box to his home for deposit in the bank the following day.

On April 5, 1973, all employees left the plant at the usual closing time except Donnie P. Christian who remained in the office. At about nine o'clock in the evening, Donald Lee Christian, father of Donnie P. Christian, went to the plant and found his son's automobile at the gate. The lights were on and the motor was running. His son's body was on the ground beside the automobile. The gate was almost closed, but not locked. Donnie was lying in a pool of blood. Pathological examination disclosed a bullet wound under one armpit. The bullet had penetrated the body and lodged under the opposite armpit. The metal box which Donnie customarily carried home on leaving the plant was missing. Examination disclosed the day's receipts consisted of $2,396.51 in cash and $1,697.86 in checks. Donnie was known to have two $100 bills in his pocket for the purpose of paying for a C.O.D. shipment of parts for his automobile.

Detective Howell of the Sheriff's Department examined the area near the gate to the enclosure surrounding the plant. He

discovered automobile tracks in a mud hole near the gate. He made a cast of the automobile tracks which clearly showed the imprint of the tire tread.

Lammuel Rouse, who operated a body and radiator repair shop, testified that on April 12th Isaac Sherill Monk brought a 1968 Chevrolet Impala to his shop for repairs. In the trunk was a used tire. Officers took possession of this tire, examined it, and removed dirt from it. The soil expert testified that the dirt removed from the tire was of the same type and character as the soil in and around the mud hole where the tire track was discovered outside the Christian plant. The witness who made the cast of the track at the mud hole testified that the tread of the tire from Monk's car exactly fitted the imprint made of the track at the mud hole.

On April 16, 1973, Officer Pickler went to the home of the defendant, Christopher Spicer, to serve a warrant of arrest for the robbery. He had a search warrant for narcotics. On a table in Spicer's home he found one $100 bill, three $20 bills, two tens and two fives. He found some .22 long rifle cartridges, some .32 pistol cartridges, and one .308 military cartridge, and some loaded shotgun shells in a bowl in Spicer's house.

Larry Fox testified he saw the defendant and Monk together at 7 o'clock p.m. on April 5, 1973, in Wilmington.

Bertie Brailford testified that he worked at Christian Foods, Inc. Three or four weeks prior to April 5, 1973, Sam Taylor came to his house. "He wanted to borrow some money. . . . [H]e sat down and started talking, and he said that he was up tight for money. So I jokingly said, 'Well, I know where you can get a couple or three thousand dollars . . . if you wanted to.' And he said, 'How?' I told him where I worked and everything, and we went on to discuss about the money, about how my boss came out with the money at night alone. . . . I told him my boss came out of the place at night alone at dark and that he would come out of the gate . . . and lock the gate behind him. . . . Christopher Spicer came by my house looking for Sam. . . . Sam said [addressing the defendant Spicer], 'I want you to listen to what he has to say about where he works.' . . . I told him I worked for Christian Foods. . . . I told him that it was located on North Kerr Avenue . . . and that my boss would come out, usually it was dark . . . . He would be alone, that he would have the money with him . . . . Yes, I told him the money was

in a cash box . . . . I told him my boss would have 2 or 3 thousand dollars. . . . [H]e asked me would he be alone or would he have a gun. I told him no. . . . I told him no, not to my knowledge he didn't have a gun."

Brailford signed a written statement for the police containing the following: "I told Sam that I knew where he could get a couple or three thousand dollars, but I would have to get my cut out of it. Sam asked me how and where and I told him about Donnie Christian leaving the plant at Christian Poultry each night with the cash box containing the money from the daily sales." On cross-examination, Brailford admitted he signed a statement containing the above quoted section. "Yes, this conversation was still a joke . . . ."

Apparently as a result of Brailford's story, the defendant and Monk were charged with robbery and murder.

The State's witness Charles Edward Pennington testified that he was a prisoner for four days in the Wilmington jail charged with robbery (an unrelated offense). He was held in default of $5,000.00 bond. He was placed in the bullpen which was a screened-in section of the jail containing six cells, each with single bunks attached to the wall. During the time Pennington was in jail, he sent for Officer Howell and offered to help him uncover dealers in narcotics. During a conversation, Pennington told Officer Howell that he and the defendant Spicer, his cell mate, had a discussion in which the defendant said: "I was arrested for criminal robbery." "I [Pennington] asked, 'Who was you supposed to have robbed?' And he made some mention of a poultry house. And I said, 'Did you do it?' And he said, 'We did it.' "

On cross-examination, Pennington admitted that, without effort on his part, bond was reduced from $5,000.00 to $400.00 and he was released after he had talked to Officer Howell. When asked why the bond was reduced, he said: "I know nothing at all about it."

The jury was excused and the following appears from the record: On cross-examination the witness Pennington said: "No sir; I am not employed right now. The New Hanover County Sheriff's Department does not pay me a salary. No, sir; they aren't paying for rent on my apartment."

The following also appears from the record: "(It is hereby stipulated by both parties to this appeal that Pennington, along

with his wife and brother, were being held in protective custody in a residence in New Hanover County by New Hanover County Sheriff's Deputies at county expense as a prospective witness for the State in several drug cases.)" The above stipulation was not before the jury. It was entered as a stipulation *by both parties to this appeal.*

After the jury returned, defense counsel continued the cross-examination:

"Q. In January what was your wife doing for a living?

"MR. STROUD: Objection.

"THE COURT: Sustained.

"EXCEPTION No. 61

* * * * * *

"Q. How are you being sustained? How are you clothing yourself?

"MR. STROUD: Object.

"THE COURT: Sustained.

"EXCEPTION No. 62

"Q. Who is paying for your room and accommodations or rent accommodations?

"MR. STROUD: Objection.

"THE COURT: Sustained.

"EXCEPTION No. 63

* * * * * *

"Q. During the days that you had the money can you tell us how you acquired that money?

"MR. STROUD: Objection.

"THE COURT: Sustained.

"EXCEPTION No. 64"

At the conclusion of the State's evidence the court overruled a motion to dismiss.

The defendant introduced two witnesses who were confined in the bullpen during the four days the witness Pennington

was a prisoner. Both testified that Pennington and the defendant were never cell mates.

The defendant also introduced two witnesses who testified that shortly before Spicer's arrest, one of them paid him $85.00 by giving him a $100 bill and taking $15 in change.

Mrs. Spicer testified that at the time her husband was arrested she and her husband were both working. When the officers came to make the arrest she and Christopher were getting together their money for her to use in paying her tuition which was due at the Miller-Motte Business College which she was attending.

At the conclusion of the testimony, defense attorney requested the court to instruct the jury to scrutinize the testimony of accomplice Brailford. After the request was made, the court, defendant, and defense counsel held a conference which is a part of the record and here quoted in full:

"MR. HUNOVAL: I would in addition to what I have orally told the Judge and he has agreed to instruct on, I also request a cautionary instruction regarding accomplices and codefendants.

"THE COURT: Now let me see if I understand you. Do I understand you, Mr. Hunoval, that your defendant requests that the Court's instruction be, or rather, the Court advise the jury in its instructions that the defendant is charged in an additional offense of conspiracy to rob along with the witness Brailford and that your client desires the Court to instruct the jury as to Brailford being an accomplice. Is that what you are asking?

"MR. HUNOVAL: I am withdrawing the request, your Honor.

"THE COURT: The request is withdrawn. I think you have done the right thing, but I am not going to have a defendant tell his attorney to insist on something to go in the record and take the benefit of it and on the other hand turn around and won't say he didn't request it. Now you do not want it in the record to charge with reference to an accomplice or inform them you are charged with Brailford in a conspiracy to rob?

"DEFENDANT: Your Honor, I don't quite understand exactly what this is all about.

"THE COURT: Your attorney understands.

"DEFENDANT: Well, he hasn't explained it to me.

"THE COURT: I understand his request was made because you requested it, not making the request himself primarily.

"MR. HUNOVAL: Your Honor, may I state something for the record and then Mr. Spicer can say whatever he likes to say. Your Honor, I am familiar with the charge of the Court regarding accomplices and codefendants testimony. I informed Mr. Spicer about this prefactory [sic] language that you could use. I also advised him that the Court would have to apprise the jury that there was a charge involving conspiracy.

"THE COURT: Against him if I charge the jury with respect to Brailford being an accomplice.

"MR. HUNOVAL: And then I said, 'There are advantages to having that charge.' The disadvantage, of course, would be the linking—

"THE COURT: Bring before the jury another charge.

"MR. HUNOVAL: And that is why I approached the bench.

"THE COURT: Do you agree now with your attorney of withdrawing the request for the Court to make that instruction?

"DEFENDANT: Can I confer with him for a moment?

"THE COURT: Yes, you can confer with him.

"MR. HUNOVAL: Your Honor, after again talking with my client, my client has reached the conclusion that he would like you to charge in that fashion and he knows that—

"THE COURT: Do I understand your client desires that I instruct the jury that to consider Brailford as an accomplice, if they find he is an accomplice on the charge of conspiracy to rob, your defendant being charged with that same offense?

"MR. HUNOVAL: Your Honor, maybe I am laboring under a misinterpretation of what the law is. But it is my understanding that the charge you would give regarding an accomplice's testimony would be that an extra caution has to be—

"THE COURT: Now wait a minute. An accomplice—Actually Brailford is no accomplice in this case.

"He is not charged with robbery. He is not charged with murder that this man is charged with. He is not an accomplice in this case.

"(Both parties to this appeal stipulate that both Spicer and Brailford were charged with 'conspiracy to commit common law robbery'; and further that Spicer was not placed on trial in this case on that charge—he was on trial only upon the charges of murder and armed robbery.)

"MR. HUNOVAL: Well, your Honor, I would take a different position right or wrong.

"THE COURT: I just want to know. The only way I could instruct on this Brailford it would run the risk of advising the jury that this man is also charged with that offense. Otherwise, he is not an accomplice, which is detrimental, prejudicial to this defendant; and, therefore, I'll not charge upon that because it is detrimental and prejudicial to him and as a lawyer you know it is, and as a lawyer you have already requested that he not be charged upon it. You are only stating now what a defendant says about it.

"MR. HUNOVAL: Your Honor, he doesn't want that charge.

"THE COURT: Is that correct? You do not?

"DEFENDANT: Yes, sir.

"THE COURT: You have finally consented to the right course."

At the conclusion of the court's charge, the jury returned these verdicts: On the charge of robbery with firearms, "We find the defendant guilty as charged." On the charge of murder, "[T]hat Christopher Spicer is guilty of murder in the first degree as charged." The poll of the jury verified the verdicts as above recorded.

The court arrested the judgment on the robbery charge and imposed a death sentence on the charge of murder in the first degree.

The defendant excepted and appealed.

Robert Morgan, Attorney General, by Charles M. Hensey. Assistant Attorney General and C. Diederich Heidgerd, Associate Attorney, for the State.

Chambers, Stein, Ferguson & Lanning by Adam Stein for defendant appellant.

HIGGINS, Justice.

When this Court reverses a conviction on account of the insufficiency of the evidence, the custom is to recite the full substance of the testimony and point out why, in its totality, it is insufficient to support a verdict. However, when a new trial is ordered on account of the erroneous admission or exclusion of evidence, the custom is to recite only so much of the testimony as is necessary to disclose the legal basis for the decision, leaving the trial court at the new trial uninhibited as to other matters.

[1] In this case the trial judge sustained the State's objection to the repeated efforts of defense counsel to find out who was paying the living expenses of the defense witness Pennington and his wife with whom he lived. Pennington testified that the defendant admitted "We did it." He testified the admission was made while he and Spicer were cell mates in the bullpen of the jail. Two inmates testified Spicer and Pennington were never cell mates during Pennington's four day stay in the prison. Someone had procured a bond for Pennington which was reduced from $5,000.00 to $400.00. Pennington claimed not to know who made the arrangements for the reduction. Defense counsel, by cross-examination, sought to find out who was supporting State's witness Pennington and his wife, neither of whom was working. The purpose was to discover to whom the witness was indebted for such favors and to ascertain to what extent the favors colored his testimony against Spicer.

> "The cross-examiner is allowed great latitude in questioning a witness to ascertain his motive for testifying. This is particularly true where the defendant is cross-examining a witness for the prosecution who is a codefendant or accomplice, or who is a person threatened with criminal prosecu-

tion for an independent crime, whose testimony against the defendant may be motivated by a promise or hope of immunity or leniency.

"A witness for the prosecution may also be cross-examined to ascertain whether his testimony was motivated by an expectation or hope of pecuniary gain; . . . " Wharton's Criminal Evidence, Vol. 2, 13th Ed., § 435, 352-354.

This Court's language in *State v. Roberson,* 215 N.C. 784, 3 S.E. 2d 277, is pertinent: "Cross-examination would be of little value if a witness could not be freely interrogated as to his motives, bias and interest, or as to his conduct as connected with the parties or the cause of action. . . . The defendant had a right to have the jury informed as to these matters and to debate before the jury the effect of such circumstances upon the credibility of the witness."

By Assignment of Error XIII, Exception No. 94, the defendant challenges the court's failure to instruct the jury concerning its duty to evaluate accomplice's testimony. The purpose of reciting the full discussion on this question is to disclose the circumstances under which the defendant finally agreed to withdraw the request. The withdrawal occurred only after the court made the inquiry and was assured by counsel that he desired the instruction as to Brailford's testimony. "THE COURT: Now wait a minute. An accomplice—Actually Brailford is no accomplice in this case." True, Brailford was not charged as an accomplice in the murder case, but his evidence permitted the jury to make a finding that he was an accomplice either in the robbery or the murder or both. Then the court should have instructed the jury as to such accomplice's testimony. The court should have, but failed to charge that if the jury found that Brailford was an accomplice, the jury should scrutinize his testimony with care and caution.

"While the court is not required to give the instruction in the exact language of the request, if request be made for a specific instruction, which is correct in itself and supported by evidence, the court must give the instruction at least in substance." *State v. Hooker,* 243 N.C. 429, 90 S.E. 2d 690; *State v. Pennell,* 232 N.C. 573, 61 S.E. 2d 593; *State v. Booker,* 123 N.C. 713, 31 S.E. 376.

"It bears against a witness that he is an accomplice in the crime and he is generally regarded as interested in the event."

State v. Hale, 231 N.C. 412, 57 S.E. 2d 322. *State v. Roberson, supra.*

Failure to give the requested instructions when justified is reversible error. *State v. Bailey,* 254 N.C. 380, 119 S.E. 2d 165.

The record discloses that the State's witness Brailford made the admission to the officers, "I stated that I initiated the proposition concerning the hit of Christian Brothers Poultry. It was my idea." He again stated he expected his cut. Surely this participation would warrant the jury in finding Brailford was an accomplice in the robbery. The charge is required when requested if the accomplice is indicted as, or found by the jury to be, an accomplice. *State v. Booker, supra.* A witness is an accomplice within the rules relating to accomplice's testimony if he is "a principal, as an aider and abettor, or as an accessory before the fact." *State v. Bailey, supra.*

An accessory before the fact is defined by this Court in *State v. Bass,* 255 N.C. 42, 120 S.E. 2d 580, in this way: " 'The concept of accessary before the fact has been held to presuppose some arrangement with respect to the commission of the crime in question . . . . To render one guilty as an accessary before the fact to a felony he must counsel, incite, induce, procure or encourage the commission of the crime, so as to, in some way, participate therein by word or act. . . . It is not necessary that he shall be the originator of the design to commit the crime; it is sufficient if, with knowledge that another intends to commit a crime, he encourages and incites him to carry out his design. . . . ' "

The evidence discloses that the witness Brailford originated the plan to rob his employer and explained the setup at the plant. Brailford testified the defendant came by his house "the last of the week preceding the robbery" and talked to him out on the porch. "He asked me if things were still set up the same way as before at the plant. I told him that they were and he told me that he was going to hit the dude." (Brailford claimed he was joking. He neglected to explain the joke in time to save the life of the man for whom he worked.)

[2] The record discloses evidence sufficient to permit a finding that Brailford was an accessory before the fact to the offense of robbery and murder. At least the evidence was sufficient to require the court to comply with the defendant's request to

charge the jury that upon a finding Brailford was an accomplice, the law required the jury to scrutinize his testimony.

The able and painstaking trial judge in this case, with the best of intentions no doubt, succeeded in pressuring the defendant and his counsel into withdrawing the request for an appropriate instruction with respect to the testimony of the accomplice Brailford. Obviously the judge held the mistaken view that one must be charged by indictment as an accomplice in order to give the accused the benefit of the rule. When requested, the instruction must be given if the jury should find from the evidence that the witness was an accomplice. The trial judge obtained the withdrawal of the request by explaining to the defendant and his counsel that the witness Brailford was not an accomplice. We think the trial judge, because of his mistaken view of the law, exercised too much pressure to make the withdrawal of the request voluntary on the part of the defendant and his counsel.

[1] We conclude the able trial judge should have permitted defense counsel more latitude in finding out by cross-examination how the witness Pennington and his family maintained themselves. The answer might disclose the advantage the witness expected in return for his testimony.

In *State v. Hart,* 239 N.C. 709, 80 S.E. 2d 901, this Court said: "As a consequence, the law decrees that 'any evidence is competent which tends to show the feeling or bias of a witness in respect to the party or the cause,' and that jurors are to consider and weigh evidence of this character in determining the credibility of the witness to whom it relates." If a witness has an interest which may cause bias, the source of the interest is a proper subject of inquiry on cross-examination.

The evidence disclosed that at the time of his death Donnie P. Christian was twenty-seven years of age, six feet tall and weighed one hundred and eighty pounds. His resistance to robbery could not be unexpected. Brailford originated the plan for the robbery. He explained the layout and immediately before the hit, gave assurance the setup at the plant was unchanged.

We conclude the trial court committed error, (1) by sustaining the State's objection to the cross-examination of the witness Pennington as challenged by Assignment of Error III (A), Exceptions Nos. 62, 63, and 64; and (2) by failing to caution the jury to scrutinize the testimony of the State's wit-

ness Brailford if the jury found him to be an accomplice. Assignment of Error XIII, based on Exceptions Nos. 90, 91, 92, and 93.

The perpetrator of this brutal killing and robbery deserves the maximum punishment authorized by law. As a corollary the courts must see to it that the legal rights are accorded to the accused before a conviction is permitted to stand.

For the errors assigned, the defendant is entitled to go before another jury.

New trial.

STATE OF NORTH CAROLINA v. J. C. CASTOR

No. 68

(Filed 15 May 1974)

Constitutional Law § 33; Criminal Law § 48— silence of defendant in presence of State's witness — implied admission of guilt — error

Where defendant was in custody and charged with murder, his silence when a prospective State's witness was brought into his presence and questioned concerning what she had previously related to an officer in the absence of defendant could not be considered an admission of the truth of incriminating statements made by the witness, and the trial court committed prejudicial error in allowing testimony with respect to the confrontation into evidence and in instructing with reference thereto. Constitution of N. C., Art, I, § 23; G.S. 8-54; Constitution of the U. S., Amendments V, XIV.

Justice HUSKINS dissenting.

APPEAL by defendant under G.S. 7A-30(1) from the decision of the Court of Appeals, reported in 20 N.C. App. 565, 202 S.E. 2d 281, which upheld the verdict and judgment in defendant's trial before *Judge Collier*, and a jury, at the 15 November 1971 Session of CABARRUS County Superior Court.

Defendant was indicted, in the form prescribed by G.S. 15-144, for the murder of Pearl Walker on 24 June 1971.

Edith Elaine Crisco (Elaine), age 19, testified she was with defendant and Phillip Scearcy in Scearcy's car on the night of 24 June 1971; that defendant had a sawed-off shotgun and Scearcy had a rifle; that she parked the car down the road from Pearl Walker's house; that defendant left the car and went into

Pearl Walker's house; that she did not hear what occurred inside the house until she heard a woman say, "Lord, have mercy on me," and shortly thereafter, she heard a shotgun blast; and that defendant came out of Pearl Walker's house, with the sawed-off shotgun, and got back in the car with her and Scearcy.

On Friday, 25 June 1971, at approximately 11:30 a.m., J. G. Barrier, an employee of the State Bureau of Investigation, found the body of Pearl Walker on the floor of the living room of her home. She was lying on her back, next to a couch, in a pool of blood. Portions of her home had been ransacked.

A pathologist examined the body of Pearl Walker on 25 June 1971 at 11:45 a.m., approximately twelve hours after her death. He removed pellets and wadding from a shotgun wound which extended into her neck from across her shoulder. In his opinion, this shotgun wound was the proximate cause of her death.

Elaine was arrested on Thursday, 1 July 1971. Barrier talked to her briefly that night and talked to her again on Thursday, 8 July 1971, at which time he took her to the house of Pearl Walker. Barrier testified to statements made to him by Elaine when defendant was not present. This testimony was offered and admitted only for the limited purpose of corroborating her earlier testimony.

A warrant charging Elaine "for accessory after the fact" was issued on Thursday, 1 July 1971, or on Friday, 2 July 1971.

A warrant was issued for the defendant, who was arrested in Jacksonville by Florida officers. He waived extradition and returned voluntarily to Cabarrus County in Barrier's custody.

Testimony admitted over defendant's objection with reference to what occurred when Elaine and defendant, both under arrest and in custody, were brought together by Barrier, will be set forth in detail in the opinion.

Defendant did not testify. He attacked the credibility of Elaine by cross-examination and by witnesses whose testimony tended to contradict her testimony in various respects. Oliver Walker, a witness for defendant, testified he was a grandson of Pearl Walker and that he talked with her at her home about 8:15 a.m. on Friday, 25 June 1971.

In rebuttal, the State offered the testimony of Jack Richardson, a Special Agent for the State Bureau of Investigation, to

the effect Oliver Walker first told the officers he had gone to his grandmother's house on this Friday morning and had talked to her about borrowing some money, but later told the officers he "had lied" when he made that statement.

After Richardson testified, Barrier was recalled for further cross-examination by the defense. Thereupon, defendant announced that he rested.

The State then called as a witness one Brenda Leasor who testified that on 17 June 1971 defendant had told her "they knew where some money was and they were going to get it"; that on Friday, 25 June 1971, he told her "they had done the job"; that he had to shoot "the old Negro woman" because "Phillip [Sceacry] had called his name and that Phillip said he would have to shoot her or she would be able to identify them." The State then recalled Richardson who testified that statements made to him by Brenda Leasor on 1 July 1971 were in substantial accord with her testimony at trial.

After this testimony by Richardson, the State rested, and no further evidence was offered by defendant.

The jury returned a verdict of guilty of murder in the second degree. Thereupon, the court pronounced judgment which imposed a prison sentence of thirty (30) years, subject to credit for time in jail pending trial.

Pursuant to its writ of *certiorari*, the Court of Appeals reviewed the superior court trial as upon (belated) appeal. Upon such review, it found no prejudicial error.

Attorney General Robert Morgan and Assistant Attorney General Richard N. League for the State.

Smith, Carrington, Patterson, Follin & Curtis by J. David James for defendant appellant.

BOBBITT, Chief Justice.

The court admitted, over defendant's objection and motion to strike, the following portion of the testimony of Barrier:

"Q. Did you at any time talk with the witness Elaine Crisco in the presence of the defendant, J. C. Castor?

"A. Yes, sir, I did. This was on July 8, 1971.

"Q. I ask you first what the witness Elaine Crisco said to and in the presence of J. C. Castor?

"A. Miss Crisco was asked several questions in the presence of J. C. Castor, the first one was 'Who went with you to Miss Walker's home,' and she replied that Phillip Scearcy and J. C. Castor went there with her. She was also asked who was in the house when she heard the shot fired, and she stated that J. C. Castor was. We asked her why they went to Miss Walker's house, and she stated for the purpose of robbing the old woman.

"Q. Were these questions asked and answered in the presence of J. C. Castor?

"A. Yes, they were.

"Q. Did he make any denial?

"A. No, sir, he did not."

Defendant assigns as error the admission of this testimony and the instruction in the court's charge with reference thereto, to wit:

"Evidence had [sic] been received which tends to show that a statement accusing the defendant of the crime charged in this case was made in his presence and the defendant neither denied or objected to the statement. This evidence should be considered by you with great caution [sic] before you may consider the defendant's silence on this as evidence of his guilt, you must find first that the defendant—that the statement was in fact made in the hearing of the defendant, second, that he understood it and that it contained an accusation against him and third, that all the circumstances including the content of the statement and the identity of the person making it in the other person's presence was sufficient to make a reply natural and proper and fourth, that the defendant had an opportunity to reply. Unless you find all these things to be present you must completely disregard this evidence. If you find all these things to be present you may consider the defendant's silence together with all other facts and circumstances in this case in determining the defendant's guilt or innocence."

Ordinarily, whether the defendant's failure to deny an accusatory statement made in his presence may be considered an implied admission of the truth thereof is to be determined by legal principles established by decisions of this Court reviewed

in *State v. Temple,* 240 N.C. 738, 83 S.E. 2d 792 (1954), and in *State v. Guffey,* 261 N.C. 322, 134 S.E. 2d 619 (1964). *See* 2 Stansbury's North Carolina Evidence, Brandis Rev., § 179.

"[A]n admission or confession, even where it may be implied by silence, must be voluntary. Any circumstance indicating coercion or lack of voluntariness renders the admission incompetent." *State v. Guffey, supra,* at 324, 134 S.E. 2d at 621.

In *State v. Dills,* 208 N.C. 313, 180 S.E. 571 (1935), the appellants, when under arrest upon a charge of murder, were forced by officers to hear read affidavits of codefendants which accused them of complicity in the crime. The State contended the appellants' silence when confronted by these accusations constituted an implied admission that the accusations were true. Rejecting this contention, the Court awarded a new trial for error in admitting this evidence. It was held that the circumstances disclosed coercion and lack of voluntariness. The following excerpt from the opinion of Justice Schenck is pertinent to the present case: "[I]f the accusations were true, the appellants had one of three courses to pursue, either admit their truth and thereby admit their own guilt, or deny them and thereby make false statements, or remain silent. We think in remaining silent the appellants acted within their legal rights, since no man should be forced to incriminate himself, or to make false statements to avoid doing so." *Id.* at 315, 180 S.E. at 572.

In *State v. Virgil,* 263 N.C. 73, 138 S.E. 2d 777 (1964), the defendant, under arrest for burglary, was taken by an officer to the hospital room of one Evans. The officer testified that the defendant failed to deny incriminating statements made by Evans in defendant's presence. Under these circumstances, it was held that defendant's silence did not constitute an implied admission of the truth of the incriminating statements, and that the officer's testimony as to Evans's statements (declarations) was incompetent and the admission thereof was prejudicial error.

In *State v. Fuller,* 270 N.C. 710, 155 S.E. 2d 286 (1967), the court admitted over objection the testimony of an officer with reference to incriminating statements made by the defendant when in custody charged with murder. The testimony disclosed that the statements attributed to the defendant were made after officers confronted him with a State's witness who made accusatory statements in the defendant's presence. The court's

findings after a *voir dire* hearing included a finding that "he [the defendant] was advised by the officers that anything he said or did not say in response to anything said by Margaret Campbell could be used for or against him." This Court, in an opinion by Justice Pless, noted the holding in *Miranda v. Arizona,* 384 U.S. 436, 444, 16 L.Ed. 2d 694, 707, 86 S.Ct. 1602, 1612 (1966), that, prior to any questioning, a person in the custody of law enforcement officers must be warned *inter alia* "that he has a right to remain silent, that any statement he does make may be used as evidence against him. . . . " The defendant was awarded a new trial on the ground the admission of his incriminating statements after he had been advised "that anything he said or *did not say* in response to anything said by Margaret Campbell *could be used for or against him,*" (our italics) violated defendant's constitutional privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States, made applicable to the States by the Fourteenth Amendment, *Malloy v. Hogan,* 378 U.S. 1, 12 L.Ed. 2d 653, 84 S.Ct. 1469 (1964), and Article I, Section 11 (now Section 23), of the Constitution of North Carolina.

Defendant was in custody, charged with the murder of Pearl Walker, when Elaine was brought into his presence and questioned concerning what she had previously related to Barrier in the absence of defendant. Defendant was not then represented by counsel and had not been advised of his constitutional rights. However, decision is not based on either of these circumstances. The crucial fact is that he exercised his constitutional right to remain silent.

The constitutional right against self-incrimination which defendant exercised by remaining silent when Elaine made accusatory statements when questioned by Barrier in defendant's presence is the same constitutional privilege against self-incrimination he exercised at trial when he did not testify after Elaine had testified to substantially the same effect. Adverse comments on a defendant's failure to testify at trial are impermissible under North Carolina law, Constitution of North Carolina, Article I, Section 23, N.C.G.S. § 8-54, and under the Fifth and Fourteenth Amendments to the Constitution of the United States, *Griffin v. California,* 380 U.S. 609, 14 L.Ed. 2d 106, 85 S.Ct. 1229 (1965). *A fortiori,* a defendant's failure to testify may not be considered an admission of the truth of testimony which tends to incriminate him. Similarly, under the circum-

stances disclosed by the evidence herein, defendant's silence in the rightful exercise of his privilege against self-incrimination may not be considered an admission of the truth of incriminating statements made in defendant's presence by a prospective State's witness in response to an officer's questions.

The Court of Appeals held that error in the admission of the challenged testimony and in the court's instruction with reference thereto was harmless beyond a reasonable doubt and therefore defendant was not "sufficiently prejudiced" to warrant a new trial. This conclusion is based upon its application of the doctrine stated by Justice Huskins in *State v. Taylor*, 280 N.C. 273, 280, 185 S.E. 2d 677, 682 (1972), as follows:

"Every violation of a constitutional right is not prejudicial. Some constitutional errors are deemed harmless in the setting of a particular case, not requiring the automatic reversal of a conviction, where the appellate court can declare a belief that it was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824, 24 A.L.R. 3d 1065 (1967); *Harrington v. California*, 395 U.S. 250, 23 L.Ed. 2d 284, 89 S.Ct. 1726 (1969). Unless there is a reasonable possibility that the evidence complained of might have contributed to the conviction, its admission is harmless. *Fahy v. Connecticut*, 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229 (1963)."

Although our conclusion differs from that of the Court of Appeals, nothing stated herein should be interpreted as a departure from the quoted statement.

The fact that, exclusive of the erroneously admitted evidence, there was plenary evidence to support the verdict is not determinative. The test is whether, in the setting of this case, we can declare a belief that the erroneously admitted evidence was harmless beyond a reasonable doubt, that is, that there is no reasonable possibility the admission thereof might have contributed to the conviction.

The statements of Elaine when questioned by Barrier in defendant's presence do not relate to incidental or peripheral features of the case. On the contrary, the facts related therein, if true, were sufficient to establish that defendant was the person who committed the crime charged in the indictment. If considered an admission of the truthfulness of these statements, defendant's silence would be the equivalent of a confession of guilt. Under these circumstances, it seems probable the chal-

lenged evidence contributed substantially to the conviction of defendant. Certainly we cannot say there is no reasonable possibility that it contributed significantly to defendant's conviction. Hence, the erroneous admission of this evidence was prejudicial, *not* harmless beyond a reasonable doubt.

For error in admitting the challenged testimony and in the instruction with reference thereto, defendant is entitled to a new trial. Accordingly, we reverse the decision of the Court of Appeals and vacate the verdict and judgment of the superior court. The cause is remanded to the Court of Appeals with direction that it be remanded to the Superior Court of Cabarrus County for a new trial.

Reversed and remanded.

Justice HUSKINS dissenting.

When a defendant is in custody under circumstances requiring the custodial officers to advise him of his constitutional rights as mandated in *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), evidence of silence as an admission of guilt is clearly inadmissible. I regard decisions of this Court on "in-custody silence" prior to *Miranda* as no longer authoritative. I therefore fully agree with the majority opinion that the challenged testimony in this case was erroneously admitted. Even so, I share the conclusion reached by the Court of Appeals that its admission was harmless beyond a reasonable doubt.

In the evidentiary setting of this case, I see no reasonable possibility that the evidence complained of might have contributed to defendant's conviction. Edith Elaine Crisco testified from the witness stand that she was with defendant and one Phillip Scearcy in Scearcy's car on the night Pearl Walker was murdered; that she parked the car on a road near the victim's house and defendant left the car and entered the house carrying a sawed-off shotgun; that she heard a woman say, "Lord, have mercy on me," and shortly thereafter heard a shotgun blast; that defendant came out of the house with the sawed-off shotgun, and reentered the car with her and Scearcy. The pathologist who examined the body of Pearl Walker approximately twelve hours later removed pellets and wadding from a shotgun wound in the victim's neck. It is undenied that a shotgun wound was the cause of death.

Brenda Leasor testified from the witness stand that one week before the murder defendant told her "they knew where some money was and they were going to get it"; that on the day following the murder defendant told her "they had done the job"; that he had to shoot "the old Negro woman" because "Phillip [Sceacy] had called his name and that Phillip said he would have to shoot her or she would be able to identify them." S.B.I. Agent Richardson testified that statements made to him by Brenda Leasor in his investigation of the crime were in substantial accord with her testimony.

In the face of such damning evidence, it is unrealistic in my view to award a new trial because S.B.I. Agent Barrier was erroneously allowed to testify that he talked to Elaine Crisco in the presence of this defendant two weeks after the murder and that she made statements substantially in accord with the very things she swore at the trial and defendant made no denial but remained silent. In some cases, and this is one of them, the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the improperly admitted evidence is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improperly used evidence did not contribute to the conviction and was therefore harmless error. *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); *Fahy v. Connecticut,* 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229 (1963). In my judgment, the minds of an average jury would not have found the State's case significantly less persuasive had Barrier's incompetent testimony been excluded. In the language of Mr. Justice Douglas in *Harrington v. California,* 395 U.S. 250, 23 L.Ed. 2d 284, 89 S.Ct. 1726 (1969), the evidence of guilt "is so overwhelming that unless we say that no violation of *Bruton* can constitute harmless error, we must leave this . . . conviction undisturbed." In the *Harrington* case the constitutional error consisted of the admission in evidence at Harrington's trial of a confession by a codefendant who did not testify, implicating Harrington. Since the evidence supplied through the erroneously admitted confession was merely cumulative and other evidence of Harrington's guilt was overwhelming, as here, it was held that admission of the codefendant's confession was harmless beyond a reasonable doubt. To like effect is *Milton v. Wainwright,* 407 U.S. 371, 33 L.Ed. 2d 1, 92 S.Ct. 2174 (1974).

Consistent decisions of this Court, holding 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, include *State v. Taylor,* 280 N.C. 273, 185 S.E. 2d 677 (1972) ; *State v. Barbour,* 278 N.C. 449, 180 S.E. 2d 115 (1971) ; *State v. Swaney,* 277 N.C. 602, 178 S.E. 2d 399 (1971) ; *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969). "Verdicts and judgments are not to be lightly set aside, nor for any improper ruling which did not materially and adversely affect the result of the trial." *State v. Bovender,* 233 N.C. 683, 65 S.E. 2d 323 (1951).

Every defendant is "entitled to a fair trial but not a perfect one." *Lutwak v. United States,* 344 U.S. 604, 97 L.Ed. 593, 73 S.Ct. 481 (1953). I think this defendant had a fair trial and that the error complained of was harmless. The verdict itself is some evidence of that fact since, notwithstanding the overwhelming evidence of first degree murder, he was only convicted of murder in the second degree. I vote to uphold the verdict and judgment and respectfully dissent from the majority opinion awarding a new trial.

STATE OF NORTH CAROLINA v. JAMES ERNEST BRUNSON

No. 31

(Filed 15 May 1974)

1. **Criminal Law § 31— judicial notice of calendar**

The law requires the courts to take judicial notice of the days, weeks, and months of the calendar.

2. **Criminal Law § 80— record entries of business or governmental agency — admissibility**

If entries are made in the regular course of business at or near the time of the transaction involved and are authenticated by a witness who is familiar with them and the system under which they are made, the entries are admissible in evidence; the same rule applies to records of governmental agencies.

3. **Criminal Law § 80; Homicide § 20— school attendance record of defendant — admissibility**

The trial court in a murder prosecution erred in refusing to permit the custodian of school attendance records to use the regular calendar for February 1972 and to point out to the jury the relation-

ship between the attendance record and the February calendar, since such testimony would have indicated that the attendance record showed defendant neither absent nor tardy on the day of the murder and would have been of probative value on a controverted issue of fact.

APPEAL by the defendant from *Braswell, J.*, October 22, 1973 Criminal Session, CUMBERLAND Superior Court.

The defendant, James Ernest Brunson, was charged by grand jury indictment with the murder of Vanessa Dale Lewis.

The evidence disclosed that Vanessa Dale Lewis, age nine years, at about 8:20 on the morning of February 22, 1972, passed the residence of Annie Houston, as was her custom, on the way to Walker Elementary School in Fayetteville. Usually she accompanied Mrs. Houston's children, but on that day they had already left and Vanessa followed, running in an effort to overtake them.

Mr. Marvin McGathy passed by his old, abandoned house located near the Walker Elementary School at about 9:00 a.m. He discovered Vanessa lying on the floor in a pool of blood, her clothes strown about the floor and her books and lunchbox nearby. She made a struggling sound. Two of her teeth were on the floor and her brain was exposed. Mr. McGathy notified the police. The ambulance took her to the hospital where she died a few minutes after arrival.

The pathologist, as a witness for the State, testified that Vanessa's skull was fractured and her brain exposed as a result of blows from a blunt instrument. Some of her teeth were missing. Three were removed from her stomach during the autopsy.

The officers received the call at 9:30 a.m. and reported to the scene where they released a bloodhound. The dog immediately set out on a trail and at a point about twenty-five yards from the house, the dog, leaving the trail, turned sharply to the right through underbrush for about twenty-five yards and stopped at a big bush. The officers found a hammer with fresh blood on it concealed in the bush.

Officer Newsom testified: "We made a door to door survey of every street in the immediate vicinity collecting the names .... I am not sure whether Robert Carmichael was talked to. In any event neither Robert Carmichael [State's witness] nor James Brunson [defendant] was charged until . . . like a year later."

Almost a year after the little girl's death, the officers (W. A. Newsom and Ray Davis) interrogated Robert Carmichael at the Cameron Morrison Training School for delinquents at Hoffman, North Carolina. "We related the facts of what we thought had happened to the little girl." The officers told him that James Brunson was pointing the finger at him. Thereafter, by questions, they obtained from Robert Carmichael a statement that on the morning of February 22, 1972, he and the defendant had planned to collect some copper wire to sell as they had done on a former occasion. They took a hammer from the toolbox belonging to Robert's father and went to a place near McGathy's abandoned house where the defendant first engaged Vanessa in conversation and then took her into the old house where he removed her clothes without any protest from her, attempted to have sexual intercourse with her, and finally struck her with the hammer a number of times. Thereafter, both the witness and Brunson went to the latter's home, washed away the blood that came from Vanessa's wounds, changed clothes, and went to school, arriving late. The foregoing story was repeated in substance at the trial of James Brunson for murder. The witness (Carmichael) admitted, "I got blood on me, on my pants and spots on my shirt. . . . We went from there to James' house. . . . After changing clothes, we went to school."

During the examination before the jury at Brunson's trial, the Assistant District Attorney made the following announcement for the State:

> "I would state on behalf of the State in this case, that Mr. Lynn Johnson, Asst. Solicitor, or District Attorney, stated in open court in front of Judge Derb Carter, at the time of the juvenile hearing of this defendant and this witness, that the State granted complete immunity to this witness, that the State granted complete immunity to this witness for any acts which he observed and reported, which occurred on the 22nd day of February 1972 by Brunson and I believe Mr. Johnson stated by reason of the fact that his statement was exculpatory and was not admissible against him by reason of his not having a parent or guardian present."

On cross-examination, Robert Carmichael testified that when he was first questioned at the Training School, he told

the officers he did not know anything about Vanessa Dale Lewis' death.

> "I was under the impression that James Brunson had pointed the finger at me as being the one who killed Vanessa . . . I don't know whether I would have made the statement if I hadn't thought Brunson had pointed the finger at me as being the one who did it.
>
> "Q. . . . When you were under the impression that James Brunson had stated you killed Vanessa, you decided in your own mind you better tell that James Brunson was the one who did it, didn't you?
>
> "A. (No answer.)
>
> "Q. Isn't that right?
>
> "A. Something like that."

After obtaining the statements from Robert Carmichael, the officers secured a warrant charging James Brunson with the murder of Vanessa Lewis. They arrested him at the Stonewall Jackson Training School in Concord, North Carolina. A warrant was served on Robert Carmichael charging him with murder of Vanessa Lewis.

Officer Newsom testified that he told Brunson that Robert Carmichael had implicated him and that he might as well admit it. Officer Newsom said that the defendant said: "I did it. Prove it." However, on the way from Concord to Fayetteville the driver of the automobile (Officer Ray Davis) testified that he heard Officer Newsom interrogating the defendant, telling him that he might as well admit it that they had the evidence on him. He heard the defendant say, "Prove It."

The defendant in his own defense, testified that on the morning of February 22, 1972, he went to school and at about fifteen minutes before eight o'clock he, James Carmichael (Robert's brother), and Charles Davis played basketball until the school bell rang at eight-thirty and they went to their classes; that he knew nothing about Vanessa Lewis' death. Both James Carmichael and Charles Davis testified, corroborating the defendant's testimony. Each testified that the three played basketball and went from the basketball court to their classes.

The defendant called Mrs. Evelyn West who testified:

" . . . I am the custodian of the records of Fayetteville City Schools, . . . I have with me a photostatic copy of the attendance record of one James Brunson for February 22, 1972. . . . This is the record submitted to my office and is an official record of the school. This is complete from when he first enrolled in the city schools, the first grade.

"Q. Can you state what, if anything, the record indicates as to his school attendance on February 22, 1972?"

The State objected to the introduction of the attendance record. The court excused the jury and proceeded to conduct a voir dire.

"A. The record shows that he was enrolled on February 22, 1972.

"Q. Does it indicate whether or not he attended?

"A. Yes, he did attend school.

"Q. Does it indicate whether or not he was tardy on that date?

"A. No, sir.

"Q. Does it indicate he was tardy, or not tardy, or what?

"A. The system for keeping the record is, if they are not tardy, there is no entry; if they are tardy, we have a code number that we go by, showing if they are tardy or if they are absent.

* * * *

"A. In a school year, in lieu of having a three hundred and sixty-five day calendar, we go by a nine months period, which is a period of one hundred and eighty school days. In marking the school record, you go by the days, actual days that he attended.

* * * *

"Q. How do you determine which one is February 22, 1972?

"A. This is February 22nd. [indicating a space in the school record.]

"COURT: How do you know that, looking at that paper? Is there any way I could know that, by looking at that very paper itself?

"A. This is what I have; we have a calendar.

"COURT: You pick up another paper?

"A. Well, we have a calendar at school, which the bookkeeper makes at the beginning of each school month. The beginning of the sixth school month is marked on her large calendar, . . . So that would be this month right here, you see. . . .

"COURT: Doesn't that come out a different number from what you earlier testified?

"A. We could take out the Saturdays and Sundays; that is what you have to do, take out the number of Saturdays and Sundays within a period. [Saturdays and Sundays are not school days and, therefore, no record is kept.]

"COURT: Just a moment. I direct this question to the witness. Can any person, looking at this paper [school attendance record] that has now been marked Exhibit 2, find on that the calendar date February 22, 1972?

"A. If we have a seventy-two calendar, yes.

"COURT: I am not talking about a seventy-two calendar; I am talking about this exhibit. Does the date February 22, 1972 appear on that piece of paper anywhere?

"A. It does not except down here where Mr. Looper, in charge of the records department, has gone through there and gotten this information for me to present through the school calendar.

* * * *

"COURT: I hold this record is not self-explanatory and takes interpolation from this document, to get the date of February 22, . . . The State's objection is sustained as to this witness."

The defendant excepted.

At the close of the evidence the court overruled the motion to dismiss and charged the jury without reference to the school attendance record or Mrs. West's testimony.

The jury returned a verdict of guilty of murder in the first degree. From the sentence of life imprisonment the defendant excepted and appealed.

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

Cherry & Grimes by Sol G. Cherry for defendant appellant.

HIGGINS, Justice.

The first break in the solution of this case grew out of the interrogation of Robert Carmichael who was charged by warrant with the murder of Vanessa Lewis. The officers told Robert that James Brunson was pointing a finger at him. Robert then told the officers the story in substance as above recited. The interrogation of James Brunson brought his denial of any implication in or knowledge of the crimes committed against Vanessa Lewis. He claimed he was playing basketball and went from the basketball court to his classes at a time when it would have been impossible for him to have been present at the time the crimes were committed. James Carmichael and Charles Davis corroborated his story. They were testifying one year after the events. However, each said he remembered because he heard of Vanessa's death near the school on the day it occurred.

In this setting, the school attendance record of James Brunson on February 22, 1972, would be of material benefit to the defendant if it disclosed that on that day he was present at the school and not tardy. The discussion between the court and Mrs. West about the school attendance record discloses that she and the trial judge were communicating on different wave lengths. The school record showed a five day week. Hence, in order for the witness to identify February 22, 1972, on the school calendar, it was necessary for her to refer to the regular monthly calendar for that month. The first school day in the month of February, 1972, began on Tuesday. Omitting the Saturdays and Sundays (non-school days) the 22nd day of February was the 16th school day of that month.

The monthly school attendance record for each pupil was prepared by the school authorities and sent to the school at the beginning of the month. This record contained a space for each school day (omitting Saturdays, Sundays, and school holidays) to be filled in indicating whether the pupil was present, tardy, or absent. If the student was present and on time, the space on

the record was left unmarked; if tardy or absent, the proper mark so indicating was entered in the space for that day. A clean record indicated presence on time. To corrolate the school days as shown on the attendance record with the regular calendar days, required the examination of both the calendar and the attendance record. The comparison disclosed that February 22, 1972, was the sixteenth regular school day and the space for that day would indicate whether the defendant was present, tardy, or absent. If, however, as seems to have occurred in this case, the first *actual* school day in February, 1972, as explained by Mrs. West, was February 8th (indicating a midterm vacation of one week), then February 22nd would be the eleventh school day for the month.

Mrs. West testified the school attendance record for February, 1972, began on the 8th, indicating the first week was the midterm break. In that event, relating the school record to the regular calendar, February 22nd would be the eleventh school day; so that the record of James Brunson for February 22nd, assuming the week of vacation, would be contained in the eleventh space on the school record.

The trial judge excluded the school record because it was necessary for Mrs. West to check the regular calendar in order to relate the attendance record to that date. The court refused to permit Mrs. West to refer to the regular calendar or to testify to the jury about the record. The court ruled: "The State's objection is sustained as to this witness," the objection being that Mrs. West sought to correlate the school attendance record with the calendar.

[1] The law requires the courts to take judicial notice of the days, weeks, and months of the calendar. "The courts take judicial notice of the day of the week upon which any day of the month falls. . . . It is generally held that the courts are bound to take judicial notice of what days are legal holidays." 29 Am. Jur. 2d, Evidence, § 99, 130. *Smith v. Kinston,* 249 N.C. 160, 105 S.E. 2d 648; *Dowdy v. R. R.,* 237 N.C. 519, 75 S.E. 2d 639; *State v. Anderson,* 228 N.C. 720, 47 S.E. 2d 1; *State v. Vick,* 213 N.C. 235, 195 S.E. 779; 123 A.L.R. 1242.

"Courts will judicially notice the things properly belonging to an almanac. The courts take judicial notice of the calendar and of the periods within the calendar. They take judicial notice of the computation of time, the subdivision of the year into

months, weeks, and days, the days of the week, the order of succeeding days of the week, the number of days in a month, the coincidence of days of the week with days of the month, and of the days of the month with those of the year." 31A C.J.S., Evidence, § 100, 148-149. See also *State v. Anderson, supra.*

The defendant's school attendance record, a photostat of which Mrs. West had with her in court, enabled her to identify the defendant's attendance record showing that on February 22, 1972, he was neither absent nor tardy. The objections of the trial judge indicate his view that the attendance record should have been authenticated by the teacher who made it and not by the official custodian of the attendance records for the entire Fayetteville school system and that reference to the calendar was impermissible.

There was a time, long ago, when the keeping of records was simple and limited in scope. Now, almost every business or governmental function is a matter of detailed record. Now record keeping extends to all essential public, semi-public, and private businesses. The value of these records arises from the fact that they are made at the time when the events recorded are fresh in the minds of the persons who made them. They are intended to be a testimonial for future use. The larger the scope of the business, the greater the need for permanent records. An unreliable record would indicate a mistake or an intent to deceive. As the practice of keeping records has expanded, the courts more and more have liberalized the rules governing their admission as evidence in court proceedings. *Glenn v. Orr,* 96 N.C. 413, 2 S.E. 538; *Turnpike Co. v. M'Carson,* 18 N.C. 306.

In the landmark case of *Insurance Co. v. R. R.,* 138 N.C. 42, 50 S.E. 452, Justice Connor, speaking of book entries, said: " 'Shall this proof be received, or shall the plaintiffs be compelled to go behind the books thus verified by the clerks who kept them, and resort to each of the subagents who participated in the transaction and sale of this produce? Are not the entries thus made in the usual course of business of this extensive trading establishment, and as a part of the proper employment of the witnesses who prove them, not only the best, but the only reliable evidence which it is practicable to procure?' "

[2] In the Brandis Revision of Stansbury's North Carolina Evidence, § 155, this appears: "If the entries were made in the

regular course of business, at or near the time of the transaction involved, and are authenticated by a witness who is familiar with them and the system under which they were made, they are admissible."

The rule with respect to entries in the course of business applies to governmental agencies. "Operations of instrumentalities of government including federal, state, and county agencies, constitute 'business' within statute permitting admission of records made in the regular course of business. *La Porte v. U.S.*, C.A. Cal., 300 F. 2d 878, 880.

* * * *

"The word 'business' . . . whether in form of an entry in a book or otherwise . . . is admissible in proof thereof, if made in regular course of any 'business,' includes business, profession, occupation and calling of every kind. *Snyder v. Cearfoss*, 57 A. 2d 786, 790, 190 Md. 151." 5A Words and Phrases, "Business," at 663.

Defendant's attendance record, Exhibit 2, does not appear in the case on appeal. This Court of its own motion issued a writ of certiorari directing that the superior court certify Exhibit 2 as a part of our record. The Superior Court of Cumberland County answered the writ saying the exhibit was not allowed in evidence and was not in possession of the court.

The discussion between the court and Mrs. West was on the voir dire at the conclusion of which the court stated: "The State's objection is sustained as to this witness [Mrs. West]." The ruling is challenged by Exception No. 6 and discussed in the brief as Assignment of Error 6.

[3] Obviously, the school attendance record made at the time showing that James Brunson was neither absent nor tardy, but was present in school on the morning of February 22, 1972, would be of probative value on a controverted issue of fact. The court should have permitted the custodian of the attendance records to use the regular calendar for February, 1972, and to point out to the jury the relationship between the attendance record and the February calendar, indicating that the attendance record showed the defendant neither absent nor tardy on that critical day.

The exclusion of that record was prejudicial error. The Court orders that there be a

New trial.

STATE OF NORTH CAROLINA v. ROBERT BOYD KING

No. 69

(Filed 15 May 1974)

1. **Obscenity— indecent exposure — insufficiency of warrants**

In a prosecution for indecent exposure, warrants which failed to charge that exposure of private parts was "in the presence of any other person or persons, of the opposite sex" were fatally defective and should have been quashed. G.S. 14-190.9.

2. **Obscenity— operator of night club — violator of indecent exposure statute**

Defendant who operated a night club at which nude dancing took place was subject to prosecution under G.S. 14-190.9, since the conduct for which he was arrested—namely, aiding or abetting other persons in wilfully exposing their private parts in the presence of other persons of the opposite sex and in a public place—was expressly proscribed by that statute.

3. **Obscenity— indecent exposure statute — unwilling viewers not required for violation**

There is nothing whatsoever in the present N. C. indecent exposure statute which in any way requires the viewers of the exposure of one's private parts to be unwilling observers.

ON *certiorari* to review the decision of the North Carolina Court of Appeals reported in 20 N.C. App. 505, 201 S.E. 2d 724 (1974), reversing the judgments of *Crissman, J.*, at the 9 April 1973 Regular Criminal Session of GUILFORD Superior Court, Greensboro Division.

Defendant was initially tried in Guilford District Court upon four separate warrants, each of which charged that on or about 22 February 1973 defendant

> "did unlawfully, wilfully, aid and abet in the act of indecent exposure by knowingly allowing and permitting [naming one of the four females involved] to expose her private parts at the Rathskeller, 716 West Market Street, Greensboro, N. C., a public place, and did allow this premises which he has control over to be used for the purpose of such an act.
>
> "The offense charged here was committed against the peace and dignity of the State and in violation of law G.S. 14-190.9."

District Court Judge Elreta M. Alexander found defendant guilty on all four counts, and from judgments pronounced defendant appealed to Guilford Superior Court, where defendant was tried *de novo* upon the same warrants. The jury returned verdicts of guilty on all four counts, and from judgments imposed defendant appealed to the Court of Appeals. That court reversed. We allowed the State's petition for *certiorari* on 5 March 1974.

The State's evidence tends to show that on the evening of 22 February 1973 four detectives of the Greensboro Police Department Vice Division went to the Rathskeller, a Greensboro night club operated by defendant. Signs at the entrance to the Rathskeller read "Bottomless dancing, nightly," and "Topless dancing, nightly." Another sign read, "This is a private club. Membership is open to anyone willing to abide by house rules. If the nude body offends you, please don't enter."

The detectives entered the premises and found defendant standing behind a cash register near the entrance. Defendant informed the detectives that the admission fee was $5 and that "the girls would take it all off." Each detective signed a note pad, paid $5, and was then admitted. Defendant did not tell them that the Rathskeller was a private club or that they were becoming members by paying $5, nor did he indicate that by paying $5 they were entitled to anything other than admission on that particular evening. They received no membership card or other indicia of membership.

The detectives proceeded to the street-level area of the premises and were seated. For approximately thirty minutes two females danced topless on a raised stage in front of the detectives and some seventy-five other male customers. Then defendant announced that the show was starting downstairs. The customers, including the detectives, went downstairs into a large room. There they observed four females dancing one at a time on a raised stage. While dancing the four females completely disrobed before the audience. Part of their routine is illustrated by the testimony of Officer Heffinger, one of the detectives from the Vice Division:

> "Then, Sandra Faye Hall danced again. During the dance, she took off her purple pants. She had no clothing on at all. She got down on the floor on her hands and knees and rotated her hips. . . . After this, Miss Hall turned

with her feet toward the audience, her head toward the back of the stage. She was on her back, and she separated her legs, raising the lower portion of her body and began rotating her hips, during which I could see the pubic area, the vagina lips of her body. She stayed in that position 15 to 30 seconds."

The other three females went through a somewhat similar routine.

At the conclusion of the show, the detectives identified themselves and arrested the girls for indecent exposure. Defendant was also placed under arrest for aiding and abetting indecent exposure.

Defendant did not testify or offer any evidence.

Attorney General Robert Morgan and Assistant Attorney General Edwin M. Speas, Jr., for the State.

Comer and Dailey by John F. Comer for defendant appellee.

MOORE, Justice.

Before entering a plea in Superior Court, defendant moved "to quash the warrants for that the same are unconstitutional." This motion was denied. On appeal the Court of Appeals reversed saying: "We certainly do not say that G.S. 14-190.9 is unconstitutional. We merely say that it is not applicable to the conduct here. . . . We do hold that the court committed reversible error in failing to grant defendant's motion to quash the warrants in this case."

We agree with the Court of Appeals that the warrants should be quashed but for an entirely different reason—not because G.S. 14-190.9 is not applicable to the facts in this case, but because the warrants on their face are fatally defective. G.S. 14-190.9 provides:

"*Indecent exposure.*—Any person who shall willfully expose the private parts of his or her person in any public place *and in the presence of any other person or persons, of the opposite sex,* or aids or abets in any such act, or who procures another to perform such act; or any person, who as owner, manager, lessee, director, promoter or agent, or in any other capacity knowingly hires, leases or permits the land, building, or premises of which he is owner, lessee

or tenant, or over which he has control, to be used for purposes of any such act, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both." (Emphasis added.)

[1] One of the essential elements of the offense created by this statute is that the exposure of the private parts be *"in the presence of any other person or persons, of the opposite sex."* The warrants in these cases failed to so charge. Such omission was fatal, and the warrants must be quashed. As stated in *State v. McBane,* 276 N.C. 60, 170 S.E. 2d 913 (1969):

> " 'A valid warrant or indictment is an essential of jurisdiction.' *State v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166; *State v. Thornton,* 251 N.C. 658, 660, 111 S.E. 2d 901, 902. The warrant or indictment must charge all the essential elements of the alleged criminal offense. *State v. Morgan, supra.* Nothing in G.S. 15-153 or in G.S. 15-155 [statutes dealing with certain informalities and defects that do not vitiate a warrant or indictment] dispenses with the requirement that the essential elements of the offense must be charged. *State v. Gibbs,* 234 N.C. 259, 261, 66 S.E. 2d 883, 885, and cases cited; *State v. Strickland,* 243 N.C. 100, 101, 89 S.E. 2d 781, 783."

See generally 4 Strong, N. C. Index 2d, Indictment and Warrant §§ 9, 14 (1968).

Although the warrants must be quashed, we believe the following observations are in order. First, we do not have before us at this time and we express no opinion as to the constitutionality of G.S. 14-190.9. Secondly, we do not agree with the conclusion of the Court of Appeals that G.S. 14-190.9 is not applicable to the particular conduct disclosed by the evidence in this case and that *the only statute* under which defendant could have been charged is G.S. 14-190.1 (a) (2), which deals with the presenting or directing of obscene plays, dances, or other performances.

In its opinion the Court of Appeals stated:

> ". . . The [North Carolina] indecent exposure statute, certainly as it now is written, is simply a codification of the common law crime of exposure of one's private parts, whether intentional or unintentional, in a situation where

the exposure could be viewed by the public. The statute does not contemplate willing viewers, but those who are offended and annoyed by the exposure."

This proposition is without support in either the judicial or statutory development of the law of indecent exposure in this State. Prior to 1907 there was no North Carolina statute dealing with indecent exposure and the common law was in effect. At common law the willful and intentional exposure of the private parts in a public place in the presence of an assembly was a misdemeanor. In an 1835 case this Court stated: "We consider it a clear proposition, that every act which openly outrages decency, and tends to the corruption of the public morals, is a misdemeanor at common law. A public exposure of the naked person, is among the most offensive of those outrages on decency and public morality." *State v. Roper,* 18 N.C. 208 (1835).

In 1907 the General Assembly enacted a statute dealing with exposure of one's private parts and "other indecent exhibitions" and performances. This statute was made a part of an 1885 statute dealing with obscene literature. 1885 Laws of North Carolina, chapter 125, § 1. See also Revisal of 1905, § 3731. The pertinent language in the 1907 Act was as follows:

". . . [A]ny person making any public exposure of the person, or other indecent exhibitions, or giving or taking part in any immoral show, exhibition, or performance where indecent, immoral, or lewd dances or plays are conducted in any booth, tent, room, or other place to which the public is invited, or any one who permits such exhibitions or immoral performances to be conducted in any tent, booth, or other place owned or controlled by him, he shall be guilty of a misdemeanor." 1907 Public Laws of North Carolina, chapter 502, § 1.

This statute remained substantially unchanged until 1935. See C.S. § 4348 (1919). In 1935 the General Assembly rewrote North Carolina's statute dealing with indecent exposure and other lewd performances, and also separated it from that portion of the previous statute dealing with obscene literature. 1935 Public Laws of North Carolina, chapter 57, § 1. Except for minor changes by the General Assembly in 1941 and 1969, the 1935 Act on indecent exposure was in effect in this State until 1971. See 1941 Public Laws of North Carolina, chapter 273, § 1; 1969 Session Laws, chapter 1224, § 9. Prior to 1971 this

statute, along with the noted 1941 and 1969 changes, was G.S. 14-190 (1969), and read as follows:

> "*Indecent exposure; immoral shows, etc.*—Any person who in any place wilfully exposes his person, or private parts thereof, in the presence of one or more persons of the opposite sex whose person, or the private parts thereof, are similarly exposed, or who aids or abets in any such act, or who procures another so as to expose his person, or the private parts thereof, or take part in any immoral show, exhibition or performance where indecent, immoral or lewd dances or plays are conducted in any booth, tent, room or other public or private place to which the public is invited; or any person, who, as owner, manager, lessee, director, promoter or agent, or in any other capacity, hires, leases or permits the land, buildings, or premises of which he is owner, lessee or tenant, or over which he has control, to be used for any such immoral purposes, shall be guilty of a misdemeanor. Any person who shall willfully make any indecent public exposure of the private parts of his or her person in any public place or highway shall be guilty of a misdemeanor. Any person violating any provision of this section shall be punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

In 1971 the General Assembly repealed G.S. 14-190 (1969) and enacted in its place the present G.S. 14-190.9 (1973 Cumulative Supplement). 1971 Session Laws, chapter 591, §§ 1, 4. In addition to clarifying the language in the previous statute dealing with the exposure of one's private parts in a public place, the 1971 legislation also deleted that portion of the previous statute dealing with immoral and indecent shows, exhibitions, performances, and dances. It was under the 1971 statute, which is fully set out at the beginning of this opinion, that defendant was tried.

[2] The Court of Appeals stated that although "the conduct promoted by defendant in the case before us could have been subject to a criminal charge under [the pre-1971 indecent exposure statute]," the above-noted deletion made G.S. 14-190.9—the present indecent exposure statute—inapplicable to defendant's conduct. With this we cannot agree. Both the former and present statutes clearly and expressly proscribe the conduct for which defendant was arrested—namely, aiding or abetting other

persons in willfully exposing their private parts in the presence of other persons of the opposite sex and in a public place as that term was defined by this Court in *State v. King,* 268 N.C. 711, 151 S.E. 2d 566 (1966). See also *State v. Fenner,* 263 N.C. 694, 140 S.E. 2d 349 (1965).

We note in passing that had the General Assembly not intended for the present statute to cover situations such as that presented by this case, it would have been totally unnecessary to include the language "or any person, who as owner, manager, lessee, director, promoter or agent, or in any other capacity knowingly hires, leases or permits the land, building, or premises of which he is owner, lessee or tenant, or over which he has control, to be used for purposes of any such act." It is inconceivable that circumstances such as those indicated by the words "manager" or "promoter" would ever arise in the case of "ordinary common law indecent exposure," to which the Court of Appeals by its ruling apparently limited the applicability of the present statute.

[3] Furthermore, there is nothing whatsoever in the present or former indecent exposure statutes that in any way requires the viewers of the exposure of one's private parts to be unwilling observers, as stated by the Court of Appeals. For cases in which indecent exposure statutes have been applied by courts in other jurisdictions where the viewers of the exposure were willing observers, see Annot., 49 A.L.R. 3d 1084 (1973); Annot., 94 A.L.R. 2d 1353 (1964); Annot., 93 A.L.R. 996 (1934). In this regard it might also be noted that the United States Supreme Court in June of 1973 "categorically disapprove[d]" any supposed distinction existing between willing and unwilling viewers of obscenity. *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 37 L.Ed. 2d 446, 93 S.Ct. 2628 (1973).

In *State v. Tenore,* 280 N.C. 238, 185 S.E. 2d 644 (1972), a recent case factually similar to the present one, defendant was charged with permitting a female to perform a nude and obscene dance before male persons in the Tempo Lounge over which defendant had control, in violation of a county ordinance. This Court held that the county ordinance under which defendant was charged was void because the State had pre-empted the field by the enactment of G.S. 14-190, the now repealed State-wide indecent exposure statute that prohibited and punished the precise type of conduct prohibited by the county ordinance. Although the conduct for which defendant was charged occurred

prior to the passage of G.S. 14-190.9, and therefore that statute was not directly involved in the case, Justice Lake speaking for the Court did note that G.S. 14-190.9 "deals specifically with the precise conduct with which the defendant is charged in this warrant pursuant to the county ordinance."

G.S. 14-190.9 was enacted by the 1971 General Assembly by passage of chapter 591 of the 1971 Session Laws, and is separate and apart from those statutes dealing with the dissemination of obscenity—G.S. 14-190.1 to 14-190.8—all of which were enacted by passage of chapter 405 of the 1971 Session Laws. G.S. 14-490.9, like its predecessors, simply declares the act of exposing one's private parts in a public place in the presence of persons of the opposite sex, or permitting or aiding or abetting another in doing so, to be a misdemeanor. The statute does not use the term "obscene" and for that matter does not even require the act of exposing one's private parts in public to be "indecent." Since the statute does not involve the concept of "obscenity"—the definition of which has given both the Federal and State courts so much difficulty—we are not concerned with the many and often conflicting decisions attempting to define "obscene" or "obscenity." For a thorough discussion of both the Federal and State decisions on this subject, see *State v. Bryant* and *State v. Floyd*, 285 N.C. 27, 203 S.E. 2d 27 (1974). Rather than being concerned with the concept of obscenity, we need only consider the facts—in this case undisputed—to determine whether they contravene the statute.

The uncontradicted evidence in the present case shows that the four females involved willfully exhibited their private parts to an audience of some seventy-five males in a public place, and that defendant aided and abetted in such exposure. Such conduct constitutes a misdemeanor under G.S. 14-190.9.

Our decision that the warrants must be quashed and the judgments arrested is based solely on the ground that the warrants are fatally defective in that they do not charge all the essential elements of the misdemeanor created and defined by G.S. 14-190.9. Under this holding defendant is not entitled to a discharge. The State may, if it so elects, proceed against defendant upon new and sufficient warrants. *State v. Partlow*, 272 N.C. 60, 157 S.E. 2d 688 (1967); *State v. Guffey*, 265 N.C. 331, 144 S.E. 2d 14 (1965); *State v. Lucas*, 244 N.C. 53, 92 S.E. 2d 401 (1956); *State v. Beasley*, 208 N.C. 318, 180 S.E. 598 (1935).

Additionally, it is important to note that our holding that defendant's conduct violated G.S. 14-190.9 is *not* a ruling that defendant's conduct could not also come under the dissemination of obscenity statutes. To the contrary, we agree with the Court of Appeals that defendant could have been charged under G.S. 14-190.1(a)(2) (1973 Cumulative Supplement). Although this statute was amended by chapter 1434, § 1, of the 1973 Session Laws (2nd Session, 1974), effective 1 July 1974, this amendment did not affect G.S. 14-190.9 under which defendant was tried.

For the reasons stated the decision of the Court of Appeals is affirmed, and the cases are remanded to the Court of Appeals with direction for that court to remand to the Superior Court of Guilford County, Greensboro Division, for such further action as the State may elect in accordance with this opinion.

Modified and affirmed.

B. WALTON BROWN, ADMINISTRATOR OF THE ESTATE OF RONALD WILSON WALKER v. LUMBERMENS MUTUAL CASUALTY COMPANY

No. 48

(Filed 15 May 1974)

Insurance § 69— uninsured motorist provision — wrongful death claim barred by statute of limitation — no recovery under contract provision

The two-year statute of limitations applicable to tort claims for wrongful death and not the three-year limitation on actions on contracts applied to bar plaintiff's claim under an uninsured motorist endorsement on a policy issued by defendant, since defendant, in undertaking "to pay all sums which the insured or his legal representative shall be legally entitled to recover . . . ," assumed liability only for damages for which plaintiff could recover judgment in a court of law in an action against the uninsured motorist.

ON *certiorari* to review the decision of the Court of Appeals, 19 N.C. App. 391, 199 S.E. 2d 42 (1973), affirming the judgment of *Godwin, S.J.*, entered at the 9 April 1973 Session of the Superior Court of RANDOLPH, docketed and argued in the Supreme Court as Case No. 103 at the Fall Term 1973.

The following facts are established by allegations in the complaint and admissions in the answer:

Plaintiff's intestate died on 26 April 1969 from injuries received when the Chevrolet automobile he was operating left

the road on a curve and overturned. At the time of the upset the Chevrolet, which belonged to intestate's mother, was covered by a motor vehicle liability policy issued by defendant under the provisions of G.S. 20-279.21. This policy contained the standard North Carolina uninsured motorist endorsement whereby defendant agreed "to pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of: (a) bodily injury, sickness or disease, including death resulting therefrom . . . sustained by the insured; . . . . " The term "uninsured automobile" includes a hit-and-run automobile as defined in the policy.

On 25 April 1972 plaintiff instituted this action to recover from defendant the sum of $10,000.00, the policy limit for the death of one insured. Plaintiff alleged that his intestate's death was caused by the negligence of an unknown motorist, who approached the Chevrolet from the rear and collided with it in an attempt to pass the vehicle in the curve; that the unknown driver did not stop after the collision, and his identity is unascertainable.

Defendant, answering the complaint, pled five defenses. The only one pertinent to this appeal is the first:

"(1) This suit was instituted more than two years after the death of intestate and is therefore barred by the statute of limitations." G.S. 1-53(4).

After having filed its answer defendant moved for summary judgment pursuant to G.S. 1A-1, Rule 56, upon the ground that the action, having been commenced more than two years after intestate's death, is barred by the statute of limitations. Judge Godwin allowed the motion and entered summary judgment that plaintiff recover nothing of defendant. Plaintiff appealed to the Court of Appeals, which affirmed the judgment dismissing plaintiff's action. Upon plaintiff's petition we allowed certiorari.

Ottway Burton for plaintiff appellant.

Henson, Donahue & Elrod for defendant appellee.

Robert Morgan, Attorney General and Charles A. Lloyd, Assistant Attorney General for John Randolph Ingram Commissioner of Insurance, Amicus Curiae.

SHARP, Justice.

This appeal presents one question: Is an action against an insurer, brought under the uninsured motorist insurance endorsement to an automobile liability insurance policy to recover damages for a death caused by the wrongful act of an uninsured motorist, subject to the two-year statute of limitations prescribed for the commencement of the tort action for wrongful death, G.S. 1-53(4), or the three-year limitation prescribed for actions on contract, G.S. 1-52(1)?

Neither the statute relating to uninsured motorist insurance nor the policy endorsement specifies the period of time within which such an action must be commenced. Whether that period is fixed by the statute of limitations governing actions on contract or the applicable wrongful death statute is a question which has not heretofore been presented to this Court, and it has not been decided in most jurisdictions. Thus far, California seems to be the only state to have clarified the problem by legislation which specifies a statute of limitations against the insured under the uninsured motorist coverage. Widiss, A Guide to Uninsured Motorist Coverage, § 2.25 (1969). *See Id.*, 1973 Supplement.

To answer the question presented, this Court must construe the phrase "legally entitled to recover," which appears in defendant's undertaking. Were the defendant in this action the motorist whose wrong allegedly caused intestate's death, his plea of the two-year statute of limitations would be an absolute defense, clearly entitling him to summary judgment dismissing the action.

Plaintiff's arguments that the three-year contract limitation is applicable to this action are the following:

(1) The two-year period now prescribed for the commencement of a wrongful death action is not a condition precedent annexed to the cause of action as was the one-year limitation specified in G.S. 28-173 prior to its amendment in 1951. It is a statute of limitations. *(See Country Mutual Insurance Co. v. National Bank of Decatur,* 109 Ill. App. 2d 133, 248 N.E. 2d 299 (1969), and *Franco v. Allstate Insurance Company,* 496 S.W. 2d 150 (1973), for a discussion of this situation.) The lapse of two years, therefore, does not discharge the defendant's liability or affect its legal obligation to pay pursuant to its contract; it merely bars recovery when properly pleaded. *Williams v. Thompson,* 227 N.C. 166, 41 S.E. 2d 359 (1947).

(2) The phrase "legally entitled to recover" denotes fault and means only that plaintiff must be able to establish negligence on the part of the uninsured motorist which proximately caused the death of plaintiff's intestate. Since defendant remains "legally liable," damages may be recovered against it in a suit on its policy endorsement instituted within three years of intestate's death.

(3) Even though the uninsured motorist's tortious conduct gives rise to plaintiff's rights under the policy, plaintiff's claim against defendant is based upon the insurance contract; therefore, the three-year contract limitation should apply.

(4) The intent of uninsured motorist endorsement, namely, to afford protection to innocent victims of uninsured motorists, should resolve the issue in favor of the longer statute of limitations. Notwithstanding the necessity that the insured establish the tort liability of the uninsured motorist, defendant's obligation to plaintiff arises from its contract of insurance and coverage may reasonably be construed to continue even after the insured's remedy in tort is barred. *(See* 48 Calif. L. Rev. 516, 531 (1960).)

Defendant's arguments that the two-year statute of limitations specifically governing actions for wrongful death is applicable are summarized as follows:

(1) The right of action for wrongful death is created by G.S. 28-173. To establish his right to recover from defendant insurer plaintiff must prove that the tortious conduct of an uninsured motorist proximately caused his intestate's death. Thus, albeit plaintiff's right to proceed against defendant derives from the policy endorsement, this is actually a tort action in which the insurer is a substitute defendant for the uninsured motorist, its liability being dependent upon his.

(2) The purpose of the uninsured motorist endorsement is to put an insured (or his personal representative) who is the innocent victim of the negligence of an uninsured motorist, in the same position as one who has been injured by the negligence of an insured motorist. There is no reason why an insured should have a greater length of time to proceed against his insurance company than he had against the tort-feasor who injured him.

(3) Having waited more than two years to institute his action for wrongful death, upon defendant's plea of the applica-

ble statute, G.S. 1-53(4), plaintiff was no longer "legally entitled to recover" from the uninsured motorist.

(4) The application of the three-year contract statute of limitations could extinguish the insurer's right of subrogation against a known uninsured motorist. Where the right to subrogation exists "and where the uninsured motorist's identity is known, suit against the insurer after the tort statute of limitations has run would in effect make the insurance company the liability insurer of the uninsured motorist. . . . This situation could foster collusion between the uninsured motorist and the insured in that the insured could delay maintaining his claim until after the tort statute of limitations had run. This would bar any recourse against the uninsured motorist for his negligence, since the tort statute of limitations would bar the claim against the uninsured motorist." Cox, Uninsured Motorist Coverage, 34 Mo. L. Rev., 1, 36 (1969). But see 14 U. of Fla. L. Rev. 455, 472 (1962); 48 Calif. L. Rev. 516, 531 (1960). (Since the theory of plaintiff's case is that the death of his intestate was caused by the negligence of an unknown hit-and-run driver, the contention that to apply the three-year contract limitation would bar defendant's claim against the uninsured motorist has no relevancy here.)

The argument generally accepted by the courts of last resort which have considered the question is that "despite the necessity that the insured establish that a tort was committed by the uninsured motorist, and that injury resulted, the action is nevertheless one based upon the insurance contract, on which the liability of the insurer depends, and that the contract limitation period therefore controls." Annot., 28 A.L.R. 3d 580, 584-585 (1969); Widiss, A Guide to Uninsured Motorist Coverage § 2.25 (1969 and 1973 Supp.) Our research has produced the following decisions by courts of last resort which support this view:

Schlief v. Harware Dealer's Mutual Fire Insurance Company, 218 Tenn. 489, 404 S.W. 2d 490 (1966); *Deluca v. Motor Vehicle Accident Indemnification Corp.,* 17 N.Y. 2d 76, 215 N.E. 2d 482 (1966); *Booth v. Fireman's Fund Insurance Company,* 253 La. 521, 218 So. 2d 580 (1968); *Sahloff v. Western Casualty and Surety Co.,* 45 Wis. 2d 60, 171 N.W. 2d 914 (1969); *Turlay v. Farmer's Insurance Exchange,* 259 Ore. 612, 488 P. 2d 406 (1971); *Pickering v. American Employers Insurance Co.,* 109 R.I. 143, 282 A. 2d 584 (1971).

See also the following cases from trial and intermediate appellate courts:

Hartford Accident & Indemnity Co. v. Mason, 210 So. 2d 474 (Fla. App. 1968); *Schultz v. Allstate Insurance Co.,* 17 Ohio Misc. 83, 244 N.E. 2d 546 (Court of Common Pleas for Franklin County (1968)); *Breen v. New Jersey Manufacturers Indemnity Insurance Co.,* 105 N. J. Super. 302, 252 A. 2d 49 (1969); *Hartford Accident and Indemnity Co. v. Holada,* 127 Ill. App. 2d 472, 262 N.E. 2d 359 (1970); *Witkowski v. Covenant Security Insurance Co.,* 1 Ill. App. 3d 1074, 275 N.E. 2d 709 (1971); *Detroit Automobile Inter-Ins. Exch. v. Hafendorfer,* 38 Mich. App. 709, 197 N.W. 2d 155 (1972); *Franco v. Allstate Insurance Co.,* 496 S.W. 2d 150 (Court of Civil Appeals of Texas (1973)).

We note that in some of the jurisdictions cited above, a great disparity exists between contract and tort limitations. No such disproportion exists in this State, where the period of limitation governing actions upon contract and for injuries to the person not arising on contract are both three years. As heretofore noted, the limitation for wrongful death actions is two years.

The decision of the Court of Appeals of New York in *Deluca v. Motor Vehicle Accident Indemnification Corporation, supra,* was a four-to-three decision in which Chief Judge Desmond, writing for the dissenting judges, said:

"The holding that the six-year limitation is available to respondent because this is an 'action on a contract' . . . is correct if, forgetting all else, we consider only the circumstance that respondent's right to recover from MVAIC is expressed in a rider to an insurance policy. But the result (six years instead of three for beginning a litigation for personal injuries) is so obviously unreasonable and unintended that we should look at the larger picture. The whole concept of MVAIC was a legislative creation intended to secure to injured persons like these the same protection (subject to dollar limits) they would have had as to their tort-feasor had their injuries been caused by insured cars or drivers who did not hit and run. . . . The policy rider here sued upon was a mere instrumentality for carrying out the legislative mandate and so it is legislative intent we should be looking for. To say in these days of struggle against litigation delays that the Legislature for no discoverable reason gave this class of claimants three years longer to commence

suit than they would have had to sue in the more usual situation is to ascribe to the Legislature an incredible purpose." *Id.* at 81-82, 215 N.E. 2d at 485.

We perceive no reason why plaintiff should have three years to sue the insurance company when he had only two in which to sue the individual primarily liable. The insurer has at all times been amenable to suit. Application of the two year statute of limitations governing actions for wrongful death "is consistent with the objective of uninsured motorist coverage of placing the insured in the same position as he would have been had the adverse motorist been insured. If the insured's claim against the tort-feasor is not enforceable, he is not 'legally entitled to recover' damages from the tort-feasor, and should not be allowed recovery under his uninsured motorist coverage." Cox, Uninsured Motorist Coverage, 34 Mo. L. Rev. 1, 37 (1969).

In our view it would indeed constitute "antics with semantics" to say that a litigant with a stale tort claim, one against which the applicable statute of limitations has been specifically pleaded, remains "legally entitled to recover" when his remedy has been taken away! To be "legally entitled to recover damages" a plaintiff must not only have a cause of action but a remedy by which he can reduce his right to damage to judgment. Today, "it is the consensus of the authorities that the defense of the statute of limitations stands upon the same place as any other legal defense." 51 Am. Jur. 2d, *Limitations of Actions,* §§ 3, 5 (1970). In this jurisdiction a plea of the statute of limitations is a plea in bar "sufficient to destroy the plaintiff's action." When established by proof, it defeats and destroys the action altogether. *Bank v. Evans,* 191 N.C. 535, 538, 132 S.E. 563, 564 (1926). *See Lithographic Co. v. Mills,* 222 N.C. 516, 23 S.E. 2d 913 (1943); *Poultry Co. v. Oil Co.,* 272 N.C. 16, 157 S.E. 2d 693 (1967).

Plaintiff's right to recover against his intestate's insurer under the uninsured motorist endorsement is derivative and conditional. Unless he is "legally entitled to recover damages" for the wrongful death of his intestate from the uninsured motorist the contract upon which he sues precludes him from recovering against defendant. It is manifest, therefore, that despite the contractual relation between plaintiff insured and defendant insurer, this action is actually one for the tort allegedly committed by the uninsured motorist. Any defense available to the uninsured tort-feasor should be available to the insurer. The

argument that a plea of the statute of limitations is personal to the tort-feasor and not available to the insurance company flies in the face of the policy.

With all deference to the six courts of last resort and the seven lower courts which have taken the opposite view, it is our opinion that when defendant undertook "to pay all sums which the insured or his legal representatives shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of (a) bodily injury, sickness or disease, including death resulting therefrom. . . . " it assumed liability *only* for damages for which plaintiff could recover judgment in a court of law in an action against the uninsured motorist. At the time this action was instituted plaintiff could have recovered no damages from the hit-and-run motorist because his action was barred by the statute of limitations. We hold, therefore, as did the Court of Appeals, that at the time this action was instituted plaintiff's claim against defendant was no longer within the coverage provided by the defendant's policy endorsement. The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. DONALD SAMUEL LAWSON

No. 58

(Filed 15 May 1974)

1. **Constitutional Law § 32; Criminal Law § 75— defendant in custody — necessity of Miranda warnings**

The trial court erred in determining that no *Miranda* warning was required and that questions put by an officer to defendant were part of the officer's investigation of a routine accident where the evidence tended to show that defendant was arrested for public drunkenness, placed in a patrol car, advised of his rights, asked if he understood his rights, and then interrogated.

2. **Constitutional Law § 37; Criminal Law § 76— rights of defendant in custody — silence as waiver**

Even if defendant understood his rights, the trial court erred in holding that he waived those rights where the evidence tended to show that defendant was told his rights and asked if he understood them before interrogation began, but defendant did not respond to the inquiry.

3. Constitutional Law § 32; Criminal Law § 75— Miranda warnings — applicable to persons in custody

Rights set forth in *Miranda v. Arizona* are not limited to persons charged with felonies or misdemeanors; rather, those rights relate to any person being subjected to custodial interrogation concerning a criminal charge.

ON *certiorari* to review the decision of the North Carolina Court of Appeals reported in 20 N.C. App. 171, 201 S.E. 2d 97 (1973), which found no error in the trial before *Rouse, J.*, at the 30 April 1973 Session of CARTERET Superior Court.

Defendant was initially tried in Carteret District Court upon a warrant charging that on 20 January 1973 about 1:25 a.m. he (1) appeared in an intoxicated condition in a public place, and (2) operated a motor vehicle upon a public highway while under the influence of intoxicating liquor. Defendant pleaded guilty to public intoxication and not guilty to driving under the influence. District Court Judge J. W. H. Roberts found defendant guilty of both offenses, and from judgments pronounced, defendant appealed to Carteret Superior Court. In Superior Court defendant again entered pleas of guilty of public intoxication and not guilty of driving under the influence. The jury returned a verdict of guilty of driving under the influence, and from judgment imposed defendant appealed to the Court of Appeals. That court found no error in the trial. We allowed *certiorari* on 5 February 1974.

The State's evidence consisted primarily of testimony by C. R. Askew, a State Highway Patrolman stationed in Carteret County. Askew's pertinent testimony is accurately summarized in the following findings of fact made by the trial judge after a *voir dire* hearing to determine the admissibility of statements allegedly made by defendant:

> "1. During the early morning hours of January 20, 1973, Mr. C. R. Askew, a North Carolina State Highway Patrolman, went to the scene of an accident on Old Highway 70 west of Newport at about 1:40 a.m. He found a vehicle in the ditch on the north side with the motor running and the lights on. The defendant was under the wheel of the automobile, a 1968 Ford; and at the time another vehicle was about to pull him out of the ditch.
>
> "2. That the officer then approached Mr. Lawson and asked him to get out of the car and observed that he could

hardly stand, and in the opinion of the officer the defendant was very much under the influence of some intoxicating beverage.

"After asking the defendant for his license the defendant gave him his license; whereupon, the officer placed the defendant under arrest for being publicly intoxicated. After the defendant was arrested the officer placed the defendant in his automobile and then gave him the '*Miranda*' warning [which] in all respects complied with the requirements of '*Miranda*,' and the precise warning appears in the record in this case; and the Court finds that he gave the warning as stated by the officer. After being given the warning, the defendant made no response. The officer then proceeded to question the defendant as to what had happened and the defendant made certain incriminating statements as will appear in the record."

These statements and other facts surrounding the arrest and questioning of defendant are discussed later in this opinion. After finding the above facts, the trial judge ruled that the statements allegedly made by defendant were admissible into evidence, and Patrolman Askew was allowed to testify about them. Askew also testified that defendant was taken to the police department in Newport, North Carolina, and there defendant took various "performance tests" and was given a breathalyzer test by Officer C. R. Tomlinson of the Newport Police Department. Details surrounding the administration and results of these tests are fully discussed later in this opinion. Under cross-examination by defense counsel, Patrolman Askew stated: "I never saw Mr. Lawson drive an automobile. So, what I am telling you here today is that the reason he is charged with driving under the influence is that he told me that he had been driving."

Defendant offered evidence tending to show that he was not driving the automobile on the occasion in question, but rather that the automobile was being driven by a girl who was taking defendant home and who was not familiar with the operation of the car. Some lights from an oncoming car had blinded the girl and caused her to drive off the road. Someone named Jerry—who had been following the car in which defendant was a passenger—and the girl had gone to get help when Patrolman Askew arrived and took defendant to the police department in Newport. Defendant admitted that he was drunk on the

evening of 20 January 1973, but he testified that he did not remember Patrolman Askew giving him his *Miranda* rights.

Attorney General Robert Morgan and Assistant Attorney General Ralf F. Haskell for the State.

Wheatly & Mason by L. Patten Mason for defendant appellant.

MOORE, Justice.

Defendant first asserts that the trial court erred in admitting into evidence incriminating statements made by defendant to the investigating officer at the scene of the accident.

Defendant was arrested for public drunkenness by Patrolman Askew and placed in the patrol car. He was then advised of his constitutional rights as required by *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), and questioned by the patrolman. Among his other rights, defendant was advised that he had the right to an attorney and that he could call an attorney when he arrived at the Newport Police Department. The patrolman asked defendant if he understood his rights. Defendant made no response. The patrolman then questioned defendant as to what had happened and defendant told him that he was driving the car and was attempting to turn around in the road when the car ran into the ditch. This statement was admitted into evidence over the objection of defendant. Without this statement the State had no direct proof that defendant was driving.

Defendant contends this statement was elicited by custodial interrogation before he had knowingly and intelligently waived his rights guaranteed by *Miranda,* and that the statement should have been excluded. *Miranda* warnings and waiver of counsel are required when and only 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." *Miranda v. Arizona, supra; State v. Blackmon,* 284 N.C. 1, 199 S.E. 2d 431 (1973).

In *State v. Sykes,* 285 N.C. 202, 203 S.E. 2d 849 (1974), Justice Huskins, for the Court, stated:

> " . . . 'The brief detention of a citizen based upon an officer's reasonable suspicion that criminal activity may

be afoot is permissible for the purpose of limited inquiry in the course of a routine investigation, and any incriminating evidence which comes to the officer's attention during this period of detention may become a reasonable basis for effecting a valid arrest.' *United States v. Harflinger,* 436 F. 2d 928 (8th Cir. 1970).

"Furthermore, the decision in *Miranda* was not intended to hamper the traditional function of police officers in investigating crime. 'Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. . . . In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present. * * * In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence.' *Miranda v. Arizona, supra.*"

[1] In the present case Patrolman Askew testified that he arrested defendant for public drunkenness and placed him in the patrol car. Clearly, the subsequent interrogation was "custodial interrogation," and the trial court erred in the conclusion of law that it made following the *voir dire:*

"1. That no *Miranda* warning was required, that the questions asked were part of the officer's investigation of a routine accident and was not an in-custody interrogation and under the circumstances here the *Miranda* warning was not required."

Defendant was highly intoxicated or drunk at the time of his arrest, and even assuming he was in condition to intelligently and understandingly waive his rights, the record discloses and the trial court found that he made no response when asked if he understood those rights. He was further advised by the patrolman that he could call an attorney when he reached Newport, but without waiting until they reached Newport the patrolman immediately started questioning him about what had happened. As a result of this questioning, the statement allegedly made by defendant was secured. See *State v. Edwards,* 282 N.C. 201, 192 S.E. 2d 304 (1972).

The trial court next concluded:

"2. That the *Miranda* warning was in all respects given and the defendant by his silence and continued answering of questions waived any right to counsel,

"(After the State had rested its case, the court on its own motion amended the above conclusions of law and provided 'and any statements were voluntarily and understandingly made.')"

Prior to amending his conclusions of law to the effect that defendant's statements were "voluntarily and understandingly made," the trial judge had heard the testimony of the arresting officer that defendant "was the drunkest man he had seen in a right good while." In further describing defendant's condition after he arrived at the police station, the patrolman stated:

"After I got him to the police station, I gave him some tests which I have described to the solicitor. In my opinion, he failed these tests. All of them. I asked him questions at the police station. I asked him a question as to whether or not he had been driving an automobile and his answer at the police station was 'no.' He said 'no' to that question. On the form that I put down he had a hard time understanding the performance tests that I was trying to give him for what to do. I had to tell him a couple of times each or what I wanted him to do two or three times each. After I told him two or three times he tried to do them, but he still couldn't do them."

The trial judge also had heard the following testimony from Officer Tomlinson who administered the breathalyzer test almost an hour after defendant had been arrested:

"I have been a breathalyzer operator approximately ten months. I have run approximately 70 or 80 tests during this ten months' period. I believe Mr. Lawson's test had the highest results I have ever obtained in giving any of these tests. On the scale of Exhibit No. 1, it runs from .0 to .40. The highest reading that the machine will give on this scale is .40. Mr. Lawson's test was within 5 points of being the highest reading that you could give. I observed Mr. Lawson and, in my opinion, he was drunk, very drunk."

[2] Assuming that defendant understood his rights, we hold that the court erred in concluding as a matter of law that by

defendant's silence and continued answering of questions he waived any right to counsel. These facts are not sufficient to constitute a waiver of counsel. This is stated in *State v. Blackmon,* 284 N.C. 1, 10, 199 S.E. 2d 431, 437 (1973) :

> "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)."

However, the State contends that under *State v. Beasley,* 10 N.C. App. 663, 179 S.E. 2d 820 (1971), a case factually similar to this case, no *Miranda* warnings were necessary. In *Beasley,* however, defendant was not in custody at the time of the questioning and his incriminating statement was made as a result of an on-the-scene investigation, an exception specifically recognized in *Miranda.* Hence, *Beasley* is distinguishable from the present case, for as stated in *Lowe v. United States,* 407 F. 2d 1391 (9th Cir. 1969) :

> "The questioning of a driver of a stopped car on an open highway by one policeman, without more, cannot be characterized as a 'police dominated' situation or as 'incommunicado' in nature. . . .
>
> * * *
>
> " . . . This general on the scene questioning is a well accepted police practice; it is difficult to imagine the police warning every person they encounter of his *Miranda* rights. This is why the opinion in *Miranda* expressly ex-

cluded 'on-the-scene questioning' from the warning requirements. . . . "

See *State v. Sykes, supra.*

[3] The Court of Appeals in *Beasley* quoted with approval from *State v. Macuk,* 57 N.J. 1, 15-16, 268 A. 2d 1, 9 (1970), as follows:

> "Now, with the problem squarely before us, we are of the opinion that, in view of the absence of any indication to the contrary by the United States Supreme Court, the rules of *Miranda* should be held inapplicable to all motor vehicle violations."

We do not approve this language. This Court in *State v. Hill,* 277 N.C. 547, 553, 178 S.E. 2d 462, 466 (1971), stated: "One who is detained by police officers under a charge of driving while under the influence of an intoxicant has the same constitutional and statutory rights as any other accused," citing *State v. Morris,* 275 N.C. 50, 165 S.E. 2d 245 (1969). In *State v. Strickland,* 276 N.C. 253, 261, 173 S.E. 2d 129, 134 (1970), a case in which defendant was charged with operating a motor vehicle while under the influence of intoxicating liquor, Justice Branch, speaking for the Court, stated:

> "It is the law in this State '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.' *State v. Catrett,* 276 N.C. 86, 171 S.E. 2d 398 [Citations omitted.]"

See *State v. Sykes, supra;* Annot., 25 A.L.R. 3d 1076 (1969).

In *Miranda* the Supreme Court adopted the following rule:

> "At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. . . . The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. . . . [T]he right

> to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. . . . [T]he need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires. . . . Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation. . . . As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. . . . " 384 U.S. at 467-71.

The Supreme Court of the United States in *Miranda* does not limit the rights it sets forth to persons *charged* with felonies or misdemeanors, and neither does this Court in *State v. Strickland, supra;* rather both Courts relate those rights to any individual being subjected to custodial interrogation concerning a criminal charge. See *Argersinger v. Hamlin,* 407 U.S. 25, 32 L.Ed. 2d 530, 92 S.Ct. 2006 (1972). We hold, therefore, that after the defendant in this case was arrested and placed in the patrol car, the rules of *Miranda* were applicable to him just as any other person in custody on a criminal charge.

For the reasons stated, the decision of the Court of Appeals is reversed, and the cause is remanded to that court with direction to award a new trial to be conducted in accordance with the principles herein set forth.

Reversed and remanded.

STATE OF NORTH CAROLINA v. WILLIAM THOMAS SHORE

No. 62

(Filed 15 May 1974)

1. Arrest and Bail § 3— arrest without warrant — reasonable ground

Officers acted on reasonable ground and with probable cause when they stopped defendant and his companion and took them to the police station for photographing and fingerprinting, since the officers had been informed by officers in another town that a man

fitting defendant's description had committed an armed robbery aided and abetted by a man fitting the description of defendant's companion and that the two robbers had been seen in a vehicle registered to defendant's companion.

2. **Arrest and Bail § 3— warrantless arrest — armed robbery — reasonable belief that defendant will evade arrest**

Armed robbery is a crime of violence, the very nature of which suffices to support a reasonable belief that defendant would evade arrest if not immediately taken into custody; therefore, officers who had reasonable grounds to believe that defendant and his companion had committed an armed robbery lawfully arrested defendant and his companion without a warrant.

3. **Criminal Law § 66— in-court identification — observation at crime scene as basis**

The trial court in an armed robbery case did not err in admitting an in-court identification of defendant by two eyewitnesses where the evidence tended to show that one witness gave a detailed description of defendant as one of the robbers, picked defendant's photograph out of a group of eight photographs, and then observed defendant as he was brought alone into a hallway to be observed by the witnesses, while the second eyewitness did not identify defendant from the group of photographs or from the hallway showup, but subsequently made up her mind that defendant was one of the robbers, based on her observation of defendant at the crime scene.

4. **Criminal Law § 60— fingerprint evidence — testimony of officer who lifted prints**

The trial court did not err in admitting testimony of an officer that he had lifted latent fingerprints from an adding machine at the crime scene, though the officer had not been qualified as an expert, since the officer's testimony indicated that he had been lifting prints for ten years and was well qualified to perform that procedure and since the officer made no attempt to express an opinion with respect to the prints.

5. **Criminal Law § 60— fingerprint evidence — chain of custody of evidence**

The trial court did not err in allowing an expert witness to testify that latent fingerprints lifted by an officer from the crime scene and fingerprints of defendant on a fingerprint card were the same since there was no breach in the chain of custody of the evidence as indicated by testimony that the officer who lifted the prints personally mailed them together with a fingerprint card of defendant's prints to the SBI in Raleigh, the envelope containing these was received unopened by the witness, he opened the envelope, ran tests on the two sets of prints, and concluded that they were made by the same person.

6. **Criminal Law § 118— alibi — formal instruction not required**

Although the trial court did not use the word "alibi" in its charge or recapitulation of the evidence, the court did make it quite clear that the burden was on the State to prove all essential elements of the crime charged and that defendant did not have to prove anything in

order to be found not guilty; therefore, the charge afforded defendant the same benefits a formal charge on alibi would have afforded.

PURSUANT to G.S. 7A-30(1) defendant appeals from decision of the Court of Appeals upholding judgment of *Falls, J.*, 16 July 1973 Session, CATAWBA Superior Court.

Defendant was tried upon three separate bills of indictment, proper in form, each charging him with armed robbery on 7 June 1973.

The State's evidence tends to show that on 7 June 1973 Steven Clark was employed as office manager of Capitol Credit Plan, Inc., located at 258 First Avenue, N.W. in Hickory. Other employees working in the office that day were Mrs. Carol Austin and Wayne Hildebran. At approximately 9:50 a.m. two Negro males entered the office. One walked to the center of the room while the larger of the two approached the counter and said he wanted to apply for a loan. While Mrs. Austin prepared to take the application, Steven Clark went to his parked car and returned with a briefcase. When he went to the booth where the applicant was sitting, a pistol was shoved in his face and he was told "to be cool and do like he was told and nobody would get hurt."

Wayne Hildebran and Carol Austin were taken to a back room by the smaller robber and forced to lie face down on the floor. Hildebran's hands were tied behind his back with his own necktie. Steven Clark was then taken into the same room, required to lie face down on the floor, and his hands were also tied behind his back with his necktie. One of the robbers then tied Hildebran's feet with an extension cord. The larger robber carried an adding machine from a table across the room, placed it beside Steven Clark on the floor and tied Clark's feet with the cord that was attached to the adding machine. Clark's wallet containing $14.00 was taken from his person and $37.00 in cash was taken from Wayne Hildebran. Mrs. Austin, with a gun in her back, was then taken to the front office where she put over $1300 in a small bank bag and handed it to the shorter robber. She was returned to the back room and required to remove her panty hose which the robbers used to tie her hands and feet behind her back. After warning the victims not to move, the robbers fled the scene with their loot. All told, they were in the office for five to seven minutes.

Steven Clark worked his arms loose within a minute and the police were called. When the police arrived, Clark told them the robbers were two black males, one about five feet ten or eleven inches in height, weighing 220 pounds, with muttonchops and a small goatee, wearing khaki trousers, brown shirt and work boots; and the other, five feet six or eight inches in height, weighing about 160 pounds, with muttonchops and possibly a mustache, wearing work clothing and a golf-type hat. The larger one had very broad shoulders and both were armed.

At about 9:40 a.m., 7 June 1973, James H. Edwards observed two Negro men walking down First Avenue, N.W. in Hickory. Due to their suspicious actions, he got in his car, circled the block, and observed them as they entered a car parked on First Avenue, N.W. behind the old Belk or Penney Building. It was a 1973 Chevrolet, yellowish-gold, North Carolina license number AEL542. "The tall one" got under the wheel, drove the car from the parking space and followed Mr. Edwards down the street for several blocks before departing in a different direction. Mr. Edwards went directly to the police department where he furnished a description of the men, the car and the license number. Later that morning, after Mr. Clark reported that a robbery had been committed by two men fitting the same description as given by Mr. Edwards, the Hickory Police checked with the Motor Vehicles Department and ascertained that the vehicle in question was registered in the name of William Gallaway, 5129 Britt Drive, Winston-Salem. This information was relayed by radio to the Winston-Salem Police Department together with a description of the men and the car and the fact that a robbery had been committed in Hickory by robbers using that car.

About 2:30 p.m. on 7 June 1973, after receiving the radio message from Hickory, two Winston-Salem officers went to 5129 Britt Drive where they observed a 1973 Chevrolet, North Carolina license number AEL542, parked in the driveway. The officers staked out the place and shortly thereafter two subjects rode up on a motorcycle. They stopped the bike, got off and went into the house. Then both of them came out, got back on the motorcycle and proceeded down Britt Drive toward Cherry Street. The officers stopped the motorcycle and ascertained from the driver's operator's license that he was William Gallaway. Defendant William Thomas Shore was the passenger. Gallaway gave his address as 5129 Britt Drive, the same house

where the 1973 Chevrolet was parked. Upon request of the officers, William Gallaway and defendant William Thomas Shore accompanied them to the police station, the officers in their patrol car and Gallaway and defendant on the motorcycle.

At the police station both Gallaway and Shore were fingerprinted and Shore was photographed. The officers from Hickory arrived later that day and returned defendant to Hickory. Gallaway, who gave the Winston-Salem police permission to search his residence, was taken to his residence where he escaped from the officers. The officers found a .22 caliber revolver, a pair of khaki pants, a pair of brown work shoes, and a golf-type cap, which they seized.

On the afternoon of the robbery, Steven Clark viewed eleven photographs at the Hickory Police Department and picked Gallaway's photograph as one of the robbers. He left Hickory that day around 4:30 p.m. and, upon his arrival at the Winston-Salem Police Department, viewed a group of eight additional photographs from which he picked defendant's picture as the man who stuck the gun in his face that morning.

Mrs. Carol Austin viewed the eight photographs at the Winston-Salem Police Department but did not select anybody. She also saw defendant Shore in the hall at the station but did not identify him as one of the robbers at that time. However, on the return trip to Hickory she "made up her mind" that defendant Shore was one of the robbers. She so testified, adding: "I thought about it a long time." She picked the shorter man (Gallaway) from the eleven photographs exhibited to her in Hickory. She said on voir dire: "I was sure about Gallaway."

Harold Wayne Hildebran testified that he was unable to identify defendant Shore either from the eight photographs he viewed in Winston-Salem or from viewing defendant personally.

James H. Edwards identified defendant Shore as one of the men he saw walking on First Avenue, N.W. in Hickory, and saw entering the 1973 Chevrolet bearing North Carolina license number AEL542 at approximately 9:40 a.m. on 7 June 1973.

On 7 June 1973 O. M. McQuire, Captain of the Detective Division, Hickory Police Department, lifted three or four latent fingerprints from the adding machine found in the back room

at the office of Capitol Credit Plan and placed them on a sheet of Capitol Credit Plan letterhead paper. Detective L. D. Morrison with the Hickory Police Department inked defendant's fingerprints onto a fingerprint card, with defendant's consent, on 7 June 1973. The sheet of paper bearing the latent lifts from the adding machine (State's Exhibit 10) and the fingerprint card containing defendant's inked fingerprints (State's Exhibit 11) were mailed to the State Bureau of Investigation in Raleigh by Captain McQuire personally on 8 June 1973 in a sealed envelope properly addressed and bearing correct postage.

Steven R. Jones, Supervisor of the Identification Section of the State Bureau of Investigation, received State's Exhibits 10 and 11 on 11 June 1973 by first class mail. He personally opened the envelope containing them and compared the latent fingerprints with defendant's known inked impressions. Comparison of the latent prints with the inked impression of defendant's right thumbprint revealed more than twelve points of identification. Based on such comparison it was Mr. Jones' opinion that defendant's right thumb made the two latent thumbprints on State's Exhibit 10.

Approximately ten days prior to 7 June 1973 defendant William Thomas Shore and William Gallaway each traded for a new motorcycle at Town and Country Honda in Winston-Salem. Since considerable custom work had to be done on the new motorcycles, they were not delivered at that time. Between 10 and 11 a.m. on 7 June 1973, Gallaway called Town and Country Honda concerning delivery of the motorcycles previously purchased and was informed they would be ready for delivery at 2 p.m. that day. Shore and Gallaway arrived at Town and Country Honda around 1:30 p.m. on 7 June 1973, and each completed his purchase. Shore paid $849 in cash for the difference in his trade, and Gallaway paid $999 in cash for the difference in his trade.

The in-court identifications of defendant by Steven Clark and Mrs. Carol Austin were admitted over defendant's objection. The court conducted a voir dire, made findings of fact, and concluded that their in-court identifications of defendant were independent in origin and not tainted by any outside confrontation.

As a witness in his own behalf, defendant testified that he was twenty-one years of age, six feet, one and one-half inches

tall, and weighed 225 pounds on 7 June 1973; that on the date of this robbery he had a goatee around the edge of his chin, a light moustache and sideburns; that he did not participate in the armed robbery for which he stands accused and was not in Hickory on that date until taken there late in the evening by the officers. He stated that he was at home until noon on 7 June 1973, and that he telephoned Town and Country Honda about 10 or 10:15 a.m. from his home in Winston-Salem to make sure the motorcycles were ready. About 11 a.m. William Gallaway came to defendant's home and the two of them left to go to the Honda place, arriving there about 11:30 a.m. The trades were completed and defendant testified he paid the difference of $849 with money he got from his father.

Gary Shore, defendant's brother, testified he went to defendant's home at 9:15 a.m. on 7 June 1973 to borrow some tape and left about 10:30 a.m.; that defendant was at home at that time.

Roswell Howard Shore, defendant's wife, testified that on the morning of 7 June 1973 defendant was at home with her until he left the house around 11 or 11:15 a.m.

William B. Shore, defendant's father, testified that he loaned defendant $800 "a day or two before June 7" and told him he could get more if he needed it. Mr. Shore said he had worked for Reynolds Tobacco Company for twenty-eight years and part-time at Baptist Hospital for fifteen and a half years averaging $10,000 to $20,000 a year; that he had approximately $15,000 in the Credit Union and could get money when he needed it.

The jury convicted defendant of armed robbery in all three cases. From judgments pronounced defendant appealed to the Court of Appeals. That court upheld the judgments, 20 N.C. App. 510, and defendant appealed to this Court allegedly as of right under G.S. 7A-30(1), asserting involvement of substantial constitutional questions. Errors assigned are discussed in the opinion.

Robert Morgan, Attorney General; Charles R. Hassel, Jr., Associate Attorney, for the State of North Carolina.

John F. Morrow of Wilson and Morrow, attorney for defendant appellant.

HUSKINS, Justice.

Defendant contends that his photograph and fingerprints were taken by the Winston-Salem Police while he was illegally detained. He argues therefore that admission of identification evidence based on his photograph and fingerprints violated his constitutional rights and constitutes prejudicial error. His first assignment of error is based on this contention.

G.S. 15-41 in pertinent part provides: "A peace officer may without warrant arrest a person: . . . (2) When the officer has reasonable ground to believe that the person to be arrested has committed a felony and will evade arrest if not immediately taken into custody." It is not required that a felony be shown actually to have been committed. It is only necessary that the officer have reasonable ground to believe that such an offense has been committed. *State v. Mobley,* 240 N.C. 476, 83 S.E. 2d 100 (1954). The terms "reasonable ground" as used in the foregoing statute and "probable cause" as used in the Fourth Amendment to the Federal Constitution are substantial equivalents having virtually the same meaning. *Draper v. United States,* 358 U.S. 307, 3 L.Ed. 2d 327, 79 S.Ct. 329 (1959). A warrantless arrest is based upon probable cause if the facts and circumstances known to the arresting officer warrant a prudent man in believing that a felony has been committed and the person to be arrested is the felon. *McCray v. Illinois,* 386 U.S. 300, 18 L.Ed. 2d 62, 87 S.Ct. 1056 (1967). "Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. . . . To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith." 5 Am. Jur. 2d, Arrest § 44 (1962); *State v. Harris,* 279 N.C. 307, 182 S.E. 2d 364 (1971).

[1, 2] In *State v. Roberts,* 276 N.C. 98, 171 S.E. 2d 440 (1970), we said that reasonable ground for belief "may be based upon information given to the officer by another, the source of such information being reasonably reliable." Here, the Winston-Salem Police had been informed by the Hickory Police that a man fitting defendant's description had committed an armed robbery in Hickory aided and abetted by a man fitting the description of William Gallaway; that the two robbers had been seen in a Chevrolet automobile bearing North Carolina license

number AEL542, a car registered in the name of William Gallaway. The Winston-Salem officers had been furnished a description of the robbers, including their estimated height and weight, their clothing and color. When defendant was first seen by the Winston-Salem officers he was on a motorcycle with William Gallaway and stopped at Gallaway's address where the car described by the Hickory Police was parked. Both men fitted the description of the men sought in connection with the armed robbery in Hickory. Manifestly, the totality of these facts and circumstances would warrant a prudent man in believing that the felony of armed robbery had been committed in Hickory and that defendant had participated in the commission of that crime. Thus the officers acted on reasonable ground and with probable cause when they stopped Gallaway and this defendant and took them to the police station for photographing and fingerprinting. *State v. Alexander,* 279 N.C. 527, 184 S.E. 2d 274 (1971); *State v. Harris, supra; State v. Roberts, supra.* Armed robbery is a crime of violence, the very nature of which suffices to support a reasonable belief that defendant would evade arrest if not immediately taken into custody. *State v. Alexander, supra.*

While there is no absolute test to ascertain exactly when an arrest occurs, the time and place of an arrest is determined in the context of the circumstances surrounding it. *State v. Allen,* 282 N.C. 503, 194 S.E. 2d 9 (1973). When the foregoing principles of law are applied to the facts in this case, the exact point in time when defendant was "arrested" is immaterial. The Winston-Salem Police had reasonable grounds under the law to arrest defendant and Gallaway without a warrant at the moment of their initial on-the-street detention. Furthermore, their arrest was constitutionally valid because the officers had probable cause to make it. *State v. Eubanks,* 283 N.C. 556, 196 S.E. 2d 706 (1973). Since defendant's detention at the time he was photographed and fingerprinted was in all respects lawful, his first assignment of error has no merit and is overruled.

Defendant contends his in-court identification by Steven Clark and Carol Austin was based on unnecessarily suggestive pretrial identification procedures which violated due process. He therefore argues that the identification testimony of these witnesses was erroneously admitted.

"The test under the due process clause as to pretrial identification procedures is whether the totality of the circumstances

reveals pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice. *Foster v. California,* 394 U.S. 440, 22 L.Ed. 2d 402, 89 S.Ct. 1127; *Stovall v. Denno,* 388 U.S. 293, 18 L.Ed. 2d 1199, 87 S.Ct. 1967; *Rochin v. California,* 342 U.S. 165, 96 L.Ed. 183, 72 S.Ct. 205; *State v. Haskins,* 278 N.C. 52, 178 S.E. 2d 610; *State v. Austin,* 276 N.C. 391, 172 S.E. 2d 507; *State v. Rogers,* [275 N.C. 411, 168 S.E. 2d 345]." *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974).

In *Simmons v. United States,* 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S.Ct. 967 (1968), identification by photograph was expressly approved and the Court held that "each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

The *Simmons* test has been applied by this Court in many cases including *State v. Tuggle,* 284 N.C. 515, 201 S.E. 2d 884 (1974); *State v. Lock,* 284 N.C. 182, 200 S.E. 2d 49 (1973); *State v. Morris,* 279 N.C. 477, 183 S.E. 2d 634 (1971); *State v. Jacobs,* 277 N.C. 151, 176 S.E. 2d 744 (1970); *State v. Accor and Moore,* 277 N.C. 65, 175 S.E. 2d 583 (1970).

At defendant's request the trial court conducted a voir dire to determine whether defendant's in-court identification was tainted by prior photographic identification procedures or by any confrontation procedure. The evidence on voir dire reveals that Steven Clark, Carol Austin, and Wayne Hildebran were shown eight photographs at the Winston-Salem Police Station on the afternoon of the robbery. The photographs were placed on a table in two rows of four. Although the record is not entirely clear on this point, each witness apparently viewed the photographs separately. Steven Clark picked the photograph of defendant as one of the men who robbed the Capitol Credit Plan office in Hickory earlier that day. Mr. Clark testified that "there wasn't anything on the photographs to reveal the name of any of the subjects," and that "no one suggested to me that the defendant was in this group of eight photographs." There is no evidence that defendant's photograph was marked in any way to make it conspicuous. There is some evidence that the *quality* of defend-

ant's photograph may have been better than the others, but this alone would not render the procedure impermissibly suggestive. There is nothing in the record to support defendant's contention in that respect. *State v. Knight,* 282 N.C. 220, 192 S.E. 2d 283 (1972).

After Steven Clark and Carol Austin had viewed the eight photographs at the Winston-Salem Police Station, and after Clark had picked defendant's photograph as one of the robbers while Mrs. Austin had failed to make any selection, the officers brought defendant and Gallaway singly into the hallway to be viewed by the witnesses. Defendant contends this hallway showup was impermissibly suggestive and a violation of due process. The record discloses, however, that the State offered no evidence of this hallway showup in the presence of the jury. Our inquiry therefore is not whether evidence of the showup would be admissible but whether the in-court identification by these witnesses was tainted by the confrontation in the hallway.

Although the practice of showing suspects singly for identification purposes has been recognized as suggestive and widely condemned, whether such a confrontation violates due process depends upon the totality of the circumstances. *Neil v. Biggers,* 409 U.S. 188, 34 L.Ed. 2d 401, 93 S.Ct. 375 (1972); *Stovall v. Denno,* 388 U.S. 293, 18 L.Ed. 2d 1199, 87 S.Ct. 1967 (1967); *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974). In the *Biggers* case the United States Supreme Court considered the scope of due process protection against the admission of evidence deriving from suggestive identification procedures and held that even if a pretrial confrontation procedure was suggestive there is no violation of due process if examination of the total circumstances indicates the identification was reliable. The factors set out by the Court to be considered in evaluating the likelihood of misidentification are: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.

Here, the record discloses that Steven Clark observed defendant at the Capitol Credit Plan office for a period of five to seven minutes. He supplied the officers with a detailed description of the two men who robbed the office and one description fit defendant very closely. Mr. Clark was certain that he "will

never forget his face or his body build" and the witness never wavered in his identification of defendant. The time lapse between the crime and the confrontation in question was only nine hours and occurred shortly after Mr. Clark had picked defendant's photograph from the eight photographs shown him by the police.

Mrs. Carol Austin testified on voir dire that defendant was one of the men who committed the robbery and that she recognized him "from seeing him in our office on the 7th of June . . . not tainted by seeing any photograph or seeing him anywhere else." The record discloses that after viewing the eight photographs at the Winston-Salem Police Station she made no photographic identification. After seeing defendant in person in the hallway at the police station in Winston-Salem, she still made no identification. Explaining the basis for her in-court identification, she said: "I interviewed him [defendant] face to face concerning the loan. . . . I do not think that my being able to see him even though I could not identify him at that time has helped me make up my mind. I made up my mind when we were coming back from Winston-Salem. No one talked to me about making up my mind. I thought about it a long time." She had already identified Gallaway from the eleven photographs exhibited to her in Hickory.

[3] The trial court found and concluded "that the in-court identification of this defendant by the witnesses Clark and Mrs. Austin . . . is not tainted by any outside confrontation but was based upon the identification during the course of the alleged robbery." Since this finding is supported by competent evidence, it alone renders the in-court identification competent even if it be conceded *arguendo* that the showup procedure was improper. *State v. Haskins,* 278 N.C. 52, 178 S.E. 2d 610 (1971); *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581 (1968); *see Coleman v. Alabama,* 399 U.S. 1, 26 L.Ed. 2d 387, 90 S.Ct. 1999 (1970). The finding, supported by competent evidence, is conclusive on appeal and must be upheld. *State v. Tuggle,* 284 N.C. 515, 201 S.E. 2d 884 (1974). The failure of Mrs. Austin to identify defendant from the photographs and her failure to identify him during the brief hallway showup goes to the weight rather than the competency of her in-court identification.

The totality of the circumstances indicates that the identification was reliable and hence no violation of due process was committed. Defendant's objections to the in-court identification

testimony of Steven Clark and Carol Austin were properly overruled.

[4] Over defendant's objection the trial court permitted Captain O. M. McQuire of the Hickory Police Department to testify concerning the "lifting" of latent fingerprints from an adding machine in the Capitol Credit Plan office. Defendant asserts, and correctly so, that Captain McQuire had not been qualified as an expert. On that ground defendant assigns as error the admission of Captain McQuire's testimony.

Defendant cites no authority, and we are unaware of any, that only "experts" may "lift" fingerprints and then testify that the latent prints had been lifted from some surface or object at the scene of the crime. Admittedly, a person who lifts latent prints must know how to perform that procedure. But this does not mean he must be qualified as an "expert." The basic reason for qualifying a witness as an expert is to insure that he is better qualified than the jury to form an opinion and draw appropriate inferences from a given set of facts. 1 Stansbury's North Carolina Evidence § 132 (Brandis rev. 1973).

Here, Captain McQuire's testimony indicates that he had been lifting latent fingerprints for a period of ten years and was well qualified to perform that procedure. He made no attempt to express an opinion and was asked no questions requiring him to do so. This assignment of error is totally without merit.

[5] Defendant further contends that the trial judge committed prejudicial error in allowing Stephen R. Jones to testify that he compared the latent fingerprints lifted by Captain McQuire (State's Exhibit 10) with the fingerprints of defendant on the fingerprint card (State's Exhibit 11). Defendant does not challenge Jones as an expert witness but argues that the State failed to lay a proper foundation for his testimony in that it failed to show a proper "chain of custody" of the two exhibits.

The evidence on this question shows that Captain McQuire lifted the latent prints from an adding machine in the Capitol Credit Plan office, placed them on a sheet of letterhead paper from Capitol Credit and on 8 June 1973 personally mailed this sheet of paper together with a fingerprint card containing defendant's fingerprints to the State Bureau of Investigation in Raleigh. The envelope containing these two exhibits was received unopened by Stephen R. Jones when his secretary carried

the envelope from the SBI mailroom to his desk. Jones then opened the envelope, ran the comparison tests on State's Exhibits 10 and 11, and concluded that the latent prints on the letterhead stationery and defendant's right thumbprint on the fingerprint card were made by the same thumb. At trial, Captain McQuire identified Exhibit 10 as the letterhead paper on which he placed the latent prints, and Detective Morrison testified that Exhibit 11 was the fingerprint card containing defendant's fingerprints. We see no breach in the chain of custody from this evidence. It all points unerringly to the conclusion that the latent prints examined by Stephen R. Jones were the latent prints lifted from the adding machine by Captain McQuire and that the fingerprints on the fingerprint card were those of defendant. This assignment has no merit and is overruled.

Finally, defendant assigns as error the failure of the trial court to instruct the jury as to the legal principles applicable in its consideration of defendant's alibi evidence.

Prior to decision of this Court in *State v. Hunt,* 283 N.C. 617, 197 S.E. 2d 513 (filed 12 July 1973), a defendant who offered alibi evidence was entitled to such instruction without specifically requesting it. *State v. Vance,* 277 N.C. 345, 177 S.E. 2d 389 (1970); *State v. Leach,* 263 N.C. 242, 139 S.E. 2d 257 (1964); *State v. Gammons,* 258 N.C. 522, 128 S.E. 2d 860 (1963); *State v. Spencer,* 256 N.C. 487, 124 S.E. 2d 175 (1962).

In *State v. Hunt, supra,* we held "that reason and authority support a different rule, namely, that the court *is not required* to give such an instruction unless it is requested by the defendant. Hence, the cited decisions, in respect of the rule stated above, are overruled. The rule stated herein will be applicable in trials commenced after the filing of this opinion. . . . " The opinion in *Hunt* was filed 12 July 1973. The trial of this case commenced on 17 July 1973. Defendant concedes he made no request for an instruction on alibi but contends, nevertheless, that since the decision in *Hunt* had not been published at the commencement of his trial he may not be charged with knowledge of the change in the rule.

Prior to the filing of our decision in the *Hunt* case, a defendant offering evidence of alibi was entitled, *without request,* to a charge substantially as follows: "An accused, who relies on an alibi, does not have the burden of proving it. It is incumbent upon the State to satisfy the jury beyond a reasonable doubt on

the whole evidence that such accused is guilty. If the evidence of alibi, in connection with all the other testimony in the case, leaves the jury with a reasonable doubt of the guilt of the accused, the State fails to carry the burden of proof imposed upon it by law, and the accused is entitled to an acquittal." *State v. Minton,* 234 N.C. 716, 68 S.E. 2d 844 (1952); *State v. Spencer, supra.*

Portions of the charge in this case pertinent to alibi are as follows:

> "The defendant has entered pleas of not guilty to any and all of these three charges of armed robbery. The fact that he has been indicted is no evidence of his guilt. Under our system of justice once a defendant such as this defendant pleads not guilty *he is not required to prove his innocence,* he is presumed to be innocent. The State must prove to you that the defendant in these cases is guilty beyond a reasonable doubt. (Emphasis added.)
>
> * * *
>
> "The defendant does not have the burden of proof or establishing his innocence as I told you awhile ago, *he does not have to prove anything. The burden is on the State from the beginning to the end of the case.* Nevertheless the defendant offered evidence in his own behalf and by members of his family. (Emphasis added.)
>
> * * *
>
> " . . . [T]he defendant testified to the effect that he was not in Hickory at all and therefore he could not be the person or one of the persons that robbed the Capitol Credit Plan and the employees of their money; that he was in Winston-Salem and until he was brought back to Hickory that he had never been in Hickory in his life.
>
> * * *
>
> " . . . [A]nd he was corroborated in that he didn't leave Winston-Salem on the 7th of June by his wife who testified that he did not leave the apartment or the house where they lived except to make a phone call in or around 11:30 or 12:00 that day; that his brother testified that he went to his apartment or his house on the morning of June 7th, about ten and was there until 10:30 and that the defendant was there and did not leave while he was there . . . . "

Then in the final mandate to the jury in each of the three cases the court instructed the jury that in order to convict defendant of armed robbery the State must prove beyond a reasonable doubt (1) that defendant Shore either alone or with another took the money alleged in the bill of indictment, (2) carried it away, (3) without the consent of the victim, (4) with intent to deprive the victim of the use of the money permanently, (5) knowing he was not entitled to take the money, (6) having a firearm in his possession at the time of the taking, and (7) obtained the money by endangering or threatening the life of the employees Clark, Hildebran and Mrs. Austin. The court then charged the jury:

> "If you do not so find or have a reasonable doubt about either one or more of these seven essential elements which I just outlined for you, it would be your duty to return a verdict of not guilty as to that charge or if upon a fair and impartial consideration of *all the facts and circumstances in the case,* you have a reasonable doubt as to the defendant's guilt of that crime, it would be your duty to give him the benefit of such doubt and to find him not guilty." (Emphasis added.)

[6] It thus appears that the trial judge made it quite clear that the burden was on the State to prove all essential elements of the crime charged and that defendant did not have to prove anything in order to be found not guilty. Although the word "alibi" was not mentioned in the charge or in the recapitulation of the evidence, the charge given afforded defendant the same benefits a formal charge on alibi would have afforded. We perceive no prejudice to defendant. "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) ; *accord, State v. Cross,* 284 N.C. 174, 200 S.E. 2d 27 (1973). Insubstantial technical errors which could not have affected the result will not be held prejudicial. *State v. McWilliams,* 277 N.C. 680, 178 S.E. 2d 476 (1971). This assignment is overruled.

Defendant having failed to show prejudicial error the verdict and judgment in each case must be upheld.

No error.

FRANCES HOSIERY MILLS, INC. v. BURLINGTON INDUSTRIES, INC.

No. 17

(Filed 15 May 1974)

1. **Constitutional Law § 26— full faith and credit — void in personam judgment**

A judgment *in personam* is void if the court which rendered it did not have jurisdiction both as to the person and as to the subject matter of the action before it, and the Full Faith and Credit Clause does not give validity to such void judgment when it is offered as a basis for action, or as a defense, in the court of another state. Article IV, § 1, of the Constitution of the United States.

2. **Constitutional Law § 26; Judgments § 51— foreign judgment — lack of jurisdiction — burden of proof**

When suit is brought upon a judgment *in personam* rendered by a court of another state, or when such judgment is pleaded as a defense, the burden is upon the person resisting such judgment to establish that the court rendering it had no jurisdiction, and the jurisdiction of such court is to be determined by the law of the state wherein the judgment was rendered.

3. **Constitutional Law § 26; Judgments § 51— foreign judgment — inquiry into foreign court's jurisdiction**

A mere recital in a judgment that the court rendering it had jurisdiction is not conclusive and, notwithstanding such recital, the court of another state in which the judgment is asserted as a cause of action or as a defense may, within certain limits, make its own independent inquiry into the jurisdiction of the court which rendered the judgment.

4. **Constitutional Law § 26; Judgments § 51— foreign judgment — inquiry into foreign court's jurisdiction — prior litigation of issue**

Jurisdiction of a court to enter a judgment may not be inquired into by the court in another state in which the judgment is thereafter pleaded as a cause of action or as a defense where the jurisdiction issue was fully litigated in and determined by the court which rendered the judgment.

5. **Judgments § 51— foreign judgment — jurisdiction of foreign court**

The New York court which gave judgment *in personam* against plaintiff in favor of defendant had no jurisdiction to render such judgment, unless plaintiff consented to the jurisdiction of that court by its contract with defendant, where plaintiff is a North Carolina corporation not doing business in New York, it was not served with process in New York, its contract with defendant was made in North Carolina and required performance in this State, the claim of defendant which the New York judgment purported to determine did not originate in any activity of plaintiff in New York or in any contact of plaintiff therewith, and plaintiff did not appear in the New York court.

6. Uniform Commercial Code § 13— oral contract by telephone — validity

An oral contract for sale of yarn was enforceable where the evidence of both parties showed that a complete and valid contract was made by telephone. G.S. 25-2-201(3)(b).

7. Uniform Commercial Code § 13— invoices — written confirmation of contract

Invoices sent by defendant to plaintiff were sufficient to indicate that a contract for sale had been made between the parties within the meaning of G.S. 25-2-201(1) and constituted a "written confirmation" of a previously made oral contract for sale within the meaning of G.S. 25-2-207.

8. Uniform Commercial Code § 13— oral contract — written confirmation — additional terms — material alteration — necessity for consent

When one party to a valid oral contract for the sale of goods, within a reasonable time after the making of such contract, sends to the other party a document purporting to set out in writing the terms of the contract and includes therein a term not previously agreed upon, this constitutes a proposal for an addition to the contract; and when the parties to the contract are "merchants" as defined in G.S. 25-2-104(1), all such proposed additional terms to which the other party does not object in due time become part of the contract unless "they materially alter it." G.S. 25-2-207.

9. Uniform Commercial Code § 13; Constitutional Law § 26; Judgments § 51— oral contract — written confirmation — additional term — arbitration agreement — material alteration — necessity for consent — foreign arbitration award — full faith and credit

Where the parties entered an oral contract for the sale of yarn and written confirmations in the form of invoices sent by the seller to the buyer contained an additional term that disputes would be submitted to arbitration in New York, the proposed additional provision for arbitration constituted a material alteration of the contract that may not be deemed incorporated into the contract by reason of the mere silence of the buyer following its receipt of the invoices; therefore, where the buyer did not consent to the provision and the only basis for jurisdiction in a New York court was the purported arbitration agreement, the New York court had no jurisdiction to enter an arbitration award and such award is not entitled to full faith and credit in the courts of this State.

APPEAL by defendant from the decision of the Court of Appeals, reported in 19 N.C. App. 678, finding no error in the judgment of *Robert Martin, S.J.*, for the plaintiff at the 21 May 1973 Session of ALAMANCE.

The ground of appeal is that the courts below failed to give full faith and credit to a judgment of the Supreme Court of the State of New York for the County of New York.

The plaintiff, a North Carolina corporation, manufactures hose in North Carolina. The defendant, a Delaware corporation, with executive offices in Greensboro, North Carolina, manufactures and sells yarn for use in the production of hose. They contracted for the purchase by the plaintiff from the defendant of yarn, and the defendant, for the purpose of performing that contract, shipped yarn to the plaintiff. Hose made by the plaintiff from this yarn were defective.

The present action is a suit for damages for breach of alleged warranties of merchantability and fitness for purpose. The complaint alleges that the contracts of sale were oral and were made in North Carolina and that the defendant was specifically advised of the intended use of the yarn.

By its answer, the defendant denies the alleged warranties and, as an affirmative defense, asserts that all matters in controversy in this action are *res judicata* by virtue of an award of arbitrators, under the rules of the General Arbitration Council of the Textile Industry, and a judgment, upon such award, was entered in the Supreme Court of New York on 13 May 1969, in favor of the defendant against the plaintiff for $6,979.23, the alleged balance due upon the purchase price of the yarn. The answer also asserts a counterclaim for the amount of such New York judgment with interest from its rendition.

The plaintiff filed a reply denying the validity of the New York judgment, for want of jurisdiction in the Court of New York over the plaintiff.

Upon motion of the defendant, the plea in bar was tried separately before a jury. The following facts were stipulated:

> "On or about the first of June, 1967, the plaintiff * * * by telephone commenced purchasing yarn from the defendant * * * through an office of the defendant in High Point, North Carolina. Eleven (11) shipments were delivered by defendant to plaintiff as agreed, were used and paid for by the plaintiff.
>
> "Specifically, on January 3, 15, 17 and March 1, 1968, the plaintiff * * * by telephone ordered certain yarn from [the defendant] through an office of the defendant in High Point, North Carolina.
>
> "On or about January 25, 1968, or within a week thereafter, plaintiff alleges it discovered certain defects in panty-

hose produced by defendant's yarn, the subject of orders of January 3, 15, 17, 1968. Plaintiff notified defendant of the alleged defects and stopped payment for the yarn received. * * *

"As the yarn was shipped to the plaintiff by defendant, written invoices were issued for each shipment and duly received by the plaintiff. * * * The specifications on the invoices met the specifications of yarn ordered by telephone and no objection to any of the invoices was made by the plaintiff at the time of delivery. The yarn, subject of the orders and invoices, was received and used by the plaintiff in the production of panty hose.

"Thereafter, a controversy arose between the parties concerning the yarn. Payment was never made to the defendant by the plaintiff for the same, plaintiff alleging that defective conditions in the yarn were the cause of the defective condition in the panty hose, which defective conditions were denied by the defendant.

"The parties were unable to adjust their differences and in July, 1968, [the defendant] gave notice of and requested arbitration as provided in the alleged agreement between the parties as set forth in defendant's Exhibits A, B, C and D [invoices for shipments in fulfillment of the orders of January 3, 15 and 17 and March 1].

"Notice of arbitration hearing was duly served upon [the plaintiff] by registered mail on July 16, 1968.

"On September 30, 1968, [the plaintiff] filed a 'Notice and Objection' to the arbitration proceedings * * * .

"On February 24, 1969, [the plaintiff] filed a motion in the arbitration proceedings * * * stating that at no time and under no circumstances had plaintiff agreed to arbitrate any dispute in the State of New York.

"On February 25, 1969, [the plaintiff] instituted the present action in the Superior Court of Alamance County, North Carolina.

"On April 2, 1969, an unanimous arbitration award was made in favor of [the defendant] and [the plaintiff] was directed to pay to [the defendant] the sum of $6,365.75 for goods sold and delivered upon the contracts above referred

to, together with interest and costs. Thereafter, under date of April 11, 1969, [the defendant] filed a notice of application to confirm the arbitrator's award with the Supreme Court in the State of New York, in the County of New York, with service thereof upon [the plaintiff] by registered mail. * * * Thereafter, the matter came on for hearing before the court in the State of New York on April 28, 1969, and the award of the arbitrators was duly affirmed; the judgment entered against [the plaintiff] in conformity with the arbitrator's award, in the total sum of $6,979.23. * * * ."

The above mentioned Exhibits A, B, C and D are invoices upon the defendant's printed form, which form contains on the front thereof the following printed statement:

"The yarns as described below are ordered at the price and upon conditions of sale below and on the back of this contract.

"The buyer must sign and return a copy of this contract. The seller shall have the right to cancel this contract at any time, without liability on its part, unless a copy hereof is signed and returned by buyer to seller within five days from date hereof. In any event, delivery of yarn to seller for processing or acceptance by buyer of any part of such processed yarn shall constitute acceptance of this contract and all of its terms and conditions. *Controversies are subject to arbitration provisions on the back of this contract.*" (Emphasis added.)

The reverse side of each invoice, under the caption "CONDITIONS OF SALE," contained fourteen printed paragraphs, including the following:

"9. ARBITRATION: (a) Any controversy of claim arising under or in relation to this order or contract, or any modification thereof, shall be settled by arbitration. Such arbitration shall be held in the City of New York, in accordance with the laws of the State of New York, and the rules then obtaining of the General Arbitration Council of the Textile Industry or the American Arbitration Association as the party first referring the matter to arbitration shall elect, and the parties consent to the jurisdiction of the Supreme Court of the State of New York and further consent that any process or notice of motion or other application to the Court or a Judge thereof may be served outside the

State of New York by Registered Mail or by personal service provided a reasonable time for appearance is allowed. (b) The arbitrators sitting in any arbitration arising hereunder shall not have the authority or power to modify or alter any express condition or provision of this contract or to render an award which by its terms has the effect of altering or modifying any express condition or provision hereof."

The above printed "CONDITIONS OF SALE" on the reverse side of each such invoice also contained a paragraph disclaiming any warranties, express or implied, with respect to the goods not specifically set forth on the face of the invoice.

At the trial the defendant first offered in evidence the judgment roll of the State of New York in the matter of *Burlington Industries, Inc. v. Frances Hosiery Mills, Inc.* It then offered testimony with reference to the nature of the arbitration hearing in the City of New York and the nature of the evidence presented by Burlington Industries, Inc., thereat, including the above mentioned Exhibits A, B, C and D. According to this testimony, Frances Hosiery Mills, Inc., was not present or represented at the arbitration hearing.

The plaintiff then introduced evidence to the following effect:

Beginning on 7 December 1967, the plaintiff purchased from the defendant yarn for the manufacture of hose, receiving seventeen shipments over the period ending March 21, 1968. The plaintiff's secretary-treasurer is its officer having responsibility for its purchase of yarn. She placed the orders with the defendant's High Point office by telephone. She never talked to anyone in New York about them. The terms of the sales, including the amount of yarn, price and delivery date were agreed upon in the telephone conversations. In none of the telephone conversations was there any mention of arbitration of any differences which might arise. The above mentioned Exhibits A, B, C and D are documents "confirming an order over the telephone." When each of these arrived, she put it on the plaintiff's bulletin board and checked it against the shipment, as to poundage, when the shipment arrived. She did not read the printed matter thereon and did not sign or return a copy thereof to anyone, nor did she make any objection to the defendant concerning anything appearing on these documents. At no time did

the plaintiff agree with anyone to arbitrate in the State of New York any difference it might have with the defendant.

The defendant then offered evidence to the following effect:

Its representative in its High Point office, with whom the plaintiff's secretary-treasurer talked by telephone in placing orders, told her that he would communicate with the defendant's New York office and get back in touch with her as to the amount and delivery date. He did not have authority to enter into contracts on behalf of the defendant. (He did not testify that the plaintiff was so advised.) There was at this time a problem concerning the availability of yarn. The defendant's vice-president of sales, whose office was in New York, was in charge of deciding "who got the yarn." The above mentioned Exhibits A, B, C and D were prepared in New York and mailed therefrom, with a copy of each going to the defendant's High Point office. At no time was arbitration mentioned in any conversation between the plaintiff and the defendant's High Point office, nor was the plaintiff advised in any such conversation that if any dispute arose over the yarn it would have to go to New York. In the telephone conversations with the plaintiff's secretary-treasurer, the representative of the defendant in its High Point office discussed the price and delivery date but did not "go into any other terms of written contract." He told her "there would be a contract forthcoming covering the discussion we had as to poundage, price and delivery, etc."

The plaintiff then recalled its secretary-treasurer who testified that, in her telephone conversation with the defendant's High Point office, she was never told that the defendant's representative would have to "check with New York." He merely called back and told her that he could give her the desired poundage and the price. The plaintiff did not pay the invoices which were for the "bad yarn."

At the conclusion of all of the evidence, the defendant moved for a directed verdict in its favor upon the affirmative defense. The motion was denied. The following issues were submitted to the jury and each was answered in the affirmative.

> "1. Did the defendant's acceptance or confirmation of the plaintiff's order contain additional or different terms than orally agreed upon?
>
> "2. If so, did such additional or different terms materially alter the contract?"

Upon this verdict the court adjudged that the arbitration provision appearing in defendant's Exhibits A, B, C and D was not a part of the contract between the plaintiff and the defendant and is not binding upon the plaintiff.

On appeal to it, the Court of Appeals affirmed the judgment of the Superior Court. From this judgment the defendant now appeals on the ground that it violates the Full Faith and Credit Clause contained in Art. IV, § 1, of the Constitution of the United States.

Sanders, Holt & Spencer by W. Clary Holt, James C. Spencer, Jr. and Frank A. Longest, Jr., for defendant appellant.

Latham, Pickard, Cooper & Ennis by Thomas D. Cooper, Jr., for plaintiff appellee.

LAKE, Justice.

Article IV, § 1, of the Constitution of the United States provides:

> "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

By an Act of Congress, 28 USCA 1738, the manner in which judicial proceedings in the court of any state are to be proved in other courts within the United States is established and it is provided that judicial proceedings, so authenticated, "shall have the same full faith and credit in every court within the United States * * * as they have by law or usage in the courts of such State * * * from which they are taken."

As was said by Mr. Justice Frankfurter, speaking for the Court in Williams v. North Carolina, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577:

> "The implications of the Full Faith and Credit Clause, Article IV, § 1, of the Constitution, first received the sharp analysis of this Court in *Thompson v. Whitman,* 18 Wall. (U.S.) 457, 21 L.Ed. 897. * * * *Thompson v. Whitman* made it clear that the doctrine of *Mills v. Duryee* [i.e., the judgment of a state court should have the same credit, validity and effect in every other court of the United States which

it had in the state where it was pronounced] comes into operation only when, in the language of Kent, 'the jurisdiction of the court in another state is not impeached, either as to the subject matter or the person.' Only then is 'the record of the judgment * * * entitled to full faith and credit.' 1 Kent Commentaries (2d ed., 1832), 261 n. b. * * *

"A judgment in one State is conclusive upon the merits in every other State, but only if the court of the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment."

[1] The judgment rendered by the New York Court in the present matter is a judgment *in personam.* Such a judgment is void if the court which rendered it did not have jurisdiction both as to the person and as to the subject matter of the action before it. The Full Faith and Credit Clause does not give validity to such void judgment when it is offered as a basis for action, or as a defense, in the court of another state. *May v. Anderson,* 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed. 1221; *New York Ex Rel Halvey v. Halvey,* 330 U.S. 610, 67 S.Ct. 903, 91 L.Ed. 1133; *Bigelow v. Old Dominion Copper Co.,* 225 U.S. 111, 32 S.Ct. 641, 56 L.Ed. 1009; *Pennoyer v. Neff,* 95 U.S. 714, 24 L.Ed. 565; *Thompson v. Whitman, supra; Marketing Systems v. Realty Co.,* 277 N.C. 230, 176 S.E. 2d 775; *Thomas v. Frosty Morn Meats,* 266 N.C. 523, 146 S.E. 2d 397.

[2] "It is elementary that unless one named as a defendant has been brought into court in some way sanctioned by law, or makes a voluntary appearance in person or by attorney, the court has no jurisdiction of the person and judgment [*in personam*] rendered against him is void." *Thomas v. Frosty Morn Meats, supra; Pennoyer v. Neff, supra.* When suit is brought upon a judgment *in personam* rendered by a court of another state, or when such judgment is pleaded as a defense, the burden is upon such person resisting such judgment to establish that the court rendering it had no jurisdiction, *Thomas v. Frosty Morn Meats, supra,* and the jurisdiction of such court is to be determined by the law of the state wherein the judgment was rendered. *Marketing Systems v. Realty Co., supra; Dansby v. Insurance Co.,* 209 N.C. 127, 183 S.E. 521.

[3] However, a mere recital in the judgment that the court rendering it had jurisdiction is not conclusive and, notwithstanding such recital, the court of another state, in which the

judgment is asserted as a cause of action, or as a defense, may, within limits noted below, make its own independent inquiry into the jurisdiction of the court which rendered the judgment. *Bigelow v. Old Dominion Copper Co., supra; Brown v. Fletcher's Estate,* 210 U.S. 82, 28 S.Ct. 702, 52 L.Ed. 966; *Andrews v. Andrews,* 188 U.S. 14, 23 S.Ct. 237, 47 L.Ed. 366; *Thormann v. Frame,* 176 U.S. 350, 20 S.Ct. 446, 44 L.Ed. 500; *Pennoyer v. Neff, supra; Thompson v. Whitman, supra.* As Mr. Justice Holmes, speaking for the Court, said in *Chicago Life Insurance Co. v. Cherry,* 244 U.S. 25, 37 S.Ct. 492, 61 L.Ed. 966: "A court that renders judgment against a defendant thereby tacitly asserts, if it does not do so expressly, that it has jurisdiction over that defendant. But it must be taken to be established that a court cannot conclude all persons interested by its mere assertion of its own power, *Thompson v. Whitman,* 18 Wall. 457, even where its power depends upon a fact and it finds the fact. * * * There is no doubt of the general proposition that in a suit upon a judgment the jurisdiction of the court rendering it over the person of the defendant may be inquired into."

[4] Of course, jurisdiction is, itself, an issue which may have been fully litigated in, and determined by, the court which rendered the judgment thereafter pleaded as a cause of action, or as a defense, in a court of another state, as where the defendant therein was actually present in the first court and raised and litigated therein a question concerning the fact and validity of the service of its process upon the defendant.

In *Durfee v. Duke,* 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed. 2d 186, the petitioners sued in a Nebraska court to quiet title to certain bottom land on the Missouri River. The Nebraska court had jurisdiction of the subject matter if, but only if, the land was in Nebraska. That depended upon whether a shift in the river's course was due to accretion or avulsion. The respondent appeared in the Nebraska court and fully litigated the issues, including a contest of the jurisdiction of the Nebraska court over the subject matter of the controversy. The Nebraska court found the issues in favor of the petitioners and ordered title quieted in them. The respondent thereafter filed suit in Missouri to quiet title of the same land in her. That suit was removed to the Federal Court because of diversity of citizenship. The question arose as to whether the Federal Court in Missouri (in the same position as a State court in this respect) could inquire into the jurisdiction of the Nebraska court over the subject matter. The

District Court held that the Nebraska judgment on this question was *res judicata.* The Court of Appeals reversed, holding that a Missouri court could inquire into the jurisdiction of the Nebraska court over the subject matter of the Nebraska action. The Supreme Court reversed the Court of Appeals, saying, through Mr. Justice Stewart:

> "[W]hile it is established that a court in one State, when asked to give effect to the judgment of a court in another State, may constitutionally inquire into the foreign court's jurisdiction to render that judgment, the modern decisions of this Court have carefully delineated the permissible scope of such an inquiry. From these decisions there emerges the general rule that a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.
>
> "With respect to questions of jurisdiction over the person, this principle was unambiguously established in *Baldwin v. Iowa State Traveling Men's Assn.,* 283 U.S. 522. There it was held that a Federal Court in Iowa must give binding effect to the judgment of a Federal Court in Missouri despite the claim that the original court did not have jurisdiction over the defendant's person, once it was shown to the court in Iowa that that question had been fully litigated in the Missouri forum. 'Public policy,' said the Court, 'dictates that there be an end of litigation; that those who have contested an issue shall be bound by the results of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he had submitted his cause.' * * *
>
> "Following the Baldwin case, this Court soon made clear in a series of decisions that the general rule is no different when the claim is made that the original forum did not have jurisdiction over the subject matter."

In the Durfee case, a footnote by the Court states: "It is not disputed in the present case that the Nebraska courts had

jurisdiction over the respondent's person. She entered a general appearance in the trial court, and initiated the appeal in the Nebraska Supreme Court."

[5] In the present case, the plaintiff (defendant in the New York judgment) is a North Carolina corporation not doing business in New York. It was not served with process in New York. Its contract with the defendant was made in North Carolina and required performance in this State. The claim of the defendant, which the New York judgment purported to determine, did not originate in any activity of the plaintiff in New York or in any contact of the plaintiff therewith. The plaintiff did not appear in the New York court. It did not participate in and was not represented at the hearing before the arbitrators in New York. Thus, the New York court which gave judgment *in personam* against the plaintiff had no jurisdiction to render such judgment, unless the plaintiff consented to the jurisdiction of that court by its contract with the defendant. The defendant contends that the plaintiff did so consent, for the reason that the contract provided that any controversy arising thereon would be submitted to arbitration in New York. The plaintiff denies that its contract with the defendant so provided. The contract is governed by the Uniform Commercial Code, G.S. Chapter 25.

[6, 7] The evidence of both parties in the record before us shows that a complete and valid oral contract for the sale of the yarn was made by telephone, such oral contract being valid and enforceable where, as here, each party "admits in his pleading, testimony or otherwise in court that a contract of sale was made." G.S. 25-2-201(3)(b). Furthermore, as against the defendant, its Exhibits A, B, C and D constitute writings "sufficient to indicate that a contract for sale has been made between the parties," within the meaning of G.S. 25-2-201(1). Each of these exhibits constituted a "written confirmation" of a previously made oral contract for sale, within the meaning of G.S. 25-2-207.

The evidence of both parties is clear that the oral contract in each instance did not include any agreement for arbitration in New York, or elsewhere. Each such written confirmation did state that any controversy or claim arising in relation to the contract "shall be settled by arbitration" to be held in New York in accordance with the laws of that State. However, the plaintiff did not sign and return to the defendant any copy of such document, nor did it at any time otherwise manifest to the

defendant its consent to the arbitration provision, unless its failure to object thereto constitutes such a manifestation of assent.

The Uniform Commercial Code provides in G.S. 25-2-207 as follows:

> "*Additional terms in acceptance or confirmation.*—
>
> (1) A definite and seasonable expression of acceptance *or a written confirmation* which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms. (Emphasis added.)
>
> "(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> "(a) the offer expressly limits acceptance to the terms of the offer;
>
> "(b) they materially alter it; or
>
> "(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received. * * * "

[8] As other courts have observed, this provision of the Uniform Commercial Code is not a model of clarity. However, it does seem clear that when one party to a valid oral contract for the sale of goods, within a reasonable time after the making of such contract, sends to the other party a document purporting to set out in writing the terms of the contract and includes therein a term not previously agreed upon, this constitutes a proposal for an addition to the contract. When, as is stipulated here, the parties to the contract are "merchants," as that term is defined in the Code, G.S. 25-2-104(1), all such proposed additional terms, to which the other party does not object in due time, become part of the contract, unless "they materially alter it."

[9] Over strenuous belated objections by the plaintiff, the defendant has steadfastly refused to yield its preference for arbitration in New York over litigation in North Carolina. It ill behooves the defendant now to contend that this alleged addition to the oral contract was of no consequence to the parties and,

therefore, not a material change therein. Obviously, under the oral contract, the plaintiff was entitled to present to the courts of North Carolina such claim as it may have against the defendant for breach of that contract. Under the alleged additional term, it could not do so but would be confined to a presentation of its claim to a board of arbitration in New York. Beyond question, such a change in the contract would be a material alteration of it. Consequently, such proposed additional provision may not be deemed incorporated into the contract for sale of yarn between these parties by reason of the mere silence of the plaintiff following its receipt of the defendant's Exhibits A, B, C and D. The "Official Comment" following the above quoted section of the Uniform Commercial Code states:

> "Whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2). If they are such as materially to alter the original bargain, they will not be included unless expressly agreed to by the other party. If, however, they are terms which would not so change the bargain they will be incorporated unless notice of objection to them has already been given or is given within a reasonable time."

It follows that there was no agreement by the plaintiff to submit its claim for breach of the contract to arbitration in New York and, therefore, the New York court was without jurisdiction to enter the judgment upon which the defendant relies. Consequently, this judgment was not entitled to full faith and credit in the Superior Court and the principle of *res judicata* does not apply to claims of the parties under the contract of sale.

While peremptory instructions on the issues submitted to the jury by the Superior Court would have been proper upon the evidence in the record, the submission of these issues upon the instructions given was not error prejudicial to the defendant.

The trial in the Superior Court being limited to the defendant's plea in bar, evidence as to the quality of the yarn delivered by the defendant was not relevant to any question for determination in this trial. However, the defendant introduced, through the New York judgment roll, its contention that the yarn delivered conformed to the contract. We find no prejudicial error in the rulings of the Superior Court whereby the plaintiff was

allowed to explain that its failure to pay the contract price was due to its contention that the yarn was defective. The exclusion of such evidence could not reasonably have led to a different result as to the defendant's plea in bar.

No error.

PHYLLIS MONTAGUE BLACKLEY (NOW PHYLLIS DANIEL)
v. ROBERT HARRY BLACKLEY

No. 50

(Filed 15 May 1974)

1. **Divorce and Alimony § 24— child custody proceeding — jurisdiction**

The court in which a divorce action is brought acquires jurisdiction over the custody of the unemancipated children of the marriage, and such jurisdiction continues even after the divorce becomes final.

2. **Divorce and Alimony § 24— child custody order — requisites for modification**

The entry of an order in a custody matter does not finally determine the rights of parties as to the custody, care and control of a child, and when a substantial change of condition affecting the child's welfare is properly established, the Court may modify prior custody decrees; however, the modification must be supported by findings of fact based on competent evidence that there has been a substantial change of circumstances affecting the welfare of the child, and the party moving for such modification assumes the burden of showing such change of circumstances.

3. **Divorce and Alimony § 24— child custody — no changed circumstances — modification of order improper**

Evidence was insufficient to show a change of circumstances affecting the welfare of the parties' son so as to justify a modification of a prior order awarding custody to plaintiff mother where such evidence tended to show that plaintiff had remarried, her present husband had paid several antenuptial overnight visits to the home, the son was old enough to understand the impropriety of the visits, the present husband had disciplined the son by popping him on the bottom several times, but the husband and the son had a good relationship, and the mother loved her children and was concerned for their education, spiritual growth, and physical welfare.

ON *certiorari* to review decision of the Court of Appeals, 18 N.C. App. 535, 197 S.E. 2d 243, vacating Order of 5 June 1972, entered by *Chief District Court Judge Banzet,* of the Ninth Judicial District.

Plaintiff and defendant were married on 2 July 1961, at which time plaintiff was sixteen years old. Two children were born to the marriage, Robert Harry Blackley, Jr., on 24 December 1962, and Teresa Annette Blackley, on 6 February 1965. Plaintiff and defendant were separated on 4 January 1966, and a judgment granting an absolute divorce was entered at the July 1967 Civil Session of Granville Superior Court. Plaintiff was awarded custody of the children, and defendant was granted visitation privileges "at any reasonable time." Defendant was ordered to pay to the plaintiff the sum of $100 per month for support of the two children.

Pursuant to G.S. 7A-259(b) Judge Hobgood, by Order dated 9 May 1970, transferred the cause to the District Court Division. Upon motion of plaintiff and after a hearing, Judge Banzet entered an Order on 24 November 1970 increasing the monthly payments for support of the two children to $125 per month. On 12 May 1971, after finding that defendant was in arrears in his payments in the amount of $115, Judge Banzet entered a more detailed Order concerning visitation and transportation of the two children.

On 23 November 1971, defendant filed a Motion in the cause alleging that plaintiff had committed certain acts which made her unfit to have the care and custody of the children and prayed that the court enter such Order as " . . . may appear to be just and proper and for the best interest of said minor children." Plaintiff filed an Answer to the Motion denying any misconduct which rendered her unfit to have the care and custody of her children.

The Motion was heard by Judge Banzet on 9 December 1971, and on 20 December 1971. During the course of these hearings, defendant testified that he and one Earnest Stem observed the trailer occupied by plaintiff on 5 November 1971, from about 1:40 a.m. until 8:30 a.m., and there observed an automobile belonging to Don Daniel parked in the yard. At 8:13 a.m., Don Daniel came out of the trailer and left the premises shortly thereafter. Plaintiff came out of the trailer and fed a dog at about 8:30 a.m. He had previously seen Daniel's car parked in plaintiff's yard at approximately 6:15 or 6:30 in the morning.

Defendant further stated that he was divorced by plaintiff in July 1967, and that he remarried a few days later. His present wife, Janet, is a beauty parlor operator who has a ten year old child by a former marriage. Janet occasionally worked at night.

On cross-examination he admitted that whenever he saw the children, they were neat, clean, polite, courteous, and that they were doing well in school. He stated, "I say she was a fit mother until the 5th of November 1971."

Earnest Stem testified in corroboration of defendant's testimony concerning the events of 5 November 1971, and the presence of Daniel's automobile at plaintiff's trailer on other occasions.

The testimony of Harvey J. Ellis, Assistant Chief of the Butner Police and Fire Department, tended to show that plaintiff's reputation was good.

Janet Blackley did not testify, and defendant offered no evidence concerning her willingness to have the children born to the marriage of plaintiff and defendant in her home.

Defendant also called his nine year old son, Robert, who testified that Don Daniel had spent the night in plaintiff's trailer prior to her marriage to Daniel, and that Don Daniel had on occasion chastized him by "popping me on my bottom." We will hereafter further consider Robert's testimony.

Plaintiff's evidence tended to show that she married Don Daniel on 5 December 1971, and he lived with her and the children. There was nothing improper about his premarital visits. Her present husband loved the children and was good to them although he had "popped" them for disciplinary reasons. She stated that the children were devoted to each other.

She offered several witnesses, including her pastor, who testified as to her good character and her strong interest in her children's religious and educational life.

On 5 June 1972, after making full findings of fact, Judge Banzet entered an Order placing Robert in the custody of his father and leaving Teresa in the custody of her mother.

The crucial findings of fact upon which the Order was based is as follows:

> "15. The movant introduced certain other evidence intended to reflect upon the fitness of Phyllis to have the care, custody and control of the children. The respondent introduced evidence intended to controvert the same. From such evidence the Court finds the facts thereon to be as follows: That Don Daniel, approximately a year before his

marriage to Phyllis, spent the night in the trailer home of Phyllis and children, on Christmas Eve, 1970, at other times, two particular nights being the night of November 4-5 and the night of November 5-6, 1971, one month before the marriage; 'that on numerous occasions he slept in Phyllis' bedroom, sometimes during the day and sometimes at night, taking what was described as 'naps' of ten minutes or two hours duration; that before the marriage and after it Mr. Daniel, with Phyllis' permission, spanked Bobby, or 'popped him on the rear' by way of correction or punishment; that Bobby is old enough to understand the impropriety of Mr. Daniel's antenuptial sojourns overnight in the home of plaintiff respondent and to resent the same; that the knowledge and recognition of these improprieties and the chastisement by his stepfather adversely affect him and will continue to do so; that it will be for the best interest of Bobby that the care, custody and control of him be given to his father, the movant.' "

Pursuant to G.S. 1A-1, Rule 59(a), plaintiff on 14 June 1972, filed a Motion for a new trial. The Motion and supporting Affidavits, in essence, averred that the good relationship between the children and their stepfather had appreciated during the months following the hearings. The relationship between defendant and his wife Janet had deteriorated, and Janet Blackley had threatened to leave if the children born to plaintiff and defendant were placed in her husband's custody. Defendant filed no responsive pleadings or affidavits to rebut these allegations. On 27 December 1972, Judge Banzet denied the Motion for a new trial, and plaintiff appealed from the Order of 5 June 1972, and the Order of 27 December 1972. The Court of Appeals vacated the Order of 5 June 1972. Defendant appealed.

Watkins, Edmundson & Wilkinson by Sam B. Currin, III for defendant appellant.

Vann & Vann by Arthur Vann and Arthur Vann, III for plaintiff appellee.

BRANCH, Justice.

The question presented by this appeal is whether there was sufficient evidence of change of circumstances affecting the welfare of Robert Harry Blackley, Jr., to justify modification of prior Orders placing him in the custody of his mother.

[1] The court in which a divorce action is brought acquires jurisdiction over the custody of the unemancipated children of the marriage, and such jurisdiction continues even after the divorce becomes final. *Stanback v. Stanback,* 266 N.C. 72, 145 S.E. 2d 332; *Cox v. Cox,* 246 N.C. 528, 98 S.E. 2d 879; *Griffin v. Griffin,* 237 N.C. 404, 75 S.E. 2d 133. The trial judge, who has the opportunity to see and hear the parties and the witnesses, is vested with broad discretion in cases involving custody of children. *Swicegood v. Swicegood,* 270 N.C. 278, 154 S.E. 2d 324; *Hinkle v. Hinkle,* 266 N.C. 189, 146 S.E. 2d 73; *Griffin v. Griffin, supra.* The welfare of the child is the paramount consideration which must guide the Court in exercising this discretion. Thus, the trial judge's concern is to place the child in an environment which will best promote the full development of his physical, mental, moral and spiritual faculties. *Stanback v. Stanback, supra; Thomas v. Thomas,* 259 N.C. 461, 130 S.E. 2d 871; *Griffith v. Griffith,* 240 N.C. 271, 81 S.E. 2d 918; *Tyner v. Tyner,* 206 N.C. 776, 175 S.E. 144.

[2] The entry of an Order in a custody matter does not finally determine the rights of parties as to the custody, care and control of a child, and when a substantial change of condition affecting the child's welfare is properly established, the Court may modify prior custody decrees. G.S. 50-13.7; *Teague v. Teague,* 272 N.C. 134, 157 S.E. 2d 649; *In re Herring,* 268 N.C. 434, 150 S.E. 2d 775; *Stanback v. Stanback, supra; Thomas v. Thomas, supra; In re Means,* 176 N.C. 307, 97 S.E. 39. However, the modification of a custody decree must be supported by findings of fact based on competent evidence that there has been a substantial change of circumstances affecting the welfare of the child, and the party moving for such modification assumes the burden of showing such change of circumstances. *Shepherd v. Shepherd,* 273 N.C. 71, 159 S.E. 2d 357; *Crosby v. Crosby,* 272 N.C. 235, 158 S.E. 2d 77; and *Williams v. Williams,* 261 N.C. 48, 134 S.E. 2d 227. These rules of law must be applied in conjunction with the well-established principle that the trial judge's findings of fact in custody Orders are binding on the appellate courts *if supported by competent evidence. Teague v. Teague, supra; Thomas v. Thomas, supra;* see also, G.S. 1A-1, Rule 52(c).

[3] In instant case, the modification of the prior decree of custody was primarily based on the finding that the child Robert Harry Blackley, Jr. " . . . is old enough to understand

the impropriety of Mr. Daniel's antenuptial sojourns in the home of plaintiff respondent and *to resent the same;* that the knowledge and recognition of these improprieties and the chastisement by his stepfather *adversly affect him and will continue to do so . . . .* " (Emphasis ours.)

We think that there was sufficient evidence to support a finding that the child Robert Harry Blackley, Jr. was old enough to recognize the impropriety of the premarital nighttime visits by plaintiff's present husband. However, under the circumstances of this case, we do not think that such conduct, standing alone, is sufficient to support a modification of the custody decree. It is only one circumstance to be considered by the trial court. This record otherwise clearly reveals that plaintiff was a mother who was intensely interested in her children's education, spiritual growth and physical welfare. Her success is reflected in the testimony of her pastor, her neighbors, her children's teachers, and the testimony of the defendant himself that he always found the children to be "neat, clean, mannerly, polite and courteous." The ultimate expression of her fitness to retain custody of her children is reflected in her son's testimony that, "I know that my Mother loves me and my sister."

We find nothing in this record which supports the very critical finding of resentment on the part of Robert toward his mother and stepfather or, "that the knowledge and recognition of these improprieties and the chastisement by his stepfather adversely affect him (Robert Harry Blackley, Jr.) and will continue to do so."

It is true that Robert, testifying for defendant, confirmed the premarital nighttime visits by his stepfather. However, he further testified that he had been camping and fishing with Don and that, "We had a good time. Don makes model airplanes with me and we have a good time doing that."

In regard to the chastisement by his stepfather, Robert testified, "Don has spanked me for different things. It was only a few times . . . . On occasion Don has popped me on my bottom and every now and then he would pop my little sister. Every now and then people make mistakes and they get popped on the bottom . . . . Don has never mistreated me and my Mother has never mistreated me."

We think that Robert's testimony discloses a comradeship and respect for his stepfather often not enjoyed by natural par-

ents. This record pictures two well-adjusted children who have been well cared for by a loving mother who is deeply interested in their total welfare.

The Court of Appeals correctly held that the evidence is insufficient to show change of circumstances affecting the welfare of the child so as to justify a modification of the prior Order awarding custody to the mother.

The decision of the Court of Appeals vacating the Order of 5 June 1972, is

Affirmed.

STATE OF NORTH CAROLINA v. JODIE V. AUSTIN

No. 66

(Filed 15 May 1974)

Criminal Law §§ 80, 89; Incest— motel registration card — genuineness not proved — admission erroneous

The trial court in a prosecution for incest erred in admitting into evidence a motel registration card bearing the names of defendant and his daughter where there was no evidence identifying the handwriting as defendant's, nor was there evidence identifying defendant as the man who registered at the motel and signed defendant's name to the card; furthermore, even if the card had been admitted for the restricted purpose of corroborating the prosecuting witness, as the Court of Appeals erroneously held, defendant thereby suffered prejudice entitling him to a new trial.

APPEAL by defendant under G.S. 7A-30(2) from the decision of the Court of Appeals (20 N.C. App. 539, 202 S.E. 2d 293 (1974)) finding no error in the trial before *Chess, S.J.*, at the 30 July 1973 Session of the Superior Court of UNION.

Defendant was convicted of incest with his daughter, Jane Denise Austin, on 6 March 1973. Jane, who was 17 years old on 26 July 1973, gave testimony which tended to show:

She had had sexual intercourse with her father "about once every two weeks from the time [she] was 11 until [she] was 16." On 6 March 1973, during her mother's absence at work, defendant took her from the Forest Hills High School to their home near Wingate, where she had relations with him upon his promise to buy her an automobile. He had previously bought her a Mustang but "let it go back" after she refused

to have intercourse with him. On April 20th they again had relations at a motel in Charlotte, where they had gone to look at a car for her. Defendant returned her to school around 3:00 p.m. that day without having bought a car. The principal, who had told her she would be expelled if she went off that day, expelled her from school upon her return. The following Monday, April 23rd, Jane's mother talked to her at the home of a girl friend in Wingate. At that time Jane told her why she was expelled and what she and her father had done on March 6th and April 20th. Jane also testified that she had first told her mother "about it" when she was "about 11."

The testimony of Mrs. Austin, Jane's mother and defendant's wife, tended to show that she had been married to defendant about thirty years; that her daughter first told her of having intercourse with defendant on 23 April 1973; that Jane later said he had been bothering her since she was about eleven; that defendant always denied it when she "told him about it"; that when she told him she was going to take out a warrant for him he said it wouldn't stick in court "because it was all voluntary"; that defendant did not deny having sexual relations with their daughter; that she had left him four different times on account of Jane.

Over defendant's objection Mrs. E. S. Wolfe, a desk clerk at the Alamo Plaza Hotel Courts in Charlotte and one of the persons in charge of registration records, testified in substance as follows: Among the records of registrants at the motel on April 20, 1973 she found the registration card which was identified as State's Exhibit 7 (S-7); that it was customary for a guest to write his name and home address upon one of these cards before he paid and checked in. The italicized information on S-7, reproduced below, was filled in by handwriting:

ALAMO PLAZA HOTEL COURTS
Rents Payable in Advance

Money, Jewels and Valuables Must Be Deposited in the office safe. Otherwise the proprietor will not be responsible for any loss.

NAME: *Jodie & Jane Austin*
STREET: *608 - State St.* -
CITY AND STATE: *Rockingham, N. C.*
Room: *926* Rate: *11.96* Arrived A.M.
Date: *4/20* No. in Party: *2* P.M.
Clerk:

She does not know defendant, and she did not register him on April 20th.

Over defendant's objection S-7 was received in evidence without restriction.

Defendant, testifying as a witness in his own behalf, denied that he had ever had sexual intercourse with his daughter and denied that he had taken her to the Alamo Plaza Hotel on 20 April 1973. He testified that on the morning of April 20th he went to his daughter's school because the principal called him; that after talking to the principal he took his daughter with him to Charlotte, where he was to look at a Colt car at the Dodge place. He drove the car home on a trial run, left Jane at Wingate, and went back to work. At 3:30 he, his wife, and Jane, drove it back to Charlotte. He said he had turned in the Mustang because his daughter was skipping school and she "got involved in a rape charge brought by another girl." He further testified that during the past year he and his wife had had arguments over Jane's dating; that on one occasion, when his wife had found pornographic pictures in Jane's room, she had asked him when he put them in there, and he had denied having put any pictures in Jane's room.

The jury found defendant guilty of incest as charged. From a sentence of 10-15 years he appealed to the Court of Appeals, which found "no reversible error" in defendant's trial. Judge Carson dissented on the ground that the admission of S-7 into evidence over defendant's objection constituted prejudicial error, and defendant appealed to this Court as a matter of right.

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

Joe P. McCollum, Jr., for defendant appellant.

SHARP, Justice.

Upon this appeal defendant brings forward only one assignment of error, that the trial judge committed prejudicial error when he admitted in evidence the motel registration card, S-7.

"Before any writing will be admitted in evidence, it must be *authenticated* in some manner—*i.e.*—its genuineness or execution must be proved." 2 Stansbury's N. C. Evidence (Brandis rev., 1973) § 195.

In *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971), in a prosecution for murder, the State introduced in evidence checks, notes, and other financial documents, purportedly signed by the defendant and relevant to the State's contention that he and the murder victim had been involved in business transactions which provided the motive for the murder. However, no evidence in the record authenticated the defendant's purported signature upon any of these documents. In awarding a new trial this Court said, "The mere fact that his [defendant's] name appears on each document and the fact that the checks naming him as payee were paid by the drawee bank do not constitute proof of the genuineness of his several signatures or proof that any of these documents actually passed through the defendant's hands. . . . Their admission in evidence was substantially prejudicial to the defendant." *Id.* at 591-592, 180 S.E. 2d at 774-775. In its brief for the Court of Appeals the State conceded that it was unable to distinguish the "holding in *State v. Vestal* . . . from the instant case."

No evidence in the record now before us identifies the handwriting on S-7 as defendant's. Nor is there any evidence identifying defendant as the man who registered as Jodie Austin from Rockingham, N. C., or as the man to whom a clerk assigned Room 926. In the absence of such identification the mere fact that defendant's name and that of his daughter appear on the card constitutes no proof that the signature is his or that he authorized it. The Court of Appeals, however, held that the card was not introduced for that purpose; that the State offered it in corroboration of the prosecuting witness' testimony, and for that purpose it was admissible. In introducing the card the solicitor for the State did not specify the purpose for which it was offered. He merely offered it and, when defendant objected to its introduction, the court merely said, "overruled." This ruling was erroneous.

Once admitted the registration card not only corroborated the prosecuting witness and impeached defendant on a vital point in the case, but it also constituted substantive evidence that defendant had had incestuous relations with his daughter in Charlotte on April 20th. Any attempt by the judge to restrict this evidence would have been futile, for no limiting instruction could have overcome its devastatingly prejudicial effect upon defendant's case. See 1 Stansbury's N. C. Evidence (Brandis rev. 1973) § 79.

In a prosecution for incest, evidence of acts of incestuous intercourse between the prosecuting witness and defendant other than those charged in the indictment, whether prior or subsequent thereto, is admissible to corroborate the proof of the act relied upon for conviction. *See State v. Browder,* 252 N.C. 35, 112 S.E. 2d 728 (1960); 2 N. C. Index 2d *Criminal Law* § 34 (1967); 41 Am. Jur. 2d, *Incest* § 17 (1969). As Judge Carson pointed out in his dissent, the registration card—purportedly bearing defendant's signature—was the only evidence other than his daughter's testimony which bore directly upon the question whether defendant had had incestuous relations with her. The weight of this card was undoubtedly sufficient to overcome all discrepancies in the State's evidence. Its admission therefore requires a new trial. Accordingly the decision of the Court of Appeals is reversed with directions that it remand this cause to the Superior Court of Union County for a new trial.

Reversed and remanded.

STATE OF NORTH CAROLINA v. JAMES FRANKLIN O'KELLY III

No. 71

(Filed 15 May 1974)

1. **Constitutional Law § 30— speedy trial — factors in determining abridgment of right**

The determination whether the constitutional right of a speedy trial has been violated involves the length of the delay, the reason for the delay, the defendant's assertion of his right to speedy trial and prejudice resulting to the defendant from the delay.

2. **Constitutional Law § 30— availability of witnesses — delay in trial — right to speedy trial denied**

Defendant's right to a speedy trial was violated where defendant petitioned for a speedy trial on the grounds that four witnesses material to his defense were then available, but they were itinerant workers and their continued availability was extremely doubtful, the State failed to call the case for trial promptly and offered no explanation for the delay, and defendant then moved for dismissal, indicating what testimony the witnesses would have given and the unavailability of the witnesses at that time.

THE defendant, James Franklin O'Kelly, appealed from a two to one decision of the Court of Appeals filed Feburary 20,

1974 (20 N.C. App. 661, 202 S.E. 2d 482) finding no error in the defendant's trial and conviction in the Superior Court of UNION County upon an indictment charging felonious housebreaking and larceny. The indictment was returned at the August 1972 Session, UNION Superior Court. At the time the indictment was returned, the defendant was serving a sentence of 25 to 30 years in the State's prison for an unrelated offense.

In September, 1972, the defendant filed a written petition with the resident judge, sending a copy to the solicitor, asking for a trial at the October Session, Union Superior Court. The petition, as grounds for the speedy trial, alleged that four witnesses material to his defense were then available; that they were itinerant workers and their continued availability was extremely doubtful.

The State failed and refused to call the case against the defendant for trial as he had petitioned. On June 5, 1973, he filed a motion to dismiss for failure of the State to afford him his constitutional right to a speedy trial.

At the hearing on his motion the defendant offered evidence in substance as follows: Ann Green, a friend of the defendant, testified that she had talked with Freddie McCrorie and William Cook who were working with defendant at a time and place which would have rendered it impossible for him to have been at the Pennigar house at the time of the break-in. She had also talked with Phillis Deaton and Shirley Hoglen who were present when the defendant purchased the stolen goods from a third party. She testified she had interviewed the foregoing persons who agreed to appear and testify for the defendant. These witnesses were available in the Fall of 1972. They were gone at the time of the trial and she and the defendant's mother have been unable to locate them. The defendant offered subpoenas for the four witnesses which have been returned unserved.

The State did not offer any evidence by way of explanation or excuse for failure to try the defendant within a reasonable time.

The court, after hearing on the motion to dismiss, found these facts:

> "7. That sometime in late January or early February of 1973 witnesses moved out of the State of North Carolina and their whereabouts are no longer known by the defend-

ant. That the defendant's mother and one Miss Ann Green have continuously looked for witnesses since they left the State of North Carolina and have exhausted all possible means of finding their present whereabouts . . . .

"8. That subpoenas issued by the Clerk of Superior Court of Union County for four witnesses were returned unserved by the Sheriff of Mecklenburg County, such subpoenas being issued on the 7th day of May, 1973, and returned on the 9th day of May, 1973, and such subpoenas being marked 'Moved New Address Unknown' or 'Not Found Within Mecklenburg County.' That such witnesses lived within Mecklenburg County from the period of August, 1972, to January, 1973.

* * * * *

"11. That the defendant has been incarcerated in Central Prison since approximately August 20, 1972, and has not been able to make contact with the four witnesses personally."

The court concluded:

"2. That the delay occasioned by the failure of the State to bring the defendant to trial until the week of June 4, 1973, [the date of the motion] did not prejudice the defendant's ability to present defenses in his behalf.

* * * * *

"4. That the delay is not violative of the defendant's right to a speedy trial under the Sixth and Fourteenth Amendments to the U. S. Constitution."

The State, notwithstanding the defendant's motion to dismiss, brought the defendant to trial at the July 30, 1973 Special Criminal Session, Union Superior Court. He was unable to locate any of the witnesses who would have been available had he been given a speedy trial as he had requested.

The jury returned verdicts finding the defendant guilty of felonious housebreaking and larceny.

On the charge of felonious housebreaking, the court imposed a prison sentence of five years to begin at the expiration of the sentence he is now serving. On the charge of larceny, the court imposed a sentence of five years to begin at the expiration of the sentence for housebreaking.

The defendant excepted and appealed.

Robert Morgan, Attorney General by R. Bruce White, Jr., Deputy Attorney General and Guy A. Hamlin, Assistant Attorney General, for the State.

L. Stanley Brown for defendant appellant.

HIGGINS, Justice.

By the present appeal, the defendant challenges the refusal of the court to grant his motion to dismiss the charges on the ground his constitutional rights to a speedy trial had been denied. At the hearing on the motion to dismiss, the record shows conclusively that the defendant was in no way responsible for the delay, but was insisting on a speedy trial for fear delay would rob him of witnesses material to his defense.

The State did not see fit to offer explanation or excuse for the delay. If witnesses die or disappear during a delay, the prejudice is obvious. *Smith v. Hooey,* 393 U.S. 374, 21 L.Ed. 2d 607, 89 S.Ct. 575 (1969); *U. S. v. Ewell,* 383 U.S. 116, 15 L.Ed. 2d 627, 86 S.Ct. 773 (1966). "A convict, confined in the penitentiary for an unrelated crime, is not excepted from the constitutional guarantee of a speedy trial of any other charges pending against him. . . . A defendant who has been indicted is in a position to demand a speedy trial." *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274.

[1] The determination whether the constitutional right of a speedy trial has been violated involves four main factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to speedy trial; and (4) prejudice resulting to the defendant from the delay. *State v. Brown,* 282 N.C. 117, 191 S.E. 2d 659, (citing nine cases in support). See also *Barker v. Wingo,* 407 U.S. 514, 33 L.Ed. 2d 101, 92 S.Ct. 2182 (1972).

[2] The court's findings of fact Numbers 7, 8 and 11, in the light of the authorities cited, offer ample support for and require the conclusion that the defendant's rights to a speedy trial were denied him. The trial court's conclusions of law Numbers 2 and 4 are without support either in the evidence or in the findings.

In *State v. Wheeler,* 249 N.C. 187, 105 S.E. 2d 615, this Court disposed of a problem similar to that now before us.

"We have admiration and respect for the able and painstaking judge who conducted the post conviction hearing in this case. However, on the record as it comes to us we are unable to join in the view that the petitioners' constitutional rights have been afforded them. We think the records and his own findings require decision to the contrary."

We now hold the decision of the Court of Appeals finding no error in the trial was erroneous and must be reversed. The cause will be remanded to the Superior Court of Union County with direction that the judgments against the defendant be vacated, the verdicts set aside and the charges be dismissed.

Reversed.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

CITY OF WINSTON-SALEM v. SUTCLIFFE

No. 45 PC.

Case below: 20 N.C. App. 748.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 May 1974.

GOFF v. REALTY AND INSURANCE CO.

No. 52 PC.

Case below: 21 N.C. App. 25.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 May 1974.

HIGH v. HIGH

No. 58 PC.

Case below: 21 N.C. App. 100.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 May 1974.

LEASING, INC. v. BROWN

No. 45 PC.

Cases below: 14 N.C. App. 383.

19 N.C. App. 295.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 8 May 1974.

POOLE & KENT CORP. v. THURSTON & SONS

No. 63 PC.

Case below: 21 N.C. App. 1

Petition for writ of certiorari to North Carolina Court of Appeals allowed 8 May 1974.

RAILWAY CO. v. WERNER INDUSTRIES

No. 71 PC.

Case below: 21 N.C. App. 116.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 8 May 1974.

REFINING CO. v. BOARD OF ALDERMEN

No. 44 PC.

Case below: 20 N.C. App. 675.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 8 May 1974.

STATE v. ARNOLD

No. 42 PC.

Case below: 21 N.C. App. 92.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 8 May 1974.

STATE v. BAXTER

No. 47 PC.

Case below: 21 N.C. App. 81.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals allowed 8 May 1974. Petition by Attorney General for writ of certiorari to North Carolina Court of Appeals denied 8 May 1974.

STATE v. COBB

No. 65 PC.

Case below: 21 N.C. App. 66.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 May 1974.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. DAVIS AND WILSON

No. 53 PC.

Case below: 20 N.C. App. 739.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 May 1974.

STATE v. FOSTER

No. 68 PC.

Case below: 21 N.C. App. 226.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 May 1974.

STATE v. HARPER

No. 64 PC.

Case below: 21 N.C. App. 30.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 May 1974.

STATE v. HATCH

No. 57 PC.

Case below: 21 N.C. App. 148

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 May 1974.

STATE v. LENDERMAN

No. 46 PC.

Case below: 20 N.C. App. 687.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 May 1974.

STATE v. WEST

No. 43 PC.

Case below: 21 N.C. App. 58.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 May 1974.

STATE v. WILBURN

No. 86.

Case below: 21 N.C. App. 140.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 May 1974. Motion of Attorney General to dismiss appeal allowed 8 May 1974.

TIMBER MANAGEMENT CO. v. BELL

No. 69 PC.

Case below: 21 N.C. App. 143.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 May 1974.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; NORTH CAROLINA TEXTILE MANUFACTURERS ASSOCIATION, INC.; THE CITY OF DURHAM; NORTH CAROLINA OIL JOBBERS ASSOCIATION; JOSEPH L. BERRY; ROBERT AREY; GREAT LAKES CARBON CORPORATION; DUKE UNIVERSITY; HOUSTON V. BLAIR; BETTY MAJETT; AND ROBERT MORGAN, ATTORNEY GENERAL v. DUKE POWER COMPANY

No. 72

(Filed 1 July 1974)

1. **Utilities Commission § 6— fixing rates of electric company — fair rate of return on fair value of property**

The legislative mandate is that the Utilities Commission shall fix rates which will enable a well managed utility to earn a "fair rate of return" on the "fair value" of its properties "used and useful" in rendering its service, with the factors to be determined as of the end of the test period, the intent of the Legislature being that the Commission fix rates as low as may be reasonably consistent with the requirements of the Due Process Clause of the Fourteenth Amendment to the U. S. Constitution and requirements of Art. I, § 19 of the State Constitution. G.S. 62-133(b) and (c).

2. **Utilities Commission § 6—fair value — weight to be given evidence**

It is the clear intent of G.S. 62-133(b)(1) that the Utilities Commission, in considering the indicators of fair value which themselves are supported by competent and substantial evidence, shall use its own expert judgment as to the credibility of the evidence in the record and as to the weight to be given to it.

3. **Electricity § 3; Utilities Commission § 6— replacement cost — weight in determining fair value**

While the Utilities Commission may not brush one of the statutorily prescribed indicators of fair value aside by giving it minimal consideration, the Commission did not so treat its finding of "replacement cost" in this instance, having given that indicator a weighting of 28.6%, thereby placing "fair value" at approximately $95,500,000 above original cost, depreciated.

4. **Utilities Commission § 9— review of Commission order on appeal**

A reviewing court may not properly disturb an order of the Utilities Commission merely because it would have given a different weight to each of the indicators of "fair value."

5. **Utilities Commission § 6— fair value — weight to be given indicators**

G.S. 62-133(b)(1) does not require that, in the absence of expert opinion testimony as to the weight to be given the respective indicators of "fair value," the Utilities Commission must give them equal weight and find "fair value" by the mere striking of an arithmetic average of the indicators.

6. **Electricity § 3; Utilities Commission § 6— fair value — replacement cost**

The present "fair value" of a utility system of generating plants, transmission lines and distribution lines cannot exceed the present cost of constructing a substitute system of modern design, capable of generating and distributing the same quantity of power at less operating expense.

7. **Utilities Commission § 6— fair rate of return — fair value of properties used**

The concept contained in G.S. 62-133(b) of a fair rate of return on the fair value of the properties used in rendering the service clearly contemplates the allowance of a greater dollar return than would be allowed if the rate base were the original cost, depreciated, of the same properties, assuming that the value of the properties has been enhanced by inflation.

8. **Utilities Commission § 6— rate fixing for electric company — statutory formula**

The formula of G.S. 62-133(b) is: fair rate of return multiplied by the fair value of the properties equals the fair return in dollars.

9. **Utilities Commission § 6— fair rate of return — definition**

A "fair rate of return" is one sufficient to enable the utility to attract, on reasonable terms, capital necessary to enable it to render adequate service. G.S. 62-133(b)(4).

10. **Electricity § 3; Utilities Commission § 6— fair value increment — inclusion in determining rate of return**

The "fair value" increment (fair value of the plant less original cost, depreciated) found by the Utilities Commission must be added to the equity component of the utility company's actual investment in its electric plant, and the utility is entitled, under G.S. 62-133(b), to earn the same rate of return on this increment as it is entitled to earn on the retained earnings (surplus) which it has reinvested in its plant.

11. **Utilities Commission § 6— previous finding of fair rate of return — no res judicata**

Previous findings by the Utilities Commission that 12% on the common equity component was a fair rate of return for the utility company did not prevent the Commission from finding a lower return on common equity capital fair in the present case.

12. **Utilities Commission § 6— fair rate of return — fair value increment excluded in computation — error**

The Utilities Commission did not comply with G.S. 62-133(b) in its computation of a fair rate of return for the utility company where the total dollar return which the company was to be permitted to earn had not been increased at all by reason of the fair value increment.

13. **Evidence § 47; Utilities Commission § 6— fair value increment — expert testimony prior to determination**

In the ordinary rate case where the fair value increment has not been determined at the time the witness is testifying, the witness

may nevertheless be asked to give his opinion as to the probable effect upon the cost of capital of various hypothetical fair value determinations.

APPEAL by Duke Power Company from the Court of Appeals, which affirmed the order of the North Carolina Utilities Commission fixing rates for electric power, Judge Parker dissenting, the opinion of the Court of Appeals being reported in 21 N.C. App. 89, 203 S.E. 2d 404.

On 31 May 1972, Duke Power Company, hereinafter called Duke, filed with the North Carolina Utilities Commission, hereinafter called the Commission, its application for authority to increase its rates for the sale of electric power to retail customers in North Carolina. Attached to the application were rate schedules which Duke proposed to put into effect on its sales to the several classes of its customers, the per cent of increase in such rates over the then existing rates varying from class to class. It was Duke's estimate that the increases proposed by it would yield a total of $29,376,000 in additional revenues from its North Carolina retail sales.

By order of the Commission, the proposed rates were suspended, the proceeding was declared a general rate case and the matter was set for hearing. The Attorney General of North Carolina, the City of Durham, the North Carolina Textile Manufacturers Association, the North Carolina Oil Jobbers Association, the Great Lakes Carbon Corporation and certain individuals intervened in opposition to the proposed increases.

The hearing before the Commission commenced on 8 November 1972 and extended through eighteen hearing days. The evidence introduced by Duke, the several protestants and the staff of the Commission included 1,340 pages of testimony, as condensed in the printed record, and a large number of voluminous statistical exhibits. The evidence dealt with the revenues received and the operating expenses of Duke, both related to retail sales in North Carolina, during the twelve-month test period ending 30 June 1972 (fixed by the Commission pursuant to the motion of Duke); the original cost of the properties included in Duke's plant in service allocable to North Carolina operations; the accrued depreciation reserve; the trended original cost of such properties; a cost of service study made by Duke to determine the appropriate allocation among its several classes of customers of its costs of service, including both its investment

in plant and its operating costs; the alleged merits and demerits of an alternate system of rate schedules, proposed by the Commission staff and designed by it to produce an equal amount of additional revenue but varying the increases to be imposed upon the different classes of customers; the effect of the two sets of proposed rate schedules upon each of the various classes of customers; the earnings required by Duke in order to enable it to attract capital; the present capital structure of Duke; the amount of capital which it must attract in the near future for the construction of additions to plant; the cost of equity capital; the cost of debt capital and numerous other matters bearing upon the reasonableness of the rates which Duke proposed to put into effect.

On 1 January 1973, the Commission not having rendered its decision, Duke put into effect its entire rate proposal, pursuant to the provisions of G.S. 62-133, filing with the Commission its undertaking to refund such part of its proposed increases as might eventually be disapproved.

On 21 June 1973, approximately one year after the filing of the application, the Commission rendered its decision and entered its order authorizing Duke to put into effect rates designed to produce additional revenues (as of the test period) of $21,150,000, this being 72 per cent of the increase proposed by Duke, and directing Duke to file new rate schedules, consistent with the rate design proposed by Duke, which would produce the approved amount of additional revenue. The Commission further ordered Duke to refund to its customers, pursuant to said undertaking, all amounts collected after 1 January 1973 in excess of the increases so approved by the Commission. The Commission further ordered Duke to take certain action with reference to further cost of service studies and with reference to other matters not pertinent to this appeal.

In its order the Commission made 31 findings of fact, the following being those pertinent to this appeal:

> "4. That the reasonable original cost depreciated of Duke's electrical plant in service at the end of the test period and subject to Commission jurisdiction is $865,006,125 * * * .
>
> "5. * * * that the Replacement Cost is $1,199,093,357.
>
> "6. * * * that a reasonable working capital allowance to be included in Duke's rate base is $62,416,389.

"7. That considering the reasonable original cost of the property, less that portion of the cost which has been consumed by previous use and recovered by depreciation expense, and considering the replacement cost of said property, the condition of the property, and the outmoded design of some of the older plant, the Commission finds that the fair value of said plant should be derived from giving five-sevenths weighting to original cost (investment) and two-sevenths weighting to replacement cost (trended). By this method, the Commission finds that the fair value of the said plant devoted to retail service in North Carolina is $960,459,620 or $1,022,876,009 including $62,416,389 allowance for working capital.

"11. That Duke Power Company's present level of [generating] reserves is approximately 10 percent; that this level is less than adequate to insure reliable service; and that the amount of investment in generation devoted to use as reserves is not an issue in this proceeding.

"12. That in reference to the future needs for which Duke is presently constructing reserve capacity, the evidence before this Commission at this time is insufficient to determine the most reasonable level of reserves.

"13. That Duke is experiencing increasing costs of supplying service and constructing new capacity and that incremental costs exceed embedded costs.

"14. That expansion of service and replacement of plant under increasing cost conditions results in attrition of earnings.

"16. [That in the test period Duke earned] a rate of return on depreciated original cost of plant of 6.72%; a return on original cost equity of 7.54%; and a return on the fair value of 6.09%. That such rates of return are insufficient to provide a fair profit to Duke's stockholders considering changing economic conditions, and insufficient to allow Duke to compete in the market for capital funds on terms which are reasonable and fair to its customers and existing investors.

"17. That the rate of return necessary on the fair value of Duke's property to allow Duke, with sound management, to produce a fair profit for its stockholders, con-

sidering economic conditions as they exist, to maintain its facilities and service in accordance with its obligation to its customers, and to compete in the market for capital funds on a reasonable basis to customers and stockholders, is 7.05%, which rate of return will produce $21,150,000 of additional gross revenues on North Carolina retail electric service; and that the additional gross operating revenues of $21,150,000 will increase the net income available to the common stockholders * * * to $31,309,147 for a rate of return on book value common equity of 11% and a rate of return on fair value common equity of 8.24%.

"20. That the 1971 Cost of Service Study in evidence in this Docket, including revisals by the Staff, is the best evidence of the costs to Duke Power Company of providing various classes of service, and the results are useful to this Commission in setting rates.

"24. That the use of incremental pricing is based upon sound economic principles, promotes maximum efficiency, and inhibits attrition of earnings; that expansion of service which is priced below the total incremental cost of that expansion will lower the rate of return; and that the expansion of service which is priced above the total incremental cost of that expansion will raise the rate of return.

"25. That Duke's incremental demand cost is approximately $2.30 to $2.85 per kilowatt and its incremental energy cost is approximately .4581¢ per kilowatt hour.

"27. That the rates of return earned by Duke's proposed rates should achieve a more uniform rate of return by classes, and that Duke's proposed procedure for increasing its rates and the resulting rate structure is reasonable and not unduly discriminatory."

From its findings of fact the Commission drew a number of conclusions of which the following are pertinent to this appeal:

"The trended original cost study by Witness Gillett for the applicant has deficiencies which make it unacceptable as a complete and reasonable method for determining replacement cost. The witness, in computing the trended original cost of the properties and subtracting from the figure, thus derived, an allowance for no element of depreci-

ation, save for physical wear and tear, has obviously left out the major factor of obsolesence. While Mr. Gillett did account for advances in the art of construction, he made no attempt to determine the value of the utility plant as if the entire plant were designed in accordance with the present state of the art for the design and operation of electric systems, including modern technologies and efficiencies. The Commission considers the replacement cost more than just a 'brick-for-brick' reproduction cost, and the Commission therefore concludes that the trended original cost method employed by Duke to be insufficient as a complete and reasonable determination of replacement cost.

"The Commission concludes that the replacement cost which was determined merely by trending and depreciating original cost without proper consideration for improvements in plant design and efficiency is excessive. * * *

"The Commission further concludes that the proper weighting, considering depreciated original cost, replacement cost, and the outmoded design of some of the older plant, is five-sevenths weighting of original cost and two-sevenths weighting for replacement cost. By this method, the Commission determines the fair value of the said plant devoted to retail service in North Carolina to be $960,-459,620 or $1,022,876,009 including $62,416,389 allowance for working capital. * * *

* * * *

"The projected construction program is not unreasonable based on a 25 percent reserve margin. However, this Commission is not convinced that a 25 percent reserve margin is necessary or prudent. Present reserve levels are well below the 25 percent range and Duke's planned construction program (which anticipates reaching the 25 percent reserve range) places a large financial burden on the company and its rate payers.

* * * *

"In our order in Docket E-7, Sub 128 [a prior rate case], we found Duke's reasonable common equity cost to be 12 percent, whereas here we find that cost to be 11 percent. During a period when its return has been substantially below 12 percent (7.54% for the test period) Duke has continued to attract very large amounts of capital and

to pay out very substantial dividends to its equity investors, while increasing its retained earnings. Recent experience in the capital markets indicate that very few class A and B utilities are experiencing equity cost above 11 percent, and in the light of all these circumstances, we conclude that 11 percent is a reasonable estimate of Duke's foreseeable equity cost and that such a return will enable it to safely meet its indenture requirements and continue to attract its required equity funds.

"The rates proposed by Duke are found to be unreasonable and unjustified to the extent that they produce any increases in annualized revenue on the customers at the end of the test period in excess of $21,150,000.

"The Commission concludes that an increase of $21,150,000, 72% of the $29,376,000 increase requested in the application, is necessary to maintain Duke's facilities and service in accordance with the reasonable requirements of its customers in North Carolina, and to provide a fair rate of return to Duke on the fair value of its properties used and useful on its property in North Carolina.

* * * *

"The evidence in this Docket indicates that the Cost of Service Study accurately portrays the relationship of the different classes of service to the costs of providing service to those classes, the revenues derived from such service, and the benefits to the system as a whole. There is no clear evidence that special allowances should be made for any of the major classes of service in the consideration of the rate of return to be earned by that class. * * *

"The Commission concludes that the rates and charges for any class of service should normally recover all the costs, including a reasonable return, of [providing] that service. If all classes of service earn revenues which exactly cover all costs of service, each class will earn the average rate of return, but the Commission concludes that some variation, within a reasonable range, in rates of return between classes, is acceptable and does not necessarily result in discrimination between classes of customers. The Commission further concludes that it is incumbent upon Duke to review its rate structure on a recurring basis in order to achieve a continuing minimum of disparity of rates of return between classes of customers.

"With the above in mind, it is concluded that both Duke's rate design and the Staff's rate design are in the range of reasonableness * * * . However, the Commission concludes that consideration should be given to Duke's many years of expertise in rate design * * * . The Commission therefore concludes that Duke's proposed rate design should be followed.

* * * *

"The evidence in the record indicates that the Industrial customer class is being subsidized by other rate payers. The evidence also tends to indicate that electricity costs are a relatively small portion of the total production costs in most industries."

Upon these findings of fact and conclusions, the Commission entered its order as above summarized.

Chairman Wooten dissented solely on the ground that the entire increase requested by Duke should have been allowed. That is, he did not dissent from the order insofar as it went in allowing an increase in rates.

Commissioner McDevitt concurred in the order, but in a separate opinion expressed the view that the approved rate increase and previous increases approved by the Commission in former proceedings might not have been necessary had the management of Duke not been guilty of "insufficient planning" of construction in earlier years and had it not engaged "extensively" and "excessively" in non-utility ventures constituting "drains on managerial and company resources which should have been applied exclusively to its primary function as a public utility." In his view, "all of Duke's problems are not due to economic conditions and inflation," and "a substantial portion of the rate increases which it has been necessary to impose upon the ratepayers" could have been avoided "if greater emphasis had been placed by Duke upon planning and timely action with particular reference to generating facilities."

Commissioner Wells, apparently the undesignated author of the majority opinion, also added a separate opinion expressing his own views to the effect that Duke has been exceedingly generous to its now retired former president in paying him "a consultant's salary of $75,000 per year for only minimal services," the Commissioner noting that "Duke's administrative expenses are rising more sharply than any other category of costs."

From the order of the Commission, only Duke appealed to the Court of Appeals and it alone appeals from the decision of that court. The basis of its appeal is thus stated in its supplemental brief filed in the Supreme Court:

"Three questions are presented by Duke's appeal from the Commission Order, namely:

"1. Were the Commission's findings and conclusions with respect to the fair rate of return on the fair value of Duke's utility property used and useful in rendering retail service in North Carolina supported by competent, material and substantial evidence in view of the entire record as submitted?

"2. Did the Commission commit error of law and exceed its statutory authority or jurisdiction by failing to give effect to the statutory mandate that rates must be fixed on fair value?

"3. Were the Commission's findings and conclusion with respect to the fair value of Duke's property used and useful in rendering retail service in North Carolina supported by competent, material and substantial evidence in view of the entire record as submitted?"

Robert Morgan, Attorney General, I. Beverly Lake, Jr., Deputy Attorney General, and Robert P. Gruber, Assistant Attorney General, for the using and Consuming Public.

Edward B. Hipp, Commission Attorney, and John R. Molm, Associate Commission Attorney, for North Carolina Utilities Commission.

William H. Grigg, Steve C. Griffith, Jr., Clarence W. Walker, John M. Murchison, Jr., for Duke Power Company.

Byrd, Byrd, Ervin & Blanton for Great Lakes Carbon Corporation.

Claude V. Jones for the City of Durham, Intervenor.

LAKE, Justice.

The steps to be taken by the Utilities Commission in fixing rates to be charged by any public utility for its services are set forth in G.S. 62-133(b), which provides:

"(b) In fixing such rates, the Commission shall:

"(1) Ascertain the fair value of the public utility's property used and useful in providing the service rendered to the public within this State, considering the reasonable original cost of the property less that portion of the cost which has been consumed by previous use recovered by depreciation expense, the replacement cost of the property, and any other factors relevant to the present fair value of the property. Replacement cost may be determined by trending such reasonable depreciated cost to current cost levels, or by any other reasonable method.

"(2) Estimate such public utility's revenue under the present and proposed rates.

"(3) Ascertain such public utility's reasonable operating expenses, including actual investment currently consumed through reasonable actual depreciation.

"(4) Fix such rate of return on the fair value of the property as will enable the public utility by sound management to produce a fair profit for its stockholders, considering changing economic conditions and other factors, as they then exist, to maintain its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise, and to compete in the market for capital funds on terms which are reasonable and which are fair to its customers and to its existing investors.

"(5) Fix such rates to be charged by the public utility as will earn in addition to reasonable operating expenses ascertained pursuant to paragraph (3) of this subsection the rate of return fixed pursuant to paragraph (4) on the fair value of the public utility's property ascertained pursuant to paragraph (1)."

[1] Thus, the legislative mandate is that the Commission shall fix rates which will enable a well managed utility to earn a "fair rate of return" on the "fair value" of its properties "used and useful" in rendering its service. These factors are to be determined as of the end of the test period. G.S. 62-133(c). This concept of a "fair return on fair value" originated as a constitutional limitation over 75 years ago in *Smyth v. Ames*, 169 U.S. 466, 18 S.Ct. 418, 42 L.Ed. 819. That is, it began as a state-

ment of the minimum below which the Legislature might not go in fixing public utility rates. Immediately thereafter, the Legislature incorporated this standard into the original version of G.S. 62-133(b). With relatively minor amendments, insofar as the present appeal is concerned, the original standard has survived and appears in the present statute. The origin of this statute supports the inference that the Legislature intended for the Commission to fix rates as low as may be reasonably consistent with the requirements of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, those of the State Constitution, Art. I, § 19, being the same in this respect.

After some forty years of struggling, with indifferent success, to give clear meaning to the concept of "a fair return on the fair value," the Supreme Court of the United States abandoned it as a test of due process of law in public utility rate making. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 600-605, 64 S.Ct. 281, 88 L.Ed. 333. Nevertheless, by virtue of the above statute, it remains as the standard to be applied by the Commission in fixing rates and by this Court in determining appeals from the Commission's order.

In *Utilities Commission v. State* and *Utilities Commission v. Telegraph Co.*, 239 N.C. 333, 344, 80 S.E. 2d 133, Justice Barnhill, later Chief Justice, said, "This statute has been characterized as an 'old, rambling, and misty statutory declaration of the matters to be taken into account by the Commission * * * .' 12 N. C. Law Review 298." Since that time it has frequently been characterized in somewhat less complimentary terms. However, as Justice Barnhill there said, "Be that as it may, it is the law in this State and will continue to be the law until amended, revised, or repealed by the Legislature."

Duke contends that, in its order now before us, the Commission did not comply with the mandate of subparagraph (1) of this statute in fixing the fair value of its properties used and useful in rendering electric power service to the public in North Carolina in that its finding of "fair value" is not supported by substantial evidence. It must be so supported. G.S. 62-65. We turn first to this contention.

Preliminarily, the Commission found that the reasonable original cost, depreciated, of the properties, as of the end of the test period, was $865,006,125, that the "replacement cost" was

$1,199,093,357, that the proper allowance for working capital was $62,416,389. Duke does not challenge these preliminary findings. The finding as to "replacement cost" was derived by the Commission from the testimony of Duke's expert witness, Mr. Gillett, by applying to his trended cost calculations, computed on the basis of all of the company's properties, including those in South Carolina, the allocation factors set forth in evidence introduced by witnesses for the Commission staff. The appropriateness of the allocation factors is not questioned by Duke. Thus, Duke does not question the correctness of a Commission's preliminary finding as to the "replacement cost" of the properties used by Duke in retail service to the people of North Carolina.

Having made these preliminary findings, the Commission then found, or concluded, that the "fair value" of the properties allocated to North Carolina should be derived by giving five-sevenths (71.4%) weighting to original cost (i.e., net investment) and two-sevenths (28.6%) weighting to replacement cost. So doing, and adding to the result the working capital allowance which it had found proper, the Commission found the fair value of the properties (was $1,022,876,009). This figure, called the "rate base," is the amount on which the Commission then undertook to allow Duke to earn a fair return.

Duke contends that there is in the record no evidence to support the Commission's finding of the "rate base" because there is no evidence in the record to support the Commission's selection of the two weighting factors, five-sevenths and two-sevenths, respectively. Our careful study of this voluminous record, and of the well prepared brief filed by Duke, discloses no expert testimony whatever as to the weight which should be given by the Commission to original cost and to replacement cost in carrying out the statutory mandate to "consider" these indicators of "fair value." If such evidence be necessary in order to enable the Commission to give appropriate weight to those two indicators, which we think is clearly not the meaning of the statute, the absence of such evidence in the record does not benefit Duke, for the burden is upon Duke to establish the reasonableness of the rate increases it has proposed. G.S. 62-75; G.S. 62-134(c); *Utilities Commission v. Railway Co.*, 267 N.C. 317, 148 S.E. 2d 210.

[2, 3] It is the clear intent of G.S. 62-133(b)(1) that the Commission, in "considering" the indicators of "fair value" which,

themselves, are supported by competent and substantial evidence, shall use its own expert judgment as to the credibility of the evidence in the record and as to the weight to be given to it. *Utilities Commission v. Telephone Co.*, 281 N.C. 318, 358, 360, 189 S.E. 2d 705; *Utilities Commission v. Telephone Co.*, 266 N.C. 450, 454, 146 S.E. 2d 487; *Utilities Commission v. Public Service Co.*, 257 N.C. 233, 237, 125 S.E. 2d 457; *Utilities Commission v. State* and *Utilities Commission v. Telegraph Co., supra,* at pp. 344, 349. While the Commission may not brush one of the prescribed indicators aside by giving it "minimal consideration," *Utilities Commission v. Gas Co.*, 254 N.C. 536, 119 S.E. 2d 469, it has not so treated its finding of "replacement cost" in this instance, having given that indicator a weighting of 28.6 per cent, thereby placing "fair value" at approximately $95,500,000 above original cost, depreciated. An addition of over $95,000,000 to the rate base is not "minimal."

[4, 5] A reviewing court may not properly disturb an order of the Commission merely because it would have given a different weight to each of the indicators of "fair value." *Utilities Commission v. Telephone Co.*, 281 N.C. 318, 339, 360, 189 S.E. 2d 705; *Utilities Commission v. Gas Co.*, 254 N.C. 536, 550, 119 S.E. 2d 469. It is the prerogative of the Commission to determine the credibility of evidence before it, even though such evidence be uncontradicted by another witness. *Utilities Commission v. Telephone Co.*, 281 N.C. 318, 360, 189 S.E. 2d 705. Obviously, it is not the meaning of G.S. 62-133(b)(1) that, in the absence of expert opinion testimony as to the weight to be given the respective indicators of "fair value," the Commission must give them equal weight and find "fair value" by the mere striking of an arithmetic average of the indicators. *Utilities Commission v. Telephone Co.*, 281 N.C. 318, 358, 189 S.E. 2d 705.

As the Supreme Court of the United States said in *R. R. Commission of California v. Pacific Gas & Electric Co.*, 302 U.S. 388, 397, 58 S.Ct. 334, 82 L.Ed. 319, while it was still struggling with the rule of *Smyth v. Ames, supra:* "The Commission was entitled to weigh the evidence introduced, whether relating to reproduction cost or to other matters. The Commission was entitled to determine the probative force of respondent's estimates."

Furthermore, we find in the evidence presented to the Commission by Duke, itself, ample support for a discounting of

"replacement cost" as an indicator of fair value. Estimates of replacement cost are inherently speculative to a considerable degree. Furthermore, there is abundant evidence in the record, introduced by Duke, to the effect that its many generating plants, which are the bulk, cost-wise, of its plant in service, are different in efficiency. With justifiable pride, Duke points to its Marshall steam plant as the most efficient such plant in the entire electric power industry. Its other fossil fuel burning generating plants are of varying lesser degrees of efficiency. Its older hydroelectric plants are, according to its evidence, used primarily to meet demand peaks. While the record indicates some present misgivings by Duke as to the savings in operating costs to be effected by its presently proposed nuclear generating plants, the company's decision to turn for the future completely to nuclear generation, notwithstanding its far greater capital cost, rather than to duplicates of the Marshall plant, hardly supports Duke's position that the record contains no evidence of substantial obsolescence in its existing plant.

Duke's expert witness on "replacement cost," the only witness on this subject, testified that he arrived at his figure for this indicator of "fair value," which figure was accepted by the Commission, by trending the original cost of construction of the present properties, using modern methods of construction, but not varying the design of the present system. Specifically, Mr. Gillett testified:

> "When I said earlier that I used the present state of the art, I am talking about the art of construction. I didn't attempt to design an entire plant on today's state of the art for constructing and operating electric systems designing where the generation would go and what type of generation it would be and how the transmission lines would be laid out and where the substation would be. That would be substitute plant approach, which is a hypothetical situation we didn't indulge in.
>
> "When I say I used the present state [of the] art you are talking about what a *building contractor* would go do if he were building it today. Present construction techniques, *same design* and everything, same original investment trended as if it were built with modern materials and construction equipment and labor. * * *
>
> "I know the Company is going to a long-range program of 100 percent nuclear on new construction and *I know that*

will have the effect of phasing out steam plant but they don't have one operating yet." (Emphasis added.)

[6] Quite obviously, the present "fair value" of a utility system of generating plants, transmission lines and distribution lines cannot exceed the present cost of constructing a substitute system of modern design, capable of generating and distributing the same quantity of power at less operating expense. See: Justices Brandeis, Holmes and Stone, dissenting, in *St. Louis and O'Fallon Railway v. United States,* 279 U.S. 461, 488, 517, 49 S.Ct. 384, 73 L.Ed. 798. We find no merit in Duke's contention that the Commission committed an error of law in its respective weightings of original cost, depreciated, and replacement cost in determining Duke's rate base.

We now turn to Duke's contention that the Commission erred in fixing the fair rate of return Duke should be permitted to earn upon the rate base so determined by the Commission.

[7] Here, too, the Commission and this Court are bound by the provisions of G.S. 62-133(b). The concept therein contained of a fair rate of return on the fair value of the properties used in rendering the service clearly contemplates the allowance of a greater dollar return than would be allowed if the rate base were the original cost, depreciated, of the same properties, assuming, as is here true, that the value of the properties has been enhanced by inflation. Otherwise, the exceedingly costly and laborious determination of "fair value," as distinguished from original cost, depreciated, would be a meaningless exercise. It is not for the Commission, or for this Court, to evade the mandate of the statute by determining the number of dollars which would be a fair return on the original cost, depreciated, and then simply translating that amount into a percentage of "fair value."

[8] The formula of the statutory mandate is: A x B = C (fair rate of return multiplied by the fair value of the properties equals the fair return in dollars). Obviously, if A and B are varied in exactly inverse proportion, C remains constant (i.e., if A x B = C, then one-third of A x 3B also equals C).

Duke contends that the Commission first determined the dollar return Duke needs, and should be permitted to earn, by multiplying the original cost, depreciated, by what the Commisson deemed a fair rate of return thereon. Then, says Duke, the Commission increased the rate base to "fair value," but compensated therefor by decreasing the allowable rate of return in the

exact proportion that it had increased the rate base. To do so would be an error of law, for it would, in effect, obliterate the excess of "fair value" over original cost, depreciated.

In *Utilities Commission v. Telephone Co.*, 281 N.C. 318, 340, 189 S.E. 2d 705, we said:

> "The excess of 'fair value,' so ascertained by the Commission, over and above the original cost, less depreciation, is an unrealized paper profit to the utility. * * * Nevertheless, G.S. 62-133 clearly contemplates that this excess shall be included in the rate base of the utility, just as if it were a realized profit invested in additional property used and useful in rendering service to the public. * * * [I]t should be treated by the Commission in a proceeding to fix rates as if it were an addition to the equity component of the utility's capital structure."

[9] Since the decision of the Supreme Court of the United States in *Bluefield Water Works & Improvement Co. v. Public Service Commission*, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176, it has been accepted that a "fair rate of return" is one sufficient to enable the utility to attract, on reasonable terms, capital necessary to enable it to render adequate service. This is the test laid down by G.S. 62-133(b)(4).

We do not have before us on this appeal any question as to whether Duke needs to attract the enormous amounts of capital, which its officers testified must be attracted for expansion of its plant to meet anticipated demands for electric service. The Commission concluded that the maintenance of Duke's ability to render adequate service does not require the construction of reserve generating capacity as large as that proposed by Duke. In this Court, Duke does not assert any error in this conclusion. The issuance of securities by a public utility in this State is subject to the approval of the Commission. G.S. 62-161. A utility must commence presently to build plant additions which will be needed for adequate service by the end of the time required for construction. However, a utility may not justify an increase in its rates for service to its present customers by evidence of its present intent to build additions to its plant not reasonably considered necessary for adequate service, including proper reserve capacity, by the end of the time needed for the completion of such additions.

Likewise, we do not have before us on this appeal any question as to the reasonableness of Duke's expenditures for salaries and other operating expenses to which reference was made in the separate opinion of Commissioner Wells. No deduction was made by the Commission from Duke's actual expenditures on this account. Only reasonable expenditures for operating the plant may be charged to the customers. Obviously, rates may not be increased because a utility's board of directors has paid, or proposes to pay, excessive consultant fees to former officers of the company, whether this be due to bad judgment or to a desire to reward the recipient for services previously rendered to stockholders. Such a bonus must be at the expense of the grateful stockholders, not the ratepayers.

Again, this appeal presents for decision no question as to whether Duke's several rate schedules are so designed as to prefer, unduly, one or more classes of customers over others, through failure to charge the favored class the full cost of supplying its demand for service, and so contribute to the attrition of Duke's rate of return as the demand by the favored class increases and requires additions to the plant.

The sole question presented by this contention of Duke is whether the Commission failed to give heed to our decision in *Utilities Commission v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705, concerning the allowance of a fair return upon the "fair value" increment to the rate base. As we interpret the opinion of the Commission concerning its determination of the fair rate of return, we conclude there is merit in this contention by Duke.

[10] The "fair value" increment (fair value of the plant less original cost, depreciated) found by the Commission was approximately $95,500,000. For rate of return purposes, this increment must be added to the equity component of Duke's actual investment in its electric plant. Duke is entitled, under G.S. 62-133(b), to earn the same rate of return on this increment as it is entitled to earn on the retained earnings (surplus) which it has reinvested in its plant. The wisdom of this statute is not for us or for the Commission. The Legislature has so decreed and its mandate must be observed by the Commission. *Utilities Commission v. Telephone Co.*, 281 N.C. 318, 340, 189 S.E. 2d 705.

[11] In the present case, the Commission found that the cost to Duke of common equity capital (i.e., the fair rate of return

thereon) was 11 per cent. The testimony of Dr. Olson, the Attorney General's witness, supports this finding. So does Duke's demonstrated ability to attract huge quantities of capital, both debt and equity, when its earned return on equity capital has been less than 11 per cent. See: *Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S. 151, 163-164, 54 S.Ct. 658, 78 L.Ed. 1182. As noted in Duke's brief and in the dissenting opinion of Chairman Wooten, in two preceding rate cases the Commission had found 12 per cent on the common equity component was a fair rate of return for Duke. Such previous findings are not, however, *res judicata,* even as to what was a fair rate of return on common equity capital as of the dates of those former orders, and such findings do not prevent the Commission from finding a lower return on common equity capital fair in the present case, even though the tide of inflation has continued to rise. "The fixing of a rate of return shall not bar the fixing of a different rate of return in a subsequent proceeding." G.S. 62-133(e). Thus, if the Commission is now of the opinion that in the earlier case it fixed too high a rate of return, it is not thereby precluded from finding a lower rate of return to be fair in the present case.

In the present case, having concluded that a fair rate of return to Duke upon its equity component is 11 per cent, the Commission apparently multiplied the equity component of Duke's actual capital structure (i.e., its common equity capital plus its retained earnings) by 11 per cent and determined that the return of $31,309,147 was a fair return thereon. Adding this to the amount required to pay interest on the debt component and dividends on the preferred stock component of Duke's actual capital structure, the Commission computed that $72,023,404 was a fair dollar return to Duke on its entire actual capital invested in its electric power system. The Commission then made the mathematically correct computation that the return of $31,309,147 is a return of 8.24 per cent on the common equity component of the actual capital structure plus the fair value increment. When taken in conjunction with the interest requirement on debt capital and the dividend requirement on preferred stock capital, this equated to a return of 7.05 per cent on the fair value of the properties, which return the Commission found to be fair.

[12] Obviously, in this computation, the total dollar return which Duke is to be permitted to earn has not been increased at all by reason of the fair value increment. It is exactly the same as the Commission would have allowed if the fair value of the

properties had been exactly the same as Duke's actual net investment in the properties. This is not in accord with the mandate of G.S. 62-133(b), as construed by us in *Utilities Commission v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705, and, consequently, this proceeding must be remanded to the Commission for compliance with that mandate.

This is not to say that the Commission must now revise its order so as to permit Duke to make an additional increase of its rates sufficient to yield additional net income equal to 11 per cent of the fair value increment. It is for the Commission, not for this Court, to determine what is a fair rate of return. It is evident that in the present case the Commission determined that the fair rate of return on the fair value of Duke's properties was 7.05 per cent through a misunderstanding of our decision in *Utilities Commission v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705.

As we there said, the capital structure of the company is a major factor in the determination of what is a fair rate of return for the company upon its properties. There are, at least, two reasons why the addition of the fair value increment to the actual capital structure of the company tends to reduce the fair rate of return as computed on the actual capital structure. First, treating this increment as if it were an actual addition to the equity capital of the company, as we have held G.S. 62-133(b) requires, enlarges the equity component in relation to the debt component so that the risk of the investor in common stock is reduced. Second, the assurance that, year by year, in times of inflation, the fair value of the existing properties will rise, and the resulting increment will be added to the rate base so as to increase earnings allowable in the future, gives to the investor in the company's common stock an assurance of growth of dollar earnings per share, over and above the growth incident to the reinvestment in the business of the company's actual retained earnings. As indicated by the testimony of all of the expert witnesses, who testified in this case on the question of fair rate of return, this expectation of growth in earnings is an important part of their computations of the present cost of capital to the company. When these matters are properly taken into account, the Commission may, in its own expert judgment, find that a fair rate of return on equity capital in a fair value state, such as North Carolina, is presently less than 11 per cent. This is for the Commission, not for this Court, to determine.

[13] As we observed in *Utilities Commission v. Telephone Co.*, 381 N.C. 318, 372, 189 S.E. 2d 705, since a witness cannot, prior to the Commission's determination of the fair value increment, know the exact capital structure of the utility, for rate making purposes, the witness ordinarily computes the cost of capital (i.e., the fair rate of return) on the basis of the company's actual capital structure. His computation of the cost of capital must be adjusted by the Commission in order to take into account the effect of the fair value increment on the fair rate of return. If the Commission now holds a further hearing of Duke's application involved in this appeal, such witness would then know the fair value increment, which has now been determined, and could testify as to the effect, which, in his opinion, such increment would have on the cost of capital. In the ordinary rate case, where the fair value increment has not been determined at the time the witness is testifying, the witness may nevertheless be asked to give his opinion as to the probable effect upon the cost of capital of various hypothetical fair value determinations. This procedure the Commission may see fit to use in future rate cases.

The judgment of the Court of Appeals is, therefore, reversed and this matter is remanded to that court with direction that it enter its judgment further remanding the matter to the Utilities Commission for further proceedings by the Commission not inconsistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION, NORTH CAROLINA COTTON GINNERS ASSOCIATION, HERTFORD COUNTY BOARD OF EDUCATION, PITT COUNTY SCHOOL BOARD, BERTIE COUNTY BOARD OF EDUCATION, HALIFAX COUNTY BOARD OF EDUCATION AND ROBERT MORGAN, ATTORNEY GENERAL, APPELLEES v. VIRGINIA ELECTRIC AND POWER COMPANY, AND THE MUNICIPALITIES OF ROANOKE RAPIDS, AHOSKIE, PLYMOUTH, RICH SQUARE, ROPER AND WELDON, APPELLANTS

No. 76

(Filed 1 July 1974)

1. **Electricity § 3; Utilities Commission § 6— electricity furnished municipalities — private contracts — increase in rates by Utilities Commission**

The Utilities Commission had authority to increase the rates specified in contracts between municipalities and a power company prior to the expiration of such contracts since (1) the contracts themselves provided that the terms thereof fixing the rate for service were subject to modification by order of the Commission and (2) rates for public utility service fixed by an order of the Commission, otherwise lawful, supersede contrary provisions in private contracts concerning rates for such service.

2. **Electricity § 3; Utilities Commission § 6— statute allowing proposed rates to go into effect — supremacy over private contract**

The statute authorizing a utility to put its proposed rates into effect after the passage of six months from the filing of its application if no order has been entered by the Utilities Commission determining the validity of the proposed rates, G.S. 62-135, prevails over a private contract between municipalities and a power company fixing the rate for electricity furnished to the municipalities.

3. **Electricity § 3; Utilities Commission § 6— fair value — weighting of original and replacement costs**

The Utilities Commission did not err in its determination that the fair value of a power company's properties, exclusive of the allowance for working capital, should be determined by giving a weighting of one-third to replacement cost, depreciated, and a weighting of two-thirds to original cost, depreciated.

4. **Utilities Commission § 6— fair value — weight and credibility of evidence**

The credibility of the evidence and the weight to be given it in the determination of the "fair value" of a utility's properties are for the Utilities Commission, not the appellate court, to determine.

5. **Utilities Commission § 6— fair value — weighting of factors — appellate review**

An appellate court may not reverse the order of the Utilities Commission in a rate case because of its weighting of the respective

indicators of "fair value" unless the court finds such weighting to have been arbitrary and lacking support in the evidence, in view of the entire record, or otherwise affected by error of law. G.S. 62-94.

6. **Electricity § 3; Utilities Commission § 6— fair rate of return — dollar return — failure to consider fair value increment**

The Utilities Commission erred in its determination of a fair rate of return upon the fair value of a power company's property used and useful in rendering electric service in N. C. where the total dollar return which the power company is to be permitted to earn has not been increased by reason of the fair value increment (the excess of fair value over original cost depreciated) but is the same as the Commission would have allowed had the fair value of the properties been exactly the same as the company's actual net investment therein. G.S. 62-133(b).

7. **Electricity § 3; Utilities Commission § 6— working capital — addition to rate base**

A utility's own funds reasonably invested in materials and supplies and its cash funds reasonably held for payment of operating expenses, as they become due, fall within the meaning of the term "property used and useful in providing the service" as used in G.S. 62-133(b)(1) and are a proper addition to the rate base on which the utility must be permitted to earn a fair rate of return.

8. **Electricity § 3; Utilities Commission § 6— rate base — funds collected from customers for paying future expenses**

A utility is not entitled to include in its rate base funds which it has not provided but which it has been permitted to collect from its customers for the purpose of paying expenses at some future time and which it actually uses as working capital in the meantime since such funds are not "the public utility's property" within the meaning of G.S. 62-133(b)(1).

9. **Electricity § 3; Utilities Commission § 6— weighting of fair value factors — fair rate of return — working capital — subjective judgment — appellate review**

When the record, considered as a whole, contains substantial evidence supporting the subjective judgment of the Utilities Commission on the weighting to be given the respective indicators of "fair value," what constitutes a fair rate of return or the total amount reasonably necessary for working capital, the conclusion reached by the Commission may not be disturbed by a reviewing court merely because the court's subjective judgment is different from that of the Commission, nor is the Commission required to accept as conclusive the subjective judgment of a witness, even though the record contains no expression of a contrary opinion by another witness.

10. **Electricity § 3; Utilities Commission § 6— working capital — deduction of average customer deposits twice**

Where the Utilities Commission deducted an amount from working capital on account of customer deposits, the Commission erred in also including such amount in its computation of the deduction from working capital for "average tax accruals."

11. Electricity § 3; Utilities Commission § 6— working capital — deduction for accrued income taxes — no tax liability during test period

The Utilities Commission properly deducted from cash working capital an amount for accrued Federal income taxes even though the utility had no actual tax liability during the test period.

12. Electricity § 3; Utilities Commission § 6— working capital — deduction for tax accruals — time lag between utility's receipt and payment

The Commission's deduction from a utility's working capital on account of tax accruals was not erroneous by reason of the Commission's computation of the time lag between the utility's receipt of such money and its payment over to the tax collector.

13. Electricity § 3; Utilities Commission § 6— operating expenses — no adjustment for past test period increases

In this general rate case, the Utilities Commission did not err in failing to make an adjustment in operating expenses during the test period by reason of a salary and wage increase and an increase in Federal Social Security taxes, both known in the test period to be forthcoming but neither taking effect until after the end of the test period.

APPEALS by Virginia Electric and Power Company (hereinafter called Vepco) and by the Intervenor Municipalities (hereinafter called the Municipalities) from the decision of the Court of Appeals, reported in 21 N.C. App. 45, 203 S.E. 2d 418, affirming the order of the North Carolina Utilities Commission (hereinafter called the Commission) allowing an increase in rates charged by Vepco for retail electric service, Judge Parker dissenting on the ground that the Commission did not properly determine the rate of return which Vepco should be permitted to earn on the fair value of its properties.

On 27 July 1972, Vepco filed with the Commission its application for authority to increase in varying amounts its several schedules of rates for retail electric service in this State. Had the proposed increases been allowed in full, and been in effect throughout the calendar year 1971, they would have produced additional revenue in that year in the amount of $2,480,000. The Commission, by its final order in the matter, issued 28 June 1973, allowed the application in part, the total of the additional revenues which would have been produced in the twelve months' test period ending 30 June 1972, had the rates so approved by the Commission been then in force, would have been $962,685, approximately 38 per cent of the total increase sought by Vepco.

Vepco appealed, assigning numerous errors in the fixing of the rate base, the fixing of a fair rate of return thereon and the determination of Vepco's reasonable operating expenses.

The Municipalities (Roanoke Rapids, Ahoskie, Plymouth, Rich Square, Roper and Weldon) appealed on the ground that they were being served with power for street lighting and other governmental purposes under contracts specifying the rates to be charged for such service throughout a period which had not expired at the time of the application or at the time of the Commission's order. The Municipalities contend that the Commission is without authority to increase the rates specified in such contracts prior to the expiration thereof.

The Commission declared the matter a general rate case, suspended the proposed rate schedules pending its further order, set the matter for hearing and fixed the test period as the twelve months ending 30 June 1972.

Pursuant to G.S. 62-135, Vepco placed in effect on 1 March 1973 the full increases sought by it, giving the statutory undertaking for refunds to its customers of any amounts not finally approved by the Commission. The final order of the Commission directed Vepco to make such refunds of such excess collections.

Intervenors in opposition to approval of the requested increases in rates were the Attorney General, the Northeastern Cotton Ginners Association, and the Boards of Education of Hertford, Pitt, Bertie and Halifax Counties, in addition to the above named municipalities.

The application of Vepco also sought approval of the addition to each of its rate schedules of a "fossil fuel adjustment clause," by the operation of which clause the rates specified in the several schedules would automatically fluctuate up or down with changes in the cost of fossil fuel (coal, oil or gas) used by Vepco in generating power, the amount of such fluctuation in such rates being determined according to a formula described in the application. The order of the Commission denied approval of the proposed adjustment clause (hereinafter called the fuel clause). Vepco originally assigned this also as error, but, in its brief in the Supreme Court, asserts this question is now moot.

The hearing extended for nine full hearing days. Evidence, covering 560 pages in the printed record, plus large numbers of voluminous statistical exhibits to which the testimony of the expert witnesses relates, was received and considered by the Commission.

Only a relatively small part of Vepco's total electric plant and operations are in North Carolina. It serves also in Virginia

and in West Virginia, the bulk of its operations being in Virginia. Vepco sells electric power both at wholesale and at retail. The present proceeding relates only to its rates for retail service. By allocation factors developed and put in evidence by the staff of the Commission, to which no exception is taken, portions of the original cost of the properties comprising the total electric plant in service, the reserve for depreciation, the annual depreciation expense and the operating costs incurred in the operation of the entire system for the test year were allocated to the North Carolina retail service.

Vepco has in North Carolina two major hydroelectric generating plants, both on the Roanoke River, one at Roanoke Rapids and the other at Gaston. The combined capability of those two plants is 325,000 kilowatts. Vepco also has in North Carolina, at Kitty Hawk, two combustion turbines with a combined generating capability of 49,000 kilowatts. The evidence discloses no present plans for the expansion or curtailment of these facilities. Vepco has large steam generating plants in Virginia and West Virginia and it is in the process of building nuclear generating plants in Virginia.

The peak demand for Vepco power in 1972 was more than four times the peak demand in 1958 and Vepco estimates that the peak demand in 1976 will be 50 per cent greater than that in 1972. In anticipation of this tremendous growth in demand, and so in kilowatt hours sold, Vepco is engaged in an extensive construction program. Much of the additional plant will go into service after 1976. This construction program was estimated by Vepco to require its expenditure of $2,400,000,000, during the five year period 1972-1976, necessitating the attraction of tremendous quantities of additional capital, both debt and equity capital.

No substantial expenditures at Vepco's North Carolina generating plants are contemplated by reason of environmental protection needs. Substantial additional investment at generating plants outside North Carolina is contemplated for this purpose.

The portion of Vepco's total service territory which is growing most rapidly, in absolute terms, is in the Virginia "urban corridor," extending from the Potomac River through Richmond to Norfolk and Newport News, although percentage-wise Vepco is also experiencing substantial growth in kilowatt hour sales in North Carolina.

The Commission made the following findings of fact pertinent to this appeal:

"4. That the original cost depreciated of VEPCO's electrical plant in service subject to the Commission's jurisdiction * * * is $66,223,192 * * *

"5. * * * that the Replacement Cost is $91,020,210.

"6. That the working capital allowance found to be reasonable for VEPCO's North Carolina retail operations was determined by taking the cash working capital of $1,269,215 and adding to it materials and supplies, $1,619,088. Average tax accruals in the amount of $664,348, average customer deposits of $90,235, and a fuel payment lag of $203,254, were offsets to the working capital allowance, resulting in a net working capital allowance in the amount of $1,930,466 and that the amount of working capital is $1,930,466.

"7. That considering the reasonable original cost of the property, less that portion of the cost which has been consumed by previous use recovered by depreciation expense, and considering the replacement cost of said property and considering the condition of the property and the outmoded design of some of the older plant, the Commission finds that the fair value of said plant should be derived from giving two-thirds weighting to original cost and one-third weighting to replacement cost. By this method, the Commission finds that the fair value of the said plant devoted to retail service in North Carolina is $74,488,865 or $76,419,331 including $1,930,466 allowance for working capital.

"8. That after the Staff's accounting and pro forma adjustments and jurisdictional factors, VEPCO's revenue under present rates on an annualized basis for customers served at the end of the test period for North Carolina retail service was $21,456,589; that the reasonable operating revenue deductions of VEPCO during the test period was (sic) $16,634,693; that the net operating income for return at the end of the test period * * * was $4,818,079, giving a rate of return on depreciated original cost of plant of 7.07%; a return on original cost equity of 9.87% and a return on fair value of 6.31%. That such rates are insufficient to provide a fair profit to VEPCO's stockholders considering

changing economic conditions, and insufficient to allow VEPCO to compete in the market for capital funds on terms which are reasonable and fair to its customers and existing investors.

"9. That the rate of return necessary on the fair value of VEPCO's property * * * is 6.89%, which rate of return will produce $962,685 of additional gross revenues on North Carolina retail electric service; and that the additional gross operating revenues of $962,685 will increase the net income available to the common stockholders from $2,069,730 to $2,515,500 for a rate of return on book value common equity of 12% and a rate of return on fair value common equity of 8.61%. The 12% rate of return on book value common equity would provide a before income tax interest coverage ratio of 2.61 times."

The Commission's final order also sets forth the following conclusions:

"The trended original cost study by Witness Reilly for the applicant has deficiencies which make it unacceptable as a complete and reasonable method for determining replacement cost. Instead of performing a time 'replacement cost study,' the witness computed the trended original cost of the properties and subtracted from the figure, thus derived an allowance for depreciation, which allegedly included some undetermined amounts for 'wear and tear, decay, action of the elements, inadequacy, obsolescence, changes in the art, changes in demand and requirements of public authorities.' While Mr. Reilly did account for advances in the art of construction, he made no attempt to determine the value of the utility plant as if the entire plant were designed in accordance with the present state of the art for the design and operation of electric systems, including modern technologies and efficiencies. In view of this and the previously stated fact that the Commission considers the replacement cost more than just a 'brick-for-brick' reproduction cost, the Commission finds the trended original cost method as employed insufficient as a complete and reasonable determination of replacement cost.

"The Commission believes the replacement cost which was determined merely by trending and depreciating original costs without proper consideration for improvements in plant design and efficiency is excessive. * * *

"* * * [T]he Commission further concludes that the proper weighting, considering depreciated original cost, replacement cost, and the outmoded design of some of the older plant, is two-thirds weighting for original cost and one-third weighting for replacement cost. By this method the Commission determines the fair value of the said plant devoted to retail service in North Carolina to be $74,488,865 or $76,419,331 including $1,930,466 allowance for working capital.

* * * *

"The rates proposed by VEPCO are found to be unreasonable and unjustified to the extent that they produce any increase in annualized revenue on the customers at the end of the test period in excess of $962,685."

Robert Morgan, Attorney General, I. Beverly Lake, Jr., Deputy Attorney General, Robert P. Gruber, Associate Attorney, and Jerry J. Rutledge, Associate Attorney, for the Using and Consuming Public.

Edward B. Hipp, Commission Attorney, Maurice W. Horne, Assistant Commission Attorney, and Jerry B. Fruitt, Associate Commission Attorney, for North Carolina Utilities Commission.

Joyner & Howison by R. C. Howison, Jr., Hunton, Williams, Gay & Gibson; Evans Brasfield, Guy Tripp and Allen Barringer for Virginia Electric and Power Company.

Crisp, Bolch & Smith by Thomas K. Bolch for the Municipalities.

LAKE, Justice.

APPEAL OF THE MUNICIPALITIES

[1] The appellant municipalities contend: (1) By reason of their respective contracts with Vepco for service at specified rates, the Commission has no authority to enter an order approving increases in those rates until the expiration of such contracts; (2) if this be not so, G.S. 62-135 does not authorize Vepco to increase such rates prior to the entry of an order by the Commission approving the increase. We find no merit in either of these contentions.

Each of the contracts in question contains this provision: "The provisions of this agreement are on file with the North

Carolina Utilities Commission and this agreement is subject to modification or cancellation by the Commission in the manner prescribed by law." The increases in the rates charged the municipalities were made by an order entered after a full hearing, held upon due notice and in which the appellant municipalities intervened as parties. The procedure prescribed by Chapter 62 of the General Statutes was followed. Thus, by the terms of the contracts, themselves, the provisions thereof fixing the rate for the service were subject to the change made by the order of the Commission.

Furthermore, even in the silence of the rate fixing contract upon this question, it is well settled in this State that rates for public utility service fixed by an order of the Commission, otherwise lawful, supersede contrary provisions in private contracts concerning rates for such service. *Corporation Commission v. Water Co.*, 190 N.C. 70, 128 S.E. 465; *Corporation Commission v. Manufacturing Co.*, 185 N.C. 17, 116 S.E. 178; *In re Utilities Co.*, 179 N.C. 151, 101 S.E. 619. The enforcement of such an order of the Commission does not constitute an impairment of the obligation of such contract, in violation of the Contract Clause of the United States Constitution, since contracts of public utilities, fixing rates for service, are subject to the police power of the State. *Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U.S. 372, 39 S.Ct. 117, 63 L.Ed. 309; *Atlantic Coast Line Railroad v. Goldsboro*, 232 U.S. 548, 34 S.Ct. 364, 58 L.Ed. 721; *In re Utilities Co., supra.* In this respect, there is no distinction between a contract made by the public utility with a municipality and one made by it with any other user of its service. *Corporation Commission v. Water Co., supra; In re Utilities Co., supra.*

The appellant municipalities cite in support of their position *Federal Power Commission v. Sierra-Pacific Power Co.*, 350 U.S. 348, 76 S.Ct. 368, 100 L.Ed. 388, and *United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373. These cases do not support the contention of the appellant municipalities. While holding that the Federal Power Act and the Federal Natural Gas Act do not evince a purpose to abrogate private contracts fixing rates and that such contracts may not be terminated by the unilateral act of the public utility company (see also, *Southern Utilities Company v. Palatka*, 268 U.S. 232, 45 S.Ct. 488, 69 L.Ed. 930), these cases recognize the authority of the Federal Power Commission to

prescribe a change in the rates fixed by such contracts whenever the Commission determines such rates to be unlawful. See also, *United Gas Company v. Memphis Light, Gas and Water Division,* 358 U.S. 103, 76 S.Ct. 368, 3 L.Ed. 2d 153.

It is in the public interest that a public utility company charge for its services rates which will enable it to maintain its financial ability to render adequate service and to attract the capital necessary for expansion and improvement of its service as needed. It is also in the public interest that there be no unreasonable discrimination between the users of such service. The police power of the state extends to the raising of rates fixed by private contract so as to accomplish either or both of these purposes.

[2] G.S. 62-135 was enacted for the purpose of minimizing the effect of the unavoidable time lag between the filing of an application by a utility company for an increase in its rates for service and the entry of an order of the Commission finding such increase proper. This statute authorizes the utility to put its proposed rates into effect after the passage of six months from the filing of its application, if no order has been entered by the Commission determining the validity of the proposed rates, and if the utility company files its undertaking, approved by the Commission, for a refund of any portion of such rates ultimately disapproved by the Commission. Vepco did so in this case.

The appellant municipalities contend that this is a mere unilateral termination of its contracts by Vepco. It is true that the mere existence in the Commission of authority to increase the rates specified in its contract does not authorize Vepco at its own will to disregard such contract and to charge the other party thereto a higher rate. *Southern Utilities Company v. Palatka, supra.* If the rate put into effect by the utility, pursuant to G.S. 62-135, is completely disallowed by the Commission, after a hearing, the contract remains in effect and the utility must refund the excess so collected. Thus Vepco cannot, by its own decision alone, free itself from its contract.

G.S. 62-135 is a direct exercise of the police power of the State by the Legislature itself. Thus, it too prevails over a private contract in conflict therewith. In *Midland Realty Cocpany v. Kansas City Power & Light Co.,* 300 U.S. 109, 57 S.Ct. 345, 81 L.Ed. 540, the Supreme Court of the United States said:

> "[The plaintiff] here insists that the contracts could not be abrogated 'without a proper hearing, finding, and

order of the Commission with respect thereto.' It does not, and reasonably could not, contend that immediate exertion by the legislature of the state's power to prescribe and enforce reasonable and non-discriminatory rates depends upon or is conditioned by specific adjudication in respect of existing contract rates. It is clear that, as against those specified in the contract here involved, the rates first filed by the plaintiff and those promulgated by the Commission in accordance with the statute have the same force and effect as if directly prescribed by the legislature."

Thus, the contracts between Vepco and the appellant municipalities do not bar Vepco from putting different rates into effect pursuant to G.S. 62-135, pending the final determination by the Commission.

APPEAL OF VEPCO

Vepco made 30 assignments of error to the findings, conclusions and order of the Commission. The majority of the Court of Appeals found no error which it considered "sufficiently prejudicial to justify a remanding of the cause to the Utilities Commission."

One of the assignments of error was to the failure of the Commission to approve Vepco's proposed fossil fuel adjustment clause. In its brief in this Court, Vepco states that a subsequent order of the Commission authorizing Vepco to put into effect a fossil fuel adjustment clause has made this assignment of error moot. Apparently, the subsequent order to which Vepco refers was entered in another proceeding. It is not presently before us. Consequently, on this appeal we do not have before us any question as to the propriety of any fuel adjustment clause, either that proposed by Vepco in the present proceeding or that said to have been approved by the Commission after its entry of the order to which this appeal relates. We, therefore, express no opinion as to the right of an electric utility to make a fuel adjustment clause a part of its rate schedules, or any of them, when such clause has not been approved by the Commission.

The remaining assignments of error made by Vepco relate to three major contentions: (1) The Commission erred in determining the fair value of Vepco's properties, used and useful in rendering electric retail service in this State, by its failure to give proper weight to the replacement cost of such properties; (2) the Commission erred by its failure to determine properly

the fair rate of return which Vepco is entitled to earn on the fair value of its properties; (3) in determining Vepco's rate base, specifically the allowance therein for working capital requirements, and in determining the allowance for certain operating expenses, the Commission made certain accounting errors. We turn now to these contentions.

(1) The Weighting Of Replacement Cost

[3] For the reason stated more fully in *Utilities Commission v. Duke Power Co.*, 285 N.C. 377, 206 S.E. 2d 269, decided this day, we find no reversible error in the Commission's determination that the fair value of the properties, exclusive of the allowance for working capital, should be determined by giving a weighting of one-third to replacement cost, depreciated, and two-thirds weighting to original cost, depreciated.

The Commission found the replacement cost of the properties allocable to retail electric service in North Carolina was $91,020,210. This figure was derived by applying allocation factors developed by the Commission staff to the figure computed by Vepco's witness, Mr. Reilly, as the replacement cost of Vepco's entire plant. Thus, the Commission accepted Vepco's figure for replacement cost of its entire plant. Vepco does not take exception to the allocation factors or to the figure so derived by the Commission for the replacement cost of the property allocable to retail service in North Carolina, nor does it except to the Commission's finding that the original cost, depreciated, of such properties was $66,223,192. Its sole contention, as to this point, is that the Commission should have given greater weight to replacement cost in its computation of the fair value of the properties as of the end of the test period, Mr. Reilly having testified that, in his opinion, the weighting should be exactly reversed, i.e., two-thirds weighting to replacement cost and one-third weighting to original cost.

G.S. 62-133(b)(1) provides that the Commission shall ascertain the fair value of the properties "considering" the "reasonable original cost," depreciated, and "the replacement cost" and "other factors relevant to the present fair value of the properties."

[4] As we have said many times, the credibility of the evidence and the weight to be given it in the determination of the "fair value" of the properties are for the Commission, not for this Court, to determine. *Utilities Commission v. Duke Power Co.*,

supra; Utilities Commission v. Telephone Co., 281 N.C. 318, 358, 360, 189 S.E. 2d 705; *Utilities Commission v. Telephone Co.*, 266 N.C. 450, 454, 146 S.E. 2d 787; *Utilities Commission v. Public Service Co.*, 257 N.C. 233, 237, 125 S.E. 2d 457; *Utilities Commission v. State* and *Utilities Commission v. Telegraph Co.*, 239 N.C. 333, 80 S.E. 2d 133. The Commission is not required to accept Mr. Reilly's opinion as to the weight to be given to each of these indicators of fair value, even though there be no contrary expert testimony. As Mr. Reilly testified, the determination of the weighting to be given the indicators is a matter of "subjective judgment." The Commission may and should exercise its own expert judgment in this determination.

In explanation of its weighting of original cost, depreciated, and replacement cost, the Commission said that it considered "the condition of the property and the outmoded design of some of the older plant." It noted that, in his computation of replacement cost, "While Mr. Reilly did account for advances in the art of construction, he made no attempt to determine the value of the utility plant as if the entire plant were designed in accordance with the present state of the art for the design and operation of electric systems including modern technologies and efficiencies." Mr. Reilly's own testimony gives support to this conclusion. He testified as follows:

> "In arriving at my opinion * * * I have *considered* all of the causes of depreciation which are mentioned in my definition of depreciation. * * * *Obsolescence* is taken care of through depreciation and not through the trending process. * * * I did not make a separate determination of the amount of depreciation due to each of the causes which I included in my definition of depreciation, for as a practical matter it is not possible, because electrical property is retired from service due to a combination of one or more of the causes mentioned. * * *
>
> "A weighting of one-third original cost depreciated and two-thirds trended original cost depreciated was used to determine the fair value of the property [which Mr. Reilly computed as $86,317,000]. * * * *This weighting was made on my judgment.* * * * *The determination of the fair value of utility property for rate making purposes is not an exact science;* and such determination is not based on the application of a precise mathematical formula. * * * (Emphasis added.)

"I would *not* describe what I did to arrive at an estimate of fair value as a replacement cost study envisioning replacing the utility plant in accordance with modern design and technique and the most up-to-date changes in the state of the art. What I did was to trend the original cost of the study up to the present day, this June 30, 1972, price level. That was restating the cost of the plant *as it existed* at June 30, 1972, and making allowance for any factors of obsolescence, inadequacy or whatever in the depreciation that was applied to that trended cost. (Emphasis added.)

" * * * *This [weighting] is a subjective judgment, really, in the final analysis, based on experience within reasonable limits.*" (Emphasis added.)

We think it evident that what Mr. Reilly did was to trend the original cost of each of the great number of items in the Vepco electric system to the present day price level and to subtract from each of the several components of the system an amount which, in his expert opinion, was the proper deduction for the physical wear and tear and obsolescence of that component.

[5] Obsolescence of a large plant is not necessarily limited to the sum of the allowances for obsolescence of its component parts. For example, a steam locomotive or an ocean-going sailing vessel may be in excellent physical condition and its several component parts may not be obsolete, provided one wishes to build a steam locomotive or an ocean-going sailing vessel. Nevertheless, both are obsolete because a wholly new type of motive power has been developed. One cannot be said to have acted arbitrarily and capriciously merely because he concludes that the present "fair value" of such a locomotive, or sailing ship, is much less than its replacement cost diminished by an allowance for physical depreciation and obsolescence of its several component parts, considered separately, or even less than its original cost so depreciated. This Court may not reverse the order of the Commission because of its weighting of the respective indicators of "fair value," unless we find such weighting to have been arbitrary and lacking support in the evidence, in view of the entire record, or otherwise affected by error of law. G.S. 62-94.

In this record, Vepco, through the testimony of its executive officers, asserts that it has an immediate need to attract huge quantities of capital for the construction of new generating

facilities and that these facilities will be designed for the use of nuclear power, a wholly new concept in generation of electric power. Through the testimony of another witness, Mr. Reilly, Vepco asserts that its present generating plants have a "fair value" much nearer to the present cost of replacing them than to their original cost. It is not for this Court to determine whether there is any inconsistency in this evidence, but it is for the Commission to make such determination. It has done so and we are unable to conclude from the record before us that its determination is arbitrary or unsupported by substantial evidence in the entire record.

Neither original cost, depreciated, nor replacement cost, depreciated, is the measure of "fair value," as that term is used in G.S. 62-133(b)(1). They are indicators of "fair value" and their respective weights are to be determined by the Commission in its expert judgment. We must not overlook the fact that the Commission, unlike the typical jury, accumulates, through its own experience in supervising the public utilities serving in this State, a substantial general knowledge of their properties and service. The statute contemplates that the Commission will use this general knowledge and its own expert judgment in weighing the indicators of "fair value."

(2) The Determination of a Fair Rate of Return

[6] The Commission determined that the fair rate of return upon the fair value of Vepco's property used and useful in rendering retail electric service in North Carolina is 6.89 per cent.

It is clear from the Commission's order that the Commission made this determination by the same process of calculation which we found to be an error of law in *Utilities Commission v. Duke Power Co., supra.* Having concluded that a fair rate of return to Vepco upon the equity component of its actual capital structure is 12 per cent (higher than the return believed to be fair by expert witnesses for the Commission staff and for the Attorney General and lower than the return believed to be fair by expert witnesses for Vepco), the Commission multiplied the equity component of Vepco's actual capital structure (its common equity capital plus its retained earnings) by 12 per cent and determined that the return of $2,515,500 was a fair dollar return thereon. Adding this to the amounts required to pay interest on the debt component of Vepco's actual capital structure and dividends on the preferred stock component, the Commis-

sion computed that $5,260,406 was a fair dollar return to Vepco on its entire capital invested in its electric power system. The Commission then made the mathematically correct computation that the dollar return of $2,515,500 is a rate return of 8.61 per cent on the common equity component of the actual capital structure plus the fair value increment (the excess of fair value over original cost depreciated). When taken in conjunction with the interest requirement on Vepco's debt capital and the dividend requirement on its preferred stock capital, this equated to a rate of return of 6.89 per cent on the fair value of the properties, which rate of return the Commission found to be fair.

As we noted in *Utilities Commission v. Duke Power Co., supra,* in this computation the total dollar return which Vepco is to be permitted to earn has not been increased at all by reason of the fair value increment. It is exactly the same as the Commission would have allowed had the fair value of the properties been exactly the same as Vepco's actual net investment therein. For the reasons stated in *Utilities Commission v. Duke Power Co., supra,* this is not in accord with the mandate of G.S. 62-133(b), as construed by us in *Utilities Commission v. Telephone Co.,* 281 N.C. 318, 189 S.E. 2d 705. Consequently, this proceeding must be remanded to the Commission for compliance with that mandate.

Here, as in *Utilities Commission v. Duke Power Co., supra,* our decision is not to be deemed a direction to the Commission to revise its order so as to permit Vepco to make an additional increase of its rates sufficient to yield additional net income, after taxes, equal to 12 per cent of the fair value increment. Here, as in that case, it is for the Commission, not for this Court, to determine what is a fair rate of return. For the reasons stated in *Utilities Commission v. Duke Power Co., supra,* the Commission may, in its own expert judgment, find that a fair rate of return on Vepco's equity capital, including the fair value increment, is less than 12 per cent (the rate of return it found fair without taking the fair value increment into account). How much less, if any, is for the Commission, not for this Court, to determine.

In the record before us, Dr. Phillips, Vepco's expert witness on fair rate of return, testified that when the fair value increment, as computed by Mr. Reilly (substantially larger than that found by the Commission) was added to the equity component of the actual capital structure of Vepco, the fair *rate* of

return on the equity component would be less than that which he had computed on the basis of the actual capital structure. Just as Mr. Reilly did concerning his weighting of the indicators of fair value, Dr. Phillips testified that the determination of fair rate of return on equity capital is a matter of "subjective judgment." The Commission is, of course, not obliged to adopt as its own Dr. Phillips' opinion as to the precise effect of the fair value increment upon the fair rate of return, notwithstanding his having been the only witness to testify on that subject. This is especially true in view of his patently erroneous testimony on cross-examination: "I am saying here that with a fair value rate base, this company requires a higher *rate* of return than it would on an original cost rate base." (Emphasis added.) As observed by us in *Utilities Commission v. Duke Power Co., supra,* the Commission may, upon the remand here ordered, conduct a further hearing at which expert testimony may be sought upon the question of what is the effect of the fair value increment which has now been actually found by the Commission upon the *rate* of return which it should find to be fair.

(3) The Alleged Errors of Accounting

After finding the fair value of the properties of Vepco used and useful in rendering retail electric service in North Carolina, the Commission fixed the rate base by adding to such "fair value" an allowance of $1,930,466 for working capital. It arrived at this figure in the following manner stated in its Finding of Fact No. 6:

> "That the working capital allowance found to be reasonable for VEPCO's North Carolina retail operations was determined by taking the cash working capital of $1,269,215 and adding to it materials and supplies, $1,619,088. Average tax accruals in the amount of $664,348, average customer deposits of $90,235, and a fuel payment lag of $203,254, were offsets to the working capital allowance, resulting in a net working capital allowance in the amount of $1,930,466 and that the amount of working capital is $1,930,466."

[7] Like any other business, a public utility must at all times have on hand a reasonable amount of materials and supplies and a reasonable amount of funds for the payment of its expenses of operation. While Chapter 62 of the General Statutes makes no reference to working capital, as such, the utility's own funds reasonably invested in such materials and supplies and its cash

funds reasonably so held for payment of operating expenses, as they become payable, fall within the meaning of the term "property used and useful in providing the service," as used in G.S. 62-133(b)(1), and are a proper addition to the rate base on which the utility must be permitted to earn a fair rate of return.

[8] Conversely, the utility is not entitled to include in its rate base funds which it has not provided but which it has been permitted to collect from its customers for the purpose of paying expenses at some future time and which it actually uses as working capital in the meantime. Such funds, so supplied by the customers, are "used and useful in rendering the service" and the utility, having lawfully collected them, is the owner thereof. Nevertheless, such funds, so collected from the customers and used by the utility as working capital, are not "the public utility's property" within the meaning of G.S. 62-133(b)(1). In *Utilities Commission v. State* and *Utilities Commission v. Telegraph Co., supra,* at page 348, this Court, speaking through Justice Barnhill, later Chief Justice, said:

> "When, in fixing rates, which will produce a fair return on the investment of a utility, it is made to appear it has on hand continuously a large sum of money it is using as working capital and to pay current bills for materials and supplies, that is a fact which must be taken into consideration. And if the fund on hand is sufficient, no additional sum should be allowed at the expense of the public."

[9] Chapter 62 of the General Statutes does not state a formula by which the Commission is to determine what is a reasonable amount to be added to the rate base for working capital. Vepco's witness Reilly testified that the weighting to be given the respective indicators of "fair value" is a matter for "subjective judgment." Vepco's witness Phillips testified that the determination of what constitutes a fair rate of return must also be determined by "subjective judgment." Likewise, the total amount reasonably necessary for working capital is a matter requiring the exercise of subjective judgment. When the record, considered as a whole, contains substantial evidence supporting the subjective judgment of the Commission on any of these factors in the fixing of reasonable rates, the conclusion reached by the Commission may not be disturbed by a reviewing court merely because the court's subjective judgment is different from that of the Commission, nor is the Commission required to accept as con-

clusive the subjective judgment of a witness, even though the record contains no expression of a contrary opinion by another witness.

Vepco does not take exception to the Commission's finding as to the total working capital required by it. Its contention is that the deductions therefrom by the Commission on account of funds collected in advance from the customers and actually used as working capital, while being held for ultimate disbursement for taxes, fuel bills and other expenses, were improperly computed.

[10] Vepco contends that the deduction of $90,235 on account of customer deposits was error because this amount was also included in the computation of the deduction for "average tax accruals." In its brief in the Court of Appeals, the Commission concedes that it thus inadvertently deducted the "average customer deposits" twice. The effect of this is to understate the rate base by $90,235 and so to deprive the company of approximately $6,200 in allowable return. While it would hardly be practicable to spread such a relatively small amount among Vepco's ratepayers in the form of a further increase in their rates, the Commission may take it into account, along with its error in computing the fair rate of return, in the further proceedings which must be had.

Vepco also contends that the Commission made too large a deduction from the working capital allowance on account of tax accruals. The rates for service paid by the customers are fixed so as to produce, in addition to other amounts, the sums necessary to pay Vepco's taxes, including its income taxes. Of necessity, the ratepayers pay into Vepco for this purpose, as they use electricity, money which Vepco does not have to pay over to the tax collector until a substantially later period. Meanwhile, Vepco has the use of these funds and does use them as working capital.

[11] Vepco contends that the testimony and exhibit of Mr. Thomas, the accounting witness for the Commission staff, shows that, during the test period, Vepco actually had a negative figure for its Federal income tax liability attributable to its North Carolina retail operations. Consequently, says Vepco, the Commission was in error in including in its deductions from cash working capital $60,783 for accrued Federal income taxes. The absence of an actual tax liability during the test period does not

alter the fact that Vepco's North Carolina customers have paid to it rates which included enough to cover anticipated Federal income taxes. The question here is not how much, if anything, Vepco must pay to the United States. The questions are how large a fund Vepco has collected from its customers with which to pay taxes and how long it has had the use of such fund. Having had the use of funds so collected, it is not entitled to ignore its use thereof when computing its working capital requirement. We see no error in the order of the Commission in this respect.

[12] Vepco further contends that the Commission's deduction from working capital on account of tax accruals is overstated for the reason that the Commission's computation of the time lag between Vepco's collections from its customers and its payments to the tax collector overlooks an offsetting lag between the date Vepco bills its customers and the date the customers pay Vepco. The proper computation of the time lag between Vepco's receipt of such money and Vepco's payment over to the tax collector is a matter of accounting as to which the Commission's accountant and Vepco's accountant are in disagreement. We are unable to find from the record any error of law in the Commission's computation of this portion of the deduction to be made from Vepco's full working capital requirements.

[13] Vepco also complains of the failure of the Commission to make a pro forma adjustment in its actual operating expenses during the test period by reason of a salary and wage increase and an increase in Federal Social Security taxes, both known in the test period to be forthcoming but neither taking effect until after the end of the test period. In this we find no error of law. In *Utilities Commission v. City of Durham,* 282 N.C. 308, 320, 193 S.E. 2d 95, we said:

> "The actual experience of the company *during the test period,* both as to revenues produced by the previously established rates and as to operating expenses, is the basis for a reasonably accurate estimate of what may be anticipated in the near future if, but only if, appropriate pro forma adjustments are made for abnormalities which existed in the test period and for changes in conditions *occurring during the test period* and, therefore, not in operation throughout its entirety." (Emphasis added.)

Adjustments for post test period increases in certain categories of expense may well give a distorted picture of the need

for revenue since post test period experience in other categories of expense is not known and the possibility of offsetting adjustments is not precluded. As a practical matter, there must be a cut-off date for the making of adjustments. Chapter 1041 of the Session Laws of 1973, Second Session, 1974, has no application to this matter.

We have considered and find no merit in Vepco's remaining assignments of error.

By reason of the Commission's error in its computation of the fair rate of return upon the fair value of the properties of Vepco, used and useful in rendering retail electric service in North Carolina, the judgment of the Court of Appeals is reversed and this matter is remanded to that court with direction that it enter its judgment further remanding the matter to the Utilities Commission for further proceedings by the Commission not inconsistent with this opinion.

Reversed and remanded.

ERNEST LAWING AND WIFE, JENNY LEE LAWING v. ARTHUR JAYNES AND WIFE, EDITH JAYNES

ERNEST LAWING AND WIFE, JENNY LEE LAWING v. JOHN C. McLEAN AND WIFE, KATHLEEN H. McLEAN

No. 79

(Filed 1 July 1974)

1. **Lis Pendens— notice not cross-indexed — no constructive notice**

Where notice of *lis pendens* was filed in June 1966 but was not cross-indexed until May 1973, it did not constitute constructive notice of a pending action involving the property in question to purchasers of the property whose deed was recorded in March of 1971. G.S. 1-118.

2. **Vendor and Purchaser § 1; Registration § 1— option agreement — validity — no necessity for registration**

Under G.S. 47-18(a) registration of an option to purchase land is not essential to its validity as against lien creditors or purchasers for a valuable consideration from the optionor.

3. **Registration § 3— expired option — no constructive notice of action for specific performance**

A recorded option agreement showing an expiration date of 1 March 1966 did not constitute constructive notice to purchasers of the

property from the optionors in 1971 that the optionees had exercised the option and had instituted an action against the optionors to compel specific performance of the option agreement.

4. **Vendor and Purchaser § 10— option — action for specific performance — purchase by third person — burden of proving absence of notice of action**

In an action to set aside a deed conveying to defendants property which plaintiffs had allegedly exercised an option to purchase, the burden of proof was on defendants to establish that they were purchasers for a valuable consideration without actual notice of plaintiffs' pending action against the original owners for specific performance of the option agreement.

5. **Registration § 1— necessity for registration to pass title**

Under G.S. 47-18(a) conveyances, contracts to convey, and leases for more than three years are not valid to pass title against a purchaser for a valuable consideration unless and until registered in the county where the land lies.

6. **Lis Pendens— purpose of statutes**

The *lis pendens* statutes enable a purchaser for a valuable consideration who has no actual notice of the pendency of litigation affecting the title to the land to proceed with assurance when the *lis pendens* docket does not disclose a cross-indexed notice disclosing the pendency of such an action.

ON *certiorari* to review the decision of the Court of Appeals reported in 20 N.C. App. 528, 202 S.E. 2d 334.

On 9 March 1964 defendants Jaynes executed an option agreement in which they granted to plaintiffs the right to purchase within the time and upon the terms set forth a tract of 33.5 acres, more or less, in Mills River Township, Henderson County, North Carolina, including the dwelling thereon, and also the interest of defendants Jaynes in a herd of cattle and "the milk base derived therefrom." The option agreement was filed for registration on 10 March 1964 and duly recorded on 13 March 1964, in Book 419, Page 311, in the Office of the Register of Deeds of Henderson County, North Carolina.

On 13 April 1966 plaintiffs instituted the above-entitled action against defendants Jaynes to compel specific performance of the portion of the option agreement relating to the land and dwelling. In substance, plaintiffs alleged they had exercised their option within the time provided therefor but defendants Jaynes had failed and refused to convey the property to plaintiffs as required by the option agreement. The answer filed by defendants Jaynes on 31 May 1966 contained general denials of plaintiffs' essential allegations.

On 10 June 1966 plaintiffs filed in the Office of the Clerk of Superior Court of Henderson County a Notice of Lis Pendens in the form prescribed by G.S. 1-116 in which they set forth the essential facts alleged in the complaint in their pending action against defendants Jaynes. However, this Notice of Lis Pendens was not cross-indexed as required by G.S. 1-117 until 22 May 1973.

After plaintiffs' action against defendants Jaynes had been pending for nearly five years, to wit, on 4 March 1971, defendants Jaynes executed and delivered to defendants McLean a deed for the land covered by the option agreement of 9 March 1964 except a small portion on which the Jaynes dwelling was located. This deed was filed for registration on 5 March 1971, and on that date recorded in Book 482, Page 455, Henderson County Registry.

On 27 December 1972 plaintiffs instituted a separate action entitled as above against defendants McLean. In substance, plaintiffs alleged the facts stated above and prayed that the deed from defendants Jaynes to defendants McLean be declared null and void. In an answer filed 15 February 1973, defendants McLean denied plaintiffs' essential allegations.

The two cases were consolidated for trial. Upon waiver of jury trial, the evidence was heard by Judge Thornburg. Judge Thornburg's findings of fact (Nos. 1-14) are set forth in full in Chief Judge Brock's opinion for the Court of Appeals. Upon these findings of fact and his conclusions of law, Judge Thornburg entered judgment in favor of plaintiffs. All defendants excepted and appealed.

The Court of Appeals, for reasons stated in the opinion of Chief Judge Brock, reached the following results: (1) "In the Jaynes case the findings of fact will not be disturbed; the conclusions of law and decree are vacated; and the cause is remanded for entry of a proper decree upon the facts as found." (2) "In the McLean case a new trial is ordered."

On plaintiffs' petition, we granted certiorari to review the decision of the Court of Appeals.

Bennett, Kelly & Cagle by E. Glenn Kelly for plaintiff appellants.

Kenneth R. Youngblood and Boyd B. Massagee, Jr. for defendant appellees.

BOBBITT, Chief Justice.

In the agreement of 9 March 1964 defendants Jaynes granted to plaintiffs an option to purchase the real property at a purchase price to be computed on the basis of $500.00 per acre, or fractional part thereof, as determined by a surveyor acceptable to both parties, and the additional sum of $9,000.00 for the dwelling. The agreement provided: "This option shall exist and continue for a period of TWO CALENDAR YEARS from the 1st day of March, 1964, but no longer."

In their agreement of 9 March 1964, defendants Jaynes also granted to plaintiffs an option to purchase the interest of defendants Jaynes in a herd of cattle and in a milk base. The Court of Appeals held, and we agree, that these options were severable. Since plaintiffs elected to exercise only their option relating to the real property, the terms of the separate option relating to the cattle and milk base are not germane to decision.

The Court of Appeals held, and we agree, that the evidence supports Judge Thornburg's findings to the effect that, within the time provided therefor, plaintiffs duly exercised their option to purchase the real property, including the dwelling thereon.

Moreover, we agree with the disposition made by the Court of Appeals of defendants' assignments of error relating to Judge Thornburg's rulings on the admissibility of evidence. Hence, as between plaintiffs and defendants Jaynes, plaintiffs were entitled to specific performance. Although their action to compel specific performance was instituted 13 April 1966, and had been at issue since 31 May 1966, it was pending and awaiting trial on 4 March 1971 when defendants Jaynes conveyed to defendants McLean all the real property except the small portion on which the Jaynes dwelling was located.

The crucial question is whether defendants McLean, in respect of the portion of the real property conveyed to them, acquired rights therein superior to the rights of defendants Jaynes, their grantor.

It is here noted that, in order to obtain the relief they seek in their action against defendants McLean, plaintiffs must first establish their right to compel specific performance by defendants Jaynes. Since the two cases were consolidated for trial, the findings of fact of Judge Thornburg pertinent to plaintiffs' right

to compel specific performance by defendants Jaynes apply to the Lawing-McLean case as well as to the Lawing-Jaynes case.

Defendants McLean excepted to and assigned as error Finding of Fact No. 10 that, on or before the execution and recordation of the Jaynes-McLean deed, defendants McLean had constructive notice of plaintiffs' recorded option and of their pending action against defendants Jaynes.

G.S. 1-118 provides: "From the cross-indexing of the notice of lis pendens only is the pendency of the action constructive notice to a purchaser or incumbrancer of the property affected thereby; and every person whose conveyance or incumbrance is subsequently executed or subsequently registered is a subsequent purchaser or incumbrancer, and is bound by all proceedings taken after the cross-indexing of the notice to the same extent as if he were made a party to the action. For the purposes of this section an action is pending from the time of cross-indexing the notice."

[1] Since the Jaynes-McLean deed was executed and recorded in March of 1971, the Notice of Lis Pendens cross-indexed on 22 May 1973 did not constitute constructive notice to defendants McLean of the pendency of the Lawing-Jaynes action.

[3] To what extent, if any, did the option agreement, which was recorded in March of 1964, constitute constructive notice to defendants McLean that plaintiffs had exercised their option and had instituted an action to compel specific performance?

G.S. 47-18(a) provides: "No conveyance of land, or contract to convey, or lease of land for more than three years, shall be valid to pass any property as against lien creditors or purchasers for a valuable consideration from the donor, bargainor or lessor but from the time of registration thereof in the county where the land lies. . . . "

By the unilateral contract of 9 March 1964, defendants Jaynes granted to plaintiffs *option* rights. Their contract did not legally bind plaintiffs to purchase the property at any time at any price. *See Sandlin v. Weaver,* 240 N.C. 703, 707, 83 S.E. 2d 806, 809 (1954), in which the Court quotes from 55 Am. Jur., Vendor and Purchaser § 27, the following: "An option to purchase real property may be defined as a contract by which an owner of real property agrees with another person that the latter shall have the privilege of buying the property at a specified

price within a specified time, or within a reasonable time in the future, and which imposes no obligation to purchase upon the person to whom it is given. Until the holder or owner of an option for the purchase of property exercises it, he has nothing but a mere right to acquire an interest, and has neither the ownership of nor any interest in the property itself." *Accord,* 91 C.J.S., Vendor & Purchaser § 4.

"The optionee has no 'interest' in the land itself, legal or equitable, whereas in a contract for sale, both the vendor and vendee have 'interests' in the land, and both are bound by certain obligations. An option is not a contract to sell, but it is transformed into one on acceptance by the optionee." Christopher, Options to Purchase Real Estate in North Carolina, 44 N.C.L. Rev. 63, 64 (1965), citing numerous supporting cases.

G.S. 47-18(a) refers expressly to conveyances of land, to contracts to convey land, and to leases of land for more than three years. It provides that *these* are not valid to pass any property as against lien creditors or purchasers for a valuable consideration from the donor, bargainor or lessor but from the time of registration thereof in the county where the land lies.

"The registration or record of an instrument operates as constructive notice only when the statute authorizes its registration; and then only to the extent of those provisions which are within the registration statutes. Therefore, the registration of a deed or other instrument not entitled or required to be recorded is not constructive notice to subsequent purchasers. . . . " 92 C.J.S., Vendor & Purchaser § 341(b) (1), pp. 260-61. The author cites as supporting authority the decision of this Court in *Chandler v. Cameron,* 229 N.C. 62, 47 S.E. 2d 528, 3 A.L.R. 2d 571 (1948), which, as succinctly and accurately stated in the fourth headnote (N. C. Report), holds: "Registration is constructive notice as to all instruments authorized to be registered, but is not constructive notice of provisions not coming within the registration laws, even though embodied in an instrument required to be recorded."

[2] Under G.S. 47-18(a) registration of an option to purchase land is not essential to its validity as against lien creditors or purchasers for a valuable consideration from the optionor. Unless modified by Chapter 1174, Session Laws of 1961, codified as G.S. 47-117 through G.S. 47-120, it did not charge defendants McLean with *constructive* notice thereof.

The 1961 Act is entitled "An Act to Amend Chapter 47 of the General Statutes so as to Provide for the Filing of Memoranda of Leases and Options for Registration." The portion thereof enacted as G.S. 47-119 is entitled, "Form of memorandum for option to purchase real estate," and provides: "An option to purchase real estate *may* be registered by registering a memorandum thereof which shall set forth: (1) The names of the parties thereto; (2) A description of the property which is subject to the option; (3) The expiration date of the option; (4) Reference sufficient to identify the complete agreement between the parties. Such a memorandum may be in substantially the following form: . . . " (Our italics.) [The statute then sets forth a short form prepared in accordance with the quoted provisions.] G.S. 47-118 contains similar provisions with reference to "a lease of land or land and personal property." G.S. 47-120 provides: "Such memorandum of an option to purchase real estate, or lease as proposed by G.S. 47-118 or G.S. 47-119, when executed, acknowledged, delivered and registered as required by law, shall be as good and sufficient notice, and have the same force and effect as if the written lease or option to purchase real estate had been registered in its entirety." Although the 1961 Act provides that an option *may* be registered by using the approved short form memorandum, the registration thereof is only "as good and sufficient notice, and [has] the same force and effect as if the written . . . option to purchase real estate had been registered in its entirety."

Since the question has not been considered in the briefs, we make no ruling with reference to whether the recordation of the option agreement was sufficient to give defendants McLean constructive notice of the contents thereof. Our further consideration with reference to constructive notice assumes that defendants McLean had knowledge of *the contents* of the recorded option prior to the deed of 4 March 1971 from defendants Jaynes to defendants McLean.

Inspection of the recorded option would have disclosed that the time within which plaintiffs were permitted to exercise their option had expired on 1 March 1966, that is, more than five years before the deed from defendants Jaynes to defendants McLean.

We note that, under the registration statutes of Maryland and of Georgia, it has been held that the rights of an optionee under a properly recorded option agreement who exercises his

option within the prescribed time are superior to those of a third party to whom the optionor has conveyed the same property *before the time for exercising the option has expired. Daniel v. Kensington Homes, Inc.*, 232 Md. 1, 192 A. 2d 114 (1963); *Banks v. Harden*, 221 Ga. 505, 145 S.E. 2d 563 (1965).

In *Trogden v. Williams*, 144 N.C. 192, 56 S.E. 865, 10 L.R.A. (N.S.) 867 (1907), the action was for specific performance of an alleged exercised option. The option was granted to plaintiffs by executors. The will conferred a power of sale upon the executors but gave the devisees the right to elect to take the land in its unconverted form. After the date for exercising the option as stated in the record thereof had passed, all devisees, except the owner of an undivided one-fifth interest, elected to take the land itself and then contracted to convey their interest to defendant Remick. The Court concluded that the purported option was invalid and unenforceable as between the plaintiffs and the executors. Hence, it was unnecessary to decide whether defendant Remick, as a purchaser for a valuable consideration from the devisees, acquired rights superior to those of the plaintiffs. Even so, this statement from the opinion of Justice Connor is a persuasive dictum: "The registration of the option, 4 May 1905, gave no other notice than that the plaintiffs had a right to pay the money and call for the title within ninety days. Nothing else appearing of record, it would seem that Remick became, by the contract of 28 June 1905, a purchaser for value when he deposited the full amount of the purchase money in the bank, to be paid when title was made. No deed appearing of record, he was entitled to treat the option as at an end. To make the extension of time to pay the money binding upon subsequent purchasers, the option *as changed* should have been registered. It was a 'contract to convey' within the language and purpose of section 980 of the Revisal." (Our italics.) Thus, *if* the option were valid, and *if* plaintiffs had exercised their option within the prescribed time, the option would have been changed into a contract to convey and as such ineffective to pass title as against a purchaser for a valuable consideration but from the registration thereof as provided in G.S. 47-18(a), formerly Section 980 of the Revisal. It was adjudged that plaintiffs were not entitled to the relief they sought and that defendant Remick was entitled to a deed for the four-fifths interest covered by the contract signed by the devisees.

The record herein disclosed that the time for exercising the option had expired. It failed to show that defendants Jaynes had

conveyed or contracted to convey the real property pursuant to the option or otherwise. Defendants Jaynes tendered and delivered to defendants McLean a deed with full warranties. Nothing else appearing, we perceive no sound basis for the view that defendants McLean were required by inquiry *dehors* the record to explore the various circumstances under which the option agreement *might* still be a viable contract between the parties thereto.

A similar question was considered by this Court in *Insurance Co. v. Knox,* 220 N.C. 725, 18 S.E. 2d 436, 138 A.L.R. 1438 (1942). This action was instituted 10 November 1937 to foreclose a deed of trust which secured a note owned by the plaintiff. The maturity date of the note as set forth in the record thereof was 10 May 1928. On 20 November 1930, the owners executed a second deed of trust on the same land. Pursuant to the foreclosure of this deed of trust in 1933 the trustee conveyed the property to Ola G. Hendrix. On 24 April 1936, she and her husband, G. H. Hendrix, conveyed the property to J. W. Hinson and wife, Nettie Hinson. On 9 April 1939, during the pendency of the foreclosure action, the Hinsons conveyed the property to C. M. Irvin, Jr., and wife, Pearl M. Irvin, and on the same date the said Irvins executed a deed of trust to Robert H. Irvin, Trustee. When the defendants Irvin purchased the land they had no actual knowledge of the pendency of the foreclosure action or of the recorded deed of trust held by plaintiff. C. M. Irvin, Jr., and wife, Pearl M. Irvin, and Robert H. Irvin, Trustee, were made parties defendant on 13 Septetmber 1940. The foreclosure action was commenced 10 November 1937, as against all parties other than the Irvins, within ten years from the maturity date of the note according to the record. However, the Irvins were not joined as parties defendant until more than ten years from the maturity date of the note according to the record and more than ten years from 10 January 1930, the date of the last payment on the note. The defendants contended that plaintiff's right to foreclose what had been a prior first lien deed of trust was barred by the ten-year statute of limitations.

In the foreclosure action considered in *Insurance Co. v. Knox, supra,* no separate notice of *lis pendens* was filed. The record of the deed of trust the plaintiff sought to foreclose constituted constructive notice of its provisions. Decision turned upon whether this record was also constructive notice of the pending foreclosure action. In a four-to-three decision, the Court

answered "Yes," and affirmed the superior court's judgment in favor of the plaintiff. The majority views are set forth in the opinion of Justice (later Chief Justice) Barnhill and in the concurring opinion of Chief Justice Stacy. Dissenting opinions were filed by Justice (later Chief Justice) Devin, and by Justice Seawell.

As stated in the opinion of Justice Barnhill, this question was presented: "When an action is instituted to foreclose a duly registered deed of trust, must notice of the proceedings be cross-indexed as required by C.S. 501, so as to protect the mortgage creditor against subsequent purchasers from the mortgagor or his assigns who are parties to the action?" The majority gave a negative answer.

C.S. 501 provided: "Any party to an action desiring to claim the benefit of a notice of lis pendens, whether given formally under this article or in the pleadings filed in the case, shall cause such notice to be cross-indexed by the clerk of the superior court in a docket to be kept by him, to be called Record of Lis Pendens, which index shall contain the names of the parties to the action, where such notice (whether formal or in the pleadings) is filed, the object of the action, the date of indexing, and sufficient description of the land to be affected to enable any person to locate said lands. . . . " We note that C.S. 501, as amended, is now codified as G.S. 1-117 and that the statute then codified as C.S. 502 is identical with G.S. 1-118.

The majority were of the opinion that the recorded deed of trust gave notice not only of the existence of the lien created thereby but of the remedies available in the event of default, primarily (1) sale under the power contained in the instrument, and (2) sale by foreclosure proceedings. Justice Barnhill stated: "When an examiner finds a mortgage of record foreclosure of which is apparently barred the questions immediately arise: (1) has the mortgage debt been kept in date by payments; (2) has the power of sale, if any, been exercised; and (3) has the mortgagee exercised or is he exercising his right to foreclose, thus suspending the statute of limitations?"

Applying the rationale on which the decision was based, Justice Barnhill said: "Here, at the time the Irvins purchased the deed of trust was on record. Upon its face it was in default. They were put on notice that the rights existing in the holder of the lien to foreclose for satisfaction of the debt had accrued.

This notice would demand that a prudent examiner investigate further to ascertain whether the debt had been kept in date by payment and whether the lienholder was pursuing either of the remedies available, and it was the duty of the Irvins to be vigilant, take care of their interests and make such further investigation as the circumstances demanded. This clearly required that they ascertain whether foreclosure proceedings were pending. This information was readily available either from the civil issue docket or from the trustee in the deed of trust."

The justices who dissented were of the opinion that constructive notice of the pendency of an action to foreclose a deed of trust on real estate could be given only by the filing of a notice of *lis pendens* as provided in C.S. 501. The following excerpt from the dissenting opinion of Justice Devin indicates their views: "A search of the records in the office of the register of deeds would not have revealed the pendency of a suit involving the title to the land. A search of the records in the clerk's office would have been equally futile, since the pendency of the action did not appear cross-indexed on the *lis pendens* docket in that office. A searcher of titles is now no longer required to examine the multitudinous files of civil actions to determine whether an action affecting the title of the land has been instituted. The statute was intended to facilitate the examination of titles and to afford a convenient means of giving notice of suit, and to guard against the consequences of transfers of title pending the action."

By Chapter 1163, Session Laws of 1959, the General Assembly amended the statutes relating to the filing and cross-indexing of notice of *lis pendens*. The 1959 Act amended G.S. 1-116 so as to require that "[a]ny person desiring the benefit of constructive notice of pending litigation must file *a separate, independent notice thereof,* which notice shall be cross-indexed in accordance with G.S. 1-117," and provided that "[n]otice of pending litigation must be filed with the clerk of the superior court of each county in which any part of the real estate is located, not excepting the county in which the action is pending, *in order to be effective against bona fide purchasers* or *lien creditors* with respect to the real property located in such county." (Our italics.)

As amended by the 1959 Act, G.S. 1-116 specifies the actions in which such notice is required, including actions affecting title to real property, and also prescribes the contents of the

required notice and when it may be filed. Seemingly, the 1959 Act was intended to alleviate the burden placed upon a prospective purchaser by the decision in *Insurance Co. v. Knox, supra,* and to "greatly facilitate the examination of titles and afford ample protection to prospective purchasers of real property with respect to which litigation is pending." 38 N.C.L. Rev., at 214.

[3] For the reasons set forth, we conclude that defendants McLean did not have *constructive* notice of plaintiffs' pending action against defendants Jaynes to compel specific performance of the option agreement. The determinative factual issue is whether defendants McLean had *actual* notice thereof.

Finding of Fact No. 11 reads as follows: "The defendant John C. McLean had actual notice that plaintiffs claimed an interest in the real estate subject to plaintiffs' option and had this actual notice prior to March 5, 1971."

Being of the opinion the findings of fact were not dispositive of the material issues therein, the Court of Appeals awarded a new trial in the Lawing-McLean action. It treated Finding of Fact No. 11 as a finding "that Mr. McLean had actual notice of the pendency of the lawsuit against Jaynes to obtain specific performance by Jaynes to convey the land in controversy to plaintiffs," and that there was evidence sufficient to support such finding. However, it considered the findings of fact insufficient because of the trial court's failure "to determine whether Mr. McLean was acting for himself only, or was acting in behalf of Mrs. McLean and himself, or indeed who conducted the negotiations, when the purchase of a portion of the property in controversy was made from Jaynes."

[4] The foregoing disposition by the Court of Appeals is based on the view that the burden of proof was on plaintiffs to establish that defendants McLean had actual notice of the Lawing-Jaynes action when they obtained the deed of 4 March 1971 from defendants Jaynes. Judge Thornburg's findings of fact indicate this was the legal theory on which he conducted the trial. On the authority and for the reasons set forth below, we hold the burden of proof was on defendants McLean to establish that they were purchasers for a valuable consideration without actual notice of plaintiffs' pending action against defendants Jaynes for specific performance of the option.

In *Morris v. Basnight,* 179 N.C. 298, 102 S.E. 389 (1920), the opinion of Justice (later Chief Justice) Hoke concluded with

these words: "Our statute on the subject, Rev., 462 [now G.S. 1-118], only purports to deal with constructive notice, and its effect on subsequent purchasers, but where one buys from a litigant with full notice or knowledge of the suit, and of its nature and purpose, and the specific property to be affected, he is concluded or his purchase will be held ineffective and fraudulent as to decree rendered in the cause and the rights thereby established. [Citations omitted.]" *Accord,* 71 Am. Jur. 2d, Specific Performance § 169. In *Morris v. Basnight, supra,* the Court affirmed a judgment based on issues submitted in accordance with the quoted statement.

In *Whitehurst v. Abbott,* 225 N.C. 1, 33 S.E. 2d 129, 159 A.L.R. 380 (1945), the controversy was between heirs of the deceased and parties who purchased from devisees during the pendency of caveat proceedings in which the purported will was adjudged null and void. The opinion of Justice (later Chief Justice) Barnhill states: "But *lis pendens* notice under the statute is not exclusive. Nor is it designed to protect intermeddlers. When a person acquires an interest in property pending an action in which the title thereto is at issue, from one of the parties to the action, with notice of the action, *actual* or constructive, he is bound by the judgment in the action just as the party from whom he bought would have been." *Id.* at 6, 33 S.E. 2d at 133. Applying this legal principle to the case under consideration, the opinion states: "The uncontroverted evidence tends to show and it seems to be admitted that Hinton conveyed to McPherson *pendente lite.* This being true, his deed was ineffective and fraudulent as against the final decree in the pending action. Upon such showing plaintiffs were entitled to judgment, certainly as against McPherson, unless it should be made to appear that he purchased for value and without notice. This is an affirmative defense and he who claims to be a *bona fide* purchaser for value without notice so as to avoid the defective character of his deed has the burden of proving that fact. *Hughes v. Fields,* 168 N.C. 520, 84 S.E. 804; *King v. McRackan,* 168 N.C. 621, 84 S.E. 1027 (affirmed on rehearing, *King v. McRackan,* 171 N.C. 752, 88 S.E. 226); 27 R.C.L. 737."

In *Waters v. Pittman,* 254 N.C. 191, 118 S.E. 2d 395 (1961), the deed under which defendants claimed was recorded before the recordation but after the execution and delivery of the deed under which the plaintiff claimed. It was held that the plaintiff's title was good "unless the defendants are purchasers for

value, and the burden of proof is on the defendants to show by a preponderance of the evidence that they are purchasers for value. *Hughes v. Fields,* 168 N.C. 520, 84 S.E. 804; *King v. McRackan,* 168 N.C. 621, 84 S.E. 1027 (affirmed on rehearing, 171 N.C. 752, 88 S.E. 226); *Bank v. Mitchell,* 203 N.C. 339, 166 S.E. 69; *Whitehurst v. Abbott,* 225 N.C. 1, 33 S.E. 2d 129, 159 A.L.R. 380; *Skipper v. Yow,* 240 N.C. 102, 81 S.E. 2d 200. See also Anno: Burden of Proof—Good Faith—Consideration, 107 A.L.R. 502, *et seq.,* where the authorities bearing on the burden of proof in a situation like that now before us are collected." *Id.* at 194, 118 S.E. 2d at 397.

In *King v. McRackan,* 171 N.C. 752, 88 S.E. 226 (1916), the Court pointed out that this rule "places the burden of proof on the purchaser, who usually knows all the facts, and who has it in his possession to inform the court of the amount paid and to whom, and of all the circumstances surrounding the purchase, while the opposite rule, and the one contended for by the petitioner, would impose the burden on one unacquainted with the facts, and he would be required to establish a negative, to wit, that the other party was *not* a purchaser for value."

No evidence was offered with reference to the negotiations between defendants Jaynes and defendants McLean leading up to the execution of the deed of 4 March 1971, nor was there any evidence as to the terms of their transactions. Neither of defendants McLean testified. Mrs. Jaynes did not testify. The brief testimony of Mr. Jaynes related solely to the sale of cows. It contains no reference to the sale of the real property to defendants McLean.

Although defendants McLean had knowledge of all the facts and circumstances concerning the transaction in which they purportedly purchased from defendants Jaynes a portion of the subject property, and knew whether they had actual notice of plaintiffs' pending action against defendants Jaynes to compel specific performance, they failed to come forward and testify with reference to these crucial matters. Indeed, the only evidence was to the effect that Mr. McLean at least had actual notice of plaintiffs' prior rights.

We note that the answer in the Lawing-McLean suit is a general denial of plaintiffs' essential allegations. Thus, defendants McLean neither alleged nor did they offer evidence tending to show that they were purchasers for a valuable consideration without actual notice of plaintiffs' prior rights.

It seems clear that, with reference to whether defendants McLean had actual notice of the pendency of the Lawing-Jaynes action to compel specific performance of the option contract, both the parties and the trial judge proceeded upon the assumption that the burden of proof was on plaintiffs. It may be that this erroneous assumption by all concerned explains the failure of defendants McLean to testify with reference to whether they had actual notice of plaintiffs' action against defendants Jaynes to compel specific performance.

The rule stated and applied in *Waters v. Pittman, supra,* and in *Whitehurst v. Abbott, supra,* places the burden of proof on the party to whom the property is conveyed to show that he is a purchaser for a valuable consideration and, when an action is pending which affects the title to the property, that he had no actual notice of such action. In the present action, defendants McLean are the persons who have knowledge of all circumstances surrounding their transactions with defendants Jaynes and therefore should be required to establish that they were purchasers for a valuable consideration and had no actual notice of the pendency of the Lawing-Jaynes suit for specific performance when they acquired the deed of 4 March 1971 from defendants Jaynes.

[5, 6] This distinction between the registration and *lis pendens* statutes should be noted. Under G.S. 47-18(a) conveyances, contracts to convey, and leases for more than three years, *are not valid to pass title* against a purchaser for a valuable consideration unless and until registered in the county where the land lies. Hence, as against a purchaser for a valuable consideration, no title passes prior to registration; therefore, no notice however full or formal takes the place of registration. The *lis pendens* statutes enable a purchaser for a valuable consideration *who has no actual notice* of the pendency of litigation affecting the title to the land to proceed with assurance when the *lis pendens* docket does not disclose a cross-indexed notice disclosing the pendency of such an action.

We are of opinion that a partial new trial must be awarded in the consolidated cases to determine the single issue whether defendants McLean had actual notice of the pending Lawing-Jaynes action for specific performance. All findings of fact made by Judge Thornburg pertinent to plaintiffs' action against defendants Jaynes will stand. The court's adjudication that, as between plaintiffs and defendants Jaynes, plaintiffs are entitled

to specific performance will stand. Moreover, those findings and that adjudication are binding upon defendants McLean. Defendants McLean will be entitled to the land described in their deed from defendants Jaynes free and clear of any rights of plaintiffs therein *if and when* they establish by the greater weight of the evidence that they were purchasers for a valuable consideration without notice of plaintiffs' pending action against defendants Jaynes. At the next hearing the court will hear the pertinent evidence and determine this issue. If determined in favor of defendants McLean, plaintiffs will have no rights in the property conveyed by defendants Jaynes to defendants McLean. If determined adversely to defendants McLean, plaintiffs will be entitled to specific performance of their option unless at such further hearing it should be made to appear that persons who are not now parties have acquired rights superior to those of plaintiffs.

Accordingly, the decree of specific performance in the judgment of the court below is vacated. The findings of fact and adjudication with reference to plaintiffs' rights as against defendants Jaynes stand and are binding on defendants McLean. The new trial will be limited to the single issue stated above; and, upon the determination thereof, a complete new judgment will be entered consonant with the circumstances then existing.

The Court of Appeals having elected to deal with the merits of defendants' appeal, we considered further review on the merits was appropriate. Hence, plaintiffs' motion to dismiss defendants' appeal for failure to comply with the procedural rules of the Court of Appeals is denied. Too, we are well aware that no exception or assignment of error has been directed to the question we consider crucial. Being of the opinion that the ends of justice require that this crucial issue be determined, we have elected to order that it be done in the exercise of our general supervisory power under Article IV, Section 12(1), of the Constitution of North Carolina.

Accordingly, the decision of the Court of Appeals is modified as set forth herein and the cause is remanded to that court with instructions to remand to the superior court for a partial new trial and a judgment in accordance with this opinion.

Modified and remanded.

NORTH CAROLINA CONSUMERS POWER, INC. AND THE CITY OF SHELBY, A MUNICIPAL CORPORATION OF THE STATE OF NORTH CAROLINA, PETITIONERS-PLAINTIFFS v. DUKE POWER COMPANY; ROBERT W. YELTON, N. DIXON LACKEY, JR., GEORGE C. NEWMAN AND EARL D. HUNNEYCUTT, JR., INDIVIDUALLY AND AS CITIZENS, ELECTRIC CUSTOMERS AND TAXPAYERS OF THE CITY OF SHELBY, NORTH CAROLINA, RESPONDENTS-DEFENDANTS, AND CHARLES R. McBRAYER; ALI PAKSOY; VARIETY THEATRES, INC., DOING BUSINESS AS SKYVIEW DRIVE IN THEATRE; BELK BROTHERS COMPANY; BURLINGTON INDUSTRIES, INC.; FIBER INDUSTRIES, INC.; CITY OF WILSON; CITY OF GASTONIA; TOWN OF CORNELIUS; CITY OF CHARLOTTE; AND ATTORNEY GENERAL OF NORTH CAROLINA, ADDITIONAL RESPONDENTS-DEFENDANTS

No. 87

(Filed 1 July 1974)

1. **Appeal and Error § 6— refusal to dismiss action — no right of appeal**

No appeal lies from the trial court's refusal to dismiss an action on the ground of lack of a justiciable controversy since such refusal did not seriously impair any right of defendant that could not be corrected upon appeal from final judgment.

2. **Declaratory Judgment Act § 2; Rules of Civil Procedure § 12— motion to dismiss — declaratory judgment action**

A motion to dismiss pursuant to Rule 12(b)(6) is seldom an appropriate pleading in actions for declaratory judgments; such motion will not be allowed simply because the plaintiff may not be able to prevail but is allowed only when the record clearly shows that there is no basis for declaratory relief as when the complaint does not allege an actual, genuine existing controversy.

3. **Declaratory Judgment Act § 1; Injunctions § 11; Parties § 5— enjoining municipality — declaratory judgment on validity of municipal contract — class actions**

A citizen-taxpayer may maintain a class action to enjoin the governing body of a municipal corporation from transcending its lawful powers or violating any legal duty which will injuriously affect the taxpayer; and class actions for declaratory judgments may be utilized to determine the validity of contracts between a municipality and a private corporation.

4. **Declaratory Judgment Act § 1— actual controversy — litigation unavoidable**

While it is not necessary for one party to have an actual right of action against another for an actual controversy to exist which would support declaratory relief, it is necessary that the courts be convinced that the litigation appears to be unavoidable.

5. **Declaratory Judgment Act § 1— validity of contract — lack of justiciable controversy**

There was no actual or real presently existing controversy between plaintiffs and defendants in an action brought by N. C. Consumers

Power, Inc. and a city against Duke Power Company and citizens, electric customers and taxpayers of the city to obtain a declaratory judgment as to the validity of a "System Development and Power Sales Contract" entered between the two plaintiffs where the citizens-taxpayers joined in plaintiffs' prayer for relief without denying any substantial allegations of the complaint, and the complaint reveals that there is no practical certainty that plaintiffs have the capacity or power to perform the acts which would inevitably create a controversy with Duke Power Company.

THIS is an action for a declaratory judgment instituted by Consumers Power Company, a nonprofit North Carolina corporation (hereinafter referred to as Consumers), and the City of Shelby, a municipal corporation (hereinafter referred to as Shelby), against Duke Power Company, a North Carolina corporation (hereinafter referred to as Duke), and Robert W. Yelton, N. Dixon Lackey, Jr., George C. Newman and Earl D. Hunneycutt, Jr., individually and as citizens, electric customers and taxpayers of the City of Shelby.

The Petition and Complaint allege that Shelby now owns and operates an electric distribution system and purchases its electric bulk requirements from Duke Power Company; that Consumers was organized to seek and receive governmental approvals for, and to proceed to design, finance, construct and acquire electric generation and transmission facilities, and to own and operate such facilities so as to provide power to municipalities and others who own electric distribution systems.

Petitioners-plaintiffs further allege that Consumers and Shelby have executed a "System Development and Power Sales Contract" (Exhibit C-1) (hereinafter referred to as System Contract) and similar contracts have been tendered to 45 other North Carolina municipalities and North Carolina Electric Membership Corporation, representing 30 electric membership corporations (these parties, with their respective percentage shares of participation, are listed in Exhibit "A" to the System Contract); that the facilities which Consumers intends to construct and operate would furnish a competing source of wholesale electric energy to customers now served by Duke and other power companies; that Duke has committed itself to oppose the construction and operation of proposed facilities; that it is inevitable that Duke and petitioners-plaintiffs must litigate the validity of the contractual arrangements and the authority of Consumers Power to finance, construct and operate electric generation and transmission facilities; and that Shelby has now so

committed itself that any citizen, electric ratepayer or taxpayer may challenge the contract between Consumers and Shelby.

Petitioners-plaintiffs prayed for a judgment declaring that Consumers and Shelby have the power to enter into the System Contract and to perform the obligations therein required; that the action be declared a class action and the Court make provisions for proper representation of the class; and that the Court provide adequate notice to the parties. The prayer for relief also posed certain specific questions related to the System Contract to be answered by the Court.

Judge Friday found the action to be a class action, and enlarged the class by ordering that additional respondents be joined in the action.

Duke filed a Motion to Dismiss on 12 April 1973 and filed an Amended Motion to Dismiss on 20 April 1973. On the latter date Duke also filed its Answer. The Motions to Dismiss were on the grounds of lack of a justiciable controversy. On 30 May 1973 Judge Friday denied Duke's Motions to Dismiss. On 7 August 1973 Duke gave Notice of Appeal. On 29 August 1973 Duke filed a Petition for Certiorari to the North Carolina Court of Appeals for review of the trial judge's Order denying its Motions to Dismiss. Plaintiffs-petitioners filed an Answer to this Petition for Certiorari on 7 September 1973, and on the same date moved to dismiss Duke's appeal. On 17 September 1973 the Court of Appeals denied petitioners-plaintiffs' Motion to Dismiss Duke's appeal, and on the same date denied Duke's Petition for Certiorari.

After stating the facts the Court of Appeals rendered the following decision:

"CAMPBELL, Judge.

> We are of the opinion that this entire project presently is too ephemeral and that the interest of Shelby is too infinitesimal for the Court to take jurisdiction. In other words, the case does not present a justiciable matter.
>
> Reversed.
>
> Judge HEDRICK concurs.
>
> Judge VAUGHN dissents."

Petitioners-plaintiffs appealed pursuant to G.S. 7A-30(2).

Crisp, Bolch & Smith by Thomas J. Bolch; Tally & Tally by J. O. Tally, Jr., and James D. Garrison; Wood, Dawson, Love & Sabatine, of counsel for plaintiffs-appellants.

Joyner & Howison by R. C. Howison, Jr.; and William I. Ward, Jr., of counsel; Fleming, Robinson & Bradshaw by Robert W. Bradshaw, Jr.; and Horn, West, Horn & Wray for defendant-appellee.

BRANCH, Justice.

[1] At the threshold of this appeal we are confronted with the question of whether an appeal lies from the trial judge's refusal to dismiss the action.

G.S. 1-277 in effect provides that no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment. *Raleigh v. Edwards,* 234 N.C. 528, 67 S.E. 2d 669; *Veazey v. Durham,* 231 N.C. 357, 57 S.E. 2d 377.

Many decisions of this Court hold that refusal of a Motion to Dismiss is not a final determination within the meaning of the statute and, therefore, is not appealable. *G.M.C. Trucks v. Smith,* 249 N.C. 764, 107 S.E. 2d 746; *Cox v. Cox,* 246 N.C. 528, 98 S.E. 2d 879; *Johnson v. Pilot Life Ins. Co.,* 215 N.C. 120, 1 S.E. 2d 381; *Clements v. Southern R. R.,* 179 N.C. 225, 102 S.E. 399; *Plemmons v. Southern Improvement Co.,* 108 N.C. 614, 13 S.E. 188.

Johnson v. Pilot Life Ins. Co., supra, was an action to set aside a release and recover on an insurance policy. The insurer appealed from an Order denying its Motion to Dismiss. The Court dismissed the appeal, and Chief Justice Stacy, writing for the Court, stated:

> "No appeal lies from a refusal to dismiss an action. *Goldsboro v. Holmes,* 183 N.C., 203, 111 S.E., 1; *Farr v. Lumber Co.,* 182 N.C., 725, 109 S.E., 383; *Goode v. Rogers,* 126 N.C., 62, 35 S.E., 185. In such case there is no judgment—only the refusal of a judgment. *Branshaw v. Bank,* 172 N.C., 632, 90 S.E., 789. Of course, if the motion had been allowed and the action dismissed, the plaintiff could

not have proceeded in the court below, and in that event an appeal by the plaintiff would have been in order. *Royster v. Wright,* 118 N.C., 152, 24 S.E., 746. Such a ruling would have been just the reverse of the one we are now considering. *Batson v. Laundry, supra.*"

* * *

" 'It is only when the judgment or order appealed from in the course of the action puts an end to it, or may put an end to it, or has the effect to deprive the party complaining of some substantial right, or will seriously impair such right if the error shall not be corrected at once, and before the final hearing, that an appeal lies before final judgment.' *Merrimon, J.,* in *Leake v. Covington,* 95 N.C., 193."

Duke relies upon the cases of *Kilby v. Dowdle,* 4 N.C. App. 450, 166 S.E. 2d 875, and *Elliott v. Ballentine,* 7 N.C. App. 682, 173 S.E. 2d 552, to support its contention that the denial of its Motions to Dismiss is immediately appealable.

Kilby is distinguishable from the case before us. In *Kilby* plaintiff instituted an action to recover for personal injuries allegedly resulting from the negligent operation of a motor vehicle owned by defendant, Carolina Truck and Body Company, Inc., and operated by its employee Dowdle. Defendant, Carolina Truck and Body Company, alleged, as a plea in bar, that plaintiff was its employee at the time of the accident and that the North Carolina Industrial Commission had exclusive jurisdiction of the claim. The trial judge overruled the plea in bar and set the cause for trial.

Defendant Truck Company appealed from this ruling, and the Court of Appeals held that an appeal lies immediately from refusal to dismiss a cause of action for *want of jurisdiction.* However, no such jurisdictional question arises in instant case.

We are unable to find a valid distinction between instant case and *Elliott.* In *Elliott* the cause of action involved an interpretation of a will under the Declaratory Judgment Act. Defendants demurred on the grounds that the complaint did not state a cause of action, and that there was a misjoinder of parties and causes of action. The trial court overruled the demurrer, and the Court of Appeals considered defendant's appeal. It would seem that the holding in *Elliott* would, by implication, support Duke's position. On the other hand, the Court of Appeals in the later case of *Acorn v. Knitting Corp.,* 12 N.C. App. 266, 182

S.E. 2d 862, flatly held, and we think correctly so, that no immediate right of appeal lay from the trial court's order denying defendant's Motion to Dismiss because of a prior action pending in another jurisdiction between the same parties. In dismissing the action the Court, *inter alia*, quoted from *Johnson v. Pilot Life Ins. Co., supra*, the following: "No appeal lies from a refusal to dismiss an action."

Judge Friday's refusal to allow Duke's Motion to Dismiss did not put an end to the action or seriously impair any substantial right of Duke that could not be corrected upon appeal from final judgment. The Court of Appeals incorrectly denied petitioners-plaintiffs' Motion to Dismiss Duke's appeal. Nevertheless since the Court of Appeals decided this case upon its merits and because we believe that decision of the principal question presented would expedite the administration of justice, we elect, in the exercise of our supervisory jurisdiction, to consider the principal question. *Moses v. State Highway Commission*, 261 N.C. 316, 134 S.E. 2d 664; *Allred v. Graves*, 261 N.C. 31, 134 S.E. 2d 186.

We are thus brought to the consideration of whether the trial judge correctly denied defendant's Motion to Dismiss.

[2] A Motion to Dismiss pursuant to Rule 12(b)(6) performs the same function as the old common law general demurrer. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161. Thus well pleaded allegations in the Complaint and such relevant inferences of fact which might be deduced therefrom are taken as true. The Motion to Dismiss will be allowed only when the Complaint affirmatively shows that plaintiff has no cause of action. *Forrester v. Garrett, Comr. of Motor Vehicles*, 280 N.C. 117, 184 S.E. 2d 858; *Sutton v. Duke, supra*. The Motion is seldom an appropriate pleading in actions for declaratory judgments, and will not be allowed simply because the plaintiff may not be able to prevail. It is allowed only when the record clearly shows that there is no basis for declaratory relief as when the complaint does not allege an actual, genuine existing controversy. *Machine Company v. Newman*, 275 N.C. 189, 166 S.E. 2d 63; *Woodard v. Carteret County*, 270 N.C. 55, 153 S.E. 2d 809; *Walker v. Charlotte*, 268 N.C. 345, 150 S.E. 2d 493; *Hubbard v. Josey*, 267 N.C. 651, 148 S.E. 2d 638; *Insurance Company v. Roberts*, 261 N.C. 285, 134 S.E. 2d 654; 22 Am. Jur. 2d, *Declaratory Judgments*, § 91, (1965).

Since this action is bottomed on the System Contract (Exhibit C-1) between Consumers and Shelby we quote pertinent

portions of the contract to which reference will hereinafter be made:

ARTICLE I: PREAMBLE AND PREMISES

Section 1.01 Preamble

" . . . Consumers Power and the municipal and EMC Participants also desire and intend to provide for the bulk power requirements of the Participants which are in excess of the capability of the Consumers Power system. This will be done through various methods, including assumption by Consumers Power of rights and obligations of Participants in any contracts with other bulk power suppliers at the time Consumers Power goes into commercial operation, purchase and resale of supply from other bulk power suppliers and, if such proves feasible and desirable, by N. C. EMC's acquisition of power generation or transmission facilities and their utilization on an integrated basis with the Consumers Power facilities. . . .

* * *

Several years will be required to bring the proposed initial system of Consumers Power to reality. Numerous governmental approvals will be required; planning, designing, financing and construction must be arranged for and completed. These interim measures will of course require substantial expenditures, which Consumers Power will fund by issuance of its short-term obligations that will be refinanced by the issuance of long-term obligations.

* * *

Section 1.02 Premises

* * *

(6) Additional work and proceedings are required in order (a) to obtain from the North Carolina Utilities Commission a certificate of convenience and necessity . . . , (b) to obtain other governmental approvals, permits and licenses required in connection with the Initial System, . . . and (c) to firmly establish the engineering, legal and financial feasibility of the Initial System sufficient to support long-term financing of the cost of the Initial System. . . .

* * *

(7) It will be necessary, in order to enable Seller to issue its bonds, notes or other evidences of indebtedness

to pay the costs of acquiring and constructing the Initial System, to have binding contracts with the Participants.

* * *

(9) Seller proposes to enter into agreements with the other Participants containing terms and conditions substantially identical to those contained herein.

* * *

(12) Seller and Participants desire and intend by this and other substantively similar agreements to provide for the Participants' payment for, and for the performance by the Seller of, first, the services necessary to secure required governmental approvals for, and to plan, design, finance and construct to point of commercial operation, the Initial System, . . . ; and, second, all services thereafter necessary in furnishing bulk power supply to the Participants, ...

ARTICLE II

DEFINITIONS; EXHIBITS

Section 2.01 Definitions and Explanation of Terms

* * *

(p) 'Participants' means those entities which are specified in Exhibit A.

* * *

ARTICLE III

SYSTEM DEVELOPMENT SERVICES

Section 3.01 System Development Services to Be Performed by Seller

. . . As soon as practicable, the Seller will in good faith use its best efforts to finance, to complete the design for, and to construct to completion the Initial System. The Seller will use its best efforts to obtain, by January 1, 1977, all such necessary governmental approvals, and to cause the Date of Commercial Operation of the Initial System to occur by January 1, 1983. . . .

* * *

Section 3.02 Payment by Participant for System Development Service

* * *

(b) . . . [T]he Seller shall prepare and submit to the Participant a Billing Statement showing the amount to be paid by the Participant in and for such Year for services rendered pursuant to Section 3.01. Such amount shall be the Participant's Share of the Annual Initial System Development Service Costs. Such payment shall be made by the Participant to the Seller in and for each such Year without regard to the outcome of the work performed by Seller pursuant to Section 3.01 hereof or to the progress made by Seller in such performance (whether or not affected by Uncontrollable Forces) ; . . .

ARTICLE IV

SALE AND PURCHASE OF INITIAL SYSTEM POWER SUPPLY

Section 4.01 Sale and Purchase

Seller shall sell, and the Participant shall purchase, Participant's Share of the Initial System Capability and the Participant's Entitlement Share during each Power Supply Year during the term of this Contract.

* * *

Section 4.02 Payments

(a) Billing Statement. . . . Seller shall prepare and submit to Participant a Billing Statement showing the Participant's Share of Initial System Fixed Charges in the forthcoming Power Supply Year or balance of such Year. Participant shall pay its Participant's Share of such amount, ...

* * *

ARTICLE V

SALE AND PURCHASE OF TOTAL FIRM POWER SUPPLY

Section 5.01 Total Firm Power Supply to the Participant

(a) In each of the initial five Power Supply Years and, subject to Participant's right to terminate solely with respect to the provisions of this Article V relating to Additional Power Requirements, as hereinafter provided, in each such Year thereafter, Seller shall, on a firm basis, obtain or furnish, deliver or cause to be delivered, and sell, and Participant shall receive and pay for, Participant's total power supply requirements, ...

* * *

(d) In pursuance of the rights and obligations in this Article contained, Participant shall (1) contemporaneously with the effectiveness of this agreement or at such subsequent time or times as Seller shall specify, transfer and assign to Seller, in whole or in part, such of any then existing contracts between Participant and any other bulk power supplier as may be necessary or desirable to enable Seller to exercise its rights and to perform its obligations set forth in this agreement and in similar agreements with other Participants; (2) enter into such supplemental contract or contracts with Seller or any other bulk power supplier, whose terms and provisions shall not be inconsistent with this agreement, as may be necessary or desirable to enable Seller and Participant fairly, reasonably and equitably to exercise and perform their respective rights and obligations under this Article; and (3) enter into no new contract, or modification or amendment of a contract, with any other bulk power supplier without the prior written consent and approval of the Seller, which consent and approval shall not be withheld by the Seller if such new contract, or modification or amendment of a contract, is not inconsistent with the provisions of this agreement.

(e) From and after the effectiveness of this agreement, neither Seller nor Participant shall enter into any new contract or permit any then or thereafter existing contract to be renewed or extended . . . , or enter into any amendment to or modification of such a contract, with any other bulk power supplier which shall preclude or impair the ability of Seller or Participant to exercise and perform their respective rights and obligations under this Article or any other provisions of this agreement.

(f) . . . Seller, for the purpose of carrying out its rights and obligations under this Article, shall be, and Participant hereby designates and appoints Seller, Participant's sole agent to the fullest legal extent that such agency may for such purpose be established.

ARTICLE IX

TERMS; MISCELLANEOUS PROVISIONS

Section 9.01 Term of Agreement

This agreement shall be effective upon execution by both parties and, except as provided in Section 9.03 and

except as to accrued obligations and liabilities, shall terminate thirty (30) years after the first day of the initial Power Supply Year.

* * *

Section 9.03 Termination of the Initial System

The Seller may terminate all or any portion of its activities with respect to the planning, designing, financing, acquisition, construction or operation of the Initial System, or of any generating station or other component thereof, . . . if and when (a) the Seller determines it is unable to construct, operate, or proceed as owner of the Initial System or any component thereof because of its inability to obtain any required governmental approvals or because of other licensing, financing, or operating conditions or other causes which are beyond its control; or (b) the Seller and the Participants (by majority vote of the Participants' Advisory Committee) determine that the Initial System or any component thereof is not capable of producing energy consistent with Prudent Utility Practice. The Seller shall not be obligated to terminate the entire Initial System or any particular component thereof by reason of its inability to construct, operate or proceed as owner of any other part of the Initial System unless it is determined pursuant to clause (b) above that the remaining components of the Initial System are not capable of producing energy consistent with Prudent Utility Practice. The date of termination shall be the earlier of the dates of determination under clauses (a) and (b) above.

Consumers and Shelby contend that the declarations they seek are not related to the feasibility of the generation and transmission of electric power, but are concerned with the validity or invalidity of the System Contract which has been executed by Consumers and Shelby so as to impose present obligations upon the parties to the contract, and that an actual controversy exists between petitioners-plaintiffs and Duke concerning the validity and construction of the System Contract.

In support of their position Consumers and Shelby point to Section 5.01(b) of the contract which designates Consumers as the sole agent of Shelby in negotiating power contracts, effective upon execution of the contract. Further, they note that effective upon its execution, Section 5.01(d) of the System

Contract imposes heavy restrictions upon Shelby's right to contract, including Consumers' right to require Shelby to assign to Consumers its wholesale power contracts. They further contend that the immediate effectiveness of the contract is shown by its provisions which obligate Shelby to purchase its total electric power requirements from Consumers beginning on 1 July 1984. See Contract Sections 4.01 and 5.01(a). Consumers and Shelby aver that the bilateral and binding nature of the contract is disclosed by those portions of the agreement whereby Consumers agreed to diligently seek to complete preliminary work, and to obtain state and federal governmental approvals to the end that the Initial System be in operation by 1 January 1983. Section 3.01 System Contract. By Section 1.02(a) of the Contract Consumers proposes to obtain similar contracts from the other participants.

Consumers and Shelby argue that any one of the obligations of the contract could be *ultra vires* (as contended by Duke in its Answer) and that an actual controversy exists which should be decided under the Declaratory Judgment Act.

Duke, on the other hand, contends that the obligations cited by petitioners-plaintiffs as creating an existing contract and presenting subject matter presently adjudicative under the Declaratory Judgment Act are merely incidental to the real and ultimate purpose of the System Contract which is to provide a means whereby 45 municipalities and 28 electric membership corporations may develop, finance, construct and operate an electric generation and transmission system; that each of the participants as shown on Exhibit A to the contract is assigned a participating share to accept and pay for the development and construction of the system, and for delivery of electricity; and that Shelby, possessing a share of only 1.172%, is the only participant presently obligated to bear the expense of planning, designing, constructing and operating the electric generation and transmission facilities. Duke relies upon Sections 1.01 and 1.02 of the System Contract to support its contentions that no substantial portion of the contract will be effective until the system goes into operation. Duke further contends that since the contract contemplates that all expenses of planning, construction and operation of the transmission system shall be borne by participants according to their allotted participating share, it is impossible for Consumers and Shelby to now be involved in a controversy with Duke concerning the construction

and operation of an electric generation and transmission system. See System Contract 1.02(12), 3.02(b), 4.02(a).

The core of this appeal lies in the determination of whether plaintiffs have by their complaint alleged an actual genuine existing controversy.

The purpose of the Declaratory Judgment Act is to settle and afford relief from uncertainty concerning rights, status and other legal relations, and although the Act is to be liberally construed, its provisions are not without limitation. Uniform Declaratory Judgment Act, G.S. 1-253 to 1-267. Since its passage the Act has spawned a host of decisions defining its scope and objectives. The rules of law set forth in these decisions are, as here, often difficult to apply to the facts of a given case.

Many of the now accepted principles concerning the scope of the Declaratory Judgment Act were stated by Justice Ervin in the case of *Lide v. Mears*, 231 N.C. 111, 56 S.E. 2d 404, as follows:

> " . . . [The Act] does not undertake to convert judicial tribunals into counsellors and impose upon them the duty of giving advisory opinions to any parties who may come into court and ask for either academic enlightenment or practical guidance concerning their legal affairs. *Tryon v. Power Co.*, 222 N.C. 200, 22 S.E. 2d 450; *Allison v. Sharp*, 209 N.C. 477, 184 S.E. 27; *Poore v. Poore*, 201 N.C. 791, 161 S.E. 532; Anderson on Declaratory Judgments, section 13. This observation may be stated in the vernacular in this wise: The Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice.
>
> "The Act recognizes the need of society 'for officially stabilizing legal relations by adjudicating disputes before they have ripened into violence and destruction of the *status quo*.' Borchard on Declaratory Judgments (2nd Ed.), 4. It satisfies this social want by conferring on courts of record authority to enter judgments declaring and establishing the respective rights and obligations of adversary parties in cases of actual controversies without either of the litigants being first compelled to assume the hazard of acting upon his own view of the matter by violating what may afterwards be held to be the other party's rights or by repudiating what may be subsequently adjudged to be his own obligations. *Tryon v. Power Co., supra; Green v. Cas-*

ualty Co., 203 N.C. 767, 167 S.E. 38; 16 Am. Jur., Declaratory Judgments, section 7; 1 C.J.S., Actions, section 18; Anderson on Declaratory Judgments, section 71.

"While the Uniform Declaratory Judgment Act thus enables courts to take cognizance of disputes at an earlier stage than that ordinarily permitted by the legal procedure which existed before its enactment, it preserves inviolate the ancient and sound juridic concept that the inherent function of judicial tribunals is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status, or other legal relations. This being so, an action for a declaratory judgment will lie only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute. *Etheridge v. Leary*, 227 N.C. 636, 43 S.E. 2d 847; *Tryon v. Power Co., supra; Wright v. McGee*, 206 N.C. 52, 173 S.E. 31; *Light Co. v. Iseley*, 203 N.C. 811, 167 S.E. 56; *In re Eubanks;* 202 N.C. 357, 162 S.E. 769; 16 Am. Jur., Declaratory Judgments, section 9; 1 C.J.S., Actions, section 18; Anderson on Declaratory Judgments, section 22; Borchard on Declaratory Judgments (2d Ed.), 40-48. It necessarily follows that when a litigant seeks relief under the declaratory judgment statute, he must set forth in his pleading all facts necessary to disclose the existence of an actual controversy between the parties to the action with regard to their respective rights and duties in the premises. *Tryon v. Power Co., supra; Light Co. v. Iseley, supra;* 16 Am. Jur., Declaratory Judgments, section 64; 1 C.J.S., Actions, section 18; Anderson on Declaratory Judgments, section 80. If he fails to do this, the other party cannot confer jurisdiction on the court to enter a declaratory judgment by failing to demur to the insufficient pleading. *Wright v. McGee, supra.*"

In the case of *Tryon v. Power Co.*, 222 N.C. 200, 22 S.E. 2d 450, the City of Tryon granted a franchise to Tryon Electric Service Company to supply electric current to the town. Later Duke Power Company succeeded to all rights and obligations under the franchise and ordinance which granted the franchise.

Section 6 of that franchise provided:

" 'Section 6. That if, at any time in the future, the Town of Tryon shall decide to own and operate its own

electrical lighting plant, it may first acquire, either by purchase or condemnation the property of the persons or corporations who shall then be operating and serving the public by virtue of this franchise. If the said town cannot agree with the owners upon the terms of purchase, then it may have said property valued by three commissioners to be appointed by the Judge of the Superior Court, and condemn the same to the public use, as provided by Chapter 86 of the public laws of 1911.' "

The plaintiff asked the Court to render a declaratory judgment construing the contract and franchise and to determine whether or not in the event the Town of Tryon decided to own and operate its own electrical lighting plant it might first acquire, either by purchase or condemnation, the property of defendant corporation.

By an amendment to its pleadings, the plaintiff alleged the following:

" '9. That as long as the questions and differences exist between the plaintiff and the defendant regarding the rights of the plaintiff under the aforesaid contract and franchise, the plaintiff will be seriously handicapped in making financial arrangements to exercise the rights it claims under said contract and franchise, and the plaintiff, therefore, desires to have said questions adjudicated and determined, all to the end that the plaintiff may exercise its rights under said contract and franchise in accordance with the decision of this Court regarding said rights.' "

Defendant power company admitted that the town had asked it to name a price on its properties and that it had declined to do so, and that it had denied the right of the town to condemn. Defendant further admitted that a difference of opinion existed in respect to plaintiff's right to condemn defendant's property, which it denied.

The trial judge allowed the defendant's Motion to Dismiss.

This Court affirmed the ruling of the Superior Court and, in part, stated:

" . . . In marginal cases the rule may be difficult to apply, because it involves a definition, or at least an appraisal, of the term 'controversy,' which must, perhaps, depend upon the individual case; but in the case at bar, the Court does

not feel that such embarrassment exists. A mere difference of opinion between the parties as to whether plaintiff has the right to purchase or condemn, or otherwise acquire the utilities of the defendant—without any practical bearing on any contemplated action—does not constitute a controversy within the meaning of the cited cases."

We find guidance in the rules stated in *Light Co. v. Iseley,* 203 N.C. 811, 167 S.E. 56. There Carolina Power and Light Company brought an action against the City of Raleigh and the residents thereof to determine the validity of a contract between the power company and the city by the terms of which the power company was to change its electric cars to buses. The trial court held that the action was properly brought under the Declaratory Judgment Act. In affirming the trial court, this Court, *inter alia,* stated:

"Where, however, it appears from the allegations of the complaint in an action instituted under the authority and pursuant to the provisions of the act, (1) that a real controversy exists between or among the parties to the action; (2) that such controversy arises out of opposing contentions of the parties, made in good faith, as to the validity or construction of a deed, will or contract in writing, or as to the validity or construction of a statute, or municipal ordinance, contract, or franchise; and (3) that the parties to the action have or may have legal rights, or are or may be under legal liabilities which are involved in the controversy, and may be determined by a judgment or decree in the action, the court has jurisdiction, and on the facts admitted in the pleadings or established at the trial, may render judgment, declaring the rights and liabilities of the respective parties, as between or among themselves, and affording the relief to which the parties are entitled under the judgment.

* * *

It is required only that the plaintiff shall allege in his complaint and show at the trial, that a real controversy, arising out of their opposing contentions as to their respective legal rights and liabilities under a deed, will or contract in writing, or under a statute, municipal ordinance, contract or franchise, exists between or among the parties, and that the relief prayed for will make certain that which is uncertain and secure that which is insecure."

[3] A citizen-taxpayer may maintain a class action to enjoin the governing body of a municipal corporation from transcending its lawful powers or violating any legal duty which will injuriously affect the taxpayer, *Kornegay v. City of Raleigh,* 269 N.C. 155, 152 S.E. 2d 186; *Shaw v. City of Asheville,* 269 N.C. 90, 152 S.E. 2d 139; and class actions for declaratory judgments may be utilized to determine the validity of contracts between a municipality and a private corporation. 22 Am. Jur. 2d *Declaratory Judgments* § 33 (1965); Borchard, Declaratory Judgments, 519 (2d ed. 1941); *Woodward v. Fox West Coast Theaters,* 36 Ariz. 251, 284 P. 350.

We note, parenthetically, that the question of whether Duke as a taxpayer or the individual citizens-taxpayers might have successfully brought a class action for injunctive or declaratory relief is not presented by this action.

[5] Clearly there is no controversy between the parties to the contract. The individual citizens-taxpayers have abandoned any vestige of hostility which might have created a justiciable controversy between them and petitioners-plaintiffs by joining in plaintiffs' prayer for relief without denying any substantial allegations of the complaint. The relationship between Duke and the plaintiffs is not as easily catalogued. We cannot say that petitioners-plaintiffs and Duke are engaged in a friendly suit or that they have entered into a collusive agreement to set up a fictitious controversy, as is often the case where parties seek academic enlightenment concerning legal questions. It is clear that Duke will oppose any viable effort by anyone to obtain approval for or to erect and operate a non-taxpaying electric generation and transmission system in competition with it. However, Duke is not a party to the contract before the Court and has not elected to assume the posture of a citizen-taxpayer of Shelby seeking injunctive or declaratory relief. In fact, the pleadings do not reveal that Duke made any objection to or attack upon the contract until it was compelled to file its pleadings.

[4] It is not necessary for one party to have an actual right of action against another for an actual controversy to exist which would support declaratory relief. However, it is necessary that the Courts be convinced that the litigation appears to be unavoidable. 22 Am. Jur. 2d, *Declaratory Judgments* § 11 (1965).

In Borchard, Declaratory Judgments (2d ed. 1941) at page 39, we find the following:

> " . . . [N]o wrong need be proved but merely the existence of a claim or record which disturbs the title, peace, or freedom of the plaintiff, so any claims, assertions, challenges, records, or adverse interests, which, by casting doubt, insecurity, and uncertainty upon the plaintiff's rights or status, damage his pecuniary or material interests, establish a condition of justiciability. . . . "

and on page 60 of the same treatise it is stated:

> " . . . The imminence and *practical certainty* of the act or event in issue, or the intent, *capacity, and power* to *perform,* create justiciability as clearly as the completed act or event, and is generally easily distinguishable from remote, contingent, and uncertain events that may never happen and upon which it would be improper to pass as operative facts." (Emphasis added.)

[5] The complaint does not allege that Duke has made any claims or challenges which casts uncertainty upon plaintiffs' rights or liabilitlies growing out of the System Contract. Duke's overt acts and statements only indicate opposition to the construction and operation of a competitive generation and transmission system.

We are not in accord with Duke's contentions that *all* of the participants must sign contracts before the possibility of a justiciable controversy may exist between petitioners-plaintiffs and Duke. Nevertheless, the complaint reveals that as of now there is no practical certainty that plaintiffs have the capacity or power to perform the acts which would inevitably create a controversy with Duke. Thus it does not appear that litigation between the parties concerning the System Contract is unavoidable.

Taking all of the allegations in the complaint and all relevant deducible inferences therefrom to be true, the complaint affirmatively shows that there is no *actual or real presently existing controversy* between plaintiffs and defendant growing out of their opposing contentions as to the validity and construction of the System Contract.

The decision of the Court of Appeals is

Affirmed.

SZABO FOOD SERVICE, INC., OF NORTH CAROLINA v. BALENTINE'S, INC., DEFENDANT AND WAKE COUNTY, ADDITIONAL DEFENDANT

No. 28

(Filed 1 July 1974)

1. **Chattel Mortgages and Conditional Sales § 1— conditional sale or lease — character of agreement as determinant**

In determining whether a contract is one of bailment for use, a lease with an option to purchase, or one of sale with an attempt to retain a lien for the purchase price, the courts do not consider what description the parties have given to it, but what is its essential character.

2. **Chattel Mortgages and Conditional Sales § 1— character of agreement determined by intent of parties**

Whether an agreement constitutes a conditional sale or a contract of a different character is a question of the parties' intent as shown by the language they employed.

3. **Chattel Mortgages and Conditional Sales § 1— conditional sale or lease — obligation to pay purchase price**

One of the principal tests for determining whether a contract is one of conditional sale or lease is whether the party is obligated at all events to pay the total purchase price of the property which is the subject of the contract.

4. **Chattel Mortgages and Conditional Sales § 1; Landlord and Tenant § 5; Taxation § 25— cafeteria equipment — transfer at end of lease — no conditional sale — responsibility for ad valorem taxes**

An agreement entered into by the parties whereby defendant was to take over the operation of a cafeteria for the duration of plaintiff's lease with a third person was a lease and not a conditional sales contract, though plaintiff agreed to transfer equipment without further charge to defendant if defendant should operate the cafeteria until the end of the seven year lease, since plaintiff's main purpose in entering into the contract was to have defendant rescue it from a failing business venture by taking over operation of the cafeteria, the transfer of the equipment was regarded by both parties as merely a fringe benefit to defendant, defendant was under no obligation to buy the equipment, no purchase price was specified and no value was placed on the equipment; therefore, plaintiff held title to the equipment and was required to list it for taxes.

5. **Uniform Commercial Code § 71— cafeteria equipment — no conditional sale**

Though an agreement between the parties provided that defendant would become the owner of equipment at the end of the term of the agreement without paying any additional consideration, G.S. 25-1-201 (37) was not applicable to make the agreement a conditional sales contract, since that statute did not fit the facts of the case, nor was

it consistent with the fundamental proposition that to create a security interest the parties must have intended to create one.

ON *certiorari* to review the decision of the Court of Appeals reversing the judgment of *Hobgood, J.*, 19 March 1973 Session of the Superior Court of WAKE.

By this action for a declaratory judgment, brought under G.S. 1-253 *et seq.*, plaintiff (Szabo) seeks to determine whether it or defendant (Balentine's) is responsible for listing and paying the taxes for the years 1970, 1971, and 1972 on certain tangible personal property used in the operation of Balentine's Cafeteria at 410 Oberlin Road in Raleigh, Wake County, North Carolina. Wake County was joined with Balentine's as a party defendant because its tax supervisor and tax collector are charged with the duty of listing and collecting the taxes in question.

The following facts are established by the pleadings, stipulations, and unquestioned documentary evidence:

In 1966 Balentine's sold Balentine's Cafeteria, including the equipment, which is the subject of this action, to Szabo. Thereafter Szabo changed the name to Longworth's Cafeteria but continued to operate the business at the same location under a sublease of the premises from J. W. York (York) for a term ending 31 December 1976. For the years 1967, 1968, and 1969 Szabo listed and paid the taxes on the property.

On 14 August 1969 Szabo, desiring to terminate its operation of the cafeteria, entered into a written agreement with Balentine's whereby Balentine's took over the operation of the business with York's consent. In pertinent part, the terms of this agreement (hereinafter referred to as "the contract") are summarized below (enumeration ours).

AGREEMENT OF SZABO

Szabo "set over and assigned" to Balentine's its right to occupy the premises (410 Oberlin Road) and every other right granted to Szabo in the sublease between it and York. In addition Szabo agreed:

(1) To make all payments required by its lease from York except the cost of insurance, maintenance and repairs to the premises.

(2) That "Balentine's shall have the use of all existing equipment located in the demised premises" so long as Balentine's occupies the premises under the agreement and, if this agreement is not terminated prior to the expiration of Szabo's lease from York, Szabo will "transfer said equipment without further charge to Balentine's at the termination of the sublease with J. W. York."

(3) To pay the cost of new leasehold improvements and equipment installed in the premises under Balentine's direction in an amount not to exceed $50,000 and to lend Balentine's, without interest, any difference between $50,000 and the initial cost of such new equipment, any unpaid balance due on this loan to become due and payable at the termination of Balentine's occupancy of the premises under this agreement.

(4) To "pay all sales, income, ad valorem and other taxes now accrued on its operation in the demised premises and to hold Balentine's harmless from any claim or demand based thereon."

AGREEMENT OF BALENTINE'S

Balentine's agreed:

(1) To operate a cafeteria or restaurant in the premises which Szabo had leased from York "for a minimum of two years from the date on which such cafeteria opens for business under Balentine's direction and control."

(2) To pay Szabo on or before the 10th day of each month following the month on which Balentine's opens for business, up to and including the 10th day of January 1977, a sum equal to 10% of the gross amount (less sales tax) of retail sales realized from the premises during the preceding calendar month or part thereof. If Balentine's, at its option, fails to operate a cafeteria or restaurant in the demised premises for a period of two years after it initially opens for business, it will nevertheless pay monthly rent for the two-year period in an amount equal to 10% of the average monthly gross receipts for the then past six months or for the average monthly gross receipts for the period of operation if the period of operation has been less than six months.

(3) That, "if for any reason, at its option, Balentine's shall fail to operate a cafeteria or restaurant in the demised premises for the full term remaining under the lease from J. W. York to

Szabo," Balentine's will return to Szabo "all of the equipment delivered to it and contained in the demised premises and all additions made thereto in the operation of said cafeteria . . . intact, in operating condition, and connected for operation, reasonable wear and tear and . . . casualty excepted."

(4) To keep all equipment contained on the premises fully insured and, in the event of loss, to use the proceeds of such insurance to replace any damaged property.

For the year 1970 Szabo listed and paid the taxes on the equipment used in the operation of the cafeteria. This listing, introduced in evidence by Balentine's, purports to be "a full, true, and complete listing of all property which it is the duty of Szabo to list as owner . . . in Raleigh township, Wake County, North Carolina." Thereafter, however, asserting that the property had been improperly listed and paid, Szabo demanded a refund. Subsequently, in the years 1971 and 1972, the tax supervisor forwarded to Szabo a proper tax abstract, but each year Szabo refused to list the property upon the ground that Balentine's was responsible for the taxes. Balentine's has refused to list the property for taxes on the ground that Szabo owns it.

Upon the trial before Judge Hobgood, Szabo introduced the stipulations, the contract, and the lease-agreement between Szabo and York. Balentine's introduced the tax abstract, which Szabo filed with the tax supervisor when it listed the property for taxes for 1970, a letter from R. A. Longworth, president of Szabo, to W. W. Balentine, president of Balentine's, and offered the testimony of W. W. Balentine. Mr. Balentine's testimony, summarized except when quoted, tended to show:

In 1966 Balentine's sold its profitable restaurant and cafeteria business to Szabo. In 1969, Mr. Longworth, president of Szabo, came to Balentine "with an offer to please come back and take over this operation. They talked like they wanted [him] to take it over pretty bad. . . . The deal was that [Balentine's] would come back in and take over and run out [Szabo's] lease and would pay [Szabo] 10% for their interest and they would pay Willie York out of the 10%." The written agreement was that Balentine's would be there for two years but at any time after that it was free to go. However, if it stayed there until the end of the Szabo lease with York, the equipment would automatically be Balentine's property on 1 January 1977, and it would then be in position to continue the business without inter-

ruption if it wanted to do so. If it discontinued its operation of the cafeteria before the expiration of Szabo's lease, all equipment would be returned to Szabo, including any new equipment which replaced original equipment. The agreement to transfer the equipment to Balentine's at the end of the lease was because the equipment would be 13 years old on 20 March 1973. "Restaurant equipment is basically figured for ten years. The government will let you depreciate it over ten years. What the equipment will be worth to [Balentine's] on the first day of 1977 won't be much. . . . " Szabo started depreciating the property in 1966 and 10 years would run out at the end of its lease.

The cafeteria equipment has never been carried on Balentine's books as an asset of the corporation, and it has never taken any depreciation or amortization on the property. In the discussions preceding the agreement between Szabo and Balentine's of 14 August 1969, "Mr. Longworth said that the depreciation [on this property] meant a lot to them and is how they could go ahead and lease me and put this fifty thousand dollars which they would add to their depreciation."

During most of the months of August and September 1969 the cafeteria was closed for the purpose "of tearing down what they had done to [Balentine's] profitable place." That is what the $50,000 was used for.

In a letter which Longworth wrote Balentine on 21 July 1969 he set out the essentials of the agreement which he and Balentine had agreed to sign. In Item 3 of the letter he said: "You will receive title to the equipment after we have fully depreciated it at our existing rates."

No additional evidence was offered.

In his judgment Judge Hobgood found facts consistent with the above statement. *Inter alia,* he found that the cafeteria equipment in question had a useful life for tax-depreciation purposes of 10 years and at the termination of Szabo's lease with York on 31 December 1976 the equipment will have been fully depreciated; that Szabo retained title to the equipment for the purpose of depreciating it and voluntarily listed it for taxes with the Wake County Tax Supervisor for the year 1970 and paid the taxes on it. As a matter of law he concluded: (1) Szabo is the owner of the cafeteria equipment; (2) the contract is a sublease of the cafeteria premises and equipment and not a chattel mortgage, conditional sale, or security agreement; (3)

as owner Szabo is required by G.S. 105-304 to list the property for taxation for the years 1970 and 1971, and is required by G.S. 105-306 to list the property for 1972 and subsequent years.

From the judgment that Szabo list and pay the taxes for the years 1971, 1972, 1973, and each year subsequent thereto during which plaintiff shall own the property on the first day of January, Szabo appealed. The Court of Appeals reversed Judge Hobgood's decision upon the following rationale: (1) Under Section 1-201(37) of the Uniform Commercial Code, G.S. 25-1-201(37) the contract was "one intended for security" and is, therefore, a conditional sale of the cafeteria equipment. (2) Under both G.S. 105-304(a) (1958) and G.S. 105-306(c)(2) (1972) the vendee in possession of personal property under a conditional sales contract is required to list it for taxes. *Food Service Inc. v. Balentine's,* 19 N.C. App. 654, 199 S.E. 2d 736 (1973). Upon defendant's petition we allowed certiorari.

Bailey, Dixon, Wooten, McDonald & Fountain for plaintiff appellee.

Purrington, Hatch & Purrington and J. B. Bilisoly, Wake County Tax Attorney for defendant appellants.

SHARP, Justice.

Prior to 1971 G.S. 105-304, enacted as Section 802, Chapter 291, N. C. Sess. Laws of 1937, required the owner of personal property to list it for taxation but provided that the owner of the equity of redemption in property subject to a chattel mortgage and the vendee of personal property under a conditional sale, or any other sale contract through which title is retained by the vendor as security for the payment of the purchase price, should be considered the owner of the property if he had possession of the property or the right to use it. Since 1971 the listing of personal property for taxation has been governed by G.S. 105-306, which does not differ materially from G.S. 105-304, summarized above.

The sole question presented by this appeal is whether the contract between Szabo and Balentine's, dated 14 August 1969, is a lease or a conditional sale of the cafeteria equipment described therein. If the agreement constituted a lease Szabo holds the legal title as owner, and Judge Hobgood's decision was correct; if the contract was a conditional sale, title remaining in Szabo "as security for the payment of the purchase price. . . ,"

then Balentine's is a conditional vendee in possession and the decision of the Court of Appeals must be affirmed.

At the outset we note that the purpose of this action is to determine which of two parties to a purported lease agreement is required by the taxing statute to list the equipment in the demised premises for taxation. This is not a suit brought by a lessor-creditor under the provisions of the Uniform Commercial Code (G.S. 25-1-101 *et seq.)* (the Code) to enforce against its lessee-debtor, or one claiming through him, a security interest in property which the debtor holds under an alleged security agreement. On this record Balentine's has performed its obligations under the contract and is not in default. Szabo seeks to have the equipment it purportedly leased to Balentine's declared subject to a "security interest" and the contract declared a "security agreement" under the Code upon the theory that G.S. 25-1-201(37) makes the lease "one intended for security," because Balentine's will become the owner of the property for no additional consideration if it operates the cafeteria until the end of Szabo's lease on 31 December 1976. From this premise it argues (and the Court of Appeals held) that if the equipment is subject to a security interest the contract is, in effect, a conditional sales agreement and, as the vendee in possession, Balentine's has the duty to list and pay the taxes in controversy.

Balentine's contends that the Code is irrelevant to this controversy because (1) the contract shows on its face that the parties did not intend to create a security interest in the property and therefore none could result; (2) even if it be held that G.S. 25-1-201(37) made the lease one for security the decisive question remains one of title; (3) the Code does not attempt to determine whether title to property subject to a security interest is in the secured party or the debtor; and (4) their rights under the Code are without reference to title which will be decided by well established rules for determining whether an agreement is a lease or a conditional sale.

The parties' contentions make it necessary to examine the character of a conditional sale and the provisions of the Code with reference to security transactions.

Part 2 of Article 1 of the Uniform Commercial Code is entitled "General Definitions and Principles of Interpretation." In pertinent part G.S. 25-1-201 (the first section of Part 2) provides, "Subject to additional definitions contained in the

subsequent articles of this chapter which are applicable to specific articles or parts thereof, and unless the context otherwise requires, in this chapter:

. . .

"(3) 'Agreement' means the bargain of the parties in fact as found in their language or by implication from other circumstances. . . .

. . .

"(37) 'Security interest' means an interest in personal property or fixtures which secures payment or performance of an obligation. . . . Unless a lease . . . is intended as security, reservation of title thereunder is not a 'security interest.' . . . Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security." Here we note the official comment that the last two sentences in Code section 1-201(37) "give guidance on the question whether reservation of title under a particular lease of personal property is or is not a security interest."

G.S. 25-9-102 defines the "Policy and scope" of Article 9, which specifically governs "Secured Transactions." Subsection (a) declares Article 9 applicable "to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures" within the jurisdiction of the State. Subsection (c) of G.S. 25-9-105 defines "collateral" as "property subject to a security interest, and includes accounts, contract rights and chattel papers which have been sold." Subsection (h) defines "security agreement" as "an agreement which creates or provides for a security interest." In the Official Comment to section (a) of G.S. 25-9-102 it is said, "Except for sales of accounts, contract rights and chattel paper [the subject of section (b)] the principal test whether a transaction comes under this Article is: Is the transaction intended to have effect as security? . . . Transactions in the form of consignments or leases are subject to this Article if the understanding of the parties or the effect of the arrangement shows that a security interest was intended. . . . When it is found that a security interest as defined in Section 1-201(37) was intended, this Article

applies regardless of the form of the transaction or the name by which the parties may have christened it."

G.S. 25-9-202 makes the title to collateral immaterial by providing, "Each provision of this article [9] with regards to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor."

In the Official Comment to Article 9 it is said:

"This article does not determine whether 'title' to collateral is in the secured party or in the debtor and adopts neither a 'title theory' nor a 'lien theory' of security interests. Rights, obligations and remedies under the Article do not depend on the location of title (Section 9-202). The location of title may become important for other purposes—as, for example, in determining the incidence of taxation—and in such a case the parties are left free to contract as they will. In this connection the use of a form which has traditionally been regarded as determinative of title *(e.g.,* the conditional sale) could reasonably be regarded as evidencing the parties' intention with reference to the collateral." Uniform Commercial Code § 9-101, Comment.

The Official Comment, Uniform Commercial Code § 9-202, reiterates that "the incidents of a security interest which secures the purchase price of goods are the same under this Article whether the secured party appears to have retained title or the debtor appears to have obtained title and then conveyed it or a lien to the secured party. . . . Thus if a revenue law imposes a tax on the 'legal' owner of goods . . . this Article does not attempt to define whether the secured party is a 'legal' owner or whether the transaction 'gives' a security interest for the purpose of such laws. Other rules of law or the agreement of the parties determine the location of 'title' for such purposes."

The North Carolina Comment to G.S. 25-9-202 includes the following: " . . . [T]he Official Comment states that this section does not mean that title will never be significant. For tax, or other purposes it may be necessary to determine the location of title, and the Code takes no position on the theory used for such purposes. . . . In such a case under the Code, the court would have to determine location of title in order to determine if the security interest is in the nature of a conditional sale."

G.S. 25-1-201(37), then, defines "security interest" without reference to whether title is in the vendor or the vendee under

the security agreement. The applicable taxing statutes, however, specify that ad valorem taxes will be paid by the vendee of personal property where "title to the property is retained by the vendor as security for the payment of the purchase price. . . . " The proper listing and payment of taxes therefore depends upon the location of title, and the Code provides no guidance in this search.

CONDITIONAL SALE OR LEASE

[1] It has long been the rule with us that in determining whether a contract is one of bailment for use, a lease with an option to purchase, or one of sale with an attempt to retain a lien for the purchase price, the courts "do not consider what description the parties have given to it, but what is its essential character." A conditional sale or chattel mortgage, whatever its label, will be held to be a security agreement. "The construction put upon the contract by the parties is entitled to consideration in determining its true meaning, but they cannot, by giving a name to it, change its legal effect." *Guy v. Bullard,* 178 N.C. 228, 230, 100 S.E. 328, 329 (1919). "If the contract between the parties, as expressed in the writing, be substantially one of conditional sale, the fact that the purchase money is denominated as 'hire' or as 'rent,' and divided into sums payable at various periods throughout the term of credit, will not render the transaction one of bailment for hire, so as to subject it to the law of bailments instead of the law of conditional sales or mortgages." *Hamilton v. Highlands,* 144 N.C. 279, 284, 56 S.E. 929, 931 (1907). *Accord, Wilcox v. Cherry,* 123 N.C. 79, 31 S.E. 369 (1898) ; *Barrington v. Skinner,* 117 N.C. 48, 23 S.E. 90 (1895) ; *Puffer v. Lucas,* 112 N.C. 378, 17 S.E. 174 (1893). *See* 67 Am. Jur. 2d, *Sales* § 27 (1972).

[2] Whether an agreement constitutes a conditional sale or a contract of a different character is a question of the parties' intent as shown by the language they employed. In ascertaining its true character "the whole contract is to be considered and no detached term or condition is to be given prominence or effect over another. The question of intent is one of fact to be determined from the circumstances surrounding each case; and the situation of the parties, their purpose, the thing they sought to accomplish and the method they employed, are all important." 78 C.J.S., *Sales* § 555 (1952).

[3] One of the principal tests for determining whether a contract is one of conditional sale or lease is whether the party is

obligated at all events to pay the total purchase price of the property which is the subject of the contract. If the return of the property is either required or permitted, the instrument will be held to be a lease; if the so-called lessee is obligated to pay the purchase price, even though it be denominated rental, the contract will be held to be one of sale. Annot., 175 A.L.R. 1366, 1384 (1948). "A lease of personal property is substantially equivalent to a conditional sale when the buyer is bound to pay rent substantially equal to the value of the property and has the option of becoming, or is to become, the owner of the property after all the rent is paid. . . . " 8 C.J.S., *Bailments* § 3(3) (1962). *See* 67 Am. Jur. 2d, *Sales* § 31 (1972).

In 2 Williston on Sales, § 336 (1948), we find the following pertinent exposition: "It is, however, essential in order to make a conditional sale, in the sense in which that term is used ordinarily in statutes or elsewhere, that the buyer should be bound to take title to the goods, or at least to pay the price for them. Therefore, a lease which provides for a certain rent in installments is not a conditional sale if the lessee can terminate the transaction at any time by returning the property, even though the lease also provides that if rent is paid for a certain period, the lessee shall thereupon become the owner of the property. And though the rent is to be applied at the buyer's option toward the payment of the price, the transaction is not a conditional sale if the price largely exceeds the rent that the lessee is bound to pay." *See Equilease Corp. v. Donahue,* 10 Ohio St. 2d 81, 226 N.E. 2d 721 (1967).

[4] The circumstances which led to the execution of the contract and the action of the parties thereafter are for our consideration in determining whether they intended a lease or a conditional sale. *Bell v. Concrete Products, Inc.,* 263 N.C. 389, 139 S.E. 2d 629 (1965) ; McCormick on Evidence, § 220 (1954). " 'The conduct of the parties in dealing with the contract indicating the manner in which they themselves construe it is important, sometimes said to be controlling in its construction by the court.' *Bank v. Supply Co.,* 226 N.C. 416, 432, 38 S.E. 2d 503." *Preyer v. Parker,* 257 N.C. 440, 446, 125 S.E. 2d 916, 920 (1962). Frequently the intention of the parties "can best be gathered from the practical construction of the contract which [they] themselves have adopted and observed during the period of harmonious operation." *Cole v. Fibre Co.,* 200 N.C. 484, 488, 157 S.E. 857, 858 (1931).

The evidence discloses that in 1966 Balentine's sold Szabo the good will and equipment of the profitable cafeteria it was then operating in the premises which Szabo immediately thereafter leased from York for a period ending 31 December 1976. Szabo's rental was the *greater* of a designated sum or six percent of the gross annual sales of the business. In 1969, when its lease still had over seven years to run, Szabo's president came to Balentine's president "with an offer to please come back and take over this operation." He "talked like" they wanted Balentine's "to take it over pretty bad." So anxious was Szabo for Balentine's to take over that it agreed to pay the cost of new leasehold improvements and new equipment installed in the demised premises under Balentine's direction in an amount not to exceed $50,000. Balentine's used this sum to tear down "what they had done to our profitable place."

From the foregoing it is a fair inference that Szabo was losing considerable money in the business which Balentine's had operated profitably, and that it faced a substantial loss over a seven-year period unless Balentine's could be induced "to come back in and take over." It is apparent that Szabo's main purpose in obtaining the contract was to have Balentine's rescue it from a failing business venture by taking over the operation of the cafeteria for the duration of its lease and that its agreement to transfer the equipment to Balentine's at the end of it lease was merely incidental to its primary objective—to insure the continued and successful operation of a cafeteria in the leased premises through 31 December 1976. The transfer of the equipment, which on 31 December 1976 would have little, if any, value to Szabo, was regarded by both parties as merely a fringe benefit to Balentine's if it was still operating the cafeteria at the end of Szabo's lease with York and if it wanted to continue in the cafeteria business at that location.

At the time Balentine's took over the operation of the cafeteria under its contract with Szabo of 14 August 1969 the cafeteria equipment was over nine years old, Balentine's having acquired it on 20 March 1960. It was six years old when Balentine's sold it to Szabo in 1966. Under Treasury guidelines, which permitted the equipment to be depreciated over a period of ten years as an income tax deduction, Szabo started depreciating the equipment in 1966 and "the ten years would run out" at the end of its lease with York. Szabo's president, Longworth, told Balentine that the right to take this depreciation as an income

tax deduction enabled Szabo to lease the cafeteria to Balentine's and to "put (in) this fifty thousand dollars which they would add to their depreciation." At no time has Balentine's taken any depreciation upon the cafeteria equipment or carried it on its books as a capital asset.

Only a taxpayer who has a present depreciable interest in property may take a deduction for depreciation. The allowance for depreciation allowed by Section 167 of the Internal Revenue Code is deductible by the one who has made the investment of capital which is to be recovered through the allowance and whose capital is decreasing at the time of the allowance. *Reisinger v. Commissioner of Internal Revenue,* 144 F. 2d 475 (2d Cir. 1944); 47 C.J.S., *Internal Revenue* § 365 (1946); 26 U.S.C.S. § 167. Notes 18 and 21 (1974).

In our view the provisions of the contract, the circumstances which led to its execution, and the subsequent conduct of the parties with reference to it are entirely inconsistent with any contention that the contract they denominated a lease was actually a conditional sales agreement. On the contrary, they compel the conclusion that the contract was a lease and that title and sole ownership of the cafeteria equipment remains in Szabo.

Szabo, as an alleged conditional vendor, failed to protect itself against possible claims against Balentine's by registering the contract as a security agreement pursuant to the filing provisions of Article 9 of the Code (G.S. 25-9-304 and G.S. 25-9-401(1)(c)). It did, however, in due course, list and pay the ad valorem taxes on the equipment for the year 1970.

Aside from the fact that the contract speaks in terms of a sublease of premises in which a cafeteria is being operated and a lease of the equipment being used therein, under all the tests for determining whether an agreement is a lease or a conditional sale, this contract is a lease. It imposes upon Balentine's no obligation to buy the equipment; no purchase price is specified and no value is placed upon the equipment. Balentine's rent is based solely upon its gross retail sales from the operation of the cafeteria, an amount which has no relation to the value of the equipment.

Although Szabo leased the premises and cafeteria equipment to Balentine's for the remainder of its lease from York, Balentine's is not *bound* to make rental payments until then.

Balentine's assumed responsibility for the operation of the cafeteria for only two years from the date on which it reopened the cafeteria for business. These two years expired not later than 1 October 1971. Therefore, Balentine's now has the option to terminate its contract with Szabo at any time. In such event the contract *requires* it to return to Szabo all the equipment Szabo delivered to it, and all additions made thereto in the operation of the cafeteria, intact, in operable condition, and connected for operation, reasonable wear and tear and casualty damage excepted.

With no guarantee that Balentine's would continue to operate the business until the end of its lease, ordinary business prudence would require Szabo to retain title to the equipment in order to protect itself in the event Balentine's should choose to give up the cafeteria and Szabo be required to take over. Only by continuing to operate the cafeteria until the expiration of Szabo's lease, which Balentine's is not bound to do, can Balentine's acquire title to the equipment. However, the contract requires Szabo to transfer the equipment to Balentine's "without further charge" if it operates the cafeteria through 31 December 1976.

Here it is important to note that the equipment will then be almost seventeen years old; that at the termination of the lease Szabo will have fully depreciated the property and that "much of it is built to order and made for that particular location." As Balentine testified, "If we couldn't get together with Cameron Village [York] we naturally would be looking for another location." He added that, in the negotiations, "it was a minor thought that if everything went right" on 1 January 1977, when Szabo would be free of its lease, Balentine's could continue the business there without interruption if it wanted to. In that event this arrangement would also relieve Szabo of the inconvenience and expense of removing and disposing of fully depreciated equipment.

[5] It was only the provision that Balentine's will become the owner of the equipment at the end of the term of the agreement without paying any additional consideration which caused the Court of Appeals to hold that the contract was "not a leasing or bailment arrangement but rather provided Szabo with a security interest in the cafeteria equipment and is in reality a conditional sale of these items." Its decision was based solely upon Section (b) of the last sentence of G.S. 25-1-201(37).

It may be conceded that when a lessee, pursuant to an agreement that upon compliance with the terms of the lease he shall become the owner of the property for no additional consideration, has made periodic payments which relate to the property and are commensurate with the value or stated purchase price of the property the purported lease is in reality a security agreement. However, this is not the situation here. Despite the provision for the conveyance of the equipment to Balentine's without additional consideration, clause (b) of G.S. 25-1-201(37) simply does not fit the facts of this case; nor is it consistent with the fundamental proposition that to create a security interest the parties must have intended to create one. *See* G.S. 25-9-102(1)(a) and other Code provisions cited *supra;* 68 Am. Jur. 2d, *Secured Transactions* § 6 (1973).

The same considerations which refute the contention that the contract was a conditional sale negate any intention to create a security interest in the equipment. However, since this is not an action under the Code to enforce a security interest we need not determine whether, under different circumstances, by the fiat of clause (b) in the last sentence of G.S. 25-1-201(37), the contract might have legal consequences the parties did not contemplate. As heretofore pointed out, under the Code the rights and duties of the parties to a security transaction are without reference to the location of title to collateral, that is, property subject to a security interest.

[4] We hold that the agreement is not a conditional sale of the cafeteria equipment; that title to the property is in Szabo and, as owner, Szabo is required to list it for taxes. The judgment of Judge Hobgood must be affirmed.

The decision of the Court of Appeals is

Reversed.

BULOVA WATCH COMPANY, INC., A CORPORATION v. BRAND DISTRIBUTORS OF NORTH WILKESBORO, INC., A CORPORATION, AND ROBERT YALE

BULOVA WATCH COMPANY, INC., A CORPORATION v. MOTOR MARKET, INC., A CORPORATION, d/b/a BOB'S JEWELRY & LOAN, AND ROBERT YALE

No. 67

(Filed 1 July 1974)

1. **Statutes § 4— determination of constitutionality — other factual situations**

The Supreme Court will not undertake to pass upon the validity of a statute as it may be applied to factual situations materially different from that before it.

2. **Appeal and Error § 69— overruling of prior decision**

A decision of the Supreme Court, subsequently concluded to have been erroneous, may properly be overruled when such action will not disturb property rights previously vested in reliance upon the earlier decision.

3. **Constitutional Law § 1— construction of State Constitution**

In the construction of a provision of the State Constitution, the meaning given by the U. S. Supreme Court to even an identical term in the U. S. Constitution is, though highly persuasive, not binding upon the N. C. Supreme Court.

4. **Constitutional Law §§ 7, 19, 24; Monopolies § 1; Trademarks and Trade names— Fair Trade Act — applicability to non-signers — unconstitutionality**

Provision of G.S. 66-56 extending the force and effect of a "fair trade" agreement to a seller not a party thereto is unconstitutional because it delegates legislative power to a private corporation in violation of Art. II, § 1, of the Constitution of North Carolina, and because it deprives the non-signer of such agreement of liberty contrary to the law of the land in violation of Art. I, § 19, thereof. *Lilly & Co. v. Saunders*, 216 N.C. 163 is overruled.

APPEAL by defendants from the Court of Appeals which affirmed the judgment of *Rousseau, J.*, at the 10 September 1973 Session of WILKES, the decision of the Court of Appeals being reported in 20 N.C. App. 648, 202 S.E. 2d 350.

The plaintiff is a well known manufacturer of watches and other products which it sells throughout the nation to retail jewelry stores for resale. Within this State, it sells its watches to retailers with whom it enters into a "Fair Trade Agreement."

By such agreement the retailer agrees not to sell or offer for sale any watch or other article, bearing the plaintiff's brand or trade name, at a price different from that shown on a retail price list compiled and furnished by the plaintiff, who reserves the right to change the listed prices from time to time. The agreement further provides that the plaintiff agrees to employ all reasonable and lawful means, including legal action, to obtain and enforce general observance of such prices by retailers.

The corporate defendants operate retail establishments selling watches, jewelry and like products in North Wilkesboro, the individual defendant being the president and principal stockholder of each such corporation. None of the defendants has made any contract with the plaintiff, or with any other person, restricting such defendant's right to sell any watch or other product manufactured by or bearing the brand, name or trademark of the plaintiff, or restricting such defendant's right to fix, as it may see fit, the price for which it will sell such article.

Each corporate defendant, having notice of the plaintiff's "Fair Trade Agreements" with the various retail outlets in this State, sold at retail, for prices less than those listed by the plaintiff, watches manufactured by the plaintiff, bearing the plaintiff's brand and trade name and the retail price so listed. The watches so sold were not purchased by such defendant from the plaintiff, but were purchased at bankruptcy sales or from various other parties. The defendants propose to continue to offer for sale watches and other articles, bearing the plaintiff's brand or trade name, at prices less than those established by the plaintiff's "Fair Trade Agreements."

Watches and other products manufactured by the plaintiff are sold in North Carolina in fair and open competition with like products of other manufacturers. The plaintiff has repeatedly taken legal action and, by other lawful means, has consistently endeavored to prevent sales of its products at retail in North Carolina for prices less than those established by its price lists issued pursuant to its "Fair Trade Agreements."

The parties having waived trial by jury, the Superior Court found the foregoing facts, which were stipulated, and concluded that the defendants had violated the plaintiff's "Fair Trade Agreement" and, thereby, had violated the North Carolina Fair Trade Act and that such Act "as it applies to the defendants, non-signers of any Fair Trade Agreement with the plain-

tiff, is constitutional under the Constitution of the State of North Carolina." Further concluding that the plaintiff has no adequate remedy at law and has been damaged by such actions of the defendants, the Superior Court entered its judgment permanently enjoining the defendants "from directly or indirectly advertising, offering for sale at retail, or selling at retail the plaintiff's watches or other jewelry products bearing the plaintiff's trademarks, brands or trade names * * * at prices less than the stipulated minimum retail selling prices established by the plaintiff's fair trade agreements entered into by the plaintiff with retailers of such watches and other jewelry products in the State of North Carolina * * *."

The defendants appealed, contending in the Court of Appeals, as they had done in the Superior Court, that the North Carolina Fair Trade Act is unconstitutional, insofar as it applies to a non-signer of such "Fair Trade Agreement." In each of the lower courts they contended that the Act is a violation of the Law of the Land Clause, Article 1, § 19, of the Constitution of North Carolina in that: (1) It arbitrarily limits the property rights of a retailer in a product which he has purchased and his liberty to dispose of the article as he sees fit; (2) it has no relation to the health, safety or welfare of the citizens of North Carolina, but is an unwarranted and unconstitutional use of the police power of the State to enforce an artificial price fixed by the plaintiff; and (3) it is an unconstitutional delegation to private persons, firms and corporations of the power to fix prices without any standard of administration or control by any governmental agency.

The Court of Appeals affirmed the judgment of the Superior Court, relying upon *Lilly & Co. v. Saunders,* 216 N.C. 163, 4 S.E. 2d 528. From that decision the defendants appealed as a matter of right because of the constitutional question presented.

An affidavit by one of the plaintiff's authorized retailers, offered by the plaintiff in support of its motion in the Superior Court for summary judgment, which motion was denied, states, among other things, "Bulova is the only watch manufacturer from whom I can purchase watches without fear that the watches will also be sold at discount prices in chain stores and discount houses."

McElwee & Hall by John E. Hall; and W. G. Mitchell for defendant appellants.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston by Mark R. Bernstein and W. Samuel Woodard for plaintiff appellee.

LAKE, Justice.

The pertinent portions of the North Carolina Fair Trade Act, enacted in 1937, are as follows:

"GS 66-52: *Authorized contracts relating to sale or resale of commodities bearing trademark, brand or name.*— No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others, shall be deemed in violation of any law of the State of North Carolina by reason of any of the following provisions which may be contained in such contract:

"(1) That the *buyer* will not resell such commodity at less than the minimum price *stipulated by the seller*. (Emphasis added.)

"(2) That the *buyer* will require of any dealer to whom he may sell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller. (Emphasis added.)

"(3) That the *seller* will not sell such commodity: (Emphasis added.)

"a. To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

"b. To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price.

"GS 66-55. *Resales not precluded by contract.*—No contract containing any of the provisions enumerated in § 66-52 shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases:

* * * *

"(4) By any officer acting under an order of court.

* * *

"GS 66-56. *Violation of contract declared unfair competition.*—Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this article, *whether the person so advertising, offering for sale or selling is or is not a party to such contract,* is unfair competition and is actionable at the suit of any person damaged thereby." (Emphasis added.)

In *Lilly & Co. v. Saunders,* 216 N.C. 163, 4 S.E. 2d 528, 125 A.L.R. 1308 (1939), this Court held the Fair Trade Act constitutional, Justice Barnhill, later Chief Justice, dissenting. The judgments of the Court of Appeals and of the Superior Court in the present case are in accord with that decision. The defendants ask us to reconsider that decision and to determine anew the constitutionality of the Fair Trade Act, specifically the nonsigner provision contained in G.S. 66-56, substantially for the reasons set forth in the dissenting opinion of Justice Barnhill. We allowed certiorari for that purpose.

The articles, bearing the plaintiff's trade name, sold and proposed to be sold by the defendants were and are lawfully acquired and owned by such defendant, having been purchased by such defendant "at bankruptcy sales and from various parties other than the plaintiff." Nothing in the record suggests that any defendant acquired any such article through the breach by its supplier of any contract between such supplier and the plaintiff. The prices charged for such products by each such defendant have been satisfactory to it and to its respective customers. Nothing in the record indicates that such selling de-

fendant has failed to make a profit, deemed reasonable by it, upon any such sale, or proposes to do so.

[1] The authority of this Court to declare an act of the Legislature unconstitutional arises from its duty to determine, in accordance with applicable and valid rules of law, the rights of litigants in a controversy brought before it by proper procedure. *State v. Lueders,* 214 N.C. 558, 200 S.E. 22. Consequently, when asked to determine the constitutionality of a statute, the Court will do so only to the extent necessary to determine that controversy. It will not undertake to pass upon the validity of the statute as it may be applied to factual situations materially different from that before it. *Nicholson v. Education Assistance Authority,* 275 N.C. 439, 447, 168 S.E. 2d 401; *Person v. Doughton,* 186 N.C. 723, 120 S.E. 481; *Commissioners v. State Treasurer,* 174 N.C. 141, 149, 93 S.E. 482, 2 A.L.R. 726; 16 C.J.S., Constitutional Law, § 94, p. 321. Consequently, we do not have before us upon this appeal, and we express no opinion as to the validity of, any contract authorized by G.S. 66-52 as between the parties thereto. The question for decision upon this appeal is, Does the existence of such a contract between the plaintiff and a retailer entitle the plaintiff to enjoin one not a party thereto from selling an article, bearing the plaintiff's trade name, lawfully acquired by such person, at a price less than that specified by the plaintiff?

It is obvious that, nothing else appearing, a contract between A and B cannot deprive C of his preexisting liberty to contract with D. Here, the plaintiff contends something else appears, namely, G.S. 66-56. The clear intent of the statute is so to restrict C's liberty of contract. Thus, we must determine its validity.

[2] This Court attaches great importance to the doctrine of *stare decisis.* Observance of that doctrine is not only an expression of our respect for the opinions of our predecessors. It promotes stability in the law and uniformity in its application, which, in turn, enable people to predict with reasonable accuracy the consequences of their acts and business transactions. It gives protection to property rights acquired in reliance upon past decisions of this Court and marks the path which the trial courts may follow with some degree of assurance. *Potter v. Water Co.,* 253 N.C. 112, 116 S.E. 2d 374; *Williams v. Hospital,* 237 N.C. 387, 391, 75 S.E. 2d 303; *State v. Fulton,* 149 N.C. 485, 63 S.E. 145; *Hill v. Railroad,* 143 N.C. 539, 573-575, 55 S.E.

854. Nevertheless, a decision of this Court, subsequently concluded to have been erroneous, may properly be overruled when such action will not disturb property rights previously vested in reliance upon the earlier decision. See, *Rabon v. Hospital,* 269 N.C.1, 152 S.E. 2d 485. As this Court, speaking through Justice Johnson, said in *State v. Mobley,* 240 N.C. 476, 487, 83 S.E. 2d 100, "The doctrine of *stare decisis* should never be applied to perpetuate palpable error." In that respect the present case is much like *State v. Ballance,* 229 N.C. 764, 51 S.E. 2d 731. In that case, as here, this Court reconsidered its earlier decision holding valid a statute regulating business activity. Speaking for the Court, Justice Ervin said:

> "[T]he law must be characterized by stability if men are to resort to it for rules of conduct. These considerations have brought forth the salutary doctrine of *stare decisis* which proclaims, in effect, that where a principle of law has become settled by a series of decisions, it is binding on the courts and should be followed in similar cases. [Citations omitted.]
>
> "But the case at bar does not call the rule of *stare decisis* in its true sense into play. Here, no series of decisions exists. [Citation omitted.] We are confronted by a single case which is much weakened as an authoritative precedent by a dissenting opinion 'of acknowledged power and force of reason.' "

Here, the plaintiff asserts no property right acquired by it in reliance upon the decision of *Lilly & Co. v. Saunders, supra.* It has, in the intervening years, expended substantial sums in advertising its products for the purpose of making its tradename, "Bulova," synonymous, in the public mind, with high quality. It has entered into contracts throughout the State with retailers for the distribution of these products. There is nothing, however, in the record to indicate that the plaintiff has made any investment or substantial expenditure in this State which it would not have made had the opposite result been reached in *Lilly & Co. v. Saunders, supra,* or which it has not made, in comparable degree, in other states of the Union where no Fair Trade Act is in effect.

The defendants assert that the provision of G.S. 66-56, extending the force and effect of a "fair trade" contract to a seller not a party thereto, is invalid because it is an unlawful

delegation of legislative power to a private corporation and also because it deprives the defendants of their liberty and property otherwise than by the law of the land, in violation of Article I, § 19, of the Constitution of North Carolina.

In *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 57 S.Ct. 139, 81 L.Ed. 109, the Supreme Court of the United States had before it the Illinois Fair Trade Act, which, in all respects material hereto, is identical with the North Carolina Act. The Court, in an opinion by Mr. Justice Sutherland, held that the provision of the Act, extending the force of the "fair trade" contract to a non-signer thereof, was not "so arbitrary, unfair or wanting in reason as to result in a denial of due process," and that there was "nothing in this situation to justify the contention that there is an unlawful delegation of power to private persons to control the disposition of the property of others."

[3] The decisions of the Supreme Court of the United States as to the construction and effect of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States are, of course, binding upon this Court. It is also true that the expression "The Law of the Land," used in Article I, § 19, of the Constitution of North Carolina, is synonymous with "Due Process of Law." *Rice v. Rigsby* and *Davis v. Rigsby*, 259 N.C. 506, 518, 131 S.E. 2d 469. However, in the construction of the provision of the State Constitution, the meaning given by the Supreme Court of the United States to even an identical term in the Constitution of the United States is, though highly persuasive, not binding upon this Court. *State v. Barnes*, 264 N.C. 517, 520, 142 S.E. 2d 344. See also, *Corning Glass Works v. Ann & Hope, Inc. of Danvers*, ... Mass. ....., 294 N.E. 2d 354.

Consequently, neither *Lilly & Co. v. Saunders, supra*, nor *Old Dearborn Distributing Co. v. Seagram-Distillers Corp., supra*, prevents us from a redetermination of the validity of the provision of G.S. 66-56, insofar as it purports to extend to one not a party thereto the effect of a fair trade contract made by the plaintiff with another retailer.

[4] It is our opinion, and we so hold, that this "non-signer" provision of G.S. 66-56 is unconstitutional, both because it delegates legislative power to a private corporation, in violation of Article II, § 1, of the Constitution of North Carolina, and

because it deprives the non-signer of liberty, contrary to the law of the land, in violation of Article I, § 19, thereof.

Article II, § 1, of the Constitution of North Carolina, provides, "The legislative power of the State shall be vested in the General Assembly." It is well settled that the Legislature may not delegate its power to make laws even to an administrative agency of the government. *Foster v. Medical Care Commission,* 283 N.C. 110, 195 S.E. 2d 517; *Turnpike Authority v. Pine Island,* 265 N.C. 109, 143 S.E. 2d 319; *Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 74 S.E. 2d 310. As Justice Johnson, speaking for the Court, said in *Coastal Highway v. Turnpike Authority, supra:* "[T]he legislative body must declare the policy of the law, fix legal principles which are to control in given cases, and provide adequate standards for the guidance of the administrative body or officer empowered to execute the law. * * * In short, while the Legislature may delegate the power to find facts or determine the existence or nonexistence of a factual situation or condition on which the operation of a law is made to depend, or another agency of the government is to come into existence, it cannot vest in a subordinate agency the power to apply or withhold the application of the law in its absolute or unguided discretion." It follows, necessarily, that the Legislature may not vest in a private corporation the authority to determine "in its absolute or unguided discretion" the price at which another, with whom it has no contractual relation, may sell to a willing buyer an article lawfully acquired and owned by him. See, *Wilcher v. Sharpe,* 236 N.C. 308, 312, 72 S.E. 2d 662.

Under the rule so stated in *Coastal Highway v. Turnpike Authority, supra,* the Legislature has properly delegated to the Utilities Commission the authority to fix, in accordance with standards and procedures prescribed by the Legislature itself and subject to judicial review, the prices at which the public utilities in the State may sell their services. By contrast, under the North Carolina Fair Trade Act, the producer of any article bearing its trademark or trade name may, if it so desires, make a contract with a single retailer in North Carolina that such retailer will, upon his own sales, charge the retail price set by the producer, may then give notice of such contract to all other retailers in the State and may thereby cause it to be unlawful for such other retailers thereafter to sell, at prices satisfactory to them and to their customers, such articles lawfully acquired by them. See: *Rogers-Kent, Inc. v. General Electric Co.,* 231 S.C.

636, 99 S.E. 2d 665, 668; *Remington Arms Co., Inc. v. Skaggs,* 55 Wash. 2d 1, 345 P. 2d 1085. The price so fixed need have no relation to the cost to such retailer, to a reasonable profit to him or to any other standard. When so fixed, it is subject to change by the producer at will from time to time and with no right in any retailer to be heard by anyone.

A recent decision of the Supreme Judicial Court of Massachusetts, *Corning Glass Works v. Ann & Hope, Inc. of Danvers, supra,* holds the non-signer clause of the Fair Trade Act of Massachusetts, which is similar to G.S. 66-56, is an unconstitutional delegation of legislative power, overruling an earlier decision of that Court. To the same effect are: *Olin Mathieson Chemical Corp. v. White Cross Stores, Inc.,* No. 6, 414 Pa. 95, 199 A. 2d 266; *House of Seagram, Inc. v. Assam Drug Co.,* 85 S.D. 27, 176 N.W. 491; *Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Brothers Markets,* 231 La. 51, 90 So. 2d 343.

In *Lilly & Co. v. Saunders, supra,* the majority opinion stated: "But the law delegates nothing. At the most it lifts the ban supposed to rest by virtue, largely, of public policy, against contracts fixing the resale price." G.S. 66-56, however, goes far beyond a mere lifting the previously existing ban against price fixing contracts illustrated by *Dr. Miles Medical Co. v. Park & Sons Co.,* 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502. G.S. 66-56 undertakes to extend the reach of such contract so as to enable the producer of the article to lay hold upon and restrict the liberty of a retailer with whom the producer has no contract.

Lilly & Co. v. Saunders, supra, relied heavily upon the statement in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp., supra,* to the effect that a statute such as G.S. 66-56 is not an unlawful delegation of legislative power to private persons because "the restriction, already imposed with the knowledge of [the defendant retailer], ran with the acquisition and conditioned it." This concept of a restrictive covenant running with an article of personal property was accepted, without discussion or citation of other authority, by the majority opinion in *Lilly & Co. v. Saunders, supra.* We need not presently determine the validity of this concept for G.S. 66-56 is not limited to resales by non-signers of articles purchased from suppliers who have so contracted with the producer. Nothing in the present record indicates that these defendants purchased the watches which they have sold, or those they now propose to sell, from a supplier who was bound by a "fair trade" agreement with the

plaintiff. The record shows that some of these watches were acquired by them at bankruptcy sales, to which sales the Fair Trade Act does not apply. G.S. 66-55(4). Furthermore, there are now ten states which have no Fair Trade Act and many more in which, by reason of legislative or judicial action, the reach of a "fair trade" contract does not extend to sales by retailers who are not parties to it. See: Shearin, North Carolina Fair Trade Act, 8 Wake Forest Law Review 45; *Corning Glass Works v. Ann & Hope, Inc. of Danvers, supra; House of Seagram, Inc. v. Assam Drug Co., supra.* The present Virginia statute, for example, does not contain a non-signer clause. Shearin, North Carolina Fair Trade Act, 8 Wake Forest Law Review 45, 57. The South Carolina Court has declared the non-signer clause of that State's Fair Trade Act unconstitutional. *Rogers-Kent, Inc. v. General Electric Co., supra.* The record shows the Post Exchange at Fort Bragg in this State is permitted to sell free from the "fair trade" limitation. Thus, by purchasing in Virginia or South Carolina from suppliers not parties to a "fair trade" contract, or in North Carolina, at bankruptcy sales or at the Fort Bragg Post Exchange, the defendants would acquire articles to which no restrictive covenant or condition was attached. Yet, G.S. 66-56, by its terms, would apply to a resale of such articles. The restrictive covenant theory does not support the statute. The validity of the concept was expressly rejected by the Supreme Court of Louisiana. *Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Brothers Markets, supra.*

In our opinion, G.S. 66-56 clearly delegates to producers and distributors of trademarked articles legislative powers.

G.S. 66-56, in its application to non-signers of fair trade contracts, is also invalid for the reason that it violates Article I, § 19, of the Constitution of North Carolina. The term "liberty," as used in this provision of the Constitution, is as extensive as is the same term used in the Fourteenth Amendment to the Constitution of the United States.

In *Allgeyer v. Louisiana,* 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832, the Supreme Court of the United States, speaking through Mr. Justice Peckham, said:

> "The liberty mentioned in that [Fourteenth] amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by in-

> carceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

Obviously, this liberty of contract is not absolute. Like the other aspects of liberty, it may be reasonably restricted by legislation, otherwise valid, for the protection of the public health, safety, morals or welfare, including economic welfare. As was observed in *Nebbia v. New York,* 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, there is nothing "peculiarly sacrosanct about the price one may charge for what he makes or sells," and when the economic welfare of the public so requires, it is within the power of the state to fix a minimum as well as a maximum price for the sale of a commodity, even though the seller is not a public utility. It is also true that, within constitutional limits, it is the function of the Legislature, not of the courts, to determine the economic policy of the State and this Court may not properly declare a statute invalid merely because the Court deems it economically unwise. *Mitchell v. Financing Authority,* 273 N.C. 137, 144, 159 S.E. 2d 745. It is, however, the duty of this Court to declare invalid a statute which forbids one who has lawfully acquired an article of commerce to sell it at a price satisfactory to himself, unless there is some reasonable basis for the belief that the benefit to the public therefrom outweighs the infringement upon the owner's liberty of contract.

In determining whether a tax is direct or indirect, Mr. Justice Holmes observed, "Upon this point a page of history is worth a volume of logic." *New York Trust Co. et al v. Eisner,* 256 U.S. 345, 349, 41 S.Ct. 506, 65 L.Ed. 963. Our predecessors cited this observation by the great Justice in *Lilly & Co. v. Saunders, supra,* in support of their location of the point of reasonable balance between liberty of contract and governmental regulation of price. We, however, have the advantage of access to another page of history. At the time *Lilly & Co. v. Saunders, supra,* was decided, practically every state in the Union had adopted a Fair Trade Act and in many of them the courts had sustained the constitutionality of the legislation. This was in the post-Depression era of the late 1930s when governmental

regulation of the economy was at the height of its popularity. In contrast, the Supreme Judicial Court of Massachusetts noted in *Corning Glass Works v. Ann & Hope, Inc. of Danvers, supra,* "In 1972 * * * one source reports that out of the forty states which presently have such legislation, twenty-three have declared their acts unconstitutional as applied to noncontracting third parties, fifteen have declared theirs to be constitutional in this respect and two have not ruled on the question." By both legislative and judicial actions, the fair trade tide continues to ebb. See: *Remington Arms Co., Inc. v. Skaggs, supra, House of Seagram, Inc. v. Assam Drug Co., supra;* Shearin, North Carolina Fair Trade Act, 8 Wake Forest Law Review 45, 57. An article in The Wall Street Journal for May 10, 1974, page 1, column 1, asserts:

> "Many fair-trade laws were passed in the early 1930s when many stores closed because of the Depression; fair trade was designed to keep the remaining stores profitable. As recently as 1941, 45 states permitted manufacturers to assert fair-trade prices and enforce them through the courts. In the wake of the postwar discount merchandising revolution and the trend toward pro-consumer legislation, only sixteen states retain the laws [as to non-signers] * * * ."

Obviously, the popularity or non-popularity of legislation in other states does not determine its constitutionality in North Carolina, but it does constitute some evidence as to the relation between the legislation and the public's economic welfare. The record indicates no diminution of the plaintiff's ability to market its products in states where the former fair trade legislation has been repealed or held invalid as applied to non-signers of the fair trade contracts. The record contains an affidavit by a North Carolina retailer, offered in evidence by the plaintiff, which states, "Bulova is the only watch manufacturer from whom I can purchase watches without fear that the watches will also be sold at discount prices in chain stores and discount houses." The necessary inference is that Bulova's competitors have not found it necessary to resort to fair trade contracts in order to sell their products in this State. Though we might take judicial notice of the well known fact that throughout North Carolina watches made by other manufacturers are widely sold, that is not necessary for the plaintiff contends, as it must do in order to support its contracts, that its products are in free and open competition with products of a like kind manufactured by others.

Thus, there is no persuasive evidence that G.S. 66-56, as applied to non-signers of "fair trade" agreements, is necessary to protect a producer of a trademarked article against destructive price cutting.

In *Lilly & Co. v. Saunders, supra,* this Court took the view that a sale of a trademarked or trade named article by a non-signer retailer at a price less than that fixed by the producer is an unfair use of such trademark or trade name. In our opinion, this is an overstatement of the rights protected by the trademark or trade name. The purpose of the trademark or trade name is to assure the ultimate purchaser for use that the article is the genuine product of the owner of such trademark or trade name and, therefore, is of the quality which the public associates with that mark or name. Thereby, it promotes the demand for the producer's product. To protect the producer and the public from fraud the law does not permit a rival producer to affix such mark or name to his product so as to palm it off as the product of the owner of the mark or name. The reputation of the product for quality is not impaired by its sale by the retailer at a lower price than that customarily charged. Apart from the Fair Trade Act, the producer of a trademarked article has no right to control the price for which it may be resold by his customer, nothing else appearing. *Dr. Miles Medical Co. v. Park & Sons Co., supra.* As the Massachusetts Court said in *Corning Glass Works v. Ann & Hope, Inc., of Danvers, supra:*

> "Once Ann & Hope has acquired glassware not subject to any restriction—for example, by a purchase in Rhode Island, where there is no 'fair trade' law—the fact that the glassware carries a Corning trade mark gives Corning no property interest in the glassware, and a resale by Ann & Hope is a sale of its own property. Ann & Hope does not sell Corning's trademark or good will or any interest therein."

Lilly & Co. v. Saunders, supra, also relied upon the distinction between a vertical and a horizontal price fixing agreement, a position which is generally adopted by the supporters of the Fair Trade Acts. The vertical agreement is one running from the producer down through the distributor to the ultimate retailer. The horizontal agreement is one made between dealers at the same level. The horizontal agreement is deemed contrary to the public interest because it stifles competition, whereas the vertical agreement is thought to leave to the public the benefit of competition at a given level of the marketing procedure. The

difficulty with this position is that when the vertical agreement is extended by G.S. 66-56 to all retailers, including those who have not signed the "fair trade" agreement, the effect on competition in the marketing of the particular article is exactly the same as is the effect of a horizontal price fixing agreement. Aycock, Anti-Trust and Unfair Trade Practice Law in North Carolina—Federal Law Compared, 50 North Carolina Law Review 199, 219; Shearin, North Carolina Fair Trade Act, 8 Wake Forest Law Review 45, 59.

By the Fair Trade Act the Legislature has undertaken to confer upon the plaintiff the authority to fix the price at which these defendants, with whom it has no contract, may sell an article produced by the plaintiff but lawfully acquired by the defendants in legitimate channels of trade. There is no restriction placed by the Act upon this authority. The plaintiff is free to set the price at whatever figure pleases it. The defendants have no opportunity to be heard and no right to judicial review. It is immaterial, under this Act, that the defendants, by reason of more efficient merchandising practices or otherwise, may, by charging a price lower than that fixed by the plaintiff, make a profit on their resales which is reasonable and entirely satisfactory to them. *Lilly & Co. v. Saunders, supra,* at page 181. We find no public interest and no property right of the plaintiff in its trademark which can reasonably be deemed to justify this interference with the defendants' freedom of contract. We, therefore, conclude that G.S. 66-56, insofar as it applies to nonsigners of the "fair trade" agreement, deprives such non-signing retailers of their liberty of contract contrary to the law of the land. Decisions of other courts reaching a like conclusion include: *Union Carbide & Carbon Corp. v. White River Distributors,* 224 Ark. 558, 275 S.W. 2d 455; *Olin Mathieson Chemical Corp. v. Francis,* 134 Colo. 160, 301 P. 2d 139; *Shakespear Co. v. Lippman's Tool Shop & Sporting Goods,* 334 Mich. 109, 54 N.W. 2d 268; *Skaggs Drug Center v. General Electric Co.,* 63 N.M. 215, 315 P. 2d 967; *Rogers-Kent, Inc. v. General Electric Co., supra* (South Carolina); and *Remington Arms Co., Inc. v. Skaggs, supra* (Washington).

We, therefore, conclude that G.S. 66-56, as applied to nonsigners of the "fair trade" agreement, is unconstitutional. *Lilly & Co. v. Saunders, supra,* is hereby overruled. The injunction issued by the Superior Court in this action is, therefore, vacated.

Reversed.

STATE OF NORTH CAROLINA v. LAUNA IONIA HARGETT GREENE AND DOUGLAS DONALD DONNELL

No. 90

(Filed 1 July 1974)

1. **Criminal Law § 21— preliminary hearing — necessity**

A preliminary hearing is not an essential prerequisite to the finding of an indictment in this jurisdiction.

2. **Criminal Law § 99— expression of opinion by trial judge**

The provisions of G.S. 1-180 may be violated at any stage of the trial by comments on the testimony of a witness, by remarks which tend to discredit a witness, by imbalancing the evidence in the charge to the jury or by any other means which intimate an opinion of the trial judge in a manner which would deprive an accused of a fair and impartial trial before the jury; however, in the exercise of his duty to supervise and control the course of a trial so as to insure justice for all parties, the court may interrogate a witness for the purpose of clarifying his testimony, and it is the duty of the trial judge to control the examination and cross-examination of witnesses.

3. **Criminal Law § 99— remarks of trial judge — burden of showing prejudice**

An accused is not entitled to a new trial because of remarks of the trial judge unless they tend to prejudice defendant in light of the circumstances in which they were made, and the burden of showing that he has been deprived of a fair trial by such remarks is upon defendant.

4. **Criminal Law § 88— scope of cross-examination — restriction proper**

Defendant was not prejudiced where the trial judge restricted that portion of the cross-examination which sought to have an untrained witness distinguish between felonies and misdemeanors, or where the judge allowed an assistant solicitor to relate a witness's additional convictions, since the witness was a prisoner at the time he testified and he had already admitted to extensive criminal activities.

5. **Criminal Law § 99— admonition by trial judge to witness — no expression of opinion**

Where the trial judge told a witness, "Listen, you don't have to talk like that," the remark was simply an admonition to the witness to give serious and responsive answers to questions put to him, and it did not reflect on the witness's credibility or amount to an expression of opinion as to the weight of the evidence.

6. **Criminal Law § 87— leading question — definition**

A leading question is one which suggests the answer desired and is a question which may often be answered by yes or no.

7. **Criminal Law § 87— leading questions — discretion of trial court**

It is generally recognized that an examining counsel should not ask his own witness leading questions on direct examination; however,

it is firmly entrenched in the law of this State that it is within the sound discretion of the trial judge to determine whether counsel shall be permitted to ask leading questions, and in the absence of abuse the exercise of such discretion will not be disturbed on appeal.

8. Criminal Law § 87— leading questions — guidelines for allowance

Counsel should be allowed to lead his witness on direct examination when the witness (1) is hostile or unwilling to testify, (2) has difficulty in understanding the question because of immaturity, age, infirmity or ignorance, or where (3) the inquiry is into a subject of delicate nature such as sexual matters, (4) the witness is called to contradict the testimony of prior witnesses, (5) the examiner seeks to aid the witness's recollection or refresh his memory when the witness has exhausted his memory without stating the particular matters required, (6) the questions are asked for securing preliminary or introductory testimony, (7) the examiner directs attention to the subject matter at hand without suggesting answers, and (8) the mode of questioning is best calculated to elicit the truth.

9. Criminal Law § 87— leading questions allowed — no abuse of discretion

The trial court did not abuse its discretion in allowing the solicitor to ask leading questions of two State's witnesses.

10. Criminal Law § 89— bad character — showing by specific acts improper

The general rule is that the State cannot show bad character by specific acts, and the solicitor may not place before the jury incompetent or prejudicial matters not legally admissible in evidence by the use of insinuating questions.

11. Criminal Law §§ 96, 169— improper questions — objections sustained — evidence of like import subsequently admitted

Where not more than three questions were directed to State's witnesses concerning one defendant's complicity in the drug traffic and defense counsel's objections were sustained as to each question in the presence of the jury so that the jury must have known that the questions were not for their consideration, defendant was not prejudiced by the trial court's failure to instruct the jury to disregard the questions asked by the solicitor; furthermore, any prejudice which might have arisen because the jury heard the unanswered questions was rendered harmless by the subsequent admission without objection of evidence of like import to that which the solicitor had apparently sought to elicit.

APPEAL by defendants Launa Ionia Hargett Greene and Douglas Donald Donnell from *Copeland, S.J.*, 5 November 1973 Session of GUILFORD Superior Court.

Defendants were originally charged upon warrants issued by the District Court Division with the crimes of murder, conspiracy to murder and kidnapping. A nol pros with leave was taken as to each defendant, over his objection, as to the charges contained in the warrants, and bills of indictment charging the same crimes were returned by the grand jury.

Each defendant was charged in separate indictments, proper in form, with murder, kidnapping and conspiracy to commit murder.

Upon arraignment, the District Attorney announced in open court that he would not seek a conviction of murder, but would seek a conviction of the offense of accessory before the fact to murder.

Each defendant entered a plea of not guilty to the charges contained in the respective bills of indictment.

The State's motions to join the defendants and consolidate the cases for trial were allowed over the objections of both defendants.

The evidence for the State, in summary, tends to show:

Danny Edward Cobb (hereafter referred to as Cobb) testified that on 9 April 1973 he was at the Guilford County Courthouse awaiting the call of a case in which he was involved. He was approached by Launa Hargett Greene (hereafter referred to as Greene) and Douglas Donald Donnell (hereafter referred to as Donnell). Mrs. Greene questioned Cobb about his alleged indebtedness to her for some $1,500 worth of merchandise taken out of her house by his son-in-law. After a scuffle Greene and Donnell left.

A short time later Cobb and Bernadett Means (hereafter referred to as Means) were attempting to start Cobb's automobile when Donnell appeared armed with a pistol. Donnell accused Cobb of "snitching" to the police about his dealings in narcotics and at gunpoint forced Cobb and Means into Cobb's automobile. Pursuant to Donnell's orders, they proceeded to an isolated area outside Greensboro. Greene followed in her automobile. There, Donnell demanded the $1,500 and fired a shot near Cobb. Mrs. Greene also fired a shot in the air with a .45 Colt pistol. Greene and Donnell consented to take Cobb to his mother's home when he stated that he could there obtain the money. Upon arrival Cobb obtained and confronted Donnell with a pistol. A struggle ensued during which several shots were fired. Cobb secured the pistol and shot Donnell in the leg. Donnell was also "grazed" on the head by a bullet as he and Greene fled.

Shortly after this incident Cobb began serving an active prison sentence for an unrelated crime.

Brenda Diane Isley Lindsay (hereafter referred to as Lindsay) testified that she was the sister of Douglas Donnell. She stated that she visited her brother in the hospital where he was recovering from the bullet wound inflicted by Cobb. Donnell wanted to "get Cobb," and she mentioned that she knew a man named Dwayne Maxwell who could help out. In Greene's presence Donnell gave her $100 to pay Maxwell to kill Cobb. She gave Maxwell $80 of the money. On the following day both defendants asked her if she had contacted Maxwell. Shortly thereafter they learned that Cobb had been imprisoned, and Mrs. Lindsay testified that she was present when Greene and Donnell discussed killing Cobb's mother in order to kill Cobb when he attended her funeral. Mrs. Greene gave her an additional $200 to hire Maxwell to kill Mrs. Cobb. She thereafter saw Greene gave Maxwell a gun to be used in killing Mrs. Cobb.

Dwayne Maxwell testified that he shot Mrs. Cobb. He stated that he was approached by Mrs. Lindsay who offered him a job which he believed to involve the sale of narcotic drugs. He accepted, and she gave him $80. Subsequently Mrs. Lindsay introduced him to Greene and Donnell at which time Greene gave him an additional $100 and told him she would let him know about the job. Later in Donnell's presence, Greene told him that she wanted him to kill Cobb because Cobb had shot Donnell. Maxwell declined, and Greene demanded return of the money that she had paid him. Maxwell could not refund the money, and Greene gave him a gun, informing him that Cobb would be in court on that day. Maxwell went to court, but Cobb did not appear. The next day Maxwell met with Greene who told him she wanted him to kill Cobb's mother so Cobb would come to his mother's funeral. The following day Lindsay showed Maxwell where Mrs. Cobb lived.

Maxwell, armed with a knife, went to Mrs. Cobb's home on the pretext of inquiring about her son. He left because he could not bring himself to cut her. He then went to Donnell's house, and Donnell gave him a .38 pistol. Maxwell then returned to Mrs. Cobb's residence and shot Mrs. Cobb with the pistol. The next morning he approached Greene and Donnell for more money and received $25 from Donnell and $35 from Greene.

After the shooting he again met with Greene and Donnell, and further plans were made to kill Cobb when he attended his mother's funeral. Greene pointed out a bridge from which he could do the shooting, and Donnell gave him a rifle with a tele-

scopic sight. However, on the day of the funeral he did not attempt to kill Cobb and did not approach the cemetery. He shot Mrs. Cobb because he was afraid he would be killed if he didn't kill her.

Dr. W. W. Forrest, an expert pathologist, testified that Mrs. Cobb died from a gunshot wound which pierced her left lung.

At the close of the State's evidence each defendant moved for dismissal of all charges. The motions were denied.

Defendant Greene presented twenty-five witnesses who testified as to her good character.

Defendant Greene testified that on the afternoon of 9 April 1973 Donnell called her to pick him up at Cobb's mother's residence. When she arrived there Donnell tried to wave her off but she managed to pick him up. Cobb shot into her windshield before she was able to get away. Donnell told her that Cobb had shot him. She took Donnell to his sister's house and left. She testified that she did not kidnap Cobb and that she had not procured, counseled or paid any money to Dwayne Maxwell or any other person to kill Danny Edward Cobb or Nellie Marie Cobb.

Defendant Donnell testified in his own behalf. He stated that on 9 April 1973 he spoke to Cobb in the Guilford County Courthouse about the $1,500 Cobb allegedly owed Donnell's sister. He subsequently went with Cobb and Means to Cobb's mother's residence to receive this money. There Cobb confronted him with a gun and they began wrestling over it. During the struggle he fell, and Cobb shot him. He tried to run and Cobb shot again and the bullet glanced off his head. Mrs. Greene drove up and he got in her car. Cobb shot at her, but the bullet hit the hood and glanced off the car window. Greene took him to his sister's house and he later went to the hospital. He admitted telling his sister that if he were paralyzed he would kill Danny Cobb, but that he was no longer angry when he was able to leave the hospital. He did not know Dwayne Maxwell; he never gave his sister money for a gun or any other purpose; he did not take part in any plan to kill Danny Edward Cobb; and he did not kidnap Cobb or Means. He further testified that he never saw Mrs. Greene give Maxwell a gun or money.

Mrs. Gertrude Donnell Isley, the mother of Douglas Donnell, testified that on the night Mrs. Cobb was shot her son did not leave the house between the hours of 6:00 p.m. and 10:20 p.m. Maxwell did not come to see her son during that time.

On rebuttal the State introduced the testimony of three Greensboro police officers to the effect that Mrs. Greene's character and reputation were bad.

The jury returned a verdict of not guilty as to the kidnapning charges.

The jury found both defendants guilty of accessory before the fact to murder and conspiracy to murder.

Defendant Greene appealed from sentences of imprisonment for the term of her natural life for the offense of accessory before the fact to murder, and imprisonment for a term of ten years for the offense of conspiracy to murder.

Defendant Donnell appealed from sentences of imprisonment for the term of his natural life for the offense of accessory before the fact to murder, and imprisonment for the term of not less than five years nor more than seven years for the offense of conspiracy to murder.

We allowed motion to bypass the Court of Appeals on the charges of conspiracy to commit murder.

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

Comer and Dailey by John T. Comer for defendant appellants.

BRANCH, Justice.

Defendants assign as error the denial of their motions for preliminary hearings upon warrants and bills of indictment charging each of them with kidnapping, conspiracy to commit murder and murder.

[1] Whether an accused is entitled to a preliminary hearing as a matter of right was considered in the case of *State v. Hargett,* 255 N.C. 412, 121 S.E. 2d 589. There, Justice Moore speaking for the Court stated:

" . . . A preliminary hearing is not an essential prerequisite to the finding of an indictment in this jurisdiction. 'We have

no statute requiring a preliminary hearing, nor does the State Constitution require it. It was proper to try the petitioner upon a bill of indictment without a preliminary hearing.' *State v. Hackney,* 240 N.C. 230, 237, 81 S.E. 2d 778. See also *State v. Doughtie,* 238 N.C. 228, 232, 77 S.E. 2d 642; *State v. Cale,* 150 N.C. 805, 808, 63 S.E. 958. If defendant was at a disadvantage in preparing for trial through ignorance of the nature of the evidence against him, ample remedies were available to him. He might have obtained a hearing at any time by petition for *habeas corpus.* In fact, he requested and obtained a bill of particulars. The ruling on the motion was proper."

This Court has consistently adhered to the principles stated in *Hargett. State v. Harrington,* 283 N.C. 527, 196 S.E. 2d 742; *State v. Foster,* 282 N.C. 189, 192 S.E. 2d 320; *State v. Howard,* 280 N.C. 220, 185 S.E. 2d 633; *Gasque v. State,* 271 N.C. 323, 156 S.E. 2d 740.

We have carefully considered defendants' arguments that we should change this well recognized rule because it contravenes modern notions of due process and fair trial. We do not agree. There are ample provisions in our system of criminal procedure and practice to enable an accused to prepare for his defense without aid of a preliminary hearing. Further, defendants fail to show that they were taken by surprise or that their defense was prejudiced by the Court's ruling.

This assignment of error is overruled.

By Assignments of Error Numbers 3, 4 and 12 defendants contend that the trial judge violated the provisions of G.S. 1-180 by expressing opinions and by unduly restricting their right of cross-examination.

G.S. 1-180 provides:

"*Judge to explain law, but give no opinion on facts.*— No judge, in giving a charge to the petit jury in a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury, but he shall declare and explain the law arising on the evidence given in the case. He shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; provided the judge shall give equal stress to the State and defendant in a criminal action."

The duty of the trial judge to abide by the provisions of former § 535 *Revisal of 1905,* now substantially codified as G.S. 1-180, was eloquently stated by Justice Walker in the case of *Withers v. Lane,* 144 N.C. 184, 56 S.E. 855:

> " . . . The judge should be the embodiment of even and exact justice. He should at all times be on the alert, lest, in an unguarded moment, something be incautiously said or done to shake the wavering balance which, as a minister of justice, he is supposed, figuratively speaking, to hold in his hands. Every suitor is entitled by the law to have his cause considered with the 'cold neutrality of the impartial judge,' and the equally unbiased mind of a properly instructed jury. This right can neither be denied nor abridged. . . . "

[2] The provisions of G.S. 1-180 may be violated at any stage of the trial by comments of the testimony of a witness, by remarks which tend to discredit a witness, by imbalancing the evidence in the charge to the jury or by any other means which intimates an opinion of the trial judge in a manner which would deprive an accused of a fair and impartial trial before the jury. *State v. Belk,* 268 N.C. 320, 150 S.E. 2d 481; *State v. Douglas,* 268 N.C. 267, 150 S.E. 2d 412. However, in the exercise of his duty to supervise and control the course of a trial so as to insure justice for all parties, the Court may interrogate a witness for the purpose of clarifying his testimony, *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376; *Andrews v. Andrews,* 243 N.C. 779, 92 S.E. 2d 180, and it is the duty of the trial judge to control the examination and cross-examination of witnesses. *United States v. Coplon,* 185 F. 2d 629; *State v. Frazier,* 278 N.C. 458, 180 S.E. 2d 128; *State v. Wright,* 274 N.C. 380, 163 S.E. 2d 897; *Greer v. Whittington,* 251 N.C. 630, 111 S.E. 2d 912, and *State v. Stone,* 226 N.C. 97, 36 S.E. 2d 704.

[3] An accused is not entitled to a new trial because of remarks of the trial judge unless they tend to prejudice defendant in light of the circumstances in which they were made, and the burden of showing that he had been deprived of a fair trial by such remarks is upon the defendant. *State v. Green,* 268 N.C. 690, 151 S.E. 2d 606; *State v. Faust,* 254 N.C. 101, 118 S.E. 2d 769; *State v. Gibson,* 233 N.C. 691, 65 S.E. 2d 508; *State v. Carter,* 233 N.C. 581, 65 S.E. 2d 9.

We consider these assignments of error in light of the above stated principles of law.

[4] During the course of his cross-examination the witness Danny Cobb admitted that he had been convicted of the "marijuana tax" in 1958 and that in 1970 he was convicted of possession of methadone. Defense counsel thereupon asked the witness what methadone was, and the trial judge sustained the State's objection. Thereafter the witness admitted that he had been convicted of felonious possession of a firearm. When defense counsel inquired as to what other *felonies* the witness had been convicted of, the trial judge observed that counsel was getting into the field of law and that he should restrict this line of questioning to the crimes of which the witness had been convicted. When defense counsel again pursued his cross-examination concerning prior convictions, the witness professed to be puzzled by the meaning of the word "convicted." At this point Judge Copeland said:

> "Just a minute. The District Attorney has stated that he would stipulate to everything that this witness has been convicted or pled guilty to, or of which he has knowledge."

An assistant prosecuting attorney then stated that to his knowledge the witness had been convicted of felonious possession of a hand gun, possession of heroin and that both of these cases were on appeal. Also on appeal was another case in Cumberland County for possession of heroin.

Defendants strenuously argue that by these statements and rulings, the trial judge improperly limited and frustrated their right to cross-examination and expressed an opinion detrimental to them.

Considering the witness' prior admission that it was a crime to possess methadone, we see no relevancy or purpose in allowing defendants' counsel to elicit evidence as to the other characteristics of the drug.

It was also reasonable and proper for the trial judge, in the exercise of his duty to control the course of the trial, to restrict that portion of the cross-examination which sought to have an untrained witness distinguish between felonies and misdemeanors. Neither do we discern that prejudicial error resulted because Judge Copeland allowed an Assistant Solicitor to relate Cobb's additional convictions in light of the facts that the witness was a prisoner at the time that he testified and that he had already admitted to extensive criminal activities.

The witness was fully revealed to the jury as a repeated criminal offender, and defense counsel's attempts to discredit and impeach the witness were not frustrated by the remarks and rulings of the trial judge.

We hold that defendant has failed to carry the burden of showing prejudice in these rulings and statements of the trial judge.

By Assignment of Error Number 12 defendant again contends that the trial judge made a comment amounting to an expression of opinion which denied him a fair trial.

[5] Defendant Donnell, testifying in his own behalf, stated that on 9 April 1973 he went to the home of Danny Edward Cobb's parents to collect a debt, and while there he was shot in the leg by Danny Cobb. Defendants introduced into evidence the pants which Donnell was allegedly wearing when he was shot and Donnell pointed out the hole in the clothing which he stated was caused by the shot.

On cross-examination, the District Attorney inquired about the severity of the wound, and the following exchange occurred:

> Donnell: "I didn't say how bad I was shot. The pants speak for themselves.
>
> Q. Tell the jury where the blood is.
>
> A. In my leg.
>
> COURT: Listen, you don't have to talk like that."

Aside from a ruling on the admission of evidence, the words complained of in this Assignment of Error were the only utterances made by the trial judge during Donnell's direct examination and cross-examination. The words appear to be simply an admonishment to the witness to give serious and responsive answers to questions put to him. Such comment was made pursuant to the trial judge's duty to insure proper decorum in the courtroom and an orderly trial. There was nothing in the Judge's statement which reflected upon the credibility of the witness or which amounted to an expression of opinion as to the weight of the evidence.

This assignment of error is overruled.

Defendants next contend that prejudicial error resulted from the trial judge's rulings permitting the Solicitor to interro-

gate two State's witnesses by asking questions which they contend were leading.

[6, 7] It is generally recognized that an examining counsel should not ask his own witness leading questions on direct examination. A leading question has been defined as one which suggests the answer desired and is a question which may often be answered by yes or no. *State v. Price,* 158 N.C. 641, 74 S.E. 587; 1 *Stansbury's North Carolina Evidence* § 31 (Brandis Revision 1973); 58 Am. Jur. *Witnesses,* § 569 (1948); *McCormick's Handbook of the Law of Evidence* § 6 (2d ed. 1972); 2 *Wharton's Criminal Evidence* § 411 (13th ed. Charles E. Torcia 1972). The rule prohibiting leading questions is not based on a technical distinction between direct examination or cross-examination, but on the alleged friendliness existing between counsel and his witness. It is said that this relationship would allow the examiner to provide a false memory to the witness by suggesting the desired reply to his question. *United States v. Durham,* 319 F. 2d 590; 1 *Stansbury's North Carolina Evidence* § 31 (Brandis Revision 1973); 98 C.J.S. *Witnesses* §§ 329, 330 (1957). However, it is firmly entrenched in the law of this State that it is within the sound discretion of the trial judge to determine whether counsel shall be permitted to ask leading questions, and in the absence of abuse the exercise of such discretion will not be disturbed on appeal. *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384; *State v. Clanton,* 278 N.C. 502, 180 S.E. 2d 5; *State v. Painter,* 265 N.C. 277, 144 S.E. 2d 6; *State v. Pearson,* 258 N.C. 188, 128 S.E. 2d 251; 2 *Wharton's Criminal Evidence* § 411 (13th ed. Charles E. Torcia 1972).

[8] The trial judge in ruling on leading questions is aided by certain guidelines which have evolved over the years to the effect that counsel should be allowed to lead his witness on direct examination when the witness is: (1) hostile or unwilling to testify, (2) has difficulty in understanding the question because of immaturity, age, infirmity or ignorance or where (3) the inquiry is into a subject of delicate nature such as sexual matters, (4) the witness is called to contradict the testimony of prior witnesses, (5) the examiner seeks to aid the witness' recollection or refresh his memory when the witness has exhausted his memory without stating the particular matters required, (6) the questions are asked for securing preliminary or introductory testimony, (7) the examiner directs attention to the subject matter at hand without suggesting answers and (8) the mode of

questioning is best calculated to elicit the truth. *State v. Johnson,* 272 N.C. 239, 158 S.E. 2d 95; *State v. Pearson, supra;* 58 Am. Jur. *Witnesses,* § 570 (1948); 1 *Stansbury's North Carolina Evidence* § 31 (Brandis Revision 1973); 98 C.J.S. *Witnesses* § 331 (1957); 2 *Wharton's Criminal Evidence* § 412 (13th ed. Charles E. Torcia).

[9] Examination of the challenged rulings does not convince us that this questioning falls within the traditional abuse of suggesting answers or asking questions designed to secure a yes or no answer. It could just as easily be said that the District Attorney sought to direct the witness' attention to the matters at hand in a manner best calculated to elicit truth and expedite the trial. Furthermore, in deciding these questions, we must be advertent to the fact that because of his opportunity to observe the witnesses and because of his knowledge of the circumstances of the particular case, the trial judge is in better position than an appellate court to decide the proper course of a trial so as to establish the truth and protect the rights of an accused. *State v. Pearson, supra.*

We cannot say from our examination of this record that the trial judge abused his discretion or deprived defendants of a fair trial by the rulings here challenged.

Defendants assign as error the failure of the trial judge to timely sustain objections to questions addressed to the witness Lindsay and to, *ex mero motu,* instruct the jury to disregard the questions posed to witnesses Lindsay and McMillan. On redirect examination of the witness Lindsay by the District Attorney the following occurred:

> "Q. Now, I want—there's been right many questions put to you on cross-examination about narcotics traffic and Danny Cobb, and I want to ask you what, if anything, you know about Launa Hargett Greene's relationship to Danny Cobb and the dope traffic?
>
> MR. COMER: I object.
>
> COURT: Come up here a minute. (Conference at the bench.)
>
> COURT: Objection SUSTAINED for the time being."

Thereafter the witness Lindsay was recalled and the following colloquy took place:

"REDIRECT EXAMINATION (By Mr. Albright)

Q. Mrs. Lindsay, what occasion, if any, have you had to purchase narcotic drugs from the defendant, Launa Hargett Greene?

MR. COMER: OBJECTION.

COURT: Step up here a minute.
(Conference at the bench.)

COURT: The objection is SUSTAINED."

On rebuttal the District Attorney questioned Detective Norwood McMillan concerning the character and reputation of the defendant Greene, and the witness started to answer in a nonresponsive manner. At that point the record reveals the following:

"MR. COMER: OBJECTION.

COURT: Did you say you knew her reputation?

WITNESS: Yes.

COURT: Your answer will be good, bad, or you don't know, and if you need to, you can explain your answer.

A. (BY THE WITNESS) It's bad.

Q. In what respect?

MR. COMER: OBJECTION.

COURT: SUSTAINED."

[10, 11] The general rule is that the State cannot show bad character by specific acts, *State v. Davis,* 259 N.C. 138, 129 S.E. 2d 894; *State v. Grundler,* 251 N.C. 177, 111 S.E. 2d 1; *State v. Bowman,* 232 N.C. 374, 61 S.E. 2d 107; *State v. King,* 224 N.C. 329, 30 S.E. 2d 230, and the District Attorney may not place before the jury incompetent or prejudicial matters not legally admissible in evidence by the use of insinuating questions. *State v. Phillips,* 240 N.C. 516, 82 S.E. 2d 762. Defendants argue that the District Attorney sought to offer specific acts of misconduct by cross-examination in order to show the bad character of defendant Greene and that after sustaining the objections of

the defense counsel, the trial judge should have instructed the jury to disregard the questions asked by the District Attorney.

The question here considered is similar to the one presented by an *unresponsive answer* in the case of *Moore v. Insurance Company,* 266 N.C. 440, 146 S.E. 2d 492. There the witness unresponsively answered a question proper in form, and the Court allowed defense counsel's Motion to Strike. Finding the nonresponsive answer to be nonprejudicial the Court speaking through Justice Lake stated:

> "Although the proper procedure, upon allowing a motion to strike an answer not responsive to the question, is for the court immediately to instruct the jury not to consider the answer, we think that the failure to do so in this instance, in view of the court's prompt allowance of the motion to strike, is not prejudicial error. The jury could only have interpreted the ruling of the court as meaning that the answer given by the witness was not to be regarded as evidence in the case."

Defendants, relying heavily on *State v. Phillips, supra,* contend that the *posing* of the questions resulted in prejudicial error. In *Phillips,* the Court found prejudicial error in the cross-examination by the Solicitor upon a factual situation in which the Solicitor asked *defendant* at least 32 questions which contained improprieties ranging from assuming defendant's guilt of collateral offenses by insinuation to framing questions which in advance asserted the untruth of defendant's subsequent denials. In *Phillips* the Solicitor capped his cross-examination by, in effect, personally vouching for the truth of the State's allegations.

The facts in instant case are a far cry from those in *Phillips.* Here not more than three questions were directed to *State's witnesses* concerning defendant Greene's complicity in the drug traffic. Defense counsel's objections were sustained as to each question in the presence of the jury so that the jury must have known that the questions were not for their consideration. There was no harassment or vilification of defendant or her witnesses.

Thereafter evidence of like import to that which the District Attorney apparently sought to elicit was admitted, without objection, when the witness Maxwell stated:

" . . . I met Launa Hargett Greene at Douglas Donnell's house. Diane told me Launa wanted to see me—she figured she knew where I could get drugs. . . . "

The admission of testimony over objection is ordinarily harmless when testimony of like import is thereafter introduced without objection. *State v. Creech,* 265 N.C. 730, 145 S.E. 2d 6; *State v. Gaskill,* 256 N.C. 652, 124 S.E. 2d 873. Certainly the subsequent admission of testimony, without objection, obviously of like import to that which the District Attorney unsuccessfully sought to elicit from the witnesses would render harmless any prejudice which might have arisen because the jury heard the unanswered questions.

We do not deem it necessary to further discuss defendants' contentions concerning the testimony of the witness McMillan. Suffice it to say that Judge Copeland's ruling was correct and for reasons stated above his failure to instruct the jury concerning the Solicitor's further inquiry was not prejudicial error.

Even had there been error in these challenged evidentiary rulings, we are of the opinion that the State's evidence was so convincing that there is no reasonable possibility that the matters here complained of might have contributed to defendants' conviction. *Fahy v. Connecticut,* 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229; *State v. Humphrey,* 283 N.C. 570, 196 S.E. 2d 516; *State v. Thacker,* 281 N.C. 447, 189 S.E. 2d 145; *State v. Taylor,* 280 N.C. 273, 185 S.E. 2d 677. This complicated and vigorously contested case consumed five days of trial time. In such cases it is a real and accepted fact that an accused cannot be guaranteed a perfect trial. He is guaranteed a fair trial.

Our examination of this entire record discloses that defendants received a fair trial, free from prejudicial error.

No error.

State v. Carey

STATE OF NORTH CAROLINA v. ANTHONY DOUGLAS CAREY

No. 16

(Filed 1 July 1974)

1. **Conspiracy § 6— conspiracy to rob — defendant not participant in robbery**

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of conspiracy to commit armed robbery where it tended to show that defendant and four others planned a service station robbery on the day prior to the date it was attempted, that defendant rejected a suggestion that he go with one of the others to rob the station because his fingerprints and photograph were on file with the police, that just prior to the actual robbery attempt defendant stated that they could "get a whole lot of money from him" and that defendant remained in a car during the robbery attempt awaiting the return of the robbers with the fruits of the crime, defendant's active participation in the planned criminal activity not being required to establish guilt of the conspiracy.

2. **Homicide § 2— conspiracy to rob — murder during attempt to rob — responsibility of co-conspirator**

Where defendant entered into a conspiracy to commit an armed robbery, he is criminally responsible for a murder committed by another conspirator during the attempted armed robbery even though he did not actively participate in that attempt.

3. **Conspiracy § 5; Criminal Law § 79— testimony by co-conspirator — independent proof of conspiracy**

The State was not required to establish the existence of a conspiracy by independent proof before the sworn testimony of one conspirator could be introduced against another conspirator.

4. **Criminal Law § 79— unsupported testimony of co-conspirator**

The unsupported testimony of a co-conspirator is sufficient to sustain a verdict although the jury should receive and act upon such testimony with caution.

5. **Constitutional Law § 29; Criminal Law § 135; Jury § 7— selection of jury — inquiries as to death penalty views**

It was error for the trial judge in a capital case to deny the solicitor and defense counsel the right to examine prospective jurors concerning their moral or religious scruples, beliefs, and attitudes toward capital punishment since both the State and the defendant were thus deprived of the right to exercise intelligently their peremptory challenges and their challenges for cause.

6. **Criminal Law § 88— co-conspirator as State's witness — cross-examination as to plea bargaining — exclusion of mention of possible death penalty**

In a first degree murder case in which defendant was permitted to cross-examine a co-conspirator who testified for the State with respect to the fact that he had originally been charged with first

degree murder and had been allowed to plead guilty to second degree murder, the trial court erred in limiting the scope of such cross-examination so as to exclude all mention of the death penalty which might have been imposed upon the co-conspirator for a conviction of first degree murder.

DEFENDANT appeals from judgment of *Ervin, J.*, 29 October 1973 Session, MECKLENBURG Superior Court.

Defendant was tried upon bills of indictment, consolidated for trial, charging (1) armed robbery, (2) conspiracy to commit armed robbery, and (3) first degree murder. The armed robbery charge was dismissed at the close of the State's evidence. Defendant was convicted on the two remaining charges and we allowed his petition to bypass the Court of Appeals in the conspiracy case to the end that both convictions might be reviewed by the Supreme Court.

The jury was selected in obedience to an instruction by the trial judge that neither the solicitor nor defense counsel should mention the fact on voir dire examination of the jurors that this was a capital case requiring imposition of the death penalty upon a verdict of guilty of first degree murder.

The State's evidence tends to show that on 18 June 1973 Albert "Butch" Carey was driving his wife's Buick Electra 225 automobile in which his younger brother Anthony Carey (defendant in this case), James Calvin "Peanut" Mitchell and Antonio Dorsey were riding. The car was driven down Trade Street and through the intersection of Trade and Cedar Street where the passengers observed Raymond B. Williams in the process of closing his Exxon service station. Butch Carey said at that time: "That's the man right there that we're going to get the money from. We need someone who is not scared." In the discussion which followed, defendant Anthony Carey stated that he would not go into the service station because his picture and fingerprints were on record at the Charlotte Police Department. Butch Carey suggested that Harold Givens was not afraid and would be willing to commit the robbery with Peanut Mitchell. Harold Givens was picked up at his home and the proposed armed robbery was outlined to him. It was then decided that it would be better to postpone the robbery for one day, and the occupants of the car were returned to their various homes.

The next day, 19 June 1973, Butch Carey and defendant Anthony Carey assembled the same group. Butch Carey was

driving the car, and they first picked up Peanut Mitchell followed by Harold Givens and Antonio Dorsey. Butch Carey drove the car to a point approximately three blocks from the scene of the proposed robbery and parked. While riding along Anthony Carey said: "There's a whole lot of money in there, and we can get a whole lot of money from him." It was about 6:30 p.m. Peanut Mitchell and Harold Givens left the car while the others remained in it and waited for their return. Mitchell carried with him a 20-gauge sawed-off shotgun which had been furnished by Butch Carey. Mitchell and Givens went to the service station where Givens entered and bought a soft drink while Mitchell remained outside near the rest room. Givens gave a prearranged signal to Mitchell who then came to the front of the service station where he pointed the gun at Raymond B. Williams, the owner, who was preparing to close the station and leave with the day's receipts. Mitchell ordered Mr. Williams to give him the money. Mr. Williams said nothing, but James D. Sloop, who had been employed by Mr. Williams for thirty-seven years, and who was on the scene at the time, said, "I wouldn't give you anything." Peanut Mitchell then fired the shotgun at Mr. Sloop as a result of which Mr. Sloop's stomach was blown open, his intestines fell out and were supported by the interlaced fingers of Mr. Sloop's hands. Numerous internal organs were perforated and damaged and there was profuse bleeding. Mr. Sloop was taken to the hospital where extensive surgery was undertaken. He lived thirteen days, dying on 3 July 1973 from infection caused by perforation of the digestive organs.

After the gun was discharged both Givens and Mitchell fled without getting the money or anything else. They were picked up by the Carey automobile and all the occupants were returned to their various homes. The attempted robbery took place between 6:30 and 7:00 p.m. on 19 June 1973.

James Calvin "Peanut" Mitchell was fifteen years and seven months old and had completed the ninth grade in school at the time Mr. Sloop was murdered. He was allowed to plead guilty to second degree murder and testified as a witness for the State, his sentence being deferred until after the trial of his co-defendants. On a voir dire hearing in the absence of the jury, the trial court instructed defense counsel that cross-examination of Mitchell with regard to the plea-bargaining would be permitted in the presence of the jury but that no mention was to be made of the death penalty which might have been imposed upon Mitchell for a first degree murder conviction.

Mitchell testified that he, Butch Carey, Anthony Carey, and Antonio Dorsey planned the service station robbery prior to the date it was attempted; that he was in the company of Anthony and Butch Carey on the 18th of June from late morning until approximately 6:00 p.m.; that he met with Butch and Anthony Carey between 4:00 and 5:00 p.m. on 19 June 1973 and rode around with them for about two hours, passing the Exxon station five or six times; that he originally was charged with first degree murder of Mr. Sloop, pled guilty to second degree murder and had not been sentenced. He said he told Officer H. R. Thompson about the Exxon station robbery and signed a written statement containing the same information he had already related, and after giving the statement he accompanied Officer Fesperman to the Exxon service station and showed the officer "the way that I had run from the station and the path which I took in leaving the station. I also showed Officer Fesperman where I reloaded the shotgun."

The State offered in evidence a written waiver of rights and waiver of counsel signed by Anthony Carey dated 11 July 1973 at 3:15 p.m. (State's Exhibit 8) together with Anthony Carey's written statement bearing the same date and indicating it was finished at 4:10 p.m. The pertinent portion of the statement concerning the murder of James Sloop reads as follows:

> "Sometime just before the man got shot down at the Exxon Station, we all, Butch, me, and James Mitchell, and Tony Dorsey, and Harold Givens, were in Butch's car. We were all in the car together. I believe Harold ask me to go with him to rob the man and I told him I wasn't going. Harold or Peanut (James Mitchell), one of them, asked Tony if he would go and Tony told them he wasn't going. Tony said he wasn't going because Peanut accused Tony of being scared and Tony made some kind of remark back to Peanut. We went out West Trade Street to Cedar Street there at the station (Exxon Station), then we went to the next corner and went across 5th Street and we went up a little bit. We let Peanut and Harold out of the car. ~~Peanut had the gun.~~ (HRT) (AC) We let them out on Cedar Street. Peanut said when they finished the job that they were going to run back down Cedar Street—indicating the Fifth Street area. He said 'If you all don't find me, I will be in the Fairview Homes.' We then rode on down by the cemetery on Kates Street. We came back to Trade Street and

went across Trade Street and went back by the service station. We saw Peanut standing by the bathroom on the side at the station and Harold was going toward the drink box to get a drink. We turned left on Cedar Street and went to 5th to the traffic light and we saw Peanut and Harold running behind the service station. Before this we had heard a shot. Then we turned left on Fifth Street and we lost Peanut and Harold and we went on to Sycamore Street. We came back and hit Irwin Avenue and we saw Peanut coming down behind the building that sits on the corner of Fifth and Irwin, and we stopped and picked up Peanut and Harold. We went right on Fifth and went toward Johnson C. Smith University and went to Grant Street. In the meantime, we had heard the shot and when they got into the car, we were all kind of scared. Nobody said anything about this until we got back home on Grant Street. I asked Peanut why he shot the man and he said something like 'He was trying to be like all the rest, they want to go for their gun.' Harold said that he didn't get the money because 'I saw all that blood and got scared and ran.' "

Defendant testified in his own behalf. He stated that he did not participate in the robbery of the Exxon station where Mr. Sloop was shot and did not help anybody plan that robbery. He said: "I never encouraged anyone to commit that robbery. I had no knowledge of the crimes which were being committed by Peanut Mitchell until later in the month of June when his activities became common knowledge in my community. I had no knowledge of the Exxon service station robbery prior to the time the robbery took place."

Other witnesses testifying for the defendant placed him elsewhere from late evening on 18 June 1973 until 7:00 p.m. on 19 June 1973. No alibi evidence was presented with respect to the period of time when the robbery was planned on 18 June 1973, but defendant denied any participation in the planning or commission of the attempted robbery and denied that he was with the alleged co-conspirators on either of the days in question.

Defendant was convicted of conspiracy to commit armed robbery and first degree murder. He received ten years on the conspiracy charge and was sentenced to death for first degree murder. Both cases are now before the Supreme Court for appellate review. Errors assigned are discussed in the opinion.

Robert Morgan, Attorney General; James F. Bullock, Deputy Attorney General; and Raymond W. Dew, Jr., Assistant Attorney General, for the State of North Carolina.

Gene H. Kendall, attorney for defendant appellant.

HUSKINS, Justice.

[1] The action of the trial court in overruling defendant's motion for judgment of nonsuit in the conspiracy case constitutes his first assignment of error.

"A criminal conspiracy is the unlawful concurrence of two or more persons in a wicked scheme—the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way or by unlawful means. The conspiracy is the crime and not its execution." *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334 (1964), and cases cited therein; *accord,* 16 Am. Jur. 2d, Conspiracy § 1 (1964). "As soon as the union of wills for the unlawful purpose is perfected the offense of conspiracy is completed." *State v. Knotts,* 168 N.C. 173, 83 S.E. 972 (1914).

Viewed in the light most favorable to the State, the evidence shows that defendant, Peanut Mitchell, Harold Givens, Antonio Dorsey, and defendant's brother Butch Carey were together on 18 June 1973 when the robbery was planned. As they drove past the Exxon station on that date Butch Carey said: "That is the man right there we are going to get the money from. We need someone who is not scared." Peanut Mitchell suggested that defendant go with him to rob the station. Defendant rejected the suggestion because the Charlotte Police had his photograph and fingerprints on file. The same group reassembled on 19 June 1973 and, just prior to the actual robbery attempt, defendant said: "It's a whole lot of money in there, and we can get a whole lot of money from him." During the robbery attempt defendant remained in the car with Butch Carey and Antonio Dorsey, awaiting the return of the robbers with the fruits of the crime. He was a willing participant in the scheme.

Since the gravamen of the offense of conspiracy is the agreement or union of wills for the unlawful purpose, active participation in the planned criminal activity is not required to establish guilt. "A man may join a conspiracy by word or by deed. However, criminal responsibility for a conspiracy requires

more than a merely passive attitude toward an existing conspiracy. One who commits an overt act with knowledge of the conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with the other conspirators, actually standing by while the others put the conspiracy into effect, is guilty though he intends to take no active part in the crime." 16 Am. Jur. 2d, Conspiracy § 15 (1964).

In *State v. Turner,* 119 N.C. 841, 25 S.E. 810 (1896), we said that "[t]hose who aid, abet, counsel *or encourage,* as well as those who execute their designs, are conspirators. . . . " (Emphasis added.) In *State v. Andrews,* 216 N.C. 574, 6 S.E. 2d 35 (1939), responding to a contention similar to that advanced by this defendant, we said: "The fact that the appealing defendant did not personally participate in the overt act is not material if it be established by competent evidence that he entered into an unlawful confederation for the criminal purpose alleged."

In light of these legal principles, we hold the evidence is sufficient to make out a *prima facie* case of conspiracy and to withstand the motion for judgment of nonsuit.

[2] By like reasoning, defendant argues that since he did not actively participate in the armed robbery attempt he is not criminally responsible for the murder committed in that attempt. Denial of his motion to nonsuit the murder case is assigned as error.

"Those who enter into a conspiracy to violate the criminal laws thereby forfeit their independence, and jeopardize their liberty, for, by agreeing with another or others to engage in an unlawful enterprise, they thereby place their safety and freedom in the hands of each and every member of the conspiracy." *State v. Gibson,* 233 N.C. 691, 65 S.E. 2d 508 (1951).

"The felony-murder rule applies whenever a conspirator kills another person in the course of committing a felony, as against the contention that the killing was not part of the conspiracy. If the unlawful act agreed to be done is dangerous or homicidal in its character, or if its accomplishment will necessarily or probably require the use of force and violence, which may result in the taking of life unlawfully, *every party* to such agreement will be held criminally liable for whatever any of his co-conspirators may do in furtherance of the common design." 1 Wharton's Criminal Law and Procedure § 251 (1957) (emphasis added). *Accord,* 40 Am. Jur. 2d, Homicide §§ 34-35

(1968); 40 C.J.S., Homicide § 9e(1) (1944). For a more general statement of the same principle, see *State v. Kelly,* 243 N.C. 177, 90 S.E. 2d 241 (1955); *State v. Smith,* 221 N.C. 400, 20 S.E. 2d 360 (1942); *State v. Williams,* 216 N.C. 446, 5 S.E. 2d 314 (1939); 16 Am. Jur. 2d, Conspiracy § 14 (1964).

The following statement from *State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561 (1970), is in agreement with the general rule and is most appropriate here: "[W]hen a conspiracy is formed to commit a robbery or burglary, and a murder is committed by any one of the conspirators in the attempted perpetration of the crime, each and all of the conspirators are guilty of murder in the first degree." *Accord, State v. Bell,* 205 N.C. 225, 171 S.E. 50 (1933).

Application of the foregoing principles to the evidence in this case leads inexorably to the conclusion that defendant's motion for judgment of nonsuit in the murder case was properly denied. The evidence makes a case for the jury. Defendant's first assignment of error is overruled.

[3] Defendant contends the trial court erred in allowing James Calvin Mitchell, alleged co-conspirator, to testify to defendant's involvement in the conspiracy. Defendant argues that the State is required to establish the existence of the conspiracy by independent proof before evidence of the conspiracy from a co-conspirator can be introduced.

The principles defendant urges us to apply in this case were stated in *State v. Conrad,* 275 N.C. 342, 168 S.E. 2d 39 (1969), as follows:

> "The general rule is that when evidence of a prima facie case of conspiracy has been introduced, the acts and declarations of each party to it in furtherance of its objectives are admissible against the other members. *State v. Gibson,* 233 N.C. 691, 65 S.E. 2d 508; *State v. Smith,* 221 N.C. 400, 20 S.E. 2d 360; 16 Am. Jur. 2d, Conspiracy, §§ 35, 36, 37, 38, pp. 146, 147 (citing authorities). Consideration of the acts or declarations of one as evidence against the co-conspirators should be conditioned upon a finding: (1) a conspiracy existed; (2) the acts or declarations were made by a party to it and in pursuance of its objectives; and (3) while it was active, that is, after it was formed and before it ended. *State v. Dale,* 218 N.C. 625, 12 S.E. 2d 556; *State v. Lea,* 203 N.C. 13, 164 S.E. 737; 11 Am. Jur.

571. Of course a different rule applies to acts and declarations made before the conspiracy was formed or after it terminated. Prior or subsequent acts or declarations are admissible only against him who committed the acts or made the declarations."

Defendant seeks to apply a sound principle of law to an ineligible state of facts. Of course, the existence of a conspiracy must be established by evidence *aliunde* for the *acts and declarations* of one conspirator, in furtherance of the common design, to be competent against the others. *State v. Benson,* 234 N.C. 263, 66 S.E. 2d 893 (1951); *State v. Blanton,* 227 N.C. 517, 42 S.E. 2d 663 (1947); 2 Strong's N. C. Index 2d, Conspiracy § 5 (1967). This rule, however, affords this defendant no solace because this case does not involve the use of *acts and declarations* of one conspirator against another. Rather, it involves the *sworn testimony* of one conspirator against another.

[4] It is seldom that the State can show the existence of a conspiracy by direct proof, but when the testimony of a co-conspirator is available it is competent to establish the conspiracy. *State v. Summerlin,* 232 N.C. 333, 60 S.E. 2d 322 (1950). A co-conspirator is an accomplice and is always a competent witness. *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334 (1964); 16 Am. Jur. 2d, Conspiracy § 41 (1964). It has been held in many cases that the unsupported testimony of a co-conspirator is sufficient to sustain a verdict, although the jury should receive and act upon such testimony with caution. *State v. Horton,* 275 N.C. 651, 170 S.E. 2d 466 (1969), *cert. denied,* 398 U.S. 959 (1970). *See State v. Tilley,* 239 N.C. 245, 79 S.E. 2d 473 (1954); *State v. Bovender,* 233 N.C. 683, 65 S.E. 2d 323 (1951).

Under applicable principles of law James Calvin Mitchell was a competent witness to testify to the conspiracy. Defendant's second assignment of error is overruled.

Prior to arraignment the trial judge instructed the solicitor and defense counsel that the fact that this was a capital case or that the death penalty might be imposed should not be mentioned in the presence of the jury. Defendant objected to this instruction and now assigns it as error. He contends that denial of his right to question prospective jurors concerning their views on capital punishment or to inform them of the punishment prescribed by law upon a verdict of guilty of first degree murder was prejudicial and requires a new trial.

The basic concept in jury selection is that each party to a trial has the right to present his cause to an unbiased and impartial jury. *State v. Spence,* 274 N.C. 536, 164 S.E. 2d 593 (1968); *State v. Peele,* 274 N.C. 106, 161 S.E. 2d 568 (1968). "A defendant on trial has the right to reject any juror for cause or within the limits of his peremptory challenges before the panel is completed." *State v. McKethan,* 269 N.C. 81, 152 S.E. 2d 341 (1967).

"Peremptory challenges are challenges which may be made or omitted according to the judgment, will, or caprice of the party entitled thereto, without assigning any reason therefor, or without being required to assign a reason therefor." 50 C.J.S., Juries § 280(a) (1947). *Accord, State v. Allred,* 275 N.C. 554, 169 S.E. 2d 833 (1969); *Freeman v. Ponder,* 234 N.C. 294, 67 S.E. 2d 292 (1951); 47 Am. Jur. 2d, Jury § 233 (1969). G.S. 9-21(a) confers upon each defendant in a capital case the right to challenge fourteen jurors "peremptorily without cause."

In *State v. Allred, supra,* we quoted with approval the following passage from *State v. Brooks,* 57 Mont. 480, 188 P. 942 (1920): "The *voir dire* examination of jurors is a right secured to the defendant by the statutes and has a definite double purpose: First, to ascertain whether there exist grounds for challenge for cause; and, second, to enable counsel to exercise intelligently the peremptory challenges allowed by law." The quoted passage vividly reveals the crucial relationship between voir dire examination of prospective jurors and challenges, both peremptory and for cause. The right to make inquiry as to the fitness and competency of any person to serve as a juror is vouchsafed by G.S. 9-15(a) which provides: "The court, and any party to an action, or his counsel of record, shall be allowed, in selecting the jury, to make direct oral inquiry of any prospective juror as to the fitness and competency of any person to serve as a juror, without having such inquiry treated as a challenge of such person, and it shall not be considered by the court that any person is challenged as a juror until the party shall formally state that such person is so challenged." The extent of the inquiries, of course, is subject to the control and supervision of the trial judge. *State v. Harris,* 283 N.C. 46, 194 S.E. 2d 796 (1973); *State v. Bryant,* 282 N.C. 92, 191 S.E. 2d 745 (1972).

Since decision of the United States Supreme Court in *Witherspoon v. Illinois,* 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct.

1770 (1968), we have held in many capital cases that solicitors may ask prospective jurors whether they have moral or religious scruples against capital punishment; if so, whether they are willing to consider all of the penalties provided by law, or are irrevocably committed to vote against a verdict carrying the death penalty regardless of the facts and circumstances that might be revealed by the evidence. See *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974); *State v. Honeycutt*, 285 N.C. 174, 203 S.E. 2d 844 (1974); *State v. Crowder*, 285 N.C. 42, 203 S.E. 2d 38 (1974); *State v. Noell*, 284 N.C. 670, 202 S.E. 2d 750 (1974); *State v. Washington*, 283 N.C. 175, 195 S.E. 2d 534 (1973); *State v. Frazier*, 280 N.C. 181, 185 S.E. 2d 652 (1972); *State v. Doss*, 279 N.C. 413, 183 S.E. 2d 671 (1971); *State v. Sanders*, 276 N.C. 598, 174 S.E. 2d 487 (1970).

This right of inquiry concerning a prospective juror's competency and fitness to serve may, of course, be exercised by or on behalf of the defendant as well as the State. "In order to insure a fair trial before an unbiased jury, it is entirely proper in a capital case for both the State and the defendant to make appropriate inquiry concerning a prospective juror's moral or religious scruples, beliefs, and attitudes toward capital punishment." *State v. Crowder, supra.*

[5] Applying the foregoing principles, we hold it was error for the trial judge to deny the solicitor and defense counsel the right to examine prospective jurors concerning their moral or religious scruples, beliefs, and attitudes toward capital punishment. Both the State and the defendant were thus deprived of the right to exercise intelligently their peremptory challenges and their challenges for cause. This assignment is sustained and requires a new trial.

[6] Defendant contends it was error for the trial judge to preclude mention of the death penalty during the cross-examination of Peanut Mitchell.

The record discloses that defendant was permitted to cross-examine Mitchell with respect to his plea bargaining and the fact that he was originally charged with first degree murder. Mitchell testified on cross-examination in regard to this matter as follows: "I have not been sentenced for murder in the Sloop robbery murder. I don't know when I will be sentenced. I was originally charged with murder and have entered a plea

of guilty of murder in the second degree, which is a different charge from that with which I was first charged."

"Cross-examination of an opposing witness for the purpose of showing his bias or interest is a substantial legal right, which the trial judge can neither abrogate nor abridge to the prejudice of the cross-examining party." *State v. Hart,* 239 N.C. 709, 80 S.E. 2d 901 (1954).

"While latitude is allowed in showing the bias, hostility, corruption, prejudice and interest or misconduct of the witness with respect to the case or other facts tending to prove that his testimony is unworthy of credit, 3 Jones on Evidence, 1538, the question as to the extent to which the cross-examination may extend is to be determined with a view to the discretion of the trial judge. Nevertheless, if the latter has excluded testimony which would clearly show bias, interest, the promise, or the hope of reward on the part of the witness, it is error and may be ground for a new trial. *Alford v. U.S.,* 75 L.Ed., 624; 3 Jones on Evidence, 1538. The discretionary power of the trial judge is to confine the cross-examination within reasonable limits. It does not include the authority to exclude altogether questions, and the answers thereto, which directly challenge the disinterestedness or credibility of the witness' testimony." *State v. Roberson,* 215 N.C. 784, 3 S.E. 2d 277 (1939).

The pressures which induced Peanut Mitchell to plead guilty to second degree murder and to testify for the State against a co-conspirator are material and have a substantial bearing upon the credibility to be given his testimony, and are permissible subjects for cross-examination. It is logical to assume that one very important factor which may have influenced Mitchell's decision to cooperate with the State was the possibility that had he been tried for first degree murder, he might have been convicted and sentenced to death. Because the question of Mitchell's credibility and bias is of such vast importance in this case, we hold it was error for the scope of cross-examination to be limited so as to exclude all mention of the death penalty.

We deem it unnecessary to discuss other assignments of error relating to recall of a witness and to instructions given by the court, in response to a juror's question, alleged by defendant to contradict instructions initially given. These are matters not likely to arise on retrial.

For error committed with respect to selection of the jury defendant is entitled to a new trial and it is so ordered.

New trial.

STATE OF NORTH CAROLINA v. ALBERT LEWIS CAREY, JR.

No. 19

(Filed 1 July 1974)

1. **Constitutional Law § 29; Criminal Law §§ 102, 135; Jury § 7— jury selection — death penalty views — informing jury of death penalty in argument**

In a first degree murder prosecution, the trial court erred in refusing to permit defendant (and the State) to interrogate prospective jurors concerning their views with reference to imposition of the death penalty upon one convicted of first degree murder and in refusing to permit the defendant, in his argument to the jury, to inform the jury that, under the law of this State, the prescribed punishment for first degree murder is death.

2. **Conspiracy § 6; Homicide § 21— conspiracy to rob — murder in perpetration of robbery — sufficiency of evidence of defendant's guilt**

The State's evidence was sufficient for the jury on the issues of defendant's guilt of conspiracy to commit armed robbery and murder in the first degree where the trigger man in the shooting testified that he, defendant and three others conspired to rob a service station, that defendant was the principal planner of the robbery, that defendant transported the conspirators to a point near the service station in his wife's car where he let two conspirators out for the purpose of perpetrating the robbery, that the witness fatally shot an attendant at the station while attempting the robbery, and that the two perpetrators fled and were picked up by defendant and transported by him to their homes.

3. **Homicide § 4— homicide during robbery — first degree murder**

A murder perpetrated in an attempt to commit robbery is murder in the first degree. G.S. 14-17.

4. **Conspiracy § 8; Criminal Law § 26; Homicide § 31— conviction of conspiracy to rob and murder in perpetration of robbery**

While a charge of armed robbery was merged into an offense of murder committed in perpetration of the robbery, a charge of conspiracy to commit the armed robbery was not merged into the murder charge, and defendant was properly convicted of both conspiracy and murder.

5. **Criminal Law § 84; Searches and Seizures § 1— seizure without warrant — article in plain view — officer lawfully on premises**

The trial court in a murder prosecution did not err in the admission of a box of shotgun shells found by a police officer in the kitchen of the home of defendant's sister where the trial court found upon supporting evidence that officers went to the home with warrants for the arrest of defendant, his brother and two other persons, that defendant and his brother were found upstairs asleep in separate rooms, that the officers had information that one of the other persons for whom they had warrants might be physically present in the home, and that in looking for such other person an officer went to the door of the kitchen and inadvertently observed the box of shells in plain view in an open drawer.

6. **Indictment and Warrant § 13— denial of bill of particulars**

The trial court in a conspiracy to rob and homicide case did not abuse its discretion in the denial of defendant's motion for a bill of particulars where the State's main witness had testified in the prior trial of defendant's brother for the same offenses and defendant should have been fully aware of the theory of the State's case against him.

7. **Criminal Law §§ 75, 80— pretrial order to provide defendant's statements to counsel — statement not provided — good faith of solicitor — admission of statement**

In a homicide prosecution in which the court, pursuant to defendant's pretrial motion under G.S. 15-155.4, ordered the State to provide defense counsel with any written statement by defendant and with the name of any person to whom defendant gave any oral statement, the trial court did not abuse its discretion in permitting officers to testify as to an oral statement given by defendant of which defense counsel had not been advised prior to trial where the solicitor had no notice of the statement until after the trial was under way and he informed defense counsel thereof on the day before the statement was offered in evidence.

8. **Criminal Law § 75— statement in polygraph room — effect on admissibility**

The fact that defendant's statement to police, found by the court upon competent evidence to have been made voluntarily, was made in the polygraph testing room is irrelevant on the question of its admissibility.

9. **Criminal Law §§ 73, 89— reason for inconsistent testimony — threats by codefendant out of defendant's presence — admissibility**

Testimony by the State's main witness that he had given inconsistent testimony in the prior trial of a codefendant and had given the codefendant a signed statement that "what I am saying on the stand today is a lie" because he had been beaten and threatened by the codefendant and another while they were in jail awaiting the codefendant's trial was not hearsay and was properly admitted in defendant's trial although the threatening statements to the witness were not made in defendant's presence.

State v. Carey

APPEAL by defendant from *Ervin, J.*, at the 26 November 1973 Session of MECKLENBURG.

Under indictments, proper in form, the defendant was convicted of murder in the first degree and of conspiracy to commit armed robbery. Upon the charge of murder, he was sentenced to death and upon the charge of conspiracy to commit armed robbery, he was sentenced to 10 years in the State's prison, less credit for time he was in jail pending trial.

The defendant was also indicted for armed robbery. The three cases were consolidated for trial. At the close of the State's evidence, a judgment of nonsuit was entered upon the charge of armed robbery, the defendant's motions for like judgments on the other two charges being denied. The defendant gave notice of appeal in the two cases in which sentences were imposed. Certiorari was granted to bring to this Court, prior to determination by the Court of Appeals, the appeal from the judgment in the conspiracy case and the two appeals were heard together.

Prior to the bringing of any prospective jurors into the courtroom, the trial court stated that it would not permit the State or the defendant, "in questioning the jurors or in the course of the trial to indicate in any way that the punishment for first degree murder upon the present case law in North Carolina is death." At the conclusion of all the evidence, prior to argument of counsel, the court directed that counsel not argue the question of the death penalty or show to the jury portions of certain exhibits containing reference to the death penalty. To each of these directions the defendant objected and excepted in due time. Each such direction of the court was complied with by counsel and the record discloses that at no time was any reference to the death penalty made in the presence of prospective jurors or in the presence of the empaneled jury.

The theory of the State's case was that the defendant, his brother, Anthony Carey, James Calvin Mitchell and two others, planned and conspired to rob with firearms the operators of a filling station, that the defendant, for the purpose of carrying out this design, transported, in his or his wife's automobile, Mitchell and another of the conspirators to a point near the filling station and there waited for their return, Mitchell and his companion went to the filling station and, in an unsuccessful attempt to accomplish the intended robbery, shot one of the operators, James Sloop, in the abdomen with a sawed-off shot-

gun, supplied to Mitchell by the defendant, and fled from the scene back to the automobile in which the defendant then transported them back to their homes, after they reported to him what had occurred at the filling station. The evidence of the State, if true, fully supports the theory of the State and the verdicts of the jury finding the defendant guilty both of the conspiracy and of the murder.

Robert Morgan, Attorney General, and John R. B. Mathis, Assistant Attorney General, for the State.

Waggoner, Hasty & Kratt by John H. Hasty for defendant.

LAKE, Justice.

[1] It was clearly error for the trial judge to refuse to permit the defendant (and the State) to interrogate prospective jurors concerning their views with reference to the imposition of the death penalty upon one convicted of murder in the first degree, and also error to refuse to permit the defendant, in his argument to the jury, to inform the jury that, under the law of this State, the prescribed punishment for murder in the first degree is death. *State v. Anthony Douglas Carey,* 285 N.C. 497, 206 S.E. 2d 213, decided this day; *State v. Britt,* 285 N.C. 256, 204 S.E. 2d 817. Because of these errors there must be a new trial of the defendant. The jury not having been selected in accordance with the requirements of the law, there must be a new trial on the conspiracy charge as well as upon the murder charge.

[2] The defendant's contention that his motion for judgment of nonsuit should have been allowed as to both charges has no merit as to either. In *State v. Fox,* 277 N.C. 1, 17, 175 S.E. 2d 561, we said: "[W]hen a conspiracy is formed to commit a robbery or burglary, and a murder is committed by any one of the conspirators in the attempted perpetration of the crime, each and all of the conspirators are guilty of murder in the first degree." See also: *State v. Anthony Douglas Carey, supra; State v. Bell,* 205 N.C. 225, 171 S.E. 50.

This is a companion case to *State v. Anthony Douglas Carey, supra,* the two defendants being brothers and alleged coconspirators. The evidence for the State concerning the conspiracy to rob and the fatal shooting of the filling station attendant was substantially the same in both cases. Reference

is made to our opinion in that case for a more complete narration of the facts. For the present, it is sufficient to state that the testimony of Mitchell, the trigger man at the shooting, is ample to support a finding that he, the two Carey brothers, Harold Givens and Antonio Dorsey conspired to rob Williams' Exxon Service Station; that this defendant—Albert Lewis Carey, Jr.—was the principal planner of the robbery; that, in his own or his wife's automobile, he transported all of the conspirators to a point near the filling station where he let Mitchell and Givens out for the purpose of perpetrating the planned robbery; that they went to the filling station and, in an attempt to carry out the plan, Mitchell fatally shot James Sloop, an attendant thereat; following the shooting, Mitchell and Givens fled and were picked up by this defendant and transported back to their homes in his automobile.

[3] A murder perpetrated in an attempt to commit robbery is murder in the first degree. G.S. 14-17; *State v. Fox, supra.*

[4] As the defendant contends, when the State proves another felony, as an element of first degree murder, such other felony is merged into the murder and may not be the ground for another, separate prosecution and punishment. *State v. Moore,* 284 N.C. 485, 202 S.E. 2d 169; *State v. Carroll,* 282 N.C. 326, 193 S.E. 2d 85; *State v. Peele,* 281 N.C. 253, 188 S.E. 2d 326. For this reason, the trial court properly allowed the motion for judgment of nonsuit upon the charge of armed robbery, under which the defendant, otherwise, could have been convicted of an attempt to commit armed robbery. This well settled principle of law does not, however, prevent the trial and conviction of the defendant both on the charge of first degree murder and on the charge of conspiracy to rob. The conspiracy is a separate offense from the attempt to rob. Conspiracy is a completed crime when it is formed, without any overt act designed to carry it into effect. *State v. Goldberg,* 261 N.C. 181, 202, 134 S.E. 2d 334; *State v. Brewer,* 258 N.C. 533, 539, 129 S.E. 2d 262; *State v. Davenport,* 227 N.C. 475, 494, 42 S.E. 2d 686. The conspiracy and the accomplishment or attempt to accomplish the intended robbery are separate offenses and the conspirators may be convicted of both and punished for both. *State v. Brewer, supra,* at p. 558. In the present case, the murder occurred in the perpetration of the attempt to rob. It is this felony, not the separate offense of conspiracy, which was merged into the charge of first degree murder.

Consequently, there was no error in the denial of the motion for judgment of nonsuit as to either charge, no error in the instruction to the jury that it might find the defendant guilty of conspiracy and also guilty of murder in the first degree, and no error in the imposition of the prescribed punishment for each offense.

[5] The defendant contends that the court erred in admitting into evidence a box of shotgun shells found by Officer Stroud in the kitchen of the defendant's home. We find no merit in this contention.

The court conducted a voir dire upon the defendant's motion to suppress this evidence. It found as facts: At 2 a.m. on 10 July 1973, ten police officers, under the command of Lieutenant Stroud, went to the residence of the sister of the defendant; that the officers had warrants for the arrest of this defendant, his brother, Anthony Douglas Carey, Harold Givens and Antonio Dorsey; these arrest warrants charged each of these individuals with murder and the purpose of the officers' going to the house was to arrest the Carey brothers on those warrants; at that time, the officers also had information indicating that Antonio Dorsey might be physically present in the residence and they also had the purpose of arresting him pursuant to the warrant so charging him; arriving at the residence, they knocked at the door and stated that they were looking for the Carey brothers and had warrants for their arrest; they were admitted to the residence by the sister of the defendant, whose residence it was, and advised by her that the brothers were upstairs asleep; the officers went upstairs, found the Carey brothers asleep in separate rooms, arrested both of them and searched the rooms in which they were arrested in an unsuccessful effort to find the shotgun used in the perpetration of the murder; Lieutenant Stroud then examined other parts of the house to determine whether Antonio Dorsey was present on the premises; returning downstairs he went to the door of the kitchen, he being the first officer to enter the kitchen; arriving at the door of the kitchen, he observed a drawer open and in the open drawer, he standing in the doorway, observed the box of shotgun shells, which he then took into his possession; at the time the shells were so discovered, the officer did not have any information that shotgun shells were in the house and he was not looking for these but was seeking the whereabouts of Antonio Dorsey; that his observance of the box of shells was inadvertent; that Lieu-

tenant Stroud was lawfully inside the residence pursuant to the arrest warrants and had a lawful right to be where he was when he observed the shotgun shells which were in plain view as he stood at the door of the kitchen.

The evidence on voir dire was ample to support these findings of fact, although there was conflicting evidence as to whether the shells were in plain view of one standing in the doorway and as to whether other officers had previously been into the kitchen. The findings of fact, being supported by the evidence on voir dire, are conclusive. *State v. Grant,* 279 N.C. 337, 182 S.E. 2d 400; *State v. Belk,* 268 N.C. 320, 150 S.E. 2d 481; Stansbury, North Carolina Evidence (Brandis' Revision), § 121a, p. 378. The box of shells having been in plain view of the officer as he stood where he had a right to be and having been observed by him inadvertently, not as the result of a search therefor, there was no violation of the defendant's constitutional rights in the officer's taking them into his possession, or in their introduction into evidence. *Harris v. United States,* 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed. 2d 1067. See also: *Ker v. California,* 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed. 2d 726, the plurality opinion of Justices Clark, Black, Stewart and White; Stansbury, North Carolina Evidence (Brandis' Revision), § 121a, p. 372.

[6] The defendant, prior to trial, moved for a bill of particulars, which motion was denied. In this there was no error. The allowance of a motion for a bill of particulars rests in the sound discretion of the trial court. G.S. 15-143; *State v. Overman,* 269 N.C. 453, 468, 153 S.E. 2d 44; *State v. Vandiver,* 265 N.C. 325, 144 S.E. 2d 54; *State v. Scales,* 242 N.C. 400, 87 S.E. 2d 916. The trial of Anthony Douglas Carey had occurred prior to the trial of this defendant. There also, the testimony of Mitchell was the foundation of the State's case. Thus, at the time the present defendant was placed on trial, he should have been fully aware of the theory of the State's case against him.

[7] Prior to the commencement of the trial, the defendant, pursuant to G.S. 15-155.4, moved that the State be required to make available to the defendant's counsel exhibits proposed to be used by the State at the trial and copies of all written statements or summaries of oral statements of the defendant to the solicitor, the police or other persons. Such order was entered, including the following:

> "9. The State shall inform the defendant's attorney whether or not the defendant has given any statement

to the police or Solicitor and furnish a copy of any such written statement to the defendant's attorney or the name of any person to whom any oral statement may have been given."

The solicitor, prior to trial, responded:

"9. The State provided the defense attorney a copy of all statements by the defendant and a summary of all oral statements given by the defendant."

After the trial was in progress, the solicitor learned that the defendant, having been given the full Miranda warning, signed a waiver of his constitutional rights to which such warning relates and made an oral statement to the police officer in charge of the polygraph testing room. When the solicitor proposed to offer such statement in evidence, defendant's counsel objected and the judge conducted a voir dire in the absence of the jury. Upon such voir dire the solicitor and the defendant's counsel advised the court that, at approximately 6:00 p.m. on the previous day, the solicitor brought these matters to the attention of the defendant's counsel, the solicitor having had no knowledge of them until the night before that.

Evidence for the State on the voir dire was to the following effect: The defendant, after having been given the Miranda warning and having signed the waiver of such rights, consented to the taking of a polygraph test and was carried to the room used for such tests. Proceedings introductory to the taking of a polygraph test were begun but the taking of the test was discontinued and the idea was abandoned when the officer in charge of the test room found the defendant was under the influence of drugs and not in condition to take the test. The following day he was taken back to the polygraph room for such a test, having again been given the Miranda warning of his constitutional rights and having again waived those rights in writing, including the right to have an attorney present at the taking of the polygraph test. Upon arrival in the polygraph test room the defendant stated to the officer in charge thereof that he did not wish to take a polygraph test but desired to make a statement to that officer. Accordingly, no polygraph test was taken. While still in the polygraph testing room the defendant told the officer in charge thereof that he, the defendant, had planned, with Dorsey, Givens and Mitchell, to rob the filling station, that he had transported these three men to the vicinity

of the filling station in his wife's car and there let them out of the car. These statements were overheard by two other officers who had given the defendant the above mentioned warnings and had brought him to the polygraph testing room, after which they had gone into an adjoining room where they could observe the proceedings through a two-way mirror and hear what was said. The defendant had been advised of the existence of such a room and its facilities, but did not actually know the two officers were therein.

The defendant testified on the voir dire that he made no such statement to any officer.

At the conclusion of the voir dire, in the absence of the jury, the court made detailed findings of fact, including findings that the defendant made the statement, that it was made voluntarily and spontaneously and was not the result of or induced by any questioning of the defendant, that it had no connection with the polygraph examination and that it was not tainted by anything done in connection with the activities of the officer in charge of the polygraph testing room.

Thereupon the court concluded that the evidence as to the statement was competent but directed that the State should not, on direct examination, elicit any testimony indicating that the statement occurred in connection with an attempt to conduct a polygraph examination.

Thereupon, in the presence of the jury, the officer in charge of the polygraph testing room testified that the defendant made the said statement to him and the other two officers testified that they overheard it. On direct examination of these witnesses no reference was made to a polygraph test or to the fact that the statement was made in the polygraph testing room or that the officers had any duties in connection with such room or tests. On cross-examination by the defendant's counsel it was developed that the statement was made in the polygraph testing room. On redirect examination it was developed that, at the time of making these statements, the defendant had said that he did not care to take the polygraph test but wished to make a statement to the officer, this being the statement in question.

We perceive no error in the ruling permitting the police officers to testify as to the statement so made by the defendant.

G.S. 15-155.4 provides that, for good cause shown, the judge assigned to hold the courts of the district wherein the

case is pending, or the resident superior court judge of the district, shall direct the solicitor to produce for inspection, examination, copying and testing by the defendant or his counsel "any specifically identified exhibits to be used in the trial of the cases sufficiently in advance of the trial to permit the accused to prepare his defense." This statute does not specifically declare inadmissible any exhibit or any oral statement not so exhibited or called to the attention of counsel for the defendant. The expressed and clear purpose of the statute is to give to the defendant's counsel notice of such matters in sufficient time to avoid his being taken by surprise. *State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664.

In the present instance, it is not denied that the solicitor has acted in good faith, he, himself, having had no notice of the statement in question until after the trial was under way and, having informed the defendant's counsel thereof on the day before the statement was offered in evidence. Under these circumstances, the admission of such evidence lies in the sound discretion of the trial court.

[8] In *State v. Foye,* 254 N.C. 704, 120 S.E. 2d 169, this Court held that the results of a polygraph test are not admissible in evidence to establish the guilt or innocence of one accused of a crime. That rule has no application to the present case. The testimony concerning the statement made by the defendant to the officer in charge of the polygraph testing room was not the result of any polygraph test nor was it made in the course of the taking of a polygraph test. The fact that this statement, found by the court upon competent evidence on voir dire to have been made voluntarily, was made in the polygraph testing room is irrelevant on the question of its admissibility. Furthermore, it was the defendant, not the State, who brought to the attention of the jury the fact that the statement was made in that room.

[9] Mitchell, the key witness for the State, testified in detail as to the conspiracy, the attempt to carry out the planned robbery and the fatal shooting in the course of such attempt. He then testified that he had previously testified at the trial of Anthony Douglas Carey and the later trial of Harold Givens and had not "testified the same thing both times." On cross-examination, he testified that in the trial of Harold Givens, one week earlier, he had testified directly contrary to his present testimony and that he had given to Harold Givens a signed statement that "what I am saying on the stand today is a lie." On

redirect examination, over objection by the defendant, Mitchell testified that his inconsistent testimony in the previous trial of Givens and his said signed statement were the result of his having been beaten and threatened by Givens and Dorsey while they were all together in jail awaiting the trial of Givens following the trial of Anthony Douglas Carey. The ground of the defendant's objection was that the threatening statements to Mitchell were not made in the presence of the defendant. There is no merit in this objection. The testimony at this trial by Mitchell was not hearsay. It was not offered to show the truth of the threatening statements to him by Givens and Dorsey but to show the fact of those statements having been made and the bearing of that fact upon his inconsistent testimony at the three trials. This was his own in-court testimony as to why he had testified inconsistently at a former trial of another defendant. Mitchell was, of course, subject to cross-examination by this defendant in this trial concerning this and other aspects of his present testimony. We have examined other contentions of the defendant concerning the admissibility of evidence and find no merit therein. No purpose would be served by a discussion of these matters in detail.

For the error of the trial court in the matter of the interrogation of prospective jurors and in the limitation of the argument of defendant's counsel, there must be a new trial, but there is no merit in the other contentions presented by the defendant on this appeal.

New trial.

BURT E. RUCKER v. HIGH POINT MEMORIAL HOSPITAL, INC., AND HORACE HENRY STOVALL, M.D.

No. 81

(Filed 1 July 1974)

1. **Evidence § 50; Physicians, Surgeons, Etc. § 15— treatment of gunshot wounds — qualification of expert — familiarity with practices at accredited hospitals**

In an action against a hospital and a staff doctor in the hospital's emergency room to recover damages allegedly resulting from defendants' negligence in failing properly to treat a shotgun wound sustained by plaintiff in his lower leg, the trial court erred in exclud-

ing testimony by plaintiff's medical expert on the ground that the witness was not acquainted with the medical staff at defendant hospital and did not know about its facilities where defendant hospital was a fully accredited hospital, and the expert witness testified that he was familiar with duly accredited hospitals and that the standards and practices of such hospitals in the treatment of gunshot wounds of the extremities are essentially the same throughout the United States.

2. **Hospitals § 3; Master and Servant § 3; Physicians, Surgeons, Etc. § 11— emergency room physician — employee of hospital**

Contract of employment between a hospital and a staff physician in the hospital's emergency room established the relationship of employer and employee.

3. **Physicians, Surgeons, Etc. § 17— negligence in treating gunshot wound**

In an action against a hospital and a staff doctor in the hospital emergency room to recover damages allegedly resulting from negligence in failing properly to treat a shotgun wound in plaintiff's lower leg, issues of fact for the jury were raised by the pleadings, the evidence admitted tending to show that defendant doctor merely looked at the wound, instructed the nurse to give a shot and told plaintiff to see his own doctor, and the erroneously excluded testimony by plaintiff's medical expert that standard practice required x-rays and certain other studies in the treatment of shotgun wounds of the lower extremities.

ON *certiorari* to the North Carolina Court of Appeals to review its decision filed February 20, 1974 (20 N.C. App. 650, 202 S.E. 2d 610) ordering a new trial in this action which *Judge Lupton* dismissed at the close of the plaintiff's evidence. On November 13, 1970, the plaintiff, Burt E. Rucker, instituted this civil action in the Superior Court of GUILFORD County against the defendants, High Point Memorial Hospital, Inc., and Dr. Horace Henry Stovall, seeking to recover damages resulting from the defendants' alleged negligence in failing properly to treat the plaintiff's gunshot wounds sustained on November 22, 1969, as the result of a hunting accident.

The plaintiff's complaint alleged:

"1. Plaintiff is a resident of the City of High Point, Guilford County, North Carolina.

"2. Plaintiff is informed and believes that defendant High Point Memorial Hospital, Inc., is a North Carolina corporation organized and existing under and by virtue of law, and authorized to and was at all times herein mentioned engaged in operating and managing a fully accredited hospital in the City of High Point, North Carolina, acting

through and by its agents and servants, all within the course and scope of their employment.

"3. Plaintiff is informed and believes that defendant Horace Henry Stovall is a citizen and resident of Guilford County, North Carolina.

"4. Plaintiff is informed and believes that at all times herein mentioned, defendant Horace Henry Stovall, M.D., was a physician and surgeon duly licensed to practice medicine in the State of North Carolina, and was employed by defendant High Point Memorial Hospital, Inc., in its Emergency Room in High Point, North Carolina, where he held himself out to possess that degree of skill, ability and learning common to medical practitioners in said community and similar communities.

"5. On November 22, 1969, plaintiff Burt E. Rucker came under the consultation, advice, care, diagnosis and treatment of the defendants. Such was rendered as a result of an extensive shotgun injury which the plaintiff received on the lower part of his left leg earlier in the same day.

"6. The defendants were so negligent in the advice, care, consultation, diagnosis and treatment that was given, and were generally so negligent in the premises that as a proximate result of all such negligence, plaintiff suffered a severe, painful and disabling injury to his left leg as is hereinafter described in more detail.

"7. The resulting injuries and damages to the plaintiff were a proximate cause of the negligence and carelessness of the defendants.

"8. By reason of the aforesaid negligence and carelessness on the part of the defendants, plaintiff's left leg was allowed to develop into a gangrenous state. Extensive hospitalization and operative procedures have been required, and plaintiff is informed and believes they will be required in the future. Plaintiff has suffered pain, injury, mental anguish and disfigurement, as well as other difficulties and loss of enjoyment of life; and he is informed and believes that this will continue for the remainder of his natural life. He was required to expend sums of money for hospitalization, medical treatment and care, and incur other expenses with regard to this injury; and he is informed and believes

that this will continue into the future. Plaintiff missed time from and eventually lost his gainful employment in consequence of these injuries; and he is informed and believes that he is permanently disabled from working, and that he has been otherwise damaged in the sum of Two Hundred Fifty Thousand Dollars ($250,000.00)."

The defendant, Dr. Stovall, filed answer on December 30, 1970, admitting allegations 1, 2, 3, 4, and 5 of the complaint. Other allegations were denied. As further defenses, he alleged: (1) The complaint failed to state a cause of action upon which relief can be granted; (2) he gave the plaintiff emergency treatment and referred him to his regular physician for further treatment; (3) the plaintiff failed to go to his regular doctor as directed and in so doing failed to exercise due care for his own safety and his negligence caused or contributed to his injury and damages.

The defendant, High Point Memorial Hospital, Inc., filed answer admitting allegations 1, 2, and 3 in the complaint. Replying to allegation 4, the defendant denied that it employed Dr. Horace Henry Stovall or that he was an agent of the Hospital; and that in treating the plaintiff he was acting on his own behalf and not for the Hospital; his dealing with the plaintiff was in the nature of an independent contractor.

The defendant Hospital alleged these further defenses: (1) The plaintiff has not stated a claim upon which relief can be granted. (2) The plaintiff was guilty of contributory negligence in failing to seek continued medical treatment which failure caused and aggravated his injury and damages; and his own contributory negligence barred his right to recover.

A pre-trial conference was held at which the plaintiff listed the names of the expert witnesses he expected to call. The list included Dr. Julius L. Levy, but did not include Dr. Thomas Wood.

At the trial, the plaintiff offered evidence in material substance as here disclosed: On March 22, 1969, he and a companion, Gregory Palmer, were hunting rabbits in the woods near Mount Gilead in Montgomery County. At about ten o'clock in the morning Mr. Palmer fired his .12 gauge shotgun at a rabbit running through bushes. A part of the load of number four shot struck the plaintiff in the left leg between the knee and the

ankle. At the time, the hunters were about fifty feet apart. The shot pattern covered an area about the size of a man's hand. Approximately fifty pellets penetrated the plaintiff's leg.

Immediately following the accident, Mr. Palmer took the plaintiff to Dr. Armstrong, a general practitioner in Mount Gilead. Dr. Armstrong administered first aid and advised immediate hospitalization. The plaintiff was carried to the emergency room of the High Point Memorial Hospital in High Point, arriving at about 1:30 p.m. approximately three hours after the accident. The defendant, Dr. Stovall, was on duty as the staff physician in charge of the emergency facilities of the Hospital.

Dr. Stovall examined the wound, instructed the nurse "Just give him a shot," told the plaintiff to go home and apply heat treatment, and that his local doctor would be able to take care of his injury. Dr. Stovall did not give or advise x-ray examination of the wound and did not make any effort to have him admitted for further examination, treatment, or surgery and did not call a surgeon or other specialist to examine and treat the injury.

When the plaintiff arrived at home his doctor was not immediately available. During the next two days his pain became excruciating. His daughter returned him to the High Point Memorial Hospital. Another physician at the Hospital had the plaintiff admitted as a patient. X-ray examination disclosed the presence of "gas gangrene" in the injured leg. The plaintiff, under the direction of Dr. Parham, was removed to Duke Hospital at Durham.

The plaintiff remained in Duke Hospital for weeks undergoing numerous surgical operations to remove dead and infected tissue. In addition to his suffering, the plaintiff has lost seventy-five percent of the functional use of his leg. The loss is permanent.

The plaintiff called as his expert witness, Dr. Julius L. Levy who testified that he graduated from Tulane University in 1954 with a B.S. degree and in 1957 with an M.D. degree. He served his one year internship and four year's residency in surgery at Charity Hospital in New Orleans. The hospital had a capacity of 3,000 beds. During his residency in surgery he treated patients in practically every scope of medical and surgical involve-

ment. He was certified by the American Board of Surgery in 1963. Thereafter he practiced in Virginia and in various towns and cities in Mississippi and in Louisiana. He practiced in Clarksdale, Mississippi, a city of 32,000. He served two years in the Naval Hospital in Portsmouth, Virginia. He was one of five surgeons who supervised the surgical service and supervised twelve surgical residents and a varying number of interns in a fully accredited hospital of 1600 beds at Portsmouth, Virginia. "Accreditation for a hospital, to my knowledge, consists of passing an examination or inspection every other year by the Joint Commission on the Accreditation of Hospitals which, I believe, is a subsection of the American Medical Association. . . . To the best of my knowledge, every hospital I have practiced in has been a fully accredited hospital."

In June 1965, Dr. Levy joined the faculty of the Tulane University Medical School on a part-time basis and since 1965 has continued his private practice and his association with the University. "I am an Associate Professor of Surgery. I am a Fellow of the American College of Surgeons, the International College of Surgeons, and . . . . I belong to the Orleans Parish Medical Society, the Louisiana State Medical Society, The Southern Medical Association, the New Orleans Surgical Society, the Surgical Association of Louisiana, Southeastern Surgical Congress, among possibly others. . . . I am visiting surgeon at Charity Hospital; and I am consultant at Alexandria, Louisiana, Veterans' Memorial Hospital, at Huey P. Long Hospital, Charity Hospital in Alexandria, Louisiana, Lallie Kemp Charity Hospital in Independence, Louisiana; and I am a Consultant at the Keesler Air Force Base Hospital in Biloxi, Mississippi." Dr. Levy has practiced in cities the size of High Point and in cities larger and smaller.

Dr. Levy testified that he had kept up with the surgical practices and procedures in hospitals, other than those on whose staffs he served, by attending seminars, professional society meetings, by reading reports and medical journals, and by conferring with other doctors. "To the best of my knowledge, the treatment of gunshot wounds of the extremities is standard throughout the United States, among qualified surgeons."

He further testified: "I do not know of any variations of standards of the management of gunshot wounds of the lower extremities from any one community to another, not within the

United States. . . . In the case of a delayed inspection . . . the presence or absence of infection . . . testing of the portion of the leg past the injury, to determine whether any major nerves . . . had been damaged by the missiles. An x-ray would be necessary to determine whether or not there had been any bony involvement . . . it would be helpful in a shotgun wound to find out whether or not any of the pellets lay in proximity to the arteries . . . or the nerves. . . . [X]-ray would also be indicated to see the number of pellets present, because this would reflect the extent of the injury. These studies and examinations are absolutely standard for a shotgun injury to the lower extremity, between the knee and the ankle; I would say these were the minimum standards acceptable under the circumstances of a gunshot wound to the area below the knee." X-ray examination is standard. The evidence disclosed that Dr. Stovall superficially examined the injury, ordered an injection of an antibiotic and pain medication, and sent the plaintiff to his country doctor for further treatment.

Dr. Levy testified that in the various hospitals where he had practiced he had personally treated perhaps a thousand gunshot wounds of which as many as two hundred were shotgun wounds.

> " . . . There is no difference in the standards of treatment of gunshot wounds to the lower extremities in the hospitals where I have practiced in Clarksdale, Mississippi, in Norfolk, Virginia Naval Hospital, in Alexandria, Louisiana, in Biloxi, Mississippi, in Touro Infirmary in New Orleans, in Sara Mayo Hospital in New Orleans, East Jefferson Hospital in Metairie, Louisiana, or Lakeside Hospital in Metairie, Louisiana. From my attendance in seminars, reading of publications, my academic affiliations, my travels and speaking with other doctors, keeping up with the literature, to the best of my knowledge, the standards are the same around the United States; there is no difference in the standards."

Dr. Levy would have testified before the jury as above indicated. Judge Lupton, however, excluded the testimony for the reason that Dr. Levy stated he was not acquainted with the medical staff at High Point Memorial Hospital and did not know about its facilities. The exclusion of this testimony was the subject of plaintiff's Exception No. 3, Assignment of Error No. 2.

After the court had refused to permit Dr. Levy to testify, the plaintiff called Dr. Thomas Wood as its expert witness who would have testified, if permitted, as to the standards of care and treatment in High Point, or in similar communities, and that the treatment provided by Dr. Stovall and by the High Point Memorial Hospital did not measure up to required standards. However, the court refused to permit the examination and testimony of Dr. Wood on the ground that he had not been listed by the plaintiff as his expert witness.

At the conclusion of the plaintiff's evidence, the court allowed motions to dismiss made by Dr. Stovall and by High Point Memorial Hospital. On appeal, the North Carolina Court of Appeals ordered a new trial, holding, however, that the trial court had not committed error in refusing to permit the plaintiff to offer Dr. Levy's testimony before the jury. Our certiorari to the Court of Appeals brought the decision here for review.

Arch Schoch, Jr. and Ellis I. Kahn for plaintiff appellee.

Sapp and Sapp by Armistead W. Sapp, Jr. for defendant appellant High Point Memorial Hospital, Inc.

Perry C. Henson and Sammy R. Kirby for defendant appellant Horace Henry Stovall, M.D.

W. C. Harris, Jr. and Randolph L. Worth for North Carolina Hospital Association, Amicus Curiae.

HIGGINS, Justice.

[1] We agree with the conclusion of the North Carolina Court of Appeals that a new trial should be awarded in this case. However, we are of the opinion that the trial court committed error in excluding from the jury the testimony of Dr. Levy. Dr. Levy admitted that he was not familiar with the facilities of the defendant hospital and was not familiar with the members of its staff or with their qualifications. He testified he was familiar with the standards of practice and procedures in duly accredited hospitals and that they were essentially the same throughout the United States. However, the plaintiff alleged and both defendants admitted that the defendant High Point Memorial Hospital was engaged, at all times herein mentioned, in operating and maintaining *"a fully accredited hospital"* in the City of High Point. (Emphasis added.)

Dr. Levy testified that he is familiar with fully accredited hospitals and the standards and practices of such hospitals are essentially the same throughout the United States in the treatment of gunshot wounds; that the treatment of such wounds is standard; that x-ray examination is required to determine the extent of the injury and to determine what, if any, operative procedures should be followed.

The testimony that the treatment is essentially the same is by no means surprising. All shotguns are smooth bore. They perform uniformly as to range and penetration. The ammunition provided for shotguns is practically uniform throughout the United States. To his knowledge acquired through service, seminars, personal consultations, journals and periodicals, gunshot wounds and their treatment are not essentially different in any section of the United States. Insofar as applicable to a local doctor, the rules are stated in *Dickens v. Everhart,* 284 N.C. 95, 199 S.E. 2d 440; *Wiggins v. Piver,* 276 N.C. 134, 171 S.E. 2d 393; *Brune v. Belinkoff,* 354 Mass. 102, 235 N.E. 2d 793; *Naccarato v. Grob,* 384 Mich. 248, 180 N.W. 2d 788; *Murphy v. Little,* 112 Ga. App. 517, 145 S.E. 2d 760; *Geraty v. Kaufman,* 115 Conn. 563, 162 A. 33; *McElroy v. Frost,* 268 P. 2d 273 (Okla. 1954); *Riley v. Layton,* 329 F. 2d 53 (10th Cir.).

In this case, however, we are not dealing with a local country doctor. We are dealing with a *duly accredited hospital* and a member of its staff who was in charge of its emergency department. To begin with, a country doctor (Dr. Armstrong) gave first aid and sent the plaintiff to the defendant Hospital where he knew facilities were available for proper treatment of gunshot wounds.

Clearly the plaintiff's injury required facilities more advanced than were available in a country doctor's office. Dr. Armstrong knew this and sent the plaintiff to the hospital where proper facilities were available. Sound reason supports the view that gunshot wounds of the lower leg lend themselves most readily to uniform medical and surgical treatment without regard to locality. Not all injuries are so uniform and the treatment so generally well known and followed. The medical profession in Alaska, for example, would be informed and knowledgeable on the treatment of snow blindness, frozen feet, and frostbitten lungs, but they would be without experience in the treatment of rattlesnake bites. A Florida doctor would know

about the snake bites, but not about frozen feet. A gunshot wound would require the same treatment whether in Florida or Alaska.

Dr. Armstrong made the first examination, performed the functions of giving first aid and of sending the plaintiff to the hospital. There Dr. Stovall took over instead of calling a specialist who by x-ray could examine and determine the extent of the plaintiff's injury and determine what should be done in the treatment. Instead, Dr. Stovall looked at the wound, instructed the nurse to give a shot, and sent the plaintiff back to a country doctor. Dr. Stovall's duty as a staff doctor in the emergency department, as disclosed by the contract with the defendant Hospital, required him to "diagnose and treat all conditions except those requiring the services of a specialist. When the illness or injury is such that the services of a specialist is required, the Physician will provide emergency care . . . pending the arrival of the specialist on back-up call, who shall be called promptly."

Judge Lupton refused to permit Dr. Levy to testify as an expert witness. The Court of Appeals agreed with that ruling. Hence, in order that the ruling may not become the law of the case, we hold that Judge Lupton committed error in refusing to permit Dr. Levy to testify as an expert witness for the plaintiff.

[2] The Court of Appeals correctly held that the contract of employment between the High Point Memorial Hospital and Dr. Horace Henry Stovall established the relationship of employer and employee. The answer of the hospital alleged that Dr. Stovall was an independent contractor. Here quoted are pertinent parts of the contract of employment which was identified and offered in evidence as plaintiff's Exhibit No. 11.

> "It is the intention of the Hospital to engage a staff of four full time Physicians to provide professional coverage for the Hospital Emergency Department. To this end it is the desire of the above parties to enter into an agreement whereby the above named Physician will provide professional services, as hereinafter set forth, for the Emergency Department of the Hospital. The Hospital hereby engages the services of the above named Physician who by the execution of this agreement accepts an appointment as a member of the four man Emergency Department Staff.
>
> "It is mutually understood that each Physician member of the group, when on duty, will see all patients who present

themselves to the Emergency Department for professional care. The Physician on duty will diagnose and treat all conditions except those requiring the services of a specialist. When the illness or injury is such that the services of a specialist is required the Physician will provide emergency care as indicated by the condition of the patient pending the arrival of the specialist on back-up call, who shall be called promptly. All services of the Emergency Department Physicians are to be performed in a manner as to further the best interest of the hospital including the best possible care and treatment of the patient with special emphasis on the maintenance of good public relations.

"Physicians appointed to this service are required to be licensed to practice medicine in the state of North Carolina and prior to appointment they must become a member of the Medical Staff of the Hospital in the same manner as all other medical staff members."

[3] Our writ of certiorari brought the record here for the review. The office of the writ "extends to the review of all questions of jurisdiction, power, and authority of the inferior tribunal to do the action complained of . . . . " *Belk's Department Store, Inc. v. Guilford County,* 222 N.C. 441, 23 S.E. 2d 897; *Chambers v. Board of Adjustment,* 250 N.C. 194, 108 S.E. 2d 211; *Russ v. Board of Education,* 232 N.C. 128, 59 S.E. 2d 589. For that reason we have discussed matters not stressed by the Court of Appeals. We hold the pleadings, the evidence admitted, and that which was erroneously excluded, raise issues of fact to be resolved by the jury.

The decision of the Court of Appeals awarding a new trial is

Affirmed.

GARY P. SMITH, d/b/a HOLIDAY HEALTH CLUB, ROBERT THOMPSON AND PEGGY N. THOMPSON, d/b/a PEGGY'S HEALTH CLUB, JAMES B. EDGE, d/b/a ROMAN HEALTH CLUB, STEPHEN E. SCOTT, d/b/a TOUCH OF MAGIC, ON BEHALF OF THEMSELVES AND SUCH OTHER PERSONS, FIRMS AND CORPORATIONS AS ARE SIMILARLY AFFECTED BY SECTION 17-14.1 AND SECTION 17-12 OF THE CITY CODE OF THE CITY OF FAYETTEVILLE, NORTH CAROLINA, CONCERNING THE LICENSING OF MASSEURS AND MASSEUSES AND MASSAGE PARLORS AND HEALTH CLUBS IN THE CITY OF FAYETTEVILLE v. HERVEY KEATOR, ACTING CHIEF OF POLICE OF THE CITY OF FAYETTEVILLE, NORTH CAROLINA, OTTIS F. JONES, SHERIFF OF CUMBERLAND COUNTY, NORTH CAROLINA, AND JACK THOMPSON, DISTRICT ATTORNEY (DISTRICT SOLICITOR) OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF NORTH CAROLINA

No. 82

(Filed 1 July 1974)

1. **Statutes § 4— interpretation of statute in favor of constitutionality**

Where a statute or ordinance is susceptible to two interpretations —one constitutional and one unconstitutional—the court should adopt the interpretation resulting in a finding of constitutionality.

2. **Constitutional Law §§ 12, 14; Municipal Corporations § 32— massage parlor — regulation by city**

The operation of a massage parlor is a proper subject for regulation by a city.

3. **Constitutional Law §§ 12, 14; Municipal Corporations § 32— massage parlor ordinance — constitutionality**

In considering the Fayetteville massage parlor ordinance it is proper to infer that after a complaint is filed by the chief of police or other interested citizen, and after notice, a licensee is entitled to a hearing before the city council, and that the council will not be permitted to deny the application for a massage license or to revoke the same after issuance except upon reasonable grounds; when so construed, the licensing provisions of the ordinance meet the constitutional due process requirements.

4. **Constitutional Law § 20; Municipal Corporations § 32— massage parlor ordinance — no sex discrimination**

Since the prohibition in the Fayetteville massage parlor ordinance against massaging members of the opposite sex applies equally to both men and women, there is no discrimination whatsoever based on sex; furthermore, in light of the inherent character of the subject matter and the evil sought to be eliminated—namely, immoral acts likely to result from too intimate familiarity of the sexes—the classification is reasonable and not arbitrary and has a fair and substantial relation to the object of the ordinance.

APPEAL by plaintiffs pursuant to G.S. 7A-30(1) from the decision of the North Carolina Court of Appeals, reported in

21 N.C. App. 102, 203 S.E. 2d 411 (1974), reversing the judgment of *Braswell, J.*, at the 9 August 1973 Session of CUMBERLAND Superior Court.

The facts pertinent to this appeal are as follows: On 24 July 1972, for the stated purpose of protecting the general health, safety, welfare and morals of its citizens, the City of Fayetteville adopted Section 17-14.1 of its Code of Ordinances requiring a city license "for the privilege of carrying on the business, trade or profession of masseur or masseuse and for the operation or carrying on of the businesses, trade or professions commonly known as massage parlors, health salons, physical culture studios, clubs or establishments, or similar establishments by whatever name designated, wherein physical culture, massage, hydotherapy or other physical treatment of the human body is carried on or practiced." Each of the plaintiffs in this case was engaged in the business or profession of masseur or masseuse and prior to the institution of this case had been arrested for not obtaining a city license as required by Section 17-14.1.

On 3 August 1973 plaintiffs instituted this action to restrain and enjoin the enforcement of Section 17-14.1 on several grounds, one being that the city ordinance was unconstitutional. Those portions of the ordinance to which plaintiffs pointed as rendering the ordinance unconstitutional are subsections (e), (j), and (l). Subsections (c) and (d) set forth the requirements and procedures for applying for a license under the ordinance. Briefly stated, these subsections require an applicant for a license to furnish to the mayor and city council "written recommendations showing proof of good moral character" and "a health certificate from a medical doctor." Then subsection (e)—one of the three portions of the ordinance complained of and pertinent to this appeal—provides:

> "(e) *Issuance of License.* If such application is submitted in proper form and is approved by the city council, then the city tax collector is authorized to issue a business license to such applicant."

The other two portions of the ordinance complained of on this appeal are as follows:

> "(j) *Revocation of License.* Whenever, in the opinion of the chief of police of the city, there is good cause to

revoke a license acquired hereunder, he shall submit a written recommendation of revocation, stating the reasons therefor, to the mayor and the city council, and by registered mail shall forward to the licensee a copy of his recommendation. The city council shall thereupon be authorized to revoke such license if in its sound discretion it is deemed in the best interests of the health, safety, welfare or morals of the people of the city.

* * *

"(1) *Treatment of Persons of Opposite Sex Restricted.* It shall be unlawful for any person holding a license under this section to treat a person of the opposite sex, except under the signed order of a licensed physician, osteopath, chiropractor, or registered physical therapist, which order shall be dated and shall specifically state the number of treatments, not to exceed ten (10). The date and hour of each treatment given and the name of the operator shall be entered on such order by the establishment where such treatments are given and shall be subject to inspection by the police at any reaasonable time. The requirements of this subsection shall not apply to treatments given in the residence of a patient, the office of a licensed physician, osteopath or registered physical therapist, chiropractor, or in a regularly established and licensed hospital or sanitarium."

Plaintiffs also sought to restrain the enforcement of Section 17-12 of the Code of Ordinances. This section makes it unlawful to commence business without a license when, as in this case, the business is subject to a licensing ordinance. Following a hearing on 3 August 1973, Judge Braswell entered a temporary restraining order enjoining the defendant law enforcement officers from enforcing Sections 17-14.1 and 17-12 of the City Code. Upon the return of the temporary restraining order, a second hearing was conducted before Judge Braswell. Thereafter, on 20 August 1973, Judge Braswell, after noting that injunctive relief was "necessary to protect plaintiffs from irreparable injury to their property rights," entered an order restraining and prohibiting the defendant law enforcement officers from enforcing or attempting to enforce Sections 17-14.1 and 17-12 of the Code of Ordinances of the City of Fayetteville. In the same judgment Judge Braswell also ruled that Section 17-14.1 and the part of Section 17-12 dealing with massage parlors were invalid and

void, because, among other reasons, such ordinances were unconstitutional.

In his conclusions of law dealing with the constitutionality of Section 17-14.1, Judge Braswell noted that subsections (e) and (j) were unconstitutional in that they gave the chief of police and the city council the right to determine arbitrarily what is good for the public welfare, safety, health, and morals, guided only by their own ideas and not by narrow, objective, and definite standards. Furthermore, he noted, no procedure for a hearing is provided by the ordinance for one who stood to have his license revoked, and to allow the chief of police and the city council, without guidelines or standards, to revoke a license without a hearing was a violation of the due process clause.

In his conclusions of law dealing with subsection (l), Judge Braswell quoted with approval the following language from *J.S.K. Enterprises, Inc. v. City of Lacey,* 6 Wash. App. 43, 56, 492 P. 2d 600, 607 (1971): "Because it prohibits all massagists, not licensed under one of the other healing arts, from performing massages upon the opposite sex, without a reasonable basis for such a mandate, it constitutes discrimination on the basis of sex in contravention of the equal protection clause of the fourteenth amendment to the United States Constitution."

From the judgment entered, defendants appealed to the North Carolina Court of Appeals. That court, in an opinion by Judge Baley, reversed the judgment entered by Judge Braswell. We denied *certiorari* but plaintiffs appealed to this Court pursuant to G.S. 7A-30(1).

Butler, High & Baer; Christine Y. Denson for plaintiff appellants.

Nance, Collier, Singleton, Kirkman & Herndon by Rudolph G. Singleton, Jr., and Ocie F. Murray, Jr.; Clark, Clark, Shaw & Clark by Heman R. Clark for defendant appellees.

MOORE, Justice.

The only question before us on this appeal is the constitutionality of the ordinance in question. Plaintiffs contend that the ordinance is invalid because it violates the due process and equal protection clauses of the United States Constitution.

Plaintiffs first assert that the ordinance violates the due process clause of the Fourteenth Amendment by permitting the

city council to act arbitrarily in denying or revoking massage parlor licenses. Plaintiffs have not applied for a license, so the question of a denial or revocation has not been before the city council. Instead, plaintiffs seek a judgment declaring Section 17-14.1 of the City Code of Fayetteville unconstitutional.

The following statutes are pertinent to the authority which cities have to regulate and license occupations, trades, professions, and businesses.

G.S. 160A-194 in part provides:

> "A city may by ordinance, subject to the general law of the State, regulate and license occupations, businesses, trades, professions, and forms of amusement or entertainment and prohibit those that may be inimical to the public health, welfare, safety, order, or convenience. . . . "

G.S. 160A-174 in part provides:

> "(a) A city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances."

G.S. 160A-4 provides that in construing ordinances:

> "It is the policy of the General Assembly that the cities of this State should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect. . . . "

[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 to two interpretations—one constitutional and one unconstitutional—the Court should adopt the interpretation resulting in a finding of constitutionality. *State v. Frinks,* 284 N.C. 472, 201 S.E. 2d 858 (1974) ; *Randleman v. Hinshaw,* 267 N.C. 136, 147 S.E. 2d 902 (1966) ; *Finance Co. v. Leonard,* 263 N.C. 167, 139 S.E. 2d 356 (1964). And when the legislative body undertakes to regulate a business, trade, or profession, courts assume it acted within its powers until the contrary clearly appears. *Mitchell v. Financing Authority,* 273

N.C. 137, 159 S.E. 2d 745 (1968); *Roller v. Allen,* 245 N.C. 516, 96 S.E. 2d 851 (1957).

[2] In *Cheek v. City of Charlotte,* 273 N.C. 293, 160 S.E. 2d 18 (1968), this Court held that a city could regulate the operation of massage parlors. Justice Sharp, speaking for the Court, stated: "We hold that the occupation of a massagist and the business of massage parlors and similar establishments are proper subjects for regulation under the police power of the City of Charlotte." The Charlotte ordinance had the same provisions as those of the Fayetteville ordinance, except the Charlotte ordinance contained a provision exempting barbershops, beauty shops, and the health club activities of the YMCA and YWCA from its application. This Court held that there was no reasonable ground for those exemptions, and for that reason the ordinance was invalid. This unconstitutional feature is not found in the Fayetteville ordinance.

[3] Plaintiffs contend, however, that subsections (e) and (j) give the city council unlimited discretion to deny any application for a license or revoke any license already issued without a hearing. Under the due process clause, a city may not deny or revoke an occupational license arbitrarily or without notice and a hearing. As was stated in *State v. Parrish,* 254 N.C. 301, 118 S.E. 2d 786 (1961):

> "A license to engage in business or practice a profession is a property right that cannot be taken away without due process of law. The granting of such license is a right conferred by administrative act, but the deprivation of the right is a judicial act requiring due process. *Boyce v. Gastonia,* 227 N.C. 139, 41 S.E. 2d 355; *In re Carter,* 195 F. 2d 15 (D.C. 1951), cert. den. 342 U.S. 862; *In re Carter,* 177 F. 2d 75 (D.C. 1949), cert. den. 338 U.S. 900; *Laisne v. Board of Optometry,* 101 P. 2d 787 (Cal. 1940); *In re Greene,* 130 A. 2d 593 (D.C. 1957)."

Under Article I, Section 19, of the North Carolina Constitution, no person can be deprived of his property except by his own consent or the law of the land. The law of the land and due process of law are interchangeable terms and both import notice and an opportunity to be heard or defend in a regular proceeding before a competent tribunal. *Hagins v. Redevelopment Comm.,* 275 N.C. 90, 165 S.E. 2d 490 (1969); *Eason v. Spence,* 232 N.C. 579, 61 S.E. 2d 717 (1950); *Willner v. Com-*

mittee on Character & Fitness, 373 U.S. 96, 10 L.Ed. 2d 224, 83 S.Ct. 1175 (1963).

Justice Branch in *State v. Frinks, supra,* at 484, 201 S.E. 2d at 866, stated:

> " . . . [I]t 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."

See *Cox v. New Hampshire,* 312 U.S. 569, 10 L.Ed. 1049, 61 S.Ct. 762 (1941).

We approve and adopt the construction of the Fayetteville ordinance stated by our Court of Appeals as follows:

> " . . . The ordinance can be construed so as to avoid constitutional deficiencies. See Education Assistance *Authority v. Bank,* 276 N.C. 576, 174 S.E. 2d 551; *Milk Commission v. Food Stores,* 270 N.C. 323, 154 S.E. 2d 548. Subsection (j) should be construed to allow a licensee to appear before the city council and present his case before his license can be revoked. The subsection expressly provides that a licensee must be notified by registered mail whenever there is a proposal to revoke his license, and this notice procedure would be of no use if the licensee were not allowed to come before the council for a hearing. Subsection (e), likewise, should be interpreted in a manner that will satisfy the requirements of the due process clause; the city council should not be permitted to deny an application for a massage license except upon reasonable grounds, and after notice and a hearing. When interpreted in this way, the licensing provisions of the ordinance are entirely constitutional."

We consider it proper to infer, as did our Court of Appeals, that after a complaint is filed by the chief of police or other interested citizen, and after notice, the licensee would be entitled to a hearing before the city council, and that the council would

not be permitted to deny the application for a massage license or to revoke the same after issuance except upon reasonable grounds.

Plaintiffs' second contention is that subsection (l) of the massage parlor ordinance creates "an invidious and irrational classification based on sex." In *Cheek v. City of Charlotte, supra,* this Court upheld that part of a similar city ordinance forbidding massagists to treat persons of the opposite sex, and quoted with approval from Ex Parte Maki, 56 Cal. App. 2d 635, 133 P. 2d 64 (1943), as follows:

> "The ordinance applies alike to both men and women. . . . The barrier erected by the ordinance against immoral acts likely to result from too intimate familiarity of the sexes is no more than a reasonable regulation imposed by the city council in the fair exercise of police powers. . . .
>
> * * *
>
> "There is nothing in the ordinance that denies the equal protection guaranteed by the Fourteenth Amendment. It applies to all alike who give massages for hire and who are not licensed to practice one of the arts of healing. . . ."

See Tussman and tenBroek, *The Equal Protection of the Laws,* 37 Calif. L. Rev. 341, 343-47 (1949).

In *Patterson v. City of Dallas,* 355 S.W. 2d 838 (Tex. Civ. App. 1962), the Texas Court, after noting that the California case of Ex Parte Maki, supra, was so well decided that it was decisive of the appeal before them, held that a city ordinance declaring that it was unlawful to administer a massage to any person of the opposite sex was a fair exercise of the police power of the city that did not violate any constitutional rights of the licensees of the massage establishment. The Court stated that the ordinance bore a reasonable relation to the objects sought to be obtained, and that the ordinance was valid and constitutional. This case was appealed to the Supreme Court of the United States. That Court in a *per curiam* opinion dismissed the appeal stating, "The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question." 372 U.S. 251, 9 L.Ed. 2d 732, 83 S.Ct. 873 (1963).

Relying on and quoting extensively with approval from Ex Parte Maki, supra, the Supreme Court of Virginia in *Kisley v. City of Falls Church,* 212 Va. 693, 187 S.E. 2d 168 (1972),

held that ordinances regulating the operation of health clubs, massage salons, bath parlors, and similar establishments, and making it unlawful to operate a massage salon, bath parlor, or any similar type of business, where the service rendered to a customer was by a person of the opposite sex, were not unconstitutional as depriving the complainants of property rights without due process of law, or as denying them and their employees equal protection of the law. On appeal to the United States Supreme Court, the appeal was "dismissed for want of substantial federal question." 409 U.S. 907, 34 L.Ed. 2d 169, 93 S.Ct. 237 (1972). See also *Connell v. State,* 371 S.W. 2d 45 (Tex. Crim. App. 1963) ; *City of Houston v. Shober,* 362 S.W. 2d 886 (Tex. Civ. App. 1962) ; Annot., 51 A.L.R. 3d 936 (1973).

Despite the above discussed cases, plaintiffs contend that "though at one time it might have been said that discrimination based upon sex did not give rise to equal protection violations, this is certainly not the case today." Specifically, plaintiffs assert that in a recent case, *Reed v. Reed,* 404 U.S. 71, 30 L.Ed. 2d 225, 92 S.Ct. 251 (1971), the United States Supreme Court held for the first time that classifications that discriminate on the basis of sex are violative of the equal protection clause.

Prior to *Reed v. Reed,* the United States Supreme Court had consistently upheld the constitutionality of statutes applying differently to the different sexes under the "reasonable classification" or "rational basis" test. See *Hoyt v. Florida,* 368 U.S. 57, 7 L.Ed. 2d 118, 82 S.Ct. 159 (1961) ; *Goesaert v. Cleary,* 335 U.S. 464, 93 L.Ed. 163, 69 S.Ct. 198 (1948) ; *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 81 L.Ed. 703, 57 S.Ct. 578 (1937) ; *Muller v. Oregon,* 208 U.S. 412, 52 L.Ed. 551, 28 S.Ct. 324 (1908). For a general discussion of the reasonable basis test under the equal protection clause, see *Developments in the Law—Equal Protection,* 82 Harv. L. Rev. 1065, 1077-87 (1969).

In *Reed v. Reed* the United States Supreme Court reviewed an Idaho statute that provided a mandatory preference for males over females in selecting estate administrators within a given class of qualified persons. Although the Court invalidated the statute on the ground that it denied equal protection to women, this holding was based on the Court's determination that the statute lacked a rational basis. The Court did not hold that sex discrimination should be closely scrutinized for equal protection purposes as a suspect classification, thereby requiring the State to show it is necessary to promote a compelling

governmental interest. See *Dunn v. Blumstein,* 405 U.S. 330, 337-42, 31 L.Ed. 2d 274, 281-84, 92 S.Ct. 995, 1000-03 (1972); *McLaughlin v. Florida,* 379 U.S. 184, 191-92, 196, 13 L.Ed. 2d 222, 228, 231, 85 S.Ct. 283, 288, 290-91 (1964). To the contrary, it is apparent from the language used that the Court intended to continue passing on sexual classifications under the traditional equal protection test:

> "In applying [the equal protection] clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. [Citations omitted.] The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920)."

In a 1973 case, *Frontiero v. Richardson,* 411 U.S. 677, 36 L.Ed. 2d 583, 93 S.Ct. 1764 (1973), the Supreme Court considered federal statutes providing that a married female member of the armed services could receive increased housing assistance and obtain for her husband medical and dental care equivalent to that afforded members of the uniformed services only if she demonstrated that she was the source of funds for more than half of her husband's living expenses; a married serviceman, however, could obtain these benefits regardless of whether he provided funds for more than half of his wife's living expenses. Although the Court found this different treatment of servicemen and servicewomen unconstitutional and invalidated the statutes insofar as they withheld benefits from married servicewomen and their spouses who could not show that they met the dependency requirement, there was no majority opinion in the case. While a majority on the Court favored ruling that the challenged statutes constituted an unconstitutional discrimination against servicewomen, a majority of the Court was unwilling to find sex an inherently suspect classification requiring close judicial scrutiny.

In a case handed down on 24 April 1974, the Supreme Court shed further light on these two earlier holdings. In that case, *Kahn v. Shevin*, ___ U.S. ___, 40 L.Ed. 2d 189, 94 S.Ct. 1734 (1974), the appellant, a widower, contended that a Florida statute violated the equal protection clause in that it granted widows an annual $500 property tax exemption but did not offer an analogous benefit for widowers. The Florida Supreme Court, in rejecting the appellant's contention that the statute was violative of the equal protection clause because the classification "widow" was based upon gender, held that the classification was valid under *Reed v. Reed* because it had a "fair and substantial relation to the object of the legislation," that object being the reduction of "the disparity between the economic capabilities of a man and a woman." The United States Supreme Court affirmed, noting that under the authority of *Reed v. Reed* there can be no doubt "that Florida's differing treatment of widows and widowers 'rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation.' " Furthermore, the Court stated, "[t]his is not a case like *Frontiero v. Richardson*, 411 U.S. 677, where the Government denied its female employees both substantive and procedural benefits granted males *'solely* for administrative convenience.' Id., at 690." In concluding the Court stated: "A state tax law is not arbitrary although it 'discriminate[s] in favor of a certain class . . . if the discrimination is founded upon a reasonable distinction, or difference in state policy,' not in conflict with the Federal Constitution. . . . The statute before us is well within those limits."

Unlike the factual situations presented in *Reed v. Reed* and *Frontiero v. Richardson* wherein females were treated differently from males similarly situated, in the present case neither males nor females are treated differently from other males or females similarly situated. As stated in *Cheek v. City of Charlotte, supra:*

> " ' "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. Or, as the principle is more often expressed, when the law applies uniformly to all persons in like situation,—which of itself implies that the classification must have a reasonable basis, without arbitrary discrimination between those in like situation.' *State*

v. Glidden Co., supra [228 N.C. 664, 666, 46 S.E. 2d 860, 862]. *Accord, Motley v. Board of Barber Examiners,* 228 N.C. 337, 45 S.E. 2d 550."

[4] Since the prohibition against massaging members of the opposite sex applies equally to both men and women, we fail to discern any discrimination whatsoever based on sex. Admittedly, if the ordinance provided that male massagists could massage female patrons but that females could not massage males, a different situation would be presented. However, this is not the case under the ordinance in question. Furthermore, in light of the inherent character of the subject matter and the evil sought to be eliminated—namely, immoral acts likely to result from too intimate familiarity of the sexes—we hold the classification is reasonable and not arbitrary and has a fair and substantial relation to the object of the ordinance.

For the reasons stated, the decision of the Court of Appeals is affirmed.

Affirmed.

GASTON-LINCOLN TRANSIT, INC. v. MARYLAND CASUALTY COMPANY

No. 59

(Filed 1 July 1974)

1. **Equity § 1— maxim**

He who seeks equity must do equity.

2. **Insurance § 10— reformation of contract — payment of additional premiums**

Generally, when an insurance contract is reformed, equity requires the insured, as a condition to the equitable relief granted, to pay the insurer any additional premium lawfully due under the policy as reformed.

3. **Appeal and Error § 57— findings of fact — review on appeal**

Where the jury trial is waived, findings of fact supported by competent evidence are conclusive on appeal.

4. **Estoppel §§ 4, 8; Insurance § 10— reformation of policy — applicability of equitable estoppel**

In an action to reform an insurance policy by eliminating an endorsement purporting to limit the territorial coverage provided by the

policy, the doctrine of equitable estoppel was properly applied against defendant where the evidence showed that defendant failed to notify plaintiff of the endorsement to the renewal policies—conduct reasonably calculated to convey the impression that the renewal policy imposed no territorial restriction on the coverage; this was conduct which would lead a reasonably prudent person to believe that defendant intended for plaintiff to rely on its renewal policies to contain coverage as previously provided; and defendant had actual knowledge that the endorsement had been attached and that plaintiff was never informed of the change.

5. **Estoppel §§ 4, 8; Insurance § 10— reformation of insurance policy — applicability of equitable estoppel**

Evidence was sufficient to entitle plaintiff to the application of equitable estoppel where the evidence tended to show that plaintiff lacked knowledge that defendant had attached an endorsement to the insurance policy in question, and plaintiff had the right to rely upon the assumption that the renewal policy would contain the same terms as the original policy, and was thus legally and equitably excused from examining the renewal policy; plaintiff relied upon the conduct of defendant in that it renewed the policy and paid all premiums requested by defendant, assuming that the renewal policy covered all the business activities covered by the original policy; and plaintiff thus acted to its prejudice, retaining and paying premiums upon an insurance contract inadequate to cover its business activities, and has suffered much trouble and expense in prosecuting this action to reform the renewal policy and to recover for its losses under the policy as reformed.

6. **Estoppel §§ 4, 8; Insurance § 10— reformation of policy — payment of additional premiums not required**

Defendant which either intentionally, neglectfully or indifferently reduced insurance coverage of plaintiff without giving plaintiff notice was not entitled to recover additional premiums from plaintiff upon reformation of the policy by the court to provide full coverage.

7. **Insurance § 10— policy renewal — assumption that terms are same**

Generally, an insured in renewing his policy may rely upon the assumption that the renewal will be upon the same terms and conditions of the earlier policy, and therefore he is not bound by a reduction in the renewal policy where the change was not called to his attention at the time of renewal.

ON *certiorari* to the Court of Appeals to review its decision, 20 N.C. App. 215, 201 S.E. 2d 216, upholding judgment of *McLean, J.*, 7 May 1973 Session, GASTON Superior Court.

Civil action to reform an insurance policy by eliminating an endorsement purporting to limit the territorial coverage provided by the policy and to recover the sum of $10,000.00 for the loss by fire of a motor bus covered by the policy.

The parties waived trial by jury and agreed for the court to hear the evidence, find the facts, make conclusions of law, and enter judgment.

Based on the evidence adduced at the trial, Judge McLean found facts, and the findings pertinent to this appeal are summarized in the numbered paragraphs below:

1. Plaintiff is a North Carolina corporation, domiciled in Gaston County and engaged in the business of a motor carrier for hire on scheduled and charter operations as a carrier of passengers pursuant to authority granted by the North Carolina Utilities Commission and the Interstate Commerce Commission.

2. Defendant is a Maryland corporation with principal offices in Baltimore, Maryland, and at all times pertinent to this case engaged in the insurance business in North Carolina. The George A. Jenkins Agency, Inc., is defendant's agent in Gastonia, North Carolina.

3. For several years, particularly from December 31, 1966 to December 31, 1971, plaintiff was insured by defendant under Automobile Liability and Physical Damage Policies, and renewals of policies. All renewal policies since 1966 were issued through the George A. Jenkins Agency, Inc. The term of each policy, or renewal thereof, coincided with the calendar year. The following policies, pertinent to this case, were issued by defendant to plaintiff:

Policy No. 2-3662696, effective 31 December 1967 for one year.

Policy No. 2-3785758, effective 31 December 1968 for one year.

Policy No. 2-3895407, effective 31 December 1969 for one year.

Policy No. 2-3953208, effective 31 December 1970 for one year.

Each of the foregoing policies stated on its face that it was a renewal of the policy for the preceding year.

4. Defendant Maryland Casualty Company (not its agent in Gastonia) inserted in renewal policy No. 2-3895407, which covered the period of 31 December 1969 to 31 December 1970, an endorsement entitled "Auto 1145." The renewal policy No.

2-3953208 which covered the period of plaintiff's loss (31 December 1970 to 31 December 1971) contained an identical endorsement entitled "Auto 1145." This endorsement appeared for the first time in these two policies. It had never been attached to any other policy for any prior year. Said endorsement purported to restrict coverage to the operation of plaintiff's motor buses in a territory within 50 miles (as to some buses and 150 miles as to others) of the principal place of garaging of said buses. The principal place of garaging of plaintiff's buses was Gastonia, North Carolina, which is more than 150 miles from Louisville, Kentucky.

5. Renewal policy No. 2-3953208 was in full force and effect on 5 July 1971 when plaintiff's 1956 GMC Bus No. 104 (Serial No. PD 41041676) was totally destroyed by fire while on a charter trip to Louisville, Kentucky, and while in said city and state. Said bus was listed on the schedule of insured vehicles in the policy with coverage limited to the sum of $10,000.00. By reason of the fire plaintiff's bus was damaged in an amount exceeding $10,000.00.

6. Defendant received prompt notice of the loss and denied liability by reason of the "Auto 1145" endorsement.

7. Plaintiff did not learn that the endorsement "Auto 1145" had been attached to his renewal policies until approximately two days after the loss when it was called to plaintiff's attention by a representative of Maryland Casualty Company. Plaintiff had not read the renewal policies since 1966 when it called upon the George A. Jenkins Agency, Inc., to renew its coverage as it previously existed in the outstanding policy in force at the time of renewal and which defendant's agent agreed to do. Upon learning of the endorsement "Auto 1145" plaintiff discussed it with George A. Jenkins, President of the George A. Jenkins Agency, Inc., and he advised plaintiff that notwithstanding the report he had received from Maryland Casualty Company denying liability, plaintiff should not be concerned because "you will get your money."

8. Prior to the loss, neither Maryland Casualty Company nor its agent, the George A. Jenkins Agency, Inc., had given plaintiff any notice or information as to the insertion of "Auto 1145" endorsement in the renewal policy.

9. At the time of plaintiff's loss by fire on 5 July 1971, the policy then in force covered a total of forty buses then owned

and operated by plaintiff and its affiliated companies. Defendant's records show that the premium paid on policy No. 2-3895407 for the year 31 December 1969 to 31 December 1970 was $1,438.75; and the premium paid on policy No. 2-3953208 for the year 31 December 1970 to 31 December 1971 was $2,211.22.

10. Maryland Casualty Company deliberately and intentionally inserted endorsement "Auto 1145" in its renewal policy for the year preceding the policy period in which plaintiff's loss occurred without giving any notice thereof to its agent, the George A. Jenkins Agency, Inc., or to the plaintiff. Neither defendant nor its agent ever gave any notice to plaintiff that said endorsement had been attached to said renewal policies. Defendant's agent George A. Jenkins and the George A. Jenkins Agency, Inc., knew plaintiff was engaged in the operation of a charter bus business and regularly transported passengers for many miles beyond a 150-mile radius of Gastonia, North Carolina.

11. Each policy and renewal policy issued by defendant to plaintiff throughout their years of dealing with each other, including the policy in force at the time of plaintiff's loss, was written entirely by defendant. Defendant's conduct in inserting endorsement "Auto 1145" in the renewal policies in which said endorsement appears, without notice to plaintiff, constitutes inequitable and fraudulent conduct. Defendant had a duty to notify plaintiff of any alteration or change of coverage in any renewal policy at the time of its issuance. In the absence of such notice, plaintiff had a right to assume that defendant would renew the policies of insurance here in question on the same terms as the original policy and that the renewals would provide the same coverage. By inserting endorsement "Auto 1145" in the renewal policies without notice to plaintiff, the defendant materially changed the coverage purchased by plaintiff and plaintiff is entitled to have the renewal policies reformed to conform to the prior and original policy which did not contain said endorsement. Defendant had a duty to speak and advise plaintiff of any change of coverage upon issuance of a renewal policy. By its silence it practiced a fraud upon the plaintiff.

12. Plaintiff is entitled to reform the renewal policies by deleting the endorsement "Auto 1145" *without any further assessment of premiums*. By its conduct defendant has waived the

right, if any it had, to demand additional premiums and is estopped to claim any further payment of premiums.

Upon the foregoing findings of fact, and other findings not pertinent here, Judge McLean entered his conclusions of law and signed judgment (1) reforming policy No. 2-3895407 covering the period 31 December 1969 to 31 December 1970 and policy No. 2-3953208 covering the period 31 December 1970 to 31 December 1971 by deleting endorsement "Auto 1145"; and (2) awarding plaintiff the sum of $10,000.00 for the loss by fire of its motor bus with interest thereon from 5 July 1971 until paid, together with the costs of the action. This judgment was upheld by the Court of Appeals and we allowed certiorari for the limited purpose of reviewing that decision with respect to the question of additional premiums.

Basil L. Whitener and Anne M. Lamm, attorneys for plaintiff appellee.

Harry C. Hewson of Jones, Hewson & Woolard, attorney for defendant appellant.

HUSKINS, Justice.

Defendant contends that when equitable reformation of an insurance policy "expands" the coverage, equity requires the insured to pay the proper premium for the additional coverage. Two policies were reformed in this case by eliminating endorsement "Auto 1145" which restricted territorial coverage on plaintiff's buses to a 50-mile radius of Gastonia for some buses and a 150-mile radius for others. Defendant claims additional premiums of $816.00 on policy No. 2-3895407 (1969-70) and $4,007.00 on policy No. 2-3953208 (1970-71). We allowed certiorari for the limited purpose of reviewing the decision of the Court of Appeals on the premium question only.

The trial court found, *inter alia,* (1) that plaintiff is entitled to reformation of the renewal policies by deletion of the endorsement *without any further assessment of premiums,* and (2) that by its conduct defendant has waived the right, if any it had, to demand additional premiums and is estopped to claim any further payment of premiums.

[1] Defendant asserts in its petition for certiorari that the Court of Appeals, in upholding the trial court's denial of additional premiums, ignored the equitable maxim that "he who

seeks equity must do equity." Of course, this maxim is part of the rules and procedures applicable to equitable actions in this State. "One of the best known and most often reiterated maxims of equity is: 'He who seeks equity must do equity.' It is a mandatory application of the 'Golden Rule' in the field of law administration, and has been said to express the fundamental principle of equity jurisprudence." *Hairston v. Keswick Corp.*, 214 N.C. 678, 200 S.E. 384 (1939); *accord, Pinnix v. Casualty Co.*, 214 N.C. 760, 200 S.E. 874 (1939); *Bank v. McEwen*, 160 N.C. 414, 76 S.E. 222 (1912). *See generally*, 1 Story's Equity Jurisprudence §§ 69-75 (14th ed. 1918) and 2 Pomeroy on Equity §§ 385-396 (5th ed. 1941).

[2] Generally, when an insurance contract is reformed, equity requires the insured, as a condition to the equitable relief granted, to pay the insurer any additional premium lawfully due under the policy as reformed. *See Modica v. Hartford Accident and Indemnity Co.*, 236 Cal. App. 2d 588, 46 Cal. Rptr. 158 (1965); *Maier Brewing Co. v. Pacific National Fire Insurance Co.*, 218 Cal. App. 2d 869, 33 Cal. Rptr. 67 (1963); *Fireman's Fund Indemnity Co. v. Boyle General Tire Co.*, 392 S.W. 2d 352 (Tex. 1965). This equitable requirement simply applies the maxim "he who seeks equity must do equity" to the reformation of insurance contracts. With this principle in mind, we turn to the question whether, under the facts of this case, this maxim should be applied and plaintiff required to pay additional premiums.

In the case before us, there are specific findings, supported by competent evidence, of inequitable conduct by defendant. The trial judge, sitting as judge and jury, found that defendant by its conduct "has waived any right, if any it had, to demand additional or further payments by plaintiff and is estopped to claim or demand any further payment of premiums," and held that "defendant is not entitled to any recomputation of premiums for any period that it has insured the plaintiff. . . ."

[3] Where jury trial is waived, as here, findings of fact supported by competent evidence are conclusive on appeal. *Cogdill v. Highway Commission*, 279 N.C. 313, 182 S.E. 2d 373 (1971); *Huski-Bilt, Inc. v. Trust Co.*, 271 N.C. 662, 157 S.E. 2d 352 (1967). There is competent evidence in the record (and no evidence to the contrary) that defendant intentionally inserted endorsement "Auto 1145" in the renewal policies at its home office in Baltimore, Maryland, and did not disclose this change to

plaintiff. From the moment it learned of the accident, defendant has contended it was not liable, taking the position that plaintiff had been given notice. At trial, however, the only evidence presented by defendant even remotely pertaining to notice was a copy of plaintiff's 1968 policy (2-3785758) with endorsement "Auto 1145" attached, which was taken from the files of Maryland Casualty Company's Charlotte office. All the evidence presented by plaintiff showed that the George A. Jenkins Agency had no knowledge of the endorsement and that plaintiff had never been given notice of the endorsement and had no knowledge of it.

After hearing all the evidence, Judge McLean determined that as a result of its conduct, defendant was estopped, or had waived the right, to demand further payment of premiums. Although the terms *waiver* and *estoppel* are not synonymous, they are often used interchangeably with reference to insurance contracts, especially in cases of waiver implied from conduct. *Hospital v. Stancil,* 263 N.C. 630, 139 S.E. 2d 901 (1965); 28 Am. Jur. 2d, Estoppel and Waiver § 30 (1966). Thus the trial judge applied the doctrine of equitable estoppel, or estoppel *in pais,* in this case.

> "Estoppel by misrepresentation, or equitable estoppel (which is estoppel *in pais),* grows out of such conduct of a party as absolutely precludes him, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, *or of remedy,* as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either by contract or of remedy. This estoppel arises when anyone, by his acts, representations, or admissions, *or by his silence when he ought to speak out,* intentionally or through culpable negligence induces another to believe certain facts to exist, and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts." *Boddie v. Bond,* 154 N.C. 359, 70 S.E. 824 (1911) (emphasis added).

The essential elements of equitable estoppel in this jurisdiction are enumerated most precisely in *Hawkins v. Finance Corp.,* 238 N.C. 174, 77 S.E. 2d 669 (1953). We there said:

"The doctrine of estoppel by conduct—estoppel *in pais*—rests upon principles of equity. It is designed to aid the law in the administration of justice when without its aid injustice would result, the theory being that it would be against the principles of equity and good conscience to permit a party against whom the estoppel is asserted to avail himself of what must otherwise be his undisputed legal rights. *Long v. Trantham,* 226 N.C. 510, 39 S.E. 2d 384; *McNeely v. Walters,* 211 N.C. 112, 189 S.E. 114; *Scott v. Bryan,* 210 N.C. 478, 187 S.E. 756; *Stone v. Bank of Commerce,* 174 U.S. 412, 43 L.Ed. 1028.

"Therefore, in determining whether the doctrine of estoppel applies in any given situation, the conduct of both parties must be weighed in the balances of equity and the party claiming the estoppel no less than the party sought to be estopped must conform to fixed standards of equity. As to these, the essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be acted upon by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially. *Self Help Corp. v. Brinkley,* 215 N.C. 615, 2 S.E. 2d 889; *Bank v. Winder,* 198 N.C. 18, 150 S.E. 489; *Boddie v. Bond,* 154 N.C. 359, 70 S.E. 824; 19 Am. Jur., Estoppel, Sections 42 and 46."

[4] In applying the law to the facts of this case, we first focus on defendant to determine whether its conduct is that of a party against whom the doctrine of equitable estoppel applies. It appears from the record that (1) defendant failed to notify plaintiff of the endorsement to the renewal policies—conduct reasonably calculated to convey the impression that the renewal

policy imposed no territorial restriction on the coverage; (2) this is conduct which would lead a reasonably prudent person to believe that defendant intended for plaintiff to rely on its renewal policies to contain coverage as previously provided; and (3) defendant had actual knowledge that the endorsement had been attached and that plaintiff was never informed of the change.

[5] With respect to plaintiff, it is equally clear that its conduct is that of a party entitled to seek the equitable protection of the doctrine. The evidence shows: (1) Plaintiff lacked knowledge that the endorsement had been attached, and as held by the Court of Appeals in this case, 20 N.C. App. 215, 201 S.E. 2d 216 (1973), plaintiff had the right to rely upon the assumption that the renewal policy would contain the same terms as the original policy, and was thus legally and equitably excused from examining the renewal policy; (2) plaintiff relied upon the conduct of defendant in that it renewed the policy and paid all premiums requested by defendant, assuming that the renewal policy covered all the business activities covered by the original policy; and (3) plaintiff thus acted to its prejudice, retaining and paying premiums upon an insurance contract inadequate to cover its business activities, and has suffered much trouble and expense in prosecuting this action to reform the renewal policy and to recover for its losses under the policy as reformed.

[6] We conclude therefore that all the essential elements of equitable estoppel are satisfied by the evidence and that the trial court correctly applied this doctrine when it held that defendant is not entitled to collect additional premiums. Defendant's conduct is such that it would be against the principles of equity and good conscience to permit it to assert its otherwise undisputed right to receive additional premiums allegedly occasioned by reformation of the policy.

Defendant is in no position to assert that plaintiff must do equity in order to seek equity. "It is not every defendant who asserts this equitable defence, who is really entitled to it. He must not have conducted himself in such a manner, or placed conditions and circumstances about the plaintiff that would make it inequitable for him to avail himself of this defence. It may be, and frequently is the case, that but for the illegal or wrongful act of the defendant, no damage would have occurred, and hence, no cause of action would have arisen; and to permit him to set up this defence would be to give him an unjust ad-

vantage by reason of his own wrong." 1 Story's Equity Jurisprudence § 74 (14th ed. 1918).

[7] Plaintiff was not bound by the endorsement "Auto 1145." "Generally, an insured in renewing his policy may rely upon the assumption that the renewal will be upon the same terms and conditions as the earlier policy, and therefore he is not bound by a reduction in the renewal policy where the change was not called to his attention at the time of renewal." Annot., Renewal Policy—Reduction in Coverage, 91 A.L.R. 2d 546, § 2 (1963). Plaintiff was not negligent in failing to examine the renewal policy because it was entitled to assume that the terms of the new policy were the same as those of the expiring policy. *Setzer v. Insurance Co.*, 257 N.C. 396, 126 S.E. 2d 135 (1962); Annot., 81 A.L.R. 2d 7, § 16 at 71 (1962).

Here, defendant either intentionally, neglectfully or indifferently reduced the coverage without giving the notice that plaintiff was entitled to receive. Then, notwithstanding the fact that the rights of the parties were controlled by the terms of the original contract, defendant resisted plaintiff's claim through the trial court and two appellate courts in consequence of which plaintiff has been forced to devote much time to this matter and to expend large sums for legal fees. Under those circumstances, no equitable principle with which we are familiar requires plaintiff to pay additional premiums (alleged to be $816.00 on one policy and $4,007.00 on the other) in order to obtain the $10,000.00 coverage which, but for defendant's conduct, would have been received with no added expense.

[6] We hold that the doctrine of equitable estoppel, which is based on an application of the Golden Rule to the everyday affairs of men, is applicable in this case and precludes defendant, both at law and in equity, from asserting its right to recover additional premiums. *McNeely v. Walters*, 211 N.C. 112, 189 S.E. 114 (1937). Otherwise, either bad faith or careless business practices would be encouraged because the party at fault, made whole each time his mistake or neglect or intentional act is discovered, would have nothing to lose.

For the reasons stated, the decision of the Court of Appeals is

Affirmed.

IN THE MATTER OF: APPEAL OF McLEAN TRUCKING COMPANY, WINSTON-SALEM, NORTH CAROLINA, FROM AN ACTION OF THE FORSYTH COUNTY BOARD OF COMMISSIONERS PLACING THE TAXABLE SITUS OF CERTAIN OF THE APPELLANT'S OVER-THE-ROAD VEHICLES IN WINSTON TOWNSHIP (CITY OF WINSTON-SALEM), NORTH CAROLINA, AS OF JANUARY 1, 1969

No. 64

(Filed 1 July 1974)

1. **Appeal and Error § 42; Evidence § 1— records of Supreme Court — judicial notice**

The N. C. Supreme Court will take judicial notice of its own records.

2. **Taxation §§ 24, 25— interstate equipment of trucking company — tax situs**

Although the tax situs of a trucking company's interstate equipment for the year 1969 was Winston Township, neither the Forsyth County Board of Commissioners nor the County Board of Equalization and Review had authority to change the trucking company's tax listing from Broadbay Township to Winston Township at the time such change was undertaken because (1) the Board of Equalization and Review had finished its work and had adjourned prior to the attempted change in listing, and (2) as of the date of the attempted listing the equipment could not be listed as discovered property.

3. **Taxation §§ 24, 25— situs of taxable property — discovered property defined**

The phrase "discovered property" means property which the tax authorities have ascertained should have been listed for tax purposes by the owner but which was not so listed, as a result of which the property has escaped taxation, and that phrase was applicable to property of a trucking company listed in a township other than that of the situs of its home office so that the City of Winston-Salem was thereby empowered to list that property in Winston Township where the home office of the company was located and to collect taxes on the property for 1970 and for five years previous to that, with the exception of 1969, during which the property might have escaped taxation.

4. **Taxation § 24— tax situs — burden of proof**

The burden is on the taxpayer who contends that some portion of his taxable personal property is not within the taxing jurisdiction of his domicile to prove that the same property has acquired a tax situs in another jurisdiction, and the trucking company in this case failed to carry that burden.

5. **Judgments § 37— res judicata — matters concluded**

Generally, the plea of *res judicata* applies not only to the points upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject in litigation and which the parties, exercising reasonable

diligence, might have brought forward at the time and determined respecting it.

APPEAL by the City of Winston-Salem and Forsyth County from judgment of *Wood, J.*, 19 November 1973 Civil Session, FORSYTH Superior Court, certified for initial appellate review by this Court prior to determination by the Court of Appeals.

McLean Trucking Company (McLean) is incorporated in North Carolina and has its principal office in the City of Winston-Salem, the boundaries of which are coterminous with Winston Township in Forsyth County.

For many years prior to 1970 McLean listed its *interstate equipment* (tractors and trailers) for tax purposes in Broadbay Township outside the City of Winston-Salem, paying taxes thereon to the County but not to the City. This was allegedly done pursuant to a long-standing opinion of a former county attorney for Forsyth County.

Accordingly, in 1969 McLean listed its interstate equipment for tax purposes in Broadbay Township. The question arose as to whether such vehicles should have been listed for taxes in Winston Township and, following various conferences between attorneys for the City, the County, and McLean, the taxing officials concluded that McLean's interstate vehicles should be listed and taxed in Winston Township. On 10 September 1969 the Tax Supervisor for the City and County notified McLean of his intent to list the vehicles in Winston Township and requested McLean to agree that the valuation for tax purposes in Winston Township should be the valuation used by McLean in listing the vehicles in Broadbay Township. McLean declined to enter into such agreement; and on 17 September 1969 advised the Tax Supervisor that (1) the vehicles were properly listed for taxation in Broadbay Township and (2) in any event, he had no authority to change the listing to Winston Township for the reason that the time within which such change might have been made, if otherwise proper, had expired.

On 22 September 1969, the Forsyth County Board of Commissioners met and fixed the value of the vehicles in question at $4,318,560, the identical valuation at which they had been listed by McLean in Broadbay Township and upon which McLean had already paid the County taxes.

On 26 September 1969 the Tax Supervisor advised McLean that he was placing the vehicles on the tax books of Winston

Township for 1969 taxes at the valuation shown; and on 30 September 1969 he billed McLean for 1969 *City taxes* based upon such listing. McLean refused to pay this bill and appealed to the State Board of Assessment.

On 12 May 1970 the State Board of Assessment concluded, among other things, that the tax situs of the vehicles in question, as of 1 January 1969, was Winston Township and that the City of Winston-Salem was lawfully entitled to collect City taxes thereon for the year 1969. McLean petitioned for judicial review by the superior court.

The superior court affirmed the conclusions of the State Board of Assessment with respect to the tax situs of the property in question but remanded the matter to the State Board of Assessment on the question of valuation with directions to take additional evidence as to whether the property was taxable on an apportionment basis and, if so, to determine the proper apportionment. From that judgment McLean, the County and the City appealed to the Court of Appeals, and the case was certified for initial appellate review in the Supreme Court prior to determination by the Court of Appeals.

We held that the City's attempt to list the property in question in Winston Township for the calendar year 1969 was without legal effect because (1) the Board of Equalization and Review had finished its work and had adjourned prior to the City's attempt to make the listing; and (2) the equipment could not be listed as "discovered property." Even so, the opinion states that "Winston Township was the tax situs of these tractors and trailers as of 1 January 1969 and they should have been listed for 1969 taxes therein." *In re Trucking Co.*, 281 N.C. 242, 188 S.E. 2d 452 (1972).

For the year 1970, McLean again listed its interstate equipment in Broadbay Township. The Tax Supervisor for the City and County transferred the equipment to Winston Township, listed same there as "discovered property" for the year 1970, computed the City taxes for that year, *and also for the preceding five years.* McLean, contending that (1) the appraised valuation was excessive, (2) the correct valuation should be apportioned on the basis of the ratio of intrastate miles traveled by McLean vehicles to the total interstate miles traveled, and (3) the tax situs of these vehicles was Broadbay Township, sought relief from the County Board of Equalization and Review. That Board affirmed the determinations of the Tax Supervisor in all

of these respects and McLean appealed to the State Board of Assessment. The State Board made findings of fact and concluded, *inter alia:* (1) The County had valued the property in question in excess of its fair market value; (2) the taxable situs of the property was Winston Township; and (3) the property in question had acquired a partial tax situs outside North Carolina which should be taken into account. The County, the City and McLean petitioned for judicial review in the superior court.

The superior court entered judgment (1) affirming the finding of the State Board of Assessment that the tax situs of McLean's interstate equipment was Winston Township; (2) affirming the State Board's determination of the value of the vehicles; (3) reversing a portion of the State Board's order that certain items of McLean's rolling stock must be listed in certain counties other than Forsyth; and (4) remanding the matter to the State Board of Assessment for further consideration on the question of apportionment. The County, the City and McLean all appealed, and the case was certified for initial appellate review by the Supreme Court.

The decision of this Court (1) affirmed the finding that the tax situs of the vehicles in question for the year 1970 was Winston Township; (2) vacated the decision of the State Board of Assessment with respect to the value fixed for tax purposes for the year 1970; (3) vacated that portion of the State Board's decision which ordered McLean to list certain items of rolling stock in counties other than Forsyth; and (4) remanded the matter to the State Board of Assessment for determination by it of the true value in money as of 1 January 1970 of the property in question. *In re Trucking Co.*, 281 N.C. 375, 189 S.E. 2d 194 (1972).

Thereafter, and in due course, the Board of Aldermen of the City of Winston-Salem adopted a resolution instructing the tax officials to proceed with collection of taxes on McLean's interstate equipment for the five years prior to 1970 (1965 through 1969). Upon adoption of that resolution, McLean (1) appealed to the State Board of Assessment and (2) applied to the superior court for an injunction to prevent the City from collecting the taxes. The injunction was granted by the superior court over objection, and both the City and County appealed. Again, the matter was certified for initial appellate review in the Supreme Court prior to determination in the Court of Appeals.

This Court held: (1) That the tax situs of the property in question was and is Winston Township, and McLean's attempt to list said property in Broadbay Township was in contravention of the statute requiring a corporation to list all its personal property at the place of its principal office in this State; (2) that the City of Winston-Salem was legally empowered to list McLean's interstate tractors and trailers for taxation for the year 1970 as "discovered property" and collect taxes thereon; (3) that the City had the right to impose and collect taxes on said property for any years prior to 1970, not in excess of five, in which McLean's property escaped taxation, with one exception: The property in question may not be "discovered" and listed in Winston Township for the year 1969 because our decision in *In re Trucking Co.*, 281 N.C. 242, 188 S.E. 2d 452 (1972), as to the year 1969 is *res judicata* and not subject to collateral attack; and (4) that the restraining order entered by Judge Wood be vacated and the proceeding remanded for disposition in accord with the opinion. *In re Trucking Co.*, 283 N.C. 650, 197 S.E. 2d 520 (1973).

Following receipt of the Supreme Court decision, the City of Winston-Salem requested the State Board of Assessment to dismiss McLean's appeal to that Board, contending the decision had adjudicated all issues pending before the State Board of Assessment. The State Board denied said motion.

The City and County then tendered a judgment vacating the restraining order theretofore signed by Judge Wood insofar as it related to 1965, 1966, 1967 and 1968 taxes on the interstate equipment of McLean Trucking Company, and containing the following paragraph:

> "It is further ORDERED, ADJUDGED and DECREED that the City of Winston-Salem may proceed to levy and collect taxes for any years prior to 1970, not in excess of five, in which McLean's property escaped taxation, except that no taxes may be collected on said property for the year 1969."

Judge Wood rejected the proposed judgment and signed a judgment tendered by McLean, identical in all respects to the judgment tendered by the City and County, except the quoted paragraph which was omitted. To the refusal of the trial court to sign and enter the judgment tendered by the City, and to the entry of judgment tendered by McLean, the City and County

excepted and appealed. We certified the cause for initial review in this Court prior to determination by the Court of Appeals.

W. F. Womble and Roddey M. Ligon, Jr. of the firm of Womble, Carlyle, Sandridge & Rice, Attorneys for the City of Winston-Salem, appellant; P. Eugene Price, Jr., Attorney for Forsyth County, appellant.

Claude M. Hamrick and George E. Doughton, Jr., of the firm of Hamrick, Doughton and Newton, Attorneys for McLean Trucking Company, appellee.

HUSKINS, Justice.

[1] The foregoing chronology of this litigation is gleaned from the docketed records in the four appeals which have now been carried through this Court. The Supreme Court will take judicial notice of its own records. *Swain v. Creasman*, 260 N.C. 163, 132 S.E. 2d 304 (1963). Our decisions on the three previous appeals establish these propositions:

[2] 1. The tax situs of McLean's interstate equipment for the years 1969 and 1970 was Winston Township, the boundaries of which are coterminous with the corporate boundaries of the City of Winston-Salem. The property in question should have been listed therein for 1969 and 1970 taxes. *In re Trucking Co.*, 281 N.C. 242, 188 S.E. 2d 452 (1972); *In re Trucking Co.*, 281 N.C. 375, 189 S.E. 2d 194 (1972); *In re Trucking Co.*, 283 N.C. 650, 197 S.E. 2d 520 (1973).

2. Neither the Forsyth County Board of Commissioners nor the County Board of Equalization and Review had authority to change McLean's 1969 tax listing from Broadbay Township to Winston Township for two reasons: (1) The Board of Equalization and Review had finished its work and had adjourned prior to the City's attempt to make the listing; and (2) "as of the date of the attempted listing" the equipment could not be listed as "discovered property." We so held in *In re Trucking Co.*, 281 N.C. 242, 188 S.E. 2d 452 (1972). By reason of the Tax Supervisor's tardy attempt to change the listing of this property for 1969 at a time when the County Board of Equalization and Review was powerless to take such action, and our decision to that effect reported in 281 N.C. 242, the matter is *res judicata* as to the year 1969 and the property in question has permanently escaped taxation by the City for that year.

[3] 3. Our decision in *In re Trucking Co.*, 281 N.C. 242, 188 S.E. 2d 452 (1972), applies to taxation of the property in question *for the year 1969 only*. Its application was thus limited by our decision in *In re Trucking Co.*, 283 N.C. 650, 197 S.E. 2d 520 (1973). There, speaking through Justice Higgins, we held that the word "discovered" and the phrase "discovered property" are not synonymous, the former meaning "newly found, not previously known," while the latter means *property which the tax authorities have ascertained should have been listed for tax purposes by the owner but which was not so listed, as a result of which the property has escaped taxation.* That definition of "discovered property" was then applied to the facts in this controversy, and we specifically held that McLean's listing of its interstate equipment in Broadbay Township was insufficient to prevent application of the "discovered property" statute because (1) the listing in Broadbay Township was an *invalid* listing and (2) McLean was not authorized to list its tangible personal property anywhere except at the situs of its home office. The law thus written in *In re Trucking Co.*, 283 N.C. 650, 197 S.E. 2d 520 (1973), is authoritative with respect to the discovery, listing and taxation of the property in question for the year 1970 and for any or all of the years 1965, 1966, 1967 and 1968 in which said property escaped taxation by the City.

4. The City of Winston-Salem was and is legally empowered to list said property in Winston Township for taxation for the year 1970 as "discovered property" and collect taxes thereon for the year 1970 and, except for the year 1969, for each of the five years prior to 1970 in which said property escaped taxation. *In re Trucking Co.*, 283 N.C. 650, 197 S.E. 2d 520 (1973); G.S. 105-331(c), (e) as written prior to the 1971 revision. This means that the City of Winston-Salem may, after listing the property in Winston Township as discovered property, levy and collect taxes on same in any or all of the years 1965, 1966, 1967 and 1968 in which said property escaped taxation by the City.

5. The property in question must be appraised for purposes of taxation "at its true value in money" as of 1 January of each of the years 1965, 1966, 1967 and 1968. *In re Trucking Co.*, 281 N.C. 375, 189 S.E. 2d 194 (1972). If the parties cannot agree on its true value in money, resort may be had to the County Board of Equalization and Review and thereafter to the State Board of Assessment (now the Property Tax Commission) with judicial review by the courts as provided by law.

[4] 6. For the tax years 1965, 1966, 1967, 1968 and 1970 there was no statutory authority in this State for apportionment of the value of McLean's interstate equipment between or among the City and County where McLean's principal office is located and other taxing units in or out of this State. *In re Trucking Co.*, 281 N.C. 375, 189 S.E. 2d 194 (1972); *Transfer Corp. v. County of Davidson*, 276 N.C. 19, 170 S.E. 2d 873 (1969); G.S. 105-281 and G.S. 105-302(a) as written prior to the 1971 revision. The burden is on the taxpayer who contends that some portion of his taxable personal property is not within the taxing jurisdiction of his domicile to prove that the same property has acquired a tax situs in another jurisdiction. *Transfer Corp. v. County of Davidson, supra.* There is nothing in the present record or in any of the three previous records involving this matter which tends to show that any portion of McLean's property had acquired a non-domiciliary tax situs for any of the years 1965 through 1970. Hence, arguments at this late date concerning apportionment only becloud the fundamental question of liability for home town taxes.

Applying the enumerated legal principles to the case now before us, we hold:

(1) The restraining order heretofore signed by Judge Wood was vacated by this Court (283 N.C. at 656) and the judgment entered in this case upon remand must decree accordingly.

(2) The only questions open for administrative or judicial review are (a) whether the property in question escaped taxation by the City for any or all of the years 1965, 1966, 1967 and 1968, and (b) if so, whether the property has been appraised for tax purposes at its true value in money as of January 1 each year.

All other matters concerning the right of the City to discover, list and tax the property in question for the named years have been litigated and decided. *In re Trucking Co.*, 281 N.C. 375, 189 S.E. 2d 194 (1972); *In re Trucking Co.*, 283 N.C. 650, 197 S.E. 2d 520 (1973). To contend otherwise and say "there has been no determination in any forum with respect to McLean's rights to defend against the assessments for the years 1965 through 1968" is unrealistic and contrary to the facts and the law contained in the cited cases.

[5] Public policy requires that there be an end to litigation. The decisions of this Court in this matter are *res judicata* and

estop McLean from raising the same issues in the future. "The general rule is that judgment of a court of competent jurisdiction is final and binding upon parties and privies. Ordinarily, to constitute a judgment an estoppel there must be an identity of parties as well as of the subject matter. In scope of operation with respect to the subject matter 'it is not only final as to the matter actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have had decided. . . . The court requires parties to bring forward the whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect to matters which might have been brought forward as part of the subject in controversy . . . The plea of *res adjudicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject in litigation and which the parties, exercising reasonable diligence, might have brought forward at the time and determined respecting it.' Herman on Estoppel and Res Judicata, sec. 122, p. 130, and sec. 123, p. 131." *Gibbs v. Higgins*, 215 N.C. 201, 1 S.E. 2d 554 (1939). *Accord, Walker v. Story*, 256 N.C. 453, 124 S.E. 2d 113 (1962); *State v. Burell*, 256 N.C. 288, 123 S.E. 2d 795 (1962); *Hayes v. Ricard*, 251 N.C. 485, 112 S.E. 2d 123 (1960).

[3] The judgment appealed from is vacated and the proceeding is remanded to the Superior Court of Forsyth County for entry of judgment decreeing that:

1. The restraining order entered by Judge Wood on 25 January 1973 be vacated.

2. The City of Winston-Salem may proceed to list the property in question in Winston Township as discovered property and may levy and collect City taxes thereon for the year 1970 and for any of the years 1965, 1966, 1967 and 1968 in which the property escaped taxation by the City.

3. Costs shall be taxed against McLean Trucking Company.

Vacated and remanded.

DOUGLAS WAYNE ROBERTSON, AN INFANT, BY AND THROUGH HIS GUARDIAN AD LITEM, SAMUEL B. ROBERTSON v. CARPER S. STANLEY, JR.

No. 75

(Filed 1 July 1974)

1. **Trial § 52— excessive or inadequate damages — setting aside verdict**

The granting or the denying of a motion for a new trial on the ground that the damages assessed by the jury are excessive or inadequate is within the sound discretion of the trial judge.

2. **Appeal and Error § 42; Damages § 16— instruction on damages — omission from record — presumption**

Where the judge's charge was not included in the record in a personal injury action, it is presumed that the judge correctly instructed the jury on all issues and told them that if the minor plaintiff had been injured by defendant's negligence and had not contributed to his injury by his own negligence, he was entitled to a reasonable satisfaction for actual suffering, both physical and mental, which were the immediate and necessary consequences of his injuries.

3. **Damages §§ 3, 15; Trial § 52— personal injury — sufficiency of evidence of damages**

Where the evidence tended to show that the minor plaintiff was hospitalized three times for approximately twenty-six days, that he was operated upon twice and has a permanent scar on his shoulder, and that he suffered pain over an extended period of time, jury verdict that defendant was negligent and that minor plaintiff was not contributorily negligent and that awarded only the exact amount of medical expenses claimed by plaintiff father but no damages to minor plaintiff for actual pain and suffering was contrary to the instructions of the trial court, inconsistent, and therefore improper and invalid.

4. **Appeal and Error § 62— partial new trial — error relating to one issue**

The court will generally grant a partial new trial when the error or reason for the new trial is confined to one issue which is entirely separable from the others and it is perfectly clear that there is no danger of complication; however, the granting of a partial new trial is entirely within the discretion of the court.

5. **Appeal and Error § 62— damages — partial new trial denied**

Where there was ground for a strong suspicion that the jury awarded no damages to minor plaintiff as a result of a compromise on the issues involving defendant's negligence and plaintiff's contributory negligence, error in assessing damages tainted the entire verdict, and it would therefore be unfair to the defendant to order a partial new trial on the issue of damages alone.

PLAINTIFF appeals from decision of the Court of Appeals, 21 N.C. App. 55, 203 S.E. 2d 83 (1974), upholding judgment of *Kivett, J.*, 9 April 1973 Session, ROCKINGHAM Superior Court.

Civil action by Douglas Wayne Robertson, minor plaintiff, to recover compensatory damages for personal injuries alleged to have been caused by defendant's negligence.

Plaintiff's evidence—defendant offered none—tends to show that he was nine and one-half years old on 10 August 1968 when his injuries were sustained. He was lying in the grass "in front of the front row of speakers at a drive-in theater watching the movie." There are driveways between the rows of speakers for traffic to come in and out of the theater, but there is no driveway in front of the front row of speakers. There is nothing between the front row of speakers and the screen except a grassy plot. Plaintiff was rolled up in a quilt to keep warm and was lying in this grassy area. The floodlights came on at the end of the movie and defendant, apparently to avoid a traffic jam forming near the exit, left the driveways constructed for vehicular use between the rows of speakers and drove across the grassy plot in front of the first row of speakers, striking plaintiff as he lay in the grass rolled up in his quilt.

As a result of the accident plaintiff suffered a dislocation of his right sternoclavicular joint requiring hospitalization on three occasions for a total of twenty-six days and two operations. The only permanent injury he suffered was a residual scar on his right shoulder.

Plaintiff brought suit to recover for his personal injuries, including pain and suffering, alleging that he had been damaged in the sum of $25,000.00. Plaintiff's father, George Dillard Robertson, brought suit to recover medical expenses (stipulated to be $1970.00) incurred by reason of his son's injury. The cases were consolidated for trial. Issues were submitted to the jury and answered as follows;

> "1. Were the plaintiffs, Douglas Wayne Robertson and George Dillard Robertson injured and damaged by the negligence of the defendant, Carper S. Stanley, Jr., as alleged in the complaint?
>
> ANSWER: Yes.
>
> 2. If so, did the plaintiff, Douglas Wayne Robertson, by his own negligence, contribute to the injuries and damages as alleged in the Answers?
>
> ANSWER: No.

3. What amount, if any, is the plaintiff, Douglas Wayne Robertson, entitled to recover of the defendant, Carper S. Stanley, Jr., for personal injury?

ANSWER: None.

4. What amount, if any, is the plaintiff, George Dillard Robertson entitled to recover of the defendant, Carper S. Stanley, Jr., for medical expenses?

ANSWER: Full Amount $1970.00."

Pursuant to Rule 59(a), Rules of Civil Procedure, plaintiff moved for a new trial solely on the third issue—the amount of damages recoverable by the minor plaintiff. The motion was denied and judgment was entered (1) that the minor plaintiff recover nothing of defendant, (2) that George Dillard Robertson, plaintiff's father, recover $1970.00, and (3) that defendant pay the costs of both actions. The Court of Appeals upheld that judgment with Vaughn, J., dissenting. The plaintiff thereupon appealed to the Supreme Court pursuant to G.S. 7A-30(2), assigning as error the denial of his motion for a new trial on the third issue.

Harrington & Stultz by Thomas S. Harrington, Attorney for the plaintiff appellant.

Joseph E. Elrod III, of the firm Henson, Donahue & Elrod, Attorney for defendant appellee.

HUSKINS, Justice.

Denial of his motion for a new trial on the issue of damages constitutes plaintiff's sole assignment of error. He contends the verdict is invalid *as a matter of law* and that the trial judge was duty bound to set it aside on the third issue and grant a new trial on the question of damages. On the other hand, defendant contends that denial of plaintiff's motion for a new trial on the damages issue was a discretionary act of the trial judge from which, absent abuse of discretion, no appeal lies.

[1] The rule is well established that "[t]he granting or the denying of a motion for a new trial on the ground that the damages assessed by the jury are excessive or inadequate is within the sound discretion of the trial judge." *Hinton v. Cline,* 238 N.C. 136, 76 S.E. 2d 162 (1953). *Accord, Brown v. Griffin,* 263 N.C. 61, 138 S.E. 2d 823 (1964); *Dixon v. Young,* 255 N.C. 578, 122

S.E. 2d 202 (1961). Even so, we are of the opinion that the quoted rule is inapplicable in this case because the verdict is contrary to law, inconsistent, invalid and should have been set aside *ex mero motu.*

In the consolidated trial of the actions—one by the father for medical expenses and the other by the son for personal injuries—the following was stipulated by counsel and read to the jury: "In addition to the other stipulations contained herein, the parties stipulate and agree with respect to the following undisputed facts. . . . That at the time of the accident, said Douglas Wayne Robertson was struck by an automobile being operated by the defendant. As a result of the accident, Douglas Wayne Robertson suffered a dislocation of his right sternoclavicular joint which resulted in his hospitalization on three occasions and caused George Dillard Robertson [his father] to incur expenses in the amount of one thousand nine hundred and seventy dollars." This judicial admission conclusively established in both cases the amount of medical expense incurred by the father and that the injury suffered by the son was the proximate result of being struck by defendant's automobile. This left for jury determination the questions of negligence, contributory negligence, and the amount of damages, if any, Douglas Wayne Robertson, the minor son, was entitled to recover.

In support of his claim for damages for pain and suffering and the residual scar on his shoulder, the minor plaintiff offered evidence tending to show that he was hospitalized three times for approximately twenty-six days as a result of the accident; that he was operated upon twice and has a permanent scar on his right shoulder from the operations; that he suffered pain over an extended period of time and that even to the date of the trial his shoulder hurt when he attempted to lift heavy objects; and that he was given medication to relieve the pain and suffering. Defendant offered no evidence at the trial; hence, plaintiff's evidence is uncontradicted.

[2] Since the judge's charge is not included in the record, it is presumed that the jury was instructed correctly on every principle of law applicable to the facts. *Long v. Honeycutt,* 268 N.C. 33, 149 S.E. 2d 579 (1966); *Jones v. Mathis,* 254 N.C. 421, 119 S.E. 2d 200 (1961); *Moore v. Humphrey,* 247 N.C. 423, 101 S.E. 2d 460 (1958); *White v. Lacey,* 245 N.C. 364, 96 S.E. 2d 1 (1957). Accordingly, we presume that the trial judge correctly instructed the jury on all issues and, with respect to the third

issue, told the jury among other things that if the minor plaintiff had been injured by defendant's negligence and had not contributed to his injury by his own negligence, he was entitled to a reasonable satisfaction for actual suffering, both physical and mental, which were the immediate and necessary consequences of his injuries.

"The law is well settled in this jurisdiction that in cases of personal injuries resulting from defendant's negligence, the plaintiff is entitled to recover the present worth of all damages naturally and proximately resulting from defendant's tort. The plaintiff, *inter alia,* is to have a reasonable satisfaction for actual suffering, physical and mental, which are the immediate and necessary consequences of the injury. The award is to be made on the basis of a cash settlement of the plaintiff's injuries, past, present, and prospective. In assessing prospective damages, only the present cash value or present worth of such damages is to be awarded as the plaintiff is to be paid in advance for future losses. . . . Generally, mental pain and suffering in contemplation of a permanent mutilation or disfigurement of the person may be considered as an element of damages, and it would seem that the weight of authority is to that effect." *King v. Britt,* 267 N.C. 594, 148 S.E. 2d 594 (1966). It should be noted that we do not state the entire rule for compensatory damages for injury to the person but only so much of it as is strictly relevant to this case. Here, plaintiff was a nine and one-half year old boy. His nursing and medical expenses were recoverable by his father. He was not employed and suffered no loss of wages. He has no permanent disability by reason of his injury. His capacity to earn money is not involved unless he could show that the scar on his shoulder is such a permanent mutilation or disfigurement as to mar his appearance to the extent that it lessens or reduces his opportunities to obtain remunerative employment in the future. Hence the measure of damages in this particular case is a reasonable satisfaction for actual suffering, both physical and mental, which are the immediate and necessary consequences of his injuries. Mental pain and suffering resulting from the permanent scar on his shoulder, if any be shown, may be considered as an element of damages; and if it be shown that the scar mars his appearance to such an extent that his opportunities to obtain remunerative employment in the future are lessened, then such evidence may be considered as an element of damages. *King v. Britt, supra. See Marshburn v. Patterson,* 241 N.C. 441, 85 S.E. 2d 683 (1955).

Notwithstanding the uncontradicted evidence of pain and suffering and the instruction of the judge on the law, the jury found that Douglas Wayne Robertson had been injured by the negligence of the defendant with no contributory negligence on his part and yet found he had suffered no compensable damages for pain and suffering and permanent scarring. Under such circumstances, with the evidence of pain and suffering clear, convincing and uncontradicted, it is quite apparent that the verdict is not only inconsistent but also that it was *not rendered in accordance with the law.* Such verdict indicates that the jury arbitrarily ignored plaintiff's proof of pain and suffering. If the minor plaintiff was entitled to a verdict against defendant by reason of personal injuries suffered as a result of defendant's negligence, then he was entitled to *all* damages that the law provides in such case.

Many cases from other jurisdictions hold that a verdict allowing the exact amount of medical expenses, but awarding nothing for pain and suffering where claim therefor was properly made and clearly proven, is invalid and cannot stand. See Annot., Verdict Omitting Damages for Pain, 20 A.L.R. 2d 276 (1951). In some cases the appellate court granted a new trial on the ground that such a verdict is contrary to the instructions of the trial court on the issue of damages and is therefore improper and invalid. *Murrow v. Whiteley,* 125 Colo. 392, 244 P. 2d 657 (1952); *Browder v. Beckman,* 275 Ill. App. 193 (1934); *Timmerman v. Schroeder,* 203 Kan. 397, 454 P. 2d 522 (1969); *Wall v. Van Meter,* 311 Ky. 198, 223 S.W. 2d 734 (1949); *Fordon v. Bender,* 363 Mich. 124, 108 N.W. 2d 896 (1961); *Gomes v. Roy,* 99 N.H. 233, 108 A. 2d 552 (1954); *Lehner v. Interstate Motor Lines, Inc.,* 70 N.J. Super. 215, 175 A. 2d 474 (1961).

In other cases the appellate court held that such a verdict is inconsistent and therefore invalid. *Pickel v. Rosen,* 214 So. 2d 730 (Fla. Ct. App. 1968); *Burkett v. Moran,* 410 P. 2d 876 (Okla. 1965); *Hall v. Cornett,* 193 Ore. 634, 240 P. 2d 231 (1952).

In *Edmondson v. Keller,* 401 S.W. 2d 718 (Tex. Civ. App. 1966), the appellate court granted a new trial on the ground that the verdict "was against the greater weight and preponderance of the evidence because the undisputed evidence shows the plaintiff sustained substantial injuries or in any event some damages. . . . The amount of damages is largely within the jury's

discretion. However, they must award something for every element of damage resulting from an injury."

In *Gallentine v. Richardson*, 248 Cal. App. 2d 152, 56 Cal. Rptr. 237 (1967), the appellate court held that "where damage is proven as a proximate result of defendant's negligence, the exact amount of plaintiff's special damages are awarded, and no award is made for the detriment suffered through pain, suffering, inconvenience, shock or mental suffering. . . [such] award . . . is inadequate *as a matter of law*." (emphasis added.)

In *Todd v. Bercini*, 371 Pa. 605, 92 A. 2d 538 (1952), the jury awarded the exact amount of the medical expenses but nothing for pain and suffering. In affirming the trial court's award of a new trial, the Pennsylvania Supreme Court said:

> "A trial is a systematic, organized procedure for determining the truth and awarding justice with precision, to the extent that precision can be ascertained through fallible human agencies. A trial is not to be a mere conscious *approximation of reality*. It is not the province of a jury to decide *generally* the issue presented to it for decision, in the spirit of boundless generosity or restrained benevolence. If Mrs. Todd was entitled to a verdict from the defendant because of the injuries he inflicted upon her as the result of his negligence, she was entitled to *all* that the law provides in such a case. And the items of pain, suffering and inconvenience . . . are inevitable concomitants with grave injuries . . . . A jury may not eliminate pain from wounds when all human experience proves the existence of pain . . . . When it is apparent that a jury by its verdict holds the defendant responsible for a whole loaf of bread, it may not then neglectfully, indifferently, or capriciously cut off a portion of that loaf as it hands it to the plaintiff."

There is some authority to the contrary. In *City of Miami v. Smith*, 165 So. 2d 748 (Fla. 1964), the jury returned a verdict for the exact amount of medical expenses claimed by plaintiff in his action to recover for injuries sustained when he fell on an allegedly defective portion of sidewalk. The Florida Supreme Court held that denial of plaintiff's motion for a new trial was not an abuse of discretion by the trial judge. The Court reasoned that such a verdict did not conclusively show that all elements of damage were not considered and that "the jurors may well have concluded that although there was in fact no com-

pensable pain and suffering, the petitioner, nevertheless, had incurred medical expense and was to that extent entitled to recover."

In *Leizear v. Butler,* 226 Md. 171, 172 A. 2d 518 (1961), the jury awarded plaintiff his medical expenses and lost wages but awarded nothing for pain and suffering. While recognizing that appellate courts in other jurisdictions had granted new trials for failure of the jury to award damages for pain and suffering, the Maryland court held its "firmly established" rule that the appellate court would "rarely, if ever" review the actions of the trial court in allowing or refusing a new trial for excessive or inadequate damages, was controlling.

[3] In keeping with the weight of authority in other jurisdictions, we hold that the verdict in this case is contrary to the instructions of the trial court, is inconsistent, and therefore improper and invalid. The trial judge on his own motion should have set the verdict aside and ordered a new trial on all issues. Since he did not do so and denied plaintiff's motion for a *partial* new trial, we must now decide whether it is proper under the circumstances (1) to order a partial new trial on the issue of damages alone, (2) to order a new trial on all issues, or (3) to let the judgment stand.

[4] "It is settled beyond controversy that it is entirely discretionary with the Court, Superior or Supreme, whether it will grant a partial new trial. It will generally do so when the error, or reason for the new trial, is confined to one issue, which is entirely separable from the others and it is perfectly clear that there is no danger of complication." *Lumber Co. v. Branch,* 158 N.C. 251, 73 S.E. 164 (1911). *Accord, Paris v. Aggregates, Inc.,* 271 N.C. 471, 157 S.E. 2d 131 (1967); *Jenkins v. Hines Co.,* 264 N.C. 83, 141 S.E. 2d 1 (1965). Before a partial new trial is ordered, "it should clearly appear that no possible injustice can be done to either party." *Jarrett v. Trunk Co.,* 144 N.C. 299, 56 S.E. 937 (1907).

Courts are reluctant to grant a new trial as to damages alone unless it is clear that the error in assessing damages did not affect the entire verdict. The rule is stated as follows:

> "As a condition to the granting of a partial new trial, it should appear that the issue to be tried is distinct and separable from the other issues, and that the new trial can

be had without danger of complications with other matters. Particularly is this true where the error in the verdict relates to the amount of damages assessed and it appears that this error was not the result of any ruling by or charge from the trial judge, but was committed solely by the jury itself after retiring to consider its verdict; in such a case it is difficult to say that the entire verdict was not affected by the cause from which resulted the error in the amount of damages." 58 Am. Jur. 2d, New Trial, § 25 (1971).

"Where it appears that the verdict was the result of a compromise, such error taints the entire verdict and requires a new trial as to all of the issues in the case. If the award of damages to the plaintiff is 'grossly inadequate,' so as to indicate that the jury was actuated by bias or prejudice, or that the verdict was a compromise, the court must set aside the verdict in its entirety and award a new trial on all issues." 58 Am. Jur. 2d, New Trial, § 27 (1971).

The limitations expressed in the quoted rule are supported by a multitude of cases. See annotations in 98 A.L.R. 941 (1935) and 29 A.L.R. 2d 1199 (1953) and cases cited. In the latter annotation a vast number of cases are cited for the proposition that "[a] new trial as to damages alone should not be granted where there is ground for a strong suspicion that the jury awarded inadequate damages to the plaintiff as a result of a compromise involving the question of liability." 29 A.L.R. 2d 1199, § 10 (1953).

[5] Under the circumstances here presented, there is ground for a strong suspicion that the jury awarded no damages to the minor plaintiff as a result of a compromise on the first and second issues involving the question of liability. For that reason we think the error in assessing damages tainted the entire verdict and it would therefore be unfair to the defendant to order a partial new trial on the issue of damages alone.

In our opinion, the issues of negligence, contributory negligence, and damages are so inextricably interwoven that a new trial on all issues is necessary. It is so ordered.

No appeal was taken in the father's case and the judgment rendered in his favor, with the costs in both cases, has been paid. That case is closed. In fact, no one seeks to disturb it. It is not affected by our disposition of this case.

For the reasons stated, the verdict and judgment with respect to this minor plaintiff's case, but not otherwise, are vacated and the case remanded for a new trial on all issues. The decision of the Court of Appeals, insofar as it conflicts with this opinion, is reversed.

Reversed and remanded.

STATE OF NORTH CAROLINA v. JAMES ELLIS LUTHER

No. 73

(Filed 1 July 1974)

1. **Homicide § 1— proximate cause**

A person is criminally responsible for a homicide only if his act caused or directly contributed to the death.

2. **Homicide § 21— cause of death — necessity for expert medical testimony**

The cause of death may be established in a homicide prosecution without the use of expert medical testimony where the facts in evidence are such that every person of average intelligence would know from his own experience or knowledge that the wound was mortal in character.

3. **Homicide § 21— cause of death — absence of expert medical testimony — sufficiency of evidence**

The State's evidence in a homicide prosecution was sufficient to establish a causal relation between the victim's death and an assault which defendant made upon him with an iron pipe where it tended to show that the victim and defendant had an argument at the victim's home, that defendant told the victim not to come out into the yard or he would kill him, that the victim hit defendant on the arm with a rubber boot, that defendant hit the victim with an iron pipe with blows so forceful that they caused his eyes to bulge out of place in their sockets, and that the victim was not breathing seconds thereafter, since any person of average intelligence would know from his own experience or knowledge that the assault caused or directly contributed to the death; even if the victim's death came about as a result of the conjunction of heart disease with either the violence or the excitement and shock of defendant's assault, as defendant's medical evidence tended to show, it was still brought about by defendant's unlawful act, for the consequences of which defendant would be answerable.

Justice HIGGINS dissenting.

APPEAL by defendant under G.S. 7A-30(2) from the decision of the Court of Appeals finding no error in his trial before

State v. Luther

Braswell, J., 13 August 1973 Session of the Superior Court of MOORE.

In a bill of indictment drawn under G.S. 15-144 the State charged that on 17 February 1973 defendant "did kill and murder Baxter McKenzie." When the case was called for trial the solicitor elected not to prosecute defendant for murder in the first degree but for "second degree or any lesser included offense."

The State's evidence tended to show:

Baxter McKenzie, a white male, was 58 years old on 17 February 1973. On that day he was at home in a weakened condition, recovering from influenza. He was employed as a printer at the Moore County News, where he had worked regularly every day. However, he had told his wife that he had heart trouble.

Mrs. Baxter McKenzie is defendant's stepdaughter. Mrs. McKenzie's mother, the wife of defendant, had come to the McKenzie home on Friday, 16 February 1973, and had stayed overnight in order to get some sleep. "Luther [defendant] had kept her awake." The two families lived about 200 yards from each other on the same road.

About 9:30 a.m. on 17 February 1973, defendant came to the McKenzie home. McKenzie was sitting in the front room drinking coffee. An argument ensued between the two men through the screen door, and McKenzie ordered defendant to leave so that Mrs. Luther could get some sleep. Hearing the argument Mrs. McKenzie came to the front door. At that time McKenzie was standing on the small front porch, and defendant was 10-12 feet out in the yard. The weather was very cold, and there was ice on the ground. A pair of rubber boots, which Mrs. McKenzie used to walk in the snow, and a length of iron pipe, which she used "to walk through the snow and ice," were on the porch.

Defendant told McKenzie not to come out into the yard or he would kill him. Mrs. McKenzie told her husband not to go into the yard, but he picked up one of her boots, "a big rubber boot you tie with big yellow stringer," and walked off the porch. Defendant had picked up the iron pipe from the porch and, at that time, he had it in his hand. McKenzie ran directly out to defendant and struck him on the arm with the boot one time. Defendant then hit McKenzie with the iron pipe. Defendant

"reared back on him three or four times and knocked his eyeballs out of his head. . . . His eyes had fell out of their place." After being struck with the pipe McKenzie fell to the ground. Defendant threw the pipe across the yard and walked up the road.

Mrs. McKenzie ran to her husband as soon as he fell. He made no sound, and he was not breathing. A neighbor who heard her screams helped her carry McKenzie into the house, "but he was already gone. He was not breathing at that time."

Deputy Sheriff Cockman arrived at the McKenzie home about 10:00 a.m. He found the body of McKenzie on the couch in the living room. There was no sign of life about him. "He appeared to be expired." At about 10:30 Cockman found defendant at his home. Defendant appeared normal except for the odor of alcohol on his breath and a small scratch on his right hand which was bleeding slightly.

Defendant's evidence consisted of the testimony of Dr. C. Harold Steffee, the pathologist who acts as medical examiner for Moore County. He performed an autopsy on McKenzie's body about 1:15 p.m. on the day of his death.

Dr. Steffee's testimony, summarized except when quoted, tended to show: He observed "a small amount of dried blood about [McKenzie's] face and a triangular laceration or cut immediately beneath the right eye, but feeling the bones underneath revealed no evidence of fracture of the underlying bone. There was another laceration or cut on the right thumb that was approximately a quarter to 3/8 inches deep, blood about this hand as well as on the left hand. . . . The most significant finding was a severe degree of hardening of the arteries of the heart. . . . There was no evidence of a recent clot in these arteries. . . . There was no evidence of bleeding inside the brain." In Dr. Steffee's opinion the cause of death was hardening of the arteries of the heart. On cross-examination Dr. Steffee said that in his final autopsy report he had said, "It is possible that the increased cardiac demand occasioned by an altercation might have precipitated death."

On rebuttal the State offered in evidence the two reports which, as medical examiner, Dr. Steffee had made on his investigation of McKenzie's death: Exhibit 4, made before the autopsy, and Exhibit 3, made afterwards.

Exhibit 4 showed the following entries:

"TYPE OF DEATH:
Violent or Unnatural Hit a pipe . . .

"FATAL WOUNDS
Type: Blunt Trauma
Size: 2x3 cum; Shape: stellate; Location:
Below right eye; Plane line or direction:

"Probable cause of death: Cerebral hemorrhage
Blunt trauma to head
Manner of death: Homicide"

Exhibit 3 was identical to Exhibit 4 except that on Exhibit 3 Dr. Steffee struck out "Hit a pipe" and listed the probable cause of death as "Coronary artery disease."

At the close of all the evidence the court denied defendant's "motion for a judgment as of nonsuit and directed verdict of not guilty."

The jury's verdict was "Guilty of murder in the second degree." From the judgment that defendant be imprisoned for the term of six years in the State's prison defendant appealed to the Court of Appeals. In a two-to-one decision, reported in 21 N.C. App. 13, 203 S.E. 2d 343 (1974), the Court of Appeals found no error in the trial, and defendant appealed to this Court as a matter of right.

Attorney General Morgan and Associate Attorney Heidgerd for the State.

Seawell, Pollock, Fullenwider, Van Camp & Robbins for defendant appellant.

SHARP, Justice.

Defendant's appeal presents one question: Considering all the evidence favorable to the State as true, is it sufficient to establish a causal relation between McKenzie's death and the assault which defendant made upon him with the iron pipe? G.S. 15-173, 15-173.1 (1973 Cum. Supp.).

[1] A person is criminally responsible for a homicide only if his act caused or directly contributed to the death. 40 Am. Jur. 2d, Homicide §§ 13, 15 (1968); *State v. Horner,* 248 N.C. 342, 103 S.E. 2d 694 (1958). Defendant argues that his motion for

nonsuit should have been allowed because (1) the State did not offer any substantial evidence from either lay or expert witnesses tending to establish the cause of McKenzie's death; and (2) defendant's witness, Moore County's Medical Examiner, an expert pathologist, testified that his autopsy revealed no relation between defendant's assault and McKenzie's death and, in his opinion, the cause of death was hardening of the arteries.

[2] The rule with reference to the necessity for expert medical testimony to show the cause of death in prosecutions for homicide was stated by Justice Ervin in *State v. Minton,* 234 N.C. 716, 721-22, 68 S.E. 2d 844, 848 (1951): "The law is realistic when it fashions rules of evidence for use in the search for truth. The cause of death may be established in a prosecution for unlawful homicide without the use of expert medical testimony where the facts in evidence are such that every person of average intelligence would know from his own experience or knowledge that the wound was mortal in character. . . . There is no proper foundation, however, for a finding by the jury as to the cause of death without expert medical testimony where the cause of death is obscure and an average layman could have no well grounded opinion as to the cause. [Citations omitted.]" See *State v. Howard,* 274 N.C. 186, 162 S.E. 2d 495 (1968); *State v. Knight,* 247 N.C. 754, 102 S.E. 2d 259 (1958).

The State's evidence in this case is sufficient to support the following findings: Prior to his attack of influenza McKenzie had worked every day as a printer at the Moore County News. On 17 February 1973 he was at home, weak but recovering. Defendant came to his home but was not admitted. An argument ensued and McKenzie ordered defendant to leave. Defendant told him not to come out into the yard or he would kill him. Notwithstanding the threat, McKenzie walked off the porch and hit defendant on the arm with his wife's rubber boot. Whereupon defendant hit him with an iron pipe. He "reared back on him three or four times and knocked his eyeballs out of his head. . . . His eyes fell out of their place." The blows felled McKenzie to the ground. His wife, who saw it all, went to him instantly. He was not breathing. A neighbor who heard her screams came immediately, but McKenzie "was already gone."

[3] In our view, from the foregoing facts, any person of average intelligence would know from his own experience or knowledge that the assault which defendant made upon McKenzie caused or directly contributed to his death. McKenzie was very

much alive before defendant felled him with blows from the iron pipe—blows so forceful that they not only struck him to the ground but also caused his eyes to bulge out of place in their sockets. Seconds thereafter McKenzie was not breathing. He had gone.

The fact that the autopsy revealed hardening of the arteries of the heart and no traumatic injury sufficient to cause death does not exonerate defendant. In his final autopsy report defendant's witness, Dr. Steffee, stated that "the increased cardiac demand occasioned by an altercation might have precipitated death." The law declares "that one who inflicts an injury on another and thereby accelerates his death shall be held criminally responsible therefor." 40 Am. Jur. 2d Homicide § 16 (1968). See also, 4 Strong, N. C. Index 2d, Homicide § 1 (1968).

Thus, if McKenzie's death came about as a result of the conjunction of his heart disease with either the violence or the excitement and shock of defendant's assault it was still brought about by defendant's unlawful act, for the consequences of which he would be answerable. Annot., 47 A.L.R. 2d 1072, 1077 (1956). The rule is well settled that the consequences of an assault which is the efficient cause of the death of another are not excused, nor is the criminal responsibility for causing death lessened, by the preexisting physical condition which made the person killed unable to withstand the shock of the assault and without which predisposed condition the blow would not have been fatal. 40 Am. Jur. 2d, Homicide § 20 (1968). See *State v. Knight, supra.*

From the evidence in this case it was permissible and reasonable for the jury to draw the inference that McKenzie would not have died but for defendant's unlawful assault and battery upon him. The motion for judgment of nonsuit was properly overruled.

The decision of the Court of Appeals is

Affirmed.

Justice HIGGINS dissenting.

The evidence is fairly stated in the opinion of the Court except in one particular. The death certificate filed by the physician quoted in the opinion was made on the basis of the doctor's preliminary examination and before the autopsy.

Fairly construed, the evidence shows the deceased advanced to the attack and struck the first blow. True, the State's witness stated the blow struck by the defendant with the pipe "knocked his eyeballs out of his head." The autopsy examination failed to disclose any injuries to the eyes, skull or brain and that death resulted from hardening of the arteries.

The poor old woman testified: "My husband (deceased) jumped up and grabbed a rubber boot and ran outside. He hit Ellis Luther on the arm with that boot and then fell to the ground . . ." After identifying the piece of pipe the defendant used, the witness said "There are a million down there (the yard where the trouble occurred) just like it. . . . Prior to being struck . . . Baxter previously was sick with flu and he was weak. He had heart trouble."

The State's evidence, in my opinion, was insufficient to go to the jury and sustain a finding that death resulted as a result of the defendant's wrongful act. The case of *State v. Horner*, 248 N.C. 342, tends to support the court's decision in this case. In Horner, I thought at the time it was heard that the evidence was insufficient to support a finding of death by a wrongful act. For that reason I dissented and for the same reason I dissent now.

CITY OF BREVARD, A MUNICIPAL CORPORATION, AND L. C. CASE, BUILDING INSPECTOR OF THE CITY OF BREVARD v. JOHN F. RITTER, FRANKIE M. WAGONER, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF LEWIS MOORE, LOIS ROBINSON, FERRELL MOORE, EUNA ANN CANTRELL AND CHARLES MORGAN COMPANY, A CORPORATION

No. 77

(Filed 1 July 1974)

Contempt of Court § 6; Municipal Corporations § 30— order to remove building — contempt proceeding — burden of proof

Where defendant was enjoined from enlarging a private airport facility in violation of a city zoning ordinance and was ordered to remove a partially constructed auxiliary hangar, and it was stipulated that defendant notified the zoning board that he was proceeding to convert the partially completed hangar into a two-bedroom dwelling, the trial court in a hearing to show cause why defendant should not be attached as for contempt in failing to comply with the order to remove the building erred in placing the burden on the city to show

that defendant had violated the court's order since defendant had the burden of purging himself of the charge of contempt by showing that he had complied with the court's mandate that he remove the offending structure.

Justice SHARP concurring in result.

Chief Justice BOBBITT and Justice BRANCH join in the concurring opinion.

ON *certiorari* to the North Carolina Court of Appeals to review its decision filed January 9, 1974 (20 N.C. App. 380, 201 S.E. 2d 534) reversing and vacating the order entered in the Superior Court of TRANSYLVANIA County on December 31, 1972, dismissing a contempt proceeding against the defendant.

The judicial history of this case had its genesis in an action instituted in the Superior Court of Transylvania County by the City of Brevard against John F. Ritter and others praying for temporary and permanent restraining orders to prevent defendant Ritter from completing construction of a building which violated the city's zoning ordinances.

The proceeding came on for hearing before *Judge Falls* on February 21, 1972. The parties stipulated that the defendant Ritter purchased a tract of land on which were located facilities for a private airport with a grass and dirt runway 1000 to 2000 feet in length. At the time of the purchase, the property was within a one mile radius of the city limits of Brevard and subject to the city's zoning regulations. The airport facilities consisted of three open air hangars and a metal storage building 12 x 15 feet "used as an office and headquarters for the airport." The area was zoned R-2, Medium Density Residential District. Ritter had requested that the area be rezoned from R-2 Residential to F-1 Flood Plain. His request was denied.

At the hearing before Judge Falls, the parties entered into stipulations recorded in sixteen separately numbered paragraphs. Among them the following are pertinent to the inquiry:

"6. That in December 1971, the defendant, John F. Ritter, began constructing a new building which was to take approximately three thousand square feet, which upon completion was to be used as a pilot clubhouse containing such facilities as restrooms, chairs, tables, and food and drink dispensing machines, etc.; that the clubhouse of the building will have dimensions of approximately 20 x 42 feet,

serving as a lounge and recreation area as described above. That immediately adjoining the club or lounge area, and as a part of the same building, will be an area approximately 51 x 34 feet which is also subject for use in extended social activity or recreation, and which will be of sufficient size to permit the storage of one small aircraft.

"8. That said new building is not connected with any of the prior existing buildings and upon completion was to be completely separate and apart from any other existing improvements located upon said premises.

"10. That the Brevard High School, Athletic Field and bus maintenance garage are adjoining the airport located to the southwest of the airport runway and there are two large apartment complexes located to the northwest of the airport runway, one containing 20 units and the other containing 50 units and there is under construction a new medical clinic to the side of and within approximately three hundred feet of the airport premises situated to the northwest.

"11. That by letter dated August 4, 1971, marked as Exhibit 7, the defendant, John F. Ritter, requested the City of Brevard to rezone the airport premises from a R-2 Residential zone to a F-1 Flood Plain zone; that said defendant with such request submitted a map marked as Exhibit 8 depicting said airport property and airport runway.

"12. That at a regularly scheduled meeting of the Board of Aldermen for the City of Brevard on October 18, 1971, the defendant's zoning request was considered; the Board of Aldermen for the City of Brevard accepted the recommendation of the Brevard Planning and Zoning Board which was to deny said zoning request.

"14. That the defendant, John F. Ritter testified that he intended to organize a Flying Club, and that a portion of the building under construction would be usable as a hangar for a small airplane."

Upon the basis of the stipulations, Judge Falls found the proposed structure was unlawful, in violation of the zoning ordinances, and entered judgment permanently restraining the defendant Ritter and Charles Morgan Company (Ritter's construction contractor) from constructing the pilot lounge and

clubhouse and auxiliary hangar or extending or enlarging the airport facilities and directing Ritter to remove within ninety days the portion already completed.

The defendant Ritter appealed to the North Carolina Court of Appeals. On April 26, 1972, the Court of Appeals affirmed the judgment entered by Judge Falls. The decision is reported in 14 N.C. App. 207, 188 S.E. 2d 41.

Prior to May 22, 1972, the defendant Ritter again applied to the Zoning Board for a change from the R-2 Medium Density Residential District to F-1. Having received no reply, on that day he notified the Zoning Board in writing that he was proceeding to convert the partially completed structure into a two-bedroom single family residence. The City Board by motion in the cause, based upon affidavit and notice, obtained from Judge Anglin an order commanding the defendant Ritter to appear and show cause, if any he has, why he should not be adjudged in contempt for failure to comply with Judge Falls' order to remove the offending structure.

The show cause order was made returnable before Judge Ervin, who on December 31, 1972, entered the following order:

> "And after consideration of the court's file, and the facts stipulated between the parties, and after hearing argument of counsel as to the facts and the law, it appeared to the Court and the Court finds that the plaintiff has failed to carry the burden of proving that the defendant, John F. Ritter, has violated the provisions of the judgment of the Honorable B. T. Falls dated February 23, 1972, nor the subsequent opinion of the Court of Appeals of North Carolina, and the plaintiff has failed to prove that the structure completed by the defendant is in violation of the court order."

On the plaintiff's appeal, the Court of Appeals concluded that the stipulations in the record disclosed a violation of Judge Falls' order, reversed Judge Ervin's order, and remanded the case to the superior court for further proceedings.

We allowed certiorari to review the decision of the Court of Appeals.

Morris, Golding, Blue & Phillips by James N. Golding for plaintiff appellee.

Van Winkle, Buck, Wall, Starnes, Hyde and Davis, P.A. by E. Starnes, Jr., for defendant appellant.

HIGGINS, Justice.

In this dispute the City of Brevard has sought to enforce its zoning ordinances preventing the enlargement of the private airport facility owned by the defendant. The defendant sought "to organize a Flying Club, and that a portion of the building under construction would be usable as a hangar for a small airplane." (Stipulation 14.)

After hearing, Judge Falls found the defendant had violated the zoning ordinances by the new construction and by enlargement of existing facilities. He ordered that the partially constructed lounge and auxiliary hangar be removed within ninety days and that further enlargement of the facilities cease. On review, the Court of Appeals affirmed the order.

On May 22, 1972, the defendant Ritter notified the Zoning Board that he was proceeding to convert the partially completed hangar into a two-bedroom dwelling "with an attached garage and hobby-tool shop in the remaining portion."

The plaintiff, after notice and on motion, obtained a citation requiring the defendant to appear and show cause why he should not be attached as for contempt (G.S. 5-8) in failing to comply with Judge Falls' order to remove the partially completed building and to cease further enlargement of the airport facilities.

At the hearing on the show cause order, Judge Ervin held that the plaintiff had not carried the burden of showing the defendant Ritter was in violation of Judge Falls' order and dismissed the proceeding. On review, the Court of Appeals (20 N.C. App. 380, 201 S.E. 2d 534) reversed and remanded the cause for further proceeding. That decision is now before us for review.

The stipulations before Judge Ervin disclosed the defendant's failure to remove the offending structure. The defendant gave notice that he was converting the building into a two-bedroom dwelling with an attached garage and hobby-tool shop in the remaining portion. "Stipulations duly made during the course of a trial constitute judicial admissions binding on the parties and dispensing with the necessity of proof . . . for the duration of the controversy." 7 Strong, N. C. Index 2d, Trial, § 6 Stipulations. *R. R. v. Highway Commission,* 268 N.C. 92, 150 S.E. 2d 70; *Heating Co. v. Construction Co.,* 268 N.C. 23,

149 S.E. 2d 625; *Moore v. Humphrey,* 247 N.C. 423, 101 S.E. 2d 460.

The burden, therefore, was on the defendant Ritter to show compliance in order to purge himself of the contempt citation.

Chief Justice Smith in *Baker v. Cordon,* 86 N.C. 116, states the rule:

> "If the act is intentional, and violates the order, the penalty is incurred, whether an indignity to the Court, or contempt of its authority, was or was not the motive for doing it. A party is not at liberty by a strained and narrow construction of the words, and a disregard of the obvious and essential requirements of the order, to evade the responsibility which attaches to his conduct. In an honest desire to know the meaning and to conform to its directions, a mistaken interpretation of doubtful language would be a defense to the charge, but when its language is plain and the attempt is made to escape the force and defeat the manifest purposes of the order, by indirection, the penalty must be enforced, or the Court would be unable to perform many of its most important functions."

In *Rose's Stores v. Tarrytown Center,* 270 N.C. 206, 154 S.E. 2d 313, this Court, quoting *Cotton Mills v. Abrams,* 231 N.C. 431, 57 S.E. 2d 803, held: " 'The question is not whether the respondent intended to show his contempt for the court, but whether he intentionally did the acts which were a contempt of the court.' . . . 'If the act is intentional, and violates the order, the penalty is incurred, whether an indignity to the Court or a contempt of its authority, was or was not the motive for it.' . . . The respondents having sought to purge themselves, the burden was on them to establish facts sufficient for that purpose."

We conclude that Judge Ervin, having dismissed Judge Anglin's order to show cause, committed error of law by placing the burden on the movant, the City of Brevard. The burden was on the defendant, Mr. Ritter, to purge himself of the charge of contempt by showing that he had complied with the court's mandate that he remove the offending structure. At the hearing, Judge Ervin did not require the defendant to show anything, but held the City had failed to carry its burden. Judge Ervin's order was based on a mistaken view of the law. His decision was, therefore, erroneous.

The Court of Appeals was correct in reversing the order and in remanding for further proceedings. The superior court will proceed to conduct a hearing on the questions raised by Judge Anglin's show cause order and otherwise make a final disposition of the controversy.

The decision of the Court of Appeals is

Affirmed.

Justice SHARP concurring in result:

I am in complete accord with the majority's decision that Judge Ervin erred in placing the burden of proof upon plaintiffs to show that defendant Ritter is in violation of Judge Falls' order and that the cause must be remanded to the Superior Court. Judge Falls' order of 23 February 1972 directed defendant "to remove that portion of construction of said pilot lounge or club and auxiliary hangar already completed within 90 days from the date of this judgment." The stipulations establish that, without removing any portion of the structure as it existed on 23 February 1972 and without obtaining any modification of the court's order, defendant made certain alterations within the existing walls and roof by building two bedrooms, a kitchen, garage, hobby-tool shop, and changing the bathrooms. The stipulations, therefore, establish defendant's violation of the order and his contumacy. No further hearing is necessary to determine that fact; the only question remaining for the court is what punishment should be imposed.

The majority opinion, as I interpret it, *requires* the demolition of the altered structure. It is my view that, if appropriate, alternative sanctions may be imposed, and, in determining what penalty should be imposed for defendant's contempt, the court may take into consideration whether the present building is in violation of the zoning ordinance and, if so, to what extent. Any portion of the structure which does not conform must, of course, be removed. The vindication of judicial authority, however, does not necessarily require the wasteful demolition of a building which could legally be reconstructed immediately after it has been razed. Such an order would seem to confuse judicial vindication with judicial vindictiveness.

Chief Justice BOBBITT and Justice BRANCH join in this concurring opinion.

STATE AUTOMOBILE MUTUAL INSURANCE COMPANY v. SMITH DRY CLEANERS, INC.

No. 11

(Filed 1 July 1974)

Bailment § 3— shrinkage from dry cleaning — responsibility of defendant — sufficiency of evidence

In an insurer's action to recover for damages to insured's draperies and bedspread by shrinkage which allegedly occurred when they were dry cleaned by defendant, the trial court erred in directing a a verdict for defendant where plaintiff's evidence tended to show that soot damage occurred in two rooms of insured's home, that a company which undertook to clean the damaged rooms took the draperies and bedspread from the home to have them cleaned and the items were then in good condition except for being sooty, that the items were delivered to defendant by said company and were thereafter in the sole, exclusive possession of defendant during the cleaning process, that the insured wrote a check to defendant for the work done, and that when returned the items were clean but had been damaged by shrinkage which occurred after they had been removed from the insured's home, notwithstanding plaintiff's evidence failed to show the condition of the items when they were delivered to defendant, that they were not damaged while in the possession of the company which removed them, or that they had not been unsatisfactorily cleaned by another before being delivered to defendant since, nothing else appearing, the more reasonable probability is that the items were taken directly from the insured's home to defendant's dry cleaning establishment and were delivered to defendant in an unshrunken condition.

ON *certiorari* to review the decision of the Court of Appeals affirming judgment of *Henderson, J.*, 12 February 1973 Session of the District Court of FORSYTH.

Plaintiff Insurance Company, as subrogee, brought this action against defendant Dry Cleaners to recover for the damage which it allegedly did to the personal property of its insureds, Mr. and Mrs. O. E. Wagoner.

Plaintiff's evidence, which consisted of the testimony of Mr. and Mrs. Wagoner and defendant's answers to two interrogatories, tended to show:

In December 1971 the furnace in the Wagoner home blew soot in to the living room and a bedroom. The walls and draperies in both rooms, and the bedspread and pillows in the bedroom, were blackened by the blast. They were "sooty and nasty." The Wagoners notified plaintiff, their "homeowner's insurance car-

rier." Arrangements were made with Serve-Pro, Inc., to clean up and undo the damage and "for those living room drapes to be taken to Smith Dry Cleaners. Serve-Pro handled it."

Servo-Pro washed and painted the walls, and took down the draperies. The living room draperies, made of antique satin, were draw drapes for a large picture window. They hung from rods almost to the carpet. At that time the draperies were less than two years old. They had been dry cleaned once before and, except for the soot damage, were in good condition. Serve-Pro took the draperies, the bedspread and the pillows from the house to have them cleaned and, approximately a week later, returned with them. The pillows "did not come clean." The bedspread and the drapes were clean but both had been shrunk. The bedspread, which had previously hung to the floor on both sides of the bed, was from six to eight inches short on one side; the living room draperies hung from four to six inches above the floor and lacked four or five inches of covering the cornice board. Mrs. Wagoner testified that the items were worth $700.00 immediately before they went to the cleaners and only $25.00 after they were returned.

On account of the shrinkage to the bedspread and the living room draperies plaintiff paid its insureds $661.38, the sum which it seeks to recover in this action. The Wagoners did not see the draperies from the time Serve-Pro removed them from their home until it returned them. Mrs. Wagoner testified that she "wrote a check to Smith Dry Cleaners for the work they did." The record is silent as to when and under what circumstances this check was delivered.

Plaintiff served eleven interrogatories upon defendant, which answered them all. Plaintiff introduced into evidence only interrogatories numbered 2 and 4, and only these were for the judge's consideration in passing upon the motion for a directed verdict.

"NUMBER 2.

"Question: On what date do your records show that you received from plaintiff's insureds:

"(a) The living room draperies?

"(b) The bedspread and pillow set?

"Answer:

"(a) Sometime in December, 1971.

"(b) Sometime in December, 1971.

"NUMBER 4.

"Question: Once they were delivered to you, were such items in your sole, exclusive possession during the cleaning process? What other persons (names and addresses) had possession of them?

"Answer: Yes and none respectively."

At the conclusion of plaintiff's evidence defendant's motion for a directed verdict was allowed and plaintiff appealed. The Court of Appeals affirmed the judgment dismissing the action, *Insurance Co. v. Dry Cleaners*, 19 N.C. App. 444, 199 S.E. 2d 157 (1973), and we allowed certiorari.

Womble, Carlyle, Sandridge & Rice by Allan R. Gitter and and William F. Womble, Jr., for plaintiff appellant.

Graves & Nifong by R. Brandt Deal and Norman L. Nifong, for defendant appellee.

SHARP, Justice.

Plaintiff prosecutes this action under the rule that an insurance company paying a loss to its insured under the obligation of its policy for property damaged by the tortious act of another is entitled to subrogation to the rights of its insured against the one whose tortious act caused the damage to the extent of the loss paid by the insurance company. *Insurance Co. v. Storage Co.*, 267 N.C. 679, 149 S.E. 2d 27 (1966).

To recover, plaintiff invokes the following well established principle of law: "A *prima facie* case of actionable negligence, requiring submission of the issue to the jury, is made when the bailor offers evidence tending to show that the property was delivered to the bailee; that the bailee accepted it and thereafter had possession and control of it; and that the bailee failed to return the property or returned it in a damaged condition." *Insurance Co. v. Motors, Inc.*, 240 N.C. 183, 185, 81 S.E. 2d 416, 418 (1954). *See* cases cited therein and *Mills, Inc. v. Terminal, Inc.*, 273 N.C. 519, 160 S.E. 2d 735 (1968). "Returned in a dam-

aged condition," as that phrase is used in the preceding quotation, means, of course, that the property was returned with damage which occurred while the property was in the bailee's possession.

Plaintiff's evidence tends to show: Arrangements were made for the draperies, a bedspread and two pillows belonging to its insureds to be taken to defendant. They were delivered to defendant "sometime in December 1971." After delivery to defendant these items were in its sole, exclusive possession during the cleaning process. Serve-Pro took the items from the Wagoner home in order to have them cleaned and, at that time, all were in good conditon except for the soot soil. At some unrevealed time Mrs. Wagoner wrote a check to defendant for the work done. When Serve-Pro returned the drapes and bedspread both were clean but they had been damaged by shrinkage which occurred after they were removed from the Wagoner premises.

Defendant's motion for a directed verdict was based upon the ground that plaintiff had failed to show the condition of the property at the time of its delivery to defendant. Defendant argued: The Wagoners did not deliver the drapes and spread to defendant; they delivered them to employees of Serve-Pro who took them away and returned with them approximately a week later. The Wagoners did not see the items in the interim. Since no representative of Serve-Pro testified, it says, "It would be mere conjecture to try to establish their condition at the time and what other acts or clean processes, if any, were performed on the goods prior to being delivered to the defendant without the testimony of the person who delivered the property. The chain of custody has been broken by the plaintiff."

The Court of Appeals found defendant's rationale convincing. Admittedly this is a close case. Deficiencies in plaintiff's evidence leave unanswered questions which defendant has been alert to raise. It is, of course, possible that Serve-Pro allowed the drapes and spread to get wet in transit from the Wagoner home to defendant's establishment. It is also possible that Serve-Pro first took the items to another cleaner which did not do a satisfactory job of cleaning and that the shrinkage occurred there. Defendant points out that the record contains no admission that the items were sooty when delivered to it; that the drapes and spread were neither measured before they left the Wagoner home nor at the time they were delivered to defendant, "sometime in December 1971."

The shrunken items were gone from the Wagoner residence "approximately a week"—not an unreasonable time for cleaning accessories of such size, bulk, and nature. Since defendant was paid for cleaning the items it is a fair inference that it did clean them and that they needed cleaning.

Conceding that the possibilities which defendant suggests do exist, we think plaintiff's evidence raises no question to which defendant cannot supply the answer. Presumably an expert dry cleaner could tell whether drapes and a spread which had taken a blast of soot from a furnace came to it for cleaning *after* they had been exposed to rain or *after* another cleaner had attempted unsuccessfully to restore them. In our view, nothing else appearing, the more reasonable probability is that Serve-Pro took the items directly from the Wagoner residence to defendant's dry cleaning establishment and delivered them in an unshrunken condition. *See Wilkerson v. Clark,* 264 N.C. 439, 141 S.E. 2d 884 (1965) and cases cited therein; 3 Strong's N. C. Index, *Evidence* § 21 (1967). On a motion for a directed verdict the evidence must be interpreted most favorably to plaintiff, and if it is of such character that reasonable men may form divergent opinions of its import, the issue is for the jury. *Stewart v. Check Corp.,* 279 N.C. 278, 182 S.E. 2d 410 (1971); *Corum v. Tobacco Co.,* 205 N.C. 213, 171 S.E. 78 (1933).

We hold that the motion for a directed verdict was improperly granted. The decision of the Court of Appeals is reversed with directions that the case be remanded to the District Court for a trial *de novo.*

Reversed.

BOARD OF EDUCATION v. EVANS

No. 120 PC.

Case below: 21 N.C. App. 493.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 July 1974.

BOWEN v. JONES

No. 80 PC.

Case below: 21 N.C. App. 224.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 June 1974.

BRAY v. BOARD OF EDUCATION

No. 77 PC.

Case below: 21 N.C. App. 225.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 June 1974.

CHADBOURN, INC. v. KATZ

No. 93 PC.

Case below: 21 N.C. App. 284.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 1 July 1974.

CITY OF DURHAM v. MANSON

No. 88.

Case below: 21 N.C. App. 161.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 4 June 1974.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

COLLINS v. EDWARDS

No. 121 PC.

Case below: 21 N.C. App. 455.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 July 1974.

DUGGER v. DEPT. OF TRANSPORTATION

No. 98 PC.

Case below: 21 N.C. App. 346.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 July 1974.

FOUST v. HUGHES

No. 94 PC.

Case below: 21 N.C. App. 268.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 June 1974.

KAMP v. BROOKSHIRE

No. 87 PC.

Case below: 21 N.C. App. 280.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 June 1974.

KAPLAN v. CITY OF WINSTON-SALEM

No. 75 PC.

Case below: 21 N.C. App. 168.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 4 June 1974.

MEYERS v. BANK

No. 78 PC.

Case below: 21 N.C. App. 202.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 June 1974.

MOYE v. EURE

No. 84 PC.

Case below: 21 N.C. App. 261.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 June 1974.

NOLAN v. BOULWARE

No. 111 PC.

Case below: 21 N.C. App. 347.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 July 1974.

PRODUCE CORP. v. COVINGTON DIESEL

No. 90 PC.

Case below: 21 N.C. App. 313.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 June 1974.

QUICK v. CITY OF CHARLOTTE

No. 99 PC.

Case below: 21 N.C. App. 401.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 June 1974.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

RODMAN v. RODMAN

No. 106 PC.

Case below: 21 N.C. App. 397.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 July 1974.

SAWYER v. SAWYER

No. 95 PC.

Case below: 21 N.C. App. 293.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 June 1974.

SHARPE v. PUGH

No. 70 PC.

Case below: 21 N.C. App. 110.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 4 June 1974.

STATE v. AKEL

No. 113 PC.

Case below: 21 N.C. App. 415.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 July 1974. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 1 July 1974.

STATE v. ALLRED

No. 88 PC.

Case below: 21 N.C. App. 229.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 June 1974. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 June 1974.

STATE v. CAPEL

No. 89 PC.

Case below: 21 N.C. App. 311.

Petitions by defendants *in propria persona* and by counsel for writs of certiorari to North Carolina Court of Appeals denied 4 June 1974.

STATE v. CHAMBERS

No. 126 PC.

Case below: 21 N.C. App. 450.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 July 1974.

STATE v. CLOER

No. 131 PC.

Case below: 22 N.C. App. 57.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 July 1974.

STATE v. CORDON

No. 100 PC.

Case below: 21 N.C. App. 394.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 July 1974.

STATE v. GRANT

No. 105 PC.

Case below: 21 N.C. App. 431.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 July 1974.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. HARMON

No. 101 PC.

Case below: 21 N.C. App. 508.

Petition by defendant *in propria persona* for writ of certiorari to North Carolina Court of Appeals denied 4 June 1974. Petition by counsel for writ of certiorari to North Carolina Court of Appeals denied 1 July 1974.

STATE v. HONEYCUTT

No. 97 PC.

Case below: 21 N.C. App. 342.

Petition by the State for writ of certiorari to North Carolina Court of Appeals denied 4 June 1974.

STATE v. HUFFMAN

No. 76 PC.

Case below: 21 N.C. App. 331.

Motion of Attorney General to dismiss petition of defendant *pro se* for writ of certiorari to North Carolina Court of Appeals allowed 8 May 1974. Petition by counsel for writ of certiorari to North Carolina Court of Appeals denied 1 July 1974.

STATE v. LASH

No. 22.

Case below: 21 N.C. App. 365.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 July 1974. Motion of Attorney General to dismiss appeal for lack of substantial constitutional allowed 1 July 1974.

STATE v. LUCAS

No. 73 PC.

Case below: 21 N.C. App. 343.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 June 1974.

STATE v. RATCHFORD

No. 91 PC.

Case below: 20 N.C. App. 427.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 July 1974.

STATE v. RIGSBEE

No. 85 PC.

Case below: 21 N.C. App. 188.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 4 June 1974.

STATE v. SMYLES

No. 115 PC.

Case below: 21 N.C. App. 533.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 July 1974.

STATE v. SOMMERSET

No. 92 PC.

Case below: 21 N.C. App. 272.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 June 1974.

STATE v. TILLEY

No. 12.

Case below: 21 N.C. App. 453.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 July 1974. Appeal dismissed *ex mero motu* for lack of substantial constitutional question 1 July 1974.

STATE v. WATSON

No. 109 PC.

Case below: 21 N.C. App. 374.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 July 1974.

STATE v. WHITE and STATE v. KEARNEY

No. 81 PC.

Case below: 21 N.C. App. 173.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 June 1974. Motion of Attorney General to dismiss appeal allowed 4 June 1974.

STATE v. WIGGINS

No. 11.

Case below: 21 N.C. App. 441.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 1 July 1974.

STATE v. YOUNG

No. 112 PC.

Case below: 21 N.C. App. 369.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 July 1974.

STOUT v. CRUTCHFIELD

No. 96 PC.

Case below: 21 N.C. App. 387.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 June 1974.

TAYLOR v. CRISP

No. 108 PC.

Case below: 21 N.C. App. 359.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 1 July 1974.

THOMPSON v. THOMPSON

No. 83 PC.

Case below: 21 N.C. App. 215.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 June 1974.

UTILITIES COMM. v. TELEGRAPH CO.

No. 79 PC.

Case below: 21 N.C. App. 182.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 June 1974.

UTILITIES COMM. v. TELEPHONE CO.

No. 103 PC.

Case below: 21 N.C. App. 408.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 1 July 1974.

WILLIAMSON v. AVANT

No. 82 PC.

Case below: 21 N.C. App. 211.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 June 1974.

PETITIONS TO REHEAR

CLARY v. BOARD OF EDUCATION

No. 12

Reported: 285 N.C. 188.

Petition by plaintiffs to rehear allowed 15 July 1974.

CRUTCHER v. NOEL

No. 16.

Reported: 284 N.C. 568.

Petition by Noel to rehear denied 8 April 1974.

SINK v. EASTER

No. 93.

Reported: 284 N.C. 555.

Petition by Sink to rehear denied 15 March 1974.

STATE v. EUBANKS

No. 67.

Reported: 283 N.C. 556.

Petition by Eubanks to rehear denied 12 July 1973.

IN THE MATTER OF: THE APPEAL OF HANES DYE AND FINISHING COMPANY, WINSTON-SALEM, NORTH CAROLINA, AND 106 OF ITS CUSTOMERS FROM A DECISION OF THE STATE BOARD OF ASSESSMENT REGARDING THE TAXABLE SITUS AND VALUATION OF CLOTH GOODS OWNED BY THE 106 CUSTOMERS BUT IN HANES' POSSESSION IN WINSTON-SALEM ON JANUARY 1, 1972.

No. 44

(Filed 30 August 1974)

1. **Taxation § 24— ad valorem taxes — greige goods in finishing plant — nonresident owners — manufacturing**

Nonresident owners of textile greige goods shipped from outside North Carolina to a textile finishing plant in Forsyth County for processing and reshipment to the owners or to their customers were not engaged in manufacturing in North Carolina, and the business premises of the finishing plant were not also the business premises of the nonresident owners for purposes of ad valorem taxation of the goods. G.S. 105-304(b)(1); G.S. 105-304(d)(1), (2).

2. **Taxation § 24— ad valorem taxes — greige goods in finishing plant — nonresident owners — purchase site — destination — tax situs**

Textile goods owned by nonresident converters which were shipped from outside North Carolina to a textile finishing plant in Forsyth County for processing and reshipment to the converters or to their customers at designated places outside North Carolina, and which were in the possession of the finishing plant on 1 January 1972, were not "situated" or "more or less permanently located" in Forsyth County on that date and, therefore, did not have a tax situs in Forsyth County on that date.

3. **Taxation § 24— ad valorem taxation — greige goods in finishing plant — resident owner**

Greige goods manufactured either inside or outside North Carolina, shipped to a textile finishing plant in this State for processing, and owned by a North Carolina corporation when in the finishing plant's custody on January 1st are subject to ad valorem taxes in North Carolina; whether such goods are taxable in the county where the principal office and place of business of the North Carolina corporate owner is located or the county where the property is physically situated is a matter for determination by the State Board of Assessment.

4. **Taxation § 24— ad valorem taxes — greige goods in finishing plant — nonresident owners — purchase site — destination — tax situs**

Textile goods in the custody of a finishing plant in Forsyth County on 1 January 1972 which had been purchased by the nonresident owners from North Carolina mills for shipment to destinations outside North Carolina after being processed by the finishing plant or which had been purchased by the nonresident owners from mills outside North Carolina for shipment to North Carolina customers

after being processed by the finishing plant were subject to ad valorem taxation by Forsyth County.

Justice HIGGINS dissenting in part.

APPEAL by Forsyth County from *Armstrong, J.*, 26 March 1973 Special Session of the Superior Court of FORSYTH County, transferred for initial appellate review by the Supreme Court pursuant to G.S. 7A-31(a), docketed and argued as case No. 89 at Fall Term 1973.

The hearing before Judge Armstrong was on the petition of Hanes Dye and Finishing Company (Hanes) and 106 of its customers (102 being nonresidents of North Carolina and 4 being North Carolina corporations with principal offices and places of business in counties other than Forsyth) for judicial review of the decision of the State Board of Assessment (State Board).

The question is whether cloth materials owned by these 106 customers on 1 January 1972, but on that date in the custody of Hanes for finishing, had a tax situs in Winston-Salem, Forsyth County, North Carolina. If so, on what basis should the goods be appraised for ad valorem taxes?

The statutory provisions on which Forsyth County relies now appear in Chapter 105, Subchapter II, of the General Statutes of North Carolina (1972 Replacement). They were enacted by Chapter 806, Session Laws of 1971, and became effective on 1 July 1971. Unless otherwise specified, the references herein will be to provisions of the General Statutes in the 1972 Replacement.

G.S. 105-315(a) provides that every person who on January 1st has custody "of taxable tangible personal property" entrusted to him by another "for storage, sale, renting, or any other business purpose," shall furnish the tax supervisor of the county in which the property is situated a statement showing the name of the owner, a description of the property and the quantity thereof.

On 29 February 1972 Hanes furnished the Forsyth County Tax Supervisor a list of goods in its custody on 1 January 1972 belonging to 106 of its customers. Hanes submitted this list to avoid the penalties provided by G.S. 105-315(b) but did so under protest, contending that such report was not required because these goods were in Forsyth County, North Carolina, on a tem-

porary basis and therefore were not *taxable* tangible personal property.

After Hanes had filed the list, 54 of the 106 customers listed their cloth goods under protest to avoid any possible penalty for failure to list. The remaining 52 customers did not list their goods. Hanes and all of the 106 customers contended that the property did not have a tax situs in Forsyth County. Pursuant to stipulation, all of the property owned by the 106 customers was listed in the name of Hanes under the provisions of G.S. 105-306(c)(8).

Hanes and its 106 customers contested the listing of the cloth at hearings before the Forsyth County Board of Equalization and Review. At the conclusion thereof, the Board of Equalization and Review resolved (1) that the property had a tax situs in Forsyth County as of 1 January 1972; (2) that all of the cloth yardage of Hanes's customers who listed under protest be appraised at its "raw material value"; and (3) that the cloth goods of the customers who did not report be appraised at the rate of .2427 cents per yard—a figure arrived at by taking the total number of yards listed under protest by the reporting customers and dividing this figure into the total valuation placed on the goods of the reporting customers.

Hanes and its 106 customers appealed to the State Board from the decision of the Forsyth County Board of Equalization and Review that the goods in question had a tax situs in Forsyth County. Forsyth County appealed from its determination that the goods be appraised at their greige goods or raw materials value.

In answering the questions presented by the appeals, the State Board quoted and based its decision upon the following stipulated facts:

"1. Hanes Dye and Finishing Company (hereinafter sometimes referred to as 'Hanes') is a North Carolina corporation having its principal office and place of business in Winston-Salem, Forsyth County, North Carolina. Its only plant is located on Buxton Street in Winston-Salem, North Carolina. The Company bleaches, dyes and finishes cloth materials (greige goods) for its various customers. It is sometimes referred to in the industry as a commission finisher, meaning that it is commissioned to do dyeing and finishing of cloth for its customers. It does not do any dyeing or finishing in any other state although

it solicits orders and makes business calls on customers in other States.

"2. Hanes does not own any of the cloth dyed or finished by it but performs a service for its various customers and is paid several cents per yard depending on the dye or finish, for its service. The cloth is shipped or caused to be shipped to Hanes by the customer and after the dyeing and finishing is completed, the goods are shipped out in accordance with the instructions of the customer. There are over a thousand different types of dyes or finishes, or combinations thereof, any one of which may be prescribed by a particular customer. Upon completion of an order (the dyeing or finishing) Hanes submits its bill for its services to the customer which is due by the tenth of the following month.

"3. There are approximately 178 companies which did business with Hanes from time to time during the calendar year 1971. As of January 1, 1972, Hanes had in its possession the cloth of 106 different customers, as set forth in the report to the Tax Supervisor. As of June 28, 1972 (the day before hearings commenced in this matter before the Board of Equalization and Review), there were 31 of those 106 customers for which Hanes was not doing any dyeing or finishing work. However, Hanes may do work for the other 31 customers and its other customers from time to time during the year. The amount, size, dyeing or finishing which Hanes does for its customers varies from one customer to another. However, there is a degree of consistency in the type of work with respect to an individual customer. Repeat orders from a customer are dependent upon good customer relations, good quality work, prompt delivery and price. Hanes competes with other commission finishers located in various parts of the country.

"4. The customers of Hanes are usually referred to in the industry as 'converters'. A converter may obtain a contract for the sale of a particular cloth product to his customer and 'presell' (sell the cloth before he actually purchases it himself) the cloth before any other part of the transaction is initiated. After obtaining such contract, the converter then buys cloth known as 'greige goods' from a greige mill. Most of such mills are located in the Southern States. During 1971, approximately 10% of the greige goods shipped to Hanes came from greige mills in North Carolina. This percentage is closely representative of the past 3 or 4 years.

"5. The order of the converter from the greige mill is subject to variation. It may cover one quantity of goods destined for one specific purpose in the fulfillment of one specific contract. This is usually but not always the case with the converters dealing in comparatively larger volumes. The order for greige goods may also supply the converter with cloth destined for various purposes, one or more customers, and different uses.

"6. 'Greige goods' is simply a descriptive term for cloth which is untreated and undyed. It varies in width, weight per square yard, threads per square inch and fiber content, depending on the purpose for which it is to be used. In appearance, it looks very much like broadcloth and may be tinted in various colors at the greige mill. A particular converter may have one or two major customers or a dozen or more. Each of such customers will use the cloth for the purpose of the particular customer. The business of the converters falls into two broad categories, industrial and clothing. In the clothing category, the cloth is used for pockets, waistbands, and linings in various types of clothing, even including the inside lining of shoes. None of the cloth, in the clothing category, is used for an entire garment but as a component part thereof. The industrial category includes such items as headlinings and trim for automobiles as well as furniture, book covers, seat and chair covers, and practically any other product where cloth is a part of the manufactured product. The backing behind vinyl wall coverings and the basic foundation for many types of furniture coverings fall into this category.

"7. The many uses to which cloth is put are almost limitless. The number of dyes and finishes required for the various purposes is likewise almost limitless and Hanes, as one commission finisher, employs combinations of dyes and finishes in excess of one thousand. The cloth dyed or finished to be used as headliners in a given make and model of automobile is normally not usable for any other purpose. It is sold to the customer for the particular purpose he intends to make of it. Further, there are few clothing manufacturers which manufacture identical garments and the dye or finish used in one garment may vary from that in another garment.

"8. Once the dyeing and finishing is accomplished by Hanes, the cloth is ordinarily subject to cutting and sometimes further treatment before being incorporated into a finished product. For example, if the cloth is to be used for vinyl covered seat backs,

it has to undergo other treatment after it leaves Hanes before it can be used for this purpose. Cloth finished for pockets or waistbands has to be cut to the proper size before being incorporated into a garment. Generally speaking, the waistband manufacturer is a separate business from the manufacturer of the garment.

"9. More specifically, the work done by Hanes is carried out in the following manner:

"The greige goods are delivered from the greige mill to Hanes at its plant in Winston-Salem, North Carolina, usually by common carrier. At or about the same time a particular shipment of greige goods arrives, Hanes receives an order for dyeing or finishing from its customer. The order sets forth the specifications for the dyeing and finishing which Hanes is to do on the lot or lots contained in the shipment. The greige goods are received by Hanes in large rolls or in bales, ordinarily wrapped in burlap. The business is done in terms of 'lots'. During 1971, the average lot contained 30,000 yards of cloth. On occasion, a lot may contain as many as 200,000 yards and on rare occasions, as little as 5,000 yards. When the shipment is received by Hanes, the bale or roll numbers are recorded by a receiving clerk on a list under the name of the particular customer. This list is then forwarded by means of a vacuum tube system to the 'front office'. Secretaries in the front office then prepare a dye and finish Order. A dye and finish Order is then forwarded by the vacuum tube system to the 'Scheduling Department'.

"The function of the Scheduling Department at Hanes is to schedule the bleaching, dyeing and finishing and determine the completion date of goods received by Hanes. A particular Order may have to go through several different machines before the specified result is completed. The Scheduling Department takes into account the work on hand, the work force, the mathematical incidence of machinery breakdown, the routing of the goods through the different machines—and fixes a scheduled date for completion of the Order.

"The scheduling sheets are prepared daily by the Scheduling Department. Certain information from the scheduling sheet is recorded on the dye and finish Order.

"When the cloth goods are ready for delivery the Scheduling Department notifies the front office by means of the same vacuum tube system and the front office proceeds to bill the customer for the work done. The goods are shipped to the converter.

the customer of the converter or when further work is to be done on the goods, they are shipped to another business establishment for such work at the direction of the customer. As an illustration, the cloth finished for automobile headliners would be shipped directly to the plant of the automobile manufacturer. The cloth finished for trouser pockets would be shipped directly to such companies as Levi Straus or Farah. Where the cloth is to be used as backing for plastic seat covers, it may be shipped to another business establishment where the plastic covering is applied.

"10. The time the goods are at Hanes from receipt to shipment is generally 5 to 6 weeks or as little as 3 weeks. The time required for dyeing and finishing is an important consideration of Hanes' customers in placing orders with Hanes due to the demands of the industry. A given quantity of particular cloth is located at the Hanes plant on only one occasion, meaning while it is being dyed or finished and until shipped out.

"11. Generally speaking, lots are not broken. They come in as lots and go out as lots. The cloth comes in in the form of bales or rolls, is unpacked, dyed and/or finished, is repackaged and then goes out in the form of bales or rolls. On occasion and in the case of some converters with a number of smaller customers, they may order a large quantity of greige goods to get the benefit of a large volume price from the greige mill with the idea of using such goods to fill various purchase orders or contracts. In such instance, part of a given lot may receive different dyeing or finishing from another part and thereafter be shipped to different points. In other words, a given converter may want a number of rolls of cloth prepared in a particular finish or color for pockets and waistbands and may want another quantity for the same purpose but in a different shade or finish.

"12. During 1971, approximately 95.4% of all work done by Hanes was for customers having their principal office and place of business outside the State of North Carolina. The remaining 4.6% of the work was done by corporations having their principal office and place of business in North Carolina. The North Carolina corporations and their principal office and place of business were as follows:

Bunch Kelly
P. O. Box 457
Conover, North Carolina

Burlington Greige Fabric
Box 21207
Greensboro, North Carolina

Carolyn Fabrics
948 West Green Drive
High Point, North Carolina

Jackson Buff Corporation
P. O. Box 398
Conover, North Carolina

"Approximately 95% of the goods shipped from Hanes during 1971 were shipped out of the State of North Carolina.

"13. Of the goods delivered to Hanes during 1971, approximately 85% were delivered by common carrier and the remainder by either customer owned or leased trucks. As of the end of 1971, approximately 77% of the goods were shipped out by common carrier. The remaining percentage of goods were shipped out by trucks owned or leased by the converters or their customers.

"14. The property reported by Hanes to the Forsyth County Tax Supervisor under the provisions of § 105-315 of the General Statutes of North Carolina was held on its (Hanes) records for the account of the companies listed in the report as of January 1, 1972.

"15. The work done at Hanes adds a value to the cloth dyed or finished. The parties disagree as to the extent of such value."

The State Board considered two questions, *viz:* 1. Did the subject property have a tax situs in Winston-Salem, Forsyth County, on 1 January 1972? 2. If so, did the County Board of Equalization and Review err in appraising the subject property at its "raw material value" as of that date? It answered both questions in the affirmative, setting forth with particularity the reasons underlying its decision.

After preliminary recitals, the judgment of Judge Armstrong continues and concludes as follows:

"[A]nd the Court having reviewed the record of the State Board of Assessment, including the Stipulations of the parties, the testimony and other evidence, and having considered the Briefs submitted by the parties, and having heard oral arguments from the parties, and the Court being of the opinion [that

the property which is the subject of this proceeding was not 'situated' or 'more or less permanently located' in Forsyth County on January 1, 1972 and therefore did not have a tax situs in Forsyth County,] EXCEPTION No. 2 and the Court being of the further opinion [that the evidence and the Stipulations of the parties do not support the conclusion of the State Board of Assessment that such property had a taxable situs in Forsyth County on January 1, 1972;] EXCEPTION No. 3

"[NOW, THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED that the property which is the subject of this proceeding did not have a tax situs in Forsyth County on January 1, 1972 and the Decision of the State Board of Assessment in this cause is hereby reversed. It is further ORDERED that the Tax Supervisor of Forsyth County shall strike the listings and assessments respecting the property which is the subject of this proceeding from the tax records of Forsyth County. It is further ORDERED that the costs of this action shall be taxed against Forsyth County.] EXCEPTION No. 4."

Forsyth County's appeal challenges Judge Armstrong's legal conclusions and judgment.

P. Eugene Price, Jr. for Forsyth County, appellant.

Hudson, Petree, Stockton, Stockton & Robinson by W. F. Maready; and John V. Hunter III for Hanes Dye and Finishing Company and 106 of its Customers, appellees.

BOBBITT, Chief Justice.

We assume, without deciding, it was Hanes's legal duty under G.S. 105-315(a) to report the facts to the Forsyth County Tax Supervisor concerning the goods owned by its 106 customers but in its custody on 1 January 1972. By the terms of G.S. 105-315(b), any person who is required to file such a report but fails to do so becomes obligated for any unpaid portion of the tax assessed plus a penalty of $250.00. However, upon filing the report prescribed by G.S. 105-315(a), Hanes discharged its legal obligation. No statutory provision has been cited which purports to make Hanes liable for the taxes assessed on these goods or restrict in any way Hanes's right to dispose of these goods as directed by the owners thereof. However, Hanes would be affected substantially in these respects: (1) A tax required of a potential customer would adversely affect Hanes's position in a highly competitive field; and (2) both Hanes and its customers

would suffer inconveniences incident to obtaining accurate data as to the ownership of the goods on hand on January 1st and as to the precise condition of the goods of each customer as of that date.

We consider first whether North Carolina statutes authorize the taxation of goods which (1) are owned by nonresident converters, and (2) are shipped from outside North Carolina to Hanes for processing and reshipment to these converters or to their customers at designated places outside of North Carolina. Whether the goods of all the 102 nonresident converters are in this category will be discussed in the latter portion of this opinion.

Prior to 1972, there had been no taxation of goods of nonresidents in the custody of Hanes under substantially the same conditions on the particular day prescribed for the listing of tangible personal property for ad valorem taxes.

The State Board held that the goods owned by the 102 nonresident converters had a tax situs in Forsyth County on 1 January 1972.

G.S. 105-274(a), cited by the State Board, provides: "All property, real and personal, within the jurisdiction of the State shall be subject to taxation unless it is: [Defined exclusions and exemptions not pertinent to this appeal.]" We note that a provision to this effect has been a part of our statutory law at least since 1939. See Public Laws of 1939, Chapter 310, Section 303. In determining whether goods such as those now under consideration are to be taxed for the first time for 1972 taxes, decision depends upon interpretation of the portion of the 1971 Act now codified as G.S. 105-304. We note that the State Board based its decision on G.S. 105-304(d) (1) and (2).

G.S. 105-304, as now codified, was enacted in 1971. It is captioned, "Place for listing tangible personal property," and consists of subsections (a) through (h). Subsection (a) provides for the listing of all taxable tangible personal property that has a *tax situs* in this State, the place in this State in which such property is taxable to be determined according to the rules prescribed in subsections (c) through (h).

Subsection (b) provides:

"(b) Definitions.—For purposes of this section:

"(1) 'Situated' means more or less permanently located.

"(2) 'Business premises' includes, for purposes of illustration, but is not limited to the following: Store, mill, dockyard, piling ground, shop, office, mine, farm, factory, warehouse, rental real estate, place for the sale of property (including the premises of a consignee), and place for storage (including a public warehouse)."

Subsection (d) of G.S. 105-304 provides:

"(d) Property of Taxpayers With No Fixed Residence in This State.—

"(1) Tangible personal property owned by an individual nonresident of this State shall be taxable at the place in this State at which the property is situated.

"(2) Tangible personal property owned by a domestic or foreign taxpayer (other than an individual person) that has no principal office in this State shall be taxable at the place in this State at which the property is situated."

The State Board's decision rests primarily upon its finding and conclusion that the goods owned by the 102 out-of-State converters were in Hanes's possession on 1 January 1972 for "a very substantial business purpose—that of being dyed, finished or otherwise processed"; that these goods were in North Carolina for the length of time necessary for completion of this manufacturing process; and that the phrase, "more or less permanently located," used to define "situated" in G.S. 105-304(b)(1), does not apply to the facts in the present case.

It was stipulated that the work done in Hanes's plant for the out-of-State converters added a value to the cloth dyed or otherwise finished. Citing this fact, the brief for Forsyth County draws the conclusion that not only Hanes but the out-of-State converters were engaged in manufacturing in North Carolina at Hanes's plant. As support for this view, Forsyth County cites *Bleacheries Co. v. Johnson, Comr. of Revenue,* 266 N.C. 692, 147 S.E. 2d 177 (1966), and *Bedford Mills v. United States,* 59 F. 2d 263 (Court of Claims 1932).

In *Bleacheries Co.,* the plaintiff, a Rhode Island corporation, operated a textile finishing plant in North Carolina. Its business operations were closely analogous to those of Hanes. It was held that plaintiff's operations constituted manufacturing within the meaning of the statutes relating to its income and franchise taxes. Unquestionably, in respect of the goods it finished for

its customers on a contractual basis, Hanes was a manufacturer. Whether the out-of-State converters were manufacturers as contended by Forsyth County is an entirely different matter.

In *Bedford Mills,* the plaintiff, a New York corporation, was a converter. The controversy related to its liability in respect of federal income and excess profits taxes. The precise question was whether is inventories, consisting of goods in various stages of manufacture short of the final finished product, were to be valued in accordance with the regulations applicable to a trader as contended by Bedford Mills or under the regulations applicable to a manufacturer as contended by the Commissioner of Internal Revenue. Seemingly, *Bedford Mills* is authority only for the proposition that, for the purpose of computing federal taxes, these goods are to be inventoried as unfinished goods in process of manufacture rather than as completed products available for sale as merchandise. Obviously, the Commissioner of Internal Revenue was not concerned at all with the tax situs for ad valorem taxes of goods owned by Bedford Mills in the possession of a finishing mill.

[1] Although Hanes was engaged in manufacturing when processing the goods of its customers, Forsyth County's contentions (1) that the out-of-State converters were also engaged in manufacturing in North Carolina, and (2) that the "business premises" of Hanes were also the business premises of the out-of-State converters, are unrealistic and without merit. Hanes was not an agent of the out-of-State converters.

In *In re Publishing Co.,* 281 N.C. 210, 188 S.E. 2d 310 (1972), cited by Forsyth County, the question was whether all of the newsprint owned by the publishing company, a North Carolina corporation, and in its possession in Buncombe County on January 1st, was subject to ad valorem taxes. The publishing company had imported the newsprint. It contended it would take only six days to get an additional supply from its Canadian suppliers; and, therefore, an ad valorem tax on the portion of the newsprint in excess of a six-day supply would be a State tax on imports in violation of Article I, Section 10, of the United States Constitution. The Court held that all newsprint on hand on January 1st was subject to ad valorem taxes in Buncombe County, North Carolina, upholding the finding of the State Board of Assessment that the entire supply of newsprint on hand on January 1st constituted "current operational needs."

The opinion of Justice Branch in *In re Publishing Co., supra,* quotes the following from the opinion of Chief Justice Marshall in *Brown v. Maryland,* 25 U.S. (12 Wheat.) 419, 441-42, 6 L.Ed. 678, 686 (1827): "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State. . . . " Chief Justice Marshall noted that the act of an importer who imports goods into this country for "his own use" and here uses them for the purpose for which they are imported indicates the article has lost its character as an import.

The factual situation now before the Court is quite different. Greige goods shipped into North Carolina for finishing by Hanes and then shipped out of North Carolina do not become incorporated and mixed up with the mass of property in North Carolina. None of it is owned by Hanes for any purpose. The identity of each specific lot and the owner thereof are carefully preserved at all times. Pursuant to a contractual arrangement in respect of each lot, it is more accurate to say that Hanes simply performs a service for which it receives a commission.

The State Board held that the term, "more or less permanently located," used to define "situated" in G.S. 105-304(b)(1), is applicable only when it becomes necessary to determine which of two or more locations has the greater degree of permanence with reference to the particular property under consideration. It asserts this term had its origin in *In re Freight Carriers,* 263 N.C. 345, 139 S.E. 2d 633 (1965), in which the question was whether certain motor vehicles owned by Pilot Freight Carriers were taxable in Forsyth County, where Pilot, a North Carolina corporation, had its principal place of business, or in Mecklenburg County, where Pilot maintained a terminal. It asserts the Court in that case expanded the definition of "situated" by saying that it did not mean "a mere temporary presence." Our research indicates that the term, "more or less permanently located," did not have its origin in *In re Freight Carriers, supra.* Nor does it appear that the generally accepted definition of this term was expanded therein.

The general use and significance of the term, "more or less permanently located," is set forth in 71 Am. Jur. 2d, State and Local Taxation §§ 660 and 661.

§ 660 provides: "Before tangible personal property may be taxed in a state other than the domicil of the owner, it must have acquired a more or less permanent location in that state, and not merely a transient or temporary one. Generally, chattels merely temporarily or transiently within the limits of a state are not subject to its property taxes. Tangible personal property passing through or in the state for temporary purposes only, if it belongs to a nonresident, is not subject to taxation under a statute providing that all real and personal property in the state shall be assessed and taxed. . . . A criterion is whether the property is there for an indefinite time or some considerable definite time, and whether it is used or exists there to be used in much the same manner as other property is used in that community . . . . "

§ 661 provides: "Permanency in the sense of permanency of real estate is not essential to the establishment of a taxable situs for tangible personal property. It means a more or less permanent location for the time being. The ownership and uses for which the property is designed, and the circumstances of its being in the state, are so various that the question is often more a question of fact than of law. In the final analysis, the test perhaps is whether or not property is within the state solely for use and profit there. . . . "

Also, see Annotation, "Situs as between different states or countries of tangible chattels for purposes of property taxation," 110 A.L.R. 707, 717, 723 (1937), and supplemental decisions. At p. 717, the author states: "The courts are all agreed that before tangible personal property may be taxed in a state other than its owner's domicil, it must acquire there a location more or less permanent. It is difficult to define the idea of permanency that this rule connotes. It is clear that 'permanency,' as used in this connection, does not convey the idea of the characteristics of the permanency of real estate. It merely involves the concept of being associated with the general mass of property in the state, as contrasted with a transient status—viz., likelihood of being in one state today and in another tomorrow."

Although each involved a factual situation different from that now under consideration, we note that the term, "more or less permanently located," either verbatim or in essence, appears in *Mecklenburg County v. Sterchi Bros. Stores*, 210 N.C. 79, 83-84, 185 S.E. 454, 457 (1936); *Credit Corp. v. Walters*, 230 N.C. 443, 446, 53 S.E. 2d 520, 522 (1949); *Montague Brothers*

v. Shepherd Co., 231 N.C. 551, 554, 58 S.E. 2d 118, 121 (1950). If it be considered that the meaning of the word "situated" as used in *In re Freight Carriers, supra,* to wit, "Clearly, *situated* connotes a more or less permanent location," was expanded by the next sentence, to wit, "It does not mean a mere temporary presence," the definition of "situated" in subsection (b) of G.S. 105-304 was incorporated in our statutory law by Chapter 806, Session Laws of 1971, presumably with full knowledge of what the State Board called the expanded meaning of the term.

In *Transfer Corp. v. County of Davidson,* 276 N.C. 19, 170 S.E. 2d 873 (1969), the plaintiff, a North Carolina corporation having its principal office and place of business in Davidson County, was a common carrier of freight. It contended Davidson County was entitled to assess ad valorem taxes only on the proportion of the value of the vehicles engaged in interstate commerce which the number of miles traveled in this State bore to the total miles traveled by these vehicles. The plaintiff failed to show either that its vehicles were operated along fixed routes and on regular schedules into, through, and out of the nondomiciliary states, or that its vehicles were habitually situated and employed in other states throughout the year. The Court held the entire value of these vehicles was subject to taxation by Davidson County. The decisions cited relate to analogous properties, *e.g.*, ships, railroad cars and aircraft. The analyses of these decisions by Justice Huskins in his opinion for this Court disclosed that to acquire a tax situs in a nondomiciliary state it must be shown that the property had a permanent situs or be habitually employed therein. Also, see *In re Trucking Co.*, 281 N.C. 375, 393, 189 S.E. 2d 194, 206 (1972).

The State Board was of the opinion that any determination of the tax situs of tangible personal property must take into account the nature of the property involved. We agree.

Each of the decisions cited by Forsyth County and by Hanes has been considered. Suffice to say, none is deemed authoritative or persuasive with reference to the present factual situation. Most involve factual situations in which *the same property, e.g.,* motor vehicles, passed back and forth between states. Others involve property, *e.g.,* road machinery, used in a nondomiciliary state in the prosecution of the owner's business.

We are considering now the goods of nonresident converters shipped from outside of North Carolina to Hanes for processing

and reshipment to these converters or to their customers at designated places outside of North Carolina. Presumably, the greige goods shipped to Hanes for finishing had been in existence as greige goods a comparatively short time before being shipped to Hanes. Whether they had been taxed as greige goods during 1971 in the state where they were manufactured does not appear. The present case involves 1972 taxes. The goods in possession of Hanes on January 1st, whether still greige goods or partially or completely finished, were in its possession for a single purpose and for a fixed and limited time. Their temporary presence in North Carolina was for the sole purpose of enabling Hanes in the prosecution *of its business* to perform a service. After this service had been completed, the goods were shipped as directed by the converters, ordinarily to the new owners thereof, such as manufacturers of automobiles and of clothing, who would incorporate them in their completed manufactured articles. To what extent, if any, these same goods, in the same form or after being incorporated into the final product of the new owner, were subject to 1972 ad valorem taxes in the state of the new owner does not appear. We note that the dates for listing tangible personal property for ad valorem taxation differ from state to state. The question here is not whether the greige goods in the possession of Hanes on January 1st were subject to taxation on that date in the states where the owners thereof on that date resided. The sole question is whether the goods had a tax situs in Forsyth County on January 1st.

Ultimate decision depends upon whether the stipulated facts establish that these goods of nonresident owners were more or less *permanently* located in Forsyth County on January 1st. Obviously, the words *more or less* permanently exclude the necessity of establishing unqualified permanency such as actual and continuous presence in the State. On the other hand, any degree of permanency would seem to require more than a temporary presence of limited duration within the State for a specific service pursuant to a scheduled arrangement as to time of entrance and departure.

[2] We hold these goods were not "situated" or "more or less permanently located" in Forsyth County on 1 January 1972, and therefore did not have a tax situs in Forsyth County on that date. Hence, with reference to *these goods,* our decision is in accord with that of Judge Armstrong.

Attention is directed to the following portions of the stipulations:

Paragraph 4 in part states: "[T]he converter then buys cloth known as 'greige goods' from a greige mill. Most of such mills are located in the Southern States. During 1971, approximately 10% of the greige goods shipped to Hanes came from greige mills in North Carolina. This percentage is closely representative of the past 3 or 4 years."

Paragraph 12 in part states: "During 1971, approximately 95.4% of all work done by Hanes was for customers having their principal office and place of business outside the State of North Carolina. The remaining 4.6% of the work was done for corporations having their principal office and place of business in North Carolina. The [4] North Carolina corporations and their principal office and place of business were as follows: [Names and addresses omitted.] Approximately 95% of the goods shipped from Hanes during 1971 were shipped out of the State of North Carolina."

[3] Whether all of the four North Carolina corporations are converters rather than manufacturers of greige goods is unclear. Certainly, greige goods manufactured in North Carolina, shipped to Hanes for processing, and owned by a North Carolina corporation when in Hanes's custody on January 1st, are subject to ad valorem taxes in North Carolina. The same is true in respect of goods owned by a North Carolina corporation but in Hanes's possession on January 1st without regard to whether the North Carolina corporation purchased the goods from a greige mill in North Carolina or from a greige mill outside the State and had them shipped to Hanes for processing. In respect of a North Carolina corporation, its tangible personal property located in North Carolina on January 1st is subject to ad valorem taxation without reference to whether it is in the custody of Hanes or in the actual custody of the North Carolina corporation. Whether such property is taxable in the county where the principal office and place of business is located or the county where the property is physically situated is a matter for determination by the State Board of Assessment. *In re Freight Carriers, supra.*

[4] The quoted portions of the stipulations give rise to uncertainty as to what goods, if any, owned by nonresident converters but in Hanes's possession on January 1st had been purchased from North Carolina greige mills and shipped to Hanes for processing and reshipment to the converter or its cus-

tomer at a destination outside of North Carolina. In our view, the goods, if any, in this category, are subject to ad valorem taxation by Forsyth County. In a decision cited by Forsyth County, to wit, *Standard Oil Company v. Combs*, 96 Ind. 179, 49 Am. Rep. 156 (1884), the holding is accurately and succinctly stated in the headnote (Am. Rep.) as follows: "Chattels purchased in one state by a citizen of another, and remaining in the former to receive a finishing process of manufacture, are taxable in the state where purchased."

The quoted portions of the stipulations also give rise to uncertainty as to what portion, if any, of the goods owned by nonresident converters but in Hanes's possession on January 1st had been purchased from greige mills outside of North Carolina and shipped to Hanes for processing and for reshipment by Hanes in accordance with the nonresident converters' instructions to customers in North Carolina. We are inclined to the view that goods in this category, if any, would be subject to taxation by Forsyth County. However, absent a clarification of of the facts relating to such a situation, we make no definitive ruling.

In view of his adjudication that none of the goods of the 106 customers were subject to ad valorem taxes, Judge Armstrong made no decision with reference to the basis on which the goods, if subject to ad valorem taxes, should be appraised. This question will be for consideration by the superior court if and when it is determined that any of these goods were subject to ad valorem taxes.

The foregoing leads to these conclusions: With reference to goods of nonresident converters shipped from outside of North Carolina to Hanes for processing and reshipment to these converters or to their customers at designated places outside of North Carolina, the judgment of Judge Armstrong is affirmed. With reference to goods, if any, in the other categories discussed above, the cause is remanded for clarification of the facts and for further consideration in a manner not inconsistent with this opinion.

Affirmed in part, modified and remanded.

Justice HIGGINS, dissenting from that part of the opinion which modifies and remands the proceeding for further consideration.

In my opinion the subject property was never more or less permanently situated in North Carolina and, therefore, did not acquire a tax status in this State. The stipulated facts fail to bring the subject property into the ambit of North Carolina taxing statutes and Judge Armstrong's judgment dismissing the action should be affirmed.

MIRIAM GAITHER THOMPSON, RUTH LITAKER HAYDEN, SALLY M. LITAKER AND HELEN BAILEY v. HAROLD L. WATKINS, SR., EXECUTOR OF THE ESTATE OF ANNA L. LITAKER; HAROLD L. WATKINS, SR., INDIVIDUALLY, AND WIFE JUANITA WATKINS; SADIE W. CARR AND HUSBAND FRANK CARR; MILDRED W. BOST BLACK AND HUSBAND FLORENCE BLACK; AND WALTER C. LITAKER, INCOMPETENT, BY HIS GUARDIAN AD LITEM, WESLEY B. GRANT

No. 80

(Filed 30 August 1974)

1. **Estates § 3— life tenant — quasi-fiduciary relationship with remainderman**

A life tenant's relation to the remainderman is a quasi-fiduciary one in the sense that he must exercise reasonable care to preserve the property intact for transmission to the remainderman and in that he can legally do nothing to prejudice or defeat the estate of the remainderman, but the life tenant is not precluded from acquiring by gift or purchase from the remainderman his estate in remainder.

2. **Estates § 3— life tenant — duty to pay taxes**

The life tenant has the obligation to list and pay the taxes on the property; therefore, he cannot defeat the estate of the remainderman by allowing the land to be sold for taxes and taking title in himself by purchase at the tax sale.

3. **Estates § 3— life tenant — duty to pay interest on prior encumbrance**

Absent a different stipulation in the instrument creating the life estate, a life tenant owes a duty to the remaindermen to pay the interest accruing during the period of his estate on a mortgage encumbrance given prior to the creation of the life estate and remainder or reversion, at least to the extent of the income or rental value of the property.

4. **Estates § 3— life tenant — payment of encumbrance — reimbursement from remaindermen**

In respect to a prior mortgage lien on the whole estate, unless obligated by the instrument creating his estate, the life tenant's only duty to the remainderman is to pay the interest, and, when a life tenant pays off an encumbrance to preserve his estate, he is entitled

to reimbursement from the owners of future interests to the extent of their interest in the property which was subject to the encumbrance.

5. **Estates § 3— life estate — mortgage due — payment by remaindermen**

When a mortgage falls due during the period of the life estate, the life tenant and reversioner or remainderman must each pay his due proportion of this amount.

6. **Estates §§ 3, 4— foreclosure — purchase by life tenant — contribution from remaindermen**

Where a mortgage, deed of trust or other encumbrance on the whole estate, the burden of which does not fall solely on the life tenant, is foreclosed, the life tenant may purchase the property at the sale in order to protect his interest; yet he cannot purchase the fee on a foreclosure sale so as to exclude the remainderman if the remainderman is willing to contribute his share of the cost of acquisition within a reasonable time.

7. **Estates § 3— life tenant — purchase of land at foreclosure sale**

When a remainderman for his own use places an encumbrance against his vested interest and defaults, purchase by the life tenant for his sole benefit at the foreclosure sale is not inconsistent with his quasi-trustee relationship to the remainderman provided the transaction is free from fraud and the life tenant had no part in bringing about the foreclosure.

8. **Estates § 3— life tenant — power to encumber estate**

A life tenant may mortgage his own interest but, unless given the power to convey in the instrument creating his estate, he cannot encumber the entire estate without the joinder of the remainderman; further, a person occupying land under a deed effective only as to the life interest does not hold adversely to the remaindermen prior to the death of the life tenant.

9. **Mortgages and Deeds of Trust § 28; Estates § 4— life estate — foreclosure sale — purchase by life tenant**

Where testator devised the property in question to his widow for her lifetime with the remainder to his children, the plaintiffs, the widow bought the property at a foreclosure sale, and plaintiffs did not contribute to the widow their proportionate parts of the purchase price within a reasonable time after she bought the land, the plaintiffs lost the right to redeem their interests in the land, and the devisees of the widow were owners of the property free of any claims by the heirs or devisees of the testator.

ON *certiorari* to review the decision of the Court of Appeals affirming the judgment of *Armstrong, J.*, rendered 5 July 1973 in a cause heard at the March 1973 Session of the Superior Court of CABARRUS.

This action to determine the title to a lot in the City of Concord, fronting 50 feet on the east side of Tournament Street

and extending back 276 feet, was heard by Judge Armstrong upon the agreed statement of facts summarized below:

Walter R. Litaker (testator) acquired the land in controversy on 22 May 1912. At the time of his death on 6 March 1949 testator was the owner of the property, subject only to a deed of trust to Cabarrus County Savings and Loan Association.

By his will, duly probated and recorded in the office of the Clerk of the Superior Court of Cabarrus County, testator devised the lot to his wife, Anna L. Litaker (the widow), during her life or widowhood, "with the understanding" that his two daughters, Helen L. Bailey and Sally M. Litaker be allowed to operate their respective businesses, a beauty parlor and a cafe, on the premises upon the payment of a reasonable rent to the widow. Upon the termination of the widow's life estate the will provides that the two daughters "shall be permitted to continue to operate the beauty parlor and cafe on said homeplace premises during either or both their lives, and keep up all necessary repairs to and pay all taxes and insurance on said homeplace during the period of time either or both continue to operate the cafe and beauty parlor." In addition each shall continue to pay a reasonable rent to testator's executrix as long as they operatae a business on the premises, "which rent my executrix shall divide equally among my children of sound mind, including the two paying said rent."

Upon the death of Helen L. Bailey and Sally M. Litaker, testator devised the lot to four of his children, Edgar E. Litaker, Marion M. Gaither, Walter C. Litaker, and Ruth E. Litaker. In the event of the death of any one of the four named children the share of that one would devolve upon the survivors.

During the lifetime of the widow and daughters Helen L. Bailey and Sally M. Litaker, testator directed that any and all of his children, including his daughter, Maude A. Turner (not otherwise mentioned in the will), be permitted to occupy the residence part of the main dwelling as a home, "and thereafter as long as they all shall live." He further directed that his personal property be applied first to the payment of funeral and administration expenses and the remainder divided equally among the widow and his children living at his death. He appointed his daughter, Helen L. Bailey, executrix of his will.

Helen L. Bailey qualified as executrix on 16 March 1949. On 29 February 1952 the clerk of the superior court audited and

approved her final account. Prior to that date G. H. Hendrix, trustee, foreclosed the deed of trust to Cabarrus County Savings and Loan Association on the property in controversy *because of a default in the payment of the principal of the indebtedness it secured.* At the foreclosure sale the widow (the life tenant) purchased the property for the sum of $3,450 and, on 25 July 1950, G. H. Hendrix, trustee, conveyed the property to her.

The final account of Helen L. Bailey, executrix of Walter R. Litaker, shows the following pertinent facts:

Assets in the amount of $5,434.70 came into the hands of the executrix. Of this sum, $2,294.83 represented the "balance from sale of house and lot under foreclosure sale"; $941.87, represented "amount advanced by Anna Litaker." After paying the debts of the estate and the cost of administration, including $513.66 to "Helen L. Bailey, commissions as Executrix," the account shows that $759.88 of the $941.87 "advanced by her for payment of debts" was refunded to Anna Litaker. Thus, it appears that, to enable the executrix to discharge all of testator's debts, the widow made up a deficit of $181.99.

The widow died testate on 6 October 1969. She devised the property in controversy to defendants Sadie W. Carr, Mildred W. Bost (Black) and Harold L. Watkins, Sr., hereinafter referred to as defendants.

Plaintiffs and defendant Walter C. Litaker, incompetent, are the surviving devisees of testator. Edgar Litaker died in 1965 unmarried and without issue. Walter C. Litaker who was declared incompetent on 4 June 1928, was made a party-defendant and appears by his duly appointed guardian ad litem. By this action plaintiffs seek an adjudication that they and defendant Walter C. Litaker are the owners and entitled to the possession of the lot described in the will of testator.

Upon the stipulated facts, Judge Armstrong adjudged that defendants own no interest in the property; that plaintiffs, Miriam Gaither Thompson (Marion M. Gaither), Ruth Litaker Hayden, and defendant Walter C. Litaker (hereinafter referred to as the plaintiffs) own the lot in fee simple, subject to the right of Helen L. Bailey and Sally M. Litaker to operate a beauty parlor and cafe on the premises. Upon appeal, the Court of Appeals affirmed the judgment, *Thompson v. Watkins,* 20 N.C. App. 717, 202 S.E. 2d 487 (1974), and we allowed certiorari.

Williams, Willeford, Boger & Grady for plaintiff appellees.

Hartsell, Hartsell & Mills by W. Erwin Spainhour for defendant appellants.

SHARP, Justice.

The question presented is whether the widow, at the time of her death, owned the land in controversy in fee simple or held it as trustee for plaintiffs. To answer this question we must review the relationship between a life tenant and remainderman and the duties each owes the other with relation to encumbrances on the land in which they hold successive interests.

[1] A file tenant's relation to the remainderman is a quasi-fiduciary one in the sense that he must exercise reasonable care to preserve the property intact for transmission to the remainderman and in that he can legally do nothing to prejudice or defeat the estate of the remainderman. 1 Tiffany, Real Property § 68 (3rd ed. 1939); 31 C.J.S., *Estates* § 34 (1964); 51 Am. Jur. 2d, *Life Tenants and Remaindermen* §§ 27, 28 (1970). "[N]o such fiduciary relations exist between a life tenant and his remainderman as to make applicable to their transactions the rules of equity which govern trustees and cestuis que trustent, and preclude the life tenant from acquiring by gift or purchase from the remainderman his estate in remainder." *Muzzy v. Muzzy,* 364 Mo. 373, 380, 261 S.W. 2d 927, 931 (1953).

[2] The life tenant has the obligation to list and pay the taxes on the property. G.S. 105-302(c)(8); G.S. 105-384. *See Smith v. Smith,* 261 N.C. 278, 134 S.E. 2d 331 (1964); *Meadows v. Meadows,* 216 N.C. 413, 5 S.E. 2d 128 (1939). Therefore he cannot defeat the estate of the remainderman by allowing the land to be sold for taxes and taking title in himself by purchase at the tax sale. *See Farabow v. Perry,* 223 N.C. 21, 26, 25 S.E. 2d 173, 176 (1943); *Creech v. Wilder,* 212 N.C. 162, 166, 193 S.E. 281, 284 (1937); *Miller v. Marriner,* 187 N.C. 449, 457, 121 S.E. 770, 774 (1924); 51 Am. Jur. 2d, *supra,* § 255; 1 Tiffany, *supra,* § 68. The life tenant's purchase at a tax sale "is regarded as a payment of the tax, and the owner of the future interest is regarded as still holding under his original title." Simes and Smith, The Law of Future Interests, § 1700 (2d ed. 1956).

[3] In addition to the taxes, absent a different stipulation in the instrument creating the life estate, a life tenant owes a duty

to the remaindermen to pay the interest accruing during the period of his estate on a mortgage encumbrance given prior to the creation of the life estate and remainder or reversion, at least to the extent of the income or rental value of the property. Simes and Smith, *supra*, § 1697. *See* 31 C.J.S., *Estates* § 48 (1964); 51 Am. Jur. 2d, *supra*, § 277.

"Being bound to pay the taxes and interest, he [a life tenant] cannot acquire a tax title or good title based on his failing to pay taxes or interest. He is a trustee to this extent." *Miller v. Marriner, supra* at 457, 121 S.E. at 774. If an encumbrance is foreclosed because of the default on the part of the life tenant in the payment of interest or otherwise, and he becomes the purchaser at the foreclosure sale, "he thereby restores the life estate and the estate in the remainder." 1 Tiffany, *supra* § 68. *See Morehead v. Harris*, 262 N.C. 330, 338, 137 S.E. 2d 174, 182 (1964); Restatement of Property §§ 129, 130, 131, 149 (1936); 31 C.J.S., *Estates* § 35 (1964).

[4] In respect to a prior mortgage lien on the whole estate, unless obligated by the instrument creating his estate, the life tenant's only duty to the remainderman is to pay the interest. He is under no obligation to pay any part of the principal. 31 C.J.S., *Estates* § 48 (1964); 51 Am. Jur. 2d, *supra*, § 275. When a life tenant, in order to preserve his estate, "pays off an encumbrance upon the fee or estate property, whether the encumbrance is a mortgage, lien, charge or other type of encumbrance, he is entitled to reimbursement from the owners of future interests, such as reversioners or remaindermen, to the extent of their interest in the property which was subject to the encumbrance." 51 Am. Jur. 2d, *supra*, § 275. *See* 31 C.J.S., *Estates* § 48 (1964); 1 Tiffany, *supra*, § 63. He "has a lien on the future interest for the amount which its owner is under a duty to pay." Simes and Smith, *supra*, § 1697. *See Farabow v. Perry, supra* at 26, 25 S.E. 2d at 176; *Creech v. Wilder, supra* at 166, 193 S.E. at 284.

[5] When a mortgage falls due during the period of the life estate the question arises: Who has the burden of paying the principal? In Simes and Smith, The Law of Future Interests, § 1697 (2d ed. 1956), the question is answered as follows: "Courts have generally indicated that life tenant and reversioner or remainderman must each pay his due proportion of this amount. To require them to share the burden would seem to be just. By paying off the mortgage, the value of both life estate and future interest have been increased in proportion to their

respective values. Hence it would seem that the due proportion would be based upon the respective values of life estate and the remainder or reversion. . . . The cases, however, are not clear as to what a due proportion of the principal is."

The foregoing statement accords with the Restatement of Property § 132 (1936). Explanatory Comment e. under this section says that the proportionate contributions of the life estate and future interests to the payment of an encumbrance "are computable by employing the mortality tables and rate of interest regularly employed in valuing an estate for life in the state wherein the affected land is located." *Id.* at p. 433. *See Faulkenburg v. Windorf,* 194 Minn. 154, 157, 259 N.W. 802, 804 (1935).

In Comment a. to § 132, *supra,* it is noted that absent some special provision in the instrument creating the estate for life, the life tenant has no duty to contribute from his other assets to the payment of the encumbrance. "He can, however, be compelled to choose between giving up his estate for life and making a contribution, from his other assets, to the new investment of capital." *Id.* at p. 431.

[6] When a mortgage, deed of trust or other encumbrance on the whole estate, the burden of which does not fall solely on the life tenant, is foreclosed, the life tenant may purchase the property at the sale in order to protect his interest. Yet he cannot purchase the fee on a foreclosure sale so as to exclude the remainderman *if* the remainderman is willing to contribute his share of the cost of acquisition within a reasonable time. "It is uniformly held that the purchase of land by a life tenant at a foreclosure sale under a mortgage or deed of trust will be deemed to have been made for the benefit of the remainderman or reversioner if he contributes his portion of the purchase money within a reasonable time." 51 Am. Jur. 2d, *supra,* § 280. *See Witcher v. Hanley,* 299 Mo. 696, 253 S.W. 1002 (1923); *Hager v. Connolly,* 204 Ky. 147, 263 S.W. 723 (1924); *Ward v. Chambless,* 238 Ala. 165, 189 So. 890 (1939); *Drane v. Smith,* 271 Ala. 54, 122 So. 2d 135 (1960); 51 Am. Jur. 2d, *supra,* § 279; 1 Tiffany, *supra,* § 68.

Courts have not attempted to mark the limits of "a reasonable time" for contribution. "Each case depends on its own peculiar facts." *Witcher v. Hanley, supra* at 704, 253 S.W. at 1004. "What constitutes reasonable time depends upon the cirstances of each case." *Ward v. Chambless, supra* at 171, 189 So.

at 894. *See Drane v. Smith, supra* at 58, 122 So. 2d at 138; *Fleming v. Brunner*, 224 Md. 97, 106, 166 A. 2d 901, 906 (1960). In any event, when a life tenant purchases the fee at a foreclosure sale his "new deed . . . is not regarded as giving the remainderman an interest in the land unless and until the latter pays his proportionate share of the incumbrance." Simes and Smith, *supra*, § 1700.

The Restatement of Property § 150 (1936) states the rule as follows:

"When an estate for life and a future interest exist in the same land and both interests become subject to sale for the collection of a sum of money, and, as between the owner of the estate for life and the owner of such future interest this whole sum is payable partly by each of such owners, then, the owner of the estate for life, who acquires the interests sold on such sale, owns the interests so acquired subject to the power of the owner of the future interest to redeem such sale."

As explained in Comment a. to Section 150, *supra*, when the whole estate becomes subject to sale for the collection of money payable partly by the owner of each estate and the life tenant purchases at the foreclosure sale, he acquires a new ownership coextensive with the interest sold. His new interest, however, is subject to the equitable power of the owner of the future interest to redeem from such sale, that is, to share in its benefits by contributing his share of the purchase price. As previously noted, the life tenant acquires no such interest when he purchases at a foreclosure sale for the collection of taxes, interest, or other obligation primarily charged against the estate for life.

[7] Of course, when only a future interest in the land is affected by a foreclosure sale, the owner of the estate for life has no disability under Section 150. Restatement of Property § 150, Comment e. (1936). Thus, when a remainderman for his own use places an encumbrance against his vested interest and defaults, purchase by the life tenant for his sole benefit at the foreclosure sale is not inconsistent with his quasi-trustee relationship to the remainderman provided the transaction is free from fraud and the life tenant had no part in bringing about the foreclosure. *Muzzy v. Muzzy, supra.*

In this case the decision of the Court of Appeals was that the widow held the property as trustee for herself and the owners of the future interest and, at her death, title passed to plain-

tiffs by operation of law. As authority for this holding three cases are cited in the court's opinion: *Morehead v. Harris,* 262 N.C. 330, 137 S.E. 2d 174 (1964); *Farabow v. Perry,* 223 N.C. 21, 25 S.E. 2d 173 (1943); and *Creech v. Wilder,* 212 N.C. 162, 193 S.E. 281 (1937). The facts in each of these cases differ so materially from those of this case that we do not regard them as decisive here. However, an analysis of them and also of *Miller v. Marriner,* 187 N.C. 449, 121 S.E. 770 (1924), a case cited by defendant appellants, seems appropriate. No other North Carolina cases containing pronouncements on the question posed have been called to our attention.

In *Creech v. Wilder, supra,* Creech *and* wife, Lillie, executed a mortgage deed on about 40 acres belonging to Creech to secure an indebtedness of $2,500 due 1 January 1922. Creech died intestate in January 1927 leaving Lillie and the plaintiffs (his six children) as his heirs-at-law. Lillie qualified as his administratrix. On 19 March 1930 she filed a purported "Final Account" in which she reported the exhaustion of Creech's personalty and the payment of all debts except the "land debt," *which she has assumed.* However, in November 1933 the mortgage was foreclosed and, at the public sale, Lillie became the final bidder at the price of $390, and "assigned her bid for value to the defendant." The bid was not raised and defendant obtained a deed to the property.

In August 1935 the plaintiffs sued to have themselves declared the owners of the land subject to Lillie's dower and to the payment of $390 to defendant less the rental value of the land for the year 1934. The plaintiffs alleged that Lillie, after personally assuming the payment of the mortgage in her final account as administratrix, had procured the foreclosure of the mortgage for the purpose of defrauding the plaintiffs of their inheritance; that the land was worth $2,000 at the time of its sale for $390 and had a rental value of $200 per year; that on account of Lillie's fraud, her relation to the property as doweress and her duty as administratrix to protect the rights of the plaintiffs, she acquired the property as trustee for herself as widow and for the plaintiffs as heirs at law of the intestate; and that her assignee, the defendant, took with knowledge of the facts and holds the land as trustee for the plaintiffs. At the close of the plaintiffs' evidence, which tended to establish their allegations, the trial judge allowed the defendant's motion of nonsuit.

On appeal the nonsuit was reversed. The court said that (1) Lillie, as administratrix, occupied a position of trust with relation to the heirs of intestate and, having taken upon herself the obligation to pay the unsettled mortgage debt, she continued in a position of trust. (2) Her duties and obligations as administratrix continued until her intestate's debts were paid or the assets of the estate exhausted, and she should have applied to the superior court for authority to sell the land to make assets to pay debts. (3) "If she had taken title to the land pursuant to the mortgage sale, she would have held that title in trust for the benefit of herself, as widow [doweress], and the heirs subject to reimbursement." (4) The evidence that the value of the land was greatly in excess of the bid was competent upon the issue of fraud, and gross inadequacy of consideration, when coupled with any other inequitable element, will induce a court of equity to interpose and do justice between the parties.

Incidentally the court quoted in part the following two excerpts from 21 C.J., *Estates* § 74 (1920). The portions omitted from the court's quotation (shown by dots in the opinion) are here bracketed: "[a life tenant may be a purchaser at a sale to satisfy an encumbrance. But] neither a life tenant, nor one claiming under him, who allows the property to be sold for taxes or the satisfaction of an encumbrance, [or the interest thereon] can acquire a title adverse to the remainderman or reversioner by purchasing at the sale [himself, or through an intermediary, or by obtaining a conveyance of the title acquired by another purchaser at such sale."]

"If the life tenant purchases [an outstanding title or encumbrance, or purchases] the property at a sale to satisfy an encumbrance, he cannot hold such [title, encumbrance, or] property for his exclusive benefit, but will be deemed to have made the purchase for the benefit of himself and the remainderman or reversioner, [*in case the latter will contribute his share of the sum paid by the life tenant, and does so within a reasonable time.*] If the life tenant pays more than his proportionate share, he simply becomes a creditor of the estate for that amount." (Emphasis added.)

Decision in *Creech v. Wilder, supra,* was controlled by the long established rule in this jurisdiction that the purchase of a decedent's land by his executor or administrator at a sale which he procured, or which was brought about by another, is fraudulent in law even if he pays full value for the property. "It will,

as of course, be set aside at the instance of the parties interested." *Pearson v. Pearson,* 227 N.C. 31, 33, 40 S.E. 2d 477, 479 (1946). *See Smith v. Smith, supra. A fortiori,* it will be set aside when the purchase price is so grossly inadequate as to be prima facie evidence of fraud. *Wall v. Ruffin,* 261 N.C. 720, 136 S.E. 2d 116 (1964); *Cowart v. Honeycutt,* 257 N.C. 136, 125 S.E. 2d 382 (1962). Since he occupies a fiduciary relationship to the heirs and creditors of his decedent, an administrator cannot buy the trust property either directly or indirectly. And if he does so, he may be charged with the full value, or the sale may be declared void at the election of the *cestui que trust,* and this, without regard to the question of fraud, public policy forbidding it. *Davis v. Jenkins,* 236 N.C. 283, 286, 72 S.E. 2d 673, 675 (1952). We also point out that Lillie, having herself signed the note, was personally liable for its payment.

In *Farabow v. Perry, supra,* the widow of intestate Hardy, who died in 1923, remained in possession of her husband's homeplace without the allotment of dower and with the acquiescence of her husbands' heirs, his brother and sister. *In 1929 the widow mortgaged the property for $389.75. In 1930 the mortgage was foreclosed and the widow "bought" the property for $400 and received "a purported mortgagee's deed."* Thereafter she remained in possession of the premises until her death in 1939. In 1937 she gave a deed of trust on the property which was unpaid at her death. In February 1942 Hardy's heirs conveyed the property to the defendant. In March 1942 the trustee in the 1937 deed of trust purported to foreclose the deed of trust under its power of sale and to convey the property to the plaintiff, the last and highest bidder at the sale.

In the resulting lawsuit this court held that the grantee of Hardy's heirs owned the property. The premise was that a widow, while in possession of land in which "she is entitled to dower, but which dower was never set apart to her, cannot perfect title to the premises in herself by claiming adverse possession under color of title for seven years, where it appears she mortgaged the premises, intentionally defaulted, and purchased the property at her own mortgagees' sale in order that she might obtain a deed on which she could rely as color of title." *Id.* at 24-25, 25 S.E. 2d at 175. The court again quoted the excerpt from 21 C.J., *Estates* § 74 (1920) as it appeared in *Creech v. Wilder, supra.*

[8] The facts in *Farabow v. Perry, supra,* obviously have no relation to those we consider here. A life tenant may mortgage his own interest but, unless given the power to convey in the instrument creating his estate, he cannot encumber the entire estate without the joinder of the remaindermen. A mortgage by the life tenant purporting to cover the fee is effective as to the life estate only. Further, a person occupying land under a deed effective only as to the life interest does not hold adversely to the remaindermen prior to the death of the life tenant. *Lovett v. Stone,* 239 N.C. 206, 79 S.E. 2d 479 (1954); Restatement of Property § 124 (1936); 31 C.J.S., *Estates* § 55 (1964). This being true, the statute of limitations with respect to an action for possession of the land will not begin to run against the remaindermen until after the expiration of the life estate. *Narron v. Musgrave,* 236 N.C. 388, 73 S.E. 2d 6 (1952).

In *Morehead v. Harris, supra,* Harris *and* wife, Daisy, executed a deed of trust upon his land (their homeplace) to secure a debt of $200 in November 1927. Harris died intestate in May 1933 without having paid the indebtedness. Daisy was appointed his administratrix, and she continued to occupy the property without the allotment of dower. In August 1933 the deed of trust was foreclosed and Daisy bought the property for $217.07, the balance due on the indebtedness plus the costs of foreclosure. In 1956 the plaintiffs (children of Harris' first marriage) sued to obtain an adjudication that they owned the property in fee simple. Daisy died testate in 1960. In her will she devised the property to her sisters. The superior court entered judgment that plaintiffs owned the property and were entitled to possession.

On appeal this court held that "under the facts disclosed in the record," as between Daisy and the plaintiffs, she took the property under the foreclosure deed for the protection of her dower and for the benefit of plaintiffs. The rationale was: (1) An administrator cannot purchase the property of the estate at his own sale or at a sale brought about by another unless he has a personal interest to protect. (2) Although she was Harris' administratrix Daisy had the right to purchase at the foreclosure sale to protect her dower but, as against Harris' heirs, her rights under the purchase extended only to the protection of the interest for which the purchase was made. (3) Daisy's possession under her deed was not adverse to the plaintiffs.

The comments heretofore made with reference to *Creech v. Wilder, supra,* are equally applicable to *Moorehead v. Harris,*

supra. Daisy was not only the administratrix of her husband but she was jointly obligated with him on the note. At the foreclosure sale she purported to acquire the property for the balance due on the note.

In *Miller v. Marriner, supra,* the facts were these:

On 1 January 1890 Blount conveyed to Jane Marriner land, later known as the Marriner Hotel Property, for the recited consideration of $259. On the same day Jane and husband, L. C. Marriner, mortgaged the property to Blount to secure Jane's bond of even date in the amount of $259, payable one, two, and three years thereafter with interest at 8%. Jane died on 18 May 1890. Her husband and two children, the plaintiffs, survived her. At the time of her death an eight-room house had been or was being constructed on the mortgaged property. On 9 January 1893 "two payments of principal" were past due, and Blount foreclosed the mortgage. At the sale Fitchett became the last and highest bidder for the sum of $321. (This figure appears to be the principal and interest due on the note.) On the same day, for the sum of $321, Fitchett conveyed the property to Marriner, who continued to live on it. Marriner died on 3 May 1921, having devised the property to his third wife and her children, the defendants.

On 26 September 1921 the plaintiffs brought this action seeking an adjudication that Marriner had acquired the property in trust for the plaintiffs after the expiration of his life estate as a tenant by the curtsey. The defendants pled the plaintiffs' laches and Marriner's adverse possession for more than twenty-one years; that he had built the hotel upon the property; that Jane had never had a separate estate and had paid nothing for the conveyance made to her. At the trial defendants offered no evidence. The record contains no evidence that the plaintiffs ever tendered to Marriner their proportionate share of the encumbrance.

In answer to specific issues the jury found that Jane owned the property at her death; that at the time of the foreclosure the amount due on the mortgage was $321.73, which amount was the fair value of the property; that Marriner did not procure the sale; that Fitchett did not bid in the property for him; and that Marriner did not acquire the land in fraud of plaintiffs' rights.

On appeal the judgment for defendants entered upon the verdict was affirmed. In an opinion by Justice Clarkson, after adverting to the rule which prevents a life tenant from acquiring a title to the property based on his failure to pay the taxes or the interest on a mortgage indebtedness, the Court said: "If a sale is made by a person who holds a mortgage to pay the *principal of the mortgage,* and the life tenant purchases it, it is a question of good faith and whether the life tenant fraudulently caused, procured or took advantage of the sale to the prejudice of the rights of the remaindermen. The decisions are in contrariety, but we think the position here taken consonant with justice and fair dealing. In the instant case this was an issue of fact for the jury, and not a question of law." *Id.* at 457, 121 S.E. at 774.

In the opinion it was specifically noted that the suit was not instituted for eighteen years after the youngest plaintiff became of age; that Marriner had recorded his deed from Blount immediately; that thereafter he occupied and claimed the property as his own for twenty-eight years before his death; that plaintiffs had delayed the suit charging their father with fraud until after his death, the deaths of Blount, Fitchett, and all the "witnesses by whom the *bona fides* of the transaction could be proven." (The Court apparently assumed that such witnesses had once been available.) The opinion concluded with the statement that courts of equity have always wisely refused to entertain stale claims.

In *Miller v. Marriner, supra,* the jury apparently accomplished its purpose to do justice in its sight by finding those facts which, under the court's instructions and theory of the case, would enable the defendants to retain possession of the land. A sympathetic appellate court took the view that "twelve honest men have decided the cause." Suffice it to say the result obtained is consistent with the law as stated herein.

In the case now before us the life tenant, the widow, was not the executor or administrator of the estate of her husband, whose deed of trust on the property was foreclosed. Her purchase of the property, therefore, was not fraudulent in law, subject to upset at the option of plaintiffs. It does not appear from the record that she was personally liable for the debt which the deed of trust secured; the inference is that she was not. There is no intimation that she procured, manipulated, or suggested the foreclosure. She purchased the property at a public sale,

duly advertised and conducted by the trustee. Neither the pleadings nor record contain any suggestion that she paid less than the fair market value of the property. There is no hint of any fraud or unfair dealing on her part.

The circumstances were such that plaintiffs must have had full knowledge of the widow's purchase, the conditions under which the sale was made, and the disposition of the proceeds. The conclusion is inescapable that the deed of trust was foreclosed to make assets to pay the debts of testator. No doubt the executrix, who was represented by counsel, was advised that this would be a less expensive procedure than a pecial proceeding for that purpose. The trustee, after paying the balance due on the note and the costs of the foreclosure, turned over the net proceeds of the sale ($2,291.83) to the executrix, plaintiff Helen Bailey. That sum being insufficient to pay the testator's debts and the cost of administering his estate—including commissions in the amount of $513.66 to the executrix—the widow advanced the difference between the estate's assets and liabilities in the about of $181.99. Testator's children made no contribution to his estate either in services or cash. Nor, during the nineteen years between the date the widow bought the property and the date of her death, did plaintiffs ever offer to pay her their proportionate part of the purchase price of the land. In this case the equities are not with plaintiffs.

Plaintiffs' theory seems to be that a life tenant who purchases the property at a foreclosure can never hold it for his own exclusive benefit. They have misapprehended the law.

Certainly, in this case, had the property been sold in a special proceeding brought by the executrix to make assets, to which all interested persons were parties, the widow could have purchased the property with leave of court and obtained a fee simple title upon the payment of full value. *See Morehead v. Harris, supra* at 335, 137 S.E. 2d at 180; *Privette v. Morgan*, 227 N.C. 264, 41 S.E. 2d 845 (1947); *Froneberger v. Lewis*, 79 N.C. 426 (1878). In the light of hindsight it now seems that would have been the preferable procedure. However, on this record, it does not appear that the consequences to plaintiffs would have been different.

[9] We hold that plaintiffs, the owners of the future interests following the widow's life estate, in order to preserve their rights in the property, were required to contribute to the widow their

proportionate parts of the purchase price within a reasonable time after she bought the land at the foreclosure sale. This they did not do. At the time of the widow's death plaintiffs had long ago lost the right to redeem their interests and to assail her title. Therefore, as her devisees, defendants are the owners of the property free of any claims by the heirs or devisees of the testator, Walter R. Litaker.

The decision of the Court of Appeals is

Reversed.

STATE OF NORTH CAROLINA v. KELLY DEAN SPARKS

No. 26

(Filed 30 August 1974)

1. **Constitutional Law § 29; Criminal Law § 135; Jury § 7— jurors opposed to death penalty — excusal for cause**

The trial court in a first degree murder case did not err in excusing for cause seven prospective jurors who stated that they could not vote for a verdict that would result in imposition of the death penalty no matter how aggravated the case and regardless of the evidence shown.

2. **Homicide § 20— bloody shirt — photograph of deceased — admissibility**

In a homicide prosecution, the trial court did not err in permitting the State to introduce into evidence the bloody shirt the victim was wearing when shot and a photograph of the deceased made on an ambulance stretcher since both exhibits corroborated testimony of the State's witnesses and the court properly instructed the jury that the photograph was admitted solely for illustrative purposes.

3. **Criminal Law §§ 52, 57; Homicide § 15— expert testimony — use of "could have"**

In a homicide prosecution, the trial court did not err in permitting an expert in forensic chemistry to testify that from tests he conducted on defendant's left hand there were indications that defendant "could have" fired a gun.

4. **Criminal Law § 102— jury argument — demonstration of weapon firing with handcuffed hands**

In a prosecution for the murder of a policeman, the trial court did not abuse its discretion in permitting the district attorney during his jury argument to demonstrate the firing of the weapon with his hands handcuffed behind him to illustrate how the defendant allegedly

killed the deceased where the solicitor's actions were supported by the evidence and did not amount to experimental evidence.

5. **Homicide § 25— first degree murder — failure to instruct on "fixed design"**

The trial court did not err in failing to charge that it was necessary for defendant to have held a "fixed design" to take the life of the deceased in order to be found guilty of first degree murder where the court charged that in order to return a guilty verdict the jury must find that defendant "intended to kill" the deceased.

6. **Homicide § 21— premeditation and deliberation — sufficiency of evidence**

There was sufficient evidence of premeditation and deliberation for submission to the jury of a charge of first degree murder of a policeman where the State's evidence tended to show that the policeman awakened defendant and his three companions who were sleeping in a car, handcuffed defendant and arrested defendant for possessing a sawed-off shotgun, that defendant shot the policeman while he was searching the car, that some 15 minutes had elapsed from the time defendant was awakened until the actual firing of the shot, that the policeman was in uniform and wearing his badge, that defendant with a gun in his hands was observing the policeman over his shoulder immediately before the fatal shot was fired, that after the shot was fired a clicking sound was heard at least twice, that the same sound had been heard the day before when the pistol jammed and failed to fire, that defendant fled and dropped the pistol near the scene of the shooting, that the pistol was jammed when found, and that defendant and his companions were in full control of their faculties despite the use of drugs the preceding day.

7. **Homicide § 14— death from intentional use of deadly weapon — presumptions — constitutionality**

Presumptions of malice and unlawfulness of killing arising from the State's proof that a death was proximately caused by defendant's intentional use of a deadly weapon are not contrary to the constitutional provision that the State has the burden of proving all the elements of the case beyond a reasonable doubt.

8. **Homicide § 8; Criminal Law § 168— mental capacity — drugs — instructions unsupported by evidence — harmless error**

Where there was no evidence that defendant was under the influence of drugs or intoxicants at the time of the fatal shooting, the court's instructions on defendant's contention with reference to mental deficiency brought about by the use of drugs as a defense to first degree murder were more favorable to defendant than he was entitled to receive, and any error or inconsistency in them was harmless to defendant.

9. **Homicide § 30— first degree murder — failure to submit involuntary manslaughter**

In a prosecution for the first degree murder of a policeman wherein all the evidence tended to show that defendant intentionally shot and killed the deceased, there is no merit in defendant's contention that

the trial court should have submitted an issue of involuntary manslaughter on the ground that it is reasonable to suppose that defendant fired a single shot at the policeman for the purpose of temporarily disabling, stunning, or injuring slightly in order to effect his escape from custody.

10. Constitutional Law § 36; Criminal Law § 135— constitutionality of death penalty

Imposition of the death penalty is not cruel and unusual punishment in violation of the Eighth Amendment or arbitrary punishment in violation of the Fourteenth Amendment to the U. S. Constitution.

Chief Justice Bobbitt and Justices Higgins and Sharp dissenting as to death sentence.

APPEAL by defendant from *Copeland, S.J.*, at the 29 October 1973 Criminal Session of GUILFORD Superior Court.

On an indictment proper in form, defendant was tried and convicted of murder in the first degree of George L. Lashley. Defendant appeals from a judgment imposing sentence of death.

The State's evidence tends to show that on 29 June 1973 defendant was driving his mother's car around Greensboro, North Carolina. The State's three principal witnesses, Paul Darrell Stone, Paula Rogers, and Robin Diana Phillips (hereinafter referred to as Stone, Paula, and Robin) were with defendant, and the four of them took differing amounts of "speed" at various times during the day. During the afternoon defendant drove his mother's car to a lake near Greensboro, and there defendant and Stone discharged a .25-caliber pistol belonging to defendant several times. Later that day defendant took the two girls, Paula and Robin, to an establishment known as the Jokers 3 in Greensboro. Defendant and Stone then went "riding around." While riding around, defendant spotted a white Mustang automobile and stopped near it. He proceeded to "straight wire" that car and drive off in it, having Stone follow him in the car belonging to defendant's mother. Later they parked defendant's mother's car, and defendant and Stone went back to the Jokers 3 in the Mustang and picked up Paula and Robin. This was sometime between 7:00 and 8:30 p.m.

After driving around Greensboro for awhile in the stolen Mustang, the four started discussing the possibility of going on a trip. They were out of drugs, and defendant suggested they go to Gibsonville and "rob" a particular doctor's office since, according to defendant, this doctor kept a lot of drugs there. The

group agreed to this plan. When they arrived in Gibsonville, they drove by the doctor's office several times. Some people were still on the street nearby, so they decided they would wait until early the next morning before "robbing" the office.

They then went to a restaurant to eat. Afterwards defendant drove the car to a wooded area near the edge of Gibsonville where one of the city's sewer system pump stations was located. There defendant parked and all four fell asleep in the car.

Stone, Paula, and Robin all testified that the four of them had been taking "speed" during the day, but they were out and had gone to Gibsonville to try to get some type of drugs on which to get "high"; and that none of them were "up" on drugs when they went to sleep in the car.

On the front seat of the car next to defendant was a sawed-off shotgun that defendant and Stone had stolen earlier in the day. Defendant also had his .25-caliber pistol under the driver's seat.

Around 6:30 a.m. on the next day Vance Evans, the assistant superintendent of Gibsonville, was checking the various pump stations around the city. He observed the white Mustang near the pump station on city property where no one was authorized to park. He immediately drove to the city hall and reported this to the town's chief of police, George L. Lashley. Evans and Chief Lashley drove to the pump station and parked the police car behind the Mustang. Chief Lashley walked up to the driver's side of the car and observed the sawed-off shotgun in the front seat. He woke defendant, asked him if he did not know that it was illegal to have a sawed-off shotgun, and told him to get out of the car. Chief Lashley then searched and handcuffed defendant, and told him he was under arrest for possessing a sawed-off shotgun.

Stone, Paula, and Robin were awakened by this activity. Stone was ordered out of the car and was searched but not handcuffed—apparently because Lashley had only one pair of handcuffs. Next, at the direction of Lashley, Paul and Robin got out of the car. Chief Lashley then searched the car, beginning with the driver's side. He removed several items from the driver's side of the car, placed them on top of the car, and then walked in front of the car to the passenger's side. Lashley left the door on the driver's side open, and as he walked toward the other side of the car, defendant moved from a position at the

rear of the car up to the driver's side by the open door where Lashley had just been. Meanwhile Chief Lashley was searching the passenger's side and was leaning forward with his shoulder inside the car. As Lashley was going through a paper bag on the front floorboard, defendant was seen to suddenly "move up in the doorway and turn around and look over his shoulder, and then kind of squat." Then a shot was fired, followed by two clicking sounds. Lashley screamed, grabbed his shoulder, and fell backwards.

Immediately after the shot and the clicks, defendant ran from the scene of the shooting into some nearby woods, dropping a pistol from his handcuffed hands as he ran. Stone and Evans quickly tried to assist Chief Lashley who was bleeding badly. When an ambulance arrived a few minutes later, Lashley was dead. According to medical testimony, the bullet went through the second rib on the right side, the upper and lower parts of the right lung, the aorta, and then lodged in the abdominal cavity near the pancreas.

A .25-caliber pistol identified as belonging to defendant was found by investigating officers in some grass where one of the State's witnesses had seen defendant drop a pistol as he fled the scene.

Other facts pertinent to decision are set out in the opinion.

Defendant did not testify or offer any evidence.

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

Smith, Carrington, Patterson, Follin & Curtis by Norman B. Smith for defendant appellant.

MOORE, Justice.

[1] Defendant first contends that the court erred in excusing prospective jurors for cause due to their scruples against capital punishment.

The parties stipulated:

> "Seven jurors were challenged by the State and excused by the Court for cause upon the grounds that they possessed conscientious scruples against the imposition of capital punishment and because of these views would not consider any verdict that would involve the death penalty, would not

under any circumstances return a verdict that would involve the death penalty regardless of what the facts of the case showed or what the evidence might reveal, and were irrecovably committed to vote against any verdict that would involve the death penalty regardless of what the circumstances were or how aggravated the case was."

Since *Witherspoon v. Illinois,* 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968), this Court has consistently 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. Fowler,* 285 N.C. 90, 203 S.E. 2d 803 (1974); *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750 (1974); *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).

In view of the stipulation entered into by the parties, the seven jurors were properly excused for cause. This assignment of error is overruled.

[2] Defendant next contends that the court erred in permitting the State to introduce in evidence the bloody shirt which Chief Lashley was wearing when shot, and State's Exhibit No. 18, a photograph of the deceased made on an ambulance stretcher.

Defendant by his plea of not guilty denied that he fired the lethal weapon or directed its aim. The evidence of the blood-stained shirt and the photograph of the body of the deceased corroborated the testimony of the State's witnesses already in the record. The location of the blood upon the victim's shirt and the photograph of the body and the wound would indicate the angle of the bullet which struck the victim and the direction from which it was fired. These also indicated an overhead shot from the opposite side of the car from where the victim was standing, and corroborated the witnesses' testimony that such was the location of defendant at the time the pistol was fired.

"' * * * In cases of homicide or other crimes against the person, clothing worn by the defendant or by the victim is admissible if its appearance throws any light on the cir-

cumstances of the crime * * * . ' Stansbury, North Carolina Evidence, 2d Ed., § 118; *State v. Rogers,* 275 N.C. 411, 430, 168 S.E. 2d 345; *State v. Atkinson,* 275 N.C. 288, 310, 167 S.E. 2d 241; *State v. Speller,* 230 N.C. 345, 53 S.E. 2d 294; *State v. Petry,* 226 N.C. 78, 36 S.E. 2d 653." *State v. Felton,* 283 N.C. 368, 196 S.E. 2d 239 (1973).

The court properly instructed the jury that the photograph was admitted solely for the purpose of illustrating and explaining the testimony of the witnesses and not as substantive evidence. Under such circumstances, the fact that the photograph depicts a gruesome or gory spectacle does not render it inadmissible. *State v. Robinson,* 283 N.C. 71, 194 S.E. 2d 811 (1973); *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652 (1972); *State v. Chance,* 279 N.C. 643, 185 S.E. 2d 227 (1971); *State v. Atkinson, supra.* See 2 Strong, N. C. Index 2d, Criminal Law §§ 42, 43 (1967).

[3] Defendant next contends that it was error to permit an expert chemist to testify for the State that defendant "could have" fired the pistol instead of limiting the witness's testimony to whether defendant probably discharged the weapon.

Mr. R. D. Cone, who was qualified as an expert forensic chemist specialized in the field of physical evidence, testified that from the tests he had conducted on defendant's left hand there were indications that defendant "could have" fired a gun. Defendant contends that this statement does not meet the tests as set out in *Lockwood v. McCaskill,* 262 N.C. 663, 138 S.E. 2d 541 (1964), and that the opinion of the expert witness should have been to the effect that it was "reasonably probable" that the defendant fired the gun.

In *Apel v. Coach Co.,* 267 N.C. 25, 147 S.E. 2d 566 (1966), this Court approved questions where expert witnesses were asked their opinion as to whether the accident which was the subject of the suit "could or might have" resulted in the type of disability alleged by the plaintiff.

In *Mann v. Transportation Co.* and *Tillett v. Transportation Co.,* 283 N.C. 734, 747, 198 S.E. 2d 558, 567 (1973), a mechanic testifying as to a defect in a bus, stated that this defect "could or might have caused the steering system to fail when Gibbs

attempted to steer the bus around the left curve." Justice Sharp in commenting on this testimony stated:

> "It is apparent that, in phrasing the hypothetical question which elicited the foregoing opinion from Jeffries, counsel was observing the rule stated in 1 Stansbury, North Carolina Evidence § 137, at 453 (Brandis Rev. 1973), that if the question relates to cause and effect an expert witness 'should be asked whether in his opinion a particular event or condition, *could* or *might* have produced the result in question, not whether it *did* produce such result.' This form of question clearly invited the argument, which Coach Company makes, that *could* or *might have* in Jeffries' answers amounts to nothing more than his speculation as to possibilities. The situation here produced demonstrates the validity of Professor Henry Brandis' comment that an expert witness should be allowed 'to make a positive assertion of causation when that conforms to his true opinion, reserving "could" and "might" for occasions when he feels less certainty'; that if the expert witness, 'though holding a more positive opinion, is forced to adopt the "could" or "might" formula, then the result is patently unjust, unless the more positive opinion may be said to be inherently incredible.' 1 Stansbury, North Carolina Evidence § 137, at 455 & n. 97 (Brandis Rev. 1973). *See also* the comment of Justice Higgins in *Apel v. Coach Co.*, 267 N.C. 25, 30, 147 S.E. 2d 566, 569-70 (1966). Cf. *Service Co. v. Sales Co.*, 259 N.C. 400, 414, 131 S.E. 2d 9, 20 (1963)."

Although in this case the witness Cone should have been allowed to give a more positive opinion, if he had one, it was not error to allow this expert witness to testify that the defendant "could have fired a gun with his left hand."

[4] During the course of the argument by the district attorney, the following proceedings were had:

> "THE COURT: The Court Reporter is present, and at this time let the record show that the District Attorney proposes to argue the case to the jury about his contention about the evidence in the case by way of having the handcuffs which are in evidence and identified as State's Exhibit 9 placed on his hands and that he proposes to demonstrate to the jury the manner in which the State of North Carolina contends the alleged murder took place. To this demonstra-

tion, counsel for the defendant objects and excepts to the demonstration. The objection is overruled, with this admonition to the jury:

"That you will take the evidence from the witnesses on the stand and the evidence that was offered here in this courtroom, as you recall it, as it came from the witnesses on the stand and the evidence that was offered and shown to you. Both the District Attorney and counsel for the defendant have a right under the law to argue their contentions about what evidence tends to show. You will bear that in mind at all times as to this demonstration about to be given, and all other arguments that the District Attorney makes and all arguments that counsel for the defendant makes.

"Proceed."

Defendant contends that the court committed reversible error by allowing the district attorney to demonstrate the firing of the weapon with his hands handcuffed behind him to illustrate how the defendant allegedly killed the deceased, for the reason that this demonstration amounted to experimental evidence which was given by argument of counsel and not through a witness under oath.

Defendant cites *State v. Williams,* 168 N.C. 191, 83 S.E. 714 (1914), and *State v. Eagle,* 233 N.C. 218, 63 S.E. 2d 170 (1951), in support of his contention that the solicitor's argument was improper. In *Williams* counsel for defendant "proposed to take some disinterested person in the courtroom and demonstrate before the jury on that person the positions that defendant and the deceased were in at the time of the shooting, as testified to by defendant, in order to show that the wounds would have been inflicted in the body of the deceased at the place and would have had the range or direction which they had, as testified to by the doctors." The defendant, while on the stand as a witness in his own behalf, demonstrated before the jury the position he, the defendant, was in and the position the deceased was in and the way the deceased had hold of him when he fired the shots. This Court stated it could not see how defendant had been deprived of any of his substantial rights by the trial court's refusal to allow defendant's counsel to make the suggested demonstration. The Court then stated:

"The defendant was permitted to make his demonstration before the jury as a part of his evidence, and it then

became the duty and right of counsel to comment on the evidence, but *not to introduce new elements.* Matters of this kind are left to the sound discretion of the presiding judge." (Emphasis added.)

In *Eagle* the solicitor in his argument to the jury exhibited an unidentified bottle of whiskey which had not been introduced in evidence. This Court in holding this action erroneous stated:

> "If in the opinion of the Solicitor the ends of justice required the exhibition to the jury of the bottle of whiskey taken from the defendant's car at the time of his arrest, the bottle should have been identified and introduced in evidence at the proper time during the course of the trial, or a motion made to reopen the case and permit its identification and introduction in evidence. [Citations omitted.]"

In both *Williams* and *Eagle* the demonstrations before the jury involved matters not in evidence. In the present case the State offered evidence that (1) defendant and the deceased were at opposite sides of the car, the defendant standing near the front door on the driver's side with his hands handcuffed behind him, while the victim was bending down on the passenger's side searching the front seat of the car; (2) defendant was looking over his shoulder at a time immediately preceding the shooting with his manacled hands pointing toward the victim; (3) defendant had a pistol in his hands immediately before and after the shooting, and burned gunpowder concentrations were found near the belt loops on the back of defendant's trousers; and (4) the position of the wound upon the victim's body indicated that he was shot by someone standing above, shooting in a direction toward his head—the position in which defendant was last seen immediately before the fatal shot was fired.

From this evidence it was proper to infer that the defendant inflicted the fatal injury in the way demonstrated by the solicitor. His actions were supported by the evidence.

As stated in *State v. Rose,* 270 N.C. 406, 411, 154 S.E. 2d 492, 496 (1967):

> " 'The manner of conducting the argument of counsel, the language employed, the temper and tone allowed, must be left largely to the discretion of the presiding judge.' *S. v. Bryan,* 89 N.C. 531. Ordinarily, this Court 'will not review his discretion unless it is apparent that the impro-

priety of counsel was gross and well calculated to prejudice the jury.' *S. v. Baker,* 69 N.C. 147; *S. v. Bowen,* 230 N.C. 710, 55 S.E. 2d 466, and cases cited; *S. v. Smith, supra* [240 N.C. 631, 83 S.E. 2d 656]; *S. v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424."

See also *State v. Westbrook, supra.*

No abuse of discretion is shown. This assignment of error is without merit.

[5] Defendant alleges that reversible error was committed by the court in failing to charge that it was necessary for defendant to have held a "fixed design" to take the life of the deceased in order to be found guilty of first degree murder. He cited *State v. Brown,* 218 N.C. 415, 11 S.E. 2d 321 (1940); *State v. Burney,* 215 N.C. 598, 3 S.E. 2d 24 (1939); and *State v. Spivey,* 132 N.C. 989, 43 S.E. 475 (1903), for the proposition that the "fixed design" definition of intention to kill was a proper part of the standard definition of this element of first degree murder. The definition of first degree murder as contained in those cases was held to be correct, but it is not necessary that the words "fixed design" always be included in defining murder in the first degree. Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. A specific intent to kill is a necessary constituent of the elements of premeditation and deliberation in first degree murder. *State v. Duncan,* 282 N.C. 412, 193 S.E. 2d 65 (1972); *State v. Robbins,* 275 N.C. 537, 169 S.E. 2d 858 (1969); *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560 (1968); *State v. Downey,* 253 N.C. 348, 117 S.E. 2d 39 (1960).

In the present case the trial court in its final mandate to the jury stated:

> "So I charge you that if you find from the evidence and beyond a reasonable doubt that on or about June 30, 1973, Kelly Dean Sparks intentionally shot and killed George L. Lashley with a .25 caliber pistol, it being a deadly weapon, thereby proximately causing George L. Lashley's death, and that Kelly Dean Sparks intended to kill George L. Lashley and that he acted with malice and with premeditation and deliberation, it would be your duty to return a verdict of guilty of first degree murder."

The phrase "that he intended to kill" is self-explanatory, and, absent a special request for instructions from the defendant, the

presiding judge was not required to supply its definition. As stated by Chief Justice Stacy in *State v. Plemmons,* 230 N.C. 56, 52 S.E. 2d 10 (1949) : "The jury could hardly have failed to understand what was meant by the expression 'with intent to kill.' It is self-explanatory. There is no point in elaborating the obvious." See *State v. Jennings,* 276 N.C. 157, 171 S.E. 2d 447 (1970) ; 3 Strong, N.C. Index 2d, Criminal Law § 113, p. 14 (1967). This assignment of error is overruled.

[6] Defendant next contends that there was not sufficient evidence to submit the charge of murder in the first degree to the jury because of lack of evidence of premeditation and deliberation.

This assignment raises the question whether the evidence for the State, taken as true and considered in the light most favorable to the State, is sufficient to permit the jury to make a legitimate inference and finding that defendant, after premeditation and deliberation, formed the fixed purpose to kill Chief Lashley and thereafter carried out that purpose. *State v. Van Landingham,* 283 N.C. 589, 197 S.E. 2d 539 (1973) ; *State v. Perry,* 276 N.C. 339, 172 S.E. 2d 541 (1970). Premeditation and deliberation are not usually susceptible to direct proof, but must be established from the circumstances surrounding the homicide. *State v. Walters,* 275 N.C. 615, 170 S.E. 2d 484 (1969) ; *State v. Faust,* 254 N.C. 101, 118 S.E. 2d 769, 96 A.L.R. 2d 1422, cert. den. 368 U.S. 851, 7 L.Ed. 2d 49, 82 S.Ct. 85 (1961).

The evidence in this case tends to show that defendant had had a full night's sleep before being awakened and handcuffed by Chief Lashley; that he and his companions were in full control of their faculties despite their use of drugs on the preceding day; that some 10 to 15 minutes elapsed from the time defendant was awakened and ordered from the car until the actual firing of the shot; that Chief Lashley was in uniform and was wearing his badge on this occasion; that defendant with a gun in his hands was observing Chief Lashley over his shoulder immediately before the fatal shot was fired; and that after the shot was fired a clicking sound was heard at least twice—the same sound that had been heard the day before when the pistol "jammed" and failed to fire. Immediately after the shot was fired, defendant ran dropping the pistol near the scene of the shooting. When the pistol was found, it was "jammed" with a shell partially in the barrel.

The want of provocation, the absence of any excuse or justification for the shooting, the number of shots fired or attempted to be fired, the fact that defendant ran immediately after the shooting, coupled with the other evidence, permitted a legitimate inference of premeditation and deliberation, and was sufficient to be submitted to the jury on the issue of murder in the first degree. *State v. Van Landingham, supra; State v. Duncan, supra; State v. Perry, supra; State v. Faust, supra; State v. Lamm,* 232 N.C. 402, 61 S.E. 2d 188 (1950).

[7] Defendant next avers that the court committed reversible error by instructing the jury that if the State proves beyond a reasonable doubt that defendant intentionally killed Lashley with a deadly weapon or intentionally inflicted a wound upon Lashley with a deadly weapon that proximately caused his death, the law raises two presumptions; first, that the killing was unlawful, and second, that it was done with malice. In support of this contention, defendant cites *Re Winship,* 397 U.S. 358, 25 L.Ed. 2d 368, 90 S.Ct. 1068 (1970); *Speiser v. Randall,* 357 U.S. 513, 2 L.Ed. 2d 1460, 78 S.Ct. 1332 (1958). Neither of these cases is pertinent to the facts in this case.

Defendant in his brief states:

> "The instructions complained of here are consistent with the well-settled case law of this state. Malice and unlawfulness of the killing are presumed, when a deadly weapon is intentionally used. 4 Strong Index 2d, Homicide, Sec. 14, pp. 207-209. The burden is upon the defendant to disprove malice and reduce a killing to voluntary manslaughter. *State v. Absher,* 226 N.C. 656, 40 S.E. 2d 26 (1946); *State v. Alston,* 214 N.C. 93, 197 S.E. 719 (1938)."

Defendant contends, however, that these long-standing rules are no longer valid and are contrary to the constitutional provision that the State has the burden of proving all the elements of the case beyond a reasonable doubt. He cites *State v. Cuevas,* 488 P. 2d 322 (Haw. 1971), in which the Supreme Court of Hawaii invalidated a statute that placed the burden on defendant to show malice was not present or that there was legal justification or extenuation in a killing, stating: "Under our legal system, the burden is always on the prosecution to establish every element of crime by proof beyond a reasonable doubt, never upon the accused to disprove the existence of any necessary element." Defendant contends that that decision ought to

be followed by this Court. We have carefully considered defendant's argument that we should change our well-established rule. However, we are not persuaded to do so. See *State v. Jennings, supra; State v. Propst, supra.*

[8] There is evidence tending to show that on 29 June 1973 defendant and his companions took differing amounts of "speed" at various times during the day. That night they ran out of drugs and planned to rob a doctor's office in Gibsonville. However, they did not do so, and, according to the three persons who were with defendant, none of them were "up" on drugs when they went to sleep in the car that night nor when they awakened the next morning. The defendant did not testify or offer any evidence.

Although there was no evidence that defendant was under the influence of drugs or intoxicants at the time of the fatal shooting, the trial judge, out of an abundance of caution and at the request of defendant, instructed the jury on defendant's contention with reference to mental deficiency brought about by the use of drugs as a defense to first degree murder. These instructions were all more favorable to defendant than he was entitled to receive, and if there was error or inconsistency in them, it was harmless to defendant.

[9] Defendant next avers that the court committed reversible error by failing to submit the crime of involuntary manslaughter, contending that it is reasonable to suppose that defendant fired a single shot at the police officer only for the purpose of temporarily disabling, stunning, or injuring slightly, in order to effect his escape from custody.

There is no evidence to support this contention. All the evidence tends to show that defendant intentionally shot and killed Chief Lashley. "The necessity for instructing a jury as to an included crime of lesser degree than the one charged arises only when there is evidence to support the included crime of lesser degree. *State v. Watson,* 283 N.C. 383, 196 S.E. 2d 212; *State v. Bryant,* 280 N.C. 551, 187 S.E. 2d 111; *State v. Carnes,* 279 N.C. 549, 184 S.E. 2d 235." *State v. Henderson,* 285 N.C. 1, 22, 203 S.E. 2d 10, 24 (1974). See also *State v. Bunn,* 283 N.C. 444, 196 S.E. 2d 777 (1973); *State v. Freeman,* 275 N.C. 662, 170 S.E. 2d 461 (1969). This assignment of error is overruled.

[10] Finally, defendant contends that the imposition of the death penalty in this State is cruel and unusual punishment in violation of the Eighth Amendment and arbitrary punishment in violation of the Fourteenth Amendment to the United States Constitution.

Defendant admits that this Court has rejected this argument in *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974). We adhere to our decision in that case. See *State v. Fowler,* 285 N.C. 90, 203 S.E. 2d 803 (1974); *State v. Dillard,* 285 N.C. 72, 203 S.E. 2d 6 (1974); *State v. Crowder,* 285 N.C. 42, 203 S.E. 2d 38 (1974); *State v. Henderson, supra; State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750 (1974); *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973).

Because of the imposition of the death sentence, we have carefully examined the entire record in this case, including the charge of the court, and have considered every contention and argument advanced by defendant. Our examination discloses that defendant received 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).

NORTH CAROLINA STATE HIGHWAY COMMISSION v. J. R. HELDERMAN AND WIFE, WILLIE H. HELDERMAN

No. 33

(Filed 30 August 1974)

1. Eminent Domain § 6— evidence of value — testimony by owner

Unless it affirmatively appears that the owner does not know the market value of his property, it is generally held that he is competent to testify as to its value even though his knowledge on the subject would not qualify him as a witness were he not the owner.

2. Eminent Domain § 6— evidence of value — opinion of owner

Where defendant's attorney in a land condemnation proceeding asked defendant if he was familiar with the fair market value of real

estate in the vicinity of his property and if he had an opinion satisfactory to himself as to the fair market value of his property on and after the date of the taking, defendant's answer, "Yes, sir, I think so," to both questions was a positive assertion that he knew land value in the vicinity of his property and had an informed opinion satisfactory to himself as to the value of the property on the pertinent date.

3. **Eminent Domain § 6; Trial § 16— evidence of value — comparable tracts — testimony stricken**

Trial court's failure to allow plaintiff's motion for mistrial in a land condemnation proceeding did not constitute prejudicial error where the court ruled that the purchase price paid in asserted comparable sales considered by realtors in valuing defendants' land would not be admitted in evidence, defendants' attorney asked a witness what one such comparable tract sold for, the court sustained plaintiff's objection but the witness answered anyway, and the trial court allowed plaintiff's motion to strike and instructed the jurors that they would not consider the witness's statement.

4. **Eminent Domain § 6— evidence of value — offers inadmissible**

Mere offers, whether made by the owner of comparable properties or to him, are inadmissible to establish value in a land condemnation proceeding; however, an offer by the owner, made at or about the time of the taking, to sell his land for a lesser price than he now contends it is worth, is competent to contradict his present contention.

5. **Eminent Domain § 6— evidence of value — opinion based on prices of comparable tracts — admissibility**

Where a witness in a land condemnation proceeding stated that, among other things, he investigated asking prices of comparable properties in the vicinity of defendants' property and then considered everything he knew in arriving at his estimates of value, his opinion was not inadmissible by reason of the fact that the comparable prices were part of his general knowledge and he did not exclude them from his considerations.

6. **Eminent Domain § 6— evidence of value — elements which may be considered**

Although a witness should consider only proper elements of value, unless he has based his opinion in a material degree upon elements which cannot legally be considered, without separating such elements from those which may legally be considered, such opinion is not incompetent.

7. **Eminent Domain § 7— jury instructions — no prejudicial error**

Plaintiff was not prejudiced by the trial court's error in instructing the jury with respect to damages to property adjoining that of defendants where it was obvious that the court meant property remaining in defendants' tract.

8. **Trial § 52— refusal to set aside verdict for excessive award — no abuse of discretion**

The trial court's refusal to set aside the jury verdict in a land condemnation proceeding is not disturbed on appeal where there was no showing that the court abused its discretion.

APPEAL by defendants under G.S. 7A-30(2) from the decision of the Court of Appeals (20 N.C. App. 394, 201 S.E. 2d 568) vacating the judgment of *McLean, J.*, for errors in the trial at the March 1973 Session of HENDERSON.

This proceeding was instituted by the State Highway Commission (now the Board of Transportation) on 7 August 1972 to condemn a portion of land belonging to defendants for its Project 8.1834101 to widen and relocate a portion of U. S. Highway No. 64 in Henderson County. *See* G.S. 136-18(16) (1964), N. C. Session Laws, ch. 507, sec. 5 (1973), G.S. 136-18(16) (1974). Simultaneously plaintiff filed a declaration of taking and deposited with the Clerk of the Superior Court $3,100 as its estimate of just compensation for the taking. The tract affected, trapezoidal in shape, contains 2.41 acres. Of it plaintiff is taking .22 of an acre. The land is located about one-half mile north of Hendersonville on the west side of U. S. 64, a heavily traveled highway and one the main thoroughfares from Hendersonville to Interstate Highway No. 26.

At the time of the taking, on the north the 2.41 acres fronted 228 feet on Linda Vista Drive, a State-maintained, 30-foot, graveled street. On the east it fronted 381.5 feet on No. 64, a two-lane, paved thoroughfare (now denominated "old U. S. 64"). From No. 64 the southern boundary ran northwesterly 428 feet to a corner from which the western boundary coursed northeasterly 321.7 feet to Linda Vista Drive. (These distances embrace all previously existing rights-of-way on the tract.) The property is generally level, vacant land, covered with brambles.

The .22 acre condemned extends from the southern boundary of the tract northeasterly along the western right-of-way line of old U. S. 64 to Linda Vista Drive; thence northwesterly with the right-of-way of Linda Vista 77.87 feet to a point. From there the line runs southerly, on three different calls, 387.78 feet to the tract's southern line; thence with that line 13.94 feet to old U. S. 64.

Control of access along the entire western line of the .22 acre taken was also condemned. A steel-wire fence, 4-5 feet high, runs the length of this line. Thus, defendants' remaining land, 2.19 acres, now has no direct access to No. 64. Linda Vista Drive, on which defendants' frontage is now 155 feet, provides its only access. After driving 70 feet from U. S. 64 on Linda Vista "you can turn left into the property and come back out

the same way. You can drive north down the four-lane highway and from I-26 and turn from either direction onto Linda Vista Drive and get onto the property."

Now, after the date of taking, a portion of new U. S. 64, a four-lane highway, "gets into appproximately 1/3 of the northeast corner of the subject property." Here it incorporates old U. S. 64 for an undisclosed distance. It then diverges to continue a strighter course south, while old U. S. 64 continues "in front of the subject property" as a one-way street south into Hendersonville.

Prior to the trial, by a consent order, all issues were eliminated except the amount which defendants are entitled to recover as just compensation for the appropriation on 7 August 1972 of a portion of their property for highway purposes.

At the opening of court on Monday, 12 March 1973, Mr. James B. Richmond, a State Highway Commission attorney from Raleigh, appeared for plaintiff and Mr. Monroe Redden of Hendersonville, for defendants. When it developed that this case would be the only jury trial during the week and that a nonjury case would precede it, Judge McLean suggested to counsel that a jury be selected, empaneled, and then excused until Wednesday morning. Both attorneys agreed to this procedure, and a jury, including two alternates, was duly chosen and empaneled. After they had received the instructions usually given to jurors before a recess, the jurors were excused. When the case was called for trial on Wednesday morning Mr. Richmond was not present. Plaintiff was then represented by Messrs. Guy A. Hamlin and G. Edison Hill, attorneys from Asheville. They moved that the jury which had been empaneled on Monday be discharged and that another jury be selected by the attorneys who would try the case. Judge McLean denied this motion, and the Court of Appeals sustained his ruling.

At the trial defendant J. R. Helderman and Messrs. B. H. Laughridge, Jr., James M. Edney, Sr., and Grayson Willeford, three realtors doing business in Henderson County, testified for defendants. One local realtor, Mr. John N. Gould, and a salaried appraiser for the State Highway Commission, Mr. Russell Carter, Jr., testified for plaintiff.

The witnesses for both plaintiff and defendants agreed that the highest and best use for the 2.41-acre tract prior to the taking was for business and commercial purposes. Defendants' wit-

nesses specified "highway business," service station, motel, restaurant, drive-in bank, "that sort of thing." Plaintiff's witnesses testified that the property is located in "a developing business and commercial area just beyond the city limits of Hendersonville" and that "it definitely had commercial potential."

Defendant Helderman's testimony tended to show that he paid between $22,000 and $23,000 for the land 7-8 years ago; that land in the area had steadily increased in value since then; that he knew the market value of his property on 7 August 1972 and, in his opinion, it was worth $40,000 per acre prior to the taking and only $10,000 per acre thereafter (a difference of $67,900). Plaintiff did not object to defendants' testimony as to value. Mr. Laughridge, basing his appraisal on four sales, which he deemed to be "comparable sales in the vicinity," his investigation of "asking prices" for similar property, and "all that he had learned" with reference to property in the area, valued defendants' property before the taking at $40,000 an acre. Without objection he testified that, in his opinion, the value of the property was $96,400 before and $29,500 after the taking, a difference of $66,500. Mr. Edney, on the basis of three sales in the vicinity which he "felt to be comparable," two of which had been cited by Laughridge, also appraised defendants' property at $40,000 per acre on 7 August 1972. In his opinion defendants had suffered damages in the amount of $66,630 by reason of the taking. Mr. Willeford testified that he considered defendants' damage to be $66,835. Plaintiffs made no objection to any part of the testimony of either Edney or Willeford.

At the beginning of Mr. Laughridge's testimony he stated that a sale of comparable property in the vicinity was made on 15 February 1973 by Goodman to Dana Associates. When plaintiff objected on the ground that this sale was made "after the date of taking," the court excused the jury. In its absence Laughridge testified that property values in the vicinity were substantially the same in August 1972 and February 1973; that the "comparable property" consisted of 1.33 acres fronting 280 feet on the east side of the four-lane "new" U. S. 64, directly across from the subject property; and that Dana paid $65,000 for the land. Laughridge did not know the date on which the four-lane highway was constructed.

At the conclusion of the *voir dire* on this piece of property Judge McLean made the following ruling: "I will sustain the

objection as to the price. I will let him describe the property which he deems comparable. He can state whether he examined this piece of property and whether, in his opinion, it is a comparable price." The jury returned and, without obection, Laughridge testified in accordance with that ruling. He also described an acre of land, adjacent to the Goodman property, which Lender sold to Wright on 16 August 1971. Despite the previous ruling of the court, counsel for defendants asked Laughridge what the one acre sold for. Although plaintiff's objection was sustained the witness answered, $45,000, ignoring the court's ruling. Plaintiff's motion to strike was allowed and the court instructed the jury not to consider the answer. Immediately thereafter counsel asked the witness, "You did investigate the price and determine for your own satisfiction what it brought?" The witness answered, "Yes", and plaintiffs moved for a mistrial. Their motion was denied.

Laughridge next testified that he investigated the sale of five acres immediately behind the Goodman property which Thompson made to Dana on 15 February 1973 and also a sale of eight-tenths of an acre which Hyder and Henderson made to Humble Oil Company on 28 April 1966.

Plaintiff's witness Carter valued defendants' property at $29,800 prior to the taking and $13,800 afterwards, "for a difference of $15,800." (sic). He testified that in the course of making his appraisal he investigated more than 100 sales in and around Hendersonville, beginning back in 1967. He also made an economic study of the area. In arriving at his evaluation of defendants' property, however, he considered only three specified sales, which he deemed "comparable to the subject property." These sales were made between 18 June 1971 and 7 August 1972. In his deliberations he adjusted these three sales "for time which was 8-10 percent upwards, a year."

Although he was familiar with the sales from Goodman to Dana Associates, Lender to Wright, and Thompson to Dana Associates, "all being on the east side of the four-lane highway," Carter did not consider them in arriving at the values he placed upon defendants' property. He testified that, in his opinion, these were not comparable sales because (1) they occurred after the date of the taking (the majority, after the project was completed), and the new four-lane connector would inflate values; and (2) "they were sales which were combined for plottage."

Several times during his testimony the court denied Carter's request that he be allowed to explain his answer during Mr. Redden's cross-examination. Plaintiff excepted to these rulings, but the explanations nowhere appear in the record.

Mr. Gould gave defendants' property a valuation of $26,280 before the taking and $13,140 afterwards, a difference of $13,140. Like Mr. Carter he did not consider the sales on which defendants' witnesses based their appraisals. Despite a 50% loss in value it was Gould's opinion that defendants' remaining 2.19 acres could be used for a number of industrial or commercial enterprises.

The jury awarded defendants $47,500 "as just compensation . . . for the appropriation of a portion of their property for highway purposes on the 7th day of August, 1972." From the judgment entered upon the verdict plaintiff appealed. The Court of Appeals ordered a new trial on the ground that "the cumulative effect" of numerous errors committed by the trial judge, any one of which might not have been sufficiently prejudicial to warrant a trial *de novo*, had deprived plaintiff of a fair trial. One member of the panel having dissented, defendants appealed to this Court as a matter of right.

Attorney General Morgan; Deputy Attorney General White; Assistant Attorney General Hamlin for plaintiff appellee.

Redden, Redden & Redden for defendant appellants.

SHARP, Justice.

The position of defendants (appellants here, appellees below) is that plaintiff's assignments of error neither singly nor collectively disclose any error sufficiently prejudicial to justify the trial *de novo* ordered by the Court of Appeals.

On this appeal we do not consider any assignment which the Court of Appeals decided adversely to plaintiff, that is, overruled. We examine first plaintiff's assignment No. 3, which the Court of Appeals sustained, that the trial court erred in permitting one of the owners, defendant J. R. Helderman, to express an opinion as to the value of his property before and after the taking without any showing that he was qualified to give such an opinion. This assignment raises the question whether the owner of property is *ipso facto* presumed qualified to give an opinion as to its market value.

[1] Unless it affirmatively appears that the owner does not know the market value of his property, it is generally held that he is competent to testify as to its value even though his knowledge on the subject would not qualify him as a witness were he not the owner. "He is deemed to have sufficient knowledge of the price paid, the rents or other income received, and the possibilities of the land for use, to have a reasonably good idea of what it is worth. The weight of his testimony is for the jury, and it is generally understood that the opinion of the owner is so far affected by bias that it amounts to little more than a definite statement of the maximum figure of his contention. . . . " 5 Nichols, Law of Eminent Domain, § 18.4(2) (3rd ed., 1969), wherein the decisions pro and con are collected. *Accord,* 32 C.J.S., *Evidence* § 546 (116) (1964); 32 C.J.S., *Evidence* § 545(d)(3) (pp. 305-306) (1942); Jahr, Law of Eminent Domain § 133 (1953); 3 Wigmore on Evidence, §§ 714, 716 (Chadbourn rev. 1970). *See Light Co. v. Rogers,* 207 N.C. 751, 753, 178 S.E. 575, 576 (1935). For an exposition of the minority rule that the owner, just as any other witness, must establish his qualifications before expressing his opinion of market value, *see Commonwealth, Department of Highways v. Fister,* 373 S.W. 720 (Ky., 1963).

[2] When his attorney asked defendant Helderman if he was familiar with the fair market value of real estate in the vicinity of his property and if he had an opinion satisfactory to himself as to the fair market value of his property on and after 7 August 1972, he answered both questions, "Yes, sir. I think so." The market value of land is usually a matter of opinion, and we interpret defendant's answers as a positive assertion that he knew land values in the vicinity of his property and had an informed opinion, "satisfactory to himself," as to the value of his property on the pertinent date. In *Harrelson v. Gooden,* 229 N.C. 654, 50 S.E. 2d 901 (1948), an owner's similar assertion was held sufficient to establish prima facie his qualifications to testify as to value. The Court said, "This evidence was not incompetent. Its probative value, subject to being tested on cross-examination, was for the jury." *Id.* at 657, 50 S.E. 2d at 903. *(See* 32 C.J.S., *Evidence* § 546 (115), n. 65 at p. 432 (1964), for comment on *Harrelson v. Gooden, supra.)*

In our view, Helderman was entitled to testify to the value of his property. However, the short answer to plaintiff's contention that it was error to permit him to do so is that counsel

did not object to the questions which elicited his estimates of the value of the property before and after the taking. We hold that plaintiff's assignment of error should have been overruled.

[3] The assignment of error No. 5 which plaintiff stresses most forcibly is directed to Judge McLean's refusal to grant its motion for a mistrial after the following incident, which has been more fully described in the preliminary statement of facts. After the court had ruled that the purchase price paid in asserted "comparable sales" considered by the realtors in valuing defendants' land would not be admitted in evidence, defendants' attorney asked the witness Laughridge what one such "comparable", one-acre tract (the Lender lot) "sold for." Notwithstanding the court sustained plaintiff's objection, the witness answered, "$45,000." Both the question and answer set at naught the court's ruling. Right or wrong, the ruling should have been respected by both attorney and witness. At that time no witness except the owner had given his opinion as to the value of the land, and, at that stage of the trial, Judge McLean would have been within bounds had he allowed the motion for a mistrial. Instead, however, he allowed plaintiff's motion to strike and instructed the jurors that they would "not consider that statement."

We are unable to determine from the record whether the court correctly ruled that the sales price of the Lender land, or that of the other tracts which defendants' witnesses considered comparable in arriving at their valuation of defendants' property, was inadmissible evidence. The question of admissibility was not determined in accordance with the decisions of this Court. If the sales were in fact comparable, the price was admissible; otherwise, not. If the properties or sales were not comparable the court erred in allowing the witnesses to describe the land sold to the jury, to state that they deemed the sales comparable and had considered the sales prices in determining the values they had placed upon defendants' property. In any event, the ruling of the court, which permitted the witnesses to describe the sales as comparable while excluding the sales price, was inconsistent. However, neither party excepted to the ruling.

In this State the rule is well settled "that the price paid at voluntary sales of land, similar in nature, location, and condition to the condemnee's land, is admissible as independent evidence of the value of the land taken if the prior sale was not too remote in time. Whether two properties are sufficiently

similar to admit evidence of the purchase price of one as a guide to the value of the other is a question to be determined by the trial judge in the exercise of a sound discretion guided by law." *State v. Johnson,* 282 N.C. 1, 21, 191 S.E. 2d 641, 655 (1972). *See Redevelopment Comm. v. Panel Co.,* 273 N.C. 368, 159 S.E. 2d 861 (1968). The approved practice is for the judge to conduct a *voir dire,* to hear testimony in the absence of the jury as a basis for determining the admissibility of such evidence. *Barnes v. Highway Commission,* 250 N.C. 378, 109 S.E. 2d 219 (1959) ; *Highway Commission v. Pearce,* 261 N.C. 760, 136 S.E. 2d 71 (1964) ; *Highway Commission v. Coggins,* 262 N.C. 25, 136 S.E. 2d 265 (1964) ; *Carver v. Lykes,* 262 N.C. 345, 137 S.E. 2d 139 (1964).

After the denial of plaintiff's motion for a mistrial defendants' witnesses testified without objection as to the valuations which they had placed upon defendants' land, and plaintiff's witnesses explained to the jury why, in their opinion, the asserted comparable sales were not, in fact, comparable. In their turn, without the judge having conducted a *voir dire,* plaintiff's witnesses likewise described lands which they asserted were comparable to defendants' and testified that they had based their valuations of defendants' property upon the sales price of these tracts.

Under all the circumstances we cannot say that the court's failure to allow the motion for a mistrial constituted prejudicial error. Where the judge sustains a motion to strike an answer of a witness and immediately cautions the jury not to consider it, it will be assumed that the jury followed the instruction and no prejudice resulted. *Apel v. Coach Co.,* 267 N.C. 25, 147 S.E. 2d 566 (1966) ; 7 Strong's North Carolina Index 2d, *Trial* § 16 (1968). Assignment of error No. 5 is not sustained.

Plaintiff's assignment No. 6 is that the trial court erred "in allowing defendants' witness Laughridge *to testify* that in forming his opinion of value he investigated the asking price which owners of similar property in that area were demanding." (Emphasis added.)

As this Court said in *Highway Commission v. Coggins, supra* at 31, 136 S.E. 2d at 269, "It is not the offering of property at a given price that furnishes evidence of market value; it is the actual sale by 'a seller willing but not obliged to sell, to a buyer willing but not obligated to buy.' An owner may and fre-

quently does place a higher price on his property than it will bring in the market. It is not until a voluntary buyer is willing to take the property at the stated price that the transaction becomes an indication of market value." *See Canton v. Harris,* 177 N.C. 10, 12, 97 S.E. 748, 749 (1918). A mere offer to buy or sell property is incompetent to prove its market value. The figure named is only the opinion of one who is not bound by his statement and it is to unreliable to be accepted as a correct test of value. *State v. Lincoln Memory Gardens, Inc.,* 242 Ind. 206, 177 N.E. 2d 655 (1961) ; *State v. Morehouse Holding Company,* 225 Ore. 62, 357 P. 2d 266 (1960) ; *Thornton v. Birmingham,* 250 Ala. 651, 35 So. 2d 545, 7 A.L.R. 2d 773 (1948). *See* Annot., 7 A.L.R. 2d 781 (1948) ; McCormick on Evidence, § 166 (1954) ; 1 Orgel, Valuation under Eminent Domain § 148 (1953).

[4] The rule is firmly established that mere offers, whether made by the owner of comparable properties or to him, are inadmissible. "The objections to the reception of evidence of offers to buy the identical land which is taken are multiplied ten fold in the case of other land in the neighborhood, and if offers for neighborhing land were competent, the trial of a land damage case would degenerate into a confused and endless wrangle in which collateral issues and what is, in substance, hearsay evidence would play the most prominent part." 5 Nichols, *supra,* § 21.4(3) (1969). However, an offer by the owner, made at or about the time of the taking, to sell his land for a lesser price than he now contends it is worth, is competent to contradict his present contention. *Id.* § 21.4(2). *See* Jahar, *supra,* § 145 (1953).

[5] In his testimony Laughridge did not state the asking price of any of the "comparable" properties in the vicinity, and he did not base his opinion solely on them or upon any other one factor. His statement was that, among other things, he investigated the asking prices and then considered everything he knew in arriving at his estimates of value. The prejudice here, if any, would not have come from his statement that the asking prices were a part of the general information upon which he based his opinion. The question is whether the fact that these prices were a part of his general knowledge and he did not exclude them from his considerations required the rejection of his opinion. The answer is No.

[6] Although the witness should consider only proper elements of value, unless he "has based his opinion in a material degree upon elements which cannot legally be considered, without sep-

arating such elements from those which may legally be considered, without separating such elements from those which may legally be considered, such opinion is not incompetent." 5 Nichols, *supra*, § 18.42(1) (1969). The element complained of here affects the weight rather than the competency of the evidence. In *Highway Commission v. Conrad,* 263 N.C. 394, 399, 139 S.E. 2d 553, 557 (1964), this Court quoted with approval the following statement from *People v. Gangi Corporation,* 15 Cal. Rep. 19, 25 (1961), rev'd on different grounds sub nom. *People v. Donovan,* 57 Cal. 2d 346, 19 Cal. Rep. 473 (1962): " 'An integral part of an expert's work is to obtain all possible information, data, detail and material which will aid him in arriving at an opinion. Much of the source material will be in and of itself inadmissible evidence but this fact does not preclude him from using it in arriving at an opinion. All of the factors he has gained are weighed and given the sanction of his experience in his expressing an opinion.' " This statement appears to describe the manner in which Mr. Laughridge arrived at the opinions he expressed. It was not error for the court to permit him to detail the facts upon which he based his opinions. *Highway Commission v. Conrad, supra.* However, we again note that his opinions went into evidence without objection from plaintiff. We find no merit in assignment No. 6.

[7] Finally we consider assignment No. 16, which challenges the following portion of Judge McLean's charge: "As the court has heretofore instructed, Members of the Jury, the measure of damages is the difference between the fair market value of the property immediately before the taking and the fair market value of the remainder of the tract after the taking, which shall include the value of the property taken plus damages to the *adjoining* property." (Italics ours.) Plaintiff's exception relates to the use of the italicized word "adjoining." What the judge intended to say, of course, was "remaining" property. He had previously instructed that the measure of damages for the taking was "the difference between fair market value of the entire tract immediately prior to said taking and the fair market value of the *remainder* immediately after said taking." (Italics ours.)

Plaintiff contends that "damages to the adjoining property have no bearing upon damages to the subject property and do not enter into the case." We consider this contention so obviously true that it is inconceivable to us the jury could have thought

the judge was referring to property belonging to others which adjoined defendants' original 2.41 acres. On the contrary, the jurors must have understood that his Honor meant defendants' remaining property which then adjoined the .22 acres taken. Our opinion is bolstered by the fact that defendants owned no other property in the area.

After having examined all of plaintiff's assignments, it is our decision that none disclose error in law sufficiently prejudicial to require a new trial.

[8] Plaintiff's argument on its assignment that the judge erred in refusing to set aside the verdict because it was an excessive award is no doubt the same argument its counsel directed to the jury before verdict and to the judge thereafter. The trial judge's refusal to set aside a verdict for excessiveness "will not be disturbed on appeal unless it is obvious that he abused his discretion," and no such abuse of discretion appears in this case. *Kight v. Seymour,* 263 N.C. 790, 792, 140 S.E. 2d 410, 413 (1965) ; 7 Strong's North Carolina Index 2d, *Trial,* § 52 (1968). Perhaps a comment appearing in *Brown v. Power Co.,* 140 N.C. 333, 348, 52 S.E. 954, 960 (1905) is pertinent here: "As long as witnesses differ so widely in their opinion as to values, and as long as litigants measure value so entirely by the standard of self-interest, we cannot hope for verdicts that shall be satisfactory to both parties. The utmost to which we can hope to attain is to sometimes reach a verdict that is unsatisfactory to both parties."

The decision of the Court of Appeals is

Reversed.

ARNOLD v. DISTRIBUTORS and WILSON v. DISTRIBUTORS

No. 127 PC.

Case below: 21 N.C. App. 579.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974.

BROOKS v. BROOKS

No. 24 PC.

Case below: 22 N.C. App. 507.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 September 1974.

EARLE v. WYRICK

No. 129 PC.

Case below: 22 N.C. App. 24

Petition for writ of certiorari to North Carolina Court of Appeals allowed 30 August 1974.

GARDNER v. INSURANCE CO.

No. 42 PC.

Case below: 22 N.C. App. 404.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974.

GASTON v. SMITH

No. 154 PC.

Case below: 22 N.C. App. 242.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

GRIFFIN v. WHEELER-LEONARD & CO.

No. 34 PC.

Case below: 22 N.C. App. 323.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 30 August 1974.

HARDY v. EDWARDS

No. 23 PC.

Case below: 22 N.C. App. 276.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974.

HINSON v. CREECH

No. 130 PC.

Case below: 21 N.C. App. 727.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 30 August 1974.

HOLLOMAN v. HOLLOMAN

No. 146 PC.

Case below: 22 N.C. App. 176.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 September 1974.

IN RE MARTIN

No. 27 PC.

Case below: 22 N.C. App. 225.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 3 September 1974.

JOHNSON v. HOOKS

No. 136 PC.

Case below: 21 N.C. App. 585.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974.

LACHMANN v. BAUMANN

No. 10 PC.

Case below: 22 N.C. App. 160.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974.

LEWIS v. FOWLER

No. 33 PC.

Case below: 22 N.C. App. 199.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974.

LONG v. EDDLEMAN

No. 147 PC.

Case below: 22 N.C. App. 43.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974.

MEWBORN v. HADDOCK

No. 25 PC.

Case below: 22 N.C. App. 285.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

MILLER v. KENNEDY

No. 9 PC.

Case below: 22 N.C. App. 163.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974.

POTTER v. TYNDALL

No. 4 PC.

Case below: 22 N.C. App. 129.

Petitions of plaintiff and additional defendants for writ of certiorari to North Carolina Court of Appeals denied 3 September 1974.

POWER CO. v. CITY OF HIGH POINT

No. 6 PC.

Case below: 22 N.C. App. 91.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974.

REDMON v. GUARANTY CO.

No. 135 PC.

Case below: 21 N.C. App. 704.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974.

ROCK v. BALLOU

No. 145 PC.

Case below: 22 N.C. App. 51.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 30 August 1974.

SIDES v. HOSPITAL

No. 7 PC.

Case below: 22 N.C. App. 117.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 30 August 1974.

SPARKS v. CHOATE

No. 133 PC.

Case below: 22 N.C. App. 62.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 September 1974.

STATE v. AIKENS

No. 155 PC.

Case below: 22 N.C. App. 310.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 3 September 1974.

STATE v. ALEXANDER

No. 137 PC.

Case beow: 22 N.C. App. 196.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974.

STATE v. BENFIELD

No. 13 PC.

Case beow: 22 N.C. App. 330.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974. Appeal dismissed ex mero motu for lack of substantial constitutional question 30 August 1974.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. BLACKWELDER

No. 148 PC.

Case below: 22 N.C. App. 18.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 September 1974.

STATE v. BRAKE

No. 35 PC.

Case below: 22 N.C. App. 342.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974.

STATE v. BRINKLEY

No. 16 PC.

Case below: 22 N.C. App. 339.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974.

STATE v. BYRD

No. 1 PC.

Case below: 22 N.C. App. 320.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974.

STATE v. CAMP

No. 8 PC.

Case below: 22 N.C. App. 109.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 30 August 1974.

STATE v. CANNADY and HINNANT

No. 144 PC.

Case below: 22 N.C. App. 53.

Petitions for writs of certiorari to North Carolina Court of Appeals denied 3 September 1974.

STATE v. CANTY

No. 15 PC.

Case below: 22 N.C. App. 45.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974.

STATE v. COGDELL

No. 30 PC.

Case below: 22 N.C. App. 327.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974.

STATE v. COLLINS

No. 40 PC.

Case below: 19 N.C. App. 553.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974.

STATE v. DAIS

No. 19 PC.

Case below: 22 N.C. App. 379.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 30 August 1974.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. FEIMSTER

No. 149 PC.

Case below: 21 N.C. App. 602.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 September 1974.

STATE v. GRAY

No. 11 PC.

Case below: 21 N.C. App. 63.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 September 1974.

STATE v. HAMMOCK

No. 36 PC.

Case below: 22 N.C. App. 439.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974.

STATE v. HARDING

No. 142 PC.

Case below: 22 N.C. App. 66.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974.

STATE v. HARRIS

No. 132 PC.

Case below: 21 N.C. App. 697.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974.

STATE v. KING and McDOUGALD

No. 44 PC.

Case below: 21 N.C. App. 549.

Petition of McDougald for writ of certiorari to North Carolina Court of Appeals denied 3 September 1974.

STATE v. LISK

No. 122 PC.

Case below: 21 N.C. App. 474.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974.

STATE v. LOGAN

No. 38.

Case below: 22 N.C. App. 55.

Petition for writ of certiorari to North Carolina Court of Appeals denied 13 August 1974. Motion of Attorney General to dismiss appeal allowed 13 August 1974.

STATE v. MOORE

No. 35.

Case below: 21 N.C. App. 557.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 13 August 1974.

STATE v. PIERCE

No. 18.

Case below: 21 N.C. App. 451.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 13 August 1974.

STATE v. RICHARDS

No. 31.

Case below: 21 N.C. App. 686.

Petition for writ of certiorari to North Carolina Court of Appeals denied 13 August 1974. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 13 August 1974.

STATE v. RUSSELL and TATUM

No. 138 PC.

Case below: 22 N.C. App. 156.

Petition of Tatum for writ of certiorari to North Carolina Court of Appeals denied 3 September 1974. Appeal of Tatum dismissed ex mero motu for lack of substantial constitutional question 3 September 1974.

STATE v. SASSER

No. 141 PC.

Case below: 21 N.C. App. 618.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 September 1974.

STATE v. SHELTON

No. 140 PC.

Case below: 21 N.C. App. 662.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974.

STATE v. TEAT

No. 38 PC.

Case below: 22 N.C. App. 484.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 September 1974.

STATE v. TURNER

No. 37.

Case below: 21 N.C. App. 608.

Petition for writ of certiorari to North Carolina Court of Appeals denied 13 August 1974. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 13 August 1974.

STATE v. VESTER

No. 143 PC.

Case below: 22 N.C. App. 16.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974.

STATE v. VICKERS

No. 3 PC.

Case below: 22 N.C. App. 282.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974.

STATE v. WEEKS

No. 2 PC.

Case below: 22 N.C. App. 360.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974.

STATE v. WHITE

No. 5 PC.

Case below: 22 N.C. App. 123.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. WHITTED

No. 125 PC.

Case below: 21 N.C. App. 649.

Petition of defendant for writ of certiorari to North Carolina Court of Appeals denied 1 July 1974. Petition of Attorney General for writ of certiorari to North Carolina Court of Appeals denied 30 August 1974.

TAYLOR v. CITY OF RALEIGH

No. 29 PC.

Case below: 22 N.C. App. 259.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 3 September 1974.

WYATT v. HAYWOOD

No. 32 PC.

Case below: 22 N.C. App. 267.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 30 August 1974.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM 1974

STATE OF NORTH CAROLINA, EX REL, UTILITIES COMMISSION, CITY OF DURHAM, MONROE-UNION COUNTY CHAMBER OF COMMERCE, AND ROBERT MORGAN, ATTORNEY GENERAL v. GENERAL TELEPHONE COMPANY OF THE SOUTHEAST

No. 43

(Filed 10 October 1974)

1. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— telephone rates — inadequate service due to bad management — effect on fair rate of return — denial of rate increase**

When, upon substantial evidence, a public utility is found to be rendering grossly inadequate service due to bad management and managerial indifference, and the rates presently charged by it yield a return sufficient to pay the interest on its indebtedness and a substantial dividend upon its stock, but less than that which would be deemed a fair return upon the fair value of its properties were the service adequate, the Utilities Commission may lawfully deny it authority to increase its rates for such service. G.S. 62-133.

2. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— purpose of public utility laws**

The primary purpose of G.S. Chapter 62 is not to guarantee to the stockholders of a public utility constant growth in the value of and in the dividend yield from their investment, but is to assure the public of adequate service at a reasonable charge.

3. **Utilities Commission § 6— statutes assuring utility of adequate revenue — purpose**

Provisions of G.S. Chapter 62 designed to assure a public utility of adequate revenues are in the nature of corollaries to the basic proposition that the public is entitled to adequate service at reasonable rates and safeguards against administrative action which would violate constitutional protections by confiscation of the utility's property.

4. **Utilities Commission § 6— rate of return — zone of reasonableness**

For a utility rendering acceptable service, there is a zone of reasonableness extending over a few hundredths of one per cent within which a rate of return fixed by a regulatory commission will not be disturbed by the courts.

5. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— service inadequacies — condition of properties — bad management — consideration of both**

In a telephone rate case, the Utilities Commission did not err in considering service inadequacies due to the condition of the properties in determining fair value and also in considering service inadequacies due to the quality of the management and personnel of the company in determining a fair return upon the fair value of the properties.

6. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— failure to remedy inadequacies of service — denial of rate increase**

Where the Utilities Commission granted a telephone company increases in rates three times in a period of five years notwithstanding its finding of serious inadequacies in the company's service, and the company has indicated that it does not intend to make two of the improvements in service ordered by the Commission unless compelled to do so, the Commission cannot be deemed to have acted arbitrarily in saying that it would permit the company to raise its rates so as to increase its return on the fair value of its properties from 6.65% to at least 8.02% if its service were adequate but it will not now permit such increase in view of the company's persistent disregard of such inadequacy of service.

7. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— excessive prices paid to affiliate — deduction from original cost**

Evidence that in instance after instance a telephone company paid to an affiliated company for equipment and materials prices far in excess of those paid by companies in the Bell System to Western Electric Company for like or superior equipment and materials supported the Utilities Commission's finding that such prices were so excessive as to indicate bad faith or mismanagement by those who control the telephone company, and such finding supported the Commission's deduction from the original cost, and so from the replacement cost and fair value, of the telephone company's properties on account of the excessive prices paid to the affiliated company.

8. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— excessive plant margin — deduction from original cost**

There was sufficient evidence to support the Utilities Commission's deduction from original cost, and so from replacement cost and

fair value, of the properties of a telephone company because of overbuilding of plant and the resulting excessive plant margins.

9. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— necessary working capital — administrative question**

The amount of cash working capital reasonably required in a telephone company's operations is an administrative question upon which the Utilities Commission's determination is conclusive.

10. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— rate case — rates charged by other utilities**

While rates charged by one telephone company do not, per se, constitute a standard by which to determine the reasonableness of those of another company, evidence of comparative rates may have some relevancy for use as a guide to the limits of the zone of reasonableness when the territories served and operating conditions are similar.

11. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— evidence of rates charged by other similar utilities — absence of prejudice**

In a telephone rate case, the Utilities Commission did not commit prejudicial error in the admission of rate tariffs of other telephone companies having similar territories and operating conditions where the order of the Commission does not indicate that it gave any effect to such evidence other than use as a guide to the limits of the zone of reasonableness and it is inconceivable that the order would have been different had such evidence not been introduced.

12. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— rates yielding return below that allowed in prior proceeding**

A telephone company's properties were not confiscated by the Commission's order continuing in effect rates which will yield a rate of return below that determined by the Commission to be reasonable in a prior proceeding, since such determinations are not *res judicata* and do not forbid either a higher or lower rate of return in a subsequent proceeding.

13. **Utilities Commission § 6— replacement cost — uncontradicted expert testimony — rejection by Commission**

The Utilities Commission is not required to accept in full the conclusion of an expert witness as to replacement cost, even though it be uncontradicted by other evidence in the record.

14. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— telephone rate case — inadequate service due to plant deficiencies — effect on replacement cost — failure to find facts — harmless error**

Failure of the Utilities Commission to find facts with respect to the effect it gave to inadequacy of service due to plant deficiencies in determining replacement cost, and so the fair value, of a telephone company's properties was not prejudicial error where it is apparent that the Commission's denial of the utility's request for an increase in rates was due to a finding of gross inadequacies of service due to management and personnel deficiencies rather than to plant deficiencies, and the effect given by the Commission to inadequacy of

service due to plant deficiencies in determining fair value does not appear to have been large in relation to its finding of fair value.

Chief Justice BOBBITT not sitting.

ON *certiorari* to review the decision of the Court of Appeals, reported in 21 N.C. App. 408, 204 S.E. 2d 529, remanding to the Utilities Commission a general rate case, in which the Utilities Commission denied, in its entirety, the application of General Telephone Company of the Southeast for an increase in its rates.

General Telephone Company of the Southeast, hereinafter called General, is a public utility corporation, supplying telephone service in this and other states. In North Carolina it serves through its Durham, Creedmoor, Monroe, Altan and Goose Creek exchanges. It is a wholly owned subsidiary of General Telephone and Electronics Corporation, hereinafter referred to as GT&E. It purchases the major part of its equipment and supplies from Automatic Electric Company, hereinafter called Automatic, another wholly owned subsidiary of GT&E.

General estimated that the proposed rates and charges would increase its total annual revenue from intrastate service in North Carolina by $2,930,575. The Attorney General, the City of Durham and the Monroe-Union County Chamber of Commerce intervened in opposition to the proposed increases.

The Commission conducted hearings which extended over 15 hearing days. It received from witnesses for General, the protestants and the Commission's staff oral testimony, the narration of which covers more than one thousand pages of the printed record on appeal, plus many voluminous statistical exhibits. Witnesses in opposition to the proposed increases included 89 individual subscribers to General's telephone service, their testimony relating primarily to the quality of the service being rendered.

Pending the hearing and determination of its application, General, pursuant to G.S. 62-135, put the proposed increases into effect, filing with the Commission its undertaking to make refund, with interest, of the additional revenues to the extent that such increases were not finally approved by the Commission.

On 22 October 1973, the Commission, Chairman Wooten dissenting, issued its order denying the application for increased

rates and charges in its entirety and directing General to refund all such collections pursuant to its undertaking. The order of the Commission, covering 78 pages in the printed record on appeal, contains extensive and detailed findings of fact and conclusions of the Commission thereon.

General appealed to the Court of Appeals, making 12 assignments of error presenting, in its view, eight questions of law. Without passing upon these, the Court of Appeals remanded the proceeding to the Commission because of what it deemed a failure by the Commission "to find facts with respect to the effect it gave the factor of inadequate service in reducing the fair value of the properties."

General petitioned for certiorari, seeking the determination by the Supreme Court, prior to the remand to the Commission, of the above mentioned questions of law, which relate to: (1) A deduction from General's net investment in plant in service by reason of alleged excessive prices paid by General to Automatic; (2) a deduction from General's net investment in plant in service by reason of alleged excess plant margins; (3) the Commission's finding that the replacement cost of General's properties is less than that stated by General's expert witness; (4) the Commission's consideration of alleged inadequacy of service both in determining the fair value of General's properties and in determining a just and reasonable rate of return thereon; (5) alleged confiscation of General's properties in that the Commission's order restricts General to a rate of return below the level allowed it by the Commission in an order issued in 1971; (6) the Commission's finding that General was not providing adequate, efficient and reasonable service; (7) the Commission's taking into consideration rates and operating statistics of other telephone companies; and (8) the Commission's computation of General's cash working capital requirement.

The Commission made the following findings of fact (summarized except as indicated by quotation marks):

4. On 11 May 1971, in an earlier proceeding, the Commission ordered General to make specified service improvements. These have not been completed. General's contention that two of them are unreasonable is not supported by the record.

5. Customer complaints in the record show dissatisfaction with direct distance dialing service, local dialing service, billing

matters, the necessity for repeatedly reporting service problems and other aspects of General's service.

6. General's net investment in intrastate utility plant in service, as shown on its books, must be adjusted downward in the amount of $838,448 (after considering accumulated depreciation) by reason of the "excess profits" made by Automatic upon its sales to General. This adjustment "is based on the concept of limiting the earnings of the supplier affiliate to a reasonable rate of return-on-equity. Any rate of return-on-equity to [Automatic] on transfers of equipment and supplies in excess of 15% is unjust and unreasonable."

7. The net original cost of General's North Carolina intrastate utility properties (cost less depreciation reserve), as shown on General's books, is $57,503,365. From this must be subtracted $838,448 because of the excess profits made by Automatic. (See Finding No. 6 above.) A further subtraction of $686,526 (after considering accumulated depreciation) must be made for "excess margin in central office equipment" due to overbuilding of the plant. The net original cost of the properties, so adjusted, is $55,978,391. To this nothing is added for working capital, the reason being that General has the use of customer deposits and funds collected from customers (as part of the rates charged for service) for the purpose of paying General's taxes before such taxes are payable, the total being in excess of General's working capital requirements.

8. General's expert witness on the subject of replacement cost presented a trended original cost study which is "unacceptable as the full basis for determining replacement cost." It does not make any allowance for "inefficiency of excess margin, existing service or plant deficiencies, any advances in the art of telephony which have occurred over the life span of the surviving plant, or adjust for any excess prices paid for installed plant facilities. To the contrary, the result * * * is to compound all of these deficiencies through his trending process." In view of these deficiencies in General's evidence of replacement cost, the Commission "can only approximate the reasonable replacement cost in this docket as being $60,000,000."

9. "The fair value of General's property used and useful in providing service to the public within North Carolina as of the end of the test period is $57,201,810."

10. After appropriate accounting and pro forma adjustments, General's revenue under present rates is $17,474,709 and its operating expenses are $6,641,934, the depreciation and amortization expense is $3,173,763, its taxes other than income are $2,231,327, its State and Federal income taxes are $1,619,695, its interest payable on customer deposits is $4,000, and its net operating income for return is $3,804,990, giving General "a rate of return on adjusted depreciated original cost net investment of 6.84%; a return on original cost common equity of 7.34%; a return on the adjusted fair value rate base of 6.65%; and a return on fair value common equity of 6.90%."

11. After appropriate adjustments, above mentioned, "General's interest coverage before income taxes is 2.77 times."

12. "Assuming adequate service were being provided, a rate of return between 8.02% and 8.24% on the fair value rate base, and a rate of return on General's common book equity in the range of 10.5% to 11.0%, based on test year operations and the present capital structure would represent a fair rate of return on fair value and a reasonable rate of return on the end of test year common equity investment; that the rate of return in the range of 8.02% to 8.24% on the fair value rate base would provide a rate of return in the range of 9.87% to 10.34% on common equity as adjusted for the increment by which fair value exceeds original cost, which would be a reasonable rate of return on said adjusted common equity, if adequate service were being provided."

13. "Because of General's presently inadequate service, a rate return of 6.65% on the fair value rate base is just and reasonable; that said 6.65% rate of return on the fair value rate base will produce a 7.34% rate of return on test period common equity and a rate of return of 6.90% on common equity as adjusted for the fair value increment; and that although the 7.34% rate of return on test period common equity is below the return on common equity which would be found reasonable for this utility equity investment if the service were adequate, the net operating income for return produced by the present rates produce [sic] the rates of return on the fair value rate base and the rates of return on common equity set out above and is sufficient to cover all test year interest charges, preferred dividends, and results in an interest charges coverage of 2.77 times, which will allow General to issue additional bond debt for financing purposes, and based on the present quality of

service, such rates of return are just and reasonable, and telephone rates producing revenues for any higher rate of return on fair value or on common equity would be unjust and unreasonable *at this time.*" (Emphasis added.)

14. "That General's inability to earn a better rate of return at its present level of rates and charges has been and continues to be substantially caused by a) its inordinately high plant investment; b) inordinately high maintenance expense; and c) management practices and policies resulting in operating inefficiencies."

15. "That the rate increase proposed in this docket are [sic] unjust and unreasonable, and that General has failed to carry the burden of proof that any rate increase should be allowed *in this Docket.*" (Emphasis added.)

Under the caption "CONCLUSIONS" the Commission made the following observations, which are summarized except as indicated by quotation marks:

A. "The level of service now being provided by General to its North Carolina subscribers is not adequate and must be improved with respect to reliability and dependability of service. The Commission concludes that the requirements for specific service improvements set forth in the Commission Orders in Docket No. P-19, Sub 115 [an earlier proceeding] should remain in full force and effect. *General's progress in meeting all service improvement requirements* of orders dated May 11, 1971, and November 14, 1972, *as well as its progress in remedying other subscriber dissatisfactions will be carefully considered in any future proceedings before this Commission.*" (Emphasis added.)

B. Prices charged by Automatic to General have been unreasonably high and excessive to the extent that they produce a rate of return on Automatic's common equity in excess of 15%, making the above adjustment to the rate base on that account appropriate.

C. The above mentioned "excess plant margin" is not "used and useful in providing telephone service in North Carolina," making the above mentioned adjustment to the rate base on that account appropriate.

D. "We find the record to be replete with evidence of poor planning and engineering, biased selection of equipment and

materials, high investment, high expenses, operational inefficiencies, and chronically poor service. The whole ball of wax adds up to bad management. * * * For us to allow General to increase its rates in this docket sufficiently to achieve an adequate or acceptable rate of return as judged by the marketplace, would of necessity involve our finding and concluding that General's investment is at reasonable original cost, that its service is adequate, efficient, economical and reasonable, and that its management has been sound. This we simply cannot do. * * * We recognize that many of the shortcomings of General's management are intangible and somewhat difficult to observe from a written record. However, *the demeanor of several of the witnesses from the higher levels of management are [sic] clearly demonstrative of an attitude of a complacement monopoly.* We conclude that *if all prerequisites were present, a substantially higher rate of return should and would be allowed, but that in view of the inefficient and inadequate service, unreasonable levels of investment and expense, and unsound management, no increase in rates should be allowed herein."* (Emphasis added.)

Robert Morgan, Attorney General, I. Beverly Lake, Jr., Deputy Attorney General, and Jerry J. Rutledge, Associate Attorney, for the Using and Consuming Public.

Edward B. Hipp, Commission Attorney, Maurice W. Horne, Assistant Commission Attorney, and John R. Molm, Associate Commission Attorney, for North Carolina Utilities Commission.

Claude V. Jones for the City of Durham, Intervenor.

Ward W. Wueste, Jr.; Newsom, Graham, Strayhorn, Hedrick, Murray & Bryson by A. H. Graham, Jr., and K. Byron McCoy; Power, Jones & Schneider by John Robert Jones and William R. White for General Telephone Company of the Southeast.

LAKE, Justice.

[1] The crucial question upon this appeal is: When, upon substantial evidence, a public utility is found to be rendering grossly inadequate service, due to bad management and managerial indifference, and the rates presently charged by it yield a return sufficient to pay the interest on its indebtedness and a substantial dividend upon its stock, but less than that which would be deemed a fair return upon the fair value of its prop-

erties were the service adequate, may the Utilities Commission lawfully deny it authority to increase its rates for such service? The answer is yes.

There is ample evidence in the record to support the Commission's findings that General is rendering "chronically poor service" and that this is due to "bad management" and demonstrates "an attitude of a complacement monopoly." Although the company presented evidence to the contrary, these findings of the Commission, being supported by substantial, competent evidence in the record are conclusive. *Utilities Commission v. General Telephone Co.*, 281 N.C. 318, 336, 189 S.E. 2d 705; *Utilities Commission v. Coach Co.*, 269 N.C. 717, 153 S.E. 2d 461; *Utilities Commission v. Telegraph Co.*, 267 N.C. 257, 148 S.E. 2d 100; *Utilities Commission v. Champion Papers, Inc.*, 259 N.C. 449, 130 S.E. 2d 890.

[2, 3] Pursuant to G.S. 62-110, the State, through the Utilities Commission, has granted to General a monopoly upon the business of rendering telephone service to the public within its several service areas in North Carolina. The primary purpose of Chapter 62 of the General Statutes is not to guarantee to the stockholders of a public utility constant growth in the value of and in the dividend yield from their investment, but is to assure the public of adequate service at a reasonable charge. It became evident long ago that the attainment of this primary objective is endangered both by unrestrained competition and by the creation of a "complacent monopoly" in the public utility business. Consequently, Chapter 62 provides for the granting of a monoploy and for the regulation of its service and its charges by the Utilities Commission. The entire chapter is a single, integrated plan. Its several provisions must be construed together so as to accomplish its primary purpose. Its provisions, such as G.S. 62-133, designed to assure the utility of adequate revenues, are in the nature of corollaries to the basic proposition that the public is entitled to adequate service at reasonable rates and safeguards against administrative action which would violate constitutional protections by confiscation of the utility's property. Without such assurance, the owners of capital would not invest it in the utility's bonds or stock and the utility could not provide the plant necessary for the rendering of adequate service.

G.S. 62-133 lays down the procedure by which the Commission is to fix rates which will enable the utility "by sound

management" to pay all of its costs of operation, including maintenance, depreciation and taxes, and have left a fair return upon the fair value of its properties. This, however, must be applied in the light of the provisions of Chapter 62 relating to the duty of the utility to render adequate service. G.S. 62-32(b) provides: "The Commission is hereby vested *with all power necessary* to require and compel any public utility to provide and furnish to the citizens of this State reasonable service of the kind it undertakes to furnish and fix and regulate the reasonable rates and charges to be made for such service." (Emphasis added.) G.S. 62-131 provides: "(a) Every rate made, demanded or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable. (b) Every public utility shall furnish adequate, efficient and reasonable service."

Obviously, it was not the intent of the Legislature to require the Commission to fix rates without any regard to the quality of the service rendered by the utility and thus to assure a "complacent monopoly" a "fair return upon the fair value of its properties," while it persists in rendering mediocre service and turns a deaf ear both to customer complaints and to Commission orders for improvement. On the contrary, the quality of the service rendered is, necessarily, a factor to be considered in fixing the "just and reasonable" rate therefor.

[4] As we said in *Utilities Commission v. General Telephone Co., supra,* at page 370, the rate making procedure prescribed in G.S. 62-133 is designed to yield to the utility a return which will meet the test laid down in *Bluefield Water Works & Improvement Co. v. Public Service Commission,* 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176. In that case the Supreme Court of the United States gave more precise meaning to the constitutional requirement of a "fair return on fair value," declared by it in *Smyth v. Ames,* 169 U.S. 466, 18 S.Ct. 418, 42 L.Ed. 819. The quality of the utility's service was not in question. The Bluefield test assumes reasonably good service. Since the rate of return on the fair value of its properties which will enable a utility company to attract the capital it needs (the essence of the Bluefield test) cannot be pinpointed with absolute accuracy, it is universally recognized that, for a utility rendering acceptable service, there is a zone of reasonableness extending over a few hundredths of one per cent, within which a rate of return fixed by a regulatory commission will not be disturbed by the courts.

General contends that, however poor may be its service, a utility has a constitutional right to charge therefor rates which will enable it to earn upon the fair value of its properties a return not less than the lower limit of this zone of reasonableness. No decision of this Court so holds. Neither the Bluefield case, *supra*, *Smyth v. Ames*, *supra*, nor any other decision of the Supreme Court of the United States which has been brought to our attention gives support to this contention. Neither of those cases dealt with a utility which was rendering a grossly inadequate service. In *Smyth v. Ames*, *supra*, at page 545, the Court quoted with approval *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 596-7, 17 S.Ct. 198, 41 L.Ed. 560, as follows:

> "It cannot be said that a corporation is entitled as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. * * * The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. * * * So that the right of the public to use the defendant's turnpike upon payment of such tolls as in view of the nature and value of the service rendered by the company are reasonable, is an element in the general inquiry whether the rates established by law are unjust and unreasonable."

In *Utilities Commission v. Morgan, Attorney General*, 277 N.C. 255, 177 S.E. 2d 405, the appellant utility made the same contention now made by General; that is, that the Utilities Commission could not lawfully refuse to approve rates which would yield the utility a fair return on the fair value of its properties, regardless of the quality of its service. We said (at page 266):

> "It is not reasonable to construe G.S. 62-133(b) to require the Commission to shut its eyes to 'poor' and 'substandard' service resulting from a company's wilful, or negligent, failure to maintain its properties or to heed com-

plaints from its subscribers when the Commission is called upon by the company to permit it to increase its rates for its inadequate service. We reject the contention of the company upon this question."

We adhere to that construction of G.S. 62-133.

In the present case, we do not reach the question of the authority of the Commission to fix rates at a confiscatory level as a penalty for inadequate service. The Commission found that the existing rates for service, which the order continued in effect, were sufficient, after payment of all expenses, including maintenance, depreciation and taxes, to yield to General a return of 6.65% on the fair value of its properties. This finding is not challenged. Schedule II of Exhibit 1, introduced by the Commission's staff, shows that, during the twelve-month test period, the rates produced net operating income for return of $3,778,527 from North Carolina intrastate service, a figure slightly less than that found by the Commission. After paying all interest on General's indebtedness, taxes and the dividends on the portion of its preferred stock allocable to North Carolina intrastate service, this left $1,740,282 for the common stockholders. This was sufficient to pay a 6% dividend on the portion of the common stock allocable to North Carolina intrastate service and still leave for addition to surplus $359,770. The staff's computation of results achieved during the test period does not include any adjustment for excessive profits paid by General to Automatic for materials and supplies purchased by General during the test period. This is not confiscation. See: *Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S. 151, 163-164, 54 S.Ct. 658, 78 L.Ed. 1182.

[5] General contends that it has been penalized twice for poor service in that the Commission, in its computation of the fair value of General's property, considered "the inadequacy of telephone service provided by the plant." There is no merit in this contention. As we said on the previous appeal of this company (*Utilities Commission v. General Telephone Co., supra,* at page 361), "It is obvious that consistently poor service, *attributable to defective or inadequate or poorly designed equipment or construction,* justifies a subtraction from both the original cost and the reproduction cost of the existing plant before weighing these factors in ascertaining the present 'fair value' of the properties." (Emphasis added.) To the same effect is *Utilities Commission v. Morgan, supra.* This is not the imposi-

tion of a penalty. It is merely the consideration of a factor in the computation of the "fair value" of the properties.

Inadequacy of service due, not to the condition of the properties but to inefficient personnel, bad management and the indifference of a "complacent monopoly" is an entirely different matter. This does not relate to the value of the properties. But it does relate to the value of the service and to the reasonableness of the rates proposed to be charged therefor. The record now before us contains ample evidence to support the Commission's findings of service inadequacies due to the condition of the properties and others due to the quality of the management and personnel of this company.

In 1968, General applied to the Commission for an increase in rates. The Commission granted an increase but warned General that its service was inadequate and must be improved. In 1971, General again applied for an increase in rates. Again, the Commission allowed a part of the requested increase but found the service inadequate and specified eleven respects in which it must be improved promptly. On appeal this order was remanded to the Commission for further consideration. See: *Utilities Commission v. General Telephone Co., supra.* On remand the Commission again allowed a portion of the requested increase and reaffirmed its orders requiring improvement in service. General did not appeal from the portion of the Commission's original order relating to service improvements and did not appeal from any portion of its order on remand. In the present case, the Commission found that two of the previously ordered improvements in service have not been made. General contended before the Commission that these two improvements are "unreasonable," thus clearly indicating that it does not intend to make them unless compelled to do so.

[6] Thus, three times in a period of five years the Commission has granted General increases in rates, notwithstanding its finding of serious inadequacies in General's service. This was within the administrative discretion of the Commission. *Utilities Commission v. Morgan, supra,* at page 266. Having labored patiently with General in an effort to induce it to improve its service by allowing it rate increases, the Commission cannot be deemed to have acted arbitrarily in saying, as it has now done, that it would permit General to raise its rates so as to increase its return on the fair value of its properties from 6.65% to at least 8.02% if its service were adequate but it will

not now permit such increase in view of General's persistent disregard of such inadequacy of service. See: *D. C. Transit System, Inc. v. Washington Metropolitan Area Transit Commission,* 466 F. 2d 394, 407, 418 (cert. den. 409 U.S. 1086); *United Telephone Co. of Florida v. Mayo (Fla.),* 215 So. 2d 609 (app. dism. 394 U.S. 995).

To remove inadequacies of service resulting from the indifference of top level management and from incompetence or indifference of operating personnel does not require the attraction of additional capital. It does not require time consuming construction programs or the acquisition of equipment. These circumstances distinguish the present case from *Elyria Telephone Co. v. Public Utilities Commission,* 158 Ohio St. 441, 110 N.E. 2d 59, and *General Telephone Co. v. Michigan Public Service Commission,* 341 Mich. 620, 67 N.W. 2d 882, which approved and followed the Elyria case. In *Village of Apple River v. Illinois Commerce Commission,* 18 Ill. 2d 518, 165 N.E. 2d 329, also relied upon by General, the Supreme Court of Illinois reversed the decision of the lower court, which had held that the Commission did not have administrative discretion to allow a rate increase where the service was inadequate. This reversal is in accord with our holding in *Utilities Commission v. Morgan, supra.* In the present case, General is faced with no emergency or sudden demand for improved service.

[7] The remaining questions raised by General in this appeal do not require extended discussion. The principles of law governing the authority of the Commission to make a deduction from the original cost, and so from the replacement cost and the fair value, of the properties of General on account of excessive prices paid to Automatic for equipment and materials are set forth in *Utilities Commission v. General Telephone Co., supra,* at pages 341 to 348, and need not be repeated here. See also: *Utilities Commission v. Morgan, Attorney General, supra,* at pages 270 to 273.

In the former General Telephone case, we concluded that the evidence in the record did not support the finding that the prices charged by Automatic to General were so excessive as to indicate bad faith or mismanagement by those who control General. In the present record, there is evidence sufficient to support the Commission's finding in this respect. This evidence is to the effect that, in instance after instance, General paid to Automatic for equipment and materials prices far in excess of

those paid by operating companies in the Bell System to Western Electric Company for like or superior equipment and materials. This evidence was not introduced by the Commission's staff, or considered by the Commission, as evidence that General could have purchased its equipment and materials more cheaply from Western Electric. Western Electric sells only to the Bell System operating companies, with exceptions not here material. The significance of this evidence is that it affords basis for a finding that GT&E has consistently used its complete control over its two subsidiaries so as to cause General to pay excessive prices to Automatic, thus decreasing General's rate of return while increasing the profits of its only stockholder.

Neither in sales by Automatic to General nor by Western Electric to the Bell System operating companies is there bargaining between seller and purchaser at arm's length. Judicial notice may be taken, however, of the well known fact that Western Electric is not operated as an eleemosynary institution but is a significant source of the overall profit of the Bell System. The evidence of the prices charged by it to its affiliates is relevant in determining the reasonableness of prices charged by Automatic to General.

[8] The principles of law governing the authority of the Commission to make a deduction from original cost, and so from replacement cost and fair value, of the properties of General because of the overbuilding of the plant and the resulting excessive plant margins are also set forth in *Utilities Commission v. General Telephone Co., supra,* at pages 351 to 355, and need not be repeated. While, in the present case, the company offered substantial evidence to show that there was no significant excess plant margin, this conflict of evidence presented a question of fact upon which the finding of the Commission is conclusive and may not be disturbed by the reviewing court, even though the court might have reached a different conclusion thereon. *Utilities Commission v. Telephone Co., supra,* at page 336, and cases therein cited.

[9] There was no error in the Commission's finding as to the cash working capital requirements of General, based upon the Commission's long established formula for making that determination, notwithstanding evidence by a witness for General that a lead-lag study made by him led him to the conclusion that a larger allowance was appropriate. The lead-lag study, itself, was not introduced in evidence. The credibility of the evidence

was for the Commission, and the amount of cash working capital reasonably required in the company's operations is an administrative question upon which the Commission's determination is conclusive. *Utilities Commission v. Virginia Electric and Power Co.*, 285 N.C. 398, 415, 206 S.E. 2d 283.

The City of Durham, a party protestant, introduced as exhibits rate tariffs of Southern Bell Telephone & Telegraph Company, Carolina Telephone & Telegraph Company, General Telephone Company of Kentucky, United Telephone Company of Ohio and Rochester Telephone Company. General assigns the admission of this evidence as error, for the reason that there was no showing of comparable operating conditions. On the contrary, there was testimony by the Commission's staff engineers as to similarity of territories and operating conditions as between General, on the one hand, and Southern Bell Telephone & Telegraph Company and Carolina Telephone & Telegraph Company, on the other. General, itself, through its expert witness on the question of rate of return, offered testimony and exhibits as to the earnings of the other three companies, the witness testifying that they are comparable in size and investor risk to General.

[10, 11] Obviously, rates charged by one telephone company do not, per se, constitute a standard by which to determine the reasonableness of those of another company, even when the territories served and operating conditions are similar. The probative value of such evidence is slight at best, but where, as here, there is evidence of substantial similarity of conditions, evidence of comparative rates may have some relevancy for use as a guide to the limits of the zone of reasonableness. The order of the Commission does not indicate that it gave any other effect to this evidence and it is inconceivable that the order would have been different in any way whatever had this evidence not been introduced. The statute requires the reviewing court to take due note of the rule of prejudicial error. G.S. 62-94(c).

[12] There is no merit in General's contention that its properties have been confiscated in that the rates continued in effect by the Commission's order will yield a rate of return below that determined by the Commission to be reasonable in its 1971 order. Such determinations are not *res judicata* and do not forbid an allowance of either a higher or a lower rate of return in a subsequent proceeding. G.S. 62-133(e).

[13] The Commission did not exceed its authority in finding the replacement cost of General's properties to be less than that stated by General's expert witness, even though there was no other testimony on the question of replacement cost. The credibility of the testimony was for the determination of the Commission. *Utilities Commission v. Virginia Electric and Power Co., supra,* at page 409. In this instance, it found the conclusion of the witness unacceptable, to a degree, by reason of specified deficiencies in his method of computation. The Commission is not required to accept in full the conclusion of an expert witness as to replacement cost, even though it be uncontradicted by other evidence in the record. *Utilities Commission v. Duke Power Co.,* 285 N.C. 377, 390, 206 S.E. 2d 269; *Utilities Commission v. General Telephone Co., supra,* at page 360-361.

[14] The Court of Appeals adjudged that the proceeding should be remanded to the Commission because the Commission failed "to find facts with respect to the effect it gave the factor of inadequate service in reducing the fair value of the properties." This the Commission should have done. *Utilities Commission v. General Telephone Co., supra,* at page 361. However, under the circumstances of this case, this was harmless error and not ground for such remand. G.S. 62-94(c).

The effect given by the Commission to inadequacy of service due to management is shown clearly and precisely. It is apparent from consideration of the order of the Commission, in its entirety, that the denial of the request for an increase in rates for service was due to the Commission's finding of gross inadequacies of service due to management and personnel deficiencies rather than to plant deficiencies. The effect given by the Commission to inadequacy of service due to plant deficiencies in determining the replacement cost, and so the fair value, of the properties of General does not appear to have been large in relation to its finding of fair value. This was but one of several matters considered by the Commission in refusing to accept at face value the company's evidence of replacement cost.

Under the circumstances of this case, it appears that no useful purpose would be served by a remanding to the Commission for the further finding directed by the Court of Appeals. Such remand would only delay the final determination of the present proceeding. Nothing in the order of the Commission precludes General from filing, at a time selected by it, a new

proceeding with the Commission and establishing therein that it has removed the cause of the service inadequacies which, in the present proceeding, caused the Commission to deny its application. The order from which General now appeals shows clearly that such a course would result in the allowance of a higher rate of return.

The judgment of the Court of Appeals remanding this proceeding to the Utilities Commission is, therefore, reversed and the matter is remanded to the Court of Appeals for the entry of a judgment by it affirming the order of the Commission.

Reversed and remanded.

Chief Justice BOBBITT not sitting.

SPARTAN LEASING, INC. v. WILLIAM W. BROWN, JR., AND JAMES W. HOWARD, t/a COASTAL STEEL ERECTORS, A PARTNERSHIP, AND COASTAL STEEL ERECTORS, INC., A CORPORATION

No. 7

(Filed 10 October 1974)

1. **Appeal and Error § 68— interlocutory decision — law of case in subsequent proceeding**

An interlocutory decision of the Court of Appeals did not constitute the law of the case on review by the Supreme Court of a subsequent decision in the same case.

2. **Appeal and Error §§ 22, 68— interlocutory order — no petition for certiorari — effect on subsequent proceedings**

Failure of plaintiff to petition for a writ of certiorari to review an interlocutory decree of the Court of Appeals does not preclude the Supreme Court from granting certiorari after final judgment and thereupon considering and rectifying any errors which occurred at any stage of the proceedings.

3. **Appearance § 2; Rules of Civil Procedure § 12— general appearance — lack of jurisdiction over person — waiver**

Defendants who were South Carolina residents clearly became subject to the jurisdiction of the North Carolina courts when they made a general appearance by obtaining an extension of time to answer or otherwise plead.

Chief Justice BOBBITT not sitting.

ON *certiorari*.

Plaintiff, a North Carolina corporation with its principal office and place of business in Mecklenburg County, filed this action on 3 March 1971 for damages allegedly due from defendants for violation of the provisions of an equipment lease entered into by the parties. Summons issued on the same date, and copies of both the summons and complaint were served on defendants in South Carolina by a deputy sheriff of Berkeley County, South Carolina, on 11 May 1971. Upon request of counsel for defendants, the Clerk of Superior Court of Mecklenburg County, by order of 7 June 1971, ordered an enlargement of time "within which the defendants must file answers, motions or other pleadings."

On 12 July 1971, defendants moved to dismiss the action under G.S. 1A-1, Rule 12(b)(2), for that defendants were residents of South Carolina and therefore no grounds for *in personam* jurisdiction existed. Plaintiffs contested this motion on two grounds: (1) Defendants made a general appearance by requesting and obtaining an enlargement of time in which to file responsive pleadings, motions or other pleadings, and (2) the Superior Court had jurisdiction over defendants under G.S. 55-145(a)(1) and G.S. 1-75.4(5) a. and c. Judge Friday denied the motion on the ground that defendants waived the right to object by obtaining the enlargement of time. Defendants appealed.

The Court of Appeals, by decision filed 24 May 1972, reversed the ruling of the trial court and held that the obtaining of an enlargement of time did not constitute a waiver of the defense of lack of *in personam* jurisdiction. The Court of Appeals, however, declined to dismiss the action and remanded to the Superior Court of Mecklenburg County for a determination as to whether *in personam* jurisdiction existed under G.S. 55-145(a)(1) and G.S. 1-75.4(5) a. and c. *Leasing, Inc. v. Brown*, 14 N.C. App. 383, 188 S.E. 2d 574. Neither plaintiff nor defendant sought review of this decision of the Court of Appeals.

On remand, at the 2 January 1973 "C" Civil Session of Mecklenburg Superior Court, Judge Snepp, after receiving affidavits and interrogatories, dismissed this action for lack of sufficient minimum contacts with the State of North Carolina to establish *in personam* jurisdiction. Plaintiff appealed.

On appeal, the Court of Appeals affirmed the determination of the trial court. *Leasing, Inc. v. Brown,* 19 N.C. App. 295, 198 S.E. 2d 583. On 8 May 1974, we allowed plaintiff's petition for writ of *certiorari.*

Grier, Parker, Poe, Thompson, Bernstein, Gage & and Preston, by Gaston H. Gage, for plaintiff appellant.

No counsel contra.

BRANCH, Justice.

Prior to the Judicial Department Act of 1965, which, *inter alia,* established the Court of Appeals, it was well established in this jurisdiction that questions actually presented and determined on a former appeal became the law of the case and became binding on this Court and the trial courts when the same facts were subsequently presented in the cause at trial or on appeal. *Hayes v. Wilmington,* 243 N.C. 525, 91 S.E. 2d 673; *Bruce v. Flying Service,* 234 N.C. 79, 66 S.E. 2d 312; *Maddox v. Brown,* 233 N.C. 519, 64 S.E. 2d 864. Accord: *Pulley v. Pulley,* 256 N.C. 600, 124 S.E. 2d 571; *Stamey v. Membership Corp.,* 249 N.C. 90, 105 S.E. 2d 282; *Glenn v. Raleigh,* 248 N.C. 378, 103 S.E. 2d 482.

[1] We recognize that the introduction of the Court of Appeals into the appellate scheme of this State adds a new dimension which we have not heretofore considered. We must therefore decide whether an interlocutory decision of the Court of Appeals constitutes the law of the case on review by this Court of a subsequent decision in the same case.

The various jurisdictions which have considered this question have differed. There appear to be six states whose highest courts have clearly held that the prior decision of the intermediate court becomes the law of the case. *R. O. A. Motors, Inc. v. Taylor,* 220 Ga. 122, 137 S.E. 2d 459; *South Bend Home Tel. Co. v. Beaning,* 181 Ind. 586, 105 N.E. 52; *Clore v. Davis,* 19 Ky. L. Rptr. 353, 40 S.W. 380; *Huntington v. Westerfield,* 119 La. 615, 44 So. 317; *Chandler v. Lafferty,* 282 Pa. 550, 128 A. 507; *Life & Cas. Ins. Co. v. Jett,* 175 Tenn. 295, 133 S.W. 2d 997. Nine other states, however, have held that such prior decisions do not become the law of the case and thereby bind the court of last resort. *City of Pueblo v. Shutt Inv. Co.,* 28 Colo. 524, 67 P. 162; *Weiner v. Pictorial Paper Package Corp.,* 303 Mass. 123, 20 N.E. 2d 458; *Jones v. Keetch,* 388 Mich. 164, 200

N.W. 2d 227; *Orleans Dredging Co. v. Frazie,* 179 Miss. 188, 173 So. 431; *Grant v. Kansas City Southern Ry.,* 190 S.W. 586 (Mo.); *New Amsterdam Cas. Co. v. Popovich,* 18 N.J. 218, 113 A. 2d 666; *Walker Mem. Baptist Church, Inc. v. Saunders,* 285 N.Y. 462, 35 N.E. 2d 42; *Pengelly v. Thomas,* 151 Ohio St. 51, 84 N.E. 2d 265; *Roach v. Los Angeles & S.L.R.R.,* 74 Utah 545, 280 P. 1053. The State of Illinois has taken a still different position, that when the intermediate appellate decision is not reviewable on appeal by the State Supreme Court, such decision is not the law of the case. *Linington v. Strong,* 111 Ill. 152. Conversely, if the decision is reviewable by the Supreme Court, and appeal is not taken, the intermediate decision apparently becomes law, binding even the State Supreme Court on subsequent appeal. *See Henning v. Eldridge,* 146 Ill. 305, 33 N.E. 754. The strength of this intermediate position is diminished by a more recent pronouncement of the Illinois court on the subject, which, without expressly overruling prior cases, simply states that the law of the case doctrine is not applicable to the Supreme Court when it reviews the decision of the intermediate appellate court. *Sjostrom v. Sproule,* 33 Ill. 2d 40, 210 N.E. 2d 209.

The California court, one of the most rigid adherents of the strict law of the case view that even a court of last resort is bound by intermediate decision, has more recently indicated a less inflexible position. *See Tomaier v. Tomaier,* 23 Cal. 2d 754, 146 P. 2d 905; *Allen v. California Mut. Bldg. & Loan Ass'n,* 22 Cal. 2d 474, 139 P. 2d 321.

The federal courts have consistently followed the view that prior decisions of intermediate appellate courts, state or federal, cannot bind the Supreme Court of the United States upon a subsequent appeal. *Davis v. O'Hara,* 266 U.S. 314, 45 S.Ct. 104, 69 L.Ed. 303; *Diaz v. Patterson,* 263 U.S. 399, 44 S.Ct. 151, 68 L.Ed. 357; *Zeckendorf v. Steinfeld,* 225 U.S. 445, 32 S.Ct. 728, 56 L.Ed. 1156; *Messenger v. Anderson,* 225 U.S. 436, 32 S.Ct. 739, 56 L.Ed. 1152; *Galigher v. Jones,* 129 U.S. 193, 9 S.Ct. 335, 32 L.Ed. 658; *Williams v. Conger,* 125 U.S. 397, 8 S.Ct. 933, 31 L.Ed. 778. This federal holding has particular efficacy with regard to interlocutory orders. A situation strikingly similar to the situation presented in the instant case was presented in *United States v. United States Smelting, Refining & Mining Co.,* 339 U.S. 186, 70 S.Ct. 537, 94 L.Ed. 750. In that case, a three-judge federal district court held that certain orders of the Interstate Commerce Commission were not supported by the

evidence and enjoined enforcement of the orders. The order of the district court, although interlocutory, was explicitly made appealable by 28 U.S.C. § 1253, but the Commission did not appeal. Instead, upon remand, it took no further evidence but restated essentially the same grounds for its action and entered cease and desist orders. On a second appeal to the three-judge court, that court again held the orders unlawful and permanently enjoined their enforcement. The Commission and the United States appealed, and the Supreme Court of the United States reversed. The appellees contended, *inter alia,* that the judgment of the district court should be affirmed because there was no appeal from the first judgment and mandate of the three-judge court. The Court, rejecting this contention, stated in part:

> "The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter. [Citations omitted.] It is not applicable here because when the case was first remanded, nothing was finally decided. The whole proceeding thereafter was in fieri. The Commission had a right on reconsideration to make a new record. [Citations omitted.] When finally decided, all questions were still open and could be presented. The fact that an appeal could have been taken from the first order of the District Court was not because it was a final adjudication but because a temporary injunction had been granted in order to maintain the status quo. This was an interlocutory order that was appealable because Congress, notwithstanding its interlocutory character, had made it appealable. . . . The appellants might have appealed, but they were not bound to. We think that it requires a final judgment to sustain the application of the rule of the law of the case just as it does for the kindred rule of res judicata. [Citations omitted.] And although the latter is a uniform rule, the 'law of the case' is only a discretionary rule of practice. It is not controlling here. [Citations omitted.]"

We are of the opinion that the better reasoned rule is that one adopted by the federal courts and a majority of the other jurisdictions which have considered the question. We therefore hold that the prior decision of the Court of Appeals in this case, filed 24 May 1972, does not constitute the law of the case so as to bind this Court.

[2] Although not argued by either party to this appeal, the crucial question presented by the appeal is whether plaintiff lost its right to further review by reason of its failure to petition for writ of certiorari to review the initial decision of the Court of Appeals.

Plaintiff could not appeal as a matter of right from the initial decision of the Court of Appeals. G.S. 7A-27(a); G.S. 7A-30. Thus, the source for further review was the discretionary authority vested in this Court by G.S. 7A-31, which provides in pertinent part:

> "(a) In any cause in which appeal has been taken to the Court of Appeals, except a cause appealed from the North Carolina Utilities Commission or the North Carolina Industrial Commission, and except a cause involving review of a post-conviction proceeding under article 22, chapter 15, the Supreme Court may in its discretion, on motion of any party to the cause or on its own motion, certify the cause for review by the Supreme Court, either before or after it has been determined by the Court of Appeals. . . .
>
> * * *
>
> "(c) In causes subject to certification under subsection (a) of this section, certification may be made by the Supreme Court after determination of the cause by the Court of Appeals when in the opinion of the Supreme Court
>
> (1) The subject matter of the appeal has significant public interest, or
>
> (2) The cause involves legal principles of major significance to the jurisprudence of the State, or
>
> (3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.
>
> Interlocutory determinations by the Court of Appeals, including orders remanding the cause for a new trial or for other proceedings, shall be certified for review by the Supreme Court only upon a determination by the Supreme Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm."

The second paragraph of our Supplementary Rule 2(a) contains language identical to the last-quoted paragraph. The rule also further provides in relevant part:

> "A petition for writ of certiorari filed under subsection (a) of this rule shall be filed within fifteen days after the date of the certification to the trial tribunal of the determination of the Court of Appeals; in all other respects Rule 34 of the Rules of Practice in the Supreme Court shall apply."

The rules do not provide an answer to this question of first impression in this jurisdiction. However, we do find guidance in the decisions of other courts.

In *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 36 S.Ct. 269, 60 L.Ed. 629, this question was considered, and the Court stated:

> "It is contended that this question is settled otherwise, at least as between these parties, by the decision of the circuit court of appeals on the first appeal, and our refusal to review that decision upon complainant's petition for a writ of certiorari, and that the only questions open for review at this time are those that were before the court of appeals upon the second appeal. This, however, is based upon an erroneous view of the nature of our jurisdiction to review the judgments and decrees of the circuit court of appeals by certiorari. . . . As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. [Citations omitted.] And, except in extraordinary cases, the writ is not issued until final decree. . . .
>
> "It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ is in no case equivalent to an affirmance of the decree that is sought to be reviewed. And, although in this instance the interlocutory decision may have been treated as settling 'the law of the case' so as to furnish the rule for the guidance of the referee, the district court, and the court of appeals itself upon the second appeal, this court, in now reviewing the final decree by virtue of the writ of certiorari, is called upon to notice and rectify any error that may have occurred in the interlocutory proceedings. [Citations omitted.]"

The United States Supreme Court again considered the same question in *Mercer v. Theriot,* 377 U.S. 152, 84 S.Ct. 1157, 12 L.Ed. 2d 206. There the court held that, notwithstanding the fact that the Supreme Court had previously denied certiorari to review the judgment of the court of appeals remanding the case to the district court, the United States Supreme Court, in reviewing the judgment of the court of appeals, could consider questions raised on the first as well as the second appeal to the court of appeals. Accord: *Reese v. Georgia,* 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77; *Indianapolis v. Chase Nat'l Bank,* 314 U.S. 63, 62 S.Ct. 15, 86 L.Ed. 47; *Toledo Co. v. Computing Co.,* 261 U.S. 399, 43 S.Ct. 458, 67 L.Ed. 719.

This Court considered a closely related question in *Peaseley v. Coke Co.,* 282 N.C. 585, 194 S.E. 2d 133. The Court of Appeals had, on a first appeal, reversed the granting of the defendant's motion for involuntary nonsuit. *Peaseley v. Coke Co.,* 5 N.C. App. 713, 169 S.E. 2d 243. This Court denied *certiorari,* 275 N.C. 596. On remand, the trial court granted summary judgment for the plaintiff on the question of liability but retained the issue of damages for jury determination. The defendant appealed to the Court of Appeals, which affirmed, 12 N.C. App. 226, 182 S.E. 2d 810. We again denied *certiorari,* 279 N.C. 512, 183 S.E. 2d 688. Subsequently the Superior Court entered summary judgment for plaintiff on the question of damages. The Court of Appeals affirmed, 15 N.C. App. 709, 190 S.E. 2d 690. This Court allowed *certiorari,* 282 N.C. 304, 192 S.E. 2d 195. The decision of this Court, in an opinion by Justice Moore, made clear that, where there has been previous denial of *certiorari* by this Court, followed by the later granting of *certiorari* to review the same case, this Court could proceed to review questions raised and preserved throughout the proceedings:

> "Under our general supervisory power, we could review the entire record, but in the present case defendant in its petition for *certiorari* to this Court assigned as error decisions of the trial court and of the Court of Appeals throughout the course of the litigation and preserved these assignments by arguments or citation of authorities in its brief filed in this Court. Under these facts we hold that the previous denials of *certiorari* do not constitute approval of either the reasoning or the merits of the prior decisions of the Court of Appeals. On the present petition this Court may review the entire proceedings and consider any errors

which have occurred during the course of the litigation provided the parties have taken the proper steps to preserve the questions for appellate review."

The narrow difference in this line of cases and the case now before us is that here, *plaintiff failed to petition for certiorari from the initial decision.* That failure, however, does not prevent its presently raising the prior question. In *Panama R. R. v. Napier Shipping Co.,* 166 U.S. 280, 17 S.Ct. 572, 41 L.Ed. 1004, the Supreme Court of the United States dealt with a strikingly similar situation. In that admiralty case, the district court dismissed the libel. The libelant, in accordance with the federal appellate structure as it then existed, appealed to the circuit court, which affirmed. He then appealed again to the circuit court of appeals, which reversed and remanded the cause to the circuit court for the determination of damages. The libelee did not seek further review. Damages were assessed, and the libelee appealed. The circuit court affirmed, and the Supreme Court of the United States granted the libelee's petition for *certiorari.*

Upon review by the Supreme Court, the libelant claimed that the Court was limited to a review of the damages question only. The Court emphatically rejected such a contention:

" . . . While this writ begins with a recital that 'there is now pending' in the circuit court of appeals 'a suit in which,' etc., we think it is giving it too narrow a construction to hold that it was intended to bring before this court only the question of damages then pending before the circuit court of appeals, particularly in view of the fact that the petition for the writ of certiorari set forth the facts of the case, and claimed that upon those facts the libel should have been dismissed—making no claim whatever that error had been committed in the assessment of damages. A difference of opinion existed in the court below upon the question of liability, and the writ was granted to review the whole case as on appeal from the second decree of the circuit court, which was contrary to its first decree, and was entered in obedience to the direction of the court of appeals.

"If, under such circumstances, this court were powerless to examine the whole case upon certiorari, we should then be compelled to issue it before final decree, whereas . . . it is and generally should be issued only after a final

> decree. . . . But while the court of appeals may have been limited on the second appeal to questions arising upon the amount of damages, no such limitation applies to this court, when, in the exercise of its supervisory jurisdiction, it issues a writ of certiorari to bring up the whole record. Upon such writ the entire case is before us for examination."

Decisions of state courts also support this view. *See McLaughlin v. Hahn,* 333 Ill. 83, 164 N.E. 148; *Weiner v. Pictorial Paper Package Corp.,* 303 Mass. 123, 20 N.E. 2d 458. *See also Thornton v. St. Paul & Chicago R. R.,* 6 Daly 511 (N.Y. Com. P.).

Charles A. Wright in his treatise (C. Wright, Law of Federal Courts, § 106 at 477 (2d. ed.)), states the rule succinctly, as follows:

> "A party is not required to petition for certiorari to review the interlocutory order, *and the fact that he did not petition,* or that his petition was denied, does not bar the court from granting certiorari after final judgment in the case and then considering the supposedly erroneous interlocutory order." (Emphasis ours.)

In this case the decree in the initial case by the North Carolina Court of Appeals was obviously not a final one, and the interlocutory judgment which remanded the cause to the Superior Court of Mecklenburg County for a new trial did not result in such delay as would result in substantial harm to plaintiff; neither was the decision of major significance to the jurisprudence of the State; nor did the decision clearly appear to be in conflict with the decisions of this Court since we had not construed Rule 12 of the new Rules of Civil Procedure at that time.

The North Carolina General Statute, § 7A-31, which grants to this Court discretionary powers of review, is a sweepingly broad statute which, in part, provides that this Court "may in its discretion on motion of any party to the cause or on its own motion, certify the cause for review by the Supreme Court, either before or after it had been determined by the Court of Appeals." To *require* a party to petition for a writ of *certiorari* from an adverse interlocutory decree in order to preserve his right to review of the question after final judgment would encourage fragmentary appeals, a practice long condemned by this Court, and would impose an additional and useless burden upon the appellate court system. The broad powers of review granted

to this Court should not be encumbered by such a procedural requirement.

We are advertent to the language in *Peaseley v. Coke Co., supra,* to the effect that the Court may review the entire proceedings and consider any errors which have occurred during the course of the litigation, provided that *the parties have taken the proper steps to preserve the questions for appellate review.* In instant case plaintiff timely filed its petition for a writ of *certiorari* requesting review of the *final judgment* and by that petition assigned as error the rulings of the Court of Appeals in the interlocutory proceedings and the final judgment. In its brief, plaintiff preserved its assignments of error by ample citation of authority and lucid argument. Plaintiff was not *required* to petition for *certiorari* to review the interlocutory decree, and in our opinion it has taken the proper steps to preserve for review the entire proceedings.

We hold that the failure of plaintiff to petition for a writ of *certiorari* to review the interlocutory decree of the Court of Appeals does not preclude this Court from granting *certiorari* after final judgment and thereupon considering and rectifying any errors which occurred at any stage of the proceedings.

Having decided that plaintiff has preserved its right to further review and that this Court is not bound by any prior determination of the Court of Appeals in this case, we now turn to the holding of the Court of Appeals in the initial, interlocutory decision to the effect that defendant did not waive the defense of lack of jurisdiction over his person when he requested an enlargement of time under Rule 6(b).

In *Simms v. Stores, Inc.,* 285 N.C. 145, 203 S.E. 2d 769 (filed 10 April 1974), after construing Rule 12 of the North Carolina Rules of Civil Procedure and G.S. 1-75.7, we held that "by securing an extension of time in which to answer or otherwise plead, defendant made a general appearance which rendered service of summons upon it unnecessary."

[3] In light of the holding in *Simms,* it is not necessary to consider the question of whether defendant had minimum contacts in North Carolina sufficient to confer jurisdiction upon the courts of this State. Under that holding defendant clearly became subject to the jurisdiction of the North Carolina courts when he obtained an extension of time to answer or otherwise plead.

The decision of the Court of Appeals, filed in this cause 24 May 1972, is reversed, and the decision of the Court of Appeals, filed in this cause 29 August 1973, is vacated. The cause is remanded to the Court of Appeals with direction that it remand to the Superior Court of Mecklenburg County for proceedings consistent with this opinion.

Remanded with directions.

Chief Justice BOBBITT not sitting.

CHADBOURN, INC., A CORPORATION v. DANIEL KATZ AND BREVARD REALTY COMPANY, INC., A CORPORATION

No. 42

(Filed 10 October 1974)

1. **Rules of Civil Procedure § 4— jurisdiction over nonresident in another state — contract to convey property in this State**

G.S. 1-75.4(6) provides that a court of this State having jurisdiction over the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) of the Rules of Civil Procedure if there is a claim arising out of a bargaining arrangement made with the defendant; there is a promise made anywhere which evidences the bargaining arrangement upon which suit is brought; and the subject matter of the arrangement is real property situated in this State.

2. **Process § 9; Rules of Civil Procedure § 4— jurisdiction of nonresident in another State — contract involving real property**

In an action for breach of contract, G.S. 1-75.4(6) was applicable to give the trial court jurisdiction over the nonresident defendant where the contract in question revealed a promise by individual defendant to acquire and a promise by plaintiff to dispose of real property situated in this State and the complaint was grounded on that promise and alleged a tender of the deed and other documents specified in the contract and a failure of defendant to keep his promise.

3. **Constitutional Law § 24; Process § 9; Rules of Civil Procedure § 4— jurisdiction of nonresident in another state — no denial of due process**

Assumption of *in personam* jurisdiction over defendant by the courts of this State does not offend traditional notions of fair play and substantial justice within the contemplation of the Due Process Clause of the Fourteenth Amendment, and defendant's contacts with the State are sufficient to satisfy due process requirements where the record shows that defendant entered into a contract to purchase real property situated in North Carolina, formed a corporation in

this State to receive title, and thus invoked the benefits and protection of its laws.

4. **Process § 9; Rules of Civil Procedure § 4— service by registered mail — compliance with due process**

Service upon defendant by registered mail apprised him of the pendency of the action against him and afforded him an opportunity to present his objections; therefore, such service complied with due process requirements.

Chief Justice BOBBITT not sitting.

ON *certiorari* to the Court of Appeals to review its decision, 21 N.C. App. 284, 204 S.E. 2d 201 (1974), upholding judgment of *Clarkson, J.*, 22 October 1973 Session, MECKLENBURG Superior Court.

Chadbourn, Inc., is a North Carolina corporation. Defendant Daniel Katz is a citizen and resident of New York. Brevard Realty Company, Inc., is a North Carolina corporation.

Chadbourn, Inc., and Daniel Katz duly executed a written contract by the terms of which Chadbourn agreed to sell and Katz agreed to buy several tracts of real property in Charlotte, North Carolina, for $350,000.00, with a $25,000.00 down payment and $112,000.00 in cash payable on closing date, and the balance of $213,000.00 to be evidenced by a promissory note secured by a purchase money deed of trust. Daniel Katz allegedly breached that contract and plaintiff brought this action alleging two claims for relief. The first claim seeks specific performance while the second claim, in the event specific performance is not decreed, seeks recovery of damages in the sum of $135,000.00 for broker's fees, attorney's fees, alterations to the premises, and loss of benefit of the bargain. The complaint alleges that prior to the date of closing specified in the contract Daniel Katz informed Chadbourn, Inc. that he had caused Brevard Realty Company, Inc. to be organized to take title to the property, stating that the contract in question had been assigned to Brevard Realty Company, Inc. and Chadbourn should make its conveyance of the property in question to Brevard Realty Company, Inc.

Chadbourn alleges that at the time stipulated in the contract for closing the sale it had complied with all the requirements of the contract and tendered to the defendants a deed to the property together with other documents required by the contract. Chadbourn further alleges that defendant Daniel Katz refused

to accept the tender, pay the the cash portion of the purchase price and deliver the promissory note for $213,000.00 secured by a purchase money deed of trust. Plaintiff brought this action for specific performance or, in the alternative, for damages for breach of contract.

Service of process upon Daniel Katz was made pursuant to Rule 4(j)(9)b of the North Carolina Rules of Civil Procedure, by mailing a copy of the summons and complaint by registered mail, return receipt requested, addressed to him at 60 Madison Avenue, New York, New York. The registered receipt discloses that the summons and complaint were delivered personally to Mr. Katz on 23 August 1973.

Daniel Katz appeared by counsel and, pursuant to Rule 12 of the North Carolina Rules of Civil Procedure, filed a motion to dismiss the action, or to quash the substituted service of summons, on the grounds that he was a nonresident of North Carolina and had not been properly served with process so as to enable the court to render a personal judgment against him. This motion was denied by the trial court and Daniel Katz appealed to the Court of Appeals. That court found no error and we allowed certiorari to review the decision.

William J. Waggoner of the firm Waggoner, Hasty & Kratt for defendant appellant.

Helms, Mulliss & Johnston by E. Osborne Ayscue, Jr., and C. Marcus Harris for plaintiff appellee.

HUSKINS, Justice.

After argument of this case in the Court of Appeals, plaintiff filed a motion to amend its complaint by deleting its claim and prayer for specific performance of the contract. That motion was allowed. Moreover, plaintiff states in its brief that the proceedings by Chadbourn against the codefendant Brevard Realty Company, Inc. are not involved in this appeal. Accordingly, this suit now involves only the $135,000.00 damages claimed by plaintiff for breach of contract by defendant Katz.

The sole question posed for decision is whether the trial court acquired personal jurisdiction of Daniel Katz pursuant to G.S. 1-75.4(6)a and Rule 4(j)(9)b of the North Carolina Rules of Civil Procedure.

Defendant contends that the courts of North Carolina may not acquire jurisdiction *in personam* over a nonresident vendee in this manner and argues that our statute and rule of procedure, *as applied,* offend due process of law in violation of the Fourteenth Amendment to the United States Constitution.

Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565 (1877), established three jurisdictional principles as requisites of due process: (1) A personal judgment rendered by a court which has no jurisdiction over a defendant is void; (2) the mere fact that a nonresident defendant owns property in the forum state confers no jurisdiction to render a personal judgment against him; and (3) if a court has no personal jurisdiction over a nonresident defendant, jurisdiction cannot be acquired by publication or merely by serving process upon him outside the forum state. Later decisions of the United States Supreme Court have engrafted modifications upon the *Pennoyer* doctrine, greatly expanding the concept of a state's jurisdiction over nonresident individuals and foreign corporations.

In *International Shoe Co. v. Washington,* 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945), the Court said: "[D]ue process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " The thrust of this decision is that traditional notions of fair play and substantial justice are not offended and a nonresident defendant may be subjected to a judgment *in personam* if "certain minimum contacts" of the defendant with the state of the forum are shown. *Accord, Perkins v. Benguet Consolidated Mining Co.,* 342 U.S. 437, 96 L.Ed. 485, 72 S.Ct. 413 (1952); *Travelers Health Association v. Virginia,* 339 U.S. 643, 94 L.Ed. 1154, 70 S.Ct. 927 (1950).

Jurisdiction over a foreign insurance corporation on the basis of a *single insurance contract* issued to a resident of the forum state was sustained in *McGee v. International Life Insurance Co.,* 355 U.S. 220, 2 L.Ed. 2d 223, 78 S.Ct. 199 (1957). There, discussing the expansion of a state's jurisdiction over nonresidents, the Court said.

> "Since *Pennoyer v. Neff* . . . this Court has held that the Due Process Clause of the Fourteenth Amendment places some limit on the power of state courts to enter binding

judgments against persons not served with process within their boundaries. But just where this line of limitation falls has been the subject of prolific controversy, particularly with respect to foreign corporations. In a continuing process of evolution this Court accepted and then abandoned 'consent,' 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over such corporations. . . . More recently in *International Shoe Co. v. Washington* . . . the Court decided that 'due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' . . .

"Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."

The above trilogy of United States Supreme Court cases *(Pennoyer v. Neff, supra; International Shoe Co. v. Washington, supra;* and *McGee v. International Life Insurance Co., supra)* illustrate the modern trend in personal jurisdiction away from the strict common law requirements of either establishing a nonresident defendant's consent to jurisdiction or personally serving him while he is within the state's territory. One commentator on the Wisconsin "long-arm" statute, upon which G.S. 1-75.4 is based, describes this direction in state *in personam* jurisdiction as follows:

"The principal modern developments in state judicial jurisdiction over persons (both individual and corporate) have veered sharply away from the grounds of presence and consent, and the new grounds depend importantly upon the relation between the state and the particular litigation sued

upon. Importance attaches to what, with respect to the action brought, the defendant has caused to be done in the forum state."

Foster, Revision Notes to Wis. Stat. Ann. § 262.05 (1974 Cum. Supp.).

State legislatures have responded to these expanding notions of due process with "long-arm" legislation designed to keep abreast of this jurisdictional trend and to make available to the courts of their states the full jurisdictional powers permissible under due process. Chapter 1, Article 6A of the North Carolina General Statutes reflects this national approach to personal jurisdiction. 1 Phillips, Pocket Part to McIntosh North Carolina Practice and Procedure § 937.5 (1970).

It must be noted, however, that the trend toward expansion of personal jurisdiction of nonresidents does not mean that all restrictions on the personal jurisdiction of state courts have been removed. Unless a nonresident defendant has had "minimum contacts" with the forum state, that state may not exercise jurisdiction over him. Application of the "minimum contacts" rule "will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla,* 357 U.S. 235, 2 L.Ed. 2d 1283, 78 S.Ct. 1228 (1958). *See also Goldman v. Parkland,* 277 N.C. 223, 176 S.E. 2d 784 (1970); *Byham v. House Corp.,* 265 N.C. 50, 143 S.E. 2d 225 (1965) (lists various factors to be considered in determining if minimal contacts exist); Annotation, Validity, As a Matter of Due Process, of State Statutes or Rules of Court Conferring *In Personam* Jurisdiction over Nonresidents or Foreign Corporations on the Basis of Isolated Business Transaction Within State, 20 A.L.R. 3d 1201 (1968). The existence of minimum contacts, therefore, depends upon the particular facts of each case. *Perkins v. Benguet Consolidated Mining Co., supra; Farmer v. Ferris,* 260 N.C. 619, 133 S.E. 2d 492 (1963).

We now turn to application of these principles to the facts in this case.

[1] G.S. 1-75.4(6), in pertinent part, provides:

"*Personal jurisdiction, grounds for generally.*—A court of this State having jurisdiction of the subject matter has

jurisdiction over a person served in an action pursuant to Rule 4 (j) of the Rules of Civil Procedure under any of the following circumstances:

* * * *

(6) Local Property.—In any action which arises out of:

a. A promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to create in either party an interest in, or protect, acquire, dispose of, use, rent, own, control or possess by either party real property situated in this State . . . . "

This subsection requires three jurisdictional facts: (1) a claim arising out of a bargaining arrangement made with the defendant by or on behalf of the plaintiff; (2) a promise made anywhere which evidences the bargaining arrangement upon which suit is brought; and (3) the subject matter of the arrangement is real property situated in the state. Foster, Revision Notes to Wis. Stat. Ann. § 262.05, supra; Stockton, Jurisdiction and Process, 5 Wake Forest Intra. L. Rev. 46 (1968).

[2] The contract out of which this action arose quite clearly reveals a promise by Daniel Katz to *acquire* and a promise by plaintiff to *dispose of* real property situated in this State. The complaint is grounded thereon and alleges a tender of the deed and other documents specified in the contract and a failure of defendant to keep his promise. These facts bring this case squarely within the scope of the quoted statute.

We would stop at this point, but defendant contends that G.S. 1-75.4(6)a *as applied* in this case does not comport with due process requirements. Since due process, and not the language of the statute, is the ultimate test of "long-arm" jurisdiction over a nonresident, we must determine if defendant's contacts with this State are such that "traditional notions of fair play and substantial justice" are offended by maintaining the suit here. *See* 1 Phillips, Pocket Part to McIntosh North Carolina Practice and Procedure § 937.10 at 163 n. 46 (1970).

[3] The record shows that defendant Katz entered into a contract to purchase real property situated in North Carolina, formed a corporation in this State to receive the title, and thus invoked the benefits and protection of its laws. This suit arises

out of an alleged breach of that contract. North Carolina has a legitimate interest in the protection of its residents in the making of contracts with nonresidents which affect the title to real property within its borders. The courts of this State are open to defendant for protection of his activities and to enforce the valid obligations which Chadbourn, Inc., assumed by reason of the contract. The contract was to be performed in North Carolina and has a substantial connection with the State.

Applying to these facts the law as interpreted by the Supreme Court of the United States, we hold that assumption of *in personam* jurisdiction over defendant by the courts of this State does not offend traditional notions of fair play and substantial justice within the contemplation of the Due Process Clause of the Fourteenth Amendment and that defendant's contacts with the State are sufficient to satisfy due process requirements.

[4] Service of process was made upon defendant at his New York address by registered mail, return receipt requested, in accordance with G.S. 1A-1, Rule 4(j)(9)b, North Carolina Rules of Civil Procedure. The registered receipt discloses that summons and complaint were actually delivered to Daniel Katz personally. Such service by registered mail is "reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," and therefore, complies with due process requirements. *Travelers Health Association v. Virginia, supra; Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950); *see* Louis, Modern Statutory Approaches to Service of Process Outside the State—Comparing the North Carolina Rules of Civil Procedure with the Uniform Interstate and International Procedure Act, 49 N.C.L. Rev. 235 (1971).

For the reasons stated the decision of the Court of Appeals is

Affirmed.

Chief Justice BOBBITT not sitting.

STATE OF NORTH CAROLINA v. JACK W. RIGSBEE

No. 24

(Filed 10 October 1974)

1. **Criminal Law § 91— motion for continuance — discretionary matter**

A motion for continuance is ordinarily addressed to the sound discretion of the trial court, and its ruling thereon is not subject to review absent an abuse of discretion.

2. **Criminal Law § 91— motion for continuance — necessity for supporting affidavit**

Continuances should not be granted unless the reasons therefor are fully established, and though there is no statutory requirement that an affidavit be filed showing the grounds for continuance, it is desirable that a motion for continuance be supported by such affidavit.

3. **Criminal Law § 91— motion for continuance to produce witness — denial proper**

The trial court did not abuse its discretion in denying defendant's motion for continuance in order to produce a witness where the evidence showed that defendant's counsel had an opportunity to confer with his client and possible witnesses over a period of some three months, counsel had ample opportunity to prepare his defense, the name and address of a confidential informant were furnished defendant, and the case was continued until counsel could confer with her.

4. **Searches and Seizures § 4— item not listed in search warrant — plain view — seizure permissible**

An item is lawfully seized even though it is not listed in a search warrant if the officer is at a place where he has a legal right to be and if the item seized is in plain view.

5. **Criminal Law § 84; Searches and Seizures § 4— search for marijuana — currency in plain view — admissibility**

In a prosecution for possession of marijuana with intent to distribute and distribution, the trial court did not err in refusing to suppress currency seized during a search of defendant's home pursuant to a warrant listing only marijuana as the item sought where the evidence was sufficient to support the trial judge's finding that the currency was in plain view and that the search of the apartment was for marijuana and not for the currency.

6. **Criminal Law § 164— denial of motion for nonsuit at close of State's evidence — waiver of right to except**

Defendant introduced evidence and by doing so waived his right to except on appeal to the denial of his motion for nonsuit at the close of the State's evidence. G.S. 15-173.

7. **Criminal Law § 164— sufficiency of evidence — review on appeal**

Under G.S. 15-173.1 the sufficiency of the evidence of the State in a criminal case is reviewable upon an appeal without regard to whether a motion has been made pursuant to G.S. 15-173.

8. **Narcotics § 4— possession and distribution of marijuana — sufficiency of evidence**

In a prosecution for possession of marijuana with intent to distribute and distribution, evidence was sufficient to withstand defendant's motion for nonsuit where it included admissions by defendant that he smoked marijuana, that on the day in question he had four lids of marijuana in his possession, and that he sold three of the lids to an SBI agent for $60.

9. **Criminal Law § 163— assignment of error to charge — setting out proper charge**

Defendant's assignment of error to the trial court's charge on entrapment should have set out what the court should have charged.

Chief Justice BOBBITT not sitting.

ON *certiorari* to review the decision of the Court of Appeals, reported in 21 N.C. App. 188, 203 S.E. 2d 660 (1974), which found no error in the trial before *Canaday, J.*, at the 10 September 1973 Session of CUMBERLAND Superior Court.

Defendant was tried on a two-count bill of indictment charging him with possession of marijuana with intent to distribute and with distribution. From verdicts of guilty of both counts and sentences imposed, defendant appealed. The Court of Appeals affirmed, and we allowed *certiorari* on 4 June 1974.

The trial was originally scheduled for 10 September 1973. Prior to trial, defendant moved the court to order disclosure of the identity and the last known address of the confidential informant who had provided information to the State which led to defendant's arrest. The court ordered the State to disclose this information and continued the trial from 10 September 1973 to 13 September 1973, in order that defendant might have an opportunity to locate said confidential informant and to discover what, if any, favorable information she might provide the defendant. The informant, Mary Helen Allen, was located on the evening of 10 September 1973, and defense counsel conversed with her concerning her knowledge of the facts pertinent to the prosecution. The informant was served with a subpoena to appear in court on 13 September 1973.

At defendant's trial on 13 September 1973, the informant failed to appear. Defendant again moved for a continuance upon the grounds that the informant was an indispensable defense witness and that the defense would be irreparably injured by her absence from the trial. The court issued an *instanter capias ad testificandum* for her arrest, but denied defendant's motion

for further continuance. The trial proceeded without the witness.

The State's evidence tended to show that the defendant, a Fayetteville police officer, sold three lids of marijuana, each containing about twenty grams, to a special agent of the State Bureau of Investigation on 21 May 1973 at defendant's home at 5900 Monica Street, Fayetteville. The agent, who was accompanied by the informant, paid for the marijuana with $60 in marked bills. Later that evening, police officers arrested defendant and took him to the Fayetteville Police Department where a valid search warrant, specifically listing marijuana as the item sought, was read to him. The officers then returned with defendant to his home and searched the premises. Another single lid of marijuana, along with pipes and "other vegetable matter," was discovered during this search. The marked bills were also found on one of defendant's stereo speakers in the living room area, the tops of which speakers were six to seven feet off the floor.

Attorney General Robert Morgan and Associate Attorney William Woodward Webb for the State.

Donald W. Grimes for defendant appellant.

MOORE, Justice.

Defendant in his petition for *certiorari* brings forward four assignments of error. He first assigns as error the denial of his motion for a continuance based upon the absence of the witness Mary Helen Allen.

The crimes for which defendant was tried were alleged to have occurred on 21 May 1973. Defendant's counsel conferred with defendant in early or mid-June 1973, at which time he was informed of the substance of a conversation between defendant and a Negro female known to him at that time only as Helen. On 31 August 1973 defendant's counsel filed written motion for a disclosure by the State of the identity and address of this female who was alleged to be a confidential informant. This motion was allowed by the court, and the case was continued from 10 September 1973 to 13 September 1973, on defendant's motion, to enable him to locate the witness. Mary Helen Allen, the witness in question, was located on 10 September 1973, and defendant's counsel conferred with her concerning her knowledge of the facts pertinent to the charges against defendant.

At that time she was confined in the Cumberland County jail pending trial on 12 September 1973 on a charge of soliciting for prostitution. She was then served with a subpoena to appear in court on 13 September 1973. She failed to appear on 13 September, and an *instanter capias ad testificandum* was issued for her arrest. She was not found.

After finding the facts substantially as set out above, the trial court—after further finding that the trial had been delayed once for the sole purpose of allowing the defendant to locate Mary Helen Allen—overruled defendant's motion for a continuance.

[1] A motion for continuance is ordinarily addressed to the sound discretion of the trial court, and its ruling thereon is not subject to review absent an abuse of discretion. 2 Strong, N. C. Index 2d, Criminal Law § 91 (1967); *State v. Baldwin,* 276 N.C. 690, 174 S.E. 2d 526 (1970); *State v. Moses,* 272 N.C. 509, 158 S.E. 2d 617 (1968); *State v. Stinson,* 267 N.C. 661, 148 S.E. 2d 593 (1966).

[2] Continuances should not be granted unless the reasons therefor are fully established. Even though G.S. 1-175 and G.S. 1-176 that required an affidavit showing the grounds for continuance have now been repealed, we still think, as a general rule, it is desirable that a motion for continuance be supported by such affidavit. *State v. Cradle,* 281 N.C. 198, 188 S.E. 2d 296 (1972); *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972); *State v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520 (1948). No affidavit was filed in this case stating what Mary Helen Allen would have testified although defendant's counsel had talked to her just three days before the trial. It would have been an easy matter for counsel to have filed such an affidavit.

In the Court of Appeals defendant contended that the trial court abused its discretion in denying his motion for continuance until he could find and produce the witness Mary Helen Allen. Defendant, in this Court, for the first time, contends that the court's ruling amounted to a practical invalidation of his right under the Sixth Amendment to obtain witnesses by compulsory process, citing *Washington v. Texas,* 388 U.S. 14, 18 L.Ed. 2d 1019, 87 S.Ct. 1920 (1967). Although the constitutional question was not timely raised, we have considered it. *Washington* is distinguishable from the present case. In *Washington* the Court held that defendant was denied his constitutional

right to have compulsory process for obtaining witnesses in his favor where the State by statute prevented persons charged as principals, accomplices, or accessories in the same crime from testifying in behalf of one another while permitting such persons to testify in behalf of the prosecution. In the present case, a subpoena was issued for the witness, and on her failure to appear an *instanter capias ad testificandum* to compel her attendance was issued. She was not prevented by the State from testifying, but instead, if she had been found, she would have been brought into court as a witness, willingly or unwillingly. Defendant was denied no right to obtain the witness by compulsory process.

However, a motion for a continuance based on a right guaranteed by the Federal and State Constitutions presents a question of law, and the order of the court is reviewable. *State v. Cradle, supra; State v. Baldwin, supra; State v. Lane,* 258 N.C. 349, 128 S.E. 2d 389 (1962); *State v. Phillip,* 261 N.C. 263, 134 S.E. 2d 386 (1964). As stated in *State v. Cradle, supra:*

> "The right to the assistance of counsel and the right to face one's accusers and witnesses with other testimony are guaranteed by the Sixth Amendment to the Federal Constitution which is made applicable to the States by the Fourteenth Amendment, and by Article I, Sections 19 and 23 of the Constitution of North Carolina. The right to the assistance of counsel includes the right of counsel to confer with witnesses, to consult with the accused and to prepare his defense. [Citations omitted.]"

[3] The facts in this case show that defendant's counsel had an opportunity to confer with his client and possible witnesses over a period of some three months. During that time he had ample opportunity to prepare his defense. The name and address of the informant were furnished defendant, and the case was continued until counsel could confer with her. Under these facts, no abuse of discretion has been shown and no violation of defendant's constitutional rights to due process under the Sixth and Fourteenth Amendments has been established.

Defendant's first assignment of error is overruled.

Defendant next assigns as error the trial court's denial of his motion to suppress the $60 in marked bills that were seized during the search of his home and admitted into evidence over his objection. It is stipulated that the search was made

under a valid search warrant that listed only marijuana as the item sought.

The Fourth Amendment to the Constitution of the United States provides in part: ". . . no warrants shall issue, . . . but upon probable cause, . . . and particularly describing the place to be searched and the persons or things to be seized." The Fourth Amendment has been made applicable to the states by the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684, reh. den. 368 U.S. 871, 7 L.Ed. 2d 72, 82 S.Ct. 23 (1961).

[4] In this case the money seized was not particularly described. However, an exception to the strict mandate of the Fourth Amendment is the "plain view rule." Under this exception, an item is lawfully seized even though it is not listed in the warrant if the officer is at a place where he has a legal right to be and if the item seized is in plain view. *Chimel v. California*, 395 U.S. 752, 23 L.Ed. 2d 685, 89 S.Ct. 2034, reh. den. 396 U.S. 869, 24 L.Ed. 2d 124, 90 S.Ct. 36 (1969); *Harris v. United States*, 390 U.S. 234, 19 L.Ed. 2d 1067, 88 S.Ct. 992 (1968); *State v. Carey*, 285 N.C. 509, 206 S.E. 2d 222 (1974); *State v. Allen*, 282 N.C. 503, 194 S.E. 2d 9 (1973).

The officers in the present case had a legal right to be in defendant's home, and there was ample evidence to support the court's finding that the money seized was in plain view of the officers. Before the money was introduced, a *voir dire* examination was held at the request of the defendant. The investigating officer testified: "I had looked behind the speaker for drugs and when I stepped back and looked up with the flashlight I saw what appeared to be currency on top of the speaker cabinet. . . . I had not been told that this [the currency] was one of the items that we were to search for." The court then asked Mr. Harrah: "Was it necessary for you to move or open any object in order to view or see these bills?" He answered: "No, sir. When I stepped away from the speaker, after searching behind it, the flashlight beam revealed what I thought was the currency, that's all there was to it." The court: "No physical items were moved in order to reveal the currency?" Answer: "No, sir. Not to reveal it." There is also evidence from the defendant that he heard one of the investigating officers make the statement when the currency was found that it was a "lucky find."

Defendant contends, however, that the money should have been suppressed under the decision of the United States Su-

preme Court in *Coolidge v. New Hampshire,* 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022, reh. den. 404 U.S. 874, 30 L.Ed. 2d 120, 92 S.Ct. 26 (1971). Defendant bases his argument on that part of the *Coolidge* opinion (II-C) in which Mr. Justice Stewart, writing for the majority, states that discovery of items under the plain view rule must be "inadvertent." 403 U.S. at 469, 29 L.Ed. 2d at 585, 91 S.Ct. at 2040. It is noteworthy that only three Justices concurred with Mr. Justice Stewart in part II-C of the opinion. Mr. Justice Stewart said, at 403 U.S. 469-71, 29 L.Ed. 2d at 585-86, 91 S.Ct. at 2040:

> "The second limitation [on the plain view doctrine] is that the discovery of evidence in plain view must be inadvertent. The rationale of the exception to the warrant requirement . . . is that a plain-view seizure will not turn an initially valid (and therefore limited) search into a 'general' one, while the inconvenience of procuring a warrant to cover an inadvertent discovery is great. But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as 'per se unreasonable' in the absence of 'exigent circumstances.' "

The inadvertence aspect of the *Coolidge* case has caused a good deal of controversy and confusion. *United States v. Bradshaw,* 490 F. 2d 1097, 1101 n. 3 (4th Cir. 1974); *The Supreme Court, 1970 Term,* 85 Harv. L. Rev. 237, 244 (1971). As said by Mr. Justice Black in a concurring and dissenting opinion in *Coolidge:* ". . . [T]he prior holdings of this Court not only fail to support the majority statement [respecting the requirement of inadvertence], they flatly contradict it. . . ." 403 U.S. at 506, 29 L.Ed. 2d at 606, 91 S.Ct. at 2058, citing *Ker v. California,* 374 U.S. 23, 10 L.Ed. 2d 726, 83 S.Ct. 1623 (1963); *Marron v. United States,* 275 U.S. 192, 72 L.Ed. 231, 48 S.Ct. 74 (1927). *See also* footnote 5 to Mr. Justice Black's concurring and dissenting opinion in *Coolidge.* As Professor Brandis stated in 1 Stansbury's North Carolina Evidence § 121a, p. 372 (Brandis Rev. 1973): "When an officer's presence at the scene is lawful (and at least if he did not anticipate finding such evidence), he may, without a warrant, seize evidence which is in plain sight and which he reasonably believes to be connected with the commission of a crime, even though the 'incident to arrest' doctrine

would not apply; and such evidence is admissible." In a footnote to this section Professor Brandis states: "The parenthetical clause in the text is inspired by *Coolidge v. New Hampshire,* 403 U.S. 443 (1971), to which are referred those readers possessing a capacity superior to that of this writer to determine what was decided by whom."

In the present case the investigating officer testified that he had not been told by his superiors that the money was one of the items he was to search for at defendant's home. The trial court found after the *voir dire* that "during the search of the defendant's apartment for marijuana, on May 21, 1973, [the officer] called the the attention of [another officer], to reveal the currency lying on top of a stereo speaker. . . ." Thus, the trial judge found that the officers were searching for marijuana at defendant's apartment. In fact, the officers found another complete lid and some pipes and some "other vegetable matter."

[5] There is ample evidence in the record to support not only the trial judge's finding that the currency was in plain view but also his finding that the search of the apartment was for marijuana and not for the currency. As Justice Higgins, writing for this Court, stated in *State v. Accor* and *State v. Moore,* 281 N.C. 287, 291, 188 S.E. 2d 332, 335 (1972): "It is well established in North Carolina that findings of fact made by the trial judge and conclusions drawn therefrom on the *voir dire* examination are binding on the appellate courts if supported by evidence." *Accord, State v. Austin,* 276 N.C. 391, 172 S.E. 2d 507 (1970); *State v. Wright,* 274 N.C. 380, 163 S.E. 2d 897 (1968).

We, therefore, contrary to defendant's contention, hold that the trial judge did not err in failing to suppress the money discovered in plain view in the defendant's apartment.

[6, 7] Defendant next assigns as error the denial of his motion for nonsuit at the close of the State's evidence. Defendant introduced evidence, and by doing so waived his right to except on appeal to the denial of his motion for nonsuit at the close of the State's evidence. G.S. 15-173. His exception to the denial of his motion for nonsuit made at the close of all the evidence raises the question of the sufficiency of all the evidence to go to the jury. *State v. McWilliams,* 277 N.C. 680, 178 S.E. 2d 476 (1970); *State v. Robbins,* 275 N.C. 537, 169 S.E. 2d 858 (1969). Under G.S. 15-173.1 the sufficiency of the evidence of the State in a criminal case is reviewable upon an appeal without regard to whether a motion has been made pursuant to G.S. 15-173.

As stated in *State v. Johnson,* 199 N.C. 429, 431, 154 S.E. 730, 731 (1930), ". . . [I]f there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury." Or, as Justice Higgins said in *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431 (1956), ". . . [T]here must be substantial evidence of all material elements of the offense to withstand the motion to dismiss."

[8] On motion for nonsuit, only the evidence favorable to the State is considered, and contradictions and discrepancies, even in the State's evidence, are for the jury and do not warrant nonsuit. *State v. Price,* 280 N.C. 154, 184 S.E. 2d 866 (1971); *State v. Murphy,* 280 N.C. 1, 184 S.E. 2d 845 (1971). Considering all the evidence in the light most favorable to the State, as we are required to do, we think the facts here disclosed constitute ample evidence of defendant's guilt. Defendant admitted that he smoked marijuana, and that on the day in question he had four lids of marijuana in his possession. He also admitted that he sold three of these to Curtis Douglas for $60. This is sufficient evidence to withstand defendant's motion for judgment as of nonsuit. His evidence in defense was for the jury. This assignment of error is overruled.

[9] Finally defendant contends the trial court erred by failing to properly charge the jury with regard to the defense of entrapment. Defendant does not set out in this assignment what the court should have charged. We have held, interpreting Rule 19 of the Rules of Practice in the Supreme Court, that "assignments of error to the charge should quote the portion of the charge to which the appellant objects, and assignments based on failure to charge should set out appellant's contention as to what the court should have charged." *State v. Kirby,* 276 N.C. 123, 131, 171 S.E. 2d 416, 422 (1970). *State v. Baldwin, supra; State v. Wilson,* 263 N.C. 533, 139 S.E. 2d 736 (1965).

Despite the failure of the defendant to set out what the court should have charged, we have carefully examined the entire charge. The only evidence offered on entrapment was defendant's statement: "After persuasion and threats I did give the three bags of marijuana to Curtis Douglas. . . . The persuasions and threats were made by the confidential informant Mary Helen Allen." Defendant had known Mary Helen Allen for some time. He testified that he had known for a month

or two that she was a prostitute. She had been in his home on at least two occasions before the night in question, and on one of these occasions he had smoked marijuana with her.

Considering all the evidence, defendant received all the instructions on the law of entrapment to which he was entitled. This assignment of error is overruled.

Examination of the entire record discloses that defendant has had a fair trial free from prejudicial error. The decision of the Court of Appeals is affirmed.

Affirmed.

Chief Justice BOBBITT not sitting.

IN RE: THE ESTATE OF KIRBY W. LOFTIN, DECEASED (72E146) AND SYBIL LEWIS LOFTIN, PETITIONER-APPELLANT (73SP35) v. KIRBY C. LOFTIN, EXECUTOR OF THE ESTATE OF KIRBY W. LOFTIN, RESPONDENT-APPELLEE

No. 36

(Filed 10 October 1974)

1. **Husband and Wife § 2— antenuptial agreement — enforcement**

A man and woman contemplating marriage may enter into a valid contract with respect to the property and property rights of each after the marriage, and such contracts will be enforced as written.

2. **Husband and Wife § 4— release of property rights after marriage — privy examination of wife**

After marriage persons may release and quitclaim any rights as they might respectively acquire or may have acquired by marriage in the property of each other; however, such transactions between husband and wife are subject to the provisions of G.S. 52-6 requiring that the contracts be in writing and that the wife be given a privy examination. G.S. 52-10.

3. **Husband and Wife § 2— antenuptial agreement — wife's right to dissent — year's allowance**

Antenuptial contracts, when properly executed and acknowledged, are not against public policy and may act as a bar to the wife's right to dissent and to petition for a year's allowance.

4. **Husband and Wife § 5— privy examination of wife — grounds for attack on certificate**

A married woman or widow may directly attack the certificate of her acknowledgment and privy examination respecting the execution

of instruments during coverture which affect or change any part of the real estate belonging to her on the grounds of (1) fraud, duress or undue influence known of or participated in by the grantee; (2) no appearance before the officer and no examination had; (3) forgery; (4) mental incapacity or infancy.

5. **Husband and Wife § 5— certificate of privy examination — conclusiveness**

When a certificate of privy examination is regular in form and complies with G.S. 52-6, it is conclusive as to all matters which the statute requires the officer to certify except upon a showing of fraud or imposition in the procurement of the acknowledgment.

6. **Fraud § 3— material misrepresentation of fact**

In order to obtain relief from a contract on the ground of fraud, the moving party must show false representation of a past or subsisting material fact, made with fraudulent intent and with knowledge of its falsity, which representation was relied upon when the party executed the instrument.

7. **Duress; Fraud § 9— undue influence — duress — definitions**

Undue influence is a fraudulent influence over the mind and will of another to the extent that the professed action is not freely done but is in truth the act of the one who procures the result, while duress is the result of coercion and may be described as the extreme of undue influence and may exist even when the victim is aware of all facts material to his decision.

8. **Fraud § 9; Husband and Wife § 5— release of rights in husband's estate by wife — sufficiency of allegations of fraud**

Allegations by testator's widow that she did not know and was not advised as to the value of the assets of her husband's estate at the time she executed instruments releasing her rights in her husband's estate, that she signed the duplicate contract of release at her husband's insistence, and that although she appeared before the clerk of superior court on two occasions, she denied that she executed the instruments freely and voluntarily or that she was properly examined by the clerk were insufficient to allege fraud, undue influence or duress in the execution of the instruments.

9. **Husband and Wife § 2— antenuptial agreement — privy examination statute inapplicable**

The statute relating to a privy examination of the wife, G.S. 52-6, does not apply to antenuptial agreements.

Chief Justice BOBBITT not sitting.

APPEAL by petitioner-appellant Sybil Lewis Loftin from the decision of the Court of Appeals, reported in 21 N.C. App. 627, 205 S.E. 2d 574, finding no error in the judgment of *James, J.*, at the 10 September 1973 Session of LENOIR County Superior Court.

This appeal presents two separate but related actions which were consolidated for trial. In the first action (No. 72E146), Sybil Lewis Loftin, widow of Kirby W. Loftin, deceased, filed a dissent to the will of her late husband pursuant to Article 1 of Chapter 30 of the General Statutes of North Carolina. Petitioner's husband had died testate on 26 July 1973 leaving an estate valued in excess of five hundred thousand dollars. By the terms of his will, he left to petitioner the sum of five thousand dollars and a life estate in the homeplace. The executor of the estate of Kirby W. Loftin filed answer setting up in bar of petitioner's dissent, *inter alia,* a "Duplicate Antenuptial Contract," executed 14 May 1968 by petitioner and deceased.

The original contract, executed 30 December 1958, was lost when the safe in which the document was kept was burglarized. Both the 1958 and 1968 contracts contained a certificate of privy examination by the Clerk of Superior Court in due form, which certified that petitioner personally appeared before him for private examination and further certified that the proposed contract was not injurious to the wife and that she had assented to the provisions thereof by her own free will and not through any coercion or fear of her husband.

The provision of the contract especially pertinent to decision states:

> "*Second:* That the party of the second part [petitioner] hereby releases, renounces, and quitclaims, all dower and all other rights in the real property, and all right to participate in the distribution of the personal property, and all claims for a year's allowance in the property of the said party of the first part [testator], should she survive him, both as to property now owned by him and property hereafter acquired, together with the right to administer on his estate."

As a second defense to the action, the executor alleged the fact that Sybil Lewis Loftin had accepted both the five-thousand-dollar bequest which she received under the will of her late husband and the life estate in the K. W. Loftin home, which she also received under the last will and testament of her late husband.

On these grounds the executor prayed the court that it enter an order declaring the dissent null and void and of no force or effect and declaring that Sybil Lewis Loftin was en-

titled to no interest in any real or personal property of Kirby W. Loftin either under his will or by intestacy.

In the other cause of action (No. 73SP35), petitioner, pursuant to G.S. 30-27 *et seq.*, seeks her year's allowance. The executor, answering this petition, again set up the "Duplicate Antenuptial Agreement" in bar of any such allowance.

The widow replied in both actions and contended that she was misled and did not know the extent of the contractual provisions which she signed; that she signed the agreement pleaded in bar after repeated importunity of her husband; and that she was at no time privately examined, separate and apart from her husband, by the Clerk of Superior Court. Petitioner admitted the genuineness of the signatures appearing on the duplicate antenuptial contract dated 14 May 1968.

The executor moved for summary judgment in each case. After consideration of the pleadings, the admissions, the contract dated 14 May 1968, the petitioner's admission of genuineness of signatures, and petitioner's affidavits, Judge James made findings of fact and rendered summary judgment in favor of the executor in each action. Petitioner appealed.

The Court of Appeals, Judge Vaughn dissenting, found no error. Petitioner appealed to this Court as a matter of right under G.S. 7A-30(2).

Donald P. Brock for petitioner appellant.

Jeffress, Hodges, Morris and Rochelle, P.A., by A. H. Jeffress, for respondent appellee.

BRANCH, Justice.

We first consider whether contracts with respect to her property and property rights constituted a bar to plaintiff's dissent and application for a year's allowance.

[1, 2] It is well settled in this jurisdiction that a man and woman contemplating marriage may enter into a valid contract with respect to the property and property rights of each after the marriage, and such contracts will be enforced as written. *Stewart v. Stewart*, 222 N.C. 387, 23 S.E. 2d 306; *Perkins v. Brinkley*, 133 N.C. 86, 45 S.E. 465; *Harris v. Russell*, 124 N.C. 547, 32 S.E. 958. After marriage the persons may release and quitclaim any rights as they might respectively acquire or may

have acquired by marriage in the property of each other. G.S. 52-10. Such transactions between husband and wife are, however, subject to the provisions of G.S. 52-6, which provides that "no contract between husband and wife made during their coverture shall be valid to affect or change any part of the real estate of the wife . . . unless such contract . . . is in writing, and is acknowledged before a certifying officer who shall make a private examination of the wife according to the requirements formerly prevailing for conveyance of land."

[3] Antenuptial contracts, when properly executed and acknowledged, are not against public policy and may act as a bar to the wife's right to dissent and to petition for a year's allowance. *Turner v. Turner,* 242 N.C. 533, 89 S.E. 2d 245; *Perkins v. Brinkley, supra.*

[4] A married woman or widow may *directly* attack the certificate of her acknowledgment and privy examination respecting the execution of instruments during coverture which affect or change any part of the real estate belonging to her. The general grounds for permissible attack in this instance are (1) fraud, duress or undue influence known of or participated in by the grantee; (2) no appearance before the officer or no examination had; (3) forgery; or (4) mental incapacity or infancy. *Eubanks v. Eubanks,* 273 N.C. 189, 159 S.E. 2d 562; *Lee v. Rhodes,* 230 N.C. 190, 52 S.E. 2d 674.

[5] We note that there is a vast difference between proof of no appearance and the denial of material findings in the certificate. As to the latter, when the certificate is regular in form and complies with G.S. 52-6, it is conclusive as to all matters which the statute requires the officer to certify except upon a showing of fraud or imposition in the procurement of the acknowledgment. *Lee v. Rhodes, supra; Best v. Utley,* 189 N.C. 356, 127 S.E. 337.

Thus, unless the certificate is attacked upon one of the above-stated grounds, when petitioner admitted her appearance before the Clerk of Superior Court, his certificate, regular in form, became conclusive and established that she acknowledged the due execution of the instrument and the purposes therein expressed; that she was privately examined separate and apart from her husband touching her voluntary execution of the same; that she signed the same freely and voluntarily without fear or compulsion of her said husband; and that it had been made to appear to the certifying officer's satisfaction, and he found as a

fact, that the execution of the instrument by petitioner was not unreasonable or injurious to her.

It is obvious that plaintiff does not rely upon mental incapacity, infancy or forgery as grounds for attack on the contracts. We therefore look to the remaining possible grounds upon which she must rely.

In petitioner's "reply to response for application for year's allowance" in *Loftin v. Loftin,* it was, in part, alleged:

> ". . . That at the time of the purported execution of the Antenuptial Contract, the undersigned widow and the deceased had been married for some ten years and misrepresentations were made to the widow at the time said contract was purportedly executed, both as to the assets of the deceased and as to the contents and meaning of said contract. That the execution of said contract was obtained through coercion and was in fact injurious and unfair to the undersigned widow."

We note that no similar allegations were contained in her "reply to answer to dissent to will" in the action of *In Re Loftin.*

Petitioner's strongest averments as to fraud or duress were to the effect that she did not know and was not advised as to the value of the assets of her husband's estate at the time she executed the instruments; that she signed the duplicate contract at her husband's insistence; and that although she appeared before the Clerk of Superior Court of Lenoir County on both occasions, she denied that she executed the instruments freely and voluntarily or that she was properly examined by the Clerk.

[6] In order to obtain relief from a contract on the ground of fraud, the moving party must show false representation of a past or subsisting material fact, made with fraudulent intent and with knowledge of its falsity, which representation was relied upon when the party executed the instrument. *Davis v. Davis,* 256 N.C. 468, 124 S.E. 2d 130; *Barnes v. House,* 253 N.C. 444, 117 S.E. 2d 265.

[7] Undue influence is a fraudulent influence over the mind and will of another to the extent that the professed action is not freely done but is in truth the act of the one who procures the result. *Lee v. Ledbetter,* 229 N.C. 330, 49 S.E. 2d 634; *Greene v. Greene,* 217 N.C. 649, 9 S.E. 2d 413. Duress is the result of coercion and may be described as the extreme of undue influence

and may exist even when the victim is aware of all facts material to his decision. *Link v. Link,* 278 N.C. 181, 179 S.E. 2d 697; 25 Am. Jur. 2d, *Duress and Undue Influence* § 1, page 353.

[8] We agree with the holding of the Court of Appeals that petitioner's allegations of fraud amounted to a mere conclusion not in compliance with G.S. 1A-1, Rule 9(b), or our former decisions, which require particular statements of the circumstances allegedly constituting fraud or duress. *Products Corp. v. Chestnutt,* 252 N.C. 269, 113 S.E. 2d 587; G.S. 1A-1, Rule 9(b). Certainly there were no allegations sufficient to allege undue influence or duress.

However, we call attention to the fact that this case differs procedurally from the case of *Van Every v. Van Every,* 265 N.C. 506, 144 S.E. 2d 603, upon which the Court of Appeals partially relied. In *Van Every* there was a motion for judgment on the pleadings, and the cause was dismissed for failure of the plaintiff to allege facts which, if found to be true, would permit a legitimate inference of fraud. In instant case, there was a motion for summary judgment pursuant to G.S. 1A-1, Rule 56, which made it incumbent upon the trial judge to consider the pleadings, affidavits, interrogatories, deposition and admissions which were before him. After such consideration, the trial judge correctly dismissed the actions upon finding that no genuine issue of material fact was raised in either proceeding.

We also observe in passing that the Court of Appeals used language which seemed to interpret our decision in *Turner v. Turner,* 242 N.C. 533, 89 S.E. 2d 245, to *require* that an antenuptial agreement satisfy the provisions of G.S. 52-6. It appears to us that this Court in *Turner,* while considering the total circumstances surrounding the execution of the antenuptial agreement, merely *observed* that the Clerk of Superior Court of Gates County did conduct a privy examination incorporating in his certificate the statement that the agreement was not unreasonable or injurious to the *femme* contractor.

[9] In our opinion the correct rule is stated by Dr. Robert E. Lee in his North Carolina Family Law, Vol. 2, § 181, page 364, as follows:

> "N. C. Gen. Stat. § 52-12 [now renumbered as § 52-6] is not applicable to antenuptial agreements. It is limited in its application to contracts between the husband and wife which affect the real estate of the wife and separation

agreements. Antenuptial agreements are not made between a husband and a wife 'during their coverture.' A postnuptial agreement between the husband and wife which affects or changes any part of the wife's real estate must, of course, comply with the provisions of N. C. Gen. Stat. § 52-12 [now renumbered as § 52-6]."

We do not deem it necessary to discuss the question of whether petitioner was barred by her acceptance of benefits under the will since we hold that the contracts affecting her real property effectively barred her rights to dower and a year's allowance.

The opinion of the Court of Appeals is

Affirmed.

Chief Justice BOBBITT not sitting.

BELDON N. LITTLE v. JAMES D. ROSE AND RICHARD (DICK) O'NEAL

No. 34

(Filed 10 October 1974)

1. **Appeal and Error § 24; Limitation of Actions § 18— statute of limitations pleaded — necessity for exceptions and assignments of error**

Where defendant did not tender an issue as to the statute of limitations, did not move for directed verdict or judgment n.o.v. on the grounds that the pleaded statute barred the cause of action, did not request instructions on the statute of limitations or except to the trial court's failure to instruct thereon, defendant failed to present to the Court of Appeals or to the Supreme Court the question of whether plaintiff had failed to introduce evidence sufficient to carry the burden of showing that the action was commenced within the prescribed period.

2. **Damages § 9— mitigation of damages — promise to repair — justification for failure to minimize damages**

Though an injured party must do what fair and reasonable business prudence requires to save himself and reduce the damage, the repeated assurance of the defendant after an injury has begun that he will remedy the condition is sufficient justification for the plaintiff's failure to take steps to minimize loss, so long, at least, as there is ground for expecting that he will perform.

3. Damages § 9— mitigation of damages — instruction proper

In an action for damages to a mobile truck crane and for loss of use of the crane, the trial court properly stated the applicable law as to mitigation of damages and correctly applied the law to the facts of the case.

Chief Justice BOBBITT not sitting.

APPEAL by defendant O'Neal, pursuant to G.S. 7A-30(2), from the decision of the Court of Appeals, reported in 21 N.C. App. 596, 205 S.E. 2d 150, finding no error in the judgment of *Fountain, J.*, at the 6 August 1973 Session of BEAUFORT.

On 16 February 1970, plaintiff instituted this action for damages to a mobile truck crane sold to plaintiff by defendants on 26 January 1967. He also sought further damages for loss of use of the crane. Plaintiff alleged that defendants as partners sold him the crane and that "as a condition for the purchase of said crane and as a part of the consideration for said sale and purchase, the plaintiff and the defendants agreed that the plaintiff could leave said crane in defendants' possession" on the lot where it was then situated for a period not to exceed one year; defendants agreed (1) that they would not use the crane nor allow anyone else to use it, (2) that they would preserve and take care of the crane, (3) that they would allow plaintiff to take the crane at any time within the one-year period, and (4) that the machine would be in good mechanical condition at the time plaintiff moved it from the premises.

Plaintiff further alleged that "between March 1967 and September 1967" defendants used and operated the subject crane in the loading of a large pump, which use ruined the crane engine and crankshaft and "mashed in" the cab of the crane, with total damages to the crane of $2,000.

As a second cause of action, plaintiff alleged that, when he called for the crane in September, 1967, and found it in such damaged condition, defendants individually agreed that they would have necessary repairs done immediately so as to place the crane in good operating condition, an agreement which neither defendant performed; that he had the opportunity to rent the crane in October, 1967, for a net earning of $1,400 and again in July, 1968, for a net consideration of $4,500; and that as a result of the failure of defendants to honor their promise to repair, he was unable to take advantage of either of these opportunities. On this cause of action, plaintiff prayed judgment for $5,900.

Defendant Rose failed to answer, and judgment by default and inquiry was entered against him by the Clerk of Superior Court of Beaufort County on 7 February 1973. Judgment by default final against Rose was entered on 14 February 1973.

Defendant O'Neal filed timely answer, in which he denied all material allegations of the complaint. He further answered that his relationship with defendant Rose was limited to furnishing Rose the money to purchase the crane. Under this financing arrangement between the two defendants, O'Neal furnished the money, and the title was retained by the East Carolina Bank for defendant O'Neal until O'Neal's advance was paid in full. Defendant O'Neal admitted that he did deliver title to plaintiff and receive a check for full payment from him on 26 January 1967 but that such payment was applied to the satisfaction of Rose's indebtedness to him. He denied any knowledge of, or participation in, any arrangement for the retention of the crane or any promise or undertaking to repair the crane after it was damaged. In further answer, defendant O'Neal pleaded the three-year statute of limitations, G.S. 1-52(1), in bar of plaintiff's claims.

On 8 August 1973, defendant O'Neal moved for judgment on the pleadings on the grounds that the complaint showed as a matter of law that plaintiff's claim was barred by the statute of limitations. Judge Fountain denied the motion. At trial, both plaintiff and defendant O'Neal offered evidence which tended to support the allegations in their respective pleadings except as to plaintiff's allegations concerning the existence of a partnership. The jury returned a verdict for plaintiff in the amount of $7,900.

Defendant appealed to the Court of Appeals, which affirmed, with Judge Baley dissenting. Defendant then appealed to this Court pursuant to G.S. 7A-30(2).

Wilkinson, Vosburgh & Thompson, by James R. Vosburgh, for appellant.

LeRoy Scott for appellee.

BRANCH, Justice.

[1] Defendant contends that the Court of Appeals erred by holding that the three-year statute of limitations did not bar plaintiff's action.

In this connection, prior to trial defendant moved for judgment on the pleadings on the ground that the action was barred by the three-year statute of limitations.

The Court of Appeals, relying on rules set forth in *Wilson v. Development Co.*, 276 N.C. 198, 171 S.E. 2d 873, correctly held that plaintiff had "pleaded facts sufficient to establish that the commencement of this action took place within the three-year period as required by G.S. 1-52(1)" and that the trial judge properly denied defendant's motion for judgment on the pleadings.

When defendant O'Neal pleaded the three-year statute of limitations, he thereby placed upon plaintiff the burden of showing that the action was instituted within the prescribed period. *Jewell v. Price*, 264 N.C. 459, 142 S.E. 2d 1; *Willetts v. Willetts*, 254 N.C. 136, 118 S.E. 2d 548. Had plaintiff failed to introduce evidence to carry such burden, the trial judge could have allowed a defense motion for a directed verdict. *Fulp v. Fulp*, 264 N.C. 20, 140 S.E. 2d 708; *Jennings v. Morehead City*, 226 N.C. 606, 39 S.E. 2d 610. Whether a cause of action is barred by a statute of limitation is a mixed question of law and fact, and where the facts are admitted or established, the trial court may sustain the plea to dismiss as a matter of law. *Teele v. Kerr*, 261 N.C. 148, 134 S.E. 2d 126; *Roberts v. Bottling Co.*, 257 N.C. 656, 127 S.E. 2d 236. Where, however, the evidence is sufficient to support an inference that the cause of action is not barred, the issue is for the jury. *Distributors v. Mitchell*, 255 N.C. 489, 122 S.E. 2d 61; *Brooks v. Construction Co.*, 253 N.C. 214, 116 S.E. 2d 454.

This Court will not ordinarily consider questions not properly presented by objections duly made, exceptions entered and assignments of error not properly set forth. *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400; *State v. Kirby*, 276 N.C. 123, 171 S.E. 2d 416; *Shuford v. Phillips*, 235 N.C. 387, 70 S.E. 2d 193. Examination of this record discloses that defendant did not tender an issue as to the statute of limitations, did not move for directed verdict or judgment notwithstanding the verdict on the grounds that the pleaded statute barred the cause of action, did not request instructions on the statute of limitations or except to the Judge's failure to instruct thereon. In short, by his failure to interpose objections, enter exceptions and properly assign error to the actions of the trial judge, defendant failed to present to the Court of Appeals or to this Court

the question of whether the plaintiff had failed to introduce evidence sufficient to carry the burden of showing that the action was commenced within the prescribed period. Further, we find no error of law upon the face of the record. Thus, defendant's contention as to the plea in bar is of no avail.

[2] Defendant next assigns as error the sufficiency of the charge of the trial judge on the question of mitigation of damages.

This Court stated the rule on this question as applied to contract cases in *Tillinghast v. Cotton Mills,* 143 N.C. 268, 55 S.E. 621:

> "It is an established principle that when there has been a breach of contract definite and entire, the injured party must do what fair and reasonable business prudence requires to save himself and reduce the damage, or the damage which arises from his own neglect will be considered too remote for recovery."

This principle has been reaffirmed by numerous decisions of this Court. *See, e.g., Construction Company v. Crain & Denbo, Inc.,* 256 N.C. 110, 123 S.E. 2d 590; *Tillis v. Cotton Mills & Cotton Mills v. Tillis,* 251 N.C. 359, 111 S.E. 2d 606; *Chesson v. Container Co.,* 215 N.C. 112, 1 S.E. 2d 357; *Harrell v. Brinkley,* 184 N.C. 624, 113 S.E. 770; *Johnson v. Railroad,* 184 N.C. 101, 113 S.E. 606; *Cotton Oil Co. v. Telegraph Co.,* 171 N.C. 705, 89 S.E. 21. *See generally* Annotation, 81 A.L.R. 282; 25 C.J.S. *Damages* §§ 33-34.

When, however, plaintiff has relied upon representations of the defendants, as here alleged, the essentially equitable rule of mitigation will not be applied to achieve an unjust result. The rule under such circumstances has been succinctly stated, as follows:

> ". . . [T]he repeated assurances of the defendant after an injury has begun that he will remedy the condition is sufficient justification for the plaintiff's failure to take steps to minimize loss, so long, at least, as there is ground for expecting that he will perform."

22 Am. Jur. 2d *Damages* § 32. This modification of the general rule that plaintiff must mitigate his damages has achieved judicial acceptance in numerous cases. *See, e.g., Krauss v. Greenbarg,* 137 F. 2d 569 (3rd Cir.), cert. den., 320 U.S. 791, 64

S.Ct. 207, 88 L.Ed. 477, reh. den., 320 U.S. 815, 64 S.Ct. 368, 88 L.Ed. 492; *American Surety Co. v. Franciscus,* 127 F. 2d 810 (8th Cir.); *Norfolk and W. R. R. v. Amicon Fruit Co.,* 269 F. 559 (4th Cir.); *Kentucky Distilleries & Warehouse Co. v. Lillard,* 160 F. 34 (6th Cir.); *Midwest Marine Inc. v. Sturgeon Bay Shipbuilding and Dry Dock Co.,* 247 F. Supp. 283 (E.D. Wis.); *Ford v. Illinois Refrigerating Construction Co.,* 40 Ill. App. 222; *Graves v. Glass,* 86 Iowa 261, 53 N.W. 231; *Steele v. J. I. Case Co.,* 197 Kan. 554, 419 P. 2d 902; *Winfrey v. Automobile Co.,* 113 Kan. 343, 214 P. 781; *Illinois Central R. R. v. Doss,* 137 Ky. 659, 126 S.W. 349; *Garbis v. Apatoff,* 192 Md. 12, 63 A. 2d 307; *Cronan v. Stutsman,* 168 Mo. App. 46, 151 S.W. 166; *Reed v. Universal C.I.T. Credit Corp.,* 434 Pa. 212, 253 A. 2d 101; *Act-O-Lane Gas Service Co. v. Hall,* 35 Tenn. App. 500, 248 S.W. 2d 398; *Vermont Salvage Corp. v. Northern Oil Co.,* 118 Vt. 337, 109 A. 2d 267; *Sears, Roebuck & Co. v. Grant,* 49 Wash. 2d 123, 298 P. 2d 497; *Lopeman v. Gee,* 40 Wash. 2d 586, 245 P. 2d 183; *Florence Fish Co. v. Everett Packing Co.,* 111 Wash. 1, 188 P. 792.

In instant case plaintiff testified that he was assured by defendants on several occasions that they would repair the damaged crane. Defendant O'Neal denied that he had given plaintiff any assurance that he would repair the crane. Thus a question of fact was presented for decision by the jury.

[3] Judge Fountain, in relevant part, instructed the jury:

> "Now, the question of loss of use is subject to certain qualifications and explanations. If the defendants agreed that the equipment had been damaged and that they would repair it and put it back in the same condition it had been before it was damaged, then the plaintiff had a right to rely upon such representations and expect the defendants to do so, until in the exercise of reasonable care for his own property, it became apparent to him that they would not do so, and if it did become apparent, that is if it was obvious to him from inaction on the part of the defendants that they would not repair the equipment as they agreed to do, if they had so agreed, then it became his duty to take such action as he could to reduce or minimize any loss that he might otherwise have had, and if the plaintiff knew or should have known that the defendants were not going to repair the equipment and if he, in the exercise of reasonable care for his own property, and own contracts

and own business could have repaired it or had it repaired so that he could have used it on the job in October of 1967 at the Georgia-Pacific yard or in July of 1968 on the marina work, then it was his duty to do so and thereby eliminate the necessity of renting equipment and, instead, charge against the defendants the repair costs, if repairing the equipment would have minimized or reduced his loss.

"In other words, members of the jury, a plaintiff or a party who is injured by a breach of contract has the duty to minimize his loss where he can do so, rather than accept as much loss as he can and seek to recover for it.

"I am not suggesting to you that he could have or could not have, or should have or should not have repaired it. I am simplying saying to you that is a matter for you to determine in passing upon the question of damages."

These instructions fully and accurately stated the applicable law as to mitigation of damages and correctly applied the law to the facts of this case. This assignment of error is overruled.

We do not deem it necessary to discuss the other questions presented by this appeal. Suffice it to say that our careful examination of this record reveals no reversible error.

The decision of the Court of Appeals is

Affirmed.

Chief Justice BOBBITT not sitting.

R. C. BOYCE v. L. RAY McMAHAN

No. 50

(Filed 10 October 1974)

1. Contracts § 3— terms left for future agreement — void contract

A contract or offer to contract leaving material portions open for future agreement is generally held to be nugatory and void for indefiniteness.

2. Contracts § 3— document subject to more detailed agreement — no enforceable contract

A paper writing between an owner of land and a developer relating to residential development of the land which states that it is a pre-

liminary agreement and that it is subject to a "more detailed agreement at some specific and subsequent date to be agreed to by the parties hereto" is not an enforceable contract.

Chief Justice BOBBITT not sitting.

APPEAL by defendant, L. Ray McMahan, from the decision of the Court of Appeals, 22 N.C. App. 254, 206 S.E. 2d 496, reversing the judgment in favor of the defendant entered in the Superior Court of GUILFORD County, by *Kivett, J.*, a jury trial having been waived by the parties.

The plaintiff, owner of a tract of land containing 170 acres in Sedgefield, brought this action for the removal of a cloud upon his title to the land by reason of the defendant's having placed upon the public record of Guilford County a paper writing which the defendant claims conveys to him the right to purchase the described land. The paper writing, attached to the complaint as an exhibit, is here quoted in full:

"NORTH CAROLINA Steve Lawing 164 S.
Guilford County Main Hipi

THIS AGREEMENT made this 15th day of December, 1971, by and between R. C. BOYCE, hereinafter referred to as OWNER, and L. RAY MCMAHAN, hereinafter referred to as DEVELOPER, both of Guilford County, North Carolina;

WHEREAS, OWNER owns approximately 170 acres, more or less, located in Sedgefield, North Carolina, said tract of land adjoining his residence at 3101 Alamance Road, Sedgefield, North Carolina; and

WHEREAS, OWNER is desirous of developing said land into residential lots or tracts for the purpose of sale; and

WHEREAS, DEVELOPER desires to develop said tract of land into residential lots or tracts for the purpose of sale; and

WHEREAS the OWNER AND DEVELOPER, in order to effectuate the same, desire to enter into a preliminary agreement setting out the main features as to the desires of both parties and to execute a more detailed agreement at a later date;

WITNESSETH:

FOR AND IN CONSIDERATION OF $10.00 and other valuable considerations paid from one to the other, the receipt

of which is hereby acknowledged, the parties agree as follows:

1. OWNER agrees that said land owned by him consisting of 170 acres, more or less, the same adjoining his home at 3101 Alamance Road, Sedgefield, North Carolina, shall be developed by DEVELOPER and sold as residential lots or tracts, and in order to effectuate the same OWNER agrees to convey and execute such written instruments so that DEVELOPER may proceed to make necessary arrangements to develop said tract of land by engaging and making arrangements for necessary engineering, surveys, and landscape plans, and any other matters necessary in the development of the tract of land into residential lots or tracts;

That prior to the same OWNER will convey to DEVELOPER or such persons or corporations as he designates, the said 170 acres, more or less, with the following understanding and agreement by both parties.

a) That when said lots or tracts are sold DEVELOPER will pay to OWNER the sum of $3000.00 per acre, the said $3000.00 per acre to be paid before any other costs of developing said land is paid.

b) DEVELOPER will engage the necessary engineering and landscaping personnel and proper zoning for said development and any other means necessary for furtherance of developing the said tract or land.

c) OWNER is to receive the said sum of $3000.00 from DEVELOPER upon the sale of said lots or tracts; that after the payment of same and all costs such as engineering, landscaping fees, and all expenses in developing said land, OWNER and DEVELOPER will then share the balance of the proceeds in equal shares.

d) DEVELOPER will commence to develop said land immediately after the engineering and landscape plans, maps, and other necessary preliminary arrangements are consummated.

2. That the parties hereto agree to supplement this preliminary agreement by executing a more detailed agreement at some specific and subsequent date to be agreed to by the parties hereto.

WHEREFORE, the parties hereto have executed this agreement in duplicate this the 15th day of December, 1971.

R. C. BOYCE (SEAL)
L. RAY McMAHAN (SEAL)"

The plaintiff alleges the defendant's claim is neither valid in law nor in fact and shows upon its face that it is a preliminary agreement and expresses the desire of the owner to have the land developed and the desire of the defendant to do the developing and that a further and more detailed agreement is to be executed at a later date to be agreed upon by the parties.

At the hearing, each party filed affidavits and each moved for summary judgment in his favor. In June, 1973, Judge Lupton denied plaintiff's motion for summary judgment. On February 6, 1974, Judge Kivett conducted a hearing and found facts, among them Finding No. 5, that the paper writing was prepared by counsel for the defendant and signed by the parties. The court adjudged that the paper writing, a copy of which is attached to the complaint and made a part thereof, is a valid, subsisting and enforceable contract for the purchase, sale, conveyance and development of the described land and ordered that the plaintiff forthwith convey the lands to the defendant or such persons or corporations as he shall designate.

The plaintiff excepted to the judgment and appealed to the North Carolina Court of Appeals. That court, in an opinion written by Morris, J., concurred in by Campbell, J. and dissented to by Vaughn, J., reversed the judgment entered by Judge Kivett in the superior court. On the basis of the dissent in the Court of Appeals, the defendant asks this Court for further review.

Smith, Moore, Smith, Schell & Hunter by Beverly C. Moore and Richard A. Leippe for plaintiff appellee.

Fisher & Fisher by Louis J. Fisher, Jr., Turner, Rollins & Rollins by Thomas Turner for defendant appellant.

HIGGINS, Justice.

Generally when parties not under disability contract at arms' length on a lawful subject, the courts will give redress to the injured party for a wrongful breach. On certain subjects and under certain conditions, contracts are required to be in writing. Others are valid if in parol. However, in either event the contracting parties must have agreed on all material terms of the contract.

To constitute a valid contract, the parties "must assent to the same thing in the same sense, and their minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement." The foregoing is the language of Justice Adams in *Croom v. Lumber Co.*, 182 N.C. 217, 108 S.E. 735, citing 13 C.J., 264; 6 R.C.L., 644; 1 Page on Contracts, sec. 28; *Elks v. Ins. Co.*, 159 N.C. 619, 75 S.E. 808. See also *Goeckel v. Stokely*, 236 N.C. 604, 73 S.E. 2d 618; *Sprinkle v. Ponder*, 233 N.C. 312, 64 S.E. 2d 171; *Kirby v. Board of Education*, 230 N.C. 619, 55 S.E. 2d 322.

[1] The courts generally hold a contract, or offer to contract, leaving material portions open for future agreement is nugatory and void for indefiniteness. " 'The reason for this rule is that there would be no way by which the court could determine what sort of a contract the negotiations would result in; no rule by which the court could ascertain what damages, if any, might follow a refusal to enter into such future contract on the arrival of the time specified. Therefore, a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as a result of future negotiations.' 1 Elliot on Contracts, sec. 175." *Croom v. Lumber Co., supra.*

[2] In the usual case, the question whether an agreement is complete or partial is left to inference or further proof. In this case, however, the writing itself shows its incompleteness by emphasizing its preliminary character. It expresses the desires of the parties but not the agreement of both. "WHEREAS the OWNER AND DEVELOPER . . . desire to enter into a preliminary agreement setting out the main features as to the desires of both parties and to execute a more detailed agreement at a later date; . . . That the parties hereto agree to supplement this preliminary agreement by executing a more detailed agreement at some specific and subsequent date to be agreed to by the parties hereto."

The "preliminary" agreement was written by defendant's counsel at defendant's request. It begins by stating that it is a preliminary agreement and closes by reciting that a more detailed agreement will be made at some specific and subsequent date to be agreed upon by the parties. The parties concede no further contract or agreement has been entered into.

When measured by applicable rules, the deficiencies in the subject document are manifest. It is incomplete and insufficient

to support either a decree of specific performance or damages for breach. The writing itself carries the terms which destroy its efficacy as a contract. The plaintiff is entitled to have it removed from the record.

The decision of the Court of Appeals reversing the superior court is

Affirmed.

Chief Justice BOBBITT not sitting.

STATE OF NORTH CAROLINA v. ROBERT EARL BAXTER, JR.

No. 4

(Filed 10 October 1974)

1. **Narcotics § 4— marijuana in apartment — constructive possession — sufficiency of evidence**

The State's evidence was sufficient for submission to the jury on the issue of defendant's guilt of possession of marijuana with intent to distribute where it tended to show that 16 small envelopes containing 219 grams of marijuana were found in a search of an apartment in which only defendant and his wife lived, that the packaged marijuana was found in a dresser drawer beneath undercloth-ing of a male person, that a man's coat with an envelope containing marijuana in its pocket was found in the closet of the bedroom, that no one other than defendant's wife was in the apartment at the time of the search, and that a box of unused cigarette papers, 28 small, empty envelopes similar to those containing the marijuana and a roll of transparent cellophane tape of a type used in the marijuana trade to seal packages were found in the bedroom.

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

An accused has possession of marijuana within the meaning of the Controlled Substances Act when he has both the power and the intent to control its disposition or use, which power may be in him alone or in combination with another, constructive possession being sufficient.

3. **Narcotics § 4— narcotics in apartment — wife present — husband's possession**

Nothing else appearing, a man residing with his wife in an apart-ment, no one else residing or being present therein, may be deemed in constructive possession of marijuana located therein, notwithstand-ing the fact that he is temporarily absent from the apartment and his wife is present therein.

4. Criminal Law § 116— defendants' failure to testify — incomplete instruction

Trial court's instruction that defendants "did not offer any evidence as they have the right to do" constituted prejudicial error where the court failed to instruct the jury further that the failure of defendants to offer evidence should not be considered against them.

Chief Justice BOBBITT not sitting.

Justice HUSKINS dissenting.

ON *certiorari* to the Court of Appeals to review its decision, reported in 21 N.C. App. 81, 203 S.E. 2d 93, reversing in part and finding no error in part in the judgment of *Clark, J.*, at the June 1973 Session of DURHAM.

By separate indictments, the defendant was charged with possession of marijuana with intent to distribute and with the manufacture of marijuana. In the Superior Court he was found guilty of both offenses and sentenced to imprisonment for terms of four to five years and one to five years, respectively, the sentences to run consecutively. His wife, similarly charged and tried with him, was found guilty of possession of marijuana. She did not appeal.

Upon the appeal by the defendant, the Court of Appeals reversed the judgment of the Superior Court upon the charge of manufacturing and found no error in the conviction and sentence for possession with intent to distribute marijuana. Both the State and the defendant petitioned for certiorari. The petition of the State was denied, that of the defendant allowed.

At the trial in the Superior Court, the defendant offered no evidence. That for the State was to the following effect:

Pursuant to a properly issued and served search warrant, police officers went to and searched the apartment in which the defendant and his wife had lived alone for approximately three years. At the time of the search, the defendant's wife was alone in the apartment. The defendant had not been seen at the apartment by the officers during the preceding week but there was no evidence that he no longer resided there. [The affidavit upon which the search warrant was issued (not introduced in evidence) stated that the informer, who did not testify at the trial, observed the defendant in the apartment on the day of the search.] The searching officers found 16 small envelopes, which contained a total of 219 grams of marijuana, in two drawers of a dresser in the bedroom under a quantity of underclothing,

male and female. Also in these dresser drawers were letters addressed to the defendant and his wife. The officers also found in the same bedroom bags containing marijuana seed, another small envelope containing marijuana in the pocket of a man's coat hanging in the closet, a box of unused cigarette papers, 28 small, empty envelopes similar to those containing the marijuana and a roll of transparent cellophane tape of a type used in the marijuana trade to seal packages. The defendant had not worked for approximately four to six months prior to his arrest. His wife was employed.

Robert Morgan, Attorney General, and Charles M. Hensey, Assistant Attorney General, for the State.

Blackwell M. Brogden for defendant.

LAKE, Justice.

[1] There was no error in the denial of the defendant's motion for judgment of nonsuit as to the charge of possession with intent to distribute marijuana. As the defendant concedes in his brief in the Court of Appeals:

> "In the case at bar, all of the evidence points inescapably [to the conclusion] that one or both of the defendants had 219 grams of marijuana, if the State's evidence is to be believed. * * * The physical evidence discovered by the officers, that is, the envelopes, the scotch tape and cigarette paper would give a reasonable inference as to the element of the intent to distribute."

The uncontradicted evidence is that the defendant, his wife, and no one else, lived in the apartment, that underclothing of a male person was found in a dresser drawer, that the packaged marijuana was found beneath it, that a man's coat with an envelope containing marijuana in its pocket was found in the closet of the bedroom and that no one other than the defendant's wife was in the apartment at the time of the search.

It is elementary that upon consideration of a motion for judgment of nonsuit the evidence for the State is deemed to be true and the State is entitled to all reasonable inferences which may be drawn therefrom. Strong, N. C. Index 2d, Criminal Law, § 104 and cases there cited.

[2, 3] As is true with reference to the possession of intoxicating liquor, an accused has possession of marijuana within the

meaning of the Controlled Subtances Act, G.S. Chapter 90, Art. V, when he has both the power and the intent to control its disposition or use, which power may be in him alone or in combination with another. *State v. Fuqua,* 234 N.C. 168, 66 S.E. 2d 667. Constructive possession is sufficient. *State v. Meyers,* 190 N.C. 239, 129 S.E. 600. Nothing else appearing, a man residing with his wife in an apartment, no one else residing or being present therein, may be deemed in constructive possession of marijuana located therein, notwithstanding the fact that he is temporarily absent from the apartment and his wife is present therein. See: *State v. Spencer,* 281 N.C. 121, 129, 187 S.E. 2d 779; *State v. Harvey,* 281 N.C. 1, 12, 187 S.E. 2d 706; *State v. Allen,* 279 N.C. 406, 410, 183 S.E. 2d 680. The jury could reasonably infer an intent to distribute from the amount of the substance found, the manner in which it was packaged and the presence of other packaging materials. There was clearly no error in the denial of the motion for judgment of nonsuit as to the charge of possession with intent to distribute.

[4] After reviewing the evidence for the State in his instructions to the jury, the trial judge said:

> "The defendants, Robert Baxter and Alveta Baxter, did not offer any evidence as they have the right to do."

There was no request for an instruction concerning the failure of the defendant to offer evidence. There was no other statement in the charge with reference thereto. The statement by the court is susceptible of two interpretations: (1) The defendant had the right not to offer any evidence and did not do so; or (2) he had the right to offer evidence and did not do so. In either view of the statement it was correct, both in law and in fact, but it was an incomplete statement of the pertinent rule of law and constituted prejudicial error.

In the absence of a request for an instruction on the point, it was not necessary for the court to refer to the failure of the defendant to offer evidence and, indeed, it would have been better to have made no reference at all to this circumstance. See: *State v. Barbour,* 278 N.C. 449, 457, 180 S.E. 2d 115; *State v. Jordan,* 216 N.C. 356, 364-366, 5 S.E. 2d 156. While it was not error for the court, in the absence of a request by the defendant, to instruct the jury correctly and completely on this point, any instruction thereon is incomplete and prejudicially erroneous unless it makes clear to the jury that the defendant has the

right to offer or to refrain from offering evidence as he sees fit and that his failure to testify should not be considered by the jury as basis for any inference adverse to him. In *State v. McNeill*, 229 N.C. 377, 379, 49 S.E. 2d 733, Justice Denny, later Chief Justice, speaking for the Court, said:

> "[W]e wish to call attention to the fact that the failure of a defendant to go upon the witness stand and testify in his own behalf should not be made the subject of comment, except to inform the jury that a defendant may or may not testify in his own behalf as he may see fit, *and his failure to testify 'shall not create any presumption against him.'* G.S. 8-54." (Emphasis added.)

The language of the pertinent portion of G.S. 8-54 concerning this matter is as follows:

> "In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, *and his failure to make such request shall not create any presumption against him.*" (Emphasis added.)

While it is entirely clear to us that by this instruction the learned trial judge intended to tell the jury that the failure of the defendant to offer evidence should not be considered against him, the jury, not being so well acquainted with this fundamental principle of law, may not so have understood the instruction. For this inadvertent error of omission, there must be a new trial.

New trial.

Chief Justice BOBBITT not sitting.

Justice HUSKINS dissenting.

G.S. 1-180 requires the judge to explain the law but give no opinion on the facts. The purpose of the statute is to secure the right of every litigant to have his cause considered by an impartial judge and an unbiased jury. *State v. Canipe*, 240 N.C. 60, 81 S.E. 2d 173 (1954). The statute is mandatory and a violation of it is prejudicial error. *Therrell v. Freeman*, 256 N.C. 552, 124 S.E. 2d 522 (1962).

The charge in every criminal case ordinarily contains a recapitulation of the State's evidence and contentions followed by a recapitulation of the defendant's evidence and contentions. Here, after reviewing the State's evidence the trial judge said: "The defendants, Robert Baxter and Alveta Baxter, did not offer any evidence as they have the right to do." The majority awards this defendant a new trial on the ground that the instruction was an incomplete statement of the pertinent rule of law and constituted prejudicial error because the jury may have understood the statement to mean that the failure of the defendant to offer evidence was a circumstance to be considered against him. I respectfully dissent. I would affirm defendant's conviction on the ground that the instruction complained of was harmless error beyond a reasonable doubt.

The test of harmless error is whether there is a reasonable possibility that the error complained of might have contributed to the conviction. *Fahy v. Connecticut,* 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229 (1963). It is highly unlikely that the statement by the able trial judge was considered by the jury as anything other than a statement that defendants had offered no evidence and therefore there was nothing for the court to summarize and bring into focus for consideration by the jury. In all events, when considered in the context in which it was used the statement had no prejudicial effect on the result of the trial and was therefore harmless. *State v. Perry,* 231 N.C. 467, 57 S.E. 2d 774 (1950). While it would have been better, as stated in *State v. Barbour,* 278 N.C. 449, 180 S.E. 2d 115 (1971), to have given no instruction whatever concerning defendants' failure to testify or offer evidence unless such an instruction is requested by defendant, I perceive nothing in the instruction given which would prejudice a mind of ordinary firmness and intelligence.

For the reasons stated I vote to affirm the decision of the Court of Appeals reversing defendant's conviction for the manufacture of marijuana and upholding his conviction and sentence for possession with the intent to distribute marijuana.

CITY OF DURHAM v. W. Y. MANSON AND WIFE, PATRICIA S. MANSON; DAVID S. EVANS, TRUSTEE; WACHOVIA BANK AND TRUST COMPANY, N. A.; MARY JOHNSON LIVENGOOD (WIDOW); AND HELEN JOHNSON BUGG AND HUSBAND, E. B. BUGG

No. 25

(Filed 10 October 1974)

1. **Appeal and Error § 3— constitutional question — no ruling by trial court — consideration on appeal**

Where the trial court specifically reserved decision on the question of the constitutionality of Chapter 506 of the Session Laws of 1967 which incorporated the "quick-take" condemnation procedure, that question was not properly before the Court of Appeals, and it was error for the Court to pass upon the constitutionality of the Chapter.

2. **Statutes § 11— passage of general act — effect on prior local act**

A legislative act of local application is repealed only when a subsequent act of general application clearly expresses such an intent.

3. **Eminent Domain § 7; Statutes § 11— passage of general act — effect on part of city charter**

The specific legislative intent of Chapter 160A was not to repeal local acts by implication but to save them; therefore, Chapter 506 which included the "quick take" condemnation procedure and which became a part of the Charter of the City of Durham, was not repealed by Chapter 160A.

4. **Eminent Domain §§ 7, 15— time of taking — determination of compensation due**

Title to the property in question in this eminent domain proceeding vested in plaintiff on the date on which plaintiff filed the complaint and declaration of taking and deposited in the court the estimated amount of compensation due; therefore, defendants are entitled to a determination of just compensation for the taking of their property. G.S. 136-104.

Chief Justice BOBBITT not sitting.

ON *certiorari* to review the decision of the Court of Appeals, reported in 21 N. C. App. 161, 204 S.E. 2d 41 (1974), reversing the decision of *Clark, J.*, at the September 1973 Civil Session of DURHAM Superior Court.

This is an eminent domain proceeding instituted pursuant to a local act (Chapter 506, Session Laws of 1967, as it amended G.S. 160-205), wherein the City of Durham seeks to acquire real property owned by defendants for the purpose of develop-

ing a public park. The local act permits the City of Durham to employ the "quick-take" procedure provided by Article 9 of Chapter 136 of the North Carolina General Statutes.

The trial court dismissed the proceeding on motion of defendants for the reason that Chapter 506 of the Session Laws of 1967, under which Durham was proceeding, was repealed by Chapter 698, Session Laws of 1971 (now codified as Chapter 160A of the General Statutes). The trial court reserved decision on the question of the constitutionality of Chapter 506. The Court of Appeals reversed the trial court, holding that Chapter 698 of the Session Laws of 1971 did not repeal Chapter 506 when it repealed G.S. 160-205. The Court of Appeals further held that the "quick-take" procedure is constitutional.

On petition of W. Y. Manson and his wife, Patricia S. Manson, we allowed *certiorari.*

Paul, Keenan & Rowan by James V. Rowan for appellants, W. Y. Manson and wife, Patricia S. Manson.

W. I. Thornton, Jr., City Attorney; Rufus C. Boutwell, Jr., and Douglas A. Johnston, Assistant City Attorneys, for appellee, City of Durham.

Robert Morgan, Attorney General, by C. Diederich Heidgerd, Associate Attorney, amicus curiae for the State.

Henry W. Underhill, Jr., City Attorney, and Charles R. Buckley, III, Assistant City Attorney, amicus curiae for the City of Charlotte.

Jesse L. Warren, City Attorney, and Dale Shepherd, Assistant City Attorney, amicus curiae for the City of Greensboro.

MOORE, Justice.

[1] Defendants contend first that the Court of Appeals erred in passing upon the constitutionality of Chapter 506, which incorporates Article 9 of Chapter 136 of the General Statutes, the so-called "quick-take" procedure for condemnation under which plaintiff filed this action.

The trial court dismissed the action for the reason that G.S. 160-205, as amended by Chapter 506, had been repealed by Chapter 698, Session Laws of 1971 (now codified as Chapter 160A of the General Statutes). In the judgment dismissing the action, the trial court stated: "The court reserves the question

of the constitutionality of Chapter 506, Session Laws 1967 because it has been able to arrive at a determination without reaching that issue."

In *State v. Dorsett* and *State v. Yow*, 272 N.C. 227, 158 S.E. 2d 15 (1967), defendants in the trial court contended that the ordinance under which they were charged was "unconstitutional for vagueness." The trial court expressly declined to rule on this question and quashed the warrants on other grounds. Justice Bobbitt (now Chief Justice) speaking for the Court said:

> " . . . Under these circumstances, 'in conformity with the well established rule of appellate courts, we will not pass upon a constitutional question unless it affirmatively appears that such question was raised *and passed upon* in the court below.' (Our italics.) *State v. Jones*, 242 N.C. 563, 89 S.E. 2d 129."

In *State v. Cumber*, 280 N.C. 127, 131, 185 S.E. 2d 141, 144 (1971), the constitutional question concerning the admission of certain evidence was not raised in the trial court but was injected for the first time on appeal to the Court of Appeals. We held that it came too late, that it was not properly before the Court of Appeals and was not properly before us, stating:

> " . . . That belated constitutional question was injected for the first time on appeal to the Court of Appeals and therefore came too late. It was not properly before that court and is not now properly before us. 'The attempt to smuggle in new questions is not approved. *Irvine v. California*, 347 U.S. 128, 129. Appellate courts will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court. *State v. Jones*, 242 N.C. 563, 564, 89 S.E. 2d 129. This is in accord with the decisions of the Supreme Court of the United States. *Edelman v. California*, 344 U.S. 357, 358.' *State v. Grundler*, 251 N.C. 177, 111 S.E. 2d 1 (1959). Accord, *State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376 (1968)."

Accord, State v. Duncan, 282 N.C. 412, 193 S.E. 2d 65 (1972); *State v. Hudson*, 281 N.C. 100, 187 S.E. 2d 756 (1972).

Since the constitutionality of the statute in question was not passed upon in the trial court, it was not properly before the Court of Appeals and is not now properly before us. This assignment is sustained.

Defendants next assign as error the conclusion of the Court of Appeals that the local act, Chapter 506, was not repealed by the enactment of Chapter 698, Session Laws of 1971, now codified as Chapter 160A of the General Statutes. The amendment to G.S. 160-205 by Chapter 506 reads in pertinent part as follows:

> "Section 1. Section 160-205 of the General Statutes of North Carolina is hereby amended by adding thereto as a separate paragraph the following words and figures:
>
> 'The procedures provided in Article 9 of Chapter 136 of the General Statutes, as specifically authorized by G.S. 136-66.3(c), shall be applicable in the case of acquisition by a municipal corporation of lands . . . and other interests in real property for any and all public purposes in the exercise of the power of eminent domain; and such municipal corporation seeking to acquire such property . . . shall have the right and authority . . . to use the . . . procedures as authorized and provided in G.S. 136-66.3(c) and Article 9 of Chapter 136 of the General Statutes. . . . '
>
> "Sec. 2. This act shall apply only to the City of Durham."

[2] G.S. 160-205 was repealed by Chapter 160A of the General Statutes. It is well established in North Carolina that a legislative act of local application is repealed only when a subsequent act of general application clearly expresses such an intent. *Bland v. City of Wilmington*, 278 N.C. 657, 180 S.E. 2d 813 (1971); *R. R. Co. v. City of Raleigh*, 277 N.C. 709, 178 S.E. 2d 422 (1971).

G.S. 160A-1(1) defines "charter" as "the entire body of local acts currently in force applicable to a particular city . . . . " G.S. 160A-1(5) defines "local act" as " . . . an act of the General Assembly applying to one or more specific cities by name. . . . " Thus, Chapter 160A expressly provides that Chapter 506 is a local act and that it is a part of the charter of the City of Durham. The General Assembly then specifically expressed its intent concerning the effect of the enactment of Chapter 160A on city charters and local acts by enacting Chapter 160A-2, as follows:

> "*Effect upon prior laws.*—Nothing in this Chapter shall repeal or amend any city charter in effect as of Jan-

> uary 1, 1972, or any portion thereof, unless this Chapter or a subsequent enactment of the General Assembly shall clearly show a legislative intent to repeal or supersede all local acts. The provisions of this Chapter, insofar as they are the same in substance as laws in effect as of December 31, 1971, are intended to continue such laws in effect and not to be new enactments . . . . "

Nothing is found in Chapter 160A or in any subsequent enactment of the General Assembly that would clearly show a legislative intent to repeal or supersede Chapter 506. G.S. 160A-2 in itself is enough to preclude a finding that Chapter 506 was repealed; however, it appears that the 1971 General Assembly and the legislative drafters wanted to make certain that previously passed statutes and local acts pertaining to Chapter 160 would not be repealed by implication. In addition to G.S. 160A-2, G.S. 160A-5, entitled "Statutory references deemed amended to conform to Chapter," states that:

> "Whenever a reference is made in another portion of the General Statutes or any local act . . . to a portion of Chapter 160 of the General Statutes that is repealed or superseded by this Chapter, the reference shall be deemed amended to refer to that portion of this Chapter which most clearly corresponds to the repealed or superseded portion of Chapter 160."

Applying G.S. 160A-5 to the problem in question, we note that Chapter 506 amended G.S. 160-205, which enabled municipalities to condemn land for public purposes. G.S. 160A-241 clearly corresponds to former G.S. 160-205 in that both statutes enable municipalities to condemn land for public purposes. Therefore, Chapter 506 is now amended so as to refer to G.S. 160A-241 and is not repealed by reason of the savings provision of G.S. 160A-5.

[3] As shown by the sections quoted above, the specific legislative intent of Chapter 160A was not to repeal local acts by implication, but to save them. We hold, therefore, that Chapter 506, which became a part of the charter of the City of Durham, was not repealed by Chapter 160A.

[4] Finally defendants contend that the Court of Appeals erred by failing to consider whether the issue was moot and whether the real parties in interest were before the court. Defendants contend that from numerous public meetings it now appears that

the City of Durham continues to have plans for a park along the Eno River running east from Guess Road. It appears that the land to the west of Guess Road, however, including the land owned by defendants, is to be a part of a State park.

There is no evidence in the record to support defendants' contentions. For that reason, the question of mootness is not before this Court. However, this case is not moot. Under the applicable statute, G.S. 136-104, title to the property in question vested in plaintiff on 8 March 1973, the date on which plaintiff filed the complaint and declaration of taking and deposited in the court the estimated amount of compensation due. Plaintiff has owned the land since that date. *Highway Commission v. Industrial Center,* 263 N.C. 230, 139 S.E. 2d 253 (1964). Defendants are therefore entitled to a determination of just compensation for the taking of their property. G.S. 136-104.

We hold in summary that the constitutionality of Chapter 506 as it incorporates Article 9, Chapter 136, has not been determined in this case; that Chapter 506 was not repealed by Chapter 698, Session Laws of 1971 (Chapter 160A of the General Statutes) ; and that the issue is not moot in that defendants are entitled to a determination of just compensation for the taking of their property.

The case is remanded to the Court of Appeals with direction to remand to the Superior Court of Durham County for further proceedings in accordance with this opinion. As herein modified, the decision of the Court of Appeals is affirmed.

Modified and affirmed.

Chief Justice BOBBITT not sitting.

STATE OF NORTH CAROLINA v. JONAS BELL

No. 1

(Filed 10 October 1974)

1. **Burglarly and Unlawful Breakings § 1— first degree burglary — elements of offense**

Burglary in the first degree is the breaking and entering in the nighttime of an occupied dwelling or sleeping apartment with intent to commit a felony therein. G.S. 14-51.

2. **Criminal Law § 104— motion for nonsuit — evidence considered in light most favorable to State**

A motion for judgment of nonsuit is properly denied if there is any competent evidence to support the allegations contained in the bill of indictment; and all the evidence which tends to sustain those allegations must be considered in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn therefrom.

3. **Criminal Law § 2— intent — proof by circumstances**

Intent is a mental attitude seldom provable by direct evidence; rather, it must ordinarily be proved by circumstances from which it it may be inferred.

4. **Burglary and Unlawful Breakings § 5— first degree burglary — sufficiency of evidence**

In a prosecution for first degree burglary, evidence was sufficient to be submitted to the jury and to support the permissible inference that defendant intended to commit rape at the time of the breaking and entering where such evidence tended to show that defendant entered an occupied sleeping compartment in the nighttime by cutting the window screen, that he got in bed with his intended victim, placed a hand over her mouth when he was discovered, threatened to cut her throat if either she or her sister screamed, and pulled up his outside pants and ran from the room when other girls appeared and turned on the light.

Chief Justice BOBBITT not sitting.

DEFENDANT appeals from judgment of *Armstrong, J.*, 7 January 1974 Session, FORSYTH Superior Court.

Defendant was charged in a bill of indictment, proper in form, with the crime of burglary in the first degree on 26 May 1971.

The State's evidence tends to show that the Julia Higgins Cottage at the Children's Home on Reynolda Road in Winston-Salem, North Carolina, was occupied by twelve or thirteen girls, all rooming on the second floor. On 26 May 1971 Bonnie Louise Whicker and her sister Luann Whicker (Lou Ann in record on previous appeal) shared a room containing two single beds arranged side by side with the headboards against the wall opposite the door to the room. They retired at approximately 9:30 p.m. on the night in question. Bonnie was awakened sometime after midnight when she turned over in her bed and felt someone on her right side—the side away from her sister's bed. She immediately sat up and the intruder put a hand over her mouth. Her scream awakened her sister who also screamed. The intruder told Bonnie he would cut her throat if either of them

screamed again. Bonnie felt what she judged to be a knife pressed against the left side of her throat.

The screams of the Whicker sisters awakened other girls on the hall and two of them came to the foot of Bonnie's bed. Bonnie told them to leave or the intruder would cut her throat. These two girls went back to the door and a third girl came to the room and turned on the light. The intruder got up, pulled up his outside pants, ran out of the room, turned to the left and went down the staircase and exited the building through a window.

Bonnie Louise Whicker has never been able to identify her assailant. Luann Whicker testified, in part, that she was awakened by her sister's screams and that when one of the girls turned on the light the intruder got up, pulled up his pants and ran out of the room. She described the intruder as a seventeen-year-old black male with a goatee and positively identified defendant as the person she saw that night.

Janice Chamelin (Chamberlin in record on previous appeal) testified that her room was next to the Whicker room and that upon hearing the screams she and another girl named Ann Chandler went into the room and stood at the foot of the bed. When a third girl named Dawn Cloninger turned the light on she saw a man sitting on Bonnie's bed with a knife to Bonnie's throat. She described the intruder as a black male, 5 feet 7 or 8 inches tall, weighing about 150 pounds, with bushy hair and a scar on his right forehead. He was wearing a green pair of pants and a green T-shirt. Miss Chamelin positively identified defendant as the person she saw in the Whicker room on the night of 26 May 1971. She testified that defendant had a scar on his right forehead and that it was the same scar she observed on the night in question.

William R. Edwards, Superintendent of the Children's Home, testified that he was awakened by police car sirens at approximately 1:00 a.m. and immediately went to the Julia Higgins Cottage. Upon arriving there, he noticed the window screen to the left of the front door had a tear in it and the screen was unlatched; and the window screen to the right of the front door was completely pushed out. He stated that there was an automatic closing arm on the front door which pushed it closed unless it was propped open.

Detective W. R. Revis of the Winston-Salem Police Department testified that he investigated this case and found, among

other things, that the small tear in the screen on the window to the left of the front door was within reach of the latch; that the screen was unlatched; that the screen on the window to the right of the front door was completely torn out.

Defendant offered no evidence.

The jury returned a verdict of guilty of first degree burglary and defendant was sentenced to life imprisonment. He appealed to the Supreme Court assigning error discussed in the opinion.

Robert Morgan, Attorney General; William W. Melvin, Assistant Attorney General, for the State of North Carolina.

John J. Schramm, Jr., Attorney for defendant appellant.

HUSKINS, Justice.

When this case was before us on a former appeal, *State v. Bell,* 284 N.C. 416, 200 S.E. 2d 601 (1973), we awarded a new trial for failure to submit to the jury the lesser included offense of felonious breaking or entering. On retrial the jury was instructed to return either of the following verdicts: (1) Guilty of first degree burglary as charged in the bill of indictment; (2) guilty of non-burglarious breaking and entering with intent to commit a felony or other infamous crime; (3) guilty of non-burglarious breaking and entering without intent to commit a felony or other infamous crime; or (4) not guilty. The jury convicted defendant of first degree burglary and he again appeals to this Court.

The sole question presented on this appeal is whether the trial court erred in denying defendant's motion for nonsuit at the close of the State's evidence. Defendant contends the evidence is insufficient to show an intent to commit rape. He therefore argues the trial court erred in overruling his motion to nonsuit the charge of burglary in the first degree.

[1] Burglary in the first degree is the breaking and entering in the nighttime of an occupied dwelling or sleeping apartment with intent to commit a felony therein. G.S. 14-51; *State v. Bell, supra; State v. Cox,* 281 N.C. 131, 187 S.E. 2d 785 (1972); *State v. Mumford,* 227 N.C. 132, 41 S.E. 2d 201 (1947). The bill of indictment charges that during the night of 26 May 1971 defendant broke and entered the Julia Higgins Cottage occupied by Bonnie Louise Whicker and others "with the felonious intent

to commit the crime of rape in said dwelling house upon the said Bonnie Louise Whicker. . . . "

[2] A motion for judgment of nonsuit is properly denied if there is any competent evidence to support the allegations contained in the bill of indictment; and all the evidence which tends to sustain those allegations must be considered in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Reid,* 230 N.C. 561, 53 S.E. 2d 849, *cert. denied,* 338 U.S. 876, 94 L.Ed. 537, 70 S.Ct. 138 (1949); *State v. Gentry,* 228 N.C. 643, 46 S.E. 2d 863, *cert. denied,* 335 U.S. 818, 93 L.Ed. 372, 69 S.Ct. 39 (1948).

[3] Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. *State v. Arnold,* 264 N.C. 348, 141 S.E. 2d 473 (1965); *State v. Gammons,* 260 N.C. 753, 133 S.E. 2d 649 (1963). "The intent with which an accused broke and entered may be found by the jury from evidence as to what he did within the house. . . . However, the fact that a felony was actually committed after the house was entered is not necessarily proof of the intent requisite for the crime of burglary. It is only evidence from which such intent at the time of the breaking and entering may be found. Conversely, actual commission of the felony, which the indictment charges was intended by the defendant at the time of the breaking and entering, is not required in order to sustain a conviction of burglary." *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269 (1967).

[4] Here, the evidence tends to show that defendant entered the sleeping apartment of Bonnie Louise Whicker in the nighttime by cutting the window screen; that he got in bed with his intended victim, placed a hand over her mouth when he was discovered, threatened to cut her throat if either she or her sister screamed, and pulled up his outside pants and ran from the room when the other girls appeared and turned on the light. We think this evidence was sufficient to carry the case to the jury upon the allegations contained in the bill of indictment and to support the permissible inference that defendant intended to commit rape at the time he broke and entered the Julia Higgins Cottage. It was for the jury to determine, under all the circumstances, defendant's ulterior criminal intent. The motion for nonsuit was properly denied.

A careful perusal of the entire record impels the conclusion that defendant received a fair trial free from prejudicial error. Therefore the verdict and judgment must be upheld.

No error.

Chief Justice BOBBITT not sitting.

STATE OF NORTH CAROLINA v. VESTA RAY ARNOLD

No. 2

(Filed 10 October 1974)

1. **Arson § 1— common law offense**

Arson is not defined by our statutes but is a common law offense.

2. **Arson § 1— felony**

Arson is made a felony by G.S. 14-58.

3. **Arson § 2— indictment for arson — conviction for attempted arson**

The felony of an attempt to commit arson created by G.S. 14-67 is a lesser included offense of the crime of arson, and a person indicted for arson may be convicted of the offense created by G.S. 14-67.

4. **Arson § 2— indictment for arson — trial for attempted arson — informing defendant of charge against him**

Defendant was sufficiently informed of the charge against him where the indictment alleged that he feloniously and maliciously burned "a dwelling house owned by Robert Chandler, located at 328 Chandler Road, Durham, North Carolina, on the 23rd day of March 1973" and the solicitor announced before trial that the State would seek only a verdict of attempt to burn the described house.

Chief Justice BOBBITT not sitting.

ON *certiorari* to review the decision of the Court of Appeals, reported in 21 N.C. App. 92, 203 S.E. 2d 395 (1974), which found no error in the trial before *Hall, J.*, at the 11 June 1973 Session of DURHAM Superior Court.

Defendant was charged in one bill of indictment with the crime of arson and in another with attempt to commit arson. On motion of defendant, the bill of indictment charging attempt to commit arson was quashed as a nullity for the reason that it failed to name the defendant, to charge the county in which the offense occurred, or to show the date on which it occurred.

At the beginning of the trial the solicitor for the State announced that the State would not seek a verdict of guilty of arson, but would try defendant on the bill of indictment charging arson and would seek a verdict of guilty of the lesser included offense of an attempt to commit arson.

Defendant was convicted of attempt to commit arson and from judgment imposing a prison sentence of not less than seven nor more than eight years, with credit for time spent in prison awaiting trial, and with recommendation that he be given proper treatment for "his alcoholic condition," appealed to the Court of Appeals. That court found no error in the trial.

The State's evidence tends to show that defendant's former wife was living in a house in Durham under the control of Robert Chandler. Upon learning that defendant was also staying at the house, Chandler advised the former wife that unless defendant left she would have to move. Defendant learned of this and went to Chandler's office. Chandler confirmed what he had told defendant's former wife. Thereafter, defendant, accompanied by his seventeen-year-old son, went to a liquor store, bought some vodka, and took several drinks. He then obtained a gallon plastic jug which he partially filled with gasoline, and drove to Chandler's home located on Chandler Road. There he lighted the jug and threw it into Chandler's carport. The fire department was called by neighbors and extinguished the fire. The contents and walls of the carport were damaged in the amount of $300.

Attorney General Robert Morgan and Assistant Attorney General Robert G. Webb for the State.

Donald R. Smith for defendant appellant.

MOORE, Justice.

The sole question presented to this Court is whether the defendant can be lawfully convicted of the felony of attempt to commit arson (G.S. 14-67) on an indictment charging him with arson.

[1, 2] Arson is not defined by our statutes but is a common law offense. *State v. Long,* 243 N.C. 393, 396, 90 S.E. 2d 739, 741 (1956). See *State v. Ingland,* 278 N.C. 42, 49, 178 S.E. 2d 577, 581 (1970). By G.S. 14-58 arson is made a felony.

Defendant contends that there can be no lesser included offense of an attempt to commit arson under a bill of indictment for arson. Contrary to this contention, G.S. 15-170 provides that upon the trial of any indictment a defendant may be convicted of the crime charged therein, or a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime. "An attempt to commit a crime is an indictable offense and as a matter of form and on proper evidence, in this jurisdiction, a conviction may be sustained on a bill of indictment making a specific charge, or one which charges a completed offense." *State v. Addor,* 183 N.C. 687, 110 S.E. 650 (1922). *State v. Willis,* 255 N.C. 473, 121 S.E. 2d 854 (1961); *State v. Parker,* 224 N.C. 524, 31 S.E. 2d 531 (1944).

In his brief counsel for defendant states:

> "At common law the lesser includant (sic) offense of attempted arson to an indictment for arson was a misdemeanor, and therefore indictable as a misdemeanor only and not as a felony. The defendant here, of course, has been tried for the felony of attempted arson.
>
> "Since the North Carolina General Statutes 14-67 enacted by the General Assembly is a substitute for attempted arson at common law, there can be no attempt to [commit] arson at common law, therefore no lesser includant (sic) offense of attempted arson to a bill of indictment for arson in the State of North Carolina. Therefore, the petitioner could not be informed of the nature and cause of the accusation against him, and, of course, this in turn is a violation of his constitutional rights granted under the 6th and 14th amendment of the U. S. Constitution."

The common law rule that an attempt to commit a felony is a misdemeanor remains unchanged in this State except where otherwise provided by statute. G.S. 4-1; *State v. Hare,* 243 N.C. 262, 90 S.E. 2d 550 (1955); *State v. Surles,* 230 N.C. 272, 52 S.E. 2d 880 (1949). So far as an attempt to commit arson is concerned, this rule was changed by G.S. 14-67, which in part provides:

> "If any person shall wilfully and feloniously attempt to burn any dwelling house . . . or any part thereof . . . he shall be guilty of a felony, and shall be punished by imprisonment in the State's prison or county jail, or by a

fine, or by both such fine and imprisonment, in the discretion of the court."

As stated in *State v. Stephens,* 170 N.C. 745, 87 S.E. 131 (1915): "At common law an attempt to commit a felony was a misdemeanor. [Citations omitted.] But now, under Revisal, 3336 [now G.S. 14-67], an attempt to commit arson is made a felony." The Court then in the same case directly answered the question which is now before us by stating: "If the defendant had been charged with committing arson, he could have been convicted of an attempt to do so." The Court cited Revisal, 3269, which is now G.S. 15-170.

In *State v. Riera,* 276 N.C. 361, 368, 172 S.E. 2d 535, 540 (1970), it is stated:

> "It is a universal rule that an indictment must allege all the elements of the offense charged. A defendant is entitled to be informed of the accusation against him and to be tried accordingly. *State v. Wilkerson, supra* [164 N.C. 431, 79 S.E. 888]; *State v. Greer,* 238 N.C. 325, 77 S.E. 2d 917. It is also well recognized in North Carolina that when a defendant is indicted for a criminal offense he may be convicted of the charged offense or of a lesser included offense when the greater offense charged in the bill contains all the essential elements of the lesser offense, all of which could be proved by proof of the allegations of fact contained in the indictment. G.S. 15-170; *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44; *State v. Rorie,* 252 N.C. 579, 114 S.E. 2d 233; Wharton's Criminal Law and Procedure, Vol. 4 Sec. 1799, at 631. . . . "

[3] To prove common law arson the State must show malicious and wilful burning of the dwelling house of another. *State v. Long, supra; State v. Anderson,* 228 N.C. 720, 47 S.E. 2d 1 (1948). Proof of an attempt to so burn an inhabited house of another would meet the requirements of G.S. 14-67. The indictment for arson included all the elements necessary to prove the felony, under G.S. 14-67, of an attempt to commit arson, and these elements could be proved by proof of the facts alleged in the indictment. We, therefore, hold that the felony created by G.S. 14-67 is a lesser included offense of the crime of arson alleged in the bill of indictment.

Defendant contends that he was not informed of the nature and cause of the accusation against him. The bill of indictment

is sufficient if it charges the offense in a plain, intelligible, and explicit manner with averments sufficient to enable the court to proceed to judgment and bar a subsequent prosecution for the same offense. G.S. 15-153; *State v. Taylor,* 280 N.C. 273, 185 S.E. 2d 677 (1971); *State v. Anderson,* 259 N.C. 499, 130 S.E. 2d 857 (1963).

> "The authorities are in unison that an indictment, whether at common law or under a statute, to be good must allege lucidly and accurately all the essential elements of the offense endeavored to be charged. The purpose of such constitutional provisions is: (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case. [Citations omitted.]" *State v. Greer,* 238 N.C. 325, 327, 77 S.E. 2d 917, 919 (1953).

[4] Here, it was charged that defendant unlawfully, wilfully, feloniously, and maliciously did burn a dwelling house owned by Robert Chandler, located at 328 Chandler Road, Durham, North Carolina, on the 23rd day of March 1973. The solicitor, before the trial, announced that the State under this indictment would seek only a verdict of guilty of attempt to burn this house. Clearly, defendant was informed of the charge against him. Being convicted and sentenced under this indictment, he could not again be lawfully indicted and tried for this offense. Defendant's contention that he was not informed of the nature and cause of the accusation against him is without merit.

Under the provisions of G.S. 14-67, an attempt to commit arson is now a felony rather than a common law misdemeanor. Therefore, the sentence of seven to eight years' imprisonment was properly imposed.

The decision of the Court of Appeals is affirmed.

Affirmed.

Chief Justice BOBBITT not sitting.

BROWN v. MOORE

No. 43 PC.

Case below: 22 N.C. App. 445.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 24 September 1974.

BURKHEAD v. WHITE

No. 52 P.C.

Case below: 22 N.C. App. 432.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 September 1974.

CARVER v. MILLS

No. 68 PC.

Case below: 22 N.C. App. 745.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 September 1974.

DUKE v. INSURANCE CO.

No. 51 PC.

Case below: 22 N.C. App. 392.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 24 September 1974.

EGGIMANN v. BOARD OF EDUCATION

No. 50 P.C.

Case below: 22 N.C. App. 459.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 September 1974.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

ELECTRIC CO. v. NEWSPAPERS, INC.

No. 73 PC.

Case below: 22 N.C. App. 519.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 September 1974.

FURR v. FURR

No. 48 PC.

Case below: 22 N.C. App. 487.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 September 1974.

HARRELL v. CITY OF WINSTON-SALEM

No. 53 PC.

Case below: 22 N.C. App. 386.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 September 1974.

HARRINGTON v. HARRINGTON

No. 49 PC.

Case below: 22 N.C. App. 419.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 24 September 1974.

IN RE BEATTY

No. 75 PC.

Case below: 22 N.C. App. 563.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 24 September 1974. Motion of Employment Security Commission to dismiss appeal for lack of substantial constitutional question denied 24 September 1974.

IN RE BULLARD

No. 57.

Case below: 22 N.C. App. 245.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 24 September 1974.

IN RE HENNIE

No. 76 PC.

Case below: 22 N.C. App. 690.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 September 1974.

INSURANCE CO. v. TIRE CO.

No. 22 PC.

Case below: 22 N.C. App. 237.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 24 September 1974.

MORGAN, ATTY. GENERAL v. POWER CO.

Nos. 56 and 28 PC.

Case below: 22 N.C. App. 300.

Petition of Attorney General for writ of certiorari to North Carolina Court of Appeals denied 24 September 1974. Motions of Utilities Comm. and Power Co. to dismiss appeal allowed 24 September 1974.

Justice LAKE dissenting: It is my view that the appeal of the Attorney General in this case presents a substantial question of law, neither heretofore nor now determined by this Court, as to the authority of the Utilities Commission to grant, without a hearing, an interim increase in rates charged by a public utility for its service, that the public interest requires a prompt determination of this question and that to continue the increased rates in effect pending further consideration thereof by the Utilities Commission subjects the users of the service to the risk of substantial legal and economic injury. For these reasons, it is my view that the appeal should now be heard by this Court and should not be summarily dismissed as premature.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

MORGAN, ATTY. GENERAL v. POWER CO.

No. 63.

Case below: 22 N.C. App. 497.

Petition of Attorney General for writ of certiorari to North Carolina Court of Appeals denied 24 September 1974. Motions of Utilities Comm. and Power Co. to dismiss appeal allowed 24 September 1974.

Justice LAKE dissenting: It is my view that the appeal of the Attorney General in this case presents a substantial question of law, neither heretofore nor now determined by this Court, as to the authority of the Utilities Commission to grant, without a hearing, an interim increase in rates charged by a public utility for its service, that the public interest requires a prompt determination of this question and that to continue the increased rates in effect pending further consideration thereof by the Utilities Commission subjects the users of the service to the risk of substantial legal and economic injury. For these reasons, it is my view that the appeal should now be heard by this Court and should not be summarily dismissed as premature.

PROCTOR v. WEYERHAEUSER CO.

No. 47 PC.

Case below: 22 N.C. App. 470.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 September 1974.

STATE v. CARROLL

No. 60 PC.

Case below: 21 N.C. App. 530.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 September 1974 for failure to file in time.

STATE v. CARVER

No. 74 PC.

Case below: 22 N.C. App. 674.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 24 September 1974.

STATE v. CLARK

No. 46.

Case below: 22 N.C. App. 81.

Appeal dismissed for failure to comply with Rule 19(3) of the Rules of this Court and Rule 3(b) of the Supplementary Rules of this Court, as interpreted in *In re Will of Adams,* 268 N.C. 565, and *State v. Staten,* 271 N.C. 600, 12 September 1974.

STATE v. COLLINS

No. 67 PC.

Case below: 22 N.C. App. 590.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 September 1974.

STATE v. CUMMINGS

No. 55 PC.

Case below: 22 N.C. App. 452.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 September 1974.

STATE v. CURTIS

No. 78 PC.

Case below: 22 N.C. App. 606.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 September 1974.

STATE v. DARK

No. 72 PC.

Case below: 22 N.C. App. 566.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 September 1974.

STATE v. ELLIOTT

No. 53.

Case below: 22 N.C. App. 334.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 24 September 1974.

STATE v. FRINKS

No. 66.

Case below: 22 N.C. App. 584.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 24 September 1974.

STATE v. GAGNE

No. 65 PC.

Case below: 22 N.C. App. 615.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 September 1974.

STATE v. GREENLEE

No. 64.

Case below: 22 N.C. App. 489.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 24 September 1974.

STATE v. HICKS

No. 64 PC.

Case below: 22 N.C. App. 554.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 September 1974.

STATE v. LIVINGSTON

No. 20 PC.

Case below: 22 N.C. App. 346.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 September 1974.

STATE v. McAULIFFE

No. 62.

Case below: 22 N.C. App. 601.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 September 1974. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 24 September 1974.

STATE v. MOORE

No. 84.

Case below: 22 N.C. App. 640.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 24 September 1974.

STATE v. MOORE

No. 63 PC.

Case below: 22 N.C. App. 679.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 September 1974.

STATE v. ORANGE

No. 48.

Case below: 22 N.C. App. 220.

Appeal dismissed for failure to comply with Rule 19(3) of the Rules of this Court and Rule 3(b) of the Supplementary Rules of this Court as interpreted in *In re Will of Adams,* 268 N.C. 565, and *State v. Staten,* 271 N.C. 600, 12 September 1974.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. PAGE

No. 54 PC.

Case below: 22 N.C. App. 435.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 September 1974. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 24 September 1974.

STATE v. STALLS

No. 156 PC.

Case below: 22 N.C. App. 265.

Petition for writ of certiorari to North Carolina Court of Appeals denied 24 September 1974. Motion of Attorney General to dismiss appeal allowed 24 September 1974.

STATE v. THOMAS

No. 52.

Case below: 22 N.C. App. 206.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 24 September 1974.

STATE v. WOODS

No. 45.

Case below: 22 N.C. App. 77.

Appeal dismissed for failure to comply with Rule 19(3) of the Rules of this Court and Rule 3(b) of the Supplementary Rules of this Court as interpreted in *In re Will of Adams,* 268 N.C. 565, and *State v. Staten,* 271 N.C. 600, 12 September 1974.

WYATT v. HAYWOOD

Nos. 71 and 32 PC.

Case below: 22 N.C. App. 267.
285 N.C. 669, cert. allowed.

Motion of defendants to withdraw appeal allowed 26 September 1974.

APPENDIX

AMENDMENT TO
RULES GOVERNING ADMISSION TO
THE PRACTICE OF LAW

RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

The attached amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina were duly adopted at a regular quarterly meeting of the Council of The North Carolina State Bar.

BE IT RESOLVED that Rule IV of the Rules Governing Admission to the Practice of Law in the State of North Carolina be and the same is hereby amended by rewriting section 4 as appears in 279 N. C. 734 to read as follows:

RULE IV

Registration

Section 4. Each registration by a resident of the State of North Carolina must be accompanied by a fee of $20.00 and each registration by a non-resident shall be accompanied by a fee of $35.00. An additional fee of $25.00 shall be charged all applicants who file a late registration, both resident and non-resident. All said fees shall be payable to the Board. No part of a registration fee shall be refunded for any reason whatsoever.

BE IT FURTHER 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 rewriting section 3 as appears in 279 N.C. 736 to read as follows:

RULE VII

Requirements for Comity Applicants

Section 1. (3) Pay to the Board with each written application a fee of $300.00 plus such fee as the National Conference of Bar Examiners or its successors may charge from time to time for processing an application of a non-resident, not more than $125.00 of which may be refunded to the applicant in the discretion of the Board if admission to practice law in the State of North Carolina is denied;

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 26th day of July, 1974.

B. E. James, Secretary-Treasurer
The North Carolina State Bar

After examining the foregoing amendments of the Rules of the Board of Law Examiners as adopted by the Council of The North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 30th day of August, 1974.

William H. Bobbitt
Chief Justice
Supreme Court of North Carolina

Upon the foregoing certificate, it is ordered that the foregoing amendments of the Rules of the Board of Law Examiners and the Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the 30th day of August, 1974.

Moore, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this index, e.g. Appeal and Error § 1, correspond with titles and section numbers in N. C. Index 2d.

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR

§ 3. Review of Constitutional Question

Court of Appeals erred in ruling on a constitutional question not considered by the trial court. *City of Durham v. Manson*, 741.

§ 6. Judgments and Orders Appealable

No appeal lies from the trial court's refusal to dismiss an action on the ground of lack of a justiciable controversy. *Consumers Power v. Power Co.*, 434.

§ 22. Certiorari to Preserve Right to Review

Failure of plaintiff to petition for a writ of certiorari to review an interlocutory decree of the Court of Appeals does not preclude the Supreme Court from granting certiorari after final judgment and thereupon rectifying any errors which occurred at any stage of the proceedings. *Leasing, Inc. v. Brown*, 689.

§ 24. Necessity for Objections, Exceptions and Assignments of Error

Defendant failed to present to the Court of Appeals or to the Supreme Court through exceptions and assignments of error the question of whether plaintiff had introduced sufficient evidence to carry the burden of showing that the action was commenced within the prescribed period of time. *Little v. Rose*, 724.

§ 42. Presumptions in Regard to Matters Omitted

Where the judge's charge was not included in the record on appeal, it is presumed that his instructions on damages were correct. *Robertson v. Stanley*, 561.

§ 62. Partial New Trial

Error of the jury in assessing damages tainted its verdict, and partial new trial on the issue of damages alone would be improper. *Robertson v. Stanley*, 561.

§ 68. Law of the Case and Subsequent Proceedings

An interlocutory decision of the Court of Appeals did not constitute the law of the case on review by the Supreme Court of a subsequent decision in the same case. *Leasing, Inc. v. Brown*, 689.

Decision of the Supreme Court may properly be overruled when such action will not disturb property rights previously vested in reliance upon the earlier decision. *Watch Co. v. Brand Distributors*, 467.

APPEARANCE

§ 2. Effect of Appearance

By securing an extension of time in which to plead, defendant made a general appearance which rendered service of summons upon it unnecessary. *Simms v. Stores, Inc.*, 145; *Philpott v. Kerns*, 225; *Leasing, Inc. v. Brown*, 689.

ARREST AND BAIL

§ 3. Right to Arrest Without Warrant

Officers acted on reasonable ground and with probable cause when they stopped defendant and his companion without a warrant and took

CONSTITUTIONAL LAW

§ 7. Delegation of Powers by General Assembly

Provision of G.S. 66-56 extending the force and effect of a "fair trade" agreement to a seller not a party thereto is an unconstitutional delegation of legislative power to a private corporation. *Watch Co. v. Brand Distributors*, 467.

§ 14. Morals and Public Welfare

Fayetteville massage parlor ordinance is constitutional. *Smith v. Keator*, 530.

§ 18. Rights of Free Press and Speech

State's obscenity statutes which do not state with specificity what essential conduct may be obscene and patently offensive may by construction be limited to obscene matter which constitutes hard-core pornography. *S. v. Bryant*, 27.

§ 19. Monopolies and Exclusive Privileges

Provision of G.S. 66-56 extending the force and effect of a "fair trade" agreement to a seller not a party thereto is unconstitutional. *Watch Co. v. Brand Distributors*, 467.

§ 26. Full Faith and Credit to Foreign Judgment

A court in which a foreign judgment is asserted as a cause of action or as a defense may make its own independent inquiry into the jurisdiction of the court which rendered the judgment. *Hosiery Mills v. Burlington Industries*, 344.

Where the N. Y. court had no jurisdiction to enter an arbitration award, such award is not entitled to full faith and credit in the courts of this State. *Ibid.*

§ 29. Right to Indictment and Trial by Duly Constituted Jury

In a capital case it is proper to inquire into a prospective juror's views on capital punishment. *S. v. Fowler*, 90.

Stipulation that two jurors were excused for cause "because of their views on capital punishment" does not provide an adequate basis for determining whether such jurors were properly excused. *Ibid.*

There is no merit in defendant's contentions that in a capital case there should be no voir dire examination of prospective jurors and that a juror cannot be excused under any circumstances because of his views on capital punishment. *S. v. Honeycutt*, 174.

Exclusion of jurors opposed to capital punishment does not result in an unrepresentative jury which is weighted toward conviction. *Ibid.*

Trial court in a capital case erred in refusing to allow counsel for defendant and the solicitor to inquire into the moral or religious scruples, beliefs and attitudes of the prospective jurors concerning capital punishment. *S. v. Britt*, 256; *S. v. Carey*, 497; *S. v. Carey*, 509.

Trial court in a first degree murder case properly excused for cause prospective jurors who stated they could not vote for a verdict which would result in the death penalty. *S. v. Sparks*, 631.

Inquiries put to prospective jurors as to their death penalty views were proper. *S. v. Crowder*, 42.

CONSTITUTIONAL LAW — Continued

§ 30. Due Process in Trial

Defendant's right to a speedy trial was violated where witnesses were available when defendant petitioned for a speedy trial, defendant informed the court that their continued availability was doubtful, and the witnesses were in fact unavailable when the trial finally commenced. *S. v. O'Kelly*, 368.

§ 31. Access to Evidence

Defendant in a rape and burglary case was not denied a fair trial because the investigating officer failed to make a microscopic comparison of a hair found on defendant's clothing and a hair from the prosecutrix and to make laboratory comparison of defendant's blood and blood found on bed clothing belonging to the prosecutrix. *S. v. Henderson*, 1.

§ 32. Right to Counsel

Defendant did not have a constitutional right to the presence of counsel at an out-of-court identification proceeding where no adversary judicial criminal proceedings had been initiated against defendant. *S. v. Henderson*, 1.

Where an officer stopped defendant because he was driving his vehicle in an erratic manner and asked defendant if he had been drinking, defendant's answer was admissible in evidence though Miranda warnings had not been given defendant at the time. *S. v. Sykes*, 202.

Trial court erred in determining that no Miranda warning was required where defendant was questioned as he was seated in a patrol car subsequent to his arrest for public drunkenness. *S. v. Lawson*, 320.

§ 33. Self-incrimination

Miranda requirements are inapplicable to a breathalyzer test, and results were properly allowed in evidence by the trial court. *S. v. Sykes*, 202.

Silence of defendant when a State's witness made incriminating statements in his presence could not be considered an admission of the truth of those statements. *S. v. Castor*, 286.

§ 36. Cruel and Unusual Punishment

Sentence of death for the crimes of rape and first degree burglary does not constitute cruel and unusual punishment. *S. v. Henderson*, 1.

Death penalty was the proper punishment in a first degree murder case. *S. v. Crowder*, 42; *S. v. Dillard*, 72; *S. v. Fowler*, 90; *S. v. Honeycutt*, 174; *S. v. Sparks*, 631.

§ 37. Waiver of Constitutional Guaranties

Trial court erred in holding that defendant waived his rights where defendant was told his rights and asked if he understood them but defendant did not respond. *S. v. Lawson*, 320.

CONTEMPT OF COURT

§ 6. Hearing on Order to Show Cause, Findings and Judgments

In a hearing to show cause why defendant should not be held in contempt for failing to comply with an order to remove a partially constructed building which violated a zoning ordinance, trial court erred in placing

CRIMINAL LAW — Continued

§ 50. Opinion Testimony

Use of "I think" did not render testimony inadmissible. *S. v. Henderson*, 1.

§ 52. Examination of Experts

Trial court properly allowed into evidence a psychiatrist's opinion on defendant's sanity based upon his personal examination and other information in the patient's record. *S. v. DeGregory*, 122.

Trial court properly permitted an expert in forensic chemistry to testify that from tests he conducted on defendant's left hand there were indications that defendant "could have" fired a gun. *S. v. Sparks*, 631.

§ 57. Evidence in Regard to Firearms

An SBI agent was qualified to take gunshot wipings from defendant's hands, and results of tests conducted on the wipings were admissible in a murder prosecution. *S. v. Crowder*, 42.

Trial court properly permitted an expert in forensic chemistry to testify that from tests he conducted on defendant's left hand there were indications that defendant "could have" fired a gun. *S. v. Sparks*, 631.

§ 60. Evidence in Regard to Fingerprints

Trial court did not err in admitting testimony of an officer that he had lifted latent fingerprints from an adding machine at the crime scene though the officer had not been qualified as an expert, and the chain of custody of the fingerprints was sufficiently established to allow an expert to testify that the fingerprints were defendant's. *S. v. Shore*, 328.

§ 63. Evidence as to Sanity of Defendant

Diagnosis of defendant's mental condition as paranoid schizophrenia, standing alone, does not exempt him from legal responsibility for criminal conduct. *S. v. Potter*, 238.

§ 64. Evidence as to Intoxication

Miranda requirements are inapplicable to a breathalyzer test, and results were properly allowed in evidence by the trial court. *S. v. Sykes*, 202.

§ 66. Evidence of Identity by Sight

The test under the due process clause as to pretrial identification procedures is whether the totality of the circumstances reveals pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice. *S. v. Henderson*, 1.

Defendant did not have a constitutional right to the presence of counsel at an out-of-court identification proceeding where no adversary judicial criminal proceedings had been initiated against defendant. *Ibid.*

In-court identification of defendant by rape victim was of independent origin and not tainted by a single exhibition of defendant to the victim prior to trial. *Ibid.*

In-court identification of defendant by two witnesses was based on observation of defendant at the crime scene. *S. v. Shore*, 328.

CRIMINAL LAW — Continued

§ 68. Other Evidence of Identity

Rape victim's testimony that her assailant "asked me if I knew a family I didn't know. I think the name was Wood" became competent on the question of identity when defendant testified he worked for a man named Woods. *S. v. Henderson,* 1.

§ 73. Hearsay Testimony

Statements made by deceased to a witness, "My God, that man tried to rob me" or "did rob me" and "I've been stabbed with this" were admissible as spontaneous utterances. *S. v. Deck,* 209.

Testimony by State's witness that he had given inconsistent testimony in a prior trial of a codefendant because the codefendant had threatened him was not hearsay and was properly admitted in defendant's trial although threats were not made in defendant's presence. *S. v. Carey,* 509.

§ 75. Voluntariness and Admissibility of Confession

Where an officer stopped defendant because he was driving his vehicle in an erratic manner and asked defendant if he had been drinking, defendant's answer was admissible in evidence though Miranda warnings had not been given defendant at the time. *S. v. Sykes,* 202.

Trial court properly allowed in evidence defendant's confession in a prosecution for first degree murder and armed robbery. *S. v. Thompson,* 181.

Trial court erred in determining that no Miranda warning was required where defendant was questioned as he was seated in a patrol car subsequent to his arrest for public drunkenness. *S. v. Lawson,* 320.

Although defendant's oral statement to police officers was not provided defense counsel pursuant to pretrial order, the statement was properly admitted in defendant's trial where the solicitor had no notice of the statement until after the trial was under way and he informed defense counsel thereof on the day before the statement was offered in evidence. *S. v. Carey,* 509.

The fact that defendant's statement to the police was made in the polygraph testing room was irrelevant on the question of its admissibility. *Ibid.*

§ 76. Determination of Admissibility of Confession

Trial court erred in holding that defendant waived his rights where defendant was told his rights and asked if he understod them but defendant did not respond. *S. v. Lawson,* 320.

§ 79. Acts and Declarations of Co-conspirators

The State was not required to establish conspiracy by independent proof before sworn testimony of one conspirator could be introduced against another conspirator. *S. v. Carey,* 497.

§ 80. Books, Records and Private Writings

Trial court erred in refusing to permit the custodian of school attendance records to use the regular calendar and to point out to the jury the relationship between the attendance record and the regular calendar. *S. v. Brunson,* 295.

CRIMINAL LAW — Continued

Defendant was not prejudiced where his objections to questions were sustained but the trial court failed to instruct the jury to disregard the questions. *S. v. Greene*, 482.

§ 99. Expression of Opinion on Evidence During Progress of Trial

Trial court did not express an opinion in making remarks and admonishing a witness. *S. v. Greene*, 482.

§ 102. Argument and Conduct of Counsel or Solicitor

Defendant's counsel was not entitled to argue the question of punishment to the jury in a first degree murder case. *S. v. Dillard*, 72.

Trial court did not abuse its discretion in permitting the district attorney during his jury argument to demonstrate the firing of a weapon with his hands handcuffed behind him to illustrate how defendant allegedly killed deceased. *S. v. Sparks*, 631.

§ 113. Statement of Evidence and Application of Law Thereto

Defendant was not prejudiced by the court's failure to include in the charge certain evidence elicited by defense counsel on cross-examination. *S. v. Henderson*, 1.

§ 114. Expression of Opinion by Court on Evidence in the Charge

Trial court did not express an opinion concerning the strength of defendant's defense when he twice stated that defendant's alibi was in the form of defendant's own testimony. *S. v. Henderson*, 1.

Instruction that the jury could consider evidence "of the absence of provocation" on the question of premeditation and deliberation was not an expression of opinion that there was no evidence of provocation in the case. *S. v. Fowler*, 90.

Trial court did not express an opinion in stating the State's contention that there was no evidence that defendant acted in self-defense. *Ibid.*

Trial court's remark in explaining the speeding statute did not amount to an expression of opinion. *S. v. Willis*, 195.

§ 116. Charge on Defendant's Failure to Testify

Trial court's instruction that defendants "did not offer any evidence as they have the right to do" constituted prejudicial error. *S. v. Baxter*, 735.

§ 117. Charge on Character Evidence and Credibility of Witness

Trial court erred in failing to comply with defendant's request that the jury be instructed to scrutinize a witness's testimony where the evidence was sufficient to permit a finding that the witness was an accessory before the fact to the offense charged. *S. v. Spicer*, 274.

§ 118. Charge on Contentions of the Parties

Though the trial court did not use the word "alibi" in its jury charge, the court did make it clear that the burden was on the State to prove all essential elements of the crime charged. *S. v. Shore*, 328.

§ 120. Instruction on Right of Jury to Recommend Life Imprisonment

If the trial judge in a capital case observes that the jury is confused or uncertain as to whether one of its permissible verdicts would result in the death sentence, trial judge should inform the jury of the consequences of their possible verdicts. *S. v. Britt*, 256.

CRIMINAL LAW — Continued

When the jury returned a verdict of "first degree murder, with mercy," trial judge should have informed them that neither the jury nor the court had any discretion as to punishment if the jury returned a verdict of guilty of first degree murder. *Ibid.*

Counsel may inform the jury that the death penalty must be imposed if it should return a verdict of guilty upon a capital charge. *S. v. Britt,* 256; *S. v. Carey,* 509.

Defendant's counsel was not entitled to argue the question of punishment to the jury in a first degree murder case. *S. v. Dillard,* 72.

§ 135. Judgment and Punishment in Capital Cases

The death penalty for first degree murder is not cruel and unusual punishment. *S. v. Crowder,* 42; *S. v. Dillard,* 72; *S. v. Fowler,* 90; *S. v. Honeycutt,* 174; *S. v. Sparks,* 631.

Inquiries put to prospective jurors as to their death penalty views were proper. *S. v. Crowder,* 42.

Sentence of death for the crimes of rape and first degree burglary does not constitute cruel and unusual punishment. *S. v. Henderson,* 1.

Trial court did not err in failing to instruct the jury that a verdict of guilty upon charge of rape or of first degree burglary would result in the death penalty. *Ibid.*

There is no merit in defendant's contentions that in a capital case there should be no voir dire examination of prospective jurors and that a juror cannot be excused under any circumstances because of his views on capital punishment. *S. v. Honeycutt,* 174.

Exclusion of jurors opposed to capital punishment does not result in an unrepresentative jury which is weighted toward conviction. *Ibid.*

In a capital case it is proper to inquire into a prospective juror's views on capital punishment. *S. v. Fowler,* 90.

Stipulation that two jurors were excused for cause "because of their views on capital punishment" does not provide an adequate basis for determining whether such jurors were properly excused. *Ibid.*

Trial court in a capital case erred in refusing to allow counsel for defendant and the solicitor to inquire into the moral or religious scruples, beliefs and attitudes of the prospective jurors concerning capital punishment. *S. v. Britt,* 256; *S. v. Carey,* 497; *S. v. Carey,* 509.

Trial court in a first degree murder case properly excused for cause prospective jurors who stated they could not vote for a verdict which would result in the death penalty. *S. v. Sparks,* 631.

§ 146. Appellate Jurisdiction of Supreme Court in Criminal Cases

Where a case is before the Supreme Court solely by reason of defendant's appeal under G.S. 7A-30(1), review is limited to the constitutional question presented by him. *S. v. Horn,* 82.

§ 157. Necessary Parts of Record Proper

The record on appeal in a speeding case was sufficient to present the case for consideration by the court on appeal. *S. v. Willis,* 195.

§ 163. Assignments of Error to Charge

Defendant's assignment of error to the trial court's charge on entrapment should have set out what the court should have charged. *S. v. Rigsbee,* 708.

CRIMINAL LAW — Continued

§ 164. Exceptions and Assignments of Error to Refusal of Motion for Nonsuit

Defendant introduced evidence and by doing so waived his right to except on appeal to the denial of his motion for nonsuit at the close of the State's evidence. *S. v. Rigsbee*, 708.

The sufficiency of the State's evidence in a criminal case is reviewable upon appeal without regard to whether a motion has been made pursuant to G.S. 15-173. *Ibid.*

§ 168. Harmless and Prejudicial Error in Instructions

Court's instructions on defendant's contention with reference to mental deficiency brought about by the use of drugs as a defense to first degree murder were more favorable to defendant than he was entitled to receive. *S. v. Sparks*, 631.

§ 169. Harmless and Prejudicial Error in Admission or Exclusion of Evidence

Where objections to questions are sustained and counsel wishes to insert in the record what the witnesses' answers would have been, the jury should be excused and the record completed in open court. *S. v. Willis*, 195.

In a consolidated trial of two defendants for armed robbery, trial court's error in allowing into evidence the confession of a nontestifying codefendant was not harmless beyond a reasonable doubt. *S. v. Heard and Jones*, 167.

DAMAGES

§ 3. Compensatory Damages for Injury to Person

Where the evidence tended to show that plaintiff suffered pain over an extended period of time, the jury verdict that defendant was negligent and plaintiff was not contributorily negligent and that awarded plaintiff no damages for actual pain and suffering was improper. *Robertson v. Stanley*, 561.

§ 5. Damages for Injury to Real Property

Where defendant removed sand and gravel from plaintiff's land with his knowledge and consent, plaintiff was entitled to recover the value of the sand and gravel as they lay in the earth before being disturbed. *Sanders v. Wilkerson*, 215.

§ 9. Mitigation of Damages

Though an injured party must take steps to minimize damages, repeated assurance of defendant that he will remedy the condition is sufficient justification for plaintiff's failure to take steps to minimize loss. *Little v. Rose*, 724.

§ 16. Instructions on Damages

Where the judge's charge was not included in the record on appeal, it is presumed that his instructions on damages were correct. *Robertson v. Stanley*, 561.

DECLARATORY JUDGMENT ACT

§ 1. Nature and Grounds of Remedy

There was no actual controversy between plaintiffs and defendants in an action brought by N. C. Consumers Power, Inc. and a city against Duke Power Company and citizens, electric customers and taxpayers of the city to obtain a declaratory judgment as to the validity of a "System Development and Power Sales Contract" entered between the two plaintiffs. *Consumers Power v. Power Co.*, 434.

DIVORCE AND ALIMONY

§ 24. Custody

Evidence in a child custody proceeding was insufficient to show a change of circumstances sufficient to warrant modification of a prior order awarding custody to the mother. *Blackley v. Blackley*, 358.

EASEMENTS

§ 11. License to Use Land

Where defendants removed sand and gravel from plaintiff's land under an agreement which subsequently was held invalid, defendant was a licensee. *Sanders v. Wilkerson*, 215.

ELECTRICITY

§ 2. Service to Customers

While G.S. 60-110.2 did not prohibit a city from providing electricity for customers in an area outside the city limits which had been assigned by the Utilities Commission to a public utility, such extension of service exceeded "reasonable limitations" and was beyond the authority of the city. *Electric Service v. City of Rocky Mount*, 135.

§ 3. Rates

Weighting of 28.6% given to replacement cost in determining fair value of a utility's property was proper. *Utilities Comm. v. Power Co.*, 377.

The Utilities Commission had authority to increase rates specified in contracts between municipalities and the power company prior to the expiration of such contracts. *Utilities Comm. v. Power Co.*, 398.

Statute authorizing a utility to put its proposed rates into effect after the passage of six months prevails over a private contract between municipalities and a power company. *Ibid.*

The Commission properly determined fair value by giving a weighting of one-third to replacement cost and two-thirds to original cost. *Ibid.*

Working capital is a proper addition to the rate base, but funds collected from customers for the purpose of paying expenses at some future time which are actually used as working capital in the meantime are not properly included in the rate base. *Ibid.*

The Commission properly deducted from cash working capital an amount accrued for Federal income taxes even though the utility had no actual tax liability during the test period. *Ibid.*

EVIDENCE

§ 1. Judicial Notice of Judicial Acts

The N. C. Supreme Court will take judicial notice of its own records. *In re Trucking Co.*, 552.

§ 35. Declarations Constituting Part of the Res Gestae

Statements made by deceased to a witness, "My God, that man tried to rob me" or "did rob me" and "I've been stabbed with this" were admissible as spontaneous utterances. *S. v. Deck*, 209.

§ 47. Expert Testimony as Invasion of Province of Jury

In an ordinary rate case expert testimony is admissible as to the possible effect of various hypothetical fair value determinations though the fair value increment has not been determined at the time the witness testifies. *Utilities Comm. v. Power Co.*, 377.

§ 50. Medical Testimony

In an action against a hospital and an emergency room doctor to recover for alleged negligence in failing properly to treat a shotgun wound, trial court erred in excluding testimony by plaintiff's medical expert on the ground the witness was not acquainted with the medical staff at defendant hospital and did not know about its facilities. *Rucker v. Hospital*, 519.

FRAUD

§ 9. Pleadings

Allegations by testator's widow with respect to the release of her rights in her husband's estate were insufficient to allege fraud, undue influence or duress in the execution of the releasing instruments. *In re Estate of Loftin*, 717.

GARNISHMENT

§ 2. Proceeding to Secure and Enforce

Employee of a corporate garnishee was an "agent" authorized to receive process in a garnishment proceeding. *Paper Co. v. Bouchelle*, 56.

HOMICIDE

§ 2. Parties and Offenses

Where defendant entered into a conspiracy to commit an armed robbery, he is criminally responsible for a murder committed by another conspirator during the attempted armed robbery even though he did not actively participate in that attempt. *S. v. Carey*, 497; *S. v. Carey*, 509.

§ 8. Effect of Drugs Upon Mental Capacity

Court's instructions on defendant's contention with reference to mental deficiency brought about by the use of drugs as a defense to first degree murder were more favorable to defendant than he was entitled to receive. *S. v. Sparks*, 631.

§ 14. Presumptions and Burden of Proof

Presumptions of malice and unlawfulness arising from the State's proof that death was proximately caused by defendant's intentional use of a deadly weapon are not unconstitutional. *S. v. Sparks*, 631.

HOMICIDE — Continued

§ 15. Relevancy and Competency of Evidence

Trial court properly permitted an expert in forensic chemistry to testify that from tests he conducted on defendant's left hand there were indications that defendant "could have" fired a gun. *S. v. Sparks*, 631.

§ 16. Dying Declarations

Statements by a stabbing victim were not admissible as dying declarations. *S. v. Deck*, 209.

§ 18. Evidence of Premeditation and Deliberation

Circumstances to be considered in determining whether a killing was with premeditation and deliberation. *S. v. DeGregory*, 122.

§ 20. Demonstrative Evidence; Photographs and Physical Objects

Photograph of the murder victim's body was admissible in this first degree murder case. *S. v. Crowder*, 42.

A pistol was sufficiently connected with the homicide to permit its admission in evidence. *S. v. Britt*, 256.

Trial court erred in refusing to permit the custodian of school attendance records to use the regular calendar and to point out to the jury the relationship between the attendance record and the regular calendar. *S. v. Brunson*, 295.

Trial court properly permitted the State to introduce into evidence the bloody shirt the victim was wearing when shot and a photograph of the deceased made on an ambulance stretcher. *S. v. Sparks*, 631.

§ 21. Sufficiency of Evidence

Evidence was sufficient to be submitted to the jury in a first degree murder case where it tended to show that defendant shot his victim. *S. v. Dillard*, 72.

Evidence was sufficient to show premeditation and deliberation in a first degree murder case where it tended to show that defendant shot his victims after inflicting head wounds. *S. v. DeGregory*, 122.

State's evidence was sufficient to allow inference of premeditation and deliberation so as to require the trial judge to submit an issue of first degree murder. *S. v. Britt*, 256.

State's evidence was sufficient to establish a causal relation between the victim's death and an assault by defendant with an iron pipe without expert medical testimony. *S. v. Luther*, 570.

There was sufficient evidence of premeditation and deliberation for submission to the jury of a charge of first degree murder of a policeman while he was searching defendant's car. *S. v. Sparks*, 631.

§ 25. Instructions on First Degree Murder

Where charges for first degree murder and armed robbery were consolidated for trial, the court properly submitted both offenses to the jury and separate conviction and sentence on each charge is upheld. *S. v. Thompson*, 181.

Instruction that the jury could consider evidence "of the absence of provocation" on the question of premeditation and deliberation was not an expression of opinion that there was no evidence of provocation in the case. *S. v. Fowler*, 90.

HOMICIDE — Continued

Trial court did not err in failing to charge that it was necessary for defendant to have held a "fixed design" to take the life of deceased in order to be found guilty of first degree murder. *S. v. Sparks*, 631.

§ 27. Instructions on Manslaughter

Trial court erred in failing to instruct the jury in the charge on manslaughter that the jury should return a verdict of not guilty if the State failed to satisfy the jury from the evidence beyond a reasonable doubt that defendant shot the victim and thereby proximately caused his death; however, such error was harmless where the court properly instructed as to both degrees of murder and the jury found defendant guilty of first degree murder. *S. v. Fowler*, 90.

§ 28. Instructions on Defenses

There was not sufficient evidence of intoxication to require an instruction as to the law on intoxication as a defense to murder in the first degree where the only evidence of intoxication was defendant's exculpatory statement to a detective. *S. v. Fowler*, 90.

Trial court did not express an opinion in stating the State's contention that there was no evidence that defendant acted in self-defense. *Ibid.*

Where there is evidence of self-defense, the court must charge on that aspect even in the absence of a request. *S. v. Dooley*, 158; *S. v. Deck*, 209.

The trial judge erred in failing to include not guilty by reason of self-defense as a possible verdict in his final mandate to the jury, and such error was not cured by the discussion of the law of self-defense in the body of the charge. *S. v. Dooley*, 158.

§ 30. Submission of Question of Lesser Degree of the Crime

There is no merit in defendant's contention that the trial court should have submitted an issue of involuntary manslaughter on the ground it is reasonable to suppose defendant fired a single shot at the policeman for the purpose of temporarily disabling him in order to effect his escape from custody. *S. v. Sparks*, 631.

§ 31. Verdict and Sentence

Defendant's counsel was not entitled to argue the question of punishment to the jury in a first degree murder case. *S. v. Dillard*, 72.

Death penalty was the proper punishment in a first degree murder case. *S. v. Crowder*, 42; *S. v. Dillard*, 72.

Sentence of life imprisonment was proper for an offense of first degree murder committed prior to 18 January 1973. *S. v. Talbert*, 221.

Charge of conspiracy to commit armed robbery was not merged into the offense of murder committed in perpetration of the robbery. *S. v. Carey*, 509.

HOSPITALS

§ 3. Liability of Hospital to Patient

Contract of employment between a hospital and an emergency room doctor established the relationship of employer and employee. *Rucker v. Hospital*, 519.

HUSBAND AND WIFE

§ 2. Antenuptial Agreements

Antenuptial contracts are not against public policy and may act as a bar to the wife's right to dissent and to a petition for a year's allowance, and will be enforced as written. *In re Estate of Loftin,* 717.

The statute relating to a privy examination of the wife, G.S. 52-6, does not apply to antenuptial agreements. *Ibid.*

§ 4. Contracts and Conveyances Between Husband and Wife

After marriage persons may release and quitclaim any rights as they might respectively acquire or may have acquired by marriage in the property of each other; however, such transactions between husband and wife are subject to the provisions of G.S. 52-6 requiring that the contracts be in writing and that the wife be given a privy examination. *In re Estate of Loftin,* 717.

§ 5. Wife's Separate Estate; Contracts and Conveyances

A certificate of privy examination is conclusive as to all matters which the statute requires the officer to certify except upon a showing of fraud. *In re Estate of Loftin,* 717.

Allegations by testator's widow with respect to the release of her rights in her husband's estate were insufficient to allege fraud, undue influence or duress in the execution of the releasing instruments. *Ibid.*

INCEST

Trial court in an incest prosecution erred in admitting a motel registration card bearing the names of defendant and his daughter where the genuineness of defendant's signature was not proved. *S. v. Austin,* 364.

INDICTMENT AND WARRANT

§ 9. Charge of Crime

In a prosecution for dissemination of obscenity in a public place, warrants were sufficient which gave defendants full and explicit notice that the obscene material on which the prosecutions were based was hard-core pornography. *S. v. Bryant,* 27.

INSURANCE

§ 10. Reformation of Policies

The doctrine of equitable estoppel was applicable in this action for the reformation of an insurance policy, and plaintiff was not required to pay additional premiums. *Transit, Inc. v. Casualty Co.,* 541.

Generally, an insured in renewing his policy may rely upon the assumption that the renewal will be upon the same terms and conditions of the earlier policy. *Ibid.*

§ 69. Protection Against Injury by Uninsured Motorist

The two-year statute of limitations applicable to tort claims for wrongful death and not the three-year limitation on actions on contracts applied to bar plaintiff's claim under an uninsured motorist policy issued by defendant. *Brown v. Casualty Co.,* 313.

JUDGMENTS

§ 37. Matters Concluded

The plea of res judicata applies to every point which the parties might have raised as well as those actually raised. *In re Trucking Co.*, 552.

§ 51. Foreign Judgment

A court in which a foreign judgment is asserted as a cause of action or as a defense may make its own independent inquiry into the jurisdiction of the court which rendered the judgment. *Hosiery Mills v. Burlington Industries*, 344.

Where the N. Y. court had no jurisdiction to enter an arbitration award, such award is not entitled to full faith and credit in the courts of this State. *Ibid.*

JURY

§ 5. Selection Generally

There is no merit in defendant's contention that in a capital case there should be no voir dire examination of prospective jurors. *S. v. Honeycutt*, 174.

§ 6. Examination

In a capital case it is proper to inquire into a prospective juror's views on capital punishment. *S. v. Fowler*, 90.

§ 7. Challenges

Stipulation that two jurors were excused for cause "because of their views on capital punishment" does not provide an adequate basis for determining whether such jurors were properly excused. *S. v. Fowler*, 90.

There is no merit in defendant's contention that a juror cannot be excused under any circumstances because of his convictions concerning capital punishment. *S. v. Honeycutt*, 174.

Exclusion of jurors opposed to capital punishment does not result in an unrepresentative jury which is weighted toward conviction. *Ibid.*

Inquiries put to prospective jurors as to their death penalty views were proper. *S. v. Crowder*, 42.

Trial court in a capital case erred in refusing to allow counsel for defendant and the solicitor to inquire into the moral or religious scruples, beliefs and attitudes of the prospective jurors concerning capital punishment. *S. v. Britt*, 256; *S. v. Carey*, 497; *S. v. Carey*, 509.

Trial court in a first degree murder case properly excused for cause prospective jurors who stated they could not vote for a verdict which would result in the death penalty. *S. v. Sparks*, 631.

LANDLORD AND TENANT

§ 5. Lease of Personal Property

Plaintiff landlord was responsible for ad valorem taxes on cafeteria equipment leased by defendant though the equipment was to be transferred to defendant without further cost at the termination of the lease. *Food Service v. Balentine's*, 452.

LIMITATION OF ACTIONS

§ 18. Sufficiency of Evidence

Defendant failed to present to the Court of Appeals or to the Supreme Court through exceptions and assignments of error the question of whether plaintiff had introduced sufficient evidence to carry the burden of showing that the action was commenced within the prescribed period of time. *Little v. Rose*, 724.

LIS PENDENS

Notice of lis pendens did not constitute constructive notice to purchasers whose deed was recorded before the notice of lis pendens was properly indexed. *Lawing v. Jaynes*, 418.

MASTER AND SERVANT

§ 3. Distinction Between Employee and Independent Contractor

Contract of employment between a hospital and an emergency room doctor established the relationship of employer and employee. *Rucker v. Hospital*, 519.

MINES AND MINERALS

§ 3. Liabilities for Trespass and Conversion of Minerals

Where defendant removed sand and gravel from plaintiff's land with his knowledge and consent, plaintiff was entitled to recover the value of the sand and gravel as they lay in the earth before being disturbed. *Sanders v. Wilkerson*, 215.

MONOPOLIES

§ 1. Validity and Construction of Statutes

Provision of G.S. 66-56 extending the force and effect of a "fair trade" agreement to a seller not a party thereto is unconstitutional. *Watch Co. v. Brand Distributors*, 467.

MORTGAGES AND DEEDS OF TRUST

§ 28. Parties Who May Bid In and Purchase the Property

Where a life tenant bought property at a foreclosure sale and the remaindermen did not contribute to the purchase price, devisees of the life tenant were owners of the property free of any claims by the remaindermen. *Thompson v. Watkins*, 616.

MUNICIPAL CORPORATIONS

§ 4. Powers of Municipalities

A city's extension of its electric system across its city limits to serve a new apartment complex in an area assigned to an investor-owned utility exceeds "reasonable limitations" and is beyond the authority of the city. *Electric Service v. City of Rocky Mount*, 135.

MUNICIPAL CORPORATIONS — Continued

§ 30. Zoning Ordinances

In a hearing to show cause why defendant should not be held in contempt for failing to comply with the city's order to remove a partially constructed building which violated a zoning ordinance, trial court erred in placing the burden on the city to show defendant had violated the court's order since defendant had the burden to purge himself of the charge of contempt. *City of Brevard v. Ritter*, 576.

§ 32. Regulations Relating to Public Morals

Fayetteville massage parlor ordinance is constitutional. *Smith v. Keator*, 530.

NARCOTICS

§ 4. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient for the jury on the issue of defendant's guilt of possessing with intent to distribute marijuana found in an apartment in which defendant and his wife lived. *S. v. Baxter*, 735.

Evidence was sufficient to withstand defendant's motion for nonsuit in a prosecution for possession of marijuana with intent to distribute and distribution. *S. v. Rigsbee*, 708.

OBSCENITY

In a prosecution for dissemination of obscenity in a public place, the prosecution carried a greater burden than was required in establishing that the films involved were patently offensive when tested by contemporary national community standards and the films were utterly without redeeming social value. *S. v. Bryant*, 27.

State's obscenity statutes which do not state with specificity what essential conduct may be obscene and patently offensive may by construction be limited to obscene matter which constitutes hard-core pornography. *Ibid.*

In a prosecution for dissemination of obscenity in a public place, warrants were sufficient which gave defendants full and explicit notice that the obscene material on which the prosecutions were based was hard-core pornography. *Ibid.*

Statute prohibiting dissemination of obscenity in a public place is constitutional when applied to charges against defendant of selling certain magazines. *S. v. Horn*, 82.

Warrants charging defendant with indecent exposure were fatally defective and should have been quashed. *S. v. King*, 305.

Defendant who operated a nightclub at which nude dancing took place was subject to prosecution under G.S. 14-190.9. *Ibid.*

The N. C. indecent exposure statute does not require viewers of one's private parts to be unwilling observers. *Ibid.*

PARENT AND CHILD

§ 5. Right of Parent to Recover for Injuries to Child

Evidence was insufficient for the jury in a father's action against a county board of education to recover medical expenses allegedly in-

RAPE

§ 5. Sufficiency of Evidence

State's evidence was sufficient for the jury in a rape case although the State introduced a statement in which the prosecutrix related that her assailant was not as rough after she "submitted." *S. v. Henderson*, 1.

§ 6. Instructions and Submission of Guilt of Lesser Degrees of the Crime

Trial court in a rape case did not err in failing to submit lesser included offenses. *S. v. Henderson*, 1.

Trial court did not err in failing to describe the degree of resistance required of the prosecutrix. *Ibid.*

§ 7. Verdict and Judgment

Sentence of death for rape does not constitute cruel and unusual punishment. *S. v. Henderson*, 1.

REGISTRATION

§ 1. Necessity for Registration and Instruments Within Purview of Statute

Under G.S. 47-18(a) registration of an option to purchase land is not essential to its validity as against lien creditors or purchasers for a valuable consideration from the optionor. *Lawing v. Jaynes*, 418.

§ 3. Registration as Notice

A recorded option agreement showing an expiration date of 1 March 1966 did not constitute constructive notice to purchasers of the property from optionors in 1971 that the optionees exercised the option and instituted action against the optionors for specific performance. *Lawing v. Jaynes*, 418.

ROBBERY

§ 5. Instructions and Submission of Lesser Degrees of the Crime

Where charges for first degree murder and armed robbery were consolidated for trial, the court properly submitted both offenses to the jury and separate conviction and sentence on each charge is upheld. *S. v. Thompson*, 181.

§ 6. Verdict and Sentence

Where defendant robbed two employees of the same store during one holdup and took only money belonging to the employer, a single robbery was committed and two judgments imposing prison sentences are to be considered as though a single judgment had been entered. *S. v. Potter*, 238.

RULES OF CIVIL PROCEDURE

§ 4. Process

Defendant corporation was not effectively served with process where a deputy sheriff delivered summons and complaint to a security officer in defendant's store. *Simms v. Stores, Inc.*, 145.

G.S. 1-75.4(6) was applicable in a breach of contract action to give the trial court jurisdiction over the nonresident defendant. *Chadbourn, Inc. v. Katz*, 700.

TAXATION

§ 24. Situs of Property for Taxation

Property of a trucking company listed in a township other than the situs of its home office could be listed in township of its home office as discovered property. *In re Trucking Co.*, 552.

Textile goods owned by non-resident converters which were shipped from outside N. C. to a textile refinishing plant in Forsyth County for processing and reshipment to the converters or their customers at designated places outside N. C. did not have a tax situs in Forsyth County when in possession of the finishing plant on 1 January 1972. *In re Appeal of Finishing Co.*, 598.

§ 25. Ad Valorem Taxes

Tobacco belonging to a manufacturer of tobacco products which has been removed from the manufacturer's storage facilities to the processing area is still an agricultural product within the purview of G.S. 105-277(a) and is therefore subject to taxation at only 60% of the rate applicable to other property in the local taxing unit. *In re Forsyth County*, 64.

Plaintiff landlord was responsible for ad valorem taxes on cafeteria equipment leased by defendant though the equipment was to be transferred to defendant without further cost at the termination of the lease. *Food Service v. Balentine's*, 452.

TELEPHONE AND TELEGRAPH COMPANIES

§ 1. Control and Regulation

The Utilities Commission may lawfully deny a rate increase to a telephone company which is found to be rendering grossly inadequate service due to bad management where the present rates yield a return sufficient to pay the interest on its indebtedness and a substantial dividend upon its stock but less than that which would be deemed a fair return upon the fair value of its properties were the service adequate. *Utilities Comm. v. Telephone Co.*, 671.

The Utilities Commission properly made a deduction from original cost of a telephone company's properties on account of excessive prices paid to an affiliated company for equipment and materials and on account of excessive plant margin. *Ibid.*

Amount of cash working capital reasonably required in a telephone company's operations is an administrative question for the Utilities Commission. *Ibid.*

The Utilities Commission did not commit prejudicial error in admission of rate tariffs of other telephone companies having similar territories and operating conditions. *Ibid.*

Rate determinations in a prior proceeding are not res judicata and do not forbid a lower rate of return in a subsequent proceeding. *Ibid.*

Utilities Commission is not required to accept in full the conclusion of an expert witness as to replacement cost even though it is uncontradicted. *Ibid.*

Failure of the Commission to find facts with respect to the company's inadequacy of service due to plant deficiencies in determining replacement costs was not prejudicial error. *Ibid.*

TRADEMARKS AND TRADENAMES

Provision of G.S. 66-56 extending the force and effect of a "fair trade" agreement to a seller not a party thereto is unconstitutional. *Watch Co. v. Brand Distributors,* 467.

TRESPASS

§ 7. Sufficiency of Evidence and Nonsuit

Trial court improperly entered summary judgment in an action for the wrongful taking of sand and gravel where there were unresolved factual issues with respect to estoppel. *Sanders v. Wilkerson,* 215.

TRIAL

§ 52. Setting Aside Verdict for Excessive or Inadequate Award

Where the evidence tended to show that plaintiff suffered pain over an extended period of time, jury verdict that defendant was negligent and plaintiff was not contributorily negligent and that awarded plaintiff no damages for actual pain and suffering was improper. *Robertson v. Stanley,* 561.

Trial court's refusal to set aside the jury verdict in a land condemnation proceeding did not constitute abuse of discretion. *Highway Comm. v. Helderman,* 645.

UNIFORM COMMERCIAL CODE

§ 13. Form and Formation of Contract

Invoices sent by defendant to plaintiff constituted a "written confirmation" of a previously made oral contract for sale within the meaning of the U.C.C. *Hosiery Mills v. Burlington Industries,* 344.

When parties to an oral contract for the sale of goods are merchants, proposed additional terms included by one party in a written confirmation of the oral contract, if not objected to by the other party, become a part of the contract unless they materially alter it. *Ibid.*

Where the parties entered an oral contract for the sale of yarn and written confirmations in the form of invoices sent by the seller to the buyer contained an additional term that disputes would be submitted to arbitration in N. Y., the proposed additional provision constituted a material alteration of the contract that may not be deemed incorporated therein by reason of the mere silence of the buyer. *Ibid.*

§ 71. Particular Transactions

Though an agreement between the parties provided that defendant would become the owner of equipment at the end of the term of the agreement without paying any additional consideration, G.S. 25-1-201 (37) was not applicable to make the agreement a conditional sales contract. *Food Service v. Balentine's,* 452.

UTILITIES COMMISSION

§ 4. Jurisdiction and Authority of Commission Over Electric Companies

While G.S. 62-110.2 did not prohibit a city from providing electricity for customers in an area outside the city limits which had been assigned

UTILITIES COMMISSION — Continued

by the Utilities Commission to a public utility, such extension of service exceeded "reasonable limitations" and was beyond the authority of the city. *Electric Service v. City of Rocky Mount,* 135.

§ 6. Hearings and Orders; Rates

Weighting of 28.6% given to replacement cost in determining fair value of a utility's property was proper. *Utilities Comm. v. Power Co.,* 377.

Previous findings by the Utilities Commission that 12% was a fair rate of return did not prevent the Commission from finding a lower return fair in the present case. *Ibid.*

In an ordinary rate case expert testimony is admissible as to the possible effect of various hypothetical fair value determinations though the fair value increment has not been determined at the time the witness testifies. *Ibid.*

The Utilities Commission had authority to increase rates specified in contracts between municipalities and the power company prior to the expiration of such contracts. *Utilities Comm. v. Power Co.,* 398.

Statute authorizing a utility to put its proposed rates into effect after the passage of six months prevails over a private contract between municipalities and a power company. *Ibid.*

The Commission properly determined fair value by giving a weighting of one-third to replacement cost and two-thirds to original cost. *Ibid.*

Working capital is a proper addition to the rate base, but funds collected from customers for the purpose of paying expenses at some future time which are actually used as working capital in the meantime are not properly included in the rate base. *Ibid.*

The Commission properly deducted from cash working capital an amount accrued for Federal income taxes even though the utility had no actual tax liability during the test period. *Ibid.*

The Commission properly refused to make an adjustment in operating expenses during the test period by reason of forthcoming wage and Social Security tax increases. *Ibid.*

The Commission erred in its determination of a fair rate of return where the total dollar return was not increased by reason of the fair value increment. *Utilities Comm. v. Power Co.,* 377; *Utilities Comm. v. Power Co.,* 398.

The Utilities Commission may lawfully deny a rate increase to a telephone company which is found to be rendering grossly inadequate service due to bad management where the present rates yield a return sufficient to pay the interest on its indebtedness and a substantial dividend upon its stock but less than that which would be deemed a fair return upon the fair value of its properties were the service adequate. *Utilities Comm. v. Telephone Co.,* 671.

The Utilities Commission properly made a deduction from original cost of a telephone company's properties on account of excessive prices paid to an affiliated company for equipment and materials and on account of excessive plant margin. *Ibid.*

Amount of cash working capital reasonably required in a telephone company's operations is an administrative question for the Utilities Commission. *Ibid.*

WORD AND PHRASE INDEX

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